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S.J. RES. 35, PROPOSING A VICTIMS' RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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S.J. RES. 35, PROPOSING A VICTIMS' RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION

WEDNESDAY, JULY 17, 2002

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

The Subcommittee met, pursuant to notice, at 10:02 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, Chairman of the Subcommittee, presiding.

Present: Senators Feingold, Feinstein, and Kyl.

OPENING STATEMENT HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. This hearing will come to order. Good morning, and welcome to this hearing of the Senate Judiciary Committee's Subcommittee on the Constitution. I want to thank everyone for being here today.

This hearing concerns Senate Joint Resolution 35, a proposed victims' rights amendment to the United States Constitution. I agreed to hold this hearing at Senator Feinstein's request, and I did so even though I oppose her proposed amendment. But I did it because I agree with her goal to protect and enhance the rights of victims of crime.

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 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 I think Congress should proceed very carefully when it comes to amending the Constitution.

After thinking long and hard about this issue, I am just not convinced that an amendment to the Constitution is necessary to protecting the rights of victims—a goal we all share. I believe that Congress can better protect the rights of victims by ensuring that current State and Federal laws are enforced, by providing resources to prosecutors and the courts to allow them to enforce and comply with existing laws, and also by working with victims to enact additional Federal legislation.

In the 207-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, in effect, canceled 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 it is difficult to believe that the basic calculus of prosecutor, defendant, and victim has changed much since the founding of the Republic. There was some debate on this when we considered the amendment on the floor in the last 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 11, and now we are in the process of amending that statute to cover victims of other terrorist attacks.

But unlike statutes, constitutional amendments cannot be easily modified. If this amendment were to be ratified and if some new development in the law were to require a change to the amendment, we would once again need to get approval of two-thirds of the members of each House of Congress and then ratification by three-fourths of the State legislatures. This is a real problem because there are numerous uncertainties about the effect of this amendment. Even the sponsors have rewritten the entire amendment since the last time it was considered by the Senate not too long ago.

I might add, however, that of all the constitutional amendments that I have considered since I became a Senator, this one is perhaps the least troubling because the goal is so laudable. In fact, as I have 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. Thirty-three 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 be 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. That has been the 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 this is the case. They have never provided a convincing justification for that refusal, in my opinion.

Finally, I would just note that I am also concerned that a victims' rights amendment could jeopardize the ability of prosecutors to investigate their cases, to prosecute suspected criminals, and to 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.

Now, let me turn to the distinguished ranking member and one of the main authors of this proposal for his opening remarks, Senator Kyl.

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

Senator KYL. Thank you, Senator Feingold, and I welcome all of the witnesses. I think that since we have had a number of hearings, our views are quite well known and it is probably more appropriate that we hear from the various witnesses that we have today.

But since the text of the amendment is slightly different than what we dealt with earlier I would like to comment just a little bit about that and respond to a couple of the points that the Chairman made, and then turn this over to my colleague, Senator Feinstein, who has been working with me shoulder to shoulder for I don't know how many years now in this effort. I think we have come a long way, but it is clear we still have a way to go.

Let me just state that a couple of our witnesses today will make the case, I think, for the amendment as being needed to protect victims' rights. The question that Senator Feingold raises is, of course, the question for this Committee, namely is it necessary to elevate those rights to Federal constitutional protection. It is a legitimate question, it is a serious question, and it is the one that has, I suspect, been the primary focus of our colleagues over the last several years.

There is, in my view, ample evidence to support the proposition that the statutes and constitutional amendments that exist today in the States have not done the job. There are many statements from the previous administration—Department of Justice officials, including the Attorney General, Janet Reno—that back that up.

Let me just cite two statistics from a study that was done by the Department of Justice. It analyzed the States, like my own State of Arizona, that have some of the strongest protection for victims' rights of any State. And, remember, the States are where 99 percent of the action is, because most serious crimes of aggravated assault, sexual assault, murder, and so on, are violations of State law and those cases are tried in State courts. There aren't very many cases tried in Federal courts of that kind, so essentially we are talking about State prosecutions.

According to this report of the National Institute of Justice, 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 pre-trial release of the defendant.

The report concluded, and I am quoting now, "Enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice." That is the problem. We all have our hearts in the right place here, but as a practical matter it just doesn't happen. It isn't happening at the State level. And until rights are elevated to the level of full U.S. constitutional protection, I don't think they will be given the degree of importance and enforced to the extent that we intend for them to be.

Now, there were some questions raised about the text that we had introduced before. Notwithstanding the fact that it passed the full Judiciary Committee by a bipartisan vote of 12 to 5, there were some questions, and so we worked over the course of last winter with the experts in the field to rewrite the text to provide the same rights, but to do it in a form that was more consistent with what we are all familiar with as amendments to the Constitution. And I think we have done it in this text. President Bush recently announced his support for this exact text, and in doing so he said the amendment was written with care and strikes a proper balance.

One of the experts that has helped us with this from the beginning is Laurence Tribe, a law professor from Harvard. I have come to have great respect for his brilliance in these matters, and frankly a lot of the textual change was the result of his suggestions.

It is therefore perhaps not surprising that he has written a letter commenting upon the text that we finally introduced, praising the greater brevity and clarity of the amendment and saying, "That you achieved such conciseness, while fully protecting defendants' rights"—let me underline that—"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."

Now, that is the concern that I had when victims first came to me. I said, how can we write this in a way that is worthy of being part of the U.S. Constitution? I think we have done that now and I feel much better about the language as a result of the changes that we made over the winter.

There is a predicate assumption here in the current text that goes to this question of protecting the defendant's rights. And while you should not in an amendment reiterate something that is already provided for in terms of other rights, the predicate assumption is, and I quote—this is the very first line of the very first section of the article—"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," et cetera.

We have placed that recognition of defendants' rights in such a prominent place in response to legitimate questions that have been raised by people such as the Chairman today. I hope, therefore, that that predicate assumption will reduce people's concerns about somehow adversely impacting defendants' rights.

There will be much more to be said. I think the witnesses here can respond to questions better than I. As I said, my views are well

known on this. This amendment has had a large degree of support—both party platforms in the last national election called for the adoption of a Federal victims' rights constitutional amendment.

You have a group of organizations, from Mothers Against Drunk Driving, Parents of Murdered Children, the National Organization of Victim Assistance, the Stephanie Roper Foundation—we are going to hear from Roberta Roper here, I think, a little bit later on—Arizona Voice for Crime Victims, one of my favorite groups, Crime Victims United, and other victims groups that are strongly in support, as are law enforcement groups, like the National Association of Police Organizations, the International Union of Police Associations, the Federal Law Enforcement Officers Association, and others. Thirty-nine State attorneys general have signed a letter, and on and on.

So I think it is time for us to translate this strong support into political support here in the United States Senate. I would note that the amendment is moving forward in the U.S. House of Representatives. That is important, since we know that both bodies will have to approve it.

I am very hopeful that whatever questions and concerns are raised—and I concede that the Chairman raises very serious questions here, legitimate questions—that we are able to move this amendment to the floor of the U.S. Senate so that we will at least have an opportunity to vote on it. We weren't able to vote on it before. Senator Feinstein and I had to pull it back from the floor. I hope that this time we will at least have an opportunity to have a vote and advance the cause of victims' rights another step or two, if not to reach all the way to a final victory in this year.

Mr. Chairman, I would really like to hear from the witnesses, but, before that, from my colleague-in-arms who has been such a strong supporter and has given a great deal of not just energy, but moral support to this effort, Senator Feinstein.

Chairman FEINGOLD. Senator Kyl, I will turn to Senator Feinstein in a moment. Let me first say that we will have a vote at about 10:30, as I understand it, and I will recess the hearing just long enough so I can run over and vote and come straight back.

I am pleased to turn to Senator Feinstein now. I must say that this is an impressive bipartisan effort by two of the most serious and very dedicated members of the Committee and the Senate. I like bipartisan combinations, especially with Senators from Arizona. I am a big fan of it. I just regret that I cannot, at least at this point, support what you are doing, but I do admire the way you have worked together.

With that, I will turn to Senator Feinstein.

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

Senator FEINSTEIN. Well, thanks very much, Mr. Chairman, and thank you so much for having this hearing. Senator Kyl mentioned some of the organizations that are here. I wonder if the victims that have come, some of you from very far away, would just stand so that I might know who you are.

[Several persons stood.]

Senator FEINSTEIN. I just want to say thank you, Roberta. I want to say thank you very much for being here. It means a lot to us. Thank you so much.

I believe very passionately in this. I first got involved in this amendment in 1982. It was called the Victims' Bill of Rights and California was the first State to pass it. I supported it, and at the time it was very controversial and it passed overwhelmingly. Since then, some 32 States have passed victims' rights constitutional amendments. I often say to people, when you watch big trials you will see a victim in the courtroom and the reason generally is because the State has passed such an amendment.

It is a pretty simple amendment, and the rationale for the amendment was when our country was founded, when we were 13 colonies and essentially less than 4 million people, victims did have rights. Victims hired a sheriff, victims often prosecuted the case.

Then, in the mid–19th century, in the 1850s, when the concept of the public prosecutor was evolved, the victim was less out, so that a victim as not noticed of a trial, a victim had no right to be present during the trial. As a matter of fact, the defense attorneys fast learned that what they wanted to do was very often subpoena victim and say they were going to use them specifically to keep them out of the courtroom so that there could be no sympathy that that victim would elucidate.

The victim today is not even noticed if their attacker is released from jail or prison. What we have had is that many victims are victimized a second time by the attacker because of this.

I was called by a young woman in San Francisco when I was a supervisor and when I was a mayor. It was a terrible case. Someone had gone into her home, had killed her husband, raped her, broke her arm, broke her jaw, tied her up, and set the house on fire. She survived, and the only reason the perpetrator was convicted was because she was there to testify against him.

Well, to this very day, she has changed her name and she lives in anonymity. She would call me every year when he would come up for parole and say, please help me; I have to keep him in, I live in dread, I know he is going to come after me. Her pseudonym was Annette Carlson, and I don't know if he has ever been paroled or not, but I do know this: No victim should ever, ever have to live like this.

So that is sort of the passion that has fueled me in this debate, and it is has been very interesting to me because on the floor I have heard, well, what we drafted last time was too long; well, it doesn't mention the defendant.

The whole point is that the judge has to balance these rights, and the judge can balance them. As Senator Kyl pointed out, in the predicate to the constitutional amendment we point out that the intent is not to adversely impact a defendant's rights.

The rights are pretty simple: the right to receive notice. What is wrong with that? Nothing. The right to be present in the courtroom. A victim should have that right. The right to make a statement; the right to restitution, if ordered by a judge; the right to be considered for the timeliness of the trial. We all know that one of the things that happens is you stall the trial. Witnesses disappear, evidence gets cold, a case is harder to make.

The right to know when your attacker is released. Why? So you can protect yourself. The right to restitution, if ordered by a judge. Pretty simple rights. I believe that virtually every American, if this were put to a vote, would be in support of these basic rights.

We also heard the last time we did this that, well, we should pass a statute; a statute is going to handle. But, ladies and gentlemen and members of the Committee, we have already found that a statute won't handle this, and I would like to give you the Oklahoma City bombing case as an example.

In that case, two Federal victims' rights statutes were not enough to give victims of this bombing a clear right to be present and to testify, even though one of the statutes was passed with the specific purpose of allowing the victims to do just that.

Let me quote from one of these statutes, the Victims of Crimes Bill of Rights, passed in 1990 by the House, by the Senate, and signed by the President, and it says, "A crime victim has the following rights: the right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial."

That statute further states, "Federal Government officers and employees engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights." The law also provides that this section does not create a cause of action or defense in favor of any person arising out of the failure to accord a victim these rights.

Now, you would think that would be enough, but it wasn't, because in spite of this law, the judge in the Oklahoma City bombing case ruled, without any request from Timothy McVeigh's attorneys, that no victim who saw any portion of the case could testify about the bombing's impact at a possible sentencing hearing.

The Justice Department asked the judge to exempt victims who would not be factual witnesses at trial, but who might testify at a sentencing hearing about the impact of the bombing on their lives. The judge denied the motion.

The victims were then given until the lunch break to decide whether to watch the proceedings or remain eligible to testify at a sentencing hearing. In the hour that they had, some of the victims opted to watch the proceedings. Others decided to leave, to remain eligible to testify at the sentencing hearing.

Subsequently, the Justice Department asked the court to reconsider its order in light of the 1990 Victims Bill of Rights. Bombing victims then filed their own motion to raise their rights under the Victims Bill of Rights. The court denied both motions.

With regard to the victims' motion, the judge held that the victims lacked standing, and this is the crux. The judge stated that the victims would not be able to separate the experience of trial from the experience of loss from the conduct in question. The judge also alluded to concerns about the defendant's constitutional rights, the common law, and rules of evidence.

The victims and the Justice Department separately appealed to the Court of Appeals for the Tenth Circuit. That court ruled that the victims lacked standing under Article III of the Constitution,

because they had no legally-protected interest to be present at trial and thus had suffered no injury, in fact, from their exclusion.

The victims and the Department of Justice then asked the entire Tenth Circuit to review that decision. Forty-nine members of Congress, all six attorneys general in the Tenth Circuit, and many of the leading crime victims organizations filed briefs in support of the victims, all to no avail.

The Victims Clarification Act of 1997 was then introduced in Congress. That Act provided that watching a trial does not constitute grounds for denying victims the chance to provide an impact statement. This bill passed the House 414 to 13. It passed the Senate by unanimous consent. Two days later, President Clinton signed it into law, explaining that, quote, "When someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in," end quote.

The victims then filed a motion asserting a right to attend the trial under the new law. However, the judge declined to apply the law as written. He concluded that, and I quote, "Any motions raising constitutional questions about this legislation would be premature and would present questions and issues that are not now ripe for decision," end quote.

Moreover, he held that it could address issues of possible prejudicial impact from attending the trial by interviewing the witnesses after the trial. The judge also refused to grant the victims a hearing on the application of the new law, concluding that his ruling rendered their request moot. The victims then faced a painful decision: watch the trial or preserve their right to testify at the sentencing hearing. Many victims gave up their right to watch the trial as a result.

Now, what is the point? The point is that there is no statute that you can pass that will give victims sufficient standing under Article III to satisfy a court, and therefore a constitutional amendment becomes vital if victims are going to have any standing to assert any rights that they might be given.

So I say that to really make it clear, because I have been hearing over and over and over again that a statute will do it. Well, Members, we have tried a statute. We have tried it twice and both times the statute effectively was null and void in the court, and certainly in the appellate court.

So if we do believe—and I do passionately—that a victim of a violent crime should have the right to receive notice, to be present, to be heard, to know when their attacker is released, and to restitution if ordered by a court, there is only one way to get there and that is through the Constitution of the United States of America.

Thanks, Mr. Chairman.

Chairman FEINGOLD. Thank you, Senator Feinstein.

I am going to make just a couple of comments and then start our first panel. In fact, I am pleased to welcome our patient first panel member. I welcome the Honorable John Gillis, Director of the Justice Department's Office for Victims of Crime. Director Gillis is a co-founder of Justice for Homicide Victims and the Coalition of Victims' Equal Rights. He also served four years as a member of the California State Bar Association's Crime Victims and Corrections Committee.

I thank you for joining us today. I do note that we just received your testimony, I understand, just a little bit ago. In quickly reviewing it, I saw the reference, of course, to the fact that my State, Wisconsin, has a victims' rights constitutional amendment, which I supported as a State Senator.

But I would reiterate that that had an explicit provision that essentially required that in no way can the constitutional amendment derogate or limit the existing rights of criminal defendants. I would suggest that that is different and much stronger than what the two Senators here have proposed.

The Senator from Arizona talks about a predicate assumption. Now, that is a good opportunity to go back to our grammar lessons and to review exactly what that means, but that is not the same as a clear statement, a direct statement that defendants' rights cannot be undercut.

In fact, the language says, "being capable of protection without denying the constitutional rights of those accused of victimizing them." That, to me, isn't a statement of law. That is a statement of fact, which I think isn't even necessarily always true. I don't think it is always the case, unfortunately, that you can easily balance the rights of victims and the rights of defendants. That is a serious problem.

All this is is a statement of fact, which I think is, in fact, incorrect in some cases. I think in most cases it is correct, and that is why I certainly support strong statutes that would protect the rights of victims.

I would suggest that the very example that Senator Feinstein uses, the Oklahoma City case, proves that it is not the case that this amendment would guarantee that the rights of defendants are not limited. The judge in this case obviously was concerned, whether he was right or wrong on the merits, that what could happen here would in some way diminish the rights of the defendants.

So I think that is why this has to be victims' rights statutes that go up against a constitutional protection for defendants' rights, with the understanding that I certainly agree with the Senators that there is far more that can be done to protect the rights of victims through the statutes and that it needs to be done. So I would simply offer that because of the statements that have been made at this point and the fact that we got this testimony just recently.

With that, I am going to just briefly recess the hearing.

Senator KYL. Excuse me, Mr. Chairman. Before you do that, could I ask unanimous consent to put three items in the record? One is a letter to Senator Feinstein from Joshua Marquis, District Attorney in Astoria, Oregon. Another is an e-mail from Stephen Dole, President of Crime Victims United of Oregon. And, third, is a very moving statement by Susan Russell, who is here, a resident of Vermont who was herself a victim of a very brutal and violent crime and who has made a very compelling statement in support of our amendment. I would like her statement to be made part of the record at this point, as well.

Chairman FEINGOLD. Without objection.

Senator Thurmond asks that his statement be submitted for the record, as well. I will enter his statement into the record and we will hold the record open for one week for any additional Senators.

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

Chairman FEINGOLD. Senator Feinstein?

Senator FEINSTEIN. I would like to submit a statement by Professor Larry Tribe, the National Association of Police Organizations, the California District Attorneys, the Western Governors Association, the International Union of Police Associations, and a number of victims, if I might.

Chairman FEINGOLD. Without objection.

With that, we will briefly recess.

[The Subcommittee stood in recess from 10:35 a.m. to 10:54 a.m.]

Chairman FEINGOLD. Thank you for your patience again, and now I look forward to the testimony of Director Gillis.

You may proceed.

STATEMENT OF HON. JOHN W. GILLIS, DIRECTOR, OFFICE FOR VICTIMS OF CRIME, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. GILLIS. Thank you, and good morning, Chairman Feingold and distinguished members of the Subcommittee. As a crime victim, a law enforcement officer, former Chair of the California Board of Prison Terms, and a citizen who works to uphold justice and advocates for victims' rights and services, I am honored to have this opportunity to present the views of the administration on the proposed amendment to the Constitution of the United States to establish fundamental rights for victims of violent crime.

The administration strongly supports the concept and substance of the victims' rights amendment and the rights it will secure for victims of violent crime. There is broad-based support for the amendment all across the country. Democratic and Republican leaders, liberal and conservative scholars, and Americans of every persuasion have rallied in support of this important cause.

As the Director of the Justice Department's Office for Victims of Crime, or OVC, I am committed to enhancing the Nation's capacity to assist crime victims and to providing leadership in an ongoing effort to change attitudes, policies, and practices, with a determination to promote justice and healing for victims of crime.

Immediately following my confirmation by the U.S. Senate as Director of OVC, I began meeting with crime victims, victim advocates, and representatives of national victim organizations to identify emerging issues and unmet needs of victims across the United States.

Not surprisingly, time and again victims attending the roundtable discussions have shared the agony they have suffered at the hands of criminals and their disappointment in learning the realities of our criminal justice system's view of and response to crime victims. Victims discussed not being notified of key events and, when notified, how they were not allowed to speak at critical stages like post-arrest release, bond reduction hearings, plea agreement proceedings, sentencing, or parole.

I know firsthand the personal, financial, and emotional devastation that violent crime exacts on its victims. As a survivor of a homicide victim, I testify before you today with the unique advantage of understanding the plight that victims and their families

face in the criminal justice system. I know the players and their responsibilities, and my experience has given me the ability to work within the system. More typically, however, when a person is victimized by crime, he or she is thrust into a whole new world in which the State's or the government's needs take priority.

Chairman Feingold, as you know, on April 16 President Bush announced his support for an amendment to the United States Constitution to protect the rights of crime victims. As the President so eloquently stated, "Too often, our system fails to inform victims about proceedings involving bail and pleas and sentencing, and even about the trials themselves. Too often, the process fails to take the safety of victims into account when deciding whether to release dangerous offenders. Too often, the financial losses of victims are ignored. And too often, victims are not allowed to address the court at sentencing and explain their suffering, or even to be present in the courtroom where their victimizers are being tried. When our criminal justice system treats victims as irrelevant bystanders, they are victimized for a second time."

Although more than 27,000 victims' rights laws have been enacted, victims' bills of rights have been passed in every State, and 32 States have passed constitutional amendments protecting victims' rights, victims still struggle to assert basic rights to be notified, present, and heard.

The 32 existing State victims' rights amendments and other statutory protections differ considerably across the country. Further, there is no uniformity in the implementation of victims' rights laws in these States. A recent study, funded by the National Institute of Justice, found that even in States with strong victims' rights laws, only about half of all victims surveyed were notified of plea negotiations and sentencing hearings, a notice that is critical if they are to exercise their rights to seek restitution and to inform the court of the impact of the crime on them.

Even in States with strong victims' rights laws or ratified victims' rights constitutional amendments, a victim's ability to assert his or her rights may be nullified by judicial decisions. State victims' rights laws lack the force of Federal constitutional law, and thus may be given short shrift. Federal law, however, directly covers only certain violent crimes, leaving non–Federal crimes to State prosecution and State law.

Senator Feinstein has already discussed the Oklahoma case, but just to recap, a U.S. District Court judge presented victims with the choice to either attend the trial or speak at sentencing, despite Federal law that provides victims a right to be present at all court proceedings related to the offense.

The victims and several national organizations filed an appeal to reverse the judge's ruling. However, the U.S. Court of Appeals for the Tenth Circuit affirmed the judge's ruling, which effectively barred from the courtroom the victims who intended to speak at sentencing. Congress thereafter intervened, passing legislation prohibiting the U.S. district judge from ordering victims excluded from the trials of the defendants.

A Federal constitutional amendment is the only legal measure strong enough to rectify the current imbalance and inconsistencies among victims' rights laws, and can establish a uniform national

floor for victims' rights. A Federal amendment to the United States Constitution is the vehicle by which compliance with victims' rights laws can be enforced.

The passage of a Federal constitutional amendment will provide the means to make victims' rights a reality. The amendment will not abridge the rights of defendants or offenders, or otherwise disrupt the delicate balance of our Constitution. The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do. With bipartisan support, we can balance the scales of justice for victims by establishing in the U.S. Constitution our basic rights. Crime victims encourage your support in our struggle for human dignity and fair treatment.

That concludes my statement, and I would welcome the opportunity to answer any questions you might have.

Chairman FEINGOLD. Thank you, sir, and I will start with the first round. This proposed amendment has a section giving the attorneys for victims a right to be heard in court, and then lists exceptions to the amendment based on a compelling interest or a substantial interest in public safety or the administration of criminal justice.

In other words, this amendment practically dictates that a dispute between a prosecutor and the victim must be resolved with a fact-finding hearing that would have the prosecutor cross-examining the very victim the prosecutor is trying to protect. It also means a hearing where the attorney for the victim will be cross-examining Government witnesses, which could potentially create inconsistent statements for the defendant's attorney to use at a later trial.

Doesn't this amendment then in some ways simply set up a potential showdown in court between victims and prosecutors, and isn't it a showdown that sometimes the guilty will be able to use to their advantage?

Mr. GILLIS. In my experience as a law enforcement officer and working as a detective for many years, when victims were brought to court, when they appeared in court, they were just automatically excluded from court.

I must talk about my personal experience, also. After the murder of my daughter, when I appeared at court I wanted to know what was going on in court. I was not a percipient witness. There was nothing that I could have testified to in court that would have hurt the offender or the perpetrator, but still I was automatically excluded from the courtroom proceedings.

This is the process that goes on all across the United States, where victims are not able to go into court to hear what is taking place, when, in fact, they are not a percipient witness. But it does give the district attorney or the trier of fact an opportunity to interview that victim to find out whether or not they are percipient witnesses, and if they are and it would have an impact on the perpetrator, then they could be excluded.

Chairman FEINGOLD. If the purpose of this amendment is to effect the rights of victims at the Federal level, isn't it true that the Attorney General's guidelines for victims and witnesses provide at least as extensive rights in the Federal criminal justice system as those that are listed in the amendment?

Mr. GILLIS. It does not give the victim standing as far as the Constitution is concerned, and I think that is what we are trying to do with the amendment.

Chairman FEINGOLD. But it does outline all the various specific goals and protections that are wanted vis-a-vis the amendment. Isn't that right?

Mr. GILLIS. It does outline those things, but still the victim does not have standing when it comes to the Constitution.

Chairman FEINGOLD. Obviously, one of the central questions here, as I have raised and Senator Kyl has raised, is is this really a problem needing a constitutional amendment, or isn't it true that in many cases isn't more really an issue of ensuring that prosecutors will do what they should do, which is to pick up the phone and do what is asked of them, like notifying victims of court dates, sentencing hearings, and release dates for offenders? Isn't there a lot of the answer in getting prosecutors to do what they should do in this situation, as opposed to having to actually pass a constitutional amendment?

Mr. GILLIS. I wish that was the only thing. However, it is somewhat arbitrary, and you will find that arbitrariness from prosecutor to prosecutor, from county to county, from State to State. The victim cannot be assured that they will have the right to receive that information.

Chairman FEINGOLD. I thank you, sir, and I will turn now to questions from Senator Kyl.

Senator KYL. Thank you, Mr. Chairman. Thank you very much, Mr. Gillis, for being here representing the Department of Justice and the administration.

Let me ask you a fairly straightforward question. Do you believe that defendants' rights would be adequately protected by State and Federal statutes?

Mr. GILLIS. Not without the constitutional inclusion, if they were not included in the Constitution.

Senator KYL. If there were no Federal constitutional rights guaranteed for defendants, would states, and I will even add State constitutional provisions, but Federal and State statutes and State constitutional provisions alone, without Federal constitutional protection—would those State statutes and Federal statutes be enough, in your view, to protect defendants' rights?

Mr. GILLIS. I don't believe so.

Senator KYL. Is there anything to indicate a difference between defendants and victims?

Mr. GILLIS. No.

Senator KYL. Is that perhaps one of the reasons why we are here supporting a constitutional amendment for victims' rights?

Mr. GILLIS. That is correct.

