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THE WHITE HOUSE
WASHINGTON

CMW *MA*

April 21, 2000

MEMORANDUM FOR THE PRESIDENT

FROM: Beth Nolan *2266*
Bruce Reed
Chuck Brain

See memo

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Nolan
Reed
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SUBJ: Victims' Rights Amendment

I. SUMMARY

The Department of Justice is preparing a "views letter" on S.J. Res. 3, the version of a Victims' Rights Amendment now before the Senate. Senators Kyl and Feinstein sponsor this amendment, and a cloture vote on the motion to proceed is scheduled for Tuesday, April 25th. Although you and the Attorney General have historically strongly supported a victims' rights amendment, the particular version before the Senate is seriously flawed. The DoJ views letter, therefore, will note the Administration's support for a "good" constitutional amendment, our willingness to support S.J. Res. 3 if its flaws were fixed, but express our opposition to the current version of Kyl-Feinstein.

II. BACKGROUND

You first announced your support for a constitutional amendment for victims' rights in June 1996, at a Rose Garden event attended by victims and Senators Feinstein and Kyl. Your remarks laid out the basic elements needed in a victims' amendment: the right to be told about public court proceedings and to attend them; the right to make a statement to the court about bail and about sentencing; the right to be heard prior to acceptance of a plea bargain; the right to be told about parole hearings and to attend and speak; the right to notice when the defendant or convict escapes or is released; the right to restitution from the defendant; the right to reasonable protection from the defendant; and notice of these rights.

The victims' community applauded you for supporting a constitutional amendment. Since then, the Administration, including Attorney General Reno, has repeatedly voiced its strong support for an amendment. In addition, last July, the Vice President expressed his commitment to lead a "national fight" for a victims' rights amendment, but he has not commented on Kyl-Feinstein in particular.

At the time of your remarks, you did not offer your specific support for the Kyl-Feinstein amendment. Initially, the Justice Department had concerns with the amendment language, some of which the sponsors worked to fix. As a general matter, the Kyl-Feinstein amendment addresses your principles. As set forth below, however, there are four significant concerns with this particular version.

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- (1) The rights provided crime victims by Kyl-Feinstein could conflict with the constitutional rights afforded the accused, including the rights set forth in the 5th, 6th, and 8th Amendments. And as a latter ratified Amendment, it is possible that a court will construe the victim's rights created by Kyl-Feinstein to trump the accused's rights. Our position, therefore, is that any amendment must include language stating it should not be construed to deny or diminish the rights of the accused as guaranteed by the Constitution.

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- (2) Kyl-Feinstein would create an improper incursion on the President's (and governors') executive pardon power. Kyl-Feinstein does more than simply diminish the control over pardons that the Framers vested in the President, it does so in particularly significant ways. The proposed language would require the President to give victims notice and an opportunity to submit a statement, and would arguably permit a court to reopen a pardon, commutation, or remission of restitution. It also seemingly would authorize Congress to regulate the pardon power in some respects. We would eliminate the clemency provisions entirely.

agrees

- (3) Kyl-Feinstein would unnecessarily impinge upon law enforcement by permitting exceptions from victims' rights guarantees only where there is a "compelling" governmental interest, a constitutional standard that could effectively prevent law enforcement interests from ever prevailing. We believe that the standard should be "significant" government interest.

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- (4) One of the restitution provisions in Kyl-Feinstein would undercut both finality and law enforcement interests. The current language would appear to permit a victim to reopen the restitution portion of a sentence for any reason at all, at any time, even after a sentence has been served in full. We would, therefore, eliminate this restitution provision.

III. ANALYSIS

As previously noted, DoJ is preparing a "views letter" on Kyl-Feinstein. This letter will outline the four concerns outlined above. In addition, the letter will clearly note that we would support a constitutional amendment that addresses our concerns, but that we oppose this particular version of the VRA. Specifically, the DoJ letter will read in pertinent part:

We strongly support a victims' rights amendment to the Constitution and would support S.J. Res. 3 if the concerns detailed in this letter are addressed, but we oppose it in its current form. We urge the Senate to continue to work with the

Department to improve the constitutional amendment, while, in the interim, continuing to assist crime victims through the enactment of appropriate legislation.

DPC, Counsel's Office, Legislative Affairs, and Justice have agreed on the above position, because, as outlined above, the amendment is seriously flawed. More importantly, however, Kyl-Feinstein may actually pass the Senate. There is no definite vote count, because no VRA has ever been addressed by the full Senate. However, our estimates suggest that there are at least 56 solid "yes" votes with 20 Senators still undecided. Perhaps more telling is that there are currently 13 Democratic cosponsors of Kyl-Feinstein, and it is unlikely that many Republicans will oppose. In addition, if the Senate passes this version of the VRA, it is also possible that the House will pass the same version by a wide margin. Finally, Senator Daschle has emphatically requested that the Administration express its opposition to the amendment, because he believes this will spur enough Democrats to vote against it.

We have couched our "opposition" to Kyl-Feinstein, however, with a reiteration of our support for a "good" constitutional amendment and our interim support for a statutory fix until acceptable constitutional language can be worked out. We have done so to mitigate the antagonism of the victims' rights groups, to whom we have promised support for an amendment and who continue to hope you will support Kyl-Feinstein. As noted above, you and the Attorney General have historically supported a victims' rights constitutional amendment. To remain consistent, therefore, it is imperative that we highlight the fact that the Administration is opposing *only this particular version*, that we would support Kyl-Feinstein if the sponsors addressed our four concerns, and that we will work with those committed to the issue to craft a constitutional amendment around which we all can rally.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DATE

The Honorable Trent Lott
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Mr. Majority Leader:

I write to convey the views of the Department of Justice on S.J. Res. 3, a resolution setting forth the text of a proposed Victims' Rights Amendment (VRA) to the Constitution, which was voted out of the Committee on the Judiciary on September 30, 1999, and sent to the full Senate. The Department continues to have significant concerns with four aspects of S.J. Res. 3. For this reason, we urge the Senate to continue to work with the Department in improving the constitutional amendment while, in the interim, continuing to help crime victims through the enactment of appropriate legislation.

As you know, the President and the Attorney General both strongly support a victims' rights amendment that will ensure that victims have a voice in the criminal justice system. See Pres. Proc. No. 7290, 65 FR 19823 (Apr. 10, 2000); Speech of Attorney General Janet Reno to the National Organization for Victim Assistance (Apr. 7, 2000). At the same time, this Administration believes that our constitutional system, which the Framers established after much deliberation and debate, has served our nation well for more than 200 years and should not be altered without the most cautious deliberation. See Statement of President Clinton in Support of Victims' Rights Constitutional Amendment (June 25, 1996). Our support for the VRA has rested on the premise that the Amendment would not undermine existing constitutional provisions; thus, our first concern has been that the resolution lacks an express provision preserving the rights of the accused. In light of our role as the chief federal law enforcement agency, our support has also depended on the Amendment not hampering effective law enforcement; accordingly, our second concern has been the unduly stringent standard for creating exceptions to the Amendment's applicability where necessary to promote the interests of law enforcement. We are committed to an amendment that gives real rights to victims while satisfying these basic criteria. This letter augments our previous letter of June 17, 1998 (enclosed), regarding the then-current S.J. Res. 44, in which we noted the above-mentioned concerns. This letter also

reflects further concerns we have about the Amendment's application to the pardon power and the reopening of restitution that we discussed with committee staff before markup in September.

