Courts Reject Bush Policies on "Enemy Combatants"

by Paul Wolf, 19 December 2003

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Introduction

Yesterday's two stunning decisions are online:

- *Gherebi v. Bush* (Guantanamo prisoners) in pdf format
- Padilla v. Rumsfeld (in PDF format; found at http://www.ca2.uscourts.gov/searchtest.htm by entering Docket number "03-2235")

The 9th Circuit in *Gherebi* seems to have done an end run around the US Supreme Court, which is scheduled to hear oral arguments in another Guantanamo detainee case, *Al Odah et al v US*, next month. However, in *Al Odah* the petitioners deny being members of the Taliban or "Al Qaida", while the 9th Circuit decision would apply to all Guantanamo detainees.

The question presented before the SC is whether the detainees may challenge their status as enemy combatants. The 9th Circuit held that all of the detainees, even Taliban and "Al Qaida" members, have the right to lawyers and to have their habeas corpus petitions heard in a federal court.

That's not to say the Supreme Court can't issue a broader ruling reaching all the detainees - maybe the 9th Circuit will have pushed them to do it.

The *Gherebi* opinion focusses on the terms of the lease agreement with Cuba, and tries to define "sovereignty" and "ultimate sovereignty" using various dictionary definitions. The dissent (and governement) argue that the situation is comparable to the treatment of German POW's after WWII (the *Eisentrager* case). Unfortunately, those POW's weren't released until 1951. By that time, much of Germany had already been rebuilt. Unfortunately for the Afghans, there is no end in sight to a war that is already 25 years old.

- Paul

Courts affirm rights of terror suspects
Judges reject Bush policies on prisoners in Cuba and U.S.
by Reynolds Holding, *The San Francisco Chronicle*, 19 December 2003

Two federal appeals courts ruled Thursday that the Bush administration overstepped its bounds in detaining suspected terrorists, issuing decisions that favored key civil liberties over the power of the government in the post-Sept. 11 legal era.

The decisions, issued separately by U.S. courts of appeal in San Francisco and New York, are significant rebukes to the administration's hard-line approach in combatting terrorism and affirm the rights of both foreigners and American citizens considered suspect by the government.

In one case, judges in New York ruled 2-1 that President Bush does not have the power to order that a U.S. citizen captured in this country be held indefinitely as an enemy combatant. The panel ordered Defense Secretary Donald Rumsfeld to release Jose Padilla -- the so-called dirty bomb suspect -- from a Navy brig in Charleston, S.C., within 30 days and then turn him over for possible prosecution in a federal court with all the legal rights of a U.S. citizen.

Padilla was detained in Chicago 18 months ago on suspicion of plotting to detonate a radioactive bomb in the country and receiving explosives training from the al Qaeda network, but he has not been charged with a crime.

Hours later in San Francisco, federal judges ruled 2-1 that the administration's policy of imprisoning about 660 non-citizens on a naval base in Guantanamo Bay, Cuba, without access to U.S. legal protections "raises the gravest concerns under both American and international law."

Overshadowing that ruling is the U.S. Supreme Court's decision last month to review a case that upheld the Bush policy, which denies court access to the prisoners at the base. Whatever the high court rules will be the final word, though that did not stop human-rights advocates

from praising Thursday’s opinion.

"It reaffirms the courts’ critical role in providing a check on unilateral presidential power," said Lucas Guttentag, head of the national American Civil Liberties Union’s immigrants’ rights project in Oakland. "That role is especially important in times of national crisis."

But a U.S. Justice Department spokesman sounded unfazed.

"Our position that U.S. courts have no jurisdiction over non-U.S. citizens being held in military control abroad is based on long-standing Supreme Court precedent,’’ said Mark Corallo, director of public affairs for the department.

Corallo did not say what the department will do next, but legal experts see two options. One would be to ask the San Francisco court to rehear the case. The other, more likely course would be to ask the Supreme Court to put the decision on hold and either review it or dispose of it consistent with the outcome of the cases now before the justices. If the Justice Department does nothing, the case would go back to U.S. District Court in Los Angeles for a hearing on the merits.

The decision by the San Francisco judges came down to the issue of whether the naval base at Guantanamo is U.S. territory. If it is, American courts have jurisdiction to hear the prisoners’ complaints that they are being held in violation of the U.S. Constitution and the Geneva conventions. If the base is not U.S. territory, as the Justice Department argued, then the prisoners essentially have no right to complain, a position that the federal appeals court in San Francisco found untenable.

"We simply cannot accept the government’s position,’’ wrote Judge Stephen Reinhardt for the court’s majority, "that the executive branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement."

The case came before the appellate court on a petition filed in U.S. District Court in Los Angeles by the brother of Faren Gherebi, who was captured by American forces in Afghanistan and, along with hundreds of citizens of Afghanistan, Iraq, Pakistan, Canada, Britain and other countries, transferred to Guantanamo Bay naval base. They were declared enemy combatants by the U.S. government and denied attorneys or any means to challenge their incarceration.

The district court decided that the base was not within "sovereign U.S. territory" and, in a "reluctant" conclusion, denied Gherebi’s petition for lack of jurisdiction.

The court of appeal reversed that decision Thursday, ruling that under any standard U.S. control over the base, which it leased from Cuba in 1903, was near absolute, perhaps even abusive.