Senator KYL. Let me read something that the predecessor Attorney General said and ask if you agree, a statement that then–Attorney General Janet Reno made. She said, "Several of the rights we would guarantee in such an amendment," meaning a victims' rights amendment, "would provide law enforcement with additional benefits on top of the benefit of victims' increased resolve to participate in the process. If victims are notified of public proceedings and allowed to attend, they will be able to alert prosecutors to distor-

tions of fact in defendants' and defense witnesses' testimony. Allowing victims to be heard during critical phases of the trial will increase the likelihood that courts will engage in better decisionmaking. Victim testimony can provide courts with additional relevant information and impress upon them that an actual human being has suffered as a result of a defendant's conduct. Having had an opportunity to be heard, victims will likely be better able to accept a court's decision, whatever it may be. Notice of release of the defendant or offender will enable victims to take precautions that may prevent the commission of more crime. By holding offenders financially responsible through restitution for the harm they caused, they will be more clearly required to acknowledge and accept responsibility for that harm."

Is that a statement from the previous administration that you can subscribe to?

Mr. GILLIS. Yes, definitely.

Senator KYL. So there are benefits, in addition to the direct benefits for victims and victims' families, to the administration of justice generally and even to the prosecutors in the prosection of a case?

Mr. GILLIS. That is correct, yes.

Senator KYL. Again, I thank you very much. I note that the administration's strong support for this amendment has given a lot of impetus to a renewed effort around the country by victims' organizations who were feeling that perhaps they had been forgotten, but with this new degree of support, there is a new resolve to try to push this process along. Therefore, I very much appreciate your involvement and I appreciate the President's support for our amendment. Thank you for being here today.

Chairman FEINGOLD. Thank you, Senator Kyl.

Senator Feinstein?

Senator FEINSTEIN. Thanks very much, Mr. Chairman. I would like to enter into the record a new opinion from the Court of Appeals of Maryland in the case of Sherri Rippeon and John Dobbin, Jr. This was filed July 9, 2002, so it is a very new circuit court opinion.

This is the case of the parents of a murdered infant who unsuccessfully sought in the Circuit Court for Howard County to enforce provisions of Maryland's victims' rights law. The judges found that, "The appellants' case lacks the justiciability required to resolve the issues raised here." It says, "Specifically, we find that this appeal is moot and affirm the decision of the court below."

The opinion goes on to point out, "Only the defendant may appeal the final judgment and sentence. Victims must seek enforcement of their rights in the only way provided under the Maryland Code, and that is by filing for leave to appeal in a separate proceeding." That is on the question of standing.

It also makes another point here, and I found it, but I just lost it, but effectively that they have no standing. I can't find the exact wording, but I would like to, if I might, enter this into the record.

Chairman FEINGOLD. Without objection.

Senator FEINSTEIN. Mr. Gillis, I want to thank you very much for your support, for your testimony, and really for the active help of

the Justice Department and the administration. I, for one, am very grateful for that.

Let me ask this question: How often do you believe will a victim's constitutional right actually conflict with a defendant's right, and can you indicate to us what you think those specific situations might be?

Mr. GILLIS. I would be hard-pressed to come up with a situation where I think the victim's rights would conflict with those of the perpetrator. Nothing comes to mind. The offender's rights are well-protected under the Constitution. If the victim's rights were protected under the Constitution, I see that there would be no conflict.

Senator FEINSTEIN. I happen to agree with that. It happens all the time. I mean, in the First Amendment, for example, press are allowed in a courtroom. If there is a question, the judge certainly considers it and balances the rights. I don't see either why this is a different situation. I know you have had access to the courtroom. I have, as well.

Let me just thank you very much for your testimony.

Mr. GILLIS. Thank you.

Chairman FEINGOLD. Thank you, Director. I would just make the comment that if there is no conflict with defendants' rights, I am puzzled why we need a organization amendment. What is the barrier that the Constitution is going to erect to the assertion of these rights in a statute? That is puzzling to me.

At this time, without objection, I will introduce into the record editorials and statements from organizations in opposition to the proposed amendment.

I thank you very much, Director, and we will turn to our next panel of witnesses.

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

Senator KYL. Mr. Chairman, could I just, for the record, read one statement in? It doesn't go directly to Mr. Gillis' testimony, but it does go to the comment you just made.

Chairman FEINGOLD. Senator Kyl.

Senator KYL. Thank you. Harvard Law Professor Laurence Tribe I referred to before and quoted with respect to the language of our amendment. He speaks to the protection of defendants' rights, I think, and the insufficiency of State statutes as also relevant. He testified before this Committee in 1999 that, "Existing statutes and State amendments are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights, regardless of whether those rights are genuinely threatened."

Since he is not here to testify in person, I thought it was important to have that statement in the record.

Chairman FEINGOLD. Well, I respect Professor Tribe very much. All I can say is if that is the case, I don't know why we wouldn't include an explicit provision in the constitutional amendment that says that this will not derogate from defendants' rights.

Senator KYL. I think if Senator Feinstein and I thought that would win your vote and the vote of other opponents to support the amendment, we would be much more inclined to consider it.

Chairman FEINGOLD. As I have indicated in previous years, I am willing to discuss some of that with you. In fact, I offered, I believe, an amendment in the previous consideration of this along these lines which I believe was opposed. So this is a serious matter.

I have indicated that I believe this amendment is not by any means an outrageous proposal. It is less troubling to me than some of the other constitutional amendments that I have seen proposed here, but I regret that after all these concerns, all we have here is what you described as a predicate assumption, as opposed to a direct statement that this will not undercut the basic rights of defendants that have been embodied in our Constitution for over 200 years.

Senator FEINSTEIN. Does that offer still exist? We would be happy to sit down and talk with you.

Chairman FEINGOLD. I will sit down and talk.

Senator FEINSTEIN. I don't look at this as a predicate. It is in Article I of the amendment and if we can strengthen it, we would be delighted to do that.

Chairman FEINGOLD. I know that this attempt has been made in the past and I will be happy to sit down and discuss it again.

Senator FEINSTEIN. Thank you.

Chairman FEINGOLD. It is a very serious matter and I know you take it seriously, as well.

Now, we will turn to the second panel of witnesses. As we get organized, I will introduce the first witness. Our first witness is Ms. Arwen Bird. Ms. Bird is the co-founder and Executive Director of Survivors Advocating for an Effective System, in Portland, Oregon. Ms. Bird has worked as a legal assistant for both prosecuting and defense attorneys in Oregon.

I thank you for joining us today and you may proceed with your testimony.

STATEMENTS OF ARWEN BIRD, SURVIVORS ADVOCATING FOR AN EFFECTIVE SYSTEM, PORTLAND, OREGON

Ms. BIRD. Thank you. Good morning, Chairman Feingold, members of the Senate Judiciary Committee. Thank you for this opportunity to testify.

My name is Arwen Bird and I am the Director of SAFES, Survivors Advocating for an Effective System. I become before you to add the voice of crime survivors to the many groups opposed to Senate Joint Resolution 35, the Victims' Rights Amendment.

Survivors Advocating for an Effective System was founded three years ago by myself, a survivor of a DUI crash, and two other women, both of whom survived the murder of a loved one. Our mission, in part, is to empower survivors to advocate for restorative justice, the concept of a balanced restorative approach to crime. This is why I am here today.

As advocates for survivors of crime, SAFES works to ensure that we participate in and are heard by our criminal justice system. We believe that survivors have the right to restitution, compensation, and services to help us heal after victimization. We are actively working with State agencies and fellow advocates to make certain that survivors have access to all of these provisions. However,

amending the United States Constitution is not necessary to guarantee the rights of crime survivors.

Crime survivors want to be heard, we want to feel safe, and we want our criminal justice system to hold offenders accountable. If you, members of the United States Senate, want to help survivors heal after crime has occurred, fund programs and agencies designed to help survivors get back on their feet after victimization. Increase Federal funding for State agencies that are working directly with survivors of crime. Consider the concept of a parallel system of justice proposed by Susan Herman, of the National Center for Victims of Crime, where survivors, regardless of the status of the offender, could get the assistance they need to get their lives back in order. Work to enforce the rights of crime victims that are already guaranteed. Do not spend your time and energy degrading the rights of accused people. That does nothing to help us.

The provisions in this amendment are aimed at involving survivors in the criminal justice system. In a general sense, we agree with this aim. Moreover, we believe that considering the perspective of crime survivors is necessary to a balanced criminal justice system.

However, including our perspective and facilitating our participation can be ensured through Federal statutes. Every State already has at least statutory rights for survivors, and many States have constitutional amendments. A Federal amendment would do nothing to improve upon these rights. Greater effort should be made in enforcing these existing laws rather than creating new ones.

As survivors of crime who are also United States citizens, we benefit from the fundamental protections that are guaranteed through our State and Federal constitutions. the Federal Bill of Rights ensures certain protections for all citizens. This includes those who have been victimized by crime. The amendment before you would do nothing to improve upon our rights as survivors. Sadly, this amendment would only erode our rights as citizens.

Thank you for hearing my testimony today and I look forward to answering any questions you may have.

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

Chairman FEINGOLD. Thank you very much, Ms. Bird. We appreciate your testimony.

Our next witness is Roberta Roper. Ms. Roper is Co–Chairperson of the National Victims Constitutional Amendment Network, and Executive Director of the Stephanie Roper Committee and Foundation, a Maryland victim advocacy organization.

Ms. Roper, we welcome you to the panel. Thank you for being here and you may proceed.

STATEMENT OF ROBERTA ROPER, EXECUTIVE DIRECTOR, STEPHANIE ROPER COMMITTEE AND FOUNDATION, INC., UPPER MARLBORO, MARYLAND

Ms. ROPER. Good morning, Mr. Chairman. I am honored today to speak for everyday Americans who place their trust in our system and their dependence on government to do the right thing for justice. But most importantly, I speak for those whose voices can no

longer be heard—our sons, our daughters, our parents, our spouses, our brothers and sisters and friends.

In the course of my testimony, I ask you to remember this important lesson, that any one of us can become a victim of crime and suffer the secondary victimization that I will describe in some of the examples. I ask you to hear my testimony as a parent, as a spouse, as a brother or sister, and ask how you would want your loved one to be treated should they become a victim of crime and suffer the consequences that most of these folks have.

I want to be clear. Providing crime victims with protected rights in our Constitution is not a complicated legal issue. It is a human rights issue that deserves ensuring that these basic human rights to fundamental fairness are protected under the Constitution. These are rights that every person accused or convicted of crime deserves and enjoys. Yet, everyday Americans are appalled and disbelieving to learn that, unlike criminal defendants, they have no similar rights.

Let us also be clear about the need for this amendment. There are those who say the Constitution is a sacred document that should never be amended. I ask you to remember the wisdom of our Founding Fathers. The Framers of the Constitution understood that the document they were creating would need to change as the needs of society require change. They were creating a more perfect Union, not a perfect one.

That wisdom allowed our Constitution to abolish slavery and to provide voting rights to women. Those human rights could not be sufficiently protected by State or Federal laws. Likewise, victims' rights cannot be sufficiently protected by State or Federal laws.

There are those who say we should focus on strengthening existing laws. Well, we can tell you that more than two decades of effort in securing State and Federal laws are evidence of the failure to provide victims with sufficiently protected rights, and laws enacted by this Congress are the best evidence of this failure, as has been cited earlier, with the Victim Allocution Clarification Act of 1997. Federal laws, no matter how strong, will only apply to a small section of victims, not the vast majority of victims.

The whole history of our Nation has taught us that basic human rights must be under the Constitution. As we have heard, the language today has been carefully crafted to protect the rights of the accused, while enabling victims and survivors of criminal violence to have minimal rights.

I speak to the need for this amendment from personal experience, as well as after 20 years of advocacy and service to thousands of crime victims in my home State of Maryland. Like many advocates, the catalyst for my action was my family's experience with the criminal justice system when our oldest child, our beloved daughter Stephanie, was kidnapped, brutally raped, tortured and murdered in 1982 by two strangers who came upon her disabled car on a country road near our home.

Like countless victims and survivors of that era, we discovered that, unlike our daughter's killers, we had no rights to be informed, no rights to attend the trial, and no rights to be heard at sentencing. Place yourself in that nightmare. Imagine how you would

feel to be shut out of the trial of the accused of your loved one for no good cause.

We were subpoenaed as the State's first witnesses, but simply recalled a last family meal and the automobile our daughter was driving. Did we know the individuals charged? Did we have knowledge of the events that led to our daughter's abduction and murder? Did the State advocate for our right to remain in the courtroom, or did the judge ask if there were reasons to sequester us? The answer to all those questions was no.

Rather, the rule on witnesses was invoked, unchallenged, and imposed. Instead of hearing the truth and seeing justice imposed, we were banished from the most important event of our lives. Finally, at sentencing, we hoped to use what was then being proclaimed as the first victims' rights law; that is, a victim impact statement at sentencing. Instead, the defense objected on the grounds that anything I had to say was emotional, irrelevant, and probable cause for reversal on appeal. After a lengthy bench conference, the court agreed. While our daughter's convicted killer had unlimited opportunities for himself and others to speak to the court on his behalf, we were silenced. No one could speak for Stephanie.

Like countless other families then and now, we struggled not only with the devastating effects of the crimes committed against our loved ones, but the consequences that were in many ways worse, being shut out of the criminal justice system we depended upon and trusted.

In trying to rebuild our broken lives, the greatest challenge we faced was trying to preserve hope for our children when the system we had taught them to believe in had failed us. That challenge is forever etched in my mind by the memory of the day one of our sons came home from school, explaining that he could no longer pledge allegiance to the flag with his classmates because liberty and justice for all did not include us.

You may conclude that because this happened 20 years ago, this would surely not happen today. You would also correctly conclude that the progress that has been made has been revolutionary, both on the State and Federal level, and constitutional amendments passed in so many States. The sad reality remains that victims' rights are paper promises, too often ignored, too often denied.

None of the State or Federal laws are able to match the constitutionally-protected rights of offenders. Studies also demonstrate that the system's bias against victims is even more pronounced against racial minorities and the poor, who constitute the largest group of victims of violence.

I want to give you some examples of victims, some of whom are here today, whose rights have been violated. One is Dawn Sawyer Walls. Dawn was six months pregnant and the manager of a convenience store when a robber with a sawed-off shotgun ordered her to lie face down as he emptied the store's cash drawer. In violation of Maryland law, Dawn was not notified when a plea agreement was struck. As a result, and in violation of Maryland law, she was not present in court to give a victim impact statement. She was not able to ask for restitution from the offender. The disposition was characterized as a good outcome, and besides, she was told, you didn't suffer physical injuries. The trauma of that event had a se-

vere financial impact on her because she was unable to return to work.

Teresa Baker is also present. When her only son was murdered, she was present in court, had fulfilled the notification request, and heard the court impose a sentence of 30 years when the offender pleaded guilty to second-degree murder. She heard the judge impose the maximum sentence, except no one explained to Teresa that under the terms of the American Bar Association plea the convicted offender would be freed in less than three years. She only learned about his release by chance. That painful discovery prompted Teresa to ask why she wasn't told the truth of the terms of the plea agreement and the release.

Cecelia and Dexter Sellman are also here. Their son was an honor roll student when he was shot down and killed by two young men. The Sellmans trusted the system and relied on it to bring them a measure of justice, and asked for restitution, not for revenge, not to replace their loss, but for some of their out-of-pocket expenses and to hold the offenders accountable. The State flatly told Cecelia that they would not request restitution. This is a violation not only of victims' rights under Maryland law, but an obligation of the prosecuting attorney.

Sherri Rippeon and John Dobbin were mentioned by Senator Feinstein, and the opinion that has been submitted into the record. Their experience is the most compelling, powerful example of why this amendment is needed, and it is a recent decision, having coming out on July 9.

Two-and-a-half years ago, their infant daughter, Victoria Rose, died of blunt force trauma inflicted by their babysitter's boyfriend. They sought compliance with Maryland law, as required, filed a notification request form, were excluded from the trial as observers even after they filed a pro se demand for rights form, and then took remedial action that applies under Maryland law; that is, filing leave to appeal.

As you have heard, the Maryland Court of Special Appeals has given them yet another failure, saying that on the one hand these victims are the proper parties and have sought enforcement of their rights in the only way provided under Maryland law, but at the same time has failed to give them an effective remedy, saying that the issue must be dismissed as moot.

How would a victims' rights amendment help them? First of all, history has shown that once a right is in the Constitution, it is applied. That is why defendants have no trouble exercising their rights. But with an amendment and if their rights were not applied, Congress and the State could provide emergency proceedings.

It is important to stress that the amendment before you has little to do with the punishment of offenders or increasing or decreasing funding for victim services, but everything to do with how we treat people. Treating crime victims with respect and not excluding them from the proceedings arising from the crimes committed against them are separate and distinct.

I would point out Marsha Kite, who is here, because Marsha Kite was a survivor of an Oklahoma City bombing victim who was excluded from observing the trial and excluded from providing a victim impact statement because she opposes capital punishment.

There are those who have also said we should just include Federal incentives for better funding. Does anyone truly believe that we should be dependent on the whim of Federal incentives for funding?

Chairman FEINGOLD. Ma'am, I am going to have to ask you to conclude.

Ms. ROPER. I will.

Chairman FEINGOLD. I should have said that people should limit their statements to five minutes. I did not do that, so I have given you over ten minutes.

Ms. ROPER. I am sorry.

Chairman FEINGOLD. It is an important statement, so please continue.

Ms. ROPER. I just want to conclude that I ask you to listen to the people of this country. We ask you to remember that the Constitution belongs to the people. Let the Constitution protect the people of this Nation.

Thank you very much.

Chairman FEINGOLD. Thank you, Ms. Roper, for your powerful statement. Of course, your entire statement will be included in the record, and we appreciate your testimony.

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

Chairman FEINGOLD. Our next witness is Julie Goldscheid. She is the General Counsel for Safe Horizon, a non-profit victims assistance organization. Ms. Goldscheid once served as a senior staff attorney for the now Legal Defense and Education Fund, and has extensive experience arguing gender-motivated violence cases.

It is my pleasure to welcome you, Ms. Goldscheid, and you may proceed.

STATEMENT OF JULIE GOLDSCHEID, GENERAL COUNSEL, SAFE HORIZON, NEW YORK, NEW YORK

Ms. GOLDSCHEID. Thank you. Good morning, Mr. Chairman, Senator Kyl, Senator Feinstein, and thank you for providing Safe Horizon the opportunity to testify today.

As you heard, I am Julie Goldscheid. I am General Counsel of Safe Horizon, which is the Nation's leading victim assistance organization. Our mission is to provide support, prevent violence, and promote justice for victims of crime and abuse, their families and communities.

Safe Horizon assists over 250,000 crime victims each year through over 75 programs located in all five boroughs of New York City. Everyday, in our family and criminal court programs, our police programs, our domestic violence and immigration legal services programs, our domestic violence shelters, and our community offices, our staff of over 900 inform victims about their rights, support them with counseling and practical assistance and, when necessary, advocate to ensure that their rights and choices are respected.

In the aftermath of the September 11 terror attacks, we have provided crisis intervention, support counseling, information and referrals, and service coordination. We have distributed nearly $100 million in financial assistance to over 45,000 victims.

While we are ardent supporters of victims' rights, we oppose the proposed victims' rights amendment out of a concern that it will not enhance and, in fact, could impair crime victims' abilities to meaningfully participate in the criminal justice system.

Our opposition is informed by the victims we serve, who are primarily people of color living in economically depressed urban neighborhoods and who face complex challenges in asserting their rights. Enhancement and vigorous enforcement of State protections and Federal statutory rights rather than a constitutional amendment is the best way, in our view, to advance their concerns.

As you have heard this morning, every State, including New York, has enacted statutory or constitutional protections for crime victims. While in some cases those provisions could be improved, victims' overwhelming need is for enforcement of existing rights. Statutory frameworks requiring officials to take steps such as notifying victims about court proceedings can be enhanced and must be fully enforced, and services for victims need support.

When so much remains to be done to enforce existing victims' rights provisions and to expand the services so vital to victims, we find it difficult to justify the extensive time and resources needed to pass a Federal constitutional amendment.

Moreover, while our clients' interests and rights such as notice and participation are critical, they are not the same as the concerns of defendants who face the potential loss of fundamental rights and liberty. The risk of unwarranted State power is a particular concern for those, like many of our clients, whose experience is compounded by race, gender, or other forms of discrimination. In fact, many of our clients strongly support vigorous safeguarding of defendants' constitutional rights.

Safe Horizon is particularly concerned about the potential impact of the proposed amendment on the approximately 200,000 domestic violence victims we serve every year. Batterers frequently make false claims of criminal conduct which often result in the true victim's arrest.

Under the proposed amendment, a batterer could be accorded victim status and could benefit from all the proposed constitutional rights. The same concern applies to cases in which domestic violence victims strike back at their batterers in self-defense, as well as to dual arrest cases or cases resulting from misapplication of mandatory arrest or mandatory prosecution policies.

We should learn from the history of victims' rights reform that flexible frameworks are essential to serving victims' needs. Mandatory arrest laws are one case in point. They were first enacted in response to widespread reports that police failed to take domestic violence cases as seriously as similar cases involving similar violence between strangers. This led to dual arrests, and primary aggressor statutes were enacted in response. This illustrates the way that statutory approaches, which provide the flexibility to make changes, are needed to respond to this problem. A Federal Constitution, which takes years to modify, does not.

Our position regarding the proposed amendment remains firm in the aftermath of the September 11 attacks. If anything, our experience serving the range of victims affected—family members, injured people, displaced residents, displaced workers—highlights the

need to strengthen statutory protections, mandate enforcement of existing laws, and support the range of services and benefits crime victims need.

We are particularly concerned about clients who are undocumented, who seek assurance that they won't be penalized as a result of seeking assistance from private and government agencies. These experiences reinforce the importance of carefully balancing defendants' and victims' rights.

In conclusion, the proposed constitutional amendment may be well-intentioned, but good intentions do not guarantee just results. After careful consideration, we have concluded that the proposed amendment would be at best symbolic and at worst harmful to some of the most vulnerable victims.

Safe Horizon looks forward to working with all those concerned about victims' rights to advance legislative and policy responses that most fully respond to victims' needs.

Thank you. I would be pleased to answer any questions.

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

Chairman FEINGOLD. Ms. Goldscheid, thank you very much for your testimony.

Our next witness is Roger Pilon. He is the Vice President for Legal Affairs and the Founder and Director of the Center for Constitutional Studies at the Cato Institute. He served in the State and Justice Departments in the Reagan administration and has taught at Stanford's Hoover Institution.

Mr. Pilon, welcome and thank you for being here. You may proceed.

STATEMENT OF ROGER PILON, DIRECTOR, CENTER FOR CONSTITUTIONAL STUDIES, CATO INSTITUTE, WASHINGTON, D.C.

Mr. PILON. Well, thank you very much, Mr. Chairman, and thank you for inviting me.

Mr. Chairman, distinguished members of the Committee, I am here to testify in opposition to this amendment. In doing so, however, I want to be very clear that I support entirely the aims of those who support this amendment. It is just that I don't think that this is the best way to go about it.

I would ask that my prepared testimony be entered into the record, Mr. Chairman.

Chairman FEINGOLD. Without objection.

Mr. PILON. I am going to approach the issue somewhat differently in my oral remarks.

Are victims of crime too often forgotten by America's criminal justice system? Absolutely. No one doubts that victims of crime face a daunting legal situation. In places where municipal services are barely working such as in the District of Columbia, crimes often are not even investigated. But in most places, once investigators take over a case, victims are remembered only when they are useful to the case. That leaves crime victims to fend for themselves.

What is it victims want? Basically, there are two things. They want, first, to be made whole insofar as that is possible, and in most cases they want wrongdoers punished. Unfortunately, our sys-

tem as it has evolved is stacked heavily toward the second goal, which leaves victims on their own.

There was a time centuries ago, as Senator Feinstein mentioned in her opening remarks, when crime was treated mostly as a personal matter. Victims prosecuted wrongdoers in a way that focused primarily on righting the wrong and on making the victim whole again. When the king started taking over the prosecution, however, and prosecuting for a breach of the king's peace, all of that changed. The focus shifted from the victim's interest to the public's interest.

Thus, today we have two proceedings. The State prosecutes those charged with crimes and, if they are found guilty, locks them up to punish and to preserve the peace. Once that is done, the victim can bring a civil action against the wrongdoer, but the chances of being made whole by someone locked away are usually slim.

Still, it is important to keep in mind that a crime leads to the possibility of two legal proceedings—the State's action against the accused in the name of the people, to punish and preserve the peace, and the victim's action against the accused, to be made whole again. Recall the O.J. Simpson case. Even when the State failed in its effort to get a conviction, the victims were able to secure a civil judgment.

The problem, however, is that the State today is the dominant figure. At every turn, its interests trump the interests of the victim. Unless you are lucky enough to be wronged by a wealthy criminal, the king goes first and you get the scraps. As a practical matter, of course, that may be the best we can do in many cases, especially where the aim of getting a violent criminal off the streets indeed should trump the individual interest.

But too often, in cases that lend themselves to it, the system fails to search for creative remedies that would take the interests of the victim into account first. The victim is simply forgotten in the name of putting the criminal away. It may be time, then, to rethink our entire approach to crime.

In many cases, we may want to put the victim first, not the State. Among other things, that would bring what is really at issue into focus. It is not simply that the criminal committed some abstract wrong against the people. More important, he committed a real wrong against a real person. He needs to take responsibility for that and for the damage that now needs to be repaired to the extent that is possible. In short, we need to get real about crime, to bring criminal and victim face to face.

Each crime, however, is unique. Some will lend themselves to such an approach, others will not. That suggests that we need to be flexible, to learn from experience, and to be as close to the individuals involved as possible. But that is precisely why we don't want to do this through a constitutional amendments. Amendments, which are difficult to enact and difficult to retract, set things in stone. Statutes, by contrast, can be easily changed with experience. Fortunately, most States have addressed this issue today.

But amendment supporters say the problem is deeper, that there is a constitutional imbalance between the rights of defendants and the rights of victims. The Constitution lists numerous rights of de-

fendants, they say, but is silent about victims. That is true, but not without reason, which takes us to the very purpose and structure of the Constitution.

As the Declaration makes clear, the fundamental purpose of government is to secure our rights, including rights against criminals. Toward that end, the Constitution authorizes power, but it also limits power, nowhere more clearly than toward defendants. The Founders wanted a government strong enough to carry out its function, but they also wanted it not to violate rights in the process of doing so.

In fact, they were especially concerned to limit the police power of government, the power to secure rights, for they knew from experience that in the name of so basic and worthy an end, great abuse might occur. That is why they left the police power almost entirely in the hands of the States, where it was closer to the people.

It would be anomalous, then, to have a Federal constitutional amendment addressing the rights of crime victims when there is so little Federal power to begin with to address the problem of crime. It would be one thing if, in connection with its police power, the Federal Government were required to attend to the rights of victims. But except in limited circumstances, there is no general Federal police power. Thus, the constitutional rights of defendants makes perfect sense. They are restraints on government power. The Federal Government may enforce customs laws, for example, but it can't do it by introducing evidence gained from warrantless searches.

Given the defensive way we constituted ourselves, then, it is not surprising that the rights of crime victims are not explicitly in the Constitution, but that doesn't mean they are not there. The Seventh Amendment invokes the common law, and the rights of victims are at the core of that law.

