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HOUSE OF REPRESENTATIVES
REPORT
105–28

VICTIM ALLOCUTION CLARIFICATION ACT OF 1997

MARCH 17, 1997.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MCCOLLUM, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 924]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 924) to amend title 18, United States Code, to give further assurance to the right of victims of crime to attend and observe the trials of those accused of the crime, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Victim Allocution Clarification Act of 1997".

SEC. 2. RIGHTS OF VICTIMS TO ATTEND AND OBSERVE TRIAL.

(a) IN GENERAL.—Chapter 223 of title 18, United States Code, is amended by adding at the end the following:

"§ 3510. Rights of victims to attend and observe trial

"A United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may or will, during the sentencing hearing—

"(1) exercise the right to make a statement or present any information in relation to the sentence at the imposition of sentence; or

"(2) testify as to the effect of the offense on the victim and the victim's family.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 223 of title 18, United States Code, is amended by adding at the end the following new item:

"3510. Rights of victims to attend and observe trial.".

(c) EFFECT ON PENDING CASES.—The amendments made by this section shall apply in cases pending on the date of the enactment of this Act.

PURPOSE AND SUMMARY

In 1994, Congress amended the Federal Rules of Criminal Procedure to provide that a victim would have the right to make a statement to the court in a non-capital case, at the time of sentencing, in order to better ensure that the interests of victims of crime would be known to sentencing judges. Also in that year, Congress authorized the government, after a guilty verdict is returned in a capital case, to call victims and victims' family members to testify during the post-verdict sentencing hearing. This testimony may be in connection with any aggravating factors that the government wishes to prove, or to rebut evidence of mitigating factors that the convicted defendant is attempting to prove. This so-called "victim impact" testimony often describes the effect of the crime on the victim or the victim's family. The Supreme Court has upheld the government's right to present victim impact testimony against constitutional challenge.

Recently the Committee has learned that, under the Federal Rules of Evidence, some federal trial judges may be able to exclude victims and victims' family members from attending the guilt-phase of a criminal trial because these persons intend to make victim impact statements during the sentencing phase of the trial. While Federal Rule of Evidence 615 does authorize judges to exclude fact witnesses from trial, this rule was formulated primarily to guard against potential fact witnesses changing their testimony based on the testimony of other fact witnesses they might hear at trial. The situation before the Committee does not involve the testimony of fact witnesses but rather statements and other testimony presented by victims as to the impact of the offenders' crimes on them personally. As such, the risk that their testimony might somehow be tainted by evidence presented during the guilt phase of a trial is minimal.

H.R. 924 provides that a victim may not be excluded from a criminal trial in federal court solely because of the fact that the victim may or will make a statement as to the impact of the crime on them or their family in accordance with existing law. The bill does not prevent judges from separating victims who will also be

fact witnesses during the guilt phase of the trial if the court determines that their fact testimony would be materially affected by hearing other fact testimony at trial. See 42 U.S.C. §10606(b)(4). Nor does the bill affect a judge's authority to manage his or her courtroom in accordance with other statutes and court rules. As such the bill strikes a balance between the goal of ensuring that fact testimony is not tainted by other testimony at trial and the goal that, when appropriate, every opportunity is given to victims to witness first hand that our system is providing justice for them.

BACKGROUND AND NEED FOR THE LEGISLATION

In recent years, the public has come to demand that its elected leaders take a greater interest in the concerns of victims of crime. Congress has responded to this demand in a number of ways. In 1990, Congress passed a provision requiring federal government employees involved in the detection, investigation, and prosection of crime to make their best efforts to see that victims of crime were accorded a number of rights, including the right to be treated with fairness and with respect for the victims' dignity and privacy, the right to be reasonably protected from the accused offender, the right to be notified of court proceedings, the right to confer with the attorney for the government in the case, and the right to information about the conviction, sentencing, imprisonment and release of the offender. See Public Law No. 101–647, codified at 42 U.S.C. § 10606. That Act also provided for two other important rights to be accorded victims: the right to restitution, and the right to be present at all public court proceedings related to the offense. Since 1990, Congress has enacted several measures to further this intent.

In 1996, Congress enacted Public Law 104–132, the "Anti-Terrorism and Effective Death Penalty Act of l996." Title II of that act made significant amendments to the restitution provisions of the United States Code to require, in large part, that federal courts order persons convicted of violent crimes, and specified other crimes, to make restitution to the victims of their crimes.

In 1994, Congress passed legislation relating to the right of the crime victim to be present at public court proceedings. In Public Law 103–322, the "Violent Crime Control and Law Enforcement Act of l994," Congress made provision for victims and their family members to be given opportunities to participate in the sentencing hearings in certain criminal cases. One of those provisions, now found in Federal Rule of Criminal Procedure 32(c)(3)(E) provides that if a sentence is to be imposed for a crime of violence or sexual abuse, the court is required to "address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence." If so, the judge is required to allow the victim to make a statement or present such information. It is generally accepted that this "right of allocution" found in Federal Rule of Criminal Procedure 32 applies only in non-capital criminal cases.

In the 1994 Act, Congress also authorized the government, in capital cases, to call victims and victims family members during the post verdict "special hearing to determine whether a sentence of death is justified" in order to testify as to any aggravating factors that the government wishes to prove. See 18 U.S.C. § 3593.

That section requires the government to provide notice to the defense that the government "believes that the circumstances of the offense are such that a sentence of death is justified and that the government will seek the sentence of death, and setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death." That section goes on to note that "the factors for which notice is provided under this subsection may include factors concerning the affect of the offense on the victim and the victims family." By implication, therefore, an aggravating factor which the government may seek to prove during the special hearing is the effect of the offense on the victim and the victims family.

Additionally, courts have held that the government may offer "victim impact" testimony to rebut mitigating factors that the offender may choose to establish pursuant to 18 U.S.C. § 3592(a)(8). This evidence is offered to counteract "the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth* v. *Maryland,* 482 U.S. 496, 517 (1987)(White, J., dissenting). Recently, the Supreme Court upheld against constitutional challenge the right of state and federal governments to offer this kind of "victim impact" evidence during consideration of the sentence of a person convicted of a capital offense. *Payne* v. *Tennessee,* 501 U.S. 808 (1991).

Recently, the Committee has learned that federal trial judges may attempt to exclude victims and victims family members from attending the guilt phase of a criminal trial because these persons have indicated a desire to make victim impact statements during the sentencing phase of the trial. The Committee understands that these judges may rely upon the provisions of Federal Rule of Evidence 615 in order to exclude these witnesses. That rule provides, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." The rule goes on to prohibit the exclusion of a party who is a natural person, an officer or employee of a party which is not a natural person designated as its representative by its attorney, or a person whose presence is shown by a party to be essential to the presentation of the party's case. These exceptions have generally not been interpreted to include the victim or the victim's family member.

When the Federal Rules of Evidence were proposed in 1972, the Advisory Committee on the Federal Rules of Evidence noted, "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion."[1] Others have described the goal of Rule 615 as two-fold: "to prevent falsification and to uncover fabrication that has already taken place."[2] With respect to the former, and put more succinctly, the rule is designed "to prevent the possibility of

[1] Fed. R. Evid. 615 advisory committee's note.

[2] 3 Jack Weinstein, Margaret A. Berger, Joseph M. McLaughlin, Weinstein's Evidence ¶ 615[01](1996). See also, 3 Christopher B. Miller, Laird C. Kirkpatrick, Federal Evidence 556 (1994).

one witness shaping his testimony to match that given by other witnesses at trial."[3] In some cases the concern is that witnesses will actually collude with one another to tailor their testimony so as to be consistent. In many circumstances, the concern is that fact witnesses will be affected, either consciously or subconsciously, in their testimony by hearing the testimony of other witnesses as to the facts in issue in the case. By preventing these witnesses from attending the trial, this concern is minimized.

In situations where victims or victims' family member will only give "victim impact" testimony during the post-conviction sentencing hearing, however, the Committee believes that the considerations that underpin Federal Rule of Evidence 615 are not in issue. Accordingly, the Committee believes that, in those instances, judges should not use the Rule to exclude victims and victims' family members from attending trials simply because they may give victim impact testimony during the sentencing hearing.[4]

When a victim or victim's family member seeks to present victim impact evidence only, this evidence is presented after the fact-finding portion of the trial has concluded and guilt has been adjudicated. The statements made by the victim or family members concern their personal experience as a result of the crime. In short, the victim impact testimony is different from the facts proven during the guilt phase of the trial. As such, there can be little, if any, impact on the victim impact testimony from the fact testimony presented during the guilt phase of the trial. Because the victim impact testimony is unique to each individual and consists largely of the subjective beliefs of the individual as to the impact of the crime, there is no need for victims to "tailor" their testimony to that of other victims and, therefore, no real concern that collusion among victim impact witnesses might take place.

Some opposed to this bill have expressed concern that by allowing victims and family members to attend the guilt phase of the trial they will become more emotionally distraught and, as a result, give more forceful victim impact testimony during the sentencing phase than they might otherwise give had they not been permitted to attend the guilt phase of the trial. While the Committee acknowledges that this may occur, the Committee also notes that victims, and especially family members, who are willing to testify during the sentencing hearing, are most likely those who feel most strongly about the actions of the convicted defendant and the effect of the crime on them. Victims know all too well the impact of what happened to them. And those family members who are motivated to come forward to seek to speak during sentencing are usually those who have already made the effort to learn the circumstances of the crime committed against their relative. It is very unlikely that they will be surprised by evidence presented during the guilt phase of the trial as to the effect of the crime on the victim. In short, the Committee believes that attendance will have little, if

[3] Id. (citing *United States* v. *Leggett,* 326 F.2d 613 (4th Cir.), cert. denied, 377 U.S. 955 (1964)).

[4] As noted above, the bill does not prevent judges from separating victims who will also be fact witnesses during the guilt phase of the trial if the court determines that their fact testimony would be materially affected by hearing other fact testimony at trial. See 42 U.S.C. §10606(b)(4).

any, effect on victims and family members who wish to make victim impact statements.

Even if the effect of observing the trial may be to increase the emotional intensity with which victims and family members may later testify as to their loss, the Committee has chosen to balance this concern with the public policy expressed by prior Congresses, and which it continues to support, that victims be afforded every opportunity to attend criminal trials. Weighing these positions, the Committee believes that the interests of the victims and their families should outweigh the concern of prejudice to a convicted defendant, for several reasons.

First, as discussed above, the Committee believes that any increase in the intensity of the victim impact testimony given by victims and family members viewing the trial is likely to be minimal at most. Second, even if this is a possibility, the Committee believes that in balancing this "risk" against the benefit of this legislation to victims of crime and their families, the interests of convicted defendants should be entitled to less protection than would be required if the purported "harm" of this bill were to persons whose guilt has yet to be proven beyond a reasonable doubt. Third, as the Supreme Court made clear in *Payne,* convicted defendants may always avail themselves of the protection of the Fifth and Eighth Amendments to the United States Constitution in order to protect themselves against victim impact testimony which is improperly prejudicial. Given all of these considerations, therefore, the Committee believes that the interests of victims of crime and their families should predominate over the somewhat speculative concerns that impermissible prejudice to convicted defendants may occur.

While the Committee reaches this conclusion with regard to all criminal cases, the Committee notes that in non-capital cases, this balance is even more clearly weighted in favor of the interest of victims and their families. At sentencing hearings in non-capital cases, victims exercising their right of allocution under the Federal Rules of Criminal Procedure make their "allocution" to the trial judge, and not to the jury. The Committee believes that a judge is even more capable of appropriately scrutinizing the statements made or other information presented by victims during sentencing so as not to be inappropriately prejudiced in deciding the appropriate sentence to be imposed on the convicted defendant. The Committee also notes that federal sentencing guidelines, in conjunction with applicable statutes, mandate the sentence options available to a judge in every criminal case, subject to departures only in certain situations. Thus, the likelihood that victim allocution evidence presented by a victim who was allowed to watch the guilt phase of the criminal trial will improperly prejudice a convicted defendant's sentence is virtually non-existent.

Finally, the Committee wishes to note that the bill is not to be interpreted as a guarantee to victims and their family members of a right to be present at trial under any circumstance. Judges continue to have the discretion, subject to other statutes and local court rules, to place reasonable restrictions on the number of persons who are present in the courtroom during trial, and to deal appropriately with spectators who choose to behave in inappropriate

ways during trial. Nor is it the Committee's intent that this bill supersede those provisions of law which give judges the power to exclude testimony if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.[5]

HEARINGS

The Committee's Subcommittee on Crime held no hearings on H.R. 924.

COMMITTEE CONSIDERATION

On March 6, 1997, the Subcommittee on Crime met in open session and ordered reported the bill H.R. 924, by a voice vote, a quorum being present. On March 12, 1997, the Committee met in open session and ordered reported favorably the bill H.R. 924 with amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

There were no recorded votes on the bill H.R. 924.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 924, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

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[5] The Committee does note, however, that the fact that a person has attended a trial pursuant to new section 3510 should not, in itself, be deemed to create a danger of creating unfair prejudice, confusing the issues, or misleading the jury.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 13, 1997.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 924, the Victim Allocution Clarification Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 924—Victim Allocution Clarification Act of 1997

CBO estimates that enacting this legislation would have no significant impact on the federal budget. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. H.R. 924 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would not impose costs on state, local, or tribal governments.

Under current federal court procedures, judges sometimes exclude victims of crime from the trial of the accused perpetrator if the victim will testify later at a sentencing hearing. H.R. 924 would provide that a crime victim could attend a criminal trial in federal court even if the victim might subsequently testify during the sentencing phase.

Enacting H.R. 924 could result in more persons attending federal trials than would under current law. Based on information from the Administrative Office of the United States Courts, however, CBO expects that any increase in attendance would be small and would not result in any significant additional costs to the federal courts.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Robert A. Sunshine, Deputy Assistant for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section cites the short title of the bill as the "Victim Allocution Clarification Act of l997."

SECTION 2. RIGHTS OF VICTIMS TO ATTEND AND OBSERVE TRIAL

a. New section 3510 of Title 18

This section adds new section 3510 of chapter 223 of Title 18, United States Code, entitled "Rights of Victims to Attend and Observe Trial." The intent of this section is to make it clear that no person who wishes to exercise any right which may otherwise be provided for by law to make statements, present information, or testify during the sentencing hearing of a federal criminal trial will be excluded from observing that trial solely because of this desire.

To accomplish this intent, the bill enacts new section 3510 of Title 18 which provides that "A United States district court shall not order any victim of an offense excluded from the trial of the defendant accused of that offense because such victim may or will, at the sentencing hearing—(1) exercise the right to make a statement or present any information in relation to the sentence at the imposition of sentence; or (2) testify as to the effect of the offense on the victim or the victim's family." The text of paragraph (1) of new section 3510 is taken from that portion of existing law (18 U.S.C. § 3593(a)) relating to the notice that the government is required to give to the defense of its intent to seek the death penalty and of the aggravated factors it will seek to prove during the "special hearing to determine whether a sentence of death is warranted" which is held after a guilty verdict is returned in a federal capital case. The text of paragraph 2 of new section 3510 is taken from Federal Rule of Criminal Procedure 32 which describes procedures to be followed during sentencing in federal criminal trials not involving capital offenses. Both of these provisions were enacted as part of Public Law 103–322, the "Violent Crime Control and Law Enforcement Act of l994."

b. Clerical amendment

Section 2 of the bill also contains a clerical amendment to the table of sections at the beginning of Chapter 223 of Title 18 of the United States Code.

c. Application of new section 3510 to pending cases

Section 2 of the bill also provides that the amendments made by the bill are to apply in cases pending on the date of enactment of this bill. This provision has been included in the bill to make it clear to courts reviewing this act that Congress intended that new section 3510 apply to all cases which were pending on the date the bill was enacted, as well as all cases filed thereafter.

OTHER CONSIDERATIONS

a. Definition of victim

Although not defined specifically in the bill, the Committee notes that the term "victim" is defined in both 42 U.S.C. § 10607 and in the Federal Rules of Criminal Procedure. In cases where the victim of the crime is deceased, Federal Rule of Criminal Procedure 32 requires the court to designate one or more family members or relatives of the deceased to exercise the right of allocution granted in that Rule. It is the Committee's intent that all persons who may

desire to exercise any right which may be provided for by law to make statements, present information, or testify during the sentencing hearing of a federal criminal trial will benefit from the effect of this bill. Thus, in interpreting this section, the Committee intends the term "victim" be defined broadly and, in so far as practical, be given the meanings set forth in those provisions which allow citizens to make statements, present information, or testify during the sentencing hearing of a federal criminal trial.

b. Applicability of other statutes and rules

It is the Committee's intent that, in accordance with the general rule of statutory construction, to the extent this bill may conflict with other statutes or any rules applicable to the federal courts, this bill be interpreted to supersede such statute or rule to the extent of the conflict.

c. Review of new section 3510

The Committee assumes that both the Department of Justice and victims will be heard on the issue of a victim's exclusion, should a question of their exclusion arise under this section. The Committee intends that an allegedly erroneous ruling by a district court excluding a victim in violation of this section be reviewable on appeal, both by the government and by the victim. The Committee points out that it has not included language in this statute that bars a cause of action by the victim, as it has done in other statutes affecting victims' rights (*see, e.g.*, 42 U.S.C. § 10606(c); 42 U.S.C. § 10608(e)).

AGENCY VIEWS

No agency views were submitted with respect to H.R. 924.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

CHAPTER 223 OF TITLE 18, UNITED STATES CODE

CHAPTER 223—WITNESSES AND EVIDENCE

Sec.
3481. Competency of accused.

* * * * * * *

3510. Rights of victims to attend and observe trial.

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§ 3510. Rights of victims to attend and observe trial

A United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may or will, during the sentencing hearing—

(1) exercise the right to make a statement or present any information in relation to the sentence at the imposition of sentence; or

(2) testify as to the effect of the offense on the victim and the victim's family.

DISSENTING VIEWS

We dissent from the Judiciary Committee's embrace of H.R. 924, a bill that bears an altogether misleading title—the "Victim Allocution Clarification Act of 1997". This bill is politically based special legislation at its worse. We find highly disturbing both its substance and the pace at which it threatens to move through the Congress.

The bill was not available from subcommittee drafters until after 5:00 p.m. March 6, 1997. No hearing was held on the bill. On March 7, 1997, the bill was voted out of the crime subcommittee without discussion. By the next Wednesday, the full subcommittee reported the bill. The Tuesday following that, it is slated to be voted upon on the House floor. This legislative railroad is plainly designed to deliver this piece of special, overly intrusive legislation to the federal courthouse steps in Denver, Colorado before the March 31 Oklahoma City bombing case trial date.

The bill's Judiciary Committee sponsors readily admitted in full committee markup that H.R. 924 would overturn United States District Court Judge Matsch's evidentiary ruling in the Oklahoma City bombing cases. That ruling held that families and survivors of the Oklahoma City bombing had to be excluded from the trial proceedings if they were to give crime impact testimony at the sentencing phase. The ruling was sustained by the Tenth Circuit Court of Appeals.

Some of the bill's sponsors joined a "friend of the court" brief during the Tenth Circuit appeal, arguing for reversal for the trial Judge's difficult ruling. After the Appellate Court decision, the bill's sponsors swiftly introduced this special legislation in an attempt to overrule the Court's decision, and are now rushing it through the House without any hearing, in an attempt to overrule the decisions of both courts.

Our Constitution created a government which is premised on checks and balances through a separation of powers among independent branches of government. The Legislative Branch is empowered to make laws, subject to certain limitations such as the Bill of Rights and prohibitions against Bills of Attainder (special legislation) and "ex post facto" (retroactively applied) laws. The function of the Executive Branch is to enforce laws. The Judiciary interprets the laws and adjudicates cases and controversies arising under them. *Marbury* vs. *Madison,* 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). "One branch is not permitted to encroach on the domain of another." (See e.g., *Plaut* v. *Spendthrift Farms, Inc.,* 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed. 2d 328 [1995], hereinafter *"Plaut",* and authorities cited therein.)

H.R. 924 violates the Constitutional framework of separation of powers in its undue, retroactive interference with a settled evidentiary ruling in a pending criminal case. It is an obvious attempt

to obtain legislatively a ruling in the Oklahoma City bombing case(s) different from the one already entered by a federal judge according to the law and the facts of the particular cases and sustained on appellant review.

As Justice Scalia recently explained in *Plaut:*

> The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judiciary powers, which had been prevalent, in the colonies long before the Revolution, and which after the Revolution had produced fractional strife and partisan oppression.
>
> * * * * * * *
>
> The sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution.

(*Plaut,* supra).

Legislatures are primarily policymaking bodies that promulgate rules to govern *future* conduct. The constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect the constitutional concern that the political process will be abused to unduly punish the unpopular. The Constitution's prohibitions against ex post facto laws and bills of attainder, and indeed, its entire structural provision for a separation of powers reflect the concern that legislation might be used, as it is in this bill, not to prevent future conduct or perfect the administration of justice, but rather, to impose by legislation a special penalty against specific persons or classes of persons. As James Madison put it, retroactive legislation of this kind abusively affords special opportunities for the politically popular and powerful to obtain improper legislative benefits. It is unseemly for someone, in the middle of a trial, to seek Congressional assistance to affect the outcome of that case.

Judge Matsch has determined that the sequestration of impact witnesses is necessary to ensure that their testimony will remain in fact "crime-impact statements", and not "trial process-impact statements." Insofar as the court's ruling ensures these constitutionally protected rights, it is beyond the power of Congress to alter that ruling by statute.

Whether or not Congress agrees with his ruling, the court should have the ability to render it according to the law and facts before him in the particular cases. He is in the best position to make such difficult determinations. Judge Matsch should be allowed to run his courtroom and conduct these trials, without the Congress grabbing his gavel from him after a ruling not to its political liking.

Intervention by Congress in a pending case is not only a blatant intrusion upon the Constitutional principles of separation of powers, it also exposes a criminal trial to problematic publicity because the U.S. Congress has obviously weighed in on one side of a pending case. Due to the prospect of prejudicial impact from the enormous pre-trial publicity surrounding the Oklahoma City bombing case, the trial of the case had to be removed not just from the jurisdiction of its original venue, but entirely outside of the State of Oklahoma. Additional complaints of prejudicial pre-trial publicity

are under consideration in connection with alleged breaches of attorney/client confidentiality privileges. This highly politicized intervention in the case by Congress will only add to these possible case infirmities and, while addressing the understandable concerns of victims, may jeopardize the government's case, altogether.

H.R. 924 requires the court to allow victim impact witnesses to observe court proceedings relating to the determination of guilt or innocence even where the court has determined that such observation will prejudicially taint their testimony. While prejudicially tainted testimony is a problem in any case, it is especially problematic in a federal death penalty case where the decision to impose death or not is made by a jury.

The legislation before us fails to consider the stark differences between the trial of capital and non-capital cases. In noncapital cases, the victims crime-impact statements are made to the judge alone during the sentencing phase of the trial. The judge has experience in separating emotions, inflammatory rhetoric, and what is relevant and irrelevant. In capital cases, however, the crime-impact statements are made directly to a jury and may well include emotional, inflammatory, and irrelevant testimony.

Unfortunately, an amendment to limit the application of the bill to non-capital cases was defeated. Therefore, all pending and future capital cases will be exposed to new legal challenges because of the passage of this bill.

This is not the first time in recent years the Congress has acted as a super appeals court by intervening in a pending case to impose a politically popular ruling different from the results achieved through court deliberations. In the Morgan/Foretich custody case, Congress served as a super Supreme Court to overturn a court decision Members did not like. Just last week, the House served as an advisor to the Alabama Supreme Court in a pending case involving the Ten Commandments.

Furthermore, it is not even the first time Congress has acted to control a court determination in the Oklahoma City bombing case. Last year, to prevent the court from prohibiting cameras in the trial, Congress added a special provision to the anti-terrorism bill directing that in any trial where venue is changed by "more than 350 miles * * *", the court "shall order closed circuit televising of the proceedings * * *". The Oklahoma bombing case is the only one which fits this description.

This legislation violates the fundamental constitutional principle of the separation of powers. It also risks further prejudicing the outcome of a pending criminal case which has already been moved out of the state due to extensive pre-trial publicity. Additionally, it fails to differentiate between the potential impact of inflammatory testimony in a capital case and in a non-capital case. Further, it creates the unseemly spectacle of Congress intervening to effect the outcome in a pending capital case.

In short, high profile criminal cases are the truest tests of the American Constitution. Congress should not act as an interlocutory court of appeals in such cases. Tinkering with the judicial process to affect the outcome of a particular pending case holds the entire process up to disrepute.

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MELVIN L. WATT.
SHEILA JACKSON LEE.
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