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PROPOSED CONSTITUTIONAL AMENDMENT TO PROTECT CRIME VICTIMS, S.J. RES. 1

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

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PROPOSED CONSTITUTIONAL AMENDMENT TO PROTECT CRIME VICTIMS, S.J. RES. 1

TUESDAY, APRIL 8, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:05 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Jon Kyl presiding.

Present: Senators Kyl, Leahy, Kennedy, Feinstein, Feingold, and Durbin.

Also Present: Representative Royce.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. This meeting of the Senate Judiciary Committee will come to order.

In the absence of the Chairman of the Committee, Senator Hatch, I will begin. Should Senator Hatch arrive, and Senator Leahy, of course, an opportunity will be afforded to them to make whatever statements they wish to make. In fact, we will keep the record open for the submission of any statements by any Senator.

We are also joined this morning by Congressman Ed Royce of California, and he will have a couple of introductions to make after awhile.

The purpose of this hearing, of course, is to consider a proposed constitutional amendment to give victims of crime certain rights that would, to some extent, parallel many more extensive rights that are provided to defendants in criminal proceedings.

The Constitution provides defendants a variety of rights, but none for victims of crime, and in certain situations where State constitutions and State statutes have attempted to provide rights to victims of crime, we have found that those rights have not been uniformly effected by the courts and that victims, therefore, continue to suffer, notwithstanding those laudable provisions.

In fact, according to a report of the National Institute of Justice, even those States that give the strongest protection by their own statutes or constitutional provisions, fewer than 60 percent of the victims were notified of the sentencing hearing, and fewer than 40 percent were notified of the pretrial release of the defendant. So even where the rights are supposedly guaranteed in statute, they simply aren't being enforced. It is our view—and Senator Feinstein and I have co-sponsored this amendment now for several years—that until these rights are actually embodied in the U.S. Constitution, they will continue to take second place. That's not right.

This idea is not new. It's over 20 years old. President Reagan, in his 1982 task force, proposed enactment of a Federal Constitution amendment to supplement the State laws and State constitutional provisions.

Now, regarding the current text that is before us, it is similar to the one in the 106th Congress, but in response to comments about its length and its cosmetics, the language has been honed and refined. We have several people to thank for that, which we will do momentarily.

But regarding this point, President Bush, when he announced his support of this precise amendment, said that it was written with care and strikes a proper balance. We believe that that is true.

Professor Laurence Tribe, who has been instrumental in helping us with this drafting and came up with a lot of the ideas for this form of text, praised the amendment's greater brevity and clarity—for which he was largely responsible, I might add—and he commented that, "You have achieved such conciseness while fully protecting defendants' rights, and accommodating the legitimate concerns that have been voiced about prosecutorial power and presidential authority is no mean feat. I think you've done a splendid job at distilling the prior versions of the Victims Rights Amendment into a form that would be worthy of a constitutional amendment." Again, we appreciate all that he has contributed to this effort.

I will just conclude with a brief comment about the degree of support that this amendment has. It has been supported by both the Republican and Democratic party platforms. It is a truly nonpartisan or bipartisan kind of issue, as evidenced again by the fact that throughout the years, regardless of which party was in power in the Senate, Senator Feinstein and I have worked together as the sponsors of this amendment to attempt to get it passed.

Major national victims rights groups, including Mothers Against Drunk Driving, Parents of Murdered Children, the National Organization for Crime Assistance, and State groups like the Arizona Voice for Crime Victims, the Maryland Crime Victims Resource Center, Memory of Victims Everywhere, and Crime Victims United, a variety of organizations support this. Senator Feinstein is going to have a very important letter to put into the record in a moment.

It is supported by various law enforcement groups, like the National Association of Police Organizations, the International Union of Police Associations, and the Federal Law Enforcement Officers Association. Forty-one State Attorneys General have just signed a letter in strong support, which we'll get to in a moment.

Thirty-two State amendments, as I've said, have passed by an average vote—and average vote—of 82 percent of the electorate of those States. So this is very popular among the people of the United States, and we believe if we can get the amendment through the Congress and to the State legislatures, it will be supported by the requisite number of State legislatures.

We have, I think, at last count, 21 cosponsors in the Senate, and we are informed that a similar amendment will be introduced in the House next week, and we are looking forward to moving the

legislation through the Judiciary Committee and on to the floor of the Senate as soon as we possibly can.

Again, our whole point here is that it is important to embody rights for victims of crime in the United States Constitution, if they are ever to have the degree of importance attached to them that matches our commitment to provide these rights to victims of crime, in a way that will truly see them, recognized and administered by our courts in a way that is fair to the victims of crime.

I want to thank all of the witnesses who are here today. I will introduce each of you in a moment. I thank Congressman Royce for being here and, of course, our colleagues, Senator Durbin and Senator Feinstein.

At this point let me turn to Senator Feinstein for any opening comments she might like to make.

STATEMENT OF HON. DIANNE FEINSTEIN, A. U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

It's hard to believe that we have been at this now for 6 years, but Steve Twist just came up and he said, yes, it was 6 years.

I want to particularly acknowledge the work you have done, Mr. Chairman. I have been very pleased to be able to join you in this effort. I have come to believe in it profoundly over the years. I particularly want to thank Steve Twist, who has represented victims and has been with us all the way through it.

I hope that Senator Durbin might appreciate the following story. After our last floor debate about the amendment, I was talking to Larry Tribe by phone, and I recounted to him many of the comments that Senator Durbin made on the floor about the amendment, that it was too statutory, that it was too long, et cetera, et cetera. A couple of months went by and one morning he called, and he said, "You know, I was taking a shower this morning and it just came to me." So that's how, in essence, we started to revise the previous version of the amendment. The idea came from a constitutional professor of law who happened to be taking a shower, and had worked with us for a number of years. I happen to think it's a great improvement.

I would like to spend my time just saying why I believe we need this amendment. Before I do, I would like to put into the record a letter signed by 42 State Attorneys General which, says—and I quote—"The rights you propose in S.J. Res 1 are moderate, fair, and yet profound. They will extend to crime victims a meaningful opportunity to participate in the critical stages of their case, and at the same time they will not infringe on the fundamental rights of those accused or convicted of offenses." So if I might add that to the record, I would appreciate it.

First, Mr. Chairman, a victims' rights constitutional amendment will balance the scales of justice. Currently, while criminal defendants have almost two dozen separate constitutional rights, 15 of them provided by amendments to the U.S. Constitution, there is not a single word in the Constitution about the victims of crime. These rights trump the statutory and State constitutional rights of crime victims because the U.S. Constitution is the supreme law of the land.

To level the playing field, crime victims need rights in the United States Constitution. In the event of a conflict between a victim and a defendant's rights, the court will be able to balance those rights and determine which party has the most compelling argument.

Second, a constitutional amendment will fix the patchwork of victims' rights laws. Seventeen States lack State constitutional victims' rights amendments. And the 33 existing State victim's rights amendments differ from one another. So they create a kind of patchwork of rights, all of them different. Also, virtually every State has statutory protections for victims, but these vary considerably across the country. So only a Federal constitutional amendment can ensure a uniform national floor for victims' rights.

Third, a constitutional amendment will restore rights that existed when the Constitution was written. It is a little known fact that at the time the Constitution was drafted, it was standard practice for victims, not public prosecutors, to prosecute criminal cases. Because victims were parties to most criminal cases, they enjoyed the basic rights to notice, to be present, and to be heard. Hence, it is not surprising that the Constitution does not mention victims.

Now, of course, it is extremely rare for a victim to undertake a criminal prosecution. Thus victims have none of the basic procedural rights they used to enjoy. That stopped in the mid–19th century, around 1850. When the position of public prosecutor became institutionalized, victims lost their rights. Victims should receive some of the modest notice and participation rights they enjoyed at the time that the Constitution was drafted.

Fourth, a constitutional amendment is necessary because mere State law is insufficient. State victims' rights laws, lacking the force of Federal constitutional law, are often given short shrift. A Justice Department sponsored study and other studies have found that even in States with strong legal protections for victims' rights, many victims are denied those rights. The studies have also found that statues are insufficient to guarantee victims' rights. Only a Federal constitutional amendment can ensure that crime victims receive the rights they are due.

Fifth, a constitutional amendment is necessary because Federal statutory law is insufficient. The leading statutory alternative to the victims' rights amendment would only directly cover certain violent crimes prosecuted in Federal court. Thus, it would slight more than 98 percent of victims of violent crime. We should acknowledge that Federal statutes have been tried and found wanting. It is time for us to amend the Constitution.

The Oklahoma City bombing case offers another reason why we need a constitutional amendment. This case shows how even the strongest Federal statute is too weak to protect victims in the face of a defendant's constitutional right. In that case, two Federal victims' rights statutes were not enough to give victims of the bombing a clear right to watch the trial and still testify at the sentencing, even though one of the statutes was passed with the specific purpose of allowing the victims to do just that.

An appellate court held, in fact, that the victims did not have standing under the Constitution to bring a case to get the right which we in the Senate and House of Representatives, signed by

the President, passed. So a constitutional amendment would help ensure that victims of a domestic terrorist attack, such as the Oklahoma City bombing, have standing, and that their arguments for a right to be present are not dismissed as "unripe". A constitutional amendment would give victims of violent crime an unambiguous right to watch a trial and still testify at sentencing.

There is strong and wide support for a constitutional amendment. President Bush, Attorney General Ashcroft, have endorsed the amendment. I appreciate their support. Both former President Clinton and former Vice President Gore have all expressed support for a constitutional amendment on victims' rights. Both the Democratic and Republican party platforms call for a victims' rights constitutional amendment. Governors in 49 out of 50 States have called for an amendment. Four U.S. Attorneys General, including Attorney General Reno, support an amendment. Forty-two State Attorneys General support an amendment. And major national victims' rights groups, including Parents of Murdered Children, Mothers Against Drunk Driving, and the National Organization for Victim Assistance support the amendment.

Law enforcement groups, including the National Association of Police Organizations, the International Association of Chiefs of Police, the International Union of Police Associations, AFL–CIO, and the Federal Law Enforcement Officers Association, support an amendment. Constitutional scholars such as Harvard Law School Professor Larry Tribe support an amendment, and I should say that Professor Paul Cassell supported the amendment prior to becoming a Federal judge.

The amendment has received strong support around the country. Thirty-two States have passed similar measures, by an average popular vote of almost 80 percent. Mr. Chairman, I look forward to hearing the testimony today, and I thank you for your leadership.

[The prepared statement of Senator Feinstein appears as a submission for the record.]

Senator KYL. Thank you very much, Senator Feinstein, and thank you for your leadership on this amendment.

This morning is an extraordinarily busy day in the Senate. I have two other committees meeting at this precise time, and I know it's busy for all of us. But that is why I'm particularly pleased that the Ranking Member of the full Senate Judiciary Committee, Senator Leahy, is here. I will turn to him next for an opening statement.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I appreciate your courtesy on this.

I would ask that a number of items for the record, including a letter from Chief Justice Rehnquist, a statement from Bud Welch, the father of an Oklahoma City bombing victim, the National Network to End Domestic Violence, and others, be included in the record at the appropriate place.

Senator KYL. Without objection, so ordered.

Senator LEAHY. Thank you.

This past Sunday marked the beginning of National Crime Victims' Rights Week. For more than two decades, we have set this week aside each year to focus attention on the needs and rights of crime victims. Each year, this week reminds us of our longstanding commitment to afford dignity and recognition to crime victims, and challenges us to build on the tremendous foundation of victims' rights and services already established across our Nation.

My involvement with victims's rights began more than three decades ago. I was State's Attorney in Chittenden County, VT and I witnessed first hand how crime can devastate victims' lives. I believe I was one of the very first, certainly in our State, one of the first prosecutors in the country to make absolutely sure that victims were heard at the time of sentencing, that they were given a chance to be part of the process all the way through. I have worked ever since to ensure that the criminal justice system is one that respects the rights and dignity of victims of crime, rather than one that presents further ordeals to those who have already been victimized.

I am pleased that Congress and the States have become far more sensitive to the rights of crime victims than either were at the time I was a prosecutor. We have greatly improved our victims' assistance programs, but we have a lot more to do.

For example, we have unfinished business with respect to the annual cap on the Crime Victims Fund, which has severely limited the amount of money available to serve victims of State crimes. In 2001, Congress passed, and then inexplicably repealed, legislation that Senator Kennedy and I proposed to replace the cap with a self-regulating system. Such a system would ensure stability and would protect the Fund assets while allowing more money to be distributed to victims. We should not be imposing artificial caps on spending at a time when unfunded needs are there.

I was disappointed, for example, that the President's latest budget for fiscal year 2004 does precisely that. It proposed a cap on spending for the Crime Victims Fund. The President's budget would reduce Federal funding for State victim assistance programs for the second year in a row. I think that's wrong, because State funding and charitable giving are drying up, and I hope the President will change his mind.

We also need to protect our most vulnerable victims, women and children who are victims of domestic violence. They are extraordinarily vulnerable. Seeing a representative from the Attorney General's office here, I would remind him that the President's budget fails to fund any transitional housing programs, and it severely underfunds grants for battered women's shelters. These are desperately needed nationwide. While it may not go through the AG's office, they may want to pass the word on.

But one important program on which progress has finally been made is the Violence Against Women office. Last year, we underscored the importance of that office's work by passing legislation that required the office to be moved to a more prominent position under the Attorney General. But for 6 months after the President signed that legislation into law, the Department of Justice refused to follow it. I am glad that the Attorney General has now changed his mind and he has agreed to set up the Violence Against Women

office with the status that Congress intended. I think you will find bipartisan support in this Committee to help the new head of that.

Then there's another area of violent crime—terrorism and mass violence. We need to focus on victims' rights in this particular context for several reasons. After September 11th, this most savage type of crime is a growing concern. Terrorism and mass violence differ from other violent crimes because it can devastate thousands of innocent lives and can also devastate whole communities. And then we have to make sure that victims' rights are tailored to ensure they're in harmony with the needs of national security.

We passed a bill to allow the families and survivors of the September 11th attacks to watch a closed circuit broadcast of the trial of Zacharias Moussaoui. But the judge in that case has severely limited the number of locations at which victims can watch those proceedings. Many of the victims are going to be denied the right that we in Congress, again in a bipartisan fashion, sought to provide. In fact, we have been told the prosecution may be moved to Guantanamo Bay, which would mean none of the victims would be able to watch it. So these are things we have to watch. If there are going to be trials at Guantanamo Bay and military tribunals, then we ought to ask are the victims going to be accommodated in this.

Now, I mention those various proposals—funding for victims of State crimes, shelter for victims of domestic violence, strengthening enforcement with respect to violence against women, and giving victims of terror access to the justice system—because these are all practical means tailored to the actual needs of real specific groups of victims. You put the money in there and it makes sure that victims' rights are protected.

I remember the debates we've had over the years about unfunded mandates. Well, we shouldn't make unfunded promises. A constitutional amendment may well make us feel good, but if we're not going to fund the things that are there to help victims, it doesn't really do anything for us.

This amendment makes victims promises that we lack the ability or political will to turn into practical realities. If that's the case, then we should reject it. I mean, we found the presidential budgets, Congressional actions, and we make all kinds of promises, but we don't put the money there. If we don't put the money there, then we're tacking on to the Constitution what Shakespeare called "words, full of sound and fury, signifying nothing." So we ought to have candor.

After all, amending the Constitution is a very serious matter. I have a great deal of respect for the sponsors of this amendment. I know they worked very hard on it. They have been through, I believe, 70 drafts to date. It shows their sincerity. But it also shows how difficult this is if you have to go through all those drafts. In fact, if we had passed an earlier version, like the one we debated 3 years ago, we would now be stuck with that version. Everybody now concedes there were flaws in it. We would be out here trying to pass another constitutional amendment to correct what we did back then.

So we're not disagreeing about the importance of victims' rights. I have demonstrated that throughout my career. I demonstrated that in my career when I was in law enforcement. We have to

make sure victims are heard. But let's make sure that we do it in a way that they really are heard. Let's make sure we take the laws that are on the books today and put the money behind them. Let's make sure we don't have six-month delays in the future in setting up offices needed for victims' rights. Let's make sure that when we all give speeches in favor of victims' rights and all the programs we have established for them, that we then come up with the money to fund them.

I would hope that people would read the testimony of Bud Welch, whose daughter was killed in the Oklahoma City bombing. This is a man who cares very much about victims. He speaks of the need for victims' legislation, not for a constitutional amendment.

I think of Mrs. Patricia Perry, who is sitting in the front row with her husband, John. Her son was killed on September 11th. He had finished his career as a police officer and had passed in his resignation papers in the normal course of events, and turned in his badge. The call came for the attack on the Trade Center Towers and he went back, retrieved his badge, and went in to save people in the Trade Towers. He did not come out.

These are people concerned about victims. But I think they agree that you can't have a "one size fits all" solution to victims' rights. I'm afraid that's what happens here in this amendment. Even the distinguished Senator from California quoted Laurence Tribe. Well, Laurence Tribe also said "the States and Congress, within their respective jurisdictions,. already have ample authority to enact rules protecting [victims] rights" without the constitutional amendment he has worked on.

So, Mr. Chairman, we have to ask ourselves why should we amend our Constitution for only the 18th time in 200 years, and whether it might be better to put all our energies into funding the victims' programs that are there.

Again, I thank you for your courtesies on this. I would also note for the record how much work you and Senator Feinstein have put into this. I think with both of you it has been a labor of love in the truest sense of the word.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator KYL. Thank you very much, Senator Leahy.

I would at this time include, without objection, into the record letters from the organization Mothers Against Drunk Driving, Crime Victims United of Oregon, Roberta Roper and Russell Butler of the Maryland Crime Victims Resource Center; a letter from Parents of Murdered Children, from NOVA, from Racial Minorities for Victims Assistance, and Sue Russell of the State of Vermont. Without objection, those letters will be inserted in the record.

Senator FEINSTEIN. Mr. Chairman, I have a packet of letters. May I insert those as well?

Senator KYL. Yes, those will also be inserted, without objection.

Now, even though the first three of us who have spoken exceeded the five minute limit that we ordinarily impose, and we're going to ask our witnesses to abide by, I would like to ask everyone else, if they can possibly do so, to try to abide by that. I'm sorry to say that just before I call on Senator Durbin first.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. I'll try to make my statement even briefer. I thank both you and Senator Feinstein for your good faith effort to take this work product and make it much more compact.

It still raises some fundamental questions that I believe Senator Leahy has addressed, because I think what we all agree on is that victims should have a right to be notified, to be informed, and to be present. Now we have a competing right, too, and that would be the right of the accused. With a presumption of innocence, with the establishment of constitutional protections, does this amendment preempt or take away any of the rights of the accused in America? I think that is a legitimate threshold question. If the answer is yes, which rights are now removed from criminal defendants?

Senator Feingold and I have both offered amendments to this constitutional amendment at various times over the last several years that would say "nothing herein shall deny the rights of an accused under the Constitution." Both times those amendments have been defeated in the Judiciary Committee, which certainly raises the question, if not the presumption, that we are preempting the rights of the accused defendant. If we are doing so, let's do it honestly. Let's be open about it.

When the Department of Justice comes to testify, I'm going to ask Professor Dinh early in my questioning just which rights of the criminal defendants are we going to remove, or restrict, or hamper, by protecting the rights of victims. If there are none, then we should say it straight out. If there are some, let's also be very explicit about it.

We also have a question here, which I raised about the earlier version of this amendment, which gets down to some basics: who are victims? It is easy to find the victim of an assault, to identify that person and to say that is the protected person. But in the case of a murder, who is the victim? Is it the mother and father of the victim who died? Is it the brother and sister? Who will it be? How many people will have rights vested by this constitutional amendment?

There is also a question about a lawful representative of the victim, another undefined term here, which also is going to raise some questions about the responsibility of the State to notify the lawful representatives of the victims and the victims themselves of their constitutional rights. So many questions have been raised by it.

I will close by saying I start with the same presumption that I start with any constitutional amendment: there is a reason why, in the history of the United States of America, we have amended this Constitution so rarely. It is because we assume that the Constitution and the amendments, particularly the Bill of Rights, have stood the test of time, and we should never be so presumptuous as to believe that we can take a roller to a Rembrandt and make it look a little better. We ought to start with the presumption that, if we can do it by statute, we should do it by statute and not by constitutional amendment. That, of course, is my concern as we go into this debate.

Thank you, Mr. Chairman.

Senator KYL. Thank you very much.

Senator Feingold.

STATEMENT OF HON. RUSS FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I have a longer statement that I would also like to include in the record. I will come well within the 5 minutes because all I have to do is strongly associate myself with the remarks of Senator Durbin that were, to my mind, very effective, and I will just say a few other words.

I share the desire to ensure that those in our society who most directly feel the harm callously inflicted by criminals do not suffer yet again at the hands of a criminal justice system that ignores victims.

But Congress should proceed very carefully when it comes to amending the Constitution. I believe that Congress can better protect the rights of victims by ensuring that current State and Federal laws are enforced, providing resources to prosecutors and the courts, as Senator Leahy has said, to allow them to enforce and comply with existing laws and working with victims to enact additional Federal legislation, if needed.

As Senator Durbin indicated, in the 214-year history of the United States Constitution, only 27 amendments have been ratified, just 17 since the Bill of Rights was ratified in 1791. Two of the 17 concerned prohibition and so they cancelled each other out. Yet, literally hundreds of constitutional amendments have been introduced in just the past few Congresses.

To change the Constitution now is to say that we have come up with an idea that the Framers of that great charter did not. I do not believe that the basic calculus of prosecutor, defendant and victim has changed enough since the foundation of the Republic to justify this significant action.

Now, as a Senator in the Wisconsin State Senate, I did vote in favor of amending the Wisconsin State Constitution to include protections for victims. The majority of States now do have State constitutional protections for victims, and every State in the country has statutes to protect victims.

But the Wisconsin State Constitution, like a number of other State constitutions, appropriately clarifies that the rights granted to victims cannot reduce the rights of the accused in a criminal proceeding. That is why Senator Durbin and I have tried, unsuccessfully, to have this kind of a protection added to this amendment, because that would make a huge difference.

I am also concerned that a victims' rights amendment could jeopardize the ability of prosecutors to investigate their cases, to prosecute suspected criminals, and balance the competing demands of fairness and truth-finding in the criminal justice system.

So today, I look forward to hearing from our witnesses on the issue of whether it is necessary for Congress to take the rare and extraordinary step of amending the Constitution to protect the rights of victims.

Thank you for the chance to speak, Mr. Chairman.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Senator KYL. Thank you. All of the questions have been raised, and I think they're good and appropriate questions, and now we'll hear from some witnesses who perhaps can answer those questions.

We would like to begin with Mr. Viet Dinh. Viet, if you would take the dias, I will introduce you.

Viet Dinh is Assistant Attorney General for the Office of Legal Policy at the Department of Justice. Prior to his entry into government service, Mr. Dinh was professor of law and deputy director of Asian Law and Policy Studies at the Georgetown University Law Center.

Mr. Dinh graduated magna cum laude from both Harvard College and the Harvard Law School. He was a law clerk to Judge Lawrence H. Silverman of the U.S. Court of Appeals for the D.C. Circuit, and to U.S. Supreme Court Justice Sandra Day O'Connor. He is joined by Mr. John Gillis, who is Director of the Office of Victims of Crime.

We welcome you both. Mr. Dinh, the floor is yours.

STATEMENT OF VIET D. DINH, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. DINH. Thank you very much, Mr. Chairman, and good morning, Senators. Thank you very much for the opportunity to be here.

I have a fuller statement that I would ask to be entered into the record in the interest of time. I will take a few moments to reiterate the Department's and the administration's support for this crime victims' rights amendment.

As the President stated last year, "The protection of victims' rights is one of those rare instances where amending the Constitution is the right thing to do, and the Feinstein–Kyl Crime Victims' Rights Amendment is the right way to do it."

Today, as you have noted, is part of National Crime Victims' Rights Week, and it is fitting, it seems to me, that this year's theme is "Fulfill the Promise", because it has been over two decades since President Reagan convened his landmark task force on victims of crime, and Congress passed the Victim and Witness Protection Act of 1982.

Yet the promise remains unfulfilled and victims of crime continue to be silenced by a criminal justice system intended to protect them. Although I agree that, as a general matter, we should be wary of attempts to amend the Constitution, this is one of those times when it is both necessary and prudent.

I would like to thank you, Mr. Chairman, and Senator Feinstein, for your continued leadership and advocacy for a victims' rights amendment. Having participated in countless meetings and discussions, I know that this is, indeed, a labor of love and a labor of passion for the team of lawyers that worked endlessly to craft this amendment.

I would like to thank Matt Lamberti and Stephen Higgins here in the Senate, Lizette Benedi and Paul Clement from the Department of Justice, and of, course, Steve Twist, from the National Victims Constitutional Amendment Network.

I talked a number of times with Professors Larry Tribe and Paul Cassell during this process, and I can reiterate that they deserve

support, thanks and praise for all of their expertise and effort in this regard.

Currently, all 50 States and the Federal Government have passed legislative measures to protect victims' rights, and 33 States have amended their constitutions to do so. However, these efforts, while substantial, have proven inadequate to protect victims' rights when courts compare them with the Federal constitutional rights of criminal defendants. In 1998, a National Institute of Justice study concluded that "a strong victims' rights law makes a difference, but even where there is strong legal protection, victims' needs are not fully met."

The proposed amendment, if enacted, undoubtedly will prompt significant adjustments in the criminal justice system. That is why, in evaluating S.J. Res. 1, the Department has viewed our support of the rights of crime victims in light of our responsibilities to enforce the criminal laws of the United States vigorously and effectively, and our commitment to fairness and justice for all persons, including those accused of crimes. We believe that the proposed amendment properly protects and advances all of these interests.

The Department believes that protecting the rights of victims of crimes is not only consistent with but advances our core mission of prosecuting perpetrators of crime. That is especially true under the proposed amendment, which we believe provides sufficient flexibility to ensure that investigators and prosecutors are able to discharge their duty to bring offenders to justice in a timely and efficient manner. That is why 41 State Attorneys General, as you have noted, Mr. Chairman, through their national association, have written a strong letter of support for this amendment, a letter which the Attorney General received this morning and which Senator Feinstein has entered into the record.

This amendment has been carefully crafted to protect the rights of victims while ensuring the proper investigation and prosecution of crime. It does so by allowing for restrictions on victims' rights only where there is a substantial interest in public safety or the administration of criminal justice.

The Department looks forward to working with you to see that this measure is passed, and to assisting you in fashioning appropriate implementing legislation should it pass.

I am at your disposal now to answer any questions you may have. Thank you, sir.

[The prepared statement of Mr. Dinh appears as a submission for the record.]

Senator KYL. Thank you very much, Mr. Dinh.

Let me ask you, since you're going to be gone at the time the next panel—well, you may not be gone, but you won't be on the dias here.

Mr. DINH. Do you know something I don't, sir?

[Laughter.]

Senator KYL. After our next panel testifies is what I was trying to say.

I noted in his written testimony that one of the presenters on the next panel, Mr. Orenstein, has identified two very narrow examples, in his view, of where the crime victims' rights amendment

might harm law enforcement efforts. I would like to have you respond to those in advance of his testimony.

First he is concerned that giving rights to victims in organized crime cases might interfere with their prosecutions. I would ask you whether or not you agree with me, that it's true that, under this amendment, no such notice would have to be given.

Second, he is concerned that in the rare situation in which the victim is actually a prisoner already, that they would have to be transported to court. I would ask you whether it's true that, under the amendment, there is no such requirement for transportation of prison victims that is necessary.

Could you respond to those two concerns that he has expressed?

Mr. DINH. Yes, sir. They are both very good points that Mr. Orenstein raises, but I think ultimately not ones that have not been thought of by you, the sponsors, and not adequately addressed in the amendment.

First of all, the question of notice, especially in the case of organized crime—I believe Mr. Orenstein mentioned his experience in the John Gotti trial, and with the cooperation of Mr. Gravano—I note that section 2 of the amendment affords victims a right to "reasonable and timely notice." The phrase "reasonable", of course, is one that is common in constitutional law, including reasonable search and seizure in the 4th Amendment and other places within the Constitution. It affords the court, when faced with the question, sufficient flexibility to decide that, where notice would jeopardize a prosecution or pose a danger to the victim or other persons, then it would not be reasonable to provide such notice.

In case that is not sufficient, I note that the last sentence of section 2 provides that "these rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of justice", thereby providing another opportunity for courts, prosecutors and investigators to consider restrictions on victims' rights in order to afford a substantial interest in public safety or the administration of justice.

I think the drafters of the amendment have very wisely considered that the interests of the prosecution are, in most cases, consonant with and complementary to the rights of victims. But where the rights of victims, if guaranteed to an absolute extent, would jeopardize the public safety or the prosecutorial interest, then reasonable accommodations can be made in order to ensure that the two teams are working together rather than working against each other.

With respect to the second question of prisoner transport, that is a very interesting question. I have not thought about it very much because it involves an area of prisoner litigation and personal rights that is ongoing as a daily matter in the Supreme Court and elsewhere.

But I would like to note that the right that is afforded under section 2 to attendance is "the right not to be excluded from such public proceeding". It is not a right to attend, as such. It is a right not to be excluded. It is a right not to be turned away at the gates. It does not speak of a right, an affirmative right, or incentive to attend a particular proceeding.

So I would think that, just as the government need not provide cab fare to normal victims, the government need not provide transportation to a particular proceeding because the right guaranteed is a right not to be excluded.

But, even so, I guess one other point I would like to make is, under the Court's jurisprudence regarding the constitutional rights of prisoners and the penalogical interest of the United States and other State governments in a case, I believe, called Turner v. Saffley, a case where Justice O'Connor wrote that the proper test for balancing the constitutional rights of prisoners, if this constitutional amendment were passed and a prisoner is a victim, then that constitutional right would be afforded to the prisoner. But in balancing that interest of the constitutional right of prisoners and the State's interest, the appropriate standard is not one of strict scrutiny or undue burden that we are familiar with, but rather it is whether or not a policy is reasonably related to a State's penalogical interest.

So I think there is sufficient room in the constitutional law in order to accommodate the concerns that Mr. Orenstein raised. But in any event, I do not think they are raised with respect to the specific text of this amendment.

Senator KYL. So the United States Department of Justice is comfortable that the amendment, as currently drafted, would not interfere with law enforcement efforts?

Mr. DINH. Absolutely, sir.

Senator KYL. Thank you very much.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Good morning.

Mr. DINH. Good morning.

Senator FEINSTEIN. I wanted to ask you to respond to Senator Durbin's concern, and that is that this amendment does not trample on or subjugate a defendant's rights. When this was redrafted, this time we tried to meet that concern, and the way we met it was in section 1, right up front, with these words:

"The rights of victims of violent crime being capable of protection without denying the constitutional right of those accused of victimizing them are hereby established and shall not be denied by any State or the United States, and may be restricted only as provided in this Article."

You mentioned the balancing test, which I think both Senator Kyl and I have wanted to protect, with the knowledge that a judge can balance those rights. But my question to you is, do you believe that the way the amendment is drafted presently does not abrogate any right that a defendant or an accused possesses under the Constitution?

Mr. DINH. Yes, ma'am, I do agree, and it starts with a statement of principle in section 1. It is a very important statement of principle which I think informs the interpretation of the rest of the provisions, most significantly the substantive provisions of section 2, which grants the operative rights and restrictions therein for the particular amendment.

With respect to section 2, I would like to note that the balancing test that you speak of specifically is contemplated by the amend-

ment. This is one of those rare places in the Constitution—I believe it's the only place in the Constitution—whereby the test is actually specified so as to give proper guidance to the court on how to balance exactly these rights that may come into tension. The amendment states that "these rights shall not be restricted, except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."

A substantial interest in the administration of criminal justice I think gives the court the ability to evaluate where rights of criminal defendants under the 4th, 5th, 6th and 8th and other places in the Constitution come into not conflict but meets the rights of the victims afforded under this amendment. Courts would be able to delineate the lines between these various rights and accommodate them in a reasonable manner by this specific language, that the rights of crime victims may be restricted, but only if there is a substantial interest in the administration of criminal justice, including protection of the rights of criminal defendants under the 4th, 5th, 6th and 8th Amendments of the United States Constitution.

Senator FEINSTEIN. Thank you very much, Mr. Dinh. I appreciate that.

Thank you, Mr. Chairman.

Senator KYL. Senator Durbin.

Senator DURBIN. Thank you very much.

Professor Dinh, let me go back to that section 1 and read it. "The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established..."

I read that differently. I think it is a presumption that we can give rights to victims without endangering or limiting the rights of the accused. But it doesn't say expressly the following: "No rights vested in victims under this amendment shall be at the cost or at the expense of the rights of the accused."

Wouldn't that be a clearer statement of what you say is, in fact, the meaning or the intent of this amendment?

Mr. DINH. I do not know what the exact intent of the amendment is, but I do know that the meaning is, I think, quite clear on the face of the amendment. Section 1 sets forth the principle, the overall principle, that the rights can be reconciled and both sets of rights can be protected.

There is no question that the introduction of a third player, if you will, into the criminal justice system that is currently dominated by the prosecutor and the criminal defendant's interest, the introduction of crime victims as full partners in this enterprise would have significant impact and would prompt significant adjustments in that criminal justice system.

I think that the admission of such an equal player, a first-class citizen, if you will, into this community of criminal justice, would prompt significant development of the law by courts seeking to adjust the criminal justice system in order to fully protect the rights of victims. That is why I think the nuance provision that is in the last sentence of section 2, that allows for a court to make proper accommodations for substantial interest in the administration of

criminal justice, is more of a clearly precise rapier-like approach rather than a broad-sword approach to the adjustment that will have to be made.

Senator DURBIN. Let's try to be specific, then. Let's get down to some specific instances.

As I read through this, and were this a Federal statute involving crime victims' rights, it would pass 100 to nothing, or close to it, on the floor of the Senate. But since we're talking about a constitutional amendment, there is and should be closer scrutiny to the exact words that are used.

In my mind, the one element here that raises more concern than others, is the element of the rights not to be excluded from public proceedings and reasonably to be heard, so forth and so on. The public proceedings, of course, refer back to any public proceeding involving a crime. So I take it what we're speaking of is the rights of the victims to be present at the trial, the trial of the defendant, whether they are going to testify or not. That, I think, raises some questions that need to be resolved.

Now, let me go to the end of that section 2. It says, "These rights shall not be restricted except—" so the exceptions clause, which you referred to in your statement, says the courts can make exceptions to the rights of the victims to be at the trial, if they find "a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."

What's the difference between a "substantial interest" and "compelling necessity"?

Mr. DINH. Senator, that is a very good question. As you know, compelling necessity is a phrase that was used in the previous version of the Crime Victims' Rights Amendment, S.J. Res. 3, in the 106th Congress. It is a very high standard for exceptions. That is, I think, a derivative of some of the Supreme Court's cases with respect to Executive power, especially in times of danger to the national security.

The phrase "substantial interest" is one that is derivative from the intermediate scrutiny standard of the Supreme Court—

Senator DURBIN. So it would be a lower standard?

Mr. DINH. It would be a lower standard in terms of strength. It only has to be a substantial interest, rather than a compelling necessity. So as I read this, where the interest is one that touches upon public safety, or the administration of criminal justice, it need only be substantial for the court to accommodate it and thereby restricting the—

Senator DURBIN. Let me ask you this question. I think in answer to Senator Feinstein you said this, but I want to make certain it's clear.

Is it your belief that the phrase "the administration of criminal justice", which is the basis for an exception to the right of the victim to be present at trial, would include a consideration by the court as to whether the presence of the victim would in any way diminish or deny the rights of the criminally accused?

Mr. DINH. Senator, let me answer that a little bit more completely by recounting a phrase that I see every single day when I come in to see the Attorney General. Right outside his office in the rotunda is a quote that says, "The United States wins its point

whenever justice is done its citizens in the courts." So yes, I do believe that justice is done when victims are fully represented in the criminal justice system, and when defendants' rights are fully protected.

I do think that the system and the administration of criminal justice has to accommodate not only the interest of the United States in prosecuting the guilty and exonerating the innocent, but also the rights of victims to be present and the rights of criminal defendants to have a fair trial.

Senator DURBIN. So if I might, Mr. Chairman, I just have two questions that are important to me and I hope we can have a few minutes to answer them.

Let's get to a specific situation. Let's assume that a judge—and this constitutional amendment is on the books. A judge takes a look at the prospect of bringing into the courtroom a group of victims who could be the families of the actual victim of a violent crime, or actual victims themselves. The judge believes that the presence of those victims in the courtroom would somehow impede the constitutional right guaranteed to an impartial jury. The judge believes that their presence in the courtroom might do that.

Do you believe that they have established in section 2 the grounds for that judge to say the constitutional rights of the victims do not supersede the substantial interest of the accused to an impartial jury and, therefore, I will restrict the victims from the courtroom?

Mr. DINH. I do not think I can venture a specific answer to your particular hypothetical, but I do think that under the language of the amendment, a judge can consider a substantial interest in the proper administration of criminal justice, and it may very well be how he conducts his courtroom includes such a substantial interest.

Without going into a prognostication as to how this amendment would be interpreted and how judges would decide cases in particular instances, I do think there is sufficient flexibility in the amendment in order to afford a judge the opportunity to control his courtroom to best protect the interests of the criminal defendants, the rights of criminal defendants, and for a prosecutor to make decisions in order to advance the interest of the prosecution.

Senator DURBIN. But you wouldn't quarrel with the conclusion that if the exception relates to the administration of justice—and I think we have come to a conclusion that that includes the rights of the accused—then it certainly would relate to constitutional protections, specific constitutional protections, that the accused have in America, such as the right to an impartial jury?

Mr. DINH. I think that would be right that the administration of criminal justice include fairness to criminal defendants and fundamental protection of rights guaranteed in the Constitution. But in any event, where there are constitutional rights that may be intentioned and where a line has to be drawn, that is a task that has traditionally been done by courts, according to standards that are well-established in the constitutional law doctrines.

I think this particular sentence affords further guidance along the lines you suggest.

Senator DURBIN. My last question is this.

Let me take you from what I think is an easier conclusion to a little more contentious one, and that is the fact that we have sequestered witnesses from trials historically because we believe they'll "go to school" on other witnesses, that they will pick up information that is testified to and repeat it as their own, whether they're conscious of that or not. So it has been kind of a standard of evidence that, unless you are a party to a case, or have a statutory right to be present, you are excluded from the courtroom until you're called to testify.

Now we're in a situation where we're dealing with victims, and possibly victims' families. Is the same basic standard going to apply? Do you believe the "substantial interest" exception under the administration of criminal justice allows a judge to determine that the presence of the victims or victims' families in the courtroom might in some way reduce the likelihood that they will be credible witnesses and, therefore, should be excluded?

Mr. DINH. The short answer to your question, Senator, is I do not know. I do know that under the current system, under Federal Rules of Evidence 615, there is discretion for a judge to make such kinds of determinations. I also know that in the Crime Victims Clarification Act of 1997, after the Timothy McVeigh issue that the Chairman raised and Senator Feinstein raised, Congress spoke specifically to the rights of victims in those circumstances.

Both of these, of course, are statutory in nature. The Federal Rules of Evidence is pursuant to the laws of Congress to adopt it, and so is the Victims Rights Clarification Act of 1997. Those you are free to amend and interpret or legislate as you see fit. I think the specific application of this amendment as it relates to future cases, should it pass, is I think for the courts to finally adjudicate.

Senator DURBIN. My last question, if I might, Mr. Chairman.

Section 1 begins with the rights of victims of violent crime. As you testify today, is it your belief that the term "violent crime" means crime as defined by both Federal and state statutes?

Mr. DINH. Yes. The amendment would be an amendment to the Constitution, and under Article VI of the Constitution, the supremacy clause, it would apply to State officials just as well as it does to Federal law.

Senator DURBIN. Maybe I wasn't clear. In my State of Illinois, the definition of violent crime is different than the Federal standard. So if someone is guilty of a violent crime in Illinois, by State definition, that doesn't meet the standard by Federal definition, which standard will apply to the phrase "the rights of victims of violent crime"?

Mr. DINH. Crimes of violence are somewhat variously defined within 18 USC, the Federal Code. And as you know, it is defined in various statutes around the country, also.

Because this will be a constitutional amendment, and the word "violent crime" will be of constitutional dimension, I would imagine the courts, in interpreting the scope of that right and the meaning of the adjective "violent" would be informed by the various legislative enactments that are extant. But I think the definition itself will be one of constitutional import that does not admit to either Federal or State legislative definition but may be both or neither.

Senator DURBIN. Thank you, Mr. Chairman, for your patience.

Senator FEINSTEIN. Mr. Chairman?

Senator KYL. Yes, Senator Feinstein.

Senator FEINSTEIN. May I just for the record say that the use of the words "administration of criminal justice" is just that, and there are three phases: preconviction, conviction, and post-conviction. The intent is that it cover those three phases.

Senator KYL. Thank you, Senator Feinstein.

First of all, Senator Durbin, I would invite you and other members of the Committee, if he is willing to do so, to submit additional written questions to Viet Dinh at the Department of Justice, to further amplify all of your questions. I thought your questions were very good questions, and there are good answers to them.

For example, as one of the authors, I agree with everything that Viet Dinh has just testified to, but would further note that with regard to the last point, section 4 provides that Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. It was our intention that questions such as definitions of who are victims, what kind of notice is required and by whom, and your last point, the definition of violent crime, could well be dealt with by appropriate Congressional legislation.

If there are no further questions of Viet Dinh—yes, sir.

Mr. DINH. Can I make just one comment, one note on your last point, Senator? The language of section 4 deliberately tracks the language of section 5 of the 14th Amendment and section 2 of the 13th Amendment. As you know, there is well-established constitutional precedent as to the proper scope of Congressional authority under those provisions and, should this amendment pass, we would gladly work with you in order to comment on the appropriate legislation.

Senator KYL. We appreciate that very much. Thank you.

Senator DURBIN. Mr. Chairman, if I might be recognized for just a moment, I thank Professor Dinh for his testimony and I accept your invitation to continue this dialogue.

I have to leave to go to another hearing, and I assure those who are here for the second panel that I will read their testimony carefully. I appreciate this opportunity for this hearing today.

Senator KYL. Thank you very much. And thank you, Viet Dinh, for your presence here, and John Gillis as well. We appreciate your being here.

Now, would the members of the second panel please come forward. I will introduce you as you are coming forward, and then we'll just take you in turn. I'm going to turn to Congressman Royce in just a moment to further introduce a couple of you.

Collene Campbell, who will be further introduced, and her husband, Gary, live in San Juan Capistrano, CA. Collene was the first woman to be mayor of San Juan Capistrano. After her son was murdered in 1982, she founded Memory of Victims Everywhere, or MOVE.

Her family suffered another blow in 1988, when her brother, race care legend Mickey Thompson and his wife, Trudy, were murdered.

Earlene Eason was raised in Chicago. She was a nurses assistant and now works in day care. She has raised three sons. Her son, Christopher, was murdered in 2000.

James Orenstein is an attorney in private practice in New York City and an adjunct professor at the law schools of Fordham University and New York University. From 1990 until June, 2001, he served in the U.S. Department of Justice as an Assistant U.S. Attorney for the Eastern District of New York.

Patricia Perry is the mother of a New York City police officer who died in the 9/11 attacks, which was referred to in Senator Leahy's testimony.

Duane Lynn met his wife, Nila, when they were 16. They married at 19. After five-and-a-half years in the Navy, Duane joined the Arizona Highway Patrol. He was a dispatcher, road officer, helicopter medic. Duane and Nila had six children and 12 grandchildren. His wife, Nila, was murdered on April 19, 2000.

Steve Twist is a lawyer in Phoenix. He's a former Chief Assistant Attorney General for the State of Arizona, and now serves as General Counsel for the National Victims of Constitutional Amendment Network. Mr. Twist is the author of the Arizona constitutional amendment for victims' rights and its implementing legislation. He teaches victims' rights law at the College of Law at Arizona State University, where he has also founded a free legal clinic for crime victims.

At this time let me turn to Congressman Ed Royce, a Member of the United States House of Representatives from California, for a further introduction of a whole variety of Californians who are with us today.

STATEMENT OF HON. ED ROYCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative ROYCE. Thank you very much, Senator Kyl. I appreciate that.

I'm the sponsor of the victims' rights amendment on the House side, and I am privileged to introduce Collene Thompson Campbell, who like our Assistant Attorney General Viet Dinh, is from Orange County, CA.

In 1982, Collene's son, Scott, was murdered. His body was tossed out of an airplane at 2,000 feet and never recovered. Scott's death, and the near decade of grief and struggle it took to bring his killers to justice, prompted Collene to become involved in the victims' rights movement and to start a group called Memory of Victims Everywhere.

In 1988, Collene helped me pass Proposition 115, the Crime Victims Justice Reform Act. She helped put it on the ballot. It required a million signatures, and it passed overwhelmingly in the State. That proposition made historic changes in California law that changed the way our criminal justice system treats victims, in some of the same ways that you intend to change here with this constitutional amendment. Many other States have copied its provisions.

Collene's tragedy did not end with her son's case, and her involvement did not end with Proposition 115. In March of 1988, Collene's brother, race car driver Mickey Thompson, and his wife, Trudy, were gunned down in their own driveway in LA County. Like her son's case, that case has taken years of investigation, and the case is now finally awaiting trial.

One has to ask, how can we allow our criminal justice system to add to the terrible grief these families are forced to endure? This amendment would help reform that injustice.

Through all this, when others would have long ago given up hope, Collene has never stopped working. Four U.S. Presidents have honored her for her work on behalf of the rights of crime victims and their families. Her dedication and her unselfishness, her commitment, have made a difference for crime victims in California and across the country. I am very privileged to introduce to you my good friend, Collene Thompson Campbell.

I thank you, Senator Kyl.

Senator KYL. Thank you very much, Congressman Royce. I was going to ask whether we should go first from the left to right or right to left, but being a conservative, I'm going to start at the right, how's that?

[Laughter.]

I might say that we have asked each of the witnesses to confine their remarks to 5 minutes. When I met with several of you this morning, you asked how can you possibly describe in 5 minutes all of the feelings that you've had about these issues, particularly when it has taken so long—in the case of Mrs. Campbell, for example. We understand that it's very difficult to do all of this within a short period of time, and we therefore especially appreciate your efforts to do so.

Collene?

STATEMENT OF COLLENE THOMPSON CAMPBELL, CITY COUNCILWOMAN, SAN JUAN CAPISTRANO, CALIFORNIA

Mrs. CAMPBELL. Thank you for the opportunity. My name is Collene Thompson Campbell, and it is really tough to be here. Honorable Kyl, Honorable Feinstein, Honorable Senator, I thank you for giving me this opportunity.

My only son is dead because of a weak and forgiving justice system. And yes, we may be one of the hardest hit families in the nation, but we are just one victim's family out of hundreds of thousands. We continue to be deeply saddened by all four of the September 11th terrorist attacks, but we also know that every ten weeks in our Nation as many people are murdered right here in the country, every ten weeks.

Our son Scott was strangled by two repeat felony criminals and thrown from an airplane, and we never found him. We couldn't even have a funeral for him. My brother, my only sibling, my friend, auto racer legend Mickey Thompson and his wife, Trudy, were shot to death as they were simply leaving their home on their way to work in the morning.

For any family to deal with murder is near impossible, but to allow the American justice system to add additional pain is shameful.

The U.S. Constitution was written to protect, balance and establish justice—and that is true—unless and until you have the misfortune of becoming a victim of crime.

There has been tremendous pain in our family, and multiplying that grief is the fact that the moment we became a victim of crime, our rights were ignored in favor of killers. That means a murderer

or rapist has rights not afforded to honest victims, all because the victim is not mentioned in our Constitution.

My husband and I were not permitted, not permitted, to be in the courtroom during all three trials for the men who murdered our son. We weren't going to be witnesses. They just kicked our fanny out of there and forced us to sit in the hall. Yet the killers, with all of their family, were inside the courtroom portraying the family unit. We were not allowed to be heard, yet the killers' family were able to testify, proclaiming goodness about the evil defendants.

We were not notified of a district court appeal hearing. Therefore, no one was there to represent our murdered son, Scotty. Yet, in full force, 40 members of the killers' group were present. The murder case was then overturned and there is yet to be another trial. The killer was released without concern for our safety, and we learned of all of this through the media.

I called the Attorney General's prosecutor in our case and I asked why she hadn't notified us regarding the appeal. Her answer was demeaning, but very typical. She said, "We never notify the victims. They simply don't understand." However, we knew the true reason we were not notified. Unlike the killer's defense, she was not required to notify us because we were only the mom and dad of the murder victim, his next-of-kin. We weren't the killer so they didn't have to notify us.

I could go on and on, but I can guarantee you that the treatment that we and thousands of other victims receive is the product of others before us doing nothing. Hopefully, you will work to change that. I don't know what we're waiting for.

You rarely hear from people like me because victims are too devastated to talk—and I'm devastated, as you can tell. We received no financial help in our attempt to expose the true victims' world, nor do we have attorneys representing us. We pay our own way in an effort to improve the justice system to save others. I paid my own way to be here today.

All we have is the honesty and integrity of good Americans asking for a balanced justice system, and we need your help now.

At a huge cost to taxpayers and our life personally, we have been forced to be in the justice system for 21 straight years, with no right for a speedy trial. And there's no end in sight for our family. And what kind of a torture in the justice system is that for a family who is trying to live a normal life?

We ask you to move forward with a proposed constitutional amendment to give the same rights to victims as the accused have. The amendment we seek does not take away rights from criminals.

On behalf of all crime victims, thank you for allowing me to be heard—and that's all crime victims. I only hope you did hear me today and that you will react to the real world that we've been forced to endure. And I want to give a special thanks to Senator Kyl and Senator Feinstein, my Senator from California. Thank you for caring, thank you for seeing the truth, and we really do appreciate you. Thank you very much.

[The prepared statement of Mrs. Campbell appears as a submission for the record.]

Senator KYL. Thank you, Collene. We will now hear from Earlene Eason of Gary, IN. Earlene.

STATEMENT OF EARLENE EASON, GARY, INDIANA

Ms. EASON. Mr. Chairman and Senators, my name is Earlene Eason, and I presently reside in Gary, IN. I strongly support the crime victims' rights amendment.

I would like to share with you my unfortunate experience as a crime victim after the murder of my 16 year old son, Christopher. He was murdered on July 16, 2000. I had relocated from Minneapolis, MN to Gary, IN. About a year after relocating, I thought allowing him a few weeks vacation with a neighbor, and previous neighbor, Penny Jackson, back in Minneapolis would help ease Christopher's transition to a new city.

Back in Minneapolis, while on vacation, my son was killed, murdered in a manner which no human being deserves to die. He was shot point blank in the lower back with a sawed-off shotgun. Forensics revealed that my son was trying to run when he was grabbed by the back of the shirt and pulled back onto the barrel of the shotgun and then the trigger was pulled. The killer was a 24 year old from El Salvador.

After my son's murder, the criminal justice system in Minneapolis treated me very badly. I was not informed of the death of my son by the authorities. Over 13 hours after my son's body was found Ms. Penny Jackson called. My family and I were not told we had rights. However, we were promised by the district attorney's office that they would keep in touch with us about the case. This would turn out to be an empty promise.

First, the DA said the charge would be first degree murder. We only learned of the actual charges filed—which were second degree murder—from the newspaper. Only after the press had printed and distributed the newspaper and after we had read it were we notified.

We also experienced significant financial hardship because of other failures to give us adequate notice. All of this wasted expense, which we could not afford, was due to constant trips to Minneapolis for court dates, which were frequently changed without adequate notice to me and my fiance.

My son's father, who resides in California, purchased several flight tickets. He was never informed of any date changes. The district attorney's office failed to contact him and inform him of anything. He became so frustrated that he gave up on coming out to any of the hearings due to the expense of cancelled tickets and the fear of losing his job from the disruption of his work schedule because of the failure to notify him.

The first trial was a hung jury, 11 to 1 to convict. The trial took place on October 17th, 2000. When I and other members of the family asked for another trial, we were treated as simpletons, as if we were invisible. Approximately 2 months later, the DA's office and the defense attorney decided to plea bargain. I was informed of this only after the fact. They had already agreed to the plea bargain. I was informed of the initial date for plea and sentencing dates, but there were several continuances. We received very short

notice of these changing dates, which was very disruptive to my fiance's job.

Finally, the date was set for 9–12–01. We were going to fly to Minneapolis from Chicago. Then the airports were shut down because of 9/11. I called the district attorney's office and asked for the proceeding to be re scheduled. The deputy DA affirmatively discouraged me from attending. He believed it was more important to have a tactical advantage by getting a sentence the day after 9/11 than it was important for me, the mother of a murdered son, to attend and speak at the sentencing of my son's killer.

The DA did not ask the court for a continuance on our behalf, even though there had been many continuances granted for other reasons, and I had never asked for a continuance before. As a result, I was unable to appear in court to try to object to the plea bargain or speak at sentencing, even though it was very important to do so. My son's cold-blooded killer is getting only 11 years of real time for killing my son. I feel like the DA and the justice system thought this was just another African–American kid killed and that our family didn't deserve to be treated with plain decency.

I was told I could not get restitution. This does not seem right. The constitutional amendment would greatly help victims efforts to get restitution. We were assured we would get financial help even for therapy, and I went for as long as long as I could afford to pay for it out of my own pocket. I then had to stop because I could no longer afford it. As a result of no therapy, I became physically sick and could not work. To this day, I have received no financial assistance for therapy.

In closing, I would like to say we were treated without compassion or respect by a justice system that really didn't care. People receive more compassion for the loss of a pet than we received from the justice system for the loss of our son.

I would like to ask the Senate to hear us, to realize that the victims of crime should not have to take this any more. I feel powerless, but I know you have the power to vote yes on the constitutional amendment, to keep what happened to us from happening to anyone else. It is time for you to stand by me and for you to pass this amendment so that people like me don't have to take this any more. We should have had rights in this, and we had none.

Thank you.

[The prepared statement of Ms. Eason appears as a submission for the record.]

Senator KYL. Thank you, Ms. Eason.

Mr. Patricia Perry. Thank you for being here.

STATEMENT OF PATRICIA PERRY, SEAFORD, NEW YORK

Mrs. PERRY. Thank you, Senators Kyl and Feinstein, and Honorable Ed Royce, for this opportunity to share my views on the proposed victims' rights amendment.

My name is Patricia Perry and I speak on behalf of my husband, James, our daughter, Janice Perry Montoya, and our son, Joel Perry, in memory of their brother, our son, John William Perry, a New York City police officer who volunteered to assist employees escaping the World Trade Center on September 11, 2001, and himself became a victim.

John graduated from New York University School of Law, but he wanted the experience of being a police officer. When he received the opportunity to enter the New York City Police Academy, he left his partnership in a law firm and eagerly trained to learn how to protect the public from those who would cause harm.

While in the NYPD, John also served as a pro bono lawyer for those whose civil rights or civil liberties had been violated. He served as legal advisor to the Kings County Society for the Prevention of Cruelty to Children and was a volunteer arbitrator for the small claims court in Manhattan, and also served as a lieutenant in the New York State Guard. He was serious about his goals, but full of humor and had an infectious smile.

After 8 years of service in the NYPD, which included nearly 5 years in the legal department, John decided he would return to private law practice. On September 11th, 2001, John went to One Police Plaza, completed his retirement papers, and turned in his badge. The first plane crashed through Tower One. He immediately retrieved his badge and ran to the World Trade Center, just minutes away. He met a friend, Captain Pearson, and entered the underground plaza. They worked together to help panicked workers find a safe way out of the area. He did not find safety for himself and became a victim.

John believed in the integrity of the Constitution and the Bill of Rights, and the institutions of our government that are established to pursue the guilty through legal means. Our system, as we have heard, is not infallible. It can at times be both insensitive to the needs of victims and less than competent in its prosecution of criminals. We know there are cases where the guilty have gone unpunished, and where innocent people have been convicted and even executed.

These are issues that need to be addressed, but we suggest this amendment is not the appropriate tool, nor will it remedy these flaws. Our family agrees that John would appreciate the concern for victims, but would oppose the victims' rights amendment. Our family believes the best way for Congress to support victims and their families is to promote and support a system of justice that provides fair and just convictions of the criminals responsible for crimes. We believe this constitutional amendment threatens the system of checks and balances in the current justice system and that it could actually compromise the ability of prosecutors to obtain convictions for those responsible for the carnage on 9/11. We believe that, to the extent this amendment is effective, it is unworkable, and even dangerous. And to the extent that it does nothing, it is an empty promise for victims who need real resources and real support.

We believe that criminal convictions should not be based on the emotions of victims and families, particularly in situations where we are not relevant witnesses to the crime. On the other hand, victims should clearly have the opportunity to participate in the penalty phases of a case after a defendant has been found guilty. As we have seen in the aftermath of this tragedy and others, victims do not always agree on the best way a case should be handled.

Under this amendment, as we understand it, victims would have the right to give input in the criminal case even before the convic-

tion, which could compromise the government's prosecution of the case. Moreover, if the amendment passes, who will be entitled to these constitutional rights? Defining "victim" is not always easy and can present problems that cannot be ignored.

Even the most well-intention efforts cannot always anticipate the problems that might arise. Look at the ongoing dissention that has been caused in defining "victim" under the Victims' Compensation Act. In a criminal case, it seems that defining victim will be even more challenging, particularly when the victim cannot represent him or herself. Who decides who is the true representative to be heard? How long will it take if every family member of every victim of 9/11 is allowed to input a position on procedure of a case against someone like Zacharias Moussaoui?

I was interviewed, as were many family members, by the Justice Department, in order for the prosecution to choose a sample of family members to testify during the penalty stage. The Justice Department already determined that not all families are necessary in the penalty stage of this trial.

This proposed amendment allows for the waiving of the right of all families to be heard in such cases, but with large numbers of victims, who passes the test for inclusion? How will different viewpoints be reconciled if all must be heard? And if, as the amendment allows, our newly found constitutional rights are easily waived, the intended relief the amendment supposedly provides to victims becomes meaningless.

We would suggest that instead of focusing on this amendment, Congress should ensure that resources are offered as needed to help heal the pain and loss of victims and victims' families, as you have before you today. The response of the American and foreign populations to our loss on 9/11 has been a great support. But most victims do not receive this love and support. Our hope is that we all consider the benefits of turning our attention to providing real help to victims, and we do so without compromising the integrity of our Constitution.

Many States have begun to provide funds to assist victims of crime. More work should be done at the State and Federal legislative level and this amendment is not only distracting legislators from doing it, but is also causing hurtful and needless dissentions within the victim community. Can you imagine how wrenching it is for our family to find ourselves at odds with other victims' families over this political issue, which will in any event do so little for crime victims.

We want justice for our son, and for the daughters and sons, husbands and wives, partners, mothers and fathers who are victims of every crime. We deserve that our government and law enforcement personnel protect us as much as possible from harm. My son, John Perry, believed strongly in the rule of law and the right of the people to direct our elected representatives, like yourselves, to use good judgment in establishing sound laws.

Thank you.

[The prepared statement of Ms. Perry appears as a submission for the record.]

Senator KYL. Thank you, Ms. Perry.

Professor James Orenstein, we are pleased to have you with us.

STATEMENT OF JAMES ORENSTEIN, ESQ., NEW YORK, NEW YORK, FORMER ASSISTANT UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK

Mr. ORENSTEIN. Good morning, Mr. Chairman, distinguished members. Thank you for inviting me to appear before you today.

As a Federal prosecutor for most of my career, I have been privileged to work closely with a number of crime victims as well as talented lawyers on all sides of this issue, including several here today, to make sure that any victims' rights amendment will provide real relief for victims of violent crimes without jeopardizing law enforcement. I think it my be possible to do both, but I also believe there are better solutions that do not carry the severe risks to law enforcement inherent in using the Constitution to address the problem.

In particular, I believe that the current bill will in some cases sacrifice the effective prosecution of criminals to achieve only marginal improvements for their victims. In the last 20 years, Congress has enacted several statutes that improve victims' rights in the criminal justice system. One of them, the Victims' Rights Clarification Act, effectively addressed the problem of victim exclusion from the courtroom in the Oklahoma City bombing case, where I was one of the prosecution team.

As a result of that statute, no victim was excluded from testifying at the penalty hearing on the basis of having watched the trial. More importantly, in considering whether this amendment is necessary and effective, you should know that Judge Matsch's actions after the enactment of that statute would likely have been exactly the same if this amendment had been in effect.

In addition to Federal legislation, every single State has enacted its own victims' rights laws. The only thing lacking is uniformity in the States' adoption of the full range of protections that this body has provided. As a result, the main benefit to be gained by this amendment is not the elimination of injustices that its supporters have described today. Most of those injustices are either already violations of existing law and, therefore, would not be cured by this amendment, or are beyond the reach of an amendment that promises not to deny the historic protections of the Bill of Rights.

Instead, the limited benefit would be uniformity in the States, a uniformity gained only by allowing Congress to mandate changes in State criminal justice systems. The same result, however, could likely be achieved without a constitutional amendment through the use of Federal spending power to give States proper incentives to meet uniform national standards. But unlike reliance on such legislation, using the Constitution to achieve such uniformity carries the risk of irremediable problems for law enforcement.

I want to stress that, in my view, the potential risks for law enforcement are not the result simply of recognizing the legal rights of victims. Prosecution efforts are generally more effective if crime victims are regularly consulted during the course of a case. There are, however, a number of cases where the victim of one crime is also the offender in another, and in such cases, this amendment could harm law enforcement.

For example, when a mob soldier decides to testify for the government, premature disclosure of his cooperation can lead to his

murder and compromise the investigation. Under this amendment, such disclosures could easily come from victims who are more sympathetic to the criminals than the government. As Senator Kyl mentioned before with Mr. Dinh, when John Gotti's underboss decided to cooperate, he initially remained in jail with Mr. Gotti and was at grave risk if his cooperation became known. Luckily, that did not happen. But the victims who would have been covered by this amendment, had it been in effect at the time, and had the wording of this current bill been in effect at the time, they probably would have gotten notice. Relatives of those gangsters who the underboss had murdered on Gotti's order would almost certainly have been notified, and notified Gotti, if they could have done so.

I have heard supporters of this amendment answer that this problem can be solved simply by closing a cooperator's guilty plea to the public. However, the 1st and 6th Amendments make it extraordinarily difficult to do that. As a result, the need for discretion is usually handled not by closing the courtroom but by scheduling guilty pleas without notice, and at times when the courtroom is likely to be empty. Such pragmatic problem-solving cannot work under this amendment.

In the prison context, inmates who assault one another may have little interest in working with prosecutors to promote law enforcement, but they may have a very real and perverse interest in disrupting prison administrations by insisting on the full range of victim services that the courts will allow. Some of those services could force prison wardens to choose between costly steps to afford victim inmates their participatory rights and foregoing the prosecution of offenses committed within prison walls. Either of these choices could endanger prison guards.

The risk to law enforcement arises not from giving rights to crime victims but from using the Constitution to do so. There are two basic ways this bill could cause more problems than using legislation to protect victims' rights: first, by not adequately allowing for appropriate exceptions, and second, by delaying and complicating trials. I explain at more length in my written statement how particular aspects of the wording of the current proposal could harm law enforcement.

I think, in response to what Mr. Dinh was saying before, one of the main issues that I still have is the use of the word "restrictions" rather than the word "exceptions" in section 2. That's a change from the version 3 years ago. That could deprive prosecutors and prison officials of the flexibility needed for safe and effective enforcement, and could make the arguments that Mr. Dinh was using earlier today ineffective in a court.

