

**Calendar No. 455**

105TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
105-409

**S.J. RES. 44—PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS**

OCTOBER 12 (legislative day, OCTOBER 2), 1998.—Ordered to be printed

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

**REPORT**

together with

**ADDITIONAL AND MINORITY VIEWS**

[To accompany S.J. Res. 44]

The Committee on the Judiciary, to which was referred the joint resolution (S.J. Res. 44) to propose an amendment to the Constitution of the United States to protect the rights of crime victims, having considered the same, reports favorably thereon, with an amendment, and recommends that the joint resolution, as amended, do pass.

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## I. PURPOSE

The Crime Victims' Rights Constitutional Amendment is intended to establish and preserve, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation.

It was decades after the ratification of the Constitution and the Bill of Rights that the offices of the public police and the public prosecutor would be instituted, and decades beyond that before the victim's role was fully reduced from that of the moving party in every criminal prosecution, to that of a party of interest in the proceedings, to that of mere witness, stripped even of membership in "the public" under the Constitutional meaning of "a public trial."

Much, of course, was gained in the transformation of criminal justice from one of private investigation and prosecution to an enterprise of government. The overall community's stake in how the System operated was recognized; the policies governing the System, the public servants hired by the System, and the resources needed by the System all became accountable to the democratic institutions of government. In many ways, crime victims themselves benefited from the change. They had the aid of public law enforcement, which was more skilled than the average victim in investigating the crime, and the aid of public prosecutors, who were more skilled than the average victim in pleading their case in court. No longer would the wealth of the violated party be a significant determinant as to whether justice was done.

However, in the evolution of the Nation's Justice System, something ineffable has been lost, evidenced in this plea of a witness speaking to the 1982 President's Task Force on Victims of Crime: "Why didn't anyone consult me? I was the one who was kidnaped—not the state of Virginia."

One of the most extraordinary aspects of the several hearings the Committee has held on this issue is the broad consensus among proponents and opponents alike that violent crime victims have a deep, innate, and wholly legitimate interest in the cases that victims bring to the justice system for resolution. It is beyond serious question that for many or most crime victims the prosecution and punishment of their violators are the most important public proceedings of their lifetimes.

This, then, is the purpose of the Crime Victims' Rights Amendment: to acknowledge and honor the humanity and dignity of crime victims within our borders who entrust the Government to seek justice for them. In pursuit of this purpose, the Committee seeks to strengthen the great theme of the Bill of Rights—to ensure the rights of citizens against the deprecations and intrusions of government—and to advance the great theme of the later amendments, extending the participatory rights of American citizens in the affairs of government.

## II. BACKGROUND AND LEGISLATIVE HISTORY

For more than 15 years, a Federal Crime Victims' Rights Amendment has been under consideration in this country. The idea dates back to at least 1982, when the Presidential Task Force on Victims

of Crime convened by President Reagan recommended, after hearings held around the country and careful consideration of the issue, that the only way to fully protect crime victims' rights was by adding such rights to the Constitution. The President's Task Force explained the need for a constitutional amendment in these terms:

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

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

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

Following that recommendation, proponents of crime victims' rights decided to seek constitutional protection in the states initially before undertaking an effort to obtain a federal constitutional amendment. See Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 Utah L. Rev. 1373, 1381–83 (recounting the history). As explained in testimony before the Committee, "[t]he 'states-first' approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the 'great laboratory of the states,' that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice system while producing no negative, unintended consequences." Senate Judiciary Committee Hearing, April 23, 1996, statement of Robert E. Preston, at 40. A total of 29 states, in widely differing versions, now have state victims' rights amendments.<sup>1</sup>

With the passage of and experience with these State constitutional amendments came increasing recognition of both the national consensus supporting victims' rights and the difficulties of protecting these rights with anything other than a Federal amendment. As a result, the victims' advocates—including most prominently the National Victim Constitutional Amendment Network (NVCAN)—decided in 1995 to shift their focus towards passage of a Federal amendment. In 1997, the National Governors Association passed a resolution supporting a Federal constitutional amend-

<sup>1</sup>See Ala. Const. Amend. 557; Alaska Const. art. I, §24; Ariz. Const. Art. II, §2.1; Cal. Const. Art. I, §§12, 28; Colo. Const. Art. II, §16a; Fla. Const. Art. I, §16(b); Idaho Const., Art. I, §22; Ill. Const. Art. I, §8.1; Ind. Const. Art. I, §13(b); Kans. Const. Art. 15, §15; Md. Decl. of Rights art. 47; Mich. Const. Art. I, §24; Missouri Const. Art. I, §32; Neb. Const. Art. I, §28; Nev. Const. Art. I, §8; N.C. Const. Art. I, §37; N.J. Const. Art. I, §22; New Mex. Const. Art. 2, §24; North Carolina Const. Art. I, §37; Ohio Const. Art. I, §10a; Okla. Const. Art. II, §34; Rhode Island Const. Art. I, §23; S.C. Const. Art. I, §24; Texas Const. Art. I, §30; Utah Const. Art. I, §28; Va. Const. Art. I, §8–A; Wash. Const. Art. 2, §33; Wisc. Const. Art. I, §9m. These amendments passed with overwhelming popular support.

ment: “The rights of victims have always received secondary consideration within the U.S. judicial process, even though States and the American people by a wide plurality consider victims’ rights to be fundamental. Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U.S. Constitution.” National Governors Association, Policy 23.1 (effective winter 1997 to winter 1999).

In the 104th Congress, S.J. Res. 52, the first Federal constitutional amendment to protect the rights of crime victims, was introduced by Senators Jon Kyl and Dianne Feinstein on April 22, 1996. Twenty-seven other Senators cosponsored the resolution. A similar resolution (H.J. Res. 174) was introduced in the House by Representative Henry Hyde. On April 23, 1996, the Senate Committee on the Judiciary held a hearing on S.J. Res. 52. Representative Hyde testified in support of the amendment. Victims and representatives of victims’ rights organizations also spoke in favor of the amendment: Katherine Prescott, the president of Mothers Against Drunk Driving (MADD); Ralph Hubbard, board member and State Coordinator of Parents of Murdered Children of New York State; John Walsh, the host of “America’s Most Wanted”; Collene Campbell, a leader in the victims’ rights movement in California; Rita Goldsmith, the national spokesperson of Parents of Murdered Children; and Robert E. Preston, co-chairman of the National Constitutional Amendment Network. Two legal experts testified in support of the amendment: Professor Paul Cassell and Steven J. Twist, a member of the board of the National Organization for Victim Assistance and the former Chief Assistant Attorney General of Arizona. Two legal experts testified against the amendment: Professor Jamin Raskin of Washington College of Law at American University and noted commentator Bruce Fein, former member of the Department of Justice.

At the end of the 104th Congress, Senators Kyl and Feinstein introduced a modified version of the amendment (S.J. Res. 65). As first introduced, S.J. Res. 52 embodied eight core principles: notice of the proceedings; presence; right to be heard; notice of release or escape; restitution; speedy trial; victim safety; and notice of rights. To these core values another was added in S.J. Res. 65, the right of every victim to have independent standing to assert these rights.

In the 105th Congress, Senators Kyl and Feinstein introduced S.J. Res. 6 on January 21, 1997, the opening day of the Congress. Thirty-two Senators became cosponsors of the resolution. On April 16, 1997, the Senate Committee on the Judiciary held a hearing on S.J. Res. 6. Representative Robert C. Scott testified in opposition to the amendment and Representative Deborah Pryce testified in support of the amendment. U.S. Attorney General Janet Reno testified that “[b]ased on our personal experiences and the extensive review and analysis that has been conducted at our direction, the President and I have concluded that an amendment to the U.S. Constitution to protect victims’ rights is warranted.” (Senate Judiciary Committee Hearing, April 16, 1997, statement of Attorney General Reno, at 40–41.)

Others testifying in support of the amendment included John Walsh, the host of “America’s Most Wanted”; Marsha Kight of Oklahoma City; Wisconsin attorney general Jim Doyle; Kansas at-

torney general Carla Stovall; Pima County attorney Barbara LaWall; and Prof. Paul Cassell of the University of Utah College of Law. The following people testified in opposition to the amendment: Lynne Henderson of Bloomington, IN; Donna F. Edwards, the executive director of the National Network to End Domestic Violence; and Virginia Beach Commonwealth Attorney Robert J. Humphreys.

S.J. Res. 44 was introduced by Senators Kyl and Feinstein on April 1, 1998. Thirty-nine Senators joined Senators Kyl and Feinstein as original cosponsors: Senators Biden, Lott, Thurmond, Torricelli, Breaux, Grassley, DeWine, Ford, Reid, Gramm, Mack, Landrieu, Cleland, Coverdell, Craig, Inouye, Bryan, Snowe, Thomas, Warner, Lieberman, Allard, Hutchison, D'Amato, Shelby, Campbell, Coats, Faircloth, Frist, Robert Smith, Gregg, Hagel, Helms, Gordon Smith, Hutchinson, Inhofe, Murkowski, Bond, and Grams. Senator Wyden subsequently joined as a cosponsor. The amendment included the core principles contained in the earlier versions. The scope of the amendment as originally proposed reached to crimes of violence and other crimes that may have been added by law. In the present text, the amendment is limited to crimes of violence.

On April 28, 1998, the Senate Committee on the Judiciary held a hearing on S.J. Res. 44. Raymond C. Fisher, the U.S. Associate Attorney General testified in support of an amendment. Additionally, the following witnesses testified in support of S.J. Res. 44: Prof. Paul Cassell; Steve Twist, a member of the National Victims' Constitutional Amendment Network and the former Chief Assistant Attorney General of Arizona; Norm Early, a former Denver district attorney and a board member of the National Organization for Victim Assistance; and Marlene Young, the executive director of the National Organization for Victim Assistance. The following witnesses testified in opposition to the amendment: Prof. Robert Mosteller of Duke Law School and Kathleen Kreneck, the executive director of the Wisconsin Coalition Against Domestic Violence.

On July 7, after debate at three executive business meetings, the Senate Committee on the Judiciary approved S.J. Res. 44, with a substitute amendment, by a vote of 11 to 6. The following Senators voted in favor of the amendment: Hatch, Thurmond, Grassley, Kyl, DeWine, Ashcroft, Abraham, Sessions, Biden, Feinstein, and Torricelli. The following Senators voted against the amendment: Thompson, Leahy, Kennedy, Kohl, Feingold, and Durbin. Senator Specter did not vote.

### III. THE NEED FOR CONSTITUTIONAL PROTECTION

After extensive testimony in hearings held over 3 different years, the Committee concludes that a Federal constitutional amendment will protect victims' rights in the Nation's criminal justice system. While a wide range of State constitutional amendments and other State and Federal statutory protections exist to extend rights to victims, that patchwork has not fully succeeded in ensuring comprehensive protection of victims' rights within the criminal justice system. A Federal amendment can better ensure that victims' rights are respected in the Nation's State and Federal courts.

The U.S. Supreme Court has held that “in the administration of criminal justice, courts may not ignore the concerns of victims.” *Morris v. Slappy*, 461 U.S. 1, 14 (1983). Yet in today’s world, without protection in our Nation’s basic charter, crime victims are in fact often ignored. As one former prosecutor told the committee, “the process of detecting, prosecuting, and punishing criminals continues, in too many places in America, to ignore the rights of victims to fundamental justice.” Senate Judiciary Committee Hearing, April 23, 1996, statement of Steven J. Twist, at 88. In some cases victims are forced to view the process from literally outside the courtroom. Too often they are left uninformed about critical proceedings, such as bail hearings, plea hearings, and sentencing. Too often their safety is not considered by courts and parole boards determining whether to release dangerous offenders. Too often they are left with financial losses that should be repaid by criminal offenders. Too often they are denied any opportunity to make a statement that might provide vital information for a judge. Time and again victims testified before the Committee that being left out of the process of justice was extremely painful for them. One victim even found the process worse than the crime: “I will never forget being raped, kidnaped, and robbed at gunpoint. However my disillusionment [with] the judicial system is many times more painful.” President’s Task Force on Victims of Crime, *Final Report* 5 (1982).

It should be noted at the outset that a Federal amendment for victims’ rights is intended to provide benefits to society as a whole, and not just individual victims. As Attorney General Reno has testified:

[T]he President and I have concluded that a victims’ rights amendment would benefit not only crime victims but also law enforcement. To operate effectively, the criminal justice system relies on victims to report crimes committed against them, to cooperate with law enforcement authorities investigating those crimes, and to provide evidence at trial. Victims will be that much more willing to participate in this process if they perceive that we are striving to treat them with respect and to recognize their central place in any prosecution.

(Senate Judiciary Committee Hearing, April 16, 1997, statement of Attorney General Reno, at 41.)

#### THE CONSTITUTION TYPICALLY PROTECTS PARTICIPATORY RIGHTS

The Committee has concluded that it is appropriate that victims’ rights reform take the form of a Federal constitutional amendment. A common thread among many of the previous amendments to the Federal constitution is a desire to expand participatory rights in our democratic institutions. Indeed, the 15th amendment was added to ensure African-Americans could participate in electoral process, the 19th amendment to do the same for women, and the 26th amendment expanded such rights to young citizens. Other provisions of the Constitution guarantee the openness of civil institutions and proceedings, including the rights of free speech and assembly, the right to petition the Government for redress of griev-

ances, and perhaps most relevant in this context, the right to a public trial. It is appropriate for this country to act to guarantee rights for victims to participate in proceedings of vital concern to them. These participatory rights serve an important function in a democracy. As the Justice Brandeis once stated, “[s]unlight is said to be the best of disinfectants.” Louis Brandeis, *Other People’s Money* 62 (1933). Open governmental institutions, and the participation of the public, help ensure public confidence in those institutions. In the case of trials, a public trial is intended to preserve confidence in the judicial system, that no defendant is denied a fair and just trial. However, it is no less vital that the public—and victims themselves—have confidence that victims receive a fair trial.

In a Rose Garden ceremony on June 25, 1996, endorsing the amendment, President Clinton explained the need to constitutionally guarantee a right for victims to participate in the criminal justice process:

Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them. People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be. It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be.

Two leading constitutional law scholars recently reached similar conclusions:

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

Participation of victims is not only a value consistent with our constitutional structure but something that can have valuable benefits in its own right. As experts on the psychological effects of victimization have explained, there are valuable therapeutic reasons to ensure victim participation in the criminal justice process:

The criminal act places the victim in an inequitable, “one-down” position in relationship to the criminal, and the victims’ trauma is thought to result directly from this inequity. Therefore, it follows that the victims’ perceptions about the equity of their treatment and that of the defendants affects their crime-related psychological trauma.

[F]ailure to \* \* \* offer the right of [criminal justice] participation should result in increased feelings of inequity on the part of the victims, with a corresponding increase in crime-related psychological harm. (Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 19 (1987).)

For all these reasons, it is the view of the Committee that it is vital that victims be guaranteed an appropriate opportunity to participate in our criminal justice process.

LESS THAN FEDERAL CONSTITUTIONAL PROTECTION HAS BEEN  
INADEQUATE

Most of the witnesses testifying before the Committee shared the view that victims' rights were inadequately protected today and that, without a Federal amendment, they would so remain. Attorney General Reno, for example, reported after careful study that:

Efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the State level for the past twenty years, and many States have responded with State statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.

(Senate Judiciary Committee Hearing, April 16, 1997, statement of Attorney General Reno, at 64.)

Similarly, a comprehensive report from those active in the field concluded that "[a] victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdiction to jurisdiction on the state and federal level." U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims' Rights and Services for the 21st Century* 10 (1998). Indeed, Professors Tribe and Cassell have reached a similar conclusion: "Congress and the states already have passed a variety of measures to protect the rights of victims. Yet the reports from the field are that they have all too often been ineffective." Laurence H. Tribe and Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. Times, July 6, 1998, at B7.

EXAMPLES OF VICTIMS DENIED THE OPPORTUNITY TO PARTICIPATE

It is the view of the Committee that a Federal amendment can better ensure that victims' opportunity to participate in the criminal justice process is fully respected. The Committee heard significant testimony about how the existing patchwork fails to transform paper promises to victims into effective protections in the criminal justice system. At the Committee's 1998 hearing, Marlene Young, a representative of the National Organization for Victim Assistance (NOVA), gave some powerful examples to the Committee:



- Roberta Roper, who testified eloquently before the Committee in her capacity as the co-chair of the National Victims Constitutional Amendment Network, was denied the opportunity to sit in the courtroom at the trial of her daughter's murderer because it was thought she might, by her presence, influence the outcome.

- Sharon Christian, 20 years old, a young victim of rape reported the crime. After the offender was arrested, she was victimized by the system when, 2 weeks later she was walking down the street in her neighborhood and saw the young man hanging out on the corner. He had been released on personal recognizance with no notice to her and no opportunity to ask for a restraining order or for the court to consider the possibility of bond.

- Virginia Bell, a retired civil servant, was accosted and robbed in Washington, DC some five blocks from the Committee's hearing room, suffering a broken hip. Her medical expenses were over \$11,000, and the resulting debilitation required her to live with her daughter in Texas. While her assailant pled guilty, Ms. Bell was not informed, and the impact of her victimization was never heard by the court. The court ultimately ordered restitution in the entirely arbitrary and utterly inadequate amount of \$387.

- Ross and Betty Parks, parents of a murdered daughter Betsy, waited 7 years for a murder trial. The delay was caused, in part, by repeated motions that resulted in delay—thirty-one motions at one point.

The unfortunate and unfair treatment of these individuals was brought to the attention of the Committee by just one witness. But the reports from the field are that there are countless other victims that have been mistreated in similar ways. Yet sadly and all too often, the plight of crime victims will never come to the attention of the public or the appellate courts or this Committee. Few victims have the energy or resources to challenge violations of even clearly-established rights and, in those rare cases when they do so, they face a daunting array of obstacles. No doubt today many frustrated victims simply give up in despair, unable to participate meaningfully in the process.

#### STATISTICAL QUANTIFICATION OF VIOLATIONS OF VICTIMS' RIGHTS

The statistical evidence presented to the Committee revealed that the current regime falls well short of giving universal respect to victims' rights. In the mid-1990's, the National Victim Center, under a grant from the National Institute of Justice, reviewed the implementation of victims' rights laws in four States. Two states were chosen because they had strong State statutory and State constitutional protection of victims' rights, and two were chosen because they had weaker protection. The study surveyed more than 1,300 crime victims and was the largest of its kind ever conducted. It found that many victims were still being denied their rights, even in States with what appeared to be strong legal protection. The study concluded that State protections alone are insufficient to guarantee victims' rights:

The *Victims Rights Study* revealed that, while strong state statutes and state constitutional amendments protecting crime victims' rights are important, they have been insufficient to guarantee the rights of crime victims. While this sub-report focused on reports by crime victims regarding their personal experiences, the responses of local criminal justice and victim service providers to similar questions in the *Victims Rights Study* corroborate the victim responses. Even in states with strong protection large numbers of victims are being denied their legal rights.

(National Victim Center, *Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims—Sub-Report: Crime Victim Responses Regarding Victims' Rights 7* (April 15, 1997).)

Important findings of the study included:

- Nearly half of the victims (44 percent) in States with strong protections for victims and more than half of the victims (70 percent) in States with weak protections did not receive notice of the sentencing hearing—notice that is essential for victims to exercise their right to make a statement at sentencing.
- While both of the States with strong statutes had laws requiring that victims be notified of plea negotiations, and neither of the weak protection States had such statutes, victims in both groups of States were equally unlikely to be informed of such negotiations. Laws requiring notification of plea negotiations were not enforced in nearly half of the violent crime cases included in the study.
- Substantial numbers of victims in States with both strong and weak protection were not notified of various stages in the process, including bail hearings (37 percent not notified in strong protection states, 57 percent not notified in weak protection states); the pretrial release of perpetrators (62 percent not notified in strong protection states, 74 percent not notified in weak protection States); and sentencing hearings (45 percent not notified in strong protection States, 70 percent not notified in weak protection States).

A later report based on the same large data base found that racial minorities are most severely affected under the existing patchwork of victims' protections. National Victim Center, *Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims—Sub-Report: Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights 5* (June 5, 1997). Echoing these findings of disparate impact, another witness reported to the Committee, "There being no constitutional mandate to treat all of America's victims, white and non-white, with dignity and compassion \* \* \* minority victims will continue to feel the sting of their victimization much longer than their white counterparts. Because of the large percentage of minority victims in the system, their neglect \* \* \* continues to create disrespect for a process in the communities where such disrespect can be least afforded." Senate Judiciary Committee Hearing, April 28, 1998, statement of Norm S. Early. A recent report concluded, after re-

viewing all of the evidence from the field, that “[w]hile victims’ rights have been enacted in states and at the federal level, they are by no means consistent nationwide. All too often they are not enforced because they have not been incorporated into the daily functioning of *all* justice systems and are not practiced by *all* justice professionals.” U.S. Department of Justice, Office for Victims of Crime, *New Directions from the Field: Victims’ Rights and Services for the 21st Century* 9 (1998).

In sum, as Harvard Law Prof. Laurence H. Tribe has concluded, rules enacted to protect victims’ rights “are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused’s rights regardless of whether those rights are genuinely threatened.” Laurence H. Tribe, *Statement on Victims’ Rights*, April 15, 1997, p. 3.

A FEDERAL AMENDMENT IS COMPATIBLE WITH IMPORTANT  
FEDERALISM PRINCIPLES

The proposed victims’ rights constitutional amendment is fully compatible with the principles of federalism on which our republic is based. First, of course, the constitutionally specified process for amending the Constitution fully involves the States, requiring approval of three-quarters of them before any amendment will take effect. There is, moreover, substantial evidence that the States would like to see the Congress act and give them, through their State legislatures, the opportunity to approve an amendment. For example, the National Governors Association overwhelmingly endorsed a resolution calling for a Federal constitutional amendment.

The important values of federalism provide no good reason for avoiding action on the amendment. Already many aspects of State criminal justice systems are governed by Federal constitutional principles. For example, every State is required under the sixth amendment to the Federal constitution as applied to the States to provide legal counsel to indigent defendants and a trial by jury for serious offenses. Victims’ advocates simply seek equal respect for victims’ rights, to give the same permanence to victims’ rights.

Adding protections into the U.S. Constitution, our fundamental law, will serve to ensure that victims’ rights are fully protected. This same point was recognized by James Madison in considering whether to add to the Constitution a Bill of Rights. He concluded the Bill of Rights would acquire, by degrees, “the character of fundamental maxims.” James Madison, *The Complete Madison*, ed. Saul K. Padover, p. 254 (1953).

Amending the Constitution is, of course, a significant step—one which the Committee does not recommend lightly. But to protect victims, it is an appropriate one. As Thomas Jefferson once said: “I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.” Thomas Jefferson, letter to Samuel Kercheval, July 12, 1816, *The Writings of Thomas Jefferson*, ed. Paul L. Ford, vol. 10,

pp. 42–43 (1899). Throughout the country, there is a strong consensus that victims' rights deserve to be protected. But at the same time, as a country, we have failed to find a way to fully guarantee rights for victims in criminal justice processes of vital interest to them. It is time to extend Federal constitutional recognition to those who are too often forgotten by our criminal justice system—the innocent victims of crime.

#### IV. THE NEED FOR SPECIFIC RIGHTS IN THE PROCESS

With this need for Federal constitutional protection of victims' rights in mind, the Committee finds that rights under eight general headings should be protected in an amendment to the Federal constitution. Each of these eight rights is discussed in turn.