"Contrary to the relevant provisions of the agreements (with Cuba), the United States has

used the base for whatever purposes it deemed necessary or desirable," Reinhardt wrote. "Cuba has protested these actions in public and for years has refused to cash the United States' rent checks."

In a dissenting opinion, Judge Susan Graber said Supreme Court precedent made clear that the United States did not exercise the degree of control over Guantanamo Bay that would be necessary to give courts jurisdiction over prisoners held there.

She wrote that the majority's description of the issues in the case as "new, important and difficult" was incorrect in one important respect.

"Although the issues that we confront are important and difficult, they are not new," she said. "Because the issues are not new, we are bound by existing Supreme Court precedent, which the majority misreads."

As in the San Francisco ruling, the majority in the New York decision regarding Padilla saw the executive branch's action as an encroachment on individual rights. While Congress may have the power to authorize the detention of an American, the judges ruled that the president, acting on his own, did not.

"The president, acting alone, possesses no inherent constitutional authority to detain American citizens seized within the United States, away from the zone of combat, as enemy combatants," said the majority, composed of Judges Rosemay S. Pooler and Barrington D. Parker Jr.

The detention of U.S. citizens arrested on American soil as enemy combatants, consequently keeping them from the usual legal protections that Americans enjoy, has been seen as especially alarming by civil liberties advocates.

"This is by far the biggest legal setback the administration has faced in conducting its war on terrorism," said David Cole, a law professor at Georgetown University and the author of a recent book on the subject. "That's because this is the furthest they've gone out on a limb. They had essentially asserted that the president had unchecked authority to label U.S. citizens as enemy combatants anywhere in the United States and lock them up."

Padilla has been held incommunicado for 18 months. The court majority said he is entitled to full constitutional protections, including access to his lawyers. Padillo's lawyers have not been permitted to see him since Bush declared him an enemy combatant in June 2002.

"As this court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the president and law enforcement officials bear for protecting the nation," Parker and Pooler wrote.

"But presidential authority does not exist in a vacuum," they said, "and this case involves not whether those responsibilities should be aggressively pursued but whether the president is obligated" to share them with Congress.

The majority said that a law known as the Non-Detention Act provides that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress." The court said the joint congressional resolution authorizing operations against terrorism after Sept. 11 "contains no language authorizing detention."

In dissent, Judge Richard C. Wesley said he believes the president had the power to "thwart acts of belligerency on U.S. soil" and said it was startling that the majority would find that the president lacked authority to detain a citizen terrorist who was "dangerously close" to executing a plan.

Appellate rulings:
Bush administration terror suspects belong in U.S. courts
by David Kravets, *Associated Press*, 18 December 2003

In twin setbacks for the Bush administration's war on terror, federal appeals courts on opposite coasts ruled Thursday that the U.S. military cannot indefinitely hold prisoners without access to lawyers or the American courts.

One ruling favored the 660 "enemy combatants" held at the U.S. naval base at Guantanamo Bay, Cuba. The other involved American citizen Jose Padilla, who was seized in Chicago in an alleged plot to detonate a radioactive "dirty bomb" and declared as an enemy combatant.

In Padilla's case, the New York-based 2nd U.S. Circuit Court of Appeals ordered the former gang member released from military custody within 30 days and if the government chooses, tried in civilian courts. The White House said the government would appeal and seek a stay of the decision.

In the other case, a three-judge panel of the San Francisco-based 9th U.S. Circuit Court of Appeals ruled that prisoners held at Guantanamo Bay Naval Base should have access to lawyers and the American court system.

An order by President Bush in November 2001 allows captives to be detained as "enemy combatants" if they are members of al-Qaida, engaged in or aided terrorism, or harbored terrorists. The designation may also be applied if it is "the interest of the United States" to hold an individual during hostilities.

The Justice Department this week said such a classification allows detainees to be held without access to lawyers until U.S. authorities believe they have disclosed everything they know about terrorist operations.

But Padilla's detention as an enemy combatant, the New York court ruled 2-1, was not authorized by Congress and Bush could not designate him as an enemy combatant without such approval.

Padilla, a convert to Islam, was arrested in May 2002 at Chicago's O'Hare airport as he returned from Pakistan. Within days, he was moved to a naval brig in Charleston, S.C. The government said he had proposed the bomb plot to Abu Zubaydah, then al-Qaida's top terrorism coordinator.

In ordering his release from military custody, the court said the government was free to transfer Padilla to civilian authorities who can bring criminal charges. If appropriate, Padilla also can be held as a material witness in connection with grand jury proceedings, the court said.

"As this court sits only a short distance from where the World Trade Center stood, we are as keenly aware as anyone of the threat al-Qaida poses to our country and of the responsibilities the president and law enforcement officials bear for protecting the nation," Judge Rosemary S. Pooler wrote.

"But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the president is obligated, in the circumstances presented here, to share them with Congress," Pooler added.

In a dissenting opinion, Judge Richard C. Wesley said that as commander in chief the president "has the inherent authority to thwart acts of belligerency at home or abroad that would do harm to United States citizens."

The White House said the ruling was inconsistent with the president's constitutional authority as well as with other court rulings.

"The president's most solemn obligation is protecting the American people," White House press secretary Scott McClellan said Thursday. "We believe the 2nd Circuit ruling is troubling and flawed."