But beyond such wording issues, some problems are created by the very fact that, contrary to the claims of some supporters of this bill, the current version of the victims' rights amendment discards some of the carefully crafted language that was the product of years of study and reflection—and that's what I'm talking about in the difference between "exceptions" and "restrictions". And there are other examples in my written remarks.

Our criminal justice system has done much in recent years to improve the way it treats victims of crimes, and it has much yet to do. The Crime Victims' Assistance Act, co-sponsored by Senator

Leahy and other members of this Committee, is a good example of legislation that should be enacted, regardless of whether you also amend the Constitution. By adopting a legislative approach now, you may well find that the potential harm to law enforcement inherent in the constitutional amendment need not be risked.

Some say the kinds of concerns I describe today make the perfect the enemy of the good. But if supporters of victims' rights, among whose numbers I count myself, allow the desire for a symbolic victory of a constitutional amendment to distract them and to distract you from passing legislation that could achieve all of their substantive goals more effectively and with less risk to law enforcement, they run the risk of making the flawed the enemy of the perfect.

We must never lose sight of the fact that the single best way prosecutors and police can help crime victims is to ensure the capture, conviction and punishment of criminals. In my opinion, as a former prosecutor, the proposed constitutional amendment achieves the goal of national uniformity for crime victims only be jeopardizing law enforcement. By doing so, it ill serves the crime victims whose rights and needs we all want to protect.

Thank you very much.

[The prepared statement of Mr. Orenstein appears as a submission for the record.]

Senator KYL. Thank you, Professor Orenstein.

Mr. Duane Lynn.

STATEMENT OF DUANE LYNN, PEORIA, ARIZONA

Mr. LYNN. Thank you, Mr. Chairman, Senators. My name is Duane Lynn.

Three years ago, Wednesday, April the 19th, 2000, started out like any other ordinary day. But my plans were interrupted and the events of that afternoon changed my life and that of my family forever. In the middle of the afternoon, an angry, bitter man, named Richard Glassel, came into our homeowners association meeting in the Vintana Lakes Community where my wife and I lived. I resided on the board. He simply walked into the room, announced to everyone "I'm going to kill you", and he started shooting. He had three handguns, one assault rifle, over 700 rounds of ammunition, and a suicide note in his pocket.

He had one purpose in mind that afternoon, to kill everyone that he could. He was mad about the way the homeowners association trimmed his bushes in his yard months before, and he was going to have the last word. Ultimately he wounded several, and he killed two before his gun jammed and he was tackled to the ground. One of the two killed was my wife. I made it out alive. We had been married 49 years and 9 months. We almost made it to 50.

We have six kids, and they had been secretly saving up their money and were going to give us a 50th wedding anniversary party in July. The money ended up paying for a casket. She died in my arms there on the floor that afternoon. It all last only just a few seconds, 23 seconds of one man's rage that changed my life forever. She was absolutely everything to me.

But, unfortunately, my story doesn't stop there. As a result of this violent crime, we became victims and faces in our judicial sys-

tem, something brand new to us. We were told from the very beginning that we could give an impact statement at the sentence phase of the trial. At the time, we really didn't understand just what all that meant. All we knew was that it was going to be our time to have a voice in this horrible ordeal, our day in court.

It took almost 3 years for that to happen. Just this past January, I gave my impact statement to the jury before the sentence of the shooter, Richard Glassel. He had already been found guilty. This was after the fact, at the sentencing phase. The courts told me that I could talk about my wife in my impact statement. I could talk about how this has all made an impact on my life. But I was also told that I had to stop short of talking about how I felt this murderer should be sentenced. I could give no comment on that. I even had to hand over my impact statement to be preread by the defense attorney, the prosecuting attorney, and the judge. Certain parts were ultimately censored, and I had to make the changes.

Then, right before I read my statement in that courtroom, the defense lawyer, in his closing arguments, made reference to what the jury would be hearing from me as a victim and began disclosing my every word and my thoughts in a lighthearted manner. One can only assume that he wanted to lessen the impact of my statement. I couldn't believe it.

I never realized, until having gone through this, that there are just a handful of players involved in what happens in a courtroom. The legal system calls that "being a party involved". The prosecuting attorney is considered a party to what happens in the courtroom; the defense attorney is considered a party as to what happens in the courtroom; the defendant is considered a party to what takes place. All of these parties can give a recommendation as to what should happen to Mr. Glassel, what kind of a sentence he should have. The jury can hear even the murderer's family as to what they would recommend his sentence should be. Land of the free, home of the brave.

Mr. Glassel dealt with his problems in a cowardly way, and in this land of the free, we, as the family of the victim, which was my wife, my love, the person that I still expect to see walk through my front door every day, as she did for 50 years, she was a real person, not just a name and a number on a document. We could say nothing about the consequences of that man who took all this away from me.

My wife is not considered a party in all this. She can't make a recommendation. She has no say. She's gone. We are her voice now, and even though we were there for every step of the way for over 2 years and 8 months that this process took, with 60 courtroom hearings, we by law had to remain silent on this issue. We just helplessly sat by there on the front row and we watched all the parties give comments concerning the statements and the sentencing.

You have no idea what that feels like. The evil done by a murderer inflicts tragedy, and that is bad enough. But injuries inflicted by friends, our legal system, are even harder to take. More betrayal, more disbelief that this was unfolding as it was. I felt kicked around and ignored by the very system the government has in place to protect law-abiding citizens.

I was a highway patrolman for 18 years. I lived by the rules. I enforced the laws of the State of Arizona. And now I have to sit in silence. The jury never heard that I wanted to recommend a life sentence. They gave him a death penalty. I had my reasons.

The system has failed the victim regarding capital punishment cases. We understand that our judicial system is there to protect the innocent, but in doing so, we erred on the side of a defendant and not the family of the victims. There is something wrong when a prisoner convicted of first degree murder, two counts, has more rights in the courtroom than the families of the victims he has murdered. How imbalanced do we want the judicial scale?

I am here today to ask you to be on the same side as the victim of the crime. Allow us, as victims, to make a recommendation as to the sentencing of the defendant. Give me a voice and as a party in the courtroom. It is our case that is before the Arizona Supreme Court now on this very issue.

I support this amendment and my hope is that in the future victims won't have to go through the betrayal that we felt by the courts. As stated earlier, let's fulfill the promise.

Thank you, ma'am.

[The prepared statement of Mr. Lynn appears as a submission for the record.]

Senator FEINSTEIN. [Presiding.] Thank you very much, Mr. Lynn.

Mr. Twist, you're next.

STATEMENT OF STEVEN J. TWIST, GENERAL COUNSEL, NATIONAL VICTIMS CONSTITUTIONAL AMENDMENT NETWORK

Mr. TWIST. Madam Chairman and Senators, thank you. My name is Steve Twist. I am grateful for the invitation to present the views of the National Victims Constitutional Amendment Network, a national coalition of America's leading crime victims' rights and services organization, including Mothers Against Drunk Driving, the National Organization for Victim Assistance, and the National Organization of Parents of Murdered Children, among many others.

We especially want to thank you, Senator Feinstein and Senator Kyl for your steadfast and faithful leadership on our cause and for championing our cause. Let me say also on behalf of our National movement how grateful we are to the President and to the Attorney General for remaining also steadfast in pursuit of the goal of a constitutional right for crime victims.

If skeptics needed any more evidence of the need for a Federal amendment, the case of Duane Lynn should be all they need. For years, critics have said—and you've heard it here this morning—statutes are enough, State constitutional amendments are enough. I have asked the critics over these same years to look at the real world that confronts victims of crime in criminal cases. Here is Duane Lynn's real world.

Arizona has a strong State amendment. Among other things, it provides victims with the right to be heard at any proceeding involving sentencing. Our legislature has further implemented that right by specifically providing that a victim's right to be heard at sentencing includes the right to offer an opinion regarding the appropriate sentence.

We filed a motion seeking to preserve this right for Mr. Lynn. The trial court denied our motion. We filed a special action in the State Court of Appeals and the court accepted our petition but denied relief. We filed a petition for review in the Arizona Supreme Court and asked for a stay. The petition was accepted, but the stay was denied. So the sentencing went forward and the jury did not hear Mr. Lynn ask for life imprisonment, and the defendant was given the death penalty.

Throughout the legal battle, the courts claimed that for Mr. Lynn to ask for life and not death denied the defendant his 8th Amendment rights against cruel and unusual punishment. This is the legal culture to which Mr. Orenstein and other critics of our amendment remain so hide-bound. This is the culture which he and others propose to fix with a statute.

I have thought how could this be? I must have missed something. And then I read Mr. Orenstein's testimony again and something jumped out at me that I had missed. It's right here in the first paragraph, right after he sets the theme that these rights will hurt law enforcement and prosecution. And by the way, as a former prosecutor for 12 years, who prosecuted violent crime cases and who supervised the prosecution of organized crime and racketeering and drug trafficking cases, with all due respect, I dismiss the fears that have been presented to the Committee about the negative impact on law enforcement and prosecution.

But you don't need to listen to me. Those fears are also contradicted by more than a decade of experience in my State. And they are also rejected by the California DA's Association and other DA's around the country, by the International Association of Chiefs of Police, by the Justice Department.

These are not the things that are so telling, however, about the gulf that divides Mr. Orenstein and myself on the amendment. What is telling is right here on the front page. Let me read it to you. "...the current language of the Victims' Rights Amendment...will achieve marginal procedural improvements for their victims." It is this phrase, "marginal procedural improvements" that haunts me. That's what Mr. Orenstein thinks this is all about, marginal procedural improvements.

I do not presume, as Mr. Orenstein and others do, to decide for Collene and Gary Campbell how important it is for them to be in the courtroom during the trial of their son's murderers. I do not want to decide for her, and I don't want my government, in an exercise of hideous paternalism, to decide for her. I don't presume to decide for Miss Eason that it's marginally important for her to know about and be heard about the plea bargain offered to her son's murderers. I don't presume, as does Mr. Orenstein and others, that it is of marginal value for Duane Lynn to have the same right as his wife's murderer and the murderer's family to offer his opinion on the sentence to be imposed, and to ask for life and not the death penalty.

Mr. Orenstein and others presume these things to be of marginal value. In a free society, I prefer to presume that free Americans should be able to decide for themselves whether these things are marginal.

For 7 years, through extensive hearings in both Houses, we have presented to the Congress case after case of injustice. We have presented a strong and, indeed, a compelling national consensus that only an amendment to the U.S. Constitution can end the injustice: former President Clinton, former Vice President Gore, former Attorney General Janet Reno, President Bush, Attorney General Ashcroft, the platforms of both the Democratic and Republican parties, constitutional scholar Larry Tribe, the list goes on and on, the vast majority of Governors, 41 Attorneys General, prosecutors, the California DA's Association, the International Association of Chiefs of Police, the mainstream of America's victims' rights movement, leading business groups, and the overwhelming voice of voters in 33 States, who when asked to support a constitutional rights amendment for victims answered yes by over 80 percent, all joined together in a chorus that rejects the fear of the critics and stands with America's crime victims to give them the freedom to choose, to decide what is important for them in their case in court.

Nothing but a constitutional amendment will give them that freedom. Arizona's constitution hasn't done it, Arizona statutes haven't done it. Nothing but an amendment to the U.S. Constitution. So, for Duane and Collene and Earlene and the millions who stand with them, we ask you to lead their cause.

[The prepared statement of Mr. Twist appears as a submission for the record.]

Senator KYL. [Presiding.] Thank you very much, Mr. Twist. I was called out of the hearing with a reminder that I'm required to be at another place right now. But I wasn't able to acknowledge both Cathy and Patty, Duane Lynn's daughters being here in the front row behind Duane. I wanted to be sure and do that. It is not only Duane who has been hurt by his wife's murder, but also his daughters. We very much appreciate your being here, and thank you, Mr. Twist, for your statement.

What I would like to do is ask a question and then turn the hearing over to Senator Feinstein, with recognition that Senator Kennedy is now here. In addition to whatever time he may wish to take with questions, Senator Kennedy, if you would like to make a statement, feel free to do that as well. And we have left the hearing open for any written questions, so if you have written questions, those would be appropriate as well.

I had two questions. I have so many questions that I would like to ask, particularly of the victims here. I think the statement that Mr. Twist just concluded with summarizes the point that would have been made, and that is that, in each individual case, there is a very real and very personal hurt that occurs when the criminal justice system appears to turn its back on victims, not to help them through the process.

I got involved in this, I might say, before I was ever in any elected office, before I ever ran for any elected office, trying to help victims of crime in my own county in Arizona, because I saw that no one was giving them a hand and helping them through the process.

Then I became aware that it wasn't only that but it was a matter of not being able to do basic things—not the same things that defendants do, because, understandably, they're going to have rights that victims could never have—but at least to participate in a way

that would help them work through the process and make others aware of their situation.

There are two very different questions I would like to ask. Mr. Twist, I want you to please answer these, if you could. And then, if others would like to answer them as well, that's fine.

The basic question is, even in a State like Arizona, where you've done as lot of work—and there is a constitutional provision and a statute—you have testified to some extent why that's insufficient. So my first question is, there have been suggestions that a Federal statute might work here. What is your opinion of that? Why won't State statutes and a Federal statute work? What is it about a constitutional amendment that would actually protect these rights, whereas the State statutes don't, and in your opinion, a Federal statute would not?

Secondly, precisely to Professor Orenstein's question—I might say, by the way, that those were very good questions. They're the same questions that we've been asking over the course of many years. Instead of having me tell you, Professor Orenstein, or others, how we have tried to deal with those questions—and most of them have to do with the exception to the rule, where you may not want to have a victim present or where it may be difficult because of the number of victims present and so on—but I would like to ask Mr. Twist, who was an author of the amendment, to describe how we tried to deal with all of those "what if" situations, those hypotheticals that may not occur very often, but when they do, they're still important, how we tried to deal with those in this amendment. Mr. Twist.

And I must please beg your forgiveness for having to leave. I would like to give the gavel to Senator Feinstein, who will conduct the remainder of the hearing.

Mr. TWIST. Senator Kyl, let me say how grateful we are to you also for championing our cause and for your leadership on this issue. We're truly grateful.

As to the first question, Senator, I think the answer of why a Federal amendment as opposed to statutes, or State constitutional amendments, is the same answer that James Madison gave to critics of the Bill of Rights, when that question was posed to then Congressman Madison, who offered the bill during the first Congress.

He observed that only the Constitution of the United States is the law of all of us. Only the Constitution of the United States reaches in this context to the criminal justice systems of every State. Only the Constitution of the United States has the power to change the culture of the criminal justice system, and that is clearly what is needed.

Effectively written laws, constitutional amendments, State statutes, State constitutional amendments, have proven over 20 years of experience to be inadequate to change the culture. It is precisely for the same reasons that Madison wanted to incorporate the Bill of Rights that we seek to incorporate these rights into the law of all of us, which is the U.S. Constitution, because only the Constitution has the power to change the culture.

As to the specific fears of Mr. Orenstein, I respect his views. I respect his observation as a former Federal prosecutor of the need not to hamper prosecution. But I would say that if you look and

parse through each of the areas of concern—and I believe Mr. Dinh did a good job of addressing those—firstly, the Constitution speaks of the requirement to provide reasonable notice. It allows exceptions for public safety and for the administration of justice.

In combination, this carefully-crafted amendment will not admit the gross injustices or gross challenges to public safety that Mr. Orenstein fears. It simply will not. And were it otherwise, you wouldn't have the International Association of Chiefs of Police, a strong voice of law enforcement, behind the amendment. You wouldn't have the endorsement of the Justice Department and the prosecutors there. You wouldn't have the endorsement of the California District Attorneys Association.

Reasonable notice, with exceptions for public safety and the administration of justice, provide the flexibility that any judge would need, any administrator would need, to be able to determine how to appropriately and properly protect the public safety and the administration of justice in any case. That's exactly why the amendment is written in the way it is.

The same thing is true with the prison examples. Reasonable notice, the right not to be excluded is not the right to force your jailer to release you from jail to go to a proceeding. It's the right not to be excluded if you can present yourself there, and if the law otherwise requires that you are not allowed to present yourself there, then so be it. The amendment isn't implicated.

That's why it says the right not to be excluded. Even if it didn't say the right not to be excluded, the exception or restriction for public safety, if there are safety threats in transporting prisoners, there is clearly an exception allowed, a restriction allowed, in those circumstances.

On Mr. Orenstein's point about the difference between the word "restriction" and the word "exception", I accept Senator Durbin's characterization. I mean, you read that, you read those sentences together, those words together, and the Constitution provides enough flexibility for these issues to be resolved by a judge or administrator or whoever would need to do it.

I would be happy to continue, Senator Feinstein, if you think more is necessary.

Senator FEINSTEIN. [Presiding.] [Mike off.] One thing, all of this is crafted in that a plea bargain would not apply.

Mr. TWIST. I take a broader view than Mr. Orenstein in his testimony has taken, on the flexibility that the courts have under the current CFR to close proceedings. I would just commend to the Committee's attention the statement that was submitted by Professor Doug Baloof at Lewis & Clark Law School on this precise point, because I think he addresses it very well.

Senator FEINSTEIN. Thanks very much, Mr. Twist.

I'm going to defer to Senator Kennedy now and will ask my questions afterwards.

Senator KENNEDY. Thank you very much, Madam Chairman. I will include my statement in the record.

Senator KENNEDY. I want to give Mr. Orenstein a chance to respond to some of the statements that we've heard here. They have done a pretty good job on your testimony and I would be interested in your reaction to this.

Mr. ORENSTEIN. There are several points I would like to address, and I will try and be brief.

On the main one in Mr. Twist's prepared statement, of course, I do not suggest that it should be up to prosecutors or any part of the Federal Government to decide which rights of victims are more important than others, or which are of more value. My concern is that this amendment either accomplishes little and perhaps harms more than it can deliver, or that whatever it delivers, it delivers at the expense of law enforcement. That is the context in which the phrase that Mr. Twist quoted is presented.

The flexibility problem, which we're all concerned with—and I worked with Mr. Twist when I was at the Department of Justice to try and get this right. I think we had it actually in some ways better in S.J. Res. 3. But here's the problem. There is a difference between an exception and a restriction. If you take the example of reasonable notice of a guilty plea, if you say that we're going to find a way not to provide notice at all, that's not providing "reasonable notice". It's just not providing notice. It's not a restriction; it's an exception.

If we have an ability to provide exceptions, that's fine. But the amendment, as it's drafted, says the right shall not be denied and may only be restricted in certain circumstances. So my concern is that courts would read that, and also read the history of this amendment as it has progressed from version to version, and say that where we're trying to not give notice because of safety concerns, we can't do it. It isn't allowed under the wording of this amendment.

The prison context, again it's partly a question of how the language has changed from one draft to another. The previous draft said—

Senator KENNEDY. The point is, this isn't a drafting issue or question. This is a broader kind of issue. I mean, is this a technical kind of question that can be worked on through with the drafting? I mean, many of the points talked about is sort of a change in the culture in terms of protecting the rights, and the only way that we're really going to change that in the criminal justice system, which has grown over this period of years, is if you're going to have a constitutional amendment. I don't want to be putting words in, but you mentioned some of these things, that this is the way it's going to have to be done in order to give more life to these victims and this is the only way and it can't be done by statute. Then he indicated that you just don't understand this as a prosecutor. I want to kind of get your reaction and response to that. I personally don't agree with it, but I want to hear your position on it.

Mr. ORENSTEIN. I don't agree, in a couple of ways. First, in terms of the culture, the culture is changing. It has changed a lot over the past 20 years, and it needs to continue changing.

My own personal experience is that I've handled a murder case where I did not adequately consult with the victims—and I've regretted it for over a decade since. I had a real education in working on the Oklahoma City bombing case, where I saw not only the necessity of working with victims, but the value to the case of doing so.

I think our culture has changed a lot. One way it has changed is in the arena of death penalty prosecutions, where victims now do have a right to speak at capital sentencing proceedings. Obviously, there are limits that the due process clause still puts on it, including limits on opining about the sentence. But even speaking at a sentencing hearing at all, just giving factual information about the impact of the crime, that used to be considered unlawful. States passed laws to change it and aggressively litigated it, and those laws worked. The Supreme Court endorsed those laws in Payne vs. Tennessee 10 years ago. The culture is changing, and there are ways to change the culture through statutes, through aggressive advocacy, and through better prosecution.

As I said in my prepared testimony, I think there are steps that this body has not yet tried. A spending-based statute that will encourage every State to adopt this uniform floor of victims' rights hasn't been tried. I think it could work. I think it would be a shame not to try it.

Senator KENNEDY. You believe that ought to be tried before a constitutional amendment?

Mr. ORENSTEIN. Well, certainly this goes back to my technical concerns. Mr. Twist and I, or Mr. Dinh and I, can argue back and forth over what the right interpretation is. I hope I'm wrong, but I don't know, and neither does anyone else here. If I turn out to be right, and it's a statute we're talking about, we can fix it. If it's a constitutional amendment, we can't.

Senator KENNEDY. This is, I guess, Judge Rehnquist's position.

Let me thank all the witnesses. Senator Kyl and others have commented that we are very mindful of these incredible losses that you've experienced. We know how difficult it is in listening to the witnesses. And to Miss Perry and Mr. Lynn, we are grateful to you for your willingness to be here and speak on this issue. It is incredibly difficult and we're thankful.

I just wanted to ask Mrs. Perry about—I got in here late because we were over at the Armed Services Committee earlier and I apologize for being late for this meeting. It is certainly an impressive life that your son had led, and the enormously impressive way in which he gave his last full measure to try and save others. It's an incredible act of heroism in the highest order of the Judao–Christian definition of a life that's well led.

He had this particular interest in terms of, I guess, civil rights and civil liberties through his pro bono services as a lawyer. Could you talk just a moment about that? Is this something that was very special to him?

Mrs. PERRY. I would just mention, also, that unfortunately you were not here for the testimony of the other two women, which was very compelling.

John was—I'm his mother, so forgive me—he was an exceptional person. We said he didn't sleep and he kept his life busy from one minute to the other, and he did fit in all kinds of activities, including assisting friends and organizations who had legal questions. He enjoyed very much using his legal knowledge. After his death, even months later, we were getting telephone calls from people whom he had represented pro bono, who didn't even know he was the person involved. They would ask, "Is this the John Perry we heard about?"

A woman he met by chance at a railroad station, who needed help, an actress who was having John represent her in some kind of a problem. A couple from Germany who had been here a few years, and years ago he helped them with a landlord/tenant case. He just enjoyed life to the fullest. He enjoyed showing people how they could help themselves, and we rejoice in that.

He also was in many organizations, and he spoke out for all people, on all topics, and was very open to different ideas.

Now, I don't want to get off into John too much, even though I could talk for 20 minutes and you all would be bored. But I was struck by something that Mrs. Feinstein reported, that victims used to have the kind of rights that we think we're talking about today, until 1850. I would say that even after 1850, victims or victims' friends took these rights, because we have a whole history in our country of frontier justice and of lynchings, where there was no due process. So while we may be negligent in really assisting the families of victims today, we don't want to go back to the point where we, as victims, and our friends, are allowed to take vengeance on someone who has not been thoroughly given their rights in court. It's a very dangerous point.

So I think my son, John, with all his interest in the law, and in acting, and friends and people, would want to make sure that we do keep close to the system we have put in place, even while recognizing the system in some places fails because we are humans. Maybe in Arizona they failed, and maybe in Minneapolis and in California, that individual courts and individual judges and prosecutors have not been sensitive. But the system, as a whole, is much better than it was when we used to not have these legal people in place to take care of us.

I don't know if I've answered your question.

Senator KENNEDY. Very good. Thank you.

Senator FEINSTEIN. Thank you very much, Senator Kennedy.

I wanted to point out that the first constitutional amendment giving victims any rights was California's in 1982. On my side of the aisle, there were not a lot of people in San Francisco supportive of it. I was mayor at the time and I was one of the few that supported it—party because of a specific case that pointed out what is lacking in the system today.

Well, the California law passed overwhelmingly, and none of the negatives came true. Other States then went out and adopted constitutional amendments, but they all did it differently. That's the problem. That's one of the reasons, Mr. Orenstein, I don't think giving money to a State and saying come up with a basic uniform floor is going to work. I don't know any issue where that has actually worked, where every State has done the same kind of thing.

I worked in a prison for 5 years, so I know a little bit about what prison life is like. I don't see how the amendment creates a problem for any prison. I want to quickly read the limited rights that we're giving an individual: "A victim of a violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime, and of any release or escape of the accused." That's not too difficult.

The victim shall also have "The rights not to be excluded from such public proceeding and reasonably to be heard at public re-

lease, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender.

Then it goes on right then and there and says, "These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."

So essentially what we're trying to do is say, for example, that, if you're attacked by somebody, and you testify against them, and they do jail time or prison time, that you have a basic constitutional right to know when they're released so that you can protect yourself. I think most Americans would agree with that, and also that, if you are a crime victim, you have a basic right to know when a trial is going to take place, and the right not to be excluded if you can present yourself, and the right to make an impact statement, or the right to be present at any public proceeding that involves the perpetrator.

I don't think those are unreasonable rights. I don't think they'll disturb defendants' rights or sensitive criminal proceedings. I sat on a term-setting and paroling authority. That's how I was in prison. We set sentences under California's indeterminate sentence law. We granted paroles. Those hearings were not public. I don't know whether they are today, but not at the time, so they wouldn't have been affected.

The reason you saw the Simpson family and the Goldman family in court was because of the 1982 California constitutional amendment. I have been deeply perplexed as to why people really feel this will influence the administration of criminal justice. I think deep down I know. I think there are defense attorneys that don't want a paralyzed victim in the courtroom, that don't want grieving small children in the courtroom. But you know what? As you sow, so shall you reap. I think you do not see a defendant the way he or she was when he or she committed the crime. They're all cleaned up, all spruced up, all shaven, many times wearing a suit and tie.

So if you're going to look at the fair administration of criminal justice—and I spent a lot of my time in this arena—you need to be fair to both sides. I think providing these limited rights to a victim really equalizes the scale of justice.

I have a little brochure that I hand out to people. It's got a scale of justice. On one side are all the rights granted by the Constitution to the accused, and on the other, there is nothing for the victim. So now amendments have been adopted in 33 States. And in every state campaign, people have alleged the same problems.

I wanted to ask you, Mr. Twist, some opponents have claimed that this amendment is going to cause staggering costs. Now, you helped draft the amendment in Arizona, and I think you were instrumental in getting it passed. What kinds of costs has Arizona encountered in implementing the amendment?

Mr. TWIST. Senator, the costs are minimal. If you think through the rights that you just enumerated, the only right that has any sort of cost attached to it is the right to receive notice. There is a cost associated with providing of the notice. I would resort back to

the testimony of county attorney Richard Romley, who several years ago submitted his statement to the record in hearings on this amendment, and county attorney Barbara LaWall, who testified before the Committee, that the costs to their offices in providing notice have been minimal. It's basically phone calls and letters. And that was several years ago. Now the technology has grown, and the capacity to provide notice through computerized systems that make it easier for victims to access, either on-line or over telephone lines, that require fewer people to actually be providing the notice. There's the bind system that was first established in Tennessee that's now spread around the country, a computerized system, a telephone-based system, for providing notice of hearings.

But that's it. When you think about the other things, the right to not be excluded from the courtroom does not have a cost. The right to be heard at various proceedings that are already scheduled, and already held in open court, does not have a cost with it.

With all due respect to Senator Leahy's earlier comment, this isn't about the money. This is about Mr. Lynn's right to offer his opinion to a proceeding that is already being held, his opinion that, in his case, he wanted life imprisonment and not the death penalty. Or in Mrs. Campbell's case, to say I just want to have a right to sit in the courtroom as the defendant's family has a right to sit in the courtroom. There's no cost associated with that. So it's been minimal, Senator.

Senator FEINSTEIN. Now, similar rights already exist in 33 States, some for as long as 20 years. Can anyone on the panel provide any evidence that the abuses that have been mentioned have occurred in these States? Yes, ma'am.

Mrs. CAMPBELL. I've been dying to say a little bit more. First of all, I would like to thank our Orange County Congressman for being here to support me, Ed Royce. Thank you, Ed.

Yeah, I can give you a lot of instances. It seems like my profession has been to stay in the courtroom. When you talk about staggering costs, to keep me in a courtroom for 21 straight years is a staggering cost, not only emotionally to my family, but every time we go into the courtroom and t there's another delay, that's a huge cost. That's happening all across the country continually.

I would like to give everybody here—

Senator FEINSTEIN. But that's not because of any constitutional amendment. To be fair, what I'm saying is—you're not really responding to my question.

Mrs. CAMPBELL. Okay. Let me give you the direct question.

A couple of months ago our district attorney came up to me and told me that I was going to be excluded in the courtroom for the coming trial. I explained to him that I was not going to be excluded, so there may be a little—I asked him, I said are you going to make me a witness, and he said no.

Senator FEINSTEIN. Under California law, you have the right to be there.

Mrs. CAMPBELL. Of course, I do. But—

Senator FEINSTEIN. They cannot keep you out.

Mrs. CAMPBELL. That was just a few months ago.

Senator FEINSTEIN. My question was a little different.

Mrs. CAMPBELL. I'm sorry.

Senator FEINSTEIN. The objection to our proposed constitutional amendment has always been that there would be certain abuses, either abuses that disadvantage the defendant, that would cost the State, That would prevent the prosecutor from giving timely notice, these kinds of things. And yet, there is no evidence of these abuses having surfaced in any of the States. Instead, the abuse has been in not carrying it out, not carrying out a State constitutional amendment for one reason or another.

What I would like to ask everybody is whether you have any indication where the constitutional amendment of a State has been abused or has cost the State substantial additional funds. I would certainly like to have that evidence.

I see Senator Feingold is here and I will yield you some time.

Senator FEINGOLD. Thank you very much for holding this hearing. It's an outstanding hearing and I have a lot of other things going on today, like other Senators, but I feel this is so important that this is the third time I have come back. I wish I could have heard all the testimony.

I want Mr. Lynn to know that, although we have some disagreements about the merits of this, it was some of the most powerful testimony I have ever heard at a hearing. So I thank everyone for being here.

This is a very, very tough subject that has to be addressed seriously, and I think you've done a wonderful job today of helping this issue come forward.

Let me ask some questions. Mr. Orenstein, as someone who has prosecuted some of the most difficult cases, like the Oklahoma bombing and organized crime, can you discuss how this proposed amendment would affect a prosecutor's ability to make the necessary and independent decisions that are in the best interest of a prosecution? As an example, what are the possible ramifications of this amendment when there are multiple crime victims for a particular incident, who each have competing interests and objectives, like wanting to watch and possibly testify at a trial?

Mr. ORENSTEIN. Well, again, the multiple victim cases are particularly difficult and they particularly call for flexibility in the system. Some of these problems are problems of drafting and the inability to predict how courts are going to interpret certain words, which is why we should proceed very carefully before enshrining certain words in the Constitution, because we don't know how they will play out.

In the mass victim case, it is impractical for everyone to be in the courtroom. You can adapt to that with closed-circuit TV. It's impractical for everyone who wants to be heard to speak at a given hearing.

Now, my experience is that victims in the Oklahoma City case were more than willing to accommodate the practical needs of situations like that, as long as they're kept in the loop, as long as they're consulted.

There are two problems. One is where you have one or two holdouts who just don't want to give up their rights, and a judge would say look, it's reasonable to have limitations here. We can't have everybody speak. If the rights belong to the individual and can't be denied but only restricted, well, you can't keep that individual from

speaking. So again, there could be problems with—it's a drafting issue.

The other problem is where the victim doesn't want to be reasonable. This is somebody who's in prison, who has been assaulted by another prisoner and wants to create problems for the court system. Again, you need to have the right kind of flexibility. My concern is very much down in the weeds of how the Constitution would play out in that situation.

Senator FEINGOLD. You're getting at this, obviously, but is this a problem that demands a constitutional amendment, or in many cases isn't this really an issue of providing training and resources to prosecutors' offices to ensure that prosecutors will pick up the phone and do what's asked of them, like notifying victims of court dates, considering issues involving victims' safety, allowing them to submit victim impact statements at sentencing hearings, informing victims of release dates for offenders?

Mr. ORENSTEIN. Very often it isn't. One thing that's really troubling for me as a former prosecutor, in hearing some of the awful stories that I've heard at this hearing and at others on this issue, is needless slights to victims and—

Senator FEINGOLD. Needless—what did you say?

Mr. ORENSTEIN. Needless slights to victims, needless harms to them, and not only needless, but contrary to the laws of their State. This is a problem of changing the culture. Neither a statute nor constitutional amendment will change somebody's heart or change a culture. We need experience, we need training. I don't think a constitutional amendment will be more or less effective in solving the kinds of problems of the prosecutor who heartlessly says we don't need to consult the victim, we don't need to tell you, you just won't understand. That should never be the case.

Senator FEINGOLD. Let me ask Miss Perry to sort of continue this. I want to underscore a point that was illustrated by the testimony we've heard, that there is not a single victim's voice in the question of a constitutional amendment. Some do support statutory relief, while others support a constitutional amendment. Whether we enact a constitutional amendment or a statute, in the end prosecutors and judges must be willing to and have the resources and training to enforce the law for victims' rights to even stand a chance of being effective.

I would ask you, Mrs. Perry, what steps do you think we should be considering in Congress to ensure that victims have the services and access to the criminal justice system that they need?

Mrs. PERRY. Someone asked earlier about the cost, and as I see it, the victim's right—If the victims' rights amendment does pass, it still does not meet the needs that I feel our family benefited from, and that these other victims' families have not experienced. That is the emotional and financial support that States or the Federal Government should make available to the victims. It increases their pain when they run out of money, just to pay to go back and forth to the various trials or hearings. It increases their pain if the person who is the victim and leaves the family is the breadwinner and they no longer have an income, they no longer have health insurance. You in Congress I would hope someday you really face the

fact that we have 41 million people without health insurance in this country.

Senator FEINGOLD. Amen on that.

Mrs. PERRY. This gets exacerbated every time someone is murdered and that person is responsible for a family's health and maintenance. I think these things would be of great assistance to families who are suffering after they have been assaulted by a person who is now accused and in court. Then they would have the resources to be able to keep up with what's going on with the victims' case in court, as long as the local people follow what's already on the books.

So I would really encourage that that would be of great help. We benefitted from it, and these victims here have not benefitted from it, and they've had to find money out of their own pockets. And our benefits are not from what Congress did, because I haven't gotten around to victims' compensation, which would just cause a lot of dissention.

I am part of the Twin Tower Fund, representing police officer families and firefighter families, and with all due respect, what you did under a lot of pressure during a very difficult time in our history, was set up a very complicated victims' compensation fund, where certain victims are worth millions of dollars and other victims are worth $250,000 or $100,000. It is very unequal and has caused a lot of bitter feelings, especially among the uniformed personnel since most of those officers were earning relatively modest incomes compared to employees on the top floors of the World Trade Center who were earning $250,000 to $500,000 a year. Therefore, they were more valuable than my son. You know, you get the picture. There's a lot of problems there.

If you could spend the time, rather than 7 years debating on how you can get the exact wording that lawyers understand for a victims' rights amendment, which even seems the lawyers don't always understand and has a lot of loopholes where you can waive rights here and enforce them there, just let's help everybody. Let's help these victims, give them the tools to put their lives back together, and you know, see if you can encourage the States to do what has to be done. In the case of Federal crimes, then the Federal Government should help.

I don't know if that—I can't write the law for you.

Senator FEINGOLD. I thank you.

Madam Chair, it is good to see you as chair again.

[Laughter.]

I take it my time has elapsed.

Senator FEINSTEIN. I think so.

I would like to thank everybody for attending, regardless of what side of this issue you are on. It is clearly something that has caught national attention and people feel strongly about. The testimony was compelling, it was cogent, it was forthright, and on behalf of Senator Kyl, I thank everybody.

This hearing is adjourned.

[Whereupon, at 12:35 p.m, the Committee adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Image Not Available

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Orrin G. Hatch
Chairman
Committe
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to follow-up questions for the record of the Committee's hearing on April 8, 2003, on S.J.Res. 1, "[p]roposing an amendment to the Constitution of the United States to protect the rights of crime victims."

We hope that you will find the information helpful and that you will not hesitate to call upon us if we may be of additional assistance in connection with this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

The Honorable Richard J. Durbin

The Honorable Dianne Feinstein

FOLLOW-UP QUESTIONS FOR
HEARING ON S.J. RES. 1, A PROPOSED CONSTITUTIONAL AMENDMENT TO PROTECT CRIME VICTIMS
APRIL 8, 2003

Questions by Senator Leahy for Viet Dinh

1. **James Madison wrote in the Federalist Papers that constitutional amendments should be reserved for "certain great and extraordinary occasions."**

(A) Do you agree with this standard?

Yes.

(B) Is there anything in our current Constitution that inhibits the enactment of State or Federal laws that protect crime victims?

Nothing in the Constitution specifically inhibits the enactment of statutes to protect crime victims. However, although there have been legislative efforts to grant victims many of the rights contained in this amendment, in my view legislative guarantees are not always sufficient when viewed in light of an accused person's rights under the U.S. Constitution. Unfortunately, this is often the case even where a victim's statutory rights are capable of protection without infringing upon the defendant's constitutional rights. Furthermore, statutes would not address two critical issues that necessitate a constitutional amendment, i.e., uniform implementation of rights, and establishing standing for victims to assert these rights in court.

(C) Please identify any appellate decisions of which you are aware that were not eventually reversed in which a State of Federal victims' rights law was not given effect because of a defendant's right in the U.S. Constitution.

Two specific examples where State victims' constitutional rights were not given effect because of a defendant's rights under the U.S. Constitution are:

State ex rel. Romley v. Superior Court, 836 P.2d 445, 453, (Ariz. Ct. App. 1992), in which the Arizona Court of Appeals ruled that a victim's State constitutional right must yield to a defendant's Federal and State constitutional right to due process. This case involved a State constitutional right that precludes the trial court from compelling disclosure of the victim's medical records. The defendant argued that the statute violated her due process rights because without the information, she could not mount an adequate defense or conduct adequate cross-examination of witnesses. The Arizona Court of Appeals ruled that the defendant's Federal and State due process right trumped the victim's State constitutional right.

Martinez v. State of Florida, 664 So.2d 1034 (Fla. Dist. Ct. App. 1996), where the defendant was convicted of attempted manslaughter with a firearm and appealed on several grounds, including that the court erred in giving priority to the constitutional right of a victim to

be present in the courtroom over the defendant's constitutional right to a fair trial by having the witnesses sequestered. Despite the Florida State victims' rights amendment, the court, citing *Gore v. State of Florida*, agreed with the defendant and stated that the victims should not have been permitted in the courtroom during opening statements. However, the court affirmed the defendant's conviction, concluding that the error in this particular case was harmless.

2. If Congress enacted spending power-based legislation to get every state to implement a uniform national standard of victims rights, what would remain to be done that only a constitutional amendment could accomplish?

~~Although such legislation would do away with one of the main concerns with statutory~~ remedies, the need for uniformity, it would not accomplish the same goals as a constitutional amendment. As stated previously, in my view legislative guarantees are not always sufficient when viewed in light of an accused person's rights under the U.S. Constitution. Unfortunately, this is often the case even where a victim's statutory rights are capable of protection without infringing upon the defendant's rights because courts often will not reach the threshold question of whether the two sets of rights are truly in conflict. This was best illustrated in a study conducted by the National Institute of Justice in 1998 entitled *The Rights of Crime Victims – Does Legal Protection Make a Difference?*, which after surveying more than 1,300 crime victims, concluded that although "[s]trong victims' rights law make a difference, . . . even where there is strong legal protection, victims' needs are not fully met."

3. Section 1 of the proposed amendment states: "The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied." If a judge concludes that there is indeed a conflict between a victim's rights and the constitutional rights of the accused, would section 1 require the judge to discard that legal conclusion and uphold the right of the accused?

As I stated during the hearing, it would be very difficult for me to speculate how this amendment will be interpreted and how judges will decide cases in particular instances. However, I do believe that the amendment allows sufficient flexibility to afford a judge the ability to protect the interests and rights of criminal defendants. For example, by allowing for restrictions when there is a substantial interest in public safety or the administration of criminal justice, or by compelling necessity, the amendment would allow the courts either to articulate boundaries defining the application of competing rights or to balance the competing rights in a particular case.

4. Four of the current amendments to the Constitution – the 14th, 15th, 24th, and 26th – recognize a distinction between the complete "denial" or rights and the "abridgement" of them. Similarly, section 1 of the proposed amendment refers to rights being both "denied" and "restricted." Does the assurance that the constitutional rights of the accused will not be "denied" mean that a judge is free to "restrict" those rights in ways that the Constitution might not otherwise allow if

doing so will make it easier to accommodate the rights of victims?

As stated in response to Question 3, I believe that the amendment allows sufficient flexibility to afford a judge in a particular case the ability to protect the interests and rights of a criminal defendant. In cases where there is a tension between the rights of victims and the rights of defendants, courts will rule in favor of the party with the more compelling legal argument.

5. **I think we would both agree that in a mass-victim case, the court should not be required to allow each of the potentially thousands of victims to speak at a bail or sentencing hearing – meaning that there are some cases when it might be entirely reasonable to deny some victims the right to be heard. But given that the rights ~~conferred by proposed amendment belong to each individual victim, and that the~~ text of the amendment allows a victim's participatory rights to be "restricted" in limited circumstances but never "denied," how would it be possible for courts to allow the kind of flexibility we need without completely ignoring the obvious difference between a "restriction" and a "denial?"**

It is my understanding that the amendment as drafted does not grant a victim the absolute right to speak at a bail or sentencing hearing. The amendment instead grants victims the right "reasonably to be heard" at specified public proceedings. The "reasonably to be heard" guarantee can be accomplished by allowing a victim to communicate his or her views to the court either orally or in writing. Such a decision would be at the court's discretion. In addition, I disagree that the language of the amendment does not allow for exceptions to the right "reasonably to be heard." Indeed, the text of the amendment itself explicitly allows for such exceptions. In other contexts, it has been left up to the courts to determine the boundaries of certain rights, for example when the press' First Amendment rights are pitted against a defendant's right to a fair trial. However, the last clause of section 2, which reads "These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity," clearly allows for exceptions by employing a two-tiered approach – the lower standard of substantial interest is used when the matter concerns public safety or the administration of criminal justice, while a higher standard of compelling necessity is used for other possible justifications.

6. **Under section 2 of the proposed amendment, a crime victim has "the right to reasonable and timely notice of any public proceeding involving the crime." Please explain how this provision would apply in multi-victim cases. For example, suppose that one victim of a multi-victim offense files a civil tort action against the offender for damages resulting from the criminal conduct. That action would be "a public proceeding involving the crime," even though the prosecutor may have no knowledge of it. Who would have the constitutional obligation to provide "reasonable and timely notice" to the other victims?**

I do not believe that the amendment as written grants victims the right to be informed of civil actions and therefore there is no attendant constitutional obligation to provide reasonable and timely notice in such cases.

7. **Section 3 of the proposed amendment states that "[o]nly the victim or the victim's lawful representative may assert the rights established by this article." If a defendant raises an objection to having an indigent victim speak at a proceeding, who would handle the litigation on behalf of the victim? I assume the prosecutor would gladly do so for a victim who could not afford to hire counsel, but under section 3, would that be permissible? Would the prosecutor have the right or the duty to make what she believed to be a better argument on behalf of a represented victim?**

Although presumably Congress and/or state legislatures could enact legislation that establishes a framework by which indigent victims can receive representation, I do not think that ~~section 3 precludes a prosecutor from asserting the rights of victims. The relevant clause in~~ section 3 to which I believe you refer reads "Only the victim or the victim's lawful representative may assert the rights established by this article...." This clause confers standing to assert the rights, something that mere legislation has been unable to do. However, although it is the victim or his or her representative who has standing, presumably any attorney could go before the court on his or her behalf.

8. **Section 3 of the proposed amendment forbids granting a new trial as a remedy for the violation of a victim's rights, but does not forbid re-opening the sentencing proceeding. (A) If a prosecutor fails to notify a victim of the sentencing hearing, can the victim obtain a new sentencing hearing after sentence has been imposed? (B) If the victim persuades the judge at such a hearing to impose a longer prison term or order greater restitution, would that constitute a denial of the accused's Fifth Amendment right to be protected against Double Jeopardy?**

I do not believe that S.J. Res. 1 provides grounds for invalidating a sentence nor would it allow a new sentencing hearing. The Department supports the need to protect the finality of judgments and believes that judgments should not be disturbed by the passage of this amendment. Remedies for violation of rights specified in the proposed amendment should be separate from the outcome of the case or any proceeding thereof.

9. **At the sentencing phase of a capital case, there are normally two parties – the government and the defendant – that call witnesses in an effort to provide as factual matters aggravating and mitigating factors that support either a death sentence or a lesser punishment. As a matter of due process, none of those witnesses is allowed to make an argument as to what the sentence should be; such arguments are reserved for counsel at the end of the phase. Would the proposed amendment give qualifying victims the right to offer their opinion as to whether the defendant should be sentenced to life or death?**

Although I am not entirely sure that due process necessarily disallows witnesses from arguing in favor of a proper sentence, I do believe that a court could decide that under the proposed amendment a victim has the right to offer his or her opinion as to whether the defendant should be sentenced to life or death. In *Payne v. Tennessee,* 501 U.S. 808 (1991), the

Supreme Court ruled that the Eighth Amendment does not erect a per se bar to the admission of victim impact evidence in capital cases. In so doing, the Court overruled two of its prior precedents, *Booth v. Maryland*, 482 U.S. 496 (1987), in which the Court ruled that victim impact evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family were barred, and *South Carolina v. Gathers*, 490 U.S. 805 (1989), which ruled that a prosecutor could not argue to the jury the human cost of the crime during the sentencing phase of a capital case. However, the Supreme Court has not ruled on whether victim impact statements can include a sentencing recommendation and it is unclear, based on the Court's prior rulings, that it would decide that such recommendations are per se unconstitutional. In Oklahoma, victims are allowed to give opinions of a recommended sentence. *See* OKLA. STAT. ANN. § 984. In ruling on a due process challenge to victim impact testimony that included a recommendation for the death penalty in a capital case, the Oklahoma Court of Criminal Appeals ruled that such opinion testimony is permissible and articulated the proper standard of review: "evidence by victim impact witnesses that the defendant deserves death is admissible but will be viewed by this Court with a heightened degree of scrutiny." *Conover v. State of Oklahoma*, 933 P.2d 904, 921 (Okla. Crim. App. 1997). Although the court found the particular opinion testimony given in this case to have been more prejudicial than probative, it ruled that "there was nothing improper in the opinions given by the three witnesses in this case that the death penalty was the appropriate sentence . . . . However, this type of evidence should be limited to a simple statement of the recommended sentence without amplification." *Id.* at 921.

I do believe that it is entirely consistent with the right "reasonably to be heard" to allow victims the right to give a sentencing recommendation. As in other contexts, the courts will have to examine this right in light of a defendant's constitutional rights and define the application of the competing rights or balance the competing rights in a particular case and rule in favor of the party with the more compelling argument.

10. Given that earlier versions of S.J. Res. 1 contained explicit language prohibiting a court from staying or continuing a trial once it is underway, language that has been discarded in the current bill, what would prevent an appellate court from doing just that to prevent further potential violations of a victim's participatory rights while an interlocutory appeal was pending?

I do not believe that S.J. Res. 1 could be construed to provide grounds to stay trials, reopen proceedings, or invalidate rulings. Although it remains to be seen how courts will interpret the amendment and make determinations given specific fact patterns, the Department believes that the proposed amendment should not be used as a tool to delay criminal proceedings (such as the use of injunctive relief to delay a proceeding). Remedies for violation of rights specified in the proposed amendment should be separate from the outcome of the case.

11. To what extent are the rights described in the proposed amendment self-executing? Please identify any specific rights that (A) would not require implementing legislation, or (B) would be immune from limiting legislation.

(A) Although the Department welcomes any appropriate implementing legislation, I believe that the entire amendment is self-executing, and therefore the rights are enforceable even in the absence of specific legislation. It is the Department's hope that Congress, when considering any implementing legislation, will strive to clearly define those situations where the amendment will apply in order to minimize the difficulties that could arise if federal, state and local prosecutors were unable to determine their proper response in certain situations.

(B) The second sentence in section 4, which reads "Nothing in this article shall affect the President's authority to grant reprieves or pardons," prevents Congress from enacting legislation that would affect the President's power to grant reprieves and pardons . The Department believes that the President's reprieve and pardon power under Article II of the Constitution is plenary and is in no way affected by the proposed amendment.

Follow-Up Questions for Assistance Attorney General Viet Dinh
Regarding a proposed constitutional amendment to protect crime victims (S.J. Res. 1)

Senator Richard J. Durbin
April 29, 2003

Question 1

Section 1 of S.J. Res. 1 states: "The rights of victims of violent crimes, being capable of protection without denying the constitutional rights of those accused of victimizing them are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article."

a.) Do you believe this presumption is true? In other words, would S.J. Res. 1 deny any rights of the accused as guaranteed under the Constitution? If so, which rights and how would they be denied?

I do believe that this presumption is true. The rights granted by the proposed amendment are not intended to operate in conflict with those rights granted to defendants under the Constitution and as enunciated by the Supreme Court, but rather are intended to operate in parallel with those rights. I do not support the proposition that the amendment, as drafted, denies any rights of the accused.

b.) Do you believe S.J. Res 1 diminishes any rights of the accused as guaranteed under the Constitution? If so, which rights and how would they be diminished?

No, I do not believe that S.J. Res. 1 as drafted diminishes any rights of the accused. If a conflict were to arise, it would ultimately be up to the Courts to delineate the boundaries of the rights and to accommodate both to the greatest extent possible.

If not, can you explain why S.J. Res. 1 would not deny or diminish the right to an impartial jury, specifically in cases where the victim is a witness in a case? In such cases, do you believe the victim would be excluded from the proceedings under the exception created by a "substantial interest in public safety or the administration of criminal justice" or do you believe the victim would be allowed to attend the proceedings?

Allowing a victim to be present during a trial, simply because he or she is an intended witness, would not necessarily deny or diminish the right to an impartial jury. Ultimately, based on the facts of the case, it would be up to the court to determine if indeed a defendant's right to an impartial jury would be implicated by granting a victim a right not to be excluded from the proceedings. Indeed, courts make similar determinations in many contexts and are able to harmonize rights that some may argue are in conflict. For example, courts are often called upon to accommodate the right of the press and the public to attend trials and to reconcile these rights

with the rights of a defendant to a fair trial.

Question 2

In the 105th Congress, when the Senate Judiciary Committee considered another version of this amendment, I offered an amendment that said "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by this Constitution."

Would you object to the adoption of similar language to S.J. Res. 1? Why or why not?

~~I believe that the language you suggested would be detrimental to the intended purpose of~~ the amendment. The inclusion of such language would make the amendment similar to a legislative grant of victims' rights, where a court would not need to consider the relationship between the rights of victims and the rights of the accused, but rather would protect the latter to the detriment of the former.

Do you believe this language is consistent with your conclusions in responding to Question 1?

While I do believe that this language is consistent with my conclusion in Question 1, I do not necessarily believe that it would be consistent with the intent of the amendment – to require courts to give consideration to the rights of victims in the criminal justice system. Because its inclusion would make the amendment similar to a legislative grant of rights, courts would not be required to reach the threshold question of whether a victim's right truly conflicts with a right of the defendant.

Question 3

Section 3 states: "Only the victim or the victim's lawful representative may assert the rights established by this article." However, this amendment does not define "victim." I understand your position that Congress will likely be responsible for defining this term. Please provide guidance for Congress in addressing the following hypothetical possibilities:

a.) Someone is murdered. Is the deceased the only victim of the crime? What about the spouse? Significant others? Domestic partner? Parents? Children?

b.) A child is kidnaped and recovered. Is the child the victim? Or the parents?

c.) A battered wife, who has been the victim of domestic violence for a long period of time and finally strikes back and assaults the spouse who has battered her, is brought in on criminal charges of assault and battery, and the abusing spouse becomes a victim, too. Who is the victim with Constitutional rights?

If the amendment is adopted, the courts presumably will develop a body of jurisprudence that will more precisely define the term "victim," and the corresponding reach of Congressional authority to refine that definition. However, I believe that in the case of a murdered person, it would be appropriate to allow the victim's rights to be exercised by a surviving family member or other appropriate representative, and am confident that courts will agree with this conclusion. In the case of a minor victim, such as in the kidnaping context, it should again be an appropriate representative that will exercise the victim's rights. As for situations involving domestic violence, it may very well be that the accused batterer technically meets any developed definition of a victim. However, the amendment currently contains exception language which reads: "These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." In domestic violence cases, where the true victim of the abusive relationship may actually be the defendant in a particular case and the abuser may be the victim, a judge may well decide that a substantial interest in public safety, or one of the other grounds for an exception, exists so as to preclude the abusive "victim" from exercising the given rights.

Question 4

S.J. Res. 1 also does not define "the victim's lawful representative" or explain how such a person should be chosen. In the hypothetical situation involving a murder victim, what would happen if both the spouse and the father of the deceased wanted to be the "lawful representative?" Who do you propose should make that determination? A judge? The prosecutor? What if the party who was not selected wants to appeal this decision?

It would be up to the courts to determine, on a case-by-case basis, who the victim's lawful representative should be.

Question 5

In your statement, you wrote, "By focusing on victims of violent crime, however, the proposed amendment recognizes the more detrimental effects that violent crime has on the most vulnerable of victims."

This assumes that violent crime has more detrimental effects on its victims. What about the victim of a misdemeanor assault? Is that person more worthy of Constitutional rights than an elderly widow has been swindled out of her life savings?

I do not believe that it would be correct to state that one type of victim is more or less worthy of Constitutional rights. However, those affected by violent crime often have not only a pecuniary loss as a result of the crime, but also suffer physically and psychologically.

In addition, it is important to note that the proposed amendment respects the role of state and local governments because it does not bar state and local governments from providing additional or broader rights to victims. It provides a floor and not a ceiling of the rights to be afforded to victims of crime. Some states have already extended statutory victims' rights to

victims of other types of crime and the amendment in no way restricts such rights. Furthermore, the states and the federal government are free to broaden statutory protections for these other types of crime and it is my belief that by passing S.J. Res. 1, more attention will be focused on the plight of all victims, and perhaps other protections will be examined and possibly broadened.

Should the court examine the detrimental effects of each crime before determining whether the victim has Constitutional rights?

When dealing with a constitutional amendment, there are always going to be situations where it will be impossible to determine just what the courts will do when interpreting the boundaries of the amendment. Other amendments to the Constitution have undergone many of years of review and interpretation and we therefore have developed a jurisprudence that better equips us to determine what the most likely, and proper outcome will be. Although recognizing that one-hundred percent certainty is an impossibility, I do believe that the sponsors of this amendment have strived to reduce the situations where uncertainty could exist. By requiring courts to examine the detrimental effect of each crime before determining whether the victim has constitutional rights, I believe that it would invite even more uncertainty which would increase the difficulties that could arise if federal, state, and local prosecutors were unable to predict what their proper response should be in certain circumstances.

Question 6

In your statement, you wrote, "Our major concern with a constitutional amendment protecting the rights of victims is that our prosecutorial and law enforcement responsibilities are not unnecessarily burdened so as to impair our ability to prosecute criminals." In California, relatives of a homicide victim complained to a judge that a plea bargain between the prosecution and the defense was too lenient. They got what they wanted – withdrawal of the plea and prosecution of the man on murder charges. However, at the close of the trial, the defendant was acquitted and went free.

Do you believe that the rights of victims in this case burdened the prosecutor's ability to prosecute the case?

Although I would not feel comfortable stating unequivocally that the victims' rights did or did not burden the prosecutor's ability to prosecute the case without knowing the particular circumstances and having all of the facts before me, I do believe that the facts that you have cited led to an unfortunate result in this particular case. However, I think that even the opponents of the victims' rights amendment concede that overall prosecutorial efforts are more, not less, effective when victims are regularly consulted during the course of a case.

How would the language of S.J. Res. 1 avert a similar outcome in other criminal prosecutions?

The proposed language of S.J. Res. 1 allows victims the right reasonably to be heard and

to decisions that duly consider the victim's safety. However, it does not allow a victim the right to preclude plea bargains. Judges will be called upon to consider the rights of the defendant, the rights of the victim, and the pursuit of justice, and they will make determinations on a case-by-case basis.

Question 7

In your statement, you wrote, "The Department fully supports Section 5's limitation on the ratification period to seven years from the time Congress submits the amendment to the States. The limitation is necessary to ensure that the ratification period does not remain open in perpetuity, possibly outliving the intent and circumstances of its original passage by Congress." I believe we should not amend the Constitution – which has served us well for over 200 years – casually.

If you think the "intent and circumstances" leading us to amend the Constitution may change in as few as seven years, is this not an argument for a statutory and not a constitutional approach to protecting victims?

I do not believe that it is. A number of amendments to the Constitution contain such a clause – the 18th, 20th, 21st, and the 22nd Amendments. The purpose of such a clause is to preclude the type of situation like that encountered with the ratification of the 27th Amendment, which was originally proposed in 1789 but not ratified by the requisite number of state legislatures until 1992. I believe that the experience of the 27th Amendment, which remained in constitutional limbo for over 200 years, has led the Congress to include such a clause in a substantial number of proposed constitutional amendments over the last two decades. For example, amendments proposed in the last few years which have contained such a time limitation include those to ban flag burning and to limit campaign expenditures introduced recently in the 108th Congress; to repeal the 22nd Amendment and to provide for a balanced budget introduced in the 107th Congress; and an amendment to provide for Congressional term limits and your amendment to abolish the electoral college introduced in the 106th Congress.

Question 8

In Ms. Earlene Eason's testimony, she wrote of her frustration that the DA would not ask for a continuance on her behalf so she could attend the sentencing of the person who pled guilty to murdering her son. Do you believe S.J. Res. 1 would allow a victim to seek a continuance? If so, under what circumstances? How would this be reconciled with the Constitutional right to a speedy trial?

I do not believe that the amendment as drafted allows a victim an absolute right to a continuance. The amendment grants a victim the right not to be excluded from a public proceeding and the right reasonably to be heard at a public sentencing hearing. First, the right not to be excluded is not tantamount to a right to be present, i.e., the court does not need to accommodate the victim's right to be there, it simply cannot exclude him or her from the proceeding. Second, the right reasonably to be heard does not necessarily have to entail the

victim's presence, a victim could be afforded the right to be heard in writing rather than orally. However, courts may well decide, on a case-by-case basis, that a continuance would not adversely affect the proceedings and therefore order a continuance so that the victim's right under the amendment can be fully realized.

There are numerous scenarios where the defendant's right to a speedy trial would in no way be implicated by a continuance issued so as to allow the victim to be present. This would be the case when the continuance sought was a mere matter of days, or even longer. The Supreme Court has stated that the right to a speedy trial does not preclude delays and has identified four factors that should be considered when making determinations in this context: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972). In addition, the Court stated that "until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 530. Under this analysis, depending on the length of the delay a continuance may cause, it is entirely possible that the defendant's right to a speedy trial will in no way be implicated.

Question 9

In Mr. Duane Lynn's testimony, he expressed his frustration that he could not comment on how his wife's murdered should be sentenced. Do you believe S.J. Res. 1 would allow a victim to make a sentencing recommendation (such as the death penalty instead of life in prison or vice versa) in his or her impact statement?

I do believe that a court could decide that under the proposed amendment a victim has the right to offer his or her opinion as to whether the defendant should be sentenced to life or death. Indeed, it is unclear that current law precludes such victim testimony. In *Payne v. Tennessee,* 501 U.S. 808 (1991), the Supreme Court ruled that the Eighth Amendment does not erect a per se bar to the admission of victim impact evidence in capital cases. In so doing, the Court overruled two of its prior precedents, *Booth v. Maryland*, 482 U.S. 496 (1987), in which the Court ruled that victim impact evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family were barred, and *South Carolina v. Gathers*, 490 U.S. 805 (1989), which ruled that a prosecutor could not argue to the jury the human cost of the crime during the sentencing phase of a capital case. However, the Supreme Court has not ruled on whether victim impact statements can include a sentencing recommendation and it is unclear, based on the Court's prior rulings, that it would decide that such recommendations are per se unconstitutional. In Oklahoma, victims are allowed to give opinions of a recommended sentence. *See* OKLA. STAT. ANN. § 984. In ruling on a due process challenge to victim impact testimony that included a recommendation for the death penalty in a capital case, the Oklahoma Court of Criminal Appeals ruled that such opinion testimony is permissible and articulated the proper standard of review: "evidence by victim impact witnesses that the defendant deserves death is admissible but will be viewed by this Court with a heightened degree of scrutiny." *Conover v. State of Oklahoma*, 933 P.2d 904, 921 (Okla. Crim. App. 1997). Although the court found the particular opinion testimony given in this case to have been more prejudicial than probative, it ruled that "there was nothing improper in the opinions

given by the three witnesses in this case that the death penalty was the appropriate sentence . . . . However, this type of evidence should be limited to a simple statement of the recommended sentence without amplification." *Id.* at 921.

Ultimately, it will be up to the courts to decide whether or not the amendment grants victims the right to offer their opinion as to whether the defendant should be sentenced to life or death, but I do believe that it is entirely consistent with the right "reasonably to be heard" to allow victims the right to give a sentencing recommendation. As in other contexts, the courts will have to examine this right in light of a defendant's constitutional rights and define the application of the competing rights or balance the competing rights in a particular case and rule in favor of the party with the more compelling argument.

Senator Dianne Feinstein

Senate Judiciary Committee Hearing on S.J. Res. 1,
the Victims' Rights Amendment
Written Question for Assistant Attorney General Viet Dinh

1. At the hearing, there was some discussion about what would happen if S. J. Res. 1 was adopted and a victim's constitutional right came into conflict with a criminal defendant's constitutional right. First, I want to clarify that nothing in the amendment would take away defendants' rights. Section 1 of the amendment makes clear that victims' rights are capable of protection without denying defendants' constitutional rights. Second, in many instances, the basic procedural rights conferred by the amendment would have little, if any, impact on defendants' rights. For example, is hard to see how a defendant could plausibly object to providing notice to victims about the date and location of public proceedings involving the crime. Third, the amendment qualifies many of the victims' rights to ensure that courts limit them appropriately. For instance, under the amendment, victims would have no constitutional right to be heard at trial and, at other public proceedings involving the crime, victims would have only a right "reasonably" to be heard. Fourth, the amendment provides three specific exceptions to restrict victims' rights: 1) a substantial interest in public safety; 2) a substantial interest in the administration of criminal justice; and 3) compelling necessity.

I would like to clarify one point about the administration of criminal justice exception. In responses to me and to Senator Durbin at the hearing, you suggested that the administration of criminal justice exception would allow courts faced with a conflict between a defendant's constitutional right and a victim's constitutional right to balance these rights and decide in favor of the person with the more compelling argument.

I agree with that response. However, to avoid any misunderstanding, I want to make clear that defendants' rights could come under any one (or more) of the three exceptions in Section 2 of the amendment, not just the administration of criminal justice exception. Let me offer some examples of how that could happen. If a victim sat in the courtroom and tried to disrupt the proceeding by yelling at the defendant, this would adversely affect the administration of criminal justice. To ensure that the defendant received his or her constitutional right to a fair trial, the judge could have the victim removed (and even pursue other actions against the victim, such as holding the victim in contempt). If the same victim threatened bodily harm to the defendant or judge, that would also implicate public safety as well as violate the defendant's constitutional right to a fair trial. The judge could, at a minimum, force the victim to leave under the public safety exception. If the victim was horribly maimed by the crime and insisted on sitting immediately in front of the jury, the judge could determine that compelling necessity dictated that the victim not be allowed to be present during the trial.