Preserving the Existing Constitution

As we stated in our previous letter, we believe that, to ensure the protection of existing constitutional guarantees, the VRA should contain language that expressly preserves the rights of the accused. To that end, we urged that the following language be added: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution."

Moreover, we are concerned that new language that has been added to the proposed VRA would further alter our existing constitutional framework. Section 1 of S.J. Res. 3 has been amended to grant victims the right "to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence." This provision would create an unprecedented incursion on the President's exclusive power to grant pardons, commute sentences and remit restitution. See U.S. Const. art. 2, § 2, cl. 1 (pardon power); Schick v. Reed, 419 U.S. 256, 263-64 (1974) (commutation power falls within the pardon power); see also Knote v. United States, 95 U.S. 149, 153-155 (1877) (pardon power includes authority to remit unpaid financial obligations imposed as part of a sentence). The Supreme Court has observed that "the draftsmen of [the pardon clause] spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed.'" Schick, 419 U.S. at 263. The Court has also observed that "whoever is to make [the pardon power] useful must have full discretion to exercise it." Ex parte Grossman, 267 U.S. 87, 121 (1925). In addition, we note that this provision could encroach upon the clemency powers of governors in states where their authority is also plenary.

S.J. Res. 3 does more than simply diminish the control over pardons that the Framers vested in the President; it does so in particularly significant ways. The proposed language would require the President to give victims notice and an opportunity to submit a statement (Section 1), and would arguably permit a court to reopen a pardon, commutation, or remission of restitution (Section 2). It also seemingly would authorize Congress to regulate the pardon power in some respects by granting Congress "the power to enforce [the VRA] by appropriate legislation," rather than reserving enforcement authority to the President (Section 3). By contrast, under our existing constitutional framework, the President has both the responsibility and authority to determine the procedures for his Administration's handling of executive clemency requests so that he may receive the information he deems necessary, including input from victims and others. The current procedures are set out at 28 C.F.R. §§ 1.1-1.10. The Department is presently exploring how, and under what circumstances, additional victim interests can be best integrated into the Department's advisory role in counseling the President as he makes decisions about clemency.

Furthermore, the pardon provision differs from the rest of the VRA, which focuses on criminal proceedings. Although other provisions of the VRA would give victims rights in proceedings in which defendants have rights, the pardon provision would grant victims rights in a setting in which no one – including defendants – has ever possessed rights, and that has always

been controlled entirely by the President. The Framers assigned this power wholly to the President, and we oppose any amendment that would encroach upon it.

Law Enforcement Concerns

As we have noted previously, we are concerned that the very high standard for exceptions to the Amendment's victims' rights guarantees in Section 3 of S.J. Res. 3 would render the government unable to remedy the practical law enforcement problems that may arise under the Amendment. We believe that the authority to create exceptions should exist where necessary to promote a "significant" government interest, rather than the "compelling" interest required by the current draft. It is important that the VRA be flexible enough to permit effective and appropriate responses to the variety of difficult circumstances that arise in the course of implementing the Amendment. This concern is explained in more detail in our letter of June 17, 1998.

Our last issue concerns the addition of restitution to the list of proceedings and rulings subject to retrospective relief. We believe that any remedies provision should strive to make rights of victims real and enforceable, while ensuring that society's and victims' interests in finality and effective law enforcement are not undermined. Measured against these objectives, we believe Section 2 of S.J. Res. 3 is overly broad and would unduly disrupt the finality of sentences. The current language would appear to permit a victim to reopen the restitution portion of a sentence for any reason at all, at any time, even after a sentence has been served in full. The problems for law enforcement that could be caused by this provision include, for example, the possibility that because of the limited economic means of many defendants, restitution awarded to some victims at sentencing might have to be decreased to accommodate subsequent claims by victims who come forward after sentencing; the potential that defendants will litigate the reopening of a restitution order without the reopening of other parts of the sentence; and the difficulty in reaching and defending plea agreements in light of possible reopenings of and changes in the terms of restitution. In our view, these issues constitute serious obstacles to including restitution among the matters subject to retrospective relief.

Further, we believe the inclusion of restitution in Section 2 is not necessary in light of existing legislation providing relief for victims who are denied restitution or whose restitution is inadequate. If a federal court fails to impose restitution in accord with controlling statutes, the government can appeal the unlawful sentence without impairing the defendant's Double Jeopardy rights. See 18 U.S.C. § 3742(b); United States v. DiFrancesco, 449 U.S. 117, 137 (1980). Likewise, the States can legislatively protect victims in this regard by authorizing state prosecutors to appeal criminal sentences that do not satisfy state restitution statutes. Congress and the States can also enact legislation to address perceived gaps in current laws without going so far as to amend the Federal Constitution.

Doing More For Victims While Improving the Amendment

This Administration, with Congress, has kept its commitment to victims of crime, even as it has pushed aggressively for a victims' rights amendment. We have witnessed historic

reductions in violent crime over the past seven years, and through our efforts, there are fewer victims in this country than ever.

Even with the significant drop in violent crime, we have not become complacent. In 1994 the President signed into law the Violent Crime Control and Law Enforcement Act, which gives victims of violent crime and sexual abuse the right to speak out in court before sentencing, providing them the opportunity to describe the impact such victimization has had on their lives.

The Department, working with Congress, has also provided unprecedented levels of funding for victims' services. Since 1993, we have received over \$2.2 billion in the Crime Victims' Fund, over 90 percent of which has been distributed to the states and victims' compensation and assistance funds. The Violence Against Women Act has also infused new dollars into victim services: under that act, the Department has funded nearly \$1 billion in new domestic violence programs for states, communities, and tribes since 1995.

In addition to funding, the Department has taken other steps to improve the way it provides services to victims. We are auditing every component that has any responsibility for our contact with victims to assure appropriate staffing, improve practices and address problems. We have also revised and updated the Attorney General's guidelines for victim assistance.

There is more yet that can be done while we continue to strive for an appropriate constitutional amendment. For example, as then Associate Attorney General Raymond Fischer testified before the Senate Judiciary Committee in 1998, we can enact federal legislation that will improve victims' rights and services in the federal system while at the same time providing funds and other incentives to states to improve their own victims' rights laws and policies.¹ By passing such legislation, we can build a crucial bridge to the victims' rights amendment.

We appreciate the Judiciary Committee's willingness to work with the Department on issues relating to the Victims' Rights Amendment over the last four years. We strongly support a victims' rights amendment to the Constitution and would support S.J. Res. 3 if the concerns detailed in this letter are addressed, but we oppose it in its current form. We urge the Senate to continue to work with the Department to improve the constitutional amendment, while, in the interim, continuing to assist crime victims through the enactment of appropriate legislation. Should you have any questions, please do not hesitate to contact me.