##### 1. *Right to notice of proceedings*

Rights for victims in the criminal justice process are of little use if victims are not aware of when criminal justice proceedings will be held. The Committee heard testimony about the devastating effects on crime victims when hearings about the crime are held without prior notice to them. For example, a witness from Parents of Murdered Children (POMC) testified:

Each week at our national office, we receive more than 1,000 murder-related calls. Of these calls, about half involve homicide survivors who believe that they have been treated unfairly by some part of the criminal justice system. Some of our members even have as much anger about their unfair treatment by the criminal justice system as they do about the murder. \* \* \*

Many of the concerns arise from not being informed about the progress of the case. \* \* \* [V]ictims are not informed about when a case is going to court or whether the defendant will receive a plea bargain. \* \* \* [I]n many cases, the failure to provide information arises simply from indifference to the plight of the surviving family members or a feeling that they have no right to the information.

Because they do not know what is going on, victims frequently must take it upon themselves to call \* \* \* the prosecutor, or the courts for information about their case. All too often, such calls have to be made when victims' families are in a state of shock or are grieving from the loss of their loved ones. Victims' family should not have to bear the added burden of trying to obtain information. It should be their automatic right.

(Senate Judiciary Committee Hearing, April 23, 1996, prepared statement of Rita Goldsmith, at 35–36.)

No witness testified before the Committee that victims should not receive notice of important proceedings. The Committee concludes that victims deserve notice of important criminal justice proceedings relating to the crimes committed against them.

Based on a demonstrated need for victims to receive notice, as long ago as 1982 the President's Task Force on Victims of Crime recommended that legislation and policies to guarantee that victims receive case status information, prompt notice of scheduling

changes of court proceedings, and prompt notice of a defendant's arrest and bond status. Reviewing this status of these recommendations, a recent Department of Justice Report found:

Fifteen years later, many states, but not all, have adopted laws requiring such notice. While the majority of states mandate advance notice to crime victims of criminal proceedings and pretrial release, many have not implemented mechanisms to make such notice a reality. \* \* \*

Many states do not require notification to victims of the filing of an appeal, the date of an appellate proceeding, or the results of the appeal. Also, most do not require notification of release from a mental facility or of temporary or conditional releases such as furloughs or work programs.

Some state laws require that notice be made "promptly" or within a specified period of time. \* \* \* Victims also complain that prosecutors do not inform them of plea agreements, the method used for disposition in the overwhelming majority of cases in the United States criminal justice system. (U.S. Department of Justice, Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services for the 21st Century* 13 (1998).)

This recent report confirms the testimony that the Committee received that victims are too often not notified of important criminal justice proceedings. It is time to protect in the Constitution this fundamental interest of victims.

## 2. Right to attend

The Committee concludes that victims deserve the right to attend important criminal justice proceedings related to crimes perpetrated against them. This is no new insight. In 1982, the President's Task Force on Victims of Crime concluded:

The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule provided for the exclusion of witnesses, be permitted to be present for the entire trial.

(President's Task Force on Victims of Crime, *Final Report* 80 (1982).)

Allowing victims to attend court proceedings may have important psychological benefits for victims. "The victim's presence during the trial may \* \* \* facilitate healing of the debilitating psychological wounds suffered by a crime victim." Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status*, 17 *Pepperdine L. Rev.* 19, 41 (1989). In addition, without a right to attend trials, victims suffer a further loss of dignity and control of their own lives. Applying witness sequestration rules in rape cases, for example, has proven to be harmful. See Lee Madigan and Nancy C. Gamble, *The Second Rape: Society's Continued Betrayal of the Victim* 97 (1989).

The primary barrier to victims attending trial is witness sequestration rules that are unthinkingly extended to victims. Not infre-

quently defense attorneys manipulate these rules to exclude victims from courtrooms simply because the defendant would like the victim excluded. The Committee heard no convincing evidence that a general policy excluding victims from courtrooms is necessary to ensure a fair trial. As a Department of Justice report recently explained:

There can be no meaningful attendance rights for victims unless they are generally exempt from [witness sequestration rules]. Just as defendants have a right to be present throughout the court proceedings whether or not they testify, so too should victims of crime. Moreover, the presence of victims in the courtroom can be a positive force in furthering the truth-finding process by alerting prosecutors to misrepresentations in the testimony of other witnesses.

(U.S. Department of Justice, Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services for the 21st Century* 15 (1998).)

The Committee finds persuasive the experience of the growing number of States that have guaranteed victims an unequivocal right to attend a trial. *See, e.g.*, Ariz. Const. Art. 2, § 2.1(A)(3) (victim right “[t]o be present \* \* \* at all criminal proceedings where the defendant has the right to be present”); Mo. Const. Art. I, § 32(1) (victim has “[t]he right to be present at all criminal justice proceedings at which the defendant has such right”); Idaho Const. Art. I, § 22(4) (victim has the right “[t]o be present at all criminal justice proceedings”). An alternative approach is to give victims a right to attend a trial unless their testimony would be “materially affected” by their attendance. Congress has previously adopted such a standard, *see* 42 U.S.C. § 10606(b)(4), but the results have proven to be unfortunate. In the Oklahoma City bombing case, for example, a district court concluded that testimony about the impact of their loss from family members of deceased victims of the bombing would be materially affected if the victims attended the trial. This perplexing ruling was the subject of unsuccessful emergency appeals (*see* Cassell 1997 testimony) and ultimately Congress was forced to act. *See* Victim Rights Clarification Act of 1997 (Pub. L. 105–6, codified at 18 U.S.C. §§ 3510, 3481, 3593). Even this action did not fully vindicate the victims’ right to attend that trial. The Committee heard testimony from a mother who lost her daughter in the bombing that even this Act of Congress did not resolve the legal issues sufficiently to give the victims the legal assurances they need to attend all the proceedings. Senate Judiciary Committee Hearing, April 16, 1997, statement of Marsha Kight, at 73–74. Rather than create a possible pretext for denying victims the right to attend a trial or extended litigation about the speculative circumstances in victim testimony might somehow be affected, the Committee believes that such a victim’s right to attend trial should be flatly recognized.

While a victim’s right to attend is currently protected in some statutes or State constitutional amendments, only a Federal constitutional amendment will fully ensure such a right. The Committee was presented with a detailed legal analysis that convincingly

demonstrated that there is no current federal constitutional right of criminal defendants to exclude generally victims from trials. *See* Senate Judiciary Committee Hearing, April 23, 1996, statement of Paul Cassell, at 26–34. While this appears to be an accurate assessment of constitutional legal principles, the fact remains that the law has not been authoritatively settled. In the wake of this uncertainty, State rights for victims to attend trials are not fully effective.

Confirmation of this point came when the Committee heard testimony that “even in some States which supposedly protect a victims’ right to attend a trial, victims are often ‘strongly advised’ not to go in because of the possibility that it might create an issue for the defendant to appeal.” Senate Judiciary Committee Hearing, April 23, 1996, statement of Rita Goldsmith, at 36. Federal prosecutors in the Oklahoma City bombing case, for example, were forced to give victims less-than-clear-cut instructions on whether victims could attend proceedings. *See* Senate Judiciary Committee Hearing, April 16, 1997, statement of Marsh Kight, at 73–74.

Moreover, efforts to obtain clear-cut legal rulings have been unsuccessful. In Utah, for example, despite a strongly written *amicus* brief on behalf of a number of crime victims organizations requesting a clear statement upholding the right of victims to attend, the Utah Court of Appeals has left unsettled the precise standards for exclusion of crime victims. *See* Senate Judiciary Committee Hearing, April 16, 1997, statement of Paul Cassell, at 114–15 (discussing *State v. Beltran-Felix*, No. 95–341–CA). The result has been that, in Utah and presumably many other States, crime victims must struggle with the issue of whether to attend trials of those accused perpetrating crimes against them at the expense of creating a possible basis for the defendant to overturn his conviction. The issue of a victim’s right to attend a trial should be authoritatively settled by Federal constitutional protection.

### 3. *Right to be heard*

Crime victims deserve the right to be heard at appropriate points in the criminal justice process. Giving victims a voice not only improves the quality of the process but can also be expected to often provide important benefits to victims. The Committee concludes that victims deserve the right to be heard at four points in the criminal justice process: plea bargains, bail or release hearing, sentencing, and parole hearings.

Victims have vital interests at stake when a court decides whether to accept a plea. One leading expert on victims’ rights recently explained that:

The victim’s interest in participating in the plea bargaining process are many. The fact that they are consulted and listened to provides them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine. \* \* \* [B]ecause judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.

(Douglas E. Beloof, *Victims in Criminal Procedure: A Casebook* 7–33 (forthcoming N.C. press 1998).)

Victim participation in bail hearings can also serve valuable functions, particularly in alerting courts to the dangers that defendants might present if released unconditionally. Without victim participation, courts may not be fully informed about the consequences of releasing a defendant. “It is difficult for a judge to evaluate the danger that a defendant presents to the community if the judge hears only from the defendant’s counsel, who will present him in the best possible light, and from a prosecutor who does not know of the basis for the victim’s fear. \* \* \* The person best able to inform the court of [threatening] statements that may have been made by the defendant and the threat he poses is often the person he victimized.” President’s Task Force on Victims of Crime, *Final Report* 65 (1982).

The Committee heard chilling testimony about the consequences of failing to provide victims with this opportunity from Katherine Prescott, the President of Mothers Against Drunk Driving (MADD):

I sat with a victim of domestic violence in court one day and she was terrified. She told me she knew her ex-husband was going to kill her. The lawyers and the judge went into chambers and had some discussions and they came out and continued the case. The victim never had the opportunity to speak to the judge, so he didn’t know how frightened she was. He might have tried to put some restrictions on the defendant if he had known more about her situation, but it was handled in chambers out of the presence of the victim.

That night, as she was going to her car after her shift was over at the hospital where she was a registered nurse, she was murdered by her ex-husband, leaving four young children, and then he took his own life—four children left orphans. I will always believe that if the judge could have heard her and seen her as I did, maybe he could have done something to prevent her death.

(Senate Judiciary Committee Hearing, April 23, 1996, statement of Katherine Prescott, at 25–26.)

Victim statements at sentencing also serve valuable purposes. As the President’s Task Force on Victims of Crime concluded:

Victims of violent crime should be allowed to provide information at two levels. One, the victim should be permitted to inform the person preparing the presentence report of the circumstances and consequences of the crime. Any recommendation on sentencing that does not consider such information is simply one-sided and inadequate. Two, every victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice. When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant’s crime be allowed to speak.



(President's Task Force on Victims of Crime, *Final Report* 77 (1982).)

Courts have found victim information helpful in crafting an appropriate sentence. For instance, in *United States v. Martinez*, the District Court for the District of New Mexico stated that it "has welcomed such [allocution] statements and finds them helpful in fashioning an appropriate sentence." 978 F. Supp. 1442, 1452 (D.N.M. 1997). Likewise in *United States v. Smith*, 893 F. Supp. 187, 188 (E.D.N.Y. 1995), Judge Weinstein explained that the "sensible process [of victim allocution] helps the court gauge the effects of the defendant's crime not only on the victim but on relevant communities." Victim statements can also have important cathartic effects. For example, a daughter who spoke at the sentencing of her step-father for abusing her and her sister: "When I read [the impact statement], it healed a part of me—to speak to [the defendant] and tell him how much he hurt." Senate Judiciary Committee Hearing, April 28, 1998, statement of Paul Cassell (quoting statement of victim). The sister also explained: "I believe that I was helped by the victim impact statement. I got to tell my step-father what he did to me. Now I can get on with my life. I don't understand why victims don't have the same rights as criminals, to say the one thing that might help heal them." *Id.*

Victims deserve the right to be heard by parole boards deciding whether to release prisoners. Without victim testimony, the boards may be unaware of the true danger presented by an inmate seeking parole. An eloquent example of this point can be found that was provided by Patricia Pollard, who testified before the Committee in 1996. She was abducted, raped, brutally beaten, and had her throat slashed with the jagged edge of a beer can, and left to die in the Arizona desert. Miraculously she survived. In moving testimony, she described for the Committee what happened next:

Eric Mageary, the man who attacked me, was caught and convicted. He was sentenced to 25 years to life in the Arizona State Prison. While he was still 10 years short of his minimum sentence he was released on parole, but no one ever told me or gave me a chance to say what I thought about it. The system had silenced me, just like Mageary did that night outside of Flagstaff \* \* \*

But my story does not end with Eric Mageary's first parole. Within less than a year he was back in prison, his parole [r]evoked for drug crimes. Then in 1990, the people of Arizona voted State constitutional rights for crime victims. In 1993, Mageary again applied for release from prison and, incredibly, he was again released without any notice to me. I was again denied any opportunity to tell the parole board about the horrible crime or the need to protect others in that community. They ignored my rights, but this time, I had a remedy.

The county attorney in Flagstaff filed an action to stop the release and the court of appeals in Arizona forced the board, because they had denied me my constitutional rights, to hold another hearing and to hear from me. This time, after they heard from me directly and heard first-

hand the horrible nature of the offense, they voted for public safety and Mageary's release was denied.

(Senate Judiciary Committee Hearing, April 23, 1996, statement of Patricia Pollard, at 31–32.)

Voices such as Patricia Pollard's must not be silenced by the system. Victims deserve the right to be heard at appropriate times in the process.

#### *4. Right to notice of release or escape*

The Committee heard testimony about Sharon Christian, 20 years old, a young victim of rape who reported the crime and whose offender was arrested. She was doubly victimized when 2 weeks later she was walking down the street in her neighborhood and saw the young man hanging out on the corner. He had been released on personal recognizance with no notice to her and no opportunity to ask for a restraining order or for the court to consider the possibility of a bond. Senate Judiciary Committee Hearing, April 28, 1998, statement of Marlene Young.

Defendants who are released from confinement often pose grave dangers to those against whom they have committed crimes. In a number of cases, notice of release has been literally a matter of life and death. As the Justice Department recently explained:

Around the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many of these cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.

(U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims' Rights and Services for the 21st Century* 14 (1998).)

The problem of lack of notice has been particularly pronounced in domestic violence and other acquaintance cases, in which the dynamics of the cycle of violence lead to tragic consequences. For example, on December 6, 1993, Mary Byron was shot to death as she left work. Authorities soon apprehended Donovan Harris, her former boyfriend, for the murder. Harris had been arrested 3 weeks earlier on charges of kidnaping Byron and raping her at gunpoint. A relative's payment of bond money allowed Harris to regain his freedom temporarily. No one thought to notify Byron or the police of her release. See Jeffrey A. Cross, Note, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 J. Family L. 915 (1996) (collecting this and other examples). The Committee concludes that victims deserve notice before violent offenders are released.

Recent technological changes have also simplified the ability to provide notice to crime victims. Today some jurisdictions use automated voice response technology to notify victims of when offenders are released. New York City, for example, recently implemented a system in which any victim with access to a telephone can register for notification simply by calling a number and providing an in-

mate's name, date of birth, and date or arrest. If an inmate is released, the victim receives periodic telephone calls for 4 days or until the victim confirms receiving the message by entering a personal code. Victim assistance providers and police have been trained to explain the system to victims. Other jurisdictions have developed other means of notification, including websites that allow victims to track the location of inmates at all times. While recent developments in these innovative jurisdictions are encouraging, notification needs to be made uniformly available for crime victims around the country.

5. *Right to consideration of the victim's interest in a trial free from unreasonable delay*

Today in the United States, criminal defendants enjoy a constitutionally protected right in the sixth amendment to a "speedy trial." This is as it should be, for criminal charges should be resolved as quickly as is reasonably possible. Defendants, however, are not the only ones interested in a speedy disposition of the case. Victims, too, as well as society as a whole, have an interest in the prompt resolution of criminal cases. "Repeated continuances cause serious hardships and trauma for victims as they review and relive their victimization in preparation for trial, only to find the case has been postponed." U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims' Rights and Services for the 21st Century* 21 (1998). For victims, "[t]he healing process cannot truly begin until the case can be put behind them. This is especially so for children and victims of sexual assault or any other case involving violence." President's Task Force on Victims of Crime, *Final Report* 75 (1982).

The Supreme Court has generally recognized such interests in explaining that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interest of the accused." *Barker v. Wingo*, 407 U.S. 514, 519 (1972). However, as two leading scholars have explained, while the Supreme Court has acknowledged the "societal interest" in a speedy trial, "[i]t is rather misleading to say \* \* \* that this 'societal interest' is somehow part of the [sixth amendment] right. The fact of the matter is that the Bill of Rights does not speak of the rights and interests of the government." Wayne R. LaFare and Jerold H. Israel, *Criminal Procedure* §18.1(b), at 787-88 (2d ed. 1992). Nor does the Bill of Rights currently speak, as it should, to the rights and interests of crime victims. Of course, victim's rights to consideration of her interest will not overcome a criminal defendant's right to adequate assistance of counsel.

Defendants have ample tactical reasons for seeking delays of criminal proceedings. Witnesses may forget details of the crime or move away, or the case may simply seem less important given the passage of time. Delays can also be used to place considerable pressure on victims to ask prosecutors to drop charges, particularly in cases where parents of children who have been sexually abused want to put matters behind them. Given natural human tendencies, efforts by defendants to unreasonably delay proceedings are frequently granted, even in the face of State constitutional amendments and statutes requiring otherwise.

### 6. *Right to order of restitution*

Crime imposes tremendous financial burdens on victims of crime. The Bureau of Justice Statistics reports that each year approximately two million people in America are injured as the result of violent crime. Approximately 51 percent of the injured will require some medical attention, with 23 percent requiring treatment at a hospital with an average stay of 9 days. While the true cost of crime to the victims is incalculable, the direct costs are simply staggering. In 1991, the direct economic costs of personal and household crime was estimated to be \$19.1 billion, a figure that did not include costs associated with homicides.

The perpetrators of these crimes need to be held accountable to repay such costs to the extent possible. Victims deserve restitution from offenders who have been convicted of committing crimes against them. The Committee has twice previously explained that:

The principle of restitution is an integral part of virtually every formal system of criminal justice, or every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.

(S. Rep. 104–179, Senate Judiciary Committee, Victim Restitution Act of 1995, 104th Cong., 1st Sess. 12 (1995), quoting S. Rept. 97–532 at 30 (Judiciary Committee), Aug. 19, 1982 (to accompany S. 2420).)

Consistent with this principle, Federal and State courts have long had power to order restitution against criminal offenders. In practice, however, restitution orders are not entered as frequently as they should be. At the Federal level, for example, this Committee recently investigated Federal restitution procedures and found that restitution orders were often entered haphazardly and that “much progress remains to be made in the area of victim restitution.” S. Rep. 104–179, at 13. Similarly, a recent report from the U.S. Department of Justice concluded that “[w]hile restitution has always been available via statute or common law, it remains one of the most underutilized means of providing crime victims with a measurable degree of justice. Evidence of this is apparent both in decisions to order restitution and in efforts to monitor, collect, and disperse restitution payment to victims.” U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Rights and Services for the 21st Century* 357 (1998).

The President’s Task Force on Victims of Crime long ago recommended that “[a] restitution order should be imposed in every case in which a financial loss is suffered, whether or not the defendant is incarcerated.” President’s Task Force on Victims of Crime, *Final Report* 79 (1982). As a step in this direction, in 1982 Congress passed the Victims Witness Protection Act (Pub. L. 97–291, codified at 18 U.S.C. §§ 1501, 1503, 1505, 1510, 1512–1515, 3146, 3579, 3580). More recently, to respond to the problem of inadequate restitution at the Federal level, this Committee recently recommended, and Congress approved, the Mandatory Victim Restitution Act, codified at 18 U.S.C. § 3663A and 3664. Valuable

though this legislation may turn out to be, it applies only in Federal cases. To require restitution orders throughout the country, Federal constitutional protection of the victims' right to restitution is appropriate. Victims advocates in the field recently recommended that "restitution orders should be mandatory and consistent nationwide." U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims' Rights and Services for the 21st Century* 364 (1998). Of course, there will be many cases in which a convicted offender will not be able to pay a full order of restitution. In such cases, realistic payment schedules should be established and victims appraised of how much restitution can realistically be expected to be collected. But even nominal restitution payments can have important benefits for victims. And by having a full restitution order in place, the offender can be held fully accountable for his crime should his financial circumstances unexpectedly improve.

#### *7. Right to have safety considered*

Victims are often placed at risk whenever an accused or convicted offender is released from custody. The offender may retaliate against or harass the victim for vindictive reasons or to eliminate the victim as a possible witness in future proceedings. Not only are victims threatened by offenders, but recent reports from across the country suggest that the intimidation of victims and other witnesses is a serious impediment to effective criminal prosecution.

Under current law, the safety of victims is not always appropriately considered by courts and parole boards making decisions about releasing offenders. Laws concerning whether victim safety is a factor in such decisions varies widely. The result, unsurprisingly, is that in too many cases offenders are released without due regard for victims. From witness after witness, the Committee heard testimony about the danger in which crime victims are placed when their attackers are released without any regard for their safety. Patricia Pollard, Dr. Marlene Young, and others each confirmed the real-life daily failures of the justice system.

The Committee concludes that, in considering whether to release an accused or convicted offender, courts and parole boards should give appropriate consideration to the safety of victims. Of course, victim safety is not the only interest that these entities will need to consider in making these important decisions. But the safety of victims can be literally a life and death matter that should be evaluated along with other relevant factors. In evaluating the safety of victims, decisionmakers should also take into account the full range of measures that might be employed to protect the safety of victims. For example, a defendant in a domestic violence case might be released, but subject to a "no contact" order with the victim. Or a prisoner might be paroled, on the condition that he remain within a certain specified area. If directed to consider victim safety, our Nation's courts and parole boards are up to the task of implementing appropriate means to protect that safety.

### 8. *Notice of these rights*

Victims will be in a better position to exercise the foregoing rights if they are provided notice for them. As a recent analysis concluded:

Justice system and allied professions who come into contact with victims should provide an explanation of their rights and provide written information describing victims' rights and the services available to them. Furthermore, rights and services should be explained again at a later time if the victim initially is too traumatized to focus on the details of the information being provided. Explanations of rights and services should be reiterated by all justice personnel and victim service providers who interact with the victim.

(U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims' Rights and Services for the 21st Century* 14 (1998).)

In Patricia Pollard's case in Arizona, the State Court of Appeals found that her State constitutional right to notice was the lynchpin for her right to notice and for her right to be heard. Victims deserve appropriate notice of their rights in the process.

## V. SECTION-BY-SECTION ANALYSIS

The Committee intends that the amendment guarantee the protection of and participation by crime victims in the criminal justice process.

The Committee rejected an amendment that would have required the courts to resolve any conflict between the constitutional rights of defendants and those of victims, in favor of defendants rights. As the chief justice of the Texas Court of Criminal Office has written, "[v]ictims' rights versus offenders' rights is not a "zero-sum-game." The adoption of rights for the victim need not come at the expense of the accused's rights. Chief Justice Richard Barajas and Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 Baylor L. Rev. 1, 17 (1997) (internal citation omitted). The Crime Victims' Rights Amendment creates rights, not in opposition to those of defendants, but in parallel to them. The parallel goal in both instances is to erect protections from abuse by State actors. Thus, just as defendants have a sixth amendment right to a "speedy trial," the Crime Victims' Rights Amendment extends to victims the right to consideration of their interest "in a trial free from unreasonable delay." These rights cannot collide, since they are both designed to bring criminal proceedings to a close within a reasonable time. "[I]f any conflict were to emerge, courts would retain ultimate responsibility for harmonizing the rights at stake." Laurence H. Tribe and Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. Times, July 6, 1998, at B7.