Obviously, I do not intend these examples to be exhaustive. However, I do think that they illustrate some of the variety of ways in which the amendment would ensure the

protection of defendants' constitutional rights consistent with the existence of victims' constitutional rights. These ways would always depend heavily on the underlying context in which the rights came into conflict and the weight of the defendant's and victim's respective interests. Similar balancing is done in other situations where constitutional rights conflict–for example, where the media's First Amendment right to cover a trial conflicts with a defendant's constitutional right to a fair trial.

a) Do you agree that criminal defendants' rights could come under any one (or more) of the three exceptions in Section 2 of the amendment, not just the administration of criminal justice exception?

~~Yes.~~

b) Assuming that you answer yes to question 1(a), do you agree that, if a victim's constitutional right conflicted with a defendant's constitutional right, the judge would then–applying applicable precedent–balance (or otherwise reconcile) these rights and then decide in favor of the person with the more compelling argument?

Yes. I believe that by allowing for restrictions when there is a substantial interest in public safety or the administration of criminal justice, or by compelling necessity, the amendment would allow the courts either to articulate boundaries to define the application of competing rights or to balance the competing rights in a particular case and rule in favor of the party with the more compelling argument.

JAMES ORENSTEIN
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May 28, 2003

Katie Stahl
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: A Proposed Constitutional Amendment to Protect Crime Victims, S.J. Res. 1

Dear Ms. Stahl:

Pursuant to Chairman Hatch's request, enclosed please find my responses to written questions from Senator Leahy regarding S.J. Res. 1. I am also sending you an electronic copy of the responses by e-mail. If there is any additional information I can provide, please do not hesitate to contact me.

Sincerely,

James Orenstein

Enclosure

Responses to Questions by Senator Leahy for Jamie Orenstein

1. *Supporters of the proposed amendment have argued that it simply seeks to place victims' rights on the same constitutional footing as the rights of the accused. If you were still a prosecutor, and S.J. Res.1 had been passed and ratified, would you be able to argue that, in fact, victims' rights trump those of the accused?*

Response: Either as a prosecutor or a victim's counsel, I could make several arguments.[1] First, I could argue that a court must interpret the amendment as having been ratified with a full understanding of pre-existing amendments, and therefore, necessarily, with an intent to have the latest-ratified one trump in cases of direct conflict. In other words, if two amendments passed at different times are capable of producing irreconcilably inconsistent rights for different parties, then the framers of the later-ratified amendment must have intended that one to prevail. Had they intended otherwise, I could argue, they would have so stated in the amendment itself – particularly because they would have known of the canon of construction that in the absence of such limiting language would assume the primacy of the later, more specific law. But this amendment contains no such language – it has only a preamble that predicts a conflict of rights will never arise. That preamble either provides no guidance about how to resolve a conflict should the prediction prove wrong, or, as discussed below, would lead a court to rule that the victim's right must trump the defendant's.

Second, I could compare the distinction in last sentence of Section 1 between the words "denied" and "restricted" to similar distinctions in several earlier constitutional amendments. *Compare* S.J. Res. 1, 108th Cong. § 1 (2003) ("The rights of victims ... shall not be denied by any State or the United States and may be restricted only as provided in this article") *with* U.S. Const., amend. IX (referring to rights being "den[ied]" or "disparage[d]"), *id.*, amend. XV, § 1 (referring to rights being "denied" or "abridged"), *id.*, amend. XIX (same), *id.*, amend. XXIV, § 1 (same), *and id.*, amend. XXVI, § 1 (same). I could then contrast that long-recognized distinction between denying and restricting rights with the carefully limited assertion in the preamble to Section 1 of the proposed amendment that victims' rights are "capable of protection without *denying* the constitutional rights of those accused of victimizing them." S.J. Res. 1, 108th Cong. § 1 (emphasis added). I could argue that given the provision's two references to the concept of denying rights, one of which is plainly grounded in an assumption that denial and restriction are

[1] Under Section 3, "[o]nly the victim or the victim's lawful representative may assert the rights established by this article." As a result, prosecutors might be deemed no longer to have standing to advance any argument based on an assertion of a victim's rights – thereby potentially undermining useful victim-assistance statutes such as 42 U.S.C. § 10606 (requiring prosecutors to use "best efforts" to secure certain rights for victims). It is thus more likely that a victim's retained counsel would make the arguments summarized in this response. Moreover, unlike a federal prosecutor who might be constrained by the adoption of Justice Department policy to avoid advocating certain interpretations of the amendment, a victim's private counsel would be free – and duty-bound – to assert a robust view of the victim's rights.

different concepts, the framers of the amendment must have contemplated that courts could restrict a defendant's constitutional rights in order to vindicate the rights of the victim, provided that in doing so it did not completely deny the defendant's rights. Moreover, even an outright denial of the defendant's rights would be preferable to a burden on the victim's rights, as the preamble to Section 1 is deliberately phrased as an observation rather than a mandate.

Third, and perhaps most obviously, I could argue that while Section 1 may be susceptible of several different interpretations, the one construction that *cannot* have been intended is that a defendant's constitutional right must trump in cases of conflict with a victim's right. Such a construction is plainly not intended because the sponsors have repeatedly declined to adopt alternative phrasing to make that result an explicit requirement of the amendment. *See, e.g.*, S. Rep. 106-254, at 43, 72-73 (2000). By reviewing the legislative history of the amendment, I could argue that the court could find a legislative intent in S.J. Res. 1 not to allow a defendant's constitutional right to trump should a conflict arise, and that therefore the victim must prevail.

Moreover, I could also use the same legislative history to help refute the defendant's best argument – namely, that the preamble to Section 1 precludes the possibility of the victim's rights trumping the defendant's. If a judge found that a right established by the proposed amendment was in fact irreconcilably in conflict with the defendant's constitutional rights, the defendant would point to the preamble to argue that it forbids allowing the victim's right to trump. In effect, the defendant would be arguing that the victim's substantive right already found to be within the provisions of Section 2 was trumped not simply by operation of his own constitutional rights, but by the terms of the preamble to Section 1.

In response, I could argue as follows that the preamble's drafter did not intend such an interpretation. The preamble was drafted by Harvard Law School Professor Laurence H. Tribe. *See* Statement of Steven J. Twist in support of S. J. Res. 1, the Crime Victims' Rights Amendment, at 14 (Apr. 8, 2003) ("Twist Statement"). Only one other amendment to the Constitution – the Second – contains a preamble that does not itself define or limit any rights. I could argue that it is no mere coincidence that the author of the preamble to Section 1 had closely studied the meaning of such prefatory language and concluded that it could *not* trump substantive rights. *See* Laurence H. Tribe and Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. Times, Oct. 28, 1999 ("the Second Amendment reference to the people's 'right' to be armed cannot be trumped by the Amendment's preamble"). The obvious implication would be that Prof. Tribe modeled the preamble to Section 1 on the structure of the Second Amendment precisely to avoid letting a defendant's right trump a victim's should a conflict ultimately arise.

The preamble would thus serve as a potentially useful interpretive tool for the defendant in arguing that no conflict existed, but would not assist the court in resolving a conflict once it was found to exist. For example, as explained below in response to Question 5, there is uncertainty about whether the proposed amendment is intended to give a victim the right to tell the jury in a capital case how she thinks the defendant should be sentenced. Because the Constitution currently forbids such statements, the defendant would argue that the preamble to Section 1 is a valuable interpretive tool that should persuade the court to avoid a conflict of rights

by interpreting Section 2 to establish a right "reasonably to be heard" at a sentencing proceeding that does not include the right to make a sentencing recommendation. If the court rejected that argument and determined that the framers of the amendment intended to confer a right of victim allocution, then a conflict would plainly exist between the victim's constitutional right and the defendant's. At that point, it appears to be Prof. Tribe's view that the victim's Section 2 right to be heard could not be trumped by the observation in the preamble to Section 1.

Given the legislative history of the preamble to Section 1 – the repeated rejection of alternate language prohibiting the denial or diminishment of defendants' rights as well as the drafter's view that a preamble cannot trump the language establishing substantive rights – I could argue that the court should interpret the clause as an optimistic prediction that victims' and defendants' rights could be harmonized, but a prediction lacking the force of law. And if the prediction proved incorrect, I could argue that the court would not only be free to conclude that the victim's rights must prevail in cases of conflict, but that it would be bound to do so.

2. *To what extent would S.J. Res.1 give victims the right to stay or continue a trial once it is underway? To what extent would it allow victims to reopen a proceeding or invalidate a ruling?*

Response: The current bill deletes explicit language from a previous version that prohibited such unwanted delays and appeals. *See* S.J. Res. 3, 106th Cong. § 2 (2000) ("[n]othing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling"). The deleted language was expressly drafted "because of the concern that a broad judicial remedy might allow victims to inappropriately interfere with trials already underway." S. Rep. 106-254, at 40. By deleting the prohibition against such forms of relief, the current version of the proposed amendment plainly authorizes courts to grant victims' requests to stay trials, reopen proceedings, and invalidate rulings to remedy violations of victims' rights. Two examples of how that change could affect criminal cases are set out below.

(1) Assume that in a capital case, the judge determines that allowing a particular victim to testify at the penalty phase will violate the defendant's right to due process. Under S.J. Res. 3, the trial could not be stayed pending the victim's appeal of the exclusion order, but under the current proposal, it could. Such a delay would at a minimum complicate the sentencing process, and could possibly undermine the prosecution's efforts to secure a death sentence. Among other problems, the delay could result in the loss of some of the jurors who decided the defendant's guilt, thereby requiring the empanelment of a new sentencing jury.

(2) Assume that a defendant is sentenced without prior notice to the victim. Under the current proposal, the defendant's sentence could be vacated and remanded for a new sentencing hearing on notice to the victim. This resentencing – which would require the allocation of resources from the court, the prosecutor, the Marshal and possibly prison officials – would either result in the same sentence or a different one. If the sentence was the same, and the remedy for

the violation of the victim's right would have in essence been a formality.[2] If the result was a more severe sentence, the defendant could claim a violation of the Double Jeopardy clause of the Fifth Amendment.

3. *Mr. Twist writes that the restrictions clause in section 2 of the proposed amendment "settles what might otherwise have been years of litigation to adopt the appropriate test for when, and the extent to which, restrictions will be allowed." Do you agree?*

Response: I do not agree. To the contrary, the meaning of several phrases in Section 2 – such as "when...dictated," "to the degree dictated," "substantial interest," "public safety," "administration of criminal justice," and "compelling necessity," – as well as the way each interacts with the others will have to be determined on a case-by-case basis. Even if some of those phrases have taken on a generally accepted judicial gloss in other contexts, it can hardly be considered a "settled" matter that courts will uniformly apply the same interpretation when those phrases are inserted for the first time into the federal Constitution.

Further, as the hearing demonstrated, there are widely differing views on the implication of the difference between the term "restrictions" in the current version of Section 2 and the corresponding use of the word "exceptions" in the 2000 version of the proposed amendment. Some supporters of the amendment appeared to treat the two concepts as synonymous. *See, e.g.*, Statement of Viet D. Dinh, Assistant Attorney General, Office of Legal Policy, United States Department of Justice, Before the Committee on the Judiciary, United States Senate, Concerning Proposed Victims' Rights Constitutional Amendment, at 4 (Apr. 8, 2003) (asserting that Section 2 allows for the "overriding" of victims' rights in specified circumstances). As set forth in my written statement and at greater length below, I believe the terms have different meanings. "Overriding" a victim's right – for example, by denying an individual victim the right to be heard at a hearing in order to accommodate practical considerations in a mass-victim case – constitutes an "exception" to that right but cannot fairly be described as a mere "restriction."

There is little reason to assume that prosecutors, victims' counsel, defense attorneys and judges will find it any easier to achieve consensus on the meaning of Section 2 than have the several legislators and witnesses who have already debated it. As a result, it seems inevitable that the language of Section 2 would lead to years of litigation that ultimately could cause more frustration and dissatisfaction for the crime victims the proposed amendment is intended to help.

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[2] Describing such a remedy as a "formality" is not intended to disparage the underlying right. Victim notification in advance of sentencing is unquestionably an important value, and taking steps to ensure the victim's participation in sentencing will normally promote the interests of justice. However, the drafters of S.J. Res. 3 and this Committee decided in 2000 that allowing a resentencing as a remedy for the violation of a victim's notification right did not strike the proper balance between that value and the competing interest of society's need for finality. *See* S. Rep. 106-254, at 40.

4. *How would the difference between the words "restrictions" and "exceptions" affect the ability of courts or law enforcement to function in (A) mass victim cases like Oklahoma City and (B) organized crime cases like Gotti?*

Response: My response to each part of the question is based not only on the two words' different definitions, but also on the history of this proposed amendment. The word "exceptions" was used in a version previously endorsed by this Committee but has deliberately been replaced in the current bill with the word "restrictions." *Compare* S.J. Res. 3, 106th Cong. § 3 ("Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest") *with* S.J. Res. 1, 108th Cong. § 1 ("The rights of victims of violent crime ... shall not be denied ... may be restricted only as provided in this article") *and id.*, § 2 ("These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.").

(A) Mass victim cases. In a mass victim case, the difference between the two words would most likely be a problem for courts (or parole boards or clemency review panels) in honoring the individual victim's right "reasonably to be heard" at certain public proceedings.[3] This right differs in substance from the corresponding right conferred in an earlier version, which was the right "to be heard, if present, and to submit a statement" at such proceedings. S.J. Res. 3, 106th Cong. § 1. I have explained in my previous written statement how the change in phrasing makes it more likely that the current formulation could be interpreted to confer on victims an affirmative right to be present (thereby obliging the government to transport indigent and incarcerated victims to court) and to make an oral statement ("be heard") rather than simply "submit" a written one. *Cf.* S. Rep. 106-254, at 34 (explaining the substantive limitations provided by the terms "if present" and "submit a statement").

The distinction between "restrictions" and "exceptions" exacerbates this problem in mass victim cases. As a practical matter, courts will sometimes be simply unable to allow every victim to be heard. The pragmatic approach generally adopted in such cases is to hear from a representative cross-section of victims. If the amendment permitted "exceptions" to victims' rights in appropriate circumstances, this pragmatic approach would plainly be constitutional (assuming the courts agreed that the exclusion was "dictated by a substantial interest in ... the administration of criminal justice"). But such a solution would not work under an amendment that permits "restrictions" but not "exceptions." A victim excluded from the representative group in this scenario could plainly show that her right reasonably to be heard had been "denied," in violation of Section 1. The fact that others with similar interests had been allowed to speak

[3] The right not to be excluded from public proceedings in mass victim cases would likely be accommodated relatively easily, through the use of closed-circuit television. While this would "affect" courts by requiring the alteration of some rules (for example, the Supreme Court would presumably be required to abandon its traditional prohibition of cameras when hearing arguments in mass victim cases), such changes need not inherently undermine courts' ability to function.

might fairly be considered an appropriate "restriction" on the *collective* interest of all victims in being heard, but the proposed amendment creates rights for *individual* victims, not a group.

Moreover, courts might well rule that allowing the excluded victim to submit a statement would not cure the problem because Congress chose to confer a right "reasonably to be heard" rather than a right to "be heard, if present, and submit a statement." Given the distinction, the word "reasonably" could be read to permit the court to impose appropriate limitations on, for example, scheduling, duration of the live presentation, and subject matter, but not to silence the victim entirely in favor of the submission of a prepared statement. A victim permitted only to submit a statement has not been permitted "reasonably to be heard" – she has not been "heard" at all – and accordingly her right has been "denied" rather than merely "restricted."

Notwithstanding the obvious difference between "exceptions" and "restrictions," Mr. Twist assumes the proposed amendment will be interpreted to provide sufficient flexibility. He bases this view on his reading of *Maryland v. Craig*, 497 U.S. 836 (1990). *See* Twist Statement at 33-34 & n.50. In *Craig*, the Supreme Court took up "'the question whether any exceptions exist' to the 'irreducible literal meaning of the [Sixth Amendment's Confrontation] Clause: "a right to meet face to face all those who appear and give evidence at trial."'" 497 U.S. at 844 (emphasis and citations omitted). It answered that question in the affirmative, based on a conclusion that such a face-to-face meeting is not "an indispensable element of the Sixth Amendment's guarantee" of confrontation. *Id.* at 849.

While it is conceivable that Mr. Twist's optimistic extrapolation from the result in *Craig* could ultimately prove correct, I believe the Supreme Court's reasoning in that case would more likely lead it to *disagree* with the view that the "restrictions" clause provides the level of flexibility Mr. Twist anticipates. First, in *Craig* the Supreme Court explicitly assumed that the issue whether the Sixth Amendment allows for any "exceptions" to its literal meaning was a "question." There can be no such "question" under the proposed victims' rights amendment, because (1) unlike the Sixth Amendment, it flatly states that the rights established for victims "shall not be denied," and (2) its sponsors deliberately replaced a provision allowing limited "exceptions" with one allowing only limited "restrictions." Second, even assuming there is such a question under the victims' rights amendment and that it would be answered with the same "indispensable element" standard as in *Craig*, the result might be different. A court could easily hold that actually being heard is indeed an indispensable element of a victim's individual right "reasonably to be heard" – an element that is not satisfied simply by allowing someone else with presumptively similar views to speak. Such a common-sense interpretation, while wholly consistent with *Craig*, would forbid a pragmatic cross-section approach in mass victims cases.

(B) Organized crime cases. In organized crime cases, the most likely adverse affect of the distinction between "restrictions" and "exceptions" arises in the context of cooperation agreements under which one gangster agrees to plead guilty and then, upon release on bail, surreptitiously to gather information about others. In many such cases, the prospective cooperator has previously committed violent crimes in which the victims are themselves criminals. The amendment would confer on such victims "the right to reasonable and timely

notice of" the cooperator's guilty plea, the same right with respect to the cooperator's bail hearing, and "the rights not to be excluded from ... and reasonably to be heard" at both. Those rights can be "restricted" in certain circumstances (which I assume for purposes of this answer would exist in this context) but not "denied."

For the law enforcement interest to be vindicated in this context, the victims must receive *no* notice of the cooperator's plea or release, at least until well after the fact. Alerting the victims to these events would endanger the cooperator and undermine his ability to assist law enforcement by collecting evidence. But in most cases, alerting such victims would likely be unavoidable under the proposed amendment.[4] The best argument I could make as a prosecutor in this scenario would be that the court should for good cause postpone the notice required by the amendment, much as it is empowered to do under the wiretap statute, 18 U.S.C. § 2518(8)(d). Such a postponement could be characterized alternately as a "reasonable" form of notice or an appropriate "restriction" on the victim's right.

Such an argument would likely fail. Even if the delayed notice could be considered "reasonable," it could not be considered "timely," which the amendment would also require. *See* Twist Statement at 19 ("'Timely' notice would require that the victim be informed enough in advance of a public proceeding to be able reasonably to organize his or her affairs to attend."). Moreover, taking affirmative steps to delay notice would effectively exclude the victim from the proceeding – that would be the precise point of the delay – and would unquestionably make it impossible for the victim reasonably to be heard with respect to the plea or the cooperator's release. In short, the victim's rights would plainly have been "denied," in violation of Section 1.

None of that would be a problem if the amendment permitted "exceptions," as the facts would likely be held to implicate a substantial interest in public safety or the administration of criminal justice. But the amendment allows only "restrictions" that do not "deny" a victim's rights – and the necessary restrictions would in most cases do just that.

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[4] There appears to be considerable disagreement as to whether this problem can be avoided by closing the court for cooperators' plea and bail proceedings, thereby rendering the proceedings non-public and not subject to the proposed amendment. As noted in my written statement, my experience is that organized crime prosecutors rarely seek such closure due to the high barriers erected by the First and Sixth Amendments. Of course, my experience may be atypical. The Department of Justice could shed valuable light on the matter by providing information about how often prosecutors have previously sought and received the permission of the Deputy Attorney General, pursuant to 28 C.F.R. § 50.9, to ask for or acquiesce in the closure of a courtroom in the context of a prospective cooperator's guilty plea or bail proceeding.

5. *One of the concerns voiced by supporters of the amendment is that some victims who lost family members in the Oklahoma City bombing did not have a right to testify at McVeigh's sentencing hearing because they opposed capital punishment and the prosecutors refused to call them to testify at the penalty hearing. Would this amendment have allowed these victims to testify, and if so, how would that have affected the case?*

Response: The proposed amendment would have guaranteed each bombing victim "the right ... reasonably to be heard at public ... sentencing ... proceedings." As explained below, there are a number of different ways that language could have been implemented in the bombing case due to (1) the unique procedures in capital cases, (2) the qualitative difference between victim impact testimony and victim allocutions (and the important constitutional distinction between the two), and (3) the uncertainty about what the amendment's supporters intend. Depending on which of the several plausible alternative interpretations had prevailed, the effect on the Oklahoma City case would likely either have been nothing at all (*i.e.*, the victims would have had no additional rights with respect to the sentencing process) or a potentially adverse effect on the prosecution's efforts to secure just punishment for the bombers.

(1) Defining the "sentencing proceeding". Capital cases have two separate proceedings after a verdict of guilt, either or both of which might properly be considered a "sentencing proceeding" for purposes of the proposed amendment. Under federal law, for example, there are two separate district court proceedings that follow a determination of a defendant's guilt of a capital crime. First, there is a "penalty phase" hearing, usually conducted before the same jury that determined guilt, at which the parties seek to establish or contest the existence of facts that aggravate or mitigate the crime. *See* 18 U.S.C. § 3593(b); 21 U.S.C. § 848(i). Subsequently, there is a separate proceeding at which the judge imposes sentence, taking into account any recommendation resulting from the penalty phase. *See* 18 U.S.C. § 3594; 21 U.S.C. § 848(l).

Arguably, both could be considered "sentencing proceedings," but it is also possible to make the case for either one as the sole "sentencing proceeding" under the proposed amendment. The penalty phase is arguably the only "sentencing proceeding," because, as a practical matter, that is where a decision-maker vested with discretion to act upon the recommendations it hears (usually a jury) determines the defendant's sentence. Alternatively, the judge's imposition of sentence after the jury's discharge is arguably the only "sentencing proceeding," among other reasons because it is where sentence is actually imposed and because a judge can in limited circumstances override the jury's penalty phase recommendation. The issue becomes even murkier in those States, such as Alabama, that allow the trial judge to override the jury's sentencing recommendation.

Although the question would plainly have to be revisited in the unique context of this amendment, the Supreme Court has previously characterized the penalty phase of a capital case as a proceeding that "is in many respects a continuation of the trial on guilt or innocence of capital murder." *Monge v. California*, 524 U.S. 721, 732 (1998). Given that the proposed amendment establishes a victim's right to be heard at a sentencing proceeding but not at the trial,

the *Monge* view suggests that the proposed amendment would confer a right to be heard at the imposition of sentence but *not* at the penalty phase.

(2) Defining the subject matter of the "right reasonably to be heard". A victim can provide two different kinds of information with respect to sentencing. First, a victim can provide factual "impact" evidence about the harm resulting from the defendant's crime. Second, a victim can give an allocution stating her personal opinion about how the defendant should be punished. The proposed amendment does not specify whether right reasonably to be heard at a sentencing proceeding includes a right of allocution as well as the right to present impact testimony.

Under current law, victims in a capital case are already generally permitted to give impact testimony. *See* 18 U.S.C. § 3593(a); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). However, such testimony must currently remain within certain limits to avoid conflicts with the rights of the defendant. As the Court noted in *Payne*, the admission of particularly emotional impact testimony can in some cases render the penalty phase fundamentally unfair, in violation of a defendant's right to due process. In such cases, admitting the testimony can lead to a reversal of the resulting sentence. *See id.* at 825 (majority opinion), 831 (O'Connor, J., concurring).

Whereas the Constitution generally permits victim impact testimony, it currently forbids victims from giving a penalty phase jury their opinions regarding sentencing or the defendant. *See Booth v. Maryland*, 482 U.S. 496, 508-09 (1987); *Payne*, 501 U.S. at 830 n.2 (noting that *Booth*'s prohibition regarding victims' opinions was not disturbed in overruling the ban on impact testimony); *id.* at 833 (O'Connor, J., concurring) (noting same); *Hain v. Gibson* 287 F.3d 1224, 1238-39 (10th Cir. 2002) (collecting cases noting same); *Lynn v. Reinstein*, No. CV-02-0435-PR, 2003 WL 21147287 (May 19, 2003) (noting same) (this was the case that hearing witness Duane Lynn mentioned was pending before the Arizona Supreme Court as of April 8, 2003). Thus, if the proposed amendment were read to give victims the right to allocute at the penalty phase, there would be a conflict between the rights of the victim and the accused, despite the assurance to the contrary in Section 1.[5]

(3) Differing statements of legislative intent. Some supporters of the proposed amendment appear to intend that the victim's right to be heard with regard to sentencing in a capital case would be consistent with existing constitutional law. For example, during the question-and-answer portion of at the hearing on April 8, 2003, Senator Feinstein described "the limited rights that we're giving an individual" in the proposed amendment and explained each of

[5] Even where the victim's allocution would recommend against imposition of a death sentence, the result could be the injection of a constitutionally impermissible level of arbitrariness into the overall use of capital punishment. The latter risk could arise because a defendant's exposure to the death penalty would be dependent on the fortuity of the views of a murder victim's relatives about capital punishment and their willingness and ability to express those views in court. Such arbitrariness could not only form the basis of a constitutional claim in the particular case where the opinion was admitted, but could lead to a systemic challenge to the death penalty in all cases.

the substantive rights under Section 2. With respect to the right to be heard, the Senator said that "essentially what we're trying to do is say ... that you have a basic constitutional right ... to make an impact statement," but made no mention of a right of allocution. Draft Transcript at 103-04.

Others, however, appear to anticipate a broader right that would overrule the portion of *Booth* that the Supreme Court preserved in *Payne*. For example, Mr. Twist takes the position that "[t]he right to be heard at sentencing includes the right to make a recommendation regarding the appropriate sentence to be imposed, including in capital cases." Twist Statement at 30.

This Committee's 2000 report could arguably be read to support either position, although on balance it appears to accept the existing *Booth-Payne* prohibition against victims making sentencing recommendations to a penalty phase jury. *See* S. Rep. 106-254, at 33-34 (stating that the proposed amendment would "enshrine in the Constitution the Supreme Court's decision in *Payne*" and acknowledging that "the victim's right to be heard at sentencing will not be unlimited, just as the defendant's right to be heard at sentencing is not unlimited today").[6] Such a view is bolstered by the text of the current version of the proposed amendment, which flatly asserts that the rights it confers are "capable of protection without denying the constitutional rights of [the] accused." Given existing Supreme Court case law, that assertion can be true in this context only if the limited right to make an impact statement described by Senator Feinstein is intended, rather than the broader right described by Mr. Twist.

(4) Possible effects on the Oklahoma City bombing case. At each of the Oklahoma City bombing trials, the prosecutors selected certain victims to testify at the penalty phase – *i.e.*, the factual hearings under 18 U.S.C. § 3593(b) – to help establish certain aggravating factors in support of the government's attempt to secure a death sentence.[7] Some of the many victims who had hoped to testify were necessarily excluded by this selection process. With respect to those who were called as penalty phase witnesses, the court required the prosecutors to limit the testimony to factual information concerning the impact of the bombing on their lives. The witnesses were not permitted to offer an opinion as to how the defendants should be sentenced,

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[6] To the extent that the Committee anticipated that a victim's right of allocution in a capital case would simply parallel the defendant's, it should be noted that neither the Federal Death Penalty Act nor the federal Constitution gives a capital defendant the right to allocute at the penalty phase (as opposed to testifying subject to cross-examination), although the federal courts have not spoken with one voice on the issue and some states grant such a right under their own laws. *See, e.g.*, *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998) (defendant has no right to allocute; summarizing state practices); *but see United States v. Chong*, 104 F. Supp.2d 1232 (D. Haw. 1999) (defendant does have right to allocute). Of course, to the extent that some courts do permit capital defendants to allocute without cross-examination before a penalty phase jury, establishing a parallel right for victims would require the denial of the defendant's constitutional right, as recognized in *Booth* and preserved in *Payne*, to exclude such victim allocutions.

[7] Several other victims were called during the guilt phase of each trial to help establish factual elements of the charged offenses.

and were also instructed to avoid certain factual areas that the court ruled would be so emotionally charged as to violate the defendants' due process rights.

In the *McVeigh* case, the jury recommended death, and the court imposed that sentence at a separate proceeding. In the *Nichols* case, the jury was discharged without making a sentencing recommendation, and the court thereafter decided to impose life imprisonment. Before deciding Nichols' sentence on June 4, 1998, the court heard allocutions from several victims who had not previously testified in the penalty phase (including some who had opposed a death sentence), all of whom made moving and eloquent statements regarding both the impact of Nichols' crime and their recommendations as to his sentence.

As summarized below, the proposed amendment would likely have affected these outcomes in one of three ways. First, it might have made no difference at all. Second, it might have prevented the prosecutors from securing McVeigh's death sentence and had no effect on Nichols' life sentence. Third, it could have made the death sentence imposed on McVeigh – and on Nichols, if the statements permitted under the amendment had moved the jury to recommend such a sentence – vulnerable to reversal on appeal.

Assuming the right would not have applied in the penalty phase (*i.e.*, assuming that "sentencing ... proceeding" means only the imposition of sentence under 18 U.S.C. § 3594), there would have been no effect. Victims were already entitled to be heard at the imposition of sentence even without the proposed amendment.

Assuming the right would have applied in the penalty phase, its likely effect depends on whether the right to be heard would have included the right to make recommendations to the jury, or only to provide impact statements. If the latter, there would again have been no effect, as victims were in any event permitted to make such statements. Since the question assumes the exclusion of witnesses who would have recommended a non-death sentence – rather than the exclusion of witnesses with factual information pertaining to the aggravating and mitigating factors at issue – I must assume for purposes of this part of my answer that such witnesses, or at least the recommendation portion of their testimony, would have been excluded in any event.[8]

The most difficult problem arises if the proposed amendment would have permitted victims to make sentencing recommendations to a penalty phase jury. If hearing from the victims who preferred a non-death sentence would have swayed the jury, then the effect of the

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[8] The amendment might have resulted in testimony by *additional* victims if the selection of some representative victims to the exclusion of others were deemed unconstitutional for reasons described in response to Question 4. In that case, the likely effect on the outcome would have been either nothing (if the sentences were the same) or an adverse impact on the prosecution's efforts (if, for example, McVeigh's death sentence were reversed on appeal because the additional impact testimony made the overall effect so overwhelming as to violate due process, *see Payne*, 501 U.S. at 831).

amendment would have been to frustrate the government's effort to punish McVeigh with death for having committed what was at the time the worst crime ever committed on American soil.

On the other hand, if the jury had not been so swayed (as I believe is more likely), the result in McVeigh's case would have been the same: a death sentence. However, whereas the death sentence imposed without such victim allocutions survived all appellate and collateral challenges, it could have been vulnerable to reversal if it had been secured in part through testimony that violated McVeigh's constitutional rights. *See United States v. McVeigh*, 153 F.3d 1166, 1216-22 (10th Cir. 1998) (rejecting challenges to impact testimony and noting that McVeigh did not claim a violation of the limitations in *Booth* left untouched by *Payne*).

The potential for mischief would have been even greater in Nichols' case, where the jury never reached the point of considering any arguments for or against the death penalty. Having failed to reach a unanimous factual conclusion as to whether Nichols' level of intent in committing the crime sufficed to permit imposition of the death penalty, *see* 18 U.S.C. § 3591(a)(2), the *Nichols* jury was discharged without making any sentencing recommendation.[9] Presumably, in those circumstances, the addition of victims' opinion testimony to the penalty phase could have had no effect on the outcome.

But if the victims had been permitted to make recommendations (which would likely have strongly favored execution), and if the outcome had been different, it could only be because the victims' moving pleas for justice had affected the way the jurors decided *factual* issues. In other words, the only difference the proposed amendment could have made would have been one that led jurors to make a factual decision on the basis of emotion rather than evidence. Such a result would plainly be contrary not only to the jurors' legal duty and to existing constitutional protections, but also to the promise of the preamble to Section 1 of the proposed amendment.

6. *At the hearing, Assistant Attorney General Dinh stated that the proposed amendment's failure to define key terms like "victim" and "crime of violence" could be handled by means of legislation under the section 4 enforcement power. He added that the Supreme Court has addressed the use of the similar enforcement power under the 14th Amendment. Do you agree that Congress's power to "enforce" a constitutional provision carries with it the power to define constitutional terms?*

Response: I do not agree. Like Mr. Twist, I understand the Supreme Court to have ruled that "[t]he power to enforce is not the power to define." Twist Statement at 38 (citing *City of*

[9] Mr. Twist is thus mistaken when he cites Nichols' life sentence as support for the proposition that "many juries decline to return death sentences even when presented with powerful victim impact testimony." Twist Statement at 26 (quoting Paul G. Cassell, Professor of Law, University of Utah College of Law, Statement Before the Committee on the Judiciary, United States Senate, Responding to the Critics of the Victims' Rights Amendment (Mar. 24, 1999)). The *Nichols* jury did not "decline" to recommend a death sentence; it simply did not reach the issue.

Boerne v. Flores, 521 U.S. 507, 519 (1997)). In recent years, the Supreme Court as well as some lower courts have issued several decisions interpreting the enforcement provision of the Fourteenth Amendment, upon which Section 4 of the proposed amendment is modeled. Those cases state that Congress is not empowered, under the guise of "enforcing" a constitutional amendment, either to diminish the rights of the persons it was designed to protect or to impose substantive new restrictions on State governments. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) (stating that the task of assessing the constitutionality of Enforcement Clause legislation requires the court to determine whether the statute "is in fact ... an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations"); *Saenz v. Roe*, 526 U.S. 489, 508 (1999) ("Congress' power under § 5, however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)); *Boerne*, 521 U.S. at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.... It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."); *see also Nanda v. Bd. of Trs. of the Univ. of Ill.*, 303 F.3d 817, 827 (7th Cir. 2002) ("Congress' enforcement power must stop short of redefining the States' substantive obligations under the Fourteenth Amendment.").

Given this case law, any attempt by Congress to use the enforcement power to define the proposed amendment's key terms would likely be held invalid. Such legislation would necessarily either restrict the rights of some persons who might otherwise be considered victims of violent crimes, or expand the substantive obligations of States whose laws would otherwise exclude certain persons from the protected class of victims. Assume, for example, that in State A the term "crime of violence" is defined (either through State legislation or judicial interpretation of the amendment) to include both burglary and a driving-while-intoxicated offense resulting in injury within its definition of the term "crime of violence," while the same term is defined in State B to exclude both of those offenses. In this scenario, the class of protected victims would be broader in State A than in State B. But assume that Congress enacted legislation, purporting to rely on its Section 4 enforcement power, to define "crime of violence" to include vehicular offense but exclude burglary. Such legislation would run afoul of both *Saenz* (because the exclusion of burglary would "restrict, abrogate or dilute" the constitutional rights of burglary victims in State A) and *Boerne* (because the inclusion of the vehicular offense would decree the substance of otherwise non-existent restrictions on State B).

I believe the view expressed by Assistant Attorney General Dinh with which both Mr. Twist and I disagree – *i.e.*, the view that the enforcement provision itself includes the power to define key constitutional terms – is the product of the lengthy history of this proposed amendment and the several attempts to approach the difficult question of definition. It is important to set out that history in some detail so that the Committee can appreciate why the current reliance on the Section 4 enforcement provision alone appears to be predicated on an interpretation of *Boerne* that was untested and optimistic when first formulated by the Justice Department in 1998, and has been rendered unreliable by subsequent Supreme Court decisions.

The Supreme Court decided *Boerne* in 1997. The sponsors of the proposed amendment subsequently introduced a new version that provided, "The Congress and the States shall have the power to *implement and* enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when necessary to achieve a compelling interest." S.J. Res. 44, 105th Cong. § 3 (Apr. 1, 1998) (emphasis added). The Justice Department recognized that the new language was aimed at preserving the power to define key terms, but opined that such an approach would be superfluous under the narrow reading of *Boerne* the Department favored:

> We understand that the word "implement" was added to ensure that Congress would have the authority to define key terms such as "victim" and "crime of violence" after [*Boerne*]. In *Boerne*, the Supreme Court held that Congress did not have the power under the enforcement clause of the Fourteenth Amendment to decree the substance of the rights conferred by that amendment. Notwithstanding *Boerne*, we believe that the enforcement power would give Congress authority to define key terms in the proposed amendment. We believe that *Boerne* is best read in light of its context: an attempt by Congress to reinstate a constitutional standard of decision that the Supreme Court had expressly rejected.

Letter dated June 2, 1998, from L. Anthony Sutin, Acting Assistant Attorney General, to the Honorable Orrin G. Hatch, attachment at 4 ("DOJ 1998 Letter") (citation omitted).

Thus, in assuming that the Supreme Court will interpret the enforcement power to include the power to define substantive constitutional terms, Assistant Attorney General Dinh appears to be relying on the Department's 1998 analysis. But in the years since that view was articulated, the Supreme Court, in assessing the validity of federal laws enacted under the Fourteenth Amendment's enforcement provision, has repeatedly invoked reasoning that exceeds the limitation of *Boerne* that the Department anticipated in 1998. *See, e.g.*, *Nevada Dep't of Human Res. v. Hibbs*, No. 01-1368, 2003 WL 21210426 (U.S. May 27, 2003) ("*Boerne* ... confirmed ... that it falls to this Court, not Congress, to define the substance of constitutional guarantees"); *Kimel*, 528 U.S. at 81 ("The ultimate interpretation of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.") (citing *Boerne*, 521 U.S. at 536); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637-48 (1999) (invalidating Patent Remedy Act because the historical record and the scope of the act's coverage demonstrated that it was not merely remedial or prophylactic, but changed States' substantive obligations). Given this subsequent case law, I believe that the broader interpretation of *Boerne* that prompted the amendment's sponsors to add the word "implement" in 1998 has prevailed, and that an enforcement provision alone cannot be relied upon to empower Congress to define the key terms of the proposed amendment.

Despite the need for something other than an enforcement provision, the current version of the amendment contains *nothing* else that could be construed as granting Congress the power to define key terms. As noted above, the sponsors of S.J. Res. 44 first sought to overcome

Boerne by giving Congress the power to "implement" as well as enforce the amendment. After the Justice Department expressed a concern that such language might itself cause unanticipated problems, *see* DOJ 1998 Letter, attachment at 5, the sponsors deleted "implement" and added a provision stating explicitly that the key terms were to be "defined by law." *See* S. Rep. 105-409, at 38-39 (1998). That approach was retained in the 2000 version of the amendment. *See* S.J. Res. 3, 106th Cong. § 1. In reporting that bill to the full Senate, the Committee appears to have continued to assume, as a result of *Boerne*, that the enforcement provision alone would *not* be interpreted to allow Congress to define key terms, but that the "defined by law" provision would empower Congress, the States, and the courts to provide definitions controlling within their respective jurisdictions. *See* S. Rep. 106-254, at 28; *see also id.* at 46 (additional views of Sens. Kyl and Feinstein) ("the 'law' that will serve to define these terms will typically be State law").

When the proposed amendment was reintroduced in the 107th Congress as S.J. Res. 35, the "defined by law" provision – which had been criticized in the 2000 Senate debate – was excised. As a result, for the first time since the decision in *Boerne*, the enforcement clause was the *only* provision in the proposed amendment under which Congress could hope to enact legislation defining key terms that would control in the States. This Committee issued no report on that bill, and the same approach – deleting the "defined by law" provision and relying solely on the enforcement provision for the definition of key terms – was retained in the current bill.

As noted above, Mr. Twist – one of the amendment's primary drafters and supporters – disagrees with Assistant Attorney General Dinh and accepts that '[t]he power to enforce is not the power to define." Twist Statement at 38 (citing *Boerne*). However, he does not see a limited enforcement power as cause for concern. Quoting from the prior report by this Committee, he writes that "the *States* will, subject to Supreme Court review, flesh out the contours of the amendment by providing definitions of 'victims' of crime and 'crimes of violence.'" Twist Statement at 38 (quoting S. Rep. 106-254 at 41) (emphasis added). When the Committee made that observation in 2000, it was correct: the *States* would indeed have had the power to define key terms – under the "defined by law" provision. *See* S. Rep. 106-254 at 28. Now, however, it is not: Mr. Twist's observation no longer holds true because the "defined by law" provision has been deleted and the Section 4 enforcement provision empowers only "Congress," not the States. *See* S. Rep. 106-254, at 46 (additional views of Sens. Kyl and Feinstein) (noting that a proposal that "explicitly extended enforcement power to both Congress and the States .... did not garner the broad consensus necessary to survive" in the draft approved by the Committee).

In short, there are only three basic ways the key terms of this amendment can be defined: (1) by federal legislation that controls all jurisdictions, (2) by a combination of federal and State statutes that control within their respective jurisdictions, or (3) by judicial interpretation. The first option is plainly best suited to the apparent goals of the amendment's supporters because it avoids a patchwork of rights across jurisdictions, and because clear and detailed legislative definitions will help avoid a long and uncertain wait for the courts to develop common-law definitions. But that approach is not available under the language of the current bill because the enforcement power – the only remaining plausible source of such legislative authority after the deletion of "implement" and "defined by law" – does not include the power to define key terms.

The second option, combining federal and State legislation, may be the next best in that it avoids the delay and uncertainty of judicial interpretation. But that option simply reproduces the "patchwork" problem the amendment is designed to overcome. Moreover, it is no longer available as the result of the deletion of the "defined by law" clause from the 2000 version.

As a result, I believe it is most likely that the third approach would prevail by default, meaning that the amendment's key terms would be defined piecemeal by individual judges interpreting the new constitutional language. Such interpretation would undoubtedly be informed by the varying definitions of the terms in pre-existing State and federal law,[10] and would therefore likely produce different interpretations of the same federal constitutional right that would be controlling within the courts' respective jurisdictions. Such judicial interpretation might ultimately lead to the Supreme Court's creation of a uniform national definition, but the process of developing such a definition – the contours of which cannot be predicted with any certainty – would likely require years of litigation and produce a patchwork of inconsistent rights for crime victims in the interim. As a result, ratification of the proposed amendment would simply replace one patchwork of State laws protecting crime victims with another. But unlike the current patchwork – which at least preserves a uniform statutory definition applicable within all federal courts – ratification of the proposed amendment would produce an interim patchwork of rights not only from one State to another, but also from one federal jurisdiction to another.

7. *At the hearing, Assistant Attorney General Dinh described the rights established under the proposed amendment as "self-executing." To what extent are the flexibility problems you described a result of the rights being self-executing, and is there a way to avoid such problems while still achieving the amendment's goals?*

Response: Virtually all of my concerns about flexibility arise directly or indirectly from the fact that the rights established in the proposed amendment are self-executing. Because the substance of those rights would be established by the amendment itself, the only certain and effective way to provide flexibility is for the amendment itself to identify explicitly the circumstances in which the rights can be restricted or denied. In other words, by making the rights self-executing, the amendment makes it imperative for Congress to predict what circumstances may require what level of flexibility, and how the language it uses to preserve such flexibility will in fact be interpreted by the courts – and to get it right the first time.

There are at least two ways to avoid this problem, neither of which has yet been tried. The first, as set forth in my earlier statement, is to address the problem of non-uniformity in the

[10] Even within a single jurisdiction, the amendment's terms can mean different things in different contexts. In the federal system, for example, manslaughter is a "crime of violence" for purposes of determining whether a defendant should be sentenced as a career offender, *see* U.S.S.G. § 4B1.2(a), cmt. n.1 (2002), but is not necessarily such a crime for other purposes such as determining his immigration status. *See Jobson v. Ashcroft*, 326 F.3d 367, 372-73 & n.5 (2d Cir. 2003); *Dalton v. Ashcroft*, 257 F.3d 200, 207 (2d Cir. 2001).

States through spending-based federal legislation. However, some supporters of a constitutional amendment respond that spending-based legislation is insufficient because (a) some States may forego funding so as to preserve a lower level of protection for victims,[11] and (b) such legislation, unlike a constitutional amendment, would not have the symbolic value needed to change a judicial culture that too often ignores or mistreats crime victims.

Thus, the second way to avoid the problems associated with the establishment of self-executing constitutional rights accommodates both of those concerns. The pending bill would amend the Constitution by giving specific affirmative rights to the undefined class of crime victims, and would give Congress the power to enforce (but not define or limit the scope of) those rights. As an alternative, the Constitution could instead be amended simply by expanding the legislative power under Article I, Section 8 so as to allow Congress to pass victims' rights laws that control in State as well as federal proceedings. I have appended to this response an example of such an alternative amendment. This approach could solve several problems:

The "patchwork" problem. There is little disagreement that Congress has improved the rights of crime victims in federal cases, but has been unable to make such laws applicable in the several States (which, as a result, have a patchwork of more or less effective laws). By explicitly granting Congress the power to legislate for the States in this limited area, the alternative amendment would cure the "patchwork" problem in the most direct possible manner, and without the risk that some States might choose not to accept the changes, even at the risk of losing federal funding. It would also avoid the problem of different States adopting different definitions of the class of victims to be given rights under the federal Constitution.

The "culture" problem. While many supporters of an amendment readily concede that most of the injustices and indignities suffered by victims are already prohibited by existing laws, they believe that a constitutional amendment would help simply by virtue of the fact that it would better sensitize prosecutors and judges to the importance of honoring existing guarantees of victims' rights. To the extent they are right, it seems likely that any constitutional amendment specifically designed to help crime victims would have the desired effect. Any such amendment would represent only the 18th time in over two centuries that our nation has reached the extraordinarily broad level of consensus required under Article V of the Constitution to alter our fundamental law. Further, any such amendment would plainly highlight the importance of

[11] Given the fact that every State has already shown a willingness to alter its laws to improve the rights of crime victims, and given the fact that ratification of the proposed amendment would in any event require the overwhelming approval of State legislatures, this concern appears counter-intuitive. It also seems inconsistent with the confidence in the effectiveness of such financial incentives that Congress has shown on a variety of critically important matters, most recently with respect to the national Amber Alert system. *See* Pub. L. 108-21, tit. III, §§ 301-304, 42 U.S.C. §§ 5791-5791c (2003). In any event, enacting spending legislation would not foreclose a later constitutional amendment if some States failed to respond to the federal financial incentive.

affording legal protections to an identified group – victims of violent crimes – in a way comparable to very few other groups in our society.

The "conflicting rights" problem. Supporters of the proposed amendment are confident that it would not be interpreted to diminish the historic constitutional rights that all individuals now enjoy under the Bill of Rights. Some others have raised the concern that such confidence may prove to be misplaced. To the extent that the supporters of the current draft might be proved wrong, it will likely be because of the self-executing nature of victims' rights. But if the Constitution is amended simply by expanding Congress' power to legislate, it will be easy for courts to interpret the resulting legislation like other laws that cannot and do not purport to abridge other constitutional rights. However, once the Constitution is amended explicitly to protect crime victims, it will not be easy for courts to do what supporters of the amendment have cited as a problem in past cases: adopt a default practice of reflexively ignoring victims' rights so as to guard against inadvertently infringing a criminal defendant's rights. To the contrary, a defendant claiming (for example) that his rights would somehow be harmed by the vindication of a victim's specific participatory right, affirmatively established by legislation under the amendment, would likely bear the heavy burden of demonstrating the conflict. Further, if the observation set forth in the preamble to Section 1 of the current bill is correct, no defendant could possibly meet that burden and thereby trump the victim's right.

The "definition" problem. As noted above and in my prior written statement, I believe it is unlikely that the courts would interpret the proposed amendment to allow Congress to use its enforcement power to define the scope of victims' rights by defining key terms such as "victim" and "crime of violence." The importance of the issue is magnified if the rights are self-executing, because the uncertainty about who will be deemed to enjoy rights under the amendment makes it even harder to provide in advance for appropriate exceptions and remedies – as must be done if the rights are self-executing.[12]

The "flexibility" problem. Although there are differing views about the extent to which courts may allow pragmatic limitations on victims' rights, there is widespread agreement that some such limitations are necessary for mass-victim cases and cases where there is reason to believe the victims may seek affirmatively to frustrate law enforcement efforts. As noted above, an amendment establishing self-executing rights has only one chance to strike the right balance. But if the amendment simply empowers Congress to enact appropriate legislation, there is no such problem: any statute that proves either too rigid or too flexible can be amended. Further, given Congress' commendable history of passing at least 15 separate victim's rights statutes in the last two decades, there is little reason to fear that Congress will not take advantage of its new-

[12] In my sample alternative draft, Congress is explicitly given the power "reasonably to define" key terms for purposes of the amendment. Such language makes it clear that the terms are to be defined in the first instance by Congress rather than through judicial development of a common law, but uses "reasonably" to provide a judicial check on a legislative power to define constitutional rights that might otherwise be interpreted as unlimited.

found ability to export to the States the protections that have proved so effective in the federal arena.

The "remedies" problem. As noted in my earlier written statement, it is particularly difficult to set out in the text of the Constitution itself a limitation on the remedies available to victims whose rights are violated. If the rights are self-executing, some such limitation must be spelled out, as statutory or common-law limits would likely prove ineffective. But once we try to make the limitations on remedial action explicit, it seems our only choices are bad ones: If we choose a nuanced recitation that addresses the full range of foreseeable circumstances, the language will necessarily be inelegant. By opting for more elegant phrasing that speaks the language of the Constitution, we sacrifice clarity. And both approaches carry an obvious risk of unintended consequences. However, if the rights are not self-executing, but are conferred by legislation that the amendment empowers Congress to pass, then there is no need for the Constitution itself to address the issue of remedies at all – Congress can effectively tackle that issue in its implementing legislation.

ADDENDUM

The following is one example of an alternative approach to amending the Constitution to protect the rights of crime victims without establishing self-executing constitutional rights.

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States:

`Article--

`SECTION 1. The Congress shall have the power, through appropriate legislation, reasonably to define the terms "victim" and "violent crime" for purposes of this article and to ensure that a victim of a violent crime: receives reasonable and timely notice of public proceedings under the laws of the United States or any State involving that crime and of any release or escape of the accused offender; is not excluded from such public proceedings; is permitted reasonably to be heard at such public proceedings involving the accused offender's release, plea, sentencing, reprieve, or pardon; and enjoys the right to adjudicative decisions in such proceedings that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the convicted offender.

`SECTION 2. Nothing in this article shall affect the President's authority to grant reprieves or pardons, or deny or diminish any right guaranteed by this Constitution.

`SECTION 3. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 7 years from the date of its submission to the States by the Congress.'.

Answers Submitted by Steve Twist
In Response to
Questions Posed by Sen. Leahy
Following the United States Senate
Judiciary Committee Hearing
On S. J. Res 1,
A Proposed Constitutional Amendment to Protect Crime Victims

May 30, 2003

1. Imagine a situation in which a trial judge relies solely on the proposed amendment to allow a victim to speak at a proceeding over the defendant's due process objection. When the defendant appeals this decision, would the last clause of section 3 ("no person accused of the crime may obtain any from of relief hereunder") bar the appeals court from reversing on the basis of section 1 (describing the rights of victims as being "capable of protection without denying the constitutional rights of [the] accused")?

Answer: No. In the circumstance described, if the defendant obtained relief it would not be "hereunder" (referring to relief under the Crime Victims Rights Amendment), but rather would be pursuant to the Due Process Clause of the Fourteenth Amendment. The amendment erects no per se bar to a defendant obtaining relief under other provisions of the Constitution.

2. For purposes of section 2 of the proposed amendment, is the penalty phase of a capital case part of the trial (at which a victim does not have a right to be heard) or is it part of the sentencing proceeding (at which a victim does have a right to be heard)? If the latter, would a victim have a right under the proposed amendment to opine as to whether the defendant should be sentenced to life or death?

Answer: Certainly the penalty phase of a capital case would be a "sentencing ... proceeding" within the meaning of section 2 of the amendment. The U.S. Supreme Court will have to ultimately decide the question of whether or not a victim can make a sentencing recommendation in a capital case. As of now, courts have split on this question. I would note that there is no split on the question of whether a defendant, or for that matter, a defendant's loved ones may make sentencing recommendations in capital cases. They are routinely allowed. If the amendment is adopted the courts will still need to resolve this question.

3. Under section 2 of the proposed amendment, a crime victim has "the right to reasonable and timely notice of any public proceeding involving the crime." Please explain how this

provision would apply in multi-victim cases. For example, suppose that one victim of a multi-victim offense files a civil tort action against the offender for damages resulting from the criminal conduct. That action would be "a public proceeding involving the crime," even though the prosecutor may have no knowledge of it. Who would have the constitutional obligation to provide "reasonable and timely notice" to the other victims?

Answer: In the circumstance described no notice would be required because the civil proceeding would not involve "the crime," but rather the related, albeit distinct, tort.

4. (A) Are the rights established by the proposed amendment collectively shared by all victims of an offender's crime, or are they conferred independently on each individual victim? (B) If the rights are conferred on each individual victim rather than the group, then how can we be confident that practical solutions in mass-victim cases – such as allowing only representative victims to be heard at a bail hearing, or holding a lottery to decide who can enter a courtroom of limited size – would be constitutional, since such solutions would "deny" the rights of individual victims, even if they only "restrict" the rights of the group?

Answer: The rights are individual, even as the rights of defendants are individual. In the circumstance described, the right to be heard may be protected by allowing a brief written statement to be submitted to the court and the right not to be excluded may be protected by making accommodations for closed circuit viewing at another location, as was done in the Oklahoma City bombing trials.

5. Section 2 of the proposed amendment refers to "just and timely claims to restitution from the offender." (A) Does that clause establish a right to make claims to restitution, a right to obtain restitution, or a right to "adjudicative decisions that duly consider" claims to restitution? In other words, is the refusal to grant restitution appealable as a violation of this amendment? (B) Does your answer simply reflect how you personally intend the amendment to be interpreted, or do you have some basis under cases interpreting other constitutional amendments for concluding that judges would share your interpretation?

Answer: The amendment does not establish a right to restitution. Such a right would have to be established by state or federal law. Indeed such rights have been established by the laws of most states and the federal government. Once established, the amendment provides for victims a right to have the courts give due consideration to claims for restitution from the offender. The exact nature of the means by which a victim could seek review of a refusal to give due consideration to a claim for restitution, whether it would be "appealable" or subject to another form of post-sentencing review (e.g., special action), would depend on implementing legislation.

6. Section 3 of the proposed amendment states that "[o]nly the victim or the victim's lawful

representative may assert the rights established by this article." If a defendant raises an objection to having an indigent victim speak at a proceeding, who would handle the litigation on behalf of the victim? I assume the prosecutor would gladly do so for a victim who could not afford to hire counsel, but under section 3, would that be permissible? Would the prosecutor have the right or the duty to make what she believed to be a better argument on behalf of a represented victim?

Answer: The courts will ultimately decide the scope of the "lawful representative" definition. However, the United States or a State could provide by statute that a prosecutor was a "lawful representative" of a victim. Arizona, for example, has enacted just such a law. Whether it would be a "right" or a "duty" would depend on the language of the law and court decisions..

SUBMISSIONS FOR THE RECORD

July 15, 2002

To: Senator Dianne Feinstein (D-CA)
Senator Jon Kyl (R-AZ)

Re: Statement in Support for Victims' Rights Amendment to the U.S. Constitution

On August 20, 1999, Keith and Wendy Albright delivered a beautiful baby boy "Hunter Morse Albright". This was their first child and they were thrilled. They both had successful careers, a home and lots of family and friends. Because they wanted the best for their son, they went to a reputable Highland Park (Dallas) nanny agency to find a nanny that could be at their home during the day to watch their son.

On November 12, 1999 our beautiful two and half month old baby boy "Hunter Morse Albright" died a horrible death while in the care of his nanny. After we his parents, demanded an autopsy (which is required by Texas State law) the investigator found Hunter had died of a skull fracture. The nanny was then arrested on capital murder and held on $500,000 bail. Three days later she was released on $80,000 bail. We were never notified.

Because there was reason she would flee to Mexico to be with her parents, an electronic ankle bracelet was put on her for approximately a year. It took 2 years to go to trial, with multiple docket calls. We were never notified of any of the court hearings, even though our Texas Victim's Rights said that we were to be told. We contacted our District Attorney's office to find out when these court hearings were to be held and stated numerous times that we wanted to be notified. We attended approximately 3-4 of the docket calls. Four months before the trial, we received a phone call from the nanny. We saved the call notes and gave it to the Prosecutors office because she was now threatening us. That is when we found out she had been to court a week earlier and had her bracelet removed. Again, we were never notified.

Finally, in June 2001, the trial was held in Fort Worth, Texas with a Jury of 11. The nanny had four attorney's present at the trial, with one of them having a reputation of degrading witnesses and obnoxious behavior in the courtroom. Both Keith and Wendy were witnesses for the Prosecution. They had the top forensic scientist in the country and other witnesses who all confirmed, she, the nanny, was the murderer. Before the trial Keith and Wendy had been involved with the case and provided an abundance of information to be used in trial. They also requested to sit in during jury selection and at the trial. The Prosecutors discouraged them from being in the courtroom and said that they could ask the defense attorney but that they would have to give something back to the defense in return. Wendy asked that if they couldn't be in the courtroom that they put

a picture up the entire time of Hunter. The Prosecutor said that there would be lots of pictures of Hunter up in the courtroom. There never was.

The defense attorney attacked every part of our family and friends in the courtroom. He was full of rage and out of control the day Wendy was on the witness stand. The District Attorneys said he would come after me because I was Hunter's mother. However, this defense attorney made continuous put-downs, degraded her abilities as a mother, accused her of taking medications, flipped her and the judge off while she was on the stand, made rude accusatory comments to her without asking any questions and accused her of having prescriptions in her purse while on the stand. Her right to protection was eliminated when the defense attorney required her to point out people in the courtroom audience that she had talked to during the week of the trial. He made her have them stand up and give their names and relation to her. There were approximately10 people who stood up and were never sworn in. The Judge didn't say anything and the Prosecution didn't object. At that point Wendy realized that these people's lives could be in danger because of the nanny's violent family background. Wendy was on the witness stand for 6 continuous hours that day, all the while being humiliated, and lied about by this defense attorney. Our prosecutors did nothing to stop this re-victimization.

Neither Keith nor Wendy was allowed to be in the courtroom during any of the testimony. When the defendant was on the stand, Keith and Wendy were not allowed to be in the courtroom or know what she was saying. Later they found out she lied about several things that could have been proven, if Keith and Wendy were in the courtroom. The prosecutors refused to provide any information other than to say, " it is going well."

After approximately two weeks the Jury acquitted the murderer on all charges. No victim impact statement was allowed and no one told the media that everything the defense attorney said was a lie. We are writing this statement of fact, in hope that NO OTHER VICTIMS are treated in this manner in the courtroom. There needs to be protection, notification and rights for victims of these horrendous crimes, and there needs to be a standard of conduct upheld in the courtroom.

We have a real issue of how poorly our trial was conducted, what little control or concern the judge exhibited, and how unbelievable this verdict was. The facts of our case are accurate, and validated. We told the truth, only to have justice corrupted by a defense attorney who knows no ethics or morality.

Our lives remain shattered, and our hearts forever broken from the murder of our infant son, and the injustice we received from an indifferent and inattentive legal system.

Please contact us if we can be of further help.

Thank you for caring, for listening, and for making a difference.

Keith & Wendy Albright
817-423-2400

WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

1333 H Street, NW, 10TH Floor, Washington, DC 20005

Tel (202) 544-1681 **Fax** (202) 546-0738

April 7, 2003

Re: Oppose S.J. Res. 1, "An amendment to the Constitution of the United States to protect the rights of crime victims."

Dear Senator:

On January 7th 2003, Senators Feinstein and Kyl introduced S.J. Res. 1, "An Amendment to the Constitution to Protect the Rights of Crime Victims." This amendment would fundamentally alter the nation's founding charter and would apply to every federal, state and local criminal case, profoundly compromising the Bill of Rights protections for accused persons.

S.J. Res. 1 would give rights to victims of violent crime such as the right to notice of any public proceeding; the right not to be excluded from public proceedings, the right to be heard at release, plea, sentencing, pardon and reprieve hearings; an interest in avoiding unreasonable delay and just and timely restitution. The Amendment also provides victims with the right to "adjudicative decisions" regarding victim's safety, speedy trial and restitution. Although adjudicative decisions are not defined in the bill, this could be interpreted as providing victims with the right to a hearing on these issues.

Many of these provisions reflect laudable goals, but it is unnecessary to pass a constitutional amendment to achieve them. Every state has either a state constitutional amendment or statute protecting victims' rights and the proponents have not made the case that those measures do not protect victims' interests. More importantly, providing these "rights" to defendants will compromise the rights of the accused. It would be the first time in our nation's history that the Constitution was amended in a manner that restricted individual rights.

This amendment poses the same problems as previous versions and may create additional new problems.

The amendment does not protect the rights of accused persons. The wording of this amendment is the same as the version introduced in the 107th, but is different from previous versions of the Amendment introduced in earlier sessions of Congress. The effect of each version, however, is the same. If passed, the Amendment would erode the presumption of innocence; jeopardize the right to a fair trial; hamper the ability of law enforcement to effectively prosecute cases; discriminate between victims and impose legal liability on the states.

Many organizations that provide support to battered women are opposed to this amendment because battered women are often charged with crimes when they use force to defend themselves against their batterer. Under the VRA, the battering spouse is considered the "victim" and will have the constitutional right to have input into each stage of the proceeding from bail through parole. Why should batterers who have spent years abusing their partners be given special constitutional rights?

The Victims' Rights Amendment jeopardizes the right to a fair trial. S. J. Res. 1 would give crime victims a constitutional right to attend the entire criminal trial—even if the victim is going to be a witness in the case. In many instances, the testimony of a prosecution witness will be compromised if the person has heard the testimony of other witnesses. Despite the possibility of tainting his or her testimony, S.J. Res. 1 gives the victim a constitutional right to be present—even over the objections of the defense or prosecution.

S. J. Res. 1 would also confer an "interest in avoiding unreasonable delay." Any victim or representative of a victim of a violent crime has standing under the Amendment to intervene and assert a constitutional right for a faster disposition of the matter. This provision will threaten defendants' rights to effective assistance of counsel if defendants are required to go to trial before their attorneys are ready. Furthermore, the right could compromise the prosecution's case if it is not ready to proceed to trial but must do so at the victim's insistence. Under the first scenario innocent people may be wrongfully convicted; under the second scenario guilty people may go free. Most importantly, protecting the rights of a person accused of a crime would no longer be a preeminent focus of a criminal trial.

The Amendment is likely to be counter-productive because it could hamper effective prosecutions and cripple law enforcement by placing enormous new burdens on state and federal law enforcement agencies. Instead of putting their resources towards prosecuting crimes, states will be required to divert tremendous resources to make sure that victims are given notice about every hearing and be given the opportunity to be heard "at public release, plea, sentencing, reprieve, and pardon proceedings."