Sincerely,

¹ In this regard, it is worth noting that, thanks to the concerted efforts of crime victims' advocates and governmental bodies at all levels, all fifty States have now enacted laws safeguarding crime victims' rights in the criminal justice process, and 32 States have amended their constitutions accordingly.

Robert Raben
Assistant Attorney General

Enclosure



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Chambers
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April 25, 2000

The Honorable Trent Lott
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Mr. Majority Leader:

I write to convey the views of the Department of Justice on S.J. Res. 3, a resolution setting forth the text of a proposed Victims' Rights Amendment (VRA) to the Constitution, which was voted out of the Committee on the Judiciary on September 30, 1999, and sent to the full Senate. The Department continues to have significant concerns with four aspects of S.J. Res. 3. Although we continue strongly to support a victims' rights amendment to the Constitution, and would support S.J. Res. 3 if the concerns detailed in this letter were addressed, we oppose the amendment in its current form. In the interim, we hope you will continue to help crime victims through the enactment of appropriate legislation.

As you know, the President and the Attorney General both strongly support a victims' rights amendment that will ensure that victims have a voice in the criminal justice system. See Pres. Proc. No. 7290, 65 FR 19823 (Apr. 10, 2000); Speech of Attorney General Janet Reno to the National Organization for Victim Assistance (Apr. 7, 2000). At the same time, this Administration believes that our constitutional system, which the Framers established after much deliberation and debate, has served our nation well for more than 200 years and should not be altered without the most cautious deliberation. See Statement of President Clinton in Support of Victims' Rights Constitutional Amendment (June 25, 1996). Our support for the VRA has rested on the premise that the Amendment would not undermine existing constitutional provisions; thus, our first concern has been that the resolution lacks an express provision preserving the rights of the accused. In light of our role as the chief federal law enforcement agency, our support has also depended on the Amendment not hampering effective law enforcement; accordingly, our second concern has been the unduly stringent standard for creating exceptions to the Amendment's applicability where necessary to promote the interests of law enforcement. We are committed to an amendment that gives real rights to victims while satisfying these basic criteria. This letter augments our previous letter of June 17, 1998 (enclosed), regarding the then-current S.J. Res. 44, in which we noted the above-mentioned concerns. This letter also reflects further concerns we have about the Amendment's application to the pardon power and the reopening of restitution

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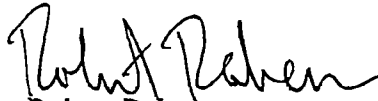
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improving the constitutional amendment, while, in the interim, continuing to assist crime victims through the enactment of appropriate legislation. Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Raben". The signature is fluid and cursive, with the first and last names being more prominent.

Robert Raben
Assistant Attorney General

Enclosure



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 17, 1998

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On June 2, 1998, I wrote to outline the position of the Department of Justice on S.J. Res. 44, the Victims' Rights Amendment. My letter attached a list of legislative recommendations designed to ensure that the amendment accomplishes the following goals: (1) provides certain enumerated rights to victims of crime; (2) eliminates the existing patchwork of victims' rights and establishes a national baseline; (3) does not give unintended advantages to defendants and does not hinder law enforcement, and; (4) preserves the constitutional rights of the accused.

Since my last letter, the lead sponsors of S.J. Res. 44, Senators Jon Kyl and Dianne Feinstein, have worked to incorporate a number of the Department's proposed changes into the most recent draft of the amendment. We very much appreciate their willingness to consider the views of the Department, and believe that the changes they have adopted have made a substantial improvement in the amendment.

Two issues described in the attachment to my earlier letter remain of concern to the Department, and we are reviewing a recent addition to the remedies provision, related to restitution. The two issues of continuing concern are preserving the rights of the accused, and ensuring adequate exceptions authority.

First, the current draft of S.J. Res. 44 does not contain language that preserves the fundamental protections of those accused of crimes. While conflicts between victims' rights and the protections accorded the accused under the Constitution

likely would be rare, the Attorney General has testified that in those rare instances "we must as a society ensure that a fair trial is not jeopardized." For that reason, S.J. Res. 44 should contain the following language:

Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by this Constitution.

By including such language, Congress would ensure that courts always seek to accommodate the constitutional rights of both the accused and the victim. However, in cases of irreconcilable conflict, where accommodation cannot protect both the rights of the accused and the rights of the victim, we believe that the accused's historical constitutional right to a fair trial must be preserved. The attachment to my earlier letter also included alternative language to achieve this goal. We have been, and remain, open to other legislative proposals that will ensure that the fundamental rights of the accused are preserved.

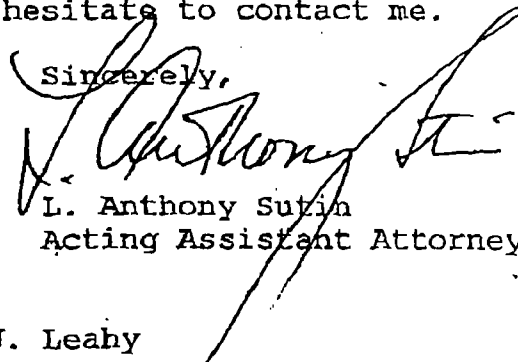
Second, the current draft of S.J. Res. 44 provides that exceptions may be enacted only where necessary to achieve a "compelling" interest. The Department believes that the authority to create exceptions should exist where necessary to promote a "significant" government interest. Adequate exceptions authority is crucial to ensuring that the government has sufficient flexibility to deal with circumstances involving, for example, culpable victims, potentially violent victims, cooperating defendants, or incarcerated victims. We believe that the current language may impose too high a burden to permit the necessary flexibility.

The requirement that governmental action be "necessary to achieve a compelling interest" is drawn from case law under the First and Fourteenth Amendments applying "strict scrutiny." Strict scrutiny is the most rigorous test of government action under the Constitution. Given existing Supreme Court case law, we cannot predict with certainty whether courts would interpret the compelling interest standard as affording the appropriate degree of flexibility. Moreover, by constitutionalizing the compelling interest standard, the amendment likely would require courts to apply strict scrutiny even in contexts, such as the prison setting, in which the Supreme Court has found that test inappropriate. While we would prefer that the amendment authorize the creation of exceptions that are "necessary to promote a significant government interest," we believe that eliminating the reference to the exceptions power altogether would be preferable to retaining the "compelling interest" language.

Finally, we note that the most recent draft of S.J. Res. 44 contains new language in the remedies clause (Section 2) that would make proceedings and rulings related to restitution subject to retrospective relief. As we have previously stated, our goal in crafting remedies language has been to strike an appropriate balance between making victims' rights real and effective and ensuring that law enforcement interests and society's interest in finality are not adversely affected. Accordingly, we have recommended inclusion of retrospective relief only for bail and parole decisions, and where necessary to vindicate rights in future proceedings. We are currently reviewing the addition of restitution to the category of decisions subject to retrospective relief, and will advise the Committee of our position on this issue once our review is complete.

