CRIME VICTIMS CONSTITUTIONAL ADMENDMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

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CRIME VICTIMS CONSTITUTIONAL AMENDMENT

Tuesday, September 30, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:07 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommittee] presiding.

Mr. CHABOT. The Committee will come to order. This afternoon, the Subcommittee on the Constitution is convening to hear testimony concerning H.J. Res. 48, the Crime Victims' Rights Amendment to the United States Constitution. The purpose of the Victims' Rights Amendment is to ensure comprehensive protection throughout the criminal prosecution process to victims of violent crime. While there are Federal and state statutes that provide protections to some victims of violent crime, not only are crime victims not provided comprehensive rights, but these rights are not available to all victims.

In 1982, President Ronald Reagan convened the Presidential Task Force on Victims of Crimes. After holding hearings around the country and carefully considering the issue, the Task Force concluded that the only way to fully protect crime victims' rights was to amend the U.S. Constitution.

Following this strong recommendation, crime victims' rights advocates decided to seek constitutional protections on the state level before undertaking a Federal initiative. The campaign to enact protections at the state level was overwhelmingly successful. Today, 32 states, including my home State of Ohio, have passed amendments with the truly overwhelming support of voters.

Although state amendments now extend rights to the victims of crime, the patchwork of protections has proven inadequate in fully protecting crime victims. A clear pattern has emerged in courthouses around the country. Judges and prosecutors are reluctant to apply or enforce existing state laws when they are routinely challenged by criminal defendants. A study by the National Institute of Justice found that only 60 percent of victims are notified when defendants are sentenced, and only 40 percent are notified of a defendant's pretrial release. A follow-up analysis revealed that minorities are the least likely to be afforded their rights as victims.

Currently, the U.S. Constitution is completely silent on victims' rights, while it speaks volumes about the rights of the accused. Thus, the U.S. Constitution essentially serves as a trump card for

those accused of committing crimes in order to keep victims from participating in their prosecution, or even just sitting in the courtroom during trial.

Only an amendment to the Constitution can establish uniformity in the criminal justice system and ensure victims receive the justice they deserve. These strong new victims' rights, like others guaranteed in our constitution, would become fundamental, and citizens of every state would be protected.

Additionally, the Federal statutes are insufficient. They require only that best efforts are used to provide rights to victims, but victims have no recourse if they fail to receive the rights to which they are legally entitled. Federal statutes are also ineffective in addressing victims concerns. There are currently more than 1,500 Federal and state statutes that are aimed at providing victims' rights, and yet victim after victim is denied basic protections. Moreover, the rights granted by Federal statutes only apply in certain Federal proceedings.

A constitutional amendment is absolutely needed to help facilitate a balance between the rights of victims and those of defendants.

I want to stress that nothing in this amendment will undermine or weaken the long-established rights of defendants under our Constitution. A study of 36 states found that victims' rights legislation had little effect on the sentencing of convicted defendants. A second study of judges interviewed in states with victims' rights legislation indicated that courts did not unfairly favor victims over defendants. The amendment will not deny defendants their rights, but rather grant victims' rights that can co-exist side by side with defendants' rights.

Crime victims deserve to be treated with dignity in our criminal justice system. I have introduced this legislation in the last two Congresses, and working with Senator Kyl and Senator Feinstein, I think we made great progress in raising awareness of this critical issue. With the strong support that we have received from President Bush, I am hopeful that this Congress can pass this amendment and fortify an important truth, that victims must have their own inalienable rights under our Constitution.

Mr. CHABOT. At this time, I would yield to the gentleman from New York, Mr. Nadler, for the purpose of making an opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Today, we address the subject of great importance to every Member of this House, the need for victims of crime to have their needs and concerns respected and addressed.

As the representative for lower Manhattan, which now has the unwanted distinction of being the largest crime scene in American history, the site of the worst act of terrorism and mass murder ever on American soil, my office has had to deal with the problems of thousands of crime victims in the wake of the World Trade Center attack. New Yorkers are certainly not strangers to crime and its impact, but we also know what it takes to provide genuine assistance to crime victims and their families.

People need counseling, they need financial assistance to relocate or to get on with their lives, more businesses need assistance if

they have been victims to stay on their feet. Families that have lost their bread-winner need help with their future. Crime victims also need to see the guilty parties punished and to be reassured that neither they nor anyone else will have to fear further victimization by that individual.

Yet, I have serious concerns about this proposed constitutional amendment. It appears that it will do more to obstruct the wheels of justice than to provide victims with the assistance they need to put their lives back together. It will certainly spark extensive litigation in our already overburdened criminal justice system, which will only lead to either worse plea bargains than we have today and to more criminals getting out with lighter sentences as the system is further overwhelmed. And it may provide an opportunity for people who do not have the best of motives to cause terrible trouble in prosecutions.

If we want to get serious about helping victims, there are ways this Committee in particular can provide victims and their families with real rather than symbolic help. We could, for example, this Congress could, for example, fully fund Federal programs to aid crime victims, which we have certainly neglected to do. We could provide assistance to Federal and state prosecutors to enforce existing law, which we are doing increasingly less and less. There are many other things we could do, but we have a duty to do the job and to do it right.

Constitutional amendments may make for great headlines, but I do not believe this is the answer. If anything, it will only make things worse for victims. It will not provide them with the assistance they need, but it will interfere with prosecutions as many prosecutors have told us.

Letting criminals go free is not the way to help victims of crime. Allowing criminals to game the system as this proposal would do is not the way to help victims of crime. Lying to crime victims and stonewalling any assistance to them is not the way to help victims of crime. Playing constitutional convention will certainly not help victims of crime.

I have another objection. This Congress, or at least this Committee, the majority of it, seems slap-happy with constitutional amendments. Constitutional amendments, we must have considered eight or nine of them in this session of Congress compared to 20—what is it, 25 or 26 in the last 200 years, and only 16 since the Bill of Rights? 27. Fine. 17 since the Bill of Rights, and one of them to repeal a former one. So really only 15 new ones that are still in effect in 200 years.

The fact is that this amendment would override the rights of states. It is another example of saying to the states, we know best and we are going to implement a uniform standard in a place where we shouldn't do that.

There are plenty of laws to help victims. Perhaps there should be other laws. If the problem—the Chairman said there are 1,500 laws. Well, maybe the problem is enforcement. A constitutional amendment is no more self-enforcing than is a statute. If you have 1,500 laws and it is not helping, 1,501, even if one of them is in the Constitution, is not likely to help with those having—especially if the problem is lack of enforcement or perhaps lack of funding.

So in addition to which, of course, this amendment—we have 200 years of statutes and case laws that seek to balance the rights of defendants and victims. And in one sense, the key, of course, to our constitutional system is that a person is presumed innocent until proven guilty, and must be given every opportunity and cannot—and we must demand that the state prove his guilt or her guilt. In some ways, this amendment would make that more difficult and would lead to the conviction in some cases of innocent persons, more than happens now.

We know from DNA evidence that it happens now too often, but this would increase it. And we should not juxtapose rights of victims not against rights of criminals but against rights of defendants who may not be criminals, who may be innocent. And we don't want in the name of helping victims to increasingly convict the innocent or make it harder to show innocence as this amendment would tend to do.

So, it is not necessary because there are many ways of helping victims, much of them involving enforcement of existing laws or funding existing laws without getting into the dangers of hinging prosecution—not hinging, hurting prosecutions—hindering prosecutions as this would do in many cases, or of unhinging constitutional rights that defendants who may be innocent must have.

So I think this is a misguided attempt to deal with a problem that it wouldn't deal with; that it would, in some ways, worsen, when there are much simpler ways of dealing with that problem. And I hope that this hearing may elucidate some of those problems. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. The gentleman's time has expired. Would any other panel members like to make an opening statement?

Mr. King from Iowa.

Mr. KING. Thank you, Mr. Chairman. I would just take this opportunity to say a few words about my overall philosophy on crime victims and victims' rights to put some perspective, I guess, through my eyes. And that is, that I look at the victims' rights or the lack of victims' rights within our laws to be a legacy from the old English common-law, where it was the crime against the crown rather than the person. And when we set up our system in this country, we simply substituted the state in place of the crown, so now the crime is committed against the state.

And if you have ever been a crime victim and sat in a courtroom during prosecution and heard the statement, this is a case of the State versus John Doe, whomever the perpetrator might be. And as a crime victim, you realize you are left out of this equation, and you are wondering how is it that you are going to contribute to that and how are you going to provide for—how are you going to contribute to justice, how are you going to obtain justice when you are really not technically in the equation?

So I go back to also a philosophy here where we have left the crime victims out in the open. And I recall a study, and this is a pretty dusty recollection so it is open to being corrected. The study I recall is a 1995 Cato study. It cost at that time, to their analysis, $18,000 a year to keep a criminal incarcerated. And they quantified each crime, murder, rape, violence, and they put dollar figures on

it. Now, no crime victim would ever submit to that crime for those dollars, but it was actual loss of income and actual medical expenses. And totalled up, that criminal that you can lock up for $18,000 was committing, if turned loose, on average, $444,000 in damage to society every single year. And so I looked at that equation, and I thought, well, if we can lock him up for 18,000, and if we turn him loose and it cost us $444,000, why do we have such trouble figuring out what to do here, and why do we have such trouble providing the resources to provide the penitentiaries necessary to protect the innocent people from the criminals?

And, of course, the answer to that question in its final analysis is, the taxpayer and the state was not paying the price for that crime, it was the victim. The victim was paying that price in great huge whopping chunks of their lives, their fortune, their earning—their income earning potential, and the psychology and their very psychological well-being. Victims pay the price way out of proportion, and yet they are not in the equation the way they should be. And I suggest that we incrementally take a look at victims' rights for that reason and begin to reevaluate how we view the victim in this equation.

So, right now I think that we disrespect and we disregard crime victims as part of this equation, and I am for opening this up and starting to move it in the direction where the state and the crime victim have something to say about how we adjudicate these crimes and about the punishment and about restitution in particular. So I welcome this constitutional amendment. I think it is a start in the right direction, it recognizes crime victims, and I will be here supporting it. I am very interested in your testimony.

Thank you very much, Mr. Chairman.

Mr. CHABOT. Thank you. Mr. King, before you yield back your time, would you yield to me for a moment?

Mr. KING. I would be happy to.

Mr. CHABOT. Thank you.

I just wanted to respond to the Ranking Member's criticism relative to slap-happy about constitutional amendments. And there are several constitutional amendments which we have considered. I would dispute that the Congress is slap-happy about it, though. I mean, there is one that I would certainly agree on, and that is that we ought to have a balanced budget constitutional amendment, which you and I would disagree on. This is another one that I support. The only other one I can think that we have had recently that has been brought to the Committee was by a Democrat, and it was Brian Baird's proposal about continuity of Congress, and that is one that I oppose.

So I think that that should always be a last resort, to amend the Constitution. This is one particular instance where I think it is appropriate because the defendants, the accused, their rights are clearly mentioned right in the U.S. Constitution: right to have an attorney, right to not have to self-incriminate, right to have witnesses compelled, and others. But there is not one mention of the victims, the person that has actually been injured, in the Constitution. And when the Constitution and some state statute or Federal statute come into conflict, which oftentimes happens, the Constitution is going to trump it every time. And this is a way for us to

put victims on an equal playing field with those that have victimized them, the defendant. And so this is one constitutional amendment that I support. There may be others, but I don't think we have had a whole slew of them here.

So I thank the gentleman for yielding. And my time has expired. Do any other Members——

Mr. NADLER. Mr. Chairman.

Mr. CHABOT. Yes.

Mr. NADLER. Can I comment on that briefly?

Mr. CHABOT. Absolutely. The gentleman is recognized.

Mr. NADLER. Just a list of constitutional amendments, without going into the merits or demerits of them to show, you know, the—we have had in the last couple of years, in the last few years we have had the balanced budget amendment.

Mr. CHABOT. You said the last few years; I thought you said this Congress. You are talking about the entire Congress?

Mr. NADLER. The last few years. I don't particularly care if it is this Congress or the last one. But this Committee, we have considered the balanced budget amendment, the victims' rights amendment, the flag burning amendment, the tax limitation amendment, the term limits amendment. What else did we have? The school prayer amendment. I am just saying, you know, without going through the merits of any of these—most of which I think lack merit—this Constitution has been amended 15 times since the Bill of Rights in 1791, and we have had 6 or 7 fairly seriously considered just in the last few years. And that is what I meant by slaphappy. Most of these things either can be dealt with by laws or whatever, and we should be very loathe—we don't want the United States Constitution to look like the Constitution of the State of New York or most other constitutions which are 2,000 pages long and amended five times a decade, and no one has any idea what is in it and are very rigid.

The Federal Constitution has served us well, and it should be amended only with utmost necessity, even though I am going to introduce a constitutional amendment, which I think is an utmost necessity, but it should be considered very carefully and only if we decide it is an utmost necessity should we do that. And without getting into the merits——

Mr. CHABOT. Would the gentleman yield for a minute?

Mr. NADLER. Yes. Do you want to ask me what my amendment is going to be?

Mr. CHABOT. No, I don't. But just taking one of those, for example. Oftentimes, it is because the Supreme Court has left the legislative branch of the government no option other than a constitutional amendment, such as the flag, where we passed a law protecting the flag and the Supreme Court strikes down the law; the only way you can do it is to amend the Constitution.

Mr. NADLER. Well, reclaiming my time. That is precisely the problem. The Supreme Court is the final arbiter, Mr. Hostettler, to the contrary, notwithstanding, of what the Constitution means, at least has been since *Marbury* v. *Madison* in 1803. And we should not amend or attempt to amend the Constitution every time the Supreme Court comes down with a decision we don't like. Some people don't like the school prayer decision or the flag burning deci-

sion. I don't like the limitations on the rights of Congress on the commerce clause. I didn't like the decision throwing out the gun-free schools or the Religious Freedom Restoration Act. I don't introduce a constitutional amendment every time there is a Supreme Court decision I don't agree with. Hopefully, with greater wisdom, different appointments, maybe the Supreme Court will change. You can't amend the Constitution all the time, period.

Mr. CHABOT. Would the gentleman yield for just one final point? Our Founding Fathers made it very difficult to be successful in amending the Constitution. It takes two-thirds in the House, two-thirds in the Senate, and three-fourths of the state legislatures. And that is why it only has been amended, other than the first 10 Bill of Rights, 17 times. And, as you indicated correctly, one time to reverse another decision, that was Prohibition.

Mr. NADLER. Only 15 that worked.

Mr. CHABOT. Yes. So it is a difficult process that it has to go through. But ultimately, when somebody proposes that, if it has enough support, then this is the Committee that deals with it, and that is why we are here.

Mr. NADLER. Reclaiming my time. I agree with that. I would simply say—it is difficult, and properly so. I would simply say that we should be a little more circumspect and a little more reluctant to propose constitutional amendments. Occasionally there are worthy proposals and so forth. But not every disagreement with the Supreme Court should elicit a debate to amend the Constitution.

Mr. KING. If I might.

Mr. CHABOT. The gentleman is granted an additional two minutes if he will yield to the gentleman from Iowa.

Mr. KING. We kind of started out on my time, so I just had to interject here that I would submit that the Supreme Court has de facto amended the Constitution many times over the decades, and that is what brings us to this.

Mr. NADLER. Well, let me just reply to that, if I may, reclaiming my time. Everybody thinks, when the Supreme Court comes down with a decision they don't agree with, that they have amended the Constitution. I think in the case of *Bush* v. *Gore*, they butchered the Constitution. Lots of people have opinions that every time that the Supreme Court amended the Constitution, legislators, et cetera, that is what politics is about, differences of opinion.

Again, I don't think it is right to try to amend the Constitution every time we think the Supreme Court has done it. We should reserve that for the most serious times. That is all I am saying.

Mr. CHABOT. And I think protecting victims is one of those serious times.

The gentleman from Virginia, Mr. Scott, is recognized for an opening statement if he would like to do so.

Mr. SCOTT. Thank you, Mr. Chairman.

I would just like to ask the witnesses to address a couple of questions. One would be, what in H.J. Res. 48 cannot be done by statute? The resolution itself says that you can protect the rights of victims of violent crime without denying the constitutional rights of those accused of victimizing them. So what is the barrier? Basically, I don't see any barrier. The only barrier to passing more

rights is, in fact, the right of the accused. So what in the resolution cannot be done by statute?

The other is the adverse effect this might have on prosecution. The gentleman from Iowa, I think in his remarks, suggested that we want to increase the rate of convictions, whether this might increase or decrease the rate of convictions.

And, finally, what recourse might you have at the end if your rights are, in fact, violated? The Chairman indicated that state statutes and constitutions have no recourse. Well, this, in fact, denies recourse, money damages or a new trial. Those would be recourses for violation of rights. Exactly how would you enforce your rights if they are, in fact, abridged?

Thank you, Mr. Chairman. I yield back.

Mr. CHABOT. Thank you.

Would the gentleman from Michigan like to make an opening statement?

Mr. CONYERS. Yes, Chairman Chabot, I would.

Mr. CHABOT. The gentleman is recognized for five minutes.

Mr. CONYERS. And I thank you for calling the hearing, and I commend our witnesses, General Counsel Twist, Director Beloof, Mr. Orenstein, and Mrs. Nolan. You may think that you are the Committee and that we are the witnesses so far, the way this is going, but it is you that we have come to hear. But we have not had a chance to talk about this issue formally among ourselves, and that is what this period of the hearing is for.

I think you are to be congratulated for showing your concern about the victims and what happens to these people in the criminal justice system. Frequently, victims of crime and the families become lost in the process. And when it happens, they are not just only victimized by the acts of violence, which causes their trial, but they become victimized a second time by sometimes an uncaring and insensitive court or prosecutors or criminal justice system itself. So I come to this hearing with a belief that victims and their families should be able to present in the courtroom, that they should be able to participate in various stages of the criminal justice process, that they should be entitled to timely notification of parole, of early release, or escape, and they are entitled, the victims and their family, to a timely trial.

Now, the question then arises, is whether there is a necessity to constitutionalize these rights. And we are faced with the fact that the Supreme Court has left us no precedent that holds that any of these rights are impeded by current constitutional precedent or doctrine.

We are also confronted with the fact that mandating that the victims or their families have the right to participate and possibly block plea agreements could result not only in the prosecutor's workload, but make it far more difficult to use plea bargaining when they are appropriate. And the speedy trial provisions, as much as I am for speedy trials, could force a case to come before the court before one side or the other is fully prepared.

And I would like to leave you with the weight of our good friend, Chief Justice Rehnquist, with whom I only met last week as a prerogative conferred upon the Ranking Member and Chairman of both the Judiciary Committee and the House and the Senate. And

he reminds me that the judicial conference has recently taken a position in favor of making provisions for victims' rights by statute rather than by constitutional amendment; that this would have the virtue of making any provision in the bill which appeared mistaken by hindsight to be amended by a simple act of Congress. And so I am happy to listen to the various views that this distinguished panel of witnesses will present to us this afternoon.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. The gentleman's time has expired.

The gentleman from New York is granted a minute.

Mr. NADLER. Thank you. I have just reread for the first time in a year this amendment, and a couple questions come to my mind. I would ask the witnesses to try to address them.

Section 2 of the amendment, I am trying to decide if this is totally meaningless or if it is harmful, and I would appreciate if the witnesses would address how these rights: The victim shall have the right to reasonable timely and notice of public receipt of any—to various—no one can object to that. But how do you enforce the right to an adjudicative decision that duly considers various things? I make a decision; you don't think I duly considered it properly. How is that enforced? Question number one.

And question number two—and especially when the next sentence says: These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice. Who decides that and balances that?

And lastly, it says: Congress shall have power to enforce by appropriate legislation the provisions of this article. As I read this, I am very tempted to the conclusion that section 2 sounds very nice but really doesn't do anything at all, and that the only really substantive thing in this amendment is section 4, which says Congress shall have the power to enforce by appropriate legislation the provisions of this article. And that what that really does is to give Congress the power in essence to rewrite to its heart's content the criminal justice procedure acts of all the states. To what extent is that conclusion right or wrong? And why is it necessary to do that? And to what extent is section 2 actually enforceable? How do you enforce it? What does it do that current laws don't do, if anything? Those are my questions.

Mr. CHABOT. The gentleman's time has expired.

I would like to introduce the panel now. And let me make one statement before I introduce the individual members. You have been peppered with a number of questions here, and my guess is that you probably prepared testimony to give before this Committee, and you only have five minutes to do that. If you answered half the questions that have been asked, you wouldn't get your statements out. After you have given your statements, you will have the opportunity then, each Member up here will have five minutes to ask you questions. You are free to address any of the questions that may have been asked of you already in your statement, but if you do, you may run out of time and not say what you really came here to say. So I will leave that to your discretion.

Our first witness will be Steven J. Twist. From 1978 through 1999, Mr. Twist served as the Chief Assistant Attorney General for

the State of Arizona. Mr. Twist founded the first state attorney general based victims witness program and authored the Arizona constitutional Victims' Bill of Rights. Mr. Twist has successfully worked with states across the country to draft and pass state constitutional amendments, and worked with Harvard law professor Lawrence Tribe and the Justice Department to draft the current Federal Victims' Rights Amendment.

Mr. Twist serves as Assistant General Counsel for the VLAP Corporation, and on the Steering Committee for the National Victims' Rights Constitutional Amendment Network. And we welcome you here this afternoon, Mr. Twist.

Our second witness will be Douglas Beloof, Executive Director of the National Crime Victim Law Institute housed at the Lewis & Clark Law School. He has been a prosecutor and a criminal defense attorney, and director of the Multnomah County Victims Assistance Program. Professor Beloof has lectured at national conferences on victims in the criminal justice system, and is the author of the books *Victims in Criminal Procedure*, and *The Third Model of Criminal Process*, *The Victim Participation Model*, about civil liberties for crime victims. And we welcome you here this afternoon, Mr. Beloof.

Our next witness James Orenstein, a partner in the New York City office of Baker and Hostetler. Prior to joining the firm, Mr. Orenstein served as an Assistant U.S. Attorney for the Eastern District of New York. From 1996 to 1998, he served as a Special Attorney to the U.S. Attorney General, and was a prosecutor at the Timothy McVeigh and Terry Nichols cases. From 1998 to 1999, Mr. Orenstein served in the Office of Legal Counsel. In 1999, Mr. Orenstein was appointed an Associate Deputy Attorney General, and served in that position until early 2001. Mr. Orenstein is an adjunct law professor at the New York University and Fordham School of Law, and we welcome you here this afternoon, Mr. Orenstein.

And our final witness is Sharon Nolan. Sharon is the mother of Shannon Marie Nolan-Broe and the grandmother of unborn Alexandra Jordan who were both brutally murdered by Shannon's husband on September 7th, 2001. Since her daughter was murdered, Sharon and her husband, L.C., speak on behalf of parents of murdered children and for the YWCA, for Women Helping Women, the Talbert House, the University of Cincinnati, and the local police department hoping to educate others about domestic violence and victims' rights. And we especially welcome you here this afternoon, Mrs. Nolan.

And each of the witnesses will have five minutes to testify.

As you know, we have a lighting system there. The yellow light will let you know when you have one minute left, so if you can wrap up during that time; when the red light comes on, we would appreciate you terminating your testimony as close to that time as possible.

Mr. CHABOT. And we will start with you this afternoon, Mr. Twist.

STATEMENT OF STEVEN TWIST, GENERAL COUNSEL, NATIONAL VICTIMS CONSTITUTIONAL AMENDMENT PROJECT

Mr. TWIST. Good afternoon, Mr. Chairman, and Members. Mr. Chairman, first to you, thank you for holding this hearing and for your continuing leadership in our quest for justice and fair and equal rights for crime victims. We hope this hearing will lead quickly to a markup and Full Committee action on the resolution. My full testimony has been submitted, and I would ask that it be included in your record.

Mr. CHABOT. Without objection.

Mr. TWIST. This afternoon, I would like to address our critics, those opposed to victims' rights. Of course, those critics never admit to being against victims' rights; indeed, they are all for them, just not for rights that are meaningful and enforceable and national and secured from legislative whim by the United States Constitution and established as a birthright for every American. They are all for victims' rights, as has been famously said by our colleague, Steve Derene from Wisconsin, as long as they are cheap, meaningless, and unenforceable. Opponents say victims' rights don't need to be in the Constitution; that statutes are sufficient. In effect, that separate and unequal status for crime victims is, well, just fine.

Mr. Chairman, the critics are wrong. As Professor Larry Tribe of Harvard has said, the rights we seek, "are the very kinds of rights with which our Constitution is typically and properly concerned, rights of individuals to participate in all those government processes that strongly affect their lives."

Not one of our opponents would ever suggest that defendants' rights don't need to be in the Constitution. Why do they insist on second-class status for crime victims? The threat of the loss of liberty or even life which a defendant may face is not a sufficient reason to denigrate the rights of victims, although our opponents say that it is. But rights are not a zero sum game, and the extension of the civil liberties we propose do not abridge the rights of the accused. The right to notice of proceedings does not. The right not to be excluded from proceedings does not. The right to be heard, a voice, not a veto on matters, does not abridge the rights of a defendant. The right to have safety, unreasonable delay, and restitution duly considered does not affect the rights of the offender. The right to standing to enforce these rights does not. These simple yet profoundly important rights of participation do not abridge the rights of the accused, period.

Our opponents say the amendment will hamper law enforcement. Perhaps the best judge of that is law enforcement itself. Forty-three of the state Attorneys General, the International Association of Chiefs of Police, the National Association of Police Organizations, the American Probation and Parole Association, the American Correctional Association, the National Troopers Coalition, the California Correctional Peace Officers Association, the California District Attorney's Association, The Department of Justice all have endorsed the amendment. They would have not done so had the dire consequences which are the subject of our opponent's speculation been credible. They are not.

The opponents say the amendment will be costly, yet they cannot identify one expense that isn't already or shouldn't be undertaken by government. Surely they do not contend that victims should not be given notice of proceedings in their cases because it is too costly. Who among the opponents would offer cost as a reason to deny to an accused or convicted offender a right in the Constitution? Our opponents say that the amendment will undermine the presumption of innocence, but the presumption of innocence importantly but simply requires the government to prove beyond a reasonable doubt the elements of each offense. And nothing in the amendment alters this fundamental principle of our justice system.

Our opponents say the amendment will intrude upon the rights of the states. Of course, not one of these opponents objects to the fact that defendants' rights are made applicable to every state's justice system. But our federalism exists to serve liberty. When rights are written into the Constitution, the cause of liberty is advanced, not set back, even as those rights restrain the power of government.

Mr. Chairman, no government should refuse to tell a battered woman when her batterer is given a release hearing or is released. And no battered woman should be forced by her government into silence on the matter of the release or her safety. No government should exclude the parents of a murdered child from the courtroom during the public trial of those accused of the murder. No government should force a victim to stand silent during the sentencing of her attacker unable to offer an opinion on the appropriate sentence. The parent of a murdered child should never be forced by her government into silence when the murderer of her child is given a plea bargain. No government should force crime victims to endure years of delays without any consideration for their interests. No woman raped and beaten and left for dead should be ignored by her government when she makes a just claim for restitution from her attacker. No government should deny crime victims the right to stand in court and seek their rights.

Mr. Chairman, over the last seven years of hearings we have presented each of these cases and many more to the Congress, and yet the injustice continues. It will keep mounting without congressional action. We have had seven years of debating, and frankly we are grateful for the debates. They have clarified our cause. But now the time for voting has come so that no government in the future will be able to treat crime victims with the gross injustice that has come to be the sad hallmark of our current system. Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Twist follows:]

STATEMENT

OF

STEVEN J. TWIST

GENERAL COUNSEL

NATIONAL VICTIMS CONSTITUTIONAL AMENDMENT PROJECT

BEFORE

THE

CONSTITUTION SUBCOMMITTEE

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

IN SUPPORT OF

H. J. RES. 48

THE CRIME VICTIMS' RIGHTS AMENDMENT

SEPTEMBER 30, 2003

Mr. Chairman and Distinguished Members:

I am grateful for the invitation to present the views of the National Victims Constitutional Amendment Project, a national coalition of America's leading crime victims' rights and services organizations. My background in this area is more fully set forth in earlier testimony before this subcommittee.[1]

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[1] *Rights of Crime Victims Constitutional Amendment: Hearing on H. J. Res. 64, Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives*, 106th Cong., 2nd Sess. 121 (Feb. 10, 2000). In addition to the background set forth there, I serve as an Adjunct Professor of Law at the College of Law at Arizona State University where I teach a course on the rights of crime victims in criminal procedure. I also have founded the Victims Legal Assistance Project, which is a free legal clinic for crime victims operating at the law school. The project, a partnership between ASU and Arizona Voice for Crime Victims, a statewide coalition of victims rights and services organizations in my state, provides free legal representation for crime victims helping them to assert their state constitutional and statutory rights in criminal cases. I currently serve as Vice President for Public Policy for the National Organization for Victim Assistance, the nation's oldest and largest victims rights organization, I serve on the Board of Trustees of the National Organization of Parent's of Murdered Children, and I serve as General Counsel, and a member of the executive committee, of the National Victims Constitutional Amendment Project. I am honored to represent these organizations here today.

The testimony I submit today is substantially the same as the testimony I submitted at our last meeting.[2] In addition, I have somewhat expanded the Appendix which sets forth responses to some of the principle arguments offered by those who oppose the Crime Victims Rights Amendment.

In the tradition of my faith, as reported in the Gospel of St. Luke, Christ tells the story of the Good Samaritan:[3]

> 25 And a lawyer stood up and put Him to the test, saying, "Teacher, what shall I do to inherit eternal life?" 26 And He said to him, "What is written in the Law? How does it read to you?" 27 And he answered, "You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself." 28 And He said to him, "You have answered correctly; do this and you will live." 29 But wishing to justify himself, he said to Jesus, "And who is my neighbor?" 30 Jesus replied and said, "A man was going down from Jerusalem to Jericho, and fell among robbers, and they stripped him and beat him, and went away leaving him half dead. 31 "And by chance a priest was going down on that road, and when he saw him, he passed by on the other side. 32 "Likewise a Levite also, when he came to the place and saw him, passed by on the other side. 33 "But a Samaritan, who was on a journey, came upon him; and when he saw him, he felt compassion, 34 and came to him and bandaged up his wounds, pouring oil and wine on them; and he put him on his own beast, and brought him to an inn and took care of him. 35 "On the next day he took out two denarii and gave them to the innkeeper and said, 'Take care of him; and whatever more you spend, when I return I will repay you.' 36 "Which of these three do you think proved to be a neighbor to the man who fell into the robbers' hands?" 37 And he said, "The one who showed mercy toward him." Then Jesus said to him, "Go and do the same."