It is unclear how much weight judges will be required to give to the views of a crime victim if he or she objects to an action of the prosecutor or judge. For example, what if a victim opposes a negotiated plea agreement? Over 90 percent of all criminal cases are resolved through negotiation rather than going to trial. Even a small increase in the number of cases going to trial would burden prosecutors' offices. There are many reasons why prosecutors enter into plea agreements such as allocating scarce prosecutorial resources, concerns about weaknesses in the evidence, or strategic choices to gain the cooperation of one defendant to enhance the likelihood of convicting others. Prosecutorial discretion would be seriously compromised if crime victims could effectively obstruct plea agreements or require prosecutors to disclose weaknesses in their case in order to persuade a court to accept a plea. Ironically, this could backfire

about the fact that the amendment only covers victims of "violent" crime? This means that a person who has been the victim of a misdemeanor assault would have constitutional rights, but an elderly widow who has been swindled out of her life savings would not. It also means that victims in different states will be treated differently because each state has its own laws defining what is and is not a crime of violence, e.g. some states consider burglary a crime of violence, while others consider it a property crime. Persons in adjoining states might have different rights under the federal constitution creating a chaotic and unfair situation.

A constitutional amendment is not the solution. Crime victims deserve protection, but a victims' rights constitutional amendment is not the proper way of providing it. S.J. Res. 1 unnecessarily amends the federal constitution, places inflexible mandates on states, may hinder prosecution of criminal cases and threatens the rights of the accused. We urge you to vote against this amendment.

If you have any questions, please do not hesitate to contact us by calling Terri Schroeder at (202) 675-2324. Thank you very much for your attention to this important issue.

Sincerely,

Laura W. Murphy Terri A. Schroeder

Laura Murphy
Director

Terri Schroeder
Legislative Representative

CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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EXECUTIVE DIRECTOR
LAWRENCE G. BROWN

July 11, 2002 Sent Via Fax & US Mail Service

The Honorable Dianne Feinstein
United States Senate
SH-331 Hart Senate Office Building
Washington, D.C. 20510-0504

The Honorable Jon Kyl
United States Senate
SH-730 Hart Senate Office Building
Washington, D.C. 20510-0504

Dear Senators Feinstein and Kyl:

On behalf of the California District Attorneys Association (CDAA), I am pleased to inform you of our endorsement and support of Senate Joint Resolution 35 and House Joint Resolution 91, the Victims' Rights Amendment. CDAA invited Steve Twist to the Annual Conference in June. Mr. Twist addressed both the Victims' Rights Committee, who voted to support the Amendment, as well as the Roundtable held with the Elected District Attorneys in California.

The District Attorneys of California and the California District Attorneys Association have been in the forefront of advocating the rights and protections of crime victims in California. We have sponsored significant legislation and collaborated with other agencies and crime victims organizations to ensure that the victim's voice is heard in the criminal justice system. The California District Attorneys Association remains committed to fighting for the rights of crime victims and the Amendment gives those victims significant protections through the fundamental law of the country.

Senate Joint Resolution 35 and House Joint Resolution 91 protects the rights of victims without impeding the rights of the accused. While balancing meaningful and enforceable rights of a victim with those of the accused, the Amendment preserves the prosecutor's executive function in the administration of justice.

We are pleased to join the many organizations and individuals who have pledged support for this very important and monumental legislation. If we can be of any further assistance, please do not hesitate to contact us.

Very truly yours,

Lawrence G. Brown
Executive Director

LGB:lkh

pc: The CDAA Board of Directors
California District Attorneys

Crime Victims' Rights Amendment

April 8, 2003

U.S. Senate Judiciary Committee

Collene (Thompson) Campbell. *Campbell is a former Mayor and currently a city councilwoman in San Juan Capistrano, CA. She is a Commissioner for the State of California serving on the Commission on Peace Officer Standards and Training (POST).*

Honorable Chairman Hatch and Honorable Committee Members:

Our only son is dead because of a weak and a crime-forgiving criminal justice system. We are one of the hardest hit crime victim families in the Nation, but we are just one family, out of hundreds of thousands. We continue to be deeply saddened by the four September 11th terrorists attacks. It is beyond belief to realize that every ten weeks there are as many people murdered right here in America as were killed in all four of those horrible attacks.

Our son, Scott, was strangled, by two repeat felons, and thrown from an airplane into the Pacific Ocean. Sadly, we never even found his body.

My brother, my only sibling, auto racing legend Mickey Thompson and his wife Trudy were shot to death as they were simply leaving their home on their way to work in the morning. For any family to deal with murder, is near impossible. But, to allow the American justice system to add additional pain is intolerable and shameful.

Since the American Revolution, our family has fought in every major war, for equality and freedom. We have worked hard, contributed greatly and never asked for a hand out from anyone. My family believes the U.S. Constitution was written to protect, balance and establish justice, yes establish justice. And, that is true, it does establish justice, unless, or until you have the misfortune of becoming a victim of crime. There has been tremendous pain to our family and expanding that grief, the moment we became victims of crime, our rights were ignored in favor of the killers. That means, a murderer or a rapist has rights not afforded to honest victims, all because we, the victim, are not mentioned in our U.S. Constitution.

My husband and I were not permitted to be in the courtroom during three trials for the men who murdered our son. We were forced to sit in the hall. Yet, the killers, along with all their party, were inside the courtroom portraying a family unit. We were not allowed to be heard, yet the killer's family members were able to testify in front of the jury, proclaiming the goodness of the defendants. We were not notified of a hearing before the court. Therefore, no one was there to represent, Scott, our murdered son. Yet in full force, forty members of the killer's group were present.

The murder case was then overturned, there was to be another trial, the killer was released, without consideration or concern for our safety, and we learned of all this through the media. I called the Attorney General's prosecutor on our case and asked why she hadn't bothered calling or notifying us regarding the appeal. Her answer was demeaning, but typical. She said: "We never notify the victims, they simply don't understand." However,

we knew the true reason, unlike the killer's defense, she was not required, by constitutional right, to notify us — we were only the Mom and Dad of the murdered victim, his next of kin!

We were obligated to pay $2,000.00 to get our Son's car out of storage, after it had been impounded and stored by the police for evidence. I could go on and on. But, I can guarantee you, the treatment that we, and thousands of other victims received, is the product of others before us doing nothing and hopefully you are not willing to continue that pattern.

You rarely hear from people like me, because victims are too devastated to talk. We receive no financial help to inform and expose the true reality of the victim's world, nor do we have attorneys representing us. Like today, we pay our way, in our well-meaning effort to improve the justice system, so others will not be forced to endure the injustice. And, unlike the defense attorney's associations we are unable to contribute to the policy makers or legislators. Victims are forced to fend for themselves. Our only asset is the honesty and integrity of good Americans asking for a fair and balanced justice system.

Senators, what we victims fail to understand, is how, in this great Nation, we have allowed the violent criminals to have more rights than honest, law-abiding good American citizen, who, through no fault of their own, have become victims of violent crime. I'm certain this is not what the Founders of this great nation and the authors of our Constitution intended and it needs to be corrected immediately. At a huge cost to taxpayers, and my families personal life, we have continued to be in the court system for 21 straight years, with no right for a speedy trial and there is no end in sight.

We ask you to move forward rapidly with the proposed Constitutional Amendment that will protect and give the same rights to crime victims, as those afforded to accused criminals. The amendment we seek does not take away rights from the criminal.

It is appalling that a vicious murderer has more rights than law-abiding American citizens. Unfortunately, the justice system has been broken and it needs to be fixed — now. The reality is that law abiding citizens are forced to suffer tremendous additional pain and mistreatment because of a system that fails to take into account that crime victims should be protected, not punished. The system is upside down, we overly protect and coddle the criminal, all at great expense to law abiding Americans, not exactly what the authors of our great United States Constitution intended. Obviously, the Constitution was written prior to underhanded defense attorneys defending their client, at all cost and by any means, often eliminating the ultimate goal — the finding of truth.

I was just an average American mom, with my family being my top priority. I had the privilege of marrying a wonderful man. I took my children to dance lessons and football practice, I was PTA president, with my life revolving around my children. But like many others, I wore blinders and went about my life, without ever realizing the devastation violent crime could cause in the lives of good citizens, for ever. My father was a police officer, and like most families, we believed in the American dream. But, that dream turned into a terrible nightmare, which all too many have experienced. Victims are living the never-ending grief and torment brought on, first; by an act of violent crime, and then; expanded by inequities within our criminal justice system. That just isn't right.

I am only one person, but I represent the stories of hundreds of thousands of good, hard working, law abiding citizens, who, through no fault of their own, have became victims

of violent crime. To bring this into perspective, remember there are about 23,000 murders each year in America. That's murders, add to that rapes, robbery, child molestation, domestic violence and all the other violent crimes. Multiply that by the impact on family and friends of the crime victims. Senators, there are millions of Americans who need your help, millions of good people.

The Council On Crime In American, recently released a bipartisan task force report of Violent crime in America for 1993, the financial cost to our nation, for those crimes, was about $426 billion. And yet, we pamper and favor the criminals who are the cause of financial ruin and emotional distress for our nation, not quite what our American citizens desire!

I've had to muster up some pretty strong determination to speak here today, and I apologize if I have a little trouble telling my story. I am deeply wounded and it is extremely difficult for any of us, who wear the scars of violent crime, to share that pain and our circumstances. But I'm certainly going to try. I am extremely proud of my family, our strength, courage, dignity and our integrity. However, our status in the community did not change the cruel treatment we received from the criminal justice system.

Senators, I don't have to tell you how we felt then, or how I feel right now just talking about it. But I share this experience with you today, because something is terribly wrong with that sort of mentality, that reeks of disrespect, total disregard, and a complete lack of compassion. Just because we have become the brunt of violent crime, that does not make us second class citizens, we are still part of America and we should be protected by our constitution.

You see, it is not we, who do not understand. It is our law makers who must understand that we have a justice system which has fallen off track. A justice system which now permits insensitive decisions that, forever, negatively impact and influence the lives of devastated, but honest, law-abiding citizens.

Many believe, crime victims are important enough to be included in the Constitution of this great country, just like the criminals who have murdered our loved ones. I don't believe in giving an advantage to <u>any</u> segment, but it is ludicrous that our legislators have given such a great advantage to murderers and other violent criminals.

I ask you to think, try to relate, and yet, I truly hope that you here today are never forced to fully understand our feelings, through your own personal experience.

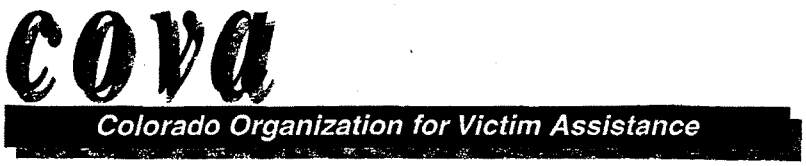
We who have lived the tortures of being crime victims, but who have also had the privilege to live our lives as honorable Americans, are simply asking to have the same level of constitutional rights as the criminal, no more — no less, that seems more than fair doesn't it?

Senators, you are responsible for all the American people who need protection under the Federal Constitution. States look to the Federal Government for leadership in areas affecting criminal justice. Give them clear and fair direction, make this amendment that will be sensitive to an entire Nation's needs.

This is not a partisan issue, it is simply the right thing to do. In talking with thousands of crime victims, I have never heard of a perpetrator who first asked their victim if they were a Democrat or Republican before they committed their crime. It is important you do the same, making this a non-partisan issue, as you lead the vote on this constitutional amendment.

We do allow great rights for criminals with tremendous sacrifice to victims. Another painful example: My nightmares include the question of how our son actually met his death. Did he become unconscious from strangulation, or was he alive when they threw him out of the airplane? Did he feel the fall, try to swim and drown or was he dead when he left the airplane or did it kill him when he hit the water? It is the killers right to keep this information silent! It is my burden to never know the answer. Don't tell me it is too much to ask that victims are allowed to attend criminal proceedings.

Mr. Chairman and Senators, thank you for all you do. May God bless you and help you to make the right decision for all the American people.



July 16, 2002

Sen. Dianne Feinstein
United States Senate
Washington, D.C.

Sent by facsimile: 202-228-2258

Dear Sen. Feinstein:

The Colorado Organization for Victim Assistance wholeheartedly supports S.J. Res. 35, the Feinstein-Kyl Victim Rights Amendment. COVA is a nonprofit, statewide membership organization with over 900 members, including personnel from the criminal justice system, nonprofit organizations providing assistance to victims of crime, survivors of crime, concerned citizens, and members of allied professions (education, mental health, clergy, etc.).

Colorado's voters passed a Victim's Rights Amendment in 1992, establishing the right of victims of crime to be heard, informed and present at all critical stages of the criminal justice process. During the past decade, Colorado's experience has proven that victims can be treated with fairness, dignity and respect, without any adverse effect on the rights already afforded to defendants.

We firmly believe that crime victims throughout the country need and deserve the same constitutional protection that Coloradans now enjoy. We endorse S.J. Res. 35, and support its passage by the Senate as soon as possible.

Sincerely,

Nancy Lewis

Nancy Lewis
Executive Director

789 Sherman Street, Suite 670, Denver, CO 80203
(303) 861-1160 • 800 261-2682 • Fax (303) 861-1265 • TTY (303) 861-8315

Higgins, Stephen (Judiciary)

From: Howard Rodstein [sdoell@crimevictimsunited.org]
Sent: Monday, April 07, 2003 3:16 PM
To: Higgins, Stephen (Judiciary)
Subject: Victims Rights Amendment

Dear Senators Kyl and Feinstein:

As President of Crime Victims United of Oregon and on behalf of countless victims of crime in our state, I would like to register my organization's strong support for S.J. RES. 1.

Since Crime Victims United was founded 20 years ago, we have worked closely with the Oregon Legislature and sponsored many ballot initiatives to advance the rights of crime victims. It has been a long struggle and we have made progress.

But in working with hundreds of victims of violent crime over those years, we have found that the statutory rights of victims, lacking a constitutional foundation, are too often denied or ignored. That is why we strongly support S.J. RES 1 and are grateful for the leadership you have provided.

Steve Doell
President, Crime Victims United

http://www.crimevictimsunited.org

Department of Justice

STATEMENT

OF

VIET D. DINH
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

PROPOSED VICTIMS' RIGHTS CONSTITUTIONAL AMENDMENT

PRESENTED ON

APRIL 8, 2003

Testimony of Viet D. Dinh
Assistant Attorney General for the Office of Legal Policy
United States Department of Justice
before
The United States Senate
Committee on the Judiciary
April 8, 2003
Proposed Victims' Rights Constitutional Amendment

Good morning Mr. Chairman, and distinguished members of the Committee. Thank you for the opportunity today to reiterate the support of the Department of Justice and the Administration for S.J. Res. 1, the Crime Victims' Rights Amendment. As President Bush stated on April 16, 2002, "The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do. And the Feinstein-Kyl Crime Victims' Rights Amendment is the right way to do it."

Both the President and the Attorney General strongly support guaranteeing rights to victims of violent crime, and we agree with the sponsors that these rights can only be fully protected by amending the Constitution of the United States. S.J. Res. 1 is the right way to do it because it strikes the proper balance between the rights of victims and the rights of criminal defendants.

As the principal Federal law enforcement agency, the Department of Justice is keenly aware of the effects that the Crime Victims' Rights Amendment would have on the landscape of the criminal justice system. There is no doubt that, were the amendment to pass, it would prompt significant adjustments in how Federal, State and local prosecutors discharge their responsibilities. Accordingly, the Department has reviewed the proposed amendment in light of our prosecutorial function within the criminal justice system, our commitment to fundamental fairness and justice for defendants, and our support of the rights of crime victims. We believe the language of the proposed amendment properly advances all of these interests.

The amendment would protect victims' rights before all levels of government in the United States. At least thirty-three States have recognized the importance of granting constitutional guarantees to victims of crime by amending their State constitutions. Additionally, most States have passed statutory protections for victims of crime. The proposed amendment respects the role of State and local governments because it does not bar them from providing additional or broader rights to victims. Instead, it provides a floor rather than a ceiling of the rights to be afforded to victims of crime.

Although there have been State and Federal legislative efforts to grant victims many of the rights contained within this amendment, in our view the statutory rights of crime victims are at times subjugated to the rights of criminal defendants. One example is the Oklahoma City bombing trial of Timothy McVeigh, where the judge barred victims from attending the trial

because of the possibility that they might later be called to testify at sentencing.[1] This decision forced victims to choose either to testify at sentencing against the man accused of murdering their loved ones, or to witness his trial. They faced this untenable choice even though 42 U.S.C. § 10606(b)(4) provides victims a right to be present at "all public court proceedings related to the offense." Although the prosecutors, the Department of Justice, and various State Attorneys General asked the court to reconsider, the decision stood. And when the victims attempted to vindicate their rights under Federal law, the court ruled that they lacked standing to challenge the adverse decisions. Congress intervened and passed the Victims' Rights Clarification Act of 1997. However, it is impractical and unrealistic to expect that Congress can and will intervene to pass legislation each time a victim is denied his or her right to participate in the criminal justice system.

State efforts to protect the rights of crime victims also have proved as inadequate as Federal legislation. Even where States have passed strong victims' rights statutes or ratified victims' rights amendments to their constitutions, these efforts to secure victims' rights have been limited, undermined, or nullified by judicial decisions. This was best illustrated in a study conducted by the National Institute of Justice in 1998.[2] After surveying more than 1,300 crime victims, the study concluded that although "[s]trong victims' rights law make a difference, . . . even where there is strong legal protection, victims' needs are not fully met."[3] Consequently, the Department strongly supports the effort to amend our Federal Constitution to provide the highest possible level of protection for victims of violent crime.

I would like to summarize briefly the provisions of the amendment and articulate our understanding of and support for each of them:

Section 1 sets forth the important principle that the rights of victims of violent crime are "capable of protection without denying the constitutional rights of those accused of victimizing them." This section serves as a preamble and simply declares the rights of victims of violent crime "are hereby established," without further specification. The substantive rights granted by the amendment and the restrictions thereon are enumerated in section 2. Although as a preamble, this section does not confer upon victims any specific rights, the Department strongly supports the proposition it espouses: that the rights of both victims and accused can be protected and accommodated in the constitutional structure.

The Department believes that all victims of crime deserve to be treated with fairness and dignity in the criminal justice system. By focusing on victims of violent crime, however, the

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[1] 106 F.3d 325, 335 (10th Cir. 1997).

[2] *The Rights of Crime Victims – Does Legal Protection Make a Difference?*, Published by The Department of Justice, December 1998.

[3] Id.

proposed amendment recognizes the more detrimental effects that violent crime has on the most vulnerable of victims.

The Department strongly supports the grant of specific constitutional rights to ensure that victims of violent crime have a voice in the criminal justice system. Section 2 delineates these rights in three categories and provides a specific standard for any restriction of these rights. This section defines the scope and strength of the rights to be established by the proposed amendment and, in the Department's view, advances the rights of victims while protecting the constitutional rights of the accused and ensuring the proper, orderly administration of criminal justice.

- "[T]he right to reasonable and timely notice of public proceedings involving the crime and of any release or escape of the accused."

This guarantee recognizes the importance of allowing victims the opportunity to be apprised of matters that concern their victimization. The "reasonable and timely notice" language places the responsibility of providing notice on the governmental entity but would not make prosecutors or courts the guarantors against circumstances that may prevent the victim from receiving actual notice. The reasonable notice requirement also allows the government to rely upon the current contact information provided by the victim or his or her representative. There are a number of situations where an actual notice requirement might prove untenable, such as in crimes involving mass casualties and where a victim has moved away without informing law enforcement officers or prosecutors. By guaranteeing notice to "public proceedings," moreover, the proposed amendment preserves flexibility for situations where prosecutorial and judicial concerns, for necessity, require that proceedings be closed to the public.

- "[T]he rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings."

For years, victims and their advocates have complained that the criminal justice system is indifferent to their interests because they are excluded from public proceedings that affect their well-being. The Department agrees with these sentiments. We therefore strongly support the right of victims of violent crime not to be excluded from public proceedings involving the crime.

By guaranteeing victims the right to be heard in the specified public proceedings, the amendment recognizes that victims should have an important voice in the criminal justice system and that expression of their voice both furthers the interests of justice and contributes to the victims' ability to cope with the crimes perpetrated against them. The "reasonably to be heard" language allows the judge or decision-maker to exercise his or her discretion to decide whether the right to be heard would best be satisfied orally or in writing, personally or through representatives.

- "[A]nd the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender."

The Department supports granting victims of violent crime the right to due consideration of certain interests that go to the very heart of their victimization--their safety, interest in finality, and restitution from their offenders. This clause ensures that in adjudicative decisions, including decisions of parole boards, proper consideration will be given to the three substantive interests enunciated. By limiting the clause to adjudicative decisions, the amendment properly does not regulate internal and deliberative decisions by law enforcement and prosecutorial personnel.

The Department is committed to ensuring the finality of judgments, and thus supports limiting restitution claims to those that are "just and timely." In previous versions of a proposed constitutional amendment, there was no such limitation. The result would have been to allow considerations of claims that were not warranted by the facts or were raised long after the adjudication of responsibility for the crime.

- "These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."

Among the primary functions of the Department is the administration of the criminal justice system. In order to discharge this function, the Department believes that prosecutors and law enforcement officials must retain a certain amount of flexibility to carry out their duty to bring offenders to justice in a timely and efficient manner. In addition, we are cognizant of these same considerations faced by State and local entities in the administration of their duties. Therefore, our major concern with a constitutional amendment protecting the rights of victims is that our prosecutorial and law enforcement responsibilities are not unnecessarily burdened so as to impair our ability to prosecute criminals. This is especially true in cases involving thousands of victims, such as acts of terrorism or mass violence. In those cases, it would be exceedingly difficult, if not impossible, both to prosecute the defendants successfully and to ensure that the rights of each of the several thousand victims are individually protected.

I would like to thank the sponsors for acknowledging this concern. The proposed amendment, in the Department's view, protects the rights of victims and ensures the proper investigation and prosecution of crime by allowing for restrictions only where there is a substantial interest in public safety or the administration of criminal justice.

The Department agrees with the two-tiered approach contained in the exceptions clause of section 2. The Department fully supports the lower standard for overriding victims' interests ("substantial interest") when the matter concerns public safety or the administration of justice, while requiring the higher standard ("compelling necessity") for other possible justifications. Where the interest that competes with a victim's right is one that implicates public safety or the

administration of justice, the "substantial interest" test strikes the proper balance between the competing concerns. For other types of interests, the more stringent "compelling necessity" test is the right standard to employ.

Although we support granting these rights as outlined above and trust that the proper enforcement mechanisms will be forthcoming in implementing legislation, the Department strongly supports the language contained in section 3 which states: "Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder."

The point and purpose of this amendment is to provide constitutional rights to victims, not to provide additional constitutional rights to criminal defendants. We would oppose any new cause of action that would be detrimental to our prosecutors and detrimental to the efficient management of the criminal justice system. State and local prosecutors would also be adversely affected if this amendment could be used in such a way as to hold them responsible when a victim felt that his or her rights were being deprived. The Department supports the need to protect the finality of judgments and believes that judgments should not be disturbed by the passage of this amendment. The Department also believes that the proposed amendment should not be used as a tool to slow down criminal proceedings (such as the use of injunctive relief to delay a proceeding) that would ultimately benefit the criminal defendant. Remedies for a violation of the rights specified in the proposed amendment should be unrelated to the outcome of the case.

Furthermore, the Department's view is that the amendment should confer standing only on those for whom it was intended to benefit. Therefore, the limiting language in the final sentence of this section is both appropriate and necessary. It precludes a criminal defendant from asserting the rights of victims under theories of third-party standing.

The Department fully supports the language contained in section 4 of the amendment, which provides that "Congress shall have the power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons."

Although the amendment is self-executing to a large extent, and therefore the rights are seemingly enforceable even in the absence of specific legislation, the Department welcomes any implementing legislation that Congress may deem appropriate. It is the Department's hope that Congress, when considering any implementing legislation, will strive to minimize the difficulties that could arise if Federal, State and local prosecutors were unable to predict what their proper response should be in certain situations. The Department looks forward to working with the Congress on such implementing legislation.

In addition, the Department strongly supports the limiting language that will prevent Congress from enacting legislation that would affect the President's power to grant reprieves and pardons. The President's reprieve and pardon power under Article II of the Constitution is plenary and is in no way affected by the proposed amendment.

The Department fully supports section 5's limitation on the ratification period to seven years from the time Congress submits the amendment to the States. The limitation is necessary to ensure that the ratification period does not remain open in perpetuity, possibly outliving the intent and circumstances of its original passage by the Congress. In addition, the Department supports the 180 day lapse period between the time of ratification and the time that the rights conferred will take effect. This language allows sufficient time for notifying all parties impacted by the amendment of its requirements and ensures that the proper framework is in place to accommodate the rights of victims.

Thank you once again for allowing me to appear before you today to voice the support of the President and the Department for this important measure. For too long, victims have been silenced by a criminal justice system that does not fully protect their rights, and I would like to thank Senators Kyl and Feinstein for their continued pursuit of this important objective. The Department looks forward to working with the Congress in the future to see that this measure is passed and to assisting in fashioning appropriate implementing legislation.

Statement of Earlene Eason
8 April 2003
U.S. Senate Committee on the Judiciary

Mr. Chairman and Senators,

My name is Earlene Eason. I reside in Gary, Indiana. I strongly support the Crime Victims' Rights Amendment.

I would like to share with you my unfortunate experience as a crime victim after the murder of my sixteen year old son, Christopher. He was murdered on July 16, 2000. I had relocated from Minneapolis, Minnesota, to Gary, Indiana. About a year after relocating, I thought allowing him a few weeks vacation with a neighbor, Penny Jackson, back in Minneapolis would help ease Christopher's transition to a new city.

Back in Minneapolis, while on vacation, my son was killed — murdered in a manner in which no human being deserves to die. He was shot point blank in the lower back with a sawed-off shot gun. Forensics revealed that my son was trying to run when he was grabbed by the back of the shirt and pulled back onto the barrel of the shotgun and then the trigger was pulled. The killer was a 24-year-old from El Salvador.

After my son's murder, the criminal justice system in Minneapolis treated me very badly. First, I was not informed of the death of my son by the authorities. Over thirteen hours after my son's body was found Ms. Penny Jackson called. My family and I were not told we had any rights. However we were promised, by the district attorney's office, that they would keep in touch with us about the case.

This would turn out to be an empty promise.

First, the D.A. said the charge would be First Degree Murder. We only learned of the actual charges filed — which were second-degree murder from the newspaper. Only after the press had printed and distributed the newspaper and after we had read it were we notified.

We also experienced significant financial hardship because of other failures to give us adequate notice. All of this wasted expense, which we could not afford, was due to constant trips to Minneapolis for court dates, which were frequently changed without adequate notice to me and my fiancé. My son's father, who resides in California, purchased several airline tickets, but he was never advised by the District Attorney's office of changes in court dates. He became so frustrated that he gave up on coming to any hearing due to the expense of cancelled tickets and the fear of losing his job from the disruption in his work schedule.

The first trial was a hung jury, 11 to 1 to convict. The trial took place on Oct 17, 2000. When I and other members of the family asked for another trial we were treated as invisible simpletons. Approximately 2 months later, the D.A.'s office and defense attorney decided to plea bargain. I was informed of this only after the fact; they had already agreed to the plea bargain. I was informed of the initial date for plea and sentencing dates, but there were several continuances. We received very short notice of these changing dates, which was very disruptive to my fiancé's job. Finally, the date was set for 9-12-2001. We were going to fly to

Minneapolis from Chicago. Then the airports were shut down because of 9-11. I called the District Attorney's office and asked for the proceeding to be rescheduled. The Deputy D.A. affirmatively discouraged me from attending. He believed it was more important to have a tactical advantage by getting a sentence the day after 9-11 than it was important for me, the mother of a murdered son, to attend and speak at the sentencing of my son's killer. The D.A. did not ask the court for a continuance on our behalf, even though there had been many continuances granted for other reasons, and I had never asked for a continuance before. As a result I was unable to appear in court to try to object to the plea bargain or speak at sentencing, even though it was very important to do so. My son's cold blooded killer is getting only 11 years of real time for killing my son. I feel like the D.A. and the justice system thought that this was just another African-American kid killed, and that our family didn't deserve to be treated with plain decency.

I was told I could not get restitution. This does not seem right. The Constitutional Amendment would greatly help victims efforts to get restitution. We were assured we would get financial help for therapy and I went for as long as I could pay for it out of my own pocket, then I had to stop because I could not afford it anymore. As a result of no therapy I became physically sick and could not work. To this day we received no financial assistance for therapy.

In closing I would like to say we were treated without compassion or respect by a justice system that really didn't care. People receive more compassion for the loss of a pet than we received from the justice system for the

loss of our son.

I would like to ask the Senate to hear us, to realize that we — the victims of crime — should not have to take this anymore. I feel powerless, but I know you have the power to vote yes on the Constitutional Amendment to keep what happened to us this from happening to any more victims. It is time for you to stand by me and for you to pass this Amendment so that people like me don't have to take this anymore. We should have had rights in this case and we had none.

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July 15, 2002

Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

Dear Senator Feinstein:

On behalf of the more than 19,000 members of the Federal Law Enforcement Officers Association (FLEOA), I want to express our strong support for the Crime Victims' Rights Constitutional Amendment.

FLEOA, the voice of America's federal criminal investigators, agents, and officers, is the largest professional association in the nation exclusively representing the federal law enforcement community. FLEOA, a non-partisan, volunteer organization comprised of active and retired federal law enforcement members from the agencies listed on the left side of this document are dedicated to the advancement of the federal law enforcement community.

We are an organization comprised of individuals who have dedicated their lives to protecting and serving the American public. It is our belief that the time is right to amend the Constitution to correct the injustice that has developed in this area. This amendment will ensure those who have been touched by crimes of violence are not further victimized by laws that may prevent them from being notified, and provided the opportunity to be present and heard at critical stages of their cases. We believe that the Founders created the Constitution to be a living document and this proposed amendment is consistent with that principle.

FLEOA looks forward to working with Congress and the States in securing passage of the Crime Victim's Right Constitutional Amendment. Please do not hesitate to contact me on this issue or on any other legislative matter impacting federal law enforcement. I can be reached at (212) 264-8406.

Richard J. Gallo

News From:

U.S. Senator
Russ Feingold

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Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Committee Hearing on
The Victims Rights Amendment

April 8, 2003

I share the desire to ensure that those in our society who most directly feel the harm callously inflicted by criminals do not suffer yet again at the hands of a criminal justice system that ignores victims. A victim of a particular crime has a personal interest in the prosecution of the alleged offender. Victims want their voices to be heard. They want and deserve to participate in the system that is designed to redress the wrongs that they -- and society -- have suffered at the hands of criminals.

But Congress should proceed very carefully when it comes to amending the Constitution. After thinking long and hard about this issue since I've been a U.S. Senator and this amendment has been proposed, I am just not convinced that an amendment to the Constitution is a necessary means to bring about the end of protecting the rights of victims that we all share. I believe that Congress can better protect the rights of victims by ensuring that current state and federal laws are enforced, providing resources to prosecutors and the courts to allow them to enforce and comply with existing laws, and working with victims to enact additional federal legislation, if needed.

In the 214-year history of the U.S. Constitution, only 27 amendments have been ratified -- just 17 since the Bill of Rights was ratified in 1791. Two of the 17 concerned prohibition and so cancelled each other out. Yet, literally hundreds of constitutional amendments have been introduced in the past few Congresses.

To change the Constitution now is to say that we have come up with an idea that the Framers of that great charter did not. Yes, there are occasions when we need to bring the Constitution up to date, as with granting women the right to vote and protecting the civil rights of African-Americans after the Civil War. But I do not believe that the basic calculus of prosecutor, defendant, and victim has changed enough since the foundation of the Republic to justify this significant action. There was some debate on this when we considered the amendment on the floor

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in the 106th Congress, but I think it is fairly well-established that public prosecutions were the norm when the Constitution was written and adopted.

I also believe that it is impossible to foresee the needs of all victims. Statutes are a better, more flexible, and faster response than amending the Constitution. For example, Congress enacted a statute after the Oklahoma City bombing and created a victims compensation program after September 11th.

But unlike statutes, constitutional amendments cannot be easily modified. Once this amendment is ratified, if some new development in the law requires a change to the amendment, we would once again need to get approval of 2/3 of the members of each house of Congress, and then ratification by 3/4 of the state legislatures. This is a real problem because there are numerous uncertainties about the effect of this amendment. Even the sponsors have re-written the entire amendment since the last time it was considered by the Senate.

I might add, however, that of all the constitutional amendments that I have considered since I became a Senator, this one is perhaps the most appealing because the goal is so laudable. In fact, as I noted before, as a Senator in the Wisconsin State Senate, I voted in favor of amending the Wisconsin state constitution to include protections for victims. The majority of the states now have a state constitutional protection for victims, and every state in the country has statutes to protect victims.

But the Wisconsin state constitution, like a number of other state constitutions, appropriately clarifies that the rights granted to victims cannot reduce the rights of the accused in a criminal proceeding. Unfortunately, the proposed victims' rights amendment before us today does not contain a similar provision. This has been a source of significant debate in past years. Proponents of the amendment have argued that the rights of the accused are not undermined by giving victims constitutional rights. Yet, they have steadfastly refused to add a clause such as that contained in the Wisconsin state victims' rights amendment to make it absolutely clear that that is the case. In my opinion, they have never provided a convincing justification for that refusal.

Finally, I am concerned that a victims' rights amendment could jeopardize the ability of prosecutors to investigate cases, prosecute suspected criminals, and balance the competing demands of fairness and truth-finding in the criminal justice system.

And, so, today, I look forward to hearing from our witnesses on the issue of whether it is necessary for Congress to take the rare and extraordinary step of amending the Constitution to protect the rights of victims. I will be interested to see if the proponents have better answers to the questions I have raised or have new evidence that this amendment is really needed when we have available alternative means of accomplishing our shared goals.

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News from . . .

Senator Dianne Feinstein

of California

FOR IMMEDIATE RELEASE:
Tuesday, April 8, 2003

Contact: Howard Gantman
or Scott Gerber 202/224-9629
http://feinstein.senate.gov/

Opening Statement of Senator Feinstein at Hearing on the Need for a Crime Victims' Rights Constitutional Amendment

***Washington, DC** – The Senate Judiciary Committee today held a hearing on a Constitutional Amendment, sponsored by Senators Jon Kyl (R-AZ) and Dianne Feinstein (D-Calif.), that would provide victims of violent crime the rights to be notified, present, and heard at critical stages of their case. The following is the prepared text of Senator Feinstein's opening statement:*

"I am very pleased that the Judiciary Committee is having a hearing on S.J. Res. 1, the Crime Victims' Rights Constitutional Amendment. I would like to thank the chairman for having this hearing. I would also like to thank Senator Kyl for his leadership on this important issue. In particular, I want to thank the crime victims who are here today. I know how difficult it is for you to speak about your loss, and I greatly appreciate your presence here today.

S.J. Res. 1 would give crime victims the rights to be notified, present, and heard at critical stages throughout their case. It would ensure that their views are considered and they are treated fairly. It would ensure that their interest in a speedy resolution of the case, safety, and claims for restitution are not ignored. And it would do so in a way that would not abridge the rights of defendants or offenders, or otherwise disrupt the delicate balance of our Constitution. The amendment currently has 22 cosponsors. It has also been endorsed by President Bush and by Attorney General Ashcroft. I am hopeful that the Judiciary Committee will report the amendment out and we can get it adopted in this Congress.

There are many reasons why we need a constitutional amendment. First, a constitutional amendment will balance the scales of justice. Currently, while criminal defendants have almost two dozen separate constitutional rights–fifteen of them provided by amendments to the U.S. Constitution–there is not a single word in the Constitution about crime victims. These rights trump the statutory and state constitutional rights of crime victims because the U.S. Constitution is the supreme law of the land. To level the playing field, crime victims need rights in the U.S. Constitution. In the event of a conflict between a victim's and a defendant's rights, the court will be able to balance those rights and determine which party has the most compelling argument.

Second, a constitutional amendment will fix the patchwork of victims' rights laws. Seventeen states lack state constitutional victims' rights amendments. And the 33 existing state victims' rights amendments differ from each other. Also, virtually every state has statutory protections for victims, but these vary considerably across the country. Only a federal constitutional amendment can ensure a uniform national floor for victims' rights.

- more -

Third, a constitutional amendment will restore rights that existed when the Constitution was written. It is a little known fact that at the time the Constitution was drafted, it was standard practice for victims–not public prosecutors–to prosecute criminal cases. Because victims were parties to most criminal cases, they enjoyed the basic rights to notice, to be present, and be heard. Hence, it is not surprising that the Constitution does not mention victims. Now, of course, it is extremely rare for a victim to undertake a criminal prosecution. Thus, victims have none of the basic procedural rights they used to enjoy. Victims should receive some of the modest notice and participation rights they enjoyed at the time that the Constitution was drafted.

Fourth, a constitutional amendment is necessary because mere state law is insufficient. State victims' rights laws lacking the force of federal constitutional law are often given short shrift. A Justice Department-sponsored study and other studies have found that, even in states with strong legal protections for victims' rights, many victims are denied those rights. The studies have also found that statutes are insufficient to guarantee victims' rights. Only a federal constitutional amendment can ensure that crime victims receive the rights they are due.

Fifth, a constitutional amendment is necessary because federal statutory law is insufficient. The leading statutory alternative to the Victims' Rights Amendment would only directly cover certain violent crimes prosecuted in federal court. Thus, it would slight more than 98 percent of victims of violent crime. We should acknowledge that federal statutes have been tried and found wanting. It is time for us to amend the U.S. Constitution.

The Oklahoma City bombing case offers another reason why we need a constitutional amendment. This case shows how even the strongest federal statute is too weak to protect victims in the face of a defendant's constitutional rights. In that case, two federal victims' rights statutes were not enough to give victims of the bombing a clear right to watch the trial and still testify at the sentencing–even though one of the statutes was passed with the *specific* purpose of allowing the victims to do just that. A constitutional amendment would help ensure that victims of a domestic terrorist attack such as the Oklahoma City bombing have standing and that their arguments for a right to be present are not dismissed as 'unripe.' A constitutional amendment would give victims of violent crime an unambiguous right to watch a trial and still testify at sentencing.

There is strong and wide support for a constitutional amendment. As I mentioned, President Bush and Attorney General Ashcroft have endorsed the amendment. I greatly appreciate their support. And I am also pleased that both former President Clinton and former Vice President Gore have all expressed support for a constitutional amendment on victims' rights.

In addition, both the Democratic and Republican Party Platforms call for a victims' rights amendment. Governors in 49 out of 50 states have called for an amendment. Four former U.S. Attorneys General, including Attorney General Reno, support an amendment. Attorney General Ashcroft supports an amendment. Forty state attorneys general support an amendment Major national victims' rights groups–including Parents of Murdered Children, Mothers Against Drunk Driving (MADD), and the National Organization for Victim Assistance–support the amendment

Many law enforcement groups, including the National Association of Police Organizations, the International Association of Chiefs of Police, the International Union of Police Associations AFL-CIO, and the Federal Law Enforcement Officers Association, support an amendment. Constitutional scholars such as Harvard Law School Professor Larry Tribe support an amendment.

The amendment has received strong support around the country. Thirty-two states have passed similar measures–by an average popular vote of almost 80 percent. I look forward to hearing the testimony today."

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July 16, 2002

Senate Judiciary Committee's Constitution subcommittee

Dear Subcommittee Member:

I am writing as a victim of crime (kidnapping, sexual assault, and near murder), to urge you to support the passage of the victims' rights constitutional amendment now before Congress: Senate Joint Resolution 35.

In 1979, there were no victims' rights for me. Somehow I knew that if I didn't make my presence known to the Prosecutor in my case, he would have followed through with a plea bargain that would have ultimately dropped the sexual assault charge. y perseverance persuaded the Prosecutor to abandon the plea bargain strategy and ask for the stiffest penalty. I feel today that if I had not intervened in my case my perpetrator would be out making our streets unsafe once more. He is still behind bars for his heinous acts against me.

I work as a volunteer sexual assault victims advocate at our local Rape Trauma Center and have found that although we are a victims' rights State, victims' rights are not being adhered too. The problem I have seen is that Prosecutors, Law Enforcement and State Victim Advocates have denied basic rights to victims; (Section 2 of the amendment) the right to be informed, protected and be heard. It is only when I accompany the victim with Florida Statute 960.00 in hand, that the victim is responded to in a dignified manner.

Case 1: Florida vs. Motto. In this case the victim was never called by the Prosecutions office to inform her of crucial hearings nor was she ever called to meet with the Prosecutor. She was denied access to police reports. She was not informed that she had the right to be heard at crucial hearings, etc. The victim never received any correspondence in writing from the Prosecutors office; i.e., hearings, charges, meetings, pre-sentencing, court dates, victims' rights.

Case 2: Florida vs. Suther. In this case the victim was never informed who her Prosecutor was. Because the perpetrator was not arrested she didn't feel the State was giving her adequate protection. She was never informed in writing of any crucial hearings nor was she called to meet with her Prosecutor. In this case a hearing took place where the victim was not notified in a timely matter and the Judge approved a Defense Motion to allow the perpetrator and Defense

attorney to reenter the victim's home. Once the victim and I were alerted to this order (after the fact) an appeal was entered by the Prosecution but denied through the 2nd District Court of appeals. Due to this unfair order the victim would rather have gone to jail then allow the perpetrator back into her home where the assault took place. Due to this ruling, the victim agreed to a plea bargain to protect her from being victimized once more. The victim never received any correspondence in writing from the Prosecutors office; i.e., hearings, charges, meetings, pre-sentencing, plea bargain, court dates, victims' rights.

These are only two cases among many that are happening everyday in our Judicial System. This amendment will give balance and will treat victims with the same respect, fairness and dignity we show to the accused. The people of our state are depending on you to take a stand so that victims, like defendants, are given "equal justice under the law."

Sincerely,

Donna J. Ferres

APR 09 2003 13:00 FR TO 2280542 P.02/02

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CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

9 April 2003

The Honorable Jon Kyl
United States Senate
Washington, D.C. 20510

Dear Senator Kyl,

I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our support for S. 627, the "Unlawful Internet Gambling Funding Prohibition Act."

This legislation provides a needed enforcement mechanism for the growing problem of Internet gambling by targeting the operators of offshore gambling businesses. Specifically, the bill makes it a crime to accept financial instruments, such as credit cards or electronic funds transfers, for debts incurred in illegal Internet gambling. It would also allow Federal banking regulators to create rules requiring financial institutions to use designated methods to block or filter Internet gambling transactions. Once law enforcement is able to gather sufficient evidence of illegal activity and present it to a court, the court will be able to issue an injunction against any party that can help stop the illegal activity. Once issued, the name and other relevant information about a suspected gambling business will be given to financial institutions or other parties, which will then discontinue the processing of transactions to or from the gambling business.

This legislation gives us the tools we need to enforce the gambling laws already on the books and apply them effectively against offshore operators. Not only will this legislation help law enforcement combat illegal Internet gambling businesses, it will also help reduce the increased use of these operations to launder money from other illegal activities.

On behalf of the more than 305,000 members of the Fraternal Order of Police, I want to commend you for your leadership on this important issue and look forward to working with you and your staff to pass this bill. If I can be of any further assistance, please do not hesitate to contact me or Executive Director Jim Pasco at my Washington office.

Sincerely,

Chuck Canterbury
National President

Statement of Chairman Orrin G. Hatch
Hearing before the United States Senate Committee on the Judiciary on
"A Proposed Amendment to the Constitution to Protect Crime Victims, S. J. Res. 1"

Tuesday, April 08, 2003

I am pleased to participate in this important hearing on the issue of victims' rights. Senators Kyl and Feinstein deserve great credit for their sustained effort – over several years now – to try to address this important and complex issue to create a proposed Constitutional Amendment to protect the rights of victims of violent crime.

I am – and have long been – an ardent supporter of efforts to promote the rights of the unfortunate victims of crime. For example, as the principal author of the federal Mandatory Victim's Restitution Act, I have worked hard to make criminals pay for the damage that their behavior causes. And for years, I fought for comprehensive habeas corpus reform to provide finality of criminal convictions, an effort which was finally successful in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act of 1996. That piece of legislation also included provisions that I sponsored to provide the victims of mass crimes, like the Oklahoma City bombing, the opportunity to observe the trials through closed circuit television.

Because victims should never be victimized by our system of justice, I intend to support a constitutional amendment to protect victims' rights. It is the right thing to do. But I do still have some concerns with the text of the proposed amendment as it is currently drafted. For example, I have a question as to whether we should create a constitutional distinction that grants greater rights to the victims of violent crime than the victims of non-violent crime, such as a financial fraud that wiped out a lifetime of savings. I also worry about the broad wording of several sections of the proposed amendment, which might be construed to hamper the jobs of prosecutors. Every bit of this amendment must be carefully scrutinized to avoid any potential for unintended consequences which could deleteriously affect the established relationship and interaction between the prosecution, the defense, and the court.

Despite these concerns, I believe that the process should move forward. I look forward to working with Senators Kyl and Feinstein to address these concerns as the amendment proceeds to the floor of the Senate.

Boyd School of Law–UNLV
4505 Maryland Parkway, Box 451003
Las Vegas, Nevada 89154

April 7, 2003

The Honorable Senator Orrin Hatch, Chairman
Senate Committee on the Judiciary
506 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Senator Patrick Leahy, Ranking Member
Senate Committee on the Judiciary
217 Russell Senate Office Building
Washington, D.C.

Dear Senators Hatch and Leahy:

I am writing to ask you to oppose S.J. Res. 1, the proposed Victim's Rights Amendment to the Constitution of the United States. I write as a rape survivor who has counseled many rape and sexual abuse victims as well as a teacher and scholar of criminal and constitutional law. Although the desire to do something to assist crime victims and to make a statement on their behalf is a commendable one, amending our fundamental charter is unnecessary to do so. Indeed, the proposed amendment suffers from the same flaws as its predecessors and creates new problems, while again doing little to assist victims of crime.

The Constitution should be amended only when there is a pressing need that cannot be addressed in any other manner. There is no pressing need for a victim's rights amendment, as virtually every right provided victims by the amendment can be or is already protected by state and federal law. No new reason exists to believe that victims of crime cannot adequately protect their interests through the democratic political process such that a constitutional amendment is necessary to protect them.

Every single state has a constitutional amendment or statutory scheme protecting rights of crime victims, including many of those contained in Section 2 of S.J. Res. 1. For example, restitution for crime victims is required by the Antiterrorism and Effective Death Penalty Act of 1996 and under the laws of virtually every state. Victim impact statements have become a routine part of federal and state sentencing. Victim safety as a consideration in pretrial release already exists under federal and state law. Federal and some state statutes protect the right of victims to be present at public proceedings in many instances. As part of a continuing process, state and Federal law have responded to victim concerns and refined laws.

There are serious dangers in amending the Constitution in the manner provided by S.J. Res. 1. The Framers of the Constitution were aware of the enormous power of Government to deprive a person of liberty or life in a criminal prosecution. As a result, the Constitution and the Bill of Rights accord criminal defendants numerous protections--protections that are among the most precious and essential rights we have. While S.J. Res. 1 provides in Section 1 that "The rights of victims of crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, " this language does not explicitly protect defendant's rights from abridgment. Indeed, the last sentence of Section 2 states that victim's rights "shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of justice, or by a compelling state interest." This language would suggest that a defendant's rights under the Constitution may not restrict a victim's rights. At best, the sections suggest that courts would have to engage in a case-by-case balancing of the rights of the accused and the rights of the victim.

The Amendment gives victims a right to obtain " adjudicative decisions" that "duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution by the offender." The language here is broad and vague, leading to uncertainty about the application of these rights. "Due consideration of the victim's safety " does not appear to be limited to any particular issue that arguably might affect the victim's safety. At a minimum, it appears to apply to release of offenders from custody at any point in criminal proceedings, including substantive determinations of a defendant's guilt. Victims also could argue against the release of convicted offenders from prison on grounds of safety, even though the offender had served his or her entire sentence.

Under Section 2 as written, a victim could demand a special judicial hearing whenever the victim asserted an interest in "avoiding unreasonable delay." This section could be used to deny defendants needed time to gather and present essential evidence in order to demonstrate their innocence of the crime charged. It also could impair a prosecutor's ability to develop the evidence necessary to prove guilt beyond a reasonable doubt.

The provisions in Section 2 for adjudicatory determinations could lead to additional judicial proceedings on issues of safety, delay, and "just and timely" restitution at the behest of the victim or the victim's representative. This would not only burden already burdened trial courts and require the creation of mechanisms for such determinations, but also would allow a victim to intervene at any stage to assert the victim's constitutional rights.

The right of victims to be "reasonably heard" at plea proceedings could hamper prosecutorial efforts. It is unclear how much weight judges must give to a victim's objection to a plea bargain, because it is not clear whether the state must demonstrate a compelling interest or a substantial interest in the bargain or how a judge would evaluate valid prosecutorial concerns. Often prosecutors enter into plea agreements based on strategic choices to gain the cooperation of one defendant to enhance the likelihood of convicting others, or based on concerns about allocating scarce prosecutorial resources, or based on concerns about the weaknesses of the evidence against the accused. Roughly 90 per cent of all criminal convictions are obtained by plea bargains. Even a small increase in trials because of victim objections would impose heavy

burdens on prosecutors' offices and the courts.

The right to be heard might well create a right to counsel in order for the victim to be effectively heard. Some victim advocates already support a right to court-appointed counsel for victims. Courts, in interpreting the amendment, could determine that the right to counsel includes the right to state-provided counsel for those victims without the ability to pay.

Section 3 explicitly forbids courts or Congress to provide money damages to victims for violations of their rights. The creation of a constitutional right without a meaningful remedy for many contradicts one of the very principles of justice, that for violation of a right there must be a remedy. Injunctive relief for denial of rights, while possible under the amendment, may often provide an inadequate remedy, and bringing injunctive actions against courts and prosecutors would create additional uncertainty in the criminal justice process.

Section 3 of the Amendment not only subjects state criminal proceedings to congressional oversight, but also creates new burdens on federal courts to interpret and apply the Amendment. Terms used in Section 2, such as "duly consider . . .safety," "unreasonable delay," and "just and timely restitution" will need judicial interpretation, as they are broad and vague. The term "victim of violent crime" remains undefined, as does the term "lawful representative." Family members, friends, and others who know the victim of a violent attack or murder may claim injury and invoke a constitutional right to intervene and be heard.

All crime victims deserve consideration and respect, but the Amendment only extends to victims of "violent crime." Victims of economic crimes, no matter how seriously they are hurt, would have no constitutional rights. Concern and respect for crime victims have lead to many laws on their behalf across the nation. Continuing the process should be left to legislatures, not this constitutional amendment. I respectfully urge the rejection of the proposed Victim's Rights Amendment as unnecessary and constitutionally problematic.

Sincerely,

Lynne Henderson
Professor of Law

Lambert

WESTERN
GOVERNORS'
ASSOCIATION

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May 7, 2002

The Honorable Jim Sensenbrenner, Jr.
Chairman
House Committee on the Judiciary
2138 RHOB
Washington, DC 20515-6216

The Honorable John Conyers, Jr.
Ranking Minority Member
House Committee on the Judiciary
2138 RHOB
Washington, DC 20515-6216

Dear Representatives Sensenbrenner and Conyers:

A just and appropriate judicial system is one which affords basic rights to the millions of victims of violent and potentially violent crimes which, at a minimum, includes the right to be present at judicial proceedings and to be heard at the most important stages of those proceedings.

Despite the efforts of some states to amend their state constitutions to provide for victims' rights, inconsistencies still exist due to the supremacy clause of the federal Constitution. The only way to restore balance between defendants' rights and victims' rights and to remove these incongruent philosophies is to amend victims' rights into the U.S. Constitution. It is appropriate that such an amendment should limit Congress' role to the power to enforce the amendment while clearly preserving the states' authority to implement, define, and enforce victims' rights in state criminal justice proceedings.

The Western Governors Association (WGA) is pleased that the House Judiciary Committee is considering the victims' rights issue. The WGA is supportive of your efforts consistent with the Constitutional amendment sought by Senators Jon Kyl and Diane Feinstein.

Please contact the WGA if we may assist you. WGA policy resolution 99-020, entitled "Victims' Rights," is attached for your information.

Sincerely,

Jane Dee Hull
Jane Dee Hull
Governor of Arizona, Chairman

cc: Western Governors
Senator Jon Kyl
Senator Dianne Feinstein

Attachment

Western Governors' Association

Policy Resolution 99 - 020

Victims' Rights

June 15, 1999

SPONSORS: Governors Hull and Geringer

A. BACKGROUND

1. There are over 12 million Americans who will be the victims of violent and potentially violent crimes this year. A just and appropriate system would afford these victims with the opportunity, at a minimum, to be present at judicial proceedings relating to the crime. It would allow the victim the right to be heard at the most important stages of those proceedings. Unfortunately, the U.S. Constitution does not afford the victims these rights.

2. Even in the states that have such a constitutional provision, the U.S. Constitutional rights of defendants may too often trump the victims' rights thus relegating victims to second class citizenship. The only way to achieve a balance between the rights of the defendants and the rights of the victims is to amend the U.S. Constitution. Placing victims' rights into the U.S. Constitution will also remove the inconsistencies that exist between states' constitutional victims' rights provisions and the supremacy clause of the U.S. Constitution.

3. The thought of the need to guarantee victims' rights was unnecessary at the time of our founding fathers because victims had the right of prosecution. The purpose of providing defendants' rights was to guarantee against an abusive government. In recent years, the federal courts have expanded the rights of defendants disproportionately while leaving victims disenfranchised from the judicial system.

4. Senate Joint Resolution 3, introduced by Senators Kyl (AZ), Feinstein (CA) and others, and similar resolutions, introduced by Congressman Hyde (IL), have protections for the states against federal mandates. The state legislatures always retain the right to pass laws to implement, define, and enforce these rights in state court proceedings.

B. GOVERNORS' POLICY STATEMENT

1. A just and appropriate judicial system is one which affords basic rights to the millions of victims of violent and potentially violent crimes which, at a minimum, includes the right to be present at judicial proceedings and to be heard at the most important stages of those proceedings.

2. Despite the efforts of some states to amend their state constitutions to provide for victims' rights, inconsistencies still exist due to the supremacy clause of the federal Constitution. The only way to restore balance between defendants' rights and victims' rights and to remove these incongruent philosophies is to amend victims' rights into the U.S. Constitution.

3. It is appropriate that any amendment to the U.S. Constitution limit Congress' role to the power to enforce the amendment while clearly preserving the states' authority to implement, define, and enforce victims' rights in state criminal justice proceedings.

C. **GOVERNORS' MANAGEMENT DIRECTIVE**

1. The Western Governors' Association (WGA) staff shall convey this resolution to the members of the U.S. Senate and U.S. House of Representatives expressing the Governors' support for the principles embodied in both Senate Joint Resolution 3 and companion House Joint Resolutions.

2. WGA shall convey this resolution to the leadership of the legislatures of the Western states urging them to support an amendment to the U.S. Constitution that would provide for victims' rights.

Originally adopted as Policy Resolution 96 - 008 in 1996.

Approval of a WGA resolution requires an affirmative vote of two-thirds of the Board of the Directors present at the meeting. Dissenting votes, if any, are indicated in the resolution. The Board of Directors is comprised of the Governors of Alaska, American Samoa, Arizona, California, Colorado, Guam, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Northern Mariana Islands, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.

All policy resolutions are posted on the WGA Web site (www.westgov.org) or you may request a copy by writing or calling:

Western Governors' Association
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Ph: (303) 623-9378
Fax: (303) 534-7309

Lamden 11

INTERNATIONAL UNION OF POLICE ASSOCIATIONS AFL-CIO

THE ONLY UNION FOR LAW ENFORCEMENT OFFICERS

SAM A. CABRAL
International President

DENNIS J. SLOCUMB
International Executive Vice President
Legislative Liaison

RICHARD A. ESTES
International Secretary-Treasurer

January 13, 2003

VIA FACSIMILE AND (202) 224-2207
FIRST CLASS MAIL
The Honorable Dianne Feinstein
Chairman, Senate Judiciary Committee
Hart 331
Washington, D.C. 20510

Dear Senator Feinstein:

On behalf of the International Union of Police Associations, AFL-CIO, I am proud to add our name to those who support the Senate Joint Resolution 1, The Crime Victims' Rights Amendment. It is long past the time that victims are considered, informed, and heard on the matters of their cases. This amendment will bring balance to our system of justice and help ease the thought that many have of being victimized twice.

I salute you for bringing this amendment and I hope that other members of Congress will join you in this noble effort.

The International Union of Police Associations will assist you or your staff in any way possible in this matter. Please feel free to call on us.

Respectfully,

Dennis J. Slocumb
International Executive Vice President

cc: Sam A. Cabral
Richard A. Estes
Jon Kyl
Hart Senate Office Bldg. #730
Washington, DC 20510

International Headquarters • 1421 Prince Street • Suite 400 • Alexandria, Virginia 22314-2805 • (703) 549-7473

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
April 8, 2003

CONTACT: Stephanie Cutter
(202) 224-2633

STATEMENT OF SENATOR EDWARD M. KENNEDY ON "A PROPOSED CONSTITUTIONAL AMENDMENT TO PROTECT CRIME VICTIMS"

For too long, our criminal justice system has neglected the hundreds of thousands of victims of crime whose lives are shattered by violence or threats of violence each year. I believe, along with every other member of this Committee, that the rights of victims deserve better from our criminal justice system.

Too often, the system does not provide adequate relief for victims of crime. They are not given basic information about their case – such as the case's status, the scheduling of court proceedings, plea negotiations, and notice of a defendant's arrest and bail status. Victims deserve to know about their case. They deserve to know about hearings and other court proceedings. They deserve to know when their assailants are being considered for parole or sentence adjustments. And they certainly deserve to know when offenders are released from prison.

But there is a right way and a wrong way to protect victims' rights. The wrong way is to amend the Constitution. One of the guiding principles that has served the nation well for two hundred years is that if it is not necessary to amend the Constitution, it is necessary not to amend it.

We have amended the Constitution only 17 times in the two centuries since the adoption of the Bill of Rights. We should rely on such amendments only in rare instances, when the enactment of a statute is clearly inadequate.

The right way to protect victims' rights is by statute, not by constitutional amendment. Yesterday, I joined Senator Leahy and several other colleagues in introducing the Crime Victims Assistance Act of 2003. Our bill provides enhanced protections to victims of both violent and non-violent crimes and establishes an effective way to implement and enforce these rights. It assures victims a greater voice in the prosecution of the criminals who injured them and their families. It gives victims the right to be notified and consulted on detention and plea agreements; the right to be present and heard at trial and at sentencing; and the right to be notified of a scheduled hearing on a sentence adjustment, discharge from a psychiatric facility, or grant of executive clemency.

-more-

The rights established by this bill will fill existing gaps in federal criminal law and will be a major step toward guaranteeing that victims of crime receive fair treatment and are given the respect they deserve. Our bill achieves these goals in a way that does not interfere with the efforts of the States to protect victims in ways appropriate to each State's unique needs.

Rather than mandating that States modify their criminal justice procedures in particular ways, our bill authorizes the use of federal funds to establish effective programs to promote victim-rights compliance. It increases resources for the development of state-of-the-art systems for notifying victims of important dates and developments in their cases. It provides funds for the development of community-based justice programs relating to those rights. It also provides funds for case management programs to streamline access to victim services and reduce "re-victimization" in the criminal justice system. It supports programs to extend the capacity of victim service providers to help victims with special communications needs, such as limited English proficiency, hearing disabilities, and developmental disabilities.

The bill replaces the cap on spending from the Crime Victims Fund, which has prevented millions of dollars of fund deposits from reaching victims and supporting essential services. Instead, the bill adopts a new approach supported by victim groups to strengthen the stability of the fund and protect its assets, while enabling more funds to be distributed for victim programs.

There is no need to amend the Constitution to achieve these important goals. The Constitution is the foundation of our democracy. It reflects the enduring principles of our country. The framers deliberately made the Constitution difficult to amend, because it was never intended to be used for legislative purposes.

Chief Justice Rehnquist opposes amending the Constitution. He has specifically stated that a statute, rather than a constitutional amendment, "would have the virtue of making any provisions in the bill which appeared mistaken by hindsight to be amended by a simple act of Congress."

Many prosecutors, victims' rights groups, and state and federal judges oppose the Constitutional amendment because its specific provisions. They understand that it would hurt victims more than help them, by diverting resources from the prosecution of criminals and permitting massive intrusion into state criminal justice systems.

It is clear that we must do more to assist victims of crime. But it is equally clear that a constitutional amendment would do more harm than good. I urge my colleagues to act by statute – to build on the legislation that Senator Leahy and I introduced yesterday – to achieve real and immediate protections for victims' rights.

-30-

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing On S.J. Res. 1,
A Proposed Constitutional Amendment To Protect Crime Victims
April 8, 2003

This past Sunday marked the beginning of National Crime Victims' Rights Week. For more than two decades, we have set this week aside each year to focus attention on the needs and rights of crime victims. Each year, this week reminds us of our longstanding commitment to afford dignity and recognition to crime victims, and challenges us to build on the tremendous foundation of victims' rights and services already established across our nation.

My involvement with crime victims began more than three decades ago when I served as State's Attorney in Chittenden County, Vermont, and witnessed first-hand how crime can devastate victims' lives. I have worked ever since to ensure that the criminal justice system is one that respects the rights and dignity of victims of crime, rather than one that presents additional ordeals for those already victimized.

Both Congress and the States have become more sensitive to the rights of crime victims since I was a prosecutor. We have greatly improved our crime victims assistance programs and made advances in recognizing crime victims' rights. But we still have more to do.

For example, we have unfinished business with respect to the annual cap on the Crime Victims Fund, which has severely limited the money available to serve victims of state crimes. In 2001, Congress passed -- and then repealed – legislation that Senator Kennedy and I had proposed that replaced the cap with a self-regulating system. Such a system would ensure stability and protection of Fund assets while allowing more money to be distributed for essential victim services. We should not be imposing artificial caps on spending from the Fund while substantial needs remain unmet.

I am disappointed that the President's latest budget, for fiscal year 2004, does precisely that. Its proposed cap on spending from the Crime Victims Fund would reduce federal funding for state victim assistance programs for the second year in a row. This is particularly troubling at a time when both state funding and private charitable giving for victims' programs are drying up.

We also need to protect our most vulnerable victims – women and children who are victims of domestic violence. Yet for the second year running, the President's budget fails to fund any transitional housing programs, and severely underfunds grants for battered women's shelters. Both of these services are desperately needed nationwide.

On the other hand, one important program on which progress has finally been made is the Violence Against Women Office. Last year, we underscored the importance of that Office's work by passing legislation that required the Office to be moved to a more prominent position under the Attorney General. Yet for six months after the President signed that legislation into law, the Department willfully refused to follow it Now, however, the Attorney General has reversed course and agreed to set up the Violence Against Women Office with the status that Congress intended. I look forward to working with the

senator_leahy@leahy.senate.gov
http://leahy.senate.gov/

President's nominee to head that Office, to ensure that she has the tools necessary to provide effective protection to women victimized by violent crime.

One further category of violent crime requires special attention: terrorism and mass violence. We need to focus on victims' rights in this particular context for three reasons. First, after September 11, this most savage type of crime is a growing concern. Second, terrorism and mass violence differs from other violent crime in its ability to devastate thousands of innocent lives and whole communities. And third, provisions for protecting victims' rights in this context need to be specially tailored to ensure that they are in harmony with the needs of national security and public safety.

Last year, Congress passed a bill to allow the families and survivors of the September 11 attacks to watch a closed circuit broadcast of the trial of Zacharias Moussaoui. Unfortunately, the judge in that case has severely limited the number of locations at which victims can watch those proceedings, which means that many victims will be denied the right that Congress sought to provide. There have also been reports that the White House may abandon the civilian prosecution of Mr. Moussaoui, remove him from the United States, and place him before a military tribunal in Guantanamo Bay. One of several concerns raised by that possibility is that the Defense Department's procedures for trials by military commission do not appear to give victims any role at all in the proceedings. I intend to be vigilant, and I urge my colleagues to join me, to ensure that neither judicial limitations nor military procedures unnecessarily impair the rights we promised last year to the victims of September 11.

In addition, as we prepare for the threat of more acts of terrorism on American soil by providing much-needed funding for first responders – the police officers, firefighters, and emergency medical professionals who are the first on the scene in any terrorist attack – we should not lose sight of the experience, expertise and assistance that our victims assistance organizations can contribute. These organizations increasingly provide direct crisis response services to communities in need. With our help, they could become an integral and invaluable part of our emergency preparedness.

The illustrations I have just given of areas for improvement for victims' rights may seem like a disparate group – funding for victims of state crimes, shelter for victims of domestic violence, strengthening enforcement against violence against women, giving victims of terror access to the justice system, and incorporating victims' assistance organizations into our first responder teams. But this diverse array of proposals all have one thing in common. They are practical means, tailored to the actual needs of real, specific groups of victims, of turning the promise of victims' rights into a reality.

I hope that we will soon hold a hearing – and, more important, take action – on such practical concerns as actually funding the commitments we have already made to victims. That would be a fine way to honor National Crime Victims' Rights Week. Sadly, however, today's hearing will not address such practical issues. Instead, the proposal before us is more symbolic in nature, and its consideration has become something of an annual ritual. Today, we consider once again whether to make victims more promises, in the form of a constitutional amendment.

I would like to begin my contribution to that debate by suggesting two general guidelines to which I hope we can all agree. First, remembering the debates we have had over the years about "unfunded mandates," I propose that we start with an agreement not to make any "unfunded promises." Insofar as the amendment makes victims promises that we lack the ability, or the political will, to turn into practical realities, we should reject it. Otherwise, we will just be tacking on to the Constitution what Shakespeare called "words, full of sound and fury, signifying nothing." We owe crime victims more than empty politicking, and the very least we owe them is candor.

My second principle is, "if it ain't broke, don't fix it." We should not amend the Constitution unless and until we identify problems in the Constitution itself that need to be fixed.

Amending the Constitution is a very serious matter, and I know the distinguished sponsors of this amendment have approached it as such. Indeed, they have been through nearly 70 drafts to date. Every time the language changes, they assure us that "this time, we've got it right." I do not doubt their sincerity, and their devotion, which I share, to the cause of victims' rights, and I commend their diligent work and their responsiveness to criticisms. But to me, the history of all these drafts is not at all reassuring. If Congress had passed an earlier version, like the version that the Senate debated three years ago, we could now be stuck with that version, with both the flaws that its sponsors now concede and the inevitable limitations that arise from the fact that it was drafted before September 11 radically changed the nature of the violent criminal threats that we face. It could be enshrined in the Constitution, with all its flaws and limitations, and fixing it would require another constitutional amendment.

Our disagreement is not about the importance of victims' rights. I completely endorse the stated goals of the proposed amendment, which are to enhance victims' rights by ensuring that they can be heard, and that their views will be sought, at every stage of the prosecution. In fact, I have worked for years, with Senator Kennedy and other members of this Committee, to secure in a practical way many of the rights promised in the proposed amendment. Our current bill, the Crime Victims Assistance Act, would provide enhanced rights and protections for victims of federal crimes, and establish innovative new programs to help States provide better services to victims of State crimes. It also proposes a new alternative to the cap on the Crime Victims Fund that is supported by national crime victims' organizations.

I urge all of my colleagues, on both sides of the aisle, to take a careful look at the Crime Victims Assistance Act. I hope our witnesses today will also take a look at this bill, and get back to me after the hearing with any thoughts they might have as to how it might be improved. I believe we can accomplish our goals far more quickly and effectively with legislation than with an amendment to the Constitution. I look forward to hearing from each of our witnesses this morning. I am sorry that Senator Kyl, who is chairing this hearing, refused my request to allow one additional witness to testify. When I chaired this Committee, I had several requests from my Republican colleagues to call more witnesses than the rules permitted them. I tried to honor those requests as did our Democratic subcommittee chairs. At the June 2001 hearing on the Innocence Protection Act – one of my top legislative priorities – I accommodated Chairman Hatch's request for a third witness. At the July 2002 hearing on class action litigation, the witnesses were evenly split.

We should always strive to hold balanced hearings, at which all opposing views can be aired and all arguments made. That is especially true when we are considering an amendment to the Constitution that could preempt the legislative efforts of both Republican and Democratic majorities, and impose mandates on both Republican and Democratic law enforcers, for decades to come.

Let me say a little about the witness who was not permitted to testify this morning, a man named Bud Welch, whose daughter was killed in the Oklahoma City bombing. I find it ironic that at this hearing about providing victims a greater voice, the Committee would not allow Mr. Welch the opportunity to be heard. His testimony is compelling. It is deeply moving, in expressing the anguish of a victim of the very worst form of violent crime. And it is deeply practical, in examining in concrete terms the implications of entrenching the proposed amendment as a one-size-fits-all solution to the problems of victims' rights -- problems that take on a very particular and difficult form in the emerging context of terrorism and mass violence. I will submit his statement for the record, and I urge my colleagues on the Committee to read it.

Mr. Welch opposes S.J. Res. 1 because he believes it could have harmed, rather than helped, the prosecution of the Oklahoma City Bombing case. One of the prosecutors in that case will be testifying this morning, and I know that he shares Mr. Welch's concerns.

Turning to the witnesses who are appearing before us today, I have the same question for all of them: Why is this amendment necessary? Why are federal and state laws – both the laws on the books and those that we could pass tomorrow in the Crime Victims Assistance Act – inadequate to protect the rights of crime victims? One of the leading academic proponents of the proposed constitutional amendment, Harvard law professor Laurence Tribe, has acknowledged that "the States and Congress, within their respective jurisdictions, already have ample authority to enact rules protecting [victims'] rights." So, then, why do we need to amend our federal Constitution?

Amending the Constitution should be an extraordinary action of last resort. The normal way that laws are made in this country is by legislation, and those who insist on amending the Constitution bear a heavy burden of justification. I do not believe that the proponents of this constitutional amendment have met their burden of justifying why we should amend our Constitution for just the 18th time in more than 200 years. In this Senate, we have previously rejected proposed amendments, such as the balanced budget amendment, that, whatever their merit, at least attempted to do things that could not be done by statute. The same cannot be said of this amendment.

I also hope that our witnesses will share their views about the text of this year's version of the amendment. We must not forget that this is a constitutional amendment we are considering, and every single word counts.

I thank the witnesses for coming.

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Los Angeles County
POLICE CHIEFS' ASSOCIATION

LAWRENCE LEWIS
President

THOMAS HOEFEL
First Vice President

JAMES HERREN
Second Vice President

September 12, 2002

Senator Dianne Feinstein
11111 Santa Monica Blvd., Suite 915
Los Angeles, California 90025

Dear Senator Feinstein:

The Los Angeles County Police Chiefs' Association is aware of your work in drafting and proposing the "Crime Victims' Rights Amendment." This Amendment to the Constitution would specify rights that have not been fully and clearly been addressed in the past.

The "Crime Victims' Rights Amendment" has been endorsed by Attorney General Ashcroft and President George W. Bush along with many other government officials. This level of support shows that a need for this type of legislation exists and that it is important for this legislation to be approved. The proposed amendment seeks to enhance the rights of crime victims without infringing on the rights of the accused.

Our government was founded on principles that ensure justice, liberty, and provide for the welfare of all that live in this country. This amendment continues in that tradition by defining the rights of crime victims, and providing those who have been victimized with Federal Constitutional rights.

The Los Angeles County Police Chiefs' Association has supported this legislation in the past, and continues to support this legislation during this 107th session of Congress. We urge you to continue your efforts in bringing this amendment to the people of the United States of America.

Sincerely,

Chief Larry Lewis
President,
Los Angeles County Police Chiefs' Association

Alhambra Police Department • 211 South First Street, Alhambra, CA 91801
Phone: (626) 570-5131 • Fax: (626) 284-5978 • Email: alhcop@ix.netcom.com

Mothers Against Drunk Driving
NATIONAL OFFICE
511 E. John Carpenter Frwy., Suite 700
Irving, TX 75062-8187
Phone (214)744-MADD
Fax (972)869-2206/2207
www.madd.org

April 8, 2003

The Honorable Jon Kyl
United States Senate
Washington D.C. 20510

Dear Senator Kyl:

On behalf of over two million members and supporters of Mothers Against Drunk Driving (MADD), I would like to thank you for your continued efforts to protect the rights of crime victims. As you know, MADD's mission is to stop drunk driving, protect the victims of this violent crime, and prevent underage drinking.

As the Senate prepares to hold hearings on the need for a constitutional amendment for victims rights, I want to reemphasize MADD's support for Senate Joint Resolution 1. MADD's members know first hand about the heartbreaking frustration crime victims face in the judicial system. Many victims are not allowed to have any part in the proceedings for the crimes that have devastated their lives. This injustice must be corrected.

Passage of a constitutional amendment for victims rights would guarantee basic rights to victims -- rights that many Americans assume victims already have -- such as the right to be informed of, to be present at, and to be heard at criminal justice proceedings. MADD has served as a voice of victims for more than two decades and will continue to support efforts to pass a constitutional amendment to give victims the rights they deserve. MADD would like to thank you for your continued leadership on this critical issue.

Sincerely,

Wendy J. Hamilton

Wendy J. Hamilton
National President

Senator Dianne Feinstein
United States Senate
Washington, DC

July 16, 2002

Re: SJR 35 - Victims Right Amendment

Dear Senator Feinstein:

I write in strong support of SJR 35. I have spent most of adult life in law enforcement, the last eight years as the elected District Attorney in Astoria, Oregon. I serve as the Oregon State Director of the National District Attorneys Association and an immediate past president of the Oregon District Attorneys Association. I have been involved in Oregon's Victims Right movement since 1985.

While there is not unanimity among prosecutors a substantial group of us are in strong support of your efforts to pass SJR 35. Just as many states, like Oregon, have fought to pass state constitutional victims rights laws, there is ample evidence that statutory provisions are simply inadequate. The best example was the injustice endured by victims of the Oklahoma City bombing case who were denied virtually any access to the trial of the man who murdered their loved ones. A constitutional amendment would have made the lawsuits and special acts of Congress unnecessary.

Prosecutors are becoming more aware of our moral and ethical duty to involve victims in plea negotiations and at an absolute minimum to let them know when the case will be in court. The current version of SJR 35 does not give criminals the opportunity to exploit victims rights, a concern frequently voiced by opponents of this legislation.

I commend you in your bipartisan effort to pass this important piece of legislation.

Sincerely,

Joshua Marquis
District Attorney, Clatsop County
Astoria, OR 97103

Maryland Crime Victims' Resource Center, Inc.
Continuing the Missions of the Stephanie Roper Committee and Foundation, Inc.

14750 Main Street, 1B • Upper Marlboro, Maryland 20772-3055
Phone: (301) 952-0063 • FAX: (301) 952-2319 • Toll Free: 1-877-VICTIM 1
Email: mail@mdcrimevictims.org • Web Page: www.mdcrimevictims.org

April 7, 2003

Senator Jon Kyl
730 Hart Senate Office Building
Washington, DC 20510-0304

Dear Senator Kyl:

I am writing you to express the strong support of the Maryland Crime Victim Resource Center for a United States constitutional amendment for crime victims' rights. While Maryland has a good State constitutional amendment and statutes for victims' rights, Maryland law cannot trump the federal constitutional rights of a person accused or convicted of crime. It is important for Congress to act in order that crime victims' rights can be considered *in pari materia* or together with the constitutional right of an accused or convicted person.

This year in the Maryland case of *State v. Trevor Piggott*, (Case # 102123020) in the Circuit Court for Baltimore City, Maryland) Clara Strickland, the mother of the decedent Michelle Strom, was prevented from attending the trial for the alleged murder of her daughter. The prosecutor, Phil Pickus, attempted to have the victim's mother exercise her right under Maryland law to attend the proceedings, but to no avail.

Similar to what happened to Roberta Roper twenty years ago, and despite the passage of numerous statutes and a State constitutional amendment, the mother of a victim was prevented from attending a proceeding vitally important for her to attend. Notwithstanding these state laws and constitutional protections, it is clear that our federal constitution must be balanced to include basic rights to crime victims if there is to be equal justice under our laws.

While those opposed to this amendment may rightfully contend that constitutions are to be amended sparingly, this amendment of our constitution illustrates that it is both timely and necessary if we are to secure equal justice and fairness for all our citizens. If our judicial system is to recognize victims' rights, those rights need a constitutional basis otherwise they will fall short of the rights of the accused and will be ignored by the judiciary as subservient to the federal constitutional rights of an accused or convicted person. We seek not to reduce the rights of the accused, but only to allow for the proper balancing of the rights of crime victims.

To make the system work for victims of crime, we strongly urge that you adopt the constitutional amendment for victims of crime and allow the states of our great country to determine if victims of crime should have an appropriate place in the justice system.

Respectfully submitted,

Russell P. Butler
Executive Director

Maryland Crime Victims' Resource Center, Inc.
Continuing the Missions of the Stephanie Roper Committee and Foundation, Inc.

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April 7, 2003

Honorable Jon Kyl
730 Hart Senate Office Building
Washington, DC 20510-0304

Dear Senator Kyl:

I am writing to you to express my strong *personal* support for Senate Joint Resolution 1 (SJ RES 1) a United States constitutional amendment for crime victims' rights. I speak on behalf of the two organizations that I have been associated with for the past twenty years: the Maryland Crime Victim Resource Center, Inc. (formally, the Stephanie Roper Committee and Foundation, Inc.) and the National Victims' Constitutional Amendment Network (NVCAN). The time has come for America to fulfill its promises to citizens who become victims of crime. American citizens, no less than the offenders who have committed crimes against them, deserve equal justice under the law.

As you know, our daughter, Stephanie, was a victim of most heinous crimes that ended her innocent life twenty-one years ago this month (April 3, 1982). Our family lost a beloved daughter, sibling, cousin, grandchild, niece, and friend. But in many ways, we lost so much more and were almost destroyed as a family. Being shut out of the trial and denied rights to information, rights to observe the trial, and an opportunity to express the consequences of the crime before sentencing, shattered trust, respect and hope for our four surviving children.

My husband and I have dedicated our lives to advocating for victims' rights and providing support services to crime victims in Maryland. And while Maryland has a good State constitutional amendment and numerous statutes for victims' rights, these laws have failed to adequately provide the protected rights every crime victim needs and deserves. Until the U.S. Congress acts to pass a U.S. Constitutional Amendment for crime victims' rights, victims and survivors will remain *second-class citizens*. The rights of crime victims can and must be considered *in pari materia* or together with the constitutional right of an accused or convicted person.

In my testimony last year for the proposed amendment, I sited a then very timely Maryland case (Sherry Rippeon & John Dobbin v State of Maryland, No. 2554 - #13K0038862) that was an example not only of Maryland's victims' rights laws, but also of its enforcement failures. The Maryland Court of Appeals ruled that the issue of victims' attendance at trial was moot. When the attorney for the family filed for certiorari, the application was denied. The Court had an opportunity to address this issue and *prevent* it from happening again. They did not.

And it *has happened again* ... just barely two weeks ago in the Maryland case of *State v. Trevor Piggott*, (Case # 102123020) in the Circuit Court for Baltimore City, Maryland) Clara Strickland, the mother of a murder victim, Michele Strom, was prevented from attending the trial for the man charged in the murder of her daughter. The prosecutor,

Phil Pickus, attempted to have the victim's mother exercise her right under Maryland law to attend the proceedings, but the judge denied this right. The mother had no testimony relevant to the crime and would have only wished to be an observer at this trial. While Maryland law provides such victims with a right to appeal, the expense, trauma and *failed* history of this right *discourages* any victim from using this right.

So when your colleagues ask why there is little evidence of case law of victims' rights tested in the higher courts, tell them of the unsuccessful efforts in Maryland. Until victims' rights share the protection of our U.S. Constitution, and are given *equal* consideration as those of the accused or convicted, state and federal victims' rights laws will remain *paper promises*.

We strongly urge your colleagues to join you in supporting and adopting SJ RES 1 and to fulfill the promise for America's victims of crime.

Sincerely,

Roberta Roper
CO-Chair, National Victims' Constitutional Amendment Network
Chair, Board of Directors, Maryland Crime Victims' Resource Center, Inc.

Michael and Penny Moreau

3701 Rue Delphine
New Orleans, LA 70131

April 7, 2003

Senator Jon Kyl
730 Hart Senate Office Building
Washington, DC 20510-0304

Dear Senator Kyl:

We wanted you to know we support the Crime Victims Rights Amendment S.J. Res. 1. We are the parents of a murdered child, our first-born son. We know first-hand how important a Constitutional amendment will be to crime victims and their families.

Thank you for your efforts on behalf of crime victims.

Sincerely,

Michael and Penny Moreau

Michael and Penny Moreau
Phone (504) 394-7166

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April 3, 2003

Senator Orrin G. Hatch
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

As you ponder your vote on a Victims' Rights Amendment to the United States Constitution, I urge you to consider the contents of this letter.

With National Victims' Rights Week so close, it hardly seems the right time to write concerning misgivings about the appropriateness of a Federal Constitutional Amendment about victims' rights. Nevertheless, I have some.

I have been a local prosecutor since 1969. Although I am a former President of the National District Attorneys Association, I am writing solely in my individual capacity and not on behalf of the Association.

Approximately ninety-five percent (95%) of the crimes prosecuted in the United States are prosecuted by local prosecutors. Most crimes involving victims are local. Consequently, the potential provisions and impact of a Victims' Rights Amendment will fall squarely on the local prosecutors of this country.

What is more, victims are, realistically, our "stock in trade". We, therefore, have a direct interest in their concerns. In fact, when the New York State Legislature saw the need and justification to require law enforcers and judges to treat crime victims with "dignity and respect" it was dismaying to me. I had always thought that was the way we should have been doing things.

Many states have passed statutes or amendments to their own constitutions dealing with this very subject. To date, those efforts have met with little opposition- from anyone. With the prospect of almost unanimous adoption of such provisions by the states, is there a need for an amendment to the U.S. Constitution? I think not. Additionally, I wonder what the impact of a Federal Amendment might have on these State provisions. Will they be superseded? Called into question?

A law, passed by Congress, giving victims the right to attend trials has already caused concern and litigation in the Murrah bombing case. Is this an example of things to come if there is a Constitutional amendment? I suggest that the last thing anyone needs, including crime victims, is a device to delay or prolong criminal cases. Will the Amendment be used to call into question the judgement of prosecutors about how a case is to be handled - to the point of interference and impedance?

The proposed Amendment appears to me to be an attempt at a "quick fix" for a whole range of problems and may even be seen as a symbol, rather than substance. Neither justification should carry the day.

The United States is world-renowned and admired for its system of public prosecutions. It bespeaks our leadership in the precepts of democracy that justice is mandated for all citizens. No individual or group is favored. Wealth does not determine whose case gets prosecuted, or how well. The public prosecutors of the United States are required to seek justice, not revenge or vengeance. We have historically and proudly eschewed private criminal prosecution based on our common sense of democracy. Unfortunately, the proposed Victims' Rights Amendment seems to portend the end of this tradition.

Control of, and the exercise of discretion in the operation of the criminal justice process has always been in the hands of representatives of the people, acting in their interest, collectively. The parties to criminal prosecution (in the legal sense of that term) are "The People" (or "The State") and the defendant. Victims are witness on behalf of the "people" - all of us. They are not parties, acting on their own behalf or with their individual interests under their own control. Exaggeration of their place in the jurisprudence of this nation will turn our notions of how we dispense justice upside-down and inside-out.

It has to be obvious to clear thinking people, especially in an era when the criminal justice system is expected to address an increasing number of society-based issues and problems (which used to be addressed by social agencies), that there are, and can be, no "quick fixes". Likewise, the simple fact that law libraries are teaming with treatises and casebooks addressing "Constitutional Law" belies the notion that our Constitution and its constituent parts are mere "symbols".

Keeping victims apprized about a whole host of matters surrounding cases involving them is not conceptually troublesome. It may be practically so.

Who are "victims"? Convicted felons injured in prison assaults? The unborn? The current proposal relegates the definition to "law". Is it federal or state law? How much litigation will it take to straighten out conflicts or inconsistencies?

What are the crimes to which rights attach? What if one state's crimes differ in definition and import from others? (e.g. In New York house burglaries are violent crimes, without violence- not all states have similar provisions.) The U.S. Constitution cannot, and should not be tailored to fit the particular State involved. Which jurisdiction and, what, defines a "crime"? If it is so "adapted", what becomes of the nationwide standard?

Who represents, as "victim", society, which is the putative victim of "victimless crime"? Who represents homicide victims? Abused children?

These are real and important questions. They are traditionally the meat of legislative resolution. They are appropriately so. They are hardly appropriate for specific Constitutional provision or litigation.

Speaking of litigation, what remedy will there be for instances when victims' rights are not provided? Civil suits? Against whom? Will criminal defendants benefit when victims' rights are violated? What becomes of "frivolous" suits? Is the sovereign immune? I suggest that the current proposal's attempt to limit litigation is not adequate. We only have to look at litigation concerning the First Amendment's definite and bold prohibition that "congress shall make no law..." to see that it's not as simple as that.

Fiscal considerations must be made and resolved, as well, before Constitutional Rights attach. Will there be additional resources made available to the law enforcement community to cover notification expenses? How much for "due diligence" in pursuing fulfillment of the Constitutionally imposed tasks? What about costs in defending annoyance suits? Is prosecutorial immunity a possibility?

Clearly, the movement for a National Victims' Rights Amendment has a basis. Is it frustration? At what? Is it based on concerns or situations which are regionally or locally significant or truly national? Crime victims are citizens whose concerns must be addressed.

Perhaps we need extensive Congressional hearings to establish a foundation, above and beyond mere frustration, for a recent trend to criminalize all sorts of things. Is there a better way? If the criminal justice process was not subjected to so many demands, would the frustrations level be reduced? If it were, and if crime continues to go down, is a Constitutional amendment needed?

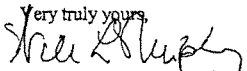
Is it nationally appropriate to maximize the impact of the criminal justice process? Must plea bargaining be eliminated? Should all sentences be maximum? Should bail be eliminated in favor of presumptive pre-trial incarceration? Is the more appropriate Constitutional amendment the elimination of the presumption of innocence?

More radically, one might simply provide that prosecutors have no discretion.

If citizens really do not want judges to make decisions, maybe there should only be two branches of government.

Above all, haste will undoubtedly made waste in this matter. If that waste is the effective operation of the criminal justice process, what is left? Under such a circumstance, aren't victims' rights in greater peril?

Very truly yours,



WILLIAM L. MURPHY,
District Attorney

WLM:me

cc: Senator Patrick Leahy
Senator Charles E. Schumer
Senator Hillary Rodham Clinton

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April 8, 2003

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Executive Director

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BILL LOCKYER
Attorney General of California

VICE PRESIDENT
WILLIAM H. SORRELL
Attorney General of Vermont

PRESIDENT'S DESIGNEE
JIM PETRO
Attorney General of Ohio

Honorable Jon Kyl
United States Senate
730 Hart Senate Office Building
Washington, D.C. 20510

Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Kyl and Feinstein:

We, the undersigned Attorneys General, write to express our strong support for your efforts to pass S. J. Res. 1, the proposed amendment to protect the rights of crime victims, and send it to the States for ratification.

As Attorneys General from diverse regions and populations in our nation, we continue to see a common denominator in the treatment of crime victims throughout the country. Despite the best intentions of our laws, too often crime victims are still denied basic rights to fair treatment and due process that should be the birthright of every citizen who seeks justice through our courts. We are convinced that statutory protections are not enough; only a federal constitutional amendment will be sufficient to change the culture of our legal system.

The rights you propose in S. J. Res. 1 are moderate, fair, and yet profound. They will extend to crime victims a meaningful opportunity to participate in critical stages of their cases. At the same time, they will not infringe on the fundamental rights of those accused or convicted of offenses. In addition, extending these fundamental rights to victims will not interfere with the proper functioning of law enforcement.

Some have argued that federal constitutional rights of victims will infringe on important principles of federalism, however we respectfully disagree. Each of our state criminal justice systems accommodates federal rights for defendants. To provide a similar floor of rights for victims is a matter of basic fairness.

Please share this letter with your colleagues so that they may know of our strong support for S. J. Res. 1.

Sincerely,

Attorney General Ken Salazar
Attorney General of Colorado

Attorney General M. Jane Brady
Attorney General of Delaware

Attorney General Bill Pryor
Attorney General of Alabama

Attorney General Gregg Renkes
Attorney General of Alaska

Attorney General Terry Goddard
Attorney General of Arizona

Attorney General Mike Beebe
Attorney General of Arkansas

Attorney General Bill Lockyer
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Attorney General Richard Blumenthal
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Attorney General Peg Lautenschlager
Attorney General of Wisconsin

Attorney General Jerry Kilgore
Attorney General of Virginia

Attorney General Darrell V. McGraw Jr.
Attorney General of West Virginia

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New Bedford (MA) Police Union

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WILLIAM J. JOHNSON
Executive Director

March 5, 2003

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Feinstein:

On behalf of the National Association of Police Organizations (NAPO) representing 220,000 rank-and-file police officers from across the United States, I would like to thank you for re-introducing the Victims Rights Constitutional Amendment and bring to your attention our wholehearted support for S.J.Res. 1. As efforts during the 107th Congress illustrated, this proposed amendment has the strong support of both houses of Congress, the Bush Administration, the Department of Justice and our nation's governors.

If enacted, the amendment would help to improve the balance of the criminal justice system by granting victims of violent crimes the right to be properly informed, represented and heard at important stages of their case. The amendment will call for the victim to be quickly notified of any public proceedings involving their case, the release or escape of the accused, and the right to be present at all public proceedings. Further, it will allow the victim to speak at plea, sentencing, pardon and reprieve hearings and have case decisions on timelines be considered with the victim's safety and interest in mind.

We are proud to stand with you in support and look forward to working with you and your staff to ensure the amendment's enactment.

Sincerely,

William J. Johnson
Executive Director

***The National Association of Police Organizations (NAPO)** is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement through legislative and legal advocacy, political action and education. **Founded in 1978, NAPO now represents more than 4,000** police unions and associations, 220,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.*

National Clearinghouse for the Defense of Battered Women

125 S. 9th Street, Suite 302 Philadelphia, PA 19107 215/351-0010 Fax: 215/351-0779

POSITION PAPER ON PROPOSED VICTIMS' RIGHTS AMENDMENT

April 2003

Introduction and Overview

The National Clearinghouse for the Defense of Battered Women strongly opposes the S.J. Res. 1, the proposed Victims' Rights Amendment to the United States Constitution. Our opposition to the proposed amendment does not reflect a lack of support for, or empathy with, victims of crime. We, like the proponents of the amendment, are extremely disturbed by the way in which crime victims are treated by our criminal justice system. As an organization that assists battered women, we know only too well the paucity of services and supports afforded to victims, and we see firsthand the tragic consequences that result from society's and the criminal justice system's devaluing and misunderstanding of the experiences of victimization.

The National Clearinghouse is a unique victims' advocacy organization; we assist battered women who, in response to their victimization, end up in conflict with the law. All too frequently, women who have been battered and have not received the protection of society's institutions, including the police and the legal system, resort to violence or other acts to defend their lives and those of their children against on-going abuse. Sadly, these women, who are victims, then become the accused; they become defendants in criminal prosecutions. Our mission, since we opened our doors in 1987, has been to advocate for these victims of violence who continue to fill our nation's courtrooms as defendants and continue to fill our nation's prisons.

The National Clearinghouse for the Defense of Battered Women opposes the amendment for the many reasons outlined below.

- **Too many victims of domestic violence become the accused**. We work with battered women who, as a result of responding to the abuse they experienced, are accused of a crime. Do these women lose their "victim" status once they have defended their lives and become defendants? And, once battered women defend themselves against their abusers' violence, do these batterers who terrorized and victimized their partners deserve the exalted constitutional status as "victims"? The Amendment refers to victims and criminal defendants as though they were mutually exclusive and designates someone a victim *solely* by virtue of the fact that another person has been charged with a crime. The basic error in this absolutist position — that the defendant is the perpetrator and the complaining witness is the victim — is revealed in the cases of battered women charged with crimes. It would, for example, permit a husband who has repeatedly beaten his wife to stand before a judge and object to her release on bail, even when she is the only parent who has cared for their minor children. Or, if the battered woman ended up getting convicted of a crime against her batterer, the Amendment would require her to pay restitution to her abuser because he is considered the "victim."

- **The federal constitution is the wrong place to try to "fix" the complex problems facing victims of crimes; statutory alternatives and state remedies are more suitable.** Our nation's constitution should not be amended unless there is a compelling need to do so *and* there are no remedies available at the state level. Instead of altering the US Constitution, we urge policy makers to consider statutory alternatives and statewide initiatives that would include the enforcement of already existing statutes, and practices that can truly assist victims of crimes, as well as increased direct services to crime victims.

  Much of the impetus for the proposed amendment has been the shameful realization that crime victims are often neglected, if not ignored, in the criminal process. We understand and sympathize with the fact that closure of the criminal case can be an important component of healing for some victims of crime. We fully believe that the victim of a crime should be kept thoroughly apprised of all scheduling, hearings and developments in the case, and that s/he should be provided the right of access as long as it does not interfere with the defendant's fair trial rights. We fully support prosecutors' paying greater attention to, being more sensitive to, and more respectful of the needs of their victims/witnesses, and, where appropriate, we support the provision of advocates for victims.

  However, all of these things can and should be accomplished within the present system, through legislation on the state level or through federal statutes. The healing that may happen when victims are heard, informed and respected during the criminal legal process is extremely important. But, as we have found in working with victims of domestic violence, the criminal system is often a particularly poor forum in which to try to solve the complex of social and other problems inherent in victimization. Unfortunately, the grave injustices of being victimized probably cannot be fully addressed or remedied in the criminal justice system. We urge, instead, that additional time, money and energy go into providing the support and services that many victims of crime very much need and certainly deserve.

- **The proposed amendment's real benefit to crime victims is speculative at best and, in fact, may end up *hindering*, rather than helping, victims**. It is entirely unclear how the proposed amendment would increase basic courtesies and respect for victims (particularly in light of the amendment's explicit provision for governmental immunity from civil actions). In addition, there are particular problems with the mandatory restitution clause. By forcing restitution to a constitutional level, restitution payments will be given priority over the payment of federal fines. This will certainly end up seriously undercutting payments to the Victims of Crime Act Fund (VOCA) in cases where defendants lack the resources to fully satisfy both. VOCA currently provides funds to more than 3,000 local victims' services organizations, including many domestic violence and sexual assault programs. If this Amendment passes there will ironically be *less* money available for victims' services.

- **While the amendment promises much to victims, it provides virtually no remedies for victims whose rights are violated**. As is inherently the case with federal constitutional amendments, the proposed amendment is broadly worded and suggests many rights without

corresponding remedies (or methods for enforcing these rights). In fact, the amendment specifically prevents victims from receiving monetary damages.

- **If passed, the enforcement of the amendment will divert critically needed resources from already underfunded victim assistance programs and from all key branches of the criminal justice system**. The National Clearinghouse is persuaded that the constitutional financial mandate this amendment imposes upon the states would require their already overburdened governments to divert funds from agencies that provide meaningful assistance to battered women, and that the implementation of the amendment would create numerous practical, administrative and financial burdens for courts, prosecutors, law enforcement personnel, and corrections officials. Congress has a responsibility to investigate thoroughly the cost of the proposed amendment to the 50 states, and the drastic shift in resources that would result if the amendment were ratified. Congress has not undertaken this analysis and the passage of the resolution before completion of this analysis does a disservice to the public.

- **This Amendment will not reduce the number of battered women being charged with crimes**. Some proponents of the Amendment have been arguing that passage of the Amendment will reduce the numbers of battered women who end up as defendants because, if the Amendment were passed, battered women would be much more likely to turn to the criminal justice system for assistance *before* they get arrested. While we acknowledge that criminal justice reform is essential in helping to reduce violence against women and is a very effective tool for some battered women, for others, however, it fails to offer any real protection. We also know that many women will never turn to the criminal justice system and will not do so *even if* the Amendment *were* able to provide all the support and services it promises to victims (which is highly unlikely). Unfortunately, for many battered women, the first time the system "pays attention" to them is when they enter it as defendants. The same system that failed to protect them or couldn't seem to find any resources to assist them *before* they get arrested, suddenly finds all sorts of resources to prosecute them vigorously. In fact, one of the unintended consequences of many mandatory and pro-arrest policies has been a massive increase in the numbers of battered women being arrested in many communities. Until all women are safe, battered women will continue to become defendants. This Amendment will not change that reality.

- **Defendants are facing loss of liberty and life at the hands of the state, and their rights must not be eroded.** Much has been made of the need for this amendment in order to "balance" the rights of victims with the rights of defendants. We agree that, if the playing field were level and the consequences of the "imbalance" equal, the goal of "balance" would be a germane one. But such an argument is completely inappropriate when talking about balancing the rights of victims and the rights of defendants. In this instance, the playing field is *far* from level; the power of the state far outstrips that of the defendant and his or her attorney, and the consequences at trial are dramatically different for victims and defendants. For example, a defendant may lose her liberty or even her life as result of the trial; the harsh reality is that the victim has very little to lose as a result of the trial — the victim's losses occurred long before the trial. We understand that

victims have experienced (often) tragic consequences as a result of being victimized; and we take their experiences and losses extremely seriously.

We also understand that victims can *gain* a sense of control and a host of other important psychological and emotional results when they are kept informed, are actively listened to, and are respected throughout the trial process. But the role of the criminal justice system is to determine whether or not the defendant committed the offense he or she is charged with, not to restore the victim. We believe that victims *should* be restored and should be informed, heard and respected throughout the proceedings, but this cannot and should not be achieved by eroding the rights of defendants.

- **If passed, the Amendment is sure to wreak havoc on the Bill of Rights, and will inevitably erode the basic constitutional guarantees that are designed to protect all of us — including victims of violence who are criminal defendants — from wrongful convictions**. There is no question that the primary constituents of the National Clearinghouse — battered women who have been victimized and then have become defendants — will be hurt by this Amendment. For example, depriving the trial courts of their historic authority to sequester witnesses — including alleged victims — from the courtroom until they testify would permit victim-witnesses to be influenced because they would hear the testimony and cross-examination of other witnesses. As a result, jurors will be far less likely to receive independent, truthful testimony and the possibility of a fair, reliable and just verdict will be diminished. In cases involving battered women charged with crimes, the abuser and/or his family become the "victims;" if not sequestered, they would have the right to be present and heard at all stages of the process. We know that batterers' families often collude in keeping the violence secret for many reasons (denial, their own experiences of abuse, and/or fear of retribution if they speak out against the abuser). If passed, the Amendment would make it possible for batterers and their families to listen to one another's testimony and to tailor their own testimony so as to avoid effective cross-examination when called as a witness. Additionally, passage of the Amendment would make it much more difficult for judges to limit testimony of "victims" at all stages of the proceeding, even if their testimony is not relevant or is so inflammatory that justice would be undermined.

- **Justice rushed is justice denied — for all, including victims of crimes**. The proposed Amendment says victims have the right to "a final disposition of the proceedings ... free from unreasonable delay." In our work at the National Clearinghouse, we see the tragic results that occur when attorneys rush to trial without proper investigation and preparation. Many battered women are unable to discuss their experiences of abuse candidly until they have established a relationship of trust and confidence with their defense counsel, a process which can take considerable time. The amendment would allow batterers to force cases to trial before the battered woman's attorney has adequately investigated or prepared for the case, thereby substantially affecting reliable determinations of guilt and creating an intolerable risk of wrongful conviction.

- **Victims *should* be restored and should be informed, heard and respected throughout the proceedings, but this cannot and should not be achieved by eroding the rights of defendants.** All of us who work within the criminal legal system and are committed to justice need to be concerned about due process and the rights of defendants. One of the purposes of the constitution is to protect individuals from government abuses and to preserve liberty, not to "get a conviction at any cost," or to provide victim advocacy. None of us who are committed to justice (including many victims of crime) has an interest in diluting rights intended to prevent wrongful deprivation of liberty and unreliable determinations of guilt. As victim advocates, we need to be in the forefront of advocating for justice — which includes supporting the right of defendants to get fair trials and this Amendment will erode this right.

- **The proposed amendment would radically alter and jeopardize basic constitutional principles that protect us all.** The proposed amendment would mark a radical and unprecedented change in our system of criminal justice and to the foundation of our Bill of Rights, a change which would jeopardize those rights and undermine the truth-seeking function of the criminal justice process. Our system of justice is built on the concept of public, rather than private, prosecutions. The accuser is the government, not the aggrieved individual. The structural integrity of our entire justice system depends on this equation — between the accused and the government, not the accused and the individual victim of crime.

  The very purpose of the Bill of Rights is to curtail the power of the government against the rights of the accused. It arms the accused with basic guarantees, such as the presumption of innocence and the need of proof beyond a reasonable doubt. These fundamental guarantees are necessary to ensure that the government's power is not abused; that the innocent do not fall prey to the weight and power of the government; and that only the guilty are convicted.

  To elevate victim participation in the criminal process to the level of a federal constitutional amendment would jeopardize the critical balance between accuser and accused, as reflected in the Bill of Rights, and threatens to diminish those rights. None of us, including victims of crime, has an interest in diluting rights intended to prevent wrongful deprivation of liberty, and unreliable determinations of guilt.

- **The criminal justice system does not overprotect; rather it *re-victimizes* battered women defendants.** Much support for the proposed amendment is grounded on the assumption that criminal defendants have too many rights, and that victims have none. While we agree that victims should have greater support, advocacy and respect, it is a fallacy that the criminal justice system overprotects the rights of the defendants, especially the rights of indigent defendants and defendants of color. On a daily basis, we assist countless battered women defendants who have been denied basic due process. We assist women who did not receive fair trials and were wrongfully convicted because, for example, their attorneys did not investigate, understand, or properly present vital defense evidence. Many of these women were denied funds for expert testimony that would have enabled the jury to hear and understand the basis of their defense. Thus, in our experience, the criminal justice system does not overprotect; rather, it often *re-*

victimizes battered women defendants, as can be attested to by the thousands of wrongfully convicted and incarcerated battered women defendants who fill jails and prisons across this country.

Conclusion

In conclusion, the National Clearinghouse for the Defense of Battered Women agrees that crime victims have much to gain when they are kept informed, actively listened to, and respected throughout the adjudication of a criminal case, but passage of a Constitutional Amendment is the wrong way to achieve these goals. Enhanced victim participation in the justice system can be, and largely has been, made by statutory enactments at the state level. At the federal level, Congress has ample authority to enact new laws, as well as to expand and amend the laws it has already passed, to improve the treatment of crime victims without jeopardizing our cherished constitutional protections.

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United States Senator
Board Member: 1986-1991

April 7, 2003

The Honorable Jon Kyl
United States Senate
Washington, DC 20510

The Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

Dear Senators Kyl and Feinstein,

I write in behalf of the Board of Directors of the National Organization for Victim Assistance and its thousands of members, and I am pleased to inform you of our unanimous endorsement of Senate Joint Resolution 1, the Crime Victims' Rights Amendment.

The time for enacting the amendment is now long overdue. The vast majority and the mainstream of both the victims' movement and the citizenry at large support the amendment and urge its swift passage out of Congress.

Sincerely,

Jeannette M. Adkins

Jeannette M. Adkins
President of the Board

United States Senate
Committee on the Judiciary

Statement of

James Orenstein

on
S.J. Res. 1, the Proposed Victims' Rights
Amendment to the United States Constitution

Tuesday, April 8, 2003
226 Dirksen Senate Office Building

I. Introduction

Mr. Chairman, distinguished Members of the Committee, thank you for inviting me to appear before you today. It is an honor to have a chance to speak with you about a matter as fundamentally important as our Constitution, and to address two issues that mean a great deal to me: the rights of crime victims and the effective enforcement of criminal law. As a federal prosecutor for most of my career, I have been privileged to work closely with a number of crime victims, including those harmed by one of the worst crimes in our Nation's history. I have also been privileged to spend considerable time working with talented people on all sides of the issue to make sure that any Victims' Rights Amendment to the Constitution would provide real relief for victims of violent crimes without jeopardizing law enforcement. I think it may be possible to do both, but I also believe that there are better solutions that do not carry the severe risks to law enforcement inherent in using the Constitution to address the problem. In particular, I believe that the current language of the Victims' Rights Amendment – language that differs in significant respects from the carefully crafted Amendment that came very close to passage in the 106th Congress – will in some cases sacrifice the effective prosecution of violent offenders to achieve marginal and possibly illusory procedural improvements for their victims.

I am currently an attorney in private practice in New York City and an adjunct professor at the law schools of Fordham University and New York University.[1] From February 1990 until June 2001, I served in the United States Department of Justice as an Assistant United States Attorney for the Eastern District of New York. For most of that time, I was assigned to the office's Organized Crime and Racketeering Section, eventually serving as its Deputy Chief. While a member of that section, I prosecuted a number of complex cases against members and associates of La Cosa Nostra, including the successful prosecution of John Gotti, the Boss of the Gambino Organized Crime Family.

In 1996, at the request of the Attorney General, I temporarily transferred to Denver to serve as one of the prosecutors in the Oklahoma City bombing case. I remained in Denver for 18

[1] The views expressed herein are mine alone.

months to prosecute the trials of both Timothy McVeigh and Terry Nichols, and then returned in the Spring of 2001 to represent the government when McVeigh sought to delay his execution on the basis of the belated disclosure of certain documents. As a member of the OKBOMB task force, I learned first-hand about the many difficulties and frustrations that victims of violent crimes face in our justice system, and I also learned how critically important it is for prosecutors and law enforcement agents to zealously protect the interests of crime victims while prosecuting the offenders.

From 1998 to 2001 I served on temporary work details at Justice Department headquarters in Washington, D.C., first as an attorney-adviser in the Office of Legal Counsel, and later as an Associate Deputy Attorney General. In both positions I was a member of a group that worked extensively with sponsors and other supporters of previous versions of the Victims' Rights Amendment. Our goal in doing so was to ensure that if the Amendment were ratified, it would provide real and enforceable rights to crime victims while at the same time preserving our constitutional heritage and – most important from my perspective as a prosecutor – maintaining the ability of law enforcement authorities to serve victims in the single best way they can: by securing the apprehension and punishment of the victimizers.

II. The Argument For A Constitutional Amendment: Allowing Congress to Legislate for the States To Achieve A Uniform National Standard

I have no doubt that law enforcement authorities have historically been far too slow in realizing how important it is to protect the interests of crime victims as investigations and prosecutions. Twenty years ago, when President Reagan received the Final Report from the President's Task Force on Victims of Crime, courts, prosecutors and law enforcement officers too often ignored or too easily dismissed the legitimate interests of crime victims. Since then, Congress, the State legislatures and federal and state law enforcement agencies have made great improvements in official laws and policies. Further, thanks largely to effective advocacy by groups representing the victims of crime, officers, prosecutors and judges are much more sensitive now than they were two decades ago to the needless slights our criminal justice system can thoughtlessly impose, and are generally doing better in making sure that the system does not victimize people a second time. But despite such improvements, there is more that can and should be done.

Amending the Constitution to achieve that goal has both risks and benefits, and given the difficulty of curing any unintended adverse consequences, it should properly be considered only as a last resort. Given the legislative progress of the last twenty years, the principal benefit of an Amendment would be the empowerment of Congress to impose uniform national standards on the States. Congress has enacted a wide variety of statutes that protect crime victims. These laws ensure crime victims' participatory rights in the criminal justice system by making sure they are notified of proceedings, admitted to the courtroom and given an opportunity to be heard.[2]

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[2] One of those statutes – the Victims' Rights Clarification Act of 1997, 18 U.S.C. § 3510 – effectively addressed one of the problems often cited by supporters of this bill as showing the need for a constitutional amendment: the decision by the trial judge in the Oklahoma City bombing case to exclude from the courtroom any victim who wished to testify at the penalty

(continue)

They improve crime victims' safety by providing for notification about offenders' release and escape, and by providing for protection where needed. They help crime victims obtain restitution from offenders and remove obstacles to collection. But these measures only apply in federal criminal cases, and cannot protect crime victims whose victimizers are prosecuted by State authorities.

And while every single State has enacted its own protections for crime victims – 32 of them by means of constitutional amendments, and the rest through legislative change – the States have not uniformly adopted the full panoply of protections that this body has provided to the victims of federal crimes.[3] For example:

- Although every State allows the submission of victim impact statements at an offender's sentencing, only 48 States and the District of Columbia also provide for victim input at a parole hearing.
- Despite the prevalence of general victim notification procedures, only 41 States specifically require victims to be notified of canceled or rescheduled hearings.
- There is a similar lack of procedural uniformity with respect to restitution: only 43 States allow restitution orders to be enforced in the same manner as civil judgments.
- Finally, while convicted sex offenders are required to register with state or local law enforcement in all 50 states and the District of Columbia, and all of those jurisdictions have laws providing for community notification of the release of sex offenders or allowing public access to sex offender registration, such notification and access procedures are not uniform.

The ratification of a federal constitutional amendment could eradicate this disparity by empowering Congress to pass legislation that would override State laws and bring local practices into line.[4] The same result, however, could likely be achieved through the use of the federal

(continued)
phase. As a result of the 1997 law, no victim was excluded from testifying at the defendants' penalty hearing on the basis of having attended earlier proceedings. Further, the trial judge's conduct of the case following enactment of that statute – including his voir dire of prospective victim witnesses and his decision to exclude the testimony of one child victim because its admission would have violated the defendant's right to due process – would almost certainly have been exactly the same even if the proposed amendment had been in effect at the time.

[3] Statistics about state victim protection laws are drawn from U.S. Department of Justice, Office for Victims of Crime, "Crime and Victimization in America, Statistical Overview" (Apr. 2002) <http://www.ojp.usdoj.gov/ovc/ncvrw/2002/ncvrw2002_rg_3.html#legislative>.

[4] Of course, Congress would not be required to use such power to bring uniformity to the States, but if it did not do so, the situation would be no different than under current circumstances, where congressional legislation improves procedures only in federal cases and the treatment of victims in other cases is left to the effective but varying protection of the respective States.

spending power to give States proper incentives to meet uniform national standards. But unlike reliance on spending-based legislation, using the Constitution to achieve such uniformity carries the risk of unintended adverse consequences to law enforcement.

III. The Proposed Amendment Needlessly Undermines Effective Law Enforcement

A. Background

It is important to emphasize that the potential risks to effective law enforcement are not the result of giving legal rights to victims and placing corresponding responsibilities on prosecutors, judges, and other governmental actors. The changes brought about by improved legislation in this area over the past twenty years have demonstrated that the criminal justice system can provide better notice, participation, protection and relief to crime victims without in any way jeopardizing the prosecution of offenders. To the contrary, I strongly believe that prosecution efforts are generally more effective if crime victims are regularly consulted during the course of a case, kept informed of developments, and given an opportunity to be heard. There are of course occasions when such participation can harm law enforcement efforts, but my experience has been that most crime victims are more than willing to accommodate such needs if their participation is the norm rather than an afterthought.

In most cases, crime victims and prosecutors are natural allies: both want to secure the offender's punishment, and both are better able to work toward that result if the prosecutor keeps the victim notified and involved. But there are a number of cases – typically arising in the organized crime context and in prison settings – where the victim of one crime is also the offender in another, and the kind of participatory rights that this Amendment mandates would harm law enforcement efforts.

When a mob soldier decides to cooperate with the government, he typically pleads guilty as part of his agreement, and in some cases then goes back to his criminal colleagues to collect information for the government. If his disclosure is revealed, he is obviously placed in great personal danger, and the government's efforts to fight organized crime are compromised. Under this Amendment, such disclosures could easily come from crime victims who are more sympathetic to the criminals than the government. To illustrate that perverse kind of alliance: When I was working on the case against mob boss John Gotti, ten weeks before the start of trial, Gotti's underboss, Salvatore Gravano, decided to cooperate and testify – but for weeks after he decided to do so he was still in a detention facility with Gotti and other criminals and at grave risk if his cooperation became known. Luckily, that did not happen. But there were clearly victims of Gravano's crimes who would have notified Gotti if they could have done so. Gravano had, at Gotti's direction, killed a number of other members of the Gambino Family. Shortly after Gravano's cooperation became known, some of the murdered gangsters' family members filed a civil lawsuit for damages against Gravano – but not Gotti – and sought to use the civil discovery procedures to collect impeaching information about Gravano before the start of Gotti's trial. That their agenda was to help Gotti was demonstrated by the fact that when Gravano impleaded Gotti into the lawsuit, the problem disappeared.

Some argue that this problem of victim notification of cooperation agreements in organized crime cases is cured by the fact that the cooperating defendant's plea normally takes place in a non-public proceeding. While this may be true in a small number of cases, it is generally an unreliable solution. First, the standard for closing a public proceeding is exceptionally high, *see* 28 C.F.R. § 50.9, and as a result cooperators' guilty pleas are rarely taken in proceedings that are formally closed to the public.[5] Instead, it is usually necessary to take such a plea in open court and protect the need for secrecy by scheduling it at a time when bystanders are unlikely to be present and by not giving advance public notice of the plea. Such pragmatic problem-solving would not work under the proposed Amendment, because victims allied with the targets of the investigation would be entitled to notice. Second, the Amendment's guarantee of the right to an adjudicative decision that considers the victim's safety might make courts reluctant to release a cooperating defendant to gather information without hearing from victims at the bail proceeding.

In the prison context, incarcerated offenders who assault one another may have little interest in working with prosecutors to promote law enforcement, but may have a very real and perverse interest in disrupting prison administration by insisting on the fullest range of victim services that the courts will make available. If, as discussed below, the current language of the Amendment creates a right to be present in court proceedings involving the crime, or at a minimum to be heard orally at some such proceedings, prison administrators will be faced with the Hobson's choice between cost- and labor-intensive measures to afford incarcerated victims their participatory rights and foregoing the prosecution of offenses within prison walls. Either choice could undermine orderly prison administration and the safety of corrections officers.[6]

The risk to law enforcement thus arises not from the substantive rights accorded to crime victims, but rather from the use of the Constitution to recognize those rights. As discussed below, there are two basic ways in which the Victims' Rights Amendment, as currently drafted, could undermine the prosecution and punishment of offenders: first, it may not adequately allow for appropriate exceptions to the general rule; and second, its provisions regarding the enforcement of victims' rights may harm prosecutions by delaying and complicating criminal trials. Both types of problems are uniquely troublesome where the source of victims' rights is the Constitution rather than a statute, and both are exacerbated by the likely effect on the

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[5] For example, in light of the important First and Sixth Amendment interests at stage, federal regulations require prosecutors to secure the express permission of the Deputy Attorney General before seeking or even consenting to a closed court proceeding. 28 C.F.R. § 50.9(d)(1).

[6] One possible solution to the prison problem would be for Congress to exercise its enforcement power to exclude incarcerated offenders from the class of victims protected by the Amendment. Such an approach would be overbroad, and arguably inconsistent with the purpose of Section 4, which is designed to "enforce" rather than restrict the Amendment. See, e.g., Saenz v. Roe, 426 U.S. 489, 508 (1999) ("Congress' power under § 5 [of the Fourteenth Amendment], however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'") (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

interpretation of this bill resulting from its differences with prior versions of the Amendment. I will address the general interpretive issue first and then discuss in turn the specific problems for law enforcement and prison administration caused by particular portions of the current bill.

B. Interpreting The Amendment In Light Of Its Legislative History

Proponents of the current bill assert that it reflects years of study and debate, and that it embodies compromises reached after much effort by supporters and critics alike.[7] As someone who was involved in those efforts, I can tell you that while the current bill is unquestionably the product of good-faith effort by its supporters, and does indeed incorporate some improvements suggested by others, it does not fully reflect the years of work that have gone into efforts to serve both crime victims and our Constitutional heritage. To the contrary, as explained below, the current version of the Amendment discards several important compromises that were crafted in an earlier version that was endorsed by this Committee, and thereby exacerbates the risks to effective law enforcement.

During the time I worked for the government, I was fortunate enough to work with a number of very talented and dedicated attorneys from the Justice Department, Congress, and victims' advocacy groups to refine the language of the Victims' Rights Amendment. I became involved in the effort while an earlier version, S.J. Res. 44, was pending in the 105th Congress. By that time a great many issues had been resolved, and only a few remained. Some, though not all, potentially implicated very practical law enforcement concerns about the conduct of criminal trials and the administration of prisons. Over the course of several months, most of those remaining concerns were addressed. By the time that S.J. Res. 3 of the 106th Congress was favorably reported by the Senate Judiciary Committee (S. Rep. 106-254, Apr. 4, 2000 (the "Senate Report")), virtually every word in the bill had been crafted and vetted with an eye to achieving a careful balance of meaningful victims' rights and the needs of law enforcement.

Much of the language adopted in S.J. Res. 3 to address law enforcement concerns has been changed or deleted in the current version.[8] Even if Congress were writing on a blank slate, I would have some concerns about some of the language in S.J. Res. 1. But you are not writing

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[7] *See, e.g.*, Statement of Steven J. Twist, General Counsel, National Victims Constitutional Amendment Network, Before the Subcommittee on the Constitution, Federalism, and Property Rights, Committee on the Judiciary, United States Senate, in Support of S. J. Res. 35 [107th Cong.], The Crime Victims' Rights Amendment at 10 (Jul. 17, 2002) ("Twist Statement") ("These efforts have produced the proposed amendment which is now before you. It is the product of quite literally six years of debate and reflection. It speaks in the language of the Constitution; it has been revised to address concerns of critics on both the Left and the Right, while not abandoning the core values of the cause we serve.").

[8] The changes first appeared in S.J. Res. 35 of the 107th Congress, the substantive terms of which were identical to those of the current bill. For the reader's convenience, I have appended to this statement the text of the 2000 version of the Victims' Rights Amendment, as set forth in S.J. Res. 3 of the 106th Congress.

on a blank slate, and that fact exacerbates the potential law enforcement problems created by some of the provisions of this bill. As you know, when legislation contains ambiguous language, most judges will resolve the ambiguity in part by looking at the legislative history and in part by applying certain assumptions about legislative intent.

Thus, for example (and as discussed below), the remedies provision of the current bill no longer contains an explicit prohibition – as the earlier version of the Amendment did – forbidding a court from curing a violation of a victim's participatory rights by staying or continuing a trial, reopening a proceeding or invalidating a ruling. If the current version of the Amendment is ratified, courts interpreting it might rule that this was a deliberate change and that any ambiguity on the issue must therefore be resolved in favor of allowing such remedies – remedies that could well harm the prosecution's efforts to convict an offender.

C. Exceptions And Restrictions, And The Need For Flexibility In Law Enforcement And Prison Administration

There are unquestionably times when providing victims with the substantive participatory rights set forth in the Amendment will be inconsistent with the interests of a successful prosecution or prison administration. For example, providing notice and an opportunity to be heard with regard to the acceptance of the guilty plea of a potential cooperating witness – that is, a criminal who is willing to testify against more serious offenders in exchange for leniency – may in some cases risk compromising the secrecy from other offenders necessary to the successful completion of such an agreement. This is particularly true in the organized crime context, where the victims may themselves be members of rival criminal groups. Likewise, in the case of prison assaults, there may be cases where accommodating the participatory rights of the victim inmate will unduly disrupt the safe and orderly administration of the prison. I am confident that the sponsors of this bill and other victims' rights advocates agree that such exceptions are appropriate. The problem is that the current language may not allow them.

1. The "Restrictions" Clause Generally

The current bill allows victims' rights to be "restricted" "to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." Like its predecessor (which allowed "exceptions" to "be created only when necessary to achieve a compelling interest"), the current version allows courts to provide flexibility in individual cases rather than relying on Congress to prescribe uniform national solutions. The current bill also improves on the S.J. Res. 3 by expanding the scope of circumstances in which courts can allow for such flexibility. The earlier bill's limitation of exceptions to those "necessary to achieve a compelling interest" would likely have triggered "strict scrutiny" by reviewing courts, as a result of which virtually no exceptions would likely be approved. However, some of the language changes may harm the law enforcement interest in flexibility, as discussed below.

a. "Restrictions" rather than "Exceptions"

Given the current bill's use of the word "restrictions" in contrast to the earlier bill's use of "exceptions," I am concerned that courts will interpret a "restriction" to mean something other

than an exception to the general rule. An "exception" plainly refers to a specific situation in which the substantive rights that would normally be accorded under the amendment need not be vindicated by the courts at all. If a "restriction" is interpreted to mean something different – such as, for example, a limitation on the way the right is to be afforded in a particular situation rather than an outright denial – the unintended effect might be harmful to law enforcement. For instance, in the case where it makes sense not to notify one gang member who is the victim of another one's assault that the latter is about to plead guilty and cooperate, an "exception" approved by the court would allow the prosecutor not to provide notice at all, whereas the "restriction" might nevertheless require some form of notice – which might endanger the cooperating defendant and compromise his ability to assist law enforcement.[9]

b. Prison administration may not fall within "the administration of criminal justice."

Because so many of the victims who would be given rights under this Amendment are themselves offenders, it is critically important that the bill provide sufficient flexibility in the context of prison administration. One approach that would work in the prison context – but that would likely fail to provide sufficient flexibility to prosecutors – would be simply to have no "exceptions" language in the Amendment at all. In the context of the First Amendment, for example, courts have held that the legitimate needs of prison administration justify reasonable limitations on free expression rights, despite the fact that the First Amendment contains no provision for exceptions and is absolute in its phrasing.[10] But if the Amendment is to provide for exceptions or restrictions in some circumstances, prison administrators might have to do far more than show reasonable needs for relief, and would instead have to meet the explicit standard set forth in the Amendment.

As noted above, the current bill improves upon its predecessor by expanding on the "compelling interest" standard for exceptions. However, if courts do not interpret "the administration of criminal justice" broadly, the legitimate needs of prison administrators might nevertheless be sacrificed. Although I would likely disagree with an interpretation of the phrase that excluded prison administration, such an interpretation is certainly possible. Given that habeas corpus proceedings challenging the treatment of prisoners are treated as civil cases and are collateral to the underlying criminal prosecutions, it would not be unreasonable for a court to conclude that the needs of prison administrators are not included within the phrases "public safety" or "administration of criminal justice" and that prison-related restrictions of victims rights must therefore pass strict scrutiny under the "compelling necessity" prong of the Section 2.

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[9] Similarly, in a mass-victim case, a pragmatic decision to allow only a limited number of representative victims speak at a hearing would almost certainly be considered a reasonable "exception" to the individual victim's right to be heard, but could not fairly be characterized as a mere "restriction" of that individually-held right.

[10] See, e.g., Shaw v. Murphy, 532 U.S. 223, 229 (2001); Turner v. Safley, 482 U.S. 78, 89 (1987).

2. Specific Flexibility Problems

a. The right "to be heard"

One of the most important participatory rights for crime victims is the right to be heard in a proceeding. As in earlier versions, the current version properly limits this right to public proceedings so as not to jeopardize the need for security and secrecy in proceedings that are not normally open to the public. However, certain language changes from the earlier version compromise that limitation, and certain other changes discard the important flexibility achieved by allowing victim input to come in the form of written or recorded statements.

The corresponding language in S.J. Res. 3 accorded a victim of violent crime the right "to be heard, if present, and to submit a statement" at certain public proceedings.[11] In contrast, the current bill provides a right "reasonably to be heard" at such proceedings. While the drafters may have intended no substantive difference, I believe that the courts will interpret the change in language to signal the opposite intention. Specifically, I would expect some courts to interpret the deletion of "submit a statement" to signal a legislative intent to allow victims actually to be "heard" by making an oral statement. Nor do I think the use of the term "reasonably to be heard" would alter that interpretation; instead, I believe courts would likely reconcile the two changes by interpreting "reasonably" to mean that a victim's oral statement could be subjected to reasonable time and subject matter restrictions.[12] If the above is correct then prison officials might face an extremely burdensome choice of either transporting incarcerated victims to court for the purpose of being heard or providing for live transmissions to the courtroom.

A related problem would extend beyond prison walls. Because the difference between the previous and current versions of the Amendment suggest that a victim must be allowed specifically to be "heard" rather than simply to "submit a statement," a victim might persuade a court that the "reasonable opportunity to be heard" guaranteed by the current version of the Amendment carries with it an implicit guarantee that the government will take affirmative steps, if necessary, to provide such a reasonable opportunity. This undermines the intent of the Amendment's careful use of negative phrasing with respect to the right not to be excluded from public proceedings – a formulation designed to avoid a "government obligation to provide funding, to schedule the timing of a particular proceeding according to a victim's wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings."[13] Further undermining that intent is the fact that unlike its predecessor, the current version of the Amendment does not include the phrase "if present" in the specification of the right to be heard.

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[11] The 2000 version also provided the same right at non-public parole hearings "to the extent those rights are afforded to the convicted offender." There is no corresponding participatory right under the current proposed Amendment.

[12] Such an interpretation of legislative intent would be consistent with the Senate Judiciary Committee's explanation of the corresponding language in S.J. Res. 3. See Senate Report at 34.

[13] Senate Report at 31.

b. Providing notice of ancillary civil proceedings.

Section 2 provides that "[a] victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime ...." Some public proceedings "involving the crime" are civil in nature, and normally proceed without any participation by the executive branch of government. Here again, the change in language from S.J. Res. 3 could be problematic: that bill used the phrase "relating to the crime," which the Senate Judiciary Committee noted would "[t]ypically ... be the criminal proceedings arising from the filed criminal charges, although other proceedings might also relate to the crime." Senate Report at 30-31. A court interpreting the current bill might conclude that the change from "relating to" to "involving" was intended to make it easier to apply the Amendment to proceedings outside the criminal context.

Thus, for example, if an offender murders multiple victims and the survivors of one victim bring a civil suit for damages against the offender, this Amendment would give the non-suing victims' relatives an affirmative right to notice of the public proceedings in the lawsuit – without specifying who must provide the notice. The only possible candidates are the plaintiff (who is herself a crime victim and should not be burdened by this Amendment), the court (which is already overburdened and may lack the information necessary to provide the required notice), and the law enforcement agencies that investigated and prosecuted the crime. It seems inevitable (and correct) that this burden would fall to law enforcement under the Amendment – a burden that is totally unrelated to improving the lot of crime victims in the criminal justice system and that would further deplete the already strained resources of prosecutors and police, assuming that they even have sufficient knowledge of the ancillary suit to fulfill the obligation.

Two possible solutions seems likely to be unsatisfactory. First, the problem of providing notice in ancillary civil suits would be eliminated by changing "any public proceeding" to "any public criminal proceeding." However, such a change would likely exclude habeas corpus proceedings, which are considered civil in nature, despite the important role they play in the criminal justice system. Second, as explained above, I believe it is doubtful that Congress could eliminate the problem under the "restrictions" authority in the last sentence of Section 2. As noted above, such restrictions are reserved for matters of "public safety ... the administration of criminal justice [and] compelling necessity." The burden associated with providing notice in civil suits is plainly not a matter of public safety and would almost certainly fail to withstand the strict scrutiny that the "compelling necessity" language will likely trigger. And if the burden is held to be a sufficiently "substantial interest in the ... administration of criminal justice" to warrant use of the restriction power, then it seems likely that virtually any additional burden to law enforcement or prison officials would justify a restriction – making the rights set forth in the Amendment largely illusory. Because I doubt that the courts would interpret the restriction power to be so broad, I am concerned that there would be no legislative mechanism available to cure this problem.

D. Potential Adverse Effects on Prosecutions

One of the criticisms of the previous version of the Victims' Rights Amendment was the length and inelegance of its language. The substantive rights in Section 1 were set forth in a series of very specific subsections resembling a laundry list, and the remedies language of

Section 2 set forth a bewildering series of exceptions to exceptions.[14] But while the language of the current bill is more streamlined and reads more like other constitutional amendments than its predecessor, it achieves such stylistic improvement at the expense of clarity, which could result in real harm to criminal prosecutions.

For the most part, this problem arises from the interplay of two clauses: the "adjudicative decisions" clause in Section 2 (recognizing the "right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender") and the remedies clause in Section 3 ("Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages."). The former suggests that all of the victims' listed interests – in safety, the avoidance of delay, and restitution – are at stake and must therefore be considered in every adjudicative decision; the latter, by deleting specific language from S.J. Res. 3, suggests the possibility of interlocutory appeals of any such adjudicative decision that does not adequately consider all of the victim's interests. In combination, these two aspects of the bill could greatly disrupt criminal prosecutions.

1. Adjudicative decisions

The 2000 version of the Amendment included in its list of crime victims' rights the following three items: the right "to consideration of the interest of the victim that any trial be free from unreasonable delay;" the right "to an order of restitution from the convicted offender;" and the right "to consideration for the safety of the victim in determining any conditional release from custody relating to the crime." The interest in a speedy trial was generalized – it was not tied to a specific stage of the prosecution, much less to every such stage. Such language allowed courts the freedom to interpret the right to apply in proceedings at which the trial schedule was at issue.[15] The interest in restitution was specifically tied to the end of the case, at which point the victim's interest would be vindicated by the issuance of an appropriate order.[16] And the interest in safety was explicitly tied to bail, parole and similar determinations.[17]

In contrast, the current language appears to require the consideration of all the listed interests in the context of any "adjudicative decision" that a court (or, presumably, a parole or

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[14] *See, e.g.*, 146 Cong. Rec. S2984 (daily ed. Apr. 27, 2000) (statement of Sen. Leahy) ("Let us call that 'the tax lawyer's provision,' since it is so obscure that I think only someone who has spent half their life plumbing the depths of the tax code could understand it. It would certainly be the first triple negative in the United States Constitution.... Regardless of how it is ultimately interpreted, this intricate web of exceptions is not the stuff of a Constitution.")

[15] See Senate Report at 36.

[16] This provision gave courts sufficient flexibility by allowing an order of only nominal restitution if there was no hope of satisfying the order and by conferring no rights with regard to a particular payment schedule. Senate Report at 37.

[17] See Senate Report at 37-38.

pardon board) makes in connection with a criminal case. Indeed, it is precisely because of the contrast with the earlier formulation that such an interpretation is plausible. And if that interpretation proves to be correct, then courts and prosecutors will have to grapple with a number of questions, the resolution of which could make the prosecution of offenders a far lengthier and complicated process. For example:

- Must every "adjudicative decision" in a criminal case examine the effects of the ruling on the right to restitution?
- Must a victim be heard on disputes about jury instructions because the result, by making conviction more or less likely, may affect her safety-based interest in keeping the accused offender incarcerated?
- Does a crime victim have the right to object to the admission of evidence on the ground that it might lengthen the trial?

Examples could be multiplied, and undoubtedly some would be more fanciful than others. But given the change in language from the previous bill, and given the countless adjudicative decisions that are made in every criminal prosecution, it seems inevitable that the current version of the Amendment could cause real mischief in criminal prosecutions.

2. Remedies

The potential for unintended adverse consequences is magnified by the change in language regarding remedies. This is one of the most challenging issues in crafting a Victims' Rights Amendment: the need to make crime victims' rights meaningful and enforceable while at the same time preserving the finality of the results in criminal cases and also avoiding interlocutory appeals that could harm the interests of speedy and effective prosecution. The balance that was struck in S.J. Res. 3 recognizes that a crime victims have a variety of interests that can be protected in a variety of ways. Generally speaking, the remedies provision of S.J. Res. 3 recognized that a crime victim's interest in safety – which is at stake in decisions regarding an accused offender's release on bail – should be capable of vindication at any time, including through a retrospective invalidation of an order of release. On the other hand, a victim's participatory rights can effectively be honored by prospective rulings without the need to reopen matters that were decided in the victim's absence.

Thus, for example, if a victim were improperly excluded from a courtroom during the consideration of a motion in limine to exclude evidence, it would make more sense to allow the victim to obtain appellate relief in the form of a prospective order to admit the victim to future proceedings than a retrospective one that would vacate the evidentiary ruling so that the matter could be re-argued in the victim's presence. Moreover, it would plainly be contrary to the interests of effective law enforcement if a victim could obtain a stay or continuance of trial while the interlocutory appeal of described above was pending. The remedies language of S.J. Res. 3,

inelegant as it was,[18] would have prevented such anomalous results. The more streamlined language of the current bill – by deleting the prohibitions against staying or continuing trials, reopening proceedings, and invalidating ruling – would not.

IV. Legislation Can Achieve The Desired Results Without Risking Effective Law Enforcement

While I believe, for the reasons set forth above, that ratification of the proposed Constitutional amendment would incur unwarranted risks for law enforcement, I do not believe that this body lacks a useful alternate course of action. To the contrary, the substantive benefits to be achieved by the bill – in particular, the creation of a national standard of crime victims' rights that courts, prosecutors and police would be legally bound to respect – can and should be achieved through federal legislation. Such legislation would be appropriate under the proposed Amendment – as made clear by the enforcement power contemplated in Section 4 – but there is no need for Congress to wait for the Amendment to be ratified to take such action. To the contrary, Congress has previously used its power to pass a number of valuable enhancements of victims' rights over the last twenty years,[19] and can do so again both to fill the remaining gaps in federal law and to provide proper incentives for the States to improve their own laws. Such legislation could provide crime victims across the country with the respect, protection, notification and consultation they deserve, while at the same time preserving the flexibility essential to effective law enforcement.

Such a bill is now pending in the Senate: The Crime Victims Assistance Act of 2003, Title III, Subtitle B of S. 22. Although this hearing is not about that bill, it is worth noting that the pending Act would, by means of the provisions of Part 1, implement all of the substantive rights embodied in S.J. Res. 1 that have yet to be included in federal law, as well as others, and would strengthen enforcement of all federal victims rights. It would also, through the funding and pilot program provisions of Part 2, encourage States to improve their own laws. There may well be alternatives to the specific provisions of the pending legislation – and in particular, there may be stronger measures available to encourage States to enact victim protection laws that meet federal standards – but regardless of any alternatives there are at least two advantages that this legislative approach has over the proposed Constitutional amendment.

First, because the Crime Victims Assistance Act is a statute, it can properly be drafted as such, and thereby achieve the balancing of the interests of crime victims and law enforcement that a more generally worded constitutional amendment necessarily lacks. As noted above, some critics of S.J. Res. 3 objected to the length, inelegance and statute-like specificity of some of its

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[18] "Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial."

[19] *See* Attorney General Guidelines for Victim and Witness Assistance, App. D (2000) (listing 15 federal laws) <http://www.ojp.usdoj.gov/ovc/publications/infores/agg2000/agguidel.pdf>.

provisions. The current version largely avoids such problems and reads more like other constitutional amendments, but only at the rather significant price of risking harm to law enforcement, as explained above. The fundamental problem is that there is no short and elegant way to describe the kinds of cases where the "victim" of one crime is also the offender (or allied with the offender) in another – i.e., the kinds of cases where providing the full panoply of victims' rights can do more harm than good. Nor is there a short and elegant sentence that precisely separates the kinds of remedial actions crime victims should be able to take to enforce their rights from those that would unduly delay trials and jeopardize convictions. As a statute, the Crime Victims Assistance Act can more precisely draw such distinctions.[20]

Second, a statute is easier to fix than the Constitution. If legislation intended to strike the proper balance of law enforcement and victims' needs proves upon enactment to be ineffective in protecting one interest or the other – that is, if it gives an unintended windfall to offenders by being too rigid or if it gives insufficient relief to victims by being too susceptible to exceptions – then the statute can be changed through the normal process. If a Constitutional amendment proves to have similar problems, it is all but impossible to remedy, because any change requires the full ratification process set forth in Article V of the Constitution.

Accordingly, there seems to be no good reason for Congress to consider amending the Constitution without first – or, at a minimum, simultaneously – enacting legislation that can both improve the protection of crime victims in both State and federal cases and minimize the unforeseen and unintended risks to effective law enforcement. Congress would almost undoubtedly seek to enact similar legislation pursuant to its enforcement power if the Amendment were ratified, and it will be no less effective if enacted now. More important, if the legislative approach proves effective, it would allow Congress to provide all the protection crime victims seek without needlessly risking society's interest in effective law enforcement.

Proponents of this bill sometimes dismiss concerns about a constitutional amendment's effects on law enforcement and prison administration as niggling doubts that would attend any ambitious attempt to improve the system. They argue that such concerns "make the perfect the enemy of the good" and question the bona fides of those who articulate them.[21] But these proponents themselves too easily dismiss a better solution that has not yet been tried and that may make the risks inherent in a constitutional amendment unnecessary. If supporters of victims' rights, among whose number I count myself, allow the desire for the symbolic victory of a constitutional amendment to distract them – and to distract Congress – from passing spending-

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[20] It is no answer to assert that similar line-drawing could be achieved under the Section 4 enforcement power that the proposed amendment would grant Congress. Because the effectiveness on such rules to protect law enforcement interests relies on the ability to carve out exceptions to the general grant of rights to crime victims, the portions of S. 22 that allow for such exceptions might well be deemed unconstitutional if the proposed Amendment were ratified.

[21] *See, e.g.*, Twist Statement at 2 ("critics are always heard to counsel delay, to trade on doubts and fears, to make the perfect the enemy of the good. Perhaps some would prefer it if crime victims just remained invisible.").

based legislation that could achieve all of their substantive goals more effectively and more easily than this bill, and with less risk to effective law enforcement, they run the risk of making the flawed the enemy of the perfect.

V. **Conclusion.**

Our criminal justice system has done much in recent years to improve the way it treats victims of crime, and it has much yet to do. But in trying to represent crime victims better, we must never lose sight of the fact that the single best way prosecutors and police can help crime victims is to ensure the capture, conviction, and punishment of the victimizers. In my opinion as a former prosecutor, the current version of the Victims' Rights Amendment to the United States Constitution achieves the goal of national uniformity for victims' rights only by risking effective law enforcement. By doing so, it ill serves the crime victims whose rights and needs we all want to protect.

I will be happy to answer any questions the Committee may have.

APPENDIX: The 2000 Version of the Victims' Rights Amendment (from S. J. Res. 3, 106th Congress)

SECTION 1. A victim of a crime of violence, as these terms may be defined by law, shall have the rights:

to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;

to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;

to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence;

to reasonable notice of a release or escape from custody relating to the crime;

to consideration of the interest of the victim that any trial be free from unreasonable delay;

to an order of restitution from the convicted offender;

to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and

to reasonable notice of the rights established by this article.

SECTION 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

SECTION 3. The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

SECTION 4. This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States.

Parents Of Murdered Children, Inc.
Central Arkansas Chapter
2311 Biscayne Drive, Suite 203
Little Rock, AR 72227
501-225-POMC 501-225-7665 fax 888-325-POMC toll free

7 April 2003

Dear Senator Feinstein:

Just a short fax to let you know that Crime Victims in Arkansas support the Crime Victims Rights Amendment. Passing the Amendment will help Crime Victims in Arkansas and across this great nation.

Thank you,

Dee McManus Engle

Dee McManus Engle
Arkansas POMC State Coordinator
National POMC Board of Trustees
2311 Biscayne Drive, Suite 203
Little Rock, AR 72227
501-225-POMC (7662) office
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www.pomc.com/ar

National Organization of
Parents Of Murdered Children, Inc.
For the families and friends of those who have died by violence.

100 East Eighth Street, Suite B-41 • Cincinnati, OH 45202 • Toll Free: (888) 818-POMC
Fax (513) 345-4489 • Website: www.pomc.com • Email: natlpomc@aol.com

April 8, 2003

Dear Senator Kyl:

Representing Parents Of Murdered Children Queens Chapter, I am writing to express our endorsement of the Kyl-Feinstein Crime Victim Rights Amendment. We respectfully urge its immediate passage.

Sincerely,

Carolee

Carolee Brooks
51-45 195 St
Flushing, New York 11365

National Organization of
Parents Of Murdered Children, Inc.
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April 8, 2003

Dear Senator Kyl:

Representing Parents Of Murdered Children Albany Chapter, I am writing to express our endorsement of the Kyl-Feinstein Crime Victim Rights Amendment. We respectfully urge its immediate passage.

Sincerely,

Pat Gioia
1531 Randolph Road
Schenectady NY 12308

National Organization of
Parents Of Murdered Children, Inc.
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April 7, 2003

Dear Senator Kyl:

I am a Contact Person for Parents Of Murdered Children in New York, I am writing to express our endorsement of the Kyl-Feinstein Crime Victim Rights Amendment. We respectfully urge its immediate passage.

Sincerely,

Matthew

Matthew Knapp
Freeville, New York

National Organization of
Parents Of Murdered Children, Inc.
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April 7, 2003

Dear Senator Kyl:

Representing Parents Of Murdered Children North Bronx Chapter, I am writing to express our endorsement of the Kyl-Feinstein Crime Victim Rights Amendment. We respectfully urge its immediate passage.

Sincerely,

Patricia

Patricia Solomon-Lawrence
1336 Morrison Ave
Bronx NY 10472

PR-09-03 01:47 AM POMC 5133454489 P.01

National Organization of
Parents Of Murdered Children, Inc.
For the families and friends of those who have died by violence.

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April 8, 2003

Dear Senator Kyl:

I am a Contact Person for Parents Of Murdered Children in New York, I am writing to express our endorsement of the Kyl-Feinstein Crime Victim Rights Amendment. We respectfully urge its immediate passage.

Sincerely,

Debra Moseley

Debra Moseley

168 Court St

Watertown NY 13601

National Organization of
Parents Of Murdered Children, Inc.
For the families and friends of those who have died by violence.

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April 8, 2003

Dear Senator Kyl:

I am a Contact Person for Parents Of Murdered Children in New York, I am writing to express our endorsement of the Kyl-Feinstein Crime Victim Rights Amendment. We respectfully urge its immediate passage.

Sincerely,

Louise Spiers

Louise Spiers

4578 A Kings Highway

Brooklyn New York 11365

National Organization of
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April 3, 2003

202 228-0542

Dear Senator Kyl:

On behalf of the National Organization of Parents Of Murdered Children, Inc. and our 100, 000 members, I am writing to express our board's unanimous endorsement of the Kyl-Feinstien Crime Victim Rights Amendment. We respectfully urge its immediate passage.

Sincerely,

Nancy Ruhe-Munch
Executive Director
Parents Of Murdered Children, Inc.

STATEMENT FROM PARENTS OF MURDERED CHILDREN OF NEW YORK STATE

By

Mrs. Odile Stern

Executive Director, Parents of Murdered Children of New York State

Since its inception in 1982, Parents of Murdered Children of New York State, Inc. (POMCONYS) has strongly advocated amendments to the U.S. and N.Y.S. Constitutions to ensure that like criminal defendants, crime victims are constitutionally protected..

24 years ago after the brutal rape and murder of our youngest daughter Michele in Atlanta Georgia, my family among many others had no voice in the criminal justice system. As we were struggling to mend our shattered lives, the system kept a deaf ear on our pleas for information, for voicing to the Court the terrible hurt done to our children and its impact on our lives. We stood helpless as our children's murderers enjoyed constitutionally protected rights.

20 years ago we founded Parents of Murdered Children of New York State, Inc. "United with Families and Friends, Working for Justice" is our motto. We drafted a Crime Victims' Bill of Rights based on our personal frustrations with criminal unjust system. We advocated victim compensation, restitution, escrow forfeiture of offender profits, protection from intimidation, victim notification, victim participation in proceedings, return of seized property, victim-witness assistance, privacy and security of victim information, victim's voice at sentencing and parole hearings.

20 years later, in 2002, we are proud to have been instrumental in the enactment by New York State of 135 bills addressing those rights but their full implementation remains a serious problem. The support of our State Constitution could have helped to ensure observance of those rights, but unfortunately our legislators have refused to act on a needed amendment. Unlike some crime victims assistance programs in New York State, POMCONYS strongly supports the Feinstein-Kyl Victims' Rights Amendment (Senate Joint Resolution 35). The Amendment speaks of basic human rights within reason. We also speak of those rights, seeking justice, not revenge.

Parents of Murdered Children of New York State, Inc. applauds the courageous initiative of those two legislators with the hope that their Amendment will be added to the U.S. Constitution.

Testimony of Patricia Perry

On S. J. Res. 1

The Victims' Rights Amendment

Before the

Committee on the Judiciary

United States Senate

April 8, 2003

Thank you for the opportunity to share my views on the proposed Victims' Rights Amendment.

My name is Patricia Perry and I speak on behalf of my husband James, our daughter Janice Montoya and our son Joel, in memory of their brother, our son, John William Perry, a NYPD officer who volunteered to assist employees escaping the World Trade Center on September 11, 2001, and himself became a victim. My husband Jim and I are Midwesterners, Jim from Missouri and I from Salina, Kansas, and both graduated from the University of Kansas. Our children were raised on Long Island, New York; John attended the State University at Stony Brook and New York University School of Law. As a young man, John wanted the experience of being a police officer and when he received the opportunity to enter the NYC police academy, he left his partnership in law and eagerly trained to learn how to protect the public from those who would cause harm.

After eight years of service to the NYPD, which included nearly five years in a legal department, John decided that he would return to a law practice. On September 11, 2001, John went to One Police Plaza, completed his retirement papers, and turned in his badge. Then the first plane crashed through Tower One. He immediately retrieved his badge, bought a shirt with the police insignia, and ran to the World Trade Center, just minutes away. He met a friend, Captain Timothy Pearson and entered the underground plaza to help panicked workers find a safe way out of the area. But he did not find safety for himself and became a victim of the terrorists of 9-11.

Even while working full-time for the NYPD, John found the time to serve as a pro bono lawyer for individuals whose civil rights and civil liberties had been violated. He also used his legal knowledge to serve as a NYC Small Claim Court Volunteer Arbitrator and as a legal advisor to the Kings County Society for the Prevention of Cruelty to Children. He was also a Lieutenant in the New York Guard. He was serious about his goals but full of humor and possessed an infectious smile. He was proficient in several languages, interested in people and ideas and enjoyed long conversations about philosophy and religion. He also ran marathons and raced in Hudson River swims.

There are thousands of victims of the World Trade Center attack. Some died in the first hour; a larger number survived with physical and emotional injuries that heal slowly. The families and friends of all these victims continue to suffer. As parents, we are bereft. Even though John was the "middle" child, he was the mentor to both his siblings, encouraging them to follow his lead in all aspects of their lives. Both have been devastated by his loss. His friends also have continued to contact us with their feelings of loss and despair. The terrorists of 9-11 shattered the lives of our family and the lives of all who knew and loved John. Many questions linger on. What do I, what do we as a family and what do all John's friends want as justice for his murder? Each victim of 9-11 leaves family, friends and loved ones who mourn as we do.

John believed in the integrity of the Constitution and the Bill of Rights, and in the institutions of our government that are established to pursue the guilty through legal means. Our system is not infallible; it can, at times, be both insensitive to the needs of victims and incompetent in its prosecution of criminals. We all know that there are cases where the guilty have gone unpunished and where innocent people have been convicted and even executed. These are issues that need to be addressed, but we suggest that this amendment is not the appropriate tool, nor will it remedy these flaws. Our family agrees that John would appreciate the concern for victims, but would oppose the Victims' Rights Amendment.

Our family believes that the best way for Congress to support victims and their families is to promote and support a system of justice that provides for fair and just convictions of the criminals responsible for these crimes. We believe that this constitutional Amendment threatens the system of checks and balances in the current justice system and that it could actually compromise the ability of prosecutors to obtain the convictions of those responsible for the carnage on 9-11. We believe that to the extent that this amendment is effective, it is unworkable and even dangerous. And to the extent that it does nothing, it is an empty promise among many for victims that need real resources and real support.

Victims and family members are not dispassionate. We are angry, depressed and mourning. As families, we have a torrent of emotions that are not useful in preparing a legal case. We usually lack expertise and have a desire for vengeance that we claim is the need for justice. We are

likely to quickly claim that an accused is guilty in our need to satisfy our loss and grief. We believe that criminal convictions should not be based on the emotions of victims and families, particularly in situations where we are not relevant witnesses to the crime. On the other hand, victims should clearly have the opportunity to participate in the penalty phases of a case, after a defendant has been found guilty of a crime.

In the case of the tragedy on 9-11 there were thousands of deaths and tens of thousands of victims. And, as we have seen in the aftermath of this tragedy and others, victims do not always agree on the best way a case should be handled. Under the Victims' Rights Amendment the prosecution would be required to try to weigh the opinions of different victims, leaving those victims with whom the prosecution does not agree feeling left out of the process.

Under this amendment as we understand it, victims would have the right to give input in the criminal case even before a conviction, including "consideration for the interest of the victim in a trial free from unreasonable delay," bail decisions and plea agreements. This could really compromise the government's prosecution of its case. Moreover, if the amendment passes, who will be entitled to these new constitutional rights? If a victim survives a wrong by an accused, it is simple to understand the meaning of "victim" for the purposes of such an Amendment, but defining "victim" is not always easy and can present a problem that cannot be ignored.

Even the most well intentioned efforts cannot always anticipate the problems that might arise. Just look at the on-going dissention that has been caused in defining "victim" under the Victims Compensation Act for the families of 9-11 victims. In a criminal case, it seems that defining victim will be even more challenging, particularly when the victim cannot represent him or herself. How does the government, local, state or federal, decide who is the true representative to be heard? How long will that take if every family member of every victim of 9-11 is allowed to input a position on procedure of a case against someone like Zacharias Moussaoui, now awaiting trial as a conspirator in the 9-11 tragedy? I was interviewed, as were many family members, by the Justice Department, in order for the prosecution to choose a sample of family members to testify during the penalty stage of the Moussaoui trial. The Justice Department has

already determined that not all families are necessary in the penalty stage of the pending trial of Zacharias Moussaoui.

This proposed Amendment allows for the waiving of the right of all families to be heard in such cases, but with large numbers of victims, who passes the test for inclusion? How much more complicated will such a presentation pose if thousand of families are involved in the preparation for trial? How will different viewpoints be reconciled if all must be heard? In cases such as Moussaoui's, where there are countless victims and victim's families, the issues are endless. And, even if Congress can, under the VRA, waive the constitutional rights of victims in cases like Mousaoui's, the problems do not disappear. In fact, if our newly found constitutional rights are waived, like they most likely would be for victims of 9-11 or other mass tragedies, the intended relief the VRA supposedly provides to victims becomes meaningless.

We would suggest that instead of focusing on this Amendment, Congress should ensure that resources are offered as needed to help heal the pain and loss of victims and victims' families. Families need more than what the VRA promises: dealing with loss intensifies the need for emotional and financial support. The response of the American and foreign populations to our loss on 9-11 has been a great support to families. The caring that has been expressed through school children's letters, stuffed animals, contributions, and gifts—all have said plainly, "We share your loss." Most victims do not receive such love and support and we believe this is more helpful than the invitation to practice law without a license. Our hope is that we all consider the benefits of turning our attention to providing real help, not the tools of vengeance, to victims, and that we do so without compromising the integrity of our criminal justice system and our Constitution.

Amending the Constitution is a very great responsibility of Congress and the legislatures of the 50 states. We suggest that victims' rights can be ensured by the states and, if need be, by the Federal Government. Many states have begun to provide funds to assist victims of crime. There's more work to be done at the state and federal legislative level, and this VRA effort is not only distracting legislators from doing it, but it's also causing hurtful and needless divisions within the victim community. Can you imagine how wrenching it is for our family to find

ourselves at odds with other victims' families over this political issue—which will in any event do so little for crime victims?

We want justice for the death of my son and the daughters and sons, husbands and wives, partners, mothers and fathers who are victims of every crime. As citizens, we deserve that our government and law enforcement personnel protect us as much as possible from harm. My son believed strongly in the rule of law and the right of the people to direct our elected representatives, like you, to use good judgment in establishing sound laws.

Thank you.

Racial Minorities for Victim Justice

c/o National Organization for Victim Assistance
1730 Park Road, N.W.
Washington, DC 20010
(202) 232-6682
Fax: (202) 462-2255

April 8, 2003

The Honorable Jon Kyl
United States Senate
Washington, DC 20510

The Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

Dear Senators Kyl and Feinstein,

As you may recall, I wrote to you in behalf of Racial Minorities for Victim Justice two years ago this month to express our support for your proposed Constitutional Amendment for Victim Rights. The thrust of our letter was very simple: that all Americans deserve to be treated with the kind of respect your amendment will require of the criminal justice system, but that no groups in society will benefit more from that reform than racial minorities, who endure a disproportionate share of criminal victimization – and of maltreatment by the justice system.

The evidence of that maltreatment is just as distressing today as when I presented it to you two years ago. Let me recall some key findings of that 1996 survey research:

Measures of rights granted by the justice system, by race

	Strong states		Weak states	
	nonwhites	*whites*	*nonwhites*	*whites*
Informed of bail hearing	56%	72%	na*	na*
Opportunity to speak at bail hearing	44	61	na*	na*
Informed of bail release	32	55	19	38
Notice of a possible plea bargain	43	63	44	56
Notice of continuances	78	87	69	73
Informed of sentencing hearing	83	95	49	78
Opportunity to speak at parole hearing	41	80	na*	na*

*na = no statistical significance in the differences in the rates

Few of these rates of compliance should be satisfactory to any racial group of victims. At the same time, the fact that, whenever racial disparities crop up, nonwhites always lag behind whites – in figures that almost reach a gap of 40 percentage points – is to us repugnant and unacceptable.

In our opinion, people of color should be especially outraged at these disproportionate deprivations of our legal and human rights. For, as we all know, it is our minority communities who disproportionately suffer the pains of criminal victimization.

And yet we also know that one or more prominent organizations representing racial minorities have spoken out in opposition to the victim rights amendment. As best as I can discern, that opposition stems from a fear that the protection of victims' rights must somehow come at the expense of defendants' rights – the kind of fear that Franklin Roosevelt once branded as nameless, unreasoning, and unjustified.

Is that too strong a characterization? Consider this: while compliance with current victim rights laws has been spotty – disgracefully so – nonetheless, it is fair to assume that millions of crime victims have had all their rights honored and protected since those laws went on the books beginning in 1980. So I must ask the stalwarts of the civil rights bar, and the civil liberties bar, and the criminal defense bar – in what way have criminal defendants been harmed by the full exercise of victim rights?

They cannot show us a pattern of abuse, nor can they articulate a real danger that victim rights poses to the accused, because they cannot recite even one single case where a defendant was unfairly disadvantaged because a victim was permitted to be present and heard on a matter of profound importance to that injured person.

I commend you, in your redraft of the proposed amendment, for hammering home that point. I trust that the prefatory language you have inserted – "The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established . . ." – will help to dispel the lingering fears that people of color have expressed about the amendment, and that they will join with us in recognizing that, to be true to our minority brothers and sisters, we need victim rights to be observed for all of the people all of the time. Your amendment is the only available means of achieving that just end.

Sincerely,

Norman S. Early, Jr.
Convenor

Norman Early is the Past President of the Board of Directors of the National Organization for Victim Assistance, which has agreed to serve as the secretariat for Racial Minorities for Victim Justice. He is also the former District Attorney of Denver, Colorado, the founding President of the National Black Prosecutors' Association, and President of Early Enterprises in Denver.

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Testimony of

Lynn Rosenthal
Executive Director
National Network to End Domestic Violence

Submitted to

United States Senate
Judiciary Committee
Washington, D.C.

April 8, 2003

NNEDV TESTIMONY BEFORE THE UNITED STATES SENATE REGARDING THE PROPOSED VICTIMS' RIGHTS AMENDMENT

Chairman Hatch, Senator Leahy, and Members of the Committee, thank you for providing the National Network to End Domestic Violence ("NNEDV") with the opportunity to submit testimony regarding our position on the proposed victim rights amendment to the United States Constitution.

The NNEDV, a social change organization made up of forty-eight state and territory domestic violence coalitions, is dedicated to creating a social, political and economic environment where violence against women no longer exists. These state domestic violence coalitions represent more than two thousand local shelters and thousands more non-residential victim assistance programs providing services to battered women and their children. Many of the leaders of state coalitions and local domestic violence programs are themselves survivors of domestic violence or were raised in homes where they witnessed their mothers being battered. We speak from our hearts as former victims, survivors and advocates. We do not take lightly the charge to analyze and evaluate the potential impact of the proposed constitutional amendment on the families we serve.

Based on our experiences and work within communities, we believe that a constitutional victims' rights amendment raises serious concerns that outweigh any conceivable benefits. Our testimony falls into three sections. The first section addresses our concerns about Senate Joint Resolution 1. The second section makes a Constitutional argument against the proposed amendment. The third section provides suggestions for services, safety and options.

I. CONCERNS REGARDING SENATE JOINT RESOLUTION 1

While Senate Joint Resolution 1 ("S.J. Res. 1") is well-intentioned, we cannot support it for the following reasons: (1) it would drain valuable resources from the system and prevent innovative solutions; (2) it provides inadequate protections for victims of domestic violence; and (3) it is an empty promise to victims. Each of these concerns are explained in greater detail below.

A. The "Victims' Rights" Amendment Would Both Drain Valuable Resources From The System And Prevent Innovative Solutions.

NNEDV believes that Congress should be wary of imposing additional burdens on the criminal justice system. There are two interrelated concerns along these lines. First, implementing S.J. Res. 1 would likely divert attention away from enforcing current victim rights provisions that already exist at both the federal and state levels. Indeed, the measure would probably take critically needed resources from already underfunded victim assistance programs and from key branches of the criminal justice system.[1] The financial burden S.J. Res. 1 would place on states would require their already overburdened governments to redirect funds from agencies that provide meaningful assistance to battered women.[2] Moreover, implementing the amendment would create many practical, administrative and financial burdens for courts, prosecutors, law enforcement personnel and corrections officials.[3]

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[1] National Clearinghouse for the Defense of Battered Women – Position Paper on Proposed Victims' Rights Amendment, April 1997.

[2] Id.

[3] Id. For example, consider the burden that will be placed on judges who will be forced to interpret S.J. Res. 1 as well as the burden that will be placed on the criminal justice system should they too liberally interpret the rights created by the proposed amendment. Given the uncertainty of judicial interpretation, we feel the costs may outweigh the benefits of passing a federal victims' rights amendment.

Getting the proposed amendment passed in Congress, subsequently ratified and finally implemented would take important attention and resources away from a system that is already stretched very thin. Cuts in Victims of Crime Act funding, for example, are expected to result in an 8% decrease at the state and local level for funding victim advocates in law enforcement agencies, prosecutor's offices and victim service programs this year. These advocates play a critical role in demystifying the system for victims, explaining the rights that exist in state statutes and providing support as their cases move through the system. High turnover among poorly paid prosecutors, public defenders and others in the judicial system further convolutes the system. High case loads, gaps in training and a lack of resources for evidence collection are very real, tangible problems in the criminal justice system.

In addition, the existing federal and state statutory frameworks that require state officials to take steps to notify victims about court proceedings, a defendant's release, and that allow for the safety of victims as cases move through the criminal justice system need to be implemented. These very real gaps in the system, and the subsequent impact on the experiences of victims within the criminal justice system, should be the focus of the attention of public policy makers today.

S.J. Res. 1 does nothing to address these problems that could aid victims of crime. "When so much remains to be done to enforce existing victims' rights provisions and to expand the support services so vital to victims, [it is] difficult to justify the extensive resources needed to pass a constitutional amendment."[4]

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[4] Julie Goldscheid, General Counsel of Safe Horizons, July 17, 2002 Testimony before Senate Judiciary Committee. See also Arwen Bird, Survivors Advocating For an Effective System, July 17, 2002 Testimony before Senate Judiciary Committee (asking Congress to "work to enforce the rights of crime

Second, we have learned the hard way in domestic violence cases that remedies need to be flexible and allow for innovative solutions. Every policy and practice that we have seen implemented at the state and local level has resulted in unintended consequences. While we continue to learn as we go, we know much more now than we did a decade ago about state laws and policies that best provide for victim safety and offender accountability.

For example, there was a case in Massachusetts in which a man not only abused his girlfriend, he ultimately killed her and then killed himself.[5] A few weeks before her death, the woman sought a restraining order in her local district court after a series of abusive incidents and beatings by the man.[6] The judge issued the order for the man not to contact the woman and to stay away from her, but never checked the man's criminal record.[7] It turns out the man had several criminal charges pending against him in other district courts as well as restraining orders issued against him in Massachusetts and other states.[8] Eleven days later, both were dead.[9] Since the murder, it is no longer permissible for Massachusetts judges to treat cases of domestic violence as routine civil matters.[10] Specifically, the state legislature passed a bill creating a computerized state-wide domestic violence registry and requires judges to check it when handling such cases.[11] This registry was one of the first in the nation and includes a record of civil restraining

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victims that are already guaranteed, do not spend your time and energy degrading the rights of accused people, that does nothing to help.").

[5] See George Lardner Jr., "The Stalking of Kristen: The Law Made it Easy for my Daughter's Killer," The Washington Post, November 22, 1992.

[6] See id.

[7] See id.

[8] See id.

[9] See id.

[10] See George Lardner, "After the Murder, Massachusetts Gets a Common-Sense Law," The Washington Post, November 22, 1992.

[11] See id.

and other protective orders, violations of those orders, and all data from the state's existing criminal record information system.[12]

Because of such lessons, as shown in one example through the Massachusetts case, we have had the opportunity to amend statutes, change policies and adapt procedures to meet our new understanding of remedies. In contrast, however, a Constitutional amendment is static. The proposed amendment only addresses our understanding about what we know of victim needs today, but would not allow us to adapt and change over time without having to amend the Constitution again – an equally burdensome and costly process.

NNEDV fears the distraction S.J. Res. 1 will engender by diverting attention from the panoply of guarantees and services that have already been created at the federal and state level that are not being fulfilled. We believe that investing resources to fill the gaps in the criminal justice system and allowing for more flexible community responses to change problems with statutes and policies would make a dramatic difference in the treatment of victims. We also fear that the economic, social and political cost of implementing the proposed amendment will outweigh the benefits it may provide victims and society.

B. The "Victims' Rights" Amendment Provides Inadequate Protections for Victims of Domestic Violence.

S.J. Res. 1 also provides inadequate protection for victims of domestic violence for two reasons. First, victims of domestic violence, all too often, become criminal defendants as a result of circumstances beyond their control. In some instances, victims are driven to retaliate against their abusers in self-defense. With increased frequency,

[12] See id.

perpetrators seeking to exact revenge against their victims will characterize any attempt at self-defense as an act of criminal battery. Others may be subject to dual arrest due to the chaotic and emotionally charged nature of domestic violence crime scenes.

A case from Arizona provides a poignant example of precisely this situation.[13] In that case, a battered woman found herself as the defendant after injuring her husband in self-defense after he threatened her with a knife.[14] The wife/defendant made a "911" call to the police at the time of the incident asking for help.[15] According to the transcript of the call, she requested help because her husband was beating her and threatening her with a knife.[16] When the police arrived at the home, they found the husband/victim bleeding from a stomach wound allegedly inflicted by the wife/defendant.[17] A police report revealed that the husband/victim had been arrested three times for assaulting the wife/defendant and was convicted in Florida in 1989 for assaulting her as well.[18] In order to establish her defense, the wife/defendant sought her husband's psychiatric records because he had been treated for a multiple personality disorder that included violent personalities.[19] The trial court ordered production of the records, but the state petitioned the Arizona Court of Appeals to seek relief from the trial judge's order because the Arizona Victims' Rights Amendment precluded the trial court from compelling disclosure of the victim's medical records.[20] The Arizona Court of Appeals determined that the wife/defendant's need to cross-examine and impeach the husband/victim in order

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[13] See State ex rel. Romley v. Superior Court, 172 Ariz. 232, 836 P.2d 445, 450 (1992)
[14] See id. at 450
[15] See id.
[16] See id.
[17] See id.
[18] See Romley, 836 P.2d at 450.
[19] See id. at 447.
[20] See id. at 448.

to establish her justification defense required that she be allowed access to the psychiatric records before her trial.[21]

Similarly, bail determination proceedings provide another clear example of what could go wrong. According to the proposed amendment, "a victim of violent crime shall have the right to reasonable and timely notice...of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings."[22] In a case where a wife retaliates against her husband by acting in self defense and becomes the "accused," the proposed amendment would give her husband, who has repeatedly beaten her, the right to stand before a judge exercising his "constitutional right" and object to her release on bail, even when she is the only parent who has cared for their minor children. As a result, the woman, who is the true victim, could lose her children to her abuser or to his family.

S.J. Res. 1 also grants victims the right to "adjudicative decisions that duly consider the victim's ... interest in avoiding unreasonable delay."[23] The proposed amendment could allow an abuser in the "victim" role to force a case to trial before the battered woman's attorney could adequately investigate or prepare for the case, thereby substantially affecting a reliable determination of guilt and creating an intolerable risk of wrongful conviction. Moreover, many battered women are unable to discuss their experiences of abuse candidly until they have established a relationship of trust and

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[21] See id. at 453-54.
[22] S.J. Res. 1, Section 2.
[23] Id.

confidence with their defense counsel, which is a process that can take considerable time.[24]

These situations represent a sampling of the manner in which the conceptual line between "victims" who are to be protected from further harm and "accused" offenders blurs within the context of domestic violence. In a world where victims are accorded constitutional protections, abusers clothed as victims would have ample opportunity to slow, convolute, derail, and otherwise use the process to the continued detriment of their victims.

Second, S.J. Res. 1 provides inadequate protections for victims of domestic violence because the exception it carves out is ambiguous. In this most recent iteration of a victims' rights amendment, S.J. Res. 1 attempts to address issues pertaining to domestic violence through the following language: "[t]hese rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."[25] While this language may reflect the drafters' intent to protect individuals such as domestic violence victims who are criminal defendants, the framework for how the exceptions will be defined is unclear.[26] Specifically, the point at which a trial judge would make a ruling determining whether a "compelling necessity" warranted restricting victims newly granted rights is unclear.[27] Further, if a victim of domestic violence is the "accused," it is unclear as to when and how these rights could be asserted, if at all, and whether asserting these rights

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[24] See National Clearinghouse for the Defense of Battered Women: Position Paper on Proposed Victim's Rights Amendment, April 1997.

[25] S.J. Res. 1, Section 2.

[26] See Julie Goldschied (General Counsel of Safe Horizon), Capitol Hill Hearing Testimony, July 17, 2002

[27] See id.

would compromise Fifth Amendment rights.[28] Finally, it is unclear what would constitute sufficient evidence to persuade a judge that the defendant is a victim of domestic violence – especially if, as is often the case, there are no police reports or no restraining orders.[29]

Until these questions have been thought through and answered, the NNEDV believes that the addition of this language is insufficient to protect the interests of victims of domestic violence who find themselves as defendants in the criminal justice system. We appreciate the proposed amendment's effort to address the complex nature of domestic violence, but are concerned that the standard set forth in S.J. Res. 1 is too weak and subjective[30] to adequately protect the rights of domestic violence victims, particularly when perpetrators of domestic violence will have an opportunity to exploit the procedural safeguards to their benefit and their victims' detriment. Moreover, we believe it will be impossible to apply the framework for this exception because it does not address the complexity of domestic violence cases.

C. A "Victims' Rights" Amendment Is An Empty Promise to Victims

In light of our foregoing concerns, NNEDV also believes that the proposed amendment is an empty promise to victims. S.J. Res. 1 plainly states that "[n]othing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages."[31] The proposed amendment thereby provides no tangible remedy for

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[28] See id.

[29] See id.

[30] In particular, the language in the proposed amendment that determines when victims' rights can be restricted is vague. The primary result of this language will be that judges will be given ample room for interpretation of this clause. As a result, a victim's rights will often be subject to unnecessary judicial activism.

[31] S.J. Res. 1, Section 3.

victims. Without remedies, victims will have no recourse if these proposed rights are violated.

It seems that the proponents of S.J. Res. 1 purposefully omitted a remedy for the violation of victims' rights. As a result of this exclusion the proposed amendment promises something to victims yet leaves them with no recourse.

It is a fundamental principal of criminal law that crimes are committed against society and are prosecuted and punished by society. NNEDV focuses on the communal aspect of the crime of domestic violence, not the individuality of each case. S.J. Res. 1, however, refocuses attention on the individual nature of victim's rights. While these rights are important, they are not a solution to the problem of domestic violence. Domestic Violence must be addressed through a coordinated community response -- not by putting the individual victim in the position of needing to assert "rights." Simply stated, we cannot see how creating individual rights will help eradicate domestic violence.

II. CONSTITUTIONAL ARGUMENTS AGAINST A VICTIMS' RIGHTS AMENDMENT

S.J. Res. 1 proposes amending the Constitution to protect the rights of crime victims. Specifically, the proposed amendment would grant to "victims" of crime the rights to reasonable and timely notice of court proceedings involving the crime and of any release or escape of the accused; the rights not to be excluded from public proceedings and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, and just and timely claims to restitution by the offender.

This portion of our testimony seeks to demonstrate that (1) the proposed amendment is unnecessary and constitutes an undesirable and unwise use of the constitutional amendment process and (2) a victims' rights amendment would generate undue tensions and conflicts with the existing constitutional jurisprudence. As a result, NNEDV believes the proposed victims' rights amendment should not be passed.

A. The Proposed Amendment Is Unnecessary And Constitutes An Undesirable And Unwise Use Of The Constitutional Amendment Process

Two very thorough studies of the amending process and our experience with it have been published recently by very distinguished practitioners and academics. Each study concludes with criteria for evaluating when changing our law by amending the Constitution is a sound strategy. Under each set of criteria, this proposed victims' rights amendment should be shelved, in order to focus on more practical and effective methods of legal reform in the area of victims' rights.

University of Chicago Professor David Strauss, writing in the Harvard Law Review, concludes that amendment to the Constitution has historically not been an important means of altering the existing constitutional order.[32] Typically, fundamental changes in the constitutional order have occurred by means other than the amendment process. Strauss concludes that constitutional amendments have beneficial uses in two cases: 1) constitutional amendments can be used to settle legal matters that have to be settled one way or another and 2) amendments can mop up pockets of resistance to a national consensus, making what otherwise would be simply a dominant rule into a

[32] David A. Strauss, The Irrelevance of Constitutional Amendments, 114 Harv. L. Rev. 1457, 1459 (2001).

universal rule. Neither of these instances applies to the proposed victims' rights amendment at the center of our discussion today.[33]

Another group of constitutional scholars and practitioners, called the Citizens for the Constitution, recently set out to establish a set of axiomatic principles regarding when a constitutional amendment is necessary.[34] This distinguished group includes former Chief Judge of the United States Court of Appeals for the D.C. Circuit, Abner Mikva; former member of the House of Representatives, Mickey Edwards; and renowned constitutional scholar from the Georgetown University Law Center, Louis Michael Seidman.

The proposed victims' rights amendment is inconsistent with five of the eight principles propounded by the group and comports with none of them. The five principles established by the group of academics and practitioners, which this proposed amendment fails to satisfy, are:

a. **Amendments should not make our system less politically responsive, unless to the extent necessary to protect individual rights;**

b. **Amendments should be used only when there are obstacles to achieving the same objectives by other means;**

c. **Amendments should not be adopted if they damage the cohesiveness of constitutional doctrine;**

d. **Amendments should embody enforceable, not purely aspirational, standards; and**

e. **Proponents should thoroughly contemplate consequences of their proposals.**[35]

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[33] Id.

[34] See Guidelines for Amending the Constitution, available at http://www.constitutionproject.org/cai/guidelines.

[35] Id.

As elaborated more fully below, this proposed amendment carries with it great potential for impairing the rights of the accused in a way that would certainly "damage the cohesiveness of constitutional doctrine as a whole."[36] Neither side of this debate has had the benefit of careful study of the potential consequences of this amendment, including the ways in which this amendment would interact with other constitutional provisions. In the absence of potent mechanisms for victim redress, this amendment would in fact be less enforceable and more aspirational. Finally, the objectives of the victims' rights amendment can be met more effectively through far less drastic means and means that can be more easily altered if circumstances change or experience yields unanticipated consequences. These failures would make our system "less politically responsive."[37]

B. A Victims' Rights Amendment Would Generate Undue Tensions And Conflicts With The Existing Constitutional Framework

Our existing constitutional framework provides a delicate balance between the rights of a criminal defendant and the prosecutorial powers of the state. This balance is essential for the effective and just operation of our judicial system. A proposed victims' rights amendment might well tip this delicate balance to the detriment of the accused.

First, a victims' rights amendment would erode the bedrock constitutional principle that an accused is innocent until proven guilty. Assigning substantive and procedural rights to an individual initially determined to be a "victim," before the accused has been afforded the opportunity to appear before a judicial officer and explain his or her conduct, burdens defendants and accused persons and lightens the government's burden to prove guilt beyond a reasonable doubt. In addition, there may be situations

[36] Id.; see also infra Part 2.
[37] Id.

where the individual initially determined to be the "victim", turns out to be anything but a "victim", and therefore, has been afforded rights unjustly. Second, there is a significant danger in using victims' rights to deny procedural protections important to determining guilt. Finally, when the rights proposed in the amendment are equated with the right to be presumed innocent until proven guilty, the right to due process of law, the right to confront accusers, and the right to fair trial, our constitutional principle of fairness in criminal proceedings is severely compromised.

Another reason why a victims' rights amendment is not sound constitutional policy is because a victims' rights amendment will assuredly but unnecessarily create conflict and tension between existing state victims' rights amendments and the federal constitution. The Arizona case, discussed in detail earlier in this testimony, is an example of the resulting conflict and tension created between victims' rights and the rights of the accused when a victims' rights amendment is in place. In the Arizona case, the Court of Appeals found that the state victims' rights amendment must yield to the defendant's rights under the U.S. Constitution. This was simply a matter of federal preemption of state law. However, in a conflict pitting a defendant's rights against a victim's rights, both created by the U.S. Constitution, the outcome is far from certain. These conflicts create additional and undesirable areas of legal uncertainty, especially for local judges. The overall effect of such conflicts is destabilization of our judicial system.

Finally, a victims' rights amendment freezes into place, for all time, one set of solutions to the important and vexing issue of how best to protect victims' rights. Until we are certain that there is only one way to protect victims' rights effectively and fairly,

and we know that this method works well, a sense of our own limitations cautions that we should not enshrine these principles into the unalterable bedrock of our law.

III. VICTIMS REALLY NEED SERVICES, SAFETY AND OPTIONS

We can all agree that there are steps Congress can take today to help provide victims with the services, sensitivity and immediate response that is needed to help address the trauma and aftermath of crime. For example, Congress could and should act this year to substantially raise the Victims of Crime Act (VOCA) funding cap. The VOCA Fund is made up of fines and penalties on federal offenders, and does not involve the spending of taxpayer dollars. For the past three years, Congress has capped the distribution of funding from VOCA, resulting in a large surplus balance in the Fund. This balance continues to accrue, even as the needs of victims continue to grow. More than 6,000 local programs depend on VOCA assistance grants to provide services to victims of many types of crime. VOCA is a particularly important funding source for services to victims of domestic violence, sexual assault and child abuse. VOCA pays for life-saving crisis intervention, counseling, transportation, services for disabled victims, volunteer coordinators, translation services, and other support services that help victims deal with the trauma and aftermath of crime.

Alarmingly, statutory changes in the way VOCA funds are distributed are expected to result in deep cuts in victim assistance programs over the next two years. Raising the VOCA cap substantially could ward of these devastating cuts and allow states and local communities to address unmet needs of victims of crime. States could use these funds to develop victim notification systems, conduct needs assessments and develop special programs to meet the needs of isolated and underserved victims of crime. These

real, tangible measures could improve the experiences of victims within the system immediately.

Full funding of other federal programs designed to assist victims of crime could have a similar impact on the services that are available to assist victims and their families. The Battered Women's Shelter and Services and the Rape Prevention and Education Program remain dramatically underfunded, yet these programs address the most common forms of victimization experienced by women communities across the country. Increasing the availability of victim services and enhancing public awareness of the impact of these crimes will make a difference in the way communities respond to victims and their families. In addition, training programs that focus on both the practical and emotional needs of victims are urgently needed for law enforcement officer, prosecutors, judges and others who come in daily contact with victims.

Finally, mechanisms for better enforcement of civil protective orders, bail release conditions that take into account victims safety, implementation of victim notification systems, resources that educate victims about the remedies available to them and the presence of victim-witness advocates within the system are all examples of initiatives that can be undertaken in state and federal legislation to respond to the needs of victims. These steps are far more likely to address the real needs of victims than the lengthy and cumbersome process of passing and then implementing the proposed constitutional amendment. While the proposed constitutional amendment is not a solution, it is a call to action. We can and must make the justice system work for victims through better practices, policies, funding and enforceable state and federal laws.

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April 2, 2003
Senator Jon Kyl
Senator Dianne Feinstein
Hon. Orrin Hatch

Dear Senators Kyl, Senator Feinstein and Hon. Hatch,

I am writing to you in the hopes you will support Senate Joint Resolution (S.J. Res. 1), the Crime Victims' Rights Amendment. I, myself am a survivor of horrendous kidnapping, rape and attempted murder that occurred in Vermont on June 19, 1992, by a man residing in my own community, Richard Laws. Fortunately he was caught and sentenced as a result of a plea agreement to 20-35 years at NW Penitentiary. He will soon be eligible for parole having served only 11-12 yrs of his sentence.

However there was no restitution ordered due to my offender's inability to pay. Subsequently, now 11 years later I am still paying for the actions he committed. The Constitutional Amendment would ensure restitution is ordered. Interesting, a few years ago, I learned that my offender is earning $7.25 cents an hour working in prison and while 20 % is given to the Victims Compensation program he does not have to pay any restitution to me, his victim.

I recall working diligently to advocate for the passage of the Vermont Victims Bill of Rights in 1995. And over the years you and I have corresponded on several crime victims' related issues. While I recognize that many states, including Vermont have enacted legislation, these laws are insufficient to fully vindicate victims' rights in the criminal justice system. A Constitutional Amendment will help balance the scales of justice and ensure that crime victims' rights are achieved.

Support for a victims' rights constitutional amendment is strong. As a member of the National Constitutional Amendment Project and the VT Victim Survivor of Crime Council, I am working towards as well as witnessing an increase in support both in VT and nationally for this amendment. Most states have adopted similar measures — by an average popular vote of almost 80 percent. Vermont in the past seems to be one of the last state to enact crime victim legislation i.e. Victims Bill of Rights, DNA legislation. A step towards positive action would be for Vermont to be the 34th state to provide rights for victims.

Although this would be a step in the right direction we will still need a federal amendment to balance the scales of justice. Let us take action now and join in this support for a federal amendment. Thank you for your time and please do not hesitate to contact me should you have any questions or concerns regarding this matter.

Sincerely,
Susan S. Russell, M.A.

Susan S. Russell, M.A.

Testimony on the Constitutional Amendment for Victims Rights

April 8, 2003

By

Susan S. Russell, M.A.

Good Day,

Thank you for the opportunity to submit testimony on the Constitutional Amendment for Victims Rights. My name is Susan Russell. I live and have resided in Warren, Vermont for 18 years. However, on June 19, 1992, I became more than just a resident of Vermont, reportable the safest state in the nation, when I became the victim of a horrendous kidnapping, sexual assault and attempted murder. Although my perpetrator was a stranger to me he was from my small and rural community of approximately 2,500 This stranger kidnapped me, raped me, and beat me, fracturing my nose and several facial bones. He then drove me to a remote wilderness area, where he took a tire iron and fractured my skull in three places. I now have a one and half inch dent in my head that serves as a reminder, although I will never ever forget this horrific experience. This man then left me to die discarding my body into the woods, but I survived. Luckily I awoke hours later and managed to crawl a 1/10 of a mile to where 5 teenagers had camped for the night. Nothing short of a miracle can explain why I survived and am alive today. And those these are my own words and my story; I speak for many victims who cannot speak for one reason or another. It takes a tremendous amount of courage to tell you my story, but I do so, because as a victim/survivor I can speak to you with the experience and knowledge of being a victim.

My perpetrator was caught 4 days after my attack and then the long arduous process of being thrown into an unknown and confusing criminal justice system began. At the time of my interaction with the criminal justice system there was very little in place concerning victims rights and I want to take this opportunity to highlight some of the major key points that had a Constitutional Amendment been in place would have provided me:

The right to just and timely claims to restitution from the offender.

Due to physical injuries I sustained as a result of my offender's actions, I suffered severe financial loss even with medical insurance and Victim's Compensation. I was out of work for almost a year. And yet the judge did not order restitution. I was told that my offender had no money and/or property. However, a few years ago I was told that my offender was working in prison making $7.25 an hr, yet I would never obtain any restitution due to the fact there was none ordered. Furthermore I was told that if I wanted to try and claim restitution I would have to return to court and by returning to court I could jeopardize the current sentence my offender is currently serving. A Constitutional Amendment would have ensured that restitution was ordered.

The right to reasonable and timely notice of any release or escape of the accused:

In Nov. 1992 my offender managed to escape from a secure courtroom fled across the street and was apprehended by a friend of mine who happened to be attending the hearing. I first heard about my offender's escape through my friend and the newspaper. Had a Constitutional Amendment been in place perhaps I would have learned about this

through a more timely notification process and been prepared to see it on the front page of the next morning paper.

The right to be heard at sentencing:

In my case I was persuaded by the State Attorney to accept a plea agreement. I was told although the evidence against my offender was high and there was an 80 % change of winning the case there was a 20 % chance of losing the case. I did not want to see this man set free under any circumstances and chose not to take the risk even though it was only 20 %. The terms of the plea agreement was 25-50 years. The Parole Board strongly recommend 50 years to life. In the end the Judge stated that the mitigating circumstances outweighed the aggravating circumstances and sentenced him to 20-30 yrs. While this may seem like many yrs it is not when the truth is that offenders serve only 1/3 of their sentence. In fact my offender will be eligible for parole in approx 1-2 yrs having served 11-12 yrs of his sentence. I was not giving the opportunity to respond to the sentence given nor explained why such a sentence was given. I recall having to look up many of the judges terminology regarding the sentence in a Law dictionary. Had a Constitutional Amendment been in place I would have a right to respond to the sentence and given a through explanation allowed to ask questions such as definitions.

In 1992, Vermont did not have a Victims Bill of Rights and I recall working hard to advocate for the passage of Vermont's Victims Bill of Rights in 1996. However, while it has been said that crime victims are assured their rights due to these state and other federal laws, I can tell you from my experience as a victim advocate for many years these

laws are not sufficiently consistent, comprehensive or authoritative nor do they hold system accountable and therefore do not safeguard our rights. There are countless stories where these laws have failed to provide adequate and necessary protection for the rights of victims as these state statutory rights can be changed at the whims of the legislative majority and they do not provide adequate means to hold these systems accountable when it fails to provide victim's these rights. None of these state or federal laws are able to match the constitutionally protected rights of the offenders. State Constitutions live in the shadow of the U.S. Constitution. **The result is that we crime victim/survivors remain and will remain second-class citizens in our nation's system of justice until an Amendment such as thus is implemented. It is the only law that carries the weight and accountability needed to create a more balanced and equal justice system for all.** Rights without Remedy are merely Rhetoric

These rights that I stand before and ask for are **human rights**, which all American Citizens deserve, a right to fundamental fairness in a justice system. Criminal defendants have almost 2 dozen separate constitutional rights 15 of these are provided by amendments to the US Constitution. Constitutional amendments such as enfranchising newly free slaves and the right for women to vote were all changes for the better, ending the exclusion of those who deserve and paid a heavty price to be inclusive. The Crime Victims' Rights Amendment will bring a balance to the system by giving crime victims the right to be informed, present, heard at critical stages throughout their case and it will duly consider the victim's just and timely claims to restitution from the offender.

There is considerable support for this amendment. State constitutional amendments have won overwhelming approval in 33 states; and we have the support of our President who stated "The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do." **The Constitution belongs to all of us and therefore I ask you to support and assist the people who have suffered and have lost the most, the crime victims of this country. Thank you.**

SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, INC.

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H.G. "Bill" Thompson

5 June 2002

The Honorable Dianne Feinstein (D-CA)
The United States Senate
SH-331 Hart Senate Office Building
Washington, DC 20510

Dear Senator Feinstein,

On behalf of the Southern State Police Benevolent Association (SSPBA) and our over 25,000 law enforcement members in the Southeastern U.S. and Colorado, I am proud to endorse S.J. Res. 35, which proposes an amendment to the Constitution of the United States to protect the rights of crime victims.

If there is anything we can do to assist you or your staff to secure passage of the bill, please feel free to let me know.

Respectfully,

H.G. "Bill" Thompson

A LIBERAL STANCE FOR VICTIM RIGHTS!

I am a liberal. If you define liberal by the causes one supports, then I must be a liberal. I have participated in civil rights marches and sit ins. I actively opposed the Vietnam War. I supported the grape boycott. I voted for McGovern and Carter. I am opposed to the death penalty. I was honored to have served my country in the War on Poverty. I am a liberal.

In 1978, I was the Director of an anti-poverty center in Midtown St. Louis. When the budget allowed, I hired ex-cons, because they knew the streets and could help me reach poor people who escape the radar of most social service agencies. I also helped five (5) neighborhoods secure a $208,000 community anti-crime grant from the Law Enforcement Assistance Administration. Because of this work, I came into contact with the St. Louis Crime Commission, who invited me to join the Board of Directors of Aid for Victims of Crime, Inc. (AVC), the local, non-profit, crime victim assistance agency.

The invitation stopped me dead in my liberal tracks.

Liberals, I thought, support the rights of the accused, prison reform, the rehabilitation of ex-cons, etc. How could I turn my back on all my liberal values and join an organization that supported.....crime victims? My liberal values seemed to be at odds with this invitation. I was conflicted!

This I had to think about. It took awhile. I was not comfortable with my final decision, but the logic was clear and compelling:

1) When Christ preached the Sermon on the Mount, he said: "Visit the imprisoned!" He didn't say: "Ignore their victims!"

2) In fact, when asked: "Who is my neighbor?" Christ responded with a story that we have unfortunately come to know as "The Parable of the Good Samaritan." Actually, it was a story about a crime victim, a man who had been waylaid along the roadside, beaten almost to death, and left for dead. The Good Samaritan stopped, cleaned his wounds, took him to an inn and asked the innkeeper to take care of him till he recovered. In today's jargon, the Good Samaritan provided crisis intervention, created a sense of safety and security for the victim, and mobilized local resources to help him regain control.

When Christ was asked, "Who is my neighbor?" he told the story about a crime victim.

I concluded that a definition of justice that excludes the victim is a definition of injustice, that a definition of justice must include both the accused and the victim.

I said "Yes" to the Crime Commission's invitation, joined the Board of Aid for Victims of Crime and two years later became its Executive Director where I have served for the past 20 years.

That same logic, and 22 years of listening to crime victims, has led me to a parallel decision that the only way to balance the scales of justice is to have parallel rights for the accused and for the victimized. As a citizen of the United States, I have rights if I am accused of a crime. I want every one of those rights, if I am ever accused. They are sacred! They are the very foundation of our nation. But, if I am victimized by crime, I have no rights. I have no rights to

know anything about the justice system or what services are available to me. I have no rights to know what has happened to the accused, if he is released or escapes or is coming up for a parole hearing. I don't even have a right to be in the courtroom during his trial. This is not fair! This is not justice. This is a crime. I should be assured that my constitution protects me both when I am accused and when I am victimized.

Having parallel rights, if I am victimized, in no way diminishes my rights if I am ever accused.

I am not talking about the rights of one person over the rights of another. I am talking about equal rights, equal protection under the law, for me, for you: If I am accused of a crime, then my country's constitution protects me against the unwieldy power of government; if I am the victim of a crime, then my country's constitution should be there to protect me with the same level of force and commitment.

Right now that level of force and commitment is not there, if I am victimized by crime. Shouldn't it be?

Are you a Liberal? Are you a Conservative? Shouldn't make any difference!

Shouldn't justice include the victim, as well as, or I should say, equally as well as the accused?

Ed Stout
Executive Director
Aid for Victims of Crime, Inc.
St. Louis, Missouri 10/4/02

Empowering crime survivors to advocate for restorative justice

April 2, 2003

United States Senate
Washington, D.C.

Dear Senator;

I am writing to add our voice to that of survivors of crime *opposed* to S.J. Res. 1, the "Victims' Rights Amendment." Survivors Advocating For an Effective System (SAFES) is an organization of survivors of crime who advocate for restorative solutions to crime and victimization.

We firmly believe in the right of survivors to participate and be heard by our criminal justice system. We also believe that survivors have rights to restitution, compensation and services to help them heal after victimization. Amending the constitution is not necessary to guarantee these rights. These provisions, aimed at involving crime survivors, are better suited as federal statues.

As survivors of crime we believe in the fundamental protections that are guaranteed through the state and federal constitution. The federal Bill of Rights ensures certain protections for *all* citizens; this includes those who have been victimized by crime. This amendment would unnecessarily clutter the Constitution.

Thank you for your consideration of a matter of grave significance to not only survivors, but all citizens. Please be assured that your 'no' vote on the Crime Victims Amendment is a vote to preserve the rights of all citizens.

Thank You,

Arwen Bird
Director

The Honorable Senator Orrin Hatch, Chairman
Senate Judiciary Committee
506 Hart Senate Office Building
Washington, DC 20510

The Honorable Senator Patrick Leahy, Ranking Member
Senate Judiciary Committee
217 Russell Senate Office Building
Washington, DC 20510

April 7, 2003

OPPOSE: S.J. Res. 1, "An Amendment to the Constitution of the United States to protect the rights of crime victims."

Dear Senators Hatch and Leahy:

We are writing to ask that you oppose S.J. Res. 1,which will be the subject of an April 8 hearing before the Senate Judiciary Committee. S.J. Res. 1, introduced on January 7, 2003, poses the same problems as victims' rights amendments proposed in previous Congresses. If passed, this amendment would fundamentally alter the nation's founding charter and would apply to every federal, state and local criminal case, profoundly compromising Bill of Rights' protections for accused persons.

S.J. Res. 1 would give rights to victims of violent crime such as: the right to notice of any public proceeding; the right not to be excluded from public proceedings; the right to be heard at release, plea, sentencing, pardon and reprieve hearings; an interest in avoiding unreasonable delay; and just and timely restitution. The Amendment also provides victims with the right to "adjudicative decisions" regarding victim's safety, speedy trial and restitution. Although "adjudicative decisions" is not defined in the bill, this phrase could be interpreted as providing victims with the right to a hearing.

While many of these provisions reflect laudable goals, it is unnecessary to pass a constitutional amendment to achieve them. Every state has either a state constitutional amendment or statute protecting victims' rights. The proponents of S. J. Res. 1 have not made the case that those measures fail to protect victims' interests.

Furthermore, there is no agreement within the victims' community that amending the constitution is a good idea. Many victims organizations, both national and state, oppose this amendment including: Wisconsin Coalition Against Domestic Violence, Safe Horizons, the largest victims service provider in New York State and the organization

responsible for administering funds to the victims of the September 11th attack; the Louisiana Foundation Against Sexual Assault; the Iowa Coalition Against Domestic Violence; the Pennsylvania Coalition Against Domestic Violence; the North Dakota Council on Abused Women's Services, the Arizona Coalition Against Domestic Violence; the National Clearinghouse for the Defense of Battered Women; the National Network to End Domestic Violence; and Survivors Advocating for an Effective System.

The Constitution should only be amended when there are no other alternatives available. Since 1791, the Federal Constitution has been amended only 19 times. (Amendment XVIII established prohibition and Amendment XXI repealed it. Thus, only 17 amendments have been permanently added to the Constitution.) Amending the Constitution is a serious matter and should be reserved for those issues where there are no other alternatives available. S. J. Res. 1 does not meet this standard because there are other alternatives available to protect the interests of crime victims. Thirty-three states have passed victims' rights constitutional amendments and those that have not protect victims' rights by statute.

The Amendment is likely to be counter-productive because it could hamper effective prosecutions and cripple law enforcement by placing enormous new burdens on state and federal law enforcement agencies. It is unclear how much weight judges will be required to give to the views of a crime victim if he or she objects to an action of the prosecutor or judge. For example, what if a victim opposes a negotiated plea agreement? Over 90 percent of all criminal cases do not go to trial but are resolved through negotiation. Even a small increase in the number of cases going to trial would burden prosecutors' offices and courts as well. There are many reasons why prosecutors enter into plea agreements such as allocating scarce prosecutorial resources, concerns about weaknesses in the evidence, or strategic choices to gain the cooperation of one defendant to enhance the likelihood of convicting others. Prosecutorial discretion would be seriously compromised if crime victims could effectively obstruct plea agreements or require prosecutors to disclose weaknesses in their case in order to persuade a court to accept a plea. Ironically, this could backfire and result in the prosecution being unable to obtain a conviction against a guilty person, which would not serve the interests of society or victims.

Similar problems could arise from the notice requirement. We do not oppose statutes that require states and the federal government to give notice to victims about key hearings, but we do oppose making this a constitutional requirement. What remedy will the victim have when the state inevitably fails to inform him or her of a proceeding?

Section three reads, "'Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages." However, this still leaves open the possibility of seeking declaratory or injunctive relief against the judge, prosecutor or police when they fail to follow through with every requirement under the amendment. The remedy for violation of an injunction is a fine for contempt, which could be as substantial as damages, particularly considering the millions of cases and tens of millions of events triggering the amendments' rights every year. Presumably, victims

would be entitled to bring suit under 42 U.S.C. sec. 1983. If the victim prevails under a 1983 claim, he is entitled to attorneys' fees, which are not considered damages.

One must also consider the Supreme Court's history of antipathy to constitutional rights without meaningful remedies. As the Court demonstrated by fashioning out of whole cloth a damages remedy for Fourth Amendment violations in the case of *Bivens v. Six Unknown Named Agents,*[2] there are situations where damages are the only possible remedy – i.e., for property damage or physical injury directly occasioned by the violation. When cases start cropping up in which a victim is seriously injured or murdered as a direct result of a government official failing to give notice of a planned release or plea bargain, the Court may feel compelled to fashion a monetary remedy – labeled something other than "damages," to be sure – to ensure that victims' constitutional rights are not second-class constitutional rights.

It bears emphasis that the defendants in any such action for redress of a violation of victims' constitutional rights will be local government officials whose primary duties are the enforcement of the criminal laws or the custody and supervision of criminal offenders, including police, prosecutors, judges, corrections, probation and parole offenders, and even victims services agencies. Whatever time they take defending such litigation will be time away from their primary responsibility to promote public safety. Any money paid as a result of the litigation – whether in attorneys' fees, fines, or an alternative form of "damages" – will come from taxpayers, reducing accounts otherwise dedicated to public safety.

Section three of S.J. Res. 1 may also authorize appointment of counsel for victims. The section reads, "Only the victim or the victim's lawful representative may assert the rights established by this article." The term "lawful representative" is undefined, and could be interpreted as meaning an attorney. If victims are entitled to attorneys, then in order to make this right meaningful the state will have to subsidize the cost of attorneys for those who cannot afford to hire their own.

State and federal criminal justice systems are in crisis because they are unable or unwilling to provide adequate counsel for indigent accused persons. The additional cost of providing counsel to victims as well as defendants in criminal cases would be prohibitively expensive. Adding the financial burden of providing counsel to victims will likely further limit defendants' access to counsel as well as pose a major conflict of interest. If this happens, it will tax an already severely overtaxed systemincreasing the number of cases involving ineffective assistance of counsel and the risk of wrongful conviction.

[2] 403 U.S. 388 (1971).

In guaranteeing victims the "right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender," the amendment commands, at the least, millions of new local court hearings every year, and potentially, widespread federal judicial interference with the decisions of local law enforcement, prosecution and corrections officials.

This is a new clause that has not been included in previous versions of the amendment. It is unclear what this phrase means, but at the least, it would appear to guarantee victims a right to a hearing on these issues. Previous amendments have given victims the right to be present and heard at all public proceedings – this version appears to go beyond the right to be present and be heard by also granting the right to a hearing. Serious questions are presented for all components of the system: Should a judge give greater weight to the victim's preference for speed or type of disposition than to the prosecutor's strategy?[3] Does the amendment require judges to make adjudicative decisions ordering police or corrections officials to take various steps to protect victims' safety, possibly trumping personnel or resource allocations they would otherwise have made? If the judge does not enter such an order, or the officials do not obey it, are they subject to an injunction or declaratory relief, plus fines for contempt? Must judges and probation officers go through restitution and fact-finding hearings to protect themselves against litigation, even where the defendant is indigent with no possibility of making payments?

The Victims' Rights Amendment erodes the presumption of innocence. The framers were aware of the enormous power of the government to deprive a person of life, liberty and property. The constitutional protections afforded the accused in criminal proceedings are among the most precious and essential liberties provided in the Constitution. The VRA undermines the presumption of innocence by conferring rights on the accuser, and potentially diminishing fundamental safeguards designed to protect against convicting the innocent.

Not every accused person is actually guilty. But giving the accuser the constitutional status of victim will impact the judge and jury, making it extraordinarily difficult for fact finders to remain unbiased when the "victim" is present at every court proceeding giving his or her opinion as to what should happen. The VRA makes the accuser a third party in the criminal case, before a judge or jury has determined that the accuser is actually a "victim," that a crime was actually committed, or that the accused did it.

Many organizations that provide support to battered women are opposed to this amendment because battered women are often charged with crimes when they use force to defend themselves against their batterer. Under the VRA, the battering spouse is considered the "victim" and will have the constitutional right to have input into each

[3] This has been a leading concern of prosecutors in expressing opposition to the amendment – for example, in letters from former U.S. Deputy Attorney General Philip Heymann to Senator Kennedy on September 4, 1996, and from National District Attorneys Association President-elect William Murphy to Senator Moynihan on April 17, 2000.

stage of the proceeding from bail through parole. Why should a life-long abuser be given special constitutional rights?

The amendment does not contain language to explicitly protect the rights of accused persons. One of our primary concerns is that the amendment will trump the constitutional rights of accused persons. The victims' rights amendments of eight states expressly provide that nothing in the amendment may diminish the rights of the accused. Proposed S.J. Res. 1 does not, but oddly suggests that the rights of victims are "capable of protection without denying the constitutional rights of those accused of victimizing them." This clause constitutes more of an observation than a prohibition. Nothing in it purports to prohibit any diminution of other rights, which have long existed under the Constitution. It would be the first time in our nation's history that the Constitution was amended in a manner that restricted rights of the accused.

The amendment poses more problems than solutions. Will the amendment usher in a new era of federal court oversight of state and local criminal justice systems that will dwarf the federalism concerns that motivated Congress to enact the 1996 habeas corpus restrictions and the Prison Litigation Reform Act? Apart from the serious constitutional problems this amendment raises, there are many practical problems that the VRA will create. Who is a victim? The amendment does not define this and it is quite possible that in any one case there would be multiple victims with competing interests. In a homicide case, a child of the victim and the parent of the victim may disagree on how the government should handle the case. Whose opinion prevails? What if the victim changes his or her mind during the course of the case? This happens frequently in death penalty cases where the victim initially wants the government to seek the death penalty and then changes his or her mind before the case is concluded?

Crime victims deserve protection, but a victims' rights constitutional amendment is not the way to do it. S.J. Res. 1 unnecessarily amends the federal constitution, places inflexible mandates on states, may hinder prosecution of criminal cases and threatens the rights of the accused. We urge you to oppose this amendment.

If you have any questions, please do not hesitate to contact Terri Schroeder at (202) 675-2324. Thank you very much for your attention to this important issue.

Sincerely,

Arwen Bird, Director
Survivors Advocating for an Effective System

Wade Henderson, Executive Director
Leadership Conference on Civil Rights

David Kopel
Independence Institute*

Professor Lynn Henderson
Boyd School of Law -- UNLV

Laura Murphy, Director
Washington National Office
American Civil Liberties Union

Professor Robert Mosteller
Chadwick Professor of Law
Duke Law School

Professor Erwin Chemerinsky
University of Southern California School of Law

Sue Osthoff, Director
National Clearinghouse for the Defense of Battered Women

Lawrence S. Goldman, President
National Association of Criminal Defense Lawyers

Scott Wallace, Director
Defender Legal Services
National Legal Aid and Defender Association

For Identification Purposes Only

Cc: Members of the Senate Judiciary Committee

HARVARD UNIVERSITY
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April 8,2003

The Honorable Dianne Feinstein
United States Senate
SH-331 Hart Senate Office Building
Washington, DC 20510-0504

The Honorable Jon Kyl
United States Senate
SH-730 Hart Senate Office Building
Washington, DC 20510-0304

Dear Senators Feinstein and Kyl:

I think that you have done a splendid job at distilling the prior versions of the Victims' Rights Amendment into a form that would be worthy of a constitutional amendment—an amendment to our most fundamental legal charter, which I agree ought never to be altered lightly. I will not repeat here the many reasons I have set forth in the past for believing that, despite the skepticism I have detected in some quarters both on the left and on the right, the time is past due for recognizing that the victims of violent crime, as well as those closest to victims who have succumbed to such violence, have a fundamental right to be considered, and heard when appropriate, in decisions and proceedings that profoundly affect their lives.

How best to protect that right without compromising either the fundamental rights of the accused or the important prerogatives of the prosecution is not always a simple matter, but I think your final version of January 7, 2003, resolves that problem in a thoughtful and sensitive way, improving in a number of respects on the earlier drafts that I have seen. Among other things, the greater brevity and clarity of this version makes it more fitting for inclusion in our basic law. That you achieved such conciseness while fully protecting defendants' rights and accommodating the legitimate concerns that have been voiced about prosecutorial power and presidential authority is no mean feat. I happily congratulate you both on attaining it.

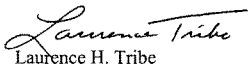
A case argued in Spring 2002 in the Supreme Judicial Court of Massachusetts, in which a woman was brutally raped a decade and a half ago but in which the man who was convicted and sentenced to a long prison term had yet to serve a single day of that sentence, helps make the point that the legal system does not do well by victims even in the many states that, on paper, are committed to the protection of victims' rights. Despite the Massachusetts Victims' Bill of Rights, solemnly enacted by the legislature to include an explicit right on the part of the victim to a "prompt disposition" of the case in which he or she was victimized, the Massachusetts Attorney General, who had yet to take the simple step of seeking the incarceration of the convicted criminal pending his on-again, off-again motion for a new trial—a motion that had not been ruled on during the 15 years that this convicted rapist had been on the streets—took the position that the victim of the rape did not even have legal standing to appear in the courts of this state, through counsel, to challenge the state's astonishing failure to put her rapist in prison

to begin serving the term to which he was sentenced so long ago. And the Supreme Judicial Court's ruling on the case left the victim a quintessential outsider to the State's system of criminal prevention and punishment.

If this remarkable failure of justice represented a wild aberration, perpetrated by a state that had not incorporated the rights of victims into its laws, then it would prove little, standing alone, about the need to write into the United States Constitution a national commitment to the rights of victims. Sadly, however, the failure of justice of which I write here is far from aberrant. It represents but the visible tip of an enormous iceberg of indifference toward those whose rights ought finally to be given formal federal recognition.

I am grateful to you for fighting this fight. I only hope that many others can soon be stirred to join you in a cause that deserves the most widespread bipartisan support.

Sincerely yours,



Laurence H. Tribe

OFFICE OF THE DISTRICT ATTORNEY

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R. THOMAS HARRIS
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GARY G. AUER, Chief
Bureau of Investigation

February 6, 2003

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Re: **Kyl-Feinstein Amendment**

Dear Senator Feinstein:

I am writing to offer my strongest support for your proposed constitutional amendment granting much needed and long overdue rights to victims of violent crime in the United States.

We are fortunate in California to have passed state constitutional amendments granting important rights to victims such as the right to be informed, present, and heard at critical stages in their cases. As a consequence, our criminal justice system is better, judges and prosecutors are more informed, and the results are more just. It is hard to imagine that our federal constitution, which so jealously guards the rights of criminal defendants, contains no similar protections for victims.

It is indeed time to balance the scales of justice and I welcome and commend your efforts. If I can be of any assistance in advancing this important proposal, please do not hesitate to contact me.

Very truly yours,

GREGORY D. TOTTEN
District Attorney

pc: Collene Campbell
Larry Brown, Executive Director, California District Attorneys Association

K:\DONEHUE\GDT\Chrono\2003\DKyl-Feinstein_Const Amendment

Hall of Justice, 800 South Victoria Ave., Ventura, CA 93009 www.ventura.org/vcda/ (805) 654-2500 Fax (805) 654-3850

STATEMENT OF

STEVEN J. TWIST

GENERAL COUNSEL

NATIONAL VICTIMS CONSTITUTIONAL AMENDMENT PROJECT

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

IN SUPPORT OF

S. J. RES. 1

THE CRIME VICTIMS' RIGHTS AMENDMENT

APRIL 8, 2003

Mr. Chairman and Distinguished Senators:

Thank you for holding this hearing today. I am grateful for the invitation to present the views of the National Victims Constitutional Amendment Project, a national coalition of America's leading crime victims' rights and services organizations. My background in this area is more fully set forth in earlier testimony.[1]

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[1] *Rights of Crime Victims Constitutional Amendment: Hearing on H. J. Res. 64, Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives*, 106th Cong., 2nd Sess. 121 (Feb. 10, 2000).I serve as an Adjunct Professor of Law at the College of Law at Arizona State University where I teach a course on the rights of crime victims in criminal procedure. I also have founded the Victims Legal Assistance Project, which is a free legal clinic for crime victims operating at the law school. The project, a partnership between ASU and Arizona Voice for Crime Victims, a statewide coalition of victims rights and services organizations in my state, provides free legal representation for crime victims helping them to assert their state constitutional and statutory rights in criminal cases. I currently serve as Vice President for Public Policy for the National Organization for Victim Assistance, the nation's oldest

We meet once again to discuss great injustice, but injustice which remains seemingly invisible to all too many. Were it otherwise, the resolution before you would have already passed. Indeed the law and the culture are hard to change, and so they should be; critics are always heard to counsel delay, to trade on doubts and fears, to make the perfect the enemy of the good. Perhaps some would prefer it if crime victims just remained invisible. Perhaps we are so numbed by decades of crime and violence we simply choose to look away, to pass by on the other side of the road. But in America, when confronted with great injustice, great hope abides.

Our cause today is a cause in the tradition of the great struggles for civil rights.[2] When a woman who was raped is not given notice of the proceedings in her case, when the parents of a murdered child are excluded from court proceedings that others may attend, when the voice of a battered woman or child is silenced on matters of great importance to them and their safety – on matters of early releases and plea bargains and sentencing – it is the government and its courts that are the engines of these injustices.

For crime victims, the struggle for justice has gone on long enough. Too many, for too long, have been denied basic rights to fairness and human dignity. Today, you hold it within your power to begin to renew the cause of justice for America's crime victims. We earnestly hope you will do so.

I would like to address two principal areas: A brief history of the amendment, its

---

and largest victims rights organization, I serve on the Board of Trustees of the National Organization of Parent's of Murdered Children, and I serve as General Counsel, and a member of the executive committee, of the National Victims Constitutional Amendment Project. I am honored to represent these organizations here today.

[2] "As majestic bells of bolts struck shadows in the sounds
Seeming to be the chimes of freedom flashing ...
Tolling for the tongues with no place to bring their thoughts...
Tolling for the aching ones whose wounds cannot be nursed ...
An' we gazed upon the chimes of freedom flashing."

Bob Dylan, *Chimes of Freedom*, 1964.

bi-partisan support, and the history of the language of the resolution before you; and second, a review of the rights proposed. In three appendices to my testimony I have attached excerpts from earlier testimony on why these rights, to be meaningful, must be in the United States Constitution; my answers to questions posed by Senator Leahy after the last Subcommittee hearing, and a more general response to the arguments of those who oppose crime victims' rights.

I. A Brief History Of The Movement For Constitutional Rights For Crime Victims, Their Broad Bi-Partisan Support, And The History Of The Proposed Language

A Brief History of the Movement for Constitutional Rights for Crime Victims

Two decades ago, in 1982, the President's Task Force on Victims of Crime, which had been convened by President Reagan to study the role of the victim in the criminal justice system, issued its Final Report. After extensive hearings around the country, the Task Force proposed, a federal constitutional amendment to protect the rights of crime victims. The Task Force explained the need for a constitutional amendment in these terms:

> In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.
>
> The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the sixth amendment to the Constitution be augmented.[3]

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[3] *President's Task Force on Victims of Crime, 'Final Report,'* 114 (1982).

In April 1985, a national conference of citizen activists and mutual assistance groups organized by the National Organization for Victim Assistance (NOVA) and Mothers Against Drunk Driving (MADD) considered the Task Force proposal.[4]

Following a series of meetings, and the formation of the National Victims Constitutional Amendment Network (NVCAN), proponents of crime victims' rights decided initially to focus their attention on passage of constitutional amendments in the States , before undertaking an effort to obtain a federal constitutional amendment.[5] As explained in testimony before the Senate Judiciary Committee, "[t]he 'states-first' approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the 'great laboratory of the states,' that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice system while producing no negative, unintended consequences."[6]

The results of this conscious decision by the victims' rights movement to seek state reforms have been dramatic, and yet disappointing. A total of 33 States now have State victims' rights amendments,[7] and every state and the federal government have victims' rights statutes' in varying versions. And yet, the results have been disappointing as well, because the body of reform, on the whole, has proven inadequate to establish meaningful

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[4] *See* LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 Wayne L. Rev. 125, 129 (1987).

[5] *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, Utah L. Rev. 1373, 1381-83 (1994) (recounting the history of crime victims' rights).

[6] Senate Judiciary Committee hearing, April 23, 1996, statement of Robert E. Preston, at 40.

[7] *See* Ala. Const. amend. 557; Alaska Const. art. I, Sec. 24; Ariz. Const. art. II, 2.1; Cal. Const. art. I, 12, 28; Colo. Const. art. II, 16a; Conn. Const. art. I, 8(b); Fla. Const. art. I, 16(b); Idaho Const. Art. I, 22; Ill. Const. art. I, 8.1; Ind. Const. art. I, 13(b); Kan. Const. art. 15, 15; La. Const. art. 1, 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, 24; Miss. Const. art. 3, 26A; Mo. Const. art. I, 32; Mont. Const. Art II, sec. 28; Neb. Const. art. I, 28; Nev. Const. art. I, 8; N.J. Const. art. I, 22; New Mex. Const. art. 2, 24; N.C. Const. art. I, 37; Ohio Const. art. I, 10a; Okla. Const. art. II, 34; Art. 1, Sec. 42, Or. Const.; R.I. Const. art. I, 23; S.C. Const. art. I, S 24; Tenn. Const. art. 1, 35; Tex. Const. art. 1, 30; Utah Const. art. I, 28; Va. Const. art. I, 8-A; Wash. Const. art. 2, 33; Wis. Const. art. I, 9m. These amendments passed with overwhelming popular support.]

and enforceable rights for crime victims.[8]

In 1995 the leaders of NVCAN met to discuss whether, in light of the failure of state reforms to bring about meaningful and enforceable rights for crime victims, the time had come to press the case for a federal constitutional amendment. It was decided to begin.[9]

Senator Kyl of Arizona was approached in the Fall of 1995 and asked to consider introducing an amendment for crime victims rights. He worked with NVCAN on the draft language and also reached across the aisle, asking Senator Dianne Feinstein to work with

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[8] Paul G. Cassell, Professor of Law, University of Utah College of Law, *Statement Before the Committee on the Judiciary, United States Senate, Responding to the Critics of the Victims' Rights Amendment*, (March 24, 1999):

> Unfortunately, however, the state amendments and related federal and state legislation are generally recognized by those who have carefully studied the issue to have been insufficient to fully protect the rights of crime victims. The United States Department of Justice has concluded that current protection of victims is inadequate, and will remain inadequate until a federal constitutional amendment is in place. As the (former) Attorney General (Reno) explained:
>
>> Efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims rights advocates have sought reforms at the State level for the past 20 years . . . . However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights. (Citation in original).

[9] Committee on the Judiciary, 79-010, Calendar No. 299, 106th Congress Report, Senate 2d Session 106, 254, *S. J. Res. 3: Crime Victims' Rights Constitutional Amendment*, April 4, 2000 (hereinafter "Senate Judiciary Report"). ("With the passage of and experience with these State constitutional amendments came increasing recognition of both the national consensus supporting victims' rights and the difficulties of protecting these rights with anything other than a Federal amendment. As a result, the victims' advocates – including most prominently the National Victims Constitutional Amendment Network (NVCAN) – decided in 1995 to shift its focus toward passage of a Federal amendment.")

him. In a spirit of true bi-partisanship the two senators worked in earnest to transcend any differences and, together with NVCAN, reached agreement on the language.

In the 104th Congress, S. J. Res. 52, the first Federal constitutional amendment to protect the rights of crime victims, was introduced by Senators Jon Kyl and Dianne Feinstein on April 22, 1996. Twenty-seven other Senators cosponsored the resolution. A similar resolution (H. J. Res. 174) was introduced in the House by Representative Henry Hyde. On April 23, 1996, the Senate Committee on the Judiciary held a hearing on S. J. Res. 52. Later that year the House Committee on the Judiciary, under the leadership of then Chairmen Henry Hyde held hearings on companion proposals in the House.[10]

At the end of the 104th Congress, Senators Kyl and Feinstein introduced a modified version of the amendment (S. J. Res. 65). As first introduced, S. J. Res. 52 embodied eight core principles: notice of the proceedings; presence; right to be heard; notice of release or escape; restitution; speedy trial; victim safety; and notice of rights. To these core values another was added in S. J. Res. 65, the right of every victim to have independent standing to assert these rights. In the 105th Congress, Senators Kyl and Feinstein introduced S. J. Res. 6 on January 21, 1997, the opening day of the Congress. Thirty-two Senators became cosponsors of the resolution. On April 16, 1997, the Senate Committee on the Judiciary held a hearing on S. J. Res. 6.[11]

On June 25, 1997 the House Committee on the Judiciary held hearings on H. J. Res. 71 which had been introduced by then Chairman Henry Hyde and others on April 15, 1997.

Work continued with all parties interested in the language of the proposal and many changes were made to the original draft, responding to concerns expressed in hearings, by the Department of Justice, and others. S. J. Res. 44 was introduced by Senators Kyl and Feinstein on April 1, 1998. Thirty-nine Senators joined Senators Kyl and Feinstein as original cosponsors.[12] On April 28, 1998, the Senate Committee on the

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[10] Committee on the Judiciary, *Legislative Hearing on Proposals for Constitutional Amendment to Provide Rights for Victims of Crime*, H. J. Res 173 and H. J. Res. 174, July 11, 1996

[11] *See* Senate Judiciary Report.

[12] *Id.*

Judiciary held a hearing on S. J. Res. 44. On July 7, after debate at three executive business meetings, the Committee approved S. J. Res. 44, with a substitute amendment by the authors, by a vote of 11 to 6.

In the 106th Congress, Seantors Kyl and Feinstein introduced S. J. Res. 3 on January 19, 1999, the opening day of the Congress. Thirty-three Senators became cosponsors of the resolution. On March 24, 1999, the Senate Committee on the Judiciary held a hearing on S. J. Res. 3.

Rep Steve Chabot (R-OH) introduced H. J. Res. 64 on August 4, 1999.

On May 26, 1999, the Senate Subcommittee on the Constitution, Federalism, and Property Rights approved S. J. Res. 3, with an amendment, and reported it to the full Committee by a vote of 4 to 3. On September 30, 1999, the Senate Committee on the Judiciary approved S. J. Res. 3 with a sponsors' substitute amendment, by a vote of 12 to 5.

Hearings on H. J. Res 64 were held on February 10, 2000 before the Constitution Subcommittee of the Committee on the Judiciary.

On April 27, 2000, after three days of debate on the floor of the United States Senate, Senators Kyl and Feinstein decided to ask that further consideration of the amendment be halted when it became likely that opponents would sustain a filibuster.[13]

A History of the Proposed Language

After S. J. Res. 3 was withdrawn by its sponsors, an active effort was undertaken to review all the issues that had been raised by the critics. I was asked by Senator Feinstein to work with Professor Larry Tribe, the pre-eminent Harvard constitutional law scholar, on re-drafting the amendment to meet the objections of the critics. I traveled to Cambridge, Mass with my colleague John Stein, the Deputy Director of the National Organization for Victim Assistance (NOVA) and together with Prof. Tribe, we wrote a new draft for consideration by the senators and their counsel. Together with Stephen Higgins, Chief Counsel to Senator Kyl, and Matt Lamberti, Counsel to Senator Dianne Feinstein, Prof. Paul Cassell (University of Utah College of Law) and Prof. Doug Beloof

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[13] "Ultimately, in the face of a threatened filibuster, Senator Kyl and I decided to withdraw the amendment." *Congressional Record Statement by Senator Dianne Feinstein on Introduction of S.J. Res. 35*, April 15, 2002.

(Lewis and Clark College of Law), we reached consensus on a new draft in the Fall of 2000.

With the advent of the new Administration, the revised draft was presented to representatives of the White House and the Department of Justice soon after Attorney General Ashcroft was confirmed. We began to have a series of meetings with Administration officials directed at reaching consensus on language.[14]

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[14] Such a consensus had always eluded proponents in discussion with the prior Administration. *See* National Organization for Victim Assistance, *Newsletter*, Volume 19, Numbers 2 and 3 (of 12 issues), 2000 which reported the following history:

> Administration Reservations
>
> For at least two years before the full Senate took up the proposal, the Justice Department had been expressing reservations about certain provisions of the Kyl-Feinstein proposal. Organizations like the National Victims Constitutional Amendment Network (NVCAN) and NOVA had written letters to Attorney General Janet Reno expressing disagreement with the Department's positions and requesting meetings to seek resolution. Those letters went unanswered.
>
> Justice formalized its objections in a February 10, 2000, hearing before the Constitution Subcommittee of the House Judiciary Committee, considering a counterpart proposal. There, Assistant Attorney General Eleanor D. Acheson submitted a statement for the Department specifying four objections to the Kyl-Feinstein resolution (and an additional one pertaining just to the House bill, introduced by Ohio Republican Steve Chabot).
>
> That statement became the focus of the discussions between the Administration and the sponsors. These began Tuesday afternoon, necessitating the sponsors to leave the floor as opponents held forth.
>
> The Justice position and the proponents' response can be found in a rejoinder that NVCAN Chief Counsel Steven Twist filed to the Acheson statement. Italicized excerpts from the statement, with the Twist rejoinder afterward, follow:
>
> *" ... [w]e urge that the following language be added: 'Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution.' "*
>
> > "The likely, although perhaps unintended, consequence of the proposed language would be to always subordinate the rights of the victim to those of an accused or convicted offender. To constitutionalize such a 'trump card' would be directly contrary to the views President Clinton expressed on June 25, 1996 ..."
>
> . . .

The discussions toward consensus were interrupted by the September 11, 2001 attacks on our nation. However, those tragic events and their resulting victimizations focused our attention on the importance of our work and strengthened our resolve to complete it as soon as the Administration was again able to rejoin the discussion. Our talks resumed earlier this year and just before the advent of Crime Victims Rights Week this year (April 21 - 27, 2002) we reached agreement.

Let me say on behalf of our national movement how grateful we are to the President and the Attorney General for committing to this lengthy process and always remaining steadfast in pursuit of the goal of constitutional rights for crime victims. We are also grateful to Viet Dinh, who led the Administration discussion team, and his many fine colleagues within DOJ and the White House.

These efforts have produced the proposed amendment which is now before you. It is the product of seven years of debate and reflection. It speaks in the language of the Constitution; it has been revised to address concerns of critics on both the Left and the Right, while not abandoning the core values of the cause we serve. The proposed language threatens no constitutional right of an accused or convicted offender, while at the same time securing fundamentally meaningful and enforceable rights for crime victims.

Senators Feinstein and Kyl introduced S. J. Res. 35 on April 15, 2002 and the following day President Bush announced his support for the amendment. On May 1, 2002, Law Day, Rep. Chabot introduced a companion House Resolution, H. J. Res. 91. A hearing before the House Judiciary Constitution Subcommittee was held on May 9, 2002. A hearing on S. J. Res. 35 was held on July 17, 2003.

The issue that seemed the thorniest was the first, concerning defendants' rights. The proponents' negotiators reported that the Administration had rejected alternative language that Professor Cassell had publicly suggested over a year before: "'Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution. In cases of conflict, the rights of the accused or convicted offender and the victim shall be reasonably balanced."

Finding a new way to express protection of both defendants' and victims' rights proved an intellectual challenge, but in the end, the lawyers and the sponsors were satisfied with their draft.

At the second meeting on Wednesday, the Administration team reviewed the sponsors' counteroffers, and accepted all but the defendant's rights language. Nor would they suggest an alternative to their own formulation.

S. J. Res. 1, the measure before you today, was introduced on January 7, 2003. Congressman Chabot will introduce the amendment in the House on April 10, 2003.

The Bi-Partisan Consensus for Constitutional Rights for Crime Victims

That there is a strong bi-partisan consensus that crime victims should be given rights is now beyond dispute, as is the consensus that those rights *can only* be secured by an amendment to the United States Constitution.

Support for a constitutional amendment for victims' rights is found in the platforms of both the Democratic National Committee[15] and the Republican National Committee.[16] Former President Clinton understood the need for a constitutional amendment for crime victims rights[17] and President Bush has recently issued a strong

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[15] Democratic National Committee, *The 2000 Democratic National Platform: Prosperity, Progress, and Peace* (2000):

> *Victims' Rights.* We need a criminal justice system that both upholds our Constitution and reflects our values. Too often, we bend over backward to protect the right of criminals, but pay no attention to those who are hurt the most. Al Gore believes in a Victims' Rights Amendment to the United States Constitution - one that is consistent with fundamental Constitutional protections. Victims must have a voice in trial and other proceedings, their safety must be a factor in the sentencing and release of their attackers, they must be notified when an offender is released back into their community, they must have a right to compensation from their attacker. Our justice system should place victims ... in their rightful place.

[16]Republican National Committee, *Republican Platform 2000: Renewing America's Purpose. Together.* (2000) (supporting "A constitutional amendment to protect victims' rights at every stage of the criminal justice system.")

[17]Statement of President Bill Clinton, June 25, 1996 from the White House:

> Having carefully studied all of the alternatives, I am now convinced that the only way to fully safeguard the rights of victims in America is to amend our Constitution and guarantee these basic rights -- to be told about public court proceedings and to attend them; to make a statement to the court about bail, about sentencing, about accepting a plea if the victim is present, to be told about parole hearings to attend and to speak; notice when the

endorsement of the proposal before you.[18] Former Attorney General Janet Reno supported

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> defendant or convict escapes or is released, restitution from the defendant, reasonable protection from the defendant and notice of these rights.
>
> . . .
>
> But this is different. This is not an attempt to put legislative responsibilities in the Constitution or to guarantee a right that is already guaranteed. Amending the Constitution here is simply the only way to guarantee the victims' rights are weighted equally with defendants' rights in every courtroom in America.
>
> Until these rights are also enshrined in our Constitution, the people who have been hurt most by crime will continue to be denied equal justice under law. That's what this country is really all about -- equal justice under law. And crime victims deserve that as much as any group of citizens in the United States ever will.

[18]Statement of President George W. Bush from the Department of Justice, April 16, 2002

> The victims' rights movement has touched the conscience of this country, and our criminal justice system has begun to respond, treating victims with greater respect. The states, as well as the federal government, have passed legal protections for victims. However, those laws are insufficient to fully recognize the rights of crime victims.
>
> Victims of violent crime have important rights that deserve protection in our Constitution. And so today, I announce my support for the bipartisan Crime Victims' Rights amendment to the Constitution of the United States.
>
> As I mentioned, this amendment is sponsored by Senator Feinstein of California, Senator Kyl of Arizona -- one a Democrat, one a Republican. Both great Americans.
>
> This amendment makes some basic pledges to Americans. Victims of violent crime deserve the right to be notified of public proceedings involving the crime. They deserve to be heard at public proceedings regarding the criminal's sentence or potential release. They deserve to have their safety considered. They deserve consideration of their claims of restitution. We must guarantee these rights for all the victims of violent crime in America.
>
> The Feinstein-Kyl Amendment was written with care, and strikes a proper balance. Our legal system properly protects the rights of the accused in the Constitution. But it does not provide similar protection for the rights of victims, and that must change.
>
> The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do. And the Feinstein-Kyl

a constitutional amendment for victims rights[19] and Attorney General John Ashcroft recently announced his support for the proposed amendment.[20] Each proposal for a

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Crime Victims' Rights Amendment is the right way to do it.

[19]Statement of Attorney General Janet Reno, House Committee on the Judiciary, *Supporting House Joint Resolution 71* (June 25, 1997):

> Based on our personal experiences and the extensive review and analysis that has been conducted at our direction, the President and I have concluded that an amendment to the Constitution to protect victims' rights is warranted. We have come to that conclusion for a number of important reasons.
>
> First, unless the Constitution is amended to ensure basic rights to crime victims, we will never correct the existing imbalance in this country between defendants' constitutional rights and the current haphazard patchwork of victims' rights. While a person arrested or convicted for a crime anywhere in the United States knows that he is guaranteed certain basic minimum protection under our nation's most fundamental law, the victim of that crime has no guarantee of rights beyond those that happen to be provided and enforced in the particular jurisdiction where the crime occurred.
>
> A victims' rights amendment would ensure that courts will give weight to the interests of victims. When confronted with the need to reconcile the constitutional rights of a defendant with the statutory rights of a victim, many courts often find it easiest simply to ignore the legitimate interests of the victim. A constitutional amendment would require courts to engage in a careful and conscientious analysis to determine whether a particular victim's participation would adversely affect the defendant's rights. The result will be a more sophisticated and responsive criminal justice system that both protects the rights of the accused and the interests of victims.
>
> Second, efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate.

[20]Statement of Attorney General John Ashcroft, Department of Justice, April 16, 2002:

> There were millions of victims of violent crime last year, but too often in the quest for justice, the rights of these victims were overlooked or ignored. It is time --it is past time -- to balance the scales of justice, to demand fairness and judicial integrity not just for the accused but for the aggrieved, as well.
>
> I am grateful to members of the Congress who are here today, and I thank in particular Senators John Kyl and Dianne Feinstein for their work to protect the rights of victims.

constitutional amendment has received strong bi-partisan support in the United States Senate.[21] The National Governors' Association, by a vote of 49-1, passed a resolution strongly supporting the need for a constitutional amendment for crime victims.[22] In the last Congress, a bipartisan group of 39 State Attorneys General signed a letter expressing their "strong and unequivocal support for an amendment. Finally, among academic scholars, the amendment has garnered the support from both conservatives and liberals.[23]

II. The Rights Proposed

> *SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any*

> Although government cannot offer the one thing that victims wish for most, and that's a return to the way life was before violence intruded, government can do more than it has done in the past. We can offer victims a new guarantee of inclusion in the process of justice. We can show our support with that of a bipartisan group of lawmakers for a constitutional amendment to ensure that the victims of crime have their rights, including the right to participate, the right to be heard, and the right to decisions that consider the safety of victims.

[21] Senators Kyl and Feinstein have co-sponsored their amendment with leading senators from both parties.

[22] National Governors' Association, Policy 23.1 ("Despite widespread state initiatives, the rihgts of victims do not receive the same consideration or protection as the rights of the accused. These rights exist on different judicial levels. Victims are relegated to a position of secondary importance in the judicial process. ... Protection of these basic rights is essential and can omly come from a fundamental change in our basic law: the U. S. Constitution.")

[23]"The proposed Crime Victims' Rights Amendment would protect basic rights of crime victims, including their rights to be notified of and present at all proceedings in their case and to be heard at appropriate stages in the process. These are rights not to be victimized again through the process by which government officials prosecute, punish, and release accused or convicted offenders. These are the very kinds of rights with which our Constitution is typically and properly concerned--rights of individuals to participate in all those government process that strongly affect their lives." Laurence H. Tribe and Paul G. Cassell, ``Embed the Rights of Victims in the Constitution," L.A. Times, July 6, 1998, at B7.

> *State or the United States and may be restricted only as provided in this article.*

The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them . . .

This preamble, authored by Professor Tribe, establishes two important principles about the rights established in the amendment: First, they are not intended to deny the constitutional rights of the accused, and second, they do not, in fact, deny those rights. The task of balancing rights, in the case of alleged conflict, will fall, as it always does, to the courts, guided by the constitutional admonition not to *deny* constitutional rights to either the victim or the accused.[24]

are hereby established

For a fuller discussion of why true rights for crime victims can only be established through an Amendment to the U. S. Constitution, and why it is appropriate to do so, see Appendix A. The arguments presented are straightforward: *twenty years of experience with statutes and state constitutional amendments proves they don't work.* Defendants trump them, and the prevailing legal culture does not respect them. They are *geldings*.[25]

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[24] *See* Killian and Costello, *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document 103-6, U. S. Gov't Printing Office, p. 1105 (1992). ("Conflict between constitutionally protected rights is not uncommon." The text continues discussing the Supreme's Court balancing of "a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's rights protection of the rights to obtain and publish information about defendants and trials.") *Id.*

[25] I pause here to note with some sadness and amusement that there are those who say they are all in favor of "victims' rights" laws, they just don't want them in the Constitution. Such laws, without constitutional authority or grounding, are like the "men without chests" referred to by C. S. Lewis:

> And all the time – such is the tragic-comedy of our situation – we continue to clamour for those very qualities we are rendering impossible. ... In a sort of ghastly simplicity we remove the organ and demand the function. We make men without chests and expect of them virtue and enterprise. We laugh at honour and are shocked to find traitors in our midst. We castrate and bid the geldings be fruitful.

The amendment provides that the rights of victims are "hereby established." The phrase, which is followed by certain enumerated rights, is not intended to "deny or disparage"[26] rights that may be established by other federal or state laws. The amendment establishes a floor and not a ceiling of rights[27] and States will remain free to enact (or continue, as indeed many have already enacted) more expansive rights than are "established" in this amendment. Rights established in a state's constitution would be subject to the independent construction of the state's courts[28]

and shall not be denied by any State or the United States and may be restricted only as provided in this article.

In this clause, and in Section 2 of the amendment, an important distinction between "denying" rights and "restricting" rights is established. As used here, "denied" means to "refuse to grant;"[29] in other words, completely prohibit the exercise of the right. The amendment, by its terms, prohibits such a denial. At the same time, the language recognizes that no constitutional right is absolute and therefore permits "restrictions" on the rights but only, as provided in Section 2, in three narrow circumstances. This direction settles what might otherwise have been years of litigation to adopt the appropriate test for when, and the extent to which, restrictions will be allowed.

SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to

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C. S. Lewis, The Abolition of Man, 26 (HarperCollins 2001).

[26] U. S. Constitution, Amend. IX.

[27] *See* Senate Judiciary Report ("In other words, the amendment sets a national 'floor' for the protecting of victims rights, not any sort of 'ceiling.' Legislatures, including Congress, are certainly free to give statutory rights to all victims of crime, and the amendment will in all likelihood be an occasion for victims' statutes to be re-examined and, in some cases, expanded.")

[28] *See Michigan v. Long*, 463 U.S. 1032 (1983).

[29] Webster's New Collegiate Dictionary, 304 (1977).

adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.

A victim of violent crime

Concern has been expressed by some over the amendment's limitation to victims of "violent crime." In a perfect world the amendment would extend to victims of all crimes. Nonetheless, we have acceded to the insistence of others that the amendment be limited in this fashion because we believe strongly that the rights proposed, once adopted, will benefit all crime victims. The rights will usher in an era of cultural reform in the criminal justice system, moving it to a more victim-oriented model.[30]

Moreover, we are confident that the scope of the "violent crime" clause will be broadly applied to effectuate the purpose of extending rights to crime victims, and not be limited as it might in more narrow contexts. The Senate Report addressed this issue at some length and it is worth inserting those views for your consideration:

> The most analogous Federal definition is Federal Rule of Criminal Procedure 32(f), which extends a right of allocution to victims of a "crime of violence" and defines the phrase as one that "involved the use or attempted or threatened use of physical force against the person or property of another * * *." (emphasis added). The Committee anticipates that the phrase "crime of violence" will be defined in these terms of "involving" violence, not a narrower "elements of the offense" approach employed in other settings. See, e.g., 18 U.S.C. 16. Only this broad construction will serve to protect fully the interests of all those affected by criminal violence.
>
> "Crimes of violence" will include all forms of homicide (including voluntary and involuntary manslaughter and vehicular homicide), sexual assault, kidnaping, robbery, assault, mayhem, battery, extortion accompanied by threats of violence, carjacking, vehicular offenses (including driving while intoxicated) which result in personal injury, domestic violence, and other similar crimes. A "crime of violence" can arise

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[30] Cite Beloof Article

without regard to technical classification of the offense as a felony or a misdemeanor.

It should also be obvious that a "crime of violence" can include not only acts of consummated violence but also of intended, threatened, or implied violence. The unlawful displaying of a firearm or firing of a bullet at a victim constitutes a "crime of violence" regardless of whether the victim is actually injured. Along the same lines, conspiracies, attempts, solicitations and other comparable crimes to commit a crime of violence should be considered "crimes of violence" for purposes of the amendment, if identifiable victims exist.

Similarly, some crimes are so inherently threatening of physical violence that they could be "crimes of violence" for purposes of the amendment. Burglary, for example, is frequently understood to be a "crime of violence" because of the potential for armed or other dangerous confrontation. See United States v. Guadardo, 40 F.3d 102 (5th Cir. 1994); United States v. Flores, 875 F.2d 1110 (5th Cir. 1989).

Similarly, sexual offenses against a child, such as child molestation, can be "crimes of violence" because of the fear of the potential for force which is inherent in the disparate status of the perpetrator and victim and also because evidence of severe and persistent emotional trauma in its victims gives testament to the molestation being unwanted and coercive. See United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993). Sexual offenses against other vulnerable persons would similarly be treated as "crimes of violence," as would, for example, forcible sex offenses against adults and sex offenses against incapacitated adults.

Finally, an act of violence exists where the victim is physically injured, is threatened with physical injury, or reasonably believes he or she is being physically threatened by criminal activity of the defendant. For example, a victim who is killed or injured by a driver who is under the influence of alcohol or drugs is the victim of a crime of violence, as is a victim of stalking or other threats who is reasonably put in fear of his or her safety. Also, crimes of arson involving threats to the safety of persons could be "crimes of violence."[31]

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[31] Senate Judiciary Report

It should be noted that the States, and the Federal Government,[32] within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal. The power to define "victim" is simply a corollary of the power to define the elements of criminal offenses and, for State crimes, the power would remain with State Legislatures.

shall have the right to reasonable and timely notice of any public proceeding involving the crime

Reasonable and timely notice is the irreducible component of fairness and due process. Each of the participatory rights established in the amendment depend first on the receipt of notice. Notice here must be "reasonable." As was noted in the Senate Judiciary Report:

> To make victims aware of the proceedings at which their rights can be exercised, this provision requires that victims be notified of public proceedings relating to a crime. 'Notice' can be provided in a variety of fashions. For example, the Committee was informed that some States have developed computer programs for mailing form notices to victims while other States have developed automated telephone notification systems. Any means that provides reasonable notice to victims is acceptable.
>
> 'Reasonable' notice is any means likely to provide actual notice to a victim. Heroic measures need not be taken to inform victims, but due diligence is required by government actors. It would, of course, be reasonable to require victims to provide an address and keep that address updated in order to receive notices. 'Reasonable' notice is notice that permits a meaningful opportunity for victims to exercise their rights. In rare mass victim cases (i.e., those involving hundreds of victims), reasonable notice could be provided to means tailored to those unusual circumstances, such as notification by newspaper or television announcement.
>
> Victims are given the right to receive notice of 'proceedings.'

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[32] Killian and Costello, The Constitution of the United States of America: Analysis and Interpretation, Senate Document 103-6, U. S. Gov't Printing Office, p. 341 (1992) ("[Congress'] power to create, define, and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded." (Numerous citations omitted).

Proceedings are official events that take place before, for example, trial and appellate courts (including magistrates and special masters) and parole boards. They include, for example, hearings of all types such as motion hearings, trials, and sentencings. They do not include, for example, informal meetings between prosecutors and defense attorneys. Thus, while victims are entitled to notice of a court hearing on whether to accept a negotiated plea, they would not be entitled to notice of an office meeting between a prosecutor and a defense attorney to discuss such an arrangement.

Victims' rights under this provision are also limited to 'public' proceedings. Some proceedings, such as grand jury investigations, are not open to the public and accordingly would not be open to the victim. Other proceedings, while generally open, may be closed in some circumstances. For example, while plea proceedings are generally open to the public, a court might decide to close a proceeding in which an organized crime underling would plead guilty and agree to testify against his bosses. Another example is provided by certain national security cases in which access to some proceedings can be restricted. See 'The Classified Information Procedures Act,' 18 U.S.C. app. 3. A victim would have no special right to attend. The amendment works no change in the standards for closing hearings, but rather simply recognizes that such nonpublic hearings take place. Of course, nothing in the amendment would forbid the court, in its discretion, to allow a victim to attend even such a nonpublic hearing. [33]

"Timely" notice would require that the victim be informed enough in advance of a public proceeding to be able reasonably to organize his or her affairs to attend. Oftentimes the practice in the criminal courts across the country is to schedule proceedings, whether last minute or well in advance, without any notice to the victim. Even in those jurisdictions which purport to extend to victims the right to not be excluded or the right to be heard, these proceedings without notice to the victim render meaningless any participatory right. Of course, it goes without saying, the defendant, the state, and the court always have notice; failure to provide notice to any of the three would render the ensuing action void. Victims seek no less consideration; indeed, principles of fairness and decency demand no less.

Witnesses before both the full House and Senate Judiciary Committees have given

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[33] *See* Senate Judiciary Report

compelling testimony about the devastating effects on crime victims who learn that proceedings in their case were held without any notice to them. What is most striking about this testimony is that it comes on the heels of a concerted efforts by the victims' movement to obtain notice of hearings. In 1982, the Task Force Report recommended that victims be kept appraised of criminal justice proceedings. Since then many state provisions have been passed requiring that victims be notified of court hearings. But those efforts have not been fully successful. The *New Directions* Report found that not all states had adopted laws requiring notice for victims, and even in the ones that had, many had not implemented mechanisms to make such notice a reality.[34]

To fail to provide simple notice of proceedings to criminal defendants would be unthinkable; why do we tolerate it for crime victims?

The right to notice of public proceedings is fundamental to the notions of fairness and due process that ought to be at the center of any criminal justice process. Victims have a legitimate interest in knowing what is happening in "their" case. Surely it is time to protect this fundamental interest of crime victims by securing an enduring right to notice in the Constitution.

of any release or escape of the accused

Reasonable and timely notice of releases or escapes is a matter of profound importance to the safety of victims of violent crime. Twenty years after the President's Task Force report victims are still learning "by accident"[35] of the release of the person accused or convicted of attacking them.[36] This continuing threat to safety must be brought

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[34] *New Directions*, 13.

[35] *President's Task Force on Victims of Crime, 'Final Report,'* 4-5 (1982). ("'One morning I woke up, looked out my bedroom window and saw the man who had assaulted me standing across the street staring at me. I thought he was in jail.' – a victim")

[36] *See* National Institute of Justice, Research in Brief, *The Rights of Crime Vicitms – Does Legal Protection Make a Difference?*, 4 (Dec. 1998), finding that even in states that gave "strong protection" to victims' rights, fewer than 60 percent of the victims were notified of the sentencing hearing and fewer than 40 percent were notified of the pretrial release of the defendant.,

to an end.[37]

Because of technological advances, automatic phone systems, web-based systems, and other modern notification systems are all widely and reasonably available. As the Senate Judiciary Report noted, "New technologies are becoming more widely available that will simplify the process of providing this notice. For example, automated voice response technology exists that can be programmed to place repeated telephone calls to victims whenever a prisoner is released, which would be reasonable notice of the release. As technology improves in this area, what is `reasonable' may change as well."[38]

not to be excluded from such public proceeding

This right parallels the language that had been reported out of the Senate Judiciary Committee in April, 2000. The comments from the Senate Judiciary Report remain instructive:

> Victims are given the right `not to be excluded' from public proceedings. This builds on the 1982 recommendation from the President's Task Force on Victims of Crime that victims `no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.' President's Task Force on Victims of Crime, `Final Report,' 80 (1982).
>
> The right conferred is a negative one--a right `*not* to be excluded'--to avoid the suggestion that an alternative formulation--a right `to attend'--might carry with it some government obligation to provide funding, to

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[37] U. S. Dep't of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 13 (1998). ("Notification of victims when the defendants or offenders are released can be a matter of life and death. Around the country there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.")

[38] Senate Judiciary Report.

schedule the timing of a particular proceeding according to the victim's wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings. `Accord,' Ala. Code Sec. 15-14-54 (right `not [to] be excluded from court or counsel table during the trial or hearing or any portion thereof * * * which in any way pertains to such offense'). The amendment, for example, would not entitle a prisoner who was attacked in prison to a release from prison and plane ticket to enable him to attend the trial of his attacker. This example is important because there have been occasional suggestions that transporting prisoners who are the victims of prison violence to courthouses to exercise their rights as victims might create security risks. These suggestions are misplaced, because the Crime Victims' Rights Amendment does not confer on prisoners any such rights to travel outside prison gates. Of course, as discussed below, prisoners no less than other victims will have a right to be `heard, if present, and to submit a statement' at various points in the criminal justice process. Because prisoners ordinarily will not be `present,' they will exercise their rights by submitting a `statement.' This approach has been followed in the States. See, e.g., Utah Code Ann. 77-38-5(8); Ariz. Const. art. II, 2.1.

In some important respects, a victim's right not to be excluded will parallel the right of a defendant to be present during criminal proceedings. See *Diaz* v. *United States,* 223 U.S. 442, 454-55 (1912). It is understood that defendants have no license to engage in disruptive behavior during proceedings. See, e.g., *Illinois* v. *Allen,* 397 U.S. 337, 343 (1977); *Foster* v. *Wainwright,* 686 F.2d 1382, 1387 (11th Cir. 1982). Likewise, crime victims will have no right to engage in disruptive behavior and, like defendants, will have to follow proper court rules, such as those forbidding excessive displays of emotion or visibly reacting to testimony of witnesses during a jury trial.[39]

Few experiences in the justice system are more devastating than an order to a victim that he or she may not enter the courtroom during otherwise public proceedings in the case involving their own victimization.

Collene and Gary Campbell of San Juan Capistrano, California still remember the pain and injustice of being forced to sit, literally, on a hard bench outside the courtroom

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[39] Senate Judiciary Report

during the trial of their son's murderer, while the murderers' family members were allowed entry and preferential seating in the courtroom. Collene and Gary were excluded as a tactical ploy by the defense, who listed them as witnesses, never intending to call them, but rather intending only to invoke "the rule" excluding witnesses. Such exclusion happens every day in courtrooms across the country. And yet exceptions are made to the rule of exclusion. Of course, it does not apply to defendants, who may take the stand to testify in their own defense, nor does the rule apply, in most jurisdictions, to the government's chief investigator, who although a witness, often sits at counsel table throughout the trial, assisting the prosecutor. Simple principles of fairness demand that we do no less for victims. This will ensure that Collene and Gary's wait will not have been in vain.

reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings

The right to be "heard," along with "notice," and the right "not to be excluded" form the bedrock of any system of fair treatment for victims. The right established here is to be heard before the relevant decision-maker at five critical public proceedings, first at "public release proceedings." The language extends its reach to both post-arrest and post-conviction public release proceedings. Thus the victim of domestic violence would have the right to tell a releasing authority, for example before an Initial Appearance Court, about the circumstances of the assault and the need for any special conditions of release that may be necessary to protect the victim's safety. The right would also extend to post-conviction public release proceedings, for example parole or conditional release hearings. In jurisdictions that have abolished parole in favor of "truth in sentencing" regimes, many still have conditional release. Only if the jurisdiction also has a "public proceeding" prior to such a conditional release would the right attach. The language would extend however, to any post-conviction public proceeding that could lead to the release of the convicted offender.

When a case is resolved through a plea bargain that the victim never knows about, until after the fact, there is a deeply impactful wound caused the justice system itself. One of the more famous quotes reported by the President's Task Force was from a woman in Virginia. "Why didn't anyone consult me? I was the one who was kidnapped, not the State of Virginia."[40] This cry for justice, for a voice not a veto, is heard throughout the country still.

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[40] Task Force Report at 9.

The Senate Judiciary Report provides further background in understanding the meaning and intent of the language:

> This gives victims the right to be heard before the court accepts a plea bargain entered into by the prosecution and the defense before it becomes final. The Committee expects that each State will determine for itself at what stage this right attaches. It may be that a State decides the right does not attach until sentencing if the plea can still be rejected by the court after the presentence investigation is completed. As the language makes clear, the right involves being heard when the court holds its hearing on whether to accept a plea. Thus, victims do not have the right to be heard by prosecutors and defense attorneys negotiating a deal. Nonetheless, the Committee anticipates that prosecutors may decide, in their discretion, to consult with victims before arriving at a plea. Such an approach is already a legal requirement in many States, see `National Victim Center, 1996 Victims' Rights Sourcebook,' 127-31 (1996), is followed by many prosecuting agencies, see, e.g., Senate Judiciary Committee hearing, April 28, 1998, statement of Paul Cassell, at 35-36, and has been encouraged as sound prosecutorial practice. See U.S. Department of Justice, Office for Victims of Crime, `New Directions from the Field: Victims' Rights and Services for the 21st Century,' 15-16 (1998). This trend has also been encouraged by the interest of some courts in whether prosecutors have consulted with the victim before arriving at a plea. Once again, the victim is given no right of veto over any plea. No doubt, some victims may wish to see nothing less than the maximum possible penalty (or minimum possible penalty) for a defendant. Under the amendment, the court will receive this information, along with that provided by prosecutors and defendants, and give it the weight it believes is appropriate deciding whether to accept a plea. The decision to accept a plea is typically vested in the court and, therefore, the victims' right extends to these proceedings. See, e.g., Fed. R. Crim. Pro. 11(d)(3); see generally Douglas E. Beloof, `Victims in Criminal Procedure,' 462-88 (1999).[41]

The right to be heard also extends to "public sentencing proceedings." Professor Paul Cassell, in his March 24, 1999 testimony before the U. S. Senate Committee on the Judiciary wrote movingly of the importance of this right. In replying to the assumption that a judge or jury can comprehend the full harm caused by a murder without hearing

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[41] Senate Judiciary Report.

testimony from the surviving family members, Prof. Cassell wrote:

> That assumption is simply unsupportable. Any reader who disagrees with me should take a simple test. Read an actual victim impact statement from a homicide case all the way through and see if you truly learn nothing new about the enormity of the loss caused by a homicide. Sadly, the reader will have no shortage of such victim impact statements to choose from. Actual impact statements from court proceedings are accessible in various places.[42] Other examples can be found in moving accounts written by family members who have lost a loved one to a murder. A powerful example is the collection of statements from families devastated by the Oklahoma City bombing collected in Marsha Kight's affecting *Forever Changed: Remembering Oklahoma City April 19, 1995.*[43] Kight's compelling book is not unique, as equally powerful accounts from the family of Ron Goldman,[44] children of Oklahoma City,[45] Alice Kaminsky,[46] George Lardner Jr.,[47] Dorris Porch and Rebeca Easley,[48] Mike Reynolds,[49] Deborah Spungen,[50] John Walsh,[51] and Marvin Weinstein[52] make all too painfully clear. Intimate third party accounts offer similar insights about the generally unrecognized yet far-ranging consequences of homicide.[53]
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> Professor Bandes acknowledges the power of hearing from victims' families. Indeed, in a commendable willingness to present victim statements with all their force, she begins her article by quoting from victim impact statement at issue in *Payne v. Tennessee*, a statement from Mary Zvolanek about her daughter's and granddaughter's deaths and their effect on her three-year- old grandson:
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> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.[54]
>
> Bandes quite accurately observes that the statement is "heartbreaking" and "[o]n paper, it is nearly unbearable to read."[55] She goes on to argue that such statements are "prejudicial and inflammatory" and "overwhelm the jury with feelings of outrage."[56] In my judgment, Bandes fails here to distinguish sufficiently between prejudice and *unfair* prejudice from a victim's statement. It is a commonplace of evidence law that a litigant is not entitled to exclude harmful evidence, but only *unfairly* harmful evidence.[57] Bandes appears to believe that a sentence imposed following

a victim impact statement rests on unjustified prejudice; alternatively, one might conclude simply that the sentence rests on a fuller understanding of all of the murder's harmful ramifications. What is "heartbreaking" and "nearly unbearable to read" about what it is like for a three-year-old to witness the murder of his mother and his two-year-old sister? The answer, judging from why my heart broke as I read the passage, it that we can no longer treat the crime as some abstract event. In other words, we begin to realize the nearly unbearable heartbreak - that is, the actual and total harm - that the murderer inflicted.[58] Such a realization may hamper a defendant's efforts to escape a capital sentence. But given that loss is a proper consideration for the jury, the statement is not unfairly detrimental to the defendant. Indeed, to conceal such evidence from the jury may leave them with a distorted, minimized view of the impact of the crime.[59] Victim impact statements are thus easily justified because they provide the jury with a full picture of the murder's consequences.[60]

Bandes also contends that impact statements "may completely block" the ability of the jury to consider mitigation evidence.[61] It is hard to assess this essentially empirical assertion, because Bandes does not present direct empirical support.[62] Clearly many juries decline to return death sentences even when presented with powerful victim impact testimony, with Terry Nichols' life sentence for conspiring to set the Oklahoma City bomb a prominent example. Indeed, one recent empirical study of decisions from jurors who actually served in capital cases found that facts about adult victims "made little difference" in death penalty decisions.[63] A case might be crafted from the available national data that Supreme Court decisions on victim impact testimony did, at the margin, alter some cases. It is arguable that the number of death sentences imposed in this country fell after the Supreme Court prohibited use of victim impact statements in 1987[64] and then rose when the Court reversed itself a few years later.[65] This conclusion, however, is far from clear[66] and, in any event, the likelihood of a death sentence would be, at most, marginal. The empirical evidence in non-capital cases also finds little effect on sentence severity. For example, a study in California found that "[t]he right to allocution at sentence has had little net effect . . . on sentences in general."[67] A study in New York similarly reported "no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy."[68] A recent comprehensive review of all of the available evidence in this country and elsewhere by a careful scholar concludes "sentence severity has not increased following the passage of [victim impact] legislation."[69] It is thus unclear why we should credit Bandes'

assertion that victim impact statements seriously hamper the defense of capital defendants.

Even if such an impact on capital sentences were proven, it would be susceptible to the reasonable interpretation that victim testimony did not "block" jury understanding, but rather presented information about the full horror of the murder or put in context mitigating evidence of the defendant. Professor David Friedman has suggested this conclusion, observing that "[i]f the legal rules present the defendant as a living, breathing human being with loving parents weeping on the witness stand, while presenting the victim as a shadowy abstraction, the result will be to overstate, in the minds of the jury, the cost of capital punishment relative to the benefit."[70] Correcting this misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur.[71] This interpretation meshes with empirical studies in non-capital cases suggesting that, if a victim impact statement makes a difference in punishment, the description of the harm sustained by the victims is the crucial factor.[72] The studies thus indicate that the general tendency of victim impact evidence is to enhance sentence accuracy and proportionality rather than increase sentence punitiveness.[73]

Finally, Bandes and other critics argue that victim impact statements result in unequal justice.[74] Justice Powell made this claim in his since-overturned decision in *Booth v. Maryland*, arguing that "in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe."[75] This kind of difference, however, is hardly unique to victim impact evidence.[76] To provide one obvious example, current rulings from the Court invite defense mitigation evidence from a defendant's family and friends, despite the fact the some defendants may have more or less articulate acquaintances. In *Payne*, for example, the defendant's parents testified that he was "a good son" and his girlfriend testified that he "was affectionate, caring, and kind to her children."[77] In another case, a defendant introduced evidence of having won a dance choreography award while in prison.[78] Surely this kind of testimony, no less than victim impact statements, can vary in persuasiveness in ways not directly connected to a defendant's culpability.[79] Yet it is routinely allowed. One obvious reason is that if varying persuasiveness were grounds for an inequality attack, then it is hard to see how the criminal justice system could survive at all. Justice White's powerful dissenting argument in *Booth* went unanswered, and remains unanswerable: "No two prosecutors

have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement . . . the evidence and argument be reduced to the lowest common denominator."[80]

Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed. Equality demands fairness not only *between* cases, but also *within* cases.[81] Victims and the public generally perceive great unfairness in a sentencing system with "one side muted."[82] The Tennessee Supreme Court stated the point bluntly in its decision in *Payne*, explaining that "[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."[83] With simplicity but haunting eloquence, a father whose ten-year-old daughter Staci was murdered, made the same point. Before the sentencing phase began, Marvin Weinstein asked the prosecutor to speak to the jury because the defendant's mother would have the chance to do so. The prosecutor replied that Florida law did not permit this. Here was Weinstein's response to the prosecutor:

What? I'm not getting a chance to talk to the jury? He's not a defendant anymore. He's a murderer! A convicted murderer! The jury's made its decision. . . . His mother's had her chance all through the trial to set there and let the jury see her cry for him while I was barred.[84] . . . Now she's getting another chance? Now she's going to sit there in that witness chair and cry for her son, that murderer, that murderer who killed my little girl! Who will cry for Staci? Tell me that, who will cry for Staci?[85]

There is no good answer to this question,[86] a fact that has led to a change in the law in Florida and, indeed, all around the country. Today the laws of the overwhelming majority of states admit victim impact statements in capital and other cases.[87] These prevailing views lend strong support to the conclusion that equal justice demands the inclusion of victim impact statements, not their exclusion.

These arguments sufficiently dispose of the critics' main contentions.[88] Nonetheless, it is important to underscore that the critics generally fail to grapple with one of the strongest justifications for admitting victim impact statements: avoiding additional trauma to the victim. For all the fairness

reasons just explained, gross disparity between defendants' and victims' rights to allocute at sentencing creates the risk of serious psychological injury to the victim.[89] As Professor Doug Beloof has nicely explained, a justice system that fails to recognize a victim's right to participate threatens "secondary harm" - that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.[90] This trauma stems from the fact that the victim perceives that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."[91] As two noted experts on the psychological effects of crime have concluded, failure to offer victims a chance to participate in criminal proceedings can "result in increased feelings of inequity on the part of the victims, with a corresponding increase in crime-related psychological harm."[92] On the other hand, there is mounting evidence that "having a voice may improve victims' mental condition and welfare."[93] For some victims, making a statement helps restore balance between themselves and the offenders. Others may consider it part of a just process or may want to communicate the impact of the offense to the offender.[94] This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome.[95]

The possibility of the sentencing process aggravating the grievous injuries suffered by victims and their families is generally ignored by the Amendment's opponents. But this possibility should give us great pause before we structure our criminal justice system to add the government's insult to criminally-inflicted injury. For this reason alone, victims and their families, no less than defendants, should be given the opportunity to be heard at sentencing.[42]

It should be noted that the victim's right to be heard at sentencing is not the right to be a witness. Rather, it is an independent right of allocution not dependent on the victim being called to the witness stand. In this way the right parallels the right of the defendant. The victim is given the right to address the sentencing authority (judge or jury).

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[42] Paul G. Cassell, Professor of Law, University of Utah College of Law, *Statement Before the Committee on the Judiciary, United States Senate, Responding to the Critics of the Victims' Rights Amendment*, pp.5-9 (March 24, 1999) (citations omitted).

The right to be heard at sentencing includes the right to make a recommendation regarding the appropriate sentence to be imposed, including in capital cases.

the right to adjudicative decisions that duly consider the victim's safety

As used in this clause, "adjudicative decisions" includes both court decisions and decisions reached by adjudicative bodies, such as paroles boards. Any decision reached after a proceeding in which different sides of an issue would be presented would be an adjudicative decision. Again the clause should be interpreted to achieve the purposes inherent in an amendment that extends rights to crime victims.

The requirement to "duly consider" is a requirement to fully and fairly consider the interest at issue. The language would not require that the interest at issue always control a decision. Hence, decisions that implicate the victim's safety, for example, release and sentencing decisions, would not be forced, by the language, to any particular result, (e.g., jail vs. no jail or high bond vs. no bond pending trial, or longer rather shorter prison sentences after conviction). Rather the constitutional mandate would simply be to hear and consider the victim's interest and to demonstrate that the interest was factored into the final decision. It is expected that records of decisions would reflect consideration of the victim's interest.

For women and children who are the victims of domestic violence, the right to have safety considered as a factor before any release decision is made, or before any sentence is imposed is a right of life and death importance.[43]

interest in avoiding unreasonable delay

Had this provision already been the law it would have been welcome news for Sally Goelzer and her brother Jim Bone from Phoenix, Arizona. Sally and Jim's brother, Hal Bone was murdered on Thanksgiving Day, 1995. Hal had been the victim of an attempted robbery by a gang member in Phoenix, had summoned the courage to report the offense and help the police track down the suspect so that he could not hurt others. Hal was scheduled to testify against the defendant the following January, 1996. His good citizenship got him killed. The defendant and another member of the same gang murdered

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[43] *See note 32, supra.*

Hal so he could not testify.

Arizona is one of 32 states that have enacted a state constitutional amendment for victims rights.[44] Arizona's is one of the stronger amendments. Three of the guarantees for victims are the "rights" to "due process" and to a "speedy trial," and to "a prompt and final conclusion of the case after conviction."[45] Arizona victims even have standing to assert their rights in court.[46]

Unfortunately for Sally and Jim, these rights, on behalf of their murdered brother, were hollow promises. The murderers' trial did not begin until January 1999, more than four years after the murderers had been arrested. Continuances were constantly granted without notice to Jim and Sally and without any consideration for their rights. The two murderers were convicted of First Degree Murder when the trial concluded the same month it had begun. By the late summer of 2000 the murderers had not yet been sentenced. Again, despite their state constitutional rights, continuances were granted without notice to them and without respecting their rights to be heard. Finally the ordeal came to an end when the two murderers were sentenced in July and August of 2001,[47] five and one-half years after Hal's murder, and two and one-half years after the convictions.

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[44] Art. II, § 2.1 Ariz. Const. was enacted and became effective November, 1990.

[45] Art. II; § 2.1 (A) (10), Ariz. Const. *But see State ex rel Napolitano v. Brown*, 982 P. 2d 815, 817 (Ariz. 1999) holding that the referenced sub-section and paragraph "creates no right" for the victim. The case is shocking in the length it goes to eviscerate the guarantee of the state constitution, in order to protect the monopoly rulemaking authority the Arizona Supreme Court has constructed for itself, only further demonstrating the need for a Federal amendment.

[46] A. R. S. § 13-4437 (A) ("The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any
right... .")

[47] *State of Arizona v. Richard Steven Rivas III*, CR 1995 - 011372 (Maricopa County) (Sentencing August 24, 2001); *State of Arizona v. James Anthony Sanchez*, CR 1995 - 011372 (Maricopa County) (Sentencing July 9, 2001).

Such is the state of victims' rights in the States.[48] Sally and Jim were cloaked in all the majesty that the law of the State of Arizona could muster. Regrettably for those interested in fair play and balance for crime victims in the criminal justice system it was not enough. Month after month, for close to six years, they summoned the strength to go to court, schedule time off work, and re-live the murder of their brother, over and over again, while the defendants sought tactical advantage through endless delays. The years of delay exacted an enormous physical, emotional, and financial toll.

The Senate Judiciary Report provides more insight into the meaning of the victim's interest in avoiding unreasonable delay:

> Just as defendants currently have a right to a `speedy trial,' this provision will give victims a protected right in having their interests to a reasonably prompt conclusion of a trial considered. The right here requires courts to give `consideration' to the victims' interest along with other relevant factors at all hearings involving the trial date, including the initial setting of a trial date and any subsequent motions or proceedings that result in delaying that date. This right also will allow the victim to ask the court to, for instance, set a trial date if the failure to do so is unreasonable. Of course, the victims' interests are not the only interests that the court will consider. Again, while a victim will have a right to be heard on the issue, the victim will have no right to force an immediate trial before the parties have had an opportunity to prepare. Similarly, in some complicated cases either prosecutors or defendants may have unforeseen and legitimate reasons for continuing a previously set trial or for delaying trial proceedings that have already commenced. But the Committee has heard ample testimony about delays that, by any measure, were `unreasonable.' See, e.g., Senate Judiciary Committee hearing, April 16, 1997, statement of Paul Cassell, at 115-16. This right will give courts the clear constitutional mandate to avoid such delays.

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[48] Senate Judiciary Committee Hearing, April 28, 1998, *Statement of Associate Attorney General Ray Fisher*, at 9: "... the state legislative route to change has proven less than adequate in according victims their rights." Senate Judiciary Committee Hearing, March 24, 1999, *Statement of Laurence Tribe*, at 7: "...there appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach... ."

> In determining what delay is 'unreasonable,' the courts can look to the precedents that exist interpreting a defendant's right to a speedy trial. These cases focus on such issues as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant. See *Barker* v. *Wingo*, 407 U.S. 514, 530-33 (1972). Courts will no doubt develop a similar approach for evaluating victims' claims. In developing such an approach, courts will undoubtably recognize the purposes that the victim's right is designed to serve. Cf. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972) (defendant's right to a speedy trial must be 'assessed in the light of the interest of defendant which the speedy trial right was designed to protect').
>
> The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.
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> The Committee also anticipates that more content may be given to this right in implementing legislation. For example, the Speedy Trial Act of 1974 (Public Law 93-619 (amended by Public Law 96-43), codified at 18 U.S.C. 3152, 3161) already helps to protect a defendant's speedy trial right. Similar legislative protection could be extended to the victims' new right.[49]

just and timely claims to restitution from the offender

The language requires the court to consider the victim's claim to restitution. The nature of the claim will be governed by State or Federal law, as appropriate to the jurisdiction.

These rights shall not be restricted except when and to the degree dictated

Clearly no one of the Bill of Rights is absolute; restrictions have been applied, in

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[49] Senate Judiciary Report

varying conditions, based on varying standards, throughout the history of the nation.[50] As noted above, the amendment sets up a distinction between "denying" a right, which may not be done, and "restricting" a right, which may only be done in three narrowly drawn circumstances. In order to justify a restriction there must be a finding ("except *when* ... dictated") of one of the three circumstances. If found, the restriction must be narrowly tailored (*"to the degree* dictated") to meet the needs of the circumstance.[51] The proposed restriction language settles what might otherwise be years of vexing litigation over what the proper standard would be for allowing restrictions.

by a substantial interest

The "substantial "interest" standard is known in constitutional jurisprudence[52] and is intended to be high enough so that only "essential"[53] interests in public safety and the administration of justice will qualify as justifications for restrictions of the enumerated rights.

in public safety

In discussing the "compelling interest" standard of S. J. Res. 3, the Senate Judiciary Report noted, "In cases of domestic violence, the dynamics of victim-offender

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[50] *See e.g., Maryland v. Craig*, 497 U. S. 836 (1990) holding that the Confrontation Clause does not grant an absolute right to face-to face confrontation. *See also, note 22, supra.*

[51] *See e.g., Shelton v. Tucker*, 364 U. S. 479 (1960) adopting "least restrictive means" standard for restrictions on the right to association.

[52] *See e.g., Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U. S. 557 (1980). ("The state must assert a *substantial interest* to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest." *Id.* At 564. The interest must be clearly articulated and then closely examined to determine whether it is substantial. The Court's analysis at 569 is instructive on this point.)

[53] Webster's New Collegiate Dictionary, 1161 (1977). ("Substantial... 1 a : consisting of or relating to substance b : not imaginary or illusory : REAL, TRUE c : IMPORTANT, ESSENTIAL ... .")

relationships may require some modification of otherwise typical victims' rights provisions. This provision offers the ability to do just that.... [Moreover] situations may arise involving intergang violence, where notifying the member of a rival gang of an offenders' impending release may spawn retaliatory violence. Again, this provision provides a basis for dealing with such situations."[54]

"Public safety" as used here includes the safety of the public generally, as well as the safety of identified individuals.[55]

the administration of criminal justice

It is intended that the language will address management issues within the courtroom or logistical issues arising when it would otherwise be impossible to provide a right otherwise guaranteed. In cases involving a massive number of victims notice of public proceedings may need to be given by other means, courtrooms may not be large enough to accommodate every victim's interest, and the right to be heard may have to be exercised through other forms. The phrase is not intended to address issues related to the protection of defendants' rights.

The term "administration of criminal justice," as used by the United States Supreme Court is a catch-all phrase that encompasses any aspect of criminal procedure. The term 'administration' includes two components: (1) the procedural functioning of the proceeding and (2) the substantive interest of parties in the proceeding. The term 'administration' in the Amendment is narrower than the broad usage of it in Supreme Court case-law and refers to the first description: the procedural functioning of the proceeding. Among the many definitions available for the term 'administration' in Webster's Third New International Dictionary of the English Language (1971), the most appropriate definition to describe the term as used in the Amendment is: "2b. Performance of executive [prosecutorial and judicial] duties: management, direction, superintendence." (Brackets added).

The potential for atypical circumstances necessitates giving courts and public

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[54] Senate Judiciary Report

[55] *See Bartnicki v. Vopper*, 532 U. S. 514 (2001) where a "public safety" threat was to identified school board members.

prosecutors the flexibility to find alternative methods for complying with victims rights when there is a substantial necessity to do so. Thus, where compliance with the exact letter of the right is either impossible or places a very heavy burden on the judiciary or the public prosecutor, the amendment allows for limited flexibility. For example, in a case such as the Oklahoma City bombing, it may be impossible to comply with the right to attend the trial simply because all the victims will not fit in the courtroom. It may be necessary for victims to view the trial in some other fashion, such as by closed circuit television. Courts also may need to exclude a disruptive victim from the court in order to manage the courtroom appropriately, but only to restrict the right in this way until the victim again cooperates. It may also be that the prosecution cannot, due to unusual circumstances, comply with a particular mandate in the Amendment. For example, in an unusual case like the Twin Towers bombing there are so many victims it might be necessary to notify all the victims of their rights through the media, as tracking down every address might be impossible or places too heavy a burden on the public prosecutor.

or compelling necessity.

The Senate Judiciary Report noted, "The Committee-reported amendment provides that exceptions are permitted only for a `compelling' interest. In choosing this standard, formulated by the U.S. Supreme Court, the Committee seeks to ensure that the exception does not swallow the rights. It is also important to note that the Constitution contains no other explicit `exceptions' to rights. The 'compelling interest' standard is appropriate in a case such as this in which an exception to a constitutional right can be made by pure legislative action."[56]

SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.

Nothing in this article shall be construed to provide grounds for a new trial to authorize any claim for damages.

The proposed language in no way limits the power to *enforce* the rights granted. Rather it provides two narrowly tailored exceptions to the *remedies* that might otherwise

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[56] Senate Judiciary Report

be available in an enforcement action. The language creates the limitations as a matter of constitutional interpretation.

Only the victim or the victim's lawful representative

It is intended that both the word "victim" and the phrase "victim's lawful representative" will be the subject of statutory definition, by the State Legislatures and the Congress, within their respective jurisdictions.[57] No single rule will govern these definitions, as no single rule governs what conduct must be criminal. In the absence of a statutory definition the courts would be free to look to the elements of an offense to determine who the victim is, and to use its power to appoint appropriate lawful representatives.

may assert the rights established by this article

With the adoption of this clause there will be no question that victims have standing to assert the rights established.

no person accused of the crime may obtain any form of relief hereunder.

This clause makes it clear, even as does the foregoing clause ("*Only the victim...*"), that the accused or convicted offender may obtain no relief in the event that a *victim's* right is violated.

SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.

Congress shall have power to enforce by appropriate legislation the provisions of this article.

Congress' power to "enforce" established by this section carries limitations that are

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[57] *See* text at n. 29, *supra.*

important for principles of federalism. The power to enforce is not the power to define.[58] As the Senate Judiciary Report noted:

> This provision is similar to existing language found in section 5 of the 14th Amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to 'enforce' the rights, that is, to ensure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment. For example, the States will, subject to Supreme Court review, flesh out the contours of the amendment by providing definitions of 'victims' of crime and 'crimes of violence.'

Nothing in this article shall affect the President's authority to grant reprieves or pardons.

The President's constitutional authority to grant reprieves and pardons[59] remains unaffected by the amendment. If the President were to establish, by executive order, a public proceeding that would be required before a reprieve or pardon were to be granted, the provisions of Section 2 arguably might require victim participation, but nothing in the amendment would obligate the President to do this.

SECTION 5. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

The seven year ratification deadline is put into the body of the amendment to ensure that there will be a contemporaneous ratification requirement. Lawyers in the Justice Department have concluded that putting the 7 year limit in the body of the amendment, rather than the resolved clause is the only reliable way to ensure the contemporaneous ratification.[60]

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[58] *City of Boerne v. Flores*, 521 U. S. 507 (1997)

[59] U. S. Const. Art. II, Sec. 2.

[60] *See e.g.*, U. S. Const. Amendments XX, XXI, and XXII.

III. Conclusion

Doubtless there will be critics who come before the Congress and argue against establishing the rights enumerated in S. J. Res. 1. They are on the extreme margins. Most of the opponents will say they support the rights, just not in the Constitution. Indeed, the rights themselves are so modest and so reasonable they are hard to argue with. Yet who among these critics would be heard to say, "I'm all for defendants' rights, but they don't need to be in the Constitution." The vast majority of Americans, when judged by the actual votes at state elections for amendments, are unequivocal in their support for constitutional rights for crime victims.[61] As my friend and colleague John Stein, Deputy Director of NOVA, has said often, they should be "the birthright of every American." And so they should – and to be meaningful and enforceable they must be in our one shared fundamental charter.

Mr. Chairman, Honorable Members, we urge you to join together, Republicans and Democrats, Conservatives and Liberals, even as your national parties have joined together, even as the former President and the sitting President have joined together, as the former Attorney General and the present Attorney General, as the Governors and the State Attorneys General have joined together, as Senators Kyl and Feinstein and so many of their colleagues, as Prof Tribe and Prof. Cassell have joined together, with the victims and the vanquished, all in a unanimous chorus that crime victims deserve fundamental rights and that only an amendment to the U. S. Constitution will guarantee them. Mr. Chairman, Honorable Members, do not rest until this great national consensus is ratified. Seek out your leadership, push for a mark-up, demand floor action, and send the resolution to the House before the end of the Summer.

Every day that goes by injustice mounts upon injustice. The parents of a murdered child sit somewhere today on a hard bench in the hallway of an American courthouse, while the defendant's family is ushered to special seats inside. Today a woman and a child are being denied the right to speak at the bail hearing of their abuser. Somewhere today, in an American courtroom, a rape victim is shut out of a plea bargain proceeding involving the charges against her rapist. Somewhere, today, as we meet, a victim endures through an endless litany of continuances without voice in the matter of delay. Today another American victim is silenced at the sentencing of her attacker, today, in our

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[61] In the 32 states with constitutional amendments for victims rights the measures passed by an average popular vote of almost 80 percent. *See* www.nvcan.org (Index item: "state vra's) for a state by state review.

country, restitution is being forgotten, and safety is being ignored because a parole board has not allowed the victim to speak. Today, in courtrooms across our beloved nation, injustice mounts upon injustice. And so we ask yet again, who will stand up now to speak against this injustice; who will give voice to the victim?

A watchful nation awaits your answer. And hope abides.

APPENDIX A

Why The Rights Can Only Be Secured In The United States Constitution

Even the Amendment's most ardent critics usually say they support most of the rights in principle. If there is one thing certain in the victims' rights debate, it is that these words, "I'm all for victims' rights but . . .," are heard repeatedly. But while supporting the rights "in principle," opponents in practice end up supporting, if anything, mere statutory fixes that have proven inadequate to the task of vindicating the interests of victims. As Attorney General Reno testified before the House Committee on the Judiciary, ". . . efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate." The best federal statutes have proven inadequate to the needs of even highly publicized victim injustices, as Professor Cassell's writing about the plight of the Oklahoma City bombing victims has ably demonstrated.

In my state, statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights -- even when those rights are not genuinely threatened." The experience in my state is, sadly, hardly unique. A recent study by the National Institute of Justice found that "even in States where victims' rights were protected strongly by law, many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution." The victims most likely to be affected by the current haphazard implementation are, perhaps not surprisingly, racial minorities.

A group calling itself "Citizens for the Constitution"[hereinafter "Citizens"] has organized under the auspices of The Century Foundation's Constitution Project. Their purpose is to call for restraint in the consideration of Amendments to the U. S. Constitution. In their recent pamphlet, *"Great and Extraordinary Occasions": Developing Guidelines for Constitutional Change*, the group propounds eight guidelines which, they argue, should be satisfied before any constitutional amendment would be justified. The "Citizens" raise some questions, in the commentary following their guidelines, about the Crime Victims' Rights Amendment. Applying these rigorous Guidelines, however, despite the reservations of the "Citizens" themselves, demonstrates unequivocal support for the case for the Amendment. I would like to direct the Subcommittee's attention to these eight guidelines, which the "citizens" offer in the form of eight questions.

1. Does the proposed amendment address matters that are of more than immediate

concern and that are likely to be recognized as of abiding importance by subsequent generations?

Yes.

Even as the Constitutional rights of persons accused or convicted of crimes address issues of "abiding importance," so to do the proposed rights of crime victims. The legitimate rights of the accused to notice, to the right to be present and the right to be heard or remain silent, the right to a speedy and public trial, or any of the other rights are surely no more enduring than the legitimate interests of the victim to notice, presence, or the right to be heard, or any of the other rights proposed by the amendment. Surely no one could persuasively argue that the rights of the innocent victim were less important or enduring.

Indeed, it is precisely because these values for victims are of enduring, or "abiding" importance that they must be protected against erosion by any branch or majoritarian will. That they do not exist today broadly across the country is evidence that they are not adequately protected despite general acceptance of their merit.

2. Does the proposed amendment make our system more politically responsive or protect individual rights?

Yes.

Clearly the proposed amendment is offered to "protect individual rights." *That is its sole purpose.*

The "Citizens" however, suggest that Congress should ask "whether crime victims are a 'discreet and insular minority' requiring constitutional protection against overreaching majorities or whether they can be protected through ordinary political means. Congress should also ask whether it is appropriate to create rights for them that are virtually immune from future revision. Let's review these two questions.

"[O]rdinary political means" have proven wholly inadequate to establish and protect the rights reviewed above. If this were not so they would exist and be respected in every state and throughout the federal government. The evidence that they are not is as compelling as it is overwhelming. Why is this so? Are crime victims unpopular? No, but as a class they are ignored; their interests subordinated to the interests of the defendant and the professionals in the system. And those interests are entrenched as deeply as any in this society. Crime victims become "discreet and insular" by virtue of their transparency. If this were not so we would not be here for our rights would be secure.

3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?

Yes.

The "Citizens" write, 'The proposed victims' rights amendment raises troubling questions under this Guideline. Witnesses testifying in Congress on behalf of the amendment point to the success of state amendments as reason to enact a federal counterpart. But the passage of the state amendments arguably cuts just the other way; for the most part, states are capable of changing their own law of criminal procedure in order to accommodate crime victims, without the necessity of federal constitutional intervention. While state amendments cannot affect victims' rights in federal courts, Congress has considerable power to furnish such protections through ordinary legislation. Indeed, it did so in March 1997 with Public Law 105-6 . . . which allowed the victims of the Oklahoma City bombing to attend trial proceedings."

I was one of those witnesses the "Citizens" referred to. They should have read all my testimony. Let me repeat again one of my statements, "In my state, the statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights -- even when those rights are not genuinely threatened." (Quoting Prof. Lawrence Tribe on the proposed amendment).

Moreover our courts have now made explicit in a series of cases (cited in Hearing Report on S. J. Res. 6, April 16, 1997, Senate Judiciary Committee) what was always understood: namely that the U. S. Constitutional rights of the defendant will always trump any right of the victim without any fair attempt to balance the rights of both.

On the Oklahoma City bombing point that the "Citizens" make they should have read the whole testimony of Prof. Paul Cassell who convincingly demonstrates how the statute cited by the citizens was inadequate to the task of fully protecting even these high profile and compelling victims. The law didn't work for them. How much less must it work for victims who don't have the clout to get an act of Congress passed? That "other means," to use the "Citizens" phrase, have simply proven inadequate is concurred in by a broad consensus that includes the Justice Department, constitutional scholars of the highest regard from both ends of the political spectrum, the President, the Vice President, the platforms of both major political parties, and bi-partisan coalition of Members and Senators, and crime victim advocates throughout our country.

4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves in tact?

Yes.

The proposed rights are perfectly consistent with the constitutional doctrine that fundamental rights for citizens in our justice system need the protection of our fundamental law.

5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?

Yes.

The text of the proposed amendment grants to crime victims constitutional standing to stand before any judge in the country and seek orders protected the established rights. This is the essence of enforceability.

6. Have the proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?

Yes.

More than simply "think through" the proposal, proponents of the CVRA have taken roughly two decades of experience with state statutes and constitutional provisions to develop a very refined understanding of the limits of state and federal law, the need for a federal amendment, and how that amendment would work in actual practice and be interpreted. No other constitutional amendment has had this degree of vetting.

7. Has there been full and fair debate on the merits of the proposed amendment?

Yes.

The Congress has had the amendment under consideration since 1996. There have been major hearings in both bodies on multiple occasions. The record of debate and discussion throughout the country is extensive.

8. Has congress provided for a non-extendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?

Yes.

The proposal establishes a seven-year deadline for State ratification.

Conclusion

The proposed amendment passes the test of the "Citizens" Guidelines. More importantly,

it is fully faithful to the spirit and design of James Madison.

The "Citizens'" pamphlet, *Great and Extraordinary Occasions,* takes its name from a line in *The Federalist* No. 49, authored by James Madison. There Madison rightly argued for restraint in the use of the amendment process. But of course he rose above rightful restraint to propose the first twelve amendments.

When James Madison took to the floor and proposed the Bill of Rights during the first session of the First Congress, on June 8, 1789, "his primary objective was to keep the Constitution intact, to save it from the radical amendments others had proposed . . . ." In doing so he acknowledged that many Americans did not yet support the Constitution.

"Prudence dictates that advocates of the Constitution take steps now to make it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them."

The fact is, Madison said, there is still "a great number" of the American people who are dissatisfied and insecure under the new Constitution. So, "if there are amendments desired of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens," why not, in the spirit of "deference and concession," adopt such amendments?

Madison adopted this tone of "deference and concession" because he realized that the Constitution must be the "will of all of us, not just a majority of us." By adopting a bill of rights, Madison thought, the Constitution would live up to this purpose. He also recognized how the Constitution was the only document which could likely command this kind of influence over the culture of the country.

Our goals are perfectly consistent with the goals that animated James Madison. There is substantial evidence in the land that the Constitution today does not serve the interests of the "whole people" in matters relating to criminal justice. And the way to restore balance to the system, in ways that become part of our culture, is to amend our fundamental law.

"[The Bill of Rights will] have a tendency to impress some degree of respect for [the rights], to establish the public opinion in their favor, and rouse the attention of the whole community . . . [they] acquire, by degrees, the character of fundamental maxims. . . as they become incorporated with the national sentiment . . . ."

Critics of Madison's proposed amendments claimed they were unnecessary, especially so in the United States, because states had bills of rights. Madison responded with the observation that "not all states have bills of rights, and some of those that do have inadequate and even 'absolutely improper' ones." Our experience in the victims' rights movement is no different. Not all states have constitutional rights, nor even adequate

statutory rights. There are 33 state constitutional amendments and they are of varying degrees of value.

Harvard Professor Lawrence Tribe has observed this failure : " . . . there appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach . . . ." As a consequence he has concluded that crime victims' rights "are the very kinds of rights with which our Constitution is typically concerned."

After years of struggle, we now know that the only way to make respect for the rights of crime victims "incorporated with the national sentiment," is to make them a part of "the sovereign instrument of the whole people," the Constitution. Just as James Madison would have done it.

APPENDIX B

Responses To Points Made In Opposition

"I'm all for victims' rights, but the proposed amendment is 'an assault on federalism as it has been defined for more than two centuries.'"

The full quote from Prof. Raskin continues, "No aspect of public policy, with the possible exception of education, has been more jealously guarded by the states and localities than the investigation and prosecution of common law crimes and the structuring of the accompanying criminal justice process." The federalism concern also has been expressed by others.

The criminal justice system which Prof. Raskin describes does not exist. In many important matters the Constitution of the United States has come to dictate to the states the "structuring" of their "criminal justice process." Certainly Prof. Raskin knows this and indeed supports it. Through the Fourteenth Amendment, the courts have structured the criminal justice process in each state to be respectful and protective of the rights established in the Bill of Rights for persons accused and convicted of crimes. The incorporation of these rights through the Fourteenth Amendment, and their applicability to the states, has been accepted within our federal system in order to secure a national threshold of fair treatment. Why should not the same deference be given to the rights of crime victims as is given to the rights of accused or convicted offenders?

The authors and supporters of the Crime Victims' Rights Amendment are sympathetic to the demands of federalism and deeply respect the role of the states. The proposal does not infringe these important values. Nothing in the proposed amendment denies to the states their rightful authority to define and implement the rights as they see fit, subject only to the unifying review of the U. S. Supreme Court. Moreover, the power of the Congress to enforce the provisions of the amendment are limited by the understanding given to the word "enforce" in recent Supreme Court decisions, *e.g. City of Boerne.* This jurisprudence is important to our understanding of the role of the states within their respective jurisdictions. For a fuller discussion of this point see the Senate Judiciary Report on S. J. Res. 44

As long as the Constitution establishes a floor of rights for defendants it will be proper for the same Constitution to establish a floor of rights for victims. As Attorney General Reno earlier testified in the House, "First, unless the Constitution is amended to ensure basic rights to crime victims, we will never correct the existing imbalance in this country between defendants' constitutional rights and the haphazard patchwork of victims' rights."

"I'm all for victims' rights, but the costs of this amendment will be staggering and local criminal justice systems will be crippled as a consequence."

This criticism is often made by those who have no direct knowledge of the costs of providing rights for crime victims and who have not thought through clearly enough the actual fiscal impact of the proposed amendment. Let them come to Arizona. Our state constitutional amendment has been in effect since November 1990 and the costs have been minimal and manageable. Consider the proposed rights themselves. The amendment proposes that in cases of violent crimes each victim would have the rights to:

•reasonable notice of . . . all public proceedings . . . •reasonable notice of a release or escape from custody

Some costs are associated with these rights, but how and where they fall will be dependant on each state's decision. In some states the duty to provide notice of proceedings could fall on the prosecutor, as in my state, while in others the duty may fall to the courts. The costs will vary with the kind of notice provided. In some places victims may receive notice by mail, while in others notice may be provided by the victim calling a central phone number. In either case the costs are not staggering.

More importantly, it is right that victims be given these notices. No similar right of a defendant would be denied on the basis of cost. None should be for crime victims.

**be heard . . . at all public release, plea, sentencing, reprieve, or pardon proceedings;*

No costs are associated with allowing the victim the right to speak at proceedings that are already held. There are those who argue that this right to be heard regarding pleas will result in far fewer pleas and far more trials. There is no evidence of this happening anywhere. In Arizona the trial rate has remained unaffected.

•Adjudicative decisions that duly consider the victim's interest in avoiding unreasonable delay;

No costs are associated with requiring the court to take these matters into consideration. To the extent it helps avoid unreasonable delays in the trial it may save costs.

•Just and timely claims to restitution;

No significant costs are associated with the requirement to order restitution. Victims typically will submit proof of economic losses to the court and restitution orders are simply made a part of sentencing. If amounts are contested the issues are resolved during sentencing proceedings that are already held.

• *safety*

Requiring courts or parole authorities to consider the safety of the victim will not impose significant costs. It may result in more carefully crafted release conditions for the accused or convicted offender, but so be it. It may save lives.

The cost argument is a red-herring. Costs are modest, and moreover, appropriate when viewed in light of the important interests at stake. Not one of these critics would dare suggest a cost litmus test for defendants' rights. None should be imposed on crime victims. Let the critics come to Arizona.

"I'm all for victims' rights, but this proposal will undermine the rights of defendants."

Nothing in the proposed amendment will limit the fundamental rights of defendants.

Giving to the victim the right to certain notices infringes no right of a defendant. Allowing the victim the right to be present does not "substantially undermine" any constitutional right of a defendant. Allowing the victim the right to speak at release, plea, or sentencing proceedings does not deny a constitutional right to a defendant, but it does allow the court to make more informed and just decisions. Defendants do not have a constitutional right to refuse or avoid restitution for the economic losses they cause to their victims. Defendants have a right to effective counsel, but they have no right to *unreasonably* delay proceedings and requiring the court to consider the interests of the victim in a trial free from unreasonable delay does not deny any constitutional right to a defendant. Defendants have no right to prohibit the court or parole authority from considering the safety of the victim when making release decisions and requiring the safety of the victim to be considered does not infringe any right of the defendant.

When considered in the light of reason, and not emotion, vague assertions that "fundamental constitutional rights will be undermined," have little value other than to inflame the debate; the amendment is not an assault on the fundamental rights of the defendant. In the justice system throughout the country, rights for those involved are not "a zero-sum game." Rights of the nature proposed here do not subtract from those rights already established, they merely add to the body of rights that we all enjoy as Americans.

Professor Tribe concurs in this analysis when he writes, "no actual constitutional rights of the accused or of anyone else would be violated by respecting the rights of victims in the manner requested."

Crime victims seek balance -- that victims' rights will not automatically be trumped every time a defendant offers a vague and undefined "due process" objection to the victims' participatory and substantive rights. The amendment will achieve this fairness and balance.

"I'm all for victims' rights, but giving the victim a right to be present in the courtroom will lead to perjured testimony by the victim."

The imbalance of the present system is evident in this criticism. The argument goes that victims must be excluded during trial, and perhaps at some pre-trial stages, just like other witnesses, so they will not hear other testimony and conform their own to it. Defendants, of course, may be witnesses in their own trials, but they have a right to be present which overrides the rule of exclusion. The same rules should apply to the crime victim. Typically those rules now make exception so that the prosecution is allowed to keep even the principal investigator in the trial without exclusion, but no exception is made for the victim.

And what of the fear of perjury? Consider the civil justice system. If a lawsuit arises from a drunk driving crash, both the plaintiff (the victim of the drunk driver) and the defendant (the drunk driver) are witnesses. Yet both have an absolute right, as parties in the case, to remain in the courtroom throughout the trial. Do we value truth any less in civil cases? Of course not. But we recognize important societal and individual interests in the need to participate in the process of justice.

This need is also present in criminal cases involving victims. How can we justify saying to the parents of a murdered child that they may not enter the courtroom because the defense attorney has listed them as witnesses. This was a routine practice in my state, before our constitutional amendment. And today, it still occurs throughout the country. How can we say to the woman raped or beaten that she has no interest sufficient to allow her the same rights to presence as the defendant? Closing the doors of our courthouses to America's crime victims is one of the shames of justice today and it must be stopped.

Victims in my state have had this unqualified right to be present since November 1990. Based on our actual experience the fears of the critics are unfounded.

"I'm all for victims' rights, but the right to have the victim's interest in a trial free from unreasonable delay will force both prosecutors and defendants to trial too early."

Nothing in the amendment will cause this result. The key phrase is "unreasonable delay." Giving the state an adequate time to prepare its case is not "unreasonable delay." The state is already under time deadlines by virtue of the defendant having a right to a speedy trial and the various acts which implement that right.

The defendant has a constitutional right to effective counsel and to be effective the defendant's counsel needs an adequate time to prepare, to review the evidence, the case file, and interview certain witnesses. Giving the defendant's counsel an adequate time to

prepare is not an "unreasonable" delay.

The Arizona Constitution has given crime victims a right to both "a speedy trial or disposition" and a "prompt and final conclusion of the case after the conviction and sentence." It has been the law for the last twelve years and I am aware of no case in which either the state or the defendant has been forced to trial before they were ready. The fears of the critics are unfounded.

What the amendment in Arizona has done, albeit inadequately, and what the federal amendment will do, is allow, in the typical case, the court to have a constitutional context in which to balance the legitimate rights of the defendant to effective counsel and due process, with the rights of the victim to some reasonable finality.

Defendants often seek continuances, and then seek to exclude the time of those continuances from the speedy trial rules that would otherwise control the processing of the case. Because these speedy trial rules run to the benefit of the accused, when the accused asks that they be waived, courts are often loath to deny the requests. This is especially true when no countervailing interest in reasonable finality is preserved and protected.

And yet, unreasonable delay is not a mere scheduling problem. It is an all too often painful agony for the victim, who must continue to re-live the crime and confront the defendant. Allowing a reasonable balance between both of the legitimate interests of the defendant and the victim to be considered by the court is the goal of the amendment.

Nothing in the proposed amendment gives the crime victim the power to force any case to trial before it or the defense is ready.

"I'm all for victims' rights, but the right of the victim to have safety considered when making release decisions will result in a constitutional right to imprisonment even after a sentence has been served."

As certain objecting law professors phrased this objection, "The proposed Amendment . . . would . . . allow a victim of a crime to argue that it is unconstitutional to release a person from prison even though the sentence had been completely served."

An examination of the text of the proposed amendment quickly disposes this criticism. The amendment provides that "[e]ach . . . victim shall have the rights to . . . consideration for the safety of the victim in determining any conditional release from custody. . . ." When a sentence "has been completely served," as the law professors posit, there is no "determining" to be done in connection with the release. The release happens by operation of law and the expiration of the original sentence. No discretionary decision is permitted and hence no "consideration" would be given to the safety of the victim on the matter of

the release itself. There may be discretion with respect to the conditions of a release and, of course, then the safety of the victim should always be considered. Sadly, it rarely is. The law professors have simply failed to understand the proposal.

Others have argued that the same safety consideration should not be given to pre-trial release decisions. For most of our recent history the only relevant standard for a court's pre-trial release decision was whether or not the defendant would appear when required. Safety of the victim was not a factor, indeed not allowed to be considered. Recent changes in some states have allowed dangerousness to the victim or the community to be considered when making pre-trial release decisions. However, even these changes have proven inadequate to require consideration for the safety of the victim when fashioning conditions of pre-trial release because they are couched in terms of the defendants rights and not the victims. The time for this imbalance to end is now.

"I'm all for victims' rights, but the terms of this amendment are too vague to have any meaning," or in the alternative, "I'm all for victims' rights, but this amendment is so specific it reads more like a statute than an amendment."

Both criticisms, each contradicting the other, have been made. Neither is true. The amendment proposed is specific enough to make real change in the justice system and is still written to properly reflect the language and patterns of the Constitution.

If all the rights of the defendant were incorporated into one amendment, it would be longer and one could argue, both more specific in some cases and much more general in others, than this proposal. The rights there are as long and as specific as they need to be, as are these.

In this connection, some also argue that the proposed amendment is fatally flawed because it does not specifically define who the "victim" is. For some purposes the definition of the victim is self-evident and even without a statutory definition the court could determine who the victim was by resort to the elements of the charged offense. My testimony before the Senate Judiciary Committee in 1996 addresses this point in more detail.

"I'm all for victims' rights, but this amendment reverses the presumption of innocence; a person is not a victim until there is a conviction."

From NOW's Legal Defense and Education Fund comes: "A victims' rights amendment would undermine the presumption of innocence by naming and protecting the victim before a crime is proven."

That it was impossible for the Fund to complete that sentence without again referring to the person against whom the crime has been committed as "the victim" is evidence of the rhetorical problem here. But it is just that, merely a rhetorical problem having nothing to

do with the presumption of innocence.

If a defendant's liberty can be taken away before trial and conviction without undermining the presumption of innocence, surely our justice system can provide the simple rights for crime victims enumerated in this proposal. The proposal has nothing to do with the burden of proof the government bears before a jury may convict an accused of an offense. That is what the presumption of innocence is all about. Nothing in this proposal reverses or undermines it in any way.

APPENDIX C
Responses to Senator Leahy

1. *Please explain why the language of the proposed amendment has changed so much since the Committee approved S. J. Res. 3 in the 106th Congress.*

We listened carefully to those who said the earlier draft read more like a statute than a constitutional amendment. Professor Laurence Tribe was instrumental in helping to shape the revised draft to address these concerns. Of the final draft, Professor Tribe has noted its "greater brevity and clarity" and commented, to Senators Feinstein and Kyl, "That you achieved such conciseness while fully protecting defendants' rights and accommodating the legitimate concerns that have been voiced about prosecutorial power and presidential authority is no mean feat. . . . I think you have done a splendid job at distilling the prior versions of the Victims' Rights Amendment into a form that would be worthy of a constitutional amendment." (Letter of April 15, 2002.) Even with the stylistic improvements, S. J. Res. 35 maintains all the core values that were embodied in S. J. Res. 3 (2001).

2. *Section 1 of the proposed amendment declares that "The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established ...." In your view, does this preamble have any substantive force? For example, if a court finds a conflict between the constitutional rights of the accused and the new constitutional rights established by this amendment, what in your view should it do?*

The comment, *"Purpose And Effect Of The Preamble"* found in Killian and Costello, *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document 103-6, U. S. Gov't Printing Office, p. 53 (1992), is helpful on this question:

> Although the preamble is not a source of power for any department of the Federal Government,[1] the Supreme Court has often referred to it as evidence of the origin, scope, and purpose of the Constitution.[2] "It's true office," wrote Joseph Story in his COMMENTARIES, "is to expound the

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[1] *Jacobson v. Massachusetts*, U.S. 11, 22 (1905).

[2] E.g., the Court has read the preamble as bearing witness to the fact that the Constitution emanated from the people and was not the act of sovereign and independent States, *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 403 (1819) [remainder of footnote omitted].

> nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, 'to provide for the common defence.' No one can doubt that this does not enlarge the powers of the Congress to pass any measures which they deem useful for the Common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation, to be adopted?"[3]

The preamble language of Sec. 1 will help "expound the nature and extent and application" of the rights established by the amendment. If a conflict is alleged between the rights of the accused and the rights of the victim, the courts should do what courts always do in these situations, namely, strike a balance so that, to the greatest extent possible, the rights of both are preserved and protected, without "denying" the rights of either. As I noted in my written testimony this is not uncharted territory. Our courts have always done this. *See* Killian and Costello, *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document 103-6, U. S. Gov't Printing Office, p. 1105 (1992). ("Conflict between constitutionally protected rights is not uncommon." The text continues discussing the Supreme's Court balancing of "a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's rights protection of the rights to obtain and publish information about defendants and trials.") *Id.*

Again we note that this issue will rarely, if ever, arise.

3. *In April 2000, during the Senate floor debate on S. J. Res. 3, backroom negotiations between the sponsors of the resolution and the Justice Department foundered over the question of how the proposed amendment would impact existing constitutional rights afforded to the accused. At that time, the Justice Department urged that the following language be added: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution." You opposed the inclusion of this language because it would "always subordinate the rights of the victim to those of an accused or convicted offender." How does this language compare, in its likely effect, to the preamble language in section 1 of S. J. Res. 35 respecting the rights of the accused?*

The language of S.J. Res 35 will require the courts to balance the rights of the

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[3] 1 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), 462, [remainder of footnote omitted].

accused and the victim, giving effect to both. The language proposed by the Justice Department in 2000 would not have done this. Again, as Prof. Tribe has said, S. J. Res. 35 has been drafted "fully protecting defendants' rights."

4. *If we can pass legislation like the Crime Victim's Assistance Act (S.783) that would mandate all victims' rights in the proposed amendment in Federal cases and give States financial incentives to pass similar legislation for their courts, is there any reason we should NOT do so? Isn't that something we can achieve a lot more easily than a constitutional amendment?*

S. 783 does not "mandate all of the victims' rights in the proposed amendment." Indeed, the legislation falls far short of such a goal. Moreover, statutes have proven inadequate because they always stand in the shadow of the defendant's superior constitutional rights, so we never have a fair opportunity for the balancing that will give full effect to the rights of both the accused and the victim.

5. *Are there any rights established by this proposed amendment that are not already established by Federal law for victims of Federal crime?*

Yes. None of the "rights" proposed in S.J. Res 35 are established as "rights" by current Federal law. "Victims rights"under federal law are essentially advisory and victims have no standing to enforce them.

6. *Are there any rights established by this proposed amendment that could not be adopted by Federal or State statute or State constitutional amendment?*

The rights proposed in S.J. Res. 35 could not be established as federal *constitutional* rights by Federal or State statute or by State constitutional amendment. Many of the rights proposed are in State statutes and State constitutional amendments. Twenty years of experience have proven these laws inadequate.

7. *Are you aware of (A) any decisions that were not eventually reversed in which victims' rights laws or State constitutional amendments were not given effect because of defendant's rights in the Federal Constitution; or (B) any cases in which defendants' convictions were reversed because of victims' rights legislation or State constitutional amendments?*

(A) Yes. (Please see cases cited by Justice Department response to this question.) The question presumes an ease of access to appellate courts to challenge trial court decisions that in fact does not exist. Victims have not generally been given standing to pursue such actions.

(B) No.

8. *Please describe what remedies may be available to victims whose rights under the proposed amendment are violated.*

The simplest remedy is also the most effective, namely, to seek an order protecting the right. The Congress will have the final authority in determining how these orders will be obtained from Federal courts, and each state legislature will have the authority to enact local enforcement mechanisms. This is the essence of the power to "enforce" granted by Sec. 4 of the proposed amendment. As the Supreme Court has recognized in the context of the Fourteenth Amendment, the language of Sec. 4 ("Congress shall have power to enforce by appropriate legislation the provisions of this article.") is an affirmative grant of power to Congress.[4] The Court has described Congress' power to "enforce" as "remedial," and not including the power to determine what constitutes a violation.[5] In determining whether an enactment is "remedial" the Supreme Court will consider whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[6]

The grant of standing in Sec. 3 ("Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.") embodies the most effective remedy for a victim who believes that a right has been denied. The victim will simply seek an order enforcing the right. Often this will be from the trial court itself. In those instances where the trial court has denied a right, the victim should be allowed to "assert" the right before an appellate court, under circumstances defined by the States and Congress.

Remedial orders might be retroactive or prospective, but structured so as to not deny to the accused any constitutional right or interfere with a substantial interest in the administration of criminal justice.

9. *Would the proposed amendment make it possible for victims to bring Federal class actions against non-complying State prosecutors and law enforcement authorities? Could such class actions result in "extensive lower Federal court surveillance of the day to day operations of State law enforcement operations," as the Conference of Chief Justices warned when a version of this amendment was introduced in the 106th Congress.?*

Nothing in the proposed amendment imposes any particular duty on state

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[4] *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997); *Board of Trustees of the University of Alabama, et. Al. V. Patricia Garrett, et. al.*, 531 U.S. 356, 365 (2001).

[5] *City of Boerne*, at 519 - 524; *Board of Trustees* at 365.

[6] *City of Boerne*, at 526.

prosecutors or law enforcement authorities. If the States or the Congress, within their respective jurisdictions, decide to impose a duty, for example to provide notice of "all public proceedings," on the prosecutor (it would be just as rational to impose such a duty on the Court), presumably such a law would also provide for a remedy. It is unlikely that a Federal class action would be an effective remedy for a victim to vindicate her rights in a pending criminal case. A better alternative would be to seek orders within the criminal case that protect her rights. This can be done through simple motion practice and interlocutory appeals, if necessary, most often within the state court system itself, not involving the Federal courts. Because the needs of each victim may vary, as the facts of each criminal prosecution are different, bringing a "class action" would pose often insurmountable problems. The delay and cost would mitigate against a Federal class action being an effective remedy. The Congress of course could control access to the Federal Courts in any event.

This "day to day" surveillance has not developed in the protection of defendant's rights; there is no reason to expect a different outcome with respect to victims' rights.

10. *In your written testimony, you suggest that the States would retain authority, under the proposed amendment, to define who is a "victim." (A) By expressly authorizing Congress – and not the States – to enforce the amendment by appropriate legislation, couldn't the amendment be read, by negative implication, to strip States of any authority to enact implementing legislation? (B) In your view, could Congress use its section 4 enforcement power to define the term "victim" more narrowly than it is defined under a State's laws, and further provide that its definition apply nationwide, in State and Federal court proceedings?*

As I explained in my written testimony, "It should be noted that the States, and the Federal Government,[7] within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal. The power to define "victim" is simply a corollary of the power to define the elements of criminal offenses and, for State crimes, the power would remain with State Legislatures." The power to "enforce" granted by Sec. 4 is not the power to "define." See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Board of Trustees of the University of Alabama, et. Al. V. Patricia Garrett, et. al.*, 531 U.S. 356 (2001).

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[7] Killian and Costello, The Constitution of the United States of America: Analysis and Interpretation, Senate Document 103-6, U. S. Gov't Printing Office, p. 341 (1992) ("[Congress'] power to create, define, and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded." (Numerous citations omitted).

11. *Under section 2 of the proposed amendment, victims' rights "shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." What is your understanding as to which of the following governmental bodies may create exceptions pursuant to this exception: (A) Congress; (B) a State legislature; (C) a Federal court (on a systemic or case by case basis); (D) a State court (on a systemic or case by case basis); (E) a Federal executive branch agency; (F) a State executive branch agency?*

Think about this question in the context of any of the Bill of Rights. Who has the authority to create "restrictions" on the First Amendment. Courts? Certainly. Legislative bodies? Of course, subject to the watchful eye of the courts. For example, laws in all the States prohibit the exercise of pure political speech within so many feet of a polling place on election day. Executive branch officials? Of course – consider the librarian who puts *Catcher in the Rye* in the adults-only section of the public library. And it's no different for the rights of the accused in the Bill of Rights. Who may "restrict" the Fourth Amendment. Courts, law enforcement officials, regulatory agents all may act to "restrict" the reach of the Fourth Amendment. But all of this activity is subject to scrutiny by the Supreme Court, and over time a body of law develops that frames the roles of the respective authorities.

12. *Section 3 of the proposed amendment addresses the issue of remedies. It states that "Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages." (A) Would you agree that, unlike earlier versions, S. J. Res. 35 could be construed to provide grounds to stay trials, reopen proceedings, or invalidate rulings? (B) More specifically, if a State inadvertently fails to notify a victim that the trial of the person accused of victimizing her is about to begin, would you expect the court to stay the trial, or even declare a mistrial, in order to vindicate the victim's new constitutional right? (C) What if the case involves multiple victims, only one of whom was not notified? (D) If a court inadvertently fails to allow a victim to speak at a plea or sentencing proceeding, would an appropriate remedy under the proposed amendment be to invalidate the plea or sentence? (E) If a court does not order restitution as part of the defendant's sentence, could the victim seek to have the sentence invalidated? (F) What if the court ordered restitution, but in an amount less than the victim claimed she was due?*

No remedy could be fashioned that would deny to a defendant his or her Fifth Amendment rights against double jeopardy. Conceptually, if a decision is made in a criminal case through a process that violates a constitutional right of any one of the parties, the decision should be voided. Surely any such decision would be voided for the State or for the defendant. Consider what would happen if there were multiple defendants in a case and one of the defendants was not given notice of a proceeding. The proceeding would be repeated.

Courts will control the degree to which they permit retroactive remedies for a violation of victims' rights, by applying them in the context of the accused's Fifth Amendment rights against double jeopardy. Courts have long dealt with this issue in the context of a victim's right to restitution and have concluded that it is permissible to impose restitution for the first time on a sentence remand.[8] Similarly, there has been no barrier to reversing the decision of a parole board releasing an inmate when it was reached without honoring the participatory rights of the victim.[9] Of course, victims' remedies will always be subject to the limitations that the defendant's rights not be denied and that the substantial interest in the administration of criminal justice be protected. These principles would apply to each of your specific questions.

13. *Would the proposed amendment allow a Federal court to stay or otherwise interfere with a State criminal proceeding at the behest of a victim who alleged she was being deprived of one of her constitutional rights?*

It is doubtful that Congress would authorize such a procedure. The amendment itself does not. The access to the Federal Courts for victims who believe their rights have been denied will be controlled by Congress. It is likely, as in the case of defendants who believe their rights are violated, that victims will exhaust state court remedies to seek vindication of their rights.

14. *With respect to the right to "adjudicative decisions that duly consider the victim's safety," you testified: "It is expected that records of decisions would reflect consideration of the victim's interest." Let us suppose that a court, in releasing a defendant on bond, does not make an explicit statement that it has considered the victim's interest. Would that automatically entitle the victim to reopen the court's decision?*

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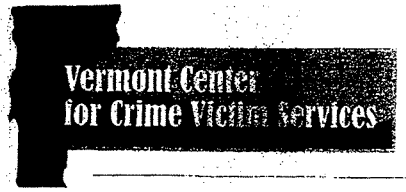
[8] *People v. Benton,* 100 Cal.App.3d 92 (1979) ("... well established that when the trial court pronounces a sentence which is unauthorized by the Penal Code that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the ... reviewing court." at 102); *People v. Rowland,* 206 CalApp. 3d 119 (1989) "The question we answer in this case is whether a sentence which fails to impose the restitution fine mandated by Government Code section 13967, subdivision (a) is "unauthorized" and thus subject to correction at any time. We believe it is." at 126).

[9] *State ex rel Hance v. Board of Pardons and Paroles*, 875 P. 2d 824 (AZ CT APP 1993).

While not "automatic," the victim should be given an opportunity to file a motion for reconsideration so the court can make clear that it did consider the victim's interest. Such a procedure does not imply the need for any additional hearings.



Vermont Victims Compensation Program
Victim Services 2000
Vermont Victim Assistance Program
www.ccvs.state.vt.us

July 16, 2002

To Whom It May Concern:

I am writing on behalf of the Vermont Center for Crime Victim Services to express support for the passage of the Crime Victims' Rights Amendment to the United States Constitution. This Amendment to the Constitution is an important step towards righting the current imbalance between the rights of the accused and the rights of the victim, and justly establishes a minimum national standard for the rights of victims of violent crime.

While our Constitution properly protects and guarantees that a person accused of a crime has certain rights, it is silent on the rights of victims of crime and affords them no protection. In fact, our Federal Constitution, the "Supreme Law of the Land," recognizes two dozen separate constitutional rights of the accused, including fifteen provided by amendments to the Constitution. At each stage of the criminal justice process, a victim of crime is confronted with numerous precautions that must be taken to protect the accused, all the while struggling merely to be noticed by the system.

The existence of state statutes and state constitutional amendments does little to alter this imbalance. Even in states where there has been an amendment to the state constitution to support statutorily provided rights, these rights are barely enforced and a victim has little to no recourse when his or her rights have been ignored. Moreover, statutory law yields to constitutional law, and where the state-by-state patchwork of victims' rights goes up against the catalogue of rights guaranteed the accused under the United States Constitution, it is the victim of crime who is victimized again – but this time by the indifference of our laws and our Constitution.

The provision of basic rights is not a "zero-sum" game. By providing victims with the basic right to participate in the criminal justice process, we are neither compromising the rights of the defendant nor interfering with the priorities of the prosecution. Our justice system can only be strengthened, and public trust in its outcomes enhanced, by providing the victim of a violent crime with the basic rights delineated in the proposed amendment: to notice; to be heard; and to have his/ her safety, restitution claims, and interest in avoiding unreasonable delay considered by a court.

Very truly yours,

Judy Rex

Judy Rex
Executive Director
Vermont Center for Crime Victim Services

103 South Main Street, Waterbury, Vermont 05671-2001
1-802-241-1250 / 1-800-750-1213 (Vermont only) / 1-800-845-4874 (TTY/Vermont only) / [illegible]

Statement of BUD WELCH

ON S. J. Res 1

BEFORE THE

SENATE JUDICIARY COMMITTEE

April 8th 2003

I appreciate the opportunity to submit testimony for the record on S. J. Res. 1, "an amendment to the Constitution to protect the rights of crime victims." I urge members to oppose this amendment. I know that many people believe that a constitutional amendment is something that crime victims want. However, I want you to know that as a crime victim, I do not want the Constitution amended. Having gone through the ordeal of witnessing a major criminal case I believe more strongly than ever in the need to protect the constitution and the rights of the accused. I believe that if this constitutional amendment had been in place it would have harmed, rather than helped, the prosecution of the Oklahoma City Bombing case.

I lost my daughter Julie in the Oklahoma City bombing. Julie was an amazing young woman. Of course, I am her father, so I am biased, but I believe other people thought she was a special person, too. At the time of her death, she was working at the Federal Building as a translator for the Social Security Administration. She spoke 5 languages and used her language abilities to help disadvantaged people. On the morning of the bombing, she had gone into the lobby to meet with her clients. Julie always did things like that – making the extra effort to make her clients feel at ease. Ironically, had she stayed in her office instead of meeting the clients in the lobby, she would have survived the bombing.

Julie was my best friend and my heart has been absolutely broken since her death. I was so angry after she was killed that I wanted McVeigh and Nichols killed without a trial. I probably would have done it myself if I could have. I consider that I

was in a state of temporary insanity immediately after her death. It is because I was so crazy with grief that I oppose the Victims' Rights Amendment. It would give victims the right to give input in the criminal case even before a conviction. I do not think crime victims should have a constitutional right to give input into bail decisions and plea agreements. I think crime victims are too emotionally involved in the case and will not make the best decisions about how to handle the case.

In my own experience, the government did an excellent job prosecuting the Oklahoma City Bombing case. Beth Wilkinson, one of the prosecutors, opposes a Victim's Rights Constitutional Amendment because she believes it would have compromised the government's prosecution of the case. The example she gives is that at one point in the case, the government entered into a plea agreement with a witness named Michael Fortier. The government believed that Fortier's testimony was crucial for it to prove its case against McVeigh and Nichols. However, many of the victims opposed this plea agreement. Had this constitutional amendment been in place it would have allowed for every one of the 168 victims to speak about the plea agreement. Ms. Wilkinson feared that if many of the victims had publicly opposed the plea agreement with Fortier then the judge might not have accepted it, or he might have required the government to explain why it was entering into the agreement. Without Fortier's testimony the government could not have proven its case. It would not have helped me or any of the other Oklahoma City Bombing victims if our participation in the case kept the government from doing its job.

Another way that the government's case could have been compromised is the provision granting victims "consideration for the interest of the victim in a trial free from

unreasonable delay". This will require the judge to consider the victim's interests in scheduling trials. If a victim wants a speedy resolution it could force the government to go to trial before it is ready. Likewise, it might force the defendant to go to trial before his or her attorney has had adequate time to prepare.

From a practical point of view, it would have been impossible to accommodate all of the victims in a case like Oklahoma City. The government could not possibly have kept all 168 victims and their representatives informed about every public hearing. Also it is unclear who is entitled to constitutional rights. For example, in the case of Julie's murder would I have been entitled to constitutional rights, would her mother, my ex-wife have been entitled, or would her fiance have been entitled? This might not be a problem if all family members have the same idea about how the criminal case should be handled, but what if we don't agree? Should all three of us have the opportunity to give our differing opinions in court? If not, who should be excluded?

There is also likely to be conflict when there are multiple victims. Victims do not always agree on the best way a case should be handled. The prosecution would be required to try to weigh the opinions of different victims, leaving those victims who the prosecution does not agree with feeling left out of the process.

I also worry that this amendment will lead to more wrongful convictions. The more emotional the trial becomes, the more likely it is to be unfair. The point of a trial is to find out what happened. It should be about facts, not fiction. Defendants are presumed innocent. By granting "rights" to a "victim" before there has been a conviction, a determination has already been made that the defendant is guilty of a crime.

Another way the Amendment will harm a defendant's right to a fair trial is by granting victims the constitutional right to be "present in all public proceedings" even if their presence would bias the trial. Take, for instance, situations where a victim is also a witness. Usually witnesses in criminal cases are not allowed to be present during the entire trial because of the danger that their testimony will be influenced by hearing the testimony of other witnesses. Under the Amendment, however, the victim/witness could not be excluded from the courtroom. Whether consciously or unconsciously, the victim/witness could easily tailor his or her testimony to fit the testimony of the other witnesses. Needless to say, the reliability and accuracy of this testimony would be questionable. Furthermore, it would be difficult for defense counsel to establish inconsistencies between witnesses. I would not have been happy had I believed that McVeigh and Nichols did not get fair trials or worse, that the government had convicted the wrong people.

The proposed amendment appears to offer a rather limited scope of possible remedies for those victims who believe their rights were violated. What if one of the 168 victims of the Oklahoma City Bombing believed their rights had been violated? What would the remedy be? Could they sue the prosecutor or judge to have the trial interrupted? Can they sue for monetary damages? If they do not have any remedies, what is the value of a constitutional right? If Congress intends to create a constitutional right without a remedy, the amendment is at best symbolic. At worst, however, it undermines constitutional rights and protections, without providing any meaningful improvement in the victim's role in the criminal justice system.

I believe that there are other ways that Congress could help victims without amending the constitution. Although I feel that the government did an excellent job providing support to the victims of the Oklahoma City Bombing, there are many places in the country that don't have the resources that victims need like counseling and financial assistance. This could help victims without the risk of hurting defendants and compromising our Constitution.

One of the primary concerns that opponents of the Amendment have raised is that it will erode the rights of accused persons. Some have asked for language that would clarify that the Amendment is not intended to erode constitutional rights for accused persons and that if a conflict between the rights of the accused and the victim arise, the rights of the accused would prevail. The amendment contains a clause that states, "These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." Notably absent is language clearly protecting the rights of accused persons. If the proponents do not intend to compromise the rights of defendants, the amendment should clearly state this.

This Amendment gives victims the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and access to just and timely claims to restitution from the offender. This clause was included, for the first time, in S. J. Res. 35 in the 107th Congress. It remains unclear what this phrase means, but a reasonable interpretation is that victims would have the right to a hearing on these issues. Previous amendments have given victims the right to be present and heard at all public proceedings; this version appears to go beyond the right to be present and be heard, but also to give the right to a hearing.

The Constitution should only be amended when there are no other alternatives available. In the past 211 years, the Federal Constitution has been amended only 17 times. Amending the Constitution is a serious matter and should be reserved for those issues where there are no other alternatives available. S. J. Res. 1 does not meet this standard because there are other alternatives available to protect the interests of crime victims. Thirty-three states have passed victims' rights constitutional amendments and every state has either a state constitutional amendment or statute that protects victims' rights. Greater effort should be made to enforce existing laws instead of amending the federal constitution.

The Victims' Rights Amendment erodes the presumption of innocence. The framers were aware of the enormous power of the government to deprive a person of life, liberty and property. The constitutional protections afforded the accused in criminal proceedings are among the most precious and essential liberties provided in the Constitution. The VRA undermines the presumption of innocence by conferring rights to the accuser at the time a criminal case is filed when the accused is still presumed to be innocent.

Not every accused person is actually guilty of committing a crime. But giving the accuser the constitutional status of victim will impact the judge and jury, making it extraordinarily difficult for fact finders to remain unbiased when the "victim" is present at every court proceeding giving his or her opinion as to what should happen. The VRA makes the accuser a third party in the criminal case, even before a judge or jury has determined that the accuser is actually a "victim."

and result in the prosecution being unable to get a conviction against a guilty person, which would not serve society's nor victims' interests.

The Amendment would impose inflexible mandates on states that many will not be able to meet. Under S. J. Res. 1, law enforcement would be constitutionally required to make reasonable efforts to find and notify crime victims or their representatives every time a case went to trial, every time a criminal case was resolved, and every time a prisoner was released from custody. To comply with S. J. Res. 1, some jurisdictions will need to send out millions of notification forms. This will impose significant new costs on the states and regardless of how efficient the state tries to be, it will fail in some situations to provide notice to the accuser.

When the state fails to fulfill its duty to provide notice, what remedies are available to the "victim"? Section three reads, "'Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages." However, this still leaves open the possibility that the victim could re-open a case if he or she disagreed with a plea agreement. It also leaves open the possibility of seeking injunctive relief against the judge, prosecutor or police when they fail to follow through with every requirement under the amendment. Presumably victims would be entitled to bring suit under 42 U.S.C. § 1983. If the victim prevails under a 1983 claim, he or she is entitled to attorneys' fees, which are not considered damages.

Section three of S.J. Res. 1 may also authorize appointment of counsel for victims. The section reads, "Only the victim or the victim's lawful representative may assert the rights established by this article." The term "lawful representative" is undefined, and could be interpreted as meaning an attorney. If victims are entitled to have attorney's represent them, then in order to make this right meaningful the state will have to subsidize the cost of attorneys for those who cannot afford to hire their own.

State and federal criminal justice systems are in crisis because they are unable or unwilling to provide adequate counsel for indigent accused persons. The additional cost of providing counsel to victims as well as defendants in criminal cases would be prohibitively expensive. Adding the financial burden of providing counsel to victims will likely further limit defendants' access to counsel. If this happens, it will tax an already severely overtaxed system, make it less likely for accused persons to retain adequate counsel, and therefore increase the likelihood of wrongful conviction.

The VRA poses more problems than solutions. Apart from the serious constitutional problems this amendment raises, there are many practical problems that the VRA will create. Who is a victim? The amendment does not define this and it is quite possible that in any one case there would be multiple victims with competing interests. In a homicide case, a child of the victim and the parent of the victim may disagree on how the government should handle this case. Whose opinion prevails? What if the victim changes his or her mind during the course of the case? This happens frequently in death penalty cases where the victim initially wants the government to seek the death penalty and then changes his or her mind before the case is concluded? And what