We look forward to continuing our discussions with the Committee and to resolving the issues that remain of concern to the Department. Should you have any questions about these or other issues, please do not hesitate to contact me.

Sincerely,



L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

The Honorable Jon Kyl

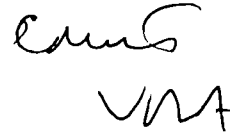
The Honorable Dianne Feinstein


 nationaljournal.com

Opening Argument

Victims' Rights: Leave The Constitution Alone

By Stuart Taylor Jr., *National Journal*
 © National Journal Group Inc.
 Monday, April 24, 2000



Chances are that most Senators have not really read the proposed Victims' Rights Amendment, which is scheduled to come to the floor for the first time on April 25. After all, it's kind of wordy -- almost as long as the Constitution's first 10 amendments (the Bill of Rights) combined. And you don't have to go far into it to understand two key points.

Amending the
 Constitution for
 popular causes is
 rarely a good idea.
 And victims' rights is
 no exception.

The first is that a "no" vote would open the way for political adversaries to claim that "Senator So-and-so sold out the rights of crime victims." This helps explain why the proposed amendment has a chance of winning the required two-thirds majorities in both the Senate and the House. Sponsored by Sen. **Jon Kyl**, R-Ariz., it has 41 co-sponsors (28 Republicans and 13 Democrats), including **Dianne Feinstein**, D-Calif., and has garnered rhetorical support from **President Clinton**, **Vice President Gore**, and Attorney General **Janet Reno**. (The Justice Department has hedged its endorsement of the fine print because of the deep misgivings of many of its officials.)

The second point is that even though the criminal justice system often mistreats victims, this well-intentioned proposal is unnecessary, undemocratic, and at odds with principles of federalism. Unnecessary because victims' groups like Mothers Against Drunk Driving have far more political clout than do accused criminals. Victims' groups can and have used this influence to push their elected officials to augment the victims' rights provisions that every state has already adopted. These include both statutes and (state) constitutional amendments, not to mention federal legislation, such as the Violence Against Women Act. Undemocratic and inconsistent with federalism because this proposal -- like others currently in vogue -- would shift power from voters and their elected officials (state and federal alike) to unelected federal judges, whose liberal or conservative predilections would often influence how they resolve the amendment's gaping ambiguities.

None of this is to deny that many victims -- especially in poor and minority communities -- are still given short shrift by prosecutors, judges, and parole officials, or that further legislation may be warranted. But would enshrining victims' rights in the Constitution be more effective than enumerating them in ordinary statutes?

Consider the proposed amendment's specific provisions. They would guarantee every "victim of a crime of violence" the right to be notified of and "not to be excluded from" trials and other public proceedings "relating to the crime," as well as the right "to be heard" before critical decisions are made on pre-trial release of defendants, acceptance of plea bargains, sentencing, and parole. In addition, courts would be required to consider crime victims' interests in having any trial be "free from unreasonable delay," and to consider their safety "in determining any conditional release from custody relating to the crime." Other provisions would entitle victims to "reasonable notice of a release or escape from custody relating to the crime" and "an order of restitution from the convicted offender."

All very worthy objectives. But rights are enumerated in the Constitution mainly to protect powerless and vulnerable minorities -- such as criminal defendants, who face possible loss of their liberty or even

loss of life -- from abuse by majoritarian governments. Amending the Constitution to promote popular causes is rarely a good idea, and advocates of the proposed Victims' Rights Amendment have failed to identify any legitimate interests of victims that cannot be protected legislatively, or any constitutional rights of defendants that stand in the way.

Moreover, to think that putting into the Constitution such benignly vague language as "free from unreasonable delay" will have some magical effect -- such as cutting through the bureaucratic inertia and resistance that some say have blunted the effect of victims' rights statutes -- is both fatuous and belied by our history. And any effort to add enough detail to eliminate ambiguities would distend our fundamental charter into something more like the Code of Federal Regulations.

Of course, at some point the objective of promoting victims' rights bumps up against other worthy goals. They include protecting defendants' rights to due process of law and other procedural protections against wrongful conviction, and giving prosecutors discretion to negotiate plea bargains with some defendants when necessary to get evidence against others.

If the courts were to construe the proposed amendment so narrowly as to leave such traditional rules and practices undisturbed, it would amount to vain tokenism. If, on the other hand, they were to construe the amendment broadly, it could foment legal confusion; set off torrents of new litigation by and among people claiming to be "victims" (a term that the amendment does not define); saddle the legal system with new costs and delays; and even increase the risks that innocent defendants would be convicted, that some of the guilty would escape punishment, and that some victims would be further victimized.

The most obvious risks the amendment poses to innocent defendants -- and as President Clinton has discovered, we are all potential defendants -- have been detailed by the American Civil Liberties Union. Courts could use the amendment to deny defendants and their counsel enough time to gather evidence of innocence before trial. They might also allow all victim-witnesses to be present when other witnesses are on the stand, even when this could compromise the reliability of the victim-witnesses' own testimony. (Current rules often require sequestering witnesses to prevent them from influencing one another's testimony.)

The risk of a guilty person's escaping punishment would be enhanced if courts used victims' objections as a basis for blocking prosecutors from entering legitimate plea bargains or for requiring them to justify such plea bargains by disclosing their strategies and any weaknesses in their evidence. Consider, for example, what might have happened to the Justice Department's effort to bring now-convicted Oklahoma City bomber **Timothy McVeigh** to justice if the Victims' Rights Amendment had been in effect in 1995.

Hundreds of victims -- the injured and the survivors of the 168 people who died -- could have invoked the amendment. Crucial evidence, provided by a witness named **Michael Fortier**, which helped convict McVeigh and co-defendant **Terry Nichols**, might have been unavailable if victims who opposed the prosecution's plea bargain with Fortier had been able to derail it, according to congressional testimony by **Beth A. Wilkinson**, a member of the prosecution team. **Emmett E. Welch**, whose daughter Julie was among those killed by McVeigh's bomb, testified at another hearing that "I was so angry after she was killed that I wanted McVeigh and Nichols killed without a trial. ... I think victims are too emotionally involved in the case and will not make the best decisions about how to handle the case."

Of course, victims' interests would hardly be served by convicting the innocent or by making it harder to bring the guilty to justice. And some victims could be hurt more directly -- for example, battered wives who complain to authorities only to be accused of assault by their victimizers, who can then invoke their own "victims' rights."

In short, the proposed constitutional amendment would do little or nothing more for crime victims than would ordinary state or federal legislation, and might in some cases be bad for them. That's why even some victims' groups, including the National Network to End Domestic Violence, are against it.

Most of us agree, of course, that prosecutors and judges should be nice to crime victims (as they usually

are). Most of us also agree that parents should be nice to their children. But would we adopt a constitutional amendment declaring, "Parents shall be nice to their children"? Or "Parents shall give their children reasonable notice and an opportunity to be heard before deciding whether and how to punish older children who have pushed them around"? Would we leave it to the courts to define the meaning of terms like *reasonable* and *nice*? A ban on spanking, perhaps? A minimum of one candy bar per day? Would we let the courts override all state and federal laws that conflict with their interpretations?

