

VICTIMS' RIGHTS AMENDMENT

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED SEVENTH CONGRESS SECOND SESSION

ON

H.J. Res. 91

MAY 9, 2002

Serial No. 74

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://www.house.gov/judiciary>

U.S. GOVERNMENT PRINTING OFFICE

79-525 PDF

WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., WISCONSIN, *Chairman*

HENRY J. HYDE, Illinois	JOHN CONYERS, JR., Michigan
GEORGE W. GEKAS, Pennsylvania	BARNEY FRANK, Massachusetts
HOWARD COBLE, North Carolina	HOWARD L. BERMAN, California
LAMAR SMITH, Texas	RICK BOUCHER, Virginia
ELTON GALLEGLY, California	JERROLD NADLER, New York
BOB GOODLATTE, Virginia	ROBERT C. SCOTT, Virginia
ED BRYANT, Tennessee	MELVIN L. WATT, North Carolina
STEVE CHABOT, Ohio	ZOE LOFGREN, California
BOB BARR, Georgia	SHEILA JACKSON LEE, Texas
WILLIAM L. JENKINS, Tennessee	MAXINE WATERS, California
CHRIS CANNON, Utah	MARTIN T. MEEHAN, Massachusetts
LINDSEY O. GRAHAM, South Carolina	WILLIAM D. DELAHUNT, Massachusetts
SPENCER BACHUS, Alabama	ROBERT WEXLER, Florida
JOHN N. HOSTETTLER, Indiana	TAMMY BALDWIN, Wisconsin
MARK GREEN, Wisconsin	ANTHONY D. WEINER, New York
RIC KELLER, Florida	ADAM B. SCHIFF, California
DARRELL E. ISSA, California	
MELISSA A. HART, Pennsylvania	
JEFF FLAKE, Arizona	
MIKE PENCE, Indiana	

PHILIP G. KIKO, *Chief of Staff-General Counsel*

PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION

STEVE CHABOT, Ohio, *Chairman*

WILLIAM L. JENKINS, Tennessee	JERROLD NADLER, New York
LINDSEY O. GRAHAM, South Carolina	BARNEY FRANK, Massachusetts
SPENCER BACHUS, Alabama	JOHN CONYERS, JR., Michigan
JOHN N. HOSTETTLER, Indiana	ROBERT C. SCOTT, Virginia
MELISSA A. HART, Pennsylvania,	MELVIN L. WATT, North Carolina
<i>Vice Chair</i>	
LAMAR SMITH, Texas	
[VACANCY]	

BRADLEY S. CLANTON, *Chief Counsel*

PAUL B. TAYLOR, *Counsel*

CRYSTAL M. ROBERTS, *Counsel*

KRISTEN SCHULTZ, *Full Committee Counsel*

DAVID LACHMANN, *Minority Professional Staff Member*

CONTENTS

MAY 9, 2002

OPENING STATEMENT

	Page
The Honorable Steve Chabot, a Representative in Congress From the State of Ohio, and Chairman, Subcommittee on the Constitution	1
The Honorable Robert C. Scott, a Representative in Congress From the State of Virginia	2
The Honorable Jerrold Nadler, a Representative in Congress From the State of New York, and Ranking Member, Subcommittee on the Constitution	3
The Honorable Edward R. Royce, a Representative in Congress From the State of California	5
The Honorable John B. Shadegg, a Representative in Congress From the State of Arizona	6

WITNESSES

Mr. Steven J. Twist, Assistant General Counsel, Viad Corporation and Member, Steering Committee for the National Victims' Rights Constitutional Amendment Network	
Oral Testimony	10
Prepared Statement	11
Ms. Roberta Roper, Executive Director, Stephanie Roper Committee and Foundation, Inc.	
Oral Testimony	37
Prepared Statement	40
Mr. James Orenstein, Partner, Baker & Hostetler, New York City	
Oral Testimony	42
Prepared Statement	45
Mr. David L. Voth, Executive Director and Victim-Offender Mediator, Crime Victim Services of Allen and Putnam Counties, OH	
Oral Testimony	53
Prepared Statement	55

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable James A. Barcia, a Representative in Congress From the State of Michigan	4
Letter from Gordon J. Campbell, Chief Executive Officer, Safe Horizons	63
Letter from Richard L. Abel, Connell Professor of Law, University of California at Los Angeles; Arwen Bird, Director, Survivors Advocating for an Effective System; Wade Henderson, Executive Director, Leadership Conference on Civil Rights; David Kopel, Independence Institute; Robert Mosteller, Chadwick Professor of Law, Duke Law School; Laura Murphy, Director, Washington National Office, American Civil Liberties Union; Erwin Schwartz, President, National Association of Criminal Defense Lawyers; Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association	66
Position Paper by the National Clearinghouse for the Defense of Battered Women	72

IV

Page

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Jon Kyl, a U.S. Senator From the State of Arizona	79
Prepared Statement of Bud Welch	82
Prepared Statement of Douglas Beloof, Associate Professor, College of Law, Lewis & Clark College	86
Letter from Roberta Roper, Executive Director, Stephanie Roper Committee and Foundation, Inc.	89

VICTIMS' RIGHTS AMENDMENT

THURSDAY, MAY 9, 2002

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

The Subcommittee met, pursuant to notice, at 12:09 p.m., in Room 2237, Rayburn House Office Building, Hon. Steve Chabot (Chairman of the Committee) presiding.

Mr. CHABOT. The Committee will come to order. I'm Steve Chabot, the Chairman of the Subcommittee on Constitution of the Judiciary Committee.

Today, the Subcommittee on the Constitution convenes to hear testimony concerning the Federal Victims' Rights Amendment. The purpose of the Victims' Rights Amendment is to ensure comprehensive protection to victims of violent crime. Many of the people here today know all too well that violent criminals damage or destroy the lives of innocent victims.

According to the Department of Justice, in the year 2000 there were almost 12 million serious crimes committed in the United States. On any day, on any street corner, a mother, a father, a son, or a daughter can become the next victim of a rapist or murderer. For too many years these victims' voices have been silenced in a criminal justice system that recognizes only the rights of the accused. A constitutional amendment is absolutely needed to help facilitate a balance between the rights of victims and those of defendants.

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.

In 1982, California became the first State to pass a victims' rights amendment to its constitution. Today, 32 States, including my home State of Ohio, have passed similar 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 court-houses 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 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.

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.

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 defendant's rights. Furthermore, the amendment will empower crime victims by giving them the knowledge and opportunity to confront their assailants in court and at sentencing or parole hearings. It will also protect victims by notifying them about the release or escape of their perpetrator from custody.

Finally, the amendment will consider victims' interest in awarding restitution. For far too long, victims of crime in this country have had to stand on the courthouse steps with meaningful justice right beyond their reach, not allowed to view proceedings in person, not permitted to speak out on behalf of a murdered loved one, not even notified often times when a violent abuser is turned loose.

Crime victims deserve to be treated better. They deserve to be treated with dignity in our criminal justice system. In the last Congress, Congressman Barcia and I introduced a very similar amendment in the House. And working with Senators Kyl and Feinstein I think we made great progress in raising awareness of this critical issue.

This year, with the strong support we have received from President Bush, I am hopeful that we can pass this amendment and fortify an important truth, that victims must have their own inalienable rights under our Constitution.

And at this time, I'm not sure if Mr. Scott would like to make an opening statement. I will let Mr. Nadler, the Ranking Member, make an opening statement shortly after, after he gets here. But Mr. Scott, would you like to make a statement?

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. Let me just say briefly, there's a lot we can do to assist victims of crime which this amendment doesn't do. There are a lot of questions with this

amendment that I hope the witness will describe. But there are several things we can do. We can expand crime prevention and offender rehabilitation programs to lessen victimization. In recent years we have reduced Pell grants for prisoners that has the effect of increasing crime.

But there is nothing that—the main thing we can do is increase victim compensation funding, victim witness coordinators, and we can fund prosecutors. There's no victims' right amendment can compensate for the fact that a prosecutor has too many cases to allow him to extend common courtesies to victims, to explain the process, and to obtain the, and consider their views. If we're serious about, about helping victims, we should do what we can—we should do that today and it would have an effect today.

But if we just here, sit here and try to amend the Constitution and in the end have a complicated mess that helps no one, with the same overburdened prosecutors, victims will still have the problems they have today.

I would yield to the gentleman from New York.

Mr. CHABOT. Thank you. The gentleman from New York is recognized.

Mr. NADLER. Thank you, Mr. Chairman. Today we address—forgive me for arriving late. Today we address a 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 a representative of 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 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, or to get on with their lives. Small businesses need assistance to stay on their feet. Families that have lost a breadwinner need help with the future. Since September 11th, the environmental hazards caused by the collapse of the World Trade Center continue to threaten the health of people in lower Manhattan, in Brooklyn, and probably New Jersey as well.

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. In this connection, I might mention this morning's *New York Times* editorial endorsing a bill that Senator Clinton and I introduced to provide for proper funding so that we can analyze the half a million rape kits that sit in police evidence lockers that have not been analyzed for lack of funds that can—those rape kits could probably catch several tens of thousands of rapists, take them off the streets, and probably exonerate a few improperly accused or incorrectly accused individuals.

I do 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 mean because of that extensive litigation, less resources for actually prosecuting crimes, and may provide an opportunity for people who do not have the best of motives to cause terrible trouble in prosecutions.

If we're really serious about helping victims, perhaps we can do better. For example, we can make sure that FEMA never again, as they did in New York, deny assistance to families who had to relocate as a result of environmental contamination of their apartment because of a criminal attack. We can keep the pressure up on EPA, which only this week, after 8 months of obfuscation and denial, finally admitted it's their job to make sure people's homes and offices are safe so that people are not slowly poisoned over the next 15 years.

We can make sure that the Victims of Crime Act is properly funded and that more money goes to the States and to crime victims assistance organizations to help those in need. We can make sure the President keeps his word and really delivers the assistance he has promised but which always seem to hit a brick wall in the Office of Management and Budget.

These things are real things that we can do that will have real impact on the lives of victims. They'll have real impact on helping victims. But that cost money. Everyone wants to help, but we have a duty to do the job and to do it right. Constitutional amendments make for great headlines, but I do not believe they are the answer. If anything, this amendment will make things for victims worse. I do not believe we need to add to their problems.

Thank you, Mr. Chairman. I yield back.

Mr. CHABOT. Thank you. I'd at this time ask for unanimous consent to permit the statements of Mr. Royce of California and Mr. Shadegg from Arizona, as guests of this Subcommittee, and in addition, without objection, I'd request that a statement be permitted and submitted by Mr. Barcia who was unable to be here today, and will become part of the permanent hearing. And without objection, we'd ask for Mr. Royce to make an opening statement at this time, if you could keep it to three to 5 minutes.

[The prepared statement of Mr. Barcia follows:]

PREPARED STATEMENT OF THE HONORABLE JAMES A. BARCIA, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MICHIGAN

I want to thank Chairman Chabot and the distinguished members of this subcommittee for the opportunity to share my thoughts about the Victims Rights Amendment.

I am proud to be the lead House Democratic co-sponsor for this critical piece of legislation.

I am also very proud to be working in the other body with Senator Jon Kyl and Senator Dianne Feinstein to ensure victims' rights in our criminal justice system.

I believe this Amendment will change the current dynamics of our criminal justice system to one that is more fair to all parties, and not allow victims to be re-victimized by an unfair legal process.

Presently, the scales of justice are tilted against crime victims. For too long, victims of crime have gone unrecognized in criminal justice laws. Too often the victim is all but forgotten, left on the outside of the process looking in. This is not right and must be changed.

Victims should not occupy the fringes of our criminal justice process. They should have the right to be notified of, and not excluded from, any public proceedings relating to the crime committed against them. They should have the right to participate in parole or early release hearings. They should have the right to be notified when

the perpetrator is released or escapes from custody. Their safety should be considered when the defendant might be released from custody.

The amendment is based on the fundamental principle that both victims of crime and accused criminals have rights in our criminal justice system. The rights of the defendant are clearly outlined in the Constitution. It is now time for the rights of victims to also be guaranteed by our Constitution.

I recognize that critics of this amendment may say that we are trying to take away the rights of the defendant, to throw our country back to the days when the defendant was guilty until proven innocent. Clearly, no one here today is advocating such a course.

Instead we are trying to ensure that when a judge has to balance the rights of the victim with the rights of the defendant, the scale is not tipped in favor of the defendant.

Critics of this legislation will ask, "Why does the Constitution need to be amended? Why can't a State Constitution address victims' rights?"

The answer is that when a judge is presented with a conflict between the rights of the victim and the rights of the defendant, the rights of the accused prevail. This is because rights guaranteed under the Constitution—the defendant's rights—take precedence over the rights of the victim, which are not universally and uniformly protected.

When a judge balances defendants' rights in the Federal Constitution against victims' rights in a state law, the victim always loses. Rights of the defendant, which are guaranteed under the Constitution, will always take precedence over the rights of victims which are not universally guaranteed.

There are still far too many situations in which victims only learn that their perpetrator has been released by seeing them on the street. There are still too many situations where family members are not allowed in the courtroom during the trials of their loved ones' perpetrator. There are still too many situations where the stories of the victim go untold.

State laws have not effectively rectified these situations.

Like everyone in this room, I do not take amending the Constitution lightly. But I believe that only an amendment to the Constitution will bring an end to the suffering victims face at the hands of this process.

Our nation was founded on the principles of equal protection under the law and equal justice for all. It is not until our Constitution specifically, expressly, and universally guarantees the rights of victims that the scales of justice will truly be balanced.

Mr. ROYCE. I will. I will, Congressman Chabot, and I appreciate it very much, Chairman, for the opportunity, and I thank you very much for your efforts to bring a victims' rights amendment before the House.

Recently, President Bush, as we know, announced his support for this amendment, and with a bipartisan bill introduced in the Senate I think the time is right to move this in the Congress. We had, from my perspective, an opportunity some years ago in 1990 in California, we moved an amendment, it gave constitutional rights to victims under our State constitution. And at that time, Proposition 115, the Crime Victims Justice Reform Act, at that time I chaired the constitutional amendments committee in the State senate, and I authored the amendment.

But there was an individual in California who was very instrumental in this, Collene Campbell. Her brother was racing legend, was a racing legend nationwide. And Gary and Collene Campbell, with the help of Mickey Thompson and his wife Trudy, helped us to collect a million signatures. Collene Campbell had lost her son, who was killed in a violent murder. And coincidentally her brother, her brother Mickey and Trudy were killed during the time that we were collecting those signatures. As a matter of fact, they had petitions with them when they were shot, executed in their car.

Tonight on 48 Hours their story is going to be told, and I would urge those of you who might want to follow that case—it has taken

so many years to bring this case to justice. But this is that family's second experience with the criminal justice system. And this is why victims like Collene and Gary Campbell are asking for these enumerated constitutional rights that are going to allow them in the courtroom, going to allow them the right to a speedy trial, going to allow them the right to make that victim impact statement at the time that the sentencing occurs or at the time that someone's to be released.

And I think it's the minimal we can do to put into our Federal Constitution certain enumerated rights. We've done that over the years for the accused on many occasions with constitutional amendments to our Constitution. It's only right. We worked very closely with district attorneys, and with judges in California, to craft laws that would work in the courtroom. And that is what Chairman Chabot, and that is what the rest of us that are involved in this effort are doing here with our counterparts in the Senate. You know, we want a constitutional amendment that's going to stand the test, a court challenge, as it has in California.

So for those who, who are concerned, I just wanted to, to share that, that we share their, their effort, that—their desire to have something here that meets a constitutional test. But I think the way this, this has been crafted, it does. And we now have 32 States that have constitutional amendments guaranteeing the rights of victims. So while many States and the Federal Government have enacted some legal protections for crime victims, those laws have been insufficient in providing all victims rights within the criminal justice system.

Why? Because these cases move from State court to the appellate Federal level. And so we need these constitutional rights enumerated in the Federal Constitution.

It is time to balance the scales of justice. It's time to give victims constitutional protections. And we agree that any effort to amend the Constitution must be undertaken with great care, and the specific language of this legislation strikes the proper balance in protecting victims' rights in America's criminal justice system.

So I wanted to commend you again, Mr. Chairman. And I did want to submit for the record Collene Campbell's testimony, if I could.

Mr. CHABOT. Without objection.

Mr. ROYCE. I appreciate that very much.

Mr. CHABOT. Thank you. We thank you very much for your leadership on this issue here in the Congress as well as relative to California.

Mr. ROYCE. Thank you, Mr. Chairman.

Mr. CHABOT. And we'll at this time recognize Mr. Shadegg of Arizona for the purpose of making an opening statement and welcome him here to the Committee today.

Mr. SHADEGG. Thank you, Mr. Chairman. And I appreciate the courtesy extended by all the Members of the Committee of allowing me to be here. I unfortunately cannot remain for the balance of the testimony but I wanted to make a statement and I appreciate your willingness to allow me to do so.

You will hear eloquent testimony this morning on the importance of this piece of legislation, and you will hear arguments far beyond

any that I could make. You've already heard some. I simply want to make a couple of points. It has already been raised that there are concerns about this issue and that there are those who believe a constitutional amendment is not needed.

I would like to impress upon those who come to this discussion today the fact that this has been a very, very long effort. Indeed, the language that is before you today has been negotiated at the Federal level for more than 6 years, precisely because of the kind of concerns that have been aired today about how do we strike the right balance? And it is indeed difficult to strike the right balance.

But, as my colleague from California has pointed out, it is absolutely essential that we do so. The States, indeed as my colleague from California pointed out, 32 States have already adopted State constitutional amendments. But those constitutional amendments have not gotten the job done. They have addressed victims' rights, but the reality is that this whole issue is driven by the rights given to defendants under the U.S. Constitution. And because those rights are derivative of the U.S. Constitution, it is critical that we amend the U.S. Constitution to deal with the rights of victims.

And it is essential that we do that because those rights don't exist today, and the only place they can be enshrined, the only place they can be granted is in the U.S. Constitution.

And it is true that striking that balance is difficult, but it is also true that this negotiation and this discussion has gone on for years. The language that you have seen is incredibly, carefully crafted. It has been the result of back and forth, give and take discussions between professors as distinguished as Laurence Tribe and Paul Cassell, from the right and from the left, trying to strike that right balance. Trying to say, how do you say in the words of the Constitution these rights? How do you not demean the Constitution? How do you ensure that the rights of defendants remain protected while also ensuring the rights of victims?

And in a, in an eloquent letter, which I would hope will be put in the record today, Laurence Tribe says, this language, negotiated over a period of now almost 7 years, strikes that right, that correct balance. It does go at the issue of, well, when do we consider the victim's rights and how do we balance those in a way that we do not ever hamper the defendant's rights?

And I urge those engaged in this discussion—and I commend you, Mr. Chairman, for holding this hearing, and I commend all of the Members that have shown today and all of the rest of the Subcommittee and the full Committee, to carefully review that language word for word, and review the critiques of the language because I think we really have struck the balance.

And I think it's also important to note that some issues rise above partisanship. I want to note, and you will hear it today in the testimony I believe, that this should not be a partisan issue. Both the Republican platform and the Democrat platform call for a victim's rights amendment, a crime victim's rights amendment to the U.S. Constitution.

Both Republican and Democrat politicians and experts have joined this cause as well. Former Attorney General Janet Reno joins Attorney General John Ashcroft in calling for a crime victim's rights amendment. Former President Bill Clinton joins, as you

heard just a moment ago, the endorsement of current President George W. Bush. Senator Dianne, Dianne Feinstein in the Senate joins Senator John Kyl. Laurence Tribe, as I mentioned, a, a, an eloquent advocate of defendants' rights and of constitutional rights, joins in this effort. And he did not join initially. It was only after careful review.

It is true that 32 States have this amendment or language like this. It is true that where it has been adopted by the vote of the people it has been adopted by an average vote of 80 percent of the people. Now that doesn't mean that we should rush to do it. But it does mean that we should thoughtfully review the language, and I hope, adopt similar language at the Federal level because there is no other location.

I did want to be here today, Mr. Chairman, to commend you for your effort, to throw my support behind this effort, and to mention that one of your witnesses, Steve Twist, is both a lifelong friend and a colleague. He was my supervisor in the Arizona's attorney general's office, and I worked with him closely there. I've read his testimony for today and I commend it to you. I think it is a thoughtful analysis of this issue. And I thank you for allowing me to appear.

Mr. CHABOT. We thank you very much. And at this time, before I introduce the rest of the panel, if the gentleman from Arizona would like to you'd be, I'd be happy to have you introduce Mr. Twist, or I've got the resume in front of me so we can do it either way.

Mr. SHADEGG. You can do the resume. I can simply tell you that he has been dedicated to this cause. That he is thoughtful. That he has worked, he has worked with Laurence Tribe and with other experts on both sides of the aisle to try to achieve this end. The reality is, and in Laurence Tribe's letter he makes the point that in the absence of a Federal constitutional right there simply is no right that the States can create that is adequate. And I think Steve documents that in his testimony.

He is an extremely bright and capable lawyer working on a cause that he believes in deeply, and I know that he would be happy to answer your questions and do so in a way which will be fair and elucidate the Members of the Committee.

Mr. CHABOT. Okay, thank you very much for your contribution to the hearing this afternoon, and at this time I will introduce the very distinguished panel that we have. And, and we appreciate them being here.