Padilla's lawyer, Donna Newman, did not immediately return a telephone message for comment. Newman has battled in court to be able to meet with Padilla; she has not done so since he was designated an enemy combatant the month after he was arrested.

Chris Dunn, a staff attorney with the New York Civil Liberties Union, called the ruling "historic."

"It's a repudiation of the Bush administration's attempt to close the federal courts to those accused of terrorism," he said.

Thursday's 2-1 decision out of San Francisco was the first federal appellate ruling to rebuke the Bush administration's position on the Guantanamo detainees who have been without charges, some for nearly two years. The administration maintains that because the 660 men confined there were picked up overseas on suspicion of terrorism and are being held on foreign land, they may be detained indefinitely without charges or trial.

The Supreme Court last month agreed to decide whether the detainees, who were nabbed in Afghanistan and Pakistan, should have access to the courts. The justices agreed to hear that

case after the U.S. Court of Appeals for the District of Columbia ruled that the prisoners had no rights to the American legal system.

"Even in times of national emergency - indeed, particularly in such times - it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike," Judge Stephen Reinhardt wrote for the majority on behalf of a Libyan captured in Afghanistan and held in Cuba.

"We cannot simply accept the government's position," Reinhardt continued, "that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement."

Reinhardt, who signed the 9th Circuit opinion last year that declared the Pledge of Allegiance unconstitutional when recited in public schools, stayed enforcement of the Guantanamo decision pending the outcome of the detainees' case already pending in the Supreme Court.

The Defense Department announced Thursday that the Pentagon had appointed a military defense lawyer for a terrorism suspect held at Guantanamo. Salim Ahmed Hamdan of Yemen becomes the second Guantanamo prisoner to be given a lawyer. Australian David Hicks got a lawyer earlier this month and recently met with an Australian legal adviser.

Both Hamdan and Hicks are among six Guantanamo Bay prisoners designated by President Bush as candidates for trials by special military tribunals. Neither Hamdan, Hicks nor the others detained in Cuba have been charged.

Padilla is accused of plotting to detonate a "dirty bomb," which uses conventional explosives to disperse radioactive materials. The government said he had proposed the bomb plot to Abu Zubaydah, then al-Qaida's top terrorism coordinator. Zubaydah was arrested in Pakistan in March 2002.

Besides Padilla, only two other known people who are being detained in the United States have been designated as enemy combatants since the 2001 terrorist attacks: Ali Saleh Kahlah Al-Marri, a citizen of Qatar accused of being an al-Qaida sleeper agent, and Esam Hamdi, a Louisiana native captured during the fighting in Afghanistan.

The New York case is Padilla v. Rumsfeld, 03-2235. The San Francisco case is *Gherebi v. Bush*, 03-55785.

US court delivers blow to Guantanamo policy
Australian Broadcasting Corporation, 19 December 2003

In a stinging rebuke of the Bush Government, a United States appeals court has ruled the US cannot imprison "enemy combatants" captured in Afghanistan indefinitely at Guantanamo Bay and deny them access to lawyers.

In a strongly worded 2-1 decision, the 9th Circuit Court of Appeals said the indefinite imprisonment at the US naval base in Cuba was inconsistent with US law and raised serious concerns under international law.

"The Government's position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law," judge Stephen Reinhardt wrote in the decision.

"We simply cannot accept the Government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access [to] counsel."

The ruling is seen as a blow to the Bush Government's policy towards detainees in the campaign against terrorism.

One of the San Francisco judges writes that it is the duty of courts to prevent the Executive branch from "running roughshod over the rights of citizens and aliens alike, especially in times of national emergency".

A lower court is now obliged to hear arguments on behalf of detainees and to make a ruling as to whether they should all be granted legal counsel.

Only two of the 600 prisoners at Guantanamo have so far been granted access to a lawyer. The first was Australian David Hicks.

The Pentagon overnight assigned a military defence lawyer to a second detainee, Yemeni national Salim Ahmed Hamdan.

Like Mr Hicks, he has not yet been charged with anything.

On the Hicks matter, the Pentagon has pointed out today that it is giving Australian lawyer Stephen Kenny permission to speak on almost everything he is formally requesting.

At a press conference yesterday, Mr Kenny said he was limited in what he could say. Today, the Pentagon says it only withheld approval for two items relating to security.

Excerpt: *Gherebi v. Bush* Decision
December 18, 2003

Coming on the heels of today's decision by the Second Circuit Court of Appeals in Padilla v. Rumsfeld, the Ninth Circuit has ruled that the executive branch may not indefinitely imprison foreign nationals at Guantanamo without charge and without providing them with the effective means to challenge their detention. The case is *Gherebi v. Bush*.