We don't need constitutional amendments to embody our broad agreement on such general principles. And we should leave it to the states (and Congress) to detail rules for applying such principles to the messy realities of life, as the states do in laws dealing with child abuse and neglect. Legislatures periodically revise and update such laws -- as they revise and update victims' rights laws -- to correct unwise judicial interpretations, fix unanticipated problems, resolve troublesome ambiguities, and incorporate evolving social values. It would be far, far harder to revise or update a constitutional amendment.

James Madison wrote that the Constitution's cumbersome amendment process was designed for "great and extraordinary occasions." This doesn't come close.

Stuart Taylor Jr. is a senior writer for National Journal magazine, where "Opening Argument" appears.

[[Opening Argument Archives](#)]



★ Letter is
attached ★

Joel K. Wiginton 04/24/2000 04:24

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: vra views letter

Four things:

Chave -

Victims

Not men

(1) I just received a call from Feinstein's Chief Counsel. She is going to call Podesta and ask for us to delay the DoJ views letter (See #2);

(2) We met with Feinstein's and Kyl's staff earlier this afternoon. They did not reject our four concerns out of hand and wanted to take the matter back to their bosses. To this end they asked if we could delay the DoJ views letter. This, of course, is difficult due to our promise to Daschle and others to get the letter up there as soon as possible. In an effort to allow for good faith negotiations, however, we told Feinstein and Kyl that they had until midnight tonight to agree to our four concerns in whole, or that we would have to send the letter first thing tomorrow morning. We emphasized, of course, that this did not mean that we did not want to continue to negotiate on the substantive issues, but that with the initial cloture vote and the Democratic Caucus lunch occurring tomorrow, we couldn't hold up the letter any longer. We also noted that the language in the letter as currently drafted specifically notes that we would support their amendment if they agreed to these four changes, so even if the letter does go up before a deal is cut, it does not preclude us continuing to work together;

(3) Justice would like to make an additional change to the views letter. They would like to change the first paragraph to note our position on the amendment (currently our position is not stated until the last paragraph). I think this is a very good idea. We don't want to make folks read a 4 or 5 page letter to figure the Admin's position. However, they want to change the pertinent part of the letter to read, "The Department continues to have significant concerns with four aspects of S.J. Res. 3. For this reason, we cannot support S.J. Res. in its confirm, but urge the Senate to continue to work with the Department to improve the constitutional amendment." I feel that we should be absolutely consistent with the "compromise language" we agree to last Friday. In other words -- at the risk of being redundant -- we would put the exact compromise language in the first paragraph and then restate it -- if necessary -- in the concluding paragraph. The compromise language was too heavily litigated to reopen that issue.

(4) Bill and I thought it best to circulate the latest version of the views letter for final check off from everyone (see attachment). It includes -- as outlined above -- the new DoJ language in the first paragraph and the compromise language in the last paragraph. Other than that, I've been told it is exactly the same. It has also been sent by DoJ to go to OMB. Please weigh in

ASAP. Thanks.

----- Forwarded by Joel K. Wiginton/WHO/EOP on 04/24/2000 04:09 PM -----



"Pearlman, Heather" <Heather.Pearlman@usdoj.gov>
04/24/2000 04:57:15 PM

Record Type: Record

To: "Jones, Gregory M" <Gregory.M.Jones@intmail.usdoj.gov>, Joel K. Wiginton/WHO/EOP

cc:

Subject: vra views letter

Greg:

Here is the latest draft of the VRA (S.J. Res. 3) views letter that needs to go through OMB/WH clearance ASAP. There are only a couple of changes since the one from last week. We want to send this out first thing tomorrow, so anything that can be done to expedite this would be much appreciated. The WH knows this is coming. Also, if you could let me know who at OMB is handling this and their phone number, I will pass it along to the WH so that this gets done tonight. Thanks,
Heather



- vra.views.letter

Message Sent To: _____

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DATE

The Honorable Trent Lott
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Mr. Majority Leader:

I write to convey the views of the Department of Justice on S.J. Res. 3, a resolution setting forth the text of a proposed Victims' Rights Amendment (VRA) to the Constitution, which was voted out of the Committee on the Judiciary on September 30, 1999, and sent to the full Senate. The Department continues to have significant concerns with four aspects of S.J. Res. 3. For this reason, we cannot support S.J. Res. 3 in its current form, and urge the Senate to continue to work with the Department to improve the constitutional amendment. In the interim, we hope you will continue to help crime victims through the enactment of appropriate legislation.

As you know, the President and the Attorney General both strongly support a victims' rights amendment that will ensure that victims have a voice in the criminal justice system. See Pres. Proc. No. 7290, 65 FR 19823 (Apr. 10, 2000); Speech of Attorney General Janet Reno to the National Organization for Victim Assistance (Apr. 7, 2000). At the same time, this Administration believes that our constitutional system, which the Framers established after much deliberation and debate, has served our nation well for more than 200 years and should not be altered without the most cautious deliberation. See Statement of President Clinton in Support of Victims' Rights Constitutional Amendment (June 25, 1996). Our support for the VRA has rested on the premise that the Amendment would not undermine existing constitutional provisions; thus, our first concern has been that the resolution lacks an express provision preserving the rights of the accused. In light of our role as the chief federal law enforcement agency, our support has also depended on the Amendment not hampering effective law enforcement; accordingly,

our second concern has been the unduly stringent standard for creating exceptions to the Amendment's applicability where necessary to promote the interests of law enforcement. We are committed to an amendment that gives real rights to victims while satisfying these basic criteria. This letter augments our previous letter of June 17, 1998 (enclosed), regarding the then-current S.J. Res. 44, in which we noted the above-mentioned concerns. This letter also reflects further concerns we have about the Amendment's application to the pardon power and the reopening of restitution that we discussed with committee staff before markup in September.

Preserving the Existing Constitution

As we stated in our previous letter, we believe that, to ensure the protection of existing constitutional guarantees, the VRA should contain language that expressly preserves the rights of the accused. To that end, we urged that the following language be added: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution."

Moreover, we are concerned that new language that has been added to the proposed VRA would further alter our existing constitutional framework. Section 1 of S.J. Res. 3 has been amended to grant victims the right "to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence." This provision would create an unprecedented incursion on the President's exclusive power to grant pardons, commute sentences and remit restitution. See U.S. Const. art. 2, § 2, cl. 1 (pardon power); Schick v. Reed, 419 U.S. 256, 263-64 (1974) (commutation power falls within the pardon power); see also Knote v. United States, 95 U.S. 149, 153-155 (1877) (pardon power includes authority to remit unpaid financial obligations imposed as part of a sentence). The Supreme Court has observed that "the draftsmen of [the pardon clause] spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed.'" Schick, 419 U.S. at 263. The Court has also observed that "whoever is to make [the pardon power] useful must have full discretion to exercise it." Ex parte Grossman, 267 U.S. 87, 121 (1925). In addition, we note that this provision could encroach upon the clemency powers of governors in states where their authority is also plenary.