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[2] May 9, 2002, Legislative hearing on H. J. Res 91, the "Crime Victims' Rights Amendment, a Proposed Amendment to the United States Constitution."

[3] Luke 10:25-37:

That Jesus chose to illustrate the meaning (and duty) of love and mercy through the story of a crime victim, a man who was stripped and beaten and left for dead reminds us that victims of violence are left with devastation and abject need. This is no less true in the 21st Century than it was in the First.

The priest and the Levite, both keepers of the Law, passed by on the other side, refusing to help the victim. It wasn't that they simply failed to stop; they crossed to the other side of the road to avoid the stricken victim. Perhaps they feared for their own safety, perhaps because they had more pressing business elsewhere they failed to stop, perhaps because they thought it would be futile to stop, or perhaps they just didn't want to get involved. Because of the enmity between the two peoples, it is central to the story that the Samaritan stopped to help the Jewish victim. While the keepers of the Law failed, the man most unlikely to do so stopped to care for the victim and in so doing stands for all time as a symbol of true love and true mercy, shown in the purest possible context, that of helping an afflicted victim of crime.

This story reaches across the ages with a powerful relevance for our own lives. It both indicts us for our failings, and calls us to a higher and better purpose. How often do we pass by to the other side of the road?

When we, as a nation, fail to give notice to crime victims of the public proceedings in their case, we pass by to the other side of the road. When we affirmatively exclude victims from the courtroom, we pass by to the other side of the road. When we leave victims without a voice at critical stages in their cases, we pass by to the other side of the road. When we deny them restitution, safety, and when we subject them to unreasonable delay – when we do these things to the "stripped and beaten and left for dead" – we are the priests and Levites of our time, passing by on the other side of the road.

The victim left by the side of the road was left dehumanized and forgotten. And so it is true today in our law, where victims are dehumanized as just another piece of evidence to be submitted and tested. Despite our best intentions and most generous funding, we cannot claim to be merciful to victims when we treat them with such great injustice. And yet the injustice continues.

The injustice for crime victims continues even after seven years of Congressional hearings. It continues in states all across the nation. The keepers of our law continue to pass by to the other side of the road. We as a nation pass by to the other side of the road. And the nation's victims, stripped, beaten, and left for dead, cry out for their Good Samaritan.

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 three appendices to my testimony I have attached excerpts from earlier testimony on why these rights, to be meaningful, must be in the United States Constitution; my answers to questions posed by Senator Leahy after the last Subcommittee hearing, and a more general response to the arguments of those who oppose crime victims' rights.

I. A Brief History Of The Movement For Constitutional Rights For Crime Victims, Their Broad Bi-Partisan Support, And The History Of The Proposed Language

A Brief History of the Movement for Constitutional Rights for Crime Victims

Two decades ago, in 1982, the President's Task Force on Victims of Crime, which had been convened by President Reagan to study the role of the victim in the criminal justice system, issued its Final Report. After extensive hearings around the country, the Task Force proposed, a federal constitutional amendment to protect the rights of crime victims. The Task Force explained the need for a constitutional amendment in these terms:

> In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.
>
> The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the sixth amendment to the Constitution be augmented.[4]

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[4] *President's Task Force on Victims of Crime, `Final Report,'* 114 (1982).

In April 1985, a national conference of citizen activists and mutual assistance groups organized by the National Organization for Victim Assistance (NOVA) and Mothers Against Drunk Driving (MADD) considered the Task Force proposal.[5]

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.[6] As explained in testimony before the Senate Judiciary Committee, "[t]he 'states-first' approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the 'great laboratory of the states,' that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice system while producing no negative, unintended consequences."[7]

The results of this conscious decision by the victims' rights movement to seek state reforms have been dramatic, and yet disappointing. A total of 33 States now have State victims' rights amendments,[8] 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

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[5] *See* LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 Wayne L. Rev. 125, 129 (1987).

[6] *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).

[7] Senate Judiciary Committee hearing, April 23, 1996, statement of Robert E. Preston, at 40.

[8] *See* Ala. Const. amend. 557; Alaska Const. art. I, Sec. 24; Ariz. Const. art. II, 2.1; Cal. Const. art. I, 12, 28; Colo. Const. art. II, 16a; Conn. Const. art. I, 8(b); Fla. Const. art. I, 16(b); Idaho Const. Art. I, 22; Ill. Const. art. I, 8.1; Ind. Const. art. I, 13(b); Kan. Const. art. 15, 15; La. Const. art. 1, 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, 24; Miss. Const. art. 3, 26A; Mo. Const. art. I, 32; Mont. Const. Art II, sec. 28; Neb. Const. art. I, 28; Nev. Const. art. I, 8; N.J. Const. art. I, 22; New Mex. Const. art. 2, 24; N.C. Const. I, 37; Ohio Const. art. I, 10a; Okla. Const. art. II, 34; Art. 1, Sec. 42, Or. Const.; R.I. Const. art. I, 23; S.C. Const. art. I, S 24; Tenn. Const. art. 1, 35; Tex. Const. art. 1, 30; Utah Const. art. I, 28; Va. Const. art. I, 8-A; Wash. Const. art. 2, 33; Wis. Const. art. I, 9m. These amendments passed with overwhelming popular support.]

meaningful and enforceable rights for crime victims.[9]

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.[10]

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.

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[9] Paul G. Cassell, Professor of Law, University of Utah College of Law, *Statement Before the Committee on the Judiciary, United States Senate, Responding to the Critics of the Victims' Rights Amendment*, (March 24, 1999):

> Unfortunately, however, the state amendments and related federal and state legislation are generally recognized by those who have carefully studied the issue to have been insufficient to fully protect the rights of crime victims. The United States Department of Justice has concluded that current protection of victims is inadequate, and will remain inadequate until a federal constitutional amendment is in place. As the (former) Attorney General (Reno) explained:
>
> > Efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims rights advocates have sought reforms at the State level for the past 20 years . . . . However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights. (Citation in original).

[10] 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.")

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.[11]

At the end of the 104th Congress, Senators Kyl and Feinstein introduced a modified version of the amendment (S. J. Res. 65). As first introduced, S. J. Res. 52 embodied eight core principles: notice of the proceedings; presence; right to be heard; notice of release or escape; restitution; speedy trial; victim safety; and notice of rights. To these core values another was added in S. J. Res. 65, the right of every victim to have independent standing to assert these rights. In the 105th Congress, Senators Kyl and Feinstein introduced S. J. Res. 6 on January 21, 1997, the opening day of the Congress. Thirty-two Senators became cosponsors of the resolution. On April 16, 1997, the Senate Committee on the Judiciary held a hearing on S. J. Res. 6.[12]

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.[13] 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

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[11] 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

[12] *See* Senate Judiciary Report.

[13] *Id.*

January 19, 1999, the opening day of the Congress. Thirty-three Senators became cosponsors of the resolution. On March 24, 1999, the Senate Committee on the Judiciary held a hearing on S. J. Res. 3.

Rep Steve Chabot (R-OH) introduced H. J. Res. 64 on August 4, 1999.

On May 26, 1999, the Senate Subcommittee on the Constitution, Federalism, and Property Rights approved S. J. Res. 3, with an amendment, and reported it to the full Committee by a vote of 4 to 3. On September 30, 1999, the Senate Committee on the Judiciary approved S. J. Res. 3 with a sponsors' substitute amendment, by a vote of 12 to 5.

Hearings on H. J. Res 64 were held on February 10, 2000 before the Constitution Subcommittee of the Committee on the Judiciary.

On April 27, 2000, after three days of debate on the floor of the United States Senate, Senators Kyl and Feinstein decided to ask that further consideration of the amendment be halted when it became likely that opponents would sustain a filibuster.[14]

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

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[14] "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.

Administration officials directed at reaching consensus on language.[15]

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[15] Such a consensus had always eluded proponents in discussion with the prior Administration. *See* National Organization for Victim Assistance, *Newsletter,* Volume 19, Numbers 2 and 3 (of 12 issues), 2000 which reported the following history:

> Administration Reservations
>
> For at least two years before the full Senate took up the proposal, the Justice Department had been expressing reservations about certain provisions of the Kyl-Feinstein proposal. Organizations like the National Victims Constitutional Amendment Network (NVCAN) and NOVA had written letters to Attorney General Janet Reno expressing disagreement with the Department's positions and requesting meetings to seek resolution. Those letters went unanswered.
>
> Justice formalized its objections in a February 10, 2000, hearing before the Constitution Subcommittee of the House Judiciary Committee, considering a counterpart proposal. There, Assistant Attorney General Eleanor D. Acheson submitted a statement for the Department specifying four objections to the Kyl-Feinstein resolution (and an additional one pertaining just to the House bill, introduced by Ohio Republican Steve Chabot).
>
> That statement became the focus of the discussions between the Administration and the sponsors. These began Tuesday afternoon, necessitating the sponsors to leave the floor as opponents held forth.
>
> The Justice position and the proponents' response can be found in a rejoinder that NVCAN Chief Counsel Steven Twist filed to the Acheson statement. Italicized excerpts from the statement, with the Twist rejoinder afterward, follow:
>
> *" ... [w]e urge that the following language be added: 'Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution.' "*
>
> > "The likely, although perhaps unintended, consequence of the proposed language would be to always subordinate the rights of the victim to those of an accused or convicted offender. To constitutionalize such a 'trump card' would be directly contrary to the views President Clinton expressed on June 25, 1996 ..."
>
> . . .
>
> The 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'

The discussions toward consensus were interrupted by the September 11, 2001 attacks on our nation. However, those tragic events and their resulting victimizations focused our attention on the importance of our work and strengthened our resolve to complete it as soon as the Administration was again able to rejoin the discussion. Our talks resumed earlier this year and just before the advent of Crime Victims Rights Week this year (April 21 - 27, 2002) we reached agreement.

Let me say on behalf of our national movement how grateful we are to the President and the Attorney General for committing to this lengthy process and always remaining steadfast in pursuit of the goal of constitutional rights for crime victims. We are also grateful to Viet Dinh, who led the Administration discussion team, and his many fine colleagues within DOJ and the White House.

These efforts have produced the proposed amendment which is now before you. It is the product of seven years of debate and reflection. It speaks in the language of the Constitution; it has been revised to address concerns of critics on both the Left and the Right, while not abandoning the core values of the cause we serve. The proposed language threatens no constitutional right of an accused or convicted offender, while at the same time securing fundamentally meaningful and enforceable rights for crime victims.

Senators Feinstein and Kyl introduced S. J. Res. 35 on April 15, 2002 and the following day President Bush announced his support for the amendment. On May 1, 2002, Law Day, Rep. Chabot introduced a companion House Resolution, H. J. Res. 91. A hearing before the House Judiciary Constitution Subcommittee was held on May 9, 2002. A hearing on S. J. Res. 35 was held on July 17, 2003.

S. J. Res. 1, the measure before you today, was introduced on January 7, 2003. Congressman Chabot will introduce the amendment in the House on April 10, 2003.

The Bi-Partisan Consensus for Constitutional Rights for Crime Victims

That there is a strong bi-partisan consensus that crime victims should be given rights is now beyond dispute, as is the consensus that those rights *can only* be secured by

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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.

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[16] and the Republican National Committee.[17] Former President Clinton understood the need for a constitutional amendment for crime victims rights[18] and President Bush has recently issued a strong

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[16] Democratic National Committee, *The 2000 Democratic National Platform: Prosperity, Progress, and Peace* (2000):

> *Victims' Rights.* We need a criminal justice system that both upholds our Constitution and reflects our values. Too often, we bend over backward to protect the right of criminals, but pay no attention to those who are hurt the most. Al Gore believes in a Victims' Rights Amendment to the United States Constitution - one that is consistent with fundamental Constitutional protections. Victims must have a voice in trial and other proceedings, their safety must be a factor in the sentencing and release of their attackers, they must be notified when an offender is released back into their community, they must have a right to compensation from their attacker. Our justice system should place victims ... in their rightful place.

[17]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.")

[18]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.

endorsement of the proposal before you.[19] Former Attorney General Janet Reno supported a constitutional amendment for victims rights[20] and Attorney General John Ashcroft

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[19]Statement of President George W. Bush from the Department of Justice, April 16, 2002

> The victims' rights movement has touched the conscience of this country, and our criminal justice system has begun to respond, treating victims with greater respect. The states, as well as the federal government, have passed legal protections for victims. However, those laws are insufficient to fully recognize the rights of crime victims.
>
> Victims of violent crime have important rights that deserve protection in our Constitution. And so today, I announce my support for the bipartisan Crime Victims' Rights amendment to the Constitution of the United States.
>
> As I mentioned, this amendment is sponsored by Senator Feinstein of California, Senator Kyl of Arizona -- one a Democrat, one a Republican. Both great Americans.
>
> This amendment makes some basic pledges to Americans. Victims of violent crime deserve the right to be notified of public proceedings involving the crime. They deserve to be heard at public proceedings regarding the criminal's sentence or potential release. They deserve to have their safety considered. They deserve consideration of their claims of restitution. We must guarantee these rights for all the victims of violent crime in America.
>
> The Feinstein-Kyl Amendment was written with care, and strikes a proper balance. Our legal system properly protects the rights of the accused in the Constitution. But it does not provide similar protection for the rights of victims, and that must change.
>
> The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do. And the Feinstein-Kyl Crime Victims' Rights Amendment is the right way to do it.

[20]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

recently announced his support for the proposed amendment.[21] Each proposal for a constitutional amendment has received strong bi-partisan support in the United States Senate.[22] The National Governors' Association, by a vote of 49-1, passed a resolution strongly supporting the need for a constitutional amendment for crime victims.[23] In the

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> patchwork of victims' rights. While a person arrested or convicted for a crime anywhere in the United States knows that he is guaranteed certain basic minimum protection under our nation's most fundamental law, the victim of that crime has no guarantee of rights beyond those that happen to be provided and enforced in the particular jurisdiction where the crime occurred.
>
> A victims' rights amendment would ensure that courts will give weight to the interests of victims. When confronted with the need to reconcile the constitutional rights of a defendant with the statutory rights of a victim, many courts often find it easiest simply to ignore the legitimate interests of the victim. A constitutional amendment would require courts to engage in a careful and conscientious analysis to determine whether a particular victim's participation would adversely affect the defendant's rights. The result will be a more sophisticated and responsive criminal justice system that both protects the rights of the accused and the interests of victims.
>
> Second, efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate.

[21]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.

[22] Senators Kyl and Feinstein have co-sponsored their amendment with leading senators from both parties.

[23] National Governors' Association, Policy 23.1 ("Despite widespread state initiatives, the rihgts of victims do not receive the same consideration or protection as the

last Congress, a bipartisan group of 39 State Attorneys General signed a letter expressing their "strong and unequivocal support for an amendment. Finally, among academic scholars, the amendment has garnered the support from both conservatives and liberals.[24]

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, in fact, deny those rights. The task of balancing rights, in the case of alleged conflict, will fall, as it always does, to the courts, guided by the constitutional admonition not to *deny* constitutional rights to either the victim or the accused.[25]

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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.")

[24]"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.

[25] *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

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*.[26]

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"[27] rights that may be established by other federal or state laws. The amendment establishes a floor and not a ceiling of rights[28] 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[29]

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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.*

[26] 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).

[27] U. S. Constitution, Amend. IX.

[28] *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.")

[29] *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;"[30] 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.[31]

Moreover, we are confident that the scope of the "violent crime" clause will be broadly applied to effectuate the purpose of extending rights to crime victims, and not be limited as it might in more narrow contexts. The Senate Report addressed this issue at

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[30] Webster's New Collegiate Dictionary, 304 (1977).

[31] Cite Beloof Article

some length and it is worth inserting those views for your consideration:

> The most analogous Federal definition is Federal Rule of Criminal Procedure 32(f), which extends a right of allocution to victims of a "crime of violence" and defines the phrase as one that "involved the use or attempted or threatened use of physical force against the person or property of another * * *." (emphasis added). The Committee anticipates that the phrase "crime of violence" will be defined in these terms of "involving" violence, not a narrower "elements of the offense" approach employed in other settings. See, e.g., 18 U.S.C. 16. Only this broad construction will serve to protect fully the interests of all those affected by criminal violence.
>
> "Crimes of violence" will include all forms of homicide (including voluntary and involuntary manslaughter and vehicular homicide), sexual assault, kidnaping, robbery, assault, mayhem, battery, extortion accompanied by threats of violence, carjacking, vehicular offenses (including driving while intoxicated) which result in personal injury, domestic violence, and other similar crimes. A "crime of violence" can arise without regard to technical classification of the offense as a felony or a misdemeanor.
>
> It should also be obvious that a "crime of violence" can include not only acts of consummated violence but also of intended, threatened, or implied violence. The unlawful displaying of a firearm or firing of a bullet at a victim constitutes a "crime of violence" regardless of whether the victim is actually injured. Along the same lines, conspiracies, attempts, solicitations and other comparable crimes to commit a crime of violence should be considered "crimes of violence" for purposes of the amendment, if identifiable victims exist.
>
> Similarly, some crimes are so inherently threatening of physical violence that they could be "crimes of violence" for purposes of the amendment. Burglary, for example, is frequently understood to be a "crime of violence" because of the potential for armed or other dangerous confrontation. See United States v. Guadardo, 40 F.3d 102 (5th Cir. 1994); United States v. Flores, 875 F.2d 1110 (5th Cir. 1989).
>
> Similarly, sexual offenses against a child, such as child molestation, can be "crimes of violence" because of the fear of the potential for force which is inherent in the disparate status of the perpetrator and victim and also because evidence of severe and persistent emotional trauma in its victims gives testament to the molestation being unwanted and coercive. See United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993). Sexual offenses against other vulnerable persons would similarly be treated as

> "crimes of violence," as would, for example, forcible sex offenses against adults and sex offenses against incapacitated adults.
>
> Finally, an act of violence exists where the victim is physically injured, is threatened with physical injury, or reasonably believes he or she is being physically threatened by criminal activity of the defendant. For example, a victim who is killed or injured by a driver who is under the influence of alcohol or drugs is the victim of a crime of violence, as is a victim of stalking or other threats who is reasonably put in fear of his or her safety. Also, crimes of arson involving threats to the safety of persons could be "crimes of violence."[32]

It should be noted that the States, and the Federal Government,[33] within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal. The power to define "victim" is simply a corollary of the power to define the elements of criminal offenses and, for State crimes, the power would remain with State Legislatures.

shall have the right to reasonable and timely notice of any public proceeding involving the crime

Reasonable and timely notice is the irreducible component of fairness and due process. Each of the participatory rights established in the amendment depend first on the receipt of notice. Notice here must be "reasonable." As was noted in the Senate Judiciary Report:

> To make victims aware of the proceedings at which their rights can be exercised, this provision requires that victims be notified of public proceedings relating to a crime. `Notice' can be provided in a variety of fashions. For example, the Committee was informed that some States have developed computer programs for mailing form notices to victims while other States have developed automated telephone notification systems. Any

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[32] Senate Judiciary Report

[33] 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).

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. [34]

"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.

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[34] *See* Senate Judiciary Report

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.[35]

To fail to provide simple notice of proceedings to criminal defendants would be unthinkable; why do we tolerate it for crime victims?

The right to notice of public proceedings is fundamental to the notions of fairness and due process that ought to be at the center of any criminal justice process. Victims have a legitimate interest in knowing what is happening in "their" case. Surely it is time to protect this fundamental interest of crime victims by securing an enduring right to notice in the Constitution.

of any release or escape of the accused

Reasonable and timely notice of releases or escapes is a matter of profound importance to the safety of victims of violent crime. Twenty years after the President's Task Force report victims are still learning "by accident"[36] of the release of the person

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[35] *New Directions*, 13.

[36] *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

accused or convicted of attacking them.[37] This continuing threat to safety must be brought to an end.[38]

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."[39]

not to be excluded from such public proceeding

This right parallels the language that had been reported out of the Senate Judiciary Committee in April, 2000. The comments from the Senate Judiciary Report remain instructive:

> Victims are given the right `not to be excluded' from public proceedings. This builds on the 1982 recommendation from the President's Task Force on Victims of Crime that victims `no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of

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me standing across the street staring at me. I thought he was in jail.' – a victim")

[37] *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.,

[38] 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.")

[39] Senate Judiciary Report.

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.

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.[40]

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

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[40] Senate Judiciary Report

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-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."[41] 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 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).[42]

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[41] Task Force Report at 9.

[42] Senate Judiciary Report.

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]
>
> Professor Bandes acknowledges the power of hearing from victims' families. Indeed, in a commendable willingness to present victim statements with all their force, she begins her article by quoting from victim impact statement at issue in *Payne v. Tennessee*, a statement from Mary Zvolanek about her daughter's and granddaughter's deaths and their effect on her three-year- old grandson:
>
> 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.[43]

It should be noted that the victim's right to be heard at sentencing is not the right to be a witness. Rather, it is an independent right of allocution not dependent on the victim being called to the witness stand. In this way the right parallels the right of the defendant. The victim is given the right to address the sentencing authority (judge or jury).

The right to be heard at sentencing includes the right to make a recommendation regarding the appropriate sentence to be imposed, including in capital cases.

the right to adjudicative decisions that duly consider the victim's safety

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[43] 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).

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.[44]

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.[45] 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

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[44] *See note 32, supra.*

[45] Art. II, § 2.1 Ariz. Const. was enacted and became effective November, 1990.

final conclusion of the case after conviction."[46] Arizona victims even have standing to assert their rights in court.[47]

Unfortunately for Sally and Jim, these rights, on behalf of their murdered brother, were hollow promises. The murderers' trial did not begin until January 1999, more than four years after the murderers had been arrested. Continuances were constantly granted without notice to Jim and Sally and without any consideration for their rights. The two murderers were convicted of First Degree Murder when the trial concluded the same month it had begun. By the late summer of 2000 the murderers had not yet been sentenced. Again, despite their state constitutional rights, continuances were granted without notice to them and without respecting their rights to be heard. Finally the ordeal came to an end when the two murderers were sentenced in July and August of 2001,[48] 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.[49] Sally and Jim were cloaked in all the majesty that the law of the State of Arizona could muster. Regrettably for those

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[46] 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.

[47] 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... .")

[48] *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).

[49] 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... ."

interested in fair play and balance for crime victims in the criminal justice system it was not enough. Month after month, for close to six years, they summoned the strength to go to court, schedule time off work, and re-live the murder of their brother, over and over again, while the defendants sought tactical advantage through endless delays. The years of delay exacted an enormous physical, emotional, and financial toll.

The Senate Judiciary Report provides more insight into the meaning of the victim's interest in avoiding unreasonable delay:

> Just as defendants currently have a right to a `speedy trial,' this provision will give victims a protected right in having their interests to a reasonably prompt conclusion of a trial considered. The right here requires courts to give `consideration' to the victims' interest along with other relevant factors at all hearings involving the trial date, including the initial setting of a trial date and any subsequent motions or proceedings that result in delaying that date. This right also will allow the victim to ask the court to, for instance, set a trial date if the failure to do so is unreasonable. Of course, the victims' interests are not the only interests that the court will consider. Again, while a victim will have a right to be heard on the issue, the victim will have no right to force an immediate trial before the parties have had an opportunity to prepare. Similarly, in some complicated cases either prosecutors or defendants may have unforeseen and legitimate reasons for continuing a previously set trial or for delaying trial proceedings that have already commenced. But the Committee has heard ample testimony about delays that, by any measure, were `unreasonable.' See, e.g., Senate Judiciary Committee hearing, April 16, 1997, statement of Paul Cassell, at 115-16. This right will give courts the clear constitutional mandate to avoid such delays.
>
> In determining what delay is `unreasonable,' the courts can look to the precedents that exist interpreting a defendant's right to a speedy trial. These cases focus on such issues as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant. See *Barker* v. *Wingo*, 407 U.S. 514, 530-33 (1972). Courts will no doubt develop a similar approach for evaluating victims' claims. In developing such an approach, courts will undoubtably recognize the purposes that the victim's right is designed to serve. Cf. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972) (defendant's right to a speedy trial must be `assessed in the light of the interest of defendant which the speedy trial right was designed to protect').

> The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.
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> The Committee also anticipates that more content may be given to this right in implementing legislation. For example, the Speedy Trial Act of 1974 (Public Law 93-619 (amended by Public Law 96-43), codified at 18 U.S.C. 3152, 3161) already helps to protect a defendant's speedy trial right. Similar legislative protection could be extended to the victims' new right.[50]

just and timely claims to restitution from the offender

The language requires the court to consider the victim's claim to restitution. The nature of the claim will be governed by State or Federal law, as appropriate to the jurisdiction.

These rights shall not be restricted except when and to the degree dictated

Clearly no one of the Bill of Rights is absolute; restrictions have been applied, in varying conditions, based on varying standards, throughout the history of the nation.[51] 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.[52] The proposed restriction language settles what might otherwise be years of vexing litigation over what the proper standard would be for allowing restrictions.

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[50] Senate Judiciary Report

[51] *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.*

[52] *See e.g., Shelton v. Tucker*, 364 U. S. 479 (1960) adopting "least restrictive means" standard for restrictions on the right to association.

by a substantial interest

The "substantial "interest" standard is known in constitutional jurisprudence[53] and is intended to be high enough so that only "essential"[54] interests in public safety and the administration of justice will qualify as justifications for restrictions of the enumerated rights.

in public safety

In discussing the "compelling interest" standard of S. J. Res. 3, the Senate Judiciary Report noted, "In cases of domestic violence, the dynamics of victim-offender 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."[55]

"Public safety" as used here includes the safety of the public generally, as well as the safety of identified individuals.[56]

the administration of criminal justice

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[53] *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.)

[54] 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 ... .")

[55] Senate Judiciary Report

[56] *See Bartnicki v. Vopper*, 532 U. S. 514 (2001) where a "public safety" threat was to identified school board members.

It is intended that the language will address management issues within the courtroom or logistical issues arising when it would otherwise be impossible to provide a right otherwise guaranteed. In cases involving a massive number of victims notice of public proceedings may need to be given by other means, courtrooms may not be large enough to accommodate every victim's interest, and the right to be heard may have to be exercised through other forms. The phrase is not intended to address issues related to the protection of defendants' rights.

The term "administration of criminal justice," as used by the United States Supreme Court is a catch-all phrase that encompasses any aspect of criminal procedure. The term 'administration' includes two components: (1) the procedural functioning of the proceeding and (2) the substantive interest of parties in the proceeding. The term 'administration' in the Amendment is narrower than the broad usage of it in Supreme Court case-law and refers to the first description: the procedural functioning of the proceeding. Among the many definitions available for the term 'administration' in Webster's Third New International Dictionary of the English Language (1971), the most appropriate definition to describe the term as used in the Amendment is: "2b. Performance of executive [prosecutorial and judicial] duties: management, direction, superintendence." (Brackets added).

The potential for atypical circumstances necessitates giving courts and public 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."[57]

SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.

Nothing in this article shall be construed to provide grounds for a new trial to authorize any claim for damages.

The proposed language in no way limits the power to *enforce* the rights granted. Rather it provides two narrowly tailored exceptions to the *remedies* that might otherwise 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.[58] 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.

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[57] Senate Judiciary Report

[58] *See* text at n. 29, *supra.*

no person accused of the crime may obtain any form of relief hereunder.

This clause makes it clear, even as does the foregoing clause ("*Only the victim...*"), that the accused or convicted offender may obtain no relief in the event that a *victim's* right is violated.

SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.

Congress shall have power to enforce by appropriate legislation the provisions of this article.

Congress' power to "enforce" established by this section carries limitations that are important for principles of federalism. The power to enforce is not the power to define.[59] 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[60] 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

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[59] *City of Boerne v. Flores*, 521 U. S. 507 (1997)

[60] U. S. Const. Art. II, Sec. 2.

amendment would obligate the President to do this.

SECTION 5. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

The seven year ratification deadline is put into the body of the amendment to ensure that there will be a contemporaneous ratification requirement. Lawyers in the Justice Department have concluded that putting the 7 year limit in the body of the amendment, rather than the resolved clause is the only reliable way to ensure the contemporaneous ratification.[61]

III. Conclusion

Doubtless there will be critics who come before the Congress and argue against establishing the rights enumerated in S. J. Res. 1. They are on the extreme margins. Most of the opponents will say they support the rights, just not in the Constitution. Indeed, the rights themselves are so modest and so reasonable they are hard to argue with. Yet who among these critics would be heard to say, "I'm all for defendants' rights, but they don't need to be in the Constitution." The vast majority of Americans, when judged by the actual votes at state elections for amendments, are unequivocal in their support for constitutional rights for crime victims.[62] 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

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[61] *See e.g.*, U. S. Const. Amendments XX, XXI, and XXII.

[62] 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.

of their colleagues, as Prof Tribe and Prof. Cassell have joined together, with the victims and the vanquished, all in a unanimous chorus that crime victims deserve fundamental rights and that only an amendment to the U. S. Constitution will guarantee them. Mr. Chairman, Honorable Members, do not rest until this great national consensus is ratified. Seek out your leadership, push for a mark-up, demand floor action, and send the resolution to the House before the end of the Summer.

Every day that goes by injustice mounts upon injustice. The parents of a murdered child sit somewhere today on a hard bench in the hallway of an American courthouse, while the defendant's family is ushered to special seats inside. Today a woman and a child are being denied the right to speak at the bail hearing of their abuser. Somewhere today, in an American courtroom, a rape victim is shut out of a plea bargain proceeding involving the charges against her rapist. Somewhere, today, as we meet, a victim endures through an endless litany of continuances without voice in the matter of delay. Today another American victim is silenced at the sentencing of her attacker, today, in our country, restitution is being forgotten, and safety is being ignored because a parole board has not allowed the victim to speak. Today, in courtrooms across our beloved nation, injustice mounts upon injustice. And so we ask yet again, who will stand up now to speak against this injustice; who will give voice to the victim?

A watchful nation awaits your answer. And hope abides.