Thus, the primary way victims vindicate their rights is through the civil, not the criminal law. It is the state's business to protect us from criminals and to punish them. It is our business to vindicate our rights to be made whole. Vindication may be achieved partially through the criminal proceeding, of course, for most victims have an interest, and even a right, in seeing criminals punished. But that forum belongs primarily to the people, whose interests and rights may not be identical to those of the victim.

Sometimes, the prosecutor will want to put a criminal away, for example, but other times he may want to plea-bargain to reach other, more dangerous criminals who are of no concern to the victim. It is crucial, therefore, that there be two forums, criminal and civil, for there are two sets of interests at issue and they are not always harmonious.

In my prepared testimony, Mr. Chairman, I go through some examples of the conflicts between those two sets of interests. I would refer you to that and I will just sum up right now by first raising a point that has been raised in these proceedings, namely, that we need to elevate these rights to the constitutional level and that will ensure that they are protected. That will not ensure that they are protected. After all, property rights are there in the Constitution

and they are violated every day by no less than the Federal Government.

Even the First Amendment is not immune to attack from—dare I say, Mr. Chairman—this Congress with respect to such matters as campaign finance.

Chairman FEINGOLD. Now, you are getting in trouble.

[Laughter.]

Chairman FEINGOLD. It sounded good before that.

Mr. PILON. But I digress. There is, in short, a disturbing air of aspiration about this amendment. Like the generous legacy in a pauper's will, it promises much, but delivers little. Clearly, rights without remedies are worse than useless; they are empty promises that, in time, undermine confidence in the document that contains them; here, the Constitution.

Remedies ordinarily are realized through litigation. One wants to know, therefore, how victims will or might litigate to realize their rights and what their doing so implies for other rights in our constitutional system. Several scenarios under this amendment are possible. None is clear. Yet all, by virtue of being constitutionalized, may make the plight of victims not better, but worse.

We owe more than empty promises to those for whom the system has already failed. What we owe victims is a better opportunity, where appropriate, to confront those who have wronged them so that they might work out a plan of restitution for the benefit of both victim and criminal. That will take enlightened legislation and enlightened prosecutors, and that is the business primarily of the States. It is not the business of a constitutional amendment.

Thank you.

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

Chairman FEINGOLD. Thank you, Mr. Pilon, for your interesting perspective.

Our next witness is Steven Twist. Mr. Twist is General Counsel for the National Victims Constitutional Amendment Network, in Scottsdale, Arizona. He also serves as Vice President for Public Policy for the National Organization for Victim Assistance and is an adjunct professor of law at the College of Law at Arizona State University.

Thank you for testifying, Mr. Twist, and you may proceed.

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

Mr. TWIST. Mr. Chairman, let me begin by thanking you for your opening remarks and for your willingness to renew a dialogue with us on the appropriate text for an amendment. We certainly want to engage in that dialogue with you and we very much appreciate it.

If this indeed is a pauper's will, as Mr. Pilon has suggested, it is hard to see how it could be such an assault on the Bill of Rights at the same time. I would say to my good friend that when a woman who is 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 bargaining and sentencing—when these things happen, it is the government and its courts that are the engines of these injustices.

Sadly, what prevents the elimination of these injustices all across our country, what prevents the establishment of some very simple rights to notice and presence and a simply voice at some key proceedings from becoming the law of the land for all Americans is simply fear, fear or change, a hide-bound clinging to the status quo even as the opponents of the amendment acknowledge that the status quo is unjust and doesn't often enough protect the rights of victims.

Also, Mr. Chairman, it evidences a profound distrust of our courts to be able to strike fair balances in giving full effect to the rights of victims and the rights of defendants in every criminal case. I daresay were the critics of S.J. Res. 35 to apply the same psychology of fear of change and the same standards of precision to the Constitution itself, the Framers in Philadelphia would be ordering iced lattes during this afternoon's break in debate and the Bill of Rights would be a distant, unreachable dream.

When exactly is a person the accused under the terms of the Constitution? Why is there no definition of a speedy trial? What process exactly is due under the Constitution? What exactly is an unreasonable search, and when is cause probable? No constitutional amendment will meet the precision called for by the critics, and I suspect they know that because in the end fear frustrates change and it is change they oppose.

For crime victims, the struggle for liberty—and it is that, liberty—has gone on long enough. Too many for too long have been denied basic rights to fairness and human dignity. The rights we seek are modest. Indeed, our opponents rarely oppose them in the abstract. But without grounding in our fundamental charter, they are not meaningful or enforceable or beyond the sweep of shifting judicial or legislative winds.

The critics say let the States pass laws, let them even pass State constitutional amendments, but the U.S. Constitution is too important a document to trifle with mere crime victims. Doubtless, you will hear, and indeed have heard these words today, but they have no answer when confronted with the real cases across this country where State laws, even State constitutional amendments, and even Federal statutes simply don't work.

Much of the criticism that we have heard is ungrounded in the real world of the courts, where I live and practice representing crime victims everyday. We have heard, Mr. Chairman, that the rights that we propose will degrade the rights of the accused. No less a constitutional scholar than Laurence Tribe has said that is simply not the case.

We have heard and will hear that the rights that we seek, the simple rights to notice and presence and an opportunity to be heard, undermine and threaten law enforcement or prosecution. I would submit, Mr. Chairman, that those critics look to Arizona, look to California, look to places where victims are regularly in-

volved in the process. No such dreadful consequences, dire consequences occur.

Victims are afforded rights to be present, to be heard on plea agreements. In Arizona, the right to be heard at pleas has not dramatically in any way affected the number of cases that go to trial or the number of pleas that are accepted. Victims are empowered by this right, and that is all we seek. I say to the critics, Mr. Chairman, look at the country and the real world. Don't speculate about fear. Look at the real world where these cases exist.

One final comment, Mr. Chairman. In response to what I just said, it may be said, well, Mr. Twist, if these are working in the States, then why do we need to amend the fundamental charter of our country?

I would say to those who would raise that question, because these need to be the law of the land, the birthright of every American from Maine to California. These rights need to follow crime victims wherever they go, and the only way to do that—and it is the same insight that James Madison had when he offered the Bill of Rights—the only way to do that is to make them part of the character of the Nation, part of the fundamental law, so that they truly will become a part of our culture. They are not today and, sadly, as Ms. Roper's stories prove, they will not be until we have constitutional rights.

Thank you.

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

Chairman FEINGOLD. Thank you, Mr. Twist.

Our final witness is James Orenstein. Mr. Orenstein is a former Assistant United States Attorney for the Eastern District of New York and served as an Associate Deputy Attorney General during the Clinton administration. He is now an attorney in private practice and an adjunct professor at Fordham University and New York University. While serving at the Department of Justice, Mr. Orenstein worked with sponsors and supporters of versions of the victims' rights amendment.

We welcome you to the panel today, sir, and you may proceed.

STATEMENT OF JAMES ORENSTEIN, BAKER AND HOSTETLER, NEW YORK, NEW YORK

Mr. ORENSTEIN. Thank you, Mr. Chairman, and Senator Kyl, Senator Feinstein. Thank you for allowing me to testify 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, to make sure that any victims' rights amendment will 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 bill will in some cases sacrifice the effective prosecution of criminals to achieve marginal improvements for their victims.

In the 20 years since President Reagan received the disturbing report of his task force, Congress has enacted a variety of statutes that ensure crime victims' rights in the criminal justice system. One of those, in my view, effectively addressed the problem in the Oklahoma City case, where I was one of the prosecutors. No victim was excluded for having witnessed prior proceedings as a result of that statute.

More importantly, for purposes of discussing whether the Constitution should be amended, I don't believe that anything that happened before or after that amendment, or particularly after, would have changed by virtue of this amendment being ratified. In one case, the judge decided that the defendant's fair trial right would be violated by a witness' testimony. That wouldn't change under this amendment.

In addition to the Federal statutes that Congress has passed, every single State has enacted its own victims' rights laws. They have not uniformly adopted the full panoply of protections that this body provided, so therefore the principal benefit to be gained by this amendment is not the elimination of the injustices that Ms. Roper and Mr. Twist described, which are in any event a violation of law.

What an amendment would do would be to provide uniformity, gained by empowering Congress to override State laws and bring local practices into line. That same result, however, could likely be achieved through the use of the Federal spending power to give States proper incentives to meet uniform national standards.

But unlike reliance on 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 to law enforcement are not the result of simply recognizing the legal rights of victims. Prosecution efforts are generally more effective if crime victims are regularly consulted during the course of the case.

There are, however, some cases, typically in the organized crime and prison settings, where the victim of one crime is also the offender in another. In such cases, this amendment could harm law enforcement. For example, when a mob soldier decides to cooperate with 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 crime victims who are more sympathetic to criminals than to the government.

When John Gotti's underboss, Salvatore Gravano, decided to cooperate—and I was one of the prosecutors in that case—he initially remained in a detention facility 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—relatives of gangsters whom Gravano had murdered on Gotti's orders—would almost certainly have notified Gotti if they could have done so.

Now, 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, under the First and Sixth Amendments, as well as relevant Federal regulations, it is extraordinarily hard to do that. As a result, the need for discretion is usually han-

dled by scheduling such guilty pleas simply without notice to others and at times when the courtroom is likely to be empty. But that kind of pragmatic problem-solving cannot work under this amendment.

In the prison context, incarcerated offenders who assault one another may have little interest in working with prosecutors to promote law enforcement, but they may have a very real and very perverse interest in disrupting prison administration by insisting on the fullest range of victims' services that the courts will make available. Some of these services could force prison wardens to choose between cost-and labor-intensive measures to afford incarcerated victims their participatory rights and foregoing the prosecution of offenses committed within prison walls. Either of these choices would undermine the safety of prison guards.

The risk to law enforcement thus arises not from the substantive rights accorded to crime victims, but rather from using the Constitution to recognize those rights. There are two basic ways in which the current bill could undermine the prosecution and punishment of offenders.

First, it may not adequately allow for appropriate exceptions to the general rules. 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 the victims' rights is the Constitution.

As I have explained in my written testimony, there are particularly aspects of the wording of the current proposal that could particularly harm law enforcement. One example is using the word "restrictions" rather than "exceptions" in Section 2. It might deprive prosecutors and prison officials of the flexibility needed for safe and effective enforcement.

But beyond specific language problems, it is important to note that some problems are created by the very fact that 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 that this Committee approved when it favorably reported S.J. Res. 3 in the year 2000. The difference between exceptions and restrictions is just one such problem and there are others in my written statement.

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. The Crime Victims Assistance Act, sponsored by Senator Leahy and Chairman Feingold and several members of this Committee, is a good example of legislation that should be enacted, regardless of whether you also amend the Constitution.

But by adopting the legislative approach now, you may well find that the potential harm to law enforcement inherent in a constitutional amendment need not be risked. 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 victims' rights only by jeopardizing effective law enforcement. By doing so, it ill-serves the crime victims whose rights and needs we all want to protect.

Thank you, Mr. Chairman.

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

Chairman FEINGOLD. Thank you, Mr. Orenstein, and all the witnesses. Now, we will begin five-minute rounds of questions.

I first would like to underscore a point that was illustrated by the testimony that we just heard. There is not a single victim's voice on the question of a constitutional amendment. Actually, as Ms. Roper noted, in the 20 years since the loss of her daughter, great progress has been made in the area of victims' rights. It sounds as though the problem that Ms. Roper has identified isn't necessarily one needing a constitutional fix, but I think it is one requiring legislators to continue to write laws addressing the real problems of victims.

I again want to reiterate with all of the witnesses that this goal of guaranteeing victims' rights is extremely important and is one that we all support. It does lead to my first question, though, for Ms. Bird and Ms. Goldscheid.

Both of you talked about the need for increased resources and enforcement of existing victims' rights, not a constitutional amendment. Can you provide us with examples of legislation that might address the needs of victims better than this proposed constitutional amendment?

Let's begin with Ms. Bird.

Ms. BIRD. Well, in my statement I talked about increased funding for services. I think that from my own experience as a crime survivor having difficulty navigating the system, what it came down to was victims assistance offices actually helping me navigate the system, individuals in those offices being willing to spend the time with me to be able to kind of help me through the system.

That is not a matter of the laws that were already existing. It is a matter of the people that were there, so legislation that would increase funding for prosecutors' offices, for perhaps agencies that are external from the government to be able to work directly with crime survivors.

Chairman FEINGOLD. Thank you, Ms. Bird.

Ms. Goldscheid?

Ms. GOLDSCHEID. I would agree with that suggestion. Legislation both at the Federal and at the State level that would increase funding for services, both in law enforcement offices and with not-for-profits that work with law enforcement offices to help victims, goes a long way toward helping enforce victims' rights.

Also, some aspects of the Leahy-Kennedy bill that I think was referenced earlier, would be helpful and could promote uniformity within the Federal system. There are examples at the State level that we could talk about as well. I would be happy to work with any members of the Committee on legislation that they would be interested in working on.

Chairman FEINGOLD. Thank you. Again, Ms. Goldscheid, you said in your remarks that one of the reason for Safe Horizon's opposition to this amendment is because of the effect it will have on domestic violence victims. I understand you have dealt with thousands of domestic violence victims, mostly women.

Can you say a bit more about how a constitutional amendment aimed at helping the victims of domestic violence could actually end up hurting them?

Ms. GOLDSCHEID. What we have seen in the context of domestic violence law reform is that as protections have been enacted to help domestic violence victims, in some cases they are also used by the offenders. As I mentioned before, for example, mandatory arrest laws sometimes have been used to lead to dual arrests.

Batterers sometimes make retaliatory arrests. They make complaints through the criminal justice system that can lead to battered women, instead of being treated as victims in the system, becoming criminal defendants. When battered women are treated as criminal defendants, and particularly if they have an arrest record, that frequently has very serious implications, for example, for child custody, which are very difficult to undo. One particular problem with a constitutional amendment is that batterers could assert new constitutional rights as victims, whih could add to their arsenal of coercive tactics and further abuse the true victims.

One of our concerns is that if we raise victims' rights to the level of constitutional protection, the litigation that arises from any conflict will be much more complex, and when we have battered women who are criminal defendants, the issues they face will be even more complicated and hard to untangle, particularly if batterers attempt to assert new victims' constitutional rights.

Chairman FEINGOLD. Thank you, Ms. Goldscheid.

Mr. Orenstein, you did a good job talking about a couple of cases and situations that you have been involved in. Senator Feinstein discussed a case in Maryland in which the victims attempted to reopen the sentencing phase.

What adverse impact could the amendment have on the sentences of criminal defendants and society's desire to prosecute and punish criminals? Specifically, could you talk about the ramifications of the amendment on sentencing cases involving multiple victims and on plea negotiations in complex multi-defendant cases?

Mr. ORENSTEIN. Well, in multiple-victim cases there is inevitably a problem for the prosecuting authority of keeping a large number of people involved and seeking their views. It is just logistically a problem.

I think in the Oklahoma City case, it was a problem. I am sure in the Moussaoui case it is a much bigger problem, but it is a problem that prosecutors are eager to address and to find ways to work around. But in a case where there are thousands of victims, a constitutional amendment that gives the right to be heard at sentencing could actually make it virtually impossible to get to the end of sentencing.

Now, I am sure everybody who supports an amendment wants a reasonable way of dealing with that situation. I don't doubt anybody's bona fides on that, and I know victims groups often say we want a voice, not a veto. The problem is this amendment doesn't allow exceptions. It allows some restrictions, but that is different, and this is why it is so important to try a statutory approach rather than a constitutional one.

It is important to find a way that allows you enough flexibility so that in a case like that you can respect the victims' rights in a

way that makes sense for their interests as a group, as well as each individual, and protect law enforcement's interest in getting to sentencing and achieving the right sentence.

Chairman FEINGOLD. Thank you for that answer.

We will turn to Senator Kyl for his questions.

Senator KYL. Thank you, Mr. Chairman.

Mr. Orenstein, you are just plain wrong when you say that this amendment doesn't allow exceptions, what you just said. I refer you to Section 2, beginning with line 19: "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."

Nobody would allow those kinds of exceptions for the protection of defendants' rights, but they are explicitly provided for victims' rights because we are well aware of the many situations that have been hypothesized as perhaps calling for some need for the court to provide an exception with multiple defendants, with the battered spouse. All of these hypotheticals, as you know because of your previous involvement, were vetted through the Department of Justice. As a result, we worked with Attorney General Reno to provide these explicit exceptions. So you are wrong when you say there are no exceptions.

Now, I have never heard so many fantastic hypotheticals in my life, and I think that Steve Twist is right when he says that the Bill of Rights would never have been enacted if we had considered them with the same degree of concern that has been reflected here.

To the comments of Ms. Bird and Ms. Goldscheid that we need better enforcement of existing statutes, I say, yes, we do. But I also heard a definition of insanity once, which is that you think things will change if you keep on doing the same thing. That is why we have said for ten years now they are not changing. We have Department of Justice studies that say they are not changing, and unless you make a change, you can't expect a different result.

To my good friend, Roger Pilon, three quick comments. Rights without remedies are empty promises. You are exactly right, and if that doesn't characterize the status quo, I don't know what does.

Secondly, there is a difference between the defendants and the victims, and you are absolutely correct in this regard. And I think the Chairman and other serious students of the law have made this point, but I think it overlooks a couple of things, and that is that there is an application of state power or coercion involved here not just with respect to the defendants but with respect to victims.

When the judge literally removes you from the courtroom because you are a victim, that is the exercise of state power no less than it is with respect to a defendant.

As to the corollary with respect to the difference between victims and defendants, namely that there is a consequence of state action with respect to the defendants—I mean you might even go to jail—I think the failure to appreciate that there is also a consequence to the victim is one of the most fundamental problems with the debate that we are having. It reveals something. It reveals an inability to appreciate that there are consequences to victims for their denial of rights in our system of justice.

I don't know what we can do to bring it home to opponents that there are these real consequences, except to be personally involved and having to suffer through one of these things and then you appreciate the consequences. But it is hard unless you have been there, I guess.

So while I appreciate the theoretical points, and I really do—you are a serious thinker—I believe that we are failing to appreciate something here about the consequences to victims, and that is why they say they are victimized a second time. It is the state's inability to protect them the first time and the actual involvement in the victimization the second time that is the thing that we are most concerned about here.

I got carried away here and I really meant to ask Steve Twist to comment on the problem that people perceive about these various exceptions and basis for the language that we put in the amendment to try to deal with those exceptions, because we recognized that we wanted to have flexibility, which is another word that one of you was talking about. There is, therefore, flexibility here and the ability of courts to deal with this.

Mr. TWIST. Mr. Chairman, Senator Kyl, fundamentally I think the critics of S.J. Res 35 distrust the courts of our country to be able to reach correct decisions when there are issues of conflict.

There is no provision in the Constitution that says when the defendant's right to a fair trial comes up against the press' right in the First Amendment that the defendant's right shall prevail in all cases. But we have a body of law that the courts have well developed that set out the parameters for fully protecting the defendant's right to a fair trial, and at the same time protecting the First Amendment interests to an open trial. These are the things that courts do.

We have allowed explicitly in the language of S.J. Res. 35 for these exceptions to be recognized when interests of public safety, when interests of the administration of criminal justice, or other compelling necessity will require exceptions. It is explicitly written into the text.

Fundamentally, I think our critics can take some confidence in renewing their trust in the court system because the courts will handle these cases very appropriately and very properly.

Chairman FEINGOLD. Thank you.

I will move to my second round, and let me first say my friend, Jon Kyl, is an enormously respectful and good colleague. In fact, he and I were arguably among the only civil participants on the Phil Donahue Show last night, which was a tough discussion about similar issues. But I am going to take somewhat strong exception to his suggestion that people who question this constitutional amendment sort of just don't get it.

I voted for a constitutional amendment to the Wisconsin State Constitution. I didn't demand at the State level that it only be done through statute. I felt that it was appropriate in Wisconsin, given the nature of State constitutions, to do it as a constitutional amendment. The Federal Constitution and the Bill of Rights, though, is a very different thing. So there is no disagreement in this room about how terrible the denial of the rights of victims is. Everyone agrees on that, and I want to reiterate that.

In fact, Mr. Orenstein, I would like you to have the opportunity to respond to Senator Kyl's forceful comments about your comments about there not being exceptions, if you would like to do that at this time.

Mr. ORENSTEIN. Let me start by saying I hope I am wrong because if this amendment becomes law, we all agree we need the flexibility we have been discussing. Here is my point: In the previous version that I was involved in working on when I was with the Justice Department, the language of S.J. Res. 3 was, "Exceptions to the rights established by this Article may be created only when necessary to achieve a compelling interest."

In the current version, "exceptions" has been discarded and it says no restrictions may be allowed, except in certain situations. So if an individual's right as a victim to speak at a sentencing hearing, for example, were curtailed because there were so many, such as the case that Senator Feingold was talking about before, the victim might say, "You can't shut me out from speaking just because there are so many. That is not a restriction on my right; that is a complete exception to the right."

The argument in support of that position would be whatever "restrictions" may mean in this amendment, the one thing we know it doesn't mean, because it was taken out from the earlier version, is "exceptions." So there must be some other meaning, such as a reasonable limitation on my time or subject matter, but not an absolute exception to my right to speak. That is what I am concerned about when I say this has restrictions, but not exceptions.

Chairman FEINGOLD. Thank you.

Mr. Pilon, I am concerned that this amendment does not do what the victims' rights amendment I voted for in Wisconsin does, as I have talked about, namely protect the rights of the accused. The Wisconsin victims' rights amendment states, "Nothing in this section or in any statute enacted pursuant to this section shall limit any right of the accused which may be provided by law."

Now, assuming that the proposed constitutional amendment before us today is ratified, would you be opposed to including language like the language in the Wisconsin victims' rights amendment that would protect the constitutional rights of the accused? I would also invite you to respond to any other comments that have been made, Mr. Pilon.

Mr. PILON. Well, thank you, Mr. Chairman. I think you are absolutely right to point to the categorical language in the Wisconsin amendment, as distinct from the non-categorical language in the current version of this amendment.

I would respectfully respond to Senator Kyl's respectfully-raised points regarding my testimony, in particular his second point about there being a real difference between the rights of defendants and the rights of victims, and that nevertheless there are real consequences not simply to defendants, but to victims of the present system. I couldn't agree more with that.

In fact, I suppose the most real of those consequences arises when the prosecution fails, when the accused, whom the victim knows to be the perpetrator of the crime, is able to be found not guilty, for whatever reason. Then there is the failure of the system in the starkest form. Yet, that is our system of justice and I don't

think that there is a great deal that you can do about that. Those kinds of cases will occur.

The O.J. Simpson case that I mentioned is one that suggests that the prosecution failed, because at the civil level it didn't. That is why, again, I pointed to our bifurcated system of justice. We have a criminal proceeding, we have a civil proceeding, and I think that those who propose this amendment are looking too much at the criminal proceeding to do what should, in fact, be done in the civil proceeding.

I would finally conclude to you, Senator Kyl, that as a member of the party that stands strongly for federalism and federalist principles and for the doctrine of enumerated powers and for the principle that there is no general Federal police power, it is anomalous, at least, to have an amendment of this kind when there is so little Federal criminal jurisdiction. As the Chairman said, most of this takes place at the State level because that is where most crimes are prosecuted. Therefore, there is a real anomaly with having an amendment of this kind in the Federal Constitution.

Chairman FEINGOLD. Thank you, Mr. Pilon. That concludes my second round.

Senator Kyl, do you have additional questions?

Senator KYL. Yes.

Mr. Pilon, would you concede that there is a similar anomaly with respect to the protection of the defendant's rights by the numerous amendments in the Federal Constitution?

Mr. PILON. No, and I will tell you why, because there is some Federal criminal jurisdiction attendant to enumerated powers. Commerce Clause——

Senator KYL. Excuse me, but should it only relate to the Federal jurisdiction?

Mr. PILON. Therefore, with respect to those cases, even before the ratification of the 14th Amendment and the incorporation of the Bill of Rights against the States—even before that, there were Federal prosecutions, therefore the need to ensure that defendants were protected in those areas where there was Federal criminal prosecution, limited though they be.

Senator KYL. How about a corollary right for victims?

Mr. PILON. I suppose you could say that with reference to those few——

Senator KYL. Then we will incorporate it via the 14th Amendment, like the Supreme Court has done.

Mr. PILON. Well, yes, you could do it, but again this is mostly a State matter. Then we come back to the practical points, to wit, that there is so much uncertainty as we venture out into this area that either you have to write a constitutional amendment that is so vague—and that is the direction we have been moving in this; if you will look at the difference between S.J. Res. 3 and S.J. Res. 6, it is moving to greater and greater generality.

Eventually, you have an amendment that says we stand for good things. Of course, that can mean anything one wants it to mean, and the greater you move to generality, the more you invite the kind of judicial chicanery that I know you and I would both like to eschew.

Senator KYL. Mr. Twist?

Mr. TWIST. Thank you, Mr. Chairman, Senator Kyl. I have been dying to make the same point that in the real world of the courts in which I represent crime victims, the difference between having Federal constitutional rights and State constitutional rights, or State statutes on the other hand, is all the difference in the world.

Even in Arizona, where we have a strong constitution and where more often than not it works, the times it doesn't work result in great injustice. I have cited cases in my testimony and I appreciate it being included in the record. I can offer more.

To Mr. Pilon, who says these rights are not rights against a government and therefore are somehow different than the rights of defendants, I simply invite him to come to a courtroom and see what it is like when a victim is kicked out of the courtroom because the judge orders it, or a victim is silenced because the power of the state comes down on her and says to her, you may not speak, where others may speak.

I invite him or any of our critics to come to a courtroom where the power of the state is felt so palpably on the shoulders of victims who do not get to be present, who do not get to be heard at critical stages. That is why I am so grateful to you, Mr. Chairman, for opening up and renewing the opportunity for a dialogue on these issues because it is a matter of civil rights and you are a champion for civil rights, and these ought to be fundamental birthrights of every American, the law of the land. And the only way to make them the law of the land is to put them in the Constitution of the United States.

Senator KYL. Thank you for that.

Mr. Pilon, you know, because I have slight libertarian leanings myself, that the idea of civil remedies is not altogether uninteresting to me. But there are some things like—and I am talking about consequences to victims now—when the victim doesn't receive notice of release or escape from jail, when a civil remedy is going to be an after-the-fact remedy and probably not very satisfactory if something very bad happens. So there are some times when that is not going to be satisfactory, it seems to me.

Might I just ask you, Steve Twist, just to briefly relate to the reason—Mr. Orenstein made the fine point about the difference between the "exception" and "restriction" language, if I understood it correctly, and I just wondered if you could explain the reason for the three different exceptions or restrictions that we have provided in here.

Mr. TWIST. Mr. Chairman, Senator Kyl, I think a fair reading of the express sentence in Section 2 which you quoted is that restrictions may not be allowed, except—emphasis on the word "except"—when three conditions are met: public safety interests, administration of criminal justice issues, or other compelling necessity.