S.J. Res. 3 does more than simply diminish the control over

pardons that the Framers vested in the President; it does so in particularly significant ways. The proposed language would require the President to give victims notice and an opportunity to submit a statement (Section 1), and would arguably permit a court to reopen a pardon, commutation, or remission of restitution (Section 2). It also seemingly would authorize Congress to regulate the pardon power in some respects by granting Congress ✕ the power to enforce [the VRA] by appropriate legislation, ✕ rather than reserving enforcement authority to the President (Section 3). By contrast, under our existing constitutional framework, the President has both the responsibility and authority to determine the procedures for his Administration's handling of executive clemency requests so that he may receive the information he deems necessary, including input from victims and others. The current procedures are set out at 28 C.F.R. §§ 1.1-1.10. The Department is presently exploring how, and under what circumstances, additional victim interests can be best integrated into the Department's advisory role in counseling the President as he makes decisions about clemency.

Furthermore, the pardon provision differs from the rest of the VRA, which focuses on criminal proceedings. Although other provisions of the VRA would give victims rights in proceedings in which defendants have rights, the pardon provision would grant victims rights in a setting in which no one - including defendants - has ever possessed rights, and that has always been controlled entirely by the President. The Framers assigned this power wholly to the President, and we oppose any amendment that would encroach upon it.

Law Enforcement Concerns

As we have noted previously, we are concerned that the very high standard for exceptions to the Amendment's victims' rights guarantees in Section 3 of S.J. Res. 3 would render the government unable to remedy the practical law enforcement problems that may arise under the Amendment. We believe that the authority to create exceptions should exist where necessary to promote a "significant" government interest, rather than the "compelling" interest required by the current draft. It is important that the VRA be flexible enough to permit effective and appropriate responses to the variety of difficult circumstances that arise in the course of implementing the Amendment. This concern is explained in more detail in our letter of June 17, 1998.

Our last issue concerns the addition of restitution to the list of proceedings and rulings subject to retrospective relief. We believe that any remedies provision should strive to make rights of victims real and enforceable, while ensuring that society's and victims' interests in finality and effective law enforcement are not undermined. Measured against these objectives, we believe Section 2 of S.J. Res. 3 is overly broad and would unduly disrupt the finality of sentences. The current language would appear to permit a victim to reopen the restitution portion of a sentence for any reason at all, at any time, even after a sentence has been served in full. The problems for law enforcement that could be caused by this provision include, for example, the possibility that because of the limited economic means of many defendants, restitution awarded to some victims at sentencing might have to be decreased to accommodate subsequent claims by victims who come forward after sentencing; the potential that defendants will litigate the reopening of a restitution order without the reopening of other parts of the sentence; and the difficulty in reaching and defending plea agreements in light of possible reopenings of and changes in the terms of restitution. In our view, these issues constitute serious obstacles to including restitution among the matters subject to retrospective relief.

Further, we believe the inclusion of restitution in Section 2 is not necessary in light of existing legislation providing relief for victims who are denied restitution or whose restitution is inadequate. If a federal court fails to impose restitution in accord with controlling statutes, the government can appeal the unlawful sentence without impairing the defendant's Double Jeopardy rights. See 18 U.S.C. § 3742(b); United States v. DiFrancesco, 449 U.S. 117, 137 (1980). Likewise, the States can legislatively protect victims in this regard by authorizing state prosecutors to appeal criminal sentences that do not satisfy state restitution statutes. Congress and the States can also enact legislation to address perceived gaps in current laws without going so far as to amend the Federal Constitution.

Doing More For Victims While Improving the Amendment

This Administration, with Congress, has kept its commitment to victims of crime, even as it has pushed aggressively for a victims' rights amendment. We have witnessed historic reductions in violent crime over the past seven years, and through our efforts, there are fewer victims in this country than ever.

Even with the significant drop in violent crime, we have not become complacent. In 1994 the President signed into law the Violent Crime Control and Law Enforcement Act, which gives victims of violent crime and sexual abuse the right to speak out in court before sentencing, providing them the opportunity to describe the impact such victimization has had on their lives.

The Department, working with Congress, has also provided unprecedented levels of funding for victims' services. Since 1993, we have received over \$2.2 billion in the Crime Victims' Fund, over 90 percent of which has been distributed to the states and victims' compensation and assistance funds. The Violence Against Women Act has also infused new dollars into victim services: under that act, the Department has funded nearly \$1 billion in new domestic violence programs for states, communities, and tribes since 1995.

In addition to funding, the Department has taken other steps to improve the way it provides services to victims. We are auditing every component that has any responsibility for our contact with victims to assure appropriate staffing, improve practices and address problems. We have also revised and updated the Attorney General's guidelines for victim assistance.

There is more yet that can be done while we continue to strive for an appropriate constitutional amendment. For example, as then Associate Attorney General Raymond Fischer testified before the Senate Judiciary Committee in 1998, we can enact federal legislation that will improve victims' rights and services in the federal system while at the same time providing funds and other incentives to states to improve their own victims' rights laws and policies.¹ By passing such legislation, we can build a crucial bridge to the victims' rights amendment.

We appreciate the Judiciary Committee's willingness to work with the Department on issues relating to the Victims' Rights Amendment over the last four years. Although we continue

¹ In this regard, it is worth noting that, thanks to the concerted efforts of crime victims' advocates and governmental bodies at all levels, all fifty States have now enacted laws safeguarding crime victims' rights in the criminal justice process, and 32 States have amended their constitutions accordingly.

strongly to support a victims' rights amendment to the Constitution, and would support S.J. Res. 3 if the concerns detailed in this letter were addressed, we oppose the amendment in its current form because it fails to do so. We urge the Senate to continue to work with the Department in improving the constitutional amendment, while, in the interim, continuing to assist crime victims through the enactment of appropriate legislation. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert Raben
Assistant Attorney General

Enclosure

April 21, 2000

MEMORANDUM FOR THE PRESIDENT

FROM: Beth Nolan
Bruce Reed
Chuck Brain

*Conrad -
mt*

SUBJ: Victims' Rights Amendment

I. SUMMARY

The Department of Justice is preparing a "views letter" on S.J. Res. 3, the version of a Victims' Rights Amendment now before the Senate. Senators Kyl and Feinstein sponsor this amendment, and a cloture vote on the motion to proceed is scheduled for Tuesday, April 25th. Although you and the Attorney General have historically strongly supported a victims' rights amendment, the particular version before the Senate is seriously flawed. The DoJ views letter, therefore, will note the Administration's support for a "good" constitutional amendment, our willingness to support S.J. Res. 3 if its flaws were fixed, but express our opposition to the current version of Kyl-Feinstein.

II. BACKGROUND

You first announced your support for a constitutional amendment for victims' rights in June 1996, at a Rose Garden event attended by victims and Senators Feinstein and Kyl. Your remarks laid out the basic elements needed in a victims' amendment: the right to be told about public court proceedings and to attend them; the right to make a statement to the court about bail and about sentencing; the right to be heard prior to acceptance of a plea bargain; the right to be told about parole hearings and to attend and speak; the right to notice when the defendant or convict escapes or is released; the right to restitution from the defendant; the right to reasonable protection from the defendant; and notice of these rights.

