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## Supreme Court to Decide Jurisdiction Over Guantanamo Detainees

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rights of the accused must be protected.<sup>9</sup> Bud Welch, who lost a daughter in the Oklahoma City bombing believes that a victims' rights amendment would have seriously hindered the prosecution of the bombing.<sup>10</sup>

Still others believe that the Victims' Right Amendment is nothing more than a new agenda for district attorneys.<sup>11</sup> John Hays, an avid opponent of the Victims' Rights Amendment, and creator of a website which allows others to speak out against the proposed legislation, says that he is personally opposed to the amendment because, "While the amendment has a pretty name, it is not really a 'victims' rights' amendment but a DA's amendment."<sup>12</sup> Mr. Hays adds that it may even be possible for the DA's to determine who qualifies as a victim such that true victims would be prohibited from testifying in lieu of those "victims" whose statements better compliment the DA's plan of attack.<sup>13</sup> Mr. Hays concludes that such an amendment really reduces the central function of the judge and jury in the criminal trial process.<sup>14</sup>

Both victims and criminal defendants, as well as their attorneys, anticipate the next step in victims' rights. Some victims anticipate the chance for retribution while others fear the effect on criminal prosecutions. Many in the legal field adamantly oppose the Victims' Rights Amendment for numerous reasons but primarily because of the effect the amendment would have on the United States Constitution. The effects of such an amendment would be far ranging and unpredictable.

1. Senate Panel Passes Victim's Rights Amendment, (Sept. 4, 2003), available at [www.talkleft.com/archives/004181.html](http://www.talkleft.com/archives/004181.html)

2. Congress Back in Session, (Sept. 2, 2003), available at [www.talkleft.com/archives/004170.html](http://www.talkleft.com/archives/004170.html) and Senate Judiciary Resolution 1.

3. *Ibid.*

4. Davenport, Paul. *Victims' rights legislation may be dead* (Feb. 20, 2003) available through Associated Press Wires and Westlaw.

5. *President Calls for Crime Victims' Rights Amendment*,

(Apr. 16, 2002) reported from the Robert F. Kennedy Department of Justice, available at <http://www.whitehouse.gov/news/releases/2002/04/20020416-1.html>

6. ACLU Warns that Proposed "Victims' Rights Amendment" Would Erode Due Process, System of Checks and Balances, (Sept. 30, 2003) available at <http://www.aclu.org/CriminalJustice/CriminalJusticeList.cfm?c=249>.

7. Wolfstone, Gary L., Wolfstone vetoes the "Victims' Rights Amendment," available at [http://www.wolfstone.com/const\\_amend.html](http://www.wolfstone.com/const_amend.html)

8. *Id.*

9. Take Action: Wrong Answer to Victim's Rights, (Mar. 26, 2003), available at <http://www.causesthatmatter.com/CivilLiberties/CivilLiberties.cfm?ID=438&c=22>

10. *Id.*

11. Interview with John Hays, internet journalist, on Jan. 25, 2004.

12. *Id.*

13. *Id.*

14. *Id.*

## Supreme Court to Decide Jurisdiction Over Guantanamo Detainees

*John Anderson*

When the United States Supreme Court decided on November 10, 2003 to hear an appeal from detainees held at the Guantanamo Bay Navy Base, it set the stage for a clash between the judicial and executive branches of government. The Court is to decide the question of whether United States courts have jurisdiction to hear challenges to the detention of foreign nationals incarcerated at Guantanamo Bay, Cuba.<sup>1,2</sup> A key factor that the court must determine is whether or not Guantanamo Bay is part of sovereign United States territory.

The appeal is based on two combined cases.<sup>3</sup> *Al Odah v. U.S.* was filed on behalf of twelve Kuwaiti detainees<sup>4</sup> and *Rasul v. Bush*, was filed on behalf of two British and two Australian detainees<sup>5</sup>. The detainees are seeking the right to have their cases reviewed in federal court and not to be left only to the jurisdiction of the military tribunals the President declared would be established.<sup>6</sup> The cases are expected to be heard by the Court in either March or April of 2004.<sup>7</sup>

The detainees, all foreign nationals who were captured in Afghanistan and Pakistan after the September 11, 2001 attacks, are accused of having ties to al Qaeda or the Taliban. In January of 2002, the United States began transferring the first of what would end up being over 600 prisoners accused of having ties to terrorism to the United States naval facility at Guantanamo Bay. The detainees' have been held for nearly two years without formal charges or the opportunity to contest the validity of their detention.

Arguing in opposition to Supreme Court review of the status of the detainees, Solicitor General Theodore B. Olson stated that the detainee's status was a question that was constitutionally the responsibility of the executive branch.