Those are intended specifically to allow for flexibility both in the statutory implementation and in the later court jurisprudence that develops, exactly the kind of flexibility that Mr. Orenstein rightfully says is necessary. If that sentence were stricken from the amendment, exceptions would still be allowed. No right in the Bill of Rights is absolute. Mr. Orenstein made the point himself about the First Amendment.

We know that there is a body of law that will develop that will hopefully, to the greatest extent possible, give full effect to the rights of defendants and the rights of victims. As everyone concedes, the rights that we seek in S.J. Res. 35 far more often than not in no way intrude on the defendant's constitutional rights.

Chairman FEINGOLD. Thank you. With that, I will bring this hearing to a close. I think we would all agree this has been a thoughtful and engaging debate on whether protecting the rights of victims—a goal that we all share—requires an amendment to the Constitution. I think everyone's participation reflected the incredibly serious issue of what happens to victims and their rights, and also the very serious matter of talking about amending the United States Bill of Rights.

Thank you all for coming. That concludes the hearing.

[Whereupon, at 12:25 p.m., the Subcommittee was adjourned.]

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

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

QUESTIONS AND ANSWERS

Question for Arwen Bird from Senator Leahy

1. **Senator Kennedy and I introduced a bill last year called the Crime Victims assistance Act, S. 783 which would among other things establish new programs to develop state-of-the-art notification systems and otherwise promote compliance with existing victims' rights laws. Would you agree that such legislation would do more to advance victims' rights than a Federal constitutional amendment?**

I would first like to thank Senator Leahy and the other sponsors of the Crime Victims Act for the understanding and sensitivity that you have demonstrated to survivors of crime. It is my belief and the view of our organization that although the intent of laws such as the Crime Victims Rights amendment is sincere, the actual implementation dilutes that objective. Simply put, if we want to ensure the best possible avenues for healing and restoration for crime survivors, we must look to increased services and programs—not a constitutional amendment.

The Crime Victims Assistance Act provides an avenue for restoration, not only due to the increased services such as notification and victims assistance, but for the mechanisms for survivors to redress a lack of compliance on the part of the state. This Act takes into account the complexity of the criminal justice system and the diverse needs of people who have been victimized by crime.

As survivors of crime who have been through the various stages of the criminal justice system, we recognize its deficiencies. One clear example is notification for survivors of crime. Many survivors are not well educated about the various stages of the system, both before and after conviction. Simply mandating that such notice be made in a timely manner does not work to improve the likelihood that survivors will be informed; unless the means of relaying this important information is also improved. The Crime Victims Assistance Act-- with its increased staff for crime victims assistance, training for state employees and ombudsmen program-- offers a solution that reflects the complex nature of victimization and the needs of individual survivors.

As survivors, it is a constant frustration for us that the only remedy we are given and expected to find healing from, relates to the trial, conviction and sentencing of offenders. Survivors of crime are expected to find healing in the length or nature of the sentence that offenders receive. Although we expect that justice be served and that offenders be held accountable for their actions—this is not all that will restore us after a crime has occurred. We find healing in many ways—through the relationships that we form with victims assistance providers, counselors, family and friends. We believe that if our government really wants

to help us heal after crime, we will have access to the support to find healing in our own way and not just from the sentence that an offender receives.

The Crime Victims Assistance Act takes this perspective into account. The enhancements, trainings and programs that it provides will do a great deal to accommodate the diverse needs of crime survivors. We do not need a constitutional amendment, what we do need is the respect and support that can be provided by well trained and educated state and federal employees.

On a final note, we would like to make the suggestion of adding a non-discrimination clause to this Act. This clause would simply state that survivors of crime, regardless of their views on the criminal justice system as a whole, the death penalty or mandatory sentencing may not be prevented from receiving any of these rights or services. As you may already know, Murder Victims Families for Reconciliation released a report this summer that highlights the exclusion of survivors who oppose the death penalty from being able to participate in the system. As survivors of a broader array of crimes, we have also experienced this type of discrimination.

Thank you again for the deference that this Act demonstrates to survivors of crime. I appreciate the opportunity to share the views of our organization on this potential law.

Written Questions of Senate Judiciary Committee Members
to the Honorable John Gillis, Director, Office for Victims of Crime
At the Hearing Before the Senate Judiciary Committee
Entitled, S.J.Res. 35, Proposing a Victims Rights Amendment
to the United States Constitution
JULY 17, 2002

1. **Members of this Committee were instrumental in enacting the September 11th Victim Compensation Fund of 2001. What are the Administration's views on the September 11 Fund and how is it working?**

Answer: The Department's regulations implementing the Act are designed to promote fair and expeditious compensation within the constraints of the Act.

The Special Master's Office continues to receive claim forms from eligible claimants. As of now, more than 1000 claim forms have been submitted. Consistent with historical trends, we expect that number to increase dramatically in the coming months, as the deadline to file - December 21, 2003 - draws near. Moreover, claims are being processed in an expeditious, non-adversarial manner that provides claimants the opportunity to a hearing and to present additional evidence relevant to their individual situations. To date, awards have been as high as $6.7 million for personally injured victims and $5.7 million for deceased victims. The average award for deceased victims exceeds $1.5 million.

The Department does not believe, however, except in unique circumstances like the September 11 attacks, that the Act creating the Fund is an appropriate model for legislation to compensate victims of international terrorism. Rather, the Department believes that a fairer and more expeditious compensation program would be based upon the Administration's principles as set out in a June 12, 2002, letter to the Congress from the Deputy Secretary of State Richard Armitage.

That letter described the Administration's principles for a comprehensive, alternative approach to compensating victims of international terrorism based upon the Federal benefit program for public safety officers (PSOB) killed in the line of duty. The Administration's alternative would provide a fixed amount of compensation to all decedents based on that provided under PSOB – approximately $250,000, indexed for inflation. Further, it would not require victims to waive their rights to sue nor require that the award be offset by collateral sources. This proposal would provide a quick, streamlined, and simple process to help victims' families in their time of need.

2. **What is the Administration's view on the bill that Senator Schumer has circulated as a substitute to HR 3375, which would provide compensation to victims of international terrorism?**

Answer: HR 3375 would expand the application of the Fund to include victims of the 1998 embassy bombings in East Africa. Senator Schumer's substitute bill would increase the Fund's scope to include – in addition to the 1998 East Africa US Embassy bombing victims – the 1993 World Trade Center victims, Oklahoma City bombing victims, those who died as a result of anthrax exposure, and victims of the USS Cole bombing. As indicated in the May 21, 2002, Statement of Administration Policy, the Administration opposes HR 3375 and believes that the bill would not provide victims with fair and expeditious compensation. For one, the bill would provide different levels of compensation to high-income victims and lower income victims. The Department believes, except in unique circumstances like the September 11 attacks, that every victim should receive a set amount of compensation, similar to the Federal no-fault benefit for public safety officers killed in the line of duty (42 U.S.C. 3796). Further, because the bill establishes a complicated process involving a Special Master for determining the amount of compensation, victims could be subjected to lengthy delays and difficult proceedings. The Department believes that a fairer and more expeditious compensation program would be based upon the Administration's principles as set out in the June 12, 2002, letter to the Congress from the Deputy Secretary of State Richard Armitage (described in the response to Question 1).

3. **What is the Administration's position on S. 2134, reported by this Committee on July 27, 2002, which would allow American victims of state sponsored terrorism to receive compensation from blocked assets of those states?**

Answer: This issue is now moot in light of the passage of the Terrorism Risk Insurance Act.

4. **What is the Administration's position on the Anti-Atrocity Alien Deportation Act, S. 864, which I introduced with Senators Lieberman and Levin on April 10, 2001, and which this Committee reported on April 25, 2002? (The bill provides that aliens who commit acts of torture, extrajudicial killings, or other specified atrocities abroad are inadmissible and removable, and establishes within the Criminal Division of the Department of Justice an Office of Special Investigations with responsibilities respecting all alien participants in war crimes, genocide, and the commission of acts of torture and extrajudicial killings abroad.)**

Answer: The Department agrees strongly that persons who have committed human rights abuses abroad should not find a haven in this country, and we applaud the work of the Committee in developing ways to make the immigration laws a better enforcement tool to that end. The Administration has made steady progress, through an interagency process involving, among other things, a thorough review of S. 864, toward the goal of identifying recommended solutions to these and other important issues. We hope to be in a position in the near future to provide the Committee with a comprehensive Administration position on this important issue.

5. **Senator Kennedy and I introduced a bill last year called the Crime Victims Assistance Act, S. 783, which would enhance the rights and protections afforded to victims of Federal crime and establish new programs to help promote compliance with State victims rights laws. Portions of this bill were included in last year's antiterrorism legislation, but the bill's important provisions respecting victims' rights have yet to be considered. What is the Administration's position on those provisions?**

Answer: The Administration is very supportive of granting victims many of the rights contained within S. 783. For example, the bill would grant many of the same rights as would S.J. Res. 35 (introduced in the 108th Congress as H.J. Res. 1), namely enhanced participatory rights at proceedings and sentencing, the right to notice of certain proceedings, and the right to consideration of a victim's safety.

However, it is the Administration's view that legislative guarantees are not always sufficient when coupled with an accused person's rights under the U.S. Constitution, as interpreted by the U.S. Supreme Court. This is the case even where a victim's statutory rights are capable of protection without infringing upon the defendant's rights. It is too often the case that the courts do not even reach the threshold question of whether or not a victim can have his or her rights protected without infringing on the defendant's constitutional rights. By granting victims rights secured by the Constitution, we ensure that a decision maker takes these rights into consideration and attempts to strike the proper balance between the rights of victims and of accused persons or convicted offenders.

6. **For the last several years, Congress has imposed a cap on spending from the Crime Victims Fund, which has prevented millions of dollars in Fund deposits from reaching victims and supporting essential services. What are the Administration's views on the wisdom of imposing artificial caps on VOCA spending while substantial unmet need continue to exist?**

In principle, the Administration supports having a cap on VOCA spending as a means for supporting incremental growth in funding for victim services. Over a three year period, from 1999 to 2001, an average of $768.8 million was collected for deposit into the Fund. These deposits were principally the result of the successful prosecution of less than a dozen large health care and banking fraud cases. In the three years prior to 1999, average collections were $405.2 million. While the large influx in collections between 1999 and 2001 helped to fund new programs and services for crime victims, it is unrealistic to expect this level of continued growth in collections. In fact, since 1999 there has been a steady decline in collections for the Fund. Many States who used the increase in funding in FY 99 to fund new programs and services for victims have indicated that the reduction of funds in subsequent years limited their ability to sustain newly funded programs and services and resulted in program closures and staff layoffs. The States have argued for

controlled growth in Federal funding which the cap on the Crime Victims Fund facilitates.

Would the Administration support my efforts to eliminate the cap, or at a minimum replace it with a self-regulating mechanism that would allow more money to be distributed to the States for victim compensation and assistance?

The Administration does not support the complete elimination of the cap on the Crime Victims Fund, but would entertain ideas to ensure that victim services, assistance and support programs are continued in a reasonable and reliable manner.

7. **Are there any rights established by this proposed amendment that are not already established by Federal law for victims of Federal crime?**

Answer: 42 U.S.C. §10606(b) delineates rights accorded to victims of Federal crime by Federal law. The proposed Victim Rights' Amendment expands upon and elevates these rights to constitutional protections so that they are not left to the discretion of the justice system. In the absence of constitutional protections for victims' rights, victims have no legally protected standing in our criminal justice system. *See, e.g., United States v. McVeigh*, 106 F.3d 325, 335 (10th Cir. 1997). The judge in the *McVeigh* case attempted to bar victims from attending the trial because of the possibility that the victims might be called as witnesses. Because a constitutional right to attend the court proceedings did not exist, the victims were forced to seek statutory action to ensure their attendance. However, it is unrealistic and impractical to expect Congress to intervene and pass legislation each time the judiciary elects to deny victims access to criminal proceedings. Even where States have passed strong victims' rights statutes or ratified victims' rights amendments to their State constitutions, these coordinated efforts to secure victims' rights have been fragmented and frequently undermined or nullified by judicial decisions.

42 U.S.C. 10606(a) provides that officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded rights described under Federal law. This in no way rises to the level of ensuring that victims are accorded rights established by statute.

Further, the proposed amendment proffers three distinct advantages over current Federal victims' rights legislation, i.e., rights to reasonable and timely notice, rights to reasonably be heard at public proceedings, and rights to have adjudicative decisions that duly consider the victim's safety.

8. **Are there any rights established by this proposed amendment that could not be adopted by Federal or State statute or State constitutional amendment?**

Answer: While any one of the rights could be adopted by Federal or State statute, this would not address two critical issues that necessitate an amendment to the U.S. Constitution, i.e., uniform implementation of rights, and establishing standing for victims' to assert these rights in court. A Victims' Rights Amendment to the U.S. Constitution is the only way to safeguard fully the rights of victims of crime.

9. **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 defendants' rights in the Federal Constitution; or (B) any cases in which defendants' convictions were reversed because victims' rights legislation or State constitutional amendments?**

Answer: Yes. For example, crime victims are not allowed to give victim opinions as to a proper sentence in capital cases in those State jurisdictions that interpret the U.S. Constitution to prohibit such opinions. Thus, if a victim desires to oppose the death penalty at sentencing, most States do not allow it. Another area where victims' laws have been scaled back because of perceived conflict with a defendant's constitutional rights are the absolute evidentiary privileges for confidentiality of rape victims' mental health treatment records, which some States have perceived to conflict with Federal or State constitutional discovery requirements.

Three specific examples where State victims' constitutional rights have been subjugated to 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.

10. **In your testimony, you noted that more than 27,000 victims' rights laws have been enacted, victims' bill of rights have been passed in every State, and 32 States have passed constitutional amendments protecting victims' rights. You also remarked that "many [States] have gone beyond what is proposed in S.J. Res. 35." Please identify any States whose laws do not go at least as far as what is proposed in S.J. Res. 35.**

Answer: All States that do not have a State constitutional amendment do not go as far to protect victims' rights as S.J. Res. 35. In addition, some State constitutions leave the designation of specific rights up to the legislatures by using language to create those rights such "as provided by law," or simply leave victims' rights to legislative creation, which allows narrowing of victims' rights protections below the threshold envisioned by S.J. Res. 35.

State constitutional provisions such as this include: AK. CONST. § 24; COLO CONST. art. II, § 16a; CONN. CONST. art. XXIX, § (b); ILL. CONST. art. 1, § 8.1; IND. CONST. art 1, § 15; KS. STATS. ANN. art. 15, § 15; LA CONST. art I, § 25; MD CONST. art. 47; MICH. CONST. § 24; MO. CONST. art. 1, § 32; N.C. CONST. § 37; NEB. CONST. art 1, § 28; N.J. CONST. § 91:1-22; N.M. CONST. § 24; NEV. CONST. art. 1, § 8; OHIO CONST. art. I, § 10A; OKLA. CONST. art II, § 34; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; UTAH CONST. art I, § 28; VA. CONST. art I, § 8-A; WIS. CONST. art I, § m.

11. **Section 1 of the proposed amendment declares that "The rights of victims of violent crime, being capable or [sic] protection without denying the constitutional rights of those accused of victimizing them, are hereby established . . ." In your view, does the clause concerning the rights of the accused have any substantive force? Should it have any bearing at all as to how the proposed amendment is construed? 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?**

Answer: I strongly support the important principle enunciated in section 1 of the proposed amendment 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 merely declares that 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, standing alone, does not confer upon victims any rights, it serves as the background against which the substantive rights and the restrictions thereon would be interpreted.

The rights conferred upon victims in the amendment should not be viewed in isolation. Rather, coupled with the exceptions enunciated in section 2, decision makers must

consider both the constitutional rights of victims and the constitutional rights of defendants or convicted offenders, and strike the proper balance between the two. If a court finds a conflict between the constitutional rights of the accused and those of victims, it is ultimately the court's decision to delineate the boundaries of the rights and accord proper weight to both sets of rights.

12. **In April 2000, during the Senate floor debate on S.J. Res. 35, 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." How does that language compare, in its likely effect, to the preamble language in section 1 of S.J. Res. 35 respecting the rights of the accused?**

I am not privy to previous negotiations or positions expounded therein. The preamble language in section 1 of S.J. Res. 35 espouses the important principle that the rights of both victims and accused can be protected and accommodated in the constitutional structure. On its face, the language quoted in your question would seem to subjugate the rights of victims to the rights of accused criminals. The practical effect of such a provision would have been to render the constitutional 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.

13. **One of the specific rights established in section 2 of the proposed amendment is the right "reasonably to be heard at public . . . pardon proceedings." (A) Given section 4's express preservation of the President's constitutional authority with respect to pardons, would you expect the right established in section 2 to have any affect whatever on the Federal pardon process? (B) Would this new right limit or otherwise affect the pardon authority currently enjoyed by most State governors?**

Answer: The Department strongly supports the limiting language in clause 2 of section 4 that 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.

Because the new right to be heard at pardon proceedings only applies to those proceedings that are public, this right will not limit or affect the pardon authority of State governors unless, under State law, pardons are considered in a proceeding that is open to the public.

14. **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 systematic case-by-case basis); (D) a State court (on a systematic case-by-case basis); (E) a Federal executive branch agency; (F) a State executive branch agency.**

Answer: As a constitutional provision, the amendment would define the conduct of all officials in government, who take an oath to uphold and defend the Constitution. Enforcement of any assertion of the rights under the amendment against governmental infringement would be through State and Federal courts.

15. **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 rights? (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?**

Answer: No, I do not agree that S.J. Res. 35 could be construed to provide grounds to stay trials, reopen proceedings, or invalidate rulings. In addition, I do not believe that trials should be delayed or reopened in the other scenarios discussed. 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 therefore 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 violation of rights specified in the proposed

amendment should be separate from the outcome of the case.

16. **Do you have any concerns that the proposed amendment, by generating myriad court hearings-- and by authorizing courts to stay trials, reopen proceedings, and upset rulings in order to vindicate victims' rights — would result in substantial delays in the administration of criminal justice?**

Answer: No. This has not been the case in the 32 States that have passed constitutional amendments, and I do not foresee this happening when the Federal constitutional amendment is ratified. Initially, there may be some minor delays as the judiciary makes the necessary adjustments to accommodate requirements of the amendment. However, there is no reason to believe that such "minor delays," if any, would infringe on a defendant's constitutionally protected rights such as the right to a speedy trial. Instead, it is anticipated that courts would conduct a balancing test to balance defendants' constitutional rights against the constitutionally protected rights of the victims, within appropriate timelines.

17. **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 that she was being deprived of one of her constitutional rights?**

Answer: The Department believes that the answer provided to question number 15 would also be applicable here in that the proposed amendment could not be construed to provide grounds for a Federal court to stay trials, reopen proceedings, or invalidate rulings. Although the Department does not think that there exists a great likelihood that a Federal court would interfere with a State proceeding, based on abstention doctrine, *Younger v. Harris*, 401 U.S. 37 (1971), this is an issue that will ultimately be decided by the courts.

18. **In your testimony, you describe a 20-year old case involving the murder of Stephanie Roper, whose parents were barred by a Maryland State court from giving victim impact evidence at the time of sentencing. Since that time, the Supreme Court has made clear that juries may consider victim impact testimony, and Maryland has amended its constitution and laws to include rights for crime victims, including the right to be heard at sentencing. Why do we need a Federal constitutional amendment to establish a right that can be --and already is-- established by ordinary legislation?"**

Answer: Even though the Supreme Court, in *Payne v. Tennessee*, 501 U.S. 808 (1991), has affirmed that juries may hear victim impact testimony and the Maryland General Assembly has amended the State constitution to include rights for crime victims, victims continue to struggle to exercise rights afforded to them by statutes and State

constitutions. For example, a few months ago, in the case of *Sherri Rippeon v. State of Maryland,* the parents of a murdered child in Maryland were denied the opportunity to remain in the courtroom during a portion of the trial. Because the Appellants would both be material witnesses in the State's case-in-chief and on rebuttal, the Defense counsel expressed concern about the appellants hearing testimony from certain witnesses whom the defense might call to rebut. Consequently, all witnesses were barred from the courtroom including the parents. Even after testifying, the court ruled in favor of the defense that the parent's must be further excluded from the remainder of the trial citing the possibility that their presence could constitute a "reversible error." Finally, during the sentencing hearing the judge denied the mother the opportunity to express her opinion of the sentence, ruling instead that she could only testify as to how the crime had affected her life. This was in spite of the fact that Maryland had amended its constitution and adopted victims' rights legislation.

19. **You refer in your testimony to the Victims' Rights Clarification Act of 1997, which Congress passed in response to a trial court ruling in the Oklahoma City bombing case that would have barred victims from attending the trial if they intended to speak at sentencing. Are you aware of any Federal trial occurring after that law was enacted in which a victim was excluded from the courtroom because he or she intended to make a statement in relation to the sentence?**

Answer: We are not aware of any specific Federal case in which a victim's right to speak at sentencing has resulted in her being barred from participation at a Federal trial. However, there is a case before the Court of Military Justice in which this statute was found to be not applicable. *See U.S. v. Spann*, 48 M.J. 586 (1998).

20. **Earlier this week, the father of the first American killed in combat in Afghanistan - CIA agent Mike Spann - complained that he was not consulted about the Government's plea bargain with John Walker Lindh, which caps the maximum sentence at 20 years. A Justice Department official reportedly said that Spann's family members were informed of the plea negotiations, but were not consulted for their advice. If this is true, why was there no consultation with the victims in this case? Did the Department comply with its internal Guidelines for Victim and Witness Assistance, which requires Government officials to "make reasonable efforts to notify identified victims of, and consider victim views about, any proposed or contemplated plea negotiations?"**

Answer: Throughout this prosecution, the Department of Justice has been very sensitive to the grievous loss of the Spann family and their interest in this prosecution. Toward that end, the United States Attorney's Office for the Eastern District of Virginia took a number of steps to facilitate the Spann family's access to and knowledge about court proceedings. These steps included providing the Spann family copies of many of our pleadings, assisting the family in getting in and out of the courthouse, and responding to inquiries from members of the family.

The plea agreement itself was handled entirely in accordance with the Attorney General Guidelines for Victim and Witness Assistance (2000). Those guidelines state in part:

> Responsible officials should make reasonable efforts to notify identified victims of, and consider victim views about, any proposed or contemplated plea negotiations. In determining what is reasonable, the responsible official should consider factors relevant to the wisdom and practicality of giving notice and considering views in the context of the particular case, including, but not limited to, the following factors:
>
> (a) The impact on public safety and risks to personal safety.
> (b) The number of victims.
> (c) Whether time is of the essence in negotiating or entering a proposed plea.
> (d) Whether the proposed plea involves confidential information or conditions.
> (e) Whether there is a need for confidentiality.
> (f) Whether the victim is a possible witness in the case . . . .

As demonstrated below, the Government's contacts with the Spann family fully complied with the Attorney General's Guidelines.

Plea negotiations began in earnest around 6 p.m. on Friday, July 12, and the agreement was signed by the Government at approximately 1:45 a.m. on Monday, July 15, and entered in Court later that morning. Time was of the essence throughout this process.

Moreover, confidentiality was absolutely critical. Any disclosure to the Spann family would have had to been made with the full recognition that they were under no obligation of confidentiality. In contrast, the Government was most certainly under a strict obligation of confidentiality, for the following reasons:

> First, any public disclosure that plea negotiations were underway would almost certainly have resulted in a complete collapse of such negotiations, particularly where such a disclosure was attributable to the Government, directly or indirectly.
>
> Second, any public disclosure that the defendant was considering a plea could severely have prejudiced the defendant's right to a fair trial. At a minimum, it would undoubtedly have led the defense to renew their motion for a change of venue or to dismiss for prejudicial pretrial publicity.

The Government did notify the Spann family prior to the entry of the plea, and this notification took place as soon as practicable after the plea agreement was signed. Johnny Spann, who is Mike Spann's father, was notified by telephone at about 8:40 a.m. Central Standard Time, which was the time in Alabama where Mr. Spann was located.

Each of the three line prosecutors were present when the call to Johnny Spann was placed. Shortly after court proceedings concluded, the Government contacted Shannon Spann, Mike Spann's wife, and had a substantial discussion about the terms of the plea. As to both Johnny Spann and Shannon Spann, the Government offered each the opportunity to have further discussions about the terms of the plea. Johnny Spann took the Government up on that offer and met at length with one of the line prosecutors. Subsequently, United States Attorney Paul McNulty offered Johnny Spann the opportunity to meet with him to discuss the plea agreement. Johnny Spann did meet with Mr. McNulty at length on August 15, 2002. A similar offer was extended to Shannon Spann.

August 23, 2002

Via e-mail, facsimile and U.S. mail
The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Att: Patrick Wheeler

Re: Follow-up question from July 17, 2002 Constitution Subcommittee Hearing, "S.J. Res. 35, Proposing a Victims' Rights Amendment to the U.S. Constitution"

Dear Senator Leahy:

This letter responds to your August 16, 2002 question, following the above-referenced hearing at which I presented testimony on behalf of Safe Horizon, the nation's leading victim assistance and advocacy organization. You asked whether legislation such as S. 783, the Crime Victims Assistance Act proposed by yourself and Senator Kennedy, would do more to advance victims' rights than a Federal constitutional amendment. As stated in Safe Horizon's oral and written testimony submitted on July 17, statutory reform such as S. 783 would better serve victims than a constitutional amendment, provided that the statute's provisions are rigorously enforced.

Generally, Safe Horizon supports statutory as opposed to a federal constitutional approach for several reasons. First, the constitution should only be amended when statutory approaches will not suffice. Here, the reform sought by victims, which primarily concern notice of developments in criminal proceedings and the ability to be heard in hearings that effect the outcome of a defendant's case, can and have been addressed by state and federal statutes. Most victims' concerns center around under-enforcement of existing provisions, not the absence of constitutional recourse. In addition, we are concerned that the lengthy and arduous process of enacting a constitutional amendment could divert attention from enforcing current laws and that critical support for enforcement efforts could languish during that process.

Second, victims' rights should be addressed by statutory rather than constitutional reform because legislative responses often need to be amended to better ensure safety and serve victims' needs. Our July 17 testimony highlighted mandatory arrest laws as an example of victims' rights legislation that has been revisited and retooled to redress unintended

harmful consequences of those laws. Other reform efforts, such as laws authorizing protective orders, those requiring full faith and credit to be given to protective orders, and provisions governing the treatment of domestic violence in the context of divorce and child custody agreements, also have been amended over time to more adequately and safely address victims' needs. Laws governing issues such as victim notice and participation similarly may require revision. A constitutional framework simply does not afford the needed ability to quickly adapt to unfolding understandings about victims' circumstances and needs.