APPENDIX A

Why The Rights Can Only Be Secured In The United States Constitution

Even the Amendment's most ardent critics usually say they support most of the rights in principle. If there is one thing certain in the victims' rights debate, it is that these words, "I'm all for victims' rights but . . .," are heard repeatedly. But while supporting the rights "in principle," opponents in practice end up supporting, if anything, mere statutory fixes that have proven inadequate to the task of vindicating the interests of victims. As Attorney General Reno testified before the House Committee on the Judiciary, ". . . efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate." The best federal statutes have proven inadequate to the needs of even highly publicized victim injustices, as Professor Cassell's writing about the plight of the Oklahoma City bombing victims has ably demonstrated.

In my state, statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights -- even when those rights are not genuinely threatened." The experience in my state is, sadly, hardly unique. A recent study by the National Institute of Justice found that "even in States where victims' rights were protected strongly by law, many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution." The victims most likely to be affected by the current haphazard implementation are, perhaps not surprisingly, racial minorities.

A group calling itself "Citizens for the Constitution"[hereinafter "Citizens"] has organized under the auspices of The Century Foundation's Constitution Project. Their purpose is to call for restraint in the consideration of Amendments to the U. S. Constitution. In their recent pamphlet, *"Great and Extraordinary Occasions": Developing Guidelines for Constitutional Change*, the group propounds eight guidelines which, they argue, should be satisfied before any constitutional amendment would be justified. The "Citizens" raise some questions, in the commentary following their guidelines, about the Crime Victims' Rights Amendment. Applying these rigorous Guidelines, however, despite the reservations of the "Citizens" themselves, demonstrates unequivocal support for the case for the Amendment. I would like to direct the Subcommittee's attention to these eight guidelines, which the "citizens" offer in the form of eight questions.

1. Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?

Yes.

Even as the Constitutional rights of persons accused or convicted of crimes address issues of "abiding importance," so to do the proposed rights of crime victims. The legitimate rights of the accused to notice, to the right to be present and the right to be heard or remain silent, the right to a speedy and public trial, or any of the other rights are surely no more enduring than the legitimate interests of the victim to notice, presence, or the right to be heard, or any of the other rights proposed by the amendment. Surely no one could persuasively argue that the rights of the innocent victim were less important or enduring.

Indeed, it is precisely because these values for victims are of enduring, or "abiding" importance that they must be protected against erosion by any branch or majoritarian will. That they do not exist today broadly across the country is evidence that they are not adequately protected despite general acceptance of their merit.

2. Does the proposed amendment make our system more politically responsive or protect individual rights?

Yes.

Clearly the proposed amendment is offered to "protect individual rights." *That is its sole purpose.*

The "Citizens" however, suggest that Congress should ask "whether crime victims are a 'discreet and insular minority' requiring constitutional protection against overreaching majorities or whether they can be protected through ordinary political means. Congress should also ask whether it is appropriate to create rights for them that are virtually immune from future revision. Let's review these two questions.

"[O]rdinary political means" have proven wholly inadequate to establish and protect the rights reviewed above. If this were not so they would exist and be respected in every state and throughout the federal government. The evidence that they are not is as compelling as it is overwhelming. Why is this so? Are crime victims unpopular? No, but as a class they are ignored; their interests subordinated to the interests of the defendant and the professionals in the system. And those interests are entrenched as deeply as any in this society. Crime victims become "discreet and insular" by virtue of their transparency. If this were not so we would not be here for our rights would be secure.

3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?

Yes.

The "Citizens" write, 'The proposed victims' rights amendment raises troubling questions under this Guideline. Witnesses testifying in Congress on behalf of the amendment point to the success of state amendments as reason to enact a federal counterpart. But the

passage of the state amendments arguably cuts just the other way; for the most part, states are capable of changing their own law of criminal procedure in order to accommodate crime victims, without the necessity of federal constitutional intervention. While state amendments cannot affect victims' rights in federal courts, Congress has considerable power to furnish such protections through ordinary legislation. Indeed, it did so in March 1997 with Public Law 105-6 . . . which allowed the victims of the Oklahoma City bombing to attend trial proceedings."

I was one of those witnesses the "Citizens" referred to. They should have read all my testimony. Let me repeat again one of my statements, "In my state, the statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights -- even when those rights are not genuinely threatened." (Quoting Prof. Lawrence Tribe on the proposed amendment).

Moreover our courts have now made explicit in a series of cases (cited in Hearing Report on S. J. Res. 6, April 16, 1997, Senate Judiciary Committee) what was always understood: namely that the U. S. Constitutional rights of the defendant will always trump any right of the victim without any fair attempt to balance the rights of both.

On the Oklahoma City bombing point that the "Citizens" make they should have read the whole testimony of Prof. Paul Cassell who convincingly demonstrates how the statute cited by the citizens was inadequate to the task of fully protecting even these high profile and compelling victims. The law didn't work for them. How much less must it work for victims who don't have the clout to get an act of Congress passed? That "other means," to use the "Citizens" phrase, have simply proven inadequate is concurred in by a broad consensus that includes the Justice Department, constitutional scholars of the highest regard from both ends of the political spectrum, the President, the Vice President, the platforms of both major political parties, and bi-partisan coalition of Members and Senators, and crime victim advocates throughout our country.

4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves in tact?

Yes.

The proposed rights are perfectly consistent with the constitutional doctrine that fundamental rights for citizens in our justice system need the protection of our fundamental law.

5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?

Yes.

The text of the proposed amendment grants to crime victims constitutional standing to stand before any judge in the country and seek orders protected the established rights. This is the essence of enforceability.

6. Have the proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?

Yes.

More than simply "think through" the proposal, proponents of the CVRA have taken roughly two decades of experience with state statutes and constitutional provisions to develop a very refined understanding of the limits of state and federal law, the need for a federal amendment, and how that amendment would work in actual practice and be interpreted. No other constitutional amendment has had this degree of vetting.

7. Has there been full and fair debate on the merits of the proposed amendment?

Yes.

The Congress has had the amendment under consideration since 1996. There have been major hearings in both bodies on multiple occasions. The record of debate and discussion throughout the country is extensive.

8. Has congress provided for a non-extendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?

Yes.

The proposal establishes a seven-year deadline for State ratification.

Conclusion

The proposed amendment passes the test of the "Citizens" Guidelines. More importantly, it is fully faithful to the spirit and design of James Madison.

The "Citizens'" pamphlet, *Great and Extraordinary Occasions,* takes its name from a line in *The Federalist* No. 49, authored by James Madison. There Madison rightly argued for restraint in the use of the amendment process. But of course he rose above rightful restraint to propose the first twelve amendments.

When James Madison took to the floor and proposed the Bill of Rights during the first session of the First Congress, on June 8, 1789, "his primary objective was to keep the Constitution intact, to save it from the radical amendments others had proposed . . . ." In doing so he acknowledged that many Americans did not yet support the Constitution.

"Prudence dictates that advocates of the Constitution take steps now to make it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them."

The fact is, Madison said, there is still "a great number" of the American people who are dissatisfied and insecure under the new Constitution. So, "if there are amendments desired of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens," why not, in the spirit of "deference and concession," adopt such amendments?

Madison adopted this tone of "deference and concession" because he realized that the Constitution must be the "will of all of us, not just a majority of us." By adopting a bill of rights, Madison thought, the Constitution would live up to this purpose. He also recognized how the Constitution was the only document which could likely command this kind of influence over the culture of the country.

Our goals are perfectly consistent with the goals that animated James Madison. There is substantial evidence in the land that the Constitution today does not serve the interests of the "whole people" in matters relating to criminal justice. And the way to restore balance to the system, in ways that become part of our culture, is to amend our fundamental law.

"[The Bill of Rights will] have a tendency to impress some degree of respect for [the rights], to establish the public opinion in their favor, and rouse the attention of the whole community . . . [they] acquire, by degrees, the character of fundamental maxims. . . as they become incorporated with the national sentiment . . . ."

Critics of Madison's proposed amendments claimed they were unnecessary, especially so in the United States, because states had bills of rights. Madison responded with the observation that "not all states have bills of rights, and some of those that do have inadequate and even 'absolutely improper' ones." Our experience in the victims' rights movement is no different. Not all states have constitutional rights, nor even adequate statutory rights. There are 33 state constitutional amendments and they are of varying degrees of value.

Harvard Professor Lawrence Tribe has observed this failure : " . . . there appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach . . . ." As a consequence he has concluded that crime victims' rights "are the very kinds of rights with which our Constitution is typically concerned."

After years of struggle, we now know that the only way to make respect for the rights of crime victims "incorporated with the national sentiment," is to make them a part of "the sovereign instrument of the whole people," the Constitution. Just as James Madison would have done it.

APPENDIX B

Responses To Points Made In Opposition

"I'm all for victims' rights, but the proposed amendment is 'an assault on federalism as it has been defined for more than two centuries.'"

The full quote from Prof. Raskin continues, "No aspect of public policy, with the possible exception of education, has been more jealously guarded by the states and localities than the investigation and prosecution of common law crimes and the structuring of the accompanying criminal justice process." The federalism concern also has been expressed by others.

The criminal justice system which Prof. Raskin describes does not exist. In many important matters the Constitution of the United States has come to dictate to the states the "structuring" of their "criminal justice process." Certainly Prof. Raskin knows this and indeed supports it. Through the Fourteenth Amendment, the courts have structured the criminal justice process in each state to be respectful and protective of the rights established in the Bill of Rights for persons accused and convicted of crimes. The incorporation of these rights through the Fourteenth Amendment, and their applicability to the states, has been accepted within our federal system in order to secure a national threshold of fair treatment. Why should not the same deference be given to the rights of crime victims as is given to the rights of accused or convicted offenders?

The authors and supporters of the Crime Victims' Rights Amendment are sympathetic to the demands of federalism and deeply respect the role of the states. The proposal does not infringe these important values. Nothing in the proposed amendment denies to the states their rightful authority to define and implement the rights as they see fit, subject only to the unifying review of the U. S. Supreme Court. Moreover, the power of the Congress to enforce the provisions of the amendment are limited by the understanding given to the word "enforce" in recent Supreme Court decisions, *e.g. City of Boerne.* This jurisprudence is important to our understanding of the role of the states within their respective jurisdictions. For a fuller discussion of this point see the Senate Judiciary Report on S. J. Res. 44

As long as the Constitution establishes a floor of rights for defendants it will be proper for the same Constitution to establish a floor of rights for victims. As Attorney General Reno earlier testified in the House, "First, unless the Constitution is amended to ensure basic rights to crime victims, we will never correct the existing imbalance in this country between defendants' constitutional rights and the haphazard patchwork of victims' rights."

"I'm all for victims' rights, but the costs of this amendment will be staggering and local criminal justice systems will be crippled as a consequence."

This criticism is often made by those who have no direct knowledge of the costs of providing rights for crime victims and who have not thought through clearly enough the actual fiscal impact of the proposed amendment. Let them come to Arizona. Our state constitutional amendment has been in effect since November 1990 and the costs have been minimal and manageable. Consider the proposed rights themselves. The amendment proposes that in cases of violent crimes each victim would have the rights to:

•*reasonable notice of . . . all public proceedings . . .* •*reasonable notice of a release or escape from custody*

Some costs are associated with these rights, but how and where they fall will be dependant on each state's decision. In some states the duty to provide notice of proceedings could fall on the prosecutor, as in my state, while in others the duty may fall to the courts. The costs will vary with the kind of notice provided. In some places victims may receive notice by mail, while in others notice may be provided by the victim calling a central phone number. In either case the costs are not staggering.

More importantly, it is right that victims be given these notices. No similar right of a defendant would be denied on the basis of cost. None should be for crime victims.

**be heard . . . at all public release, plea, sentencing, reprieve, or pardon proceedings;*

No costs are associated with allowing the victim the right to speak at proceedings that are already held. There are those who argue that this right to be heard regarding pleas will result in far fewer pleas and far more trials. There is no evidence of this happening anywhere. In Arizona the trial rate has remained unaffected.

•*Adjudicative decisions that duly consider the victim's interest in avoiding unreasonable delay;*

No costs are associated with requiring the court to take these matters into consideration. To the extent it helps avoid unreasonable delays in the trial it may save costs.

•*Just and timely claims to restitution;*

No significant costs are associated with the requirement to order restitution. Victims typically will submit proof of economic losses to the court and restitution orders are simply made a part of sentencing. If amounts are contested the issues are resolved during sentencing proceedings that are already held.

• *safety*

Requiring courts or parole authorities to consider the safety of the victim will not impose significant costs. It may result in more carefully crafted release conditions for the accused or convicted offender, but so be it. It may save lives.

The cost argument is a red-herring. Costs are modest, and moreover, appropriate when viewed in light of the important interests at stake. Not one of these critics would dare

suggest a cost litmus test for defendants' rights. None should be imposed on crime victims. Let the critics come to Arizona.

"I'm all for victims' rights, but this proposal will undermine the rights of defendants."

Nothing in the proposed amendment will limit the fundamental rights of defendants.

Giving to the victim the right to certain notices infringes no right of a defendant. Allowing the victim the right to be present does not "substantially undermine" any constitutional right of a defendant. Allowing the victim the right to speak at release, plea, or sentencing proceedings does not deny a constitutional right to a defendant, but it does allow the court to make more informed and just decisions. Defendants do not have a constitutional right to refuse or avoid restitution for the economic losses they cause to their victims. Defendants have a right to effective counsel, but they have no right to *unreasonably* delay proceedings and requiring the court to consider the interests of the victim in a trial free from unreasonable delay does not deny any constitutional right to a defendant. Defendants have no right to prohibit the court or parole authority from considering the safety of the victim when making release decisions and requiring the safety of the victim to be considered does not infringe any right of the defendant.

When considered in the light of reason, and not emotion, vague assertions that "fundamental constitutional rights will be undermined," have little value other than to inflame the debate; the amendment is not an assault on the fundamental rights of the defendant. In the justice system throughout the country, rights for those involved are not "a zero-sum game." Rights of the nature proposed here do not subtract from those rights already established, they merely add to the body of rights that we all enjoy as Americans.

Professor Tribe concurs in this analysis when he writes, "no actual constitutional rights of the accused or of anyone else would be violated by respecting the rights of victims in the manner requested."

Crime victims seek balance -- that victims' rights will not automatically be trumped every time a defendant offers a vague and undefined "due process" objection to the victims' participatory and substantive rights. The amendment will achieve this fairness and balance.

"I'm all for victims' rights, but giving the victim a right to be present in the courtroom will lead to perjured testimony by the victim."

The imbalance of the present system is evident in this criticism. The argument goes that victims must be excluded during trial, and perhaps at some pre-trial stages, just like other witnesses, so they will not hear other testimony and conform their own to it. Defendants, of course, may be witnesses in their own trials, but they have a right to be present which overrides the rule of exclusion. The same rules should apply to the crime victim. Typically those rules now make exception so that the prosecution is allowed to keep even

the principal investigator in the trial without exclusion, but no exception is made for the victim.

And what of the fear of perjury? Consider the civil justice system. If a lawsuit arises from a drunk driving crash, both the plaintiff (the victim of the drunk driver) and the defendant (the drunk driver) are witnesses. Yet both have an absolute right, as parties in the case, to remain in the courtroom throughout the trial. Do we value truth any less in civil cases? Of course not. But we recognize important societal and individual interests in the need to participate in the process of justice.

This need is also present in criminal cases involving victims. How can we justify saying to the parents of a murdered child that they may not enter the courtroom because the defense attorney has listed them as witnesses. This was a routine practice in my state, before our constitutional amendment. And today, it still occurs throughout the country. How can we say to the woman raped or beaten that she has no interest sufficient to allow her the same rights to presence as the defendant? Closing the doors of our courthouses to America's crime victims is one of the shames of justice today and it must be stopped.

Victims in my state have had this unqualified right to be present since November 1990. Based on our actual experience the fears of the critics are unfounded.

"I'm all for victims' rights, but the right to have the victim's interest in a trial free from unreasonable delay will force both prosecutors and defendants to trial too early."

Nothing in the amendment will cause this result. The key phrase is "unreasonable delay." Giving the state an adequate time to prepare its case is not "unreasonable delay." The state is already under time deadlines by virtue of the defendant having a right to a speedy trial and the various acts which implement that right.

The defendant has a constitutional right to effective counsel and to be effective the defendant's counsel needs an adequate time to prepare, to review the evidence, the case file, and interview certain witnesses. Giving the defendant's counsel an adequate time to prepare is not an "unreasonable" delay.

The Arizona Constitution has given crime victims a right to both "a speedy trial or disposition" and a "prompt and final conclusion of the case after the conviction and sentence." It has been the law for the last twelve years and I am aware of no case in which either the state or the defendant has been forced to trial before they were ready. The fears of the critics are unfounded.

What the amendment in Arizona has done, albeit inadequately, and what the federal amendment will do, is allow, in the typical case, the court to have a constitutional context in which to balance the legitimate rights of the defendant to effective counsel and due process, with the rights of the victim to some reasonable finality.

Defendants often seek continuances, and then seek to exclude the time of those continuances from the speedy trial rules that would otherwise control the processing of

the case. Because these speedy trial rules run to the benefit of the accused, when the accused asks that they be waived, courts are often loath to deny the requests. This is especially true when no countervailing interest in reasonable finality is preserved and protected.

And yet, unreasonable delay is not a mere scheduling problem. It is an all too often painful agony for the victim, who must continue to re-live the crime and confront the defendant. Allowing a reasonable balance between both of the legitimate interests of the defendant and the victim to be considered by the court is the goal of the amendment.

Nothing in the proposed amendment gives the crime victim the power to force any case to trial before it or the defense is ready.

"I'm all for victims' rights, but the right of the victim to have safety considered when making release decisions will result in a constitutional right to imprisonment even after a sentence has been served."

As certain objecting law professors phrased this objection, "The proposed Amendment . . . would . . . allow a victim of a crime to argue that it is unconstitutional to release a person from prison even though the sentence had been completely served."

An examination of the text of the proposed amendment quickly disposes this criticism. The amendment provides that "[e]ach . . . victim shall have the rights to . . . consideration for the safety of the victim in determining any conditional release from custody. . . ." When a sentence "has been completely served," as the law professors posit, there is no "determining" to be done in connection with the release. The release happens by operation of law and the expiration of the original sentence. No discretionary decision is permitted and hence no "consideration" would be given to the safety of the victim on the matter of the release itself. There may be discretion with respect to the conditions of a release and, of course, then the safety of the victim should always be considered. Sadly, it rarely is. The law professors have simply failed to understand the proposal.

Others have argued that the same safety consideration should not be given to pre-trial release decisions. For most of our recent history the only relevant standard for a court's pre-trial release decision was whether or not the defendant would appear when required. Safety of the victim was not a factor, indeed not allowed to be considered. Recent changes in some states have allowed dangerousness to the victim or the community to be considered when making pre-trial release decisions. However, even these changes have proven inadequate to require consideration for the safety of the victim when fashioning conditions of pre-trial release because they are couched in terms of the defendants rights and not the victims. The time for this imbalance to end is now.

"I'm all for victims' rights, but the terms of this amendment are too vague to have any meaning," or in the alternative, "I'm all for victims' rights, but this amendment is so specific it reads more like a statute than an amendment."

Both criticisms, each contradicting the other, have been made. Neither is true. The amendment proposed is specific enough to make real change in the justice system and is

still written to properly reflect the language and patterns of the Constitution.

If all the rights of the defendant were incorporated into one amendment, it would be longer and one could argue, both more specific in some cases and much more general in others, than this proposal. The rights there are as long and as specific as they need to be, as are these.

In this connection, some also argue that the proposed amendment is fatally flawed because it does not specifically define who the "victim" is. For some purposes the definition of the victim is self-evident and even without a statutory definition the court could determine who the victim was by resort to the elements of the charged offense. My testimony before the Senate Judiciary Committee in 1996 addresses this point in more detail.

"I'm all for victims' rights, but this amendment reverses the presumption of innocence; a person is not a victim until there is a conviction."

From NOW's Legal Defense and Education Fund comes: "A victims' rights amendment would undermine the presumption of innocence by naming and protecting the victim before a crime is proven."

That it was impossible for the Fund to complete that sentence without again referring to the person against whom the crime has been committed as "the victim" is evidence of the rhetorical problem here. But it is just that, merely a rhetorical problem having nothing to do with the presumption of innocence.

If a defendant's liberty can be taken away before trial and conviction without undermining the presumption of innocence, surely our justice system can provide the simple rights for crime victims enumerated in this proposal. The proposal has nothing to do with the burden of proof the government bears before a jury may convict an accused of an offense. That is what the presumption of innocence is all about. Nothing in this proposal reverses or undermines it in any way.

APPENDIX C

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

May 30, 2003

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

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

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

Answer: Certainly the penalty phase of a capital case would be a "sentencing ... proceeding" within the meaning of section 2 of the amendment. The U.S. Supreme Court will have to ultimately decide the question of whether or not a victim can make a sentencing recommendation in a capital case. As of now, courts have split on this question. I would note

that there is no split on the question of whether a defendant, or for that matter, a defendant's loved ones may make sentencing recommendations in capital cases. They are routinely allowed. If the amendment is adopted the courts will still need to resolve this question.

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

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

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

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

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

Answer: The amendment does not establish a right to restitution. Such a right would have

to be established by state or federal law. Indeed such rights have been established by the laws of most states and the federal government. Once established, the amendment provides for victims a right to have the courts give due consideration to claims for restitution from the offender. The exact nature of the means by which a victim could seek review of a refusal to give due consideration to a claim for restitution, whether it would be "appealable" or subject to another form of post-sentencing review (e.g., special action), would depend on implementing legislation.

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

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

Mr. CHABOT. Mr. Beloof.

STATEMENT OF DOUGLAS BELOOF, DIRECTOR, NATIONAL CRIME VICTIM LAW INSTITUTE, LEWIS AND CLARK LAW SCHOOL

Mr. BELOOF. Thank you, Mr. Chairman, honorable Members of the Committee. Those who are under the impression that victims' rights under state constitution or statute are adequate to serve crime victims are misinformed. Many state appellate courts are corrupting state constitutional and statutory rights of crime victims. These rights were enacted because constitutional rights had greater promise for compliance and enforceability than preexisting

statutory rights. The state constitutional rights were drafted and enacted and mandatory terms were placed in state court bills of rights to ensure their status as real constitutional rights. Like other rights, these constitutional civil liberties should be treated by state appellate courts within established conventions of constitutional interpretation. With the exception of a very few state courts, the promise of these rights is being broken and degraded.

Because there is no higher authority in the states than the respective state constitutions, the state appellate courts' selective failure to apply conventional constitution analysis breaks this promise. Victims' state constitutional rights in all but perhaps two state constitutions by their plain language are mandatory rights. With near uniformity, offending courts violate constitutional conventions by reaching constitutional issues despite no need to do so. Despite plain mandatory language and placement of the rights in states' respective bill of rights, rights are labeled directory and unenforceable.

Where rights are correctly identified as mandatory, victims are erroneously found to have no standing for reasons that are constitutionally unprincipled or simply wrong as a matter of law. Statutory rights fair no better.

Other jurists and scholars have also commented on the denigration of victims' rights in state courts. Dissenting from the disastrous opinion by the Rhode Island Supreme Court gutting the Rhode Island constitution victims' rights amendment, Justice Flanders had it right when he dissented, "By means of the court's decision in this case, the constitutional right of crime victims to address the court before sentencing of the criminal who injured them, 'regarding the impact which the perpetrators conduct has had upon the victim,' has been judicially emasculated."

As a result, a right under our Constitution declared to be essential and unquestionable has been rendered nonessential and questionable. A right that our Constitution decrees us to be established, maintained, and preserved has been disestablished, dismembered, and disserved. And a right that our Constitution proclaims to be of paramount obligation in all judicial proceedings has been judicially subordinated to a vision of legislative hegemony over the protection of constitutional rights. More troubling still are similarly unprincipled decisions concerning victims' rights where there is no dissent at all.

No less constitutional scholar than Lawrence Tribe has also observed the state judicial destruction of state-based victims' rights. In his testimony, his most recent testimony to the Senate by letter to Senators Kyl and Feinstein, Professor Tribe, who argued for Gore, I believe in that case Mr. Nadler mentioned, writes about the outcome of a statutory victims law in the case of *Hagan* v. *Commonwealth*. The Supreme Court's ruling on this case left the victim a quintessential outsider to the state system of criminal prevention and punishment. If this remarkable failure of justice represented a wild aberration perpetrated by a state that had not incorporated the rights of victims into its laws, then it would prove little standing alone about the need to write in to 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.

As wrongheaded as these court opinions are, there is no authority beyond these state supreme courts which can rectify their error. As a practical matter, the most effective step is to refer to the states to the proposed victims' rights amendment to the U.S. Constitution. There is little concern that the United States Supreme Court would denigrate this Federal amendment once enacted. The Supreme Court is attuned to the concept of victim harm originating in the criminal act, the potential for further harm from the criminal process, and the inclusion of victim participation in states' criminal proceeding as they have demonstrated in a variety of cases.

I would like to read perhaps the most significant statement to prove this point, which is in testimony from 1996 by Ellen Greenlee, president of the National Legal Aid and Defender Association, who bluntly and revealingly told Congress that the state victims' amendments "so far have been treated as mere statements of principle that victims ought to be included and consulted more by prosecutors in court. A state constitution is far easier to ignore than the Federal one."

While 33—my time is up, Mr. Chairman. Thank you.

Mr. CHABOT. Thank you very much. And we may get to you in questions that can get you to what you may not have covered.

[The prepared statement of Mr. Beloof follows:]

PREPARED STATEMENT OF PROFESSOR DOUGLAS E. BELOOF

Those who are under the impression that victims' rights under state constitution or statute are adequate are mis-informed. Many state appellate courts are corrupting state constitutional and statutory rights of crime victims. These rights were enacted because constitutional rights had greater promise for compliance and enforce-ability than pre-existing statutory rights. The state constitutional rights were drafted and enacted in mandatory terms and placed in state court bills of rights to ensure their status as "real" constitutional rights. Like other rights, these constitutional civil liberties should be treated by appellate courts within established conventions of constitutional interpretation. With the exception of a few state courts,[1] the promise of these rights is being broken and the rights degraded.

Conventional constitutional analysis reveals that case-law has debased both victims' constitutional rights and the rule of constitutional law. Because there is no higher authority in the states than their respective constitutions, the states appellate courts' selective failure to use

conventional constitutional analysis breaks the promise of crime victims' state constitutional rights.

With the exception of Alabama,[2] all the states with a victims' rights amendment have placed it in the states respective Bill of Rights. In many states the victims' rights and criminal defendants' rights are in the same section of the state constitution, but listed as separate subsections. In other states the rights are listed separately. In conventional constitutional analysis, placement of rights in a Bill of Rights " . . . are usually considered self executing . . ."[3] Thus, for example, civil

[1] Arizona and Utah are the only states in which the state supreme courts have clearly enforced victims rights as mandatory and enabled rights where enforcement of the right was sought by a victim of crime.

[2] Alabama appears to have a unique way of numbering sequentially constitutional amendments.

[3] 16 Am Jur Sec. 98, p. 486.

liberties of privacy,[4] freedom of speech and religion,[5] Speedy trial[6] are considered self-executing. Furthermore, modern State Constitutions "have been drafted with the presumption that they are self executing."[7] Because all Victims' State constitutional rights amendments are "modern" the presumption is that they are all self-executing.[8]

Victims state constitutional rights, in all but perhaps two state constitutions,[9] by their plain language are mandatory rights. The mandatory nature of a constitutional right is made clear by the use of the word "shall."[10] The phrase "shall have the following rights," or similar language, is present in seventeen states' victims constitutional rights provisions.[11] Other state constitutions use slightly different mandatory language to the same effect. Five states provide that victims "has a right" or "have rights."[12] Four states provide that victims "are entitled to rights."[13] Two states "grant" victims' rights.[14] One state has mandatory language with conditions on notice of the rights. The Maryland constitution states that "shall have the right to be informed . . . and if practicable, to be notified of [listing rights]."[15]

Most state constitutions are silent about what remedies are appropriate. The absence of specific remedies "is not necessarily an indication that it was not intended to be self-executing."[16] The maxim . . . where there is a right there is a remedy is as old as the law itself . . . and "tends to tip the balance in favor of vindicating constitutional rights, . . . [17] This has been true despite the fact that most states have a provision that rights shall have remedies. [18] Moreover, civil rights within bills of rights written as mandatory rights, typically leave to the courts, as final arbiters of constitutions, to determine what should be appropriate remedies.

With near uniformity, offending state courts violate constitutional conventions by reaching constitutional issues despite no need to reach it. Eg., State v. Holt, 874 P.2d 1183 (Kan. 1994); Bandoni v. State, 715 A2d 580 (RI. 1998); Dix v Superior Court, 53 Cal.3d 442, 807 P2d 1063 (Cal. 1991) Despite plain mandatory language, and placement of the rights in state's respective Bills of rights, rights are labeled

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[4] Davis v. Superior Court, 7 Cal. App.4th 1008, 9 Cal. Rptr. 209 (5th Dist.1992);

[5] Sheilds v. Gerhart, 163 Vt. 219, 658 A 2d 924 (1995).

[6] Sykes v. Superior Ct. Of Orqange County, 9 Cal. 3d 83, 106 Cal. Rptr. 786, 507 P2d 96(1973).

[7] 16 Am Jur. 2d Sec. 100, p. 488(string citing cases)

[8] California passed the first victims Constitutional Amendment in 1982.

[9] N.J. Const. Art. I, Sec. 42 ("A victim of crime shall be treated with . . .," "shall be entitled to those rights and remedies as are provided by the legislature . . ." The New Jersey courts have interpreted legislation deriving from this to create . . .; Va. Const. Art. I, Sec. 8-a Victims "as the General Assembly may be accorded rights . . ." ". . . These rights may include the following:[listing rights]." Virginia has interpreted these rights as . . . .

[10] 16 Am Jur. 2d. Const. Law, p 485–86, Sec. 97.