An excerpt from the majority opinion follows:

> "We recognize that the process due 'enemy combatant' habeas petitioners may vary with the circumstances and are fully aware of the unprecedented challenges that affect the United States' national security interests today, and we share the desire of all Americans to ensure that the Executive enjoys the necessary power and flexibility to prevent future terrorist attacks.
>
> "However, even in times of national emergency -- indeed, particularly in such times -- it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike. Here, we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement.
>
> "We hold that no lawful policy or precedent supports such a counter-intuitive and undemocratic procedure, and that, contrary to the government's contention, Johnson [*Johnson v. Eisentrager*, a 1950 Supreme Court decision relied upon by the government] neither requires nor authorizes it. In our view, the government's position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law." [7]

7. *Gherebi* argues that the government's policy of "indefinite detention" is violative of international law. While we recognize the gravity of Gherebi's argument, we need not resolve that question in this proceeding. We note, however, that the government's position here is at odds with the United States' longtime role as a leader in international efforts to codify and safeguard the rights of prisoners in wartime. It is also at odds with one of the most important achievements of these efforts -- the 1949 Geneva Conventions, which require that a competent tribunal determine the status of captured prisoners. Article 5 of the Third Geneva Convention provides:

   > Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

   Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135. In *Johnson v. Eisentrager*, itself, the Court discussed the United States' international obligations under the predecessor Convention, which did not even contain the due process rights afforded prisoners of war in the 1949 Treaty. The Court explained:

   > We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1927 . . . concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection.

   339 U.S. at 789 n.14. The government's own regulations have adopted this same requirement. *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, U.S. Army Regulation 190-8, ch. 1-5, ¶ a, Applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington D.C. (Oct. 1, 1997) ("All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") until some legal status is determined by competent authority."). The requirement of judicial review of executive detention is also reflected in the International Covenant on Civil and Political Rights, to which the United States is a party. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 9, ¶ 4 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention...."). Here, however, the government has maintained that the Guantanamo detainees do not enjoy any substantive protections as a matter of right pursuant to our international obligations; instead, it has asserted only that it will apply "the principles" of the Third Geneva Convention "to the extent appropriate and consistent with military necessity." Office of the Press Secretary, Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 2002, at 1, *at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

Guantanamo hearing delayed
Defense lawyers object to search
ABC12/*The Associated Press*, 17 December 2003

Defense lawyers' objections over the search of their offices by military investigators have forced a delay in a Guantanamo security breach hearing.

Senior Airman Ahmad al-Halabi worked as an interpreter at the US prison camp in Cuba. The military has accused him of espionage and aiding the enemy for allegedly e-mailing secrets from the prison camp to an unidentified person. And it says he planned to carry notes from some of the prisoners to his native Syria.

Al-Halabi's civilian lawyer says Air Force investigators searched the offices of his military lawyers last week, acting on a military warrant, and copied a computer hard drive. He says that interfered with preparations for his defense.

In response, the Air Force has postponed al-Halabi's hearing until January 13th.

[this is the lower court decision that was remanded]

***Gherebi v. Bush*, 262 F.Supp.2d, 1064 (C.D.Cal.,2003)**
United States District Court,
C.D. California.
Belaid GHEREBI, Petitioner,
v. George Walker BUSH, et al., Respondents.
No. CV 03-1267-AHM.
May 13, 2003.

*1065 Stephen Yagman, Kathryn S. Bloomfield, Marion R. Yagman, Joseph Reichmann, Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, CA, for petitioner.

Becky Walker, Asst. U.S. Attorney, Debra Yang, U.S. Attorney, Los Angeles, CA, for respondents.

ORDER DISMISSING PETITION FOR LACK OF JURISDICTION
MATZ, District Judge.

INTRODUCTION

The petition for a writ of habeas corpus filed in this case alleges that Respondents President Bush, Secretary of Defense Rumsfeld and unnamed "military personnel" captured Falen Gherebi in Afghanistan and, since January 2002, have detained him at the Guantanamo Bay Naval Base ("Guantanamo") in Cuba. The Petitioner, Belaid Gherebi, is Falen Gherebi's brother.

Belaid Gherebi alleges that his brother is being held incommunicado, without aid of counsel, and in violation of the United States Constitution and the Third Geneva Convention. Among other forms of relief, Petitioner asks that his brother be granted access to legal counsel and "be brought physically before the Court for a determination of his conditions of detention, confinement, and status ...." Mem. of Law in Support of Amended Verified Petition for Writ of Habeas Corpus, at 3.

Petitioner and Respondents seek a prompt ruling on the matter of this Court's jurisdiction because they intend to proceed expeditiously to the Ninth Circuit Court of Appeals. [FN1] The Court is willing to accommodate their request, because the jurisdictional question addressed here is one of great importance: Do the hundreds of persons detained at Guantanamo have the right to challenge their confinement in a United States federal court?

FN1. Counsel proposed that this Court issue its ruling based on briefs submitted to the Ninth Circuit more than one year ago in a different, although related, case. The Court has carefully considered those briefs but has also considered subsequent developments, including the decision in Al Odah v. United States, 321 F.3d 1134 (D.C.Cir.2003).

The Court concludes that *1066 Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950), and later decisions construing Johnson, compel the answer "no."

The Court reaches this conclusion reluctantly, however, because the prospect of the Guantanamo captives' being detained indefinitely without access to counsel, without formal notice of charges, and without trial is deeply troubling. And that is why a prompt ruling to speed appellate review is appropriate.

BACKGROUND

The events leading to this case are well known. Following the terrorist attacks of September 11, 2001, Congress authorized the President "to use all necessary and appropriate force" against those responsible. Authorization for Use of Military Force, Pub.L. No. 107-40, 115 Stat. 224 (2001). Pursuant to that authorization, the President sent American forces to Afghanistan to wage what has been commonly referred to (but not formally declared) as a "war" against the Taliban government and the terrorist network known as Al Qaeda. Beginning in early January 2002, the Armed Forces transferred to Guantanamo scores of individuals, including Falen Gherebi, who were captured by the American military during its operations in Afghanistan.