The proposed statute, S. 783, represents the type of approach that could lead to meaningful improvements for crime victims. Since you have not asked for a detailed analysis of that proposal, I will highlight our views on a few key provisions. However, we would be pleased to provide additional analyses upon request. Safe Horizon supports many of the bill's objectives. For example, S. 783 seeks to promote compliance by establishing procedures within the Department of Justice to receive complaints about enforcement. We agree that providing a process for review of decisions concerning victims' rights and oversight of enforcement efforts is critical. However, the proposal should include a mechanism for review outside the Department as well. In addition, we commend the proposed provision establishing pilot state programs to ensure compliance with victims' rights laws and associated procedures. However, we would want to ensure that the eligibility criteria for such programs are defined broadly enough to ensure that all states with substantial victims' rights programs are eligible. We also would want to ensure that funding for those programs does not reduce amounts otherwise available for victim assistance programs.

Similarly, we applaud efforts to increase funding for state victim notification systems. These systems are critical and state resources are limited. However, we would oppose funding such an initiative through VOCA funds. Some states may already have notification systems in place. Dedicating VOCA funding for this purpose could detract from other programs that a particular state needs more. Separate authorization should be provided for notification system enhancement.

In general, the provisions amending victims' rights to consultation and notice would improve victims' abilities to ensure their safety and play a meaningful role in the criminal justice process. For example, we agree with the section allowing for consideration of victims' concerns at pretrial release. However, definitions should be clarified to ensure that those designated as victim representatives who are authorized to speak would not include people charged with the crime. Absent such clarification, conflicts could arise in cases of child, spouse or adult abuse. We particularly support the provision encouraging consultation with victims at the plea stage, and would encourage strengthening the law to require the court to inquire whether the victim was afforded the opportunity to consult. We also commend the provision enhancing participatory rights at sentencing. By extending the introduction of victim witness statements from crimes of violence or sexual abuse to other crimes as well, the proposed legislation removes unnecessary restrictions on the types of crimes in which statements would be heard.

In addition, S.783 would amend the Victims of Crime Act (VOCA) to alter the distribution formula for funding of state and other programs that receive VOCA funding.

Presumably, those provisions would need to be amended to take into account the changes to the VOCA funding formula effected by the U.S. Patriots Act, enacted last year. Nevertheless, we are extremely concerned about any alteration to the formula that would reduce the amount of funds available to states for victim assistance programs. Current proposals would have the effect of reducing the amount of VOCA funds that are distributed to the states. We have urged Congress to eliminate the current cap on amounts distributed to the states, and at the very least, to increase the amount of the cap to $750 million, to help ensure adequate support for critical programs.

Congress created VOCA in 1984 to assist crime victims and support local crime victim assistance organizations. VOCA funding is one of the most important and fundamental ways the federal government supports state efforts to assist crime victims. Currently, numerous critical programs remain unfunded or underfunded. Safe Horizon operates a number of programs that could more fully address crime victims' needs if additional VOCA funding were available. For example, we could staff our Child Advocacy Centers, which assist child victims of sexual assault, to serve child victims over the age of 12. We could offer counseling and support groups to the children of crime victims that use our programs. We could more fully staff our community-based sexual assault programs to serve the all too many low income clients who seek their services. We could expand our domestic violence police programs, which currently operate in only 13 of New York City's 76 police precincts. Congress could go a long way toward assisting crime victims by ensuring adequate support for these key programs.

We commend the Committee's interest in improving federal law to address the rights of crime victims. Safe Horizon looks forward to working with you to craft legislative responses that best help victims recover from the crime and move on to safety and independence. Thank you.

Respectfully submitted,

Julie Goldscheid
General Counsel

107-94

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August 21, 2002

Honorable Patrick Leahy, Chairman
Committee on the Judiciary
Washington, D.C. 20510-6275

RE: SJ Res 35

Dear Senator Leahy:

Thank you for allowing me the opportunity to reply to your question: If we can pass legislation that will mandate all of the victims' rights in this amendment in Federal cases and give 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?

1. We should have improved Federal laws and incentives to the states, but these should be in addition to and not a substitute for a constitutional amendment; and Federal laws only apply to victims of Federal crimes, who represent only 1-2 % of our nations victims of criminal violence;

2. I believe that without an amendment, Congress cannot mandate that states provide basic enforceable rights for victims of crime;

3. Without a Federal Constitutional Amendment, a crime victim's right will not be considered *in pari materia* with a defendant's Federal Constitutional right in either Federal or state cases;

4. Constitutional standing for crime victims is needed in order for rights to be asserted and balance achieved; without an amendment, victims' rights will remain unenforceable and inferior.

It was a privilege and honor for me to testify supporting SJ Res 25 on behalf of those Americans whose voices can no longer be heard. Our nations' crime victims, like their offenders, deserve justice and fair treatment. We are depending on your leadership and support on this vital issue.

Sincerely,

Roberta Roper

Roberta Roper, Executive Director, Stephanie Roper Committee and Foundation, Inc.
Co-Chairperson, Natl. Victims' Constitutional Amendment Network

"one person can make a difference and every person should try - - "
Stephanie Roper

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NEWS RELEASE NEWS RELEASE NEWS RELEASE NEWS

ACLU Says Misguided Constitutional Amendment Hasn't Improved; Measure to Diminish Due Process Rights Unnecessary Change to Constitution

FOR IMMEDIATE RELEASE
Wednesday, July 17, 2002

Contact: Gabe Rottman
(202) 675-2312

WASHINGTON - Saying that the Constitution should never be modified to diminish individual rights, the American Civil Liberties Union today urged Congress to reject the disingenuously named "Victim's Rights Amendment."

"Nothing has changed since this amendment first came up for consideration -- it still doesn't do anything that can't be achieved through statute," said Rachel King, an ACLU Legislative Counsel. "Modifying the Constitution in any way - especially if the changes will diminish rights in this country - would be an extremely dangerous move."

The so-called Victims' Rights Amendment was the subject of a hearing in the Constitution Subcommittee, chaired by Sen. Russell Feingold (D-WI), of the Senate Judiciary Committee.

A Republican-controlled Senate rejected the amendment in 2000 after a strong backlash from conservatives, including George Will, and - ironically - several victims and victims' rights groups. Opposition centered around the amendment's potential to seriously diminish due process protections in America as well as fears over the enormity of amending the Constitution in a manner that would shrink the rights and freedoms accorded to all Americans.

Critics of the measure have also questioned its supporters' insistence that it take the form of a constitutional amendment; prominent legal figures in Washington and across the country have pointed out that many of the amendment's provisions can be implemented by statute. Not since Prohibition has the Constitution been changed in any way that would diminish civil liberty in America.

The ACLU said it has three main concerns with the proposed constitutional amendment:

- Victim's rights are already well protected both in state constitutions and state and federal statutes -- it is unnecessary to amend our founding documents?
- The proposed amendment is too specific; it reads more like a statute than a constitutional amendment. The Constitution and Bill of Rights were meant to codify broad principles of freedom in America like "freedom of speech" or "freedom of assembly." Specific prohibitions on freedom are meant to be dealt with in the law books.
- There is a good possibility that, were this to become part of the Constitution, the criminal justice system would be less effective as the amendment's unnecessary mandates on police and attorneys will hamper effective law enforcement and legal proceedings.

The ACLU's Letter to the Constitution Subcommittee can be found at:
http://www.aclu.org/congress/l071502a.html

The Honorable Senator Russ Feingold, Chairman
Constitution Sub-Committee
Senate Judiciary Committee
506 Hart Senate Office Building
Washington, DC 20510

The Honorable Strom Thurmond, Ranking Member
Constitution Sub-Committee
Senate Judiciary Committee
217 Russell Senate Office Building
Washington, DC 20510

July 15, 2002

OPPOSE: S.J. Res. 35, "An Amendment to the Constitution of the United States to protect the rights of crime victims."

Dear Senators Feingold and Thurmond:

We are writing to ask you to oppose S.J. Res. 35 introduced on April 15, 2002. Although worded differently, S.J. Res. 35 poses the same problems that amendments from previous Congresses have posed, most recently S.J. Res. 3 that was considered by the Senate Judiciary Committee in the 106th Congress. 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. 35 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.

It is noteworthy that the resolution only provides rights to victims of violent crime, not property crimes. Anyone who has been victimized by corporate malfeasance would not have rights under this proposal.

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[1] protecting victims' rights. The proponents of S. J. Res. 35 have not made the case that those measures fail to protect victims' interests.

Furthermore, there is not agreement with 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; Murder Victims Families for Reconciliation; and Survivors Advocating for a Fair 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.351 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. Greater effort should be made to enforce already existing laws instead of amending the federal constitution.

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. 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

[1] For a chart detailing all the state statutes and constitutional amendments go to http://www.nvcan.org.

the prosecution being unable to obtain a conviction against a guilty person – this would not serve society's or the victim's interests.

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 will be powerfully motivated 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. Whatever 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. 35 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

[2] 403 U.S. 388 (1971).

representative" is undefined, and could be interpreted as meaning an attorney. If victims are entitled to have attorneys 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 as well as pose a major conflict of interest. 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.

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

[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.

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 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. 35 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 discriminates between victims by only protecting victims of "violent" crimes and by treating victims differently depending on which state they live in. The amendment only protects the rights of victims of "violent" crime? This means that a person who has been the victim of a misdemeanor assault would have constitutional rights, but not an elderly widow who has been swindled out of her life savings. It also means that victims in different states will be treated differently because each state has its own laws defining crimes of violence and property crimes. 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. This would create serious equal protection problems.

The amendment 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 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. 35 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.

Please do not hesitate to contact us if you have any questions. Call Rachel King at (202) 675-2314. Thank you very much for your attention to this important issue.

Sincerely,

Professor Richard L. Abel
Connell Professor of Law
University of California at Los Angeles

Arwen Bird, Director
Survivors Advocating for an Effective System

Morton H. Halperin, Executive Director
Open Society Policy Institute

Wade Henderson, Executive Director
Leadership Conference on Civil Rights

David Kopel
Independence Institute*

Professor Lynn Henderson
Boyd School of Law -- UNLV

Professor Robert Mosteller
Chadwick Professor of Law
Duke Law School

Laura Murphy, Director
Washington National Office

American Civil Liberties Union

Sue Osthoff, Director
National Clearinghouse for the Defense of Battered Women

Erwin Schwartz, 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

Survivors Advocating For an Effective System

Empowering survivors of crime to advocate for restorative justice.

July 16, 2002

Arwen Bird, Director
Testimony in opposition to SJ Res. 35
United States Senate Judiciary Committee

I come before you to add the voice of crime survivors, to the many groups *opposed* to S.J. Res. 35, the 'Victims Rights Amendment'. Survivors Advocating For an Effective System was founded three years ago by myself, a survivor of a DUI crash and two other women, both of whom survive the murder of a loved one. Our mission, in part, is to empower survivors to advocate for restorative justice—the concept of a balanced and restorative approach to crime. This is why I am here today.

As advocates for survivors of crime, SAFES works to ensure that we participate in and are heard by our criminal justice system. We believe that survivors have the right to restitution, compensation and services to help us heal after victimization. We are actively working with state agencies and fellow advocates to make certain that survivors have access to all of these provisions. However, *amending the United States Constitution is not necessary to guarantee the rights of crime survivors.*

Crime survivors want to be informed, we want to feel safe and we want our criminal justice system to hold offenders accountable. If you, members of the United States Senate, want to help survivors heal after a crime has occurred--fund programs and agencies designed to help survivors get back on their feet after victimization. Increase federal funding for state agencies that are working directly with survivors of crime. Consider the concept of a parallel system of justice proposed by Susan Herman of the National Center for Victims of Crime, where survivors, regardless of the offender's status, could get the assistance they need to get their life back in order. Work to enforce the rights of crime victims that are already guaranteed, do not spend your time and energy degrading the rights of accused people, that does nothing to help us.

The provisions in this amendment are aimed at involving survivors in the criminal justice system. In a general sense we agree with this aim; moreover, we believe that considering the perspective of crime survivors is necessary to a balanced criminal justice system. However, including our perspective and facilitating our participation can be ensured through federal statues. Every state already has at least statutory rights for survivors and many states have constitutional amendments. A federal amendment would do nothing to improve upon these rights. Greater effort should be made in enforcing these existing laws, rather than creating new ones.

As survivors of crime who are also United States citizens, we benefit from the fundamental protections that are guaranteed through our state and federal constitutions. The federal Bill of Rights ensures certain protections for *all* citizens; this includes those who have been victimized by crime. The amendment before you would do nothing to improve upon our rights as survivors. Sadly, this amendment would only erode our rights as citizens.

S.A.F.E.S. • P.O. Box 42133 Portland, OR 97242 • (503) 274-2139 • fax (503) 241-3739 • www.crimesurvivors.org

BOLTON REFUGE HOUSE, INC.
P. O. Box 482 .... Eau Claire, Wisconsin 54702-0482
(715) 834-0628

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Toll Free: (800) 252-4357
FAX: (715) 834-9634

NOVUS ABUSER SERVICES
513 S. Barstow Street Suite #111
Eau Claire, Wisconsin 54701
PHONE: (715) 832-6887

United States Senator Feinstein

July 16, 2002

Dear Senator Feinstein:

Bolton Refuge House, the oldest domestic violence and sexual assault victim's shelter in the state of Wisconsin, has been a long-term supporter for victim's rights. We supported and participated in gaining the Victim's Rights Wisconsin Constitutional Amendment. Quite some time ago, the Board of Directors for Bolton Refuge House went on record supporting a United States Constitutional Amendment for Victim's Rights. We wish to reaffirm our position. Victims of crimes should not have to rely on the luck of the draw to determine what rights and protections they receive. These rights should be assured regardless of what state the victim lives in. Therefore, we greatly support the Victim's Rights Amendment to the United States Constitution.

Sincerely,

Gerald L. Wilkie
Executive Director
Bolton Refuge House, Inc.

Cc: United States Senator Russell Feingold

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

COVA

Colorado Organization for Victim Assistance

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
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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

Statement
United States Senate Committee on the Judiciary
S. J. Res. 35, Proposing A Victims' Rights Amendment to the United States Constitution.
July 17, 2002

The Honorable Russ Feingold
United States Senator , Wisconsin

This hearing will come to order. Good morning. Welcome to this hearing of the Senate Judiciary Committee's Subcommittee on the Constitution. I want to thank everyone for being here today.

This hearing concerns Senate Joint Resolution 35, a proposed victims' rights amendment to the U.S. Constitution. I agreed to hold this hearing at Senator Feinstein's request. And I did so, even though I oppose her proposed amendment, because I agree with her goal: to protect and enhance the rights of victims of crime.

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 207 year history of the US 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 it is difficult to believe that the basic calculus of prosecutor, defendant, and victim has changed much since the foundation of the Republic. There was some debate on this when we considered the amendment on the floor in the last 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 the needs of all victims are impossible to foresee. 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 11. And now, we are in the process of amending that statute to cover victims of other terrorist attacks.

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 I have considered since I became a Senator, this one is perhaps the least troubling 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. Thirty-three 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. They have never provided a convincing justification for that refusal in my opinion.

Finally, I am also concerned that a victims' rights amendment could jeopardize the ability of prosecutors to investigate their cases, to prosecute suspected criminals, and to 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.

Let me now turn to the ranking member for his opening remarks.

Donna J. Ferres
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Home (239) 768-1310
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DFerres@aol.com

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

GRAND LODGE
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STEVE YOUNG
PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

16 July 2002

The Honorable Dianne Feinstein
United States Senate
Washington. D.C. 20510

Dear Senator Feinstein,

I am writing on behalf members of the Fraternal Order of Police to advise you of our support of S.J. Res. 35, a constitutional amendment providing for rights for the victims of violent crime.

The rights of criminals are protected by the United States Constitution, but their victims have no such guarantees. Your amendment will secure basic rights for the victims of violent crime similar to those already adopted by 32 States across the country. The amendment does not infringe upon the rights of criminals, but will provide victims, whose personal safety is at stake, with due process rights. It creates seven procedural rights for victims, including the right to be informed, present and heard throughout the judicial process. They have already suffered injury as a result of crime and deserve to have constitutional protections from further harm. This amendment gives them these rights. If we can protect the rights of criminals, we can certainly protect the rights of their victims.

On behalf of the more than 300,000 members of the Fraternal Order of Police, I commend you for for your leadership on this important issue and look forward to working with you to pass the amendment. If I can be of furtherassistance, please contact me or Executive Director Jim Pasco in my Washington office.

Sincerely,

Steve Young
National President

Department of Justice

STATEMENT

OF

THE HONORABLE JOHN W. GILLIS
DIRECTOR
OFFICE FOR VICTIMS OF CRIME

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

REGARDING

S.J. Res. 35

THE PROPOSED VICTIMS' RIGHTS AMENDMENT
TO THE UNITED STATES CONSTITUTION

ON

WEDNESDAY, JULY 17, 2002
WASHINGTON, DC

Good morning, Chairman Feingold, Senator Thurmond, and distinguished members of the subcommittee. Thank you for the opportunity to present the views of the administration on the proposed amendment to the Constitution of the United States to establish basic rights for victims of violent crime.

The administration strongly supports S.J. Res 35, the Victims' Rights Amendment. There is broad-based support for the Amendment across the country. Democratic and Republican leaders, liberal and conservative scholars, and Americans of every persuasion have rallied in support of this important cause. Crime victims encourage your support in our struggle for human dignity and fair treatment.

As a crime victim, a retired law enforcement officer, a former chair of the California Board of Prison Terms, and a citizen who works to uphold justice and advocates for crime victims' rights and services, I am honored by the confidence placed in me by President Bush and Attorney General Ashcroft to ensure that crime victims' rights and needs are addressed at the national and state levels as the Director of the Justice Department's Office for Victims of Crime. The Office for Victims of Crime (or OVC) is committed to enhancing the Nation's capacity to assist crime victims and to providing leadership in an ongoing effort to change attitudes, policies, and practices and with a determination to promote justice and healing for all victims of crime. OVC administers the Crime Victims Fund, which is the Justice Department's sole source of funding for services to crime victims. Through the Crime Victims Fund, OVC provides training and technical assistance for victim advocates and allied professionals, supports demonstration projects in communities, and disseminates information about victim issues.

I know firsthand the personal, financial, and emotional devastation that violent crime exacts on its victims. As a survivor of a homicide victim, I testify before you today with the unique advantage of understanding the plight that crime victims and their families face in the criminal justice system. I know the players and their responsibilities, and my experience has

given me the ability to work within the system. More typically, however, when a person is victimized by crime, he or she is thrust into a whole new world in which the state's or the government's needs take priority. In 1982, when the Task Force on Victims of Crime, commissioned by President Reagan, examined the plight of crime victims in America by surveying victims, victim advocates, and criminal justice professionals around the country, one victim lamented:

> "They explained the defendant's constitutional rights to the *nth* degree. They couldn't do this and they couldn't do that because of his constitutional rights. And I wondered what mine were. And they told me, I haven't got any."[1]

Chairman Feingold, as you know, on April 16, President Bush announced his support for the Feinstein-Kyl amendment to the United States Constitution to protect the rights of crime victims. As the President so eloquently stated:

> "Too often, our system fails to inform victims about proceedings involving bail and pleas and sentencing and even about the trials themselves. Too often, the process fails to take the safety of victims into account when deciding whether to release dangerous offenders. Too often, the financial losses of victims are ignored. And too often, victims are not allowed to address the court at sentencing and explain their suffering, or even to be present in the courtroom where their victimizers are being tried. When our criminal justice system treats victims as irrelevant bystanders, they are victimized for a second time."

Although more than 27,000 victims' rights laws have been enacted, victims' bill of rights have been passed in every state, and 32 states have passed constitutional amendments protecting victims' rights, crime victims still struggle to assert basic rights to be notified, present, and heard.

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[1] President's Task Force on Victims of Crime, Final Report,1982

As one victim stated:

> "We were thrown into the criminal justice system. We didn't do anything wrong, but we felt over and over again that it wasn't focused on Shannon being killed, but technical procedures–things that we really didn't care about.... We have to fight those urges and those feelings of trying to take justice in our hands and turn it over and let the criminal justice system do what they are supposed to do, and then we sit there and we feel victimized over and over again."[2]

Eighteen states lack constitutional victims' rights amendments. The 32 existing state victims' rights amendments, and other statutory protections, differ considerably across the country. While we respect the work done by the states on crime victims' rights issues – and many have gone beyond what is proposed in S.J. Res. 35 – the only way to provide a basic level of consistent and uniform crime victims' rights across the country is to amend the Constitution through the passage of the Victims' Rights Amendment.

Further, there is no uniformity in the implementation of crime victims' rights laws in these states. A recent study funded by the National Institute of Justice[3] found that, even in states with strong victims' rights laws, only about half of all victims surveyed were notified of sentencing hearings--notice that is critical if they are to exercise their rights to seek restitution and to inform the court of the impact of the crime on them.

The right to notification of an assailant's release can be a matter of life and death. John and Pat Byron of Kentucky are a vivid reminder of the importance of, not only having rights of

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[2] Interview with a victim for the Council of State Governments survey of Crime Issues in the Northeast.

[3] "Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims," funded by the National Institute of Justice and prepared by the National Center for Victims of Crime.

notification established, but also implemented. Their daughter Mary was murdered in 1993 by a former boyfriend on her 21st birthday–a few days after he posted bail on a charge of raping her. He had also stalked and intimidated her in the past. Fearing for her life, Mary had asked authorities to notify her of his impending release. The notification never came. Mary was killed before she had the opportunity to take precautions she had planned.

Even in states with strong crime victims' rights laws or ratified victims' rights constitutional amendments, a victim's ability to assert his or her rights may be nullified by judicial decisions. State crime victims' rights laws lack the force of federal constitutional law and thus may be given short shrift. Federal law, however, directly covers only certain violent crimes, leaving non-federal crimes to state prosecutions and state law. Roberta Roper's case demonstrates how crime victims are often excluded from attending court proceedings in Maryland.

In April 1982, 22-year-old Stephanie Roper was kidnaped, brutally raped, tortured, and murdered by two men. Her parents, Roberta and Vincent Roper, wanted to be involved in every aspect of the judicial proceedings, not wanting to read about what was taking place in the newspapers. During the testimony in the death penalty phase, Roberta's right to provide a victim impact statement was denied. Under a year-old Maryland law, the court could (but did not have to) allow victim impact evidence at the time of sentencing. The State's Attorney put Roberta on the stand to talk about her daughter's life and the impact of her death on the family. But the defense attorney objected, arguing that the testimony would be unfairly prejudicial to the defense. The judge agreed and told Roberta to step down, ruling that the impact of the murder on her family was "irrelevant." Roberta listened as the defendants were able to provide a host of witnesses, including family members, to testify on behalf of the man who had kidnaped, brutally raped, tortured, and murdered her daughter.

In the Oklahoma City bombing case, a U.S. district court judge presented victims with the choice to either attend the trial or speak at sentencing, despite federal law which provides crime

victims a right to be present at "all public court proceedings related to the offense...." The victims and several national organizations filed an appeal to reverse the judge's ruling. However, the U.S. Court of Appeals for the 10th Circuit affirmed the judge's ruling, which effectively barred from the courtroom victims who intended to speak at sentencing. Congress thereafter intervened, passing legislation[4] prohibiting the U.S. district judge from ordering crime victims excluded from the trials of the defendants because the victim may testify or make a statement during the sentencing about the effect of the offense on the victim and the victim's family. [18 U.S.C. § 3593].

In 1980, Wisconsin was the first state to enact a victims' bill of rights. However, legislators and policymakers soon realized that the mere passage of statutory rights for victims did not yield the full force of the law that they had intended. In 1993, with 84% ratification by the voters, the Wisconsin legislature acted to correct this problem by passing a victims' rights amendment to the state constitution. In 1991, the state created a Victim Resource Center, where officials intervene on behalf of victims and present the victim's concerns and their findings to the agency in question. However, Victim Resource Center officials had no authority to prescribe remedies for violations of a victims' statutory or constitutional rights. In response, the legislature in 1997 created a Crime Victim Rights Board to enforce victims' rights. The result is that the Board has the authority to impose sanctions for violations of victims' rights, though it cannot guarantee victims' rights will not be abridged. Despite the elaborate mechanisms to protect the rights of crime victims in Wisconsin, the State Attorney General and other victim advocates recognize the need to support those efforts with a federal amendment to the Constitution.

Even with the progression of efforts to secure fundamental rights for crime victims in Wisconsin, victims' rights are not uniformly observed. Sadly, Wisconsin is not unique in its

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[4] See Victims' Rights Clarification Act of 1997 (Public Law 105-6)

experience to make victims' rights meaningful. Similarly, other states have experienced challenges in fully implementing victims' rights laws.

A federal constitutional amendment is the only legal measure strong enough to rectify the current imbalance and inconsistencies among crime victims' rights laws and can establish a uniform national floor for crime victims' rights. A federal amendment to the United States Constitution will be the vehicle by which compliance with crime victims' rights laws can be enforced. The passage of a federal constitutional amendment will provide the means to make crime victims' rights a reality.

The Constitution of the United States should never be amended for transient reasons. There is compelling reason, however, to amend the Nation's basic charter to protect the rights of crime victims. Specifically, the amendment would provide victims of violent crime the right to:

- reasonable and timely notice of any public proceeding involving the crime or the release or escape of the accused;
- not be excluded from these public proceedings;
- reasonably be heard at public release, plea, sentencing, reprieve and pardon proceedings, and
- decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender.

In short, the amendment would ensure that the views of crime victims are considered and that crime victims are treated fairly throughout the process. It would also ensure speedy resolution of their cases, promote victims' safety, and safeguard victims' claims for restitution.

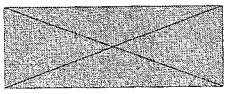
The proposed amendment makes some basic pledges to Americans. Our legal system properly protects the rights of the accused in the Constitution. But it does not provide similar protection for the rights of crime victims, and that must change. We must guarantee these constitutional rights for all victims of violent crime in America.

The protection of crime victims' rights is one of those rare instances when amending the

Constitution is the right thing to do. With bipartisan support, we can balance the scales for victims of violent crime by establishing in the U.S. Constitution our basic rights.

I would note that the Department is continuing to review the text of the joint resolution, and that we look forward to working with the Committee to ensure its sufficiency in all respects. The Department's views letter will be forthcoming shortly.

This concludes my statement, Mr. Chairman. I would welcome the opportunity to answer any questions you or members of the subcommittee may have.



Testimony of Julie Goldscheid
General Counsel
Safe Horizon

Hearing before the
Senate Judiciary Subcommittee on the Committee on
"S.J. Res. 35, Proposing A Victims' Rights Amendment to the
United States Constitution"

Wednesday, July 17, 2002

Good morning Mr. Chairman, Senator Feingold and other members of the Committee. Thank you for providing Safe Horizon the opportunity to testify today. My name is Julie Goldscheid, and I am General Counsel of Safe Horizon, the nation's leading victim assistance organization. Our mission is to provide support, prevent violence, and promote justice for victims of crime and abuse, their families, and communities. We began in 1978 as a small project in the Criminal Court in Brooklyn, New York, helping to give victims a stronger voice and role in the criminal justice system. Since then, we have pioneered victim assistance programs in criminal and civil courts, schools, police precincts, and communities throughout the City of New York and beyond.