In this respect, the Committee found unpersuasive the contention that the courts will woodenly interpret the later-adopted Crime Victims' Rights Amendment as superceded provisions in previously-adopted ones. Such a canon of construction can be useful

when two measures address precisely the same subject. But no rigid rule of constitutional interpretation requires giving unblinking precedence to later enactments on separate subjects, and the Committee does not believe such a rule would—or should—be applied in this instance.

Instead, the Committee trusts the courts to harmonize the rights of victims and defendants to ensure that both are appropriately protected. The courts have, for example, long experience in accommodating the rights of the press and the public to attend a trial with the rights of a defendant to a fair trial. The same sort of accommodations can be arrived at to dissipate any tension between victims' and defendants' rights.

*Section 1. "A victim of a crime of violence, as these terms may be defined by law. \* \* \*"*

The core provision of Senate Joint Resolution 44, as amended in Committee, is contained in section 1, which extends various enumerated rights to "a victim of a crime of violence, as these terms may be defined by law." The "law" which will define a "victim" (as well as "crime of violence") will come from the courts interpreting the elements of criminal statutes until definitional statutes are passed explicating the term. In this sense, the amendment should be regarded as "self executing"—that is, it will take effect even without a specific legislative definition. The Committee anticipates that Congress will quickly pass an implementing statute defining "victim" for Federal proceedings. Moreover, nothing removes from the States their plenary authority to enact definitional laws for purposes of their own criminal system. Such legislative definition is appropriate because criminal conduct depends on State and Federal law. Since the legislatures define what is criminal conduct, it makes equal sense for them to also have the ability to further refine the definition of "victim."

In determining how to structure a "victim" definition, ample precedents are available. To cite but one example, Congress has previously defined a "victim" of a crime for sentencing purposes as "any individual against whom an offense has been committed for which a sentence is to be imposed." Fed. R. Crim. Pro. 32(f). The Committee anticipates that a similar definition focusing on the criminal charges that have been filed in court will be added to the Federal implementing legislation and, in all likelihood, in State legislation as well.

In most cases, determining who is the victim of a crime will be straightforward. The victims of robbery, and sexual assault are, for example, not in doubt. The victim of a homicide is also not in doubt, but the victim's rights in such cases will be exercised by a surviving family member or other appropriate representative, as will be defined by law. Similarly, in the case of a minor or incapacitated victim, an appropriate representative (not accused of the crime or otherwise implicated in its commission) will exercise the rights of victims.

The amendment extends broadly to all victims of a "crime of violence." "Crimes of violence" likely will include all forms of homicide (including voluntary and involuntary manslaughter and vehicular homicide), sexual assault, kidnapping, robbery, assault, mayhem,

battery, extortion accompanied by threats of violence, carjacking, vehicular offenses (including driving while intoxicated) which result in personal injury, domestic violence, and other similar crimes. A “crime of violence” can arise without regard to technical classification of the offense as a felony or a misdemeanor. It should also be obvious that a “crime of violence” can include not only acts of consummated violence but also of intended, threatened, or implied violence. The unlawful displaying of a firearm or firing of a bullet at a victim constitutes a “crime of violence” regardless of whether the victim is actually injured. Along the same lines, conspiracies, attempts, solicitations and other comparable crimes to commit a crime of violence could be considered “crimes of violence” for purposes of the amendment if identifiable victims exist. Similarly, some crimes are so inherently threatening of physical violence that they could be “crimes of violence” for purposes of the amendment. Burglary, for example, is frequently understood to be a “crime of violence” because of the potential for armed or other dangerous confrontation. See *United States v. Guadardo*, 40 F.3d 102 (5th Cir. 1994); *United States v. Flores*, 875 F.2d 1110 (5th Cir. 1989). Similarly, sexual offenses against a child, such as child molestation, can be “crimes of violence” because of the fear of the potential for force which is inherent in the disparate status of the perpetrator and victim and also because evidence of severe and persistent emotional trauma in its victims gives testament to the molestation being unwanted and coercive. See *United States v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993). Sexual offenses against other vulnerable persons would similarly be treated as “crimes of violence,” as would, for example, forcible sex offenses against adults and sex offenses against incapacitated adults. Finally, an act of violence exists where the victim is physically injured, is threatened with physical injury, or reasonably believes he or she is being physically threatened by criminal activity of the defendant. For example, a victim who is killed or injured by a driver who is under the influence of alcohol or drugs is the victim of a crime of violence, as is a victim of stalking or other threats who is reasonably put in fear of his or her safety. Also, crimes of arson involving threats to the safety of persons could be “crimes of violence.”

Of course, not all crimes will be “violent” crimes covered by the amendment. For example, the amendment does not confer rights on victims of larceny, fraud, and other similar offenses. At the same time, many States have already extended rights to victims of such offenses and the amendment in no way restricts such rights. In other words, the amendment sets a national “floor” for the protecting of victims rights, not any sort of “ceiling.” Legislatures, including Congress, are certainly free to give statutory rights to all victims of crime, and the amendment will in all likelihood be an occasion for victims’ statutes to be re-examined and, in some cases, expanded.

Because of the formulation used in the amendment—“a victim of a crime of violence”—it is presumed that there must be an identifiable victim. Some crimes, such as drug or espionage offenses, do not ordinarily have such an identifiable victim and therefore would not ordinarily be covered by the amendment. However, in some unusual cases, a court or legislature might conclude that these of-



fenses in fact “involved” violence against an identifiable victim. For example, treason or espionage against the United States resulting in death or injury to an American government official might produce an identifiable victim protected by the amendment.

*“To reasonable notice of \* \* \* any public proceedings relating to the crime”*

To make victims aware of the proceedings at which their rights can be exercised, this provision requires that victims be notified of public proceedings relating to a crime. “Notice” can be provided in a variety of fashions. For example, the Committee was informed that some States have developed computer programs for mailing form notices to victims while other States have developed automated telephone notification systems. Any means that provides reasonable notice to victims is acceptable. “Reasonable” notice is any means likely to provide actual notice to a victim. Heroic measures need not be taken to inform victims, but due diligence is required by government actors. It would, of course, be reasonable to require victims to provide an address and keep that address updated in order to receive notices. “Reasonable” notice would be notice that permits a meaningful opportunity for victims to exercise their rights. In rare mass victim cases (i.e., those involving hundreds of victims), reasonable notice could be provided to mean tailored to those unusual circumstances, such as notification by newspaper or television announcement.

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

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

The public proceedings are those “relating to the crime.” Typically these would be the criminal proceedings arising from the filed criminal charges, although other proceedings might also relate to

the crime. Thus, the right applies not only to initial hearings on a case, but also rehearings, hearing at an appellate level, and any case on a subsequent remand. It also applies to multiple hearings, such as multiple bail hearings. In cases involving multiple defendants, notice would be given as to proceedings involving each defendant.

“\* \* \* *not to be excluded from* \* \* \* *any public proceedings relating to the crime*”

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

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

A victim’s right not to be excluded will parallel the right of a defendant to be present during criminal proceedings. *See Diaz v. United States*, 223 U.S. 442, 454–55 (1912). It is understood that defendants have no license to engage in disruptive behavior during proceedings. *See, e.g., Illinois v. Allen*, 397 U.S. 337 (1977); *Foster v. Wainwright*, 686 F.2d 1382, 1387 (11th Cir. 1982). Likewise, crime victims will have no right to engage in disruptive behavior and, like defendants, will have to follow proper court rules, such as those forbidding excessive displays of emotion or visibly reacting to testimony of witnesses during a jury trial.

*Right “to be heard, if present, and to submit a statement at all public proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence. \* \* \*”*

The amendment confers on crime victims a right to be heard by the relevant decision makers at three critical points in the criminal justice process before the final decisions are made.

First, crime victims will have the right to be heard at proceedings “to determine a conditional release from custody.” Under this provision, for example, a victim of domestic violence will have the opportunity to warn the court about possible violence if the defendant is released on bail, probation, or parole. A victim of gang violence will have the opportunity to warn about the possibility of witness intimidation. The court will then evaluate this information in the normal fashion in determining whether to release a defendant and, if so, under what conditions. Victims have no right to “veto” any release decision by a court, simply to provide relevant information that the court can consider in making *its* determination about release.

The amendment extends the right to be heard to proceedings determining a “conditional release” from custody. This phrase encompasses, for example, hearings to determine any pre-trial or post-trial release (including comparable releases during or after an appeal) on bail, personal recognizance, to the custody of a third person, or under any other conditions, including pre-trial diversion programs. Other examples of conditional release include work release and home detention. It also includes parole hearings or their functional equivalent, both because parole hearings have some discretion in releasing offenders and because releases from prison are typically subject to various conditions such as continued good behavior. It would also include a release from a secure mental facility for a criminal defendant or one acquitted on the grounds of insanity. A victim would not have a right to speak, by virtue of this amendment, at a hearing to determine “unconditional” release. For example, a victim could not claim a right to be heard at a hearing to determine the jurisdiction of the court or compliance with the governing statute of limitations, even though a finding in favor of the defendant on these points might indirectly and ultimately lead to the “release” of the defendant. Similarly, there is no right to be heard when a prisoner is released after serving the statutory maximum penalty, or the full term of his sentence. In such circumstances, there would be no proceeding to “determine” a release in such situations and the release would also be without condition if the court’s authority over the prisoner had expired. The victim would, however, be notified of such a release, as explained in connection with the victims’ right to notice of a release.

Second, crime victims have the right to be heard at any proceedings to determine “an acceptance of a negotiated plea.” This gives victims the right to be heard before the court accepts a plea bargain entered into by the prosecution and the defense before it becomes final. The Committee expects that each State will determine for itself at what stage this right attaches. It may be that a State decides the right does not attach until sentencing if the plea can still be rejected by the court after the pre-sentence investigation is completed. As the language makes clear, the right involves being

heard when the court holds its hearing on whether to accept a plea. Thus, victims do not have the right to be heard by prosecutors and defense attorneys negotiating a deal. Nonetheless, the Committee anticipates that prosecutors may decide, in their discretion, to consult with victims before arriving at a plea. Such an approach is already a legal requirement in many States, *see* National Victim Center, 1996 Victims' Rights Sourcebook 127–31 (1996), is followed by many prosecuting agencies, *see, e.g.*, Senate Judiciary Committee Hearing, April 28, 1998, statement of Paul Cassell, and has been encouraged as sound prosecutorial practice. *See* U.S. Department of Justice, Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services for the 21st Century* 15–16 (1998). This trend has also been encouraged by the interest of some courts in whether prosecutors have consulted with the victim before arriving at a plea. Once again, the victim is given no right of veto over any plea. No doubt, some victims may wish to see nothing less than the maximum possible penalty (or minimum possible) for a defendant. Under the amendment, the court will receive this information, along with that provided by prosecutors and defendants, and give it the weight it believes is appropriate deciding whether to accept a plea. The decision to accept a plea is typically vested in the court and therefore the victims' right extends to these proceedings. *See, e.g.*, Fed. R. Crim. Pro. 11(d)(3); *see generally* Douglas E. Beloof, *Victims in Criminal Procedure: A Casebook* 7–30 to 7–63 (forthcoming N.C. press 1998).

Third, crime victims have the right to be heard at any proceeding to determine a “sentence.” This provision guarantees that victims will have the right to “allocute” at sentencing. Defendants have a constitutionally protected interest in personally addressing the court. *See Green v. United States*, 365 U.S. 301 (1961). This provision would give the same rights to victims, for two independent reasons. First, such a right guarantees that the sentencing court or jury will have full information about the impact of a crime, along with other information, in crafting an appropriate sentence. The victim would be able to provide information about the nature of the offense, the harm inflicted, and the attitude of the offender. Second, the opportunity for victims to speak at sentencing can sometimes provide a powerful catharsis. *See United States v. Smith*, 893 F. Supp. 187, 188 (E.D.N.Y. 1995), *United States v. Hollman Cheung*, 952 F. Supp. 148, 151 (E.D.N.Y. 1997). Because the right to speak is based on both of these grounds, a victim will have the right to be heard even when the judge has no discretion in imposing a mandatory prison sentence.

State and Federal statutes already frequently provide allocution rights to victims. *See, e.g.*, Fed. R. Evid. 32(c), Ill. Const. Art. 1, § 8.1(a)(4). The Federal amendment would help to insure that these rights are fully protected. The result is to enshrine in the Constitution the Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808 (1991), recognizing the propriety of victim testimony in capital proceedings. At the same time, the victim's right to be heard at sentencing will not be unlimited, just as the defendant's right to be heard at sentencing is not unlimited today. Congress and the States remain free to set certain limits on what is relevant victim impact testimony. For example, a jurisdiction might determine that

a victims' views on the desirability or undesirability of a capital sentence is not relevant in a capital proceeding. *Cf. Robison v. Maynard*, 943 F.2d 1216 (10th Cir. 1991) (concluding that victim opinion on death penalty not admissible). The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence. Also, a right to have victim impact testimony heard at sentencing does not confer any right to have such testimony heard by a jury at trial. *See Sager v. Maass*, 907 F. Supp. 1412, 1420 (D. Or. 1995) (citing cases). The victim's right to be heard does not extend to the guilt determination phase of trials, although victims may, of course, be called as a witness by either party. *Cf. George P. Fletcher, With Justice for Some: Victims' Rights in Criminal Trials* 248–50 (1995).

The victim's right is one to "be heard, if present, and to submit a statement." The right to make an oral statement is conditioned on the victim's presence in the courtroom. As discussed above, it does not confer on victims a right to have the Government transport them to the relevant proceeding. Nor does it give victims any right to "filibuster" any hearing. As with defendants' existing rights to be heard, a court may set reasonable limits on the length and content of statements. At the same time, victims should always be given the power to determine the form of the statement. Simply because a decisionmaking body, such as the court or parole board, has a prior statement of some sort on file does not mean that the victim should not again be offered the opportunity to make a further statement.

Even if not present, the victim is entitled to submit a "statement" at the specified hearings for the consideration of the court. The Committee has not limited the word statement to "written" statements, because the victim may wish to communicate in other appropriate ways. For example, a victim might desire to present an impact statement through a videotape or via an Internet message over a system established by the courts. The term "statement" is sufficiently flexible to encompass such communications.

The right to be heard is also limited to "such proceedings," that is, to "such [public] proceedings." As discussed previously at greater length, a victim has no right to be heard at a proceeding that the court has properly closed under the existing standards governing court closures.

*Right to "the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender"*

The right to be heard at public proceedings to determine a conditional release confers on victims the right to be heard at *public* parole proceedings. In some jurisdictions, however, parole decisions are not made in public proceedings, but rather in other ways. For such jurisdictions, the amendment places victims on equal footing with defendants. If defendants have the right to provide communications with the paroling or releasing authority, then victims do as well. For example, in some jurisdictions the parole board might review various folders on prisoners in making a parole decision. If the defendant is given an opportunity to provide information for inclusion in those folders, so will the victim. The phrase "the fore-

going rights” encompasses all of the previously listed rights in the amendment, including the right to notice, to not be excluded, and to be heard, if present, and to submit a statement.

The term “parole” is intended to be interpreted broadly. Many jurisdictions are moving away from “parole” but still have a form of conditional release. The term also encompasses comparable hearings on conditional release from secure mental facilities.

*Right to “reasonable notice of a release or escape from custody relating to the crime”*

To ensure that the victim is not surprised or threatened by an escaped or released prisoner, the amendment gives victims a right to reasonable notice of such escape or release. As with other notice rights in the amendment, the requirement is not one of extraordinary measures, but instead of “reasonable” notice. As with the phrase used earlier in the amendment, “reasonable” notice is one likely to provide actual notice. New technologies are becoming more widely available that will simplify the process of providing this notice. For example, automated voice response technology exists that can be programmed to place repeated telephone calls to victims whenever a prisoner is released, which would be reasonable notice of the release. As technology improves in this area, what is “reasonable” may change as well. “Reasonable” notice would also need to be considered in light of the circumstances surrounding the case. While mailing a letter would be “reasonable” notice of an upcoming parole release date, it would not be reasonable notice of the escape of a dangerous prisoner bent on taking revenge on his accuser.

The requirement of notice is limited to a “release from custody.” Thus, victims are not entitled to notice under this amendment if, for example, a prisoner is simply moved from one custodial facility to another, reclassified in terms of his security level, or allowed to participate in a supervised work detail outside the prison walls. Victims are, however, entitled to notice of any government decision to finally or conditionally release a prisoner, such as allowing a prisoner to enter a noncustodial work release program or to take a weekend furlough in his old home town.

The release must be one “relating to the crime.” This includes not only a release after a criminal conviction but also, for example, a release of a defendant found not guilty of a crime by reason of insanity and then hospitalized in custody for further treatment, or a release pursuant to a habitual sex offender statute.

*Right to “consideration of the interest of the victim that any trial be free from unreasonable delay”*

Just as defendants currently have a right to a “speedy trial,” this provision will give victims a protected right in having their interests to a reasonably prompt conclusion of a trial considered. The right here requires courts to give “consideration” to the victims’ interest along with other relevant factors at all hearings involving the trial date, including the initial setting of a trial date and any subsequent motions or proceedings that result in delaying that date. This right also will allow the victim to ask the court to, for instance, set a trial date if the failure to do so is unreasonable. Of course, the victims’ interests are not the only interests that the

court will consider. Again, while a victim will have a right to be heard on the issue, the victim will have no right to force an immediate trial before the parties have had an opportunity to prepare. Similarly, in some complicated cases either prosecutors or defendants may have unforeseen and legitimate reasons for continuing a previously set trial or for delaying trial proceedings that have already commenced. But the Committee has heard ample testimony about delays that, by any measure, were “unreasonable.” *See, e.g.,* Senate Judiciary Committee Hearing, April 16, 1997, statement of Paul Cassell, at 115–16. This right will give courts the clear constitutional mandate to avoid such delays.

In determining what delay is “unreasonable,” the courts can look to the precedents that exist interpreting a defendant’s right to a speedy trial. These cases focus on such issues as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant. *See Barker v. Wingo*, 407 U.S. 514, 530–33 (1972). Courts will no doubt develop a similar approach for evaluating victims’ claims. In developing such an approach, courts will undoubtedly recognize the purposes that the victim’s right is designed to serve. *Cf. Barker v. Wingo*, 407 U.S. 514, 532 (1972) (defendant’s right to a speedy trial must be “assessed in the light of the interest of defendant which the speedy trial right was designed to protect”). The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.

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

*Right to “an order of restitution from the convicted offender”*

This provision recognizes that an offender should be held responsible for the harm his crime caused, through an order of restitution at sentencing. The Committee has previously explained this philosophy in some detail in connection with the Mandatory Victim Restitution Act, codified at 18 U.S.C. §§ 3663A and 3664, and intends that this right operate in a similar fashion. The relevant details will be spelled out under the resulting case law or, more likely, statutes to implement the amendment. However, this amendment does not confer on victims any rights to a specific amount of restitution, leaving the court free to order nominal restitution if there is no hope of satisfying the order nor any rights with regard to a particular payment schedule.

The right conferred on victims is one to an “order” of restitution. With the order in hand, questions of enforcement of the order and its priority as against other judgments are left to the applicable Federal or State law. No doubt in a number of cases the defendant will lack the resources to satisfy the full order. In others, however,

the defendant may have sufficient assets to do so and this right will place such an order in the victim's hands. The right is, of course, limited to "convicted" defendants, that is, those who pled guilty, are found guilty, or enter a plea of no contest. Even before a conviction, however, courts remain free to take appropriate steps to prevent a defendant's deliberate dissipation of his assets for the purpose of defeating a restitution order, as prescribed by current law.

*A right to "consideration for the safety of the victim in determining any conditional release from custody relating to the crime"*

This right requires judges, magistrates, parole boards, and other such officials to consider the safety of the victim in determining any conditional release. As with the right to be heard on conditional releases, this right will extend to hearings to determine any pre-trial or post-trial release on bail, personal recognizance, to the custody of a third person, on work release, to home detention, or under any other conditions as well as parole hearings or their functional equivalent. At such hearings, the decisionmaker must give consideration to the safety of the victim in determining whether to release a defendant and, if so, whether to impose various conditions on that release to help protect the victims' safety, such as requiring the posting of higher bail or forbidding the defendant to have contact with the victim. These conditions can then be enforced through the judicial processes currently in place.

This right does not require the decisionmaker to agree with any conditions that the victim might propose (or, for that matter, to agree with a victim that defendant should be released unconditionally). Nor does this right alter the eighth amendment's prohibition of "excessive bail" or any other due process guarantees to which a defendant or prisoner is entitled in having his release considered. The Supreme Court, however, has already rejected constitutional challenges to pretrial detention, in appropriate circumstances, to protect community safety, including the safety of victims. See *United States v. Salerno*, 481 U.S. 739 (1987). This right simply guarantees victim input into a process that has been constitutionally validated. –

Custody here includes mental health facilities. This is especially important as sex offenders are frequently placed in treatment facilities, following or in lieu of prison.

*Right to "reasonable notice of the rights established by this article."*

In the special context of the criminal justice system, victims particularly need knowledge of their rights. Victims are thrust into the vortex of complicated legal proceedings. Accordingly, the final right guaranteed by the amendment is the right to notice of victims rights. Various means have been devised for providing such notice in the States, and the Committee trusts that these means can be applied to the Federal amendment with little difficulty.

Once again, "reasonable" notice is one likely to provide actual notice. In cases involving victims with special needs, such as those who are hearing impaired or illiterate, officials may have to make special efforts in order for notice to be reasonable. Notice, whether of rights, proceedings, or events, should be given as soon as prac-



licable to allow victims the greatest opportunity to exercise their rights.

*Section 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article*

This provision confers on victims and their lawful representatives standing to assert their rights. The term “standing” is used here in its conventional legal sense as giving victims the opportunity to be heard about their treatment, that is, to have the merits of their claims considered. For example, under this provision victims have the right to challenge their exclusion from the trial of the accused perpetrators of the crime. This overrules the approach adopted by some courts of denying victims an opportunity to raise claims about their treatment. *See, e.g., United States v. McVeigh*, 106 F.3d 325, 334–35 (10th Cir. 1997) (finding victims of the Oklahoma City bombing lacked standing to challenge their exclusion from certain proceedings). The provision is phrased in exclusive terms—“*Only* the victim or the victim’s lawful representatives”—to avoid any suggestion that other, potentially intermeddling, persons have the right to be heard in criminal proceedings, and to avoid the suggestion that the accused or convicted offender has standing to assert the rights of the victim.

There will be circumstances in which victims find it desirable to have a representative assert their rights or make statements on their behalf. This provision recognizes the right of a competent victim to choose a representative to exercise his or her rights, as provided by law. Typically victims’ rights statutes have provided a means through which victims can select their representatives without great difficulty.

Other “lawful representatives” will exist in the context of victims who are deceased, are children, or are otherwise incapacitated. In homicide cases, victim’s rights can be asserted by surviving family members or other persons found to be appropriate by the court. This is the approach that has uniformly been adopted in victims’ rights statutes applicable in homicide cases, thus insuring that in this most serious of crimes a voice for a victim continues to be heard. Of course, in such cases the “lawful representative” would not necessarily be someone who was the executor of the estate, but rather someone involved in issues pertaining to the criminal justice process. In cases involving child victims, a parent, guardian or other appropriate representative can do the same. For victims who are physically or mentally unable to assert their rights, an appropriate representative can assert the rights.