On January 20, 2002, a group of journalists, lawyers, professors, and members of the clergy filed a petition for habeas relief on behalf of unidentified individuals detained involuntarily at Guantanamo. That petition also named as Respondents President Bush, Secretary Rumsfeld and other military personnel. The matter was assigned to this Court. After ordering the parties to brief the threshold question of jurisdiction, the Court heard oral argument and dismissed the petition. Coalition of Clergy v. Bush, 189 F.Supp.2d 1036 (C.D.Cal.2002) ("Coalition I ").

The first basis for this Court's dismissal of the Coalition I petition was that the named petitioners lacked standing. The Ninth Circuit affirmed that ruling on appeal but vacated this Court's additional rulings as to the applicability of Johnson. Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir.2002). [FN2] Respondents do not challenge Petitioner's "next friend" standing in this case, however, and the issue of Johnson's effect can no longer be avoided.

FN2. This Court had gone on to address those issues because it anticipated that the defects in the Coalition's claim of standing could be cured relatively easily. Not surprisingly, the Coalition has filed a second, near-identical petition purporting to cure the standing defect. Coalition of Clergy v. Bush, No. 02-9516 AHM (JTL) (C.D. Cal. Dec. 16, 2002) ("Coalition II "). Respondents have moved to dismiss that petition, and their motion currently is under submission before the Magistrate Judge.

ANALYSIS

Because the Supreme Court's Johnson opinion compels dismissal of this petition, the Court will begin with an examination of that decision.

A. Johnson

The following description of Johnson is taken from this Court's ruling in Coalition I.

In Johnson, Mr. Justice Jackson described "the ultimate question" as "one of jurisdiction of civil courts of the United States vis-a-vis military authorities in dealing with enemy aliens overseas." The case arose out of World War II. The habeas petitioners were twentyone German nationals who claimed to have been working in Japan

for "civilian agencies of the German government" before Germany surrendered on May 8, 1945. They were taken into custody by the United States Army and convicted by a United States Military Commission of violating laws of war by engaging in *1067 continued military activity in Japan after Germany's surrender, but before Japan surrendered. The Military Commission sat in China with the consent of the Chinese government. After trial and conviction there, the prisoners were repatriated to Germany to serve their sentences in a prison whose custodian was an American Army officer. While in Germany, the petitioners filed a writ of habeas corpus claiming that their right under the Fifth Amendment to due process, other unspecified rights under the Constitution and laws of the United States and provisions of the Geneva Convention governing prisoners of war all had been violated. They sought the same relief as petitioners here: that they be produced before the federal district court to have their custody justified and then be released. They named as respondents the prison commandant, the Secretary of Defense and others in the civilian and military chain of command.

Reversing the Court of Appeals, the Supreme Court in Johnson upheld the district court's dismissal of the petition on the ground that petitioners had no basis for invoking federal judicial power in any district. In reaching that conclusion, the Supreme Court stated the following:

"[T]he privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign and the circumstances of their offense [and] their capture ... were all beyond the territorial jurisdiction of any court of the United States."

. . . . .

"A basic consideration in habeas corpus practice is that the prisoner will be produced before the court.... To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing.... The writ, since it is ... [argued] to be a matter of right, would be equally available to enemies during active hostilities .... Such trials would hamper the war effort .... It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." 189 F.Supp.2d at 1046-47 (citations and footnotes omitted).

[1] The effect of Johnson is that the Guantanamo detainees' ability to invoke jurisdiction in any district court "depends not on the nature of their claims but on whether the Naval Base at Guantanamo Bay is under the sovereignty of the United States." *Id.* at 1048-49. In Coalition I, this Court determined that the Naval Base is not within sovereign United States territory and that, as a result, no federal court would have jurisdiction to hear the petitioners' claims. *Id.* at 1049-50. [FN3] The Court reaches the same conclusion here.

FN3. This Court described the similarities between the petitioners in Johnson and the Guantanamo captives as follows: "In all key respects, the Guantanamo detainees are like the petitioners in Johnson. They are aliens; ... they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of only the military; they have not stepped foot on American soil; and there are no legal or judicial precedents entitling them to pursue a writ of habeas corpus in an American civilian court. Moreover, there are sound practical reasons, such as legitimate security concerns, that make it unwise for this or any court to take the unprecedented step of conferring such a right on these detainees." *Id.* at 1048.

This Court does not assume, and makes no finding, that Falen Gherebi is an "enemy combatant" or "enemy alien."

*1068 B. Post-Coalition I Decisions

1. The Ninth Circuit Decision in Coalition I

Although the Court of Appeals vacated this Court's rulings about Johnson and the sovereign status of Guantanamo, in its opinion the Ninth Circuit stated:

There is no question that the holding in Johnson represents a formidable obstacle to the rights of the detainees at Camp X-Ray to the writ of habeas corpus; it is impossible to ignore, as the case well matches the extraordinary circumstances here.

Coalition of Clergy v. Bush, 310 F.3d at 1164 n. 4.