[11] Alaska Const. Art I, Sec. 24 ("Shall have the following rights . . ."); Colorado Const. Art. II (" . . ., shall have the right to . . ."); California Const. Art. I Sec. 28 (" . . . shall have the right . . ."); Conn. Const. ("shall have the following rights"); Ill. Const. Art I, Sec. 8.1 ("Crime victims, . . ., shall have the following rights"); Ind. Const. Art I Sec. 13 ("Victims of Crime, . . ., shall have the right to"); Ks. Const. Art. 15 Sec. 15 Victims of crime, . . ., shall be entitled to certain basic rights . . ."); La. Const. Art. I, Sec. 25 ("shall be treated with," "shall be informed of the rights," "shall have the right to"); Mi. Const. Art. I, Sec. 24 (1) ("Crime victims, . . ., shall have the following rights"); Mississippi Const. Art. 3, Sec. 26A (victims of crime, . . ., shall have the right to . . ."); Missouri Const. Art. I, Sec. 32 ("Crime Victims, . . ., shall have the following rights . . ."); Neb. Const. Art. I, Sec. 28 (A victim of crime, . . ., . . . shall have: The right"); Nevada Const. Art. I, Sec. 8(2) (The legislature shall provide by law for the rights of victims of crime, personally or through a representative, to be . . ."); Ohio Const. Art. I Sec. 10a ("shall be accorded rights to"); N. M. Const. ("A victim of . . . [listing specific crimes] . . . shall have the following rights"); R.I. Const. Art. I, Sec. 23 (A citim of crime, as a matter of right, shall be treated" "Such person shall be entitled to receive" "shall have the right to"); Wi. Const. Art I, Sec. 9m ("This state shall treat crime victims," "This state shall ensure that crime victims have all of the following privileges and protections").

[12] Arizona Const. Art. II, Sec. 2.1 (" . . . a victim of crime has a right . . ."); Id. Const. Art. I, Sec. 22 ("A crime victim, . . ., has the following rights"); Ok Const. Art. 2 Sec. 34(A) "The victim . . . has the right to"); S.C. Const. Art. I, Sec. 24 ("victims of crime have a right to"); Texas Const. Art. I sec. 30 ("a victim of crime has the following rights"); Utah Const. Art. I, Sec.28 ("victims of crime have these rights")

[13] Alabama Const. Amend. No 557 ("Crime victims are entitled to the right to . . ."); Fla. Const. Art. I, Sec. 16 ("are entitled to the right to"); N.C. Const. Art. I, Sec. 37 ("Victims of crime, . . ., shall be entitled to the following basic rights"); Tenn. Const. Art I Sec. 35 ("victims shall be entitled to the following basic rights").

[14] Or. Const. Art. I, Sec. 42 ("The following rights are hereby granted to victims"); Wa. Const. Art. I Sec. 35("victims of crime are hereby granted the following basic and fundamental rights").

[15] Md. Const. Art. 47.

[16] Am Jur

[17] 16 Am Jur 2d Sec. 104, p.492.

[18] Comment, State Constitutions' Remedy Guarantee Provisions Provide More than Mere "Lip Service" to Rendering Justice. 16 Tol. L.Rev. 585 (1985)

"directory" and unenforceable. Eg., Bandoni v. State, 785 A2d 580 (RI. 1998); People v Super, Ct. (Thompson), 154 Cal. App. 3d 319, 202 Cal. Rptr. 585 (2d. Dist. Cal. App. 1984); Dix v Superior Court 53 Cal.3d 442, 807 P2d 1063 (Cal. 1991); State v. Holt, 844 P.2d 1183 (1994) Where rights are correctly identified by courts as mandatory, victims are erroneously found to have no standing for reasons that are constitutionally unprincipled or simply wrong as a matter of law. Offending courts deny standing to exercise and enforce victims rights because: victims are not full or harmed parties; victims have no interest in a criminal case; victims have no interest in punishment; victims lose their rights at the conclusion of a criminal proceeding; victims' were indirectly deprived of their right (People v Pfieffer, 523 NW2d 640 (Mich. App. 1994);specific remedial provisions are not expressly articulated in the bill of rights itself, Bandoni, supra; Holt, supra People v Super, Ct. (Thompson), 154 Cal. App. 3d 319, 202 Cal. Rptr. 585 (2d. Dist. Cal. App. 1984);. the potential for prosecutors' unethical manipulation of the rights. People v. Pfeiffer, 207 Mich. App., 151, 523 NW2d 640(1994).

Statutory rights fare no better. Eg., Hagen v. Commonwealth, 772 NE.2d 32 (Mass. 2002) (victims do not have standing); Gansz v. People, 888 P2d 256 (Colo 1985) (victims are not a party because they suffer no injury in fact); Kehoe v State, 1992 Westlaw 141156 (Tex App. 1992)(unpublished opinion)(Statutory victims right to be present not enforceable).

Other jurists and scholars have also commented on the denigration of victims' rights in state courts. Dissenting from the disastrous opinion by the Rhode Island Supreme Court gutting the Rhode Island constitution victims rights amendment, Justice Flanders has it right when he dissented:

> By means of the Court's decision in this case the constitutional right of crime victims to address the court before sentencing of the criminal who injured them "regarding the impact which the perpetrator's conduct has had upon the victim," has been judicially emasculated. As a result, a right that our Constitution declares to be "essential and unquestionable," has been rendered nonessential and questionable; a right that our Constitution decrees is to be "established, maintained, and preserved," has been disestablished, dismembered, and disserved; and a right that our Constitution proclaims to be "of paramount obligation in all * * * judicial * * * proceedings," has been judicially subordinated to a vision of legislative hegemony over the protection of constitutional rights. And I especially regret that Rhode Island's Supreme Court, charged by the Constitution to say what that law is, to be the guardian of our constitutional rights, and to uphold these paramount provisions in all judicial proceedings, has relegated itself to the sidelines in this case when it comes to enforcing the State's Constitution. Instead of functioning as a key player in the protection of constitutional rights, the Court has withdrawn from the field to cower in the shadows of its intended constitutional role. Instead of serving as "an impenetrable bulwark against every assumption of power in the Legislative or Executive * * * [and] resist[ing] every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," the Court has allowed itself to become a penetrable bullseye for those who would shoot down crime victims' constitutional right. Instead of independently enforcing and protecting these constitutional rights against all violations (whether they come from within or without the government), the Court has consigned the Judiciary in this constitutional case to serving as the liveried footservants of the General Assembly, waiting for some sign on high that it is permissible for this Court to enforce the constitutional rights that are so dear to the People of this State but which, says the majority, this Court is powerless to uphold without express legislative authorization to do so. I emphatically disagree with this shrunken and withered vision of judicial power, responsibility, and independence. Bandoni v. State, 715 A2d 580, 60 (R.I. 1998)(Flanders, J., dissenting)(footnotes omitted).

More troubling still are similarly unprincipled decisions concerning victims rights where there is no dissent at all.

No less a constitutional scholar than Laurence Tribe has observed the state judicial destruction of state-based victim laws. In his testimony to the Senate, Professor Tribe writes about the outcome of the statutory case of Hagen v. Commonwealth, 772 NE.2d 32 (Mass. 2002) in his home state supreme court of Massachusetts:

> A case argued in Spring 2002 in the Supreme Judicial Court of Massachusetts, in which a woman was brutally raped a decade and a half ago but in which the man who was convicted and sentenced to a long prison term

had yet to serve a single day of that sentence, helps make the point that the legal system does not do well by victims even in the many states that, on paper, are committed to the protection of victims' rights. Despite the Massachusetts Victims' Bill of Rights, solemnly enacted by the legislature to include an explicit right on the part of the victim to a "prompt disposition" of the case in which he or she was victimized, the Massachusetts Attorney General, who had yet to take the simple step of seeking the incarceration of the convicted criminal pending his on-again, off-again motion for a new trial - a motion that had not been ruled on during the 15 years that this convicted rapist had been on the streets - took the position that the victim of the rape did not even have legal standing to appear in the courts of this state, through counsel, to challenge the state's astonishing failure to put her rapist in prison to begin serving the term to which he was sentenced so long ago. And the Supreme Judicial Court's ruling on the case left the victim a quintessential outsider to the State's system of criminal prevention and punishment.

If this remarkable failure of justice represented a wild aberration, perpetrated by a state that had not incorporated the rights of victims into its laws, then it would prove little, standing alone, about the need to write into the United States Constitution a national commitment to the rights of victims. Sadly, however, the failure of justice of which I write here is far from aberrant. It represents but the visible tip of an enormous iceberg of indifference toward those whose rights ought finally to be given formal federal recognition. Professor Laurence Tribe, Letter of April 8, 2003 to United States Senators Dianne Feinstein and Jon Kyl in Support of the Crime Victims Rights Amendment, S.J. Res 1.

As wrongheaded as these court opinions and others measured by conventional constitutional analysis are, there is no authority beyond these State Supreme Courts which can rectify the error. As a practical matter, the most effective next step is to refer to the states the proposed Victims' Rights Amendment to the United States Constitution.

There is little concern that the United States Supreme Court would denigrate this federal Victims Rights Amendment one enacted. The Supreme Court, attuned to the concept of victim harm originating in the criminal act, the potential for further harm from the criminal process, and the inclusion of victim participation in the states' criminal proceedings, has shown increasing respect for the legitimate interests of crime victims. In Morris v. Slappy, 461 U.S. 1, 103 S. Ct. 160 (1983) the court recognized that a criminal defendant's rights should not be applied in a manner that unnecessarily harms the crime victim.[19] For example, according to the Court in Payne v Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991) a murdered person is a "uniquely individual human being" for sentencing purposes.[20] Recently, the Supreme Court embraced the legitimacy of victim harm in the capital case of Calderon v. Thompson, 523 U.S. 538 11 S. Ct. 1489 (1998).[21] In Calderon, the Court addressed the seemingly endless delay in the post- conviction process, explaining that to unsettle expectations in the execution of moral judgment "is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike."[22] Closely related to this interest is the victim's interest in the imposition of an appropriate punishment.

While 33 states have victims' rights amendments, and all have statutes, the lesson learned by reviewing state judicial opinions where victims attempt to enforce law is that by no means do state constitutional Amendments or statutes creating victims rights ensure that these same rights will be upheld as mandatory and enforceable by state supreme courts. The most effective solution remaining is this federal amendment, (HJ Res 48; SJ Res 1) which, extended to the states through the Fourteenth Amendment, would ensure adherence to victims rights by state courts. It is my hope that those of you on this Honorable Committee will support this essential Amendment in a spirit of bipartisanship.

Mr. CHABOT. Mr. Orenstein, you are recognized for five minutes.

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[19] 461 U.S. 1, 14–15 (1982).

[20] Payne, 501 U.S. at 818 (quoting Booth v. Maryland, 482 U.S. 496, 504 (1987) (internal quotation marks omitted)).

[21] 523 U.S. 538 (1998).

[22] Id. at 556 (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)) (emphasis added) (citation omitted).

STATEMENT OF JAMES ORENSTEIN

Mr. ORENSTEIN. Mr. Chairman, Members, thank you for inviting me here 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. It may be possible to do both, but there are better solutions that do not carry the severe risks to law enforcement inherent in amending the Constitution. In particular, the current bill will, in some cases, sacrifice the effective prosecution of criminals to achieve little or nothing for their victims.

In the last 20 years, Congress has enacted many statutes that improve victims' rights in the criminal justice system. One of them, the Victims' Rights Clarification Act, effectively addressed the problem of victim exclusion in the courtroom in the Oklahoma City bombing case. As a result of that statute, no victim was excluded from testifying at the penalty hearing on the basis of having watched the trial.

More importantly, in considering whether the amendment before you is necessary and effective, you should know that Judge Matsch's actions after the enactment of that statute would likely have been exactly the same if this amendment had been in effect.

In addition to federal legislation, every single state has enacted its own victims' rights laws. The only thing lacking is uniformity in the states' adoption of the full range of protections that this body has provided and consistent enforcement of the laws that they have passed. As a result, the main benefit to be gained by this amendment is not the elimination of injustices that its supporters have described. Most of those injustices are either already violations of existing laws and therefore would not be cured by this amendment, or are beyond the reach of an amendment that promises not to deny the historic protections of the Bill of Rights. Instead, the limited benefit would be uniformity in the states gained only by allowing Congress to mandate changes in state justice systems.

The same result, however, could likely be achieved without a Constitutional amendment through the use of Federal spending power to give states proper incentives to meet uniform national standards. Spending legislation can attack the problem where it truly lies, by prompting all states to have the same basic protections for crime victims and by fostering the training and sensitivity that is so desperately needed to have existing laws achieve their potential. But unlike using the Constitution to achieve 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 more effective if victims are regularly consulted during the course of the case. Some prosecutors unfortunately reflexively discount that. I had a conversation recently with a current prosecutor who opposed this amendment because of the role it would give victims in the system. And that attitude, which is all too often reflected in prosecutors and judges failing to enforce existing laws, is something that can and should be corrected by promoting better training and enforcement. But increas-

ing victim participation is not the basis of my concern about this amendment. Instead, I am concerned largely about the fact that there are many cases where the victim of one crime is the offender in another. And in those cases, this amendment could harm law enforcement.

For example, when a mob soldier decides to testify for the government, premature disclosure of his cooperation can lead to his murder and compromise the investigation. Under this amendment, such disclosures could easily come from victims who are more sympathetic to the criminals than to the government. When John Gotti's underboss decided to cooperate, he initially remained in jail with Gotti, and he was at grave risk if his cooperation became known. I was the prosecutor in that case. Luckily, that didn't happen. But the victims who would have been covered by this amendment had it been in effect at the time, relatives of gangsters whom Gotti had told his underboss to murder, would almost certainly have notified Gotti if they could have done so.

I have heard supporters of this amendment answer that this problem can be solved simply by closing a cooperator's guilty plea to the public, but the Constitution already makes it extraordinarily difficult to do that. As a result, the need for discretion is usually handled by scheduling a guilty plea like that at a time when nobody is likely to be there, not by shutting the courtroom. But that kind of pragmatic problem solving won't work under this amendment.

The risk to law enforcement comes not from giving rights to crime victims—we should be doing that—but rather from using the Constitution.

There are two basic ways this bill could cause more problems than using legislation. First, by not adequately allowing for appropriate exceptions; and, second, by delaying and complicating trials. And I have explained in my written statement how both kinds of problems can arise from the wording of the current bill. But beyond such wording issues, some problems are created by the very fact that, contrary to the claims of some supporters, the current version of this amendment discards some very carefully crafted language that was the product of years of debate and reflection and that the Senate Judiciary Committee approved when it reported favorably on a prior version.

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. If you really want to help crime victims, there is a bill in the Senate now pending, the Crime Victims' Assistance Act, that is a good example of legislation that you should pass regardless of whether you also amend the Constitution. But by embracing that approach now, you may well find that there is no need to risk the potential harm to law enforcement inherent in what Chairman Chabot called the last resort, amending the Constitution.

We must never lose sight of the fact that the single best way that prosecutors and police can help crime victims is to ensure the capture, conviction, and punishment of criminals.

In my position as a former prosecutor, the proposed constitutional amendment achieves the goal of national uniformity for victims rights only by jeopardizing law enforcement. By doing so it ill-

serves the crime victims whose rights and needs we all want to protect.

Thank you.

[The prepared statement of Mr. Orenstein follows:]

PREPARED STATEMENT OF JAMES ORENSTEIN

I. INTRODUCTION

Mr. Chairman, distinguished Members of the Committee, thank you for inviting me to appear before you today.[1] It is an honor to have a chance to speak with you about a matter as fundamentally important as our Constitution, and to address two issues that mean a great deal to me: the rights of crime victims and the effective enforcement of criminal law. As a federal prosecutor for most of my career, I have been privileged to work closely with a number of crime victims, including those harmed by one of the worst crimes in our Nation's history. I have also been privileged to spend considerable time working with talented people on all sides of the issue to make sure that any Victims' Rights Amendment to the Constitution would provide real relief for victims of violent crimes without jeopardizing law enforcement. I think it may be possible to do both, but I also believe that there are better solutions that do not carry the severe risks to law enforcement inherent in using the Constitution to address the problem. In particular, I believe that the current language of the Victims' Rights Amendment - language that differs in significant respects from the carefully crafted Amendment that came very close to passage in the 106th Congress - will in some cases sacrifice the effective prosecution of violent offenders to achieve marginal and possibly illusory procedural improvements for their victims.[2]

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. From February 1990 until June 2001, I served in the United States Department of Justice as an Assistant United States Attorney for the Eastern District of New York. For most of that time, I was assigned to the office's Organized Crime and Racketeering Section, eventually serving as its Deputy Chief. While a member of that section, I prosecuted a number of complex cases against members and associates of La Cosa Nostra, including the successful prosecution of John Gotti, the Boss of the Gambino Organized Crime Family.

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[1] The views expressed herein are mine alone.

[2] At the Senate Judiciary Committee's hearing on the proposed amendment earlier this year, Mr. Twist grossly distorted my reference to "marginal and possibly illusory procedural improvements" by asserting that it shows I would arrogate to myself the power to decide for bereaved parents "how important it is for them to be in the courtroom during the trial of their son's murderer. I don't want to decide for her, and I don't want my government, in an exercise of hideous paternalism, to decide for her."

Such criticism misses the mark in several important ways. First, I do assume that it is supremely important for such victims to attend trials and obtain other protections already written into state and federal law - I simply doubt that the proposed amendment will advance either that interest in particular or the overall interest of crime victims in general to see their victimizers brought to justice. To the extent that the addition of laws can advance those interests, I believe a more nuanced statutory approach can do so more effectively.

Second, my point is quite plainly that the amendment may prove to be illusory in that it will accomplish little if anything for victims who suffer unwarranted indignities such as being excluded from trials. Under current laws such victims are generally denied the rights this amendment would establish only if granting such rights would somehow violate the defendant's existing Constitutional rights or, more likely, if judges and prosecutors are failing to observe existing legal duties and to work hard to protect victims. The former will be a rare or non-existent occurrence, but one that the amendment would not affect under the apparently intended meaning of Section 1. The latter represents a failure of education and sensitivity that cannot be combated through the ratification of a constitutional amendment - but which spending legislation can ameliorate by directly promoting better training.

Third, the need to make choices about the scope of victims' rights is inherent in the task of crafting an amendment that would establish such rights. As a result, even proponents of the proposed amendment are quite properly willing to make the kinds of choices for victims that Mr. Twist scorns as "hideously paternalistic." For example, applying Mr. Twist's reasoning would lead to the conclusion that proponents of this amendment - which explicitly protects only victims of "violent" crimes - are willing to decide that attending an accused offender's trial is important for the victims of a minor assault who sustained no injury, but not important for victims who lose their retirement plans or life savings in a non-violent fraud scheme. Such a facile charge would be as unfair to the supporters of an amendment who seek to strike the right balance of interests for crime victims and law enforcement as Mr. Twist's statement is to opponents who share the same goal but believe that the current bill strikes the wrong balance.

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 firsthand about the many difficulties and frustrations that victims of violent crimes face in our justice system, and I also learned how critically important it is for prosecutors and law enforcement agents to zealously protect the interests of crime victims while prosecuting the offenders.

From 1998 to 2001 I served on temporary work details at Justice Department headquarters in Washington, D.C., first as an attorney-adviser in the Office of Legal Counsel, and later as an Associate Deputy Attorney General. In both positions I was a member of a group that worked extensively with sponsors and other supporters of previous versions of the Victims' Rights Amendment. Our goal in doing so was to ensure that if the Amendment were ratified, it would provide real and enforceable rights to crime victims while at the same time preserving our constitutional heritage and - most important from my perspective as a prosecutor - maintaining the ability of law enforcement authorities to serve victims in the single best way they can: by securing the apprehension and punishment of the victimizers.

II. The Argument For A Constitutional Amendment: Allowing Congress to Legislate for the States To Achieve A Uniform National Standard

I have no doubt that law enforcement authorities have historically been far too slow in realizing how important it is to protect the interests of crime victims as investigations and prosecutions. Twenty-one years ago, when President Reagan received the Final Report from the President's Task Force on Victims of Crime, courts, prosecutors and law enforcement officers too often ignored or too easily dismissed the legitimate interests of crime victims. Since then, Congress, the State legislatures and federal and state law enforcement agencies have made great improvements in official laws and policies. Further, thanks largely to effective advocacy by groups representing the victims of crime, officers, prosecutors and judges are much more sensitive now than they were two decades ago to the needless slights our criminal justice system can thoughtlessly impose, and are generally doing better in making sure that the system does not victimize people a second time. But despite such improvements, there is more that can and should be done.

Amending the Constitution to achieve that goal has both risks and benefits, and given the difficulty of curing any unintended adverse consequences, it should properly be considered only as a last resort. Given the legislative progress of the last twenty years, the principal benefit of an Amendment would be the empowerment of Congress to impose uniform national standards on the States. Congress has enacted a wide variety of statutes that protect crime victims. These laws ensure crime victims' participatory rights in the criminal justice system by making sure they are notified of proceedings, admitted to the courtroom and given an opportunity to be heard.[3] They improve crime victims' safety by providing for notification about offenders' release and escape, and by providing for protection where needed. They help crime victims obtain restitution from offenders and remove obstacles to collection. But these measures only apply in federal criminal cases, and cannot protect crime victims whose victimizers are prosecuted by State authorities.

And while every single State has enacted its own protections for crime victims - 32 of them by means of constitutional amendments, and the rest through legislative

[3] One of those statutes - the Victims' Rights Clarification Act of 1997, 18 U.S.C. § 3510 - effectively addressed one of the problems often cited by supporters of this bill as showing the need for a constitutional amendment: the decision by the trial judge in the Oklahoma City bombing case to exclude from the courtroom any victim who wished to testify at the penalty phase. As a result of the 1997 law, no victim was excluded from testifying at the defendants' penalty hearing on the basis of having attended earlier proceedings. Further, the trial judge's conduct of the case following enactment of that statute - including his voir dire of prospective victim witnesses and his decision to exclude the testimony of one child victim because its admission would have violated the defendant's right to due process - would almost certainly have been exactly the same even if the proposed amendment had been in effect at the time.

change - the States have not uniformly adopted the full panoply of protections that this body has provided to the victims of federal crimes.[4] 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.[5] 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 unintended adverse consequences to law enforcement.

III. The Proposed Amendment Needlessly Undermines Effective Law Enforcement

A. Background

It is important to emphasize that the potential risks to effective law enforcement are not the result of giving legal rights to victims and placing corresponding responsibilities on prosecutors, judges, and other governmental actors. The changes brought about by improved legislation in this area over the past twenty years have demonstrated that the criminal justice system can provide better notice, participation, protection and relief to crime victims without in any way jeopardizing the prosecution of offenders. To the contrary, I strongly believe that prosecution efforts are generally more effective if crime victims are regularly consulted during the course of a case, kept informed of developments, and given an opportunity to be heard. There are of course occasions when such participation can harm law enforcement efforts, but my experience has been that most crime victims are more than willing to accommodate such needs if their participation is the norm rather than an afterthought.

In most cases, crime victims and prosecutors are natural allies: both want to secure the offender's punishment, and both are better able to work toward that result if the prosecutor keeps the victim notified and involved. But there are a number of cases - typically arising in the organized crime context and in prison settings - where the victim of one crime is also the offender in another, and the kind of participatory rights that this Amendment mandates would harm law enforcement efforts.

When a mob soldier decides to cooperate with the government, he typically pleads guilty as part of his agreement, and in some cases then goes back to his criminal colleagues to collect information for the government. If his disclosure is revealed, he is obviously placed in great personal danger, and the government's efforts to fight organized crime are compromised. Under this Amendment, such disclosures could easily come from crime victims who are more sympathetic to the criminals than the government. To illustrate that perverse kind of alliance: When I was working on the case against mob boss John Gotti, ten weeks before the start of trial, Gotti's

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[4] Statistics about state victim protection laws are drawn from U.S. Department of Justice, Office for Victims of Crime, "Crime and Victimization in America, Statistical Overview" (Apr. 2002) <http://www.ojp.usdoj.gov/ovc/ncvrw/2002/ncvrw2002—rg—3.html#legislative>.

[5] 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.

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.[6] Instead, it is usually necessary to take such a plea in open court and protect the need for secrecy by scheduling it at a time when bystanders are unlikely to be present and by not giving advance public notice of the plea. Such pragmatic problem-solving would not work under the proposed Amendment, because victims allied with the targets of the investigation would be entitled to notice. Second, the Amendment's guarantee of the right to an adjudicative decision that considers the victim's safety might make courts reluctant to release a cooperating defendant to gather information without hearing from victims at the bail proceeding.

In the prison context, incarcerated offenders who assault one another may have little interest in working with prosecutors to promote law enforcement, but may have a very real and perverse interest in disrupting prison administration by insisting on the fullest range of victim services that the courts will make available. If, as discussed below, the current language of the Amendment creates a right to be present in court proceedings involving the crime, or at a minimum to be heard orally at some such proceedings, prison administrators will be faced with the Hobson's choice between cost- and labor-intensive measures to afford incarcerated victims their participatory rights and foregoing the prosecution of offenses within prison walls. Either choice could undermine orderly prison administration and the safety of corrections officers.[7]

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. In addition, I have appended to this statement my responses to written questions concerning the likely effects of the proposed amendment posed by Senator Leahy following the Senate Judiciary Committee's hearing on the Senate Version of the proposed amendment, S.J. Res. 1, on April 8, 2003, in the hope that it will be helpful to members of the Committee with similar questions.

B. Interpreting The Amendment In Light Of Its Legislative History

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[6] 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).

[7] 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)).

Proponents of the current bill assert that it reflects years of study and debate, and that it embodies compromises reached after much effort by supporters and critics alike.[8] As someone who was involved in those efforts, I can tell you that while the current bill is unquestionably the product of good-faith effort by its supporters, and does indeed incorporate some improvements suggested by others, it does not fully reflect the years of work that have gone into efforts to serve both crime victims and our Constitutional heritage. To the contrary, as explained below, the current version of the Amendment discards several important compromises that were crafted in an earlier version that was endorsed by this Committee, and thereby exacerbates the risks to effective law enforcement.

During the time I worked for the government, I was fortunate enough to work with a number of very talented and dedicated attorneys from the Justice Department, Congress, and victims' advocacy groups to refine the language of the Victims' Rights Amendment. I became involved in the effort while an earlier version, S.J. Res. 44, was pending in the 105th Congress. By that time a great many issues had been resolved, and only a few remained. Some, though not all, potentially implicated very practical law enforcement concerns about the conduct of criminal trials and the administration of prisons. Over the course of several months, most of those remaining concerns were addressed. By the time that S.J. Res. 3 of the 106th Congress was favorably reported by the Senate Judiciary Committee (S. Rep. 106–254, Apr. 4, 2000 (the "Senate Report")), virtually every word in the bill had been crafted and vetted with an eye to achieving a careful balance of meaningful victims' rights and the needs of law enforcement.

Much of the language adopted in S.J. Res. 3 to address law enforcement concerns has been changed or deleted in the current version.[9] Even if Congress were writing on a blank slate, I would have some concerns about some of the language in H.J. Res. 48. 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 earlier version of the Amendment did - forbidding a court from curing a violation of a victim's participatory rights by staying or continuing a trial, reopening a proceeding or invalidating a ruling. If the current version of the Amendment is ratified, courts interpreting it might rule that this was a deliberate change and that any ambiguity on the issue must therefore be resolved in favor of allowing such remedies - remedies that could well harm the prosecution's efforts to convict an offender.

C. Exceptions And Restrictions, And The Need For Flexibility In Law Enforcement And Prison Administration

There are unquestionably times when providing victims with the substantive participatory rights set forth in the Amendment will be inconsistent with the interests of a successful prosecution or prison administration. For example, providing notice and an opportunity to be heard with regard to the acceptance of the guilty plea of a potential cooperating witness - that is, a criminal who is willing to testify against more serious offenders in exchange for leniency - may in some cases risk compromising the secrecy from other offenders necessary to the successful completion of such an agreement. This is particularly true in the organized crime context, where the victims may themselves be members of rival criminal groups. Likewise, in the case of prison assaults, there may be cases where accommodating the participatory rights of the victim inmate will unduly disrupt the safe and orderly administration of the prison. I am confident that the sponsors of this bill and other victims' rights advocates agree that such exceptions are appropriate. The problem is that the current language may not allow them.

1. The "Restrictions" Clause Generally

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[8] *See, e.g.*, Statement of Steven J. Twist, General Counsel, National Victims Constitutional Amendment Network, Before the Subcommittee on the Constitution, Federalism, and Property Rights, Committee on the Judiciary, United States Senate, in Support of S. J. Res. 1, The Crime Victims' Rights Amendment at 9 (Apr. 8, 2003) ("Twist Statement") ("These efforts have produced the proposed amendment which is now before you. It is the product of quite literally seven years of debate and reflection. It speaks in the language of the Constitution; it has been revised to address concerns of critics on both the Left and the Right, while not abandoning the core values of the cause we serve.").

[9] The changes first appeared in S.J. Res. 35 of the 107th Congress, the substantive terms of which were identical to those of the current bill.

The current bill allows victims' rights to be "restricted" "to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." Like its predecessor (which allowed "exceptions" to "be created only when necessary to achieve a compelling interest"), the current version allows courts to provide flexibility in individual cases rather than relying on Congress to prescribe uniform national solutions. The current bill also improves on the S.J. Res. 3 by expanding the scope of circumstances in which courts can allow for such flexibility. The earlier bill's limitation of exceptions to those "necessary to achieve a compelling interest" would likely have triggered "strict scrutiny" by reviewing courts, as a result of which virtually no exceptions would likely be approved. However, some of the language changes may harm the law enforcement interest in flexibility, as discussed below.

a. "Restrictions" rather than "Exceptions"

Given the current bill's use of the word "restrictions" in contrast to the earlier bill's use of "exceptions," I am concerned that courts will interpret a "restriction" to mean something other than an exception to the general rule. An "exception" plainly refers to a specific situation in which the substantive rights that would normally be accorded under the amendment need not be vindicated by the courts at all. If a "restriction" is interpreted to mean something different - such as, for example, a limitation on the way the right is to be afforded in a particular situation rather than an outright denial - the unintended effect might be harmful to law enforcement. For instance, in the case where it makes sense not to notify one gang member who is the victim of another one's assault that the latter is about to plead guilty and cooperate, an "exception" approved by the court would allow the prosecutor not to provide notice at all, whereas the "restriction" might nevertheless require some form of notice - which might endanger the cooperating defendant and compromise his ability to assist law enforcement.[10]

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.[11] But if the Amendment is to provide for exceptions or restrictions in some circumstances, prison administrators might have to do far more than show reasonable needs for relief, and would instead have to meet the explicit standard set forth in the Amendment.