The Bush Administration insists it has the prerogative to determine the status of prisoners captured during the war on terrorism. Generally, prisoners captured during a war would be entitled to protection under the Geneva Convention. However, due to the unique nature of

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the war on terror and the fact that al Qaeda does not follow the internationally agreed to conventions of war as established by the Geneva Conventions on War, the Bush Administration insists it may try accused terror suspects in special military tribunals.<sup>8</sup> On November 13, 2001, President Bush issued an order that provides for foreign nationals accused of either being terrorists or supporting terrorists to be tried in special military tribunals.<sup>9</sup> However no prisoners have gone before a tribunal nor has there been any date set for

**"[A]n exceptional amicus curiae brief was filed by five military attorneys assigned to defend detainees at Guantanamo Bay, challenging the use of the tribunals without civilian judicial review."**

when the tribunals would commence.

The Bush Administration also asserts that the Court lacks authority over the Guantanamo detainees because they are not on United States territory. Guantanamo Bay has been leased from Cuba since 1903 and the Administration asserts that as a result, it is not sovereign United States territory within the jurisdiction civilian courts.

As precedent, the administration cited a case the courts have invoked before to assert that aliens have no constitutional rights outside of sovereign United States territory.

In the 1950 ruling, *Johnson v. Eisentrager*, the Court denied twenty-one German war criminals the right to seek a writ of habeas corpus.<sup>10</sup> The

Germans were considered war criminals as opposed to enemy prisoners of war because after the surrender of Nazi Germany, the accused Germans continued to assist the Japanese in China by providing intelligence and supplies. The court held that enemy aliens held on foreign soil do not have constitutional rights.

Lawyers for the detainees assert that Guantanamo Bay is within the jurisdiction of United States courts because it is territory that is controlled solely by the United States. The detainees also distinguish their case from *Eisentrager* on the grounds that the German war criminals were "enemy aliens" and the detainees taking part in the appeal are citizens of American allies. Also, the Germans were actually tried by military tribunals while the Guantanamo detainees have not gone before any type of court. Further supporting the detainees' assertion, the U.S. Court of Appeals for the Ninth Circuit in December 2003, ruled that Guantanamo Bay is a part of the sovereign territory of the United States.<sup>11</sup> According to Professor Erwin Chemerinsky of the University of Southern California, these factors make the *Odah* and *Rasul* cases distinguishable from *Johnson v. Eisentrager*.<sup>12</sup> "I think that the Supreme Court will and should hold that some court must have jurisdiction to hear the claims of those in Guantanamo."

There has been a chorus of support for the Court's review of the Guantanamo detention and doubt over the legality of the tribunals. On January 14, 2004, an exceptional amicus curiae brief was filed by five military attorneys assigned to defend detainees at Guantanamo Bay, challenging the use of the tribunals without civilian judicial review.<sup>13</sup> In an article published in *Army Lawyer* criticizing the rules under which the

military tribunals would operate, retired Coast Guard Captain Kevin J. Barry wrote, "We must take care that we do not sacrifice our principles on the altar of our response to the terrorism of 11 September 2001 and the recently perceived needs of national security, or we may find ourselves sacrificing the very values we prize in an abortive effort to protect them."

1. Linda Greenhouse, "It's a Question of Federal Turf," N.Y. TIMES, Nov. 12, 2003, at A1.
2. *Fawzi Kahlid Abdullah Fahad Al Odah v. U.S.* 124 S. Ct. 534 (Mem) (2003); *Rasul v. Bush*, 124 S. Ct. 543 (Mem) (2003).
3. Linda Greenhouse, "Justices to Hear Case of Detainees at Guantanamo," N.Y. TIMES, Nov. 11, 2003, at A1.
4. *Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. 2003).
5. *Rasul v. Bush*, 215 F.Supp.2d 55 (D.D.Cir. 2002).
6. Charles Lane, "Supreme Court Revisits Enemy Combatants; Bush Administration Cites 1950 Ruling to Justify Holding Foreign Nationals at Guantanamo Bay, Cuba," WASH. POST, Nov. 23, 2003, at A03.
7. Jenner & Block, News, Events, and Publications, News, "U.S. Supreme Court Guantanamo Bay Cases: Brief Resource Center," at [http://www.jenner.com/news/news\\_item.asp?id=12520724](http://www.jenner.com/news/news_item.asp?id=12520724) (last accessed on February 3, 2004).
8. K. Elizabeth Dahlstrom, "Between Empire and Community: the United States and Multilateralism 2001-2003: A Mid-Term Assessment: Humanitarian Law: the Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay," 21 BERKLEY J. INT'L L. 662 at 672 (2003).
9. Kevin J. Barry, Captain, U.S. Coast Guard (Retired), "Military Commissions: Trying American Justice," ARMY LAW., Nov. 2003, at 1.
10. *Johnson v. Eisentrager*, 389 U.S. 763 (1950).
11. *Gherebi v. Bush*, 352 F.3d 1278 at 1305 (2003).
12. E-mail from Professor Erwin Chemerinsky, USC, to John Anderson (Jan. 22, 2004) (on file with the author).
13. Neil A. Lewis, "Bush's Power to Plan Trial of Detainees Is Challenged," N.Y. TIMES, Jan. 16, 2004, A14.