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 victim's witness program and authored the Arizona constitutional victim's 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 Laurence Tribe and the Justice Department to draft the current Federal victims' rights amendment. Mr. Twist serves as assistant general counsel for the Viad Corporation and on the steering committee for the National Victims' Rights

Constitutional Amendment network. And we welcome you here this afternoon.

Our second witness will be Roberta Roper, executive director of the Stephanie Roper Committee and Foundation, Inc. In April 1982, following the kidnapping, brutal rape, and murder of her daughter Stephanie, Roberta, together with her husband Vince, founded the committee and foundation. For the past 20 years the committee has successfully advocated for victims' rights and services in Maryland while the foundation provides victims with an array of free services.

Ms. Roper shares Maryland's State Board of Victims' Services, or chairs the Maryland State Board of Victims' Services, and is co-chairperson of the National Victims' Constitutional Amendment Network. She has been recognized by Presidents Reagan, Clinton, and Bush for her outstanding service to crime victims and we welcome you here this afternoon, Ms. Roper.

Our next witness will be James Orenstein. Is it Orenstein?

Mr. ORENSTEIN. Yes.

Mr. CHABOT. 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 Special Attorney to the U.S. Attorney General and was a prosecutor in 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 Schools of Law and we welcome you here this afternoon.

Our final witness will be David L. Voth. Am I pronouncing that correctly? Yes?

And he's executive director and victim-offender mediator for Crime Victim Services of Allen and Putnam Counties, OH. In 1987 Mr. Voth became a licensed social worker in the State of Ohio. Mr. Voth served as president of the Ohio Victim Witness Association from 1989 and 1990. From 1990 through '94 he served as co-chair of the Ohio Crime Victims Constitutional Network, during which time voters approved a victim rights amendment to the Ohio constitution. From 1993 to '98 he served on the Ohio Criminal Sentencing Commission Advisory Committee where he was instrumental in drafting Ohio's first victims' rights laws.

He currently serves as a board member of the National Victims Constitutional Amendment Network and we welcome you here this afternoon, and especially being a fellow Buckeye.

The bells that you hear going off means that we have a series of votes. Do we know if there's—how many?

Mr. SCOTT. The previous question, probably the previous question on the rule, and the rule will probably go on voice vote.

Mr. CHABOT. Okay, what we're going to do, you'll see the light system in front of you there. We ask the witnesses to stay within 5 minutes. We have time to get in one of the testimonies here before we have to run over and vote. So we'll start with Mr. Twist, and when the yellow light comes on that means you have 1 minute to wrap up. When the red light comes on we'd appreciate it if you'd

stop at that point, or shortly thereafter. So without further adieu, Mr. Twist.

STATEMENT OF STEVEN J. TWIST, ASSISTANT GENERAL COUNSEL, VIAD CORPORATION AND MEMBER, STEERING COMMITTEE FOR THE NATIONAL VICTIMS' RIGHTS CONSTITUTIONAL AMENDMENT NETWORK

Mr. TWIST. Thank you very much, Mr. Chairman, and Mr. Nadler, and Members of the Committee. I very much appreciate the invitation to offer both my statement and these oral remarks for the hearing. My name is Steve Twist. I am general counsel for the National Victims' Constitutional Amendment Network and am pleased to represent the network here today.

We meet again to discuss great injustice, but injustice which remains seemingly invisible to all too many. Critics will say that—will caution delay, will try to make this issue more complicated than it really is. Some will say that, in their opposition to the amendment they will try to convince you that victims' rights hurts law enforcement and prosecution. And I'm eager to address those issues with the Committee at the appropriate time.

Perhaps we are so numbed by decades of crime and violence that we simply choose to look away, to pass to the other side. But in America, when confronted with great injustice we, in the network and in our movement, know great hope abides. Our cause today is a cause in the tradition of the great struggles for civil rights. When a woman is raped and not given notice of the proceedings in her case, when the parents of a murdered child are excluded from court proceedings that others may attend, when the voice of a battered woman is silenced on matters of great importance to her safety, when loved ones must endure years of delay as they seek justice.

When these things happen it is the Government and its courts that are the engines of these injustices, and they should not happen in America. The rights we seek are modest and measured. The amendment is the product of years of debate and reflection. It speaks in the language of the Constitution. It has been revised to address concerns of critics while not abandoning any core values. It threatens no constitutional rights of an accused.

Who among us would deny to victims the right to notice of public proceedings in their cases? Who among us opposes allowing victims the right to be present in the courtroom on the same terms that the defendant enjoys? Who among us opposes giving victims a voice—not a veto, just a voice—at release, plea, and sentencing proceedings? And who would stand before the American people and argue against due consideration for the victims' safety, their interest in avoiding unreasonable delay, and their claims to restitution?

Indeed, our opponents rarely oppose these things. They're all for victims' rights. They just don't want them to be meaningful or enforceable. They say, let the States pass laws. Let them even pass State constitutional amendments. But the U.S. Constitution is too important a document to trifle with crime victims. Doubtless you will hear these words today.

Let the critics come to Arizona. We're credited with having, since 1990, one of the best victims' bill of rights in this country. For over 12 years I have represented crime victims as they have sought to

enforce these rights. From the front let me tell you, with more than a decade of experience, State laws don't work. They don't work to change the culture.

And this was precisely James Madison's point when he rose to defend the Bill of Rights in the very first Congress, arguing that once in the Constitution the rights would acquire "by degrees the character of fundamental maxims and become incorporated with the national sentiment." Had these rights, the rights we seek, been incorporated with the national sentiment, it would have been welcome news for Sally Goelzer and her brother Jim Bone from Phoenix.

Let me, Mr. Chairman and Members, introduce you to Sally and her husband, Jim Goelzer, who have flown here just to be with you today. Sally's brother Hal was murdered on Thanksgiving Day 1995 in Phoenix, Arizona. He had been the victim of an attempted robbery by a gang member in Phoenix and Hal helped the police track down the suspect so that he would not hurt others. His good citizenship got him killed. He was scheduled to testify in January 1996 but two gang members silenced him before he could do that.

Arizona's constitutional amendment has a victim's right to a speedy trial. The case of the murder of Hal Bone did not go to trial and conclude until January 1999. And the sentencing for the two murderers wasn't until 2 years after that, until the summer of 2001.

Despite their constitutional rights, their right to notice, their right to be heard on matters of delay, was not respected. Regrettably, that is the state of victims' rights in the States. There are many cases that could be brought before you. Month after month for close to 6 years they summoned the courage to go to court, scheduled time off work, relived the murder of their brother over and over again. The years of delay exacted an enormous physical, emotional, and financial toll.

Mr. Chairman, that is the state of victims' rights in America today. Today as we meet, in a courtroom somewhere in America, parents are excluded from a trial; a rape victim doesn't get to be heard at sentencing or the release of her offender; a battered woman doesn't get to talk at a bond hearing. Every day, day in and day out across this country. And nothing will change, nothing will change until the rights of the victim are as protected as the rights of the rest of us.

[The prepared statement of Mr. Twist follows:]

PREPARED STATEMENT OF STEVEN J. TWIST

Mr. Chairman and Distinguished Members:

Thank you, especially to you Mr. Chairman, for moving so quickly to hold this hearing today. I am grateful for the invitation to present the views of the National Victims Constitutional Amendment Network, a national coalition of America's leading crime victims' rights and services organizations. My background in this area is more fully set forth in earlier testimony before this subcommittee.¹

¹*Rights of Crime Victims Constitutional Amendment: Hearing on H. J. Res. 64, Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 106th Cong., 2nd Sess. 121 (Feb. 10, 2000).* Since my last appearance before the subcommittee, I have begun to serve as an Adjunct Professor of Law at the College of Law at Arizona State University where I teach a course on the rights of crime victims in criminal procedure. I also have founded the Victims Legal Assistance Project, which is a free legal clinic for crime victims

Continued

We meet once again to discuss great injustice, but injustice which remains seemingly invisible to all too many. Were it otherwise, the resolution before you would have already passed. Indeed the law and the culture are hard to change, and so they should be; critics are always heard to counsel delay, to trade on doubts and fears, to make the perfect the enemy of the good. Perhaps some would prefer it if crime victims just remained invisible. Perhaps we are so numbed by decades of crime and violence we simply choose to look away, to pass by on the other side of the road. But I prefer to think that in America, when confronted with great injustice, great hope abides.

Our cause today is a cause in the tradition of the great struggles for civil rights.² When a woman who was raped is not given notice of the proceedings in her case, when the parents of a murdered child are excluded from court proceedings that others may attend, when the voice of a battered woman or child is silenced on matters of great importance to them and their safety—on matters of early releases and plea bargains and sentencing—it is the government and its courts that are the engines of these injustices.

For crime victims, the struggle for justice has gone on long enough. Too many, for too long, have been denied basic rights to fairness and human dignity. Today, you hold it within your power to begin to renew the cause of justice for America's crime victims. We earnestly hope you will do so.

I would like to address two principal areas: A brief history of the amendment, its bi-partisan support, and the history of the language of the resolution before you; and second, a review of the rights proposed. In two appendices to my testimony I have attached excerpts from earlier testimony on why these rights, to be meaningful, must be in the United States Constitution; and a more general response to the arguments of those who oppose crime victims' rights.

I. A BRIEF HISTORY OF THE MOVEMENT FOR CONSTITUTIONAL RIGHTS FOR CRIME VICTIMS, THEIR BROAD BI-PARTISAN SUPPORT, AND THE HISTORY OF THE PROPOSED LANGUAGE

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

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

In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.

The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the sixth amendment to the Constitution be augmented.³

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 Parents of Murdered Children, and I serve as General Counsel, and a member of the executive committee, of the National Victims Constitutional Amendment Network. I am honored to represent these organizations here today.

²"As majestic bells of bolts struck shadows in the sounds
Seeming to be the chimes of freedom flashing . . .

Tolling for the tongues with no place to bring their thoughts . . .

Tolling for the aching ones whose wounds cannot be nursed . . .

1An' we gazed upon the chimes of freedom flashing."

Bob Dylan, *Chimes of Freedom*, 1964.

³*President's Task Force on Victims of Crime, 'Final Report,'* 114 (1982).

In April 1985, a national conference of citizen activists and mutual assistance groups organized by the National Organization for Victim Assistance (NOVA) and Mothers Against Drunk Driving (MADD) considered the Task Force proposal.⁴

Following a series of meetings, and the formation of the National Victims Constitutional Amendment Network (NVCAN), proponents of crime victims' rights decided initially to focus their attention on passage of constitutional amendments in the States, before undertaking an effort to obtain a federal constitutional amendment.⁵ As explained in testimony before the Senate Judiciary Committee, "[t]he 'states-first' approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the 'great laboratory of the states,' that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice system while producing no negative, unintended consequences."⁶

The results of this conscious decision by the victims' rights movement to seek state reforms have been dramatic, and yet disappointing. A total of 32 States now have State victims' rights amendments,⁷ and every state and the federal government have victims' rights statutes in varying versions. And yet, the results have been disappointing as well, because the body of reform, on the whole, has proven inadequate to establish meaningful and enforceable rights for crime victims.⁸

In 1995 the leaders of NVCAN met to discuss whether, in light of the failure of state reforms to bring about meaningful and enforceable rights for crime victims, the time had come to press the case for a federal constitutional amendment. It was decided to begin.⁹

Senator Kyl of Arizona was approached in the Fall of 1995 and asked to consider introducing an amendment for crime victims rights. He worked with NVCAN on the draft language and also reached across the aisle, asking Senator Dianne Feinstein to work with him. In a spirit of true bi-partisanship the two senators worked in earnest to transcend any differences and, together with NVCAN, reached agreement on the language.

In the 104th Congress, S. J. Res. 52, the first Federal constitutional amendment to protect the rights of crime victims, was introduced by Senators Jon Kyl and Dianne Feinstein on April 22, 1996. Twenty-seven other Senators cosponsored the resolution. A similar resolution (H. J. Res. 174) was introduced in the House by Representative Henry Hyde. On April 23, 1996, the Senate Committee on the Judiciary held a hearing on S. J. Res. 52. Later that year the House Committee on the

⁴See LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 Wayne L. Rev. 125, 129 (1987).

⁵See 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).

⁶Senate Judiciary Committee hearing, April 23, 1996, statement of Robert E. Preston, at 40.
⁷See 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. I, 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, 24; Miss. Const. art. 3, 26A; Mo. Const. art. I, 32; Neb. Const. art. I, 28; Nev. Const. art. I, 8; N.J. Const. art. I, 22; New Mex. Const. art. 2, 24; N.C. Const. art. I, 37; Ohio Const. art. I, 10a; Okla. Const. art. II, 34; R.I. Const. art. I, 23; S.C. Const. art. I, § 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.]

⁸Paul 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).

⁹Committee 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.")

Judiciary, under the leadership of then Chairmen Henry Hyde held hearings on companion proposals in the House.¹⁰

At the end of the 104th Congress, Senators Kyl and Feinstein introduced a modified version of the amendment (S. J. Res. 65). As first introduced, S. J. Res. 52 embodied eight core principles: notice of the proceedings; presence; right to be heard; notice of release or escape; restitution; speedy trial; victim safety; and notice of rights. To these core values another was added in S. J. Res. 65, the right of every victim to have independent standing to assert these rights. In the 105th Congress, Senators Kyl and Feinstein introduced S. J. Res. 6 on January 21, 1997, the opening day of the Congress. Thirty-two Senators became cosponsors of the resolution. On April 16, 1997, the Senate Committee on the Judiciary held a hearing on S. J. Res. 6.¹¹

On June 25, 1997 the House Committee on the Judiciary held hearings on H. J. Res. 71 which had been introduced by then Chairman Henry Hyde and others on April 15, 1997.

Work continued with all parties interested in the language of the proposal and many changes were made to the original draft, responding to concerns expressed in hearings, by the Department of Justice, and others. S. J. Res. 44 was introduced by Senators Kyl and Feinstein on April 1, 1998. Thirty-nine Senators joined Senators Kyl and Feinstein as original cosponsors.¹² On April 28, 1998, the Senate Committee on the 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, Senators Kyl and Feinstein introduced S. J. Res. 3 on January 19, 1999, the opening day of the Congress. Thirty-three Senators became cosponsors of the resolution. On March 24, 1999, the Senate Committee on the Judiciary held a hearing on S. J. Res. 3.

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

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

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

On April 27, 2000, after three days of debate on the floor of the United States Senate, Senators Kyl and Feinstein decided to ask that further consideration of the amendment be halted when it became likely that opponents would sustain a filibuster.¹³

A History of the Proposed Language

After S. J. Res. 3 was withdrawn by its sponsors, an active effort was undertaken to review all the issues that had been raised by the critics. I was asked by Senator Feinstein to work with Professor Larry Tribe, the pre-eminent Harvard constitutional law scholar, on re-drafting the amendment to meet the objections of the critics. I traveled to Cambridge, Mass with my colleague John Stein, the Deputy Director of the National Organization for Victim Assistance (NOVA) and together with Prof. Tribe, we wrote a new draft for consideration by the senators and their counsel. Together with Stephen Higgins, Chief Counsel to Senator Kyl, and Matt Lamberti, Counsel to Senator Dianne Feinstein, Prof. Paul Cassell (University of Utah College of Law) and Prof. Doug Beloof (Lewis and Clark College of Law), we reached consensus on a new draft in the Fall of 2000.

With the advent of the new Administration, the revised draft was presented to representatives of the White House and the Department of Justice soon after Attorney General Ashcroft was confirmed. We began to have a series of meetings with Administration officials directed at reaching consensus on language.¹⁴

¹⁰Committee 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

¹¹See Senate Judiciary Report.

¹²*Id.*

¹³"Ultimately, in the face of a threatened filibuster, Senator Kyl and I decided to withdraw the amendment." *Congressional Record Statement by Senator Dianne Feinstein on Introduction of S.J. Res. 35*, April 15, 2002.

¹⁴Such 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

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 quite literally six years of debate and reflection. It speaks in the language of the Constitution; it has been revised to address concerns of critics on both the Left and the Right, while not abandoning the core values of the cause we serve. The proposed language threatens no constitutional right of an accused or convicted offender, while at the same time securing fundamentally meaningful and enforceable rights for crime victims.

Senators Feinstein and Kyl introduced S. J. Res. 35 on April 15, 2002 and the following day President Bush announced his support for the amendment. On May 1, 2002, Law Day, Rep. Chabot introduced the companion resolution which is before you today.

The Bi-Partisan Consensus for Constitutional Rights for Crime Victims

That there is a strong bi-partisan consensus that crime victims should be given rights is now beyond dispute, as is the consensus that those rights can only be secured by an amendment to the United States Constitution.

Support for a constitutional amendment for victims' rights is found in the platforms of both the Democratic National Committee¹⁵ and the Republican National

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' 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.

¹⁵Democratic 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 crimi-

Continued

Committee.¹⁶ Former President Clinton understood the need for a constitutional amendment for crime victims rights¹⁷ and President Bush has recently issued a strong endorsement of the proposal before you.¹⁸ Former Attorney General Janet Reno supported a constitutional amendment for victims rights¹⁹ and Attorney Gen-

nals, 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.

¹⁶Republican 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.")

¹⁷Statement 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.

¹⁸Statement 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.

¹⁹Statement of Attorney General Janet Reno, House Committee on the Judiciary, *Supporting House Joint Resolution 71* (June 25, 1997):

Based on our personal experiences and the extensive review and analysis that has been conducted at our direction, the President and I have concluded that an amendment to the Constitution to protect victims' rights is warranted. We have come to that conclusion for a number of important reasons.

First, unless the Constitution is amended to ensure basic rights to crime victims, we will never correct the existing imbalance in this country between defendants' constitutional rights and the current haphazard patchwork of victims' rights. While a person arrested or convicted for a crime anywhere in the United States knows that he is guaranteed certain basic minimum protection under our nation's most fundamental law, the victim of that crime has no guarantee of rights beyond those that happen to be provided and enforced in the particular jurisdiction where the crime occurred.

A victims' rights amendment would ensure that courts will give weight to the interests of victims. When confronted with the need to reconcile the constitutional rights of a defendant with the statutory rights of a victim, many courts often find it easiest simply to ignore the legitimate interests of the victim. A constitutional amendment would require courts to engage in a careful and conscientious analysis to determine whether a particular victim's participation would adversely affect the defendant's rights. The result will be a more sophisticated and responsive criminal justice system that both protects the rights of the accused and the interests of victims.

Second, efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate.

eral John Ashcroft recently announced his support for the proposed amendment.²⁰ Each proposal for a constitutional amendment has received strong bi-partisan support in the United States Senate.²¹ The National Governors' Association, by a vote of 49–1, passed a resolution strongly supporting the need for a constitutional amendment for crime victims.²² In the last Congress, a bipartisan group of 39 State Attorneys General signed a letter expressing their “strong and unequivocal support for an amendment. Finally, among academic scholars, the amendment has garnered the support from both conservatives and liberals.”²³

II. THE RIGHTS PROPOSED

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

The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them . . .

This preamble, authored by Professor Tribe, establishes two important principles about the rights established in the amendment: First, they are not intended to deny the constitutional rights of the accused, and second, they do not. The task of balancing rights, in the case of alleged conflict, will fall, as it always does, to the courts, guided by the constitutional admonition not to *deny* constitutional rights to either the victim or the accused.²⁴

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.*

²⁰ Statement of Attorney General John Ashcroft, Department of Justice, April 16, 2002:

There were millions of victims of violent crime last year, but too often in the quest for justice, the rights of these victims were overlooked or ignored. It is time—it is past time—to balance the scales of justice, to demand fairness and judicial integrity not just for the accused but for the aggrieved, as well.

I am grateful to members of the Congress who are here today, and I thank in particular Senators John Kyl and Dianne Feinstein for their work to protect the rights of victims.

Although government cannot offer the one thing that victims wish for most, and that's a return to the way life was before violence intruded, government can do more than it has done in the past. We can offer victims a new guarantee of inclusion in the process of justice. We can show our support with that of a bipartisan group of lawmakers for a constitutional amendment to ensure that the victims of crime have their rights, including the right to participate, the right to be heard, and the right to decisions that consider the safety of victims.

²¹ Senators Kyl and Feinstein have co-sponsored their amendment with leading senators from both parties including Senate Minority Leader Trent Lott and Senator Joseph Biden, the distinguished former Chair of the Judiciary Committee.

²² National Governors' Association, Policy 23.1 (“Despite widespread state initiatives, the rights of victims do not receive the same consideration or protection as the rights of the accused. These rights exist on different judicial levels. Victims are relegated to a position of secondary importance in the judicial process. . . . Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U. S. Constitution.”)

²³ “The proposed Crime Victims' Rights Amendment would protect basic rights of crime victims, including their rights to be notified of and present at all proceedings in their case and to be heard at appropriate stages in the process. These are rights not to be victimized again through the process by which government officials prosecute, punish, and release accused or convicted offenders. These are the very kinds of rights with which our Constitution is typically and properly concerned—rights of individuals to participate in all those government process that strongly affect their lives.” Laurence H. Tribe and Paul G. Cassell, “Embed the Rights of Victims in the Constitution,” L.A. Times, July 6, 1998, at B7.