The victims' community applauded you for supporting a constitutional amendment. Since then, the Administration, including Attorney General Reno, has repeatedly voiced its strong support for an amendment. In addition, last July, the Vice President expressed his commitment to lead a "national fight" for a victims' rights amendment, but he has not commented on Kyl-Feinstein in particular.

At the time of your remarks, you did not offer your specific support for the Kyl-Feinstein amendment. Initially, the Justice Department had concerns with the amendment language, some of which the sponsors worked to fix. As a general matter, the Kyl-Feinstein amendment

addresses your principles. As set forth below, however, there are four significant concerns with this particular version.

- (1) The rights provided crime victims by Kyl-Feinstein could conflict with the constitutional rights afforded the accused, including the rights set forth in the 5th, 6th, and 8th Amendments. And as a latter ratified Amendment, it is possible that a court will construe the victim's rights created by Kyl-Feinstein to trump the accused's rights. Our position, therefore, is that any amendment must include language stating it should not be construed to deny or diminish the rights of the accused as guaranteed by the Constitution.
- (2) Kyl-Feinstein would create an improper incursion on the President's (and governors') executive pardon power. Kyl-Feinstein does more than simply diminish the control over pardons that the Framers vested in the President, it does so in particularly significant ways. The proposed language would require the President to give victims notice and an opportunity to submit a statement, and would arguably permit a court to reopen a pardon, commutation, or remission of restitution. It also seemingly would authorize Congress to regulate the pardon power in some respects. We would eliminate the clemency provisions entirely.
- (3) Kyl-Feinstein would unnecessarily impinge upon law enforcement by permitting exceptions from victims' rights guarantees only where there is a "compelling" governmental interest, a constitutional standard that could effectively prevent law enforcement interests from ever prevailing. We believe that the standard should be "significant" government interest.
- (4) One of the restitution provisions in Kyl-Feinstein would undercut both finality and law enforcement interests. The current language would appear to permit a victim to reopen the restitution portion of a sentence for any reason at all, at any time, even after a sentence has been served in full. We would, therefore, eliminate this restitution provision.

III. ANALYSIS

As previously noted, DoJ is preparing a "views letter" on Kyl-Feinstein. This letter will outline the four concerns outlined above. In addition, the letter will clearly note that we would support a constitutional amendment that addresses our concerns, but that we oppose this particular version of the VRA. Specifically, the DoJ letter well read in pertinent part:

We strongly support a victims' rights amendment to the Constitution and would support S.J. Res. 3 if the concerns detailed in this letter are addressed, but we oppose it in its current form. We urge the Senate to continue to work with the Department to improve the constitutional amendment, while, in the interim, continuing to assist crime victims through the enactment of appropriate legislation.

DPC, Counsel's Office, Legislative Affairs, and Justice have agreed on the above position, because, as outlined above, the amendment is seriously flawed. More importantly, however, Kyl-Feinstein may actually pass the Senate. There is no definite vote count, because no VRA has ever been addressed by the full Senate. However, our estimates suggest that there are at least 56 solid "yes" votes with 20 Senators still undecided. Perhaps more telling is that there are currently 13 Democratic cosponsors of Kyl-Feinstein, and it is unlikely that many Republicans will oppose. In addition, if the Senate passes this version of the VRA, it is also possible that the House will pass the same version by a wide margin. Finally, Senator Daschle has emphatically requested that the Administration express its opposition to the amendment, because he believes this will spur enough Democrats to vote against it.

We have couched our "opposition" to Kyl-Feinstein, however, with a reiteration of our support for a "good" constitutional amendment and our interim support for a statutory fix until acceptable constitutional language can be worked out. We have done so to mitigate the antagonism of the victims' rights groups, to whom we have promised support for an amendment and who continue to hope you will support Kyl-Feinstein. As noted above, you and the Attorney General have historically supported a victims' rights constitutional amendment. To remain consistent, therefore, it is imperative that we highlight the fact that the Administration is opposing *only this particular version*, that we would support Kyl-Feinstein if the sponsors addressed our four concerns, and that we will work with those committed to the issue to craft a constitutional amendment around which we all can rally.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530



The Honorable Trent Lott
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Mr. Majority Leader:

I write to convey the views of the Department of Justice on S.J. Res. 3, a resolution setting forth the text of a proposed Victims' Rights Amendment (VRA) to the Constitution, which was voted out of the Committee on the Judiciary on September 30, 1999, and sent to the full Senate. The Department continues to have significant concerns with four aspects of S.J. Res. 3. For this reason, we urge the Senate to continue to work with the Department in improving the constitutional amendment while, in the interim, continuing to help crime victims through the enactment of appropriate legislation.

As you know, the President and the Attorney General both strongly support a victims' rights amendment that will ensure that victims have a voice in the criminal justice system. See Pres. Proc. No. 7290, 65 FR 19823 (Apr. 10, 2000); Speech of Attorney General Janet Reno to the National Organization for Victim Assistance (Apr. 7, 2000). At the same time, this Administration believes that our constitutional system, which the Framers established after much deliberation and debate, has served our nation well for more than 200 years and should not be altered without the most cautious deliberation. See Statement of President Clinton in Support of Victims' Rights Constitutional Amendment (June 25, 1996). Our support for the VRA has rested on the premise that the Amendment would not undermine existing constitutional provisions; thus, our first concern has been that the resolution lacks an express provision preserving the rights of the accused. In light of our role as the chief federal law enforcement agency, our support has also depended on the Amendment not hampering effective law enforcement; accordingly, our second concern has been the unduly stringent standard for

creating exceptions to the Amendment's applicability where necessary to promote the interests of law enforcement. We are committed to an amendment that gives real rights to victims while satisfying these basic criteria. This letter augments our previous letter of June 17, 1998 (enclosed), regarding the then-current S.J. Res. 44, in which we noted the above-mentioned concerns. This letter also reflects further concerns we have about the Amendment's application to the pardon power and the reopening of restitution that we discussed with committee staff before markup in September.

Preserving the Existing Constitution

As we stated in our previous letter, we believe that, to ensure the protection of existing constitutional guarantees, the VRA should contain language that expressly preserves the rights of the accused. To that end, we urged that the following language be added: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution."

Moreover, we are concerned that new language that has been added to the proposed VRA would further alter our existing constitutional framework. Section 1 of S.J. Res. 3 has been amended to grant victims the right "to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence." This provision would create an unprecedented incursion on the President's exclusive power to grant pardons, commute sentences and remit restitution.

See U.S. Const. art. 2, § 2, cl. 1 (pardon power); Schick v. Reed, 419 U.S. 256, 263-64 (1974) (commutation power falls within the pardon power); see also Knote v. United States, 95 U.S. 149, 153-155 (1877) (pardon power includes authority to remit unpaid financial obligations imposed as part of a sentence). The Supreme Court has observed that "the draftsmen of [the pardon clause] spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed.'" Schick, 419 U.S. at 263.