In all circumstances involving a “representative,” care must be taken to ensure that the “representative” truly reflects the interests—and only the interests—of the victim. In particular, in no circumstances should the representative be criminally involved in the crime against the victim. The mechanics for dealing with such issues and, more generally, for the designation of “lawful” representatives will be provided by law—that is, by statute in relevant jurisdiction, or in its absence by court rule or decision.

*“Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial.”*

This provision is designed to protect completed criminal proceedings against judicially-created remedies that might interfere with finality. At the same time, the provision leaves open appropriate avenues for victims to challenge violations of their rights as well as the ability of Congress and the States to provide additional remedies.

In drafting the amendment, the Committee was faced with balancing the competing concerns of giving victims an effective means of enforcing their rights and of ensuring that court decisions retain a reasonable degree of finality. The Committee was concerned that, if victims could challenge and overturn all criminal justice proceedings at which their rights were violated, the goal of finality, and conceivably other goals, could be seriously frustrated. On the other hand, the Committee recognized that if victims were never given an opportunity to challenge previously-taken judicial actions, victims rights might remain routinely ignored. The Committee's solution to the dilemma was to leave the issue of the most controversial remedies to the legislative branches. These branches have superior fact finding capabilities, as well as abilities to craft necessary exceptions and compromises. Thus, the provision provides that “Nothing in this article” shall provide grounds for victims to challenge and overturn certain previously taken judicial actions.

The provision prevents judicially-created remedies “to stay or continue any trial” because of the concern that a broad judicial remedy might allow victims to inappropriately interfere with trials already underway. The provision also prevents judicially-created remedies to “reopen any proceeding or invalidate any ruling” because of similar finality concerns. At the same time, however, the provision recognizes that victims can reopen earlier rulings “with respect to conditional release or restitution.” In these particular areas, judicially created rules will allow victims to challenge, for example, a decision made to release a defendant on bail without consideration of the victim's safety. Similarly, victims are specifically allowed to challenge a ruling “to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial.” For example, in what will presumably be the rare case of a victim improperly excluded from a trial, a victim could seek an immediate expedited review of the decision under the existing rules allowing for expedited review, seeking admission to “future proceedings,” that is, to upcoming days of the trial. Similarly, a victim who wishes to challenge a ruling that she is not entitled to notice of a release or escape of a prisoner can challenge that ruling until the release or escape takes place. Of course, limits on the ability of victims to “invalidate” a court ruling do not forbid a victim from asking a court to reconsider its own ruling or restrict a court from changing its own ruling.

*“Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.”*

This provision imposes the conventional limitations on victims’ rights, providing that the amendment does not give rise to any claim for money damages against governmental entities or their employees or agents. While some existing victims’ rights provisions provide for the possibility of damage actions or fines as an enforcement mechanism in limited circumstances, *see, e.g.*, Ariz. Rev. Stat. Ann. § 13–4437(B) (authorizing suit for “intentional, knowing, or grossly negligent violation” of victims rights), the Committee does not believe that consensus exists in support of such a provision in a Federal amendment. Similar limiting language barring damages actions is found in many state victims’ rights amendments. *See, e.g.*, Kan. Const. Art. 15, § 15(b) (“Nothing in this section shall be construed as creating a cause of action for money damages against the state. \* \* \*”); Mo Const. Art. 1, § 32(3), (5) (similar); Tex. Const. Art. I, § 30(e) (“The legislature may enact laws to provide that a judge, attorney for the State, peace officer, or law enforcement agency is not liable for a failure or inability to provide a right enumerated in this section”). The limiting language in the provision also prevents the possibility that the amendment might be construed by courts as requiring the appointment of counsel at State expense to assist victims. *Cf. Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring counsel for indigent criminal defendants).

This provision in no way affects—by way of enlargement or contraction—any existing rights that may exist now or be created in the future independent of the amendment.

*The Congress shall have the power to enforce this article by appropriate legislation*

This provision is similar to existing language found in section 5 of the 14th amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to “enforce” the rights, that is, to insure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment. For example, the States will, subject to the Supremacy Clause, flesh out the contours of the amendment by providing definitions of “victims” of crime and “crimes of violence.”

*Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest*

Constitutional rights are not absolute. There is no first amendment right, for example, to yell “Fire!” in a crowded theater. Courts interpreting the Crime Victims’ Rights Amendment will no doubt give a similar, commonsense construction to its provisions.

To assist in providing necessary flexibility for handling unusual situations, the exceptions language in the amendment explicitly recognizes that in certain rare circumstances exceptions may need to be created to victims rights. By way of example, the Committee expects the language will encompass the following situations.

First, in mass victim cases, there may be a need to provide certain limited exceptions to victims rights. For instance, for a crime perpetrated against hundreds of victims, it may be impractical or even impossible to give all victims the right to be physically present in the courtroom. In such circumstances, an exception to the right to be present may be made, while at the same time providing reasonable accommodation for the interest of victims. Congress, for example, has specified a close-circuit broadcasting arrangement that may be applicable to some such cases. Similar restrictions on the number of persons allowed to present oral statements might be appropriate in rare cases involving large numbers of victims.

Second, in some cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions. This provision offers the flexibility to do just that.

Third, situations may arise involving intergang violence, where notifying the member of a rival gang of an offenders' impending release may spawn retaliatory violence. Again, this provision provides flexibility for dealing with such situations.

While this exceptions clause adds some flexibility, the Committee-reported amendment provides that exceptions are permitted only for a "compelling" interest. In choosing this standard, formulated by the U.S. Supreme Court, the Committee seeks to ensure that the exception does not swallow the rights. The Committee rejected proposed language that would have lowered the required justification for an exception from the settled standard of "compelling interest" to the novel standard of "significant interest."

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

The Committee has included a 180 day "grace period" for the amendment to allow all affected jurisdictions ample opportunity to prepare to implement the amendment. After the period has elapsed, the amendment will apply to all crimes and proceedings thereafter. The one exception that the Committee made was for orders of restitution. A few courts have held that retroactive application of changes in standards governing restitution violates the Constitution's prohibition of ex post facto laws. *See, e.g., United States v. Williams*, 128 F.3d 1239 (8th Cir. 1997). The Committee agrees with those courts that have taken the contrary view that, because restitution is not intended to punish offenders but to compensate victims, ex post facto considerations are misplaced. *See, e.g., United States v. Newman*, No. 97-3246 (7th Cir. 1998). However, to avoid slowing down the conclusion of cases pending at the time of the amendment's ratification, the language on restitution orders was added.

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

This provision extends the amendment to all State and Federal criminal justice proceedings. Because of the complicated nature of military justice proceedings, including proceedings held in times of war, the extension of victims rights to the military was left to Congress. The Committee intends to protect victims' rights in military justice proceedings while not adversely affecting military operations. This provision also extends victims' rights to all juvenile justice proceedings that are comparable to criminal proceedings, even though these proceedings might be given a noncriminal label. On this point, the Committee believes that "[t]he rights of victims of juvenile offenders should mirror the rights of victims of adult offenders." U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims' Rights and Services for the 21st Century* 22 (1998).

#### VI. VOTE OF THE COMMITTEE

The committee met on five occasions to consider S.J. Res. 44, on June 18, 24, 25, 1998 and twice on July 7, 1998. On July 7, 1998, Senator Kyl offered a substitute amendment, which was agreed to by unanimous consent. Two additional amendments were offered, but were defeated by rollcall votes. The Committee agreed to favorably report the S.J. Res. 44 to the full Senate, with an amendment in the nature of a substitute, on July 7, 1998, by a rollcall vote of 11 yeas to 6 nays.

1. Senator Durbin offered an amendment to: on page 2, line 12, strike "compelling" and insert "significant". *The amendment was defeated by a rollcall vote of 5 yeas to 10 nays.*

Yeas	Nays
Leahy	Thurmond
Kennedy (by proxy)	Grassley
Kohl (by proxy)	Thompson
Feingold	Kyl
Durbin	DeWine
	Ashcroft (by proxy)
	Abraham (by proxy)
	Sessions
	Feinstein
	Hatch

2. Senator Durbin offered an amendment to: on page 2, line 21, insert the following: "Section 6. Nothing in this article shall be construed to deny or diminish the rights of an accused as guaranteed by this Constitution." *The amendment was defeated by a rollcall vote of 6 yeas to 10 nays.*

Yeas	Nays
Leahy	Thurmond
Kennedy (by proxy)	Grassley
Kohl (by proxy)	Thompson
Feingold	Kyl
Durbin	DeWine
Torricelli (by proxy)	Ashcroft (by proxy)
	Abraham (by proxy)
	Sessions
	Feinstein
	Hatch

3. The Committee voted on final passage. *The resolution was ordered favorably reported, as amended, by a rollcall vote of 11 yeas to 6 nays.*

Yeas	Nays
Thurmond	Thompson
Grassley	Leahy
Kyl	Kennedy (by proxy)
DeWine	Kohl (by proxy)
Ashcroft (by proxy)	Feingold
Abraham (by proxy)	Durbin
Sessions	
Biden	
Feinstein	
Torricelli (by proxy)	
Hatch	

## VII. TEXT OF S.J. RES. 44

JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS.

*Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

### ARTICLE —

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

"to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

"to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;

“to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;

“to reasonable notice of a release or escape from custody relating to the crime;

“to consideration of the interest of the victim that any trial be free from unreasonable delay;

“to an order of restitution from the convicted offender;

“to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and

“to reasonable notice of the rights established by this article.

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

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

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

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

## VIII. COST ESTIMATE

The Congressional Budget Office has supplied the Committee with the following report estimating the proposed amendment’s potential costs.

S.J. Res. 44 would propose amending the Constitution to protect the rights of crime victims. This proposed amendment would provide certain rights to all victims of crimes of violence, including the right to be heard at any proceeding for sentencing or conditional release from custody. The legislatures of three-fourths of the States would be required to ratify the proposed amendment within 7 years for the amendment to become effective.

By itself, this resolution would have no impact on the Federal budget. If the proposed amendment to the Constitution is approved by the States, then any future Federal cases involving crimes of violence and the new constitutional rights could impose additional costs on the Fed-

eral courts and the Federal prison system to the extent that such cases are pursued and prosecuted. However, CBO does not expect any resulting costs to be significant. Because enactment of S.J. Res. 44 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

S.J. Res. 44 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments. No State would be required to take action on the resolution.

(Congressional Budget Office, Cost Estimate, S.J. Res. 44, as reported by the Senate Committee on the Judiciary on July 7, 1998, letter dated July 17, 1998.)

#### IX. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that Senate Joint Resolution 44 will not have direct regulatory impact.



## X. ADDITIONAL VIEWS OF SENATOR HATCH

I support consideration of a constitutional amendment to establish a guarantee of rights for victims of crime. I am providing these additional views to supplement the Committee's report in order to clarify several concerns I have with the text of S.J. Res. 44 as adopted by the Committee.

As an initial matter, I note that I have long been an active supporter of efforts to provide victims of crime with meaningful participation in the judicial system. For example, as the principal author of the Federal Mandatory Victims Restitution Act, I have worked hard to make criminals pay for the damage their behavior causes. For years, I fought for comprehensive habeas corpus reform to provide finality of criminal convictions, an effort which was finally successful in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act of 1996.

The Antiterrorism and Effective Death Penalty Act also included provisions I sponsored to provide the victims of mass crimes like the Oklahoma City bombing the opportunity to observe criminal trials through closed circuit television. That law also included a provision ensuring that the American victims of foreign terrorists could sue the State sponsors of terrorist acts. I take the issue of victims' rights seriously, as does all of Congress. This is evidenced by the speed at which correcting legislation was enacted in the 105th Congress, when two of the 1996 enactments proved inadequate to safeguard victim's participation.<sup>1</sup>

However, there are few tasks undertaken by Congress more serious than the consideration of resolutions proposing amendments to our national charter. With a constitutional amendment, every word and phrase must be scrutinized carefully. A poor choice of words or of drafting could significantly alter the meaning of the amendment, lead to years of unnecessary litigation, or even cause the amendment to fail in its intended purpose. We must remember that, unlike a statute which Congress can amend fairly easily, there is no such easy remedy to correct a mistake in drafting a constitutional amendment. It is with these thoughts in mind that I provide these additional comments on specific concerns I continue to have with the text of S. J. Res. 44.

### SCOPE OF THE AMENDMENT

S.J. Res. 44 includes in its text an important distinction—not reflected in the amendment's title—from earlier drafts of the proposed amendment. Previous versions of the amendment covered all

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<sup>1</sup>H.R. 924, the Victim Rights Clarification Act of 1997 (Pub. L. 105-6, codified at 18 U.S.C. §§ 3510, 3481, 3593) was introduced on March 5, 1997 and was signed by the President on March 19, 1997; H.R. 1225, a bill to make a technical correction to title 28, U.S. Code, relating to jurisdiction for lawsuits against terrorist states, (Pub. L. 105-11) was introduced on April 8, 1997, and was signed by the President on April 25, 1997.

victims of crime, but under S.J. Res 44, only victims of violent crimes, as defined by law, would receive constitutional protection. This distinction, according to advocacy groups, might remove as many as 30 million victims of non-violent crimes from the amendment's safeguards.

I believe we must tread carefully when assigning constitutional rights on the arbitrary basis of whether the legislature has classified a particular crime as "violent" or "non-violent." Consider, for example, the relative losses of two victims. First, consider the plight of an elderly woman who is victimized by a fraudulent investment scheme and loses her life's savings. Second, think of a college student who happens to take a punch during a bar fight which leaves him with a black eye for a couple days. I do not believe it to be clear that one of these victims is more deserving of constitutional protection than the other. While such distinctions are commonly made in criminal statutes, the implications for placing such a disparity into the text of the Constitution are far greater.

I would hope, for example, that courts would not use Congress' decision to exclude victims of non-violent crimes from the amendment as evidence that such victims deserve less protection under State amendments or statutes. The decision by the amendment's sponsors to exclude victims such as the elderly woman in my example has led important segments of the victims' rights community to oppose the current version of this proposed amendment.

On the other hand, in one important respect, the scope of the proposed amendment may be too broad, as well. It is important to note that the proposed amendment does not specify at what point the rights attach, or in other words, at what point a person becomes a "victim," particularly in the absence of legislation. Is one a victim at the time of the crime, at the time an arrest is made, when charges are filed against a suspect, when an indictment or information is issued, or at some later point in the process? This is particularly important to the issue of dropped or uncharged counts against a defendant who has committed multiple wrongs.

Frequently, criminal defendants are suspected to have committed crimes for which they are never charged or for which charges are later dropped, even though significant evidence may exist that the defendant did indeed commit the crime. Do the victims of these crimes have rights under the proposed amendment? If so, are they the same as the rights of the victims of charged counts, and how will their exercise affect the rights of victims of charged counts or of the defendant? Such victims, of course, would have the same rights of notice and allocution relating to conditional release, the acceptance of negotiated pleas (perhaps substantially complicating plea bargains), and sentencing. While the exercise of these rights is unlikely to collide with any defendant's rights,<sup>2</sup> the exercise of

<sup>2</sup>For instance, evidence admissible at a sentencing hearing or conditional release hearing is not limited in the same manner as evidence admissible at the guilt phase, and evidence of uncharged counts or acquitted conduct may be used. The Supreme Court has made clear for more than four decades that, as a matter of federal constitutional law, a sentencing court is, and should be, free to consider all relevant and reliable evidence. *See, e.g., Witte v. United States*, 115 S. Ct. 2199, 2205 (1995); *United States v. Tucker*, 404 U.S. 443, 446 (1972); *Williams v. New York*, 337 U.S. 241, 247 (1949). Evidence that a defendant has committed other crimes, even if they have not been proved beyond a reasonable doubt, surely is relevant and is not inherently unreliable. Unconvicted and even uncharged conduct may also be admitted at sentencing. The Supreme Court long has approved use of such evidence at sentencing. To identify just

the right to an order of restitution for the victim of an uncharged count may indeed collide with the rights of the defendant.<sup>3</sup> At a minimum, I believe that deeper consideration ought to be given these matters before this amendment is sent to the States for ratification.

#### REQUIREMENT OF REASONABLE NOTICE OF THE RIGHTS:

I have significant concerns about the necessity and wisdom of the last clause of Section 1 of the amendment proposed by S.J. Res. 44, providing that covered victims shall have the right “to reasonable notice of the rights established” by the amendment. No other constitutional provision mandates that citizens be provided notice of the rights vested by the Constitution—not even the court-created *Miranda* warnings are constitutionally required. In an analogous context, Justice O’Connor noted that “the free exercise clause is written in terms of what the Government cannot do to the individual, not in terms of what the individual can exact from the Government.”<sup>4</sup> This clause in the proposed victims’ rights amendment would create an affirmative duty on the Government to provide notice of what rights the Constitution provides, turning this formulation on its head.

Moreover, I do not believe that sufficient consideration has been given to the practical aspects of this requirement. Which governmental entity would be required to provide the notice? Would it be the police, when taking a crime report? The prosecutor, prior to seeking an indictment or filing an information? Or perhaps the court, at some other stage in the process? At what point would the

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one area, the Supreme Court twice has held—most recently, in a unanimous opinion—that a district court may enhance a defendant’s sentence if the court finds that the defendant committed perjury on the stand when the defendant testified. *United States v. Dunnigan*, 507 U.S. 87, 92–94 (1993); *United States v. Grayson*, 438 U.S. 41 at 50–51 (1978). Moreover, 18 U.S.C. §3661 provides that “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”

<sup>3</sup>The Committee wrestled with this very issue during consideration of the Mandatory Victims Restitution Act of 1996 (MVRA). In the Committee report describing what would become section 209 of the MVRA (Pub. L. 104–132, 110 Stat. 1240, 18 U.S.C. 3551 note), directing the Attorney General to formulate guidelines to obtain restitution agreements for uncharged counts in plea agreements, the Committee noted:

This provision requires the Attorney General promulgate guidelines for U.S. Attorneys to ensure that, in plea agreements negotiated by the United States, consideration is given to requesting the defendant to provide full restitution to all victims of all charges contained in the indictment or information.

H.R. 665 \* \* \* includes a provision authorizing the courts to order restitution to parties other than the direct victim of the offense. The House provision is intended to provide restitution to victims of so-called dropped or uncharged counts. For example, if a defendant is known to have committed three assaults, but is charged with, or pleads to, only two of these offenses, the House bill would permit the court to order the defendant to pay restitution to the victims of the remaining offense as well.

The Committee had grave concerns about the constitutionality of the House provision. It is the Committee’s view that permitting the court to order restitution for offenses for which the defendant has neither been convicted nor pleaded guilty may violate the due process clause of the fifth amendment.

However, the Committee shares the concern underlying the House provision that all an offender’s victims receive restitution for their losses. \* \* \* The Committee believes the victim’s losses deserve recognition and compensation.

This provision is intended to address this problem by providing guidance to U.S. Attorneys to guarantee that the concerns of these victims are considered. The Committee is sensitive to the discretion inherent in the prosecutorial function. \* \* \* However, it is the Committee’s intent that this provision be implemented in a manner that ensures the greatest practicable restitution to crime victims. *S. Rept. 104–179*, at 23.

<sup>4</sup>*Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), at 451 (quoting *Sherbert v. Verner*, 374 U.S. 398 (1963) at 412 (Douglas, J., concurring)).

right attach—when the crime is committed? When an arrest is made? And, what is “reasonable” notice? Does the term presume that the governmental entity providing notice must have assimilated the Supreme Court’s latest jurisprudence interpreting victims’ rights when giving notice? I fear that this provision might generate a body of law which will make fourth amendment jurisprudence simple by comparison.

Finally, Congress will be empowered by section 3 of the proposed amendment to enforce its provisions, presumably including the question of how governmental entities must provide victims notice. Will this permit Congress to micro manage the policies and procedures of our State and local law enforcement agencies, prosecutors, and courts? I believe greater consideration must be given to these questions before a right to notice of the rights guaranteed by the amendment is included in the Constitution.

#### RIGHT TO REOPEN CERTAIN PROCEEDINGS AND INVALIDATE CERTAIN PROCEEDINGS:

The language of section 2, which grants victims grounds to move to reopen proceedings or invalidate rulings related to, *inter alia*, the conditional release of defendants or convicts, ought to be given serious scrutiny. This provision in particular has perhaps the greatest potential to collide with the legitimate rights of defendants. All defendants and convicts have a constitutionally protected liberty interest in conditional release, once such release is granted. Permitting victims to move to reopen such proceedings or invalidate such rulings, would, of course, necessitate the re-arrest and detention of released defendants or convicts, likely implicating their liberty interest. This is not to say, of course, that the safety and views of victims ought not be considered in determining conditional releases, as provided for in the proposed amendment. However, serious reconsideration should be given to whether it is wise to include in the amendment the right of victims to unilaterally seek to overturn release decisions after the fact.

#### ENFORCEMENT POWERS

Unlike previous versions of the proposed amendment, which permitted States to enforce the amendment in their jurisdictions, S.J. Res. 44 gives Congress exclusive power to “enforce this article by appropriate legislation.” I believe that granting Congress sole power to enforce the provisions of the victims’ rights amendment, and thus, *inter alia*, to define terms such as “victim” and “violent crime” and to enforce the guarantees of “reasonable notice” of public proceedings and of the rights established by the amendment, will be a significant and troubling step toward federalization of crime and the nationalization of our criminal justice system.

Most criminal justice questions are rightly left by the tenth amendment to be decided by the States and the People through their local governments. The Founders rightly determined that such questions are best left to those levels of government closest to the people. Even the bedrock defendants’ rights included in the Constitution and incorporated in the 14th amendment permit flexible application adaptable to unique local circumstances. It is pos-

sible that the victims' rights constitutional amendment will lack this flexibility that is the hallmark of our Federal system, and perhaps in the process invalidate many State victims rights provisions. Such a prospect should give us pause.

#### ESTABLISHMENT OF A "COMPELLING INTEREST" STANDARD TO ENACT EXCEPTIONS

I am also concerned that the proposed amendment inappropriately establishes a particular standard of review to enact inevitable exceptions to the amendment. First, I share the view of others on the Committee, and that of the Department of Justice, that the standard of a "compelling" interest for any exceptions to rights enumerated by the proposed article may be too high a burden.

The compelling interest test is itself derived from existing constitutional jurisprudence, and is the highest level of scrutiny given to a government act alleged to infringe on a constitutional right. The compelling interest test and its twin, strict scrutiny, are sometimes described as "strict in theory but fatal in fact."<sup>5</sup> I truly question whether it is wise to command through constitutional text the application of such a high standard to all future facts and circumstances.

I do not believe that suggestions of utilizing another standard in place of the "compelling interest" test offer a solution, however, for such suggestions would replace one inflexible standard with another. Moreover, the "significant interest" test that some have proposed is uncharted waters. By adopting such a standard, we would be imbedding into the Constitution a new and untried term, ensuring years of litigation to resolve its meaning.

My view is that it is far better to leave the article silent on the standard of review, rather than enshrine any particular level of scrutiny in the text of the Constitution. Moreover, I believe it may not be necessary to provide a clause permitting the enactment of exceptions at all. It is axiomatic that no right is absolute, even though no other right guaranteed by the Constitution explicitly permits the enactment of exceptions. By way of example, the first amendment free speech guarantee has been interpreted to allow reasonable time, place and manner restrictions.<sup>6</sup> The courts have generally utilized a pragmatic review in establishing whether a particular government act was a valid exception to a guaranteed right, establishing standards of review appropriate to the right and the circumstances. It may be best to follow this course again, leaving exceptions to be developed in the natural evolution of the law, rather than to attempt with one hand to empower Congress (and only Congress) to provide exceptions, and with the other hand constrain that power with a too-rigid standard.