²⁴ See Killian and Costello, *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document 103–6, U. S. Gov't Printing Office, p. 1105 (1992). (“Conflict between constitutionally protected rights is not uncommon.” The text continues discussing the Supreme Court's balancing of “a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's rights protection of the rights to obtain and publish information about defendants and trials.”) *Id.*

Defendants trump them, and the prevailing legal culture does not respect them. They are *geldings*.²⁵

The amendment provides that the rights of victims are “hereby established.” The phrase, which is followed by certain enumerated rights, is not intended to “deny or disparage”²⁶ rights that may be established by other federal or state laws. The amendment establishes a floor and not a ceiling of rights²⁷ 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 courts²⁸

and shall not be denied by any State or the United States and may be restricted only as provided in this article.

In this clause, and in Section 2 of the amendment, an important distinction between “denying” rights and “restricting” rights is established. As used here, “denied” means to “refuse to grant;”²⁹ in other words, completely prohibit the exercise of the right. The amendment, by its terms, prohibits such a denial. At the same time, the language recognizes that no constitutional right is absolute and therefore permits “restrictions” on the rights but only, as provided in Section 2, in three narrow circumstances. This direction settles what might otherwise have been years of litigation to adopt the appropriate test for when, and the extent to which, restrictions will be allowed.

SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim’s safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.

A victim of violent crime

Concern has been expressed by some over the amendment’s limitation to victims of “violent crime.” In a perfect world the amendment would extend to victims of all crimes. Nonetheless, we have acceded to the insistence of others that the amendment be limited in this fashion because we believe strongly that the rights proposed, once adopted, will benefit all crime victims. The rights will usher in an era of cultural reform in the criminal justice system, moving it to a more victim-oriented model.³⁰

Moreover, we are confident that the scope of the “violent crime” clause will be broadly applied to effectuate the purpose of extending rights to crime victims, and not be limited as it might in more narrow contexts. The Senate Report addressed this issue at some length and it is worth inserting those views for the House’s 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

²⁵ I pause here to note with some sadness and amusement that there are those who say they are all in favor of “victims’ rights” laws, they just don’t want them in the Constitution. Such laws, without constitutional authority or grounding, are like the “men without chests” referred to by C. S. Lewis:

And all the time—such is the tragic-comedy of our situation—we continue to clamour for those very qualities we are rendering impossible. . . . In a sort of ghastly simplicity we remove the organ and demand the function. We make men without chests and expect of them virtue and enterprise. We laugh at honour and are shocked to find traitors in our midst. We castrate and bid the geldings be fruitful.

C. S. Lewis, *The Abolition of Man*, 26 (HarperCollins 2001).

²⁶ U. S. Constitution, Amend. IX.

²⁷ See Senate Judiciary Report (“In other words, the amendment sets a national ‘floor’ for the protecting of victims rights, not any sort of ‘ceiling.’ Legislatures, including Congress, are certainly free to give statutory rights to all victims of crime, and the amendment will in all likelihood be an occasion for victims’ statutes to be re-examined and, in some cases, expanded.”)

²⁸ See *Michigan v. Long*, 463 U.S. 1032 (1983).

²⁹ Webster’s New Collegiate Dictionary, 304 (1977).

³⁰ Cite Belooof Article

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, kidnapping, 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.”³¹

It should be noted that the States, and the Federal Government,³² within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal. The power to define “victim” is simply a corollary of the power to define the elements of criminal offenses and, for State crimes, the power would remain with State Legislatures.

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

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

To make victims aware of the proceedings at which their rights can 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

³¹ Senate Judiciary Report

³² Killian and Costello, *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document 103-6, U. S. Gov’t Printing Office, p. 341 (1992) (“[Congress] power to create, define, and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded.” (Numerous citations omitted)).

automated telephone notification systems. Any means that provides reasonable notice to victims is acceptable.

'Reasonable' notice is any means likely to provide actual notice to a victim. Heroic measures need not be taken to inform victims, but due diligence is required by government actors. It would, of course, be reasonable to require victims to provide an address and keep that address updated in order to receive notices. 'Reasonable' notice is notice that permits a meaningful opportunity for victims to exercise their rights. In rare mass victim cases (i.e., those involving hundreds of victims), reasonable notice could be provided to means tailored to those unusual circumstances, such as notification by newspaper or television announcement.

Victims are given the right to receive notice of 'proceedings.' Proceedings are official events that take place before, for example, trial and appellate courts (including magistrates and special masters) and parole boards. They include, for example, hearings of all types such as motion hearings, trials, and sentencing. They do not include, for example, informal meetings between prosecutors and defense attorneys. Thus, while victims are entitled to notice of a court hearing on whether to accept a negotiated plea, they would not be entitled to notice of an office meeting between a prosecutor and a defense attorney to discuss such an arrangement.

Victims' rights under this provision are also limited to 'public' proceedings. Some proceedings, such as grand jury investigations, are not open to the public and accordingly would not be open to the victim. Other proceedings, while generally open, may be closed in some circumstances. For example, while plea proceedings are generally open to the public, a court might decide to close a proceeding in which an organized crime underling would plead guilty and agree to testify against his bosses. Another example is provided by certain national security cases in which access to some proceedings can be restricted. See 'The Classified Information Procedures Act,' 18 U.S.C. app. 3. A victim would have no special right to attend. The amendment works no change in the standards for closing hearings, but rather simply recognizes that such nonpublic hearings take place. Of course, nothing in the amendment would forbid the court, in its discretion, to allow a victim to attend even such a nonpublic hearing.³³

"Timely" notice would require that the victim be informed enough in advance of a public proceeding to be able reasonably to organize his or her affairs to attend. Oftentimes the practice in the criminal courts across the country is to schedule proceedings, whether last minute or well in advance, without any notice to the victim. Even in those jurisdictions which purport to extend to victims the right to not be excluded or the right to be heard, these proceedings without notice to the victim render meaningless any participatory right. Of course, it goes without saying, the defendant, the state, and the court always have notice; failure to provide notice to any of the three would render the ensuing action void. Victims seek no less consideration; indeed, principles of fairness and decency demand no less.

Witnesses before both the full House and Senate Judiciary Committees have given compelling testimony about the devastating effects on crime victims who learn that proceedings in their case were held without any notice to them. What is most striking about this testimony is that it comes on the heels of a concerted efforts by the victims' movement to obtain notice of hearings. In 1982, the Task Force Report recommended that victims be kept apprised of criminal justice proceedings. Since then many state provisions have been passed requiring that victims be notified of court hearings. But those efforts have not been fully successful. The *New Directions* Report found that not all states had adopted laws requiring notice for victims, and even in the ones that had, many had not implemented mechanisms to make such notice a reality.³⁴

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

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

of any release or escape of the accused

³³ See Senate Judiciary Report

³⁴ *New Directions*, 13.

Reasonable and timely notice of releases or escapes is a matter of profound importance to the safety of victims of violent crime. Twenty years after the President's Task Force report victims are still learning "by accident"³⁵ of the release of the person accused or convicted of attacking them.³⁶ This continuing threat to safety must be brought to an end.³⁷

Because of technological advances, automatic phone systems, web-based systems, and other modern notification systems are all widely and reasonably available. As the Senate Judiciary Report noted, "New technologies are becoming more widely available that will simplify the process of providing this notice. For example, automated voice response technology exists that can be programmed to place repeated telephone calls to victims whenever a prisoner is released, which would be reasonable notice of the release. As technology improves in this area, what is 'reasonable' may change as well."³⁸

not to be excluded from such public proceeding

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

Victims are given the right 'not to be excluded' from public proceedings. This builds on the 1982 recommendation from the President's Task Force on Victims of Crime that victims 'no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.' President's Task Force on Victims of Crime, 'Final Report,' 80 (1982).

The right conferred is a negative one—a right '*not* to be excluded'—to avoid the suggestion that an alternative formulation—a right '*to attend*'—might carry with it some government obligation to provide funding, to schedule the timing of a particular proceeding according to the victim's wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings. 'Accord,' Ala. Code Sec. 15-14-54 (right 'not [to] be excluded from court or counsel table during the trial or hearing or any portion thereof * * * which in any way pertains to such offense'). The amendment, for example, would not entitle a prisoner who was attacked in prison to a release from prison and plane ticket to enable him to attend the trial of his attacker. This example is important because there have been occasional suggestions that transporting prisoners who are the victims of prison violence to courthouses to exercise their rights as victims might create security risks. These suggestions are misplaced, because the Crime Victims' Rights Amendment does not confer on prisoners any such rights to travel outside prison gates. Of course, as discussed below, prisoners no less than other victims will have a right to be 'heard, if present, and to submit a statement' at various points in the criminal justice process. Because prisoners ordinarily will not be 'present,' they will exercise their rights by submitting a 'statement.' This approach has been followed in the States. See, e.g., Utah Code Ann. 77-38-5(8); Ariz. Const. art. II, 2.1.

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,

³⁵ President's Task Force on Victims of Crime, "Final Report," 4-5 (1982). ("One morning I woke up, looked out my bedroom window and saw the man who had assaulted me standing across the street staring at me. I thought he was in jail."—a victim")

³⁶ See National Institute of Justice, Research in Brief, *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, 4 (Dec. 1998), finding that even in states that gave "strong protection" to victims' rights, fewer than 60 percent of the victims were notified of the sentencing hearing and fewer than 40 percent were notified of the pretrial release of the defendant.,

³⁷ U. S. Dep't of Justice, Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services for the 21st Century* 13 (1998). ("Notification of victims when the defendants or offenders are released can be a matter of life and death. Around the country there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.")

³⁸ Senate Judiciary Report.

such as those forbidding excessive displays of emotion or visibly reacting to testimony of witnesses during a jury trial.³⁹

Few experiences in the justice system are more devastating than an order to a victim that he or she may not enter the courtroom during otherwise public proceedings in the case involving their own victimization.

Collene and Gary Campbell of San Juan Capistrano, California still remember the pain and injustice of being forced to sit, literally, on a hard bench outside the courtroom during the trial of their son's murderer, while the murderers' family members were allowed entry and preferential seating in the courtroom. Collene and Gary were excluded as a tactical ploy by the defense, who listed them as witnesses, never intending to call them, but rather intending only to invoke "the rule" excluding witnesses. Such exclusion happens every day in courtrooms across the country. And yet exceptions are made to the rule of exclusion. Of course, it does not apply to defendants, who may take the stand to testify in their own defense, nor does the rule apply, in most jurisdictions, to the government's chief investigator, who although a witness, often sits at counsel table throughout the trial, assisting the prosecutor. Simple principles of fairness demand that we do no less for victims. This will ensure that Collene and Gary's wait will not have been in vain.

reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings

The right to be "heard," along with "notice," and the right "not to be excluded" form the bedrock of any system of fair treatment for victims. The right established here is to be heard before the relevant decision-maker at five critical public proceedings, first at "public release proceedings." The language extends its reach to both post-arrest and post-conviction public release proceedings. Thus the victim of domestic violence would have the right to tell a releasing authority, for example before an Initial Appearance Court, about the circumstances of the assault and the need for any special conditions of release that may be necessary to protect the victim's safety. The right would also extend to post-conviction public release proceedings, for example parole or conditional release hearings. In jurisdictions that have abolished parole in favor of "truth in sentencing" regimes, many still have conditional release. Only if the jurisdiction also has a "public proceeding" prior to such a conditional release would the right attach. The language would extend however, to any post-conviction public proceeding that could lead to the release of the convicted offender.

When a case is resolved through a plea bargain that the victim never knows about, until after the fact, there is a deeply impactful wound caused the justice system itself. One of the more famous quotes reported by the President's Task Force was from a woman in Virginia. "Why didn't anyone consult me? I was the one who was kidnapped, not the State of Virginia."⁴⁰ This cry for justice, for a voice not a veto, is heard throughout the country still.

The Senate Judiciary Report provides further background in understanding the meaning and intent of the language:

This gives victims the right to be heard before the court accepts a plea bargain entered into by the prosecution and the defense before it becomes final. The Committee expects that each State will determine for itself at what stage this right attaches. It may be that a State decides the right does not attach until sentencing if the plea can still be rejected by the court after the presentence investigation is completed. As the language makes clear, the right involves being heard when the court holds its hearing on whether to accept a plea. Thus, victims do not have the right to be heard by prosecutors and defense attorneys negotiating a deal. Nonetheless, the Committee anticipates that prosecutors may decide, in their discretion, to consult with victims before arriving at a plea. Such an approach is already a legal requirement in many States, see 'National Victim Center, 1996 Victims' Rights Sourcebook,' 127-31 (1996), is followed by many prosecuting agencies, see, e.g., Senate Judiciary Committee hearing, April 28, 1998, statement of Paul Cassell, at 35-36, and has been encouraged as sound prosecutorial practice. See U.S. Department of Justice, Office for Victims of Crime, 'New Directions from the Field: Victims' Rights and Services for the 21st Century,' 15-16 (1998). This trend has also been encouraged by the interest of some courts in whether prosecutors have consulted with the victim before arriving at a plea. Once again, the victim is given no right of veto

³⁹ Senate Judiciary Report

⁴⁰ Task Force Report at 9.

over any plea. No doubt, some victims may wish to see nothing less than the maximum possible penalty (or minimum possible penalty) for a defendant. Under the amendment, the court will receive this information, along with that provided by prosecutors and defendants, and give it the weight it believes is appropriate deciding whether to accept a plea. The decision to accept a plea is typically vested in the court and, therefore, the victims' right extends to these proceedings. See, e.g., Fed. R. Crim. Pro. 11(d)(3); see generally Douglas E. Beloof, 'Victims in Criminal Procedure,' 462-88 (1999).⁴¹

The right to be heard also extends to "public sentencing proceedings." Professor Paul Cassell, in his March 24, 1999 testimony before the U. S. Senate Committee on the Judiciary wrote movingly of the importance of this right. In replying to the assumption that a judge or jury can comprehend the full harm caused by a murder without hearing testimony from the surviving family members, Prof. Cassell wrote:

That assumption is simply unsupportable. Any reader who disagrees with me should take a simple test. Read an actual victim impact statement from a homicide case all the way through and see if you truly learn nothing new about the enormity of the loss caused by a homicide. Sadly, the reader will have no shortage of such victim impact statements to choose from. Actual impact statements from court proceedings are accessible in various places.[42] Other examples can be found in moving accounts written by family members who have lost a loved one to a murder. A powerful example is the collection of statements from families devastated by the Oklahoma City bombing collected in Marsha Kight's affecting *Forever Changed: Remembering Oklahoma City April 19, 1995*. [43] Kight's compelling book is not unique, as equally powerful accounts from the family of Ron Goldman, [44] children of Oklahoma City, [45] Alice Kaminsky, [46] George Lardner Jr., [47] Dorris Porch and Rebeca Easley, [48] Mike Reynolds, [49] Deborah Spungen, [50] John Walsh, [51] and Marvin Weinstein [52] make all too painfully clear. Intimate third party accounts offer similar insights about the generally unrecognized yet far-ranging consequences of homicide. [53]

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, is 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

⁴¹ Senate Judiciary Report.

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 Beloff has nicely explained, a justice system that fails to recognize a victim’s right to participate threatens “secondary harm”—that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.[90] This trauma stems from the fact that the victim perceives that the system’s resources “are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal’s hands.”[91] As two noted experts on the psychological effects of crime have concluded, failure to offer victims a chance to participate in criminal proceedings can “result in increased feelings of inequity on the part of the victims, with a corresponding increase in crime-related psychological harm.”[92] On the other hand, there is mounting evidence that “having a voice may improve victims’ mental condition and welfare.”[93] For some victims, making a statement helps restore balance between themselves and the offenders. Others may consider it part of a just process or may want to communicate the impact of the offense to the offender.[94] This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome.[95]

The possibility of the sentencing process aggravating the grievous injuries suffered by victims and their families is generally ignored by the Amendment’s opponents. But this possibility should give us great pause before we structure our criminal justice system to add the government’s insult to criminally-inflicted injury. For this reason alone, victims and their families, no less than defendants, should be given the opportunity to be heard at sentencing.⁴²

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

As used in this clause, “adjudicative decisions” includes both court decisions and decisions reached by adjudicative bodies, such as paroles boards. Any decision reached after a proceeding in which different sides of an issue would be presented would be an adjudicative decision. Again the clause should be interpreted to achieve the purposes inherent in an amendment that extends rights to crime victims.

The requirement to “duly consider” is a requirement to fully and fairly consider the interest at issue. The language would not require that the interest at issue always control a decision. Hence, decisions that implicate the victim’s safety, for example, release and sentencing decisions, would not be forced, by the language, to any particular result, (e.g., jail vs. no jail or high bond vs. no bond pending trial,

⁴² Paul G. Cassell, Professor of Law, University of Utah College of Law, *Statement Before the Committee on the Judiciary, United States Senate, Responding to the Critics of the Victims’ Rights Amendment*, pp.5–9 (March 24, 1999) (citations omitted).

or longer rather shorter prison sentences after conviction). Rather the constitutional mandate would simply be to hear and consider the victim's interest and to demonstrate that the interest was factored into the final decision. It is expected that records of decisions would reflect consideration of the victim's interest.

For women and children who are the victims of domestic violence, the right to have safety considered as a factor before any release decision is made, or before any sentence is imposed is a right of life and death importance.⁴³

interest in avoiding unreasonable delay

Had this provision already been the law it would have been welcome news for Sally Goelzer and her brother Jim Bone from Phoenix, Arizona. Sally and Jim's brother, Hal Bone was murdered on Thanksgiving Day, 1995. Hal had been the victim of an attempted robbery by a gang member in Phoenix, had summoned the courage to report the offense and help the police track down the suspect so that he could not hurt others. Hal was scheduled to testify against the defendant the following January, 1996. His good citizenship got him killed. The defendant and another member of the same gang murdered Hal so he could not testify.

Arizona is one of 32 states that have enacted a state constitutional amendment for victims rights.⁴⁴ Arizona's is one of the stronger amendments. Three of the guarantees for victims are the "rights" to "due process" and to a "speedy trial," and to "a prompt and final conclusion of the case after conviction."⁴⁵ Arizona victims even have standing to assert their rights in court.⁴⁶

Unfortunately for Sally and Jim, these rights, on behalf of their murdered brother, were hollow promises. The murderers' trial did not begin until January 1999, more than four years after the murderers had been arrested. Continuances were constantly granted without notice to Jim and Sally and without any consideration for their rights. The two murderers were convicted of First Degree Murder when the trial concluded the same month it had begun. By the late summer of 2000 the murderers had not yet been sentenced. Again, despite their state constitutional rights, continuances were granted without notice to them and without respecting their rights to be heard. Finally the ordeal came to an end when the two murderers were sentenced in July and August of 2001,⁴⁷ five and one-half years after Hal's murder, and two and one-half years after the convictions.

Such is the state of victims' rights in the States.⁴⁸ Sally and Jim were cloaked in all the majesty that the law of the State of Arizona could muster. Regrettably for those interested in fair play and balance for crime victims in the criminal justice system it was not enough. Month after month, for close to six years, they summoned the strength to go to court, schedule time off work, and re-live the murder of their brother, over and over again, while the defendants sought tactical advantage through endless delays. The years of delay exacted an enormous physical, emotional, and financial toll.

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

Just as defendants currently have a right to a 'speedy trial,' this provision will give victims a protected right in having their interests to a reasonably prompt conclusion of a trial considered. The right here requires courts to give 'consideration' to the victims' interest along with other relevant factors at all hearings involving the trial date, including the initial setting of a trial date and any subsequent motions or proceedings that result in delaying that date. This

⁴³ See note 32, *supra*.

⁴⁴ Art. II, § 2.1 Ariz. Const. was enacted and became effective November, 1990.

⁴⁵ Art. II; § 2.1 (A) (10), Ariz. Const. But see *State ex rel Napolitano v. Brown*, 982 P. 2d 815, 817 (Ariz. 1999) holding that the referenced sub-section and paragraph "creates no right" for the victim. The case is shocking in the length it goes to eviscerate the guarantee of the state constitution, in order to protect the monopoly rulemaking authority the Arizona Supreme Court has constructed for itself, only further demonstrating the need for a Federal amendment.

⁴⁶ A. R. S. § 13-4437 (A) ("The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right. . . .")

⁴⁷ *State of Arizona v. Richard Steven Rivas III*, CR 1995-011372 (Maricopa County) (Sentencing August 24, 2001); *State of Arizona v. James Anthony Sanchez*, CR 1995-011372 (Maricopa County) (Sentencing July 9, 2001).

⁴⁸ Senate Judiciary Committee Hearing, April 28, 1998, *Statement of Associate Attorney General Ray Fisher*, at 9: ". . . the state legislative route to change has proven less than adequate in according victims their rights." Senate Judiciary Committee Hearing, March 24, 1999, *Statement of Laurence Tribe*, at 7: ". . . there appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach. . . ."

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 undoubtedly recognize the purposes that the victim's right is designed to serve. Cf. *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (defendant's right to a speedy trial must be 'assessed in the light of the interest of defendant which the speedy trial right was designed to protect').

The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.

The Committee also anticipates that more content may be given to this right in implementing legislation. For example, the Speedy Trial Act of 1974 (Public Law 93–619 (amended by Public Law 96–43), codified at 18 U.S.C. 3152, 3161) already helps to protect a defendant's speedy trial right. Similar legislative protection could be extended to the victims' new right.⁴⁹

just and timely claims to restitution from the offender

Jane Doe⁵⁰ was beaten and raped in a remote wooded area of Vermont. She was left to die, but she miraculously survived, crawling through the woods until she came upon some campers. Her injuries were extensive. The rapist was caught four days later. When her case was resolved by way of a plea bargain she was not given the right to speak before the court. Incredibly, the sentence imposed did not order the criminal to pay restitution. Today he earns \$7.50 an hour making furniture inside the prison walls—and none of it goes to her for her damages and injuries because it was not part of the criminal sentence. If this provision had been the law, Jane would today be receiving restitution payments each month.