Safe Horizon assists over 250,000 crime victims each year through over 75 programs located in all five boroughs of New York City. Advocating for victims' participation in the criminal and civil justice systems is central to our work. Every day, in our family and criminal court offices, police

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programs, domestic violence and immigration legal services programs, domestic violence shelters and community offices, our staff of over 900 inform victims about their rights, support them with counseling and practical assistance, and, when necessary, intervene to ensure that their rights and choices are respected. In the aftermath of the September 11 terror attacks, we have provided crisis intervention, support counseling, information and referrals and service coordination to victims of the attacks. We have distributed nearly $100 million in financial assistance to over 45,000 victims.

While we are ardent supporters of victims' rights, we oppose the proposed victims' rights amendment out of a concern that it will not enhance, and could in fact impair, crime victims' abilities to meaningfully participate in the criminal justice system. Our opposition is informed by the victims we serve, who are primarily urban victims of color living in economically depressed neighborhoods, and who face complex challenges in asserting their rights. Enhancement and vigorous enforcement of state and federal statutory rights, rather than a federal constitutional amendment, is the best way to advance their concerns.

Victims need enforcement of statutory rights, not new constitutional protections.

Every state, including New York, has enacted statutory or constitutional protections for crime victims. While in some cases those protections could be improved, victims' overwhelming need is for enforcement of existing rights, not for a federal constitutional amendment. We work with local law enforcement to ensure that our clients' cases are prosecuted and that they are informed about progress as prosecutions proceed. Support for efforts such as enhancing notification systems and providing adequate resources to support victims who want to participate in criminal proceedings, would go a long way

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toward advancing victims' rights. We are concerned that the lengthy and arduous process of enacting a constitutional amendment could divert attention from enforcing current laws and that support for those enforcement efforts could languish during the process.

Victims' rights are critical but not the same as defendants' rights.

Our clients' experiences demonstrate that those who are victimized by violent crime suffer in numerous and often devastating ways. Participatory rights are essential to help them achieve justice. But crime victims, unlike criminal defendants, do not face the loss of fundamental rights and liberty at the hands of government. The risk of unwarranted state power being used against an individual was historically, and still is, at the core of our constitutional safeguards, and makes it appropriate for defendants' rights to trump those of victims when due process and liberty interests are at stake. Many of our clients share the concern that defendants' rights are rigorously enforced. This is particularly true for those whose experience is compounded by race, gender or other forms of discrimination.

Victims of domestic violence are especially at risk.

Crimes of domestic violence represent a high proportion of the total number of violent crimes. Safe Horizon is particularly concerned about the potential impact of the proposed amendment on the approximately 200,000 domestic violence victims we serve each year. Batterers frequently make false claims of criminal conduct, which often result in arrest of the true victim. Under the proposed

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amendment, a batterer whose false accusations result in prosecution could be accorded "victim" status and could benefit from all the proposed constitutional rights. For example, batterers could object to a mother's release even if she is the only one who cared for their minor children. The same concern applies to cases in which domestic violence victims strike back at their batterers in self-defense, as well as to dual arrest cases or cases in which victims are arrested as a result of misapplication of mandatory arrest and mandatory prosecution policies.

Victims' rights reform requires the flexibility of statutory approaches

The history of victims' rights legislation illustrates the importance of instituting a flexible framework that can be amended over time. Domestic violence law reform in particular is rife with examples of ways the law has changed to respond to well-intentioned laws that unintentionally prejudice victims. To take but one, mandatory arrest laws were first enacted in response to widespread reports that police failed to take domestic violence cases as seriously as cases involving similar violence between strangers. However, as those laws began to be enforced, the secondary problem of dual arrests emerged. Instead of making no arrest at the scene of a domestic dispute, police would arrest both parties, particularly if there was any allegation of violence by both individuals or if one party struck back in self-defense. This led battered women to be subject to criminal charges, with particularly dire consequences in terms of child custody. Primary aggressor statutes, in which police are required to assess only the actual perpetrator, emerged to address mandatory arrest policies' unintended results. This reflects the ways that law enforcement policies must adapt as awareness and understanding of crimes such as

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domestic violence evolves. A statutory approach provides that flexibility, while a constitutional amendment, which would take years to amend, does not.

Constitutionally recognized rights for victims could impair both victims' and defendants' rights.

The specter of constitutionally grounded conflicts between victims' and defendants' rights ultimately can prejudice victims by increasing rather than reducing delay. Collateral litigation over tensions between defendants' and victims' interests would take on constitutional proportion and increase the overall length of litigation without meaningfully enhancing victims' participation. For example, defendants could challenge a victim's successful assertion of her interest in a speedy trial if it resulted in the prosecution proceeding with the case before it is ready for trial. Litigation likely would arise over issues such as the extent to which a victim could participate in plea agreements, or the validity of a charging decision if the victim received no advance notice. Similarly, in New York State (as elsewhere) potential witnesses are routinely excluded from the courtroom so that their testimony will not be tainted by that of other witnesses and unfairly prejudice the defendant. Where the victim is also a witness, judges will have to weigh the defendant's right to a fair trial against a victim's newly created right not to be excluded.

Ultimately, both victims' and defendants' interests are best served by a trial in which the defendant's due process rights are fully protected. Full respect for defendants' rights will reduce the possibility of a successful appeal and protracted retrial with its attendant uncertainty and stress. Our concerns about defendants' rights are not allayed by the proposed amendment's flat statement that the rights of victims are "capable of protection without denying the constitutional rights of those accused of

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victimizing them." That clause would not prohibit rulings that could diminish long-existing and fundamental rights accorded defendants under the constitution.

The amendment's ambiguity will lead to compounded problems.

The proposed amendment would allow victims' rights to be restricted "when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." While it may be the drafters' intention to protect individuals such as domestic violence victims who are criminal defendants, it is far from clear how those exceptions would be defined. For example, at what point in the trial process would there be a ruling to determine whether a "compelling necessity" warranted restricting victims' newly granted rights? How and when would domestic violence victims assert their status? Would they be able to do so without compromising their Fifth Amendment

rights? What evidence would be sufficient to persuade a court that the defendant is a victim of domestic violence – particularly if there are no police records or orders of protection, as is often the case.

Similarly, the amendment raises new questions such as how to resolve conflicts between victims of the same attack, or conflicts between the prosecutor and the victim. These unanswered questions illustrate the difficulty of knowing the impact of this proposed amendment, whether the proposed rights would be meaningful and practicable, and whether they might rebound to harm some victims.

Conclusion

In conclusion, the proposed constitutional amendment may be well intentioned, but good

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intentions do not guarantee just results. Safe Horizon is wholeheartedly committed to advancing crime victims' interests and needs. Our nearly 25-year history speaks for itself. We believe, however, that considerable progress with respect to victims' rights has been made in New York and elsewhere in recent years. Statutory frameworks requiring officials to take steps such as notifying victims about court proceedings must be enforced and services for victims need support. When so much remains to be done to enforce existing victims' rights provisions and to expand the support services so vital to victims, we find it difficult to justify the extensive resources needed to pass a constitutional amendment.

Our position regarding the proposed amendment remains firm in the aftermath of the September 11 attacks. If anything, our experience serving the range of victims affected by the attacks -- family members, injured people, displaced residents and displaced workers -- highlights the need to strengthen statutory protections, mandate enforcement of existing laws, and support the range of services crime victims need. Our clients seek services, support, and access to benefits. Those clients who are undocumented seek assurances that they won't be penalized as a result of seeking assistance from private and government agencies. These experiences reinforce the importance of carefully balancing defendants' and victims' rights.

After careful consideration, we have concluded that the proposed amendment would at best be symbolic, and at worst harmful, to some of the most vulnerable victims. We are concerned that it could prove meaningless for the majority of victims whose cases fail to be prosecuted. Safe Horizon looks forward to working with all those concerned about victims' rights to advance legislative and policy

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responses that most fully respond to victims' needs.

I would be pleased to answer any questions. Thank you.

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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

July 15, 2002

The Honorable Dianne Feinstein
Chairman, Senate Judiciary Committee
Hart 807
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 35, 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

United States Senate
Committee on the Judiciary

Testimony of

Marsha A. Kight

S.J. Res.35, the Proposed Victims' Rights
Amendment to the United States Constitution

I sat through the hearing on Wednesday, July 17, 2002 and heard testimony for and against SJ Res. 35. Julie Goldscheid and others proposed, rather than constitutional rights for victims, that there be more funding of victims' services programs.

As you know, on April 19th, 1995, my daughter, Frankie Merrell, was violently murdered in the bombing of the Alfred P. Murrah Federal Building in Oklahoma City. After having heard the testimony, I want to share my views.

How many more of our citizens have to be slaughtered before we unite and cease to tolerate violence in our country? How many of our sons and daughters, brothers and sisters, friends, spouses, mothers and fathers have to fall victim to violence before we end the indignities in our courts to which victims are subjected every day?

I have experienced first hand these indignities. For me this debate is neither about money nor abstract constitutional theory. It is not about what the lawyers or the law professors or the experts have to say. For me, this debate is about my daughter and the voice that I must now be for her.

I am not in favor of taking rights away from accused or convicted offenders. Nothing in the language of this amendment will do so. Courts will always be able to protect the rights of defendants. Rather, I plead for fairness by asking you to expand upon the rights that all Americans enjoy. Civil liberties, which are sorely lacking for victims, are recognized as fundamental for everyone.

Let me remind the Committee of what happened to me and to all the victims from the Oklahoma City bombing case.

On a June 1996 morning, Judge Richard P. Matsch informed family members and survivors who were seated in his courtroom that they had the duration of the lunch hour recess to decide whether they would remain as observers of the trial, either in the Denver courtroom or in Oklahoma City on closed-circuit television, or participate as impact witnesses during the penalty phase of the trial. He informed us we could not do both even though the laws written by Congress appear on their face to permit both. For victims who had lost their loved ones, this was a shocking, painful moment and yet another victimization – this time by the judicial process.

Although a grueling decision like this normally requires very careful thought, every family member and survivor tearfully made his or her choice during the lunch hour. Many, who had just arrived for the hearings, left in dismay, excluded from the most important judicial process of their lives and in the history of this nation.

I chose to remain, and upon return to Oklahoma City, began seeking a way to reverse Judge Matsch's decision on behalf of all family members and survivors of the bombing, as well as all victims of crime.

Paul Cassell, then a Utah attorney and professor of law, took up our plight and filed a *writ of mandamus* in the Tenth Circuit Court of Appeals in Denver, Colorado, asking that the Court rescind Judge Matsch's order. Without a hearing, the Appeals Court's three-judge panel ruled that the 89 victims named in that petition, along with the National Organization for Victim Assistance, did not have standing to have their rights vindicated.

We then filed an *En Banc* petition asking that all judges in the Tenth Circuit Court of Appeals review this decision. Once again, we were denied a voice.

Knowing the time constraints before the trial, the decision was made by all concerned to take our case to the United States Congress. Justifiably, H.R. 924 passed the House of Representatives and the Senate and was signed by President Clinton in less than two weeks' time.

In a non-partisan act, President Clinton and Congress took a giant step toward the fair treatment of victims by enacting the "Victim Rights Clarification Act of 1997." We were hopeful that the will of the people would now prevail in the courtroom. We were wrong.

Judge Matsch did rescind his Order; however, incredibly, he left open the possibility that victims might still be excluded during the sentencing phase if they choose to remain in the courtroom throughout the trial. He determined that there could be a Constitutional defect in the new law and that our hearing the trial testimony could improperly influence the impact testimony of some individuals. Judge Matsch concluded that the time to hear these challenges would come after the conviction, if ever there was such a time.

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Due to the cloud over his ruling, on April 4th, 1997, we filed another motion seeking clarification, stating that victims' impact witnesses continue to confront the choice of the exclusion of their impact testimony or remaining eligible to testify at the cost of losing the right to observe the trial. The prosecutors advised us that, not withstanding your new law, victims should not view the trial proceedings if they wished to be heard at sentencing.

The victim's right to be heard must be made as sacred as the defendant's right to counsel. It must be protected as the accused right to remain silent. It must be given the same consideration as an indigent criminal who has the right to free representation.

Society itself is harmed by violent crime. Only the victims of a criminal act can testify to both the physical and emotional pain it causes. Just as defendants have the right to introduce mitigating circumstances at sentencing and parole hearings, victims must have the right to share the impact of crime on their lives with presiding officials.

The right of victims to present impact statements at all appropriate stages of the judicial process must be absolute. My personal experience may be instructive.

I attended the trials involving my daughters murder, but not because I did not want to testify at the sentencing hearing, but because I wanted to speak for myself, Frankie and my granddaughter and other victims whom I came to know. However, the prosecution team told me, under the current rules, I was ineligible to be an impact witness because I was, (and remain) a member of a minority group, those who oppose the death penalty.

Had a Constitutional Amendment already been passed, I could have accepted an implementation regulation limiting the number of impact witnesses, since 2,500 of us qualified as victims of this

crime. I could have accepted that a random drawing to speak could result in my exclusion from the process. What I could not accept is some ideological, religious, or philosophical test that automatically excludes people like I from speaking

Crime victims are liberals and conservatives, rich and poor, for and against the death penalty, vengeful and forgiving, weak and strong, black, white and every color in between. None of us should be barred from speaking as a result of our views or social status.

The best-funded victim witness programs cannot establish rights where there are none. No amount of money could have opened the doors to the courthouse. The law itself silenced me. This debate is not about silver. It is about justice.

Please accept this as my testimony for the record.

Marsha A. Kight
136 N. Galveston Street
Arlington, VA 22203

Statement
United States Senate Committee on the Judiciary
S. J. Res. 35, Proposing A Victims' Rights Amendment to the United States Constitution.
July 17, 2002

The Honorable Patrick Leahy
United States Senator , Vermont

I want to welcome our witnesses today and thank them for coming. Proposals for amending the United States Constitution are serious matters. I appreciate the time that you all have taken to share your experiences and expertise on this important matter.

I also want to welcome Susan Russell from my home state of Vermont, who has worked on behalf of crime victims for the past several years. In the best tradition of Vermonters taking part in the democratic process, Ms. Russell traveled to Washington this week specifically to participate in our discussion about the proposed constitutional amendment.

The treatment of crime victims is of central importance in a civilized society. The question is not whether we should help victims, but how.

I have long supported the rights of victims. In fact, my efforts have included trying to pass into law many of the rights included in the proposed constitutional amendment, such as increased rights of participation for victims at trial and sentencing, and increased notice to victims of proceedings.

For many years, Senator Kennedy and I and other members of this subcommittee have proposed a statutory route to our common goal of establishing stronger rights and protections for victims of crime.

Our bill, the Crime Victims Assistance Act (S.783), would enhance the rights and protections afforded to victims of Federal crime and establish innovative new programs to help promote compliance with state victim's rights laws. I am pleased that I was able to get portions of this bill included in last year's antiterrorism legislation, the USA PATRIOT Act. But the bill's important provisions respecting victims' rights have yet to be considered.

We also have unfinished business with respect to the annual cap on spending from the Crime Victims Fund, which has prevented millions of dollars in Fund deposits from reaching victims and supporting essential services. The USA PATRIOT Act included a proposal from the Crime Victims Assistance Act that would have allowed more money to be distributed to the states for victim compensation and assistance. Unfortunately, this provision was struck weeks later by the Commerce-Justice-State Appropriations Act. We should revisit this issue, so that we do not continue to impose artificial caps on spending while substantial needs are unmet.

In this regard, I should note that not even a constitutional amendment could prevent the undoing of legislation intended to help victims: That needs constant vigilance and hard work. A constitutional amendment would be a false promise if victims thought their work would be done if only an amendment were passed.

I urge my Republican colleagues to take a careful look at the Crime Victims Assistance Act before jumping on the constitutional amendment bandwagon. 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. We can accomplish our goals far more quickly with legislation than with an amendment to the 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 over 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 proposed amendment.

So I have the same question today for all of our witnesses: Why is this amendment necessary? Why are federal and state laws inadequate to protect the rights of crime victims?

One of the leading academic proponents of the proposed constitutional amendment – Harvard law professor Lawrence 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?

I also hope that our witnesses will share their views about the text of the proposed constitutional amendment.

This proposal has been through more than 60 drafts to date, and though we have had hearings on it in the past, this is the first hearing on the new version that was unveiled just three months ago. I would be interested to know what changes have been made, and what those changes mean. We must not forget that this is a constitutional amendment we are considering, and every single word counts.

I look forward to hearing from each of our witnesses and to continuing to work with my colleagues on the Committee on how we can most effectively and appropriately enhance the rights of victims of crime.
#####

Senator Dianne Feinstein
United States Senate
Washington, DC

July 15, 2002

Dear Senator Feinstein:

I have been informed that Arwen Bird is testifying against your Crime Victims Rights Amendment this week.

I am the elected District Attorney in Astoria, Oregon, immediate past president of the Oregon District Attorneys Association and Oregon State Director of the National District Attorneys Association. The views I am expressing are my own and do not necessarily reflect the state and federal organizations to which I belong.

I have been involved in the Victims Right movement in Oregon for more than 17 years. As a Deputy DA I helped passed Oregon's first statutory crime victims right law - Measure 10 - in 1986. It was strongly opposed by criminal defense attorneys who predicted its passage would bring an end to civil rights for defendants. Criminal defense lawyers continued to fight virtually every part of Measure 10 aftet it overwhelmingly passed.

Over the next 12 years it became apparent that in Oregon it was necessary to incorporate these statutory victims rights into the Oregon State Constitution. In 1998 Oregon voters passed Measure 40, a far reaching victims rights law. It was successfully challeneged on technical grounds and in 1999 a series of seven Measures (69 through 75) were placed on the ballot through initiative.

Arwen Bird, who was seriously injured by a drunk driver who was successfully prosecuted by the Multnomah County District Attorneys Office, has taken a major role in opposing virtually every victims rights law that has come before voters in the last three years. Bird claims to represent crime victims but has consistently accepted contributions from criminal defense lawyers whose interests couldn't be farther from that of crime victims.

Ms. Bird can hardly claim she supports victims rights when she opposed even the most basic measure (Measure 69) which did nothing more than say that crime victims rights were constitutional. Bird has also helped lead campaigns to abolish the death penalty and was a leading voice in an effort to release more than 1000 violent offenders through a failed initiative (Measure 94 in 2000) that sought to retroactively overturn Oregon's relatively mild mandatory sentencing laws for violent and sexual felons.

While she certainly has every right to voice her opinion it is widely accepted that her "group" is a front for criminal defense attorneys and those who attack virtually any law that seeks tougher penalties for violent criminals. The group she led in 1999 called "Crime Victims for Justice" was slammed even by liberal journlaists who opposed the victims rights measures as running a "dirty campaign" (Willamette Week, October 20, 1999).

Ms. Bird speaks for herself, but certainly not for the vast majority of crime victims. She has yet to meet any law protecting crime victims she will support. She personally received justice both through the criminal justice system and through a large civil settlement. Unfortunately most crime victims aren't so lucky and need the protection of your amendment.

Joshua Marquis
District Attorney
Clatsop County
Astoria, OR

Joshua K. Marquis
District Attorney

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Senator Diane 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

OFFICE OF DISTRICT ATTORNEY

Milwaukee County

E. MICHAEL McCANN • District Attorney

Robert D. Donohoo
Jon N. Reddin
Carol Lynn White
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Joan O. Agrade
Stephen W. Sawyer

Senator Russell D. Feingold
506 Hart Senate Office Building
Washington, D.C. 20510-4904

July 19, 2002
Sent Via Fax #202/228-0466

RE: Proposed Victim Rights Amendment to the United States Constitution

Dear Senator Feingold:

I strongly support victims' rights, and have supported and continue to support Wisconsin legislation advancing the rights of victims and witnesses, and imposing certain obligations upon district attorneys and others to facilitate those rights. At the same time, I oppose the adoption of an amendment to the United States Constitution on this subject.

Wisconsin from the early 1970s forward has in many ways led the victim rights legislative movement. Chapter 950 of the Wisconsin Statutes details the rights of victims and imposes obligations on district attorneys, courts, and others to respect those rights. As should be the case, this legislation is appropriately fashioned to meet the needs of the citizens of Wisconsin.

I am enclosing a copy of a recent article reflecting a study of victim rights laws conducted by the Vera Institute of Justice. The article notes the strong laws in North Carolina and Wisconsin. In fact, the Wisconsin legislature has subsidized county staff at approximately a 65%-70% reimbursement rate to perform much of the work required under the Wisconsin statutes. The system is working well.

I fear a nationally imposed standard subject to interpretation by federal judges in all 50 of the states. Make no mistake, costs are involved in protecting victims' rights, and I am prepared to see such costs extended when appropriate. I fear that a decision from California may impose requirements unneeded in Wisconsin which will draw from resources properly tailored to the needs of Wisconsin victims.

This office has a long history supporting victims' rights. In my opinion, victim rights in Wisconsin are best protected by Wisconsin statutes and not by amendments to the United States Constitution. Many district attorneys share this position but are reluctant to say so. They feel as I do that resources are limited, and a directive from a federal district court in some distant part of the country, with a judge unaware of the needs of Wisconsin citizens, may preempt resources and result in ill serving the best interests of Wisconsin victims and witnesses.

Sincerely yours,

E. Michael McCann
District Attorney

EMM:ss

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Mothers Against Drunk Driving

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NATIONAL OFFICE

July 16, 2002

The Honorable Dianne Feinstein
United States Senate
Washington D.C. 20510

Dear Senator Feinstein:

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 35. 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. Thank you for your continued leadership on this critical issue.

Sincerely,

Wendy J. Hamilton

Wendy J. Hamilton
National President

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.

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July 12, 2002

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 bring to your attention our wholehearted support for S.J.Res. 35, which will amend the United States Constitution to better protect the rights of crime victims. This proposed amendment further 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, 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 want to thank you for re-introducing this important proposed amendment in the 107th Congress. As we supported S.J.Res 3 in the 106th Congress, we are pleased to support it again in the 107th Congress and look forward to working with you and your staffs to insure 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

May 2002

Introduction and Overview

The National Clearinghouse for the Defense of Battered Women strongly opposes the H.J. Res. 91/S.J. Res. 35, 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, d/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.

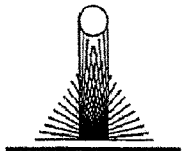
  The very purpose of the Bill of Rights is to curtail the power of the government against the rights of the accused. It arms the accused with basic guarantees, such as the presumption of innocence and the need of proof beyond a reasonable doubt. These fundamental guarantees are necessary to ensure that 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.



NOW LEGAL DEFENSE AND EDUCATION FUND 1522 K. St. NW, Suite 550, Washington, DC 20005 (202) 326-0040 Fax: (202) 589-0511

POSITION STATEMENT AGAINST PROPOSED VICTIMS' RIGHTS AMENDMENT

Legislators in the 107th Congress have introduced a proposal to amend the U.S. Constitution by adding a "Victims' Rights Amendment" (H.J. Res. 91/S.J. Res. 35). NOW Legal Defense and Education Fund (NOW Legal Defense) chairs the National Task Force on Violence Against Women and works extensively on behalf of women who are victims of violent crime, including our efforts against domestic violence, sexual assault, and all forms of gender-based violence.

Although NOW Legal Defense agrees with sponsors of victims' rights legislative initiatives that many survivors of violent crime suffer additional victimization by the criminal justice system, we do not believe a constitutional amendment is the appropriate way to address those problems. We appreciate the injustices and the physical and emotional devastation that drives the initiative for constitutional protection. Nonetheless, we do not agree that amending the federal Constitution is the best strategy for improving the experience of victims as they proceed through the criminal prosecution and trial against an accused perpetrator. Any such amendment raises concerns that outweigh its benefits. After considering the potential benefits and hardships, and particularly considering the circumstances of women who are criminal defendants, NOW Legal Defense cannot endorse a federal constitutional amendment elevating the legal rights of victims to those currently afforded the accused. However, we fully endorse efforts to improve the criminal justice system, including initiatives to ensure consistent enforcement of existing federal and state laws, and enactment and enforcement of additional statutory reforms that provide important protections for women victimized by gender-based violence.

The Need to Improve the Criminal Justice System's Response to Women Victimized by Violence

It is true that survivors of violence often are pushed to the side by the criminal justice system. They may not be informed when judicial proceedings are taking place or told how the system will work. Although many jurisdictions are working on improving their interactions with victims, many victims still experience the judicial system as an ordeal to be endured, or as a forum from which they are excluded. They often experience a loss of control that exacerbates the psychological impact of the crime itself. Certainly women victimized by violence face persistent gender bias in our criminal justice system, which includes courts and prosecutors that fail to prosecute sexual assault, domestic violence, and other forms of violence against women as vigorously as other crimes. All too often, criminal justice officials blame the victims for "asking for it" or for failing to fight back or leave. These negative experiences make it more difficult for women victimized by violence to recover from the trauma and may contribute to reduced reporting and prosecution of violent crimes against women.

As amendment proponents have stressed, increased efforts to promote victims' rights potentially could have a strong and positive impact on women who are victims of crime. The entire public relations and educational campaign mounted on behalf of the amendment can promote public awareness. Criminal justice system reform can give victims a greater voice in criminal justice proceedings and could increase

to be directed to crucial training and victims' services efforts. Additional statutory reform and funding for program implementation, particularly targeted to eliminate gender bias in all aspects of the criminal justice system can go a long way toward assisting women who have survived crimes of violence.

Statutory reform requiring prosecutors and other criminal justice system officials to take such measures as requiring timely notice to victims of court proceedings are modest and relatively inexpensive steps that would have a great impact. We must work to provide better protection for victims -- through consistent enforcement of restraining orders, and by training law enforcement officials and judges about rape, battering and stalking, so that arrest and release decisions accurately reflect the potential harm the defendant poses. NOW Legal Defense hopes the attention drawn to this issue will promote greater dialogue about the problems that victims face in the criminal justice system, and will increase the criminal justice system's responsiveness to women victimized by gender-motivated violence.

May 2002

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[1] Reported litigation under state constitutional amendments is limited, but illustrates the potential conflicts in balancing the rights of victims and the rights of the defendants. While in some cases the victim's state rights did not infringe on the defendant's federal rights, *see, e.g., Bellamy v. State of Florida,* 594 S.2d 337, 338 (Fla. App. 1st Dep't 1992) (mere presence of the victim in the courtroom in a sexual battery case would not prejudice the jury against the defendant), in others the defendant's federal rights took primacy. *See, e.g., State of New Mexico v. Gonzales,* 912 P.2d 297, 300 (N.M. App. 1996) (sexual assault victim's rights to fairness, dignity and privacy under state amendment did not allow her to prevent disclosure of medical records to defendant); *State of Arizona ex rel. Romely v. Superior Court,* 836 P.2d 445, 449 (Ct. App. Ariz. 1992) (despite victim's right to refuse deposition, in this case where defendant claimed she stabbed her husband in self-defense, she would be unable to present a sufficient defense without the deposition and thus she could force him to be deposed).