#### REFERENCE TO "IMMUNITIES"

Section 5 of the proposed amendment provides for the cases in which the "rights and immunities" established by the amendment

<sup>5</sup> See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>6</sup> See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). See also *Walz v. Tax Commissioner of New York*, 397 U.S. 664, 668-9 (1970) ("The Court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.")

will apply. In my view, a significant problem with this section is the use of the term “immunities,” which is new to this version of the amendment and does not refer to any specific “immunity” named in the article. Indeed, the rest of the article refers only to “rights,” and refers nowhere to “immunities”. It is unclear to what this term is intended to refer. Considering the problems courts have had in defining and applying this term elsewhere in the Constitution, its use here is problematic, and deserves further consideration.

In conclusion, I am strongly in favor of victims’ rights, and believe a Federal constitutional amendment to be an appropriate national response. “Appropriate,” however, does not, in my view, mean “necessary.” I believe that many of the objectives of the proposed amendment could in fact be accomplished through a Federal statute, State statutes, or State constitutional amendments. Indeed, our experience with State constitutional amendments is comparatively young. It may well be better to allow the jurisprudence to develop on these before we take the momentous step of amending the Federal Constitution.

Finally, I note that a statutory approach would carry less peril of upsetting established State constitutional amendments now taking root to guarantee the rights of crime victims. A statute would also be more readily amendable should experience dictate that changes are needed, and, of course, would not preclude the later adoption of a constitutional amendment if the statute indeed proved insufficient or unable to protect the rights of victims. Indeed, this is the same course we have taken with the protection of the flag from desecration—we first enacted a Federal statute, and, when the Supreme Court held it unconstitutional, and thus clearly inadequate to the purpose, have proposed amending the Constitution.

However, if an amendment is to be considered, we must be sure that its wording is clear, exact, and unambiguous. The concerns I have outlined here are but the most serious concerns I have with specific provisions of S.J. Res. 44. They are, however, emblematic of the textual problems I feel must be addressed before this amendment is approved by Congress and submitted to the States for ratification.

ORRIN G. HATCH.

## XI. MINORITY VIEWS OF SENATOR THOMPSON

Amending our Constitution is a very serious matter. Without question, the Framers intended that we would take such momentous steps from time to time, as Article V provides. But just as surely, those provisions are to be used only when clearly warranted. I believe we must be able to satisfy two fundamental questions before we take that step. First, is there a problem unaddressed that should be redressed at Federal level? Second, if so, is a constitutional amendment the appropriate solution? Because I believe that the answer to those questions is no, I am compelled to oppose this proposal.

At the outset, I want to make clear that I fully support the essential goal of S.J. Res. 44—to protect the countless victims of crime in America. On a daily basis, we see heart-breaking stories about violent crime on television and in the newspapers. Sometimes, crime cuts closer to home in the lives of our friends or our families. It is all the more troubling when crime victims are then forgotten by prosecutors, judges, and others in our criminal justice system. Victims of crime deserve much better.

As much as I agree with the intent of this proposal, for constitutional and practical reasons, I believe that this constitutional amendment is not the best course to take. I am concerned that this amendment could have serious unintended consequences, including hampering prosecutions; interfering with the State's interest in punishment; imposing large costs on law enforcement agencies; tying up the courts in litigation; undermining defendants' rights; and unintentionally harming victims' interests under some circumstances.<sup>1</sup> I explained many of these concerns at the Committee markup,<sup>2</sup> and they are discussed at length in the Minority Views. Therefore, I will not rehash them here. Rather, I will focus my comments on the serious implications of this proposal for our federalist system of government.

Federalism lies at the heart of our Democracy. It is the principle that limiting the powers of the national government preserves liberty and that government close to the people works best. Ironically, this proposed constitutional amendment is ascendant at the very time that our federalist system of government is working as the Founding Fathers intended. The States—the laboratories of democracy—are busy conducting experiments to solve the complex problem of protecting crime victims. Every State has passed victims'

<sup>1</sup>See, e.g., Letter from Thomas W. Hillier, II, Federal Public Defender, W. Dist. of Wash., to Sen. Orrin Hatch, Chairman, Senate Comm. on the Judiciary (June 10, 1998); Letter from William L. Murphy, President, National District Attorneys Association, to Sen. Fred Thompson (May 27, 1998); Letter from Fred E. Scoralick, President, National Sheriffs' Association, to Sen. Orrin Hatch, Chairman, Senate Comm. on the Judiciary (June 17, 1998); Letter from Philip B. Heyman, Professor of Law, Harvard Law School, to Sen. Edward Kennedy (Sept. 4, 1996).

<sup>2</sup>Executive Comm. Meeting, Senate Comm. on the Judiciary, at 22–37 (July 7, 1998) (statement of Sen. Fred Thompson).

rights legislation, including my home State of Tennessee.<sup>3</sup> Twenty-nine States have amended their constitutions to protect crime victims.

Our federalist system is not only faster and more effective than amending the Constitution, but it also offers the great benefit of flexibility. The victims' rights movement is challenging us to fundamentally rethink our approach to criminal justice. Traditionally, our criminal justice system has focused on the State's interest in punishment versus the rights of the accused. Now we are being asked to graft into this adversarial system constitutional rights of crime victims. It may well be time to rethink our criminal justice system. But, if so, the experimentation and flexibility that the States offer are all the more important. If the current balance between the interests of the State and the accused is complex—and it surely is—then our adversarial system will be vastly complicated by a three-way relationship among the State, the accused, and victims. Each crime is different, and balancing these three interests on a case-by-case basis would be no small task. It is critical we learn from the experience of the States before deciding to add new victims' rights to the Constitution.<sup>4</sup>

Constitutional amendments are not only hard to enact; they are hard to change. S.J. Res. 44 assumes that the Congress can discern the one "correct" answer to this complex problem. The many diverse State approaches to this problem, and the countless redrafts of this proposal, belie the notion that we have discerned such a single correct answer.

Beyond these practical problems, I believe that the structure and intent of the Constitution dictates that the States should take the leading role on victims' rights. The Framers' limited view of the Federal Government is reflected in the text of the Constitution. It authorizes only certain enumerated powers for the Federal Government, and it limits the exercise of those powers. Those limitations, reflected in the Bill of Rights, include the preservation of the rights of the criminally accused and State sovereignty.

The Framers' view of a limited Federal Government is underscored by the 10th amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Framers left the police power with the States, which they viewed as closer to the people and less likely to abuse such a vast power. There is no general Federal police power. *See Lopez v. United States*, 514 U.S. 549 (1995). Accordingly, it seems incongruous to have a Federal constitutional amendment addressing victims' rights when the Constitution itself left only a relatively small role for the Federal Government to address the issue of crime.<sup>5</sup>

It is all the more troubling that this proposal co-opts the States by directing them how to run their criminal justice systems. In doing so, this proposal would constitutionalize numerous unfunded mandates. These affirmative obligations of the States resemble en-

<sup>3</sup>See "Victims' Bill of Rights," 40 Tenn. Code Ann. § 40-38-101 *et seq.* (1997); "Victims' Impact Statement Act," 40 Tenn. Code Ann. § 40-38-201 *et seq.* (1997).

<sup>4</sup>See Letter from Chris Whipple, Acting Executive Director, Victim Services, to Sen. Orrin Hatch, Chairman, Senate Comm. on the Judiciary (June 9, 1998).

<sup>5</sup>See Testimony of Roger Pilon, Senior Fellow and Director, Center for Constitutional Studies, Cato Institute, before the Senate Comm. on the Judiciary (Apr. 28, 1998).



titlements that are not consistent with the Framers' view of a limited Federal Government.

S.J. Res. 44 also could open a Pandora's box of Federal court interference in State criminal proceedings.<sup>6</sup> While S.J. Res. 44 does not offer victims the opportunity to sue for damages to vindicate their rights, it does allow them to seek injunctive or declaratory relief, and perhaps writs of mandamus. There also could be large class actions against State authorities. This could lead to disruptive and costly Federal court intrusion into State criminal justice systems.

Indeed, this proposal so seriously interferes with State sovereignty that I do not think that it would pass muster as a Federal statute because such a statute would violate the Tenth Amendment. *See Printz v. United States*, 117 S. Ct. 2365 (1997) (Congress may not command State officers to administer or enforce a Federal regulatory program); *New York v. United States*, 505 U.S. 144 (1992) (the Federal Government may not compel the States to enact or enforce a Federal regulatory program). I cannot help but see in this proposal a dramatic arrogation of Federal power. We are confronted with the unnerving question of whether we effectively will amend the 10th amendment and carve away State sovereignty. I cannot support that.

As Justice Brandeis once stated, "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the Federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>7</sup> I do not take lightly the genuine motivations for this proposal. But amending the Constitution would have far-reaching impacts, and we must not lose sight of the potential consequences of our action. In the end, we must not lose sight of the limits on our power, nor the proper respect the States so richly deserve.

FRED THOMPSON.

<sup>6</sup>See Letter from Judge George P. Kazen, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Sen. Patrick Leahy, Ranking Member, Senate Comm. on the Judiciary (Apr. 17, 1997).

<sup>7</sup>*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

## XII. MINORITY VIEWS OF SENATORS LEAHY, KENNEDY, AND KOHL

### I. INTRODUCTION

Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights to one group of citizens at the expense of a powerless minority. Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights that every State is already scrambling to protect. Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights.

This amendment is not, however, without precedent. There has been one instance in our history in which we amended the Constitution without carefully thinking through the consequences. Andrew Volstead led the Congress to passage of the 18th amendment, and opened a Pandora's box of unintended consequences. The 18th amendment was appealing and entirely well meaning. It also was an utter failure that the American people were required to undo with the 21st amendment.

The disaster of Prohibition should remind us that constitutional amendments based on sentiment are a dangerous business. It would be well for Congress to heed the words of James Madison, when he urged that amendments be reserved for "certain great and extraordinary occasions," and to heed the text of Article V, which reserves amendments for things that are "necessary."

The treatment of crime victims certainly is of central importance to a civilized society, and we must never simply "pass by on the other side." The question is not *whether* we should help victims, but *how*. It long has been and is now open to Congress immediately to pass a statute that would provide full victims' right throughout the Federal system, and at the same time provide the resources necessary to assist the States in giving force to their own, locally-tailored statutes and constitutional provisions. Instead, the proponents of S.J. Res. 44 invite Congress to delay relief for victims with a complex and convoluted amendment to our fundamental law that is less a remedy than another Pandora's box which, like the 18th amendment, will loose a host of unintended consequences and ultimately force the American people to elect a Congress to undo this mischief with another constitutional amendment.

The majority appears to believe that it can control some of the inevitable damage through explications in the Committee report about how the amendment will operate. We doubt that the courts will care much for such efforts. They will look first to the plain meaning of the text of the amendment. They will seek guidance in Supreme Court precedents interpreting provisions using similar

language. They will not resort to the majority report to interpret wording that is clearly understood in current legal and political circles.

Any interpretative value of the majority report is further undermined by the inconsistency of the document, which in some situations narrows the impact of the amendment (*e.g.*, by construing away the unpopular consequences for battered women and incarcerated victims) and in other circumstances expands the impact of the amendment (*e.g.*, by devising a role for States in implementing the amendment and conjuring up a way for victims to sue for damages). Such inconsistency renders the majority report politically expedient, but legally meaningless. Weaknesses in the text of the amendment cannot with any confidence be cured by the majority's views, especially not when the majority's analysis is so directly at odds with the amendment's plain language and with settled constitutional doctrine.

## II. IT IS NOT NECESSARY TO AMEND THE CONSTITUTION TO PROTECT VICTIMS' RIGHTS

Every proposal to amend our Federal Constitution bears a very heavy burden. Amendment is appropriate only when there is a pressing need that cannot be addressed by other means. No such need exists in order to protect the rights of crime victims. The proposed amendment therefore fails the standard contained in Article V of the Constitution: it is not "necessary."

### A. CONGRESS AND THE STATES HAVE THE POWER TO PROTECT VICTIMS' RIGHTS WITHOUT A FEDERAL CONSTITUTIONAL AMENDMENT

Nothing in our current Constitution inhibits the enactment of State or Federal laws that protect crime victims. On the contrary, the Constitution is generally supportive of efforts to give victims a greater voice in the criminal justice system. No Victims' Rights Amendment was necessary, for example, to secure a role for victims at pretrial detention and capital sentencing hearings.<sup>1</sup>

A letter sent to Chairman Hatch by over 450 professors of constitutional and criminal law states that "[v]irtually every right contained in the proposed victims rights amendment can be safeguarded in federal and state laws."<sup>2</sup> Even Professor Laurence Tribe, an outspoken supporter of a Victims' Rights Amendment, has acknowledged that "the states and Congress, within their respective jurisdictions, already have ample affirmative authority to enact rules protecting these [victims'] rights."<sup>3</sup>

We asked Professor Paul Cassell, another leading proponent of S.J. Res. 44, to list all the appellate cases in which a defendant's rights under the Federal Constitution were held to supersede a victim's rights under a Federal or State victims' rights provision. He failed to identify any. More recently, Professor Robert Mosteller

<sup>1</sup> *United States v. Salerno*, 481 U.S. 739 (1987) (due process and excessive bail clauses do not prohibit courts from considering safety of victims in making pretrial detention decision); *Payne v. Tennessee*, 501 U.S. 808 (1991) (Eighth Amendment does not prohibit jury from considering victim impact statement at sentencing phase of capital trial).

<sup>2</sup> Letter from Law Professors, reprinted in *A Proposed Constitutional Amendment to Protect Victims of Crime*, Hearing on S.J. Res. 6 before the Senate Comm. on the Judiciary, 105th Cong., 1st Sess., at 140 (Apr. 16, 1997) [hereinafter "Hearing of Apr. 16, 1997"].

<sup>3</sup> *Id.* at 12 (statement of Laurence H. Tribe).

challenged the pro-amendment participants in a symposium on victims' rights, including Professor Cassell, to provide such cases. They referred him to a single decision by an intermediate appellate court that would not be affected by passage of S.J. Res. 44.<sup>4</sup> Where is the objectionable body of law that might justify the extraordinary step of amending the United States Constitution?

Given our ability to proceed without amending the Constitution, one might reasonably wonder why so much time and effort has been expended on the project. We heard one explanation during the Committee markup. Quoting Professor Tribe, one of the amendment's sponsors told us that the "real problem" with existing statutes and State constitutional amendments is that they "provide too little real protection whenever they come into conflict with \* \* \* bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights, regardless of whether those rights are genuinely threatened."<sup>5</sup> The majority report offers the same remarkable rationale.

Have we so lost confidence in our ability to govern and to regulate the conduct of public officials sworn to follow the law that we now insist on amending our basic charter of government in order to overcome habit, indifference and inertia? Do we really believe that a constitutional amendment will accomplish this objective? Habit, indifference, inertia—none is automatically extinguished by the existence of a constitutional amendment. We are especially unlikely to defeat them with a constitutional amendment like S.J. Res. 44, which creates rights riddled with qualifications and exceptions and prohibits the award of damages for their violation.

Professor Lynne Henderson, herself a victim of a violent crime, told the Committee that what is needed are good training programs with adequate funding, not more empty promises.<sup>6</sup> We agree that the only way to change entrenched attitudes toward victims' rights is through systematic re-training and re-education of everyone who works with victims' prosecutors and law enforcement officers, judges and court personnel, victim's rights advocates, trauma psychologists and social workers. But when we get to this end, why undertake a massive effort to amend our Constitution if what we really need to do is spend time and money on training and education?

#### B. STATUTES ARE PREFERABLE TO AMENDING THE FEDERAL CONSTITUTION

We believe that ordinary legislation not only is sufficient to correct any deficiencies in the provision of victims rights that currently exist, but also is vastly preferable to amending the Constitution. Indeed, the statutory approach is favored by a broad cross-section of the participants in the criminal justice system.

<sup>4</sup>See *Arizona ex rel. Romley v. Superior Court*, 836 P.2d 445 (Ariz. Ct. App. 1992). *Romley* holds that a victim's right under the Arizona Constitution to refuse discovery requests by the defendant must yield to the defendant's due process right. Far from advancing the cause of constitutional amendment, however, the case illustrates the danger of empowering certain self-proclaimed victims at the expense of the unconvicted accused. See *infra* Part V.A.

<sup>5</sup>Exec. Comm. Meeting, Senate Comm. on the Judiciary, 105th Cong., 2d Sess., at 23–24 (Jun. 25, 1998) (statement of Sen. Jon L. Kyl).

<sup>6</sup>Statement of Lynne Henderson regarding S.J. Res. 6, prepared for the Senate Comm. on the Judiciary (Apr. 14, 1997).

The U.S. Judicial Conference favors the statutory approach because it “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.”<sup>7</sup> The Conference’s Committee on Criminal Law has identified “a number of distinct advantages” that the statutory approach has over a constitutional amendment:

Of critical importance, such an approach is significantly more flexible. It would more easily accommodate a measured approach, and allow for “fine tuning” if deemed necessary or desirable by Congress after the various concepts in the Act are applied in actual cases across the country. At that point, Congress would have a much clearer picture of which concepts are effective, which are not, and which might actually be counterproductive.<sup>8</sup>

The State courts also favor a statutory approach to protecting victims’ rights. The Conference of Chief Justices has underscored “[t]he inherent prudence of a statutory approach,” which could be refined as appropriate and “holds a more immediate advantage to victims who, under the proposed amendment approach, may wait years for relief during the lengthy and uncertain ratification process.”<sup>9</sup>

Other major organizations, including several victims groups, concur. For example, the National Clearinghouse for the Defense of Battered Women says that statutory alternatives are “more suitable” to addressing the complex problems facing crime victims.<sup>10</sup> The National Network to End Domestic Violence concludes that “a constitutional amendment is not the most effective or appropriate legislative vehicle by which the government may eradicate the real problems that victims experience when seeking justice,” and urges policymakers to explore less drastic alternatives.<sup>11</sup> The National Organization for Women Legal Defense and Education Fund writes that the proposed constitutional amendment “raises concerns that outweigh its benefits,” but “fully endorse[s] \* \* \* enactment and enforcement of additional statutory reform that provide important protections for [victims].”<sup>12</sup> The Cato Institute, the National Sheriffs’ Association, the National Association of Criminal Defense Attorneys, the National Legal Aid and Defenders Association, Victim Services, Murder Victims Families for Reconciliation, the NAACP, the ACLU, the Youth Law Center, and over 450 law professors—all believe that the treatment and role of victims in the criminal justice process can and should be enhanced, but not by amending the Federal Constitution.

The widespread support for enacting victims’ rights by statute arises in part from evidence that statutes work—they can ade-

<sup>7</sup> Letter from William H. Rehnquist, Chief Justice, U.S. Supreme Court, to Judy Clarke, President, National Assn. of Criminal Defense Lawyers (Apr. 23, 1997).

<sup>8</sup> Letter from George P. Kazen, Chief U.S. District Judge, Chair, Committee on Criminal Law of the Judicial Conference of the United States, to Sen. Edward M. Kennedy, Senate Comm. on the Judiciary, at 2 (Apr. 17, 1997).

<sup>9</sup> Statement of the Conference of Chief Justices regarding H.J. Res. 71 and H.R. 1322, prepared for the House Comm. on the Judiciary (June 25, 1997).

<sup>10</sup> Hearing of Apr. 16, 1997, at 161, 162 (statement of National Clearinghouse for the Defense of Battered Women).

<sup>11</sup> *Id.* at 165 (statement of National Network to End Domestic Violence).

<sup>12</sup> *Id.* at 168 (statement of NOW Legal Defense and Education Fund).

quately ensure that victims of crimes are accorded important rights in the criminal justice process. We should not diminish the majesty of the Constitution of the United States when ordinary legislation is more easily enacted, more easily corrected or clarified, more directly applied and implemented, and more able to provide specific, effective remedies.

C. AN EXTENSIVE FRAMEWORK OF VICTIMS' RIGHTS HAS ALREADY  
BEEN CREATED

In the past two decades, the victims' movement has made historic gains in addressing the needs of crime victims, on both the national and local level. An extensive framework of victims' rights has been created through Federal and State legislation and amendments to State constitutions. The majority report asserts, based on scant authority, that existing laws have not "fully succeeded" in ensuring "comprehensive" protection of victims' rights. But given the extraordinary political popularity of the victims' movement, there is every reason to believe that the legislative process will continue to be responsive to enhancing victims' interests, so that there is simply no need to amend the Constitution to accomplish this.

*1. Federal crime victims initiatives*

At the Federal level, Congress has enacted several major laws to grant broader protections and provide more extensive services for victims of crime. The first such legislation was the Victim and Witness Protection Act of 1982,<sup>13</sup> which provided for victim restitution and the use of victim impact statements at sentencing in Federal cases, and the Victims of Crime Act of 1984,<sup>14</sup> which encouraged the States to maintain programs that serve victims of crime. The Victims of Crime Act also established a Crime Victims' Fund, which matches 35 percent of the money paid by States for victim compensation awards.

In 1990, Congress enacted the Victims' Rights and Restitution Act.<sup>15</sup> This Act increased funding for victim compensation and assistance, and codified a victims' Bill of Rights in the Federal justice system. Federal law enforcement agencies must make their best efforts to accord crime victims with the following rights: (1) to be treated with fairness and respect; (2) to be protected from their accused offenders; (3) to be notified of court proceedings; (4) to be present at public court proceedings related to the offense under certain conditions; (5) to confer with the government attorney assigned to the case; (6) to receive restitution; and (7) to receive information about the conviction, sentencing, imprisonment, and release of the offender.

The Violence Against Women Act of 1994<sup>16</sup> made tens of millions of dollars available to the States through STOP (Services, Training, Officers, Prosecutors) grants for law enforcement, prosecution and victims services to prevent and respond to violence against women, including domestic violence. A recent study shows that STOP funds are being used for training of police and prosecutors, resulting in

<sup>13</sup> P.L. 97-291, Oct. 12, 1982, 96 Stat. 1248.

<sup>14</sup> P.L. 98-473, Title I, ch. XIV, Oct. 12, 1984, 99 Stat. 1837.

<sup>15</sup> P.L. 101-647, Title V, Nov. 29, 1990, 104 Stat. 4789.

<sup>16</sup> P.L. 103-322, Title IV, Sept. 13, 1994, 108 Stat. 1796.

improved police handling of domestic violence incidents, inter-agency coordination, establishment of multi-disciplinary response teams, and higher conviction rates. Funds are also providing direct services to victims, resulting in increased victim cooperation and satisfaction.<sup>17</sup>

The Mandatory Victims Restitution Act of 1996<sup>18</sup> required courts to order restitution when sentencing defendants for certain offenses. As part of the same crime bill, the Justice for Victims of Terrorism Act of 1996<sup>19</sup> appropriated funds to assist and compensate victims of terrorism and mass violence. The Act also filled a gap in our law for residents of the United States who are victims of terrorism and mass violence that occur outside the borders of the United States. In addition, Congress provided greater flexibility to our State and local victims' assistance programs and some greater certainty so they can know that our commitment to victims' programs will not wax and wane with current events. And we were able to raise the assessments on those convicted of Federal crimes in order to fund the needs of crime victims.