Critics argue against putting restitution into the Constitution saying that criminals often cannot pay it. Jane's case is a good example of how wrong the critics are. 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 other-

⁴⁹ Senate Judiciary Report

⁵⁰ *Interview with the Victim*, April 30, 2002. The victim's name is here withheld to protect her privacy and dignity. Documentation of the facts is available upon request to the author.

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.

wise be years of vexing litigation over what the proper standard would be for allowing restrictions.

by a substantial interest

The “substantial “interest” standard is known in constitutional jurisprudence⁵³ 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

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. 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.

⁵³See 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.)

⁵⁴Webster’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 . . .”)

⁵⁵Senate Judiciary Report

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

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.

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.

⁵⁷ Senate Judiciary Report

⁵⁸ See text at n. 29, *supra*.

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

The President's constitutional authority to grant reprieves and pardons⁶⁰ remains unaffected by the amendment. If the President were to establish, by executive order, a public proceeding that would be required before a reprieve or pardon were to be granted, the provisions of Section 2 arguably might require victim participation, but nothing in the amendment would obligate the President to do this.

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

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

III. CONCLUSION

Doubtless there will be critics who come before the Congress and argue against establishing the rights enumerated in H. J. Res. 91. They are on the extreme margins. Most of the opponents will say they support the rights, just not in the Constitution. Indeed the rights themselves are so modest and so reasonable they are hard to argue with. Yet who among these critics would be heard to say, "I'm all for defendants' rights, but they don't need to be in the Constitution." The vast majority of Americans, when judged by the actual votes at state elections for amendments, are unequivocal in their support for constitutional rights for crime victims.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 of their colleagues, as Prof Tribe and Prof. Cassell have joined together, with the victims and the vanquished, all in a unanimous chorus that crime victims deserve fundamental rights and that only an amendment to the U. S. Constitution will guarantee them. Mr. Chairman, Honorable Members, do not rest until this great national consensus is ratified. Seek out your leadership, push for hearings and a mark-up, demand floor action, and send the resolution to the Senate before the summer recess.

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

⁶⁰ U. S. Const. Art. II, Sec. 2.

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.nvcn.org (Index item: "state vra"s) for a state by state review.

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 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.

See the "Resolved" Clause which introduces H. J. Res. 44. (*Note: The 7 year limit is now in section 5 of H. J. res. 91*).

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 32 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.

“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. H. J. Res 64 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 H. J. Res. 44 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. H. J. Res. 44 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 nine 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.

Mr. CHABOT. Thank you very much. At this time the Committee will have a short recess so we can go vote. We have three votes so we’re probably looking at approximately a half-hour before we are back after the three votes. But—so we’re in a short recess.

[Recess.]

Mr. CHABOT. The Committee will be back in session. Our second witness this afternoon will be Roberta Roper. Are the mikes on?

Thank you. We’re back in session and our next witness, Roberta Roper, will now give her testimony. Thank you.

**STATEMENT OF ROBERTA ROPER, EXECUTIVE DIRECTOR,
STEPHANIE ROPER COMMITTEE AND FOUNDATION, INC.**

Ms. ROPER. Good afternoon, Mr. Chairman, and Members of the Subcommittee. I proudly testify today on behalf of NVCAN and the Stephanie Roper Committee and Foundation, and commend you for introducing the victims’ rights amendment this year. It is an honor for me to speak today for everyday Americans who place their trust in our system and their dependence on Government to do the right thing for justice. Most importantly, I speak for those whose voices can no longer be heard, our sons, daughters, parents, spouses, brothers, sisters, friends.

On September 11th, the terrorist attack on our Nation awakened the consciousness of Americans to the reality of crime and random violence. Americans began to learn firsthand what every crime victim knows, that chosen acts of criminal violence turn innocent victims’ lives upside down and change them forever and/or tragically end them. I ask you to remember those important lessons and that any one of us can become a victim of crime. I ask you how you

would wish to be treated if you or a loved one became a victim of criminal violence.

Providing victims with rights in our system is not a complicated legal issue so I am going to place my focus where I believe it correctly belongs: on the human rights of American citizens who believe that they deserve basic rights of fundamental fairness under the Constitution of our land. These are rights that every accused person or convicted person deserves and enjoys, yet everyday Americans are appalled and disbelieving when they discover that unlike criminal defendants they have no similar rights. And that's what this amendment is about, guaranteeing equal justice for all of us under the law of all of us, the Constitution of the United States.

President Bush in announcing his support has mentioned that the protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do. The framers of our Constitution understood that the sacred document they were creating would need to change as the needs of society required change. They were creating a more perfect union; not a perfect one. That wisdom allowed our Constitution to abolish slavery and to give voting rights to women. Those human rights could not be sufficiently protected by State or Federal laws.

Likewise, the amendment before you is necessary in order to give protection and balanced consideration to the rights of victims. More than two decades of efforts in securing State and Federal laws and State constitutions have been evidence of their failure to provide victims with safe rights. It has been mentioned that Professor Tribe has led this effort and agreed that the language of this amendment meets the criteria of changing an amendment.

The rights in question, rights of victims not to be victimized yet again and again through the process by which Government bodies and officials prosecute, punish, and/or release the accused or convicted defendant are indisputable basic human rights. The whole history of our country has taught us that these rights must share the protection of our fundamental law, our Constitution.

You've heard how carefully crafted this language has been drafted so that the rights of the accused will not be endangered but will enable victims and survivors to have minimum rights not to be excluded from criminal proceedings that are the most important events of their lives. It will establish a basic national standard that will enable individual States to build upon that foundation.

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

Like countless other victims and survivors of that era, we discovered that unlike our daughter's killers, we had no rights to be informed, no rights to attend the trial, and no rights to be heard before sentencing. Like countless other families then and now, we struggled not only with the devastating effects of the crime com-

mitted against our loved one, but with the consequences that were in many ways worse, being shut out of a criminal justice system we believed in and depended upon.

In trying to rebuild our broken lives, the greatest challenge was trying to give hope to four surviving children; children we had taught to respect, to trust, and to believe in the system that had now failed us. That challenge is forever etched in my mind by the memory of the day one of our sons came home from school explaining that he could no longer pledge allegiance to the flag with his classmates because liberty and justice for all didn't include us.

You may conclude that this happened 20 years ago and surely would not happen today. And yes, it is true, enormous progress has been made in the passage of good laws both on the State and Federal levels, and constitutional amendments passed in 33 States. But the sad reality is those rights continue to be ignored and denied. None of these State or Federal laws are able to match the constitutionally protected rights of offenders. The result is that victims often describe themselves as second-class citizens or stepchildren in our Nation's system of justice.

Despite the passage of more than 60 laws and a State constitutional amendment in Maryland, many victims conclude that the criminal justice system is more criminal than just. This amendment will ensure that both victims' and defendants' rights are given fullest effect. Neither one will be superior, but both will be given equal consideration.

I'd like to tell you about some of those victims in Maryland whose rights were violated. One could not be here today but her name is Dawn Sawyer Walls. And I should point out her parents have dedicated their lives to serving communities. Dawn's father was a police officer for 22 years. Her mother is the executive director of Concerns of Police Survivors. Well, Dawn was 6 months pregnant and the manager of a convenience when a robber with a sawed-off shotgun ordered her to lie face down as he emptied the store's cash drawer.

In violation of Maryland laws, Dawn was not notified when a plea was struck. As a result, she was not present in court, she was not able to give a victim impact statement, and was not able to request restitution from the offender. This disposition was characterized as a good outcome. And besides, she was told, you didn't suffer physical injuries. Well, the trauma of this event had a severe financial impact for her young family because she was unable to return to work.

Other victims whose rights were denied are here with me today. Sherri Rippeon and John Dobbin also sit behind me. Two years ago their infant daughter Victoria died of blunt force trauma inflicted by the boyfriend of their babysitter. Seeking to ensure compliance with Maryland law regarding their rights to attend the public trial, Sherri and John filed a crime victim notification request form. Nevertheless, the trial court excluded them from the courtroom, and even after they filed a pro se demand for rights form the judge continued to deprive them from observing the trial.

Mr. NADLER. Were they witnesses?

Ms. ROPER. They had been original witnesses to——

Mr. NADLER. But they were going to testify in the trial?

Ms. ROPER. They had testified. Their testimony had been concluded.

Teresa Baker is also here. And when her only son was murdered she too fulfilled the victim's requirement to request notification regarding the right to be informed. She was in court when her son's killer pleaded guilty to second degree murder and was sentenced to 30 years. However, no one explained to Teresa that under the terms of the ABA plea the convicted offender would be released in less than 3 years. Consequently, she learned about his release by chance, and that painful discovery led Teresa to ask, why didn't tell me the truth?

Cecelia and Dexter Sellman had a son who was an honor roll student when he was shot down and killed by two young men. They relied on the criminal justice system to bring some justice to their family through restitution from the offender. Not for revenge, not to replace their loss, but for the pocket expenses they sustained, and to hold the offenders accountable for their actions. The State flatly told Cecelia that he would not request restitution, which was a violation of a right under Maryland law, not only for the victim but an obligation for the prosecuting attorney.

Like the other victims here today, the Sellmans believed that the system their family depended upon had failed them.

Mr. CHABOT. Ms. Roper, the time has expired. Are there any other victims that are here that you wanted to refer to in your testimony?

Ms. ROPER. I would just like to say that—no, there are not. I would just like to conclude that the whole history of our Nation has taught us that unless these rights that we're asking for are enshrined in our Constitution there will always be a struggle. And while it's very laudable to talk about funding, and funding programs that assist victims, and funding prosecutors, it is not an either/or situation. We're talking about how we treat people.

And I ask all of you to look at the folks from Maryland that I brought here today. They may not be your constituents, but their counterparts exist in each of your States. Crime has broken the hearts of those Americans. But the criminal justice has made them repeatedly victims again and again. And they want to be survivors. And they ask you to make sure that the Constitution that protects the offender also protects them.

[The prepared statement of Ms. Roper follows:]

PREPARED STATEMENT OF ROBERTA ROPER

Chairman Sensenbrenner and members of the House Judiciary Subcommittee on the Constitution: I am Roberta Roper, Co-Chairperson of the National Victims' Constitutional Amendment Network and Executive Director of the Stephanie Roper Committee and Foundation, Inc. NVCAN is the national coalition of victim advocates, legal scholars and victim service organizations, and the Stephanie Roper Committee and Foundation, Inc., is a Maryland victim advocacy and service non-profit organization bearing our slain daughter's name. Both organizations proudly express their strong support for the constitutional amendment for crime victims' rights as introduced in the House By Representative Steve Chabot.

It is with honor that I come before you today to speak for everyday Americans who place their trust in our system and their dependence on government to do the right thing for justice. Most importantly, I speak for those whose voices can no longer be heard . . . our sons, and daughters, spouses, parents, brothers and sister, friends. On September 11th, the terrorists' attack awakened the consciousness of America to the reality of random violence. Americans began to learn what every

crime victim knows . . . that by chosen acts of criminal violence, innocent lives are turned upside down and forever changed or tragically ended. I ask you to remember those lessons and that any one of us can become a victim of crime. How would you wish to be treated by our criminal justice system?

Providing crime victims with protected rights is not a complicated legal issue. Consequently, my testimony will place the focus where it correctly belongs . . . on the *human rights* of American citizens who believe that they deserve basic rights to fundamental fairness under the Constitution of the United States. These are rights that every person accused of, or convicted of a crime deserves and enjoys. Yet everyday Americans are appalled and disbelieving to learn that, unlike criminal defendants, they have no similar rights. That's what this amendment is about . . . guaranteeing equal justice for all of us *under the law of all of us, the U. S. Constitution*.

In announcing his endorsement of the amendment before you, President Bush said that "The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do." The framers of our Constitution understood that the sacred document they were creating would need to change as the needs of society required change. They were creating a "more perfect union," not a perfect one. That wisdom allowed our Constitution to abolish slavery and to give voting rights to women. Those human rights could not be sufficiently protected by state or federal laws. Likewise, this amendment is necessary in order to give protection and balanced consideration to the rights of victims. More than two decades of efforts in securing state and federal laws are evidence of their failure to provide victims' rights. Lawrence Tribe, Tyler Professor of Constitutional Law at Harvard Law School points out that a constitutional amendment is appropriate only when other means are not attainable such as a needed recognition of a basic human right. He believes that the language of this amendment meets that criteria. "The rights in question . . . rights of crime victims not to be victimized yet again through the process by which government bodies and officials prosecute, punish, and/or release the accused or convicted offender . . . are indisputable basic human rights."

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

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

I speak to the need for this amendment not only from personal experience, but after twenty years of advocacy and service to thousands of crime victims in my home state of Maryland. Like many advocates, the catalyst for advocacy and service was my family's experience with the criminal justice system when our oldest child, our beloved daughter, Stephanie, was kidnaped, brutally raped, tortured and murdered in 1982 by two strangers who came upon her disabled car on a country road. Like countless victims and survivors of that era, we discovered that unlike our daughter's killers, we had no rights to be informed, no rights to attend the trial and no rights to be heard before sentencing. Like countless other families, then and now, we struggled not only with the devastating effects of the crimes committed against our loved ones, but with consequences that were in many ways worse . . . being shut out of a criminal justice system we believed in and depended upon. In trying to rebuild our broken lives, the greatest challenge was trying to give hope to four surviving children . . . children whom we had taught to respect and trust the criminal justice system that had now failed us! That challenge is forever etched in my mind by the memory of the day one of our sons came home from school, explaining that he could no longer pledge allegiance to the flag with his classmates because "liberty and justice for all" didn't include us.

You may conclude that because this happened twenty years ago, this surely would not happen today. And while great progress has been made in the passage of good laws, both on the state and federal level and constitutional amendments passed in 33 states, the sad reality is that victims' rights continue to be denied. None of these state or federal laws are able to match the constitutionally protected rights of offenders. The result is that crime victims remain second class citizens in our nation's system of justice. Despite the passage of more than sixty victims' rights laws and

a state constitutional amendment in Maryland, many victims conclude that our criminal justice system is more criminal than just when it comes to ensuring their rights. This Constitutional Amendment will ensure that both victims' and defendants' rights are given fullest effect. Neither one will be superior, but both will be given equal consideration.

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

Sherri Rippeon and John Dobbin also sit behind me. Two years ago, their infant daughter, Victoria, died of blunt force trauma inflicted by their babysitter's boyfriend. Seeking to ensure compliance with Maryland law regarding their rights to attend the public trial, Sherri and John filed a Crime Victim Notification Request Form. Nevertheless, the trial court excluded them from the courtroom, and even after they filed a pro se Demand for Rights Form, the judge continued to deprive them from observing the trial.

When Teresa Baker's only son was murdered, she too, fulfilled the victim's requirement to request notification regarding the right to be informed. She was in court when her son's killer pleaded guilty to 2nd degree murder and was sentenced to thirty years; however, no one explained to Teresa that under the terms of the ABA plea, the convicted offender would be released in less than three years! Consequently, she learned about his release by chance and that painful discovery led Teresa to ask "why didn't someone tell me the truth?"

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

It is important to stress that this proposed constitutional amendment has little to do with the punishment of offenders, but everything to do with how our system of justice treats citizens who become innocent victims of crime. Certainly, law abiding citizens expect that those who violate the law will be held accountable for their actions; however, treating crime victims with respect and not excluding them from proceedings surrounding the crimes against them is separate and distinct. While one crime victim may choose not to be informed, present and heard at proceedings, it should not be the basis for denying rights to those victims who chose those rights.

And finally, I ask that you listen to the law-abiding citizens of our nation. I am confident that your constituents will tell you that it is time to approve this victims' rights amendment. State constitutional amendments have won overwhelming approval in 33 states; in 1994, the Maryland amendment had voter support of 92.5%! Never before has there been a proposed law, bi-partisan in support, that could make such a significant difference in the lives of so many Americans every year. We ask you to remember that the Constitution belongs to the people . . . let the Constitution protect all the people of this nation with equal justice.

Mr. CHABOT. Thank you very much. And I want to also thank the victims and the family members for coming here today. We appreciate that very much.

Our next witness will be Mr. Orenstein.

**STATEMENT OF JAMES ORENSTEIN, PARTNER, BAKER &
HOSTETLER, NEW YORK CITY**

Mr. ORENSTEIN. Thank you, Mr. Chairman. Thank you for inviting me to appear before you today.

Mr. CHABOT. Could you pull that mike a little closer?

Mr. ORENSTEIN. Sure. Is that better?

Mr. CHABOT. Yeah.

Mr. ORENSTEIN. As a Federal prosecutor for most of my career I've been privileged to work closely with a number of crime victims. I've also been privileged to work with talented people on all sides of this issue, including Mr. Twist, to make sure that any victims' rights amendment to the Constitution would provide real relief to victims of 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 the current bill will in some cases sacrifice the effective prosecution of violent offenders to achieve marginal protection for their victims.

In the last 20 years, Congress has enacted a variety of statutes that ensure crime victims' rights in the criminal justice system. Similarly, every single State has enacted its own protections for crime victims, although they have not uniformly adopted the full panoply of protections that this body has provided. As a result, the principal benefit to be gained by this amendment would be the uniformity gained by empowering Congress to override State laws and bring local practices into line. The same result, however, could likely be achieved through the use of Federal spending power to give States proper incentives to meet uniform national standards.

But unlike relying on spending-based legislation, using the Constitution to achieve such uniformity carries the risk of unforeseen and irremediable problems for law enforcement. I want to stress that in my view the potential risks to effective law enforcement are not the result of simply representing the legal rights of victims. Prosecution efforts are generally more effective if crime victims are regularly consulted and kept involved during the course of a case.

There are, however, a number of cases, typically in the organized crime context and in prison settings, where the victim of one crime is also the offender in another. In such cases this amendment could harm law enforcement efforts. For example, when a Mob soldier decides to cooperate with the Government, premature disclosure of his cooperation can lead to his murder and the compromise of the investigation. Under this amendment such disclosures could easily come from crime victims who are more sympathetic to the criminals than to the Government.

When John Gotti's underboss, Salvatore Gravano, decided to cooperate, and I was one of the prosecutors in that case, he initially remained in a detention facility with Gotti and other criminals for several weeks, and he was at grave risk if his cooperation became known. Luckily, that did not happen.

But the victims who would have been covered by this amendment, had it been in effect at the time, relatives of gangsters whom Gravano had murdered on Gotti's orders would almost certainly have notified Gotti if they could have done so. In fact, shortly after Gravano's cooperation became known, some of those relatives filed a civil lawsuit for damages against Gravano, but not against Gotti, and sought to use the discovery process to dig up impeaching information about Gravano. That their goal was to help Gotti escape

conviction was demonstrated by the fact that when Gravano impleaded Gotti into the lawsuit, the issue disappeared.

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

The risk to law enforcement thus arises not from the substantive rights accorded to crime victims but rather from the use of the Constitution to recognize those rights. There are two basic ways in which the current bill could undermine the prosecution and punishment of offenders. First, it may not adequately allow for appropriate exceptions to the general rules. 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 the victims' rights is the Constitution.

The restrictions clause of section 2 has two basic interpretive problems. First—

Mr. NADLER. What?

Mr. ORENSTEIN. I'm sorry, the restrictions clause, section 2 of the current bill, it has two problems. The first one is that it uses the word restrictions rather than the word exceptions, as an earlier version did. And that might make it impossible to accommodate the cases where what's really needed is an exception. That is, allowing a right such as notice of a cooperating witness' guilty plea to be skipped entirely rather than simply restrict it in some way.

Second, the wording of the restrictions clause may well deprive prison officials of the flexibility they need when the victims whose rights are at stake are themselves incarcerated offenders.

In addition, the language used to provide some of the substantive rights could also cause unintended problems. For example, because of language changes from earlier versions of the amendment, the right to be heard at certain proceedings set forth in this bill could be interpreted to forbid reliance on a written statement, and could even force the Government to shoulder the affirmative duty of making sure that prisoners are present and allowed to speak at certain proceedings, rather than allowing the participatory right to be vindicated in certain cases by the use of a written statement.

Likewise, the amendment's broad language could ultimately force prosecutors to keep track of civil lawsuits in which there is no law enforcement role but which involve the crime, and to keep victims notified about such proceedings. This would impose a burden that is totally unrelated to improving the lot of crime victims in the criminal justice system.

Finally, the revised language in the amendment regarding adjudicative decisions and the availability of certain remedies could lead to endless litigation and interlocutory appeals in criminal cases that greatly interfere with what should be the main goal for

prosecutors and victims alike: the conviction and punishment of the offender.

Mr. NADLER. I'm sorry, what would lead to the interlocutory appeals?

Mr. ORENSTEIN. And I explained this at length in my written testimony. The, the fact that the remedies clause in the current bill has taken out language expressly forbidding certain types of appeals and continuances of trial I think could easily lead to an interpretation that means that such delays are allowed.

