UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JANE GRAHAM, V.Z. LAWTON, Plaintiffs, vs. WARDEN HARLEY LAPPIN, INDIANA ATTORNEY GENERAL STEVE CARTER, Defendants.	)	TH 01-104-C-T/G

ENTRY CONCERNING SELECTED MATTERS

I.

The motion of the plaintiffs' attorney, Mr. Harmon, to appear *pro hac vice* is granted.

The plaintiffs' motion for leave to file a supplemental statement in support of their motion for a temporary restraining order (without notice) is **granted.**

The clerk shall **file and docket** the tendered supplemental statement, and a copy of that document shall be included with the distribution of this Entry.

II.

Timothy McVeigh has been sentenced to death as a result of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, on April 19, 1995, which resulted in the deaths of 168 people. *United States v. McVeigh,* 153 F.3d 1166 (10th Cir. 1998), *cert. denied,* 526 U.S. 1007 (1999). McVeigh is incarcerated at the United States Penitentiary at Terre Haute, Indiana, and his execution is scheduled to be carried out through lethal injection at the USPTH on June 11, 2001.

At the time this action was filed, McVeigh's execution was scheduled for May 16, 2001, and the close proximity between the date the action was filed and May 16, 2001, likely explains the filing of the motion for a temporary restraining order.

The execution has been rescheduled for June 11, 2001. This is acknowledged by the plaintiffs in their supplemental statement in support of their motion for a temporary restraining order. Although the plaintiffs do not concede that the emergency nature of their request for a temporary restraining order without notice has dissipated, the court finds otherwise. That is, with the execution of McVeigh scheduled more than three weeks away, there is no necessity for a ruling without the defendants being afforded a reasonable, though expedited, opportunity to respond to the request for a stay of the execution. The fact that McVeigh remains under a sentence of death–"is still subject to execution," in the words of the plaintiffs on page two of their supplemental statement–does not constitute an imminent crisis. A temporary restraining order without notice sought to preserve the status quo (McVeigh's non-execution) is not necessary where the status quo is firmly in place. Such is the case here. Accordingly, the plaintiffs' motion for a temporary restraining order without notice is **denied.**

III.

A.

The defendants have appeared by counsel. The court's understanding is that their counsel have each been supplied with a copy of the complaint, a copy of the motion for preliminary restraining order, a copy of the motion for preliminary injunction, a copy of the brief in support of the complaint, and a copy of the summons. *If this information is not accurate, counsel should contact the courtroom deputy clerk of the undersigned at once.*

The defendants shall have **through the close of business on May 30, 2001,** in which to respond to the plaintiffs' motion for preliminary injunction.

B.

"[J]udges must consider jurisdiction as the first order of business." *Sherman v. Community Consol. Sch. Dist. 21 of Whelling Twp.*, 980 F.2d 437, 440 (7th Cir. 1992), *cert. denied,* 114 S. Ct. 2109 (1994). The circumstances apparent from the plaintiffs' complaint are so palpable that the court *sua sponte* raises the question of its jurisdiction and will afford the parties an opportunity to respond.

The plaintiffs describe themselves as victims/survivors of the collapse of the Murrah Federal Building in Oklahoma City. Each plaintiff is a party to what they characterize as "a civil matter pending in Oklahoma arising from the facts and circumstances of that bombing." Warden Lappin is employed by the Federal Bureau of Prisons and is McVeigh's custodian at the USPTH, which lies within the Southern District of Indiana. Attorney General Steve Carter is the Attorney General of Indiana and, according to the plaintiffs' complaint, "is a necessary party for matters involving public charitable trust entities doing business in Indiana."

McVeigh's trial was transferred to the District of Colorado from the Western District of Oklahoma based on McVeigh's motion for change of venue. *McVeigh v. United States,* 918 F.Supp. 1467 (W.D.Okl. 1996). His trial, conviction, and sentence followed, as did appellate review of the entire matter. *United States v. McVeigh,* 153 F.3d 1166 (10th Cir. 1998), *cert. denied,* 526 U.S. 1007 (1999).

The plaintiffs challenge the judgment of conviction and the sentence in McVeigh's trial in Colorado. They assert that the transferee court lacked jurisdiction to conduct the trial or impose sentence and that the conviction and sentence subsequently issued are void and unenforceable. The premises of their argument are that (1) Congress lacked authority to criminalize the crime of murder in a manner which could confer jurisdiction on an Article III court outside the District of Columbia, (2) the federal court in Colorado thus had no subject matter jurisdiction over the prosecution, (3) every criminal act must be prosecuted in the State in which the act is alleged to have occurred, (4) there can be no authority to carry out McVeigh's execution in the absence of a lawful adjudication of guilt and sentence, and (5) the execution of McVeigh would "destroy evidence" (by destroying McVeigh), and hence would improperly impede a source of information pertaining to the ongoing civil litigation in Oklahoma.

Precisely how or whether the Indiana Attorney General, as a public official connected (or not connected) with matters involving public charitable trust entities doing business in Indiana, is connected with any of the above matters is not discernible from the complaint or the other documents filed by the plaintiffs.

Warden Lappin, of course, could in some circumstances be required to respond to litigation challenging the treatment of McVeigh or the conditions of McVeigh's confinement. Warden Lappin, in his official capacity and as McVeigh's custodian, could also be named as respondent in an action for a writ of habeas corpus. *See Hogan v. McBride,* 74 F.3d 144, 146-47 (7th Cir. 1996). This case, however, is not brought by McVeigh or on his behalf to challenge any aspect of his incarceration. This action is also not brought by McVeigh or anyone *purporting to act on his behalf* to challenge McVeigh's conviction and sentence. *Cf. Whitmore v. Arkansas,* 495 U.S. 149, 163-64 (1990) (explaining the bases for proceeding in a habeas action as "next friend" of the prisoner).

