

Defendant Harley Lappin (hereinafter "Warden" or "Federal Defendant") is the warden of the United States Penitentiary at Terre Haute, Indiana. As warden of the Terre Haute penitentiary, the federal defendant Lappin is the custodian of inmate Timothy McVeigh.

Defendant Steve Carter is the Attorney General of the State of Indiana. The duties and responsibilities of the Attorney General of Indiana are set forth in Indiana Code 4-6-1-1 et seq. As Attorney General of Indiana, Mr. Carter has no duties, responsibility, or authority whatever with respect to the operation or function of the Terre Haute federal penitentiary. Id. Plaintiffs do not allege that Attorney General Carter is an employee, officer, or agent of the United States Department of Justice or of the Bureau of Prisons.

THE COMPLAINT

Plaintiffs allege that they are plaintiffs in civil suits which appear are intended to discover the facts and circumstances leading up to the destruction of the Murrah Building in Oklahoma City on April 19, 1995. Timothy McVeigh has been convicted of setting the explosion which destroyed the Murrah Building, and is awaiting execution at the Terre Haute penitentiary for his role in the crime. Plaintiffs assert that Mr. McVeigh's conviction and sentence are invalid on a number of constitutional grounds, and seek to enjoin his execution based upon the constitutional defects which they perceive to exist. However, plaintiffs do not claim to be acting for or on behalf of Mr. McVeigh. Rather, they claim that they seek injunctive relief to preserve Mr. McVeigh (or, his testimony, presumably) as evidence.² Plaintiffs seek injunctive relief to enjoin

²The complaint (as well as the additional, related materials submitted by plaintiffs) fails to specify what evidence Mr. McVeigh might provide, or how such evidence would advance their civil litigation, or indeed what it is that they hope to prove with Mr. McVeigh's testimony. In this respect, the facts surrounding the tragic Oklahoma City Murrah Building bombing have been established in open court, via adversarial proceedings, by overwhelming and irrefutable evidence,

the execution of Timothy McVeigh and to (apparently) preserve him (or his knowledge and / or potential testimony) as evidence.

ISSUES

The issues before the court are as follows:

1. Whether this action presents a case or controversy sufficient to confer jurisdiction upon the district court; and
2. Whether plaintiffs' pleadings, on their face, fail to establish a basis for the granting of injunctive relief.

DISCUSSION

I. PLAINTIFFS' LACK STANDING TO MAINTAIN THIS ACTION

The district court, in its order dated May 17, 2001, raised *sue sponte* the question of subject matter jurisdiction with respect to plaintiffs' standing. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Without standing, plaintiffs' claim cannot go forward. Indeed, "the federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (internal quotation marks omitted); see also Vickers v. Henry County Savings & Loan Ass'n, 827 F.2d 228, 230 (7th Cir. 1987). Furthermore, the burden is upon the plaintiff to establish standing and the presence of

and can hardly be disputed. Nonetheless, the Federal Rules of Civil Procedure provide for the taking of depositions (including inmate depositions in appropriate circumstances) and for the perpetuation of testimony. See Fed. R. Civ. P. 26-32, generally. There appears to be no reason why plaintiffs could not have made a proper application to the courts to permit the taking of Mr. McVeigh's deposition if they could establish a genuine and legitimate need to do so.

jurisdiction in a federal forum. NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 237 (7th Cir. 1995); Grafon v. Hausermann, 602 F.2d 781, 783 (7th Cir. 1979).

A. Plaintiffs Fail To Meet The Requirement For Standing Under Article III.

Plaintiffs have failed to establish that a justiciable controversy exists in this case. Article III of the Constitution vests the federal courts with jurisdiction to decide only actual cases or controversies. Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990); Deakins v. Monaghan, 484 U.S. 193, 199 (1988); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974). A central inquiry for determining whether a case or controversy exists is whether there is a “substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality.” Lake Carriers’ Association v. MacMullan, 406 U.S. 498, 506 (1972) (citation omitted); see also Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997). The Supreme Court has noted that standing is perhaps the most important of the case or controversy requirements. See Allen, 468 U.S. at 750. The Court has summarized the standing requirement as having three elements:

First, the plaintiff must have suffered an “injury in fact” — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Lujan, 504 U.S. at 560-61 (citations and footnote omitted). “This triad . . . constitutes the core of Article III’s case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.” Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83,

103-04 (1998) (citations omitted); Kyles v. J. K. Guardian Sec. Serv. Inc., 222 F.3d 289, 293 (7th Cir. 2000) (“Implicit in that limitation [that there be a case-or-controversy] is the requirement that a party invoking the court’s jurisdiction have standing.”). As explained below, plaintiffs have not satisfied the requirements of Article III standing.