I'd just like to sum up by saying that our criminal justice system has done much in recent years to improve the way it treats victims of crimes but it has much yet to do. But we must never lose sight of the fact the single, best way prosecutors and police can help crime victims is to ensure the capture, conviction, and punishment of offenders. In my opinion as a former prosecutor, the current bill achieves the goal of national uniformity for victims' rights only by jeopardizing effective law enforcement. By doing so it ill-serves the crime victims whose rights and needs we all want to protect.

Thank you very much.

[The prepared statement of Mr. Orenstein follows:]

PREPARED STATEMENT OF JAMES ORENSTEIN

I. INTRODUCTION

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

I am currently an attorney in private practice in New York City and an adjunct professor at the law schools of Fordham University and New York University.¹ From February 1990 until June 2001, I served in the United States Department of Justice as an Assistant United States Attorney for the Eastern District of New York. For most of that time, I was assigned to the office's Organized Crime and Racketeering Section, eventually serving as its Deputy Chief. While a member of that section, I prosecuted a number of complex cases against members and associates of La Cosa Nostra, including the successful prosecution of John Gotti, the Boss of the Gambino Organized Crime Family.

In 1996, at the request of the Attorney General, I temporarily transferred to Denver to serve as one of the prosecutors in the Oklahoma City bombing case. I remained in Denver for 18 months to prosecute the trials of both Timothy McVeigh and Terry Nichols, and then returned in the Spring of 2001 to represent the government when McVeigh sought to delay his execution on the basis of the belated disclosure of certain documents. During my time on the OKBOMB task force, I learned first-hand about the many difficulties and frustrations that victims of violent crimes face in our justice system, and I also learned how critically important it is for pros-

¹ The views expressed herein are mine alone.

ecutors and law enforcement agents to zealously protect the interests of crime victims while prosecuting the offenders.

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

II. THE NEED FOR A CONSTITUTIONAL AMENDMENT: ALLOWING CONGRESS TO LEGISLATE FOR THE STATES TO ACHIEVE A UNIFORM NATIONAL STANDARD

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

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

And while every single State has enacted its own protections for crime victims—32 of them by means of constitutional amendments, and the rest through legislative change—the States have not uniformly adopted the full panoply of protections that this body has provided to the victims of federal crimes.² For example:

- Although every State allows the submission of victim impact statements at an offender's sentencing, only 48 States and the District of Columbia also provide for victim input at a parole hearing.
- Despite the prevalence of general victim notification procedures, only 41 States specifically require victims to be notified of canceled or rescheduled hearings.
- There is a similar lack of procedural uniformity with respect to restitution: only 43 States allow restitution orders to be enforced in the same manner as civil judgments.
- Finally, while convicted sex offenders are required to register with state or local law enforcement in all 50 states and the District of Columbia, and all of those jurisdictions have laws providing for community notification of the release of sex offenders or allowing public access to sex offender registration, such notification and access procedures are not uniform.

²Statistics about state laws designed to protect crime victims are drawn from U.S. Department of Justice, Office for Victims of Crime, "Crime and Victimization in America, Statistical Overview" (April 2002) (reporting data from the National Center for Victims of Crime's Legislative Database about the status of legislation at the end of the States' 2000 main legislative sessions) <<http://www.ojp.usdoj.gov/ovc/ncvrv/2002/ncvrv2002—rg—3.html#legislative>>.

The ratification of a federal constitutional amendment could eradicate this disparity by empowering Congress to pass legislation that would override State laws and bring local practices into line.³ The same result, however, could likely be achieved through the use of the federal spending power to give States proper incentives to meet uniform national standards. But unlike reliance on spending-based legislation, using the Constitution to achieve such uniformity carries the risk of unforeseen adverse consequences to law enforcement.

III. THE CURRENT VERSION OF THE VICTIMS' RIGHTS AMENDMENT NEEDLESSLY UNDERMINES EFFECTIVE LAW ENFORCEMENT

A. Background

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

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

When a mob soldier decides to cooperate with the government, he typically pleads guilty as part of his agreement, and in some cases then goes back to his criminal colleagues to collect information for the government. If his disclosure is revealed, he is obviously placed in great personal danger, and the government's efforts to fight organized crime are compromised. Under this Amendment, such disclosures could easily come from crime victims who are more sympathetic to the criminals than the government. To illustrate that perverse kind of alliance: When I was working on the case against mob boss John Gotti, ten weeks before the start of trial, Gotti's underboss, Salvatore Gravano, decided to cooperate and testify—but for weeks after he decided to do so he was still in a detention facility with Gotti and other criminals and at grave risk if his cooperation became known. Luckily, that did not happen. But there were clearly victims of Gravano's crimes who would have notified Gotti if they could have done so. Gravano had, at Gotti's direction, killed a number of other members of the Gambino Family. Shortly after Gravano's cooperation became known, some of the murdered gangsters' family members filed a civil lawsuit for damages against Gravano—but not Gotti—and sought to use the civil discovery procedures to collect impeaching information about Gravano before the start of Gotti's trial. That their agenda was to help Gotti was demonstrated by the fact that when Gravano pleaded Gotti into the lawsuit, the problem disappeared.⁴

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 insist-

³ Of course, Congress would not be required to use such power to bring uniformity to the States, but if it did not do so, the situation would be no different than under current circumstances, where congressional legislation improves procedures only in federal cases and the treatment of victims in other cases is left to the effective but varying protection of the respective States.

⁴ While the problem of victim notification of cooperation agreements in organized crime cases would in some cases be cured by the fact that the cooperating defendant's plea takes place in a non-public proceeding, reliance on that fact is not a complete solution. First, because the standard for closing a public proceeding is so high, it is sometimes necessary to take such guilty pleas 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. In such cases, under the Amendment, 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.

ing on the fullest range of victim services that the courts will make available. If, as discussed below, the current language of the Amendment creates a right to be present in court proceedings involving the crime, or at a minimum to be heard orally at some such proceedings, prison administrators will be faced with the Hobson's choice between cost- and labor-intensive measures to afford incarcerated victims their participatory rights and foregoing the prosecution of offenses within prison walls that are necessary to maintain order. Either choice could undermine the safety of prison guards.⁵

The risk to law enforcement thus arises not from the substantive rights accorded to crime victims, but rather from the use of the Constitution to recognize those rights. As discussed below, there are two basic ways in which the Victims' Rights Amendment, as currently drafted, could undermine the prosecution and punishment of offenders: first, it may not adequately allow for appropriate exceptions to the general rule; and second, its provisions regarding the enforcement of victims' rights may harm prosecutions by delaying and complicating criminal trials. Both types of problems are uniquely troublesome where the source of victims' rights is the constitution rather than a statute, and both are exacerbated by the likely effect on the interpretation of this bill resulting from its differences with prior versions of the Amendment. I will address the general interpretive issue first and then discuss in turn the specific problems for law enforcement and prison administration caused by particular portions of the current bill.

B. Interpreting The Amendment In Light Of Its Legislative History

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

Much of the language adopted in S.J. Res. 3 to address law enforcement concerns has been changed or deleted in the current version. Even if Congress were writing on a blank slate, I would have some concerns about some of the language in H.J. Res. 91. But you are not writing on a blank slate, and that fact exacerbates the potential law enforcement problems created by some of the provisions of this bill. As you know, when legislation contains ambiguous language, most judges will resolve the ambiguity in part by looking at the legislative history and in part by applying certain assumptions about legislative intent.

Thus, for example (and as discussed below), the remedies provision of the current bill no longer contains an explicit prohibition—as the previous version of the Amendment did—prohibiting 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

⁵ One possible solution to the prison problem would be for Congress to exercise its enforcement power to exclude incarcerated offenders from the class of victims protected by the Amendment. Such an approach would be overbroad, and arguably inconsistent with the purpose of Section 4, which is designed to "enforce" rather than restrict the Amendment. *See, e.g., Saenz v. Roe*, 426 U.S. 489, 508 (1999) ("Congress' power under § 5 [of the Fourteenth Amendment], however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

against more serious offenders in exchange for leniency—may in some cases risk compromising the secrecy from other offenders necessary to the successful completion of such an agreement. This is particularly true in the organized crime context, where the victims may themselves be members of rival criminal groups. Likewise, in the case of prison assaults, there may be cases where accommodating the participatory rights of the victim inmate will unduly disrupt the safe and orderly administration of the prison. I am confident that the sponsors of this bill and other victims' rights advocates agree that such exceptions are appropriate. The problem is that the current language may not allow them.

1. The "Restrictions" Clause Generally

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

a. "Restrictions" rather than "Exceptions"

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

b. Prison administration may not fall within "the administration of criminal justice."

Because so many of the victims who would be given rights under this Amendment are themselves offenders, it is critically important that the bill provide sufficient flexibility in the context of prison administration. One approach that would work in the prison context—but that would likely fail to provide sufficient flexibility to prosecutors—would be simply to have no "exceptions" language in the Amendment at all. In the context of the First Amendment, for example, courts have held that the legitimate needs of prison administration justify reasonable limitations on free expression rights, despite the fact that the First Amendment contains no provision for exceptions and is absolute in its phrasing.⁶ But if the Amendment is to provide for exceptions or restrictions in some circumstances, prison administrators might have to do far more than show reasonable needs for relief, and would instead have to meet the explicit standard set forth in the Amendment.

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

⁶See, e.g., *Shaw v. Murphy*, 532 U.S. 223, 229 (2001); *Turner v. Safley*, 482 U.S. 78, 89 (1987).

2. *Specific Flexibility Problems*

a. The right “to be heard”

One of the most important participatory rights for crime victims is the right to be heard in a proceeding. As in previous versions, the current version properly limits this right to public proceedings so as not to jeopardize the need for security and secrecy in proceedings that are not normally open to the public. However, certain language changes from the previous version compromise that limitation, and certain other changes discard the important flexibility achieved by allowing victim input to come in the form of written or recorded statements.

The corresponding language in S.J. Res. 3 accorded a victim of violent crime the right “to be heard, if present, and to submit a statement” at certain public proceedings.⁷ 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 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.⁸ If the above is correct then prison officials might face an extremely burdensome choice of either transporting incarcerated victims to court for the purpose of being heard or providing for live transmissions to the courtroom.

A related problem would extend beyond prison walls. Because the difference between the previous and current versions of the Amendment suggest that a victim must be allowed specifically to be “heard” rather than simply to “submit a statement,” a victim might persuade a court that the “reasonable opportunity to be heard” guaranteed by the current version of the Amendment carries with it an implicit guarantee that the government will take affirmative steps, if necessary, to accord such a reasonable opportunity. This undermines the intent of the Amendment’s careful use of negative phrasing with respect to the right not to be excluded from public proceedings—a formulation designed to avoid a “government obligation to provide funding, to schedule the timing of a particular proceeding according to a victim’s wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings.”⁹ 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

⁷S.J. Res. 3 also provided the same right at non-public parole hearings “to the extent those rights are afforded to the convicted offender.” There is no corresponding participatory right under H.J. Res. 91.

⁸Such 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.

⁹Senate Report at 31.

the criminal justice system and that would further deplete the already strained resources of prosecutors and police, assuming that they even have sufficient knowledge of the ancillary suit to fulfill the obligation.

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

D. Potential Adverse Effects on Prosecutions

One of criticisms of the previous version of the Victims’ Rights Amendment was the length and inelegance of its language. The substantive rights in Section 1 were set forth in a series of very specific subsections resembling a laundry list, and the remedies language of Section 2 set forth a bewildering series of exceptions to exceptions.¹⁰ 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 previous version of the Amendment included in its list of crime victims’ rights the following three items: the right “to consideration of the interest of the victim that any trial be free from unreasonable delay;” the right “to an order of restitution from the convicted offender;” and the right “to consideration for the safety of the victim in determining any conditional release from custody relating to the crime.” The interest in a speedy trial was generalized—it was not tied to a specific stage of the prosecution, much less to every such stage. Such language allowed courts the freedom to interpret the right to apply in proceedings at which the trial schedule was at issue.¹¹ 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.¹² And the interest in safety was explicitly tied to bail, parole and similar determinations.¹³

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 in-

¹⁰For the reader’s convenience, I have appended to this statement the text of the Victims’ Rights Amendment as set forth in S.J. Res. 3.

¹¹See Senate Report at 36.

¹²This 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.

¹³See Senate Report at 37–38.

interpretation is plausible. And if that interpretation proves to be correct, then courts and prosecutors will have to grapple with a number of questions, the resolution of which could make the prosecution of offenders a far lengthier and complicated process. For example:

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

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

2. Remedies

The potential for unintended adverse consequences is magnified by the change in language regarding remedies. This is one of the most challenging issues in crafting a Victims’ Rights Amendment: the need to make crime victims’ rights meaningful and enforceable while at the same time preserving the finality of the results in criminal cases and also avoiding interlocutory appeals that could harm the interests of speedy and effective prosecution. The balance that was struck in S.J. Res. 3 recognizes that a crime victim has 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,¹⁴ 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. CONCLUSION.

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

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

APPENDIX: THE 2000 VERSION OF THE VICTIMS’ RIGHTS AMENDMENT (FROM S. J. RES. 3, 106TH CONGRESS)

SECTION 1. A victim of a crime of violence, as these terms may be defined by law, shall have the rights:

¹⁴“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.”

to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;
 to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;
 to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;
 to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence;
 to reasonable notice of a release or escape from custody relating to the crime;
 to consideration of the interest of the victim that any trial be free from unreasonable delay;
 to an order of restitution from the convicted offender;
 to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and
 to reasonable notice of the rights established by this article.

SECTION 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

SECTION 3. The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

SECTION 4. This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States.

Mr. CHABOT. Thank you, Mr. Orenstein.

And our final witness this afternoon will be Mr. Voth from Ohio.

**STATEMENT OF DAVID L. VOTH, EXECUTIVE DIRECTOR AND
VICTIM-OFFENDER MEDIATOR, CRIME VICTIM SERVICES OF
ALLEN AND PUTNAME COUNTIES, OH**

Mr. VOTH. Mr. Chairman and Members of the Committee, I am pleased to testify about my passionate desire to see H.J.R. 91 enacted as the 28th Amendment to the United States Constitution. I have been director for 17 years of a non-profit crime victims' assistance program serving—

Mr. CHABOT. Could you pull the mike also—could you pull that mike over there? Thank you. You don't have to start over.

Mr. VOTH. Okay.—with the restorative justice philosophy, and I helped draft Ohio's victims' rights law and constitutional amendment. I am convinced that only a Federal victims' rights amendment will cause essential victims' rights to be meaningful, permanent, consistent, and accessible.

Victims' rights must be meaningful. When people say they believe victims should have rights but they don't need to be listed in the U.S. Constitution I ask, which victim right is not important enough to protect? Which victims' rights should a Government official have the power to grant or withhold when you are raped? Should a Government official be allowed to deny change of plea

schedule information to a grieving mother of a murdered child seeking justice for the most traumatic and evil event in her life?

Should the Government be allowed to disregard the safety of a domestic violence or stalking victim when making release decisions? Or to disregard the impact of months and years of delays on a sexually assaulted child? Should a permanently disabled drunk driving victim have a right to be heard, no matter who the prosecutor is, or in which State the crime happened? Should restitution for victims be requested by prosecutors and ordered by judges? For victims' rights to be meaningful they must be articulated in our Constitution.

Victims' rights must be permanent. Our founding fathers presumed rights for victims. They were able to hire a constable and a prosecutor to seek justice. But now victims are at the mercy of the Government which exclusively operates this process. Victims should not control or veto investigations, arrests, or the court sentence. Neither should victims be ignored. The middle ground between victim control and ignoring the concerns of victims is the point of this amendment.

Many victims tell me, I felt treated like the criminal and I respond, I know what you mean, but I wish you were treated as well as the criminal. The void of victim protections has been periodically considered and changed by court rules, legislation, and State amendments. The only enduring solution for victims' rights is to delineate them in our national charter.

Victims' rights must be consistent. The ragged patchwork of victims' rights provisions is not fair or respectful to citizens who call police and are willing to testify in order to hold lawbreakers accountable. Even Federal victims' rights laws only apply to victims of Federal crimes, leaving out 98 percent of America's crime victims. An average of 50 percent of victims say they would not report the same crime again because of how poorly they were treated.

Americans deserve a core of consistent rights upon which States may add. I think that Judge Randall Basinger, a respected judge in Putnam County, Ohio common pleas court and instructor of constitutional law at Bluffton College spoke for all judges when he noted that a victims' rights amendment to the U.S. Constitution would result in more uniform rights in courts across the Nation, and more systematic balancing with similar defendant rights.

Prosecutors and judges should not differ so widely in implementing similar victims' rights. Courts should not ignore victims just because they fear violating defendants' rights. Courts allow the sixth amendment right to a fair trial to be routinely abused as a ploy to exclude victims by simply handing them a subpoena as a potential witness. Defendants have a right to a public trial, not a private one. And a right to confront witnesses, not to exclude them. Only with a floor of rights in the victims' rights amendment will courts be able to consistently balance defendants' interest in avoiding a speedy trial with victims' interest in avoiding unreasonable delay.

Victims' rights should be accessible. The amendment provides legal standing to be heard now lacking in the patchwork of rights and remedies across this Nation. Without the right of victims to ask for enforcement of their rights, the amendment is a beautiful

rescue buoy thrown out just out of the reach of the victim. Citizens should not have to turn over to the Government all their interest in such personal and pivotal proceedings without some due process for their concerns.

In conclusion, the right of victims to have a voice in the justice process is an American justice value which was assumed by our constitutional authors but is now twisted in a practice of preemptive defendants' rights over disjointed victim' rights. Victims should have a constitutional status for their essential rights to be meaningful, permanent, consistent, and accessible.

Thank you.

[The prepared statement of Mr. Voth follows:]

PREPARED STATEMENT OF DAVID L. VOTH

Mr. Chairman and Members of the Committee, I am pleased to testify about my passionate desire to see H.J.R. 91 enacted as the 28th Amendment to the United States Constitution. I have been Director for 17 years of a non-profit crime victim assistance program serving all types of victims with a Restorative Justice philosophy, and I helped draft Ohio's Victims Rights Law and Constitutional Amendment. I am convinced that only a federal Victim Rights Amendment will cause essential victim rights to be meaningful, permanent, consistent, and accessible.

VICTIMS RIGHTS MUST BE MEANINGFUL.

When people say they believe victims should have rights, but they don't need to be listed in the U.S. Constitution, I ask, "Which victim right is not important enough to protect?"

Which victims rights should a government official have the power to grant or withhold when you are raped? Should a government official be allowed to deny change of plea schedule information to a grieving mother of a murdered child seeking justice for the most traumatic and evil event in her life? Should the government be allowed to disregard the safety of a domestic violence or stalking victim when making release decisions, or to disregard the impact of months and years of delays on a sexually assaulted child? Should a permanently disabled drunk driving victim have a right to be heard no matter who the prosecutor is or in which state the crime happened? Should restitution for victims be requested by prosecutors and ordered by judges? For victims rights to be meaningful they must be articulated in our Constitution.

VICTIMS RIGHTS MUST BE PERMANENT.

Our founding fathers presumed rights for victims. They were able to hire a constable and prosecutor to seek justice, but now victims are at the mercy of the government which exclusively operates this process. Victims should not control or veto investigations, arrests, or the court sentence. Neither should victims be ignored. The middle ground between victim control and ignoring the concerns of victims is the point of this amendment. Many victims tell me, "I felt treated like the criminal!" and I respond, "I know what you mean, but I wish you were treated as well as the criminal." The void of victim protections has been periodically considered and changed by court rules, legislation, and state constitutional amendments. The only enduring solution for victims rights is to delineate them in our national charter.

VICTIMS RIGHTS MUST BE CONSISTENT.

The ragged patchwork of victim rights provisions is not fair or respectful to citizens who call police and are willing to testify in order to hold law breakers accountable. Even federal victim rights laws only apply to victims in federal crimes, leaving out 98% of America's crime victims. An average of 50% of victims say they would not report the same crime again because of how poorly they were treated. Americans deserve a core of consistent rights, upon which the states may add.

I think Judge Randall Basinger, a respected judge in Putnam County (Ohio) Common Pleas Court, and instructor of Constitutional Law at Bluffton College, spoke for all judges when he noted that a Victim Rights Amendment to the U.S. Constitution would result in more uniform victims rights in courts across the nation and more systemic balancing with similar defendants rights.

Prosecutors and judges should not differ so widely in implementing similar victims rights. Courts should not ignore victims rights just because they fear violating defendants rights. Courts allow the Sixth Amendment right to a fair trial to be routinely abused as a ploy to exclude victims by simply handing them a subpoena as a potential witness. Defendants have a right to a "public" trial, not a private one, and a right to "confront" witnesses, not to exclude them. Only with a floor of rights in the Victims Rights Amendment will courts be able to consistently balance defendants interest in avoiding a speedy trial with the victims "interest in avoiding unreasonable delay."

VICTIMS RIGHTS SHOULD BE ACCESSIBLE.

The Amendment provides legal standing to be heard, now lacking in the patchwork of rights and remedies across this nation. Without the right of victims to ask for enforcement of their rights, the Amendment is a beautiful rescue buoy thrown just out of reach of the victim. Citizens should not have to turn over to the government all their interests in such personal and pivotal proceedings without some "due process" for their concerns.

In conclusion, the right of victims to have a voice in the justice process is an American justice value which was assumed by our Constitutional authors, but is now twisted in a practice of pre-emptive defendant rights over disjointed victim rights. Victims should have Constitutional status for their essential rights to be meaningful, permanent, consistent, and accessible.