[2] It may be less legally problematic to recognize the interests of victims by affording them a voice at sentencing or at another post-trial proceeding, after a defendant's guilt has been determined.

United States Senate
Committee on the Judiciary

Testimony of

James Orenstein

before the
Subcommittee on the Constitution

on
S.J. Res. 35, the Proposed Victims' Rights
Amendment to the United States Constitution

Wednesday, July 17, 2002
226 Dirksen Senate Office Building

Introduction

Mr. Chairman, distinguished Members of the Subcommittee, thank you for inviting me to testify 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 last 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

[1] The views expressed herein are mine alone.

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 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 Justice Department 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 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 and needlessly 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. 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 the offender 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.[2] 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.[3] The same result, however, could likely be achieved through the use of the federal 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 unforeseen adverse consequences to law enforcement.

III. The Current Version of the Victims' Rights Amendment Needlessly Undermines Effective

[2] Statistics about state laws designed to protect crime victims are drawn from U.S. Department of Justice, Office for Victims of Crime, "Crime and Victimization in America, Statistical Overview" (April 2002) (reporting data from the National Center for Victims of Crime's Legislative Database about the status of legislation at the end of the States' 2000 main legislative sessions) <http://www.ojp.usdoj.gov/ovc/ncvrw/2002/ncvrw2002_rg_3.html#legislative>.

[3] 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.

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.[4] 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.

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 that are necessary to maintain order. Either choice could undermine the safety of prison guards.[5]

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 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 some six years of study and debate,

[4] 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).

[5] 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)).

and that it embodies compromises reached after much effort by supporters and critics alike.[6] 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 six 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 previous 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. Even if Congress were writing on a blank slate, I would have some concerns about some of the language in S.J. Res. 35. But you are not writing 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 previous 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.

[6] *See, e.g.*, Statement of Steven J. Twist, General Counsel, National Victims Constitutional Amendment Network before the Constitution Subcommittee, Committee On The Judiciary, United States House Of Representatives, in support of H. J. Res. 91, The Crime Victims' Rights Amendment at 9-10 (May 9, 2002)·("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.")

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 previous 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 previous 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.

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.[7] 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 phrase "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.

2. Specific Flexibility Problems

d. 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 previous 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 previous 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.[8] In contrast, the current bill provides a right "reasonably to be heard" at such proceedings. While the drafters

[7] See, e.g., Shaw v. Murphy, 532 U.S. 223, 229 (2001); Turner v. Safley, 482 U.S. 78, 89 (1987).

[8] S.J. Res. 3 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 S.J. Res. 35.

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 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.[9] 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 accord 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."[10] 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.

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 –

[9] 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.

[10] Senate Report at 31.

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 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.[11] 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

[11] For the reader's convenience, I have appended to this statement the text of the Victims' Rights Amendment as set forth in S.J. Res. 3.

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.

3. Adjudicative decisions

The previous 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.[12] 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.[13] And the interest in safety was explicitly tied to bail, parole and similar determinations.[14]

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 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

[12] See Senate Report at 36.

[13] 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.

[14] See Senate Report at 37-38.

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,[15] 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

[15] "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."

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,[16] 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 2001, S. 783, was introduced last year by Chairman Leahy, Chairman Feingold, and several other members of this body. And while some of its provisions were incorporated into the USA PATRIOT Act of 2001, most of it remains to be considered.[17] Although this hearing is not about that bill, it is worth noting that the pending Act would, by means of the provisions of Title I, implement all of the substantive rights embodied in S.J. Res. 35 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 Title II, 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. I recall from debates about the previous version of the Victims Rights Amendment, S.J. Res. 3, that some critics objected to the length, inelegance and statute-like specificity of some of its 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

[16] *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>.

[17] The provisions of Title III of S. 783, amending portions of the Victims of Crimes Act of 1984 (42 U.S.C. § 10601, *et seq.*), were substantially incorporated into the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 296, Title VI, subtitle B, §§ 621-624 (2001). The following comments relate to the remaining portions of S. 783 (Titles I and II) that have not yet been enacted.

Assistance Act can more precisely draw such distinctions.[18]

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.

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 Subcommittee may have.

[18] 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. 783 that allow for such exceptions might well be deemed unconstitutional if the proposed Amendment were ratified.

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.

Wednesday, July 17, 2002

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. (POMCONYS). "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 a 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 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 24). This Amendment speaks within reason of basic human rights. 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.

Mrs. Odile Stern
POMCONYS Executive Director
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Mudd
Hearing

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Justice for the victims, too

JOSEPH PERKINS
San Diego Union-Tribune columnist

The trial of David Westerfield, accused kidnapper and murderer of 7-year-old Danielle van Dam, began this week in a San Diego courtroom. Two especially interested parties will be excluded from most of the otherwise public proceedings – the dead little girl's parents – because the judge presiding over the murder trial decided the van Dams should not be allowed in the courtroom, except on the occasions when they appear on the witness stand.

Judge William Mudd frets that, if the van Dam parents are allowed to sit in on Westerfield's murder trial, they will be exposed to statements and evidence that might influence their testimony.

Yet, the jurist is not similarly concerned about how the accused abductor and killer of young Danielle might shape his potential testimony based on what he hears and sees during the murder trial.

The Westerfield murder trial demonstrates how the scales of justices are tilted in favor of the criminally accused at the expense of crime victims and their families. Indeed, it is precisely the kind of unequal treatment accorded Westerfield and the parents of poor little Danielle that provides the *raison d'etre* for the crime victims movement in this country.

Like most criminal judges throughout the land, Mudd presumes that justice is a zero-sum proposition. That the courts cannot confer rights upon crime victims and their families without depriving the criminally accused of rights.

Such thinking is fallacious. Crime victims do not ask that their interests take precedence over the rights of the accused; but that victims' rights be taken half as seriously by the courts as the rights of the criminally accused.

As it is, crime victims and their families – like the pitiable van Dams – will continue to be relegated to second-class status in courtrooms throughout the land until the nation's lawgivers address themselves to the glaring injustice. And the only way to do that is with a constitutional amendment that, once and for all, enunciates the rights of crime victims.

Sens. Dianne Feinstein, D-Calif., and John Kyl, R-Ariz., have proposed just such an amendment that would guarantee victims of violent crimes the following rights:

- To be informed of public proceedings involving the crime, and not to be excluded from those proceedings.
- To be notified of the release or escape of the accused.
- To be heard at public release, plea, sentencing, reprieve and pardon proceedings.
- To be given due consideration for a victim's safety, interest in avoiding unreasonable delay and just and timely claims to restitution from the offender in judicial decisions.

While California is one of more than 30 states that have constitutional amendments on their books guaranteeing victims' rights, that didn't prevent Judge Mudd from barring the parents of little Danielle from attending much of the trial of her accused murderer. When the victims' rights conferred by state constitutional provision or law comes into conflict with the rights of the criminal accused guaranteed by the U.S. Constitution, the courts will consistently favor the accused over the victim.

That's why victims' rights must be added to the U.S. Constitution. Justice demands victims and their families be accorded the same treatment under the law as criminal offenders.

Joseph Perkins
SAN DIEGO UNION-TRIBUNE
4/19/02

Victims of crimes should have rights, too

Cynthia Casey appeared before the Utah Supreme Court last month. She argued she was denied the right to be heard at the change-of-plea hearing of the man who molested her 10-year-old son.

The defendant was originally charged in a state district court with aggravated sexual abuse of a child, a first-degree felony. However, the prosecutor in the case offered to reduce the rap to "lewdness" involving a child," a misdemeanor, in exchange for a guilty plea.

Casey objected. And she wanted the district court to know it. But by the time the aggrieved mother was given the chance to make her feelings known, the court had already accepted the plea agreement and sentenced the child molester to a mere eight months behind bars.

Utah's highest court affirmed that Casey should have been heard during the change-of-plea hearing and before sentencing. Nevertheless, it upheld the lower court ruling.

And that is how crime victims and their families are routinely treated by courts throughout the country. Even in states, like Utah, boasting victims' rights laws. For the scales of justice are tilted against crime victims.

Indeed, the rights of the criminally accused — including the right to legal counsel, to due process, to a speedy trial, to an impartial jury of peers, to confront witnesses, against self-incrimination — are set forth in the U.S. Constitution.

Crime victims have no standing under the Constitution. Whatever "rights" they claim are defined by statutory law. And when statutory law comes into conflict with constitutional law, statutory law yields.

So a sexually abused child is twice victimized. First, by the man who molested him. And second by a court that hears a plea for leniency by the criminal, while giving short shrift to a plea for justice by the victim.

For several years now, Sens. Dianne Feinstein, the California Democrat, and John Kyl, the Arizona Republican, have tried to win passage of a constitutional amendment that would place the nation's victims of violent crime on equal footing with criminal offenders.

And this week their proposed victims' rights amendment received an enthusiastic endorsement from President Bush, who noted that victims all too often are "an afterthought in our criminal justice system."

The proposed amendment is straightforward. "The rights of victims of violent crime are hereby established and shall not be denied by any state or the United States," it declares.

If approved by a two-thirds majority of the House and Senate, and then ratified by at least 38 of the 50 states, the constitutional amendment would require that victims be notified of public court proceedings and that they be allowed to be heard at sentencing and parole hearings.

It also would require that victims be notified when their attackers are released (or escape) from prison and that courts consider victims' claims for restitution.

There is, of course, the usual reflexive opposition to amending the Constitution — for victims' rights or any other purpose. If it is not already in the Bill of Rights, the argument goes, then the nation's Founders obviously did not deem it necessary.

But Feinstein countered that argument the last time the victims' rights amendment was debated in Congress.

"In 1789," she noted, "there were not 9 million victims of violent crime each year. In fact, victims of violent crime each year in this country now outnumber the country's entire population when the Constitution was written."

Indeed, never in his worst nightmare could James Madison, author of the Bill of Rights, have imagined that the United States would be as lawless, as violent, as it is today.

That an aggravated assault would be committed every 29 seconds, according to the FBI Crime Clock. A robbery every 54 seconds. A forcible rape every six minutes. A murder every 27 minutes.

Murderers and rapists, armed robbers and child molesters. All enjoy the protection of the Constitution.

That their victims are not afforded comparable protection can hardly be held out as the express intent of the nation's founders. Rather, it was more likely an oversight on their part.

For far too long the criminal justice system has been imbalanced in favor of criminal offenders. Crime victims deserve the same standing under the law. And the victims' rights amendment sponsored by Sens. Feinstein and Kyl and endorsed by President Bush, would finally give it to them.

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STATEMENT

of

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Vice President for Legal Affairs
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before the

Committee on the Judiciary
Subcommittee on the Constitution, Federalism, and Property Rights
United States Senate

July 17, 2002

S.J. Res. 35: Proposing a victims' rights amendment to the United States Constitution

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies. I want to thank the committee for inviting me to testify on S.J. Res. 35, proposing a victims rights amendment to the United States Constitution.

Although I am opposed to amending the Constitution for the purpose of protecting the rights of crime victims, I want to make it very clear at the outset that I fully support the basic aims of this proposal.[1] Too often when a prosecutor takes over the prosecution of a crime, the victim is all but forgotten. We need to do more than we sometimes do to help the victims of crime. For both constitutional and practical reasons, however, I believe that this amendment is not the best way to accomplish that end.

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[1] In fact, just to be perfectly clear on that, one of my earliest professional articles, written nearly a quarter of a century ago, was a piece lamenting that the crime victim was the forgotten person in our criminal justice system and arguing, among other things, that in most cases the victim should have the *first* crack at the criminal, through a system of victim restitution, the state or public the second crack, through a system of punishment. See Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" 88 *Ethics* 384 (1978).

Amending the Constitution is a serious matter. Clearly, the provisions of Article V that enable us to do so were put there to be used. But just as clearly, experience has taught us that those provisions are to be used only when circumstances plainly warrant it. When other, more flexible means are available to accomplish the same ends—especially when we may need to refine what we do in light of experience—prudence alone suggests that we employ such means, that we not lock ourselves inflexibly in our basic law, the Constitution.

On the subject at hand, federal, state, and local governments already provide for the victims of crime.[2] Through ordinary legislation or state constitutions they are achieving every aim of this proposal more quickly and with equal effect and greater flexibility. Thus, there is no compelling reason to pursue such ends by amending our basic charter of government.

But if there is no compelling reason to amend the Constitution to provide for victims' rights, there are compelling reasons for not amending the Constitution for that end. Some of those reasons are theoretical, others are practical.

On the theoretical side, proponents of this amendment often speak of a constitutional "imbalance" between the rights of defendants and the rights of victims. The Constitution lists numerous rights of defendants, they say, but is silent regarding victims.

There is a fundamental reason for that "imbalance." It has to do with the very purpose and structure of the Constitution. As the Declaration of Independence makes clear, the basic purpose of government is to secure our rights—against both domestic and foreign threats. To pursue that end, the founding generation wrote and ratified the Constitution. Through it they authorized, established, and empowered the institutions of government. But in the process they also limited the exercise of the power they had just authorized and established.

The protections the Constitution affords defendants are clear examples of such limitations. On one hand the Framers wanted a government strong enough to carry out the functions they had assigned it. On the other hand they did not want government to exercise its powers in ways that would violate our rights. They were especially concerned to limit the police powers of government, the power to secure our rights; for they knew from experience that in the name of so basic and worthy an end, great abuse might occur. That is why they left the police power almost entirely in the hands of the states, where it was closer to the people. And that is why such power as they gave to the national government was constrained both by enumeration and by the provisions of the Bill of Rights. The federal government had only those powers that the people, through the

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[2] See, *e.g.*, 42 U.S.C. § 10606 (1995)(passed as part of the Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, 104 Stat. 4820 (codified as amended in scattered sections of 42 U.S.C.)). Some 33 states have constitutional amendments that recognize the rights of crime victims in various ways. Others do so through statute. For a chart detailing the state constitutional amendments and statutes, see http://www.nvcan.org.

Constitution, had delegated to it, as enumerated in the document.[3] And the exercise of that power was further restrained by the rights of the individual, enumerated and unenumerated alike.

Thus, the Framers' constitutional approach was essentially guarded. They wanted to make it very clear, in our organic law, that government was limited to certain ends and was limited further in how it might pursue those ends. There is no place in that approach for "government benefits," for the modern welfare state. It is lean, limited government, empowered to do a few things, in limited ways, leaving the individual citizen free to pursue happiness however he wishes, provided only that he respect the equal rights of others to do the same, which government is there to ensure.

It is not a little anomalous, therefore, to have an amendment to the Constitution addressing the rights of victims of crime when there is so little federal power to begin with to address the problem of crime. It would be one thing if the federal government, as at the state level, were required to attend to the rights of victims in connection with its general police power. But there is no general federal police power, as the Supreme Court has repeatedly said.[4]

Moreover, such "benefits" as the Constitution does confer in the criminal law context arise entirely because the government is the moving party in an adversarial matter. The benefits or rights of due process or trial by jury, for example, arise only because the government has placed the accused in an adversarial relationship, at which time such rights kick in to limit the means government may employ. The situation is entirely different with crime victims. They stand in no adversarial relationship with the government such that the means available to the government must be restrained for their protection. What this amendment provides, rather, is closer to a true benefit from government.

This proposal has about it, then, the air of certain European, especially Eastern European, constitutions, which list "rights" not as liberties that government must respect as it goes about its assigned functions but as "entitlements" that government must affirmatively provide. We have thus far resisted that tradition in this nation. It would be unfortunate if we should begin it through this "back door," as it were.

But if the absence of any general federal police power makes this amendment anomalous, still other implications for federalism are even more clear. By constitutionalizing certain minimal standards in this area, for example, the amendment would preclude states from experimenting in ways that might fall below the minimum. Moreover, it appears from the language of Sections 1 and 5 of the amendment that

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[3] As the Tenth Amendment makes clear: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[4] See, e.g., United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

Congress would have the power to mandate states to take measures to implement the provisions of Section 2, which amounts to nothing less than constitutionalizing a number of "unfunded mandates." If Congress has no such power, however, then the amendment may amount to an empty promise.

Finally, as a structural matter, such rights as are found in our Constitution, either enumerated or unenumerated, are invoked ordinarily when some governmental action either proceeds without authority (e.g., *Lopez, Morrison*) or in violation of a recognized right (e.g., any authorized action that implicates rights of speech or religion). Thus, the putative authority of the government is pitted against the putative right of the individual or organization (to be free from such action, or from such an application of an otherwise authorized action).

Here, however, we have a three-way relationship, which raises havoc with our traditional adversarial system. How, for example, do we resolve the potential conflicts among the authority of the state to prosecute, the right of the accused to a speedy but fair trial, and the right of the victim to "adjudicative decisions that duly consider the victim's ... interest in avoiding unreasonable delay"? If judicial "balancing" poses serious jurisprudential problems in our adversarial system today—and it does—then those problems will only be exacerbated under this amendment.

In the larger context, then, the rights of defendants that we find in the Constitution make perfectly good sense. They are restraints on government power. The federal government may pursue the ends it is authorized to pursue, but it must respect our rights in the process. The government may enact and enforce customs laws, for example, but it may not engage in warrantless searches of our homes or businesses in the process. And if it prosecutes us in the course of enforcing those laws, it must respect the rights of defendants as set forth in the Constitution and the Bill of Rights.

Thus, given the basic defensive way we constituted ourselves, it is not surprising that the rights of crime victims are not mentioned in the Constitution. That does not mean that there are no such rights, however, for the Seventh Amendment invokes the common law, and that law entails the rights of victims to bring actions against those who victimize them. We must not forget, that is, that the *primary* way in which victims have their rights vindicated is not through the criminal but through the civil law. It is the business of the state to protect us from each other, as much as it can, and to punish those who injure us. It is our business to seek redress from those who injure us, to vindicate the rights that have been violated by the criminal.

That vindication may be achieved in part through the criminal proceeding, to be sure, for most victims have an interest and even a right in seeing the criminal get his comeuppance. But the criminal proceeding belongs primarily to "the people," whose interests and rights may be identical to those of the victim, but may also be at variance with those of the victim. Sometimes the prosecutor will want to put the criminal away, for example, but other times he may want to strike a deal with the criminal in order to reach other, more dangerous criminals, criminals that are of no concern to the victim,

who wants this particular perpetrator punished. In such cases, the crucial question is, whose forum is it? Under our system, where we delegated law enforcement for the most part to the state, it is the people's forum, with the prosecutor representing the interests of the people.

It is crucial, therefore, that there be two forums—criminal and civil—for there are two sets of interests to be pursued, and they are not always in harmony. It is for that reason, however, that it is crucial also to recognize that an uncritical concern for "victims' rights" may very well muddy the water. More precisely, when rights that belong properly in the civil forum are transported to the criminal forum, confusion and conflict may ensue. That is a very real risk with this proposal.

Consider, for example, the victim's right "to adjudicative decisions that duly consider the victim's ... just and timely claims to restitution from the offender," as set forth in Section 2 of the proposed constitutional amendment. Perhaps such details as would constitute a restitution order could be incorporated into the prosecutor's case against the defendant, aimed at determining his guilt or innocence, but that kind of concern rests properly with the victim, not with the people or their representative, the prosecutor. When representing separate parties, there is always the potential for conflict of interest, of course. That is clear here. The victim's interest in restitution may vitiate punishment. The people's interest in punishment may vitiate restitution. Which interest should prevail under this amendment? And would the failure to convict—perhaps because of the higher standard of proof for a criminal conviction—undermine any right of the victim to a restitution order—which might have been obtained in a civil action against the defendant?

Thus, when we cloud the theory of our system of justice with an amendment of this kind, we give rise to all manner of practical problems. Section 2's promise of "adjudicative decisions" regarding victims' safety, speedy trial, and restitution, for example, would seem to guarantee victims a right not simply to be present and heard at all criminal proceedings but to a separate victim's hearing on those matters. If that is how the provision is to be read—and surely there are courts that will read it that way—then we can only imagine how many such hearings will arise in an already overburdened criminal justice system that plea bargains over 90 percent of its cases.

More generally, however, practical questions surround the very nature of the victim's claims. In the proposed amendment they are called "rights," but it is unclear to me, at least, just how those rights would operate, just how they are invoked, and how remedies for their violation would work. Section 2, for example, says the victim shall have "the right to adjudicative decisions that duly consider the victim's safety." That "right" is either so vague as to be all but meaningless, or it is not. If not, then what does it mean? Do not most prosecutors now take such matters as the victim's safety into account when they make decisions? How would things change under this amendment? Most important, would the victim have a claim against a prosecutor who was insufficiently considerate of the victim's safety? Section 1 purports to "establish" the rights at issue. But Section 3 says, "[n]othing in this article shall be construed to ... authorize any claim

for damages." Are we to understand by that that the victim has no remedy when the "rights" "established" by this amendment are ignored or violated? "Rights" like those are no rights at all.

There is, in short, a disturbing air of "aspiration" about this proposal. Like the generous legacy in a pauper's will, it promises much but delivers little. Clearly, rights without remedies are worse than useless: they are empty promises that in time undermine confidence in the very document that contains them—the United States Constitution, in this case. But a remedy is ordinarily realized through litigation. Before this amendment goes any further, therefore, it is incumbent upon those who support it to show how victims will or might litigate to realize their rights, and what their doing so implies for other rights in our constitutional system. I can imagine several scenarios under this amendment, none of which is clear, all of which—by virtue of being constitutionalized—will make the plight of victims not better but worse. We owe more than empty promises to those for whom the system has already failed once.

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3 May, 2002

The Hon. Patrick J. Leahy
U.S.Senate
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Re: SJR35

Dear Senator Leahy,

I am writing to ask for your support with SJR35, an amendment to the U.S. Constitution of the united Sates to protect the rights of crime victims.

In 1984, we were thrilled to see the passage of 28 pages of legislation in the State of Florida, encompassing the Comprehensive Victims of Crime Act. It incorporated much of the well drafted legislation that you and Sen. Kennedy have proposed. I had the honor of attending the signing ceremony with then-Governor Bob Graham.

It soon became clear that much of the intent of the Florida Legislature was basically "poetry". Judges were not able to weigh issues upon appeal, balancing the views of Victim and Offender.

In 1987, the Florida Supreme Court ruled that "Our clear obligation is to interpret statutes in a manner consistent with constitutional rights", *and there were NONE for Victims.* (See: DAVID TAL-MASON,Petitioner,vs. STATE OF FLORIDA. Case No. 69,508. November 12, 1987).

The following year , 1988, saw the passage of an Amendment to Florida's Constitution, similar to SJR35. Over 90% of those voting, voted "yes".

Since that time, the Justice System in Florida has worked better. Victims may not always approve of the process, but they are informed, present and heard when appropriate, and no longer perceive the Prosecutors, as an unexpected "enemy".

I am enclosing a copy of the statement I was privileged to make before your committee on April 23, 1996.

I believe that Legislation without Constitutional Support can not be effective. Please consider modifying your earlier objection to Amending the Constitution, and look at this issue as a benefit to all innocent, honest, helpless Americans.

Thank you for this opportunity to express MY beliefs.

Sincerely,

Bob Preston

STATEMENT OF ROBERTA ROPER, CO-CHAIRPERSON NATIONAL VICTIMS' CONSTITUTIONAL AMENDMENT NETWORK IN SUPPORT OF SENATE JOINT RESOLUTION 25

JULY 17, 2002

Chairman Leahy and members of the Senate Judiciary Subcommittee on the Constitution: I am Roberta Roper, Co-Chairperson of the National Victims' Constitutional Amendment Network (NVCAN) and Executive Director of the Stephanie Roper Committee and Foundation, Inc. NVCAN is the national coalition of victim advocates, legal scholars and victim service organizations, and the Stephanie Roper Committee and Foundation, Inc., is a Maryland non-profit victim advocacy and service organization bearing our slain daughter's name. Both organizations proudly express their strong support for the constitutional amendment for crime victims' rights as introduced in the Senate by Senators Dianne Feinstein (D-CA) and Jon Kyl (R-AZ).

It is with honor that I come before you today to speak for everyday Americans who place their trust in our system and their dependence on government to do the right thing for justice. Most importantly, I speak for those whose voices can no longer be heard ... our sons, and daughters, spouses, parents, brothers and sisters, friends. While our nation has been justifiably preoccupied with the terrorists attacks of September 11th, these evil acts also awakened the consciousness of America to the reality and consequences of random violence ... realities and consequences every crime victim in America knows ... that by chosen acts of criminal violence, innocent lives are turned upside down and forever changed or tragically ended. This is the important lesson you must remember ... that any one of us can become a victim of crime. Listen to my testimony as a parent, a spouse, a son or daughter. How you would you wish your loved one to be treated by our criminal justice system in the aftermath of crime?

Let us be clear. Providing crime victims with protected rights in our Constitution is not a complicated legal issue. It is about the **human rights** of American citizens who become victims of criminal violence, and ensuring that these basic human rights to fundamental fairness are protected under the Constitution of the United States. These are rights that every person accused of, or convicted of a crime deserves and enjoys. Yet everyday Americans are appalled and disbelieving to learn that, unlike criminal defendants, they have no similar

rights. And that's what this amendment is about ... guaranteeing equal justice for all of us **under the law of all of us, the U. S. Constitution.**

In announcing his endorsement of the amendment before you, President Bush said that "The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do." There are those who say the Constitution is a sacred document that should never be amended. I ask you to remember the wisdom of our founding fathers. The framers of our Constitution understood that the document they were creating would need to change as the needs of society required change. They were creating a "more perfect union," not a perfect one. That wisdom allowed our Constitution to abolish slavery and to give voting rights to women. Those human rights could not be sufficiently protected by state or federal laws. Likewise, victims' rights cannot be sufficiently protected by state or federal law. This constitutional amendment is necessary to give them protection and balance.

There are those who say we should focus on strengthening existing laws. More than two decades of efforts in securing state and federal laws are evidence of the failure to provide victims with sufficiently protected rights. The laws enacted by this Congress are the best evidence of those failures. And federal laws, no matter how strong, will apply only to victims of federal crimes, not the vast majority of victims. Lawrence Tribe, Tyler Professor of Constitutional Law at Harvard Law School points out that a constitutional amendment is appropriate only when other means are not attainable such as a needed recognition of a basic human right. He believes that the language of this amendment meets that criteria. "The rights in question ... rights of crime victims not to be victimized yet again through the process by which government bodies and officials prosecute, punish, and/or release the accused or convicted offender ... are indisputable basic human rights."

The whole history of our country has taught us that basic human rights must be share the protection of our nation's fundament law ... our Constitution. The language of this amendment has been carefully crafted to preserve the protections of accused or convicted offenders, while enabling victims and survivors of criminal violence to have minimal rights not to be excluded from criminal proceedings that are the most important events in their lives! It will establish a basic national standard which will empower and enable individual states to build upon that foundation.