The Victim Rights Clarification Act of 1997<sup>20</sup> reversed a presumption against crime victims observing any part of the trial proceedings if they were likely to testify during the sentencing hearing. Specifically, this legislation prohibited courts from excluding victims from the trial on the ground that they might be called to provide a victim impact statement at the sentencing, and from excluding a victim impact statement on the ground that the victim had observed the trial. As a result of this legislation, victims of the Oklahoma City bombing were allowed both to observe the trial of Timothy McVeigh and to provide victim impact testimony.

Most recently, in this session, Congress passed the Crime Victims With Disabilities Awareness Act (S. 1976). This legislation will focus attention on the presently overlooked needs of crime victims with disabilities. It proposes to have the National Academy of Sciences conduct research so as to increase public awareness of victims of crimes with disabilities, to understand the nature and extent of such crimes, and to develop strategies to address the safety and needs of these peculiarly vulnerable victims.

Despite the gains that have been made through Federal statutes, some Members of Congress and some victims' rights groups continue to assert that statutes do not work to provide victims with certain participatory rights. For instance, during Committee deliberations on S.J. Res. 44 on June 25, 1998, two sponsors of the bill cited the Victim Rights Clarification Act as evidence that statutes cannot adequately protect a victim's rights. In particular, Senator Feinstein stated that the trial judge in the Oklahoma City bombing case "chose to ignore [the Act], just ignored it. \* \* \* If the victim was present, the victim didn't have the right to make a state-

<sup>17</sup> See 1998 Annual Report: Evaluation of the S.T.O.P. Formula Grants Under the Violence Against Women Act of 1994 (June 12, 1998).

<sup>18</sup> P.L. 104-132, Title IIA, Apr. 24, 1996, 110 Stat. 1214.

<sup>19</sup> P.L. 104-132, Title IIC, Apr. 24, 1996, 110 Stat. 1214.

<sup>20</sup> P.L. 105-6, §2(a), Mar. 19, 1997, 111 Stat. 12.

ment.<sup>21</sup> Senator Kyl made similar statements suggesting that Judge Matsch had refused to enforce the Act.<sup>22</sup>

Given such assertions, we believe it important to look at how the Victim Right Clarification Act was actually applied in the Oklahoma City case. On June 26, 1996, Judge Matsch held that potential witnesses at any penalty hearing were excluded from pretrial proceedings and the trial to avoid any influence from that experience on their testimony. Congress proceeded to pass the Victim Rights Clarification Act, which the President signed into law on March 19, 1997. One week later, Judge Matsch reversed his exclusionary order and permitted observation of the trial proceedings by potential penalty phase victim impact witnesses.<sup>23</sup> In other words, Judge Matsch did exactly what the statute told him to do. Not one victim was prevented from testifying at Timothy McVeigh's sentencing hearing on the ground that he or she had observed part of the trial.

So it is not accurate to assert that the Victim Rights Clarification Act did not work, or that statutes in general cannot adequately protect victims' rights. In fact, the Victim Rights Clarification Act is a paradigmatic example of how statutes, when properly crafted, can and do work. We are certain that additional clarifications would find judges equally receptive and willing to grant victims the rights Congress intends.

## 2. *State crime victims initiatives*

The individual States have also done their part in enhancing the role and protection of crime victims. Every State and the District of Columbia has some type of statutory provision providing for increased victims' rights, including some or all of the rights enumerated in S.J. Res. 44, as well as others. In addition, some 29 States have amended their State constitutions to provide a variety of protections and rights for crime victims.

While there may be room for improvement in the States' administration of their existing victims' rights laws, in general, victims and criminal justice personnel believe that these laws are sufficient to ensure victims' rights. For example, in 1989, the American Bar Association's Victim Witness Project analyzed the impact of State victims' rights laws on criminal justice practitioners and victims. The researchers found that prosecutors, judges, probation officers, and victim/witness advocates were almost universally satisfied with the State laws. They also found that those practitioners who had concerns about existing victims' rights provisions were generally dissatisfied with levels of funding for victims' services. With regard to victim satisfaction, the researchers concluded that "many victims in States with victims rights legislation believe the criminal justice system is doing a satisfactory job of keeping them informed, providing them an opportunity to have a say in certain decisions and notifying them about case outcomes."<sup>24</sup>

<sup>21</sup>Exec. Comm. Meeting, Senate Comm. on the Judiciary, 105th Cong., 2d Sess., at 16 (Jun. 25, 1998).

<sup>22</sup>*Id.* at 25.

<sup>23</sup>*United States v. McVeigh*, 958 F. Supp. 512, 515 (1997).

<sup>24</sup>Susan W. Hillenbrand & Barbara E. Smith, *Victims Rights Legislation: An Assessment of its Impact on Criminal Justice Practitioners and Victims*, American Bar Assn. Criminal Justice Section Victim Witness Program, at 26 (May 1989).



Since 1989, States have continued to strengthen their victims' rights provisions and services. According to a 1997 report prepared by the National Criminal Justice Association with support from the Justice Department's Office for Victims of Crime ("OVC"): "It appears evident that the trend to expand the statutory rights of victims on the State level is continuing."<sup>25</sup> A 1995 report by the State of Arizona's auditor general found that in the four counties studied, "many agencies are offering victim services above and beyond those mandated by the [Arizona Victims' Rights Implementation] Act, primarily at their own expense."<sup>26</sup>

The majority report relies heavily on two recent studies that found current victims' rights laws inadequate. The first study was conducted by the National Victim Center ("NVC")—a strong proponent of a Victims' Rights Amendment.<sup>27</sup> Insofar as the NVC study can be read to have meaning, it suggests that it is money and additional State law provisions that are needed, not a Federal constitutional amendment. The "violations" it discusses are failures of enforcement, not instances of defendants' rights trumping the rights of victims.

The NVC study does not provide a clear picture of the impact of State victims' rights laws, however, because its methodology is seriously flawed. First, the researchers relied exclusively on uncorroborated reports by crime victims regarding their personal experiences; there was no attempt to verify that victims who claimed that they had been denied rights had, in fact, been denied rights. Second, the researchers surveyed victims in only four States—and they do not reveal which four States. Third, the researchers selected the four States based on a ranking of State statutory and constitutional victims rights provisions—but, again, they do not reveal what criteria they used for ranking the States. Fourth, the researchers concluded that State provisions are not enough because victims are not universally satisfied with the quality of treatment they receive. Yet the researchers did not appear to take into consideration important factors such as the structure of the various bureaucracies or the availability of financial resources or the levels of training among State criminal justice personnel, all of which may have a dramatic impact on the treatment of victims from State to State and may be significantly related to victim dissatisfaction. Such manifest flaws in the NVC's methodology led the OVC to conclude that "more research would be needed before any policy recommendations could be made based on the data."<sup>28</sup>

<sup>25</sup> National Criminal Justice Assn., *Victims Rights Compliance Efforts: Experiences in Three States* (no date).

<sup>26</sup> *Victims' Rights Compensation and Victim-Witness Programs in Maricopa, Pima, Coconino, and Cochise Counties*, Report to the Arizona State Legislature by the auditor general (Dec. 1994).

<sup>27</sup> NVC, *Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims—Subreport: Crime Victim Responses Regarding Victims' Rights* (Apr. 15, 1997).

<sup>28</sup> Letter from Kathryn M. Turman, Acting Director, OVC, to Robert P. Mosteller, Professor, Duke University School of Law (Sept. 18, 1998). An earlier intra-office memorandum memorializes the Justice Department's wish that the complete report not be published at all. Memorandum from Sam McQuade, Program Manager, National Institute of Justice, to Jeremy Travis, Director, National Institute of Justice (May 16, 1997) ("OVC has requested that the complete report NOT be published because, in its view, the report contains contradictory information. \* \* \*") (emphasis in original).

The second study cited in the majority report was compiled by the OVC based on anecdotal information from “the field”—that is, “crime victims themselves and representatives of the agencies and organizations that serve them.”<sup>29</sup> Once again, however, the deficiencies identified in the study—deficiencies in the implementation of State victims’ rights laws and in the scope of some States’ provisions—can be corrected without a Federal constitutional amendment.

There has been no impartial, comprehensive analysis done to indicate that victims’ rights cannot adequately be protected by State and Federal laws. Before we take the grave step of amending the Constitution, we should know precisely how the Constitution fails to protect victims’ rights. We should be certain that Federal statutes are not working and can not work, no matter how carefully crafted. We should have evidence that State constitutional provisions and statutes are not and can not do the job. Further study, we believe, will show that solutions short of amendment can provide effective and meaningful relief to crime victims.

#### D. THE CRIMINAL JUSTICE SYSTEM DOES NOT NEED TO BE “BALANCED”

The majority report subscribes to the popular canard that we need a Victims’ Rights Amendment to correct an “imbalance” in our constitutional structure. According to this argument, the criminal justice system is improperly tilted in favor of criminal defendants and against victims’ interests, as evidenced by the fact that the Constitution enumerates several rights for the accused and none, specifically, for the victim.

While aesthetically pleasing, however, the concept of “balance” makes little sense in this context. The paramount purpose of a criminal trial is to determine the guilt or innocence of the accused, not to make victims whole. The interests of the victim are protected by the right to bring a civil suit against the accused, by court-ordered restitution if the accused is convicted, by victim compensation programs, and, most importantly, by our well-considered tradition of the public prosecutor.

Of course, the public prosecutors of the United States represent “the people,” not just the individual crime victim; they are required to seek justice for all, not individual justice or revenge. We have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy. That the prosecutor’s duty is to do justice may make the system appear unequal, but it is fundamentally sound: the interests of the people and the interests of the victim are often identical, but when they diverge, it is appropriate for the public prosecutor to pursue the interests of the people.

One crime victim who testified before the Committee against the proposed amendment made this point eloquently:

Victims are citizens and people first. Unless one is defined solely and for all time by one’s status as a victim, one has an interest in a free and democratic society that honors individual rights, including the rights of criminal

<sup>29</sup>OVC, *New Directions from the Field: Victims’ Rights and Services for the 21st Century* vii (May 1998).

defendants. We all, therefore, have an interest in the fairness of the criminal justice system and the manner in which the State treats its most disfavored citizens.<sup>30</sup>

The majority report itself recognizes that “a public trial is intended to preserve confidence in the judicial system, that no defendant is denied a fair and just trial.” This is as it should be. Victims’ voices should be heard, but they should not be able to make judgments that would take from the rest of us our sense that justice is being served.

Beyond this, the “balance” argument mistakes the fundamental reason for elevating rights to the constitutional level. The rights enshrined in the United States Constitution are designed to protect politically weak and insular minorities against governmental overreaching or abuse,<sup>31</sup> not to protect individuals from each other. When the government unleashes its prosecutorial power against an accused, it is the accused, not the victim, who faces the specter of losing his liberty, property, or even his life. The few and limited rights of the accused in the Constitution are there precisely because it will often be unpopular to enforce them so that even when we are afraid of a rising tide of crime, we will be protected against our own impulse to take shortcuts that will violate the essential dignity of the accused and increase the risk of wrongful conviction. In contrast, there is no need to grant constitutional protections to a class of citizens that commands virtually universal sympathy and substantial political power.

In the words of Bruce Fein, Deputy Attorney General during the Reagan Administration:

[C]rime victims have no difficulty in making their voices heard in the corridors of power; they do not need protection from the majoritarian political process, in contrast to criminal defendants whose popularity characteristically ranks with that of General William Tecumseh Sherman in Atlanta, GA.<sup>32</sup>

### III. THE PROPOSED AMENDMENT WOULD HAVE DANGEROUS AND UNCERTAIN CONSEQUENCES FOR THE NATION’S CRIMINAL JUSTICE SYSTEM

While the proposed amendment is at best unnecessary, at worst, it could help criminals more than it helps victims and cause the conviction of some who are innocent and wrongly accused. Passage of S.J. Res. 44 would enshrine new rights in the Constitution that would fundamentally realign this Nation’s criminal justice system, opening a Pandora’s box of dangerous unintended consequences.

<sup>30</sup>Statement of Lynne Henderson regarding S.J. Res. 6, prepared for the Senate Comm. on the Judiciary, at 19 (Apr. 14, 1997) (emphases in original).

<sup>31</sup>*Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>32</sup>*A Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims*, Hearing on S.J. Res. 52 before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. 100 (Apr. 23, 1996).

A. THE AMENDMENT WOULD IMPAIR THE ABILITY OF PROSECUTORS TO CONVICT VIOLENT CRIMINALS

Since we first began holding hearings on a victims' rights amendment, prosecutors and other law enforcement authorities all across the country have cautioned that creating special constitutional rights for crime victims would have the perverse effect of impeding the effective prosecution of crime.

*1.—Restricting prosecutorial discretion*

Most egregiously, the proposed amendment could compromise prosecutorial discretion and independence by allowing crime victims to second-guess and effectively dictate policy decisions made by prosecutors accountable to the public. As the National District Attorneys Association cautioned, it could afford victims the ability to place unknowing, and unacceptable, restrictions on prosecutors while strategic and tactical decisions are being made about how to proceed with a case.<sup>33</sup> A constitutionally-empowered crime victim could override the professional judgment of the prosecutor concerning the investigation of the case, the timing of the proceedings, the disposition of the charges, and the recommendation as to sentence.

Prosecutorial discretion over plea bargaining is particularly at risk if S.J. Res. 44 passes, for it is here that the interests of the victim and the broader interests of the public most often diverge. Prosecutors enter into plea agreements for many reasons. A prosecutor may need to obtain the cooperation of a defendant who can bring down an entire organized crime ring; she may need to protect the identity of an informant-witness; she may think that the evidence against the defendant will not convince a jury beyond a reasonable doubt; she may just want to speed the processes of adjudication. In each instance, the prosecutor may be acting contrary to the wishes of the victim, or causing resentment on the part of one set of victims in order to do rough justice or provide immediate security to another set of victims.

How will this play out in the courts? A Miami defense lawyer tells of representing a murder defendant who accepted a plea offer from the prosecution. The judge refused to accept the offer after the victim's mother spoke out against it. His client went to trial and was acquitted.<sup>34</sup> In California, relatives of a homicide victim complained to a judge that a plea bargain struck with the accused shooter was too lenient. They got what they wanted: withdrawal of the plea and prosecution of the man on murder charges. But at the close of the trial, the defendant was acquitted.<sup>35</sup>

Under the proposed amendment, well-meaning victims could obstruct plea proceedings, scuttling plea bargains, as in the Florida and California cases, or forcing prosecutors to disclose investigative strategies or weaknesses in their cases in order to persuade courts

<sup>33</sup> Letter from William L. Murphy, President, National District Attorneys Assn., to Sen. Patrick J. Leahy, Ranking Member, Senate Comm. on the Judiciary (May 27, 1998).

<sup>34</sup> Robert Fichenberg, *The Controversial Victims' Rights Amendment*, 30-OCT PROSECUTOR 38 (1996).

<sup>35</sup> See Wayne Wilson, *Man acquitted in killing after protest by victim's kin torpedoed plea deal*, THE SACRAMENTO BEE (July 2, 1997). Defendant Loren Joost originally pleaded no contest to voluntary manslaughter, with the understanding that he would be sentenced to no more than 6 years in prison. The victim's family sabotaged the plea agreement by gathering more than 200 signatures denouncing the proposed settlement as too lenient.

to accept victim-contested pleas. In this and other stages of the criminal process, prosecutors could be induced to make bad choices, or even to disregard their professional and ethical obligations, rather than risk violating a victim's constitutional rights.

There can be no doubt that prosecutors would feel personally constrained by the proposed amendment. S.J. Res. 44's express prohibition on claims for damages only increases the likelihood that courts would find other ways to vindicate its newly-minted rights. Just last year, the U.S. Supreme Court confirmed that the Federal civil rights laws permit criminal prosecutions in Federal court of any State official who willfully and under color of law deprived any person of any rights secured or protected under the Federal Constitution.<sup>36</sup> At a minimum, prosecutors who made choices unpopular with victims would expose themselves to disciplinary action. Meanwhile, prosecutors who become adversaries to victims because of judicially-contested conflicts over a case could be required to recuse themselves from the case in order to defend themselves in the ancillary proceeding—another unintended consequence that could have significant adverse effects on the Nation's criminal justice system.

Even the Department of Justice, which supports amending the Constitution to provide for enhanced victims' rights, has acknowledged that in at least some situations, affording special constitutional rights to victims will "impact on the prosecutor's discretion and judgment" and "adversely affect the administration of justice."<sup>37</sup> We must not create entitlements for victims that will tie prosecutors' hands and cripple law enforcement.

## 2. *Other adverse consequences*

Creating an absolute right for crime victims to attend and participate in criminal proceedings could raise other serious problems for law enforcement. Consider the problem of the victim-witness. In many cases, the victim is the Government's key witness. If she insists on exercising her constitutional right to sit through the entire trial, there is a substantial danger that her testimony will be influenced by hearing and seeing other evidence concerning the same set of facts. Whether consciously or unconsciously, she could tailor her testimony to fit the other evidence.

Apart from the obvious fairness concerns implicated by this procedure, which facilitates and even encourages collusive and inaccurate testimony, there is also the danger that the victim's presence in the courtroom during the presentation of other evidence will cast doubt on her credibility as a witness. Defense attorneys will cross-examine victims at length on this point and argue, credibly, that the victims' testimony was irretrievably tainted. Inevitably, in some cases, this tactic will succeed: the jury will discredit or discount the victim's testimony. Whole cases, or important counts, may be lost in this way. Indeed, one proponent of the amendment, formerly a public defender, admitted during the Com-

<sup>36</sup> *United States v. Lanier*, 520 U.S. 259 (1997).

<sup>37</sup> Hearing of Apr. 16, 1997, at 48, 132 (responses of Attorney General Janet Reno to questions from Sen. Patrick J. Leahy).

mittee markup that the proposed amendment could inure to the benefit of defendants.<sup>38</sup>

As a practical matter, prosecutors may be able to shield victim testimony from the appearance of taint by putting the victim on the stand first. But what happens in the event that the victim is recalled for additional testimony? What happens in cases involving more than one victim-witness? A forced reshuffling of the witness list might not help, and could well compromise the coherence and effectiveness of the prosecution's presentation to the jury.

Constitutionalizing the right not to be excluded from public criminal proceedings could also give rise to actions by victims against decisions to conduct certain proceedings under seal. This could cause particular disruption in the context of juvenile justice proceedings, which are often closed to the public, and to which the proposed amendment expressly applies. Similarly, it could compromise courtroom closure laws designed to protect child witnesses.<sup>39</sup> A no-exclusion rule could also make it more difficult for prosecutors to do their jobs when, for example, they need secrecy at some stage of a proceeding in order to assure the safety of a witness.

Finally, S.J. Res. 44's creation of a victim's right to trial "free from unreasonable delay" raises another set of concerns for prosecutors. Suppose a prosecutor in a complex case needs more time to interview witnesses and prepare for trial. Could a victim sue to require the immediate commencement of trial? Forcing prosecutors to try cases before they are fully prepared plays into the hands of the defense and would undoubtedly result in many cases being dropped or lost.

#### B. THE AMENDMENT COULD IMPOSE TREMENDOUS NEW COSTS ON THE SYSTEM

S.J. Res. 44 could impose a tremendous new administrative burden on State and Federal law enforcement agencies. These agencies would be constitutionally required to make reasonable efforts to identify, locate and notify crime victims in advance of any public proceeding relating to the crime, as well as most non-public parole proceedings. The proposed amendment's broadly-worded mandate covers even the most insignificant scheduling conference. It extends to parole hearings, appellate arguments, and habeas corpus proceedings held long after the trial is concluded, generating additional expenses in re-locating all the victims. The Attorney General has acknowledged that instituting a system that would integrate the necessary investigative information, prosecutive information, court information, and corrections information would be a complex undertaking, and costly.<sup>40</sup>

The potential costs of S.J. Res. 44's constitutionally-mandated notice requirements alone are staggering, without regard to the many hidden costs that may flow from the vague promises that this legislation proposes. Consider as an example the right of crime vic-

<sup>38</sup> Executive Comm. Meeting, Senate Comm. on the Judiciary, at 58 (July 7, 1998) (statement of Sen. Joseph R. Biden, Jr.).

<sup>39</sup> See, e.g., 18 U.S.C. § 3509(e).

<sup>40</sup> Hearing of Apr. 16, 1997, at 131-32 (responses of Attorney General Janet Reno to questions from Sen. Strom Thurmond).

tims “to be heard \* \* \* and to submit a statement \* \* \* to determine \* \* \* an acceptance of a negotiated plea.” The vast majority of all criminal cases are now resolved by plea bargaining. Although it is unclear how much weight judges would be required to give to a victim’s objection to a plea bargain, even a small increase in the number of cases going to trial would seriously burden prosecutors’ offices.

The proliferation of victim participatory rights at all accusatory and trial stages could give rise to even greater hidden costs. The right not to be excluded could create a duty for the Government to provide travel and accommodation costs for victims who could not otherwise afford to attend. More significantly, the right to be heard and to submit written statements could be read to entitle indigent victims to court-appointed counsel (and, if necessary, a translator or interpreter) so that they can exercise the right fully and equally. Indeed, some States that have provided victims’ rights in their constitutions have employed advocates to represent victims and also created special offices of oversight. If S.J. Res. 44 were interpreted to provide this sort of protection to indigent victims—as the sixth amendment has been interpreted with respect to indigent defendants—then we would be confronted with a funding problem of enormous proportion.

Cognizant of this problem, the majority report purports to find a solution in the amendment’s prohibition on claims for damages (“Nothing in this article shall give rise to or authorize the creation of a claim for damages against [a governmental entity]”). The report assures us that this language will “prevent[] the possibility” that courts will construe the amendment to require the appointment of counsel for indigent victims. However, the report fails to explain how a limitation on the remedies available for government violations of victims’ rights could even remotely affect a court’s determination regarding the Government’s duty to assist indigent victims in exercising those rights.

Incarcerated victims are another cause for concern. What happens when one inmate commits a crime of violence against another inmate? With a constitutional guarantee, as opposed to a more flexible statutory approach, prison authorities could be required to transport the victim inmate to all relevant proceedings. The majority report contradicts itself on this point. It promises that the proposed amendment “does not confer on prisoners any \* \* \* rights to travel outside prison gates,” yet asserts, in the very next paragraph: “A victim’s right not to be excluded will parallel the right of a defendant to be present during criminal proceedings.” Which is it?

Regardless, courts will pay little attention to the majority’s commentary when interpreting the comparatively clear language of S.J. Res. 44. Under established principles of constitutional law, the court could be compelled to conclude that the costs involved in transporting prisoners to court to exercise their constitutional rights as victims are not sufficiently “compelling” to justify an exception under section 3 of the amendment. The National Sheriffs’ Association has told us that such costs would be difficult to bear:

Under a constitutional amendment, a sheriff would be required to provide access to all court proceedings and

hearings for the victim inmate. Additionally, the sheriff would be responsible for the significant costs of personnel, transportation, and security for the victim inmate. Sheriffs would find it difficult to meet the mandates of a victims' rights amendment to the Constitution involving incarcerated victim inmates.<sup>41</sup>

The amendment would also impose a costly, time-consuming drain on the Nation's courts. In addition to giving an unspecified class of "victims" a right to be heard at virtually every stage of the criminal process, the amendment is so vague and rife with ambiguity that it is certain to generate a host of knotty legal questions requiring decades of litigation to resolve. Moreover, these questions will be litigated at every stage of every proceeding, causing the time for processing what would otherwise be a simple case to skyrocket. The potential cost to taxpayers is extravagant.

How would all these new costs be funded? Unless funding adequate to implement the amendment on a nationwide basis accompanies its passage, resources would, of necessity, be diverted from other law enforcement and judicial efforts. There would be less money spent fighting crime and prosecuting criminals. There would be less court time available for individual and business users of the courts, including crime victims. In the Federal system, the increased litigation would exacerbate a case overload that already threatens to bring justice in America to a grinding halt.

C. THE NEW CONSTITUTIONAL RIGHTS FOR VICTIMS WOULD UNDERMINE BEDROCK CONSTITUTIONAL PROTECTIONS AFFORDED TO THE ACCUSED BY THE BILL OF RIGHTS

The Department of Justice, the National District Attorneys Association, and the American Bar Association, among others, have underscored the urgent need to preserve the fundamental protections of those accused of crimes while giving appropriate protection to victims.<sup>42</sup>

During the markup, we considered a proposed amendment to S.J. Res. 44 stating, "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by this Constitution." The Committee rejected this amendment by a vote of 10 to 6.<sup>43</sup> Courts may therefore conclude that S.J. Res. 44 was intended to override earlier-ratified provisions securing the accused's right to a fair trial. This would make it more likely that innocent people are convicted in cases involving irreconcilable conflict, where accommodation cannot protect the rights of both the victim and the accused.

<sup>41</sup>Letter from National Sheriffs' Assn. to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (June 17, 1998).

<sup>42</sup>Letter from L. Anthony Sutin, Acting Assistant Attorney General, to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (June 2, 1998); National District Attorneys Association, Resolution: Federal Constitutional Victim Rights Amendment (Mar. 9, 1997); Letter from Michael T. Johnson on behalf of the American Bar Assn. to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (June 24, 1998). See also Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 St. Mary's L.J. \_\_\_\_\_ (forthcoming 1998) (concluding that a constitutional amendment supporting victims' rights should expressly guarantee that it will not diminish existing rights of the accused).

<sup>43</sup>Exec. Comm. Meeting, Senate Comm. on the Judiciary, 105th Cong., 2d Sess., at 109-11 (July 7, 1998).



Conflicts between the victims' rights created by S.J. Res. 44 and the protections accorded defendants by the Bill of Rights likely would be infrequent, but they would occur. Indeed, as currently drafted, S.J. Res. 44 practically invites conflict in several important areas.

*1. Giving victims rights at the accusatory stage of criminal proceedings undercuts the presumption of innocence*

Not all who claim to be victims are indeed victims and, more significantly, not all those charged are the actual perpetrators of the injuries that victims have suffered. By naming and protecting the victim as such before the accused's guilt has been determined, the proposed amendment would undercut one of the most basic components of a fair trial, the presumption of innocence.

Consider a simple assault case in which the accused claims that he was acting in self-defense. Absent some sort of corroborating evidence, the jury's verdict will likely turn on who it believes, the accused or his accuser. The amendment treats the accuser as a "victim," granting him broad participatory and other rights, before a criminal or even a crime has been established. Once charges have been brought—and the charges may be based on little more than the accuser's allegations—the accuser is entitled to attend all public proceedings and to have a say as to whether the accused should be released on bond, making it more likely that the accused will be imprisoned until the conclusion of the trial. While society certainly has an interest in preserving the safety of the victim, this fact alone cannot be said to overcome a defendant's liberty interest as afforded to him under the due process and excessive bail clauses.

*2. A victim's right not to be excluded could undermine the accused's right to a fair trial*

The proposed amendment gives victims a constitutional right not to be excluded from public proceedings. Establishing such a preference for victims does not require a constitutional amendment, unless it is intended to create an absolute right that would be used to overcome a right currently afforded defendants. That is precisely what this provision would accomplish. But while crime victims have a legitimate interest in attending public proceedings involving matters that impacted their lives, this is not a limitless interest. At the point where the victims' presence threatens or interferes with the accuracy and fairness of the trial, restrictions should be imposed.

Accuracy and fairness concerns may arise, as we have already discussed, where the victim is a fact witness whose testimony may be influenced by the testimony of others. Another example is the case in which the victim or her family acts emotionally or disruptively in front of the jury. Whether done purposefully or unintentionally, a victim exhibiting such behavior may unfairly prejudice the defendant.

Indeed, by making the right of victims to be present very difficult, if not impossible, to forfeit, S.J. Res. 44 may encourage disruptive displays by victims—a manifestly illegitimate purpose for

a constitutional amendment.<sup>44</sup> Our Nation's jurisprudence explicitly warns against determinations of guilt and punishment based upon passion, prejudice or emotion, rather than reason or evidence.<sup>45</sup>

Proponents of S.J. Res. 44 dismiss such concerns out-of-hand. The majority report declares that crime victims would have "no right" to engage in either disruptive behavior or excessive displays of emotion. The Attorney General claims that "common sense flexibility" would preserve judges' authority to keep courtrooms free from disruptive observers, even when those observers are victims.<sup>46</sup> But it is not at all clear how "common sense flexibility" could prevail over an inflexible constitutional right "not to be excluded".

3. *A victim's right to be heard could undermine the accused's right to a fair trial*

The proposed amendment gives victims a constitutional right to be heard, if present, and to submit a statement at all stages of the criminal proceeding. What happens when a victim's testimony is irrelevant, unduly or unnecessarily prolongs the proceedings, or is so inflammatory that justice would be undermined? Passage of the proposed amendment would make it much more difficult for judges to limit testimony by victims at trial and capital sentencing proceedings.

4. *A victim's right to expedite trial proceedings could undermine the accused's sixth amendment rights*

S.J. Res. 44 gives victims of violent crimes a right to "trial free from unreasonable delay." Just as this provision risks forcing prosecutors to trial before they are fully prepared, it risks forcing defendants to do the same. Defendants may also seek to postpone the trial to let prejudicial publicity about the case dissipate. Under the proposed amendment, the defendant's need for more time could be outweighed by the victim's assertion of his right to have the matter expedited, seriously compromising the defendant's right to effective assistance of counsel and his ability to receive a fair trial.

5. *Constitutionalizing victims' rights raises equal protection concerns*

We should consider the question of equal protection and equality of treatment of our defendants. During one hearing, Representative Robert C. Scott asked what happens when a prosecutor routinely recommends a 1-year sentence for first-offense burglary, but the victim is unusually emotional or articulate: should that defendant get more time than a defendant whose victim is inarticulate or even absent?<sup>47</sup> By the same token, should the amount of time that a defendant spends in jail turn on the effectiveness of the victim's attorney?

The United States is world renowned and admired for its system of public prosecutions. It bespeaks our leadership in the precepts

<sup>44</sup> See Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 Geo. L.J. 1691, 1703-04 (1997).

<sup>45</sup> See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

<sup>46</sup> Hearing of Apr. 16, 1997, at 133 (responses of Attorney General Janet Reno to questions from Sen. Patrick J. Leahy).

<sup>47</sup> Hearing of Apr. 16, 1997, at 34, 35 (statement of Rep. Robert C. Scott).

of democracy that justice is mandated for all citizens. No individual or group is favored. Wealth does not determine whose case gets prosecuted, or how well. Crime victims themselves benefit from this system, as the majority report acknowledges. We should think long and hard before we revert to a system of private prosecutions based on wealth, power, and campaign contributions.

6. *Construed to avoid any conflicts with defendants rights, the proposed amendment becomes purely hortatory*

Attempting to divert attention from the foreseeable consequences of this proposal, some supporters of S.J. Res. 44 maintain that it would not, and was never intended to, denigrate the rights of the accused in any way. Indeed, one cosponsor has flatly asserted:

There is no inconsistency between the rights of the accused and recognizing in a formal sense the victim's rights. \* \* \* [T]here is not even a hypothetical case that has been put forward where there is a conflict between the rights guaranteed to the accused under our Constitution and the rights we are proposing \* \* \* be enshrined in the Constitution for victims. There is no denigration, there is no choice required. This is not a matter of requiring anyone to say, in order to give a victim a right, we have to take away any right of the accused. If that were the case \* \* \* I would not support this amendment.<sup>48</sup>

The problem with this position, however, is that it proves too much. For if it were always possible to accommodate the constitutional rights of both the accused and the victim—a prospect that we, like the Department of Justice, find unlikely—then the proposed amendment would become purely hortatory. Professor Philip Heymann, a former Associate Deputy Attorney General, stated the matter succinctly:

If it is not intended to free the States and Federal Government from restrictions found in the Bill of Rights—which would be a reckless tampering with provisions that have served us very well for more than 200 years—it is unclear what purpose the amendment serves.<sup>49</sup>

The Constitution of the United States is no place for symbolic decorations that fail to define real rights or to give real remedies.

D. PASSAGE OF THE PROPOSED AMENDMENT COULD ACTUALLY HURT  
THE VICTIMS OF CRIME

For all the reasons discussed above, passage of this well-meaning amendment could well prove counter-productive, accomplishing little while making the lives of crime victims more difficult. “We should never lose sight of the fact that the very best way that [we] \* \* \* can serve victims of crime is to bring those responsible for crime to justice.”<sup>50</sup> Crime victims would be the first to suffer—and criminals the first to benefit—from a constitutional amendment

<sup>48</sup> Exec. Comm. Meeting, Senate Comm. on the Judiciary, 105th Cong., 2d Sess., at 19–20 (June 25, 1998) (statement of Sen. Joseph R. Biden, Jr.).

<sup>49</sup> Philip B. Heymann, *A Proposed Victims' Rights Constitutional Amendment: Against an Amendment*, STATE-FEDERAL JUDICIAL OBSERVER, No. 14, at 1 (Apr. 1997).

<sup>50</sup> Hearing of Apr. 16, 1997, at 42 (statement of Attorney General Janet Reno).

that hindered prosecutors, forced law enforcement agencies to divert scarce resources from actual crime-fighting efforts, and clogged the courts with time-consuming, justice-delaying litigation. Moreover, few benefit if, in the end, the proposed amendment undermines core constitutional guarantees designed to protect all of us from wrongful convictions.

#### IV. THE PROPOSED AMENDMENT INFRINGES ON STATES' RIGHTS

The proposed amendment constitutes a significant intrusion of Federal authority into a province traditionally left to State and local authorities. Many of our colleagues, in making their arguments in support of S.J. Res. 44, point out that nearly 95 percent of all crimes are prosecuted by the States. It is precisely that rationale that leads us to conclude that grants of rights to crime victims are—whenever possible—best left to the States to provide.

If the Federal Government had the general police power, then mandating a companion power to protect the rights of victims of crime would at least be consistent. But the Federal Government does not have this power. As the Supreme Court recently reminded us in *United States v. Lopez*,<sup>51</sup> there is no general Federal police power. “Under our Federal system, the States possess primary authority for defining and enforcing the criminal law.”<sup>52</sup> S.J. Res. 44 would dramatically alter this framework by locking States into an absolutist national pattern regarding the participation of victims in the criminal justice system.

The majority report attempts to deflect the federalism concerns raised by S.J. Res. 44 by suggesting that the States will retain “plenary authority” to implement the amendment within their own criminal systems. We find this suggestion surprising given the plain language of the amendment’s implementation clause (in section 3): “The Congress shall have the power to enforce this article by appropriate legislation.” Identical language in earlier constitutional amendments has been read to vest enforcement authority exclusively in the Congress.

In the case of S.J. Res. 44, moreover, the text is illuminated by the legislative history. Earlier drafts of the amendment expressly extended enforcement authority to the states.<sup>53</sup> These drafts drew fire from constitutional scholars, who expressed doubt that constitutionally-authorized State laws could be supreme over State constitutions or even over Federal laws, and concern that, for the first time, rights secured by the Federal Constitution would mean different things in different parts of the country. The Committee then amended the text to its current formulation. Faced with this

<sup>51</sup> 514 U.S. 549 (1995).

<sup>52</sup> *Id.* at 561 n.3 (internal quotation marks omitted). See also *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) (“Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.”)

<sup>53</sup> For example, S.J. Res. 52, introduced in the second session of the 104th Congress, provided: “The several States, with respect to a proceeding in a State forum, and the Congress, with respect to a proceeding in a United States forum, shall have the power to implement further this article by appropriate legislation.” Similarly, S.J. Res. 6, introduced in the first session of this Congress, provided: “The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions \* \* \*”

history and text, courts will surely conclude that S.J. Res. 44 deprives States of any authority to legislate in the area of victims' rights.

This is troubling in three regards. First, S.J. Res. 44 would have an adverse effect on the many State and local governments which are already experimenting with a variety of innovative victims' rights initiatives. Second, it would create an enormous unfunded burden for State courts, prosecutors, law enforcement personnel, and corrections officials. Third, it would lead inevitably to Federal court supervision and micro-management of noncomplying State and local authorities.

#### A. THE STATES AS LABORATORIES

In the words of Supreme Court Justice Louis D. Brandeis, writing in *New State Ice Co. v. Liebmann*: "It is one of the happy incidents of the Federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>54</sup> The victims' movement has induced all 50 States to serve as laboratories. Through statutes and State constitutional amendments, the States are experimenting with varied approaches to blending the competing interests of victims, prosecutors, and defendants in search of an enlightened formula.

State experimentation with victims' rights initiatives is relatively new and untested; the laboratory evidence is as yet inconclusive. S.J. Res. 44 creates a national standard for victims' rights and gives Congress exclusive power to enforce that standard by appropriate legislation. It thus forecloses the States from experimenting and exercising their judgment in an area to which the States lay claim by right of history and expertise.

That's why the States' top jurists oppose it. The Conference of Chief Justices has expressed "deep concerns" with the federalism issues presented by the amendment; it has taken the position that the States' efforts on behalf of crime victims "provide a significantly more prudent and flexible approach for testing and refining novel legal concepts."<sup>55</sup>

That's why the largest victim assistance agency in the country opposes it: Victim Services calls S.J. Res. 44 "premature" and points out the need for more research.<sup>56</sup>

At a minimum, we should explore the effectiveness of the state efforts and the nuances of their various approaches before grafting a rigid, untested standard onto the U.S. Constitution. We should have more information about what the states are failing to do before the Federal Government shuts down their research.

Example: The States' experimentation has not yet led to a consensus on the appropriate scope of the victim's right to attend trial proceedings at which they are going to be called as witnesses. A few States, including Alabama and Arkansas, have specifically pro-

<sup>54</sup> 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>55</sup> Letter from Joseph R. Weisberger, Chief Justice, Supreme Court of Rhode Island, Chairperson, Conference of Chief Justices Task Force on Victim Rights, to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary, at 1 (May 16, 1997).

<sup>56</sup> Letter from Chris Whipple, Acting Executive Director, Victim Services, to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary 1 (June 9, 1998).

vided that the rule regarding exclusion of witnesses does not apply to victims.<sup>57</sup> Other States have taken a hybrid approach, whereby the victim has the right to attend only after the victim has testified, as in Louisiana, Michigan, New Jersey, and Washington.<sup>58</sup> Washington's law also specifies that while a victim may be excluded until after testifying, the victim has the right to be scheduled as early in the proceedings as possible. Overall, a majority of States give the trial judge discretion to exclude the victim, either as a witness or to preserve the defendant's right to a fair trial generally. A categorical Federal constitutional rule that victims must never be excluded would nullify these State judgments about the appropriate way to balance the competing interests involved.

The States' overall approaches to victims' rights are also markedly different. California amended its constitution in June 1982 to include a modest "Victim's Bill of Rights." The rights enumerated include the right to "truth-in-evidence" and the "basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance."<sup>59</sup> According to Senator Feinstein, the California approach is working; it has been protecting the victim's right to be treated with dignity and respect within the criminal justice system.<sup>60</sup>

Arizona is another State with a constitutional amendment declaring a "Victims' Bill of Rights," but it has ventured substantially further than California. Approved in November 1990, Arizona's amendment guarantees victims a series of rights, including the right (1) to be informed when an accused or convicted person is to be released from custody or has escaped; (2) to be present at and, upon request, to be informed of all upcoming proceedings; (3) to be heard at any proceeding involving a post-arrest or post-conviction release decision, a negotiated plea, or sentencing; (4) to refuse an interview, deposition, or other discovery request by the defendant; (5) to confer with the prosecution and to be informed of the disposition; (6) to read pre-sentence reports; (7) to receive prompt restitution; (8) to a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence; and (9) to be informed of their rights as victims.<sup>61</sup> Will this detailed enumeration of rights work better than California's system? It is too soon to tell. Yet S.J. Res. 44 could preempt the field, sweeping away all laws, ordinances, precedents, and decisions, compatible and incompatible alike, or any matter touching upon the same subject.

In response to our questions from the April 28, 1998 hearing, the Department of Justice made clear that the *only* reason to adopt an amendment as opposed to a statute is to provide a uniform national rule rather than allow States to adopt provisions that the State legislatures and voters think will best suit their local needs. The Department's recent report on victims' rights, quoted in the

<sup>57</sup> Ala. Stat. § 15-14-55; Ark. R. Evid. 616.

<sup>58</sup> La. Code Evid. Art. 615(A)(4); Mich. Comp. Laws Ann. § 780.761(11); N.J. Const. Art. 1, ¶ 22; Wash. Rev. Code Ann. § 7.69.030(11).

<sup>59</sup> Ca. Const. Art. I, § 28.

<sup>60</sup> Exec. Comm. Meeting, Senate Comm. on the Judiciary, 105th Cong., 2d Sess., at 12 (Jul. 7, 1998).

<sup>61</sup> Az. Const. Art. II, § 2.1(A).

majority report, also emphasizes the need “to rectify the current inconsistencies in victims’ rights laws that vary significantly from jurisdiction to jurisdiction.”<sup>62</sup>

Do we need to correct some outrage that Arizona is perpetrating? Is there something that California simply refuses to do for victims? We are assuming that there is one and only one way to do this, and that we here in Washington D.C. know the way and the States do not, even though most of the experience has been in the States. That is arrogant, to say the least.

Victim Services said it best: “Before undertaking the momentous step of amending the U.S. Constitution, the right course is surely to examine the existing legislative and regulatory schemes and ascertain what is working best in practice.”<sup>63</sup>

#### B. UNFUNDED MANDATE

We have already discussed the potentially staggering costs that S.J. Res. 44 could impose on the 50 States. Congress has a responsibility to investigate these costs thoroughly and to explore the drastic shift in resources that could result if the amendment were ratified. Congress has not yet undertaken this important task. We need more information from the States about how much it costs to implement these programs, and what sort of resources are needed to be successful before we rush to validate a series of rights that could overwhelm the Nation’s criminal justice system.

Largely for this reason there is growing opposition to the proposed amendment among some of the very people who most strongly support victims’ rights—prosecutors and law enforcement officers. They are sympathetic to victims, and would welcome the resources to enable them to provide victims with notice and other assistance. They do not, however, want another unfunded mandate that will have the Federal courts and special masters directing the activities of their under-funded offices. Instead of unfunded mandates, we need to encourage States to provide the support and services that many victims of crimes need and deserve.

#### C. FEDERAL COURT SUPERVISION

Under S.J. Res. 44, a victim does not have the ability to sue for damages. A victim may, however, ask a Federal court for injunctive or declaratory relief against State officials, and possibly a writ of mandamus. The resulting interference with State criminal proceedings would be unprecedented and ill-advised.

Even more alarming is the specter of Federal class actions against noncomplying State authorities. When we asked the Department of Justice what sort of relief there might be when district attorney offices failed, as many now are failing, to provide full notice for victims, they said that the relief would be court orders like those in prison reform litigation. There is the potential for big costs to States, enormous expenditure of judicial resources, and undignified hauling into court of local prosecutors, judges, and corrections officers.

<sup>62</sup>OVC, *New Directions from the Field: Victims Rights and Services for the 21st Century* 10 (May 1998).

<sup>63</sup>Letter from Chris Whipple, Acting Executive Director, Victim Services, to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary 1 (June 9, 1998).

The States chief justices have expressed grave concerns that the proposed constitutional amendment would lead to “extensive lower Federal court surveillance of the day to day operations of State law enforcement operations.”<sup>64</sup> We share these concerns. The laudable goal of making State and local law enforcement personnel more responsive to victims should not be achieved by establishing Federal court oversight of the criminal justice and correctional systems of the 50 States.

“[F]ederalism was the unique contribution of the Framers to political science and political theory,”<sup>65</sup> and it has served this country well for over 200 years. We do not need a constitutional amendment to turn this system on its head. We have no pressing reason to thwart the States’ experimentation with innovative victims’ rights initiatives and to displace State laws in an area of traditional State concern. We have no compelling evidence pointing to the need for another unfunded mandate. And we certainly do not need more Federal court supervision and micro-management of State and local affairs.

#### V. THE WORDING OF THE PROPOSED AMENDMENT IS PROBLEMATIC

As the preceding analysis has shown, any amendment to the Constitution to provide for victims rights would be fraught with problems, ranging from resource and training issues to a plethora of unintended consequences. But in addition to the general problems associated with a constitutional amendment, the specific language of S.J. Res. 44 is problematic.

Now in its 62nd draft, the proposed amendment remains decidedly vague, its key terms undefined. Far more work is needed before we can even debate its merits intelligently. As it stands, years of litigation would be necessary to flesh out the amendment’s actual scope, enforcement mechanisms, and remedial nature.

##### A. THE TERM “VICTIM” IS UNDEFINED

Most conspicuous in its absence from S.J. Res. 44 is any definition or explanation of the critical term “victim.” Is the proposed amendment intended to give victim status only to those individuals who suffer personal injury as the result of a crime? Or is the intent to ensure that members of the immediate family are given victim status? What about cousins, close friends, neighbors? The list of potential victims is lengthy. In cases like the Oklahoma City bombing, where 168 people were killed and hundreds more were injured, would the State and Federal courts be required to hear statements from possibly thousands of people claiming victim status?

The failure to define “victim” raises another set of problems with respect to crimes committed, or allegedly committed, in self defense. For example, victims of domestic violence may respond to repeated attacks by striking back at their abusive spouses. In these cases, the victim of repeated abuse becomes the defendant, and the abusive spouse becomes the victim. If the proposed amendment is

<sup>64</sup> See Letter from the Joseph R. Weisberger, Chief Justice, Supreme Court of Rhode Island, Chairperson, Conference of Chief Justices Task Force on Victim Rights, to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary, at 1 (May 16, 1997).

<sup>65</sup> *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).



enacted, the abusive spouse might have a constitutional guarantee of access to information that includes when the defendant is released from custody, which might leave her vulnerable to violent retaliation. The National Clearinghouse for the Defense of Battered Women, the National Network to End Domestic Violence, and several State and local domestic violence support organizations—including organizations from Louisiana, Iowa, North Dakota, Wisconsin, Pennsylvania, and Wyoming—all oppose S.J. Res. 44 for this reason.

Illustrative of the peculiar problems raised by domestic violence cases is *State ex rel. Romley v. Superior Court*, 836 P.2d 445 (Ariz. Ct. App. 1992). Defendant Ann Roper was charged with stabbing her husband. She claimed that she had been the victim of horrendous emotional and physical abuse by her husband during their marriage; that the husband was a violent and psychotic individual who had been treated for multiple personality disorder for over a decade; that he was manifesting one of his violent personalities at the time of the assault; and that she had acted in self-defense. It was undisputed that the husband was mentally ill; that he had three prior arrests and one conviction for domestic violence toward the defendant; and that the defendant, not the husband, made the 911 call to the police, asking for help because her husband was beating her and threatening her with a knife. Under these circumstances, the Arizona Court of Appeals came to the sensible conclusion that the defendant's due process rights superseded the State law right of the husband/"victim" to refuse to disclose his medical records.