1. Plaintiffs Have Not Demonstrated That They Have Suffered An Actual Injury.

As an initial matter, plaintiffs fail to show that they have suffered an actual injury sufficient to establish Article III standing. Their sweeping assertions of speculative future injury are simply not sufficient to allow them to litigate this case. As noted above, each plaintiff’s injury must be “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Lujan, 504 U.S. at 560; see also Whitmore v. Arkansas, 495 U.S. 149, 155-60 (1990); Illinois v. City of Chicago, 137 F.3d 474, 477 (7th Cir. 1998) (“[i]njury is an indispensable element of a case or controversy,” and “[t]hat means a palpable harm to a concrete interest.”). The plaintiff’s injury must be one that is “peculiar to himself or to a distinct group of which he is a part.” Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); see also Schlesinger v. Reservists Comm. To Stop The War, 418 U.S. 208, 218 (1973). Each plaintiff must have a “personal stake” in the outcome of the litigation. See United States Parole Comm. v. Geraghty, 445 U.S. 388, 396, 403-04 (1980).

Plaintiffs have not articulated a sufficiently particularized “injury in fact” to satisfy the irreducible requirements of Article III. In particular, plaintiffs have not identified the defendants in their civil actions or the nature of their claims that allegedly are pending in Oklahoma. More importantly, plaintiffs have not alleged in what respects Mr. McVeigh would provide meaningful additional evidence in support of their civil suits. Their sweeping assertions of unspecified “harm”

do not substantiate an actual and concrete injury. See, e.g., Warth v. Seldin, 422 U.S. 490, 501 (1975) (absent an express statutory right of action, plaintiff must “allege a distinct and palpable injury to himself”).

2. Plaintiffs Have Not Shown That Any Alleged Injury Is Fairly Traceable To The Federal Defendant Or That the Relief Requested Is Likely to Redress the Alleged Injury

Even if each plaintiff were each able to demonstrate a concrete and particularized injury, plaintiffs would still lack standing because they cannot prove that any such injury is “fairly traceable” to the challenged action of the federal defendant or that the relief requested would likely address their alleged injury. See Lujan, 504 U.S. at 560-61.

Plaintiffs have named Warden Harley Lappin as a defendant.³ But, plaintiffs have alleged no contact, action, transaction, duty, omission, or responsibility with respect to plaintiffs and Warden Lappin which would constitute a basis for jurisdiction. Warden Lappin has neither caused nor threatened to cause any legally cognizable injury to plaintiffs. Warden Lappin is merely the lawful custodian of Mr. McVeigh, who is incarcerated awaiting execution pursuant to a valid judgment entered by a United States District Court. As the holding in custody of Mr. McVeigh by Warden Lappin is, in all respects, lawful, it cannot be said that plaintiffs have suffered any actual or threatened injury by any illegal conduct by the federal defendant. See Simmons v. Interstate Commerce Commission, 909 F.2d 186, 189 (7th Cir. 1990). Plaintiffs

³The Attorney General of Indiana has also been named as a defendant in this action. The Department of Justice does not represent the Indiana Attorney General and will not attempt to speak for him. Federal defendant Lappin has no idea why Attorney General Carter has been made a party herein, as Mr. Carter is not a federal employee nor an officer or agent of the United States or a person with any authority whatever with respect to the incarceration of Timothy McVeigh pending the execution of the sentence of death entered against Mr. McVeigh by a federal district court.

apparently seek Mr. McVeigh's testimony to support their civil actions. But the relief they apparently seek – the invalidation of Mr. McVeigh's conviction – would not redress that alleged injury. And plaintiffs have not pursued the only proper avenue of relief that could redress such an injury. The Federal Rules of Civil Procedure provide for the perpetuation of testimony as well as for the taking of depositions of incarcerated persons in proper cases and circumstances pursuant to leave of court. See generally Fed. R. Civ. P. 26-32. Plaintiffs have made no attempt to seek discovery, let alone demonstrate that such discovery is warranted.

B. Plaintiffs Lack Prudential Standing

In addition to the irreducible requirement of Article III, the standing doctrine has a prudential component. Lujan, 504 U.S. at 560. The prudential component ordinarily prevents plaintiffs from invoking the rights of third parties. Warth, 422 U.S. at 499 (1975); see also Powers v. Ohio, 499 U.S. 400, 411 (1991) (in addition to alleging injury-in-fact, a litigant seeking to invoke the rights of a third party, must allege a sufficiently close relationship with the third party so that the court is assured that the litigant will be an effective proponent of the cause and "there must exist some hindrance to the third party's ability to protect his or her own interests"); Whitmore v. Arkansas, 495 U.S. at 163-64. Here, plaintiffs seek to litigate the rights of Mr. McVeigh, a third party, without any showing of injury in fact and any showing that they possess the requisite "close relation" to Mr. McVeigh or that there was "some hindrance to [Mr. McVeigh's] ability to protect his * * * own interests." Powers v. Ohio, 499 U.S. at 411. To the contrary, Mr. McVeigh has been represented by counsel throughout his criminal trial and appeals and has thus been able actively to participate in those proceedings to protect his own legal

interests. Accordingly, plaintiffs lack standing to assert the rights of Mr. McVeigh and thereby challenge the validity of his criminal conviction.