Mr. CHABOT. Thank you very much. I now recognize myself for 5 minutes for the purpose of asking questions.

Mr. Twist, let me direct the first question to you. Mr. Orenstein in his testimony voiced concerns in opposition to the amendment. One of the basis for that was his mobster or Mafia case. Now the, the language within the constitutional amendment itself says, these rights shall not be restricted except when, and to the degree dictated by a substantial interest in public safety, or the administration of criminal justice, or by compelling necessity.

So what, what is your opinion relative to that phrase and how that would affect the, the example that Mr. Orenstein has raised?

Mr. TWIST. Mr. Chairman, I appreciate the opportunity to comment on this. As Mr. Orenstein will remember, in negotiations with the prior Administration one of the, the things that, that we, we agreed to and, and put into the last version of the amendment and that is continued in this version is a, a clause that allows for restrictions. And you have appropriately—a clause that allows for restrictions and you have appropriately referenced it.

But, but I would point out a couple of other things. Clearly, I think in the examples that he cited, public safety interests do predominate. And I also would think in other examples that he cited, concerns of the administration of justice predominate. And compelling necessity. I think all three tests can be met in, in his examples.

But I would just add two quick things, Mr., Mr. Chairman. One is, and Mr. Orenstein will remember this, that we, we wrote in public proceeding into the language of the amendment precisely because of concerns that the Justice Department, which he was a member of, expressed that there were some proceedings that they wanted to make non-public the cooperating witness proceedings and that this would give them, and the prior Administration agrees with this, the flexibility to keep some of these proceedings non-public and therefore the rights wouldn't attach in the first place.

Mr. CHABOT. Thank you very much.

Mr. Voth, let me turn to you next, if I could. Obviously one of the key issues that we all have to come to our own conclusion

about is the need to actually amend the United States Constitution as opposed to doing it by Federal statute, or as the States have done, passing State constitutional amendments. What is the key issue to you? What is your principal argument as to why it's necessary to amend the U.S. Constitution to really protect victims in this country?

Mr. VOTH. I think it all boils down to the fact that we elect and appoint law enforcement officers, prosecutors and judges who take an oath to uphold the United States Constitution, and then we turn around and ask them to balance the right of a victim with a defendant, and they cannot because victims are not in the Constitution.

Mr. CHABOT. Okay, thank you very much.

Ms. Roper, let me turn to you now, if I can. While serving as director of the Stephanie Roper Committee and Foundation you've had the opportunity to meet many victims and hear their stories, as, as you've indicated. What lessons have, have you learned from the victims who've been denied the right to attend and take part in criminal proceedings?

Ms. ROPER. I can't stress enough how intimidating being thrust into the system is for anyone who's a victim of crime. If all of us are intelligent and understand the system, or think we understand the system, imagine those who are marginalized by ethnicity, or poverty, or lack of education? And judgments are made against them. Information is denied.

But most importantly, there is this, there is an inadequacy in the current law, whether it's State or Federal law, to change the whole culture of the criminal justice system. And that's why this amendment is necessary, to balance and to consider both the offender's rights as we consider the victims' rights in the process.

Mr. CHABOT. Thank you very much. And in the short time I've got left let me turn to you, Mr. Orenstein, if I can. Now we've already heard from one former prosecutor, Mr. Twist here today, in favor of the amendment and we've heard your concern about victims' rights, but your position that it's not the constitutional amendment that is the way to deal with these victims' rights. And I know that you're, you're a former prosecutor yourself. Is it true that the general consensus among other prosecutors and organizations around the country would be supportive of the victims' rights constitutional amendment, or do you know?

Mr. ORENSTEIN. I can't say for sure. I've, I've heard concerns against it, and also support for it. I think to the extent that there's a difference, State prosecutors are more often going to be concerned about it because it's going to affect what they do more often. But I, I couldn't tell you if there was consensus one way or the other.

Mr. CHABOT. Thank you very much. And I again want to thank the panel for their testimony here this afternoon. That concludes my time and at this time I recognize the Ranking gentleman from New York for the purpose of asking questions.

Mr. NADLER. Thank you. Mr. Twist, you testified that—you raise a couple of victims and you said that, I forget what the crime was, but that they had waited quite a few years before there was a trial and that there was undue delay. Is that correct?

Mr. TWIST. Yes, sir.

Mr. NADLER. And what caused that delay?

Mr. TWIST. The delay, Mr., Mr. Chairman, Mr. Nadler, was caused by a variety of reasons. The principal engine of the reasons was the defendant's request for one continuance after another.

Mr. NADLER. And the judge granted those continuances?

Mr. TWIST. Without notice to the——

Mr. NADLER. But he granted the continuances?

Mr. TWIST. Yes, sir.

Mr. NADLER. He felt he had reason to do it. Now let's assume that this amendment had been in effect.

Oh, and you also stated that, you also stated I think that the Arizona, I think you said it was, the Arizona law or constitution had a victims' rights provision in it which the judge ignored?

Mr. TWIST. Yes, sir.

Mr. NADLER. Now, so the judge ignored the law either because he was ignoring the law—I don't know the circumstance of the case—or because perhaps there were countervailing considerations which justified what he did. I don't know the circumstances. There may have been other provisions of the law why the continuances were necessary to give the defendants time to prepare a proper defense. We don't know.

But let's assume this amendment had been in effect. What would have happened? Someone would have had to go to Federal court to maintain another proceeding to overrule the judge in the State court?

Mr. TWIST. Highly unlikely, Mr. Chairman, Mr. Nadler.

Mr. NADLER. How else would—you're saying that the, or similar provisions in Arizona law or the—or Arizona constitution were not followed by the judge, for good or not good reasons—we don't know. So now you have a provision saying essentially the same thing in the United States Constitution. How would that make a difference?

Mr. TWIST. Well, certainly I think the State would provide an initial remedy through——

Mr. NADLER. But it didn't in this case.

Mr. TWIST [continuing]. Through the State courts once the Federal amendment is ratified.

Mr. NADLER. No, no, but you just said—you just said that the State law already said this, the judge for whatever reason ignored the law. So would the State prosecutor—the judge would do the same thing, for whatever reason he did it. Just the fact that it said the same thing twice, once in Arizona law, once in Federal law, probably wouldn't cause a judge to behave any differently. You'd now have to go and maintain a different—you'd have to sue in Federal court to order the State court to obey the Federal Constitution, no?

Mr. TWIST. It's, it's possible that the would be required——

Mr. NADLER. And how would that get——

Mr. TWIST. And I would say——

Mr. NADLER. How would that speed things up?

Mr. TWIST. Pardon me?

Mr. NADLER. And how would that speed things up? Wouldn't it just add another layer of litigation?

Mr. TWIST. Well, presumably, rights once written into the United States Constitution would not be ignored at will as they are now.

Mr. NADLER. Whereas, rights into the Arizona constitution are ignored at will by Arizona judges?

Mr. TWIST. All too often. And, and that—and the reason for that, Mr. Nadler, is because the path of least resistance for a trial court judge is always the default rule, which is to protect the defendant's U.S. constitutional rights.

Mr. NADLER. Well, are you suggesting—

Mr. TWIST. And the—

Mr. NADLER. Excuse me. Then are you suggesting that this, that a Federal constitutional rule would now trump the defendant's Federal constitutional rights?

Mr. TWIST. No. What I'm suggesting is that, is that if both victim's rights and defendant's rights are written into the U.S. Constitution they will be honored and given each full effect to the greatest extent possible.

Mr. NADLER. How do you give full effect—and I'm concerned with this delay provision. If the judge in that case did not have proper grounds for granting continuances, then the constitutional amendment here shouldn't be necessary, and he should have listened to the Arizona constitution. And if he ignored one he might ignore the other.

But let's assume he had proper grounds. That for—to vindicate or to allow the, the, the, the, the defendant's constitutional rights to whatever—I don't know the case so I can't comment on it—to be properly vindicated he had to grant those continuances. Then are you saying that this amendment either wouldn't matter, you'd still have the delays, or it would trump the victim's constitutional rights—not the victim, the defendant's constitutional rights, and maybe get a reversal of the conviction later?

Mr. TWIST. I'm saying, Mr. Chairman, and Mr. Nadler, that this case took almost 4 years to get to trial. It is inconceivable—

Mr. NADLER. I understand that.

Mr. TWIST [continuing]. That, that with, with any sort of respect for the victim's right to a speedy trial that it would have required that, that much time to prepare. And—

Mr. NADLER. All right, thank you. Mr. Orenstein, since I don't have too much time left, should we expect much litigation as a result of this amendment? And what impact would that have on our criminal justice system? And why wouldn't any of the limitations and the right of victims such as those intended to protect a substantial interest in public safety or the administration of criminal justice shield prosecutors?

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

Mr. ORENSTEIN. All right. Well, in terms of the litigation, there are a lot of phrases in, in this bill that are not only, that not only need interpretation but that are also different from previous versions, and that difference I expect will cause a lot of litigation.

One change that makes a lot of litigation likely is that the substantive rights, or I'm sorry, the substantive interest that victims are given are given with respect to every adjudicative decision. In other words, every decision made in a criminal case has to take those into account. And I, I expect—and I should say the victims I'm talking about are the ones who are really more closely aligned,

for example, in Mob cases, with, with criminals than with the Government. Most victims won't, won't abuse this for sure.

But the ones who do can cause endless litigation by saying, this particular evidentiary ruling, for example, did not take into account X, Y, and Z as it, as it was supposed to. Combined with the change in the language about remedies that have dropped a prohibition against staying or continuing a trial, reopening a proceeding, or invalidating a ruling, the lack of that language in the current bill means that you likely can reopen rulings and stay trials and continue.

So the combination of those two could have a very serious effect on the speed of trials.

Mr. CHABOT. Thank you very much. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. TWIST, you, you indicated that the Arizona constitutional amendment didn't work. What were the remedies available in the Arizona constitution, constitutional amendment?

Mr. TWIST. Under Arizona law, Mr. Chairman, Mr. Scott, under Arizona law victims have standing to seek court orders and file special actions to obtain orders that would protect their rights.

Mr. SCOTT. They have standing. And were those pursued?

Mr. TWIST. In the prosecution that involved the murder of Mr. Goelzer's brother they were not pursued during—no special action was taken to an appellate court during the pendency of the case.

Mr. SCOTT. One of, one of—and I've got a lot of concerns in this but one of the things that is absent is meaningful remedies. If you're going to have rights, you've got to have remedies. And if you're going to say somebody has a right to be heard, if they're not heard they ought to have a remedy, meaningful remedy. And if you didn't have remedies in the Arizona constitutional amendment, you know, why wouldn't you have the same problem with the U.S.?

What—let me ask another question. Which rights of the defendant are we going to deny, restrict, or abridge if this passes?

Mr. TWIST. Mr. Chairman, Mr. Scott, in my opinion the rights we seek in the constitutional amendment do not deny or abridge any right of a person accused or convicted of an offense.

Mr. SCOTT. That being the case, you would recognize that we could do this by statute and not by constitutional amendment.

Mr. TWIST. Mr. Chairman, Mr. Scott, not at all. The, the, the two don't follow. The, the conclusion doesn't follow the premise at all. Because what happens is—and this is a somewhat, as Mr. Orenstein and I were talking earlier, a pointy-headed point to make, if I may. But I, I can say with a perfectly straight face that the right to notice to a victim, the right to be heard, the right to be present do not deny to a defendant any constitutional right, but at the same time the system doesn't protect those victim's rights.

Mr. SCOTT. Let's just, let's just make the point that the—you're not denying, restricting or abridging any defendant's rights. That statutory legislative intent is not to restrict, deny, or abridge defendant's rights.

Let me ask you, if a prosecutor or a judge violates the victim's rights, what remedies, Mr. Orenstein, would there be under this bill?

Mr. ORENSTEIN. If, I'm sorry, if the judge——

Mr. SCOTT. Under this constitutional amendment would he had 1983 action against the prosecutor for violating your rights?

Mr. ORENSTEIN. Congress could, through its enforcement power, create such, such a right, but the amendment itself doesn't provide, provide for that I think. I think that's the intent of——

Mr. SCOTT. Well, if you have a right don't—what's your remedy? I mean, it's meaningless if it doesn't have a remedy. What is the remedy, if you're not given notice at each stage?

Mr. ORENSTEIN. I have to give you two answers. One is, if, if the rights do have remedies—in other words, if they're not illusory—the remedies seem to be limited to, or intend to be limited to prospective enforcement. Unfortunately, I think the way it's written will allow the kinds of delays that I've talked about because it doesn't have the prohibition against delaying trials, which would have to happen while you're going to an appeals court, to say I wasn't let in in a previous ruling.

If that's not the case, then the rights may well be illusory. So——

Mr. SCOTT. Let me ask, let me ask you another question. The accused has a right to a speedy trial that trumps the prosecutor's right to slow things up. Does the victim, does the victim's right to a speedy trial trump the prosecutor's right to slow things up?

Mr. ORENSTEIN. I don't think it trumps the right. It's, it's, it's written as an interest in a speedy trial. The delay comes not because the victim will be trying to slow things down. I doubt that's likely.

Mr. SCOTT. No, the victim wants a speedy trial.

Mr. ORENSTEIN. The delay comes because——

Mr. SCOTT. And the prosecutor wants to slow things up. The defendant is sitting there uninterested. What happens? The victim comes forward and says, I want a speedy trial. The prosecutor says, no. Well, what happens?

Mr. ORENSTEIN. Well, I have to disagree. I think it's rare that the prosecutor will say no, that he wants——

Mr. SCOTT. The prosecutor's case isn't ready for trial. His witness isn't available, or otherwise he doesn't have a case. The defendant doesn't know that. And you have a public trial and the witness says, I want a speedy trial. And the prosecutor just looks embarrassed. What happens?

Mr. ORENSTEIN. Two things could happen. The judge could say, I'm going to order an immediate trial in the victim's interest, you know, letting that trump—assuming it doesn't violate the, the defendant's right, because if it does then there's a reversal. In which case you endanger the prosecution because the prosecutor's not ready. Or the judge says, okay, I've heard you but you don't get to speed up the trial because the overall balance of interests protects the right to a speedy trial.

The danger there is if, if the victim is dissatisfied and appeals it and is allowed to slow things down ironically while that's being litigated it could——

Mr. SCOTT. Or, or, or the prosecutor——

Mr. CHABOT. The gentleman's time has expired. Does the gentleman—I'll give the gentleman an additional minute to conclude his thought.

Mr. SCOTT. Thank you. Or the prosecutor has to stand up in open court and acknowledge, with the defendant looking, that he doesn't have a case.

Mr. ORENSTEIN. Exactly. That, that was my first——

Mr. SCOTT. In which case the defendant can insist on the speedy trial and that would take precedence over everything.

Mr. ORENSTEIN. Again, if the judge agrees that he has that right, sure, you could endanger the trial.

Mr. SCOTT. The victim. The victim.

Mr. ORENSTEIN. Or the defendant, defending on how it plays out.

Mr. SCOTT. Well, the defendant didn't know he wanted to exert that interest and the victim exposed the situation. There's, there's some terms in the constitutional amendment that I'd like some comment on. The public proceeding involving a crime, Mr. Orenstein, does that involve civil, civil cases and/or habeas corpus?

Mr. ORENSTEIN. Habeas corpus almost certainly involves the crime. It's not part of the criminal justice system but it's, it's directly coming out of the criminal case, or likely directly coming out of the criminal case.

If there's a civil suit for damages based on the crime, for example, a wrongful death action, I would think that that involves the crime. And so, the, the rights—there'd be at least an argument, and I don't know how courts would rule on it but I would expect some would think, sure, this involves the crime, and therefore the, the rights apply.

Mr. CHABOT. The gentleman's time has expired. That concludes the——

Mr. NADLER. Mr. Chairman?

Mr. CHABOT. Yes, Mr. Nadler.

Mr. NADLER. Mr. Chairman, I ask unanimous—well, let me say this. I have here a statement in opposition from Safe Horizon, which is a victims' assistance group that assists over 250,000 crime victims a year, and one from the National Clearinghouse, a statement in opposition from the National Clearinghouse for the Defense of Battered Women, and a few others. And I ask unanimous consent to include these statements in—of opposition in the record.

Mr. CHABOT. Without objection.

[The information referred to follows:]

2 Lafayette Street, 3rd Floor
 New York, NY 10007
 212.577.7700 Tel
 212.385.0331 Fax
www.safehorizon.org



May 8, 2002

Board of Directors

Susan Solomon
Chair
 Brooke McMurray
Vice-Chair
 Eugene Pickens
Vice-Chair & Treasurer
 Cynthia Lufkin
Secretary
 Wendy Banks
 Arthur Chang
 Jerome A. Chazan
 Malaak Compton-Rock
 Carolyn A. Drexel
 Daisy Expósito
 Linda A. Fairstein
 Barry Green
 Joseph S. Iseman, Esq.
 Stephanie Kugelman
 Linda Lam
 Joann Lang
 Thomas J. Mitchell
 Martin D. Newman, Esq.
 Steven C. Parrish
 John M. Perkins
 Kenneth A. Powell
 Peter J. Powers
 Richard T. Roberts
 Steven Rubenstein
 Jack Rudin
 Jessica Scinfeld
 Most Reverend
 Joseph M. Sullivan
 Ann Tripp

Gordon J. Campbell
Chief Executive Officer

The Honorable Steve Chabot
 House Judiciary Sub-Committee on the Constitution
 129 Cannon House Office Building
 Washington, DC 20515

The Honorable Jerrold Nadler
 233 Rayburn House Office Building
 Washington, DC 20515

Dear Representatives Chabot and Nadler:

I am writing to set out Safe Horizon's opposition to H.J. Res. 91, "An Amendment to the Constitution of the United States to protect the rights of crime victims."

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

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

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

The Honorable Steve Chabot
 May 8, 2002
 Page 2

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

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

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

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

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

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

We note that the proposed amendment would allow victims' rights to be restricted "when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." While it may be the drafters' intention to

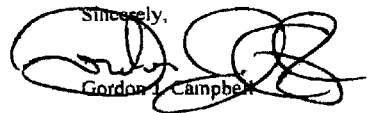
The Honorable Steve Chabot
 May 8, 2002
 Page 3

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

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

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

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

Sincerely,

 Gordon J. Campbell

The Honorable Steve Chabot, Chairman
House Judiciary Sub-Committee on the Constitution
129 Cannon House Office Building
Washington, DC 20515-3501

The Honorable Jerrold Nadler
233 Rayburn House Office Building
Washington, DC 20515

May 9, 2002

OPPOSE: H.J. Res. 91, "An Amendment to the Constitution of the United States to protect the rights of crime victims."

Dear Representatives Chabot and Nadler:

We are writing in opposition to H.J. Res. 91, which Representative Chabot introduced on May 2 and which is scheduled for a sub-committee hearing today. Although worded differently, H.J. Res. 91 poses the same problems that amendments from previous Congresses have posed, most recently S.J. Res. 3 and H.J. Res. 64 in the 106th Congress. This amendment would fundamentally alter the nation's founding charter and would apply to every federal, state and local criminal case, profoundly compromising Bill of Rights' protections for accused persons.

H.J. Res. 91 would give rights to victims of violent crime such as: the right to notice of any public proceeding; the right not to be excluded from public proceedings; the right to be heard at release, plea, sentencing, pardon and reprieve hearings; an interest in avoiding unreasonable delay; and just and timely restitution. The Amendment also provides victims with the right to "adjudicative decisions" regarding victim's safety, speedy trial and restitution. Although "adjudicative decisions" is not defined in the bill, this phrase could be interpreted as providing victims with the right to a hearing.

Many of these provisions reflect laudable goals, but it is unnecessary to pass a constitutional amendment to achieve them. Every state has either a state constitutional amendment or statute protecting victims' rights and the proponents have not made the case that those measures fail to protect victims' interests. More importantly, providing these "rights" to victims will compromise the rights of the accused.

The amendment does not protect the rights of accused persons. Although the words of this amendment are different from previous versions of the Amendment introduced in earlier Congresses, the effect is the same. If passed, the Amendment would erode the presumption of innocence, erode the right to a

fair trial, hamper the ability of law enforcement to effectively prosecute cases, discriminate between victims and impose legal liability on the states.

One of the primary concerns that opponents of the Amendment have raised is that it will erode the rights of accused persons. The victims' rights amendments of eight states expressly provide that nothing in the amendment may diminish the rights of the accused. Proposed H.J. Res. 91 does not, but oddly suggests that the rights of victims are "capable of protection without denying the constitutional rights of those accused of victimizing them." This clause constitutes more of an observation than a prohibition; nothing in its purports to prohibit any diminution of other rights, which have long existed under the Constitution. It would be the first time in our nation's history that the Constitution was amended in a manner that restricted rights of the accused.

In guaranteeing victims the "right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender," the amendment commands, at the least, millions of new local court hearings every year, and potentially, widespread federal judicial interference with the decisions of local law enforcement, prosecution and corrections officials.