2. Rasul v. Bush

In Rasul v. Bush, 215 F.Supp.2d 55 (D.D.C.2002), the district court dismissed two cases brought by Guantanamo detainees. The court ruled that it did not have jurisdiction because Guantanamo "is outside the sovereign territory of the United States" and because, under Johnson, "writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States." 215 F.Supp.2d at 72-73.

3. Al Odah v. United States

In Al Odah v. United States, 321 F.3d 1134 (D.C.Cir.2003), the Court of Appeals for the District of Columbia Circuit relied heavily on Johnson to affirm the district court's decision in Rasul and also to dismiss a third petition brought by the wife of an Australian citizen detained at Guantanamo. Al Odah rejects many of the arguments Petitioner makes here and describes the parallels between these cases and Johnson much as this Court did in Coalition I:

[T]he Guantanamo detainees have much in common with the German prisoners in [Johnson]. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military and they have never had any presence in the United States.... [W]e believe that under [Johnson] these factors preclude the detainees from seeking habeas relief in the courts of the United States. 321 F.3d at 1140.

4. Additional Post-Coalition I Decisions

Perhaps because Johnson so well matches the "extraordinary circumstances" of recent events, Coalition of Clergy, 310 F.3d at 1164 n. 4, several courts have cited it in ruling on challenges to government action in the wake of September 11. In Padilla v. Bush, 233 F.Supp.2d 564, 608 (S.D.N.Y.2002), the district court ruled that the President could detain even an American citizen taken into custody on American soil if he had "some evidence" that the detainee was an "enemy combatant." The Padilla court quoted Johnson, 339 U.S. at 789, 70 S.Ct. 936, for the proposition that "it is not the function of the Judiciary to entertain private litigation ... which challenges the legality, [the] wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." 223 F.Supp.2d at 589.

The Fourth Circuit cited Johnson several times in its wide-ranging opinion in Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir.2003), including for the proposition *1069 that responsibility for enforcing the predecessor to the current Geneva Convention rested with "political and military authorities," not the judiciary. 316 F.3d at 469 (quoting Johnson, 339 U.S. at 789 n. 14, 70 S.Ct. 936). Hamdi rejected a challenge to the continued detention of an American citizen captured in Afghanistan and transferred to a Virginia Naval Brig because it was not disputed that the detainee had been seized in a zone of active combat abroad and because the evidence proffered by the President was sufficient to establish that the detainee had been allied with enemy forces. 316 F.3d at 465, 474.

The Supreme Court also recently cited Johnson, although in a decision unrelated to the events of September 11. The Court quoted Johnson to emphasize that presence within this country's borders has traditionally afforded aliens certain constitutional protections not extended to noncitizens abroad:

"The alien ... has been accorded a generous and ascending scale of rights as he increases his identity with our society.... [A]t least since 1886, we have extended to ... resident aliens important constitutional guarantees-such as the due process of law of the Fourteenth Amendment."

Demore v. Kim, --- U.S. ----, 123 S.Ct. 1708, 1730, 155 L.Ed.2d 724 (2003) (quoting Johnson, 339 U.S. at 763, 70 S.Ct. 936).

C. Petitioner's Challenges to the Applicability of Johnson

Although Petitioner has not chosen to address these post-Coalition I cases in a new brief, he has argued that Johnson does not apply to the facts of this case.

1. Guantanamo Is Not Sovereign United States Territory

Petitioner first contends that Johnson cannot be applied to bar his claims because Falen Gherebi, unlike the Johnson prisoners, is being held within United States territory.

The question of Guantanamo's status is one of key importance because, as Justice Black noted in dissent, the Johnson majority relied entirely on the fact that the petitioners in that case had never been present in the United States to distinguish Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942) and In re Yamashita, 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946). Johnson, 339 U.S. at 780-81, 70 S.Ct. 936; id. at 795, 70 S.Ct. 936 (Black, J., dissenting). First, the Court stated that the Johnson prisoners had no right to habeas relief because they were "at no relevant time ... within any territory over which the United States is sovereign." 339 U.S. at 778, 70 S.Ct. 936. The Court again referred to sovereignty in explaining Yamashita's inapplicability, nothing that the petitioner in that case had been able to invoke the Court's jurisdiction because he had been held within sovereign United States territory. *Id.* at 780, 70 S.Ct. 936. See also United States v. Verdugo-Urquidez, 494 U.S. 259, 269, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (citing Johnson for the proposition that aliens are not entitled "to Fifth Amendment rights outside the sovereign territory of the United States") (emphasis added); Coalition of Clergy, 310 F.3d at 1164 n. 4 (Johnson "held that the privilege of the writ of habeas corpus could not be extended to aliens held outside the sovereign territory of the United States.") (emphasis added).

It is this emphasis on sovereignty, taken together with the lease agreements governing Guantanamo, that is fatal to Petitioner's argument. See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevans 113) ("the 1903 Lease"); Relations with Cuba, May 9, 1934, U.S.-Cuba, T.S. No. 866 (6 Bevans 1161). Petitioner emphasizes that *1070 for all practical purposes the United States controls Guantanamo, but such control does not establish sovereignty. See Vermilya-Brown Co. v. Connell, 335 U.S. 377, 390, 69 S.Ct. 140, 93 L.Ed. 76 (1948) (recognizing distinction between "sole power" and "sovereignty"); Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1425 (11th Cir.1995). And this Court has already concluded that under the 1903 Lease, Cuba, not the United States, is sovereign in Guantanamo Bay. See Coalition I, 189 F.Supp.2d at 1049-50. See also Vermilya-Brown, 335 U.S. at 380-83, 69 S.Ct. 140 (United States not sovereign over American military base in Bermuda, even though lease from Great Britain granted United States "substantially the same rights" as over Guantanamo Bay).