As noted above, the current bill improves upon its predecessor by expanding on the "compelling interest" standard for exceptions. However, if courts do not interpret "the administration of criminal justice" broadly, the legitimate needs of prison administrators might nevertheless be sacrificed. Although I would likely disagree with an interpretation of the phrase that excluded prison administration, such an interpretation is certainly possible. Given that habeas corpus proceedings challenging the treatment of prisoners are treated as civil cases and are collateral to the underlying criminal prosecutions, it would not be unreasonable for a court to conclude that the needs of prison administrators are not included within the phrases "public safety" or "administration of criminal justice" and that prison-related restrictions of victims rights must therefore pass strict scrutiny under the "compelling necessity" prong of the Section 2.

2. Specific Flexibility Problems

a. The right "to be heard"

One of the most important participatory rights for crime victims is the right to be heard in a proceeding. As in earlier versions, the current version properly limits this right to public proceedings so as not to jeopardize the need for security and se-

[10] Similarly, in a mass-victim case, a pragmatic decision to allow only a limited number of representative victims speak at a hearing would almost certainly be considered a reasonable "exception" to the individual victim's right to be heard, but could not fairly be characterized as a mere "restriction" of that individually-held right.

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

crecy in proceedings that are not normally open to the public. However, certain language changes from the earlier version compromise that limitation, and certain other changes discard the important flexibility achieved by allowing victim input to come in the form of written or recorded statements.

The corresponding language in S.J. Res. 3 accorded a victim of violent crime the right "to be heard, if present, and to submit a statement" at certain public proceedings.[12] In contrast, the current bill provides a right "reasonably to be heard" at such proceedings. While the drafters may have intended no substantive difference, I believe that the courts will interpret the change in language to signal the opposite intention. Specifically, I would expect some courts to interpret the deletion of "submit a statement" to signal a legislative intent to allow victims actually to be "heard" by making an oral statement. Nor do I think the use of the term "reasonably to be heard" would alter that interpretation; instead, I believe courts would likely reconcile the two changes by interpreting "reasonably" to mean that a victim's oral statement could be subjected to reasonable time and subject matter restrictions.[13] If the above is correct then prison officials might face an extremely burdensome choice of either transporting incarcerated victims to court for the purpose of being heard or providing for live transmissions to the courtroom.

A related problem would extend beyond prison walls. Because the difference between the previous and current versions of the Amendment suggest that a victim must be allowed specifically to be "heard" rather than simply to "submit a statement," a victim might persuade a court that the "reasonable opportunity to be heard" guaranteed by the current version of the Amendment carries with it an implicit guarantee that the government will take affirmative steps, if necessary, to provide such a reasonable opportunity. This undermines the intent of the Amendment's careful use of negative phrasing with respect to the right not to be excluded from public proceedings - a formulation designed to avoid a "government obligation to provide funding, to schedule the timing of a particular proceeding according to a victim's wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings."[14] 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 - 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 like-

[12] The 2000 version also provided the same right at non-public parole hearings "to the extent those rights are afforded to the convicted offender." There is no corresponding participatory right under the current proposed Amendment.

[13] 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.

[14] Senate Report at 31.

ly exclude habeas corpus proceedings, which are considered civil in nature, despite the important role they play in the criminal justice system. Second, as explained above, I believe it is doubtful that Congress could eliminate the problem under the "restrictions" authority in the last sentence of Section 2. As noted above, such restrictions are reserved for matters of "public safety . . . the administration of criminal justice [and] compelling necessity." The burden associated with providing notice in civil suits is plainly not a matter of public safety and would almost certainly fail to withstand the strict scrutiny that the "compelling necessity" language will likely trigger. And if the burden is held to be a sufficiently "substantial interest in the . . . administration of criminal justice" to warrant use of the restriction power, then it seems likely that virtually any additional burden to law enforcement or prison officials would justify a restriction - making the rights set forth in the Amendment largely illusory. Because I doubt that the courts would interpret the restriction power to be so broad, I am concerned that there would be no legislative mechanism available to cure this problem.

D. Potential Adverse Effects on Prosecutions

One of the criticisms of the previous version of the Victims' Rights Amendment was the length and inelegance of its language. The substantive rights in Section 1 were set forth in a series of very specific subsections resembling a laundry list, and the remedies language of Section 2 set forth a bewildering series of exceptions to exceptions.[15] But while the language of the current bill is more streamlined and reads more like other constitutional amendments than its predecessor, it achieves such stylistic improvement at the expense of clarity, which could result in real harm to criminal prosecutions.

For the most part, this problem arises from the interplay of two clauses: the "adjudicative decisions" clause in Section 2 (recognizing the "right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender") and the remedies clause in Section 3 ("Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages."). The former suggests that all of the victims' listed interests - in safety, the avoidance of delay, and restitution - are at stake and must therefore be considered in every adjudicative decision; the latter, by deleting specific language from S.J. Res. 3, suggests the possibility of interlocutory appeals of any such adjudicative decision that does not adequately consider all of the victim's interests. In combination, these two aspects of the bill could greatly disrupt criminal prosecutions.

1. Adjudicative decisions

The 2000 version of the Amendment included in its list of crime victims' rights the following three items: the right "to consideration of the interest of the victim that any trial be free from unreasonable delay;" the right "to an order of restitution from the convicted offender;" and the right "to consideration for the safety of the victim in determining any conditional release from custody relating to the crime." The interest in a speedy trial was generalized - it was not tied to a specific stage of the prosecution, much less to every such stage. Such language allowed courts the freedom to interpret the right to apply in proceedings at which the trial schedule was at issue.[16] 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.[17] And the interest in safety was explicitly tied to bail, parole and similar determinations.[18]

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

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[15] *See, e.g.*, 146 Cong. Rec. S2984 (daily ed. Apr. 27, 2000) (statement of Sen. Leahy) ("Let us call that 'the tax lawyer's provision,' since it is so obscure that I think only someone who has spent half their life plumbing the depths of the tax code could understand it. It would certainly be the first triple negative in the United States Constitution. . . . Regardless of how it is ultimately interpreted, this intricate web of exceptions is not the stuff of a Constitution.")

[16] See Senate Report at 36.

[17] 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.

[18] See Senate Report at 37–38.

which could make the prosecution of offenders a far lengthier and complicated process. For example:

- Must every "adjudicative decision" in a criminal case examine the effects of the ruling on the right to restitution?
- Must a victim be heard on disputes about jury instructions because the result, by making conviction more or less likely, may affect her safety-based interest in keeping the accused offender incarcerated?
- Does a crime victim have the right to object to the admission of evidence on the ground that it might lengthen the trial?

Examples could be multiplied, and undoubtedly some would be more fanciful than others. But given the change in language from the previous bill, and given the countless adjudicative decisions that are made in every criminal prosecution, it seems inevitable that the current version of the Amendment could cause real mischief in criminal prosecutions.

2. Remedies

The potential for unintended adverse consequences is magnified by the change in language regarding remedies. This is one of the most challenging issues in crafting a Victims' Rights Amendment: the need to make crime victims' rights meaningful and enforceable while at the same time preserving the finality of the results in criminal cases and also avoiding interlocutory appeals that could harm the interests of speedy and effective prosecution. The balance that was struck in S.J. Res. 3 recognizes that a crime victims have a variety of interests that can be protected in a variety of ways. Generally speaking, the remedies provision of S.J. Res. 3 recognized that a crime victim's interest in safety - which is at stake in decisions regarding an accused offender's release on bail - should be capable of vindication at any time, including through a retrospective invalidation of an order of release. On the other hand, a victim's participatory rights can effectively be honored by prospective rulings without the need to reopen matters that were decided in the victim's absence. Thus, for example, if a victim were improperly excluded from a courtroom during the consideration of a motion in limine to exclude evidence, it would make more sense to allow the victim to obtain appellate relief in the form of a prospective order to admit the victim to future proceedings than a retrospective one that would vacate the evidentiary ruling so that the matter could be re-argued in the victim's presence. Moreover, it would plainly be contrary to the interests of effective law enforcement if a victim could obtain a stay or continuance of trial while the interlocutory appeal of described above was pending. The remedies language of S.J. Res. 3, inelegant as it was,[19] would have prevented such anomalous results. The more streamlined language of the current bill - by deleting the prohibitions against staying or continuing trials, reopening proceedings, and invalidating ruling - would not.

IV. Legislation Can Achieve The Desired Results Without Risking Effective Law Enforcement

While I believe, for the reasons set forth above, that ratification of the proposed Constitutional amendment would incur unwarranted risks for law enforcement, I do not believe that this body lacks a useful alternate course of action. To the contrary, the substantive benefits to be achieved by the bill - in particular, the creation of a national standard of crime victims' rights that courts, prosecutors and police would be legally bound to respect - can and should be achieved through federal legislation. Such legislation would be appropriate under the proposed Amendment - as made clear by the enforcement power contemplated in Section 4 - but there is no need for Congress to wait for the Amendment to be ratified to take such action. To the contrary, Congress has previously used its power to pass a number of valuable enhancements of victims' rights over the last twenty years,[20] 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

[19] "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."

[20] *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>.

deserve, while at the same time preserving the flexibility essential to effective law enforcement.

Such a bill is now pending in the Senate: The Crime Victims Assistance Act of 2003, Title III, Subtitle B of S. 22. Although this hearing is not about that bill, it is worth noting that the pending Act would, by means of the provisions of Part 1, implement all of the substantive rights embodied in S.J. Res. 1 that have yet to be included in federal law, as well as others, and would strengthen enforcement of all federal victims rights. It would also, through the funding and pilot program provisions of Part 2, encourage States to improve their own laws. There may well be alternatives to the specific provisions of the pending legislation - and in particular, there may be stronger measures available to encourage States to enact victim protection laws that meet federal standards - but regardless of any alternatives there are at least two advantages that this legislative approach has over the proposed Constitutional amendment.

First, because the Crime Victims Assistance Act is a statute, it can properly be drafted as such, and thereby achieve the balancing of the interests of crime victims and law enforcement that a more generally worded constitutional amendment necessarily lacks. As noted above, some critics of S.J. Res. 3 objected to the length, inelegance and statute-like specificity of some of its provisions. The current version largely avoids such problems and reads more like other constitutional amendments, but only at the rather significant price of risking harm to law enforcement, as explained above. The fundamental problem is that there is no short and elegant way to describe the kinds of cases where the "victim" of one crime is also the offender (or allied with the offender) in another - i.e., the kinds of cases where providing the full panoply of victims' rights can do more harm than good. Nor is there a short and elegant sentence that precisely separates the kinds of remedial actions crime victims should be able to take to enforce their rights from those that would unduly delay trials and jeopardize convictions. As a statute, the Crime Victims Assistance Act can more precisely draw such distinctions.[21]

Second, a statute is easier to fix than the Constitution. If legislation intended to strike the proper balance of law enforcement and victims' needs proves upon enactment to be ineffective in protecting one interest or the other - that is, if it gives an unintended windfall to offenders by being too rigid or if it gives insufficient relief to victims by being too susceptible to exceptions - then the statute can be changed through the normal process. If a Constitutional amendment proves to have similar problems, it is all but impossible to remedy, because any change requires the full ratification process set forth in Article V of the Constitution.

Accordingly, there seems to be no good reason for Congress to consider amending the Constitution without first - or, at a minimum, simultaneously - enacting legislation that can both improve the protection of crime victims in both State and federal cases and minimize the unforeseen and unintended risks to effective law enforcement. Congress would almost undoubtedly seek to enact similar legislation pursuant to its enforcement power if the Amendment were ratified, and it will be no less effective if enacted now. More important, if the legislative approach proves effective, it would allow Congress to provide all the protection crime victims seek without needlessly risking society's interest in effective law enforcement.

Proponents of this bill sometimes dismiss concerns about a constitutional amendment's effects on law enforcement and prison administration as niggling doubts that would attend any ambitious attempt to improve the system. They argue that such concerns "make the perfect the enemy of the good" and question the bona fides of those who articulate them.[22] But these proponents themselves too easily dismiss a better solution that has not yet been tried and that may make the risks inherent in a constitutional amendment unnecessary. If supporters of victims' rights, among whose number I count myself, allow the desire for the symbolic victory of a constitutional amendment to distract them - and to distract Congress - from passing spending-based legislation that could achieve all of their substantive goals more effectively and more easily than this bill, and with less risk to effective law enforcement, they run the risk of making the flawed the enemy of the perfect.

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[21] It is no answer to assert that similar line-drawing could be achieved under the Section 4 enforcement power that the proposed amendment would grant Congress. Because the effectiveness on such rules to protect law enforcement interests relies on the ability to carve out exceptions to the general grant of rights to crime victims, the portions of S. 22 that allow for such exceptions might well be deemed unconstitutional if the proposed Amendment were ratified.

[22] *See, e.g.*, Twist Statement at 2 ("critics are always heard to counsel delay, to trade on doubts and fears, to make the perfect the enemy of the good. Perhaps some would prefer it if crime victims just remained invisible.").

V. CONCLUSION.

Our criminal justice system has done much in recent years to improve the way it treats victims of crime, and it has much yet to do. But in trying to represent crime victims better, we must never lose sight of the fact that the single best way prosecutors and police can help crime victims is to ensure the capture, conviction, and punishment of the victimizers. In my opinion as a former prosecutor, the current version of the Victims' Rights Amendment to the United States Constitution achieves the goal of national uniformity for victims' rights only by risking effective law enforcement. By doing so, it ill serves the crime victims whose rights and needs we all want to protect.

I will be happy to answer any questions the Committee may have.

APPENDIX: RESPONSES TO QUESTIONS BY SENATOR LEAHY FOR JAMIE ORENSTEIN

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

Response: Either as a prosecutor or a victim's counsel, I could make several arguments.[23] First, I could argue that a court must interpret the amendment as having been ratified with a full understanding of pre-existing amendments, and therefore, necessarily, with an intent to have the latest-ratified one trump in cases of direct conflict. In other words, if two amendments passed at different times are capable of producing irreconcilably inconsistent rights for different parties, then the framers of the later-ratified amendment must have intended that one to prevail. Had they intended otherwise, I could argue, they would have so stated in the amendment itself - particularly because they would have known of the canon of construction that in the absence of such limiting language would assume the primacy of the later, more specific law. But this amendment contains no such language - it has only a preamble that predicts a conflict of rights will never arise. That preamble either provides no guidance about how to resolve a conflict should the prediction prove wrong, or, as discussed below, would lead a court to rule that the victim's right must trump the defendant's.

Second, I could compare the distinction in last sentence of Section 1 between the words "denied" and "restricted" to similar distinctions in several earlier constitutional amendments. *Compare* S.J. Res. 1, 108th Cong. § 1 (2003) ("The rights of victims . . . shall not be denied by any State or the United States and may be restricted only as provided in this article") *with* U.S. Const., amend. IX (referring to rights being "den[ied]" or "disparage[d]"), *id.*, amend. XV, § 1 (referring to rights being "denied" or "abridged"), *id.*, amend. XIX (same), *id.*, amend. XXIV, § 1 (same), *and id.*, amend. XXVI, § 1 (same). I could then contrast that long-recognized distinction between denying and restricting rights with the carefully limited assertion in the preamble to Section 1 of the proposed amendment that victims' rights are "capable of protection without *denying* the constitutional rights of those accused of victimizing them." S.J. Res. 1, 108th Cong. § 1 (emphasis added). I could argue that given the provision's two references to the concept of denying rights, one of which is plainly grounded in an assumption that denial and restriction are different concepts, the framers of the amendment must have contemplated that courts could restrict a defendant's constitutional rights in order to vindicate the rights of the victim, provided that in doing so it did not completely deny the defendant's rights. Moreover, even an outright denial of the defendant's rights would be preferable to a burden on the victim's rights, as the preamble to Section 1 is deliberately phrased as an observation rather than a mandate.

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

Moreover, I could also use the same legislative history to help refute the defendant's best argument - namely, that the preamble to Section 1 precludes the possibility of the victim's rights trumping the defendant's. If a judge found that a right established by the proposed amendment was in fact irreconcilably in conflict with the defendant's constitutional rights, the defendant would point to the preamble to argue that it forbids allowing the victim's right to trump. In effect, the defendant would be arguing that the victim's substantive right already found to be within the

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

provisions of Section 2 was trumped not simply by operation of his own constitutional rights, but by the terms of the preamble to Section 1.

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

The preamble would thus serve as a potentially useful interpretive tool for the defendant in arguing that no conflict existed, but would not assist the court in resolving a conflict once it was found to exist. For example, as explained below in response to Question 5, there is uncertainty about whether the proposed amendment is intended to give a victim the right to tell the jury in a capital case how she thinks the defendant should be sentenced. Because the Constitution currently forbids such statements, the defendant would argue that the preamble to Section 1 is a valuable interpretive tool that should persuade the court to avoid a conflict of rights by interpreting Section 2 to establish a right "reasonably to be heard" at a sentencing proceeding that does not include the right to make a sentencing recommendation. If the court rejected that argument and determined that the framers of the amendment intended to confer a right of victim allocution, then a conflict would plainly exist between the victim's constitutional right and the defendant's. At that point, it appears to be Prof. Tribe's view that the victim's Section 2 right to be heard could not be trumped by the observation in the preamble to Section 1.

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

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

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

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

(2) Assume that a defendant is sentenced without prior notice to the victim. Under the current proposal, the defendant's sentence could be vacated and remanded for a new sentencing hearing on notice to the victim. This resentencing - which would require the allocation of resources from the court, the

prosecutor, the Marshal and possibly prison officials - would either result in the same sentence or a different one. If the sentence was the same, and the remedy for the violation of the victim's right would have in essence been a formality.[24] If the result was a more severe sentence, the defendant could claim a violation of the Double Jeopardy clause of the Fifth Amendment.

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

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

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

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

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

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

(A) Mass victim cases. In a mass victim case, the difference between the two words would most likely be a problem for courts (or parole boards or clemency review panels) in honoring the individual victim's right "reasonably to be heard" at certain public proceedings.[25] This right differs in substance from the corresponding

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

[25] The right not to be excluded from public proceedings in mass victim cases would likely be accommodated relatively easily, through the use of closed-circuit television. While this would

right conferred in an earlier version, which was the right "to be heard, if present, and to submit a statement" at such proceedings. S.J. Res. 3, 106th Cong. § 1. I have explained in my previous written statement how the change in phrasing makes it more likely that the current formulation could be interpreted to confer on victims an affirmative right to be present (thereby obliging the government to transport indigent and incarcerated victims to court) and to make an oral statement ("be heard") rather than simply "submit" a written one. *Cf.* S. Rep. 106–254, at 34 (explaining the substantive limitations provided by the terms "if present" and "submit a statement").

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

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

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

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

(B) Organized crime cases. In organized crime cases, the most likely adverse affect of the distinction between "restrictions" and "exceptions" arises in the context of cooperation agreements under which one gangster agrees to plead guilty and then,

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"affect" courts by requiring the alteration of some rules (for example, the Supreme Court would presumably be required to abandon its traditional prohibition of cameras when hearing arguments in mass victim cases), such changes need not inherently undermine courts' ability to function.

upon release on bail, surreptitiously to gather information about others. In many such cases, the prospective cooperator has previously committed violent crimes in which the victims are themselves criminals. The amendment would confer on such victims "the right to reasonable and timely notice of" the cooperator's guilty plea, the same right with respect to the cooperator's bail hearing, and "the rights not to be excluded from . . . and reasonably to be heard" at both. Those rights can be "restricted" in certain circumstances (which I assume for purposes of this answer would exist in this context) but not "denied."

For the law enforcement interest to be vindicated in this context, the victims must receive *no* notice of the cooperator's plea or release, at least until well after the fact. Alerting the victims to these events would endanger the cooperator and undermine his ability to assist law enforcement by collecting evidence. But in most cases, alerting such victims would likely be unavoidable under the proposed amendment.[26] The best argument I could make as a prosecutor in this scenario would be that the court should for good cause postpone the notice required by the amendment, much as it is empowered to do under the wiretap statute, 18 U.S.C. § 2518(8)(d). Such a postponement could be characterized alternately as a "reasonable" form of notice or an appropriate "restriction" on the victim's right.

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

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

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

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

(1) Defining the "sentencing proceeding". Capital cases have two separate proceedings after a verdict of guilt, either or both of which might properly be considered a "sentencing proceeding" for purposes of the proposed amendment. Under federal law, for example, there are two separate district court proceedings that follow a determination of a defendant's guilt of a capital crime. First, there is a "penalty phase" hearing, usually conducted before the same jury that determined guilt, at which the parties seek to establish or contest the existence of facts that aggravate

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

or mitigate the crime. *See* 18 U.S.C. § 3593(b); 21 U.S.C. § 848(i). Subsequently, there is a separate proceeding at which the judge imposes sentence, taking into account any recommendation resulting from the penalty phase. *See* 18 U.S.C. § 3594; 21 U.S.C. § 848(l).

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

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

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

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

Whereas the Constitution generally permits victim impact testimony, it currently forbids victims from giving a penalty phase jury their opinions regarding sentencing or the defendant. *See Booth v. Maryland*, 482 U.S. 496, 508–09 (1987); *Payne*, 501 U.S. at 830 n.2 (noting that *Booth's* prohibition regarding victims' opinions was not disturbed in overruling the ban on impact testimony); *id.* at 833 (O'Connor, J., concurring) (noting same); *Hain v. Gibson* 287 F.3d 1224, 1238–39 (10th Cir. 2002) (collecting cases noting same); *Lynn v. Reinstein*, No. CV-02–0435-PR, 2003 WL 21147287 (May 19, 2003) (noting same) (this was the case that hearing witness Duane Lynn mentioned was pending before the Arizona Supreme Court as of April 8, 2003). Thus, if the proposed amendment were read to give victims the right to allocute at the penalty phase, there would be a conflict between the rights of the victim and the accused, despite the assurance to the contrary in Section 1.[27]

(3) Differing statements of legislative intent. Some supporters of the proposed amendment appear to intend that the victim's right to be heard with regard to sentencing in a capital case would be consistent with existing constitutional law. For example, during the question-and-answer portion of at the hearing on April 8, 2003, Senator Feinstein described "the limited rights that we're giving an individual" in the proposed amendment and explained each of the substantive rights under Section 2. With respect to the right to be heard, the Senator said that "essentially what we're trying to do is say . . . that you have a basic constitutional right . . . to make an impact statement," but made no mention of a right of allocution.

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

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

This Committee's 2000 report could arguably be read to support either position, although on balance it appears to accept the existing *Booth-Payne* prohibition against victims making sentencing recommendations to a penalty phase jury. *See* S. Rep. 106–254, at 33–34 (stating that the proposed amendment would "enshrine in the Constitution the Supreme Court's decision in Payne" and acknowledging that "the victim's right to be heard at sentencing will not be unlimited, just as the defendant's right to be heard at sentencing is not unlimited today").[28] Such a view is bolstered by the text of the current version of the proposed amendment, which flatly asserts that the rights it confers are "capable of protection without denying the constitutional rights of [the] accused." Given existing Supreme Court case law, that assertion can be true in this context only if the limited right to make an impact statement described by Senator Feinstein is intended, rather than the broader right described by Mr. Twist.

(4) Possible effects on the Oklahoma City bombing case. At each of the Oklahoma City bombing trials, the prosecutors selected certain victims to testify at the penalty phase - *i.e.*, the factual hearings under 18 U.S.C. § 3593(b) - to help establish certain aggravating factors in support of the government's attempt to secure a death sentence.[29] Some of the many victims who had hoped to testify were necessarily excluded by this selection process. With respect to those who were called as penalty phase witnesses, the court required the prosecutors to limit the testimony to factual information concerning the impact of the bombing on their lives. The witnesses were not permitted to offer an opinion as to how the defendants should be sentenced, and were also instructed to avoid certain factual areas that the court ruled would be so emotionally charged as to violate the defendants' due process rights.

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

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

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

Assuming the right would have applied in the penalty phase, its likely effect depends on whether the right to be heard would have included the right to make recommendations to the jury, or only to provide impact statements. If the latter, there would again have been no effect, as victims were in any event permitted to make such statements. Since the question assumes the exclusion of witnesses who would have recommended a non-death sentence - rather than the exclusion of witnesses with factual information pertaining to the aggravating and mitigating factors at

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

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

issue - I must assume for purposes of this part of my answer that such witnesses, or at least the recommendation portion of their testimony, would have been excluded in any event.[30]

The most difficult problem arises if the proposed amendment would have permitted victims to make sentencing recommendations to a penalty phase jury. If hearing from the victims who preferred a non-death sentence would have swayed the jury, then the effect of the amendment would have been to frustrate the government's effort to punish McVeigh with death for having committed what was at the time the worst crime ever committed on American soil.

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

The potential for mischief would have been even greater in Nichols' case, where the jury never reached the point of considering any arguments for or against the death penalty. Having failed to reach a unanimous factual conclusion as to whether Nichols' level of intent in committing the crime sufficed to permit imposition of the death penalty, *see* 18 U.S.C. § 3591(a)(2), the *Nichols* jury was discharged without making any sentencing recommendation.[31] Presumably, in those circumstances, the addition of victims' opinion testimony to the penalty phase could have had no effect on the outcome.

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

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

Response: I do not agree. Like Mr. Twist, I understand the Supreme Court to have ruled that "[t]he power to enforce is not the power to define." Twist Statement at 38 (citing *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)). In recent years, the Supreme Court as well as some lower courts have issued several decisions interpreting the enforcement provision of the Fourteenth Amendment, upon which Section 4 of the proposed amendment is modeled. Those cases state that Congress is not empowered, under the guise of "enforcing" a constitutional amendment, either to diminish the rights of the persons it was designed to protect or to impose substantive new restrictions on State governments. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) (stating that the task of assessing the constitutionality of Enforcement Clause legislation requires the court to determine whether the statute "is in fact . . . an appropriate remedy or, instead, merely an attempt to sub-

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

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

stantively redefine the States' legal obligations"); *Saenz v. Roe*, 526 U.S. 489, 508 (1999) ("Congress' power under § 5, however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)); *Boerne*, 521 U.S. at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."); *see also Nanda v. Bd. of Trs. of the Univ. of Ill.*, 303 F.3d 817, 827 (7th Cir. 2002) ("Congress' enforcement power must stop short of redefining the States' substantive obligations under the Fourteenth Amendment.").

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

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

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

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

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

Thus, in assuming that the Supreme Court will interpret the enforcement power to include the power to define substantive constitutional terms, Assistant Attorney General Dinh appears to be relying on the Department's 1998 analysis. But in the years since that view was articulated, the Supreme Court, in assessing the validity of federal laws enacted under the Fourteenth Amendment's enforcement provision, has repeatedly invoked reasoning that exceeds the limitation of *Boerne* that the Department anticipated in 1998. *See, e.g., Nevada Dep't of Human Res. v. Hibbs*, No. 01–1368, 2003 WL 21210426 (U.S. May 27, 2003) ("*Boerne* . . . confirmed . . . that

it falls to this Court, not Congress, to define the substance of constitutional guarantees"); *Kimel*, 528 U.S. at 81 ("'The ultimate interpretation of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.") (citing *Boerne*, 521 U.S. at 536); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637–48 (1999) (invalidating Patent Remedy Act because the historical record and the scope of the act's coverage demonstrated that it was not merely remedial or prophylactic, but changed States' substantive obligations). Given this subsequent case law, I believe that the broader interpretation of *Boerne* that prompted the amendment's sponsors to add the word "implement" in 1998 has prevailed, and that an enforcement provision alone cannot be relied upon to empower Congress to define the key terms of the proposed amendment.

Despite the need for something other than an enforcement provision, the current version of the amendment contains *nothing* else that could be construed as granting Congress the power to define key terms. As noted above, the sponsors of S.J. Res. 44 first sought to overcome *Boerne* by giving Congress the power to "implement" as well as enforce the amendment. After the Justice Department expressed a concern that such language might itself cause unanticipated problems, *see* DOJ 1998 Letter, attachment at 5, the sponsors deleted "implement" and added a provision stating explicitly that the key terms were to be "defined by law." *See* S. Rep. 105–409, at 38–39 (1998). That approach was retained in the 2000 version of the amendment. See S.J. Res. 3, 106th Cong. § 1. In reporting that bill to the full Senate, the Committee appears to have continued to assume, as a result of *Boerne*, that the enforcement provision alone would not be interpreted to allow Congress to define key terms, but that the "defined by law" provision would empower Congress, the States, and the courts to provide definitions controlling within their respective jurisdictions. *See* S. Rep. 106–254, at 28; *see also id.* at 46 (additional views of Sens. Kyl and Feinstein) ("the 'law' that will serve to define these terms will typically be State law").

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

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

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

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

As a result, I believe it is most likely that the third approach would prevail by default, meaning that the amendment's key terms would be defined piecemeal by individual judges interpreting the new constitutional language. Such interpretation would undoubtedly be informed by the varying definitions of the terms in pre-existing State and federal law,[32] and would therefore likely produce different interpretations of the same federal constitutional right that would be controlling within the courts' respective jurisdictions. Such judicial interpretation might ultimately lead to the Supreme Court's creation of a uniform national definition, but the process of developing such a definition - the contours of which cannot be predicted with any certainty - would likely require years of litigation and produce a patchwork of inconsistent rights for crime victims in the interim. As a result, ratification of the proposed amendment would simply replace one patchwork of State laws protecting crime victims with another. But unlike the current patchwork - which at least preserves a uniform statutory definition applicable within all federal courts - ratification of the proposed amendment would produce an interim patchwork of rights not only from one State to another, but also from one federal jurisdiction to another.

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

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

There are at least two ways to avoid this problem, neither of which has yet been tried. The first, as set forth in my earlier statement, is to address the problem of non-uniformity in the States through spending-based federal legislation. However, some supporters of a constitutional amendment respond that spending-based legislation is insufficient because (a) some States may forego funding so as to preserve a lower level of protection for victims,[33] and (b) such legislation, unlike a constitutional amendment, would not have the symbolic value needed to change a judicial culture that too often ignores or mistreats crime victims.

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

The "patchwork" problem. There is little disagreement that Congress has improved the rights of crime victims in federal cases, but has been unable to make such laws applicable in the several States (which, as a result, have a patchwork of more or less effective laws). By explicitly granting Congress the power to legislate for the States in this limited area, the alternative amendment would cure the "patchwork" problem in the most direct possible manner, and without the risk that

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

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

some States might choose not to accept the changes, even at the risk of losing federal funding. It would also avoid the problem of different States adopting different definitions of the class of victims to be given rights under the federal Constitution.