This is a new clause that has not been included in previous versions of the amendment. It is unclear what this phrase means, but at the least, it would appear to guarantee victims a right to a hearing on these issues. Previous amendments have given victims the right to be present and heard at all public proceedings - this version appears to go beyond the right to be present and be heard by also granting the right to a hearing. Serious questions are presented for all components of the system: Should a judge give greater weight to the victim's preference for speed or type of disposition than to the prosecutor's strategy? (This has been a leading concern of prosecutors in expressing opposition to the amendment - for example, in letters from former U.S. Deputy Attorney General Philip Heymann to Senator Kennedy on September 4, 1998, and from National District Attorneys Association President-elect William Murphy to Senator Moynihan on April 17, 2000.) Does the amendment require judges to make adjudicative decisions ordering police or corrections officials to take various steps to protect victims' safety, possibly trumping personnel or resource allocations they would otherwise have made? If the judge does not enter such an order, or the officials do not obey it, are they subject to an injunction or declaratory relief, plus fines for contempt? Must judges and probation officers go through restitution and fact-finding hearings to protect themselves against litigation, even where the defendant is indigent with no possibility of making payments?

The Constitution should only be amended when there are no other alternatives available. Since 1791, the Federal Constitution has been amended only 19 times. (Amendment XVIII established prohibition and

Amendment XXI repealed it. Thus, only 17 amendments have been permanently added to the Constitution.) Amending the Constitution is a serious matter and should be reserved for those issues where there are no other alternatives available. H. J. Res. 91 does not meet this standard because there are other alternatives available to protect the interests of crime victims. Thirty-three states have passed victims' rights constitutional amendments and every state has either a state constitutional amendment or statute that protects victims' rights. Greater effort should be made to enforce already existing laws instead of amending the federal constitution.

The Victims' Rights Amendment erodes the presumption of innocence.

The framers were aware of the enormous power of the government to deprive a person of life, liberty and property. The constitutional protections afforded the accused in criminal proceedings are among the most precious and essential liberties provided in the Constitution. The VRA undermines the presumption of innocence by conferring rights on the accuser, and potentially diminishing fundamental safeguards designed to protect against convicting the innocent.

Not every accused person is actually guilty. But giving the accuser the constitutional status of victim will impact the judge and jury, making it extraordinarily difficult for fact finders to remain unbiased when the "victim" is present at every court proceeding giving his or her opinion as to what should happen. The VRA makes the accuser a third party in the criminal case, before a judge or jury has determined that the accuser is actually a "victim," that a crime was actually committed, or that the accused did it.

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

The Amendment is likely to be counter-productive because it could hamper effective prosecutions and cripple law enforcement by placing enormous new burdens on state and federal law enforcement agencies. It is unclear how much weight judges will be required to give to the views of a crime victim if he or she objects to an action of the prosecutor or judge. For example, what if a victim opposes a negotiated plea agreement? Over 90 percent of all criminal cases do not go to trial but are resolved through negotiation. Even a small increase in the number of cases going to trial would burden prosecutors' offices. There are many reasons why prosecutors enter into plea agreements such as allocating scarce prosecutorial resources, concerns about weaknesses in the evidence, or strategic choices to gain the cooperation of one defendant to enhance the likelihood of convicting others. Prosecutorial discretion would be seriously compromised if crime victims could effectively obstruct plea agreements or require prosecutors to disclose weaknesses in their case in order

to persuade a court to accept a plea. Ironically, this could backfire and result in the prosecution being unable to get a conviction against a guilty person - this would not serve society's or the victim's interests.

Similar problems could arise from the notice requirement. We do not oppose statutes that require states and the federal government to give notice to victims about key hearings, but we do oppose making this a constitutional requirement. What remedy will the victim have when the state inevitably fails to inform him or her of a proceeding?

Section three reads, "Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages." However, this still leaves open the possibility of seeking declaratory or injunctive relief against the judge, prosecutor or police when they fail to follow through with every requirement under the amendment. The remedy for violation of an injunction is a fine for contempt, which could be as substantial as damages, particularly considering the millions of cases and tens of millions of events triggering the amendment's rights every year. Presumably, victims would be entitled to bring suit under 42 U.S.C. sec. 1983. If the victim prevails under a 1983 claim, he is entitled to attorneys' fees, which are not considered damages.

One must also consider the Supreme Court's history of antipathy to constitutional rights without meaningful remedies. As the Court demonstrated by fashioning out of whole cloth a damages remedy for Fourth Amendment violations in the case of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), there are situations where damages are the only possible remedy - i.e., for property damage or physical injury directly occasioned by the violation. When cases start cropping up in which a victim is seriously injured or murdered as a direct result of a government official failing to give notice of a planned release or plea bargain, the Court will be powerfully motivated to fashion a monetary remedy - labeled something other than "damages," to be sure - to ensure that victims' constitutional rights are not second-class constitutional rights.

It bears emphasis that the defendants in any such action for redress of a violation of victims' constitutional rights will be local government officials whose primary duties are the enforcement of the criminal laws or the custody and supervision of criminal offenders, including police, prosecutors, judges, corrections, probation and parole officers, and even victims services agencies. Whatever time they take defending such litigation will be time away from their primary responsibility to promote public safety. Whatever money paid as a result of the litigation - whether in attorneys' fees, fines, or an alternative form of "damages" - will come from taxpayers, reducing accounts otherwise dedicated to public safety.

Section three of S.J. Res. 91 may also authorize appointment of counsel for victims. The section reads, "Only the victim or the victim's lawful representative may assert the rights established by this article." The term "lawful representative" is undefined, and could be interpreted as meaning an attorney. If victims are entitled to have attorneys represent them, then in order to make this

right meaningful the state will have to subsidize the cost of attorneys for those who cannot afford to hire their own.

State and federal criminal justice systems are in crisis because they are unable or unwilling to provide adequate counsel for indigent accused persons. The additional cost of providing counsel to victims as well as defendants in criminal cases would be prohibitively expensive. Adding the financial burden of providing counsel to victims will likely further limit defendants' access to counsel as well as pose a major conflict of interest. If this happens, it will tax an already severely overtaxed system, make it less likely for accused persons to retain adequate counsel, and therefore, increase the likelihood of wrongful conviction.

The VRA poses more problems than solutions. Apart from the serious constitutional problems this amendment raises, there are many practical problems that the VRA will create. Who is a victim? The amendment does not define this and it is quite possible that in any one case there would be multiple victims with competing interests. In a homicide case, a child of the victim and the parent of the victim may disagree on how the government should handle the case. Whose opinion prevails? What if the victim changes his or her mind during the course of the case? This happens frequently in death penalty cases where the victim initially wants the government to seek the death penalty and then changes his or her mind before the case is concluded? And what about the fact that the amendment only covers victims of "violent" crime? This means that a person who has been the victim of a misdemeanor assault would have constitutional rights, but not an elderly widow who has been swindled out of her life savings. It also means that victims in different states will be treated differently because each state has its own laws defining crimes of violence and property crimes. Some states consider burglary a crime of violence, while others consider it a property crime. Persons in adjoining states might have different rights under the federal constitution. This would create serious equal protection problems.

A constitutional amendment is not the solution. Crime victims deserve protection, but a victims' rights constitutional amendment is not the way to do it. H.J. Res. 91 unnecessarily amends the federal constitution, places inflexible mandates on states, may hinder prosecution of criminal cases and threatens the rights of the accused. We urge you to oppose this amendment.

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

Sincerely,

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

Arwen Bird, Director
Survivors Advocating for an Effective System

Wade Henderson, Executive Director
Leadership Conference on Civil Rights

David Kopel
Independence Institute*

Professor Robert Mosteller
Chadwick Professor of Law
Duke Law School

Laura Murphy, Director
Washington National Office
American Civil Liberties Union

Erwin Schwartz, President
National Association of Criminal Defense Lawyers

Scott Wallace, Director
Defender Legal Services
National Legal Aid and Defender Association

*For Identification Purposes Only

Cc: Members of the House Judiciary Committee
Sub-Committee on the Constitution

National Clearinghouse for the Defense of Battered Women

125 S. 9th Street, Suite 302 Philadelphia, PA 19107 215/351-0010 Fax: 215/351-0779

POSITION PAPER ON PROPOSED VICTIMS' RIGHTS AMENDMENT

May 2002

Introduction and Overview

The National Clearinghouse for the Defense of Battered Women strongly opposes the H.J. Res. 91/S.J. Res. 35, the proposed Victims' Rights Amendment to the United States Constitution. Our opposition to the proposed amendment does not reflect a lack of support for, or empathy with, victims of crime. We, like the proponents of the amendment, are extremely disturbed by the way in which crime victims are treated by our criminal justice system. As an organization that assists battered women, we know only too well the paucity of services and supports afforded to victims, and we see firsthand the tragic consequences that result from society's and the criminal justice system's devaluing and misunderstanding of the experiences of victimization.

The National Clearinghouse is a unique victims' advocacy organization; we assist battered women who, in response to their victimization, end up in conflict with the law. All too frequently, women who have been battered and have not received the protection of society's institutions, including the police and the legal system, resort to violence or other acts to defend their lives and those of their children against on-going abuse. Sadly, these women, who are victims, then become the accused; they become defendants in criminal prosecutions. Our mission, since we opened our doors in 1987, has been to advocate for these victims of violence who continue to fill our nation's courtrooms as defendants and continue to fill our nation's prisons.

The National Clearinghouse for the Defense of Battered Women opposes the amendment for the many reasons outlined below.

- **Too many victims of domestic violence become the accused.** We work with battered women who, as a result of responding to the abuse they experienced, are accused of a crime. Do these women lose their "victim" status once they have defended their lives and become defendants? And, once battered women defend themselves against their abusers' violence, do these batterers who terrorized and victimized their partners deserve the exalted constitutional status as "victims"? The Amendment refers to victims and criminal defendants as though they were mutually exclusive and designates someone a victim *solely* by virtue of the fact that another person has been charged with a crime. The basic error in this absolutist position - that the defendant is the perpetrator and the complaining witness is the victim - is revealed in the cases of battered women charged with crimes. It would, for example, permit a

husband who has repeatedly beaten his wife to stand before a judge and object to her release on bail, even when she is the only parent who has cared for their minor children. Or, if the battered woman ended up getting convicted of a crime against her batterer, the Amendment would require her to pay restitution to her abuser because he is considered the "victim."

- **The federal constitution is the wrong place to try to "fix" the complex problems facing victims of crimes; statutory alternatives and state remedies are more suitable.** Our nation's constitution should not be amended unless there is a compelling need to do so *and* there are no remedies available at the state level. Instead of altering the US Constitution, we urge policy makers to consider statutory alternatives and statewide initiatives that would include the enforcement of already existing statutes, and practices that can truly assist victims of crimes, as well as increased direct services to crime victims.

Much of the impetus for the proposed amendment has been the shameful realization that crime victims are often neglected, if not ignored, in the criminal process. We understand and sympathize with the fact that closure of the criminal case can be an important component of healing for some victims of crime. We fully believe that the victim of a crime should be kept thoroughly apprised of all scheduling, hearings and developments in the case, and that s/he should be provided the right of access as long as it does not interfere with the defendant's fair trial rights. We fully support prosecutors' paying greater attention to, being more sensitive to, and more respectful of the needs of their victims/witnesses, and, where appropriate, we support the provision of advocates for victims.

However, all of these things can and should be accomplished within the present system, through legislation on the state level or through federal statutes. The healing that may happen when victims are heard, informed and respected during the criminal legal process is extremely important. But, as we have found in working with victims of domestic violence, the criminal system is often a particularly poor forum in which to try to solve the complex of social and other problems inherent in victimization. Unfortunately, the grave injustices of being victimized probably cannot be fully addressed or remedied in the criminal justice system. We urge, instead, that additional time, money and energy go into providing the support and services that many victims of crime very much need and certainly deserve.

- **The proposed amendment's real benefit to crime victims is speculative at best and, in fact, may end up *hindering*, rather than helping, victims.** It is entirely unclear how the proposed amendment would increase basic courtesies and respect for victims (particularly in light of the amendment's explicit provision for governmental immunity from civil actions). In addition, there are particular problems with the mandatory restitution clause. By forcing restitution to a constitutional level, restitution payments will be given priority over the payment of federal fines. This will certainly end up seriously undercutting payments to the Victims of Crime Act Fund (VOCA) in cases where defendants lack the resources to fully satisfy both. VOCA currently provides funds to more than 3,000 local victims' services organizations, including

many domestic violence and sexual assault programs. If this Amendment passes there will ironically be *less* money available for victims' services.

- **While the amendment promises much to victims, it provides virtually no remedies for victims whose rights are violated.** As is inherently the case with federal constitutional amendments, the proposed amendment is broadly worded and suggests many rights without corresponding remedies (or methods for enforcing these rights). In fact, the amendment specifically prevents victims from receiving monetary damages.
- **If passed, the enforcement of the amendment will divert critically needed resources from already underfunded victim assistance programs and from all key branches of the criminal justice system.** The National Clearinghouse is persuaded that the constitutional financial mandate this amendment imposes upon the states would require their already overburdened governments to divert funds from agencies that provide meaningful assistance to battered women, and that the implementation of the amendment would create numerous practical, administrative and financial burdens for courts, prosecutors, law enforcement personnel, and corrections officials. Congress has a responsibility to investigate thoroughly the cost of the proposed amendment to the 50 states, and the drastic shift in resources that would result if the amendment were ratified. Congress has not undertaken this analysis and the passage of the resolution before completion of this analysis does a disservice to the public.
- **This Amendment will not reduce the number of battered women being charged with crimes.** Some proponents of the Amendment have been arguing that passage of the Amendment will reduce the numbers of battered women who end up as defendants because, if the Amendment were passed, battered women would be much more likely to turn to the criminal justice system for assistance *before* they get arrested. While we acknowledge that criminal justice reform is essential in helping to reduce violence against women and is a very effective tool for some battered women, for others, however, it fails to offer any real protection. We also know that many women will never turn to the criminal justice system and will not do so *even if* the Amendment *were* able to provide all the support and services it promises to victims (which is highly unlikely). Unfortunately, for many battered women, the first time the system "pays attention" to them is when they enter it as defendants. The same system that failed to protect them or couldn't seem to find any resources to assist them *before* they get arrested, suddenly finds all sorts of resources to prosecute them vigorously. In fact, one of the unintended consequences of many mandatory and pro-arrest policies has been a massive increase in the numbers of battered women being arrested in many communities. Until all women are safe, battered women will continue to become defendants. This Amendment will not change that reality.
- **Defendants are facing loss of liberty and life at the hands of the state, and their rights must not be eroded.** Much has been made of the need for this amendment in order to "balance" the rights of victims with the rights of defendants. We agree that, if the playing field were level and the consequences of the "imbalance" equal, the goal of "balance" would be a germane one. But such an argument is completely inappropriate

when talking about balancing the rights of victims and the rights of defendants. In this instance, the playing field is *far* from level; the power of the state far outstrips that of the defendant and his or her attorney, and the consequences at trial are dramatically different for victims and defendants. For example, a defendant may lose her liberty or even her life as result of the trial; the harsh reality is that the victim has very little to lose as a result of the trial - the victim's losses occurred long before the trial. We understand that victims have experienced (often) tragic consequences as a result of being victimized; and we take their experiences and losses extremely seriously.

We also understand that victims can *gain* a sense of control and a host of other important psychological and emotional results when they are kept informed, are actively listened to, and are respected throughout the trial process. But the role of the criminal justice system is to determine whether or not the defendant committed the offense he or she is charged with, not to restore the victim. We believe that victims *should* be restored and should be informed, heard and respected throughout the proceedings, but this cannot and should not be achieved by eroding the rights of defendants.

- **If passed, the Amendment is sure to wreak havoc on the Bill of Rights, and will inevitably erode the basic constitutional guarantees that are designed to protect all of us - including victims of violence who are criminal defendants - from wrongful convictions.** There is no question that the primary constituents of the National Clearinghouse - battered women who have been victimized and then have become defendants - will be hurt by this Amendment. For example, depriving the trial courts of their historic authority to sequester witnesses - including alleged victims - from the courtroom until they testify would permit victim-witnesses to be influenced because they would hear the testimony and cross-examination of other witnesses. As a result, jurors will be far less likely to receive independent, truthful testimony and the possibility of a fair, reliable and just verdict will be diminished. In cases involving battered women charged with crimes, the abuser and/or his family become the "victims;" if not sequestered, they would have the right to be present and heard at all stages of the process. We know that batterers' families often collude in keeping the violence secret for many reasons (denial, their own experiences of abuse, d/or fear of retribution if they speak out against the abuser). If passed, the Amendment would make it possible for batterers and their families to listen to one another's testimony and to tailor their own testimony so as to avoid effective cross-examination when called as a witness. Additionally, passage of the Amendment would make it much more difficult for judges to limit testimony of "victims" at all stages of the proceeding, even if their testimony is not relevant or is so inflammatory that justice would be undermined.
- **Justice rushed is justice denied - for all, including victims of crimes.** The proposed Amendment says victims have the right to "a final disposition of the proceedings ... free from unreasonable delay." In our work at the National Clearinghouse, we see the tragic results that occur when attorneys rush to trial without proper investigation and preparation. Many battered women are unable to discuss their experiences of abuse candidly until they have established a relationship of trust and confidence with their

defense counsel, a process which can take considerable time. The amendment would allow batterers to force cases to trial before the battered woman's attorney has adequately investigated or prepared for the case, thereby substantially affecting reliable determinations of guilt and creating an intolerable risk of wrongful conviction.

- **Victims *should* be restored and should be informed, heard and respected throughout the proceedings, but this cannot and should not be achieved by eroding the rights of defendants.** All of us who work within the criminal legal system and are committed to justice need to be concerned about due process and the rights of defendants. One of the purposes of the constitution is to protect individuals from government abuses and to preserve liberty, not to "get a conviction at any cost," or to provide victim advocacy. None of us who are committed to justice (including many victims of crime) has an interest in diluting rights intended to prevent wrongful deprivation of liberty and unreliable determinations of guilt. As victim advocates, we need to be in the forefront of advocating for justice - which includes supporting the right of defendants to get fair trials and this Amendment will erode this right.
- **The proposed amendment would radically alter and jeopardize basic constitutional principles that protect us all.** The proposed amendment would mark a radical and unprecedented change in our system of criminal justice and to the foundation of our Bill of Rights, a change which would jeopardize those rights and undermine the truth-seeking function of the criminal justice process. Our system of justice is built on the concept of public, rather than private, prosecutions. The accuser is the government, not the aggrieved individual. The structural integrity of our entire justice system depends on this equation - between the accused and the government, not the accused and the individual victim of crime.

The very purpose of the Bill of Rights is to curtail the power of the government against the rights of the accused. It arms the accused with basic guarantees, such as the presumption of innocence and the need of proof beyond a reasonable doubt. These fundamental guarantees are necessary to ensure that the government's power is not abused; that the innocent do not fall prey to the weight and power of the government; and that only the guilty are convicted.

To elevate victim participation in the criminal process to the level of a federal constitutional amendment would jeopardize the critical balance between accuser and accused, as reflected in the Bill of Rights, and threatens to diminish those rights. None of us, including victims of crime, has an interest in diluting rights intended to prevent wrongful deprivation of liberty, and unreliable determinations of guilt.

- **The criminal justice system does not overprotect; rather it *re-victimizes* battered women defendants.** Much support for the proposed amendment is grounded on the assumption that criminal defendants have too many rights, and that victims have none. While we agree that victims should have greater support, advocacy and respect, it is a fallacy that the criminal justice system overprotects the rights of the defendants, especially the rights of indigent defendants and defendants of color. On a daily basis, we assist countless battered women defendants who have been denied basic due

process. We assist women who did not receive fair trials and were wrongfully convicted because, for example, their attorneys did not investigate, understand, or properly present vital defense evidence. Many of these women were denied funds for expert testimony that would have enabled the jury to hear and understand the basis of their defense. Thus, in our experience, the criminal justice system does not overprotect; rather, it often *re-victimizes* battered women defendants, as can be attested to by the thousands of wrongfully convicted and incarcerated battered women defendants who fill jails and prisons across this country.

Conclusion

In conclusion, the National Clearinghouse for the Defense of Battered Women agrees that crime victims have much to gain when they are kept informed, actively listened to, and respected throughout the adjudication of a criminal case, but passage of a Constitutional Amendment is the wrong way to achieve these goals. Enhanced victim participation in the justice system can be, and largely has been, made by statutory enactments at the state level. At the federal level, Congress has ample authority to enact new laws, as well as to expand and amend the laws it has already passed, to improve the treatment of crime victims without jeopardizing our cherished constitutional protections.

Mr. NADLER. I also ask unanimous consent that all Members may have additional time for—two weeks?

Mr. CHABOT. Yeah. It's 7 days.

Mr. NADLER. For 7 days to insert in the record—

Mr. CHABOT. Without objection, the record will remain open for 7 days should any of the witnesses want to supplement their testimony in writing, you're welcome to do that. We want to thank the panel for testifying this afternoon. I think you've made an important contribution as this issue moves forward.

I also want to particularly thank the, the families of the victims that came here today. We, we're very sorry for the losses that you all suffered but you're playing a very important part in the legislative process in making the decision as to whether we amend the United States Constitution. So your being here does make a difference so thank you very much for being here.

If there's no further business to come before the Committee, we are adjourned.

[Whereupon, at 2:12 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

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

I would like to thank Representative Steve Chabot for holding this hearing and inviting me to testify.

Scales of Justice Imbalanced

The scales of justice are imbalanced. The U.S. Constitution, mainly through amendments, grants those accused of crime many constitutional rights, such as a speedy trial, a jury trial, counsel, the right against self-incrimination, the right to be free from unreasonable searches and seizures, the right to subpoena witnesses, the right to confront witnesses, and the right to due process under the law.