This dispositive distinction between "sovereign territory" and "complete jurisdiction and control" may appear technical (or at least elusive), but Petitioner's arguments provide no principled basis for this Court to disregard Johnson.

2. A Formal Declaration of War is Not Required

Petitioner next contends that Johnson is inapplicable because Falen Gherebi, unlike the Johnson prisoners, was not captured during a declared war. [FN4]

FN4. The war with Germany was not declared over until October 19, 1951. Pub.L. No. 82-181, 65 Stat. 451. See also United States ex rel. Jaegeler v. Carusi, 342 U.S. 347, 348, 72 S.Ct. 326, 96 L.Ed. 390 (1952) (per curiam).

[2] Johnson certainly did acknowledge the war-related circumstances of the German prisoners' capture. 339 U.S. at 771-72, 70 S.Ct. 936 ("It is war that exposes the relative vulnerability of the alien's status.... [D]isabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage."). See also United States v. Bin Laden, 132 F.Supp.2d 168, 182 n. 10 (S.D.N.Y.2001) (explaining that the Johnson prisoners were a "specific kind of non-resident alien--'the subject of a foreign state at war with the United States' ") (quoting Johnson, 339 U.S. at 769 n. 2, 70 S.Ct. 936); David Cole, Enemy Aliens, 54 Stan.L.Rev. 953, 984 (2002) ("[The] principles [of Johnson] apply only in a time of declared war to citizens of the country with which we are at war."). And Justice Jackson's opinion made it clear that the Court was unwilling to extend the "privilege of litigation" to the Johnson petitioners at least in part because that same privilege was not available to resident aliens subject to the Alien Enemy Act, 50 U.S.C. 21. 339 U.S. at 775-76, 778, 70 S.Ct. 936. As Petitioner points out, the Alien Enemy Act is of no consequence here because that Act applies only during declared wars. 50 U.S.C. 21. See also Jaegeler, 342 U.S. at 348, 72 S.Ct. 326.

Ultimately, however, Petitioner's argument is unpersuasive because Johnson focused on the practical realities, not legal formalities, of armed conflict. In denying the Johnson prisoners the "privilege of litigation," the Supreme Court emphasized that a contrary result would unreasonably hamper military efforts. See 399 U.S. at 779, 90 S.Ct. 2230. Even though "active hostilities" already had faded into a "twilight between war and peace," the Court worried that allowing access to the courts would "divert [the] efforts and attention [of field commanders] from the military offensive abroad to the legal defensive at home." *Id.* To limit the application of Johnson to those captured during formally declared wars would ignore this aspect of the Court's opinion and would deprive the decision of much of its rationale. Cf. Verdugo-Urquidez, 494 U.S. at 273-274, 110 S.Ct. 1056. ("The United States frequently *1071 employs Armed Forces outside this county ... for the protection of American citizens or national security.... Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.") (citation omitted).

[3] As the D.C. Circuit recently held in Al Odah, Johnson cannot be so limited. It applies to Falen Gherebi, just as it did to Al Odah, regardless of whether they are "within the category of 'enemy aliens,' at least as [Johnson] used the term." Al Odah, 321 F.3d at 1139-41. [FN5]

FN5. "[A]n enemy alien is the subject of a foreign state at war with the United States." Johnson, 339 U.S. at 769 n. 2, 70 S.Ct. 936.

3. Johnson Applies Even Though Petitioner Has Not Been Charged or Convicted

Petitioner also argues that this case is distinguishable from Johnson because, unlike the Johnson prisoners, Falen Gherebi has not been charged or brought before a military commission. [FN6] Gherebi's detention presents more compelling due process violations, Petitioner contends, because it is preventive, not punitive, in nature. See Zadvydas v. Davis, 533 U.S. 678, 690-91, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (citing the very limited instances when preventive, potentially indefinite detention has been upheld). To deprive Falen Gherebi of all judicial review would, according to Petitioner, raise "a serious constitutional problem." *Id.*, 533 U.S. at 690, 121 S.Ct. 2491. Cf. also INS v. St. Cyr, 533 U.S. 289, 298, 121 S.Ct. 2271, 150 to repeal habeas jurisdiction").

FN6. In Johnson, the Supreme Court took care to note that the petitioners in that case had been "formally accused of violation of the laws of war and fully informed" of the charges against them. 339 U.S. at 786, 70 S.Ct. 936. That language is found in Part IV of the Johnson opinion, however, where the Court went on to consider the merits of the petitioners' claims. As noted by Justice Black in dissent, and by the D.C. Circuit in Al Odah, Part IV is "irrelevant" and "extraneous" to the Johnson Court's jurisdictional holding. Johnson, 339 U.S. at 792, 70 S.Ct. 936 (Black, J., dissenting); Al Odah, 321 F.3d at 1142.

