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Alexis Reed

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Victims' Rights Amendment...

Who is the *Real Victim*?

Alexis Reed

Criminal defendants and defense attorneys beware. Those who are harmed may be allowed to testify against their attackers, not only during the trial, but also at almost all other procedural hearings. Victims of violent crimes, and their families or representatives, may soon have a constitutional right to tell their story to the judge and the jury.

On September 4th, 2003, the Senate Judiciary Committee approved a proposal to amend the Constitution to create new rights for victims of violent crimes.¹ The new amendment, proposed by Senators Jon Kyl and Diane Feinstein, would provide victims with "a right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused...and to be heard at public release, plea, sentencing, reprieve, and pardon proceedings."² The proposed text, which would be added to the United States Constitution as a separate amendment, indicates that the new victim's rights would not be restricted except when required by "a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."³

Many state legislatures have already taken concrete steps to ensure that victims of violent crimes are protected. Sentiments of supporters, echoed by state legislators, are that the bill would strengthen victims' rights to speak.⁴ Supporters like the

fact that provisions of the amendment would entitle victims to early notice of their rights as well as their attackers' proceedings. Victims and their families believe that the amendment would make the government and the legal system more sensitive and responsive to victims.

President Bush himself, as well as Attorney General John Ashcroft, stated that the current administration supports the Victims' Rights Amendment.⁵ President Bush stated that just as the government protects the rights of the accused, it

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should protect the rights of the victims of violent crimes. The President indicated that victims often feel that they have no rights. Those who support President Bush echo his sentiments adding that the system, as it is today, fails to notify victims of bail proceedings, plea bargains, and sentencing proceedings. Most worry that the system now fails to take into account the safety of victims when deciding when to release criminals

from jail.

There are many, however, who adamantly oppose the amendment. Criminal prosecutors, whose role it is to protect the victims, argue that these new rights will eventually strip the prosecutorial office of its ability to function.⁶ The main concern is that, in many cases, the victim's right to testify would obstruct justice. Prosecutors would be severely limited in their ability to present plea bargains to defendants and co-felons in order to garner testimony.

Other opponents of the amendment argue that this measure is unnecessary and too drastic a step. Washington Post columnist George Will indicated that "[t]here should be a powerful predisposition against unnecessary tinkering with the nation's constituting document, reverence for which is diminished by treating it as malleable." Those who wish to protect the Constitution argue that, in this case, adding amendments to the document would be purely for symbolic purposes.⁷

Those symbolic reasons should not undermine the protections that the Constitution provides. It is argued that the Victims' Rights Amendment will erode Constitutional guarantees of the right to a fair trial, basic fairness, due process, and the presumption of innocence.⁸ Further opponents of the amendment, including some victims of violent crimes, feel that, now, more than ever, the

rights of the accused must be protected.⁹ 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.¹⁰

Still others believe that the Victims' Right Amendment is nothing more than a new agenda for district attorneys.¹¹ 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."¹² 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.¹³ Mr. Hays concludes that such an amendment really reduces the central function of the judge and jury in the criminal trial process.¹⁴

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

2. Congress Back in Session, (Sept. 2, 2003), available at 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

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.^{1,2} 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.³ *Al Odah v. U.S.* was filed on behalf of twelve Kuwaiti detainees⁴ and *Rasul v. Bush*, was filed on behalf of two British and two Australian detainees⁵. 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.⁶ The cases are expected to be heard by the Court in either March or April of 2004.⁷

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