The Constitution, however, guarantees no rights to crime victims. For example, victims have no right to be present, no right to be informed of hearings, no right to be heard at sentencing or at a parole hearing, no right to insist on reasonable conditions of release to protect the victim, no right to restitution, no right to challenge unending delays in the disposition of their case, and no right to be told if they might be in danger from release or escape of their attacker. This lack of rights for crime victims has caused many victims and their families to suffer twice—once at the hands of the criminal, and again at the hands of a justice system that fails to protect them. The Crime Victims' Rights Amendment would bring balance to the judicial system by giving victims of violent crime the rights to be informed, present, and heard at critical stages throughout their ordeal.

Rights in the Amendment

The amendment gives victims of violent crime the right:

- To reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused;
- Not to be excluded from such public proceeding;
- Reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and
- 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 have been at the core of the amendment since 1996, when Senator Feinstein and I first introduced the Crime Victims' Rights Amendment. The amendment is the product of extended discussions with the White House, the Department of Justice, Representative Steve Chabot, Senators Hatch and Biden, law enforcement officials, major victims' rights groups, and such diverse scholars as Professors Larry Tribe and Paul Cassell. The current version (S.J. Res. 35; H.J. Res. 91) is similar to the version in the 106th Congress, but in response to comments about the length of the amendment, the language has been honed and refined. As President Bush recently stated when announcing his support for the language of the amendment, the amendment was "written with care, and strikes a proper balance." <<http://www.whitehouse.gov/news/releases/2002/04/20020416-1.html>>. One of the nation's leading constitutional scholars, Harvard Law Professor Laurence Tribe—who is on the opposite end of the ideological spectrum from President Bush—concurred. Professor Tribe recently praised the Amendment's "greater brevity and clarity" and commented, "That you achieved such conciseness while fully protecting defendants' rights and accommodating the legitimate concerns that have been voiced about prosecutorial power and presidential authority is no mean feat. . . . I think you have

done a splendid job at distilling the prior versions of the Victims' Rights Amendment into a form that would be worthy of a constitutional amendment." Letter of April 15, 2002.

Crime Victims Need Rights in the Federal Constitution

If reform is to be meaningful, it must be in the U.S. Constitution. Since 1982, when the need for a constitutional amendment was first recognized by President Reagan's Task Force on Victims of Crime, 32 states have passed similar measures—by an average popular vote of about 80 percent. These state measures have helped protect crime victims; but they are inadequate for two reasons. First, each amendment is different, and not all states have provided protection to victims; a federal amendment would establish a basic floor of crime victims' rights for all Americans, just as the federal Constitution provides for the accused. Second, statutory and state constitutional provisions are always subservient to the federal constitution; so, in cases of conflict, the defendants' rights—which are already in the U.S. Constitution—will always prevail. The Crime Victims' Rights Amendment would correct this imbalance.

It is important to note that the number one recommendation in a 400 page report by the Department of Justice on victims rights and services was that "the U.S. Constitution should be amended to guarantee fundamental rights for victims of crime." U.S. Department of Justice, Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services for the 21st Century* 9 (1998). The report continued: "A victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdiction to jurisdiction on the state and federal levels." *Id.* at 10. Further: "Granting victims of crime the ability to participate in the justice system is exactly the type of participatory right the Constitution is designed to protect and has been amended to permanently ensure. Such rights include the right to vote on an equal basis and the right to be heard when the government deprives one of life, liberty, or property." *Id.*

Some may say, "I'm all for victims' rights but they don't need to be in the U.S. Constitution. The Constitution is too hard to change." But the history of our country teaches us that constitutional protections are needed to protect the basic rights of the people. Our criminal justice system needs the kind of fundamental reform that can only be accomplished through changes in our fundamental law—the Constitution. Attempts to establish rights by federal or state statute, or even state constitutional amendment, have proven inadequate, after more than twenty years of trying. Then-Attorney General Reno has confirmed the point, noting that, "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." Senate Judiciary Committee Hearing, April 16, 1997, statement of Attorney General Janet Reno, at 41.

On behalf of the Department of Justice, Ray Fisher, then Associate Attorney General, now a judge on the Ninth Circuit Court of Appeals, testified that "the state legislative route to change has proven less than adequate in according victims their rights. Rather than form a minimum baseline of protections, the state provisions have produced a hodgepodge of rights that vary from jurisdiction to jurisdiction. Rights that are guaranteed by the Constitution will receive greater recognition and respect, and will provide a national baseline." Senate Judiciary Committee Hearing, April 28, 1998, statement of Associate Attorney General Ray Fisher, at 9.

A number of legal commentators have reached similar conclusions. Harvard Professor of Law Laurence Tribe has explained that the existing statutes and state amendments "are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened." Senate Judiciary Committee Hearing, March 24, 1999, statement of Laurence Tribe, at 6. He also stated, "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. . . ." *Id.* at 7. Indeed, according to a report by the National Institute of Justice, even in states that gave "strong protection" to victims rights, fewer than 60 percent of the victims were notified of the sentencing hearing and fewer than 40 percent were notified of the pretrial release of the defendant. National Institute of Justice, Research in Brief, "The Rights of Crime Victims—Does Legal Protection Make a Difference?" at 4 (Dec. 1998).

If crime victims are to have meaningful rights, those rights must be in the U.S. Constitution. As President Bush recently stated, "The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing

to do. And . . . the Crime Victims' Rights Amendment is the right way to do it." <http://www.whitehouse.gov/news/releases/2002/04/20020416-1.html>.

Bipartisan

The Crime Victims' Rights Amendment has strong bipartisan support. In addition to the strong support of President Bush, S.J. Res. 33 is cosponsored by 27 Senators, including Republican leadership members such as Senators Lott, Craig, and Hutchison, and 7 Democrats led by Senator Feinstein. Last Congress, a bipartisan group of 39 State Attorneys General signed a letter expressing their "strong and unequivocal support" for an amendment. In January 1997, the National Governors' Association voted in favor of an amendment. In 1996 and 2000, both the Republican and Democratic Party Platforms called for a crime victims' rights amendment. Additionally, the amendment is supported by major national victims' rights groups, including Parents of Murdered Children, the National Organization for Victim Assistance, Mothers Against Drunk Driving (MADD), the Stephanie Roper Foundation, Arizona Voice for Crime Victims, Crime Victims United, and Memory of Victims Everywhere.

The amendment has received strong support around the country. As I mentioned earlier, 32 states have passed similar measures—by an average popular vote of almost 80 percent.

Conclusion

For far too long, the criminal justice system has ignored crime victims who deserve to be treated with fairness, dignity, and respect. Our criminal justice system will never be truly just as long as criminals have rights and victims have none.

PREPARED STATEMENT OF BUD WELCH

I appreciate the opportunity to submit testimony for the record on H.J. Res. 91, "an amendment to the Constitution to protect the rights of crime victims." I urge members to oppose this amendment. I know that many people believe that a constitutional amendment is something that crime victims want. However, I want you to know that as a crime victim, I do not want the Constitution amended. Having gone through the ordeal of witnessing a major criminal case I believe more strongly than ever in the need to protect the constitution and the rights of the accused. I believe that if this constitutional amendment had been in place it would have harmed, rather than helped, the prosecution of the Oklahoma City Bombing case.

I lost my daughter Julie in the Oklahoma City bombing. Julie was an amazing young woman. Of course, I am her father, so I am biased, but I believe other people thought she was a special person, too. At the time of her death, she was working at the Federal Building as a translator for the Social Security Administration. She spoke 5 languages and used her language abilities to help disadvantaged people. On the morning of the bombing, she had gone into the lobby to meet with her clients. Julie always did things like that - making the extra effort to make her clients feel at ease. Ironically, had she stayed in her office instead of meeting the clients in the lobby, she would have survived the bombing.

Julie was my best friend and my heart has been absolutely broken since her death. I was so angry after she was killed that I wanted McVeigh and Nichols killed without a trial. I probably would have done it myself if I could have. I consider that I

was in a state of temporary insanity immediately after her death. It is because I was so crazy with grief that I oppose the Victims' Rights Amendment. It would give victims the right to give input in the criminal case even before a conviction. I do not think crime victims should have a constitutional right to give input into bail decisions and plea agreements. I think crime victims are too emotionally involved in the case and will not make the best decisions about how to handle the case.

In my own experience, the government did an excellent job prosecuting the Oklahoma City Bombing case. Beth Wilkinson, one of the prosecutors, opposes a Victim's Rights Constitutional Amendment because she believes it would have compromised the government's prosecution of the case. The example she gives is that at one point in the case, the government entered into a plea agreement with a witness named Michael Fortier. The government believed that Fortier's testimony was crucial for it to prove its case against McVeigh and Nichols. However, many of the victims opposed this plea agreement. Had this constitutional amendment been in place it would have allowed for every one of the 168 victims to speak about the plea agreement. Ms. Wilkinson feared that if many of the victims had publicly opposed the plea agreement with Fortier then the judge might not have accepted it, or he might have required the government to explain why it was entering into the agreement. Without Fortier's testimony the government could not have proven its case. It would not have helped me or any of the other Oklahoma City Bombing victims if our participation in the case kept the government from doing its job.

Another way that the government's case could have been compromised is the provision granting victims "consideration for the interest of the victim in a trial free from

unreasonable delay". This will require the judge to consider the victim's interests in scheduling trials. If a victim wants a speedy resolution it could force the government to go to trial before it is ready. Likewise, it might force the defendant to go to trial before his or her attorney has had adequate time to prepare.

From a practical point of view, it would have been impossible to accommodate all of the victims in a case like Oklahoma City. The government could not possibly have kept all 168 victims and their representatives informed about every public hearing. Also it is unclear who is entitled to constitutional rights. For example, in the case of Julie's murder would I have been entitled to constitutional rights, would her mother, my ex-wife have been entitled, or would her fiancé have been entitled? This might not be a problem if all family members have the same idea about how the criminal case should be handled, but what if we don't agree? Should all three of us have the opportunity to give our differing opinions in court? If not, who should be excluded?

There is also likely to be conflict when there are multiple victims. Victims do not always agree on the best way a case should be handled. The prosecution would be required to try to weigh the opinions of different victims, leaving those victims who the prosecution does not agree with feeling left out of the process.

I also worry that this amendment will lead to more wrongful convictions. The more emotional the trial becomes, the more likely it is to be unfair. The point of a trial is to find out what happened. It should be about facts, not fiction. Defendants are presumed innocent. By granting "rights" to a "victim" before there has been a conviction, a determination has already been made that the defendant is guilty of a crime.

Another way the Amendment will harm a defendant's right to a fair trial is by granting victims the constitutional right to be "present in all public proceedings" even if their presence would bias the trial. Take, for instance, situations where a victim is also a witness. Usually witnesses in criminal cases are not allowed to be present during the entire trial because of the danger that their testimony will be influenced by hearing the testimony of other witnesses. Under the Amendment, however, the victim/witness could not be excluded from the courtroom. Whether consciously or unconsciously, the victim/witness could easily tailor his or her testimony to fit the testimony of the other witnesses. Needless to say, the reliability and accuracy of this testimony would be questionable. Furthermore, it would be difficult for defense counsel to establish inconsistencies between witnesses. I would not have been happy had I believed that McVeigh and Nichols did not get fair trials or worse, that the government had convicted the wrong people.

The proposed amendment appears to offer a rather limited scope of possible remedies for those victims who believe their rights were violated. What if one of the 168 victims of the Oklahoma City Bombing believed their rights had been violated? What would the remedy be? Could they sue the prosecutor or judge to have the trial interrupted? Can they sue for monetary damages? If they do not have any remedies, what is the value of a constitutional right? If Congress intends to create a constitutional right without a remedy, the amendment is at best symbolic. At worst, however, it undermines constitutional rights and protections, without providing any meaningful improvement in the victim's role in the criminal justice system.

I believe that there are other ways that Congress could help victims without

amending the constitution. Although I feel that the government did an excellent job providing support to the victims of the Oklahoma City Bombing, there are many places in the country that don't have the resources that victims need like counseling and financial assistance. This could help victims without the risk of hurting defendants and compromising our Constitution.

PREPARED STATEMENT OF PROFESSOR DOUGLAS BELOOF

Mr. Chairman and Distinguished Members of the Subcommittee,
I am Professor Douglas Beloof. By way of background, so that the Members may understand my work in this area, let me begin by describing my experience with the issues before the subcommittee. I was a public prosecutor for many years, prosecuting violent crime, sex crime and homicide cases. I managed the victim assistance division of an urban prosecutors office and was involved in the development of domestic violence prosecution units, multi-disciplinary child abuse prosecution teams among other programmatic initiatives. I am presently an associate professor of law, and am a leading expert in crime victim law. I have authored the only casebook for law students in the field of victims in criminal procedure. In addition to my duties as professor I am the Director of the National Crime Victim Law Institute which litigates crime victim law issues around the country and to that end has a legal clinic at the law school run by my employees. I have represented victims in criminal courts in various contexts.

I am writing to respond to a few of the points made by James Orenstein in his Statement opposing H. J. Res. 91.

Mr. Orenstein makes essentially one point of any potential concern in his statement. Overall, he asserts that the passage of the Crime Victims Rights Amendment (H. J. Res. 91) will make it harder to prosecute and convict criminals. I respectfully disagree. In my experience, advancing the cause of victims' rights, has not hampered law enforcement or prosecution, rather it has simply made for a more just system. I have studied victim's rights laws, and their operation, for more than a decade. One conclusion from this study is inescapable: prosecution is not hampered in real cases where victims are provided real participatory rights, Mr. Orenstein's hypothetical concerns to the contrary, notwithstanding. I would note that Mr. Orenstein cites to no case where an effective prosecution could not be conducted because victim rights got in the way.

I note in passing that Mr. Orenstein concedes an important point, that "authorities have historically been far too slow in realizing how important it is to protect the interests of crime victims." While noting "improvements," he concludes "there is more that can and should be done." He supports victims' rights, he just doesn't think they need to be in the Constitution. He prefers that the Congress use "the spending power to give states proper incentives to meet uniform national standards [of victims' rights.]" But then he notes, "Amending the Constitution . . . should be properly be considered only as a last resort."

For twenty years, the strategy of states passing statutes has not worked, so it is hard to see how federal sticks and carrots to do more of the same will matter at all. Surely Mr. Orenstein cannot be serious about believing Congressional statutes will solve the problem. Furthermore, in the area of congressional control of state criminal procedure significant questions exist about the extent to which this is possible under evolving commerce clause restrictions. As a result the only statutes congress may be able to effectively implement is statutes involving the conduct of federal prosecutors. This leaves the vast number of crime victims, who are state crime victims without any meaningful federal victim rights.

Even if one applied Mr Orenstein's "last resort" test, the Crime Victims Rights Amendment easily passes muster. We have two decades of experience with other "resorts" and they have proven less than adequate. Despite the best efforts of the great body of law reform that we have seen enacted, victims are not much closer to achieving enforceable participatory rights, which are routinely complied with, rights even Mr. Orenstein, agrees victims deserve. This fact is now well documented. I refer the subcommittee to the earlier testimony of my colleagues Professor

Laurence Tribe, Professor Paul Cassell (now confirmed by the Senate as a federal judge), and Steve Twist who, in separate testimony, have set forth in some detail the evidence for the failure. The evidence is so convincing that it is no longer a matter of partisan debate. It has led both current and prior Administrations to conclude that only constitutional reform will truly protect the rights of victims.

Let's sift through Mr. Orenstein's analysis and look at his specific concern. Curiously, Mr. Orenstein begins his argument with this critical concession:

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.

Mr. Orenstein then goes on to say that in only "a number of cases" would the amendment "harm law enforcement efforts." The examples he cites are organized crime and prison cases, both of which involve "victims" who are more interested in helping the defense than the government. Mr. Orenstein argues that constitutionalizing the rights, rather than extending them in the first place is what creates the "risk to law enforcement." This is a curious position. Mr. Orenstein's first argument in support of this assertion is based on the view that the language of the amendment does not allow for adequate exceptions. Second, he argues that enforcing the rights may delay and complicate criminal trials.

Is the language adequate to allow for exceptions?

Clearly the answer is yes. In the first place, it is the amendment does not even extend to the circumstances of the organized crime cases he suggests. In Section 2 the rights are established as follows:

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.* (Emphasis added).

In the example cited by Mr. Orenstein, after Salvatore Gravano, decided to testify against John Gotti, the only right implicated would be the right to *reasonable* notice of release. Any notice that would place a life in harm's way would not be *reasonable* under any circumstances. Moreover, none of the proceedings that might ensue after Gravano's cooperation needed to be public because the criteria for non-public proceedings is met where there is "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."¹ Certainly the fact situation offered by Mr. Orenstein to any federal judge would establish such an "overriding interest" and any proceeding would be closed, and not public. As a result no "notice" need to be given and the right not to be excluded would not apply.

But there are even further protections for prosecutors within the language of the amendment itself. The rights in the Amendment are subject to restrictions for public safety, the administration of justice, or compelling necessity. All of these tests would be met in the organized crime case Mr. Orenstein offers up. Mr. Orenstein is correct that the word "Restriction," is not a word as broad as "exception," it is nonetheless more than broad enough to allow the court adopt a rule of reason that would allow "delaying" the benefits of right until it was safe to allow it.

This same analysis applies to the Mr. Orenstein's prison case example. It is clear that public safety concerns, administration of criminal justice concerns, and compelling necessity are all implicated by the prison case hypothetical. In addition, nothing in the amendment would require inmate victims to be transported to court. The amendment does not have a *right to be present* for precisely this reason and the legislative history makes this clear. The amendment is plainly drafted to eliminate any interpretation that the government would have to pay for the transport of inmate-

¹ *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

victims or any other type of victim. Finally, the statutory definition of victim could exclude persons who are in custody for an offense.²

Will enforcement of the rights be disruptive.

The most honest answer is: very, very rarely. So rarely that it is not a serious concern in deciding whether to support the amendment. Enforcement of rights can be easily accomplished with emergency review without delaying or disrupting the prosecution. There is little reason to be concerned about for the speedy trial interests of victims disrupting the proceedings because the States interest in a reasonable time for preparation will always be accommodated under the Amendment.

The proposed amendment is intended to bring fairness to crime victims, without hurting either the rights of the defendant or the government. In my view, the language of the Amendment accomplishes this goal exceedingly well. I join with Professor Tribe and other colleagues in endorsing the amendment.

² See e.g., Art. II; § 2.1 Ariz. Const.

May 10, 2002

Honorable F. James Sensenbrenner, Jr., Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Sensenbrenner:

Yesterday, I was privileged to testify before the Subcommittee on the Constitution in support of HJ Res 91, the Victims' Rights Amendment. The sponsor, Representative Steve Chabot, presided over that hearing. I am requesting that this letter be a matter of record in regard to issues that were raised and to which I was unable to respond and deserve clarification:

1. The Constitutional Amendment for crime victims' rights has little to do with the punishment of offenders and everything to do with how our system of justice treats the innocent, the honest and the helpless citizens of our country who become victims of criminal violence; how the system treats crime victims by honoring their basic human rights during criminal proceedings is as important as how the system punishes offenders; if government fails in this obligation, public trust and confidence is destroyed.
2. The language of HJ Res 91 (Section 2) was carefully crafted so as not to jeopardize law enforcement in certain cases (like the Mafia case cited) so that they are "non-public proceedings"; victims' rights not to be excluded from criminal justice proceedings are limited to "public proceedings."
3. Two decades of the failure of state and federal laws to adequately protect victims' rights are the strongest evidence for the need for this amendment; the framers of the Constitution never intended that those accused and convicted of crime prevail over the innocent, honest and helpless victims of crimes; both deserve the equal protection of the law of all of us ... the Constitution.
4. Sharing equality under the Constitution does not mean that victims will have rights superior to an offender; it means that the victim will have legal standing to assert a right; that the court will consider both, and make a decision relevant to the particular situation; sometimes, that decision will support the victim; in others, it will support the defendant; however, the current lack of legal standing means that the victims cannot even ask for consideration of their right.

5. It is offensive to hear suggestions by opponents that what can and must be done now is increase compensation, victim services and prosecutor funding; of course we should maintain adequate funding in these areas (and do so through offender fines, not tax-payer dollars); But services, compensation and prosecution have nothing to do with how the system treats people! If you are shut out of participating in the most important event of your life and treated like a piece of evidence, would you be cooperative, be respectful and trusting of this justice system?
6. Enforcement of victims' rights may create some cases that test the law through appeals; this is a process that defendants have long utilized, and is accepted, because the Constitution requires that right and protection!; without enforcement power, victims' rights would remain "paper promises"; this enforcement ability would not create action for monetary damages (it isn't about money), but rather about honoring basic human rights; in Maryland, victims have limited power for enforcement by filing a leave to appeal when certain rights are violated; this has not created an undo burden on the courts but has established a precedent and confirmed the courts obligation to follow the law; most importantly, however, a U.S. Constitutional Amendment for crime victims' rights will change the culture of our criminal justice system and support prosecutors and law enforcement; today, it is far easier to ignore and take the easier course by denying victims' rights ... why? because there is no Constitutional requirement.

On behalf of the members and crime victims served by the Stephanie Roper Committee and Foundation, I thank you for considering my additional comments. In the end, each of us must ask ourselves how we would wish to be treated by our justice system if we or a loved one became a victim of criminal violence.

Sincerely,

Roberta Roper
Executive Director