Moreover, the Supreme Court referred to the charges leveled against the petitioners simply to explain why the military commission in China had not exceeded the scope of its authority; nothing about the Court's explanation suggests that the Johnson petitioners would have been granted access to civilian courts if (like Falen Gherebi) the petitioners had sought relief during the period between their capture and formal accusation or conviction. See Johnson, 339 U.S. at 786-87, 70 S.Ct. 936 (explaining that military commissions have jurisdiction to adjudicate charges that a captured detainee violated the laws of war).

Petitioner claims to find support for his position in this quotation from Johnson: "[T]he doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their support ...." 339 U.S. at 780-781, 70 S.Ct. 936. But the quoted language refers to the three Article III courts that addressed the German prisoners' habeas petition, not to the military commission that had tried them. And while it is true no Guantanamo captive has yet been tried by any tribunal, it is also true that here, as in Johnson, Petitioner's jurisdictional arguments have been, and on appeal will be, given careful consideration.

As the D.C. Circuit recently explained in Al Odah, everything in Johnson "turned on the circumstances of those seeking relief, *1072 on the authority under which they were held, and on the consequences of opening the courts to them." 321 F.3d at 1145. To this Court it again appears, as it did in Coalition I, that with respect to Falen Gherebi "those circumstances, that authority, and those consequences differ in no material respect from" Johnson. *Id.*

4. International Law

Finally, Petitioner contends that his detention violates provisions of the International Covenant on Civil and Political Rights ("ICCPR"). Petitioner has not sought relief or stated a claim under that treaty, although he is correct to point out that a "clear international prohibition exists against prolonged and arbitrary detention." Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir.2001) (relying on the ICCPR) (internal quotation marks and citation omitted).

Because the application of international law to this case has not yet been carefully briefed, this Court will not rule on the parties' contentions except to note that several courts, including Ma, 257 F.3d at 1108, have cited Johnson as valid precedent in the years since ratification of the ICCPR. See, e.g., Zadvydas, 533 U.S. at 693, 121 S.Ct. 2491; Verdugo-Urquidez, 494 U.S. at 269, 110 S.Ct. 1056.

D. If Petitioner Is Not Permitted Access To Federal Court, Does He Have Any Legal Rights?

In Coalition I, this Court observed that it was not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the [1949] Geneva Convention ... concluded an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

189 F.Supp.2d at 1050 (quoting Johnson, 339 U.S. at 789 n. 14, 70 S.Ct. 936). The Court went on to note that the President had "recently declared that the United States [would] apply the rules of the Geneva Convention to at least some of the detainees." *Id.* at 1050 n. 15.

On November 13, 2001, the President issued a Military Order titled "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism." 66 Fed.Reg. 57833-57836 (Nov. 16, 2001). In that Order, the President stated that ad hoc military commissions might be convened to try the Guantanamo detainees.

A few months after the first detainees were brought to Guantanamo, the Department of Defense promulgated Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (March 21, 2002.). Order No. 1 guarantees "inter alia, the presumption of innocence, the right against self- incrimination, burden of proof on the Government, the choice of civilian defense counsel to serve alongside military defense counsel, the right of cross-examination and presentation of proof by the defense and proof beyond a reasonable doubt." Ruth Wedgwood, "Al Qaeda, Terrorism, and Miliary Commissions," 96 Am. J. Int'l L. 328, 337 n. 35 (2002).

On April 30, 2003, more than 13 months after Military Commission Order No. 1 *1073 was promulgated, the Department of Defense published an eight part series of "Military Commission Instructions," which (among other things) specify the crimes (and the elements of those crimes) that the commissions will have jurisdiction to try, as well as the responsibilities of both military and civilian defense counsel. See Military Commission Instructions Nos. 1-8.

More than 15 months have gone by since the United States placed Falen Gherebi and hundreds of other captured individuals into detention in Guantanamo. Not one military tribunal has actually been convened. Not one Guantanamo detainee has been given the opportunity to consult an attorney, has had formal charges filed against him or has been able contest the basis for his detention. It is unclear why it has taken so long for the Executive Branch to implement its stated intention to try these detainees. Putting aside whether these captives have a right to be heard in a federal civilian court--indeed, especially because it appears they have no such right--this lengthy delay is not consistent with some of the most basic values our legal system has long embodied.

To compound the problem, recently reports have appeared in the press that several of the detainees are only juveniles. See, e.g., Richard A. Serrano, "Juveniles Are Among Cuba War Detainees," *L.A. Times*, April 23, 2003, at A13. This development has led some to resort to extreme hyperbole in calling for immediate remedies. See, e.g., Jonathan Turley, "Appetite for Authoritarianism Spawns an American Gulag," *L.A. Times*, May 2,

2003, at B19.

Unfortunately, unless Johnson and the other authorities cited above are either disregarded or rejected, this Court lacks the power and the right to provide such a remedy. Perhaps a higher court will find a principled way to do so.

CONCLUSION

For the foregoing reasons, the petition is DISMISSED.

IT IS SO ORDERED.

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- **Geneva Conventions of 1949:**
  Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949
  http://www.yale.edu/lawweb/avalon/lawofwar/geneva05.htm
  Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949
  http://www.yale.edu/lawweb/avalon/lawofwar/geneva06.htm
  Convention (III) Relative to the Treatment of Prisoners of War; August 12, 1949
  http://www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm
  Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949
  http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm