

duly constituted committee of the Senate.)

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#### INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. MCCONNELL (for himself, Mr. BENNETT, Mr. CONRAD, and Mr. DORGAN):

S. 931. A bill to provide for the protection of the flag of the United States, and for other purposes; to the Committee on the Judiciary.

By Mr. CAMPBELL:

S. 932. A bill to prevent Federal agencies from pursuing policies of unjustifiable non-acquiescence in, and relitigation of, precedent established in the Federal judicial courts; to the Committee on the Judiciary.

By Mr. MURKOWSKI (for himself and Mr. STEVENS):

S. 933. A bill to amend the Internal Revenue Code of 1986 to clarify the tax treatment of Settlement Trusts established pursuant to the Alaska Native Claims Settlement Act; to the Committee on Finance.

By Mr. LEAHY (for himself, Mr. KENNEDY, Mr. SARBANES, Mr. KERRY, Mr. HARKIN, and Mrs. MURRAY):

S. 934. A bill to enhance rights and protections for victims of crime; to the Committee on the Judiciary.

By Mr. LUGAR:

S. 935. A bill to amend the National Agricultural Research, Extension, and Teaching Policy Act of 1977 to authorize research to promote the conversion of biomass into biobased industrial products, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

By Mr. CLELAND (for himself and Mr. MOYNIHAN):

S.J. Res. 24. A joint resolution conferring status as an honorary veteran of the United States Armed Forces on Zachary Fisher; to the Committee on Veterans Affairs.

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#### STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. MCCONNELL (for himself, Mr. BENNETT, Mr. CONRAD, and Mr. DORGAN):

S. 931. A bill to provide for the protection of the flag of the United States, and for other purposes; to the Committee on the Judiciary.

##### FLAG PROTECTION ACT OF 1999

Mr. MCCONNELL. Mr. President, the American flag is our most precious national symbol and the Constitution is our most revered national document. They both represent the ideas, values and traditions that unify us as a people and a nation. Brave men and women have fought and given their lives in defense of the freedom and way of life that they both represent.

Today, I am proud to introduce, along with my colleague from Utah, Senator BENNETT, and my colleagues from North Dakota, Senator CONRAD and Senator DORGAN, the Flag Protection Act of 1999. This legislation would ensure that acts of deliberately confrontational flag-burnings are punished with stiff fines and even jail time. My bill will help prevent desecra-

tion of the flag, and at the same time, protect the Constitution.

Those malcontents who desecrate the flag do so to grab attention for themselves and to inflame the passions of patriotic Americans. And, speech that incites lawlessness or is intended to do so merits no First Amendment protection, as the Supreme Court has made abundantly clear. From Chaplinsky's "fighting words" doctrine in 1942 to Brandenburg's "incitement" test in 1969 to Wisconsin v. Mitchell's "physical assault" standard in 1993, the Supreme Court has never protected speech which causes or intends to cause physical harm to others.

And, that, Mr. President, is the basis for this legislation. My bill outlaws three types of illegal flag desecration. First, anyone who destroys or damages a U.S. flag with a clear intent to incite imminent violence or a breach of the peace may be punished by a fine of up to \$100,000, or up to one year in jail, or both.

Second, anyone who steals a flag that belongs to the United States and destroys or damages that flag may be fined up to \$250,000 or imprisoned up to 2 years, or both.

And third, anyone who steals a flag from U.S. property and destroys or damages that flag may also be fined up to \$250,000 or imprisoned up to 2 years, or both.

Some of my colleagues will argue that we've been down the statutory road before and the Supreme Court has rejected it. However, the Senate's previous statutory effort wasn't pegged to the well-established Supreme Court precedents in this area.

This bill differs from the statutes reviewed by the Supreme Court in the two leading cases: *Texas v. Johnson*, (1989) and *U.S. v. Eichman*, (1990).

In *Johnson*, the defendant violated a Texas law banning the desecration of a venerated object, including the flag, in a way that will offend one or more persons. Johnson took a stolen flag and burned it as part of a political protest staged outside the 1984 Republican convention in Dallas. The state of Texas argued that its interest in enforcing the law centered on preventing breaches of the peace. But the government, according to the Supreme Court, may not "assume every expression of a provocative idea will incite a riot. . . ." Johnson, according to the Court, was prosecuted for the expression of his particular ideas: dissatisfaction with government policies. And it is a bedrock principle underlying the First Amendment, said the Court, that an individual cannot be punished for expressing an idea that offends.

The *Johnson* decision started a national debate on flag-burning and as a result, Congress, in 1989, enacted the Flag Protection Act. In seeking to safeguard the flag as the symbol of our nation, Congress took a different tack from the Texas legislature. The federal statute simply outlawed the mutilation or other desecration of the flag.

The Supreme Court, however, ruled in *Eichman* that the federal statute was unconstitutional. Specifically, the Court found that Congressional intent to protect the national symbol was insufficient to overcome the First Amendment protection for the expressive conduct exhibited by flag-burning.

Notwithstanding these decisions, the Court clearly left the door open for outlawing flag-burning that incites lawlessness: "the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way."

But Mr. President, you don't have to take my word on it. The Congressional Research Service has offered legal opinions concluding that this initiative will withstand constitutional scrutiny:

The judicial precedents establish that the [Flag Protection and Free Speech Act], if enacted, while not reversing *Johnson* and *Eichman*, should survive constitutional attack on First Amendment grounds.

In addition, Bruce Fein, a former official in the Reagan Administration and respected constitutional scholar, concurs:

In holding flag desecration statutes unconstitutional in *Johnson*, the Court cast no doubt on the continuing vitality of *Brandenburg* and *Chaplinsky* as applied to expression through use or abuse of the flag. [The Flag Protection and Free Speech Act] falls well within the protective constitutional umbrella of *Brandenburg* and *Chaplinsky* . . . [and it] also avoids content-based discrimination which is generally frowned on by the First Amendment.

And several other constitutional specialists also agree that this initiative respects the First Amendment and will withstand constitutional challenge. A memo by Robert Peck, and Professors Robert O'Neil and Erwin Chemerinsky concludes that this legislation "conforms to constitutional requirements in both its purpose and its provisions."

And, these same three respected men have looked at the few State court cases which have been decided since we had this debate 3 years ago and have reiterated their original finding of constitutionality. In a recent memo, they explained:

Three years ago . . . [we] expressed our strongly held opinion that [the Flag Protection and Free Speech Act] would be compatible with the U.S. Supreme Court's rulings in *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990). We write now to reiterate that position, finding that nothing that has occurred in the interim casts any doubt on our conclusion.

Mr. President, I ask unanimous consent that the full text of these various memos be printed in the RECORD. And, I note that some of the memos refer to S. 982 in the 105th Congress and some refer to S. 1335 in the 104th Congress. These bills, introduced in different sessions of Congress, are the same, and are both entitled the Flag Protection and Free Speech Act.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

BRUCE FEIN,  
ATTORNEY AT LAW,  
Great Falls, VA, October 21, 1995.  
Senator MITCH MCCONNELL,  
U.S. Senate, Russell Senate Office Building,  
Washington, DC.

DEAR SENATOR: This letter responds for your request for an appraisal of the constitutionality of the proposed "Flag Protection and Free Speech Act of 1995." I believe it easily passes constitutional muster with flying banners or guidons.

The only non-frivolous constitutional question is raised by section 3(a). It criminalizes the destruction or damaging of the flag of the United States with the intent to provoke imminent violence or a breach of the peace in circumstances where the provocation is reasonably likely to succeed. In *Chaplinsky v. New Hampshire* (1942), the Supreme Court upheld the constitutionality of laws that prohibit expression calculated and likely to cause a breach of the peace. Writing for a unanimous Court, Justice Frank Murphy explained that such "fighting" words "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

In *Brandenburg v. Ohio* (1969), the Court concluded that the First Amendment is no bar to the punishment of expression "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

In holding flag desecration statutes unconstitutional in *Texas v. Johnson* (1989), the Court cast no doubt on the continuing vitality of *Brandenburg* and *Chaplinsky* as applied to expression through use or abuse of the flag. See 491 U.S. at 409-410.

Section 3(a) falls well within the protective constitutional umbrella of *Brandenburg* and *Chaplinsky*. It prohibits only expressive uses of the flag that constitute "fighting" words or are otherwise intended to provoke imminent violence and in circumstances where the provocation is reasonably likely to occasion lawlessness. The section is also sufficiently specific in defining "flag of the United States" to avoid the vice of vagueness. The phrase is defined to include any flag in any size and in a form commonly displayed as a flag that would be perceived by the reasonable observer to be a flag of the United States. The definition is intended to prevent circumvention by destruction or damage to virtual flag representations that could be as provocative to an audience as mutilating the genuine article. Any potential chilling effect on free speech caused by inherent definitional vagueness, moreover, is nonexistent because the only type of expression punished by section 3(a) is that intended by the speaker to provoke imminent lawlessness, not a thoughtful response. The First Amendment was not intended to protect appeals to imminent criminality.

Section 3(a) also avoids content-based discrimination which is generally frowned on by the First Amendment. It does not punish based on a particular ideology or viewpoint of the speaker. Rather, it punishes based on calculated provocations of imminent violence through the destruction or damage of the flag of the United States that are reasonably likely to succeed irrespective of the content of the speaker's expression. Such expressive neutrality is not unconstitutional discrimination because the prohibition is intended to safeguard the social interest in order, not to suppress a particular idea. See *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 744-746 (1978).

I would welcome the opportunity to amplify on the constitutionality of section 3(a)

as your bill progresses through the legislative process.

Very truly yours,

BRUCE FEIN.

MEMORANDUM

To: Interested Parties.

From: Robert S. Peck, Esq. Robert M. O'Neil, Professor, University of Virginia Law School and Director, Thomas Jefferson Center for the Protection of Free Expression. Erwin Chemerinsky, Sydney Irmas Professor of Law and Political Science, University of Southern California.

Re: S. 982, the Flag Protection and Free Speech Act of 1997.

Three years ago, we offered our analysis of constitutional issues raised by S. 1335, which has been reintroduced this Congress as S. 982, the Flag Protection and Free Speech Act. We expressed our strongly held opinion that such a statute would be compatible with the First Amendment and not conflict with the U.S. Supreme Court's rulings in *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990). We write now to reiterate that position, finding that nothing that has occurred in the interim casts any doubt on our conclusion.

We observed in our earlier memorandum that the Eichman Court expressly left open a number of options for flag-related laws, including the approach taken by then-S. 1335 (now S. 982). Moreover, we noted that, in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992), the Court reiterated this opening by indicating that flag burning could be punishable under circumstances where dishonoring the flag did not comprise the gist of the crime.

S. 982 targets for punishment incitement to violence, which has never been regarded as a constitutionally protected activity. Some opponents of S. 982 have suggested that several recent state court decisions raise questions about our conclusions. They are mistaken. This memorandum will supplement our earlier analysis by reviewing those cases. Once again, we find that our earlier reasoning remains sound.

The most recent of these state court decisions, and the only one that was not available to us when we wrote our earlier memorandum, is *Wisconsin v. Janssen*, 570 N.W. 2d 746 (Wis. App. 1997), review granted, 215 Wis. 2d 421 (Wis. Nov. 20, 1997). This memorandum will also review the holdings in *Ohio v. Lessin*, 620 N.E. 2d 72 (Ohio 1993), cert. denied, 510 U.S. 1194 (1994), and *Texas v. Jimenez*, 828 S.W. 2d 455 (Tex. App.), cert. denied, 506 U.S. 917 (1992). In preparing our original memorandum in 1995, we found these two cases irrelevant to the constitutionality of S. 1335 (now S. 982). Review of these cases, in fact, strengthens our conclusion about the constitutional viability of S. 982 because these courts recognized the same distinction between the protected expression of disparaging views of the flag, and the punishable conduct outlined in our earlier memorandum.

In *Janssen*, a state statute made punishable as a crime both contemptuous treatment of the American flag, as well as conduct that did not contain expressive elements. A Wisconsin Court of Appeals invalidated the statute that penalized anyone who "intentionally and publicly mutilates, defiles, or casts contempt upon the flag . . ." Such a statute, the court said, improperly punishes contemptuous treatment of the flag and impermissibly discriminates against a viewpoint, the same flaw that the U.S. Supreme Court found in its original flag burning decisions, *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S.

310 (1990). Thus, the court found that the statute's broad language ". . . clearly encompasses acts that the United States Supreme Court has deemed to be protected speech." The Wisconsin court did not specifically examine the non-expressive portion of the statute, which did not implicate First Amendment concerns, finding that courts cannot rewrite statutes to bring them into compliance with constitutional commands. The court's treatment of the statute endorses the view that a statute that eschews punishment for expressing a point of view by mistreatment of the flag and instead focuses solely on punishable non-expressive conduct will pass constitutional muster. The far more precise language of S. 982 is carefully designed to avoid punishing an expressed viewpoint. The Janssen case thus has no bearing on S. 982.

The Ohio Supreme Court's decision in *Lessin* also has no impact on any analysis of S. 982. The Court did not overturn the statute in question, which was a general incitement statute, but instead reversed a conviction because of flawed jury instructions. In fact, the Court indicated that a conviction would be upheld if a jury convicted the accused on the basis of a more "accurate and thorough set of jury instructions." The fatal flaw in the jury instructions was that there was a failure to separate purely expressive conduct from legitimately criminalized violence. Because of that failure, the Court could not say whether the jury convicted the defendant for contempt for the flag or incitement. The Court said that the jury must be informed that "flag burning in the absence of a call to violence is protected speech under the First Amendment." By the same token, the Court's statement clearly indicates that burning an American flag to incite violence is not protected by the First Amendment. S. 982 properly punishes the use of the flag to incite violence, and *Lessin* supports its constitutionality.

Finally, *Jimenez* invalidated a Texas law that a court of appeals in that state found indistinguishable from the federal law invalidated by the U.S. Supreme Court in *Eichman*. Unlike S. 982, the Texas law did not require proof of direct incitement to imminent lawless action. Instead, it still targeted protected expression, though it contained no viewpoint bias. While the *Jimenez* Court speculated that no flag burning law could ever be constitutional, that question was definitively answered otherwise, as we indicated in our first memorandum, by the U.S. Supreme Court in *R.A.V.*, a decision issued several months after *Jimenez*. In *R.A.V.*, the Court said that flag burning that did not publish the message or viewpoint of the flag burner, but concentrated solely on the criminal conduct, would meet constitutional requirements.

Opponents of S. 982 also argue that the fact that the Supreme Court denied certiorari in *Jimenez* and *Lessin* shows that the Court would likely find S. 982 unconstitutional. This argument is flawed for two principal reasons. First, since the underlying state decisions do not address the constitutionality of S. 982, or call into question the premises upon which its validity rests, the Court's denial of certiorari in those cases could not support the claim that the Court would invalidate S. 982 on constitutional grounds.

Second, the Supreme Court each year decides to review only a tiny fraction of the several thousand appeals and petitions that are filed. The Court is not a court of error, but rather takes cases that require a national resolution, and it spoke definitively to the flag burning issue in *Johnson* and *Eichman*. Given that neither *Jimenez* nor *Lessin* raised novel or undecided constitutional issues that required such a national

resolution, there was very little chance that the Court would be interested in hearing these cases. As Justice Stevens stated last year, "it is well settled that our decision to deny a petition for a writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought." *Bethley v. Louisiana*, 117 S. Ct. 2425 (1997) (statement of Stevens, J.); see also *Maryland v. Baltimore Radio Show, Inc.*, 228 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of cert.), *U.S. v. Carver*, 260 U.S. 482 (1923). The value of the Jimenez and Lessin decisions, therefore, is in no way enhanced by the Court's refusal of review.

We conclude, on the basis of all relevant judicial decisions, that S. 982 is constitutional.

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MEMORANDUM

To: Interested Parties.  
From: Robert S. Peck, Esq. Robert M. O'Neil, Professor, University of Virginia Law School Erwin Chemerinsky, Legion Lex Professor of Law, University of Southern California.  
Re: S. 1335, the Flag Protection and Free Speech Act of 1995.  
Date: November 7, 1995.

This memorandum will analyze the constitutional implications of S. 1335, the Flag Protection and Free Speech Act of 1995. As its name implies and the legislation states as its purpose, S. 1335 seeks "to provide the maximum protection against the use of the flag of the United States to promote violence while respecting the liberties that it symbolizes." S. 1335, 104th Cong., 1st Sess. §2(b) (1995). This memorandum concludes that the bill conforms to constitutional requirements in both its purpose and its provisions.

It would be a mistake to conclude that S. 1335 is unconstitutional simply because the U.S. Supreme Court invalidated the Flag Protection Act of 1990 in its decision in *United States v. Eichman*, 496 U.S. 310 (1990). In this decision, as well as its earlier flag-desecration opinion, the Court specifically left open a number of options for flag-related laws, including the approach undertaken by S. 1335. The Court reiterated its stand in its 1992 cross-burning case, indicating that flag burning could be punishable under circumstances where dishonoring the flag did not comprise the gist of the crime. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2544 (1992).

Unlike the 1990 flag law that the Court negated, S. 1335 is not aimed at suppressing non-violent political protest; in fact, it fully acknowledges that constitutionally protected right. In contrast, the Flag Protection Act, the Court said, unconstitutionally attempted to reserve the use of the flag as a symbol for governmentally approved expressive purposes. S. 1335 makes no similar attempt to prohibit the use of the flag to express certain points of view. Instead, it both advances a legitimate anti-violent purpose while remaining solicitous of our tradition of "uninhibited, robust, and wide-open" public debate. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Moreover, the statute is sensitive to, and complies with, several other constitutional considerations, namely: (1) it does not discriminate between expression on the basis of its content or viewpoint, since it avoids the kind of discrimination condemned by the court in *R.A.V.*; (2) it does not provide opponents of controversial political ideas with an excuse to use their own propensity for violence as a means of exercising a veto over otherwise protected speech, since it requires that the defendant have a specific intent to instigate a violent response; and (3) it does not usurp authority vested in the states,

since it does not intrude upon police powers traditionally exercised by the states. Each of these points will be discussed in greater detail below.

One additional point is worth noting. Passing a statute is far preferable to enacting a constitutional amendment that would mark the first time in its more than two centuries as a beacon of freedom that the United States amended the Bill of Rights. Totalitarian regimes fear freedom and enact broad authorizations to pick and choose the freedoms they allow. The broadly worded proposed constitutional amendment follows that blueprint by giving plenary authority to the federal and state governments to pick and choose which exercises of freedom will be tolerated. On the contrary, American democracy has never feared freedom, and no crisis exists that should cause us to reconsider this path. Because the Court has never said that Congress lacks the constitutional power to enact a statute to prevent the flag from becoming a tool of violence, a statute—rather than a constitutional amendment—is an incomparably better choice.

I. S. 1335 PUNISHES VIOLENCE OR INCITEMENT TO VIOLENCE, NOT EXPRESSIVE CONDUCT

The fatal common flaw in the flag-desecration prosecution of Gregory Lee Johnson, whose Supreme Court case started the controversy that has led to the proposed constitutional amendment, and the subsequent enactment by Congress of the Flag Protection Act of 1989 was the focus on punishing contemptuous views concerning the American flag. *Eichman*, 496 U.S. at 317-19; *Texas v. Johnson*, 491 U.S. 397, 405-07 (1989). In both instances, law was employed in an attempt to reserve use of the flag for governmentally approved viewpoints (i.e., patriotic purposes). The Court held such a reservation violated bedrock First Amendment principles in that the government has no power to "ensure that a symbol be used to express only one view of that symbol or its referents." *Id.* at 417.

Johnson had been charged with desecrating a venerated object, rather than any of a number of other criminal charges that he could have been prosecuted for and that would not have raised any constitutional issues. Critical to the Supreme Court's decision in his case, as well as to the Texas courts that also held the conviction unconstitutional, was the fact that "[n]o one was physically injured or threatened with injury." 491 U.S. at 399. The Texas Court of Criminal Appeals noted that "there was no breach of the peace nor does the record reflect that the situation was potentially explosive." *Id.* at 401 (quoting 755 S.W. 2d 92, 96 (1988)). Thus, the primary concern addressed by S. 1335, incitement to violence, was not at issue in the Johnson case. The *Eichman* Court found the congressional statute to be indistinguishable in its intent and purpose from the prosecution reviewed in Johnson and thus also unconstitutional.

In reaching its conclusion about the issue of constitutionality, the Court, however, specifically declared that "[w]e do not suggest that the First Amendment forbids a State to prevent, 'imminent lawless action.'" *Id.* at 410 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). In *Brandenburg*, the Court said that government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. It went on to state that "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our

Constitution has immunized from government control." *Id.* at 448.

S. 1335 merely takes up the Court's invitation to focus a proper law on "imminent lawless action." It specifically punishes "[a]ny person who destroys or damages a flag of the United States with the primary purpose and intent to incite or produce imminent violence or a breach of the peace, and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace." S. 1335, at §3(a). The language precisely mirrors the Court's *Brandenburg* criteria. It does not implicate the Constitution's free-speech protections, because "[t]he First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

More recently, the Court put it this way: "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993). Under the Court's criteria, for example, a symbolic protest that consists of hanging the President in effigy is indeed protected symbolic speech. Although hanging the actual President might convey the same message of protest, a physical assault on the nation's chief executive cannot be justified as constitutionally protected expressive activity and could constitutionally be singled out for specific punishment. S. 1335 makes this necessary distinction as well, protecting the use of the flag to make a political statement, whether pro- or anti-government, while imposing sanctions for its use to incite a violent response.

Courts and prosecutors are quite capable of discerning the difference between protected speech and actionable conduct. Federal law already makes a variety of threats of violence a crime. Congress has, for example, targeted for criminal sanction interference with commerce by threat or violence, 18 U.S.C. §1951, (1994), incitement to riot, 18 U.S.C. §2101, tampering with consumer products, U.S.C. §1365, and interfering with certain federally protected activities. 18 U.S.C. §245. S. 1335 fits well within the rubric that these laws have previously occupied. It cannot be reasonably asserted that S. 1335 attempts to suppress protected expression.

II. S. 1335 DOES NOT UNCONSTITUTIONALLY DISCRIMINATE ON THE BASIS OF CONTENT OR VIEWPOINT

The Supreme Court has repeatedly recognized that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). On this basis, the Court recently invalidated a St. Paul, Minnesota ordinance that purported to punish symbolic expression when it constituted fighting words directed toward people because of their race, color, creed, religion or gender. Fighting words is a category of expression that the Court had previously held to be outside the First Amendment's protections. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2543 (1992), the Court gave this statement greater nuance by stating that categories of speech such as fighting words are not so entirely without constitutional import "that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." Explaining this concept, the Court gave an example involving libel: "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." *Id.*

As a further example, the Court said a city council could not enact an ordinance prohibiting only those legally obscene works that

contain criticism of the city government. *Id.* As yet another example, the Court stated that "burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *Id.* at 2544. The rationale behind this limitation, the Court explained, was that government could not be vested with the power to "drive certain ideas or viewpoints from the marketplace." *Id.* at 2545 (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S.Ct. 501, 508 (1991)).

No such danger exists under S. 1335. Both the patriotic group that makes use of the flag to provoke a violent response from dissenters and the protesters who use the flag to provoke a violent response from loyalists are subject to its provisions. A law that would only punish one or the other perspective would have the kind of constitutional flaw identified by the Court in *R.A.V.* Moreover, the legislation recognizes, as the Supreme Court itself did ("the flag occupies a 'deservedly cherished place in our community,'" 491 U.S. at 419) that the flag has a special status that justifies its special attention. Similarly, the *R.A.V.* Court noted that a law aimed at protecting the President against threats of violence, even though it did not protect other citizens, is constitutional because such threats "have special force when applied to the person of the President." *Id.* at 2546. The rule against content discrimination, the Court explained, is not a rule against content discrimination, the Court explained, is not a rule against under-inclusiveness. For example, "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud is in its view greater there." *Id.* (parenthetical and citation omitted).

The federal law cited earlier that make certain types of threats of violence into crimes are not thought to pose content discrimination problems because they deal with only limited kinds of threats. To give another example, federal law also makes the use of a gun in the course of a crime grounds for special additional punishment. See 18 U.S.C. §924(c). In *Brandenburg*, the Court found that a Ku Klux Klan rally at which guns were brandished and overthrow of the government discussed remained protected free speech. Because guns were used for expressive purposes in *Brandenburg* and found to be beyond the law's reach there does not mean that the law enhancing punishment because a gun is used during the commission of a crime unlawfully infringes on any expressive rights.

The gun law makes the necessary constitutional distinctions that the Court requires, and so does S. 1335's concentration on crimes involving the American flag rather than protests involving the flag. S. 1335 properly identifies in its findings the reason for Congress to take special note of the flag: "it is a unique symbol of national unity." §2(a)(1). It notes that "destruction of the flag of the United States can occur to incite a violent response rather than make a political statement." §2(a)(4). As a result, Congress has developed the necessary legislative facts to justify such a particularized law.

In its only post-*R.A.V.* decision on a hate-crimes statute, the Court upheld a statute that enhanced the punishment of an individual who "intentionally selects" his victim on the basis of race, religion, color, disability, sexual orientation, national origin or ancestry. *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993). A fair reading of the Court's unanimous decision in that case supports the conclusion that the Court would not strike down S. 1335 on *R.A.V.* grounds. In *Mitchell*, the Court concluded that the statute did not

impermissibly punish the defendant's "abstract beliefs," *id.* at 2200 (citing *Dawson v. Delaware*, 122 S. Ct. 1093 (1992)), but instead spotlighted conduct that had the potential to cause a physical harm that the State could properly proscribe. S. 1335 similarly eschews ideological or viewpoint discrimination to focus on the intentional provocation of violence, a harm well within the government's power to punish.

### III. S. 1335 DOES NOT ENCOURAGE A HECKLER'S VETO

First Amendment doctrine does not permit the government to use the excuse of a hostile audience to prevent the expression of political ideas. Thus, the First Amendment will not allow the government to give a heckler some sort of veto against the expression of ideas that he or she finds offensive. As a result, the Court has observed, "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988). Any other approach to free speech "would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Thus, simply because some might be provoked and respond violently to a march that expressed hatred of the residents of a community, that is insufficient justification to overcome the First Amendment's protection of ideas, no matter how noxious they may be deemed. See, e.g., *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 436 U.S. 953 (1978).

The Supreme Court's flag-burning decisions applied this principal. In *Johnson*, the state of Texas attempted to counter the argument against its flag-desecration prosecution by asserting an overriding governmental interest; it claimed that the burning of a flag "is necessarily likely to disturb the peace and that the expression may be prohibited on this basis." 491 U.S. at 408 (footnote omitted). The Court rejected this argument on two grounds: (1) no evidence had been submitted to indicate that there was an actual breach of the peace, nor was evidence adduced that a breach of the peace was one of *Johnson*'s goals; *Id.* at 407, and (2) to hold "that every flag burning necessarily possesses [violent] potential would be to exacerbate our holding in *Brandenburg* [that the expression must be directed to and likely to incite or produce violence to be subject to criminalization]." *Id.* at 409.

S. 1335 avoids the problems that Texas had by requiring that the defendant have "the primary purpose and intent to incite or produce imminent violence or a breach of the peace, . . . in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace." S. 1335, at §(a)(a). If Texas had demonstrated that *Johnson* had intended to breach the peace and was likely to accomplish this goal, *Johnson* could have been convicted of a crime for burning the U.S. flag. Texas, however, never attempted to prove this.

Moreover, S. 1335 does not enable hecklers to veto expression by reacting violently because it requires that the defendant have the specific intent to provoke that response, while at the same time taking away any bias-motivated discretion from law enforcers. The existence of a scienter requirement and a likelihood element is critical to distinguishing between a law that unconstitutionally punishes a viewpoint because some people hate it and one that legitimately punishes incitement to violence.

### IV. S. 1335 IS CONSISTENT WITH FEDERALISM PRINCIPLES

Earlier this year, the Supreme Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. §922(q)(1)(a) unconstitutionally exceeded the power of Congress to regulate Commerce. *United States v. Lopez*, 63 U.S.L.W. 4343(1995). In doing so, the Court reaffirmed the original principle that "the powers delegated by the [] Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* at 4344 (quoting *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961) (James Madison)).

S. 1335 respects these principles by directing its sanctions only at preventing the use of the national flag to incite violence, preventing someone from damaging an American flag belonging to the United States, or damaging, on federal land, an American flag stolen from another person. Each of these acts have a clear federal nexus and remain properly within the jurisdiction of the federal government. Moreover, the bill concedes jurisdiction to the states wherever it may properly be exercised. S. 1335, at §3(a)(d).

### V. CONCLUSION

S. 1335 is carefully crafted to avoid constitutional difficulties by being solicitous of federalism and freedom of speech by focusing on incitement to violence. By doing so, it meets all constitutional requirements.

CONGRESSIONAL RESEARCH SERVICE,  
Washington, DC, October 23, 1995.

To: Honorable Robert F. Bennett. Attention: Lisa Norton.  
From: American Law Division.  
Subject: Constitutionality of Flag Desecration Bill.

This memorandum is in response to your request for a constitutional evaluation of S. 1335, 104th Congress, a bill to provide for the protection of the flag of the United States and free speech and for other purposes.

Briefly, the bill would criminalize the destruction or damage of a United States flag under three circumstances. First, subsection (a) would penalize such conduct when the person engaging in it does so with the primary purpose and intent to incite or produce imminent violence or a breach of the peace and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace.

Second, subsection (b) would punish any person who steals or knowingly converts to his or her use, or to the use of another, a United States flag belonging to the United States and who intentionally destroys or damages that flag. Third, subsection (c) punishes any person who, within any lands reserved for the use of the United States or under the exclusive or concurrent jurisdiction of the United States, steals or knowingly converts to his or her use, or to the use of another, a flag of the United States belonging to another person and who intentionally destroys or damages that flag.

Of course, the bill is intended to protect the flag of the United States in circumstances under which statutory protection may be afforded. The obstacle to a general prohibition of destruction or damage to the flag is the principle enunciated in *United States v. Eichman*, 496 U.S. 310 (1990), and *Texas v. Johnson*, 491 U.S. 397 (1989), that flag desecration, usually through burning, is expressive conduct if committed to "send a message," and that the Court would review limits on this conduct with exacting scrutiny; legislation that proposed to penalize the conduct in order to silence the message or out of disagreement with the message violates the First Amendment speech clause.

Rather clearly, subsections (b) and (c) would present no constitutional difficulties, based on judicial precedents, either facially or as applied. The Court has been plain that one may not exercise expressive conduct or symbolic speech with or upon the property of others or by trespass upon the property of another. *Eichman*, *supra*, 496 U.S., 316 n. 5; *Johnson*, *supra*, 412 n. 8; *Spence v. Washington*, 418 U.S. 405, 408-409 (1974). See also *R. A. V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (cross burning on another's property). The subsections are directed precisely to the theft or conversion of a flag belonging to someone else, the government or a private party, and the destruction of or damage to that flag.

Almost as evident from the Supreme Court's precedents, subsection (a) is quite likely to pass constitutional muster. The provision's language is drawn from the "fighting words" doctrine of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). That case defined a variety of expression that was unprotected by the First Amendment, among the categories being speech that inflicts injury or tends to incite immediate violence. *Id.*, 572. While the Court over the years has modified the other categories listed in *Chaplinsky*, it has not departed from the holding that the "fighting words" exception continues to exist. It has, of course, laid down some governing principles, which are reflected in the subsection's language.

Thus, the Court has applied to "fighting words" the principle of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), under which speech advocating unlawful action may be punished only if it directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Id.*, 447. This development is spelled out in *Cohen v. California*, 403 U.S. 15, 20, 22-23 (1971). See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Hess v. Indiana*, 414 U.S. 105 (1973).

A second principle, enunciated in an opinion demonstrating the continuing vitality of the "fighting words" doctrine, is that it is impermissible to punish only those "fighting words" of which government disapproves. Government may not distinguish between classes of "fighting words" on an ideological basis. *R. A. V. v. City of St. Paul*, 112 S.Ct. 2538 (1992).

Subsection (a) is drafted in a manner to reflect both these principles. It requires not only that the conduct be reasonably likely to produce imminent violence or breach of the peace, but that the person intend to bring about imminent violence or breach of the peace. Further, nothing in the subsection draws a distinction between approved or disapproved expression that is communicated by the action committed with or on the flag.

In conclusion, the judicial precedents establish that the bill, if enacted, would survive constitutional attack. Subsections (b) and (c) are more securely grounded in constitutional law, but subsection (a) is only a little less anchored in decisional law.

Because of time constraints, this memorandum is necessarily brief. If, however, you desire a more generous treatment, please do not hesitate to get in touch with us.

JOHNNY H. KILLIAN,  
Senior Specialist,  
American Constitutional Law.

Mr. MCCONNELL. I urge the Senate to pass this legislation and protect our Nation's most cherished symbol and our most revered document.

Mr. President, I ask unanimous consent that the bill in its entirety be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 931

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Flag Protection Act of 1999".

**SEC. 2. FINDINGS AND PURPOSE.**

(a) FINDINGS.—Congress finds that—

(1) the flag of the United States is a unique symbol of national unity and represents the values of liberty, justice, and equality that make this Nation an example of freedom unmatched throughout the world;

(2) the Bill of Rights is a guarantee of those freedoms and should not be amended in a manner that could be interpreted to restrict freedom, a course that is regularly resorted to by authoritarian governments which fear freedom and not by free and democratic nations;

(3) abuse of the flag of the United States causes more than pain and distress to the overwhelming majority of the American people and may amount to fighting words or a direct threat to the physical and emotional well-being of individuals at whom the threat is targeted; and

(4) destruction of the flag of the United States can be intended to incite a violent response rather than make a political statement and such conduct is outside the protections afforded by the first amendment to the Constitution.

(b) PURPOSE.—The purpose of this Act is to provide the maximum protection against the use of the flag of the United States to promote violence while respecting the liberties that it symbolizes.

**SEC. 3. PROTECTION OF THE FLAG OF THE UNITED STATES AGAINST USE FOR PROMOTING VIOLENCE.**

(a) IN GENERAL.—Section 700 of title 18, United States Code, is amended to read as follows:

**“§ 700. Incitement; damage or destruction of property involving the flag of the United States**

“(a) DEFINITION OF FLAG OF THE UNITED STATES.—In this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, in any size, in a form that is commonly displayed as a flag and that would be taken to be a flag by the reasonable observer.

“(b) ACTIONS PROMOTING VIOLENCE.—Any person who destroys or damages a flag of the United States with the primary purpose and intent to incite or produce imminent violence or a breach of the peace, and under circumstances in which the person knows that it is reasonably likely to produce imminent violence or a breach of the peace, shall be fined not more than \$100,000, imprisoned not more than 1 year, or both.

“(c) DAMAGING A FLAG BELONGING TO THE UNITED STATES.—Any person who steals or knowingly converts to his or her use, or to the use of another, a flag of the United States belonging to the United States, and who intentionally destroys or damages that flag, shall be fined not more than \$250,000 imprisoned not more than 2 years, or both.

“(d) DAMAGING A FLAG OF ANOTHER ON FEDERAL LAND.—Any person who, within any lands reserved for the use of the United States, or under the exclusive or concurrent jurisdiction of the United States, steals or knowingly converts to his or her use, or to the use of another, a flag of the United States belonging to another person, and who intentionally destroys or damages that flag, shall be fined not more than \$250,000, imprisoned not more than 2 years, or both.

“(e) CONSTRUCTION.—Nothing in this section shall be construed to indicate an intent

on the part of Congress to deprive any State, territory, or possession of the United States, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.”.

(b) CLERICAL AMENDMENT.—The analysis for chapter 33 of title 18, United States Code, is amended by striking the item relating to section 700 and inserting the following:

“700. Incitement; damage or destruction of property involving the flag of the United States.”.

Mr. MCCONNELL. Mr. President, I yield the floor.

Mr. CONRAD addressed the Chair.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. CONRAD. Mr. President, I rise today as an original cosponsor of the bipartisan Flag Protection Act of 1999. I salute its author, Senator MCCONNELL of Kentucky.

I believe every Member of this body abhors acts of desecration against the flag. Burning a flag, or otherwise discrediting this symbol of freedom, is repugnant to me, to my colleagues, and to the vast majority of American citizens. I believe we should protect the flag from the acts of those few who would dishonor it.

But the question is, How do we do it? Mr. President, we have previously passed a statute to protect the flag but that was overturned by the U.S. Supreme Court as unconstitutional.

Some now say the only alternative is to pass a constitutional amendment. After considerable study and review, I have concluded that is not the case. There is an alternative, and the alternative is the legislation that we offer today, the Flag Protection Act of 1999. It is a statute. It is not a constitutional amendment. It will protect the flag, and I believe it will be upheld as constitutional.

We have a clear responsibility to exhaust all other options before we take the very serious step of amending the Constitution of the United States. Every one of us in the Senate pledges on our first day in this Chamber to uphold, protect, and defend the Constitution of the United States. Amending that time-honored, time-tested document is among the most serious of our duties—a step we have taken only rarely in the long history of our country.

The Constitution is the foundation of our Government. I believe it is one of the greatest documents in human history. Its freedoms are the source of our strength as a nation—and a model of freedom to the world.

Mr. President, the Founding Fathers wisely made it very difficult to amend the Constitution. They knew that a process that would allow for easy amendment of the Constitution could destabilize our country, that it could undermine the stability we have enjoyed through our long history. The Constitution has been amended only 27 times in 200 years, although many more attempts have been made.

Those 27 amendments, beginning with the Bill of Rights, were the result

of fundamental debates about the nature of our society, and who we would be as a nation. Freedom of religion, freedom of the press, freedom to assemble peacefully, the right to a trial by jury, the right to vote—these amendments address rights so basic we almost take them for granted today. Yet, some of them at the time of adoption provoked serious debate and division, division so deep they threatened to split the country.

Mr. President, I hesitate to launch this Nation on an undertaking of such magnitude and divisiveness. When there is an alternative—and there is an alternative—I believe we can protect the flag without amending the Constitution. I believe we can propose and pass a statute that will protect the flag against burning and other acts of desecration, and I believe that statute will be upheld as constitutional.

That is why today I am joining this bipartisan effort with my colleagues, Senator MCCONNELL of Kentucky, Senator DORGAN of North Dakota, and Senator BENNETT of Utah, to introduce the Flag Protection Act of 1999. This statute provides for maximum protection for the flag while respecting the liberties it symbolizes. We have been assured by experts at the Congressional Research Service and by constitutional scholars that it will be upheld by the courts.

When it comes to amending the Constitution, I am conservative. I feel strongly that the flag can and should be protected. But before we take the step of amending the Constitution of the United States, we should exhaust every other remedy. Today we have introduced a statutory remedy. I ask my colleagues to join me in approving this law to protect the flag and the Constitution.

Mr. President, I ask unanimous consent to have printed in the RECORD a letter from the AMVETS of North Dakota. The AMVETS, in a letter to me, dated September 29, 1998, have endorsed this approach. I also ask unanimous consent to have printed in the RECORD the specific provision that they adopted at their convention supporting the approach that we are taking today.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

AMVETS,  
DEPARTMENT OF NORTH DAKOTA,  
Fargo, ND, September 29, 1998

Hon. KENT CONRAD,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR CONRAD: I am sure you are hearing both sides of the issue concerning SJR-40. During our May 1998 Department convention in West Fargo, our membership passed an amended resolution to petition congress to work towards legislation to prevent U.S. Flag Desecration. Enclosed is a copy of the passed resolution S98-14. During the convention you addressed our membership and stated you felt this was a viable and defensible alternative to a proposed Constitutional amendment. At our State Executive Committee meeting Wahpeton, ND, on September 26, 1998, the SEC voted to continue pursuing this goal.

Thank you for your time and consideration of this matter.

RANDALL A. LEKANDER,  
Department Commander.

RESOLUTION S. 98-14  
U.S. FLAG DESECRATION

Whereas although the right of free expression is part of the foundation of the Constitution of the United States, very carefully drawn limits on expression, in specific instances, have long been recognized as legitimate means of maintaining public safety and defining other societal standards, and

Whereas certain actions, although arguably related to a person's free expression, nevertheless raise issues concerning public decency, public space, and the rights of other citizens, and

Whereas the United States flag is a most honorable and worthy banner of a nation which is thankful for its strengths and committed to curing its faults, a nation that remains the destination of millions of immigrants attracted by the universal power of the American ideal, and

Whereas the law, as interpreted by the United States Supreme Court, no longer accords the Stars and Stripes the reverence, respect and dignity befitting a banner of that most noble experiment of a nation-state, and

Whereas it is only fitting the Americans everywhere should lend their voices to a forceful call for restoration of the Stars and Stripes to a proper station under law and decency; now therefore, be it

*Resolved*, That AMVETS petition Congress to work towards legislation which specifies that Congress shall have the power to prohibit physical desecration of the United States flag.

Mr. CONRAD. Mr. President, I would also like to read briefly from a letter I received from a constituent in North Dakota. He wrote to me the following:

As a third generation military officer, I cannot support an amendment to the Constitution with respect to the flag. I have many compelling reasons to ask that you not support this amendment. My sworn duty as an officer in the United States Air Force to uphold and defend the Constitution of the United States lies at the heart of my opposition. This amendment will weaken the Constitution and open the door for more frivolous amendments in the future. I cannot stand by and let this happen without raising my voice.

He went on to say:

Of the gallant Americans who fought and died in the service of our country within the last 200 years, I tell you this: They did not die defending the flag. They died defending our freedom and the ideals upon which our country was founded. Don't cheapen their sacrifice by supporting this misguided amendment.

Mr. President, a third letter that I received was from a man also from North Dakota. He wrote me this:

On my mother's side, my great-grandfather came to the United States from Bohemia and fought in the Union Army. On my father's side, my great-grandmother lost her two oldest sons, Iowa soldiers, at the Siege of Vicksburg. And members of my family have represented the United States in every war since. I am a Korean War combat veteran.

He went on to say:

The flag is strong enough to take care of itself. But if these flag protectors are sincere about its protection, then strong legislation is the safest way to go.

Mr. President, that is what we are offering today on a bipartisan basis—four

Senators; two Democrats, two Republicans—offering the Flag Protection Act of 1999. We believe this is the appropriate way to protect the flag.

Mr. President, I yield the floor.

Mr. DORGAN addressed the Chair.

The PRESIDING OFFICER (Mr. BURNS). The Senator from North Dakota.

Mr. DORGAN. Mr. President, I rise today as a cosponsor of the legislation that my colleagues, Senator MCCONNELL, Senator BENNETT, Senator CONRAD and I have jointly introduced—a piece of legislation called the Flag Protection Act.

This, at its roots, is about the Constitution. Some will say the Constitution is an easy issue.

A decade ago, the U.S. Supreme Court struck down a Texas statute, a statute which provided criminal sanctions for the burning of an American flag. The Supreme Court said, no, the desecration of a flag is an expression of speech. That fellow in Texas had a constitutional right to do that. That was a 5-4 decision of the Supreme Court. I disagreed with that decision. I think the Supreme Court was wrong. But immediately—and for 10 years—there was an effort to amend the Constitution to overturn the Supreme Court's decision and allow a statute to be deemed constitutional that would prohibit the desecration of the American flag.

I have voted on two occasions against a constitutional amendment to prohibit flag desecration. Those who say it is an easy vote say it is just an amendment amending the Constitution. Let's just do it and protect the flag.

It might be easy for them; it is not easy for me.

Then there are those who say we should never amend the Constitution, that you have a right to desecrate the flag. They too say this is an easy choice. Let's just make that choice.

This decision has been just as difficult. I have agonized about this issue.

There are many, many Americans, over many, many years, who have shed their blood to nurture this country's liberties and freedoms. The burning of an American flag is a disgusting act, one that I personally do not think is protected under the first amendment of the Constitution.

The question is, however, what do you do to remedy this situation? Do you amend the Constitution, or is there a way to craft a statute saying flag desecration is wrong in a manner that the Supreme Court would say, yes, this statute will meet the test?

I believe there is. I have believed all along there is. I pledged to some folks back in my home State that I would review this, reanalyze it again. I have done that over and over. I have read everything that has been written by virtually all of the scholars on both sides of this issue. I conclude, once again, that our country is better served by reserving our attempts to alter the U.S. Constitution for those things that are extraordinary occasions, as one of the

authors of the Constitution, James Madison discussed. Then the Constitution should be amended only in circumstances when it is the only remedy.

Some 12 or 13 years ago, I went to Philadelphia in the summertime for the 200th birthday of the writing of the U.S. Constitution. I have told my colleagues this before, but I want to say it again, because it describes how I feel for the Constitution.

Two hundred years previously, 55 white men marched into the assembly room in Independence Hall, a room that is substantially smaller than this Chamber. Those 55 men wrote a Constitution for this country. Walking down the cobbled streets of Philadelphia, someone asked Benjamin Franklin, one of the 55, what they were doing. He said, we are writing a Constitution, if you can keep it.

Two hundred years after the writing of that Constitution, 55 of us were privileged to go back into the very same room. The chair where George Washington presided still sits in the front of the room. Mason sat over here, Madison, Ben Franklin. I was one of the 55 chosen, men, women, minorities. I come from a town of 300 people, a high school class of 9. I got goose bumps sitting in this room where they wrote the Constitution of the United States. I have never forgotten that day, thinking that I am in the room where the historic figures of our country created the framework for governance in our country.

That day is always etched in my memory when we debate the questions of whether we should amend the Constitution of the United States.

There have been 11,000 proposals to change America's Constitution. Outside of the first 10, the Bill of Rights, only 17 amendments have changed our Constitution in the more than two centuries of history in this country.

Now we have a proposal during these past 10 years to change the Constitution. Is it a serious proposal about a serious issue? Yes, it is. Our flag is important. So is our Constitution. It seems to me, as I said, our country is better served if there is a way to address the issue of flag desecration by passing a statute that will meet the test of the Supreme Court, to do that rather than alter our U.S. Constitution.

The piece of legislation we have introduced today has been reviewed by a number of constitutional experts, the Congressional Research Service and elsewhere, and they indicate they feel it does meet the test. It would be upheld by the Supreme Court.

To be able to enact a statute of this type and avoid altering the Constitution makes eminent good sense to me. I think future generations and our Founding Fathers would agree that it is worth the effort for us to find a way to protect our flag without having to wonder about the unintended consequences of altering this significant area of our Constitution that guaran-

tees and preserves important rights for the citizens of our country.

Mr. President, I know that many who have invested a great amount of time and effort to enact a constitutional amendment will be sorely disappointed by my decision and, perhaps, Senator CONRAD's decision and others, to not support a constitutional amendment on flag desecration. I know they are impatient to correct a decision by the Supreme Court that they and I believe was wrong.

I have wrestled with this issue for so long. I wish I were not, with my decision, disappointing so many, including some of my friends who passionately believe we must amend the Constitution to protect the flag. But as I sift through all of the material and think about the history of our country and think about this constitutional framework of our government and all of the appetite that exists here and elsewhere to change this Constitution for 100 different reasons and 100 different ways, I think our country is better served by patience and by a thoughtful effort to correct a problem short of altering our country's Constitution.

For that reason, I join my colleagues today, two Republicans and two Democrats, to offer a piece of legislation that would serve, instead of altering our Constitution, as an effort to protect our American flag.

Mr. President, I ask that my written statement be printed in the RECORD.

• Mr. DORGAN. Mr. President, 10 years ago the U.S. Supreme Court in a 5-4 decision struck down a Texas flag protection statute on the grounds that burning an American flag was "speech" and therefore protected under the First Amendment of the Constitution. I disagreed with the Court's decision then and I still do. I don't believe that the act of desecrating a flag is an act of speech. I believe that our flag, as our national symbol, can and should be protected by law.

In the intervening years since the Supreme Court decision I have twice supported federal legislation that would make flag desecration illegal, and on two occasions I voted against amendments to the Constitution to do the same. I voted that way because, while I believe that flag desecration is despicable conduct that should be prohibited by law, I also believe that amending our Constitution is a step that should be taken only rarely and then only as a last resort.

In the past year I have once again reviewed in detail nearly all of the legal opinions and written materials published by Constitutional scholars and courts on all sides of this issue. I pledged to the supporters of the Constitutional amendment that I would re-evaluate whether a Constitutional amendment is necessary to resolve this issue.

From my review I have concluded that there remains a way to protect our flag without having to alter the Constitution of the United States. I am

joining with Senators BENNETT, MCCONNELL and CONRAD today to introduce legislation that I believe accomplishes that goal. The bill we introduce today protects the flag but does so without altering the Constitution and a number of respected Constitutional scholars tell us they believe this type of statute will be upheld by the U.S. Supreme Court. This statute protects the flag by criminalizing flag desecration when the purpose is to, and the person doing it knows, it is likely to lead to violence.

Supporters of a Constitutional amendment will be disappointed I know by my decision to support this statutory remedy to protect the flag rather than support an amendment to the U.S. Constitution. I know they are impatient to correct a decision by the Supreme Court that they and I believe was wrong. I have wrestled with this issue for so long and I wish I were not, with my decision, disappointing those, including many of my friends, who passionately believe that we must amend the Constitution to protect the flag.

But in the end I know that our country will be better served reserving our attempts to alter the Constitution only for those things that are "extraordinary occasions" as outlined by President James Madison, one of the authors of the Constitution, and only in circumstances when it is the only remedy for something that must be done.

More than 11,000 Constitutional amendments have been proposed since our Constitution was ratified. However, since the ratification of the Bill of Rights in 1791 only 17 amendments have been enacted. These 17 include three reconstruction era amendments that abolished slavery, and gave African-Americans the right to vote. The amendments included giving women the right to vote, limiting Presidents to two terms, and establishing an order of succession in case of a President's death or departure from office. The last time Congress considered and passed a new Constitutional amendment was when it changed the voting age to 18, more than a quarter of a century ago. All of these matters were of such scope they required a Constitutional amendment to be accomplished.

But protecting the American flag can be accomplished without amending the Constitution, and that is a critically important point.

Constitutional scholars, including those at the Congressional Research Service, the research arm of Congress, and Duke University's Professor William Alstyne, have concluded that this statute passes Constitutional muster, because it recognizes that the same standard that already applies to other forms of speech applies to burning the flag as well. This is the same standard which makes it illegal to falsely cry "fire" in a crowded theater. Reckless speech that is likely to cause violence is not protected under the "fighting words" standard, long recognized by the Supreme Court of the United States.

I believe that future generations—and our founding fathers—would agree that it's worth the effort for us to find a way to protect our flag without having to wonder about the unintended consequences of altering our Constitution.●

Mr. President, I yield the floor.

By Mr. CAMPBELL:

S. 932. A bill to prevent Federal agencies from pursuing policies of unjustifiable nonacquiescence in, and relitigation of, precedent established in the Federal judicial courts; to the Committee on the Judiciary.

FEDERAL BUREAUCRACY ACCOUNTABILITY ACT OF 1999

Mr. CAMPBELL. Mr. President, today I introduce the Federal Bureaucracy Accountability Act of 1999.

This legislation is clearly needed because when federal bureaucracies are faced with a decision between enforcing their rules and regulations or complying with our nation's laws they all to often choose to ignore the law and follow their rules. These bureaucracies can get away with ignoring laws passed by Congress, signed into law and then interpreted by our federal courts because of a technical, legal loophole. Bureaucracies ought not ignore our laws and courts simply because they may find it easier and more convenient to stick with their familiar rules and regulations rather than changing their ways and complying with the law. And when these bureaucracies choose to ignore the law it is almost always average Americans who end up suffering.

There are thousands of stories of Americans who have been wrongfully denied their rightful benefits because some federal agency refuses to follow the legal decisions reached by our federal courts. In these situations ordinary American citizens must comply with the law, but federal agencies may simply choose to ignore that same law whenever they may so choose. This is not equal justice under the law.

Our Founding Fathers envisioned a justice system in which everyone is required to obey the laws as they are interpreted and enforced through our courts. When there are disagreements appeals can be made to higher courts. But otherwise, when the courts have spoken, we all must obey the law or face the consequences, as it was intended.

Currently, if a federal court in one jurisdiction rules against a federal agency's rule, that same federal agency can continue to follow that same rule in other jurisdictions, even if it is to the detriment of the American citizens they are purportedly serving. This needlessly leads to years of costly legal wrangling while also compounding the pain and suffering American citizens endure as they try to secure the same services other Americans are already receiving in neighboring jurisdictions.

Some of the more egregious actions are seen in the Social Security Administration, the federal agencies running Medicare and Medicaid, the Bureau of

Land Management, and the Internal Revenue Service.

In legal terms, this bill would prevent federal agencies from pursuing policies of unjustifiable nonacquiescence with, or the relitigation of, judicial precedents as established through the federal courts.

This legislation is a revised version of S. 1166, a bill I introduced in the 105th Congress. The bill I am introducing today contains perfecting language reflecting the valuable input I received during a June 15, 1998, Senate Judiciary Subcommittee on Administrative Oversight and the Courts hearing on S. 1166.

During that hearing, a fellow Coloradan, Lynn Conforti, testified about how her claims for disability benefits were repeatedly denied by the Social Security Administration, not on the basis of existing law, but on the basis of bureaucratic policies. Her testimony highlighted how her physical suffering was compounded by severe financial troubles and mental anguish as a result of her 32-month struggle with the Social Security Administration. This was her return for 27 years of contributing to Social Security. Ms. Conforti hopes to be able to return to work in the future, but she still requires access to the resources she needs to continue her rehabilitation efforts. Finally, Ms. Conforti was awarded her disability benefits by an Administrative Law Judge in an on the record determination.

Ms. Conforti's story is just one sad example of how agencies too often fail to help the very people whose need is real. Thousands of other Americans go through similar experiences each year. Something clearly must be done to ensure that federal agencies comply with federal law.

There are important organizations that also make it clear that something needs to be done. The Judicial Conference of the United States, chaired by Supreme Court Chief Justice William Rehnquist, serves as the Federal Judiciary's governing body. The Judicial Conference has identified federal agency nonacquiescence as a policy that undermines legal certainty and the fair application of the law. The American Bar Association has also strongly recommended that Congress pass legislation to stop federal agencies from disregarding federal judicial decisions. In addition, organizations such as the National Multiple Sclerosis Society and the Diabetes Research Institute also came out in support of last year's bill, S. 1166.

It's time we made sure federal agencies comply with the law. I urge my colleagues to support passage of this legislation.

Mr. President, I ask unanimous consent that a copy of the Federal Bureaucracy Accountability Act of 1999 be printed in the RECORD following my comments.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 932

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. PROHIBITING INTRACIRCUIT AGENCY NON-ACQUIESCENCE IN APPELLATE PRECEDENT.**

(a) **SHORT TITLE.**—This Act may be cited as the "Federal Bureaucracy Accountability Act of 1999".

(b) **IN GENERAL.**—Chapter 7 of title 5, United States Code, is amended by adding at the end the following:

**§ 707. Adherence to court of appeals precedent**

"(a) Except as provided in subsection (b), an agency (as defined in section 701(b)(1) of this title) shall in civil cases, in administering a statute, rule, regulation, program, or policy within a judicial circuit, adhere to the existing precedent respecting the interpretation and application of such statute, rule, regulation, program, or policy, as established by the decisions of the United States court of appeals for that circuit. All officers and employees of an agency, including administrative law judges, shall adhere to such precedent.

"(b) An agency is not precluded under subsection (a) from taking a position, either in administrative or litigation, that is at variance with precedent established by a United States court of appeals if—

"(I) it is not certain whether the administration of the statute, rule, regulation, program, or policy will be subject to review exclusively by the court of appeals that established that precedent or a court of appeals for another circuit;

"(2) the Government did not seek further review of the case in which that precedent was first established, in that court of appeals or the United States Supreme Court, because—

"(A) neither the United States nor any agency or officer thereof was a party to the case; or

"(B) the decision establishing that precedent was otherwise substantially favorable to the Government; or

"(3) it is reasonable to question the continued validity of that precedent in light of a subsequent decision of that court of appeals or the United States Supreme Court, a subsequent change in any pertinent statute or regulation, or any other subsequent change in the public policy or circumstances on which that precedent was based."

(c) **CLERICAL AMENDMENT.**—The table of sections for chapter 7 of title 5, United States Code, is amended by adding at the end the following new item:

"707. Adherence to court of appeals precedent."

By Mr. MURKOWSKI (for himself and Mr. STEVENS):

S. 933. A bill to amend the Internal Revenue Code of 1986 to clarify the tax treatment of Settlement Trusts established pursuant to the Alaska Native Claims Settlement Act; to the Committee on Finance.

**ALASKA NATIVE SETTLEMENT TRUST TAX LEGISLATION**

Mr. MURKOWSKI. Mr. President, I am pleased to be joined by Senator STEVENS in introducing legislation that will allow Alaska Native Corporations to establish settlement trusts designed to promote the health, education, welfare and cultural heritage of Alaska Natives.

Mr. President, in 1987, the Alaska Native Claims Settlement Act was

amended to permit Native Corporations to establish settlement trusts to hold lands and investments for the benefit of current and future generations of Alaska Natives. Assets in these trusts are insulated from business exposure and risks and can be invested to provide distributions of income to Native shareholders and their future generations.

Although the 1987 amendments were designed to facilitate the development of settlement trusts, many Native Corporations have been stymied in their efforts because the tax law, in many cases, imposes onerous penalties on the Native shareholders when the trusts are created. For example, when assets are transferred to the trust, they are treated as a de facto distribution of assets directly to the shareholders themselves to the extent of the corporation's earnings and profits.

Even though the current shareholders receive no actual income at the time of the transfer into the trust, they are liable for income taxes as if they received an actual distribution. This not only requires the shareholder to come up with money to pay taxes on a distribution he or she never received, but also can result in a situation where a trust fund beneficiary is required to prepay taxes on his share of the entire trust corpus, which may be substantially more in taxes than the amount of cash benefits he or she will actually receive in the future.

Our legislation remedies this inequity by requiring that a beneficiary of a settlement trust will be subject to taxation with respect to assets conveyed to the trust only when the actual distribution is received by the beneficiary. Moreover, the legislation provides that distributions from the trust will be taxable as ordinary income even if the distribution represents a return of capital. In addition, to ensure that these trusts do not accumulate excessive levels of the corporation's earnings, the legislation requires that the trust must annually distribute at least 55 percent of their taxable income.

Mr. President, Alaska Native Corporations are unique entities. Unlike Native American tribes in the lower 48, Alaska Native corporations are subject to income tax. But unlike ordinary C corporations, Alaska Native corporations have diverse purposes, one of which is to preserve and protect the heritage of the Native shareholders. The settlement trust concept is well suited to the special needs of Alaska's Natives. As the Conference Committee Report to ANSCA amendments of 1987 stated:

Trust distributions may be used to fight poverty, provide food, shelter and clothing and serve comparable economic welfare purposes. Additionally, cash distributions of trust income may be made on an across-the-board basis to the beneficiary population as part of the economic welfare function.

Settlement trusts will ensure that for generations to come, Native Alas-

kans will have a steady stream of income on which to continue building an economic base. The current tax rules discourage the creation of such trusts with the result that Native corporations are under extreme pressure to distribute all current earnings rather than prudently reinvesting for the future.

Mr. President, it is my hope that we will be able to see this legislation adopted into law this year. For the long-term benefit of Alaska Natives, this tax law change is fundamentally necessary.

Mr. President, I ask unanimous consent that the text of the legislation be included in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 933

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. TAX TREATMENT OF ALASKA NATIVE SETTLEMENT TRUSTS.**

(a) **TAX EXEMPTION.**—Section 501(c) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

“(28) A trust which—

“(A) constitutes a Settlement Trust under section 39 of the Alaska Native Claims Settlement Act (43 U.S.C. 1629e), and

“(B) with respect to which an election under subsection (p)(2) is in effect.”

(b) **SPECIAL RULES RELATING TO TAXATION OF ALASKA NATIVE SETTLEMENT TRUSTS.**—Section 501 of the Internal Revenue Code of 1986 is amended by redesignating subsection (p) as subsection (q) and by inserting after subsection (o) the following new subsection:

“(p) **SPECIAL RULES FOR TAXATION OF ALASKA NATIVE SETTLEMENT TRUSTS.**—

“(1) **IN GENERAL.**—For purposes of this title, the following rules shall apply in the case of a Settlement Trust:

“(A) **ELECTING TRUST.**—If an election under paragraph (2) is in effect for any taxable year—

“(i) no amount shall be includable in the gross income of a beneficiary of the Settlement Trust by reason of a contribution to the Settlement Trust made during such taxable year, and

“(ii) except as provided in this subsection, the provisions of subchapter J and section 1(e) shall not apply to the Settlement Trust and its beneficiaries for such taxable year.

“(B) **NONELECTING TRUST.**—If an election is not in effect under paragraph (2) for any taxable year, the provisions of subchapter J and section 1(e) shall apply to the Settlement Trust and its beneficiaries for such taxable year.

“(2) **ONE-TIME ELECTION.**—

“(A) **IN GENERAL.**—A Settlement Trust may elect to have the provisions of this subsection and subsection (c)(28) apply to the trust and its beneficiaries.

“(B) **TIME AND METHOD OF ELECTION.**—An election under subparagraph (A) shall be made—

“(i) before the due date (including extensions) for filing the Settlement Trust's return of tax for the 1st taxable year of the Settlement Trust ending after the date of the enactment of this subsection, and

“(ii) by attaching to such return of tax a statement specifically providing for such election.

“(C) **PERIOD ELECTION IN EFFECT.**—Except as provided in paragraph (3), an election under subparagraph (A)—

“(i) shall apply to the 1st taxable year described in subparagraph (B)(i) and all subsequent taxable years, and

“(ii) may not be revoked once it is made.

“(3) **SPECIAL RULES WHERE TRANSFER RESTRICTIONS MODIFIED.**—

“(A) **TRANSFER OF BENEFICIAL INTERESTS.**—

If, at any time, a beneficial interest in a Settlement Trust may be disposed of in a manner which would not be permitted by section 7(h) of the Alaska Native Claims Settlement Act (43 U.S.C. 1606(h)) if the interest were Settlement Common Stock—

“(i) no election may be made under paragraph (2)(A) with respect to such trust, and

“(ii) if an election under paragraph (2)(A) is in effect as of such time—

“(I) such election is revoked as of the 1st day of the taxable year following the taxable year in which such disposition is first permitted, and

“(II) there is hereby imposed on such trust a tax equal to the product of the fair market value of the assets held by the trust as of the close of the taxable year in which such disposition is first permitted and the highest rate of tax under section 1(e) for such taxable year.

The tax imposed by clause (ii)(II) shall be in lieu of any other tax imposed by this chapter for the taxable year.

“(B) **STOCK IN CORPORATION.**—If—

“(i) the Settlement Common Stock in any Native Corporation which transferred assets to a Settlement Trust making an election under paragraph (2)(A) may be disposed of in a manner not permitted by section 7(h) of the Alaska Native Claims Settlement Act (43 U.S.C. 1606(h)), and

“(ii) at any time after such disposition of stock is first permitted, such corporation transfers assets to such trust, clause (ii) of subparagraph (A) shall be applied to such trust on and after the date of the transfer in the same manner as if the trust permitted dispositions of beneficial interests in the trust in a manner not permitted by such section 7(h).

“(C) **ADMINISTRATIVE PROVISIONS.**—For purposes of subtitle F, any tax imposed by subparagraph (A)(ii)(II) shall be treated as an excise tax with respect to which the deficiency procedures of such subtitle apply.

“(4) **DISTRIBUTION REQUIREMENT ON ELECTING SETTLEMENT TRUST.**—

“(A) **IN GENERAL.**—If an election is in effect under paragraph (2) for any taxable year, a Settlement Trust shall distribute at least 55 percent of its adjusted taxable income for such taxable year.

“(B) **TAX IMPOSED IF INSUFFICIENT DISTRIBUTION.**—If a Settlement Trust fails to meet the distribution requirement of subparagraph (A) for any taxable year, then, notwithstanding subsection (c)(28), a tax shall be imposed on the trust under section 1(e) on an amount of taxable income equal to the amount of such failure.

“(C) **DESIGNATION OF DISTRIBUTION.**—Solely for purposes of meeting the requirements of this paragraph, a Settlement Trust may elect to treat any distribution (or portion) during the 65-day period following the close of any taxable year as made on the last day of such taxable year. Any such distribution (or portion) may not be taken into account under this paragraph for any other taxable year.

“(D) **ADJUSTED TAXABLE INCOME.**—For purposes of this paragraph, the term 'adjusted taxable income' means taxable income determined under section 641(b) without regard to any deduction under section 651 or 661.

“(5) **TAX TREATMENT OF DISTRIBUTIONS TO BENEFICIARIES.**—

“(A) **ELECTING TRUST.**—If an election is in effect under paragraph (2) for any taxable

year, any distribution to a beneficiary shall be included in gross income of the beneficiary as ordinary income.

“(B) NONELECTING TRUSTS.—Any distribution to a beneficiary from a Settlement Trust not described in subparagraph (A) shall be includable in income as provided under subchapter J.

“(6) DEFINITIONS.—For purposes of this subsection—

“(A) NATIVE CORPORATION.—The term ‘Native Corporation’ has the meaning given such term by section 3(m) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)).

“(B) SETTLEMENT TRUST.—The term ‘Settlement Trust’ means a trust which constitutes a Settlement Trust under section 39 of the Alaska Native Claims Settlement Act (43 U.S.C. 1629e).”

“(C) WITHHOLDING ON DISTRIBUTIONS BY ELECTING ANCSA SETTLEMENT TRUSTS.—Section 3402 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

“(t) TAX WITHHOLDING ON DISTRIBUTIONS BY ELECTING ANCSA SETTLEMENT TRUSTS.—

“(1) IN GENERAL.—Any Settlement Trust (as defined in section 501(p)(6)(B)) which is exempt from income tax under section 501(c)(28) (in this subsection referred to as an ‘electing trust’) and which makes a payment to any beneficiary shall deduct and withhold from such payment a tax in an amount equal to such payment’s proportionate share of the annualized tax.

“(2) EXCEPTION.—The tax imposed by paragraph (1) shall not apply to any payment to the extent that such payment, when annualized, does not exceed an amount equal to the amount in effect under section 6012(a)(1)(A)(i) for taxable years beginning in the calendar year in which the payment is made.

“(3) ANNUALIZED TAX.—For purposes of paragraph (1), the term ‘annualized tax’ means, with respect to any payment, the amount of tax which would be imposed by section 1(c) (determined without regard to any rate of tax in excess of 31 percent) on an amount of taxable income equal to the excess of—

“(A) the annualized amount of such payment, over

“(B) the amount determined under paragraph (2).

“(4) ANNUALIZATION.—For purposes of this subsection, amounts shall be annualized in the manner prescribed by the Secretary.

“(5) NO APPLICATION TO THIRD PARTY PAYMENTS.—This subsection shall not apply in the case of a payment made, pursuant to the written terms of the trust agreement governing an electing trust, directly to third parties to provide educational, funeral, or medical benefits.

“(6) ALTERNATE WITHHOLDING PROCEDURES.—At the election of an electing trust, the tax imposed by this subsection on any payment made by such trust shall be determined in accordance with such tables or computational procedures as may be specified in regulations prescribed by the Secretary (in lieu of in accordance with paragraphs (2) and (3)).

“(7) COORDINATION WITH OTHER SECTIONS.—For purposes of this chapter and so much of subtitle F as relates to this chapter, payments which are subject to withholding under this subsection shall be treated as if they were wages paid by an employer to an employee.”

“(d) REPORTING.—Section 6041 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

“(f) APPLICATION TO ALASKA NATIVE SETTLEMENT TRUSTS.—In the case of any distribution from a Settlement Trust (as de-

fined in section 501(p)(6)(B)) to a beneficiary, this section shall apply, except that—

“(1) this section shall apply to such distribution without regard to the amount thereof,

“(2) the Settlement Trust shall include on any return or statement required by this section information as to the character of such distribution (if applicable) and the amount of tax imposed by chapter 1 which has been deducted and withheld from such distribution, and

“(3) the filing of any return or statement required by this section shall satisfy any requirement to file any other form or schedule under this title with respect to distributive share information (including any form or schedule to be included with the trust’s tax return).”