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

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

The "definition" problem. As noted above and in my prior written statement, I believe it is unlikely that the courts would interpret the proposed amendment to allow Congress to use its enforcement power to define the scope of victims' rights by defining key terms such as "victim" and "crime of violence." The importance of the issue is magnified if the rights are self-executing, because the uncertainty about who will be deemed to enjoy rights under the amendment makes it even harder to provide in advance for appropriate exceptions and remedies - as must be done if the rights are self-executing.[34]

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

The "remedies" problem. As noted in my earlier written statement, it is particularly difficult to set out in the text of the Constitution itself a limitation on the remedies available to victims whose rights are violated. If the rights are self-executing, some such limitation must be spelled out, as statutory or common-law limits would likely prove ineffective. But once we try to make the limitations on remedial action explicit, it seems our only choices are bad ones: If we choose a nuanced recitation that addresses the full range of foreseeable circumstances, the language will necessarily be inelegant. By opting for more elegant phrasing that speaks the language of the Constitution, we sacrifice clarity. And both approaches carry an obvious risk

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

of unintended consequences. However, if the rights are not self-executing, but are conferred by legislation that the amendment empowers Congress to pass, then there is no need for the Constitution itself to address the issue of remedies at all - Congress can effectively tackle that issue in its implementing legislation.

ADDENDUM

THE FOLLOWING IS ONE EXAMPLE OF AN ALTERNATIVE APPROACH TO AMENDING THE CONSTITUTION TO PROTECT THE RIGHTS OF CRIME VICTIMS WITHOUT ESTABLISHING SELF-EXECUTING CONSTITUTIONAL RIGHTS.

JOINT RESOLUTION

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

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

'Article——

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

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

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

Mr. CHABOT. Thank you.

Our last witness today will be Mrs. Sharon Nolan.

STATEMENT OF SHARON NOLAN

Mrs. NOLAN. Mr. Chairman and Members of the Committee, my name is Sharon Nolan, and my husband and I have traveled here today to speak to you on behalf of our daughter Shannon Marie Nolan-Broe and our unborn granddaughter, Alexandra Jordan, who were violently and intentionally murdered on September 7, found buried on September 10 and during the autopsy performed on our daughter our murdered granddaughter was delivered on September 11, 2001, the day the Earth stood still for so many.

Can you imagine waking up one morning, 24 years after the birth of your first child, and realizing she has disappeared without a trace? Calling the police to report her missing and having begged for a search to pursue after being told that she is 24, married, pregnant and probably just walked away? We will have to wait 24 to 48 hours legally for police intervention.

Can you imagine being advised to pursue your own search for your children along with the 25 to 100 other family and friends taking us through waist high creek water, wooded areas thick with brush, abandoned tractor-trailers, trash dumpsters, miles of rail-

road tracks and empty boxcars, including any high places that she could have jumped from, when a policeman asked could she be suicidal? Searching for four days, always hoping for the safe return of your children but fearing the worst, and then it happens. The knock at the door, the sight of the police and the clergy, the look of sadness in their eyes, and then the excruciating numbness before the horrifying words are spoken, "We have found your children. They have been murdered."

You can't imagine making funeral arrangements for your oldest daughter and unborn granddaughter after being denied the right to see them one last time, after the coroner says that it is so bad there will be no need for embalming, and then to look in your surviving children's tormented eyes to deny them their last request, an open casket to say good-bye properly to their sister and their niece. Instead they are to kiss and embrace the cold black coffin along with the other 800 other mourners who attended.

Can you imagine your whole world has just been devastated, you are in shock, yet it is time for the justice system to take over, always protecting the criminal's rights first? You were notified of your right to attend pretrial hearings, yet not notified beforehand about changes, all the while being reminded to be on your best behavior and always feeling like the outsiders looking in on what was your children's lives. You are warned repeatedly by the prosecutors about not talking to the press for fear of causing a mistrial, yet a newspaper reporter, be illegal or unethical, writes a column that provides personal information concerning the trial that was not of public record. We call this freedom of the press. You also become aware that you have court documents via the Internet that your own prosecutors do not have prior to a motion to suppress, and then you were asked why are you so angry.

Can you imagine being denied the right to be present during jury selection and for the next three days to be left out in an open hallway outside the courtroom while the trial proceeds without you, not being allowed to attend the trial, yet the animal is paraded in front of you several times a day because it is his right to be there but not yours? After three days of unexplainable control of your instincts to attack this murderer, you are asked to move from the hallway because you are causing him to feel uncomfortable and, then, to add insult to injury, you are required to purchase the transcripts of the trial at a cost of $1,500 so that you can feel you have the same constitutional right that was provided to the murderer, the knowledge of what transpired.

Can you imagine being called to the witness stand during the most traumatic and evil event in your lifetime, giving up your right to attend the trial, all the while knowing that you have no direct information to the crime, yet hoping to testify that the sonogram in your hand is that of your unborn grandchild, only to be stopped short by the defense attorney's objection to quote, unquote hearsay? During an office visit with your daughter you heard the baby's heartbeat but in the courtroom she has no name. She is ignored.

Can you imagine after finding proof of previous abuse by the murderer you are told that legally it would be a violation of his rights to use the information in the trial? You hear the defense attorney's insinuation that your five month pregnant daughter was

not murdered but died accidentally because domestic violence happens every day. It is not even aggravated murder or even murder when two people fight and one of them ends up dead.

Statistics show that the leading cause of pregnant women is not from health-related issues. It is homicide. After three days of trial he is convicted, the judge passes sentence, you are granted your right to an impact statement, end of trial, so-called justice rules.

Can you imagine after being found guilty beyond a reasonable doubt by a jury of his peers that he is sentenced to two life terms for aggravated murder plus five years for tampering with evidence, for the unlawful taking of two lives; yet he is now awarded one more right, his lifetime right to appeal? Could the same taxpayer dollars that keep him from living amongst society also grant him his freedom?

Thirteen months after the jury and the judge convicts and sentences him, once again his rights prevail. He is granted an appeal and receives a lesser sentence. Nine months to convict but only three-and-a-half weeks to overrule through appellate decision his sentence for tampering with evidence.

Can you imagine being appalled by the appellate decision, yet denied your right to speak at the resentencing? He is given back five years of his life. You were denied five minutes of your rage.

What's next? His right to appeal to the Ohio Supreme Court, always with the intent of proving that his rights in the Constitution were violated.

In closing, can you imagine a country with a Constitution that protects all people both the accused and the victim and the survivor, a place where both can receive equal rights of the choice to be present, to be informed, to be involved, and to be heard?

Our Shannon and Alexandra were denied all of these rights when their God given right to live was stolen, making them victims. Because of the self-serving acts of violence directed toward our children by the murderer, their voices have been silenced. Please don't revictimize them again by legally silencing us. Who better to become their voices than the people who love them most. We did nothing wrong. We do not deserve the life sentence of victimization by the country that we choose and are proud to call home.

We may not speak the language of the bill, but we do speak the language of the heart. We support this amendment in the name of all victims who scream without sound.

Thank you.

[The prepared statement of Mrs. Nolan follows:]

PREPARED STATEMENT OF SHARON NOLAN

THE WORLD AS MOST OF YOU KNEW IT WAS FOREVER CHANGED ON SEPTEMBER 11,2001, BUT FOR THE FAMILY AND FRIENDS OF OUR DAUGHTER SHANNON MARIE NOLAN-BROE AND OUR UNBORN GRAND-DAUGHTER ALEXANDRA JORDAN, SEPTEMBER 7,2001, WAS THE DAY THE EARTH STOOD STILL. THAT WAS ALSO THE DAY THAT WE BEGAN TO DIE.

TWO YEARS AGO SHANNON AND ALEXANDRA BECAME "POLICE STATISTICS", VICTIMS OF DOMESTIC VIOLENCE, VICTIMS OF HOMICIDE. ALTHOUGH OUR CHILDREN LOST THEIR LIVES, WE TOO HAVE BECOME VICTIMS OF DOMESTIC VIOLENCE. WE HAVE NOT BEEN BEATEN BY OUR PARTNERS, BUT WE HAVE BEEN BEATEN DOWN EMOTIONALLY, PHYSICALLY, AND VERBALLY, BY THE ACTIONS OF THE MAN, NO THE ANIMAL, WHO SAID THAT HE LOVED OUR CHILDREN AND THEN TOOK THEIR LIVES. WE ARE FORCED TO WAKE UP, GO TO WORK, GO TO SCHOOL, GO TO BED, THAT IS WHEN WE CAN SLEEP, ALL "NORMAL DAILY ACTIVITIES" BEFORE, YET NOW WITHOUT OUR SHANNON AND ALEXANDRA.

SINCE SEPTEMBER 7th, WE HAVE HAD TO BURY OUR DAUGHTER AND GRANDDAUGHTER. SINCE SEPTEMBER 7th, WE HAVE HAD TO CELEBRATE SHANNON'S 25th AND 26th BIRTHDAY AS WELL AS ALEXANDRA'S 1st WHILE STANDING OVER THEIR GRAVES. SINCE SEPTEMBER 7th, WE HAVE HAD TO ENDURE HOLIDAYS, BIRTHS, WEDDINGS, ANNIVERSARIES AND SCHOOL EVENTS, ONCE HAPPY OCCASIONS FOR OUR FAMILY, YET NOW JUST BITTERSWEET MEMORIES THAT FEEL LIKE SALT RUBBED INTO AN OPEN WOUND WITHOUT OUR DESIGNATED PHOTOGRAPHER AND THE PERSON THAT WE BELIEVED TO BE THE CENTER OF STRENGTH AND FAMILY TRADITION THAT WOULD HOLD FUTURE GENERATIONS OF OUR FAMILY TOGETHER; OUR SHANNON. SINCE SEPTEMBER 7th, WE HAVE HAD TO ACCEPT THE UNACCEPTABLE REALITY THAT WE WILL NOT BE ABLE TO ENJOY WATCHING OUR THREE CHILDREN AND THEIR CHILDREN GROW OLD TOGETHER AND PASS ON THEIR WISDOM TO THE NEXT GENERATION OF NOLANS.

WE ARE NOT ABLE TO DO ANY OF THESE THINGS WITHOUT RELIVING THE GRUESOME DETAILS OF THEIR DEATHS, AND PICTURING THEIR BATTERED BODIES THAT WERE TOO HORRENDOUS FOR US TO IDENTIFY. THAT WHICH ALSO BROUGHT TEARS OF COMPASSION TO THE EYES OF THE LAW ENFORCEMENT AND THE CLERGY WHO CAME TO SAY THOSE HORRIFIC WORDS TO US, "WE HAVE FOUND YOUR CHILDREN, THEY HAVE BEEN MURDERED."

SOMEONE PLEASE WAKE US UP FROM THIS NIGHTMARE!!

IN 1991 DEATH CAME KNOCKING AT OUR DOOR AND I REGRETABLY ALLOWED HIM, JOHN BROE, TO ENTER OUR LIVES. AT THE AGE OF 14 WE THOUGHT SHANNON WAS JUST BEGINNING HER LIFE, ONE FULL OF HOPES AND DREAMS. BUT INSTEAD, SHANNON'S LIFE WAS COMING TO AN END. A SLOW, METHODICAL, AND VIOLENT DEATH, PERCEIVED AND CARRIED OUT BY THE ULTIMATE ACT OF BETRAYAL. BY SOMEONE SHE LOVED!! HE BECAME HER EXECUTIONER.

IT IS BECAUSE OF OUR LOVE FOR SHANNON AND ALEXANDRA THAT WE ARE HERE TO SPEAK TO YOU TODAY AND EVERYDAY, SO THAT JOHN

BROE'S SELFISH AND SELF-SERVING ACTS OF VIOLENCE CANNOT SILENCE THEIR VOICES. THIS IS OUR LIFE'S GOAL. THIS IS OUR NEW COMMITMENT!!

OUR DAUGHTER SHANNON WAS FIVE MONTHS PREGNANT WITH OUR GRANDDAUGHTER WHEN THEY WERE BRUTALLY MURDERED. SHE WAS ONLY 24 YEARS OLD [IRONICALLY THE SAME AGE THAT I WAS WHEN I WAS CARRYING SHANNON] BUT SHE HAD REACHED A PLACE IN HER LIFE WHERE SHE FELT AS IF ALL OF HER HOPES AND DREAMS WERE BECOMING A REALITY. AFTER GRADUATING FROM WALNUT HILLS HIGH SCHOOL IN 1995, SHANNON BEGAN ATTENDING THE UNIVERSITY OF CINCINNATI, HOPING TO GET A DEGREE IN SPORTS MEDICINE. SINCE SHE HAD BEEN A DEVOTED VOLLEYBALL PLAYER SINCE THE FOURTH GRADE, BUT CHOSE NOT TO PLAY IN COLLEGE, SHANNON BELIEVED THAT ONE OF HER LIFE GOALS WAS TO STAY WITH TEAM SPORTS. BECAUSE OF HER LOVE FOR THE GAME, SHE BEGAN COACHING YOUNG GIRLS AND BOYS, LEADING HER TWIN BROTHERS-IN-LAW AND THEIR TEAMMATES TO THEIR SCHOOLS FIRST DISTRICT WIN IN MAY OF 2000. WE HAVE SINCE ESTABLISHED A SCHOLARSHIP FUND AT THE NATIVITY SCHOOL IN HER MEMORY.

DURING SHANNON'S THIRD YEAR AT U.C. SHE MADE A DECISION TO QUIT SCHOOL AND WORK MORE FULL TIME. [WE NOW KNOW THAT SHE GAVE UP HER DREAM TO HELP HIM FINANCIALLY WITH HIS. A FOUR YEAR DEGREE IN CRIMINAL JUSTICE THAT HE WILL TRY TO USE TO CONCEAL THE MURDERS OF OUR CHILDREN.]

ON OCTOBER 8,1999, SHANNON WAS ABLE TO FULLFILL HER GREATEST DREAM. SHE MARRIED HER FIRST AND ONLY BOYFRIEND AFTER HAVING KNOWN HIM FOR 8 YEARS. SHE HAD BECOME AN IMPORTANT PART OF HIS FAMILIES LIVES AND HE HAD BECOME AN IMPORTANT PART OF OURS. HER GOAL AS ALWAYS TO BECOME ONE BIG HAPPY FAMILY. HER FATHER AND I HAD ALWAYS INSTILLED IN OUR THREE CHILDREN THE IMPORTANCE OF FAMILY, PAST, PRESENT, AND FUTURE. BECAUSE OF OUR DAUGHTERS LOVE FOR THIS BOY WE LEARNED TO LOVE, TRUST, AND RESPECT HIM ALSO. WE WERE NOW STANDING IN THE SANCTUARY OF SAINT FRANCIS DE SALES CHURCH ENTRUSTING OUR DAUGHTERS LIFE AND FUTURE TO THIS BOY THAT SHE HAD LOVE FOR 8 YEARS. AS WE LISTENED TO HIM PLEDGING HIS LOVE AND DEVOTION TO OUR DAUGHTER, HOW WERE WE TO KNOW THAT IN LESS THAN TWO YEARS HE WOULD BECOME THE EVIL FORCE THAT WOULD SHATTER ALL OF OUR DREAMS. MOST IMPORTANTLY SHANNON'S!!!!WE GAVE HIM OUR DAUGHTERS HAND IN MARRIAGE AND LOOK WHAT HE DID TO HER. HE DESTROYED HER!!

WITHIN THE FIRST YEAR OF MARRIAGE SHANNON WAS ABLE TO FIND THE JOB OF HER DREAMS, A RETIREMENT VILLAGE, WHERE SHE COULD DO WHAT SHE LOVED MOST. BE A PART OF ANOTHER FAMILY, BY SHARING HER HUGS, HER LAUGHTER, HER BEAUTIFUL SMILE, AND HER LOVING HEART WITH HER PATIENTS. SHE WAS ABLE TO GIVE TO SOME OF THEM WHAT THEY MISSED MOST. A TOUCH OF HOME AND FAMILY THAT THEY MAY HAVE LOST WHILE LIVING THERE. SHE WAS ALSO PREPARING TO GO BACK TO COLLEGE WITH THE HELP OF HER EMPLOYERS. SIX MONTHS PRIOR TO HER DEATH, SHANNON WOULD TELL ME THAT WHATEVER WAS WRONG IN HER LIFE, SHE WAS ABLE TO FIND SOLACE THERE.

BY SEPTEMBER OF 2000, SHANNON WAS ABLE TO FULLFILL ANOTHER ONE OF HER DREAMS BY PURCHASING HER CHILDHOOD HOME

FROM US AND MAKING IT HERS. ALL OF THE MEMORIES THAT WE MADE AS A FAMILY THERE, SHE WAS NOW GOING TO EMBELLISH ON WITH HER OWN MEMORIES TO LEAVE HER CHILDREN. IT WAS THROUGH HER HARD WORK, DETERMINATION, IMAGINATION, AND LOVE OF FAMILY THAT SHE WAS ABLE TO MAKE THIS HOUSE A HOME TO BE PROUD OF. YET, ANOTHER DREAM SHATTERED. SHANNON AND HER ALEXANDRA WOULD BE MURDERED THERE ONE YEAR LATER.

FORGIVENESS!! SHANNON WOULD HAVE FORGIVEN JOHN BROE ANYTHING DIRECTED TOWARDS HER BECAUSE SHE LOVED HIM AND THOUGHT THAT HE LOVED HER TOO. AFTER ALL, HE ASSURED HER THAT SHE WAS HIS FUTURE. HE SHOULD HAVE TOLD HER THAT HE WOULD CHOOSE IF SHE WERE TO HAVE A FUTURE!!

BUT, THERE WOULD BE NO FORGIVENESS FOR THE ACTS OF BETRAYAL THAT HE INFLICTED ON THE PEOPLE SHANNON LOVED MOST, HER FAMILY AND HER FRIENDS. HIS DECEPTION HAS LEFT US IN DISBELIEF, DESPAIR, DEPRESSION, ANGER, AND UNBEARABLE AGONY THAT HAS AT 'TIMES ALLOWED US TO CONSIDER THOUGHTS OF SUICIDE AS SHANNON'S AUNT TERRY SAYS, "THE SADNESS CAN BE SO OVER-WHELMING THAT THE IDEA OF DEATH IS INVITING. IT WOULD END THIS EMPTINESS THAT I FEEL." BUT THEN WE REMEMBER THE INSPIRATIONAL WORDS THAT SHANNON LEFT BEHIND FOR US ON HER WEDDING DAY, "OUR FAMILY IS A CIRCLE OF STRENGTH AND LOVE, WITH EVERY BIRTH AND EVERY UNION THE CIRCLE GROWS, EVERY JOY ADDS MORE LOVE, EVERY CRISIS MAKES THE CIRCLE STRONGER." AS YOU LOOK AT US TODAY, WE BELIEVE THAT YOU CAN FEEL THE LOVE AND STRENGTH IN US AND YOU CAN ALSO READ THE WORDS OF LOVE, PRIDE, AND RESPECT, WRITTEN ON BEHALF OF SHANNON MARIE AND ALEXANDRA JORDAN IN THIS BOOK. THIS IS OUR IMPACT STATEMENT.

WE CHALLENGE ANYONE TO HAVE A LACK OF FAITH IN OUR COMMITMENT TO SEE JUSTICE SERVED, ALTHOUGH TRUE JUSTICE IS IMPOSSIBLE. JOHN BROE HAS NO REMORSE!! FOR FOUR DAYS IN SEPTEMBER, WHILE FAMILY AND FRIENDS FRANTICALLY SEARCHED FOR OUR CHILDREN, JOHN BROE DID NOTHING TO HELP US. BECAUSE OF HIS LACK OF HUMANITY, THIS ANIMAL ALLOWED OUR DAUGHTER AND GRANDDAUGHTER TO BE CONSUMED BY THE ELEMENTS. HE NOT ONLY BEAT A DEFENSELESS SHANNON TO DEATH WITH A BASEBALL BAT, HE ALLOWED HIS OWN FLESH AND BLOOD TO SUFFOCATE UNTIL SHE TOO HAD DIED. HE THREW THEM OUT LIKE TRASH AND BURIED THEM WITH NO REGARD FOR HUMAN LIFE.

HE ALSO LEFT BEHIND SHANNON'S TWO BELOVED CATS SWOOSH AND DAMIEN WHO WE ARE RAISING NOW. ONE OF THEM SUFFERS FROM DEPRESSION AND THE OTHER SUFFERS FROM ARTHRITIS IN THE HIPS, DUE TO PAST INJURIES OBVIOUSLY INFLICTED ON THEM BY SHANNONS AND ALEXANDRAS MURDERER AND THEIR ABUSER. THEY WERE APPROXIMATELY ONE YEAR OLD AT THE TIME.

THIS WAS NOT THE PERSON THAT SHANNON HAD LOVED FOR TEN YEARS AND BECAUSE OF OUR LOVE FOR HER WE TOO HAD LEARNED TO LOVE. TO PARAPHRASE SHANNON"S AUNT TERRY AGAIN,"THE REAL JOHN BROE, THE MASTER OF DISGUISE, CARING ON THE OUTSIDE BUT A SADISTIC AND CRUEL MURDERER ON THE INSIDE STOOD BEFORE US ON JUNE 7, 2002, IN THE HAMILTON COUNTY COURTHOUSE. IT WAS EXACTLY NINE MONTHS AFTER MURDERING OUR CHILDREN, AND ONE YEAR AFTER THE FIRST SONOGRAM WAS TAKEN OF OUR UNBORN GRANDDAUGHTER , HOW BEFITTING THAT JOHN BROE WAS SENTENCED TO

45 YEARS TO LIFE IN PRISON. A MERE SHADOW OF HIMSELF, WE BELIEVE NO REMORSE, NO PLACE IN HEAVEN. THANK GOD OUR CHILDREN ARE FINALLY SAFE.

ON JULY 15,2003, WE FOUND OURSELVES IN THE SAME COURT-ROOM, IN FRONT OF THE SAME JUDGE AND THE SAME PROSECUTORS, JUST THIRTEEN MONTHS AFTER THE SENTENCING OF THIS MURDERER. HOW COULD IT BE? WE HAD BELIEVED IN THE JUSTICE SYSTEM AND WERE NOW LIVING UNDER THE ASSUMPTION THAT SO-CALLED JUSTICE HAD BEEN SERVED. YET, NOW WE ARE SHARING THE SAME BREATHING SPACE ONCE AGAIN WITH THIS ANIMAL UNDER NEW CONDITIONS. HIS RIGHT TO APPEAL!!

ALTHOUGH WE WERE ALLOWED TO ADDRESS THE COURT DURING HIS SENTENCING, WE WERE NOW BEING TOLD THAT THERE WAS NOTHING FOR US TO SAY. PLEASE BEAR WITH ME WHILE I SPEAK MY INNER MOST THOUGHTS TO THE COURT THAT WERE DENIED AT THE TIME OF HIS RESENTENCING.

YOUR HONOR JUDGE DAVIS,

I AM ADDRESSING THIS COURT TODAY WITH A RENEWED YET RESERVED RESPECT FOR THE JUSTICE SYSTEM THAT THIRTEEN MONTHS AGO TRIED, CONVICTED, AND SENTENCED JOHN P. BROE, THE ABUSER AND MURDERER OF MY DAUGHTER SHANNON MARIE AND MY UNBORN GRAND-DAUGHTER ALEXANDRA JORDAN TO THE MAXIMUM SENTENCE ALLOWED BY LAW, TWO LIFE SENTENCES PLUS FIVE YEARS FOR "TAMPERING WITH EVIDENCE" ALL TO BE SERVED CONSECUTIVELY. I THOUGHT THEN A MERE 45 YEARS FOR ENDING MY CHILDRENS LIVES AS WELL AS DESTROYING WHAT WAS LEFT TO BECOME OF MINE. BUT AS I RELIVE THEIR MURDERS WITH OTHER INNOCENT VICTIMS AND ADVOCATES OF VICTIMS RIGHTS, I SOMETIMES HEAR HOW "LUCKY" WE WERE TO HAVE HAD SUCH A MAXIMUM SENTENCE HANDED DOWN , THEN ON THE OTHER HAND I HEAR FROM OTHERS LIKE ME WHO SAY, HOW DARE HE, JOHN BROE, BE ALLOWED TO TAKE ANOTHER BREATH ON THIS EARTH. HE MURDERED TWO PEOPLE THAT I LOVED! WHY WAS THIS NOT A CAPITAL PUNISHMENT TRIAL???

ON SEPTEMBER 7,2001, THIS ANIMAL COMMITTED THE ULTIMATE ACT OF BETRAYAL WHEN HE MADE A DELIBERATE CHOICE, HIS WIFE AND UNBORN CHILD WOULD DIE SO THAT HE, JOHN BROE, HIS 18 YEAR OLD MISTRESS, KRISTEN POWERS, AND THEIR ILLEGITIMATE CHILD COULD HAVE A FUTURE TOGETHER. WHAT, WHEN, AND WHO MADE THAT FINAL DETERMINING FACTOR? WOULD IT BE SHANNON AND ALEXANDRA OR KRISTEN AND HER CHILD TO BE ALLOWED THEIR GOD GIVEN RIGHT TO LIVE?? I HAVE BEEN LEAD TO BELIEVE THAT I WILL NEVER KNOW THE ANSWER TO THAT QUESTION BUT I AM HERE TODAY TO SAY THAT MY NEW LIFES COMMITMENT IS TO UNCOVER ALL AND ANY ANSWERS TO THE QUESTIONS THAT TORMENT MY MIND DAY AFTER DAY. SEEKING SO-CALLED JUSTICE IS MY LIFES GOAL.

I'VE BECOME VERY EDUCATED ABOUT TWO RAPIDLY GROWING PROBLEMS IN OUR SOCIETY SINCE SEPTEMBER 7, 2001. THE FIRST BEING THE COWARDLY ACT OF DOMESTIC VIOLENCE AND THE SECOND BEING THE INHUMANE ACT OF MURDER. JOHN P. BROE IS GUILTY OF BOTH OF THESE SELF-SERVING ACTS OF VIOLENCE TOWARDS MY DAUGHTER AND GRANDDAUGHTER. THIS IS WHAT I DIDN'T KNOW THEN BUT WHAT I KNOW NOW. *EVERY 15 SECONDS A WOMAN IS BATTERED IN THE U.S.[SHANNON WAS ABUSED FOR TEN YEARS] *WOMEN AGES 16-24 ARE AT THE HIGHEST RISK OF BEING AFFECTED BY INTIMATE PARTNER

VIOLENCE. [SHANNON WAS 24 YEARS OLD WHEN SHE WAS MURDERED BY HER HUSBAND.] *WOMEN ARE MOST VULNERABLE TO VIOLENCE WHEN THEY ARE SEPARATED [JOHN BROE LEFT FOR TWO MONTHS AND THEN RETURNED HOME THREE MONTHS PRIOR TO THEIR MURDERS.] *ONLY ABOUT 50% OF DOMESTIC VIOLENCE INCIDENTS ARE REPORTED TO THE POLICE.[SHANNON NEVER TOLD. SECRECY FOSTERS SHAME AND SHAME FOSTERS ISOLATION!! THERE IS A CODE OF SILENCE.] * MORE THAN THREE WOMEN ARE KILLED BY THEIR HUSBANDS OR BOYFRIENDS IN THE U.S. EVERYDAY.[AFTER 8 YEARS OF DATING AND LESS THAN TWO YEARS OF MARRIAGE JOHN BROE MURDERED SHANNON.] *ONE IN FIVE ADOLESCENT GIRLS BECOME THE VICTIMS OF EITHER OR BOTH, PHYSICAL OR SEXUAL VIOLENCE IN A DATING RELATIONSHIP. [BY HIS OWN CONFESSION IN HIS SO-CALLED LOVE LETTERS TO SHANNON, JOHN BROE STARTED ABUSING SHANNON WITHIN THE FIRST YEAR OF DATING.] *AND LAST BUT CERTAINLY NOT LEAST, THE HIGHEST RATE OF MORTALITY IN PREGNANT WOMEN IS NOT HEALTH RELATED ISSUES DUE TO THEIR PREGNANCY, IT IS HOMICIDE!! [SHANNON WAS FIVE MONTHS PREGNANT WITH HER DAUGHTER ALEXANDRA WHEN THEY WERE BRUTALLY & INTENTIONALLY MURDERED BY THE PERSON KNOWN AS THE HUSBAND AND THE FATHER, JOHN P. BROE].

SHANNON ENDURED A TERRIBLE SECRET FOR TEN YEARS, LIVED A FRIGHTENING LIFE WITH JOHN BROE AND CARRIED THIS HEAVY BURDEN ALONE., NOT ABLE TO TELL HER FAMILY AND FRIENDS FOR FEAR THAT THEY MAY NOT LOVE HIM AS MUCH AS SHE DID. IT SEEMS AS IF IT WAS NOT UNTIL SHE, LIKE SO MANY OTHERS, WAS ABOUT TO GIVE BIRTH TO HER CHILD, THE ONE PERSON SHE LOVED MORE THAN HIM, THAT SHE LOST HER LIFE. JOHN BROE HAD LOST HIS CONTROL AND DOMINANCE OVER SHANNON AFTER TEN YEARS, THEREFORE SHE AS WELL AS THE BABY WERE EXPENDIBLE.

WHY ARE WE HERE TODAY? BECAUSE CRIMINALS HAVE MORE RIGHTS THAN THE VICTIMS DO. THEY NOT ONLY HAVE THE RIGHT TO A FAIR TRIAL, THEY HAVE THE RIGHT TO APPEAL THE DECISION SET FORTH BY THE JUDGE AND JURY AFTER A TEAM OF POLICE AND PROSECUTORS PAINSTAKINGLY PROVE BEYOND A REASONABLE DOUBT THE DEFENDANTS GUILT. YET, AFTER NINE MONTHS OF DELIBERATION TO CONVICT AND SENTENCE THIS MURDERER, IT TOOK LESS THAN ONE MONTH FOR A TEAM OF APPELLATE JUDGES TO AFFIRM THE TWO LIFE SENTENCES BUT RECOMMEND MODIFYING THE CONSECUTIVE SENTENCE FOR "TAMPERING WITH EVIDENCE." I HAVE TO WONDER DID THEY READ THE SAME AUTOPSY REPORT THAT I DID. TAMPERING WITH EVIDENCE IN MY MIND IS THE WASHING OF SHANNON'S CLOTHES, THE CLEANING UP OF BLOOD EVIDENCE IN THE HOME, THE FORTUNATE LOSS OF MEMORY WHEN IT COMES TO WHERE IS THE MURDER WEAPON? BUT WHAT WE ALSO HAVE TO REMEMBER HERE IS THE REMOVAL OF SHANNONS LIFELESS BODY WHICH ALSO CARRIED ALEXANDRA WITHIN HER PROTECTIVE WOMB, ALSO FALLS UNDER THE CHARGE OF TAMPERING WITH EVIDENCE. THOSE UNBEARABLE WORDS THAT I HAVE READ AND NOW CONSUME ME: POSTMORTEM EXAM OF THE BODY OF SHANNON BROE [IRONICALLY PERFORMED ON 9-11-01]

DUE TO THE EXTENT OF DECOMPOSITION, THE AGE CANNOT BE DETERMINED, THE FACE AND BODY EXHIBITS A DARK GREEN TO BLACK DISCOLORATION. THE SCALP IS BALD DUE TO SLIPPAGE OF THE EPIDERMIS. THE CORNEAS ARE CLOUDY. 3 LACERATIONS EXTEND DIAGONALLY ACROSS THE FOREHEAD. A SMALL LACERATION OVER THE

BRIDGE OF THE NOSE ALONG WITH A FRACTURE. EXTENSIVE DEPRESSED SKULL FRACTURES AND EXPOSURE OF THE CRANIAL VAULT. NUMEROUS FRACTURES OVER THE BASE OF THE SKULL. A SMALL REMNANT OF THE BRAIN!, DUE TO DECOMPOSITION AND INSECT PREDATION ARTIFACT, IS NOTED. THIS WAS OUR SHANNON!!!