An outright challenge to the conviction or sentence would traditionally be brought by McVeigh or someone acting on his behalf. That is not the role the plaintiffs play in the present case. Instead, they purport to act on their own behalf by asserting the invalidity of McVeigh's conviction and sentence.

This is a court of limited jurisdiction, with one of those limits being the constitutional requirement of a case or controversy. "Implicit in that limitation is the requirement that the party invoking the court's jurisdiction have standing." *Kyles v. J.K. Guardian Sec. Servs, Inc.,* 222 F.3d 289, 293 (7th Cir. 2000) (citing cases). "Broadly speaking, standing turns on one's personal stake in the dispute." *Id.* at 293-94. The question of standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). The question of standing is jurisdictional, *see Thompson v. County of Franklin,* 15 F.3d 245, 248 (2d Cir. 1994), and may be examined by the court *sua sponte. Id.*

In order for a party to satisfy the requirement of standing and bring suit in federal court, three constitutional requirements under Article III must be met: (1) the party must have personally suffered an actual or threatened injury caused by the defendant's illegal conduct; (2) the injury must be fairly traceable to the challenged conduct; and (3) the injury must be one that is likely to be redressed by a favorable decision. *Simmons v. Interstate Commerce Comm'n,* 909 F.2d 186, 189 (7th Cir. 1990) (citing *City of Evanston v. Regional Transp. Authority,* 825 F.2d 1121, 1123 (7th Cir. 1987)). An injury-in-fact is a harm that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)(internal quotations omitted). "Purely psychological harm" suffered by a plaintiff is not sufficient to establish standing. *Freedom From Religion Found., Inc. v. Zielke,* 845 F.2d 1463, 1467 (7th Cir. 1988). Similarly, "simple indignation," or an impact on "one's opinions, aspirations or ideology" do not suffice to establish standing. *Harris v. City of Zion,* 927 F.2d 1401, 1405 (7th Cir. 1991) (quoting in part *People Organized for Welfare and Employment Rights v. Thompson,* 727 F.2d 167, 171 (7th Cir. 1984)).

The court discerns no plausible basis on which the plaintiffs have standing to present their challenge to McVeigh's conviction and execution--because their claim rests on the validity of McVeigh's criminal conviction and because the plaintiffs are not entitled to assert any challenge McVeigh may have (in a proper forum) to the conviction and sentence.

The court also views the legal premise of the plaintiffs' complaint to be so dubious as to trigger the substantiality doctrine expressed by Judge Flaum in *Ricketts v. Midwest National Bank,* 874 F.2d 1177 (7th Cir. 1989). This doctrine requires that a claim must have a minimum plausibility to support jurisdiction, *Dozier*

v. Loop College, City of Chicago, 776 F.2d 752, 753 (7th Cir. 1985), and is based on the recognition that "[t]he Supreme Court has frequently said that a suit which is frivolous does not invoke the jurisdiction of the federal courts. . . ." *Crowley Cutlery Company v. United States,* 849 F.2d 273 (7th Cir. 1988); *see also Harrell v. United States,* 13 F.3d 22 (7th Cir. 1993) ("[F]rivolousness is an independent jurisdictional basis for dismissing a suit.").

Article III of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

U.S. Const. Art. III, § 1-2. Furthermore, 18 U.S.C. § 3231 states that "district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States," which plainly "vests the district court with original jurisdiction over all offenses against the laws of the United States." *See United States v. Janik,* 10 F.3d 470, 471 (7th Cir. 1993). A district court's jurisdiction under 18 U.S.C. § 3231 is not restricted to federal property. *See United States v. Mundt,* 29 F.3d 233, 237 (6th Cir. 1994). There is no sense in which the United States District Court for the Western District of Oklahoma lacked jurisdiction over the offenses with which McVeigh was charged, at least based on the reported decisions and the plaintiffs' allegations.

With respect to the transfer in particular, McVeigh was indicted in the Western District of Oklahoma. In the course of that prosecution, both he and his co-defendant filed a motion for change of venue, and the court in which the indictment had been returned acted on that motion by noting, in part:

> The Notes of Advisory Committee on Rules, published with this rule in 1944, make clear that a change of venue can be granted only on the motion of a defendant since the constitutional requirement for trial in the state and district where the offense was committed under Article III and Amendment VI is a right of the defendant. The filing of the motion waives that right.

McVeigh v. United States, 918 F.Supp. 1469-1470. It is implausible to maintain that the plaintiffs here had any right to compel McVeigh's prosecution in a particular court, or even in the courts of a particular sovereign, whether that of the State of Oklahoma or the United States of America.

IV.

Based on the discussion in Part III.B. of this Entry, the plaintiffs shall have **through the close of business on May 30, 2001,** in which to show cause why this action should not be dismissed for lack of jurisdiction.

The defendants likewise shall have **through the close of business on May 30, 2001,** in which to respond to the court's discussion in Part III.B. of this Entry and that response, though not anticipated in the form of a motion, may be considered together with the plaintiffs' response, if any, in determining what disposition of the case should be made or what further orders or proceedings are warranted. The defendants should file a joint response.

This Entry shall be docketed in and distributed from the Indianapolis Division of the clerk's office.

IT IS SO ORDERED.

JOHN D. TINDER, Judge
United States District Court

Date: 5/17/2001

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