II. PLAINTIFFS ARE NOT ENTITLED TO ANY INJUNCTIVE RELIEF

Plaintiffs seek injunctive relief barring the federal defendant Lappin from carrying out the execution of Timothy McVeigh, said execution currently being scheduled for June 11, 2001.

Without regard to the jurisdictional issues which compel the dismissal of this action, plaintiffs are nonetheless entitled to no relief.

To be entitled to injunctive relief, plaintiffs must satisfy three conditions: first, their case must have a likelihood of success on the merits; second, there must exist no adequate remedy at law; and third, they must suffer irreparable harm if an injunction is not granted. If these three conditions are all met, then the court must balance the irreparable harm the non-moving party will suffer if relief is granted against the irreparable harm the plaintiff will suffer if relief is denied. Ty, Inc. v. The Jones Group, Inc., 237 F.3d 891, 895 (7th Cir. 2001).

Plaintiffs' lack of standing precludes any possibility of success on the merits. Beyond this fatal defect, however, plaintiffs can demonstrate none of the three elements that they must show to have any entitlement to relief. Plaintiffs' theory -- that the person of Timothy McVeigh constitutes essential evidence for them in collateral civil actions, and that the government thus has no right to (or may be enjoined from) the carrying out of a lawful sentence imposed in a criminal case -- is totally unsupported and unsupportable.⁴ Such a theory, if taken to its ultimate

⁴The Federal defendant declines here to engage in any detailed analysis or debate regarding the contentions of plaintiffs that the conviction of Mr. McVeigh or the sentence imposed upon him is in any way infirm. These issues are Mr. McVeigh's to raise (if he so elects) and should only be addressed if Mr. McVeigh properly elects to assert such claims. These issues should not be addressed in a forum where any pronouncements on these questions would amount

conclusion, would completely undermine the ability of any state or the United States to carry into effect a capital sentence.

Moreover, plaintiffs have an adequate remedy at law. As discussed above, the Federal Rules of Civil Procedure provide for the perpetuation of testimony, as well as for the taking of depositions of incarcerated persons, in proper cases and circumstances pursuant to leave of court. See Fed. R. Civ. P. 26-32, generally. Plaintiffs have not only failed to seek any such discovery, but they have failed to demonstrate that such discovery is warranted or required through the instant case.

Plaintiffs have shown no irreparable harm, or any harm whatever, if Mr. McVeigh is executed as scheduled. At most, plaintiffs have speculated that somehow, in some way, Mr. McVeigh will say something that undermines the mountain of hard evidence that tells the story of the Oklahoma City tragedy. Irreparable harm cannot be established upon a foundation of conjecture and speculation.

On the other hand, the government of the United States, and the people it represents, will suffer irreparable harm if the relief plaintiffs seek is granted. Granting such relief would establish the principle that any civil litigant asserting that a condemned prisoner may have evidence in such civil litigation (whether or not related to the offense of conviction) could intervene and effectively override the criminal justice system of every state and of the United States. Giving effect to plaintiffs' theory would ultimately undermine our criminal justice system because it would place

to no more than an advisory opinion. While the Court's observations on the lack of merit of the so-called jurisdictional defects in Mr. McVeigh's conviction to which plaintiffs point are well taken, and reinforce the conclusion that plaintiffs cannot prevail on the merits, these are issues to be litigated (if at all) between Mr. McVeigh and the United States.

into private hands the question of whether the execution of sentences imposed by the courts in criminal cases are carried into effect.

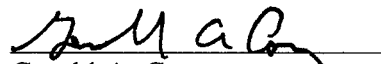
CONCLUSION

For all of the foregoing reasons, the federal defendant Harley Lappin, Warden of the United States Penitentiary at Terre Haute, Indiana, respectfully urges the court to deny all relief to plaintiffs and to dismiss this action in its entirety.

Respectfully submitted,

TIMOTHY M. MORRISON
United States Attorney

By:



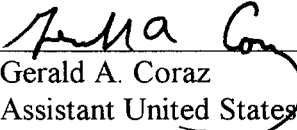
Gerald A. Coraz
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Response to Motion for Preliminary Injunction upon the following counsel of record by mailing a copy thereof by United States First Class Mail this 30th day of May, 2001:

Harmon L. Taylor
Attorney at Law
P.O. Box 516104
Dallas, Texas 75251

Thomas Perkins
Deputy Attorney General
Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
402 West Washington Street
Indianapolis, IN 46204-2770



Gerald A. Coraz
Assistant United States Attorney

Office of the United States Attorney
Southern District of Indiana
10 West Market Street, Suite 2100
Indianapolis, IN 46204