THE ABDOMEN IS ROUNDED. THE EXTERNAL GENITALIA ARE THOSE OF A NORMAL ADULT WOMAN, HOWEVER, DECOMPOSED FETAL PARTS PROLAPSE FROM THE VAGINA DUE TO DECOMPOSITION. ONLY THE UPPER EXTREMITIES, HEAD, AND UPPER TORSO ARE INTACT. THE ABDOMINAL AREA, PELVIS, AND LOWER EXTREMITIES ARE PROTRUDING THROUGH THE VAGINA AND ARE SKELETONIZED. THIS WAS OUR ALEXANDRA!!!!

PLEASE YOUR HONOR, MAKE IT CLEAR TO ME WHY ANY HUMAN BEING WHO READS THIS BARBARIC TREATMENT OF MY DAUGHTER AND GRANDDAUGHTER COULD POSSIBLY COME TO THE CONCLUSION THAT EVEN FIVE YEARS IN PRISON FOR "TAMPERING WITH EVIDENCE" IS TOO MUCH TO SERVE FOR THE CONVICTED MURDERER OF MY CHILDREN!!

THANK YOU FOR YOUR PATIENCE AND COMPASSION IN LISTENING TO MY DISBELIEF IN THIS RESENTENCING, YOUR HONOR.

RESPECTFULLY,
SHARON NOLAN

TO MY GREAT DISBELIEF AND ANGUISH THESE WORDS WERE NEVER HEARD. WE WERE DENIED OUR RIGHT TO AN IMPACT STATEMENT THAT DAY.

Mr. CHABOT. Thank you very much.

I will begin with myself, recognize myself for five minutes for the purpose of asking questions. Let me start with you, if I can, Mrs.Nolan, and I first want to thank you for testifying here this afternoon and your courage in doing so and realizing that you are testifying not just for yourself but for your daughter who can't be here and for your granddaughter, and for those that might be here there is a picture. I assume that is your daughter that is up there on the screen behind us right now, is that correct?

So we appreciate you being here.

Relative to what we are about, and that is passing a constitutional amendment to protect victims, to put them on at least the same rights that victims—that the criminals have or that defendants do, I know that you have served as a spokesperson for some other victims now because you have gotten involved on behalf of some other families as well.

While serving as a spokesperson for victims, I assume you have had the opportunity to talk with some other victims and families, and what lessons have you learned from the families about being denied the right to attend or take part in criminal proceedings? Is it something you went through, something you are hearing from other families as well?

Mrs. NOLAN. Absolutely. It is the feeling that you are the outsider looking in. From the moment of conception of your own child you make decisions for them. When they are old enough to move out, move on the road, they make decisions. My daughter made a decision to have a child. This murderer, this animal made a decision that neither one would live. When you go to the courtroom, the courts decide that not only the parents no longer can make any decisions after death, but the victim has no voice, so without the parents having a voice——

Mr. CHABOT. Did you feel perhaps that you were victimized twice in this process, once by the murderer and secondly by the criminal justice system and the way you were treated?

Mrs. NOLAN. Absolutely. We were victimized every day. Absolutely, every day.

Mr. CHABOT. Thank you very much.

Let me shift to Mr. Twist, if I could, at this time.

There has been, I think, the idea that criminals are—have basically the Constitution, the defendants have the Constitution backing them on a whole series of rights. The victims at best have state statutes and Federal statutes and state constitutions.

Could you give us some idea as to how the victim is at a disadvantage because of that situation, either some instances or how that actually works in the real world where the victim, since they only have a statute and the criminal has the Constitution, how that does put the victim at a disadvantage?

Mr. TWIST. Absolutely. As a lawyer now who litigates rights of crime victims on behalf of crime victims, I have a number of examples I could share with you.

Let me give one that I have pending right now, on a cert petition before the United States Supreme Court. I represent—we have a pro bono project. We represent crime victims, help them assert their rights in criminal cases and do it for free. I represent Duane

Lynn. Mr. Lynn's wife Nila was murdered when a man walked into their homeowners association meeting and, angry at the homeowners association in Vantana Lakes, Arizona, a little retirement community, decided he would vent his anger at the homeowners association by shooting into the meeting. He injured several people and killed two, one of whom was Nila Lynn.

Duane wanted the right to go before the jury and make his recommendation for what the sentence should be after conviction, and in Arizona he has a state constitutional right to be heard at any proceeding involving sentencing and the legislature has said that includes his right to offer his recommendation about what the sentence should be, so we filed a motion in court, asking the court and the trial court to protect Mr. Lynn's right; and the motion was denied on the basis that anything that a victim had to say, notwithstanding the state constitution or the state statutes, anything a victim would have to say on the issue of recommending a sentence in a capital case would be irrelevant and inflammatory.

We went to the Arizona Court of Appeals and the Arizona Court of Appeals upheld the trial court. We filed a petition for review with the Arizona Supreme Court and the Arizona Supreme Court upheld the trial court as well, arguing that notwithstanding Mr. Lynn's state constitutional and statutory right, that he would not be allowed to exercise it on the basis that it would infringe on the defendant's Eighth Amendment rights against cruel and unusual punishment.

But here is the O. Henry ending to the story: Mr. Lynn all along wanted to stand before the jury and ask for life imprisonment and not the death penalty, but the culture of our justice system is so hostile to the exercise of victims' rights that even a victim who wanted to stand before a jury and ask for life imprisonment and not the death penalty and whose right to do that was protected by the strongest state constitution and statutes was not allowed to exercise that right.

Mr. Chairman, that is just one example of how, until victims' rights are written into the Constitution of the United States, they will never change the culture of our justice system.

Mr. CHABOT. Thank you. My time has expired.

The gentleman from New York, Mr. Nadler, is recognized for five minutes.

Mr. NADLER. Mr. Orenstein, let me proceed with the case that Mr. Twist was just talking about. The proposed amendment says a victim of violent crime shall have the right to reasonably be heard at public release, plea, sentencing, et cetera, proceedings, and that is what Mr. Twist was referring to in this particular case.

The Arizona Supreme Court said that the victim's rights to talk about the harm caused by the defendant were okay, but statements regarding sentencing exceeded those bounds and violated the Eighth Amendment. That was the holding of the court. Mr. Twist seems to believe that this amendment would overturn that and permit a defendant—a defendant, excuse me—a victim in that circumstance to recommend or comment on the pending sentencing, because it says the rights to be reasonably heard at public release, plea, sentencing proceedings, et cetera. It also says these rights shall not be restricted except when and to the degree dictated by

a substantial interest in public safety or by the administration of criminal justice.

How do you think a court would read that? Would a court that said, without this amendment, that the Eighth Amendment, which prohibits cruel and unusual punishment, prohibits enforcement of a state provision, constitutional or statutory, that allows a victim to recommend or comment on sentencing, violates the Eighth Amendment, would such a court, would a supreme court think—what does this mean, that the right to be heard at sentencing shall not be restricted except to the degree dictated by the administration of criminal justice?

Does this amendment, in your opinion, do anything on that case at all?

Mr. ORENSTEIN. It is hard to predict, but my guess would be that many courts would say this amendment, by its terms, would not help Mr. Lynn in that case, because there is a clear line of Supreme Court, lower court and now Supreme Court cases saying you can't give a sentencing recommendation for or against the death penalty in a capital case to a sentencing jury. And I am not sure what the framers of this amendment intended it to mean, but if it means that you could make a sentencing recommendation like that to the sentencing jury, you could only do it by overturning our current understanding of the Constitution. So I think then a court would look to section 1, which says we can honor victims' rights without disturbing the rights of the accused and it would say, well, we can't interpret the amendment to mean something that will overturn the rights and there are very plausible readings of the right to be heard at sentencing, such as the right to make a sentencing recommendation to the judge, not the jury, at the actual imposition of sentence that would fit. So my guess is the result would be the same and that this amendment wouldn't accomplish a different result in that case or it would, you know, disprove what is in the first section.

Mr. NADLER. So, in other words, a court faced would, in your opinion, read the—having two apparently contradictory sentences in section 2, where it says on the one hand you should not restrict the right to be heard at a sentencing proceeding, on the other hand these rights should not be restricted except when necessary for a substantial interest in public safety or the administration of criminal justice, and the courts have read the Eighth Amendment to say you can't do that, which would be the substantial interest in the administration of criminal justice, either you overrule that, in which case the first sentence that the rights of victims of violent crime being capable of protection without denying the Constitutional rights of those accused would seem to be meaningless, so they would read it so as not to change it, but if they read it in a way to change it by the way Mr. Twist believes it would read then that really makes sentence one not true?

Mr. ORENSTEIN. I think those are the choices for the court, yeah.

Mr. NADLER. And the court would not read sentence one as not being true?

Mr. Twist, why is that wrong?

Mr. TWIST. Which part of what you said?

Mr. NADLER. Well, the way I am reading it, I am trying to figure out if this amendment really does anything at all, I am not sure it does, because it says on one hand the rights of victims shall not be restricted in the following respects, A, B and C, then it says they can be restricted when necessary for the substantial interest of public safety or the administration of justice. Then you come along and say obviously we want to overturn court decisions that say the Eighth Amendment trumps the right to be heard at the sentencing, but the court would probably read that the administration of criminal justice means it doesn't trump that and if the court read it otherwise it would seem that the sentence in section 1 is meaningless, or not true, so it would seem to dictate to read it to make it meaningless.

Mr. CHABOT. The gentleman's time has expired but you can answer the question.

Mr. NADLER. I hope you understood my question.

Mr. TWIST. I do and I think there is a strong case for why it wouldn't be meaningless.

First of all, the two cases Mr. Orenstein talks about really come on the earlier end of the victims' rights statutory and constitutional amendment revolution. They are late '80's cases, *Booth* v. *Maryland* in 1987 and then *Paine* v. *Tennessee* in 1991, and, frankly, the answer to the question is pending now before the Supreme Court. I mean, we will see what the United States Supreme Court does with Mr. Lynn's petition and whether or not the Court takes the case or whether it waits and takes another case.

Ultimately the Supreme Court will resolve this question of the limits of a victim's right to be heard in a capital proceeding, but the reason why the amendment is so important is because the only way for the jurisprudence on this issue or any other issue involving a victim's right to fairly proceed and to be presented in a way that is balanced, where the Court can equally weigh all of these important interests is for the defendant's right to be protected in the Constitution and the victim's right to be protected in the Constitution.

As long as victims' rights, as the Chairman alluded to earlier, as long as victims' rights are in subordinate law, state constitutions, state statutes, victims are always second class citizens, and there is no way to make an effective advancement of the jurisprudence in a balanced kind of way.

Nobody seeks to trump defendants' rights by any means, and this amendment wouldn't do that, but what we do seek is to be able to present to the courts a balanced argument.

Mr. NADLER. Could I have one more additional minute?

Mr. CHABOT. All right. The gentleman is granted one additional minute.

Mr. NADLER. I just wanted to pursue that last point on a philosophical basis.

No one seeks to trump the defendant's rights and the defendant's rights are designed to protect the innocent, of course, but they have to be balanced. The victim's rights cannot be subordinate to the defendant's rights is what you are saying, but if the chief goal of the criminal justice system is to protect the innocent from an unjust conviction, shouldn't the victim's rights to allocution or to rec-

ommendation be subordinate to the alleged criminal's rights to have a fair shot at proving his innocence?

Mr. TWIST. Mr. Chairman, Mr. Nadler, I think the chief goal of the criminal justice system is to do justice and indeed that is written into the ethical codes for prosecutors, it is written into our criminal justice system, and we cannot do justice, as long as the rights of the victim are always subordinate.

Mr. NADLER. Excuse me. My question is in terms of doing justice, it is the defendant who is on trial and the chief goal of the criminal justice system is to say he is innocent, he is guilty, and be correct, and that has got to be the chief goal above other things, and in that context shouldn't the ability of an innocent person to be found innocent be more important than the rights of other people, frankly?

Mr. TWIST. Mr. Chairman, Mr. Nadler, if seeking the truth were the only goal of the justice system, determining whether a person is guilty or innocent——

Mr. NADLER. Or the chief goal.

Mr. TWIST. We wouldn't have a rule that excluded evidence, knowing. There are a lot of things that we do in our criminal justice system that protect other values, and certainly the right for a victim to have a voice is a value that is sufficient to be protected by the Constitution of the United States.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Iowa, Mr. King, is recognized for five minutes.

Mr. KING. Thank you Mr. Chairman. As I reflect upon the testimony and the discussion, our definition of justice is pretty much open here and one might define it on one end for the same crime as an execution of the criminal and the other might define it on the other end as a suspended sentence or a very light sentence under a different type of a charge. So that is something that is very open for us and I don't know if we will get that defined here today, but I would like to focus on an issue that I slightly alluded to in my opening remarks and I would direct my questions to Mr. Twist, and that is the role of the state, as I am going to call it, intervener or a referee or an entity that steps in between the victim, the victim's family and interests, and the criminal, and I would ask you if you could expound upon your philosophy in regard to the role of the state as an intervener.

Mr. TWIST. Yes, Mr. Chairman. Mr. Chairman, Mr. King, I am very mindful of the background to your question, because at the founding of the Country victims were their own prosecutors; I mean, we had a system characterized by arbitration largely by the private prosecution. The notion would never have occurred to the Founders to write participatory rights for victims into the Constitution, because the system of prosecution at the time was characterized by private prosecution, by victims proceeding with their own cases, and, as time went on, even late into the 19th Century, well into the 1830's, Alexis de Toqueville wrote *Democracy in America* and noted that the offices of the prosecutor were few.

We had a system that was characterized, unlike it is now, by private prosecution, but gradually, over time, the state took on the duty to the point now where it is really a monopoly duty of the

state to investigate and prosecute offenses, and in that process sadly victims have been pushed to the side and become just another piece of evidence in the state's case, and there are a lot of good reasons why we don't have private prosecutions any more and why the state has to pursue justice. Don't get me wrong, but in the process of doing that victims have been denied essential rights and it is unfair.

Mr. KING. With regard to the study that I referenced, Cato Institute study, do you have some familiarity with that study?

Mr. TWIST. Yes, sir.

Mr. KING. And I just ran some numbers out here and in a way I am responding to the gentleman from Virginia, and I don't know whether I want to see more people locked up or crime victims compensated. I would like to see the most effective utilization of our resources as we have and for proposing this as a comment would be, say, for example, if we had 20 criminals and we could lock up 10 of them for $18,000 a year, which we really can't do any more with that 1995 number, that would be $1,800,000 a year to protect the public and the other were left to go free at $444,000 a year cost to individual crime victims in huge whopping chunks. That price is $4.44 million, so it would seem to me that if we could catch the other 10 and lock them up we would save the public 4.2 million, and how much would we save in individual human suffering cannot be measured.

And so what I am suggesting here is something I would ask you to comment on, is with that equation of not utilizing our resources as good as we might, if the state were compelled to compensate the crime victim for the full amount of their loss, we would look at that cost and I think we would focus more on prosecution, incarceration, and prevention. So what is your view of that equation?

Mr. TWIST. Mr. Chairman, Mr. King, I agree with you that we need to focus more on the justice aspects of the crime victims' rights amendment. A criminal justice system that shuns its victims and treats its victims with injustice discourages them from participating in this Country's justice system. That is why so few crimes get reported. That is why there is such difficulty in getting citizens to cooperate with the justice system, because of the gross injustice that innocent victims are met with in our justice system, and a system that would be characterized with the rights that this amendment would secure would be a system that would encourage victims to come forward and there would be a crime control and justice effect that we would see from that.

Mr. KING. Thank you, Mr. Twist, and I see that I am out of time. So thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much for your questions. We do appreciate it. The gentleman from Virginia, Mr. Scott, is recognized for five minutes.

Mr. SCOTT. Thank you, Mr. Chairman. I think we are getting to the point where we are getting the rights of the accused and the rights of the victims. If they clash, we want them balanced. The Constitution says you can't pass legislation that will undermine the rights of a defendant.

Now, is it your position that the rights of a victim can trump the rights that the defendants now have?

Mr. TWIST. Mr. Chairman, Mr. Scott, never.

Mr. SCOTT. Never. If we are not going to undermine the rights of the defendant, what then is the barrier to statutorily enacting any of the things in the resolution?

Mr. TWIST. Mr. Chairman, Mr. Scott, there is no barrier, and, indeed——

Mr. SCOTT. Aren't we doing Constitution rather than a statute? You can provide by statute the requirement for notice; is that right?

Mr. TWIST. Yes.

Mr. SCOTT. You can require by statute that decisions duly consider the victim, you can do that now?

Mr. TWIST. Yes.

Mr. SCOTT. You can do by statute the right not to be excluded to the extent it doesn't undermine the defendant's rights; you can do that by statute, right?

Mr. TWIST. Mr. Chairman, Mr. Scott, everything that is written in the amendment could be written into the statute.

Mr. SCOTT. Okay. Whether it is a statute or a constitutional amendment, what recourse or right of enforcement does the victim have?

Mr. TWIST. Mr. Chairman, Mr. Scott, that is the full answer to your question, because the truth is we have tried. We didn't begin this effort by coming to the Congress and asking for a federal constitutional amendment.

Mr. SCOTT. If it is a federal constitutional amendment, if you enact the constitutional amendment, somebody isn't notified, then what?

Mr. TWIST. The enforcement provision is clearly set forth in section 3 of the amendment, it is standing. It is the victim's right to assert the rights that are granted by the Constitution.

Mr. SCOTT. . Wait, wait, wait. That is a right and then suppose the right is denied, what is the enforcement?

Mr. TWIST. Just like a defendant's right would be, to seek a review of that decision denying the right, just as defendants have the right to do that now.

Defendants don't——

Mr. SCOTT. After the trial is over and you were afforded your right to be heard, section 3 says you can't get money and you can't get a new trial. What can you get?

Mr. TWIST. Mr. Chairman, Mr. Scott, what you would do in the real world is you would litigate the issue of the denial of your right within the criminal case as it was going on, as we have done in Mr. Lynn's case. It is a perfect example. While that prosecution was going on, we took his case first to the trial court, then to the court of appeals, then to the Arizona Supreme Court.

Mr. SCOTT. Was this during the trial?

Mr. TWIST. During the pendency of the case, yes.

Mr. SCOTT. Okay.

Mr. Orenstein, you are a prosecutor?

Mr. ORENSTEIN. Yes—well, I was, yes. Not any longer.

Mr. SCOTT. What would all of that in the middle of a trial do to your prosecution?

Mr. ORENSTEIN. Particularly in a capital case that could be very problematic. In a capital case you have got jurors sitting in the box. It is very time-consuming to get them there. You have got witnesses assembled from around the country. If you want continuity of the process—an earlier version of this amendment would have forbidden remedy for a violation of the right that would have resulted in staying the trial so you could fight it out. You could go to court separately.

Mr. SCOTT. You mean, in the middle of the trial, after the jury has been impaneled, you could be forced to stop, go to appellate court and argue?

What happens to the trial?

Mr. ORENSTEIN. It is on hold and if, for example, some jurors can no longer serve then you are in a bind and you may have to start over again.

I don't want to mislead. It is not required by this amendment, but it is permitted, particularly in relation to the last version, where it was expressly forbidden to stop trials in this way, and that language has been taken out.

Mr. SCOTT. Mr. Twist, I think you said you found that the court language would be inflammatory and what else?

Mr. TWIST. Irrelevant.

Mr. SCOTT. Inflammatory and irrelevant. If you have information in a trial that a court has ascertained is inflammatory and irrelevant and therefore against the rights of the defendant to have a fair trial, is it your understanding that this constitutional amendment would require that kind of information to come into court?

Mr. TWIST. Mr. Scott, it is my conclusion that Mr. Lynn's mere assertion that he wanted life imprisonment and not the death penalty is neither inflammatory nor irrelevant.

Mr. SCOTT. But the court found as a finding it is irrelevant and inflammatory. Having found that, I mean, we can discuss whether or not they should have found it, but having found it, would this amendment require inflammatory and irrelevant information to be injected into the trial?

Mr. CHABOT. The gentleman's time has expired, but you can answer the question.

Mr. TWIST. Mr. Scott, of course, it would not, because the——

Mr. SCOTT. Then it wouldn't affect Mr. Lynn's case.

Mr. TWIST. It would affect Mr. Lynn's case because that is not the issue. The issue—there would always be a due process limitation on making statements that are, "unduly prejudicial," but I can submit and I, you know, trust that the U.S. Supreme Court will agree with us, that a victim's simple request for life imprisonment and not the death penalty is not unduly prejudicial.

Mr. SCOTT. Mr. Chairman, are you going to have another round of questions?

Mr. CHABOT. We don't anticipate that, no, but if the gentleman wants that he would be granted it.

Mr. SCOTT. Thank you.

Mr. Orenstein, just for the record, if you have two defendants and you are offering one a plea for testimony, what would this amendment do to that process?

Mr. ORENSTEIN. If the person you are offering the bargain to has victims of his own, as he likely will, part of the bargain is going to be he is going to plead guilty and you might want to send him out on the street so you can give him bail so you can correct some more information. You are going to have to give reasonable and timely notice to that cooperating witness' victims before the——

Mr. SCOTT. That would complicate the situation.

Mr. ORENSTEIN. Yes. In some circumstances, it would.

Mr. SCOTT. Now, in this last minute I have got, we talked about witness exclusion from trials. Why should any witness be excluded from the trial and, having answered that, why should a victim be different or not be different from other witnesses?

Mr. ORENSTEIN. There is really little reason to exclude a victim from a courtroom unless the victim is also a fact witness and you want to ensure that that witness' testimony isn't tainted by listening to the trial. But as a general matter, and I include now victims who want to testify at a penalty hearing, they should never be excluded and there are statutory ways that that can——

Mr. SCOTT. But there is a purpose why any witness is excluded from the conduct of the trial?

Mr. ORENSTEIN. It is to preserve the testimony from being subject to the claim that you only decided what to say after hearing what others said.

It is generally not a constitutionally required rule and that is why statutory fixes can and have worked to overcome the problem of excluding witnesses.

Mr. CHABOT. The gentleman's time has expired.

Mr. SCOTT. Mr. Chairman, could I just follow up, one quick follow up—why wouldn't any witness—why wouldn't you be able to exclude any witness and why should a victim testifying be different, if the goal is to preserve testimony?

Mr. ORENSTEIN. Well, because; I mean, I do agree with my colleagues here. There are some different sensitivities involved with the victim. If you can accommodate the rights of the accused by making a—creating a system that allows the witness, the victim witness, to attend the trial, I think we should try to do that. There are ways to do it through legislation. It is only if you get to the point where letting that person, victim or anyone else into the courtroom that you are going to deny the defendant's due process rights that you have a conflict of rights, and then you have the question of what will happen under this amendment.

The gentleman from Florida is recognized for five minutes.

Mr. FEENEY. Thank you, Mr. Chairman, and thank you to the witnesses.

I am sorry I arrived a little late, my flight just arrived, but I don't need to be convinced of the merit of the proposal here. But coming from 12 years in the state legislature I was an advocate of victims' rights in the State of Florida. I guess what I would like to be convinced of—and maybe Mr. Twist is best able to do it—what are the 10th Amendment issues? I recognize we can amend the Constitution and we can supersede the 10th Amendment, but as a practical matter it seems to me there should be some legitimate concerns about whether the United States Constitution is the best place to provide for protecting victims.

A, I guess I would like to know why states can't do it because in large part they have already done it. What can be done without interfering with defendant's rights under the U.S. Constitution, at least in some places?

Secondly, states, after all, do define what state crimes are. It is one thing to apply this to federal crimes. It is quite another in my view to apply it to every violent crime as defined by states.

I recognize there is a certain symmetry that arguably the proponents could bring to this bill, and that is we protect the accused in state defined crimes and so that it would be appropriate to also protect the victims, but I guess I am concerned that we are just going to simply overrule a whole host of common law and statutory procedures at the state level and there is a hodgepodge.

I think Professor Tribe, in his comments, is correct, and there are greater and lesser degrees of protection throughout the 50 states I am certain with respect to victims, but I am still not convinced that one constitutional amendment is the best way to resolve that.

I am concerned about the practical costs imposed on state prosecutions and judicial systems, because each state is going to have slightly different criminal processes and protections. We don't know what the ultimate cost will be, and I guess I would also raise the, you know, jurisprudential view that in civil wrongs there is a victim or a set of victims.

In criminal matters we are all victims, and it is more than theoretical. If you walk down the street in some big cities that have large crime problems, you pay a tax through higher insurance rates on your automobile, your car. You continue to have to pay higher costs at the local grocery store and the restaurant because of their insurance costs, because of their need for security. So collectively we are all victims when violent crime occurs and are we undermining the notion with this constitutional amendment that society as a whole is the real ultimate victim of violent crime, albeit obviously some people pay a greater price if they happen to be the one assaulted, raped or murdered, whatever.

And finally, I am concerned that we are going to have a constitutional guarantee without, it appears to me, a remedy. If the remedy is to take an interlocutory appeal and hold up the trial and that is the best we can do, but we are not going to have any compensation to the victim, I guess it would be of some concern to me that we are going to write a guarantee in the United States Constitution without some adequate remedy to the victim.

And I guess, lastly, theoretically, my understanding of the United States Constitution and the parts about it which I like best, although I have taken an oath to uphold all of it, are the parts that protect individuals from government action, and this seems to me an amendment that while it is addressed to government processes, ultimately the victims have been victimized by other individuals in our society, and while the process ought to go out of its way to protect them, in my view, I guess I like to be convinced that the states are not the best place to do that protection.

And, Mr. Twist, if you are the best place to answer those concerns?

Mr. TWIST. Mr. Chairman, Mr. Feeney, when a battered woman is not given notice of the release hearing for the person accused of battering her, when the parents of a murdered child are excluded from a trial——

Mr. FEENEY. Remember, I am with you on the merits. I have already passed a lot of that in Florida as a cosponsor.

Mr. TWIST. Well, I will tell you, Mr. Feeney, it is the government who is doing that. The government is imposing those rules, and on the point of why can't we do this in the states, with all due respect we began in the states. We began with nothing in the states. We made a conscious decision to go to the states first, and now we have 50 states that have state statutes and we have 33 states of one variety or another that have state constitutional amendments, and we have tried to enforce those in the states for more than a decade, and it simply doesn't work in case after case after case to fully respect the rights of crime victims and to change the culture of our criminal justice system.

I would just make one point, Mr. Chairman, Mr. Feeney, when James Madison took to the floor of the 1st Congress and proposed the Bill of Rights, his opponents said, among other things, we don't need to put the Bill of Rights into the Federal Constitution, because the states have amendments. The states had bills of rights.

Madison responded, and this is a speech on the floor of the Congress, "Not all states have bills of rights, and some of those that do have inadequate or even absolutely improper ones."

Our experience in the victim's movement is no different. Madison's insight was that once these rights get written into the Constitution of the United States, and again this is from his speech on the floor, he said, "They will have a tendency to impress some degree of respect for the rights themselves, to establish the public opinion in their favor and rouse the attention of the whole community as they acquire by degrees the character of fundamental maxims as they become incorporated with the national sentiment."

That is exactly the power of the Constitution and only the power of the Constitution, which is the law of all of us, to change the culture of our criminal justice system in this case, and it is a criminal justice system that despite our best efforts, despite your work in Florida and our work all across the country, despite those best efforts, victims remain second class citizens.

Until their liberties—and the purpose of federalism isn't to just give power to the states. The purpose of federalism is to protect our liberty as citizens. Until our liberty as crime victims to be noticed and to be heard and to not be excluded are written into the law of our country, the U.S. Constitution, they will not become the fundamental maxims that James Madison talked about.

Mr. CHABOT. The gentleman's time has expired. I want to thank the witnesses for their testimony this afternoon. I think it is extremely helpful.

Mr. SCOTT. Mr. Chair?

Mr. CHABOT. Oh, Mr. Conyers. I am sorry, Mr. Conyers. I didn't see you there.

The gentleman from Michigan is recognized for five minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I ask unanimous consent to put into this record the statement or the letter from Hilary Shelton, Director of NAACP.

Mr. CHABOT. Without objection.

[The information referred to follows in the Appendix]

Mr. CONYERS. And I would like to invite the lawyers on the panel if they would agree to meet with Director Shelton, if I could set up an appointment.

Mr. ORENSTEIN. Of course.

Mr. CHABOT. They have all indicated they would be willing to do that.

Mr. CONYERS. Thank you very much.

Now, let me ask Mrs. Nolan, whose testimony was so personal, and I am glad that you are here today.

Mrs. NOLAN. Mm-hmm.

Mr. CONYERS. The Chief Justice of the Supreme Court favors more a statutory remedy for victims rather than a constitutional amendment. What do you think I should tell him or what would you tell him if you saw him?

Mrs. NOLAN. What I would say to him is if it takes the Constitution to have the rights for the accused to be contained at all times then it needs to be in the Constitution for the victims. We at least need to be held equal.

Mr. CONYERS. Mm-hmm, and Mr. Beloof.

Mr. BELOOF. Sir?

Mr. CONYERS. What would you suggest I discuss with the Chief Justice of the United States Supreme Court about this matter?