“(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years of Settlement Trusts ending after the date of the enactment of this Act and to contributions to such trusts after such date.

By Mr. LEAHY (for himself, Mr. KENNEDY, Mr. SARBANES, Mr. KERRY, Mr. HARKIN, and Mrs. MURRAY):

S. 934. A bill to enhance rights and protections for victims of crime; to the Committee on the Judiciary.

CRIME VICTIMS ASSISTANCE ACT

Mr. LEAHY. Mr. President, this past Sunday marked the beginning of National Crime Victims’ Rights Week. We set this week aside each year to focus attention on the needs and rights of crime victims. I am pleased to take this opportunity to introduce legislation with my good friend from Massachusetts, Senator KENNEDY, and our co-sponsors, Senators SARBANES, KERRY, HARKIN, and MURRAY. Our “Crime Victims Assistance Act” represents the next step in our continuing efforts to afford dignity and recognition to victims of crime.

My involvement with crime victims began more than three decades ago when I served as State’s Attorney for Chittenden County, Vermont, and witnessed first hand the devastation of crime. I have worked ever since to ensure that the criminal justice system is one that respects the rights and dignity of victims of crime, rather than one that presents additional ordeals for those already victimized.

I am proud that Congress has been a significant part of the solution to provide victims with greater rights and assistance. Over the past 15 years, Congress has passed several bills to this end. These bills have included: the Victims and Witness Protection Act of 1982; the Victims of Crime Act of 1984; the Victims’ Bill of Rights of 1990; the 1994 Violent Crime Control and Law Enforcement Act; the Justice for Victims of Terrorism Act of 1996; the Victim Rights Clarification Act of 1997; and the Victims with Disabilities Awareness Act.

Also, on the first day of this session, we introduced S.9, a youth crime bill. In that legislation, which we have identified as a legislative priority for the entire Democratic caucus, we included provisions for victims of juvenile crime so that their rights to appear, to be

heard, and to be informed would be protected. The recent tragedy in Littleton, Colorado, was only the most recent reminder of the urgent need to enhance protections for these victims, to ensure that their voices are heard.

The legislation that we introduce today, the “Crime Victims Assistance Act,” builds upon this progress. It provides for a wholesale reform of the Federal Rules and Federal law to establish additional rights and protections for victims of federal crime.

Particularly, the legislation would provide crime victims with an enhanced: right to be heard on the issue of pretrial detention; right to be heard on plea bargains; right to a speedy trial; right to be present in the courtroom throughout a trial; right to give a statement at sentencing; right to be heard on probation revocation; and right to be notified of a defendant’s escape or release from prison.

The legislation goes further than other victims rights proposals that are currently before Congress by including: enhanced penalties for witness intimidation; an increase in Federal victim assistance personnel; enhanced training for State and local law enforcement and officers of the Court; the development of state-of-the-art systems for notifying victims of important dates and developments in their cases; the establishment of ombudsman programs for crime victims; the establishment of pilot programs that implement balanced and restorative justice models; and more direct and effective Federal assistance to victims of international terrorism, including victims of the Lockerbie bombing and other terrorist acts occurring prior to passage of the Victims of Crime Act.

These are all matters that can be considered and enacted this year with a simple majority of both Houses of Congress. They need not overcome the delay and higher standards necessitated by proposing to amend the Constitution. They need not wait the hammering out of implementing legislation before making a difference in the lives of crime victims.

The Judiciary Committee has already held another hearing this year on a proposed constitutional amendment regarding crime victims. Previous hearings on this proposal were held in 1996, 1997, and 1998. Unfortunately, the Committee has devoted not a minute to consideration of legislative initiatives like the Crime Victims Assistance Act, which Senator KENNEDY and I have introduced over the past years to assist crime victims and better protect their rights. Like many other deserving initiatives, it has taken a back seat to the constitutional amendment debate that continues.

I regret that we did not do more for victims last year or the year before. Over the course of that time, I have noted my concern that we not dissipate the progress we could be making by focusing exclusively on efforts to amend the Constitution. Regrettably, I must

note that the pace of victims legislation has slowed noticeably and many opportunities for progress have been squandered.

I look forward to continuing to work with the Administration, victims groups, prosecutors, judges and other interested parties on how we can most effectively enhance the rights of victims of crime. Congress and State legislatures have become more sensitive to crime victims rights over the past 20 years and we have a golden opportunity to make additional, significant progress this year to provide the greater voice and rights that crime victims deserve.

I would like to acknowledge several groups and individuals who have been extremely helpful with regards to the legislation that we are introducing today: The Office for Victims of Crime at the Justice Department; the National Network to End Domestic Violence; the NOW Legal Defense Fund; the National Clearinghouse for the Defense of Battered Women; the National Victim Center; the National Organization for Victim Assistance; Professor Lynne Henderson of Indiana Law School; and Roger Pilon, Director of the Center for Constitutional Studies at the Cato Institute.

While we have greatly improved our crime victims assistance programs and made advances in recognizing crime victims rights, we still have more to do. That is why it is my hope that Democrats and Republicans, supporters and opponents of a constitutional amendment on this issue, will join in advancing this important legislation through Congress. We can make a difference in the lives of crime victims right now, and I hope Congress will make it a top priority and pass the Crime Victims Assistance Act before the end of the year.

Mr. President, I ask unanimous consent that the text of the bill and the section-by-section analysis be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 934

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) **SHORT TITLE.**—This Act may be cited as the “Crime Victims Assistance Act”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Definitions.

**TITLE I—VICTIM RIGHTS**

**Subtitle A—Amendments to Title 18, United States Code**

Sec. 101. Right to be notified of detention hearing and right to be heard on the issue of detention.

Sec. 102. Right to a speedy trial and prompt disposition free from unreasonable delay.

Sec. 103. Enhanced right to order of restitution.

Sec. 104. Enhanced right to be notified of escape or release from prison.

Sec. 105. Enhanced penalties for witness tampering.

**Subtitle B—Amendments to Federal Rules of Criminal Procedure**

Sec. 121. Right to be notified of plea agreement and to be heard on merits of the plea agreement.

Sec. 122. Enhanced rights of notification and allocution at sentencing.

Sec. 123. Rights of notification and allocution at a probation revocation hearing.

**Subtitle C—Amendment to Federal Rules of Evidence**

Sec. 131. Enhanced right to be present at trial.

**Subtitle D—Remedies for Noncompliance**

Sec. 141. Remedies for noncompliance.

**TITLE II—VICTIM ASSISTANCE INITIATIVES**

Sec. 201. Increase in victim assistance personnel.

Sec. 202. Increased training for State and local law enforcement, State court personnel, and officers of the court to respond effectively to the needs of victims of crime.

Sec. 203. Increased resources for State and local law enforcement agencies, courts, and prosecutors' offices to develop state-of-the-art systems for notifying victims of crime of important dates and developments.

Sec. 204. Pilot programs to establish ombudsman programs for crime victims.

Sec. 205. Amendments to Victims of Crime Act of 1984.

Sec. 206. Services for victims of crime and domestic violence.

Sec. 207. Pilot program to study effectiveness of restorative justice approach on behalf of victims of crime.

Sec. 208. Victims of terrorism.

**SEC. 2. DEFINITIONS.**

In this Act—

(1) the term “Attorney General” means the Attorney General of the United States;

(2) the term “bodily injury” has the meaning given that term in section 1365(g) of title 18, United States Code;

(3) the term “Commission” means the Commission on Victims’ Rights established under section 204;

(4) the term “Indian tribe” has the same meaning as in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e));

(5) the term “Judicial Conference” means the Judicial Conference of the United States established under section 331 of title 28, United States Code;

(6) the term “law enforcement officer” means an individual authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law, and includes corrections, probation, parole, and judicial officers;

(7) the term “Office of Victims of Crime” means the Office of Victims of Crime of the Department of Justice;

(8) the term “State” means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands;

(9) the term “unit of local government” means any—

(A) city, county, township, town, borough, parish, village, or other general purpose political subdivision of a State; or

(B) Indian tribe;

(10) the term “victim”—

(A) means an individual harmed as a result of a commission of an offense; and

(B) in the case of a victim who is less than 18 years of age, incompetent, incapacitated, or deceased—

(i) the legal guardian of the victim;

(ii) a representative of the estate of the victim;

(iii) a member of the family of the victim; or

(iv) any other person appointed by the court to represent the victim, except that in no event shall a defendant be appointed as the representative or guardian of the victim; and

(11) the term “qualified private entity” means a private entity that meets such requirements as the Attorney General may establish.

**TITLE I—VICTIM RIGHTS**

**Subtitle A—Amendments to Title 18, United States Code**

**SEC. 101. RIGHT TO BE NOTIFIED OF DETENTION HEARING AND RIGHT TO BE HEARD ON THE ISSUE OF DETENTION.**

Section 3142 of title 18, United States Code, is amended by adding at the end the following:

“(k) NOTIFICATION OF RIGHT TO BE HEARD.—

“(1) IN GENERAL.—In any case involving a defendant who is arrested for an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, in which a detention hearing is scheduled pursuant to subsection (f)—

“(A) the Government shall make a reasonable effort to notify the victim of the hearing, and of the right of the victim to be heard on the issue of detention; and

“(B) at the hearing under subsection (f), the court shall inquire of the Government as to whether the efforts at notification of the victim under subparagraph (A) were successful and, if so, whether the victim wishes to be heard on the issue of detention and, if so, shall afford the victim such an opportunity.

“(2) LIMITATION.—Upon motion of either party that identification of the defendant by the victim is a fact in dispute, and that no means of verification has been attempted, the Court shall use appropriate measures to protect integrity of the identification process.

“(3) DEFINITION OF VICTIM.—In this subsection, the term ‘victim’ means any individual against whom an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, has been committed and also includes the parent or legal guardian of a victim who is less than 18 years of age, or incompetent, or 1 or more family members designated by the court if the victim is deceased or incapacitated.”.

**SEC. 102. RIGHT TO A SPEEDY TRIAL AND PROMPT DISPOSITION FREE FROM UNREASONABLE DELAY.**

Section 3161(h)(8)(B) of title 18, United States Code, is amended by adding at the end the following:

“(v) The interests of the victim (or the family of a victim who is deceased or incapacitated) in the prompt and appropriate disposition of the case, free from unreasonable delay.”.

**SEC. 103. ENHANCED RIGHT TO ORDER OF RESTITUTION.**

Section 3664(d)(2)(A)(iv) of title 18, United States Code, is amended by inserting “, and the right of the victim (or the family of a victim who is deceased or incapacitated) to attend the sentencing hearing and to make a

statement to the court at the sentencing hearing" before the semicolon.

**SEC. 104. ENHANCED RIGHT TO BE NOTIFIED OF ESCAPE OR RELEASE FROM PRISON.**

Section 503(c)(5)(B) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)(5)(B)) is amended by inserting after "offender" the following: " , including escape, work release, furlough, or any other form of release from a psychiatric institution or other facility that provides mental health services to offenders".

**SEC. 105. ENHANCED PENALTIES FOR WITNESS TAMPERING.**

Section 1512 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (1), by striking "as provided in paragraph (2)" and inserting "as provided in paragraph (3)";

(B) by redesignating paragraph (2) as paragraph (3);

(C) by inserting after paragraph (1) the following:

"(2) Whoever uses physical force or the threat of physical force, or attempts to do so, with intent to—

"(A) influence, delay, or prevent the testimony of any person in an official proceeding;

"(B) cause or induce any person to—

"(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

"(ii) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

"(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; and

"(iv) be absent from an official proceeding to which such person has been summoned by legal process; or

"(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3); and

(D) in paragraph (3)(B), as redesignated, by striking "in the case of" and all that follows before the period and inserting "an attempt to murder, the use of physical force, the threat of physical force, or an attempt to do so, imprisonment for not more than 20 years"; and

(2) in subsection (b), by striking "or physical force".

**Subtitle B—Amendments to Federal Rules of Criminal Procedure**

**SEC. 121. RIGHT TO BE NOTIFIED OF PLEA AGREEMENT AND TO BE HEARD ON MERITS OF THE PLEA AGREEMENT.**

(a) IN GENERAL.—Rule 11 of the Federal Rules of Criminal Procedure is amended by adding at the end the following:

"(i) **RIGHTS OF VICTIMS.**—

"(1) IN GENERAL.—In any case involving a defendant who is charged with an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault—

"(A) the Government, prior to a hearing at which a plea of guilty or nolo contendere is entered, shall make a reasonable effort to notify the victim of—

"(i) the date and time of the hearing; and

"(ii) the right of the victim to attend the hearing and to address the court; and

"(B) if the victim attends a hearing described in subparagraph (A), the court, before accepting a plea of guilty or nolo

contendere, shall afford the victim an opportunity to be heard on the proposed plea agreement.

"(2) **DEFINITION OF VICTIM.**—In this subsection, the term 'victim' means any individual against whom an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, has been committed and also includes the parent or legal guardian of a victim who is less than 18 years of age, or incompetent, or 1 or more family members designated by the court if the victim is deceased or incapacitated.

"(4) **MASS VICTIM CASES.**—In any case involving more than 15 victims, the court, after consultation with the Government and the victims, may appoint a number of victims to serve as representatives of the victims' interests.".

(b) **EFFECTIVE DATE.**—

(1) **IN GENERAL.**—The amendment made by subsection (a) shall become effective as provided in paragraph (3).

(2) **ACTION BY JUDICIAL CONFERENCE.**—

(A) **RECOMMENDATIONS.**—Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall submit to Congress a report containing recommendations for amending the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims of offenses involving death or bodily injury to any person, the threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, to be heard on the issue of whether or not the court should accept a plea of guilty or nolo contendere.

(B) **INAPPLICABILITY OF OTHER LAW.**—Chapter 131 of title 28, United States Code, does not apply to any recommendation made by the Judicial Conference under this paragraph.

(3) **CONGRESSIONAL ACTION.**—Except as otherwise provided by law, if the Judicial Conference—

(A) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are the same as the amendment made by subsection (a), then the amendment made by subsection (a) shall become effective 30 days after the date on which the recommendations are submitted to Congress under paragraph (2);

(B) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are different in any respect from the amendment made by subsection (a), the recommendations made pursuant to paragraph (2) shall become effective 180 days after the date on which the recommendations are submitted to Congress under paragraph (2), unless an Act of Congress is passed overturning the recommendations; and

(C) fails to comply with paragraph (2), the amendment made by subsection (a) shall become effective 360 days after the date of enactment of this Act.

(4) **APPLICATION.**—Any amendment made pursuant to this section (including any amendment made pursuant to the recommendations of the United States Sentencing Commission under paragraph (2)) shall apply in any proceeding commenced on or after the effective date of the amendment.

**SEC. 122. ENHANCED RIGHTS OF NOTIFICATION AND ALLOCUTION AT SENTENCING.**

(a) **IN GENERAL.**—Rule 32 of the Federal Rules of Criminal Procedure is amended—

(1) in subsection (b)—

(A) in paragraph (4), by striking subparagraph (D) and inserting the following:

"(D) a victim impact statement, identifying, to the maximum extent practicable—

"(i) each victim of the offense (except that such identification shall not include information relating to any telephone number, place of employment, or residential address of any victim);

"(ii) an itemized account of any economic loss suffered by each victim as a result of the offense;

"(iii) any physical injury suffered by each victim as a result of the offense, along with its seriousness and permanence;

"(iv) a description of any change in the personal welfare or familial relationships of each victim as a result of the offense; and

"(v) a description of the impact of the offense upon each victim and the recommendation of each victim regarding an appropriate sanction for the defendant;"; and

(B) by adding at the end the following:

"(7) **VICTIM IMPACT STATEMENTS.**—

(A) **IN GENERAL.**—Any probation officer preparing a presentence report shall—

"(i) make a reasonable effort to notify each victim of the offense that such a report is being prepared and the purpose of such report; and

"(ii) provide the victim with an opportunity to submit an oral or written statement, or a statement on audio or videotape outlining the impact of the offense upon the victim.

(B) **USE OF STATEMENTS.**—Any written statement submitted by a victim under subparagraph (A) shall be attached to the presentence report and shall be provided to the sentencing court and to the parties.";

(2) in subsection (c)(1), by adding at the end the following: "Before sentencing in any case in which a defendant has been charged with or found guilty of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, the Government shall make a reasonable effort to notify the victim (or the family of a victim who is deceased) of the time and place of sentencing and of their right to attend and to be heard.;" and

(3) in subsection (f), by inserting "the right to notification and to submit a statement under subdivision (b)(7), the right to notification and to be heard under subdivision (c)(1), and" before "the right of allocution".

(b) **EFFECTIVE DATE.**—

(1) **IN GENERAL.**—The amendments made by subsection (a) shall become effective as provided in paragraph (3).

(2) **ACTION BY JUDICIAL CONFERENCE.**—

(A) **RECOMMENDATIONS.**—Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall submit to Congress a report containing recommendations for amending the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims of offenses involving death or bodily injury to any person, the threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, to participate during the presentencing phase of the criminal process.

(B) **INAPPLICABILITY OF OTHER LAW.**—Chapter 131 of title 28, United States Code, does not apply to any recommendation made by the Judicial Conference under this paragraph.

(3) **CONGRESSIONAL ACTION.**—Except as otherwise provided by law, if the Judicial Conference—

(A) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are the same as the amendments made by subsection (a), then the amendments made by subsection (a) shall become effective 30 days after the date on which the recommendations are submitted to Congress under paragraph (2);

(B) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are different in any respect from the amendments made by subsection (a), the recommendations made pursuant to paragraph (2) shall become effective 180 days after the date on which the recommendations are submitted to Congress under paragraph (2), unless an Act of Congress is passed overturning the recommendations; and

(C) fails to comply with paragraph (2), the amendments made by subsection (a) shall become effective 360 days after the date of enactment of this Act.

(4) APPLICATION.—Any amendment made pursuant to this section (including any amendment made pursuant to the recommendations of the United States Sentencing Commission under paragraph (2)) shall apply in any proceeding commenced on or after the effective date of the amendment.

**SEC. 123. RIGHTS OF NOTIFICATION AND ALLOCATION AT A PROBATION REVOCATION HEARING.**

(a) IN GENERAL.—Rule 32.1 of the Federal Rules of Criminal Procedure is amended by adding at the end the following:

“(d) RIGHTS OF VICTIMS.—

“(I) IN GENERAL.—At any hearing pursuant to subsection (a)(2) involving one or more persons who have been convicted of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, the Government shall make reasonable effort to notify the victim of the offense (and the victim of any new charges giving rise to the hearings), of—

“(A) the date and time of the hearing; and

“(B) the right of the victim to attend the hearing and to address the court regarding whether the terms or conditions of probation or supervised release should be modified.

“(2) DUTIES OF COURT AT HEARING.—At any hearing described in paragraph (1) at which a victim is present, the court shall—

“(A) address each victim personally; and

“(B) afford the victim an opportunity to be heard on the proposed terms or conditions of probation or supervised release.

“(3) DEFINITION OF VICTIM.—In this rule, the term ‘victim’ means any individual against whom an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, has been committed and a hearing pursuant to subsection (a)(2) is conducted, including—

“(A) a parent or legal guardian of the victim, if the victim is less than 18 years of age or is incompetent; or

“(B) 1 or more family members or relatives of the victim designated by the court, if the victim is deceased or incapacitated.”.

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendment made by subsection (a) shall become effective as provided in paragraph (3).

(2) ACTION BY JUDICIAL CONFERENCE.—

(A) RECOMMENDATIONS.—Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall submit to Congress a report containing recommendations for amending the Federal Rules of Criminal Procedure to ensure that reasonable efforts are made to notify victims of offenses involving death or bodily injury to any person, or the threat of death or bodily injury to any person, of any revocation hearing held pursuant to rule 32.1(a)(2) of the Federal Rules of Criminal Procedure.

(B) INAPPLICABILITY OF OTHER LAW.—Chapter 131 of title 28, United States Code, does not apply to any recommendation made by the Judicial Conference under this paragraph.

(3) CONGRESSIONAL ACTION.—Except as otherwise provided by law, if the Judicial Conference—

(A) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are the same as the amendment made by subsection (a), then the amendment made by subsection (a) shall become effective 30 days after the date on which the recommendations are submitted to Congress under paragraph (2);

(B) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are different in any respect from the amendment made by subsection (a), the recommendations made pursuant to paragraph (2) shall become effective 180 days after the date on which the recommendations are submitted to Congress under paragraph (2), unless an Act of Congress is passed overturning the recommendations; and

(C) fails to comply with paragraph (2), the amendment made by subsection (a) shall become effective 360 days after the date of enactment of this Act.

(4) APPLICATION.—Any amendment made pursuant to this section (including any amendment made pursuant to the recommendations of the United States Sentencing Commission under paragraph (2)) shall apply in any proceeding commenced on or after the effective date of the amendment.

**Subtitle C—Amendment to Federal Rules of Evidence**

**SEC. 131. ENHANCED RIGHT TO BE PRESENT AT TRIAL.**

(a) IN GENERAL.—Rule 615 of the Federal Rules of Evidence is amended—

(1) by striking “At the request” and inserting the following:

(a) IN GENERAL.—Except as provided in subsection (b), at the request”;

(2) by striking “This rule” and inserting the following:

“(b) EXCEPTIONS.—Subsection (a)”;

(3) by striking “exclusion of (1) a party” and inserting the following: “exclusion of—

“(1) a party”;

(4) by striking “person, or (2) an officer” and inserting the following: “person;

“(2) an officer”;

(5) by striking “attorney, or (3) a person” and inserting the following: “attorney;

“(3) a person”;

(6) by striking the period at the end and inserting “; or”; and

(7) by adding at the end the following:

“(4) a person who is a victim (or a member of the immediate family of a victim who is deceased or incapacitated) of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, for which a defendant is being tried in a criminal trial, unless the court concludes that—

“(A) the testimony of the person will be materially affected by hearing the testimony of other witnesses, and the material effect of hearing the testimony of other witnesses on the testimony of that person will result in unfair prejudice to any party; or

“(B) due to the large number of victims or family members of victims who may be called as witnesses, permitting attendance in the courtroom itself when testimony is being heard is not feasible.

(c) DISCRETION OF COURT; EFFECT ON OTHER LAW.—Nothing in subsection (b)(4) shall be construed—

“(1) to limit the ability of a court to exclude a witness, if the court determines that such action is necessary to maintain order during a court proceeding; or

“(2) to limit or otherwise affect the ability of a witness to be present during court pro-

ceedings pursuant to section 3510 of title 18, United States Code.”.

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by subsection (a) shall become effective as provided in paragraph (3).

(2) ACTION BY JUDICIAL CONFERENCE.—

(A) RECOMMENDATIONS.—Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall submit to Congress a report containing recommendations for amending the Federal Rules of Evidence to provide enhanced opportunities for victims of offenses involving death or bodily injury to any person, or the threat of death or bodily injury to any person, to attend judicial proceedings, even if they may testify as a witness at the proceeding.

(B) INAPPLICABILITY OF OTHER LAW.—Chapter 131 of title 28, United States Code, does not apply to any recommendation made by the Judicial Conference under this paragraph.

(3) CONGRESSIONAL ACTION.—Except as otherwise provided by law, if the Judicial Conference—

(A) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are the same as the amendments made by subsection (a), then the amendments made by subsection (a) shall become effective 30 days after the date on which the recommendations are submitted to Congress under paragraph (2);

(B) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are different in any respect from the amendments made by subsection (a), the recommendations made pursuant to paragraph (2) shall become effective 180 days after the date on which the recommendations are submitted to Congress under paragraph (2), unless an Act of Congress is passed overturning the recommendations; and

(C) fails to comply with paragraph (2), the amendments made by subsection (a) shall become effective 360 days after the date of enactment of this Act.

(4) APPLICATION.—Any amendment made pursuant to this section (including any amendment made pursuant to the recommendations of the United States Sentencing Commission under paragraph (2)) shall apply in any proceeding commenced on or after the effective date of the amendment.

**Subtitle D—Remedies for Noncompliance**

**SEC. 141. REMEDIES FOR NONCOMPLIANCE.**

(a) GENERAL LIMITATION.—Any failure to comply with any amendment made by this Act shall not give rise to a claim for damages, or any other action against the United States, or any employee of the United States, any court official or officer of the court, or an entity contracting with the United States, or any action seeking a rehearing or other reconsideration of action taken in connection with a defendant.

(b) REGULATIONS TO ENSURE COMPLIANCE.—

(1) IN GENERAL.—Notwithstanding subsection (a), not later than 1 year after the date of enactment of this Act, the Attorney General and the Chairman of the United States Parole Commission shall promulgate regulations to implement and enforce the amendments made by this title.

(2) CONTENTS.—The regulations promulgated under paragraph (1) shall—

(A) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice (including employees of the United States Parole Commission) who willfully or repeatedly violate the amendments made by this title, or willfully or repeatedly refuse or fail to comply with provisions of Federal law

pertaining to the treatment of victims of crime;

(B) include an administrative procedure through which parties can file formal complaints with the Department of Justice alleging violations of the amendments made by this title;

(C) provide that a complainant is prohibited from recovering monetary damages against the United States, or any employee of the United States, either in his official or personal capacity; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the ultimate arbiter of the complaint, and there shall be no judicial review of the final decision of the Attorney General by a complainant.

## TITLE II—VICTIM ASSISTANCE INITIATIVES

### SEC. 201. INCREASE IN VICTIM ASSISTANCE PERSONNEL.

There are authorized to be appropriated such sums as may be necessary to enable the Attorney General to—

(1) hire 50 full-time or full-time equivalent employees to serve victim-witness advocates to provide assistance to victims of any criminal offense investigated by any department or agency of the Federal Government; and

(2) provide grants through the Office of Victims of Crime to qualified private entities to fund 50 victim-witness advocate positions within those organizations.

### SEC. 202. INCREASED TRAINING FOR STATE AND LOCAL LAW ENFORCEMENT, STATE COURT PERSONNEL, AND OFFICERS OF THE COURT TO RESPOND EFFECTIVELY TO THE NEEDS OF VICTIMS OF CRIME.

Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used by the Office of Victims of Crime to make grants to States, units of local government, and qualified private entities, to provide training and information to prosecutors, judges, law enforcement officers, probation officers, and other officers and employees of Federal and State courts to assist them in responding effectively to the needs of victims of crime.

### SEC. 203. INCREASED RESOURCES FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES, COURTS, AND PROSECUTORS' OFFICES TO DEVELOP STATE-OF-THE-ART SYSTEMS FOR NOTIFYING VICTIMS OF CRIME OF IMPORTANT DATES AND DEVELOPMENTS.

(a) IN GENERAL.—Subtitle A of title XXIII of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322; 108 Stat. 2077) is amended by adding at the end the following:

#### SEC. 230103. STATE-OF-THE-ART SYSTEMS FOR NOTIFYING VICTIMS OF CRIME OF IMPORTANT DATES AND DEVELOPMENTS.

“(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Office of Victims of Crime of the Department of Justice such sums as may be necessary for grants to State and local prosecutors' offices, State courts, county jails, State correctional institutions, and qualified private entities, to develop and implement state-of-the-art systems for notifying victims of crime of important dates and developments relating to the criminal proceedings at issue.

“(b) FALSE CLAIMS ACT.—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used for grants under this section.”

(b) VIOLENT CRIME REDUCTION TRUST FUND.—Section 310004(d) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14214(d)) is amended—

(1) in the first paragraph designated as paragraph (15) (relating to the definition of the term 'Federal law enforcement program'), by striking 'and' at the end;

(2) in the first paragraph designated as paragraph (16) (relating to the definition of the term 'Federal law enforcement program'), by striking the period at the end and inserting ';; and'; and

(3) by inserting after the first paragraph designated as paragraph (16) (relating to the definition of the term 'Federal law enforcement program') the following:

“(17) section 230103.”

### SEC. 204. PILOT PROGRAMS TO ESTABLISH OMBUDSMAN PROGRAMS FOR CRIME VICTIMS.

(a) DEFINITIONS.—In this section:

(1) DIRECTOR.—The term 'Director' means the Director of the Office of Victims of Crime.

(2) OFFICE.—The term 'Office' means the Office of Victims of Crime.

(3) QUALIFIED PRIVATE ENTITY.—The term 'qualified private entity' means a private entity that meets such requirements as the Attorney General, acting through the Director, may establish.

(4) QUALIFIED UNIT OF STATE OR LOCAL GOVERNMENT.—The term 'qualified unit of State or local government' means a unit or a State or local government that meets such requirements as the Attorney General, acting through the Director, may establish.

(5) VOICE CENTERS.—The term 'VOICE Centers' means the Victim Ombudsman Information Centers established under the program under subsection (b).

(b) PILOT PROGRAMS.—

(1) IN GENERAL.—Not later than 12 months after the date of enactment of this Act, the Attorney General, acting through the Director, shall establish and carry out a program to provide for pilot programs to establish and operate Victim Ombudsman Information Centers in each of the following States:

(A) Iowa.

(B) Massachusetts.

(C) Ohio.

(D) Tennessee.

(E) Utah.

(F) Vermont.

(2) AGREEMENTS.—

(A) IN GENERAL.—The Attorney General, acting through the Director, shall enter into an agreement with a qualified private entity or unit of State or local government to conduct a pilot program referred to in paragraph (1). Under the agreement, the Attorney General, acting through the Director, shall provide for a grant to assist the qualified private entity or unit of State or local government in carrying out the pilot program.

(B) CONTENTS OF AGREEMENT.—The agreement referred to in subparagraph (A) shall specify that—

(i) the VOICE Center shall be established in accordance with this section; and

(ii) except with respect to meeting applicable requirements of this section concerning carrying out the duties of a VOICE Center under this section (including the applicable reporting duties under subsection (c) and the terms of the agreement) each VOICE Center shall operate independently of the Office; and

(C) NO AUTHORITY OVER DAILY OPERATIONS.—The Office shall have no supervisory or decisionmaking authority over the day-to-day operations of a VOICE Center.

(c) OBJECTIVES.—

(1) MISSION.—The mission of each VOICE Center established under a pilot program under this section shall be to assist a victim

of a Federal or State crime to ensure that the victim—

(A) is fully apprised of the rights of that victim under applicable Federal or State law; and

(B) participates in the criminal justice process to the fullest extent of the law.

(2) DUTIES.—The duties of a VOICE Center shall include—

(A) providing information to victims of Federal or State crime regarding the right of those victims to participate in the criminal justice process (including information concerning any right that exists under applicable Federal or State law);

(B) identifying and responding to situations in which the rights of victims of crime under applicable Federal or State law may have been violated;

(C) attempting to facilitate compliance with Federal or State law referred to in subparagraph (B);

(D) educating police, prosecutors, Federal and State judges, officers of the court, and employees of jails and prisons concerning the rights of victims under applicable Federal or State law; and

(E) taking measures that are necessary to ensure that victims of crime are treated with fairness, dignity, and compassion throughout the criminal justice process.

(d) OVERSIGHT.—

(1) TECHNICAL ASSISTANCE.—The Office may provide technical assistance to each VOICE Center.

(2) ANNUAL REPORT.—Each qualified private entity or qualified unit of State or local government that carries out a pilot program to establish and operate a VOICE Center under this section shall prepare and submit to the Director, not later than 1 year after the VOICE Center is established, and annually thereafter, a report that—

(A) describes in detail the activities of the VOICE Center during the preceding year; and

(B) outlines a strategic plan for the year following the year covered under subparagraph (A).

(e) REVIEW OF PROGRAM EFFECTIVENESS.—

(1) GAO STUDY.—Not later than 2 years after the date on which each VOICE Center established under a pilot program under this section is fully operational, the Comptroller General of the United States shall conduct a review of each pilot program carried out under this section to determine the effectiveness of the VOICE Center that is the subject of the pilot program in carrying out the mission and duties described in subsection (c).

(2) OTHER STUDIES.—Not later than 2 years after the date on which each VOICE Center established under a pilot program under this section is fully operational, the Attorney General, acting through the Director, shall enter into an agreement with 1 or more private entities that meet such requirements as the Attorney General, acting through the Director, may establish, to study the effectiveness of each VOICE Center established by a pilot program under this section in carrying out the mission and duties described in subsection (c).

(f) TERMINATION DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), a pilot program established under this section shall terminate on the date that is 4 years after the date of enactment of this Act.

(2) RENEWAL.—If the Attorney General determines that any of the pilot programs established under this section should be renewed for an additional period, the Attorney General may renew that pilot program for a period not to exceed 2 years.

(g) FUNDING.—Notwithstanding any other provision of law, an aggregate amount not to exceed \$5,000,000 of the amounts collected

pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the "False Claims Act"), may be used by the Director to make grants under subsection (b).

**SEC. 205. AMENDMENTS TO VICTIMS OF CRIME ACT OF 1984.**

(a) CRIME VICTIMS FUND.—Section 1402 of the Victims of Crime Act of 1984 (42 U.S.C. 10601) is amended—

(1) in subsection (b)—

(A) in paragraph (3), by striking "and" at the end;

(B) in paragraph (4), by striking the period at the end and inserting ";" and"; and

(C) by adding at the end the following:

"(5) any gifts, bequests, and donations from private entities or individuals.;" and

(2) in subsection (d)—

(A) by striking paragraph (1) and inserting the following:

"(1) All unobligated balances transferred to the judicial branch for administrative costs to carry out functions under sections 3611 and 3612 of title 18, United States Code, shall be returned to the Crime Victims Fund and may be used by the Director to improve services for crime victims in the Federal criminal justice system.;" and

(B) in paragraph (4), by adding at the end the following:

"(C) States that receive supplemental funding to respond to incidents or terrorism or mass violence under this section shall be required to return to the Crime Victims Fund for deposit in the reserve fund, amounts subrogated to the State as a result of third-party payments to victims.;".

(b) CRIME VICTIM COMPENSATION.—Section 1403 of the Victims of Crime Act of 1984 (42 U.S.C. 10602) is amended—

(1) in subsection (a)—

(A) in each of paragraphs (1) and (2), by striking "40" and inserting "60"; and

(B) in paragraph (3), by inserting "and evaluation" after "administration"; and

(2) in subsection (b)(7), by inserting "because the identity of the offender was not determined beyond a reasonable doubt in a criminal trial, because criminal charges were not brought against the offender, or" after "deny compensation to any victim".

(c) CRIME VICTIM ASSISTANCE.—Section 1404 of the Victims of Crime Act of 1984 (42 U.S.C. 10603) is amended—

(1) in subsection (c)—

(A) in paragraph (1)—

(i) by striking the comma after "Director";

(ii) by inserting "or enter into cooperative agreements" after "make grants";

(iii) by striking subparagraph (A) and inserting the following:

"(A) for demonstration projects, evaluation, training, and technical assistance services to eligible organizations;"

(iv) in subparagraph (B), by striking the period at the end and inserting ";" and"; and

(v) by adding at the end the following:

"(C) training and technical assistance that address the significance of and effective delivery strategies for providing long-term psychological care.;" and

(B) in paragraph (3)—

(i) in subparagraph (C), by striking "and" at the end;

(ii) in subparagraph (D), by striking the period at the end and inserting ";" and"; and

(iii) by adding at the end the following:

"(E) use funds made available to the Director under this subsection—

(i) for fellowships and clinical internships; and

(ii) to carry out programs of training and special workshops for the presentation and dissemination of information resulting from demonstrations, surveys, and special projects.;" and

(2) in subsection (d)—

(A) by striking paragraph (1) and inserting the following:

"(I) the term 'State' includes—

"(A) the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and any other territory or possession of the United States; and

"(B) for purposes of a subgrant under subsection (a)(1) or a grant or cooperative agreement under subsection (c)(1), the United States Virgin Islands and any agency of the government of the District of Columbia or the Federal Government performing law enforcement functions in and on behalf of the District of Columbia.;"

(B) in paragraph (2)—

(i) in subparagraph (C), by striking "and" at the end; and

(ii) by adding at the end the following:

"(E) public awareness and education and crime prevention activities that promote, and are conducted in conjunction with, the provision of victim assistance; and

"(F) for purposes of an award under subsection (c)(1)(A), preparation, publication, and distribution of informational materials and resources for victims of crime and crime victims organizations.;"

(C) by striking paragraph (4) and inserting the following:

"(4) the term 'crisis intervention services' means counseling and emotional support including mental health counseling, provided as a result of crisis situations for individuals, couples, or family members following and related to the occurrence of crime.;"

(D) in paragraph (5), by striking the period at the end and inserting ";" and"; and

(E) by adding at the end the following:

"(6) for purposes of an award under subsection (c)(1), the term 'eligible organization' includes any—

"(A) national or State organization with a commitment to developing, implementing, evaluating, or enforcing victims' rights and the delivery of services;

"(B) State agency or unit of local government;

"(C) tribal organization;

"(D) organization—

"(i) described in section 501(c) of the Internal Revenue Code of 1986; and

"(ii) exempt from taxation under section 501(a) of such Code; or

"(E) other entity that the Director determines to be appropriate.;"

(d) COMPENSATION AND ASSISTANCE TO VICTIMS OF TERRORISM OF MASS VIOLENCE.—Section 1404B of the Victims of Crime Act of 1984 (42 U.S.C. 10603b) is amended—

(1) in subsection (a), by striking "1404(a)" and inserting "1402(d)(4)(B)" and;

(2) in subsection (b), by striking "1404(d)(4)(B)" and inserting "1402(d)(4)(B)".

**SEC. 206. SERVICES FOR VICTIMS OF CRIME AND DOMESTIC VIOLENCE.**

Section 504 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996 (110 Stat. 1321-53) may not be construed to prohibit a recipient (as that term is used in that section) from using funds derived from a source other than the Legal Services Corporation to provide related legal assistance (as defined in section 502(b) of Public Law 105-119 (111 Stat. 2511)) to any person with whom an alien (as that term is used in subsection (a)(11) of that section) has a relationship covered by the domestic violence laws of the State in which the alien resides or in which an incidence of violence occurred.

**SEC. 207. PILOT PROGRAM TO STUDY EFFECTIVENESS OF RESTORATIVE JUSTICE APPROACH ON BEHALF OF VICTIMS OF CRIME.**

(a) IN GENERAL.—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of

title 31, United States Code (commonly known as the "False Claims Act"), may be used by the Office of Victims of Crime to make grants to States, units of local government, and qualified private entities for the establishment of pilot programs that implement balanced and restorative justice models.

(b) DEFINITION OF BALANCED AND RESTORATIVE JUSTICE MODEL.—In this section, the term "balanced and restorative justice model" means an approach to criminal justice that promotes the maximum degree of involvement by a victim, offender, and the community served by a criminal justice system by allowing the criminal justice system and related criminal justice agencies to improve the capacity of the system and agencies to—

(1) protect the community served by the system and agencies; and

(2) ensure accountability of the offender and the system.

**SEC. 208. VICTIMS OF TERRORISM.**

(a) IN GENERAL.—Section 1404B of the Victims of Crime Act of 1984 (42 U.S.C. 10603b) is amended to read as follows:

**SEC. 1404B. COMPENSATION AND ASSISTANCE TO VICTIMS OF TERRORISM OR MASS VIOLENCE.**

"(a) IN GENERAL.—The Director may make grants, as provided in either section 1402(d)(4)(B) or 1404—

"(1) to States, which shall be used for eligible crime victim compensation and assistance programs for the benefit of victims described in subsection (b); and

"(2) to victim service organizations, and public agencies that provide emergency or ongoing assistance to victims of crime, which shall be used to provide, for the benefit of victims described in subsection (b)—

"(A) emergency relief (including compensation, assistance, and crisis response) and other related victim services; and

"(B) emergency response training and technical assistance.

"(b) VICTIMS DESCRIBED.—Victims described in this subsection are victims of a terrorist act or mass violence, whether occurring within or outside the United States, who are—

"(1) citizens or employees of the United States; and

"(2) not eligible for compensation under title VIII of the Omnibus Diplomatic Security and Antiterrorism Act of 1986.;"

(b) APPLICABILITY.—The amendment made by this section applies to any terrorist act or mass violence occurring on or after December 20, 1989.

**SECTION-BY-SECTION SUMMARY OF THE CRIME VICTIMS ASSISTANCE ACT**

**TITLE I—VICTIMS RIGHTS IN THE FEDERAL SYSTEM**

Title I reforms federal law and the federal rules of evidence to provide enhanced protections to victims of federal crime, from the time of the defendant's arrest through sentencing, including post-sentencing hearings.

*Subtitle A. Amendments to Title I*

*Sec. 101. Right to be Notified of Detention Hearing and Right to be Heard on the Issue of Detention*

Section 101 amends federal law to establish a victim's right to be notified of a detention hearing, to attend the detention hearing, and be heard on the issue of detention. No such right currently exists in federal law.

In cases where identification of the defendant remains at issue, section 101 provides flexibility to the presiding judge to protect the integrity of the identification.

**Sec. 102. Right to a Speedy Trial and Prompt Disposition Free From Unreasonable Delay**

Section 102 amends the Speedy Trial Act to require the Court to take into account the interests of the victim in the prompt and appropriate disposition of the case, free from unreasonable delay when considering a motion to continue a trial.

**Sec. 103. Enhanced Right to Order of Restitution**

Section 103 amends federal law to ensure that the victim has the right to attend a sentencing hearing and to make a statement to the court at sentencing.

**Sec. 104. Right to be Notified of Escape or Release from Prison**

Section 104 amends the Victims Rights and Restitution Act of 1990 to expand the victim's right to be notified of an offender's release or escape from custody. Specifically, this section clarifies that a victim has the right to be notified of the offender's escape or release from a psychiatric institution. Current law does not address this potentially critical issue.

**Sec. 105. Enhanced Penalties for Witness Tampering**

Section 105 amends a federal witness tampering statute (18 U.S.C. §1512) to raise the statutory maximum penalties in witness tampering cases involving the use or threatened use of physical force from 10 years to 20 years.

**Subtitle B. Amendments to Federal Rules of Criminal Procedure****Sec. 121. Right to be Notified of Plea Agreement and to be Heard on Merits of the Plea Agreement**

Section 121 (a) amends Rule 11 of the Federal Rules of Criminal Procedure (governing pleas) to require the government to make a reasonable effort to notify the victim of an upcoming plea hearing, and of the victim's right to be heard at the plea hearing. In cases involving more than 15 victims, the Court, after consultation with the government and the victims, may appoint a number of victims as representatives of the victims' interests.

Section 121 (b) provides a timetable for the implementation of the amendments to Rule 11, taking into consideration the recommendations of the United States Judicial Conference.

**Sec. 122. Enhanced Rights of Notification and Allocution at Sentencing**

Section 122 (a) amends Rule 32 of the Federal Rules of Criminal Procedures (Sentencing) to provide for enhanced opportunities for victims to participate in the criminal sentencing process. Specifically, section 122(a) amends Rule 32 to require that presentence reports contain very specific information about victim impact. Probation officers are required to make reasonable efforts to notify the victim about the preparation of the presentence reports, and must provide victims with an opportunity to submit oral or written statements, including statements on audio or videotape, describing the impact of the offense on the victim. In addition, Rule 32 is amended to require the government to make a reasonable effort to notify the victim of the time and place of sentencing, and the victim's right to be heard at sentencing. These provisions are intended to insure that victims remain actively involved throughout the criminal process.

Section 122(b) provides a timetable for the implementation of the amendments to Rule 32, taking into consideration the recommendations of the United States Judicial Conference.

**Sec. 123. Rights of Notification and Allocution At a Probation Revocation Hearing**

Section 123(a) amends Rule 32.1 of the Federal Rules of Criminal Procedure (Probation Revocation or Modification of Supervised Release) to provide enhanced opportunities for victims to be notified of and participate in revocation hearings. Often times, when a defendant is taken into custody for violating conditions of release or conditions of probation, a victim is unaware of these important developments. Section 123 (a) amends Rule 32.1 to direct the government to make a reasonable effort to notify the victim of the impending revocation hearing, and to notify the victim of his or her right to attend the hearing and address the court.

Section 123(b) provides a timetable for the implementation of the amendments to Rule 32.1, taking into consideration the recommendations of the United States Judicial Conference.

**Subtitle C. Amendment to Federal Rules of Evidence****Sec. 131. Enhanced Right to Be Present At Trial**

Section 131 amends Rule 615 of the Federal Rules of Evidence (Witness Sequestration) to establish a statutory right for crime victims to attend court proceedings, including trials. Currently, victims are routinely prevented from being present at trials, except during their own testimony. Section 131(a) amends Rule 615 to permit crime victims to attend trials and other court proceedings, unless the court makes a finding that the testimony of the person will be materially affected by hearing the testimony of other witnesses, and the material effect will result in unfair prejudice to any party, or that due to large numbers of victims or family members of victims who may be called as witnesses, permitting attendance in the courtroom when testimony is being heard is not feasible.

Section 131(b) provides a timetable for the implementation of the amendment to Rule 615, taking into consideration the recommendations of the United States Judicial Conference.

**Subtitle D. Remedies for Noncompliance****Sec. 141. Remedies for Noncompliance**

Section 141 establishes a mechanism for addressing violations of the newly created statutory rights of crime victims. Section 141(a) clarifies that no party can file a civil action for damages or injunctive relief against the U.S., any employee of the U.S., any officer of the court, nor any entity contracting with the U.S., for failure to comply with any amendment in this Act.

Section 141(b) directs the Attorney General and the Chair of the U.S. Parole Commission to establish a workable regulatory scheme that will permit the effective administrative enforcement of victims rights. These regulations must contain disciplinary sanctions, including termination for employees of the Department of Justice who willfully violate or refuse to comply with Federal provisions pertaining to the treatment of victims of crime. These regulations must also include an administrative procedure through which formal complaints with the Department of Justice alleging violations of this title can be filed. Under the proposed administrative scheme a complainant is prohibited from recovering any monetary damages against the United States.

This subsection states that the Attorney General is the ultimate arbiter of the complaint, and there will be no judicial review of the final decision of the Attorney General.

**TITLE II—VICTIM ASSISTANCE INITIATIVES**

Title II contains a series of provisions designed primarily to assist victims of state

crime, and to ensure that victims participate in the criminal process to the maximum extent.

**Sec. 201. Increase in Victim Assistance Personnel**

Section 201 authorizes to be appropriated such sums as may be necessary to enable the Attorney General to provide grants through the Office of Victims of Crime (OVC) to qualified private entities to fund 50 victim-witness advocate positions, who can assist victims of state crimes.

This section also authorizes to be appropriated such sums as may be necessary to enable the Attorney General to hire 50 full-time (or full-time equivalent) employees to serve as victim-witness advocates to provide assistance to victims of any federal criminal offense investigation.

**Sec. 202. Increased Training for State and Local Law Enforcement, State Court Personnel, and Officers of the Court to Respond Effectively to the Needs of Victims of Crime**

Section 202 provides that funds collected pursuant to the False Claims Act (31 U.S.C. 3729-3731) may be used by OVC to make grants to States, units of local government, and qualified private entities, to provide training and information to prosecutors, judges, law enforcement officers, probation officers, and other officers and employees of Federal and State court in order to assist them in responding effectively to the needs of victims of crime.

**Sec. 203. Increased Resources for State and Local Law Enforcement Agencies, Courts, and Prosecutors' Offices to Develop State-of-the-Art Systems for Notifying Victims of Crime of Important Dates and Developments**

Section 203 amends subtitle A of title 23 of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322; 108 Stat. 2077) by authorizing to be appropriated such sums as may be necessary to OVC to fund grants to State and local prosecutors' offices, State courts, county jails, State correctional institutions, and qualified private entities, to develop and implement state-of-the-art systems for notifying victims of crime of important dates and developments relating to the criminal proceedings at issue.

Section 203 authorizes funds collected pursuant to the False Claims Act (31 U.S.C. 3729-3731) to be used for these grants.

This section also amends Section 310004(d) of the Violent Crime Control and Law Enforcement Act of 1994 to permit funds from the Violent Crime Reduction Trust Fund to be used for grants outlined in this section.

**Sec. 204. Pilot Programs to Establish Ombudsman Programs for Crime Victims**

Section 204 authorizes pilot programs designed to establish innovative programs to assist victims of both federal and state crime in vindicating their rights. All too frequently, victims do not have a sufficient voice during the criminal process. Some localities have responded to this problem by creating ombudsman programs wherein independent officers are established whose function is to represent the victim's interests. These ombudsmen will educate prosecutors and judges as to their victim-related responsibilities, and will provide helpful guidance and support to crime victims themselves. These programs have shown considerable promise in a number of cities.

Section 204 authorizes the creation of these ombudsman programs. Subsection (a) sets out definitions of the terms "director," "office," "qualified private entity," "qualified unit of State or local government," and "VOICE Centers" for the purposes of this section.

Subsection (b) provides that within a year after the enactment of this Act, the Attorney General (acting through the Director of OVC) will establish pilot programs to operate Victim Ombudsman Information Centers ("VOICE" Centers) in Iowa, Massachusetts, Ohio, Tennessee, Utah, and Vermont.

This subsection also authorizes the Attorney General to enter into agreement with and provide for a grant to assist a qualified private entity or unit of State or local government in carrying out the pilot program. The agreement shall specify that the VOICE Center shall, excepting applicable requirements of this section, operate independently of OVC, and OVC shall have no supervisory or decision making authority over the day-to-day operations of a VOICE Center. The purpose of this provision is to ensure that VOICE centers operate independently.

Subsection (c) provides that the mission of each VOICE Center shall be to ensure that victims of Federal or State crimes are fully apprised of the rights of victims and that the victims participate in the criminal justice process to the fullest extent of the law.

This subsection also sets out the duties of the VOICE Centers. The duties include providing information to victims concerning their right to participate in the criminal justice process; identifying and responding to situations in which rights of victims of crime may have been violated; attempting to rectify violations of victims' rights; educating police, prosecutors, court officials, and employees of jails and prisons about the rights of victims; and taking measures to ensure victims are treated with respect, dignity, and compassion during the justice process.

Subsection (d) authorizes OVC to provide technical assistance to each VOICE Center. Each pilot VOICE Center shall submit an annual report to the Director of OVC detailing the activities of the VOICE Center and the strategic plan for the following year.

Subsection (e) provides that within two years of each VOICE Center's pilot program establishment, the Comptroller General of the U.S. shall review their effectiveness in carrying out their mission and duties as described in subsection (c). This subsection also requires that within two years of each VOICE Center's pilot program establishment, the Attorney General shall have private entities study the effectiveness of the VOICE Centers in carrying out their mission and duties as described in subsection (c).

Subsection (f) states that the pilot program shall terminate 4 years after the date of enactment of the Act. If the Attorney General determines that any of the pilot programs should be renewed for an additional period, they may be renewable for up to two years.

Subsection (g) authorizes an amount not to exceed \$5,000,000 of the amounts collected pursuant to the False Claims Act to be used by the Director of OVC to make grants to fund the pilot programs.

*Sec. 205. Amendments to Victims of Crime Act of 1994*

Section 205 provides for various improvements in the program of federal support for victim assistance and compensation under the Victims of Crime Act.

Subsection (a) authorizes the receipt of private donations to the Crime Victims Fund. It also provides that unobligated funds transferred to the judicial branch for the establishment of the (now defunct) National Fine Center are to be returned to the Crime Victims Fund and may be used for the benefit of federal crime victims. Moreover, it requires states to return to the Crime Victims Fund amounts for which they are reimbursed under subrogation provisions as a result of

third party payments to victims, or where the state has received supplemental funding for incidents of terrorism or mass violence. This will help replenish the funds available for assistance to victims of terrorism and mass violence.

Subsection (b) changes the minimum threshold for the annual grant that the Director shall make from the Fund to an eligible crime victim compensation program. The change is from 40 percent of the amounts awarded during the preceding fiscal year to 60 percent.

Subsection (b) also enhances authority and support for demonstration projects, training, technical assistance, and program evaluation, and clarifies that compensation will not be denied to any victim because the identity of the offender was not determined beyond a reasonable doubt in a criminal trial or because criminal charges were not brought against the offender.

Subsection (c) clarifies that the Director may enter into cooperative agreements in addition to making grants; that such cooperative agreements or grants may be for evaluation purposes and training and technical assistance that address the significance of and effective delivery strategies for providing long-term psychological care; that the Director may use funds for fellowships, clinical internships, and programs of training and special workshops for the presentation and dissemination of information resulting from demonstrations, surveys, and special projects. Subsection (c) also tightens some of the definitions in the Victims of Crime Act.

*Sec. 206. Services for Victims of Crime and Domestic Violence*

Section 206 directs that a specified statute not be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to provide related legal assistance to any person with whom an alien has a relationship covered by the domestic violence laws of the State in which the alien resides or in which an incidence of violence occurred.

*Sec. 207. Pilot Program to Study Effectiveness of Restorative Justice Approach on Behalf of Victims of Crime*

Section 207 authorizes the use of funds collected under the False Claims Act by OVC to make grants to States, units of local government, and qualified private entities for the establishment of pilot programs that implement balanced and restorative justice models.

*Sec. 208. Victims of Terrorism*

Section 208 clarifies the intent of the antiterrorism amendment to the Victims of Crime Act by enabling OVC to assist the victims of terrorist acts or mass violence occurring outside the United States and authorizing it to provide funding directly to nonprofits and other Federal agencies, medical and mental health organizations and others in response to such victims' needs.

Section 208 will also enable OVC to provide assistance to the victims of terrorist acts or mass violence occurring prior to the passage of the Victims of Crime Act, but on or after December 20, 1989. This will allow OVC to assist the family members of those killed in the bombing of Pan Am 103. These family members reside in various states around the country including Alabama, California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, and West Virginia.

Mr. KENNEDY. Mr. President, today, Senator LEAHY and I are introducing

the Crime Victims Assistance Act. For too long, our criminal justice system has neglected the hundreds of thousands of victims of crime whose lives are shattered by violence or threats of violence each year.

Clearly, the rights of victims deserve better from our criminal justice system. Too often, the system does not provide adequate relief for victims of crime. They are not given basic information about their case—such as the status of the case, scheduling changes in court proceedings, and notice of a defendant's arrest, bail status and release from prison.

Victims deserve to know about their case. They deserve to know about hearings and other court proceedings. They deserve to know when their assailants are being considered for parole. And they certainly deserve to know when their attackers are released from incarceration.

But there is a right way and a wrong way to protect victims' rights. The wrong way is to amend the Constitution. One of the guiding principles that has served the nation well for two hundred years is that if it is not necessary to amend the Constitution, it is necessary not to amend it.

We have amended the Constitution only 17 times in the two centuries since the adoption of the Bill of Rights. We should consider such amendments only in rare instances, when the enactment of a statute is clearly inadequate.

The right way to protect victims' rights is by statute, not by constitutional amendment. One of the most obvious provisions of such a statute is additional resources for courts and prosecutors. These resources can be used to establish better notification, provide better training to deal with victims' needs, and to take all the other steps required to see that the criminal justice system deals fairly with the victims of crime. If Congress is truly committed to victims rights, we can act quickly by statute.

Senator LEAHY and I are proposing a victims rights statute—not a constitutional amendment, because we believe it accomplishes the needed goals. It provides protection for victims now—this year. We do not have to wait for a constitutional amendment that may take years for the States to ratify.

Chief Justice Rehnquist also opposes amending the Constitution. He has specifically stated that a statute, rather than a constitutional amendment, "would have the virtue of making any provisions in the bill which appeared mistaken by hindsight to be amended by a simple act of Congress."

Crime victims must be treated with dignity, compassion and understanding. Being victimized by crime is traumatic enough. We must do all we can to see that victims of crime are not victimized again by the criminal justice system.

At the federal level, the system has become more victim friendly. I am

proud to have sponsored the Sentencing Reform Act of 1994, which vastly expanded the authority of the courts to order defendants to pay restitution to the victims. Subsequent laws have given victims the right to be heard at sentencing.

This legislation we are introducing today assures victims of a greater voice in decisions on the detention and prosecution of criminals.

It contains a series of provisions to assist victims of state crimes, and to ensure that victims participate in the criminal justice process to the maximum extent. For example, it provides grants to fund victim-witness advocate positions. It provides training for judges, prosecutors, and law enforcement. It establishes our ombudsman programs.

Legislation on victims' rights deserves high priority in this Congress. I urge the Senate to act swiftly to accomplish the goal we share of genuine protections for victims rights.

By Mr. LUGAR:

**S. 935.** A bill to amend the National Agricultural Research, Extension, and Teaching Policy Act of 1977 to authorize research to promote the conversion of biomass into biobased industrial products, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

NATIONAL SUSTAINABLE FUELS AND CHEMICALS ACT OF 1999

• Mr. LUGAR. Mr. President, I rise to introduce The National Sustainable Fuels and Chemicals Act, with the goal of advancing biotechnologies likely to offer outstanding benefits in terms of strategic security, reduction of greenhouse gases and healthier rural economies.

At the heart of the National Sustainable Fuels and Chemicals Act is a novel research Initiative, jointly administered by the Secretary of Agriculture and the Secretary of Energy, that authorizes research for the purpose of overcoming technical barriers to low cost biomass conversion and gives priority funding to consortia composed of technical experts from academia, national laboratories, Federal research agencies and industry. By enhancing creative and imaginative approaches toward biomass processing, the Sustainable Fuels and Chemicals Research Initiative will serve to develop the next generation of advanced technologies making possible low cost biobased industrial products.

Innovative in both purpose and structure, the Initiative will promote integrated research partnerships as the best means of overcoming technical challenges that span multiple academic disciplines while also leveraging scarce Federal discretionary spending. 49 million dollars per annum is proposed for the Sustainable Fuels and Chemicals Research Initiative; funding is authorized for six years, through 2005. Given the potential benefits in improved national security, rural development and greenhouse gas reduc-

tions, this expenditure represents an investment in America's future and is in line with recommendations from a report of the President's Committee of Advisors on Science and Technology (PCAST).

The legislation will also coordinate and focus Federal research in cellulosic biomass processing through creation of the Sustainable Fuels and Chemicals Board consisting of senior representatives from the National Science Foundation, the Environmental Protection Agency, the Department of the Interior and the White House Office of Science and Technology Policy. Co-chaired by designees of the Secretary of Agriculture and Secretary of Energy, the Board shall coordinate research, development and demonstration activities relating to biobased industrial products between the Departments of Energy and Agriculture which are the two principal agencies for biotechnology research on fuels, chemicals and power. The Board will also serve to coordinate research activities across the many Federal agencies that are involved in research, regulation and policy formulation of fuels, commodity chemicals and power.

To advise the Secretary of Agriculture and Secretary of Energy on the technical focus and direction of the request for proposals issued under the research Initiative, a Sustainable Fuels and Chemicals Technical Advisory Committee is established. Modeled on the National Defense Sciences Board, the Advisory Committee consists of experts from academia, prominent engineers and scientists, representatives from commodity trade organizations and environmental or conservation groups. As an independent panel of technical experts, the Sustainable Fuels and Chemicals Technical Advisory Committee will serve an important role in the strategic planning and oversight of research carried out under the Initiative.

The case for promoting technology that will supply fuels, notably ethanol, chemicals and power from cellulosic biomass can be made independently of whether the world will continue to enjoy cheap oil. However, a wealth of scientific data indicates both that the world's supply of conventional oil is nearly half exhausted and that with each passing year, the demand for petroleum-derived energy increases. History gives us a clear warning that individual oil wells, oil fields, and national petroleum outputs have all shown a decline in production rates when the level of reserves reaches 50 percent. Balanced against both such 'common sense' and Malthusian theory are optimists, including the late economist Julian Simon, who uses energy supplies as one example when arguing that natural resources have become more available rather than more scarce.

I would suggest that cellulosic biomass offers a unique opportunity for consensus between these seemingly unalterable opposing views. No longer is

the debate centered on the delicate political and international issue of how best to divide the shrinking pie of world resources. Rather, application of the limitless supply of human ingenuity will be used to create a new and sustainable resource. In this regard, nature offers us the hint of a solution by demonstrating its own methods for harnessing power from the sun, nutrients in the soil and water, in support of a vast array of plant life.

Following nature's elegant example, engineers and scientists have developed biotechnologies capable of breaking down nearly any form of plant, tree or grass into their constituent chemical building blocks, principally in the form of complex sugars. From this intermediate step, a wide variety of biobased industrial products including feed, fuels, chemicals, materials and power can be produced. With this capability, plants, trees, grasses and agricultural residues assume a new significance as a potential source of biobased industrial products. Significantly, cellulosic biomass is the only foreseeable sustainable source of organic fuels, chemicals and materials that find ubiquitous use in any modern economy.

Consider that biobased industrial chemicals can provide functional replacements for essentially all organic chemicals currently derived from petroleum, and have clear potential for product life cycles that are much more environmentally friendly than their fossil fuel counterparts. The new cellulosic conversion technology under development will contribute towards growth of what is now a fledgling industry centered on biobased products—including chemicals, lubricants, plastics, adhesives and building materials—with a market worth an estimated \$300 billion per year in its infancy.

Biobased fuels such as ethanol have clear potential to be sustainable, low-cost and high performance, are compatible with both current and future transportation systems, and provide near zero net greenhouse gas emissions. The impact of bioethanol on greenhouse gas emissions is particularly significant because the transportation sector accounts for one-third of the total greenhouse gas emissions. Of the many contributing factors to possible climate change, the transportation sector is our most difficult challenge because of the ubiquitous dependence on greenhouse gas producing fossil fuels. Cellulosic ethanol, a renewable fuel derived from grasses, plants, trees and waste materials, offers a positive long-term approach to the problem of global warming that does not assume a shift from the automobile culture or increased costs for American employers and consumers.

Cellulosic ethanol is a versatile, liquid fuel and consequently will be able to use much of the existing infrastructure built over the last century in support of gasoline and internal combustion engines. The compatibility of water with biomass derived products,

including ethanol, is an important environmental consideration and a powerful demonstration of green chemistry. As my friend Jim Woolsey is fond of saying, "If a second Exxon Valdez filled with ethanol ran aground off Alaska, it would produce a lot of evaporation and some drunk seals."

By providing farmers of the world the possibility of additional commodity products, whether dedicated crops or income from collection of agricultural residues, biomass processing can lead to healthier rural economies. A major strength of the new technologies for breaking down cellulosic biomass is that almost any type of plant, tree, or agricultural waste can be used as a source of fuel. This high degree of flexibility allows farmers the possibility of a cash crop simply by collecting their agricultural wastes. Local crops that enrich the soil, prevent erosion and improve local environmental conditions can be planted and then harvested for fuel. My firm belief is that innovations in biotechnology enabling the co-production of food, fuel, chemicals and materials from the sustainable supply of cellulosic biomass, are vital to the future of agriculture.

While undertaking this effort, I remain mindful that biofuels must be produced in ways that enhance overall environmental quality. Sound land-use policies must be followed to protect wildlife habitat and biological diversity concerns. But professional land-use techniques should readily accomplish this.

Providing an alternative fuel that will power the internal combustion engine of the automobile will help reduce our dependence on Middle Eastern oil without necessitating a rebuilding of the massive infrastructure built in support of gasoline. Reliance on the unstable states of the Middle East adversely impacts American strategic security, while massive oil imports skew our balance of payments. With the need for affordable energy rising with increasing population, and the transportation sector fueled almost exclusively by fossil fuels, the Middle East will control something approaching three-quarters of the world's oil in the coming century, providing that unstable region with a disproportionate leverage over diplomatic affairs. At a time when the United States confronts an ill-defined and confused drama of events on the international stage, including an increasingly assertive China, and nuclear and missile technology proliferation to North Korea, it seems clear we should dedicate a relatively small amount of money toward research that could lead to a revolution in the way we produce and consume energy. Or as presented by a distinguished panel of scientists and industrial experts in a recent PCAST report, ". . . the security of the United States is at least as likely to be imperiled in the first half of the next century by the consequences of inadequacies in the energy options available to the world as by inadequacies in

the capabilities of U.S. weapons systems." The report succinctly concludes, "It is striking that the Federal government spends about twenty times more R&D money on the latter problem than on the former."

Before we are able to reap the significant benefits offered by biobased industrial products, the cost of the new conversion technology must be significantly reduced. Research and development is the only systematic means for creating the innovations and technical improvements that will lower the costs of biomass processing. Given the relatively short-term horizon characteristic of private sector investments, and because many benefits of biomass processing are in the public interest, industry is ill-equipped to fund the necessary fundamental research that will result in cost effective technologies for biomass conversion.

Research activities carried out by the Department of Agriculture, Department of Energy and other Federal agencies are a principal reason for much of the progress witnessed in biomass processing and underscore the future promise if new technology is developed. Nonetheless, coordination among the Federal agencies is disjointed and the research tends to be driven by institutional missions rather than by an overarching strategy to develop cost-effective technologies for biomass conversion. The National Sustainable Fuels and Chemicals Act is designed to overcome these shortcomings and raise the level of the Federal commitment to biotechnologies that are already demonstrating potential as powerful new alternatives to the traditional practices of the past.

In this effort, I am asking for the support of President Clinton and Vice President GORE who have indicated their commitment to the development of sustainable resources. On this issue we can develop a consensus for undertaking research that will improve our national security and balance of payments, reduce greenhouse gas emissions and strengthen rural economies in America and around the world. Working together we can promote the type of innovation-focused research essential for improvements in the utilization of America's biomass resource. It is my firm belief that future Americans will enjoy a rich return on our investment in the promise of a green revolution.●

#### ADDITIONAL COSPONSORS

S. 98

At the request of Mr. MCCAIN, the name of the Senator from North Carolina [Mr. HELMS] was added as a cosponsor of S. 98, a bill to authorize appropriations for the Surface Transportation Board for fiscal years 1999, 2000, 2001, and 2002, and for other purposes.

S. 348

At the request of Ms. SNOWE, the names of the Senator from Kentucky

[Mr. BUNNING] and the Senator from Oregon [Mr. WYDEN] were added as cosponsors of S. 348, a bill to authorize and facilitate a program to enhance training, research and development, energy conservation and efficiency, and consumer education in the oilheat industry for the benefit of oilheat consumers and the public, and for other purposes.

S. 414

At the request of Mr. GRASSLEY, the names of the Senator from South Carolina [Mr. THURMOND] and the Senator from California [Mrs. BOXER] were added as cosponsors of S. 414, a bill to amend the Internal Revenue Code of 1986 to provide a 5-year extension of the credit for producing electricity from wind, and for other purposes.

S. 514

At the request of Mr. COCHRAN, the name of the Senator from Nebraska [Mr. KERREY] was added as a cosponsor of S. 514, a bill to improve the National Writing Project.

S. 579

At the request of Mr. BROWNBACK, the name of the Senator from North Dakota [Mr. CONRAD] was added as a cosponsor of S. 579, a bill to amend the Foreign Assistance Act of 1961 to target assistance to support the economic and political independence of the countries of the South Caucasus and Central Asia.

S. 662

At the request of Mr. CHAFEE, the names of the Senator from Missouri [Mr. BOND] and the Senator from Florida [Mr. GRAHAM] were added as cosponsors of S. 662, a bill to amend title XIX of the Social Security Act to provide medical assistance for certain women screened and found to have breast or cervical cancer under a federally funded screening program.

S. 783

At the request of Mrs. FEINSTEIN, the name of the Senator from Nevada [Mr. REID] was added as a cosponsor of S. 783, a bill to limit access to body armor by violent felons and to facilitate the donation of Federal surplus body armor to State and local law enforcement agencies.

S. 880

At the request of Mr. INHOFE, the names of the Senator from Montana [Mr. BURNS] and the Senator from Virginia [Mr. WARNER] were added as cosponsors of S. 880, a bill to amend the Clean Air Act to remove flammable fuels from the list of substances with respect to which reporting and other activities are required under the risk management plan program.

S. 918

At the request of Mr. KERRY, the name of the Senator from Washington [Mr. GORTON] was added as a cosponsor of S. 918, a bill to authorize the Small Business Administration to provide financial and business development assistance to military reservists' small business, and for other purposes.