These rights include timely and reasonable notice of any public proceeding involving the crime and of any release or escape of the accused; to not being excluded from such public proceedings and reasonably to be heard at public release, plea, sentencing, reprieve and pardon proceedings; and to adjudicative decisions that consider the victim's safety, interest in avoiding reasonable delay, and just and timely claims for restitution from the offender.

I speak to the need for this amendment from personal experience, as well as after twenty years of advocacy and service to thousands of crime victims in my home state of Maryland.

Like many advocates, the catalyst for advocacy and service was my family's experience with the criminal justice system when our oldest child, our beloved daughter, Stephanie, was kidnaped, brutally raped, tortured and murdered in 1982 by two strangers who came upon her disabled car on a country road near our home. Like countless victims and survivors of that era, we discovered that unlike our daughter's killers, we had no rights to be informed, no rights to attend the trial and no rights to be heard before sentencing. Place yourselves in the unbelievable nightmare we endured. Imagine how you would feel to be shut out of the trial of the accused of your loved one for no good cause. We were subpoenaed as the State's first witnesses, recalled a last family dinner we had with our daughter the night before, and identified a family car our daughter was driving. Did we know the individuals charged? Did we have knowledge of the events that led to our daughter's abduction and murder? Did the State advocate for our right to remain in the courtroom after testifying, or did the judge ask if we there were reasons to sequester us? The answer to all of those questions is no. Rather, the rule on witnesses was invoked, unchallenged and imposed. Instead of hearing the truth and seeing justice imposed, for six weeks we were banished from the most important event of our lives, and made to feel like second-class citizens. Finally, at sentencing, we hoped to use what was then being proclaimed as the first victims' rights law in Maryland ... by telling the court the consequences of this crime in a victim impact statement. Instead, the defense objected on the grounds that anything I might say was emotional, irrelevant and was probable cause for reversal on appeal. After a lengthy bench conference, the court agreed. While our daughter's convicted killer had unlimited opportunities for himself and others to speak to the court on his behalf, we were silenced. We could not speak for Stephanie.

Like countless other families, then and now, we struggled not only with the devastating effects of the crimes committed against our loved one, but with consequences that were in many ways worse ... being shut out of a criminal justice system we believed in and depended upon. In trying to rebuild our broken lives, the greatest challenge was trying to give hope to four surviving children ... children whom we had taught to respect and trust the criminal justice system that had now failed us! That challenge is forever etched in my mind by the memory of the day one of our sons came home from school, explaining that he could no longer pledge allegiance to the flag with his classmates because "liberty and justice for all" didn't include us.

You may conclude that because this happened twenty years ago, this surely would not happen today. You also could correctly conclude that great progress has been made with the passage of good laws, both on the state and federal level and constitutional amendments passed in 33 states. The sad reality, however, is that victims' rights continue to be ignored and denied. None of the state or federal laws are able to match the constitutionally protected rights of offenders. Studies demonstrate that the system's bias against victims is even more pronounced against racial minorities and the poor, who constitute the largest group of victims of violence. As a result, many victims believe that our criminal justice system is more criminal than just. The Constitutional Amendment proposed by Senators Feinstein and Kyl

will ensure that both victims' and defendants' rights are given fullest effect. Neither one will be superior, but both will be given equal consideration. Without a constitutional amendment, crime victims will remain second class citizens in our justice system.

Some Maryland victims and survivors whose rights were violated are here today. One is Dawn Sawyer Walls, whose parents, I might add have dedicated their lives to serving communities; Dawn's father was a police officer for 22 years, and her mother is the Executive Director of Concerns of Police Survivors (COPS). Dawn was 6 months pregnant and the manager of a convenience store when a robber with a sawed off shotgun ordered her to lie face down as he emptied the store's cash drawer. In violation of Maryland laws, Dawn was not notified when a plea agreement was struck. As a result, and in violation of Maryland law, she was not present in court to give a victim impact statement, and was not able to request restitution from the offender. This disposition was characterized as a "good outcome"... and besides, she was told, "you didn't suffer physical injuries." The trauma of this event had a severe financial impact for her young family because she was unable to return to work.

Teresa Baker is also present. When her only son was murdered, she too, fulfilled the victim's requirement to request notification regarding the right to be informed. She was in court when her son's killer pleaded guilty to 2nd degree murder and was sentenced to thirty years. The judge, in fact, stated that he was imposing the maximum sentence; however, no one explained to Teresa that under the terms of an American Bar Association (ABA) plea, the convicted offender would be released in less than three years! She only learned about his release by chance. That painful discovery led Teresa to ask why she wasn't told the terms of the plea agreement? Didn't she deserve to know the truth of the plea agreement and release?

Cecelia and Dexter Sellman's son was an honor roll high school student when he was shot down and killed by two young men. The Sellmans trusted the criminal justice system and relied on it to bring some justice to their family through restitution from the offender... not for revenge, not to replace their loss, but for some of their out of pocket expenses and to hold the offenders accountable for their actions. The State flatly told Cecelia that they would not request restitution! This is a violation of a right under Maryland law not only for the victim, but is an obligation of the prosecuting attorney. Like the other victims here today, the Sellmans believe that the system their family depended upon failed them.

Sherri Rippeon and John Dobbin also sit behind me. Their experience is a powerful example that demonstrates why this amendment is needed. Two and one half years ago, their infant daughter, Victoria Rose, died of blunt force trauma inflicted by their babysitter's boyfriend. Seeking to ensure compliance with Maryland law regarding their rights to attend the public trial, Sherri and John filed a Crime Victim Notification Request Form. Nevertheless, the trial court excluded them from the courtroom, and even after they filed a ***pro se*** Demand for Rights Form, the judge continued to deprive them from observing the trial. They then took

remedial action that is provided by Maryland law by filing a leave to appeal to Maryland's Court of Special Appeals. As a result of an (unreported) opinion (1) on July 9, 2002, Sherri and John have now suffered another failure. The Court of Special Appeals says, that on the one hand, the victims are the proper parties and have sought enforcement of their rights in the only way provided under Maryland code, that is by filing for leave to appeal in a separate proceeding. At same time, the court says there can be no effective remedy that they can supply, so therefore, the case should be dismissed as moot! How would a victims' rights amendment have helped them? First of all, history has shown that once a right is in the Constitution, it is applied. Currently, federal courts are not available to enforce Maryland law. But with an amendment and if their rights were not applied, Congress and the States could provide emergency proceedings.

It is important to stress that the proposed constitutional amendment before you has little to do with the punishment of offenders, or increasing or decreasing funding for victim services, but everything to do with how our system of justice treats innocent victims of crime. Certainly, law abiding citizens expect that those who violate the law will be held accountable for their actions; however, treating crime victims with respect and not excluding them from proceedings arising from the crimes against them are separate and distinct issues. Just as those accused or convicted of crimes deserve to be treated justly and fairly, crime victims deserve no less.

And finally, I ask that you listen to the law-abiding citizens of our nation. Look at the people seated behind me. Like your constituents, they will tell you that it is time to approve this victims' rights amendment. When the people have been given a voice, state constitutional amendments have won overwhelming approval in 33 states. In 1994, the Maryland amendment had voter support of 92.5%! Senators Feinstein and Kyl are to be commended for their collaborative, bi-partisan efforts for this amendment. Senate Joint Resolution 35 has the ability to make a significant difference in the lives of so many Americans every year. We ask you to remember that the Constitution belongs to the people ... let the Constitution protect all the people of this nation with equal justice.

---

1 Sherri Rippeon and John Dobbin, Jr. v State of Maryland No. 2554 Unreported in the Court of Special Appeals in Maryland, Filed July 9,2002

(Roberta Roper, Executive Director, Stephanie Roper Committee and Foundation, Inc., may be reached locally at: 14750 Main Street, Suite 1 B, Upper Marlboro, MD 20772-3055; (301-952-0063; additional information on the amendment may be obtained by visiting: www.nvcan.org.)

Testimony on the Constitutional Amendment for Victims Rights

Wednesday July 17, 2002

By

Susan S. Russell, M.A.

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 2500 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 able to stand here in front of you 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 am here, 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.

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 2-3 yrs having served 12-13 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.**

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August 2, 2002

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The Honorable Strom Thurmond
United States Senate
217 Russell Senate Building
Washington, DC 20510

The Honorable Russ Feingold
United States Senate
506 Hart Senate Office Building
Washington, DC 20510-4904

Dear Senators Thurmond and Feingold:

I am writing to set out Safe Horizon's opposition to S.J. Res. 35 and H.J. Res. 91, "An Amendment to the Constitution of the United States to protect the rights of crime victims." I am also attaching a copy of the testimony our General Counsel, Julie Goldscheid, presented to the Constitution Subcommittee of the Senate Judiciary Committee on July 17, 2002.

Safe Horizon is the nation's leading victim assistance organization. Our mission is to provide support, prevent violence, and promote justice for victims of crime and abuse, their families, and communities. We began in 1978 as a small project in the Criminal Court in Brooklyn, New York, helping to give victims a stronger voice and role in the criminal justice system. Since then, we have pioneered victim assistance programs in criminal and civil courts, schools, police precincts, and communities throughout the City of New York and beyond.

Safe Horizon assists over 250,000 crime victims each year. Advocating for victims' participation in the criminal and civil justice systems is integral to our work. Every day, in our family and criminal court offices, police programs, domestic violence legal services program, domestic violence shelters and community offices, our staff inform victims about their rights, support them with counseling and practical assistance, and, when necessary, intervene to ensure that their rights and choices are respected. In the aftermath of the September 11 terror attacks, we have provided crisis intervention, support counseling, information and referrals and service coordination to victims of the attacks. We have distributed over $90 million in financial assistance to over 40,000 victims.

We are also engaged in policy and legislative initiatives to expand victims' rights and choices, grounded in our clients' experiences and informed by research and analysis. We listen to the concerns they express to our staff and strive to advocate in ways that are meaningful to them. Our opposition to S.J. Res. 35 and to H.J. Res. 91, described in the points set out below, is informed by the victims we serve who, for the most part, are people of color living in economically depressed urban neighborhoods, who find it harder than others to effectively assert their rights.

• *Victim's rights are critical but not the same as defendants' rights.*

Our clients' experiences demonstrate again and again that those who are victimized by violent crime suffer in numerous and often devastating ways. We believe that participatory rights are essential to help them achieve justice. But we also know that crime victims, unlike defendants, do not face the loss of fundamental rights and liberty at the hands of government. The risk of unwarranted state power being used against the individual was historically, and still is, at the core of our constitutional safeguards for criminal defendants. These are essential protections in a society in which it is easy for someone to become a criminal defendant. This is especially true for those, like many of our clients, whose experience is compounded by race, gender or other forms of discrimination.

• *Constitutionally recognized rights for victims and defendants inevitably will clash.*

One fundamental concern is that H.J. Res. 91 could erode the rights of the accused, particularly when they are in tension with asserted victims' rights. The proposed new victims' rights could have significant practical implications. For example, in New York State (as elsewhere), potential witnesses are routinely excluded from the courtroom so that their testimony will not be tainted by that of other witnesses and unfairly prejudice the defendant. The proposed amendment squarely poses a conflict because it grants a victim the right not to be excluded from the proceedings. This is particularly problematic where the victim is also a witness, forcing a judge to weigh the defendant's right to a fair trial against a victim's newly created right not to be excluded. These concerns are not allayed by the proposed amendment's flat statement that the rights of victims are "capable of protection without denying the constitutional rights of those accused of victimizing them." This clause would not prohibit rulings that could diminish long-existing and fundamental rights accorded defendants under the Constitution.

• *Victims of domestic violence are especially at risk.*

It is well known that crimes of domestic violence represent a high proportion of the total number of violent crimes. Safe Horizon assists approximately 200,000 domestic violence victims each year. We are particularly concerned about the potential impact of H.J. Res. 91 on their lives. Batterers frequently make false claims of criminal conduct against their victims. Such false accusations are one of many weapons in an abuser's arsenal and can result in the arrest of the true victim, even where there is a long, documented history of abuse. These cases often result in profound injustice: the victims may be jailed and their children removed from their care, and they risk ending up with a criminal conviction. Nevertheless, under H.J. Res. 91, the batterer whose false accusations result in prosecution of the victim could be accorded "victim" status and could benefit from all the proposed Constitutional rights. The same concern applies to cases in which domestic violence victims strike back at their batterers in self-defense, as well as to dual arrest cases or cases in which victims are arrested as a result of misuse of mandatory arrest and mandatory prosecution policies. These cases underscore the importance of reinforcing existing constitutional protections granted criminal defendants.

We note that the proposed amendment would allow victims' rights to be restricted "when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." While it may be the drafters' intention to protect individuals such as domestic violence victims who are criminal defendants, it is far from clear how those exceptions would be defined. Numerous questions arise. For example, at what point in the trial process would there be a ruling to determine whether a "compelling necessity" warranted restricting victims' newly granted rights? How and when would domestic violence victims assert their status? Would they be able to do so without compromising their Fifth Amendment rights? What evidence would be sufficient to persuade a court that the defendant is a victim of domestic violence – particularly if there are no police records or orders of protection, as is often the case. These unanswered questions illustrate the difficulty of knowing the impact of this proposed resolution, whether the proposed rights would be meaningful and practicable, and whether they might rebound to harm some victims.

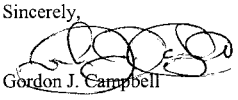
- *Conclusion*

In conclusion, H.J. Res. 91 may be well intentioned, but good intentions do not guarantee just results. Safe Horizon is wholeheartedly committed to advancing crime victims' interests and needs. Our nearly 25-year history speaks for itself. We believe, however, that considerable progress with respect to victims' rights has been made in New York and elsewhere in recent years. Almost everywhere, statutory frameworks provide protections and a majority of states have passed state constitutional amendments as well. These statutory reforms requiring officials to take steps such as notifying victims about court proceedings must be enforced and services for victims need support. When so much remains to be done to enforce existing victims' rights provisions and to expand the support services so vital to victims, we find it difficult to justify the extensive resources needed to pass a Constitutional amendment.

Our position regarding the proposed amendment remains firm in the aftermath of the September 11 attacks. If anything, our experience serving the range of victims affected by the attacks -- family members, injured people, displaced residents and displaced workers -- highlights the need to strengthen statutory protections, mandate enforcement of existing laws, and support the range of services crime victims need. Our clients seek services, support, and access to benefits. Those clients who are undocumented seek assurances that they won't be penalized as a result of seeking assistance from private and government agencies. These experiences reinforce the importance of carefully balancing defendants' and victims' rights.

After careful consideration, we have concluded that the proposed amendment would at best be symbolic, and at worst harmful, to some of the most vulnerable victims. We are concerned that it could prove meaningless for the majority of victims whose cases fail to be prosecuted. Safe Horizon looks forward to working with all those concerned about victims' rights to advance legislative and policy responses that most fully respond to victims' needs.

Sincerely,



Gordon J. Campbell

cc: The Honorable Patrick J. Leahy
The Honorable Orrin Hatch
The Honorable Edward M. Kennedy
The Honorable Joseph R. Biden, Jr.
The Honorable Herbert Kohl
The Honorable Dianne Feinstein
The Honorable Charles E. Schumer
The Honorable Richard J. Durbin
The Honorable Maria Cantwell
The Honorable John Edwards
The Honorable Mitch McConnell
The Honorable Sam Brownback
The Honorable Jeff Sessions
The Honorable Mike DeWine
The Honorable Jon Kyl
The Honorable Arlen Specter
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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

REPORTER

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, REGARDING THE VICTIMS' RIGHTS AMENDMENT, WEDNESDAY, JULY 17, 2002, SD-226, 10:00 AM.

Mr. Chairman:

Thank you for holding this hearing today on a proposed Victims' Rights Amendment (VRA) to the Constitution. This is an important issue that engenders much passion, and many victims' rights groups have worked long and hard to provide constitutional protections to those who suffer because of violent crime. I commend the supporters of the VRA, including both Senators Feinstein and Kyl, for their persistent efforts in this area, and I look forward to our discussion today.

It is highly important that both the Federal government and state governments enact laws that protect the rights of victims during the prosecution of violent criminals. In fact, many states have moved in this direction. For example, 33 states have incorporated victims' rights amendments into their constitutions and others protect the interests of victims by statute. In 1997, Congress passed and the President signed into law the Victim Rights Clarification Act, which prohibits Federal District Court judges from excluding a victim from a trial simply because

that victim plans to testify during the sentencing phase about the effects of the crime on the victim and the victim's family. These efforts at both the state and Federal levels indicate that victims' rights are being taken seriously, and I find this to be an encouraging development.

I have supported past versions of the VRA. However, I have always recognized that an amendment to the Constitution is a drastic measure. We must proceed with caution whenever we consider amending the document that has guided our great Nation for over 200 years.

As a general matter, a victims' rights amendment, if not carefully drafted, has the capability of turning on its head our time-honored principle of "innocent until proven guilty." Our criminal justice tradition places the burden on the Government to prove that a defendant has committed a crime beyond a reasonable doubt. It therefore follows that the Constitution cloaks defendants with certain rights, requiring the Government to play fair in its prosecution of defendants. This is one of the crucial distinctions between our system of government and that of autocratic regimes.

If we amend the Constitution to cloak victims with rights under the Constitution, we confer a protected status

on them even though the defendant has not yet been proven guilty beyond a reasonable doubt. A victim will not only have constitutional rights, but these rights will affect a specific defendant. We should be very careful in this regard. It is by no means certain how courts will construe the VRA, and we run the risk of severely altering basic principles of constitutional law.

I would like to comment on a few provisions of S.J. Res 35, which incorporates the newest version of the VRA. One provision would require that victims be given "reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused." As a general principle, this provision is one that we should all agree upon. When prosecutors share information with victims, it ensures that those who have suffered are not left out of the process. To be sure, victims and their families deserve to know how a criminal prosecution is progressing and, where reasonable, to have a say in how a case is being handled.

However, widespread agreement on this point does not necessitate an amendment to the Federal Constitution. In fact, criminal prosecution is for the most part a state

issue. Because most crimes are prosecuted at the state level, state legislatures are perhaps best suited to address the issues associated with victims' rights. As we consider the prospect of a Constitutional amendment, we should be careful about imposing a Federal remedy on states that are perfectly capable of establishing these same remedies themselves.

Another provision of the VRA that must be closely examined would give a victim "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." While this section attempts to implement laudable policy objectives, I am concerned that this provision would enable victims to interfere with prosecutorial decision-making. If the right to an adjudicative decision is interpreted to mean a right to a hearing, the VRA may permit a victim to insert himself into the criminal investigation or prosecution. Again, most prosecutions occur in state courts, and the VRA may allow the victim to unduly influence the prosecutorial discretion enjoyed by state governments. This result may bring about unwanted Federal encroachment into state matters.

Mr. Chairman, I am pleased that we are discussing this important topic today. We should hold frank discussions about the rights of victims. All too often, victims are shut out of criminal prosecutions, and prosecutors at all levels should permit victims to take part in the process. Victims of violent crime suffer enough. They should not be forced to endure even more suffering during the investigation and prosecution of the accused.

Nevertheless, we must be careful when considering changes to the Constitution. It should be a measure of last resort. This Committee should thoroughly examine the work of the states in providing rights to victims. If states are beginning to make serious commitments to victims' rights, a constitutional amendment may be unnecessary. We should also explore the option of a comprehensive Federal statute, rather than a Constitutional amendment, that may adequately address the legitimate concerns of victims. I feel strongly that we should explore all available options before we go down the road of a constitutional amendment, a road whose end is uncertain.

- END -

1ST STORY of Level 1 printed in FULL format.

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March 29, 2002, Friday ,THIRD EDITION

SECTION: OP-ED; Pg. A19

LENGTH: 763 words

HEADLINE: LAURENCE H. TRIBE Laurence H. Tribe is the Tyler Professor of Constitutional Law at Harvard Law School.;
A BLACK HOLE FOR VICTIMS' RIGHTS

BYLINE: BY LAURENCE H. TRIBE

BODY:

A CASE SET for argument on Monday before the Massachusetts Supreme Judicial Court dramatizes the need to take victims' rights more seriously than we do now - and the fallacy of the argument that victims' rights must come at the expense of defendants' rights or of prosecutorial flexibility.

Over 16 years ago, James Kelly brutally raped Debra Hagen in Leominster.

A jury convicted Kelly on two counts of rape and one count of indecent assault and battery, and in April 1988 the trial judge sentenced him to serve two 10-year jail terms and one five-year term, to run concurrently.

Fourteen years have passed; we've lived through recession and boom, two Bush presidencies, the rise of the Internet, and Sept. 11. Through all that time Kelly has yet to serve a single day in jail.

First the court granted him a stay for health reasons. Later in 1988, Kelly filed a new trial motion. The state claims it simply forgot to respond, apparently losing some of the trial transcripts along the way. The case lay dormant until 1992, when Hagen wrote to ask the trial judge for an explanation.

The district attorney's office responded by urging that she be satisfied with a deal that would revoke Kelly's prison sentence and put him on probation. The odds were good that he would receive a new trial, she was told. Kelly was aging rapidly and in poor health. Wouldn't she prefer not to relive the attack by having to take the witness stand? Wouldn't she prefer closure?

In fact, the new trial motion was denied, but the state still did nothing to take Kelly into custody. Hagen - who finally left Massachusetts to avoid crossing paths with her attacker - desperately wanted to put the attack behind her. But consenting to a "get out of jail free" card for a rapist who had served not one day of his sentence provided anything but comfort. And escorting Kelly to prison to begin serving his term while appealing the denial of his new trial motion would have violated none of his rights and imposed no undue burden on the state.

After nine more years of state resistance, Hagen sought relief under the

Massachusetts victims' rights statute. One provision said victims "shall be afforded . . . a prompt disposition of the case in which they are involved." But Worcester County District Attorney John Conte calls that nothing more than a suggestive guide and claims that because he represents the people, his word on what constitutes a prompt disposition is final and unreviewable.

In legal jargon, the district attorney's argument is that - despite what the victims' rights statute calls "basic and fundamental rights" - victims lack "standing." They have no power to enforce their rights in the courts. In fact, they have no right to be heard at all. Besides, he adds, the "disposition" in this case occurred more than promptly enough: It was disposed of, as far as he's concerned, when the rapist was sentenced back in 1988.

To put it bluntly, no disinterested reader of the Commonwealth's statutes, which say the victim's rights last "until the final disposition of the charges, including . . . all postconviction . . . [and] appellate proceedings," could possibly find Conte's argument convincing. It's an argument more worthy of Franz Kafka or George Orwell than of a self-respecting law enforcement officer.

One can only hope that the SJC, guided by the light of reason, will let Debra Hagen's voice be heard through her own lawyer, not through her supposed surrogate in the person of the district attorney.

Indeed, this 14-year-long procedural black hole by itself demonstrates a compelling need to empower victims with a meaningful voice in the criminal justice system - through an amendment to the federal Constitution if necessary.

Some questions in this field are doubtless difficult. Exactly what remedy to order for the inexcusable delay in this case remains to be debated. Other questions are painfully simple: "Justice should be denied or delayed to no one," the Magna Charta proclaimed many centuries ago. The SJC should heed those words.

Ours is the Commonwealth that proclaimed, long before our nation's Constitution was written, that its government was one of laws, not men. When its laws assure all citizens that their fundamental rights as victims of crime to a prompt disposition shall be secure, let no man tell them they lack standing to redeem that guarantee. Otherwise, that guarantee will, to quote Justice Jackson, be but "a promise to the ear to be broken to the hope, like a munificent bequest in a pauper's will."

LOAD-DATE: March 30, 2002

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LAURENCE H. TRIBE
Ralph S. Tyler, Jr. Professor of Constitutional Law

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March 14, 2002

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 working draft of March 1, 2002, 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 soon to be argued 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 has 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 has 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 has not been ruled on during the 15 years that this convicted rapist has been on the streets—has taken the position that the victim of the rape does 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.

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 Tribe

Laurence H. Tribe

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
THE CRIME VICTIMS' RIGHTS AMENDMENT

JULY 17, 2002

Mr. Chairman and Distinguished Members:

Thank you for holding this hearing today. 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 organizations. My background in this area is more fully set forth in earlier testimony.[1]

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.

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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). Since my last appearance before the subcommittee, I have begun to 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 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 Network. I am honored to represent these organizations here today.

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 bi-partisan support, and the history of the language of the resolution before you; and second, a review of the rights proposed. In two 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; 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

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[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.

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]

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

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[3] *President's Task Force on Victims of Crime, 'Final Report,'* 114 (1982).

[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).

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 32 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 and enforceable rights for crime victims.[8]

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[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; 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; 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.]

[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

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 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;

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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.")

[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

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 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

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[11] *See* Senate Judiciary Report.

[12] *Id.*

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 (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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[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.

[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.

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

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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 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.

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 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. 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 the companion resolution which is before you today.

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

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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

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 endorsement of the proposal before you.[18] Former Attorney General Janet Reno supported

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> 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 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

a constitutional amendment for victims rights[19] and Attorney General John Ashcroft

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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 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

recently announced his support for the proposed amendment.[20] Each proposal for a 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

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> 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.
>
> 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 including Senate Minority Leader Trent Lott and Senator Joseph Biden, the distinguished former Chair of the Judiciary Committee..

[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.")

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 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. 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]

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[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.

[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.*

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]

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]

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[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.

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).

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 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

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[29] Webster's New Collegiate Dictionary, 304 (1977).

[30] Cite Beloof Article

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.
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> "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 without regard to technical classification of the offense as a felony or a misdemeanor.
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> 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.
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> 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]

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

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[31] Senate Judiciary Report

[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).

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.' 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 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.

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[33] *See* Senate Judiciary Report

[34] *New Directions*, 13.

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 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

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[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.,

[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.

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 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.
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> 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 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-

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[39] Senate Judiciary Report

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.

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

[40] Task Force Report at 9.

> 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 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'

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[41] Senate Judiciary Report.

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:

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]

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]

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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).

[43] *See note 32, supra.*

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 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

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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... .")

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.

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

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[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).

[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... ."

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.

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.

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

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[49] Senate Judiciary Report

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 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.

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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 ... .")

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 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.

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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.

Performance of executive [prosecutorial and judicial] duties: management, direction, superintendence." (Brackets added).

The potential for atypical circumstances necessitates giving courts and public 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

[56] Senate Judiciary Report

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 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.

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[57] *See* text at n. 29, *supra.*

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 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

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[58] *City of Boerne v. Flores*, 521 U. S. 507 (1997)

[59] U. S. Const. Art. II, Sec. 2.

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]

III. Conclusion

Doubtless there will be critics who come before the Congress and argue against establishing the rights enumerated in H. J. Res. 91. 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 hearings and a mark-up, demand floor action, and send the resolution to the House before the end of October.

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,

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[60] *See e.g.*, U. S. Const. Amendments XX, XXI, and XXII.

[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.

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 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.

Vermont Center for Crime Victim Services

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
Executive Director
Vermont Center for Crime Victim Services

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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:

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