Mr. BELOOF. Well, I think I would explain to the Chief Justice of the Supreme Court the experience we have had in the states. I think I would explain to the Chief Justice why there is a need, also, to have victims' rights in the Constitution, so that they are equal and can be balanced with other rights in the Constitution.

Ultimately, the Chief Justice knows he will be in control, as will the rest of his brethren on the Supreme Court, of how those rights are balanced.

I would explain to him that people from academics, from the left, such as Lawrence Tribe, perhaps this Nation's most constitutional scholar, and people from the right and people like myself in the middle see that these don't infringe upon defendant's rights and that the court can adequately balance these rights. So that would be part of my conversation with the Chief Justice.

Mr. CONYERS. Very good; and, attorney Steven Twist, what would you recommend my discussion or yours be with the Chief Justice?

Mr. TWIST. I wish I could ask him to grant cert. on Mr. Lynn's petition.

Mr. Conyers, of course, I regret the position of the Judicial Conference, urging the Congress to pass statutes instead of a constitutional amendment, because I think that view consigns victims to second class citizenship. They would not propose that defendant's rights be in statutes and not the Constitution, and I do not understand why they ask victims to settle for second class citizenship.

Mr. CONYERS. Thank you very much.

I yield to the gentleman from Virginia.

Mr. SCOTT. Mr. Chairman, I would like to ask any of the witnesses why this is limited just to violent crimes and not other crimes. I would imagine that somebody who is a victim of embezzlement would certainly want the benefits, whatever benefits there may be in this thing, to apply to them.

Why is it limited to just violent crimes?

Mr. TWIST. Mr. Chairman, Mr. Scott, if we can get two-thirds of the Congress to agree that it should cover all the victims of crime, we would certainly support that.

Mr. ORENSTEIN. Mr. Scott, if I could, when I was at the Justice Department, I was working on that side with people who were working on this amendment, including Mr. Twist.

I think one of the concerns is that economic crimes in particular can have thousands of victims in any given case, and one of the key problems for this amendment already with cases like Oklahoma City or 9/11 is what do you do in the mass victim cases.

Those problems would be greatly exacerbated if we didn't limit it to violent crimes, and so I think that is one of the reasons. Unfortunately, it creates other definitional problems.

Mr. SCOTT. It is not limited to multiple crimes. This amendment would apply to Oklahoma, it would apply to New York.

Mr. ORENSTEIN. Absolutely, but the problem is if you extend it to nonviolent crimes as well, now you have all sorts of fraud schemes that just by their nature have thousands of victims. Right now, thank God, mass victim cases and violent crimes are a rare exception.

On the economic side of the house it is not necessarily the case, that is true, so you would have more problems.

Mr. CHABOT. The gentleman's time has expired. The gentleman from New York is recognized for the purpose of making a motion.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, I ask unanimous consent that all Members have five legislative days to revise and extend their remarks, to submit additional materials for the record or to submit additional questions to the witnesses in writing for the record.

Mr. CHABOT. Without objection.

Mr. NADLER. And, Mr. Chairman, are you able to give the Members of the Subcommittee an indication of whether you plan to do a markup on this, to follow this up with a markup and, if so, when?

Mr. CHABOT. We don't have any dates available at this time, but I certainly would like to have a markup by some time in the future, yes.

Mr. NADLER. Thank you.

Mr. CHABOT. Thank you.

I would again like to thank the panel for being here this afternoon. I especially want to thank Mrs.Nolan for sharing her experience with us, very unfortunate, and none of us can express in words our condolences for your loss and the loss of your family, but thank you for being here. It takes a lot of courage to come forward and testify at a hearing like this.

So there being no further business, we are adjourned.

[Whereupon, at 3:51 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT

This afternoon the Subcommittee on the Constitution is convening to hear testimony concerning H.J. Res. 48, the Crime Victims' Rights Amendment to the United States Constitution. The purpose of the victims' rights amendment is to ensure comprehensive protection throughout the criminal prosecution process to victims of violent crime. While there are federal and state statutes that provide protections to some victims of violent crime, not only are crime victims not provided comprehensive rights, but these rights are not available to all victims.

In 1982, President Ronald Reagan convened the Presidential Task Force on Victims of Crime. After holding hearings around the country and carefully considering the issue, the Task Force concluded that the only way to fully protect crime victims' rights was to amend the U.S. Constitution.

Following this strong recommendation, crime victims' rights advocates decided to seek constitutional protections on the state level before undertaking a federal initiative. The campaign to enact protections at the state level was overwhelmingly successful. Today, thirty-two states, including my home state of Ohio, have passed amendments—with the truly overwhelming support of voters.

Although state amendments now extend rights to victims of crime, the patchwork of protections has proven inadequate in fully protecting crime victims. A clear pattern has emerged in courthouses around the country—judges and prosecutors are reluctant to apply or enforce existing state laws when they are routinely challenged by criminal defendants. A study by the National Institute of Justice found that only 60% of victims are notified when defendants are sentenced and only 40% are notified of a defendant's pre-trial release. A follow-up analysis revealed that minorities are least likely to be afforded their rights as victims.

Currently, the U.S. Constitution is completely silent on victims' rights, while it speaks volumes about the rights of the accused. Thus, the U.S. Constitution essentially serves as a trump card for those accused of committing crimes in order to keep victims from participating in their prosecution, or even just sitting in the courtroom during trial.

A clear pattern has emerged in courthouses around the country in which judges and prosecutors are reluctant to apply or enforce existing state laws that are intended to protect victims' rights when they are routinely challenged by criminal defendants. Only an amendment to the Constitution can establish uniformity in the criminal justice system and ensure victims receive the justice they deserve. These strong new victims rights, like others guaranteed in our Constitution, would become fundamental, and citizens of every state would be protected.

Additionally, the federal statutes are insufficient. They require only that "best efforts" are used to provide rights to victims, but victims have no recourse if they fail to receive the rights to which they are legally entitled. Federal statutes are also ineffective in addressing victims' concerns. There are currently more than 1,500 federal and state statutes that are aimed at providing victims rights, and yet victim after victim is denied basic protections. Moreover, the rights granted by federal statutes only apply in certain *federal* proceedings.

A constitutional amendment is absolutely needed to help facilitate a balance between the rights of victims and those of defendants.

I want to stress that nothing in this amendment will undermine or weaken the long-established rights of defendants under our Constitution. A study of 36 states found that victims' rights legislation had little effect on the sentencing of convicted defendants. A second study of judges interviewed in states with victims' rights legislation indicated that courts did not unfairly favor victims over defendants. The

amendment will not deny defendants their rights, but rather, grant victims rights that can coexist side by side with defendants' rights.

Crime victims deserve to be treated with dignity in our criminal justice system. I have introduced this legislation in the last two Congresses, and working with Senators Kyl and Feinstein, I think we made great progress in raising awareness of this critical issue. With the strong support we have received from President Bush, I am hopeful that this Congress we can pass this amendment and fortify an important truth: that victims must have their own inalienable rights under our Constitution.

MATERIAL SUBMITTTED BY MRS.NOLAN

DOMESTIC ✸ VIOLENCE Kills KIDS

Baby's Ultrasound Photo

Baby's Picture Taken On:

6-7-01

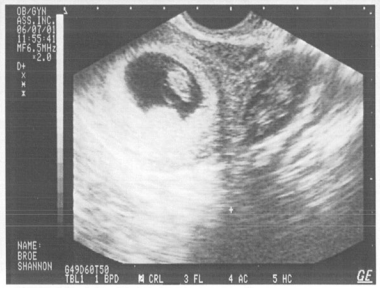
Baby's Expected Arrival Date:

1-21-02

Possible Girl Names:

ALEXANDRA JORDAN

Possible Boy Names:




SHANNON MARIE NOLAN-BROE
JULY 29, 1977 — SEPT. 7, 2001
DAUGHTER
ALEXANDRA JORDAN
FAITH, HOPE AND LOVE

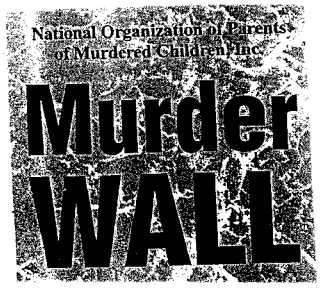
POMC NATIONAL THEME SONG

"WE ARE THE SURVIVORS"
Richard Wright/Kim Tewksbury

There are those of us whose mothers
have been taken from our arms,
There of those of us with children
we could not keep safe from harm,
There are those of us who've lived to see
our fathers lose their lives,
And each and every one of us survives.
Chorus
We are the Survivors, left behind to carry on.
We are the Survivors, joined together we are strong.
We will speak out for our loved ones
who were not given a choice.
We are the Survivors, hear our voice.

Maybe some of us have brothers who were here,
but now they're gone,
You can ask about our sisters,
because their memory is strong,
We are sons and we are daughters,
we are husbands, we are wives,
And each and every one of us survives.
Chorus
We are the Survivors, left behind to carry on.
We are the Survivors, joined together we are strong.
We will speak out for our loved ones
who were not given a choice
We are the Survivors, hear our voice.

With a part of us that never heals,
and a fear of the unknown,
There's a strength in knowing through it all,
you're not alone.
Chorus
We are the Survivors, left behind to carry on.
We are the Survivors, joined together we are strong.
We will speak out for our loved ones
who were not given a choice.
We are the Survivors, hear our voice.



We Remember Them

Author Unknown

At the rising of the sun and at its going down,
We remember them.
At the blowing of the wind and in the chill of winter,
We remember them.
At the opening of buds and in the rebirth of spring,
We remember them.
At the blueness of the skies and in the warmth of summ
We remember them
At the rustling of leaves and the beauty of autumn,
We remember them.
At the beginning of the year and when it ends,
We remember them.
As long as we live, they too will live;
for they are now a part of us, as we remember them.
When we are weary and in need of strength,
We remember them.
When we are lost and sick at heart,
We remember them.
When we have joys we yearn to share,
We remember them.
When we have decisions that are difficult to make,
We remember them
When we have achievements that are based on theirs
We remember them.
As long as we live, they too shall live,
for they are a part of us, as we remember them.

SHANNON MARIE NOLAN-BROE SCHOLARSHIP
PLAYER AND COACH OF VOLLEYBALL
IS AWARDED TO--RYAN O'CONNOR--JUNE 4, 2002

TEAMWORK

" IS THE ABILITY TO WORK TOGETHER
TOWARD A COMMON VISION
THE ABILITY TO DIRECT INDIVIDUAL
ACCOMPLISHMENT TOWARD
ORGANIZATIONAL OBJECTIVES. IT IS
THE FUEL THAT ALLOWS COMMON PEOPLE
TO ATTAIN UNCOMMON RESULTS. "

TODAY

If I knew it would be the last time that I'd see you fall asleep, I would tuck you in more tightly and pray the Lord , your soul to keep.

If I knew it would be the last time that I'd see you walk out the door, I would give you a hug and a kiss and call you back for one more.

If I knew it would be the last time I'd hear your voice lifted up in praise, I would video tape each action and word, so I could play them back day after day.

If I knew it would be the last time I could spare an extra minute or two, I'd stop and say " I love you " instead of assuming you would KNOW I do.

If I knew it would be the last time I would be there to share your day, well, I'm sure you'll have so many more, so I can let just this one slip away.

For surely there's always tomorrow to make up for an oversight, and we always get a second chance to make everything alright. There will always be another day to say our " I love you's " and certainly there's another chance to say our " Anything I can do's ? "

But just in case I might be wrong, and today is all I get, I'd like to say how much I love you and I hope we never forget. Tomorrow is not promised to anyone, young or old alike, and today may be the last chance you get to hold your loved one tight.

So if you're waiting for tomorrow, why not do it today? For if tomorrow never comes, you'll surely regret the day, that you didn't take that extra time for a smile, a hug, or a kiss, and you were too busy to grant someone, what turned out to be their last wish.

So hold your loved ones close today and whisper in their ear. Tell them how much you love them and that you'll always hold them dear. Take time to say, " I'm sorry, " "please forgive me, " "thank you, " or " it's okay, " and if tomorrow never comes, you'll have no regrets about TODAY.

IN REMEMBRANCE OF:
SHANNON MARIE NOLAN-BROE & ALEXANDRA JORDAN
[July 29, 1977 -- September 7, 2001] [unborn daughter]

SHANNON #8

The Cincinnati Enquirer/Michael E. Keating

The Walnut Hills volleyball team; front row, from left: Cara Espelage, Cally Christon, B.J. Kersh, Anna Schmalz, Sharmane Grace and coach Tim Mersch. Back row from left: Delisa Smith, Andrea Hoekstra, Stephanie Hunter, Aisha Abernathy, Shannon Nolan and Danielle Jacques.

Walnut Hills surprises itself

---TODAY---

- *If I knew it would be the last time that I'd see you fall asleep, I would tuck you in more tightly and pray the lord, your soul to keep.*
- *If I knew it would be the last time that I see you walk out the door I would give you a hug and a kiss and call you back for one more.*
- *If I knew it would be the last time I'd hear your voice lifted up in praise, I would video tape each action and word, so I could play them back day after day.*
- *If I knew it would be the last time, I could spare an extra minute or two, I'd stop and say "I love you" instead of assuming you would KNOW I do.*
- *If I knew it would be the last time I would be there to share your day, well I'm sure you'll have so many more, so I can let just this one slip away.*
- *For surely there's always tomorrow to make up for an oversight, and we always get a second chance to make everything right. There will always be another day to say our "I love you's" and certainly there's another chance to say our "Anything I can do's?"*
- *But just in case I might be wrong, and today is all I get, I'd like to say how much I love you and I hope we never forget. Tomorrow is not promised to anyone, young or old alike, and today may be the last chance you get to hold your loved one tight.*
- *So if you're waiting for tomorrow, why not do it today? For if tomorrow never comes, you'll surely regret the day, that you didn't take that extra time for a smile, a hug, or kiss, and you was too busy to grant someone, what turned out to be their one last wish.*
- *So hold your loved ones close today and whisper in their ear. Tell them how much you love them and that you'll always hold them dear. Take time to say, "I'm sorry," "please forgive me," "Thank you," or "it's okay" and if tomorrow never comes, you'll have no regrets about today.*

IN REMEMBRANCE:

SHANNON MARIE NOLAN BROE

7-29-77 9-7-01

AND ALEXANDRA JORDAN (UNBORN) DAUGHTER

Shannon/ Missing

((Verse 1))
She's no where to be found
Just up and gone one day.
There's nothing we can do
Nothing but hope and pray.

The days have been so long
There's no sleep at night.
What has happened to her?
Something isn't right.

((Chorus))
God, what can I do?
Everything is looking so hopeless.
God, please tell me what's going on here?
And tell me why I feel so helpless.

As the days go on and never end
Nothing is looking better.
Lord, I'm sorry for not trusting you
I know you have loved me forever.

((Verse 2))
He looks so guilty
Why is he acting like that?
He seems to know something is up
Someone tell me where she is at!

God, please help me.
I want to know what's going on?
Lord, why is everything turning out like this?
Is it to show me I have done something wrong?

((Chorus))

((Verse 3))
I have so many questions
I find so few answers.
God help me get through this
Help me through just one more day.

Please let her be alive
Let her have lived
I don't care what happened
Someone tell me where she is

((Ending))
Why did this happened to her
She hasn't done anything wrong
This didn't happen to her
She can't be really gone.

God I know you tell me trust in You
I'm sorry I have failed
I'm so scared of all of this
It is just all way too real

-KRISTEN NEIDLINGER
(WRITTEN THE WEEKEND THAT SHANNON & ALEXANDRA WERE MISSING BY HER COUSIN WHO WAS 16 YEARS OLD AT THE TIME.)

THE WALSH SHOW

THIS WEEK'S SHOW TOPICS | TODAY'S SHOW

WEDNESDAY
APRIL 30, 2003





WHEN PREGNANT WOMEN BECOME VICTIMS

When the remains of **Laci Peterson** and her unborn son were found and her husband, **Scott**, was charged with their murders, people across the country expressed shock and disbelief that her spouse allegedly could be the one responsible. However, recent studies by two different state health departments have shown that the leading cause of pregnancy-related death is not heart attacks or complications during childbirth – it's murder. In addition, separate studies have also shown that approximately one in six pregnant women is abused. Today, we discuss pregnant women and violence, and we talk to families whose lives were devastated when their pregnant loved one was murdered – and the killer turned out to be the unborn child's father. In a *JOHN WALSH SHOW* **EXCLUSIVE**, we talk to **Saundra Adams**, whose daughter, **Cherica**, was murdered while pregnant with professional football star **Rae Carruth's** son. Miraculously, Cherica's unborn child survived. Ultimately, Carruth was convicted of conspiracy in connection with Cherica's murder, and **Van Brett Watkins** was tried and convicted as the triggerman hired by Carruth to shoot Cherica. Saundra shares her story in the studio and talks about raising her grandson **Chancellor**, who suffers from cerebral palsy and other severe medical complications because of the shooting. We also see a videotaped interview with Van Brett Watkins from his cell in North Carolina's Central Prison. Then, in September 2001, **Shannon Broe, 24**, was five months pregnant when she was beaten to death with a baseball bat by her husband, **John**. Investigators later learned that John Broe also had an 18-year-old girlfriend – and she too was pregnant with his child. John talks to Shannon's heartbroken parents, **Sharon and L.C. Nolan**, and her 22-year-old younger sister, **Brandy**, who share their story in the studio. Finally, **Sheryl Cates**, the Executive Director of both **The Texas Council on Family Violence** and **The National Domestic Violence Hotline** joins us to provide advice and guidance to pregnant women who suspect their lives may be in danger. Both Saundra Adams and the Nolans say the warning signs were there that their pregnant loved ones were in danger, but they failed to take action. They say they are here to create awareness, in the hopes that other families don't have to suffer the same pain they have experienced.

MORE ABOUT OUR GUESTS

Saundra Adams
Saundra's pregnant daughter, **Cherica**, was shot four times while driving in her car on November 16, 1999. Miraculously, Cherica's unborn child survived, but Cherica died from her wounds nearly one month later. The father of Cherica's child, professional football star **Rae Carruth**, was ultimately convicted of conspiracy in connection with Cherica's murder. **Van Brett Watkins** was tried and convicted as the hit man hired by Carruth. Today, Saundra is raising her 3-year-old grandson, **Chancellor**, who suffers from medical complications due to his mother's shooting. Saundra is adamant that her daughter would still be alive today if she hadn't gotten pregnant, and she shares her story in the studio.

Van Brett Watkins
Van Brett Watkins was the hit man hired by **Rae Carruth** to murder his pregnant girlfriend, **Cherica Adams**. He is currently serving a 40-year sentence in North Carolina's Central Prison for the crime. We see tape of Watkins relaying messages to **Saundra** and Cherica's son, **Chancellor**, in the studio.

Sharon, L.C. & Brandy Nolan
24-year-old **Shannon Broe** was five months pregnant when she was beaten to death with a baseball bat and then buried in a shallow grave by her husband, **John**, in September 2001. Sharon and L.C. are Shannon's parents, and Brandy is Shannon's younger sister. Sharon says her daughter was overjoyed in May 2001 when she learned that she was pregnant with a baby girl. Unbeknownst to Shannon, her husband had become involved with an 18-year-old coworker – and she too was carrying his child. After the murder, John failed a polygraph test, confessed to the murder, and revealed the location of his wife's grave to police. In April 2002, John Broe was convicted of two counts of aggravated murder and was sentenced to a minimum of 45 years in prison. Today, the Nolans say they are devastated that they overlooked the obvious signs of John's controlling and obsessive behavior toward their daughter.

Sheryl Cates
Sheryl is the Executive Director of both the **Texas Council on Family Violence** and **The National Domestic Violence**, and is an expert on domestic violence prevention and treatment. She provides advice and guidance to pregnant women who suspect their lives may be in danger, as well as possible warning signs to look for.

MORE INFORMATION AND HELPFUL LINKS

TODAY'S TIPS

LINKS AND ADDITIONAL INFORMATION

www.ndvh.org
The National Domestic Violence Hotline, Toll-Free: **1.800.799.SAFE (7233)** or **1.800.787.3224 (TTY)** - Sheryl Cates, Executive Director

www.tcfv.org
Texas Council on Family Violence - Sheryl Cates, Executive Director

www.thequietstormproject.com
The Quiet Storm Project – National Domestic Violence Hotline

www.usdoj.gov/domesticviolence.htm

United States Department of Justice: Domestic Violence

www.ncadv.org
National Coalition Against Domestic Violence

www.feminist.org/911/crisis.html
Feminist Majority Foundation: Domestic Violence Hotlines and Resources

www.nnedv.org
National Network to End Domestic Violence

fvpf.org
Family Violence Prevention Fund

www.ojp.usdoj.gov/vawo/
Office on Violence Against Women

www.4woman.gov
4woman.gov: Violence Against Women

www.w-cpc.org/pregnancy/violence.html
What You Need To Know About Domestic Violence

http://pregnancy.about.com
Domestic Violence in Pregnancy

us all."

L.C. Nolan, Shannon's father, says, "If this isn't a nightmare, what is it?" He is haunted by the memory that he gave her to this man, walking her down the aisle of St. Francis De Sales Church.

On her wedding day in 1999, Shannon wrote, "Our family is a circle of strength and love, with every birth and every union, the circle grows. Every joy adds more love, every crisis makes the circle stronger." And her family struggles to honor that belief.

Shannon kept a secret from them for 10 years. The slapping. Kicking. Choking. The escalating abuse.

"So hard to believe that Shannon would put up with it," says her father. But he knows a lot more now. He has heard stories from other parents, other women. Domestic violence affects 2.5 million women a year, 4,000 of them killed by their mates. He and Sharon promised themselves when the trial was over, when they could speak without jeopardizing the careful case against John Broe, they would honor their daughter's memory by trying to save someone else's daughter. Talbert House, Women Helping Women, the YWCA - the Nolans want women to know there is help available.

Anything else?

Sharon says she wishes she could find the right words for women in abusive relationships, tell them what she never had the chance to say to her daughter.

"Please look at us," she says, raising those sad, tormented eyes. "If you don't love yourself enough, please love us enough to leave."

E-mail lpulfer@enquirer.com or phone 768-8393.

TOP LOCAL STORIES
Budget backs up sewer fixes
Police race data filed and forgotten
Security impedes university research
Public events on Sept. 11

ENQUIRER COLUMNISTS
PULFER: Anguished family wants to warn other women
BRONSON: 'Teachers, don't leave them kids alone'
HOWARD: Good Things Happening

CINCINNATI-HAMILTON COUNTY

- Chechnya Leader Suffers Food Poisoning
- Italian Govt. Scrambles As Power Returns
- India: 15 Militants Killed Near Kashmir
- Long-Delayed Malaysian Mall Opens

BUSINESS NEWS

- New York Foreign Exchange
- Central Bank: China Foreign Reserves Rise
- Japan Auto Production Slides in August
- Survey: Gas Prices Fall 10 Cents a Gallon
- Air France Board to Meet on KLM Alliance

SPORTS NEWS

- Tennis Pioneer Althea Gibson Dies at 76
- NBA Enters TV Distribution Deals
- Colts' Manning Throws 6 TDs Vs. Saints
- Pujols Wins Closest Ever NL Batting Race
- Detroit Tigers Avoid 120-Loss Season
- Giants Hand Over Home Field to Braves
- Hamm Sits Out As U.S. Reaches Quarters
- Wildcats Fire Mackovic After 1-4 Start
- Armour Shoots Record 254 at Texas Open
- Waltrip Knows How to Win With Restrictor

Photo of the Day: Pool for Pooches
Teacher speaks out on impoverished school
Bengals fans may meet detours
Candidate critical of Main St. plan
He's 98, and still a great band-mate

AROUND THE TRISTATE
Beer fest at Oktoberfest
Everyone welcome at Taste of India
Regional Report

BUTLER-WARREN-CLERMONT
Kings makes do with old sports field
Twins who allegedly plotted get probation
You're invited, Milford and Miami Township!

OBITUARIES
Mary Vera Brown was active in church, business, community
Radio broadcaster Paul Miller had a flair for stunts
Lawrence Riegling delivered for UPS
OHIO
Markers to salute history of labor
Cleveland suburb remembers 9-11
New law gets tough on 'drugged driving'
Rain could squash pumpkin harvest
Ohio Moments

KENTUCKY
CROWLEY: Dems talk big, but can they win?
Gas tax boost faces rough road
Ludlow wanted jail-time-for-cash deal
Pilot's killer will testify against wife
Ohio River bridges plan OK'd by Feds
Lexington transit unsafe, says report
Early opening launches lengthy deer season

MATERIAL SUBMITTED BY THE HONORABLE JOHN CONYERS

WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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(202) 638-2269 FAX (202) 638-5936

April 10, 2000

United States Senate
Washington, D.C. 20510

Dear Senator;

Since this nation was first founded, Americans of color have been the victims of all types of crimes -- both violent and non-violent -- in disproportionately high numbers. It is for this reason that the National Association for the Advancement of Colored People (NAACP) has always had a keen interest in seeing that crime victims are treated honorably, fairly and compassionately by the American judicial system, and that in the end they feel that justice has been served.

Yet people of color have also historically been wrongly accused in this nation of crimes varying from the very minor to the most heinous. It is for this reason that the NAACP has also been a strong and steadfast supporter of the Constitution, the Bill of Rights, and the concept of due process in the American judicial system. It is our deeply held belief in the need to protect the innocent and allow every American the right to a fair trial that leads us to oppose S. J. Res. 3, the proposed constitutional amendment to protect the rights of victims of crimes.

While we are very sympathetic to the rights and the needs of crime victims throughout this nation, and while we agree that victims are often not treated as compassionately as they should be by the judicial system, the NAACP does not believe that S. J. Res. 3 is the answer. Rather than expend the time and energy necessary for the enactment of an amendment to the Constitution, the NAACP urges you to work together and with state legislatures to develop comprehensive packages of laws that address the specific and diverse needs of crime victims. The statutory route is preferable as it is easier to update laws and to fit them to the changing yet very specific needs of victims, and laws, as opposed to a broadly worded constitutional amendment which is less likely to have long-lasting negative repercussions on the rights of the accused.

The NAACP appreciates and commends the attempts of the members of the Senate to improve the way in which the American judicial system treats crime victims, and we agree that we can and should do more to see that victims feel safe and have closure after their ordeal. We support efforts to pass laws that help victims of crimes, and we would like to work with you to develop a more narrowly tailored and effective package. Yet we cannot support S. J. Res. 3 for, as well meaning as it is, we have grave concerns that the negative effects this amendment would have on the rights of the accused seeking a fair and impartial trial would outweigh the benefits it bestows upon victims.

Thank you in advance for your attention to the concerns of the NAACP. If you have any questions or comments, I hope that you will feel free to contact me at (202) 638-2269. I look forward to working with you on this serious and important issue.

Sincerely,

Hilary O. Shelton
Director

HOS/ck

1522 K STREET, NW, SUITE 550, WASHINGTON, DC 20005 (202) 326-0040 FAX (202) 589-0511

POSITION STATEMENT AGAINST PROPOSED VICTIMS' RIGHTS AMENDMENT

Members of the House of Representatives have introduced a proposal to amend the U.S. Constitution by adding a "Victims' Rights Amendment" (H.J. Res. 48). The Senate Committee on the Judiciary has already passed a version of the same legislation (S.J. Res.1). Although NOW Legal Defense and Education Fund (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. As chair of the National Task Force on Violence Against Women, NOW Legal Defense 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.

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 strongly 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 their control over the impact of the crime on their lives. For example, notice of and participation in court proceedings, including the ability to choose to be present and express their views at sentencing, could be psychologically healing for victims. More timely information about release or escape and reasonable measures to protect the victim from future stalking and violence could improve women's safety. Women could benefit economically from restitution. Nevertheless, because statutory protections and state constitutional provisions already may provide some or all of these improvements, because additional statutory and state-level reform can be enacted, and because reform will be effective absent strict enforcement, we do not support a federal constitutional amendment to address the problems facing women crime victims.

Why a Federal Victims' Rights Constitutional Amendment is Problematic

Adding constitutional protections that could offset the fundamental constitutional protections afforded defendants marks a radical break with over two hundred years of law and tradition carefully balancing the rights of criminal defendants against

the exercise of state and federal power against them.[1] It is our belief that the proposed reforms can be afforded under statutes and state constitutions. The constitutional amendment proposal contains complex requirements that are far better suited for statutory reform.

The position of a survivor of violence can never be deemed legally equivalent to the position of an individual accused of a crime.[2] The accused -- who must be presumed innocent, and may in fact be innocent -- is at the mercy of the government, and faces losing her liberty, property, or even her life as a consequence. While the crime victim may have suffered grievous losses, she, unlike the defendant, is not subject to state control and authority. A victims' rights constitutional amendment could undercut the constitutional presumption of innocence by naming and protecting the victim as such before the defendant is found guilty of committing the crime. Amendment proposals leave undefined numerous questions ranging from the definition of a "victim" to whether victims would be afforded a right to counsel, or how victims' proposed right to a speedy trial would be balanced against defendants' due process rights. Proposals also inject an additional party (the victim and her attorney), to the proceedings against a defendant as a matter of right, increasing the power of the state and potentially diminishing the rights of the accused, particularly in the eyes of a jury.

The demonstrated existing inequalities of race and class in the modern American criminal justice system only increase the importance of defendants' guaranteed rights. Affording alleged and actual crime victims a constitutional right to participate in criminal proceedings could provide a basis for challenge to those bedrock principles that assure justice and liberty for all citizens.

While many women are victims of violent crime, women are also criminal defendants. Self-defense cases, dual arrest situations, or the abuse of mandatory arrest and mandatory prosecution policies by batterers who allege abuse by the victim, exemplify contexts in which women victimized by violence may need the vital constitutional protections afforded defendants. These cases highlight the need for constitutional protection for criminal defendants belonging to groups historically subject to discrimination.

Proposed Alternatives to Address the Needs of Women Victimized by Violence

NOW Legal Defense supports efforts to improve the experience of victims in the criminal justice process. Many statut and state constitutions already contain the reforms contained in amendment proposals. Additional mechanisms for chan include enhanced implementation and enforcement of existing state and federal legislation, enacting new statutory protections, increased training for judicial, prosecutorial, probation, parole and police personnel, and improved services for victims such as the more widespread use of victim-witness advocates. Funding available under the Violence Against Women Act can continue 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.

September 2003

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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 with 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.