While nothing in S.J. Res. 44 would directly compromise the holding in *Romley*, the case does expose the risk in creating blanket constitutional protections for "victims" without first considering and resolving who these "victims" may be. In a world where the rights of the accused must yield to the rights of the accuser, we must define our terms carefully. The sponsors of S.J. Res. 44 want to shelve the difficult definitional debate until such time as Congress is called upon to implement the amendment. But it is premature to pass this proposal on to the States for ratification without providing clear guidance on this basic issue. —

#### B. THE TERM "CRIME OF VIOLENCE" IS UNDEFINED

The scope of the proposed amendment also turns on a second undefined term, "crime of violence." Ordinarily, crimes of violence are those involving some use of physical force against a person. Thus, the term may be limited to crimes that produce physical injury (e.g., murder, assault, and rape). In some contexts, however, the term "crime of violence" has been defined or interpreted to include crimes involving some use of force against another's property (e.g., arson) and crimes that merely threaten physical injury or property damage (e.g., extortion, robbery, and burglary). Existing Federal law already provides several different definitions of "crime of vio-

lence,” including one that covers statutory rape, abusive sexual contact, and sexual exploitation of minors.<sup>66</sup>

Again, the sponsors of this bill promise to define the term “crime of violence” in the implementing legislation. Again, we believe it is imprudent to ask States to ratify a constitutional amendment before they know the full scope and scale of its effects.

#### C. THE TERM “REASONABLE NOTICE” IS UNDEFINED

S.J. Res. 44 requires that victims be given “reasonable notice” of developments in their cases. But, again, the term is undefined within the text of the proposed amendment. Just what constitutes “reasonable notice?” For example, in cases where an inmate is released from custody, what is a reasonable amount of time to wait before notifying the crime victim? Is it 30 minutes? Two hours? Twenty-four hours? Does it depend on where the inmate was imprisoned, or the distance of the inmate from the victim at the time of release?

Besides the ambiguity of the timing requirement, the term “reasonable notice” gives no indication as to what manner of notice a victim is entitled. Must the Government invariably provide direct written notice to victims? May the government simply publish notice in a local newspaper, as it may sometimes do to perfect the forfeiture of a person’s property?<sup>67</sup> Is it enough that the court publishes its calendar? Until we have some idea what notice is “reasonable,” we cannot begin to assess what the proposed amendment will actually mean in terms of administrative time and cost.

#### D. THE REMEDIAL SCHEME IS UNCERTAIN

The proposed amendment appears to offer a rather limited scope of possible remedies for those victims who believe their rights were violated. Section 2 provides, in part: “Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial.” If a remedy is contemplated by this provision, its lack of definition will lead to more costly and time consuming litigation. In particular, courts will struggle to give meaning to the exception for “future proceedings.”

Section 2 also prohibits claims for damages against governmental entities. It states: “Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.” The majority report attempts to assuage victims’ groups by suggesting that this prohibition may not be as absolute as it sounds. According to the Report, while section 2 does not itself “give rise to” a cause of action against the Government, nor does it preclude such a cause of action under other legislation—and it cites as an example 42 U.S.C. § 1983. This strained reading of the phrase “give rise to” ignores the separate proviso that nothing in

<sup>66</sup> See, e.g., 18 U.S.C. §§ 16, 924(c)(3), 3156(a)(4); 28 U.S.C. § 2901. Section 3156(a)(4)(C) incorporates felonies under chapter 109A and chapter 110, relating to sexual abuse and sexual exploitation of children.

<sup>67</sup> See, e.g., 21 U.S.C. § 853(n)(1).

the amendment shall “authorize the creation of” claims for damages against the government. If the amendment were meant to authorize such claims, it would not use the language of prohibition.

Roger Pilon, director of the Cato Institute’s Center for Constitutional Studies, compares the proposed amendment to the generous legacy in a pauper’s will: It promises much but delivers little.<sup>68</sup> To the extent that the proposed amendment creates rights without remedies, it is worse than useless. Rights without remedies are empty promises that in time undermine confidence in the very document that contains them—in this case, the U.S. Constitution.

#### E. THE “EXCEPTIONS” CLAUSE IS OVERLY RESTRICTIVE

In an attempt to address some of the concerns raised by the potential sweep of the proposed amendment, its sponsors have included an exceptions clause (in section 3) to allow for exceptions to be created “when necessary to achieve a compelling interest.” However, a “compelling interest” standard may be too strict to deal appropriately and effectively with the variety of difficult circumstances that arise in the course of criminal proceedings.

The term “compelling interest” has a relatively settled meaning. Indeed, there is hardly a term in contemporary legal usage that is clearer or more restrictive. Interpreting this term, the Justice Department has told us that it may not permit the creation of various exceptions, including exceptions that may be appropriate for cases involving crimes with mass victims, culpable victims, cooperating defendants, and incarcerated victims.<sup>69</sup> To make matters worse, we have no way of knowing in advance, before it is too late, whether courts will consider any particular problem sufficiently compelling to justify an exception.

The majority report’s discussion of the exceptions clause is yet another exercise in political expediency. As previously discussed, one of the major problems with the amendment is how it will affect the treatment of battered women who may be either victim or defendant depending upon whether they are being beaten or whether they react to their beatings by self-help violence that may be legally justified but nonetheless prosecuted. The majority report states that the exceptions clause “offers the flexibility” to modify victims’ rights provisions “in some cases of domestic violence [where] the dynamics of victim-offender relationships may require [it].” To say that the restrictive “compelling interest” test “offers \* \* \* flexibility” is a ridiculous statement obviously meant to manipulate words beyond any recognizable meaning. What the majority is attempting to say, apparently, is that the words of the amendment mean whatever is politically popular to say they mean in order to achieve adoption by the Senate and ratification by the States.

Beyond all this, the exceptions clause is also problematic because it does not identify who may create exceptions to the amendment’s

<sup>68</sup>Statement of Roger Pilon regarding S.J. Res. 6, prepared for the Senate Comm. on the Judiciary, at 6 (Apr. 16, 1997).

<sup>69</sup>*A Proposed Constitutional Amendment to Protect Crime Victims*, Transcript of Proceedings on S.J. Res. 44 before the Senate Comm. on the Judiciary, 105th Cong., 2d Sess., at 23 (Apr. 28, 1998) (statement of Raymond C. Fisher, Associate Attorney General); Letter from L. Anthony Sutin, Acting Assistant Attorney General, to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (June 17, 1998).

requirements. Does the power to create exceptions, like the general enforcement power, fall exclusively to Congress? This would further weaken State and local control over law enforcement operations and criminal proceedings. Could exceptions be crafted by State judges in individual cases? This runs the risk that Federal constitutional rights would, for the first time, mean different things in different States.

These concerns are just a sampling of the possible problems that will be confronted by law enforcement officers, prosecutors, and judges as they grapple with the implementation and enforcement of the provisions of the proposed amendment. As the Federal Public Defenders aptly concluded, “the proposed amendment is a litigator’s dream and a victim’s nightmare.”<sup>70</sup>

#### VI. CONCLUSION

We must not hamstring our prosecutors and sacrifice core protections guaranteed by the Bill of Rights to enact this unnecessary and problematic constitutional amendment on victims’ rights.

PATRICK LEAHY.  
TED KENNEDY.  
HERB KOHL.

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<sup>70</sup>Letter from Thomas W. Hillier on behalf of the Federal Public and Community Defenders, to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (June 10, 1998).

### XIII. ADDITIONAL VIEWS OF SENATORS LEAHY AND KENNEDY

We are committed to providing rights for victims of crime, and we share the desire of our colleagues to ensure that victims are given strong and enforceable rights in the criminal justice process. But we believe that all possible solutions should be carefully considered. One issue that has remained unexplored in any comprehensive way is the possibility of enacting all of the rights proposed in S.J. Res. 44 by Federal statute.

#### THE CRIME VICTIMS ASSISTANCE ACT, S. 1081

It is because of our strong belief in protecting the rights of victims that we introduced S. 1081, The Crime Victims Assistance Act, in July 1997. However, despite our repeated requests for a hearing on our bill, no serious consideration has been given to our statutory alternative. This is unfortunate, since our bill provides the very same rights to victims as the proposed constitutional amendment and, in fact, addresses many of the concerns raised by our colleagues during debate over S.J. Res. 44.

Title I of our bill 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. S. 1081 assures victims a greater voice in the prosecution of the criminals that hurt them and their families. It gives them the right to be present and to be heard at all public proceedings, including sentencing, detention, probation revocation, and negotiated plea hearings. It provides the right to reasonable notice of release or escape from custody, and ensures a speedy trial in the interest of the victim. In short, our statutory proposal is very similar to S.J. Res. 44.

But, our statutory proposal goes much further than the proposed amendment. First, our bill provides additional penalties for witness tampering—so in cases where a defendant or person acting in concert with the defendant attempts to intimidate a victim, that person will be subject to stiffer penalties. Our bill creates a wide range of victims' services outside the courtroom. It increases victims' assistance personnel to serve as victim-witness advocates to victims of any criminal offense investigated by Federal authorities. And, it creates ombudsman programs to ensure that victims are given unbiased information about navigating the criminal justice process from a trained professional.

Our bill also addresses several of the concerns raised by our colleagues about the ability of the Federal Government to create exceptions to granting the rights of victims. S. 1081 creates explicit exceptions in cases where the defendant has cooperated with the Government or when a judge believes that there is a significant expectation of physical violence or other retaliation by the victim

against the defendant. This will particularly help victims of domestic violence, but could be used in other self-defense cases and also in racketeering cases. In general, these exceptions are essential to ensuring that all victims are protected while ensuring that the ability of prosecutors to put criminals behind bars is left intact.

In response to concerns raised by the National Victim Center and other victims service organizations, our statute directs the Attorney General to promulgate regulations that will extend the implementation and enforcement of our bill to victims of fraud, provided that such victims are natural persons and not corporate entities. We direct the Attorney General to do this within 180 days of the date of enactment of our statutory alternative. We believe this is a necessary and important step toward ensuring that victims of telemarketing schemes and other pecuniary fraud are also granted key rights in the criminal justice process. Each year, con artists steal nearly \$40 billion from unsuspecting consumers, according to the National Consumers League's National Fraud Information Center. And, the American Association of Retired Persons estimates that more than half of telemarketing fraud victims are age 50 or older.

Elderly individuals whose life savings are swindled by con artists, or individuals who lose large sums of money in telemarketing or pyramid schemes are just as much victims as are individuals who are mugged—and in some cases may suffer longer-lasting financial and emotional trauma. Yet S.J. Res. 44 does not address this important—and growing—class of victims. Our statute does, and we believe that alone makes it a more attractive victims' rights proposal than S.J. Res. 44.

The rights established by title I of our statutory proposal will fill existing gaps in Federal criminal law and will be a major step toward ensuring that the rights of victims of Federal crimes receive appropriate and sensitive treatment. These new rights will work in tandem with the myriad existing State laws to protect the rights of victims without trammeling on States' rights to protect victims in ways appropriate to States' unique needs.

Title II of our statutory proposal aims to assist victims of State crime and to ensure that victims receive the counseling, information, and assistance they need to participate in the criminal justice process to the maximum extent possible. First, title II authorizes appropriations for the Attorney General to provide grants to fund 50 victim-witness advocate positions to assist victims of State crimes. It also authorizes 50 new victim-witness advocates to provide assistance to victims of any Federal criminal offense investigation. Title II of our bill also provides 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. It also provides resources for these offices to develop state-of-the-art systems for notifying victims of crime of important dates and developments.

In general, our proposed statute addresses the concerns of Senator Thompson and others about states' rights, because it would not impinge upon the rights of the States to implement and enforce their own victims' rights proposals in ways that are appropriate to address their local concerns. This is also significant because—unlike the proposed constitutional amendment—our statutory pro-

posal is not an unfunded mandate that will impose tremendous new burdens on the States. In fact, our statutory proposal explicitly authorizes funding to implement the new rights created. It resolves within the text the question of how the new rights it creates will be funded.

#### CONCLUSION

S.J. Res. 44 is not the panacea that its proponents claim. The constitutional amendment passed by this Committee amounts to a lot of symbolism and very little substance. It does not specify who will pay for the new rights it accords victims. It does not clearly define who is a victim and which crimes will result in enhanced victims rights. It does not specify how new programs and constitutional requirements will be funded. It will not cover the thousands of victims of devastating pecuniary crimes. And, because it requires an increased burden on the already tight budgets of State and local prosecutors' offices, the proposed amendment will sacrifice diligent and efficient prosecutions on the altar of victims' rights. In short, the language of S.J. Res. 44 amounts to a lot of empty promises. Our statutory substitute is clearly written, comprehensive, and timely. We should not amend our Constitution lightly, and we should not amend it with empty promises to victims. Instead, we remain hopeful that this Committee will consider the Leahy-Kennedy Crime Victims Assistance Act.

PATRICK LEAHY.  
TED KENNEDY.

#### XIV. ADDITIONAL VIEWS OF SENATOR BIDEN

I have long been devoted to both the plight of crime victims and the preservation of our constitutional liberties. I wrote and supported many legislative victims' protections. The 1994 Biden Crime Law gave victims of violent crimes and sexual abuse the right to be heard at the sentencing of their assailants. The Violence Against Women Act provided sweeping assistance to victims of family violence and sexual assault, the Anti-Terrorism Act included Hatch-Biden provisions guaranteeing mandatory restitution to all victims of violent Federal crimes, and now I am pleased to support a constitutional victims' rights amendment.

Since more than 95 percent of all crimes are handled at the State level, our Federal statutory rights simply do not reach most crime victims. Therefore, I have concluded that it is time to write a basic charter of victims' rights into our Constitution setting a national, uniform baseline of rights for all victims of violent crimes. My three key specific principles for drafting the actual language of the amendment were:

*Principle number one:* The amendment sets out the specific rights accorded constitutional status. Victims will be entitled to the following rights of participation: The right to be informed and be present at all public proceedings involving the crime; the right to make a statement to the court about bail, the acceptance of a plea, and sentencing; and the right to be informed of an escape or release.

*Principle number two:* The amendment will not unintentionally hamstring criminal prosecutions. We cannot forget that the best thing for victims is to catch and convict criminals. We have to make sure that nothing in the amendment will make that job more difficult.

*Principle number three:* The amendment will not deprive the rights of the accused. We must preserve the protections in our Constitution for the accused, such as the right to counsel, the right to a jury of one's peers, and the right against self-incrimination. Defendants' rights are there, above all, so that our system does not convict an innocent person. Locking up an innocent person benefits no one, except the guilty.

A constitutional amendment is needed to set a national, uniform baseline of rights for all victims of violent crimes. In every State, and in the Federal system, the doors of the criminal justice system must be opened to victims to make sure that they are meaningful participants, and not just spectators, in a system that has for too long kept them on the outside looking in. The Committee heard testimony about how judges, time and again, have kept victims out of the courtroom, or have refused to let them speak at sentencing, because judges perceive a conflict between a defendant's constitutional right and victims' statutory rights. That is not as it should



be. Both the defendant and the victim can have the chance to participate.

With a victims' constitutional amendment, we will be telling prosecutors and judges, loud and clear, victims must be respected and included. They have constitutional rights that must be taken into account during the entire case. However, a constitutional amendment for victims does not mean that victims' rights will take precedence over defendants' rights. I believe that the contradiction that many people see between the rights of defendants and the rights of victims is false. Our Constitution is not a zero sum game. We do not diminish the rights of defendants by recognizing the rights of victims. I agree with the intent of the amendment Senator Durbin offered in Committee. Victims' rights must not diminish the rights of the accused.

In fact, it is precisely because I agree that defendants' rights must be protected, and sought to protect defendants' rights throughout the process of drafting this amendment, that I believe the language Senator Durbin proposed is unnecessary to achieve our joint goal. Earlier drafts of the amendment arguably raised concerns that victims' rights might conflict with the fair trial rights of the accused, but because I insisted on several specific changes to ensure that defendants will be protected, I am confident that, in the words of Professor Tribe, "no actual constitutional rights of the accused or of anyone else [will] be violated by respecting the rights of victims in the manner requested" by the supporters of S.J. Res. 44.<sup>1</sup>

To give an example of the changes we have made: I was concerned that by giving victims' an absolute right to a speedy trial an earlier version of the amendment created the risk that a defendant's lawyer might be forced to proceed to trial without sufficient time to prepare a defense. We want to make sure, above all, that we get the right criminal, and that we do not convict an innocent person. We also want to make sure that the great police power of the Government is not exercised in heavy-handed, overreaching ways that threaten the constitutional liberties of all of us. Accordingly, the sponsors of earlier versions of the amendment agreed that we would draft S.J. Res. 44 to protect against the possibility that defendants, or prosecutors for that matter, would be forced to trial before they were ready.

Rather than providing an absolute speedy trial right for victims, therefore, the new version of the amendment provides for "consideration" of the victim's interest "that any trial be free from unreasonable delay." What this means in plain English is that before granting a third, fourth or fifth continuance, judges in every state, from Delaware to Utah to California, must take into account inconvenience and hardship to the victim, and must proceed with the trial unless there is a good reason to wait. This does not mean, however, that judges must push lawyers to try cases before they are ready, which could violate defendants' right to counsel and backfire on victims by causing guilty defendants to go free and innocent defendants to go to jail.

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<sup>1</sup>S.J. Res. 6, a Proposed Constitutional Amendment to Protect Crime Victims: Hearings before the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. 11 (1997) (prepared statement of Laurence H. Tribe).

To give another example of the concerns I raised with the amendment: We have heard testimony about how judges, time and again, have kept victims out of the courtroom, or have refused to let them speak at sentencing, because victims' rights were inadequate in the jurisdiction holding the trial. Though early drafts of the amendment gave victims the right to submit a statement at sentencing, along with standing to enforce the right, I was concerned that including even a limited right of allocution could diminish the defendant's constitutional rights in some cases. But I reviewed the case law and found that the contradiction that many people see between a defendant's fair trial rights and a victim's interest in speaking at sentencing is false. The courts that have excluded victim-impact witnesses from trials have generally done so based on a Federal or State rule of evidence, despite Congress' recognition that the policy of the Federal witness sequestration rule to discourage collusion of trial witnesses is "not at issue" in the context of a post-conviction sentencing hearing.<sup>2</sup>

The crucial point is this: In my view, the witness sequestration rule is a prophylactic measure rather than a constitutional imperative. The purpose of the rule can be accomplished through defense cross-examination of fact witnesses and jury instructions, without categorically excluding victims from the trial. Furthermore, if the policy of the rule applies at all to victim-witnesses testifying at sentencing, and I believe it does not, the proper remedy is not to exclude victim-impact testimony, but to allow the judge or jury charged with sentencing the convicted defendant to consider the victims' presence at trial as a factor in determining her credibility. This conclusion that the Constitution does not require exclusion of a victim from the trial proceedings solely based on her intention to testify at sentencing was implicit in our decision last year to reverse the order in the Oklahoma City bombing case. Both the defendant's right and the victim's right can, and must, be respected.

Having performed a similar analysis of numerous hypothetical situations, I am now convinced that no potential conflict exists between the victims' rights enumerated in S.J. Res. 44 and any existing constitutional right afforded to defendants and that these rights "can coexist side by side with defendants' rights."<sup>3</sup>

Again, with a victims' constitutional amendment, we will be telling prosecutors and judges, loud and clear, that victims must be respected and included in both State and Federal courts throughout the Nation. Victims will have a uniform baseline of constitutional rights that must be taken into account during the entire case that cannot be ignored on the basis of vague assertions that they may be perceived as "diminishing" the rights of the accused. But let me repeat that the victims' rights constitutional amendment does not mean that victims' rights will take precedence over defendants' rights. The specific victims' rights secured in the amendment do not conflict with any existing constitutional rights of the accused.

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<sup>2</sup>H.R. Rep. No. 28, 105th Cong., 1st Sess.

<sup>3</sup>Laurence H. Tribe and Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, *Los Angeles Times Washington Edition*, July 6, 1998, at A11.

It is a pleasure to support a victims' rights amendment that will ensure victims of crime a voice and a measure of dignity and respect in the criminal justice process. All of us, I'm sure, wish that we could give them more. Certainly, they should have nothing less.

JOSEPH R. BIDEN, Jr.

XV. ADDITIONAL VIEWS OF SENATORS RUSSELL D.  
FEINGOLD AND RICHARD J. DURBIN

The circumstances that created the perceived need for S.J. Res. 44, “[t]he Victims’ Rights Amendment,” are quite disturbing and unfortunate. We are forced to consider this constitutional amendment because far too many people are victims of crime. And these victims rightfully want the ability to be heard and to participate in the process that is designed to redress the injuries they have suffered. They are concerned that our criminal justice system does not and will not recognize that they, as the victims, are directly affected by the process; that they have a real and tangible interest in the criminal justice process.

Innocent victims have endured needless and unjustified physical and emotional suffering, and they do not want themselves or others to endure additional similar pain. Unfortunately, these same victims are sometimes wronged for a second time by the criminal justice system. These crime victims came to us with the very reasonable request that Congress ensure that other victims of crime have the right to be active and meaningful participants in the criminal justice system.

While we recognize the significance of this issue and want victims to be treated with fairness, dignity, and respect, our concern is that amending the Constitution may hamper justice and not serve victims’ best interests.

The rights afforded to these crime victims should be concrete and enforceable, but S.J. Res. 44 has several provisions which are undefined and unworkable; provisions which must be later defined by legislatures or interpreted by the courts. As a result, a number of prosecutors and victims’ rights advocates—many of whom have spent their careers fighting for crime victims—now have voiced their opposition to the proposed amendment. More specifically, many victims’ rights advocates now oppose this amendment, because they believe that the rights afforded crime victims under the amendment’s proposed language “prohibits remedies necessary to adequately protect victims’ rights.” In other words, even if the proposed amendment enumerates certain rights for victims, in many instances, these victims will have no meaningful manner in which to enforce their rights. How can we as Members of Congress amend the U.S. Constitution to provide rights which in practice may only be illusory?

A dispute arises, therefore, as to how victims’ rights should be protected. There is an alternative to this constitutional amendment—an alternative that would provided crime victims with real, enforceable rights. The alternative is the statutory measure, S. 1081, “[t]he Crime Victims Assistance Act,” introduced by Senators Leahy and Kennedy and of which we are cosponsors.

Congress has the duty to approach any effort to amend the U.S. Constitution with great trepidation. Should we not, therefore, at least attempt the less radical act of passing a comprehensive piece of Federal legislation before we start amending the Constitution?

We must also note that we are deeply troubled by the trend that has developed in the last couple of Congresses of using proposed constitutional amendments as the first and only solution to society's problems; or perhaps more accurately stated, the use of proposed constitutional amendments as political tools which make for great rhetoric and campaign speeches, but which do little or nothing to actually help the American public.

Over the past two Congresses we have seen a proliferation of constitutional amendments introduced and voted on. In fact, the 104th Congress' seven votes cast on six proposed amendments holds the record for this measure of congressional activity since 1889. Moreover, there were 149 constitutional amendments introduced in the 104th and well over a 100 so far in the 105th.

In conclusion, we want to emphasize this point: We, along with all my colleagues on the Committee, support victims' rights and understand that these rights must be provided for and protected. We also, however, have great respect for the U.S. Constitution and the legislative process. We, thus, urge our colleagues to consider other alternatives before amending the Constitution. The gravity of such an act cannot be exaggerated.

For these reasons we cannot support this constitutional amendment.

RUSSELL D. FEINGOLD.  
RICHARD J. DURBIN.

## XVI. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law caused by passage of Senate Joint Resolution 44.