The Court has also observed that "whoever is to make [the pardon power] useful must have full discretion to exercise it." Ex parte Grossman, 267 U.S. 87, 121 (1925). In addition, we note that this provision could encroach upon the clemency powers of governors in states where their authority is also plenary.

S.J. Res. 3 does more than simply diminish the control over pardons that the Framers vested in the President; it does so in

particularly significant ways. The proposed language would require the President to give victims notice and an opportunity to submit a statement (Section 1), and would arguably permit a court to reopen a pardon, commutation, or remission of restitution (Section 2). It also seemingly would authorize Congress to regulate the pardon power in some respects by granting Congress ✕ the power to enforce [the VRA] by appropriate legislation, ✕ rather than reserving enforcement authority to the President (Section 3). By contrast, under our existing constitutional framework, the President has both the responsibility and authority to determine the procedures for his Administration's handling of executive clemency requests so that he may receive the information he deems necessary, including input from victims and others. The current procedures are set out at 28 C.F.R. §§ 1.1-1.10. The Department is presently exploring how, and under what circumstances, additional victim interests can be best integrated into the Department's advisory role in counseling the President as he makes decisions about clemency.

Furthermore, the pardon provision differs from the rest of the VRA, which focuses on criminal proceedings. Although other provisions of the VRA would give victims rights in proceedings in which defendants have rights, the pardon provision would grant victims rights in a setting in which no one - including defendants - has ever possessed rights, and that has always been controlled entirely by the President. The Framers assigned this power wholly to the President, and we oppose any amendment that would encroach upon it.

Law Enforcement Concerns

As we have noted previously, we are concerned that the very high standard for exceptions to the Amendment's victims' rights guarantees in Section 3 of S.J. Res. 3 would render the government unable to remedy the practical law enforcement problems that may arise under the Amendment. We believe that the authority to create exceptions should exist where necessary to promote a "significant" government interest, rather than the "compelling" interest required by the current draft. It is important that the VRA be flexible enough to permit effective and appropriate responses to the variety of difficult circumstances that arise in the course of implementing the Amendment. This concern is explained in more detail in our letter of June 17, 1998.

Our last issue concerns the addition of restitution to the list of proceedings and rulings subject to retrospective relief. We believe that any remedies provision should strive to make rights of victims real and enforceable, while ensuring that society's and victims' interests in finality and effective law enforcement are not undermined. Measured against these objectives, we believe Section 2 of S.J. Res. 3 is overly broad and would unduly disrupt the finality of sentences. The current language would appear to permit a victim to reopen the restitution portion of a sentence for any reason at all, at any time, even after a sentence has been served in full. The problems for law enforcement that could be caused by this provision include, for example, the possibility that because of the limited economic means of many defendants, restitution awarded to some victims at sentencing might have to be decreased to accommodate subsequent claims by victims who come forward after sentencing; the potential that defendants will litigate the reopening of a restitution order without the reopening of other parts of the sentence; and the difficulty in reaching and defending plea agreements in light of possible reopenings of and changes in the terms of restitution. In our view, these issues constitute serious obstacles to including restitution among the matters subject to retrospective relief.

Further, we believe the inclusion of restitution in Section 2 is not necessary in light of existing legislation providing relief for victims who are denied restitution or whose restitution is inadequate. If a federal court fails to impose restitution in accord with controlling statutes, the government can appeal the unlawful sentence without impairing the defendant's Double Jeopardy rights. See 18 U.S.C. § 3742(b); United States v. DiFrancesco, 449 U.S. 117, 137 (1980). Likewise, the States can legislatively protect victims in this regard by authorizing state prosecutors to appeal criminal sentences that do not satisfy state restitution statutes. Congress and the States can also enact legislation to address perceived gaps in current laws without going so far as to amend the Federal Constitution.

Doing More For Victims While Improving the Amendment

This Administration, with Congress, has kept its commitment to victims of crime, even as it has pushed aggressively for a victims' rights amendment. We have witnessed historic reductions in violent crime over the past seven years, and through our efforts, there are fewer victims in this country than ever.

Even with the significant drop in violent crime, we have not become complacent. In 1994 the President signed into law the Violent Crime Control and Law Enforcement Act, which gives victims of violent crime and sexual abuse the right to speak out in court before sentencing, providing them the opportunity to describe the impact such victimization has had on their lives.

The Department, working with Congress, has also provided unprecedented levels of funding for victims' services. Since 1993, we have received over \$2.2 billion in the Crime Victims' Fund, over 90 percent of which has been distributed to the states and victims' compensation and assistance funds. The Violence Against Women Act has also infused new dollars into victim services: under that act, the Department has funded nearly \$1 billion in new domestic violence programs for states, communities, and tribes since 1995.

In addition to funding, the Department has taken other steps to improve the way it provides services to victims. We are auditing every component that has any responsibility for our contact with victims to assure appropriate staffing, improve practices and address problems. We have also revised and updated the Attorney General's guidelines for victim assistance.

There is more yet that can be done while we continue to strive for an appropriate constitutional amendment. For example, as then Associate Attorney General Raymond Fischer testified before the Senate Judiciary Committee in 1998, we can enact federal legislation that will improve victims' rights and services in the federal system while at the same time providing funds and other incentives to states to improve their own victims' rights laws and policies.¹ By passing such legislation, we can build a crucial bridge to the victims' rights amendment.

¹ In this regard, it is worth noting that, thanks to the concerted efforts of crime victims' advocates and governmental bodies at all levels, all fifty States have now enacted laws safeguarding crime victims' rights in the criminal justice process, and 32 States have amended their constitutions accordingly.

We appreciate the Judiciary Committee's willingness to work with the Department on issues relating to the Victims' Rights Amendment over the last four years. Although we continue strongly to support a victims' rights amendment to the Constitution, we cannot support S.J. Res. 3 in its current form.

We urge the Senate to continue to work with the Department in improving the constitutional amendment, while, in the interim, continuing to assist crime victims through the enactment of appropriate legislation. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert Raben
Assistant Attorney General

Enclosure

April 20, 2000

MEMORANDUM FOR THE PRESIDENT

FROM:

SUBJ: Victims' Rights Amendment

I. SUMMARY

The Department of Justice is preparing a views letter on the version of a Victims' Rights Amendment now before the Senate. This legislation is sponsored by Senators Kyl and Feinstein and a vote is expected next week. While the Administration is clearly on record in support of the concept of a victims' rights amendment, we all agree that Kyl-Feinstein in its current form is unacceptable, for reasons detailed below. However, we disagree over how our objections should be characterized. Legislative Affairs believes we should state that "we oppose" Kyl-Feinstein, in part because Sen. Daschle, who wants to defeat any such amendment, believes an express statement of opposition will spur enough Democrats to vote against it. DPC and DOJ believe we should say "we do not support" Kyl-Feinstein in its current form, because express opposition would suggest to victims' groups that we are backing away from our support in principle for an amendment. We all agree that in either case, we should state our willingness to work with the Congress to develop acceptable language. All sides also agree we should suggest that Congress pursue an interim statutory fix until acceptable constitutional language can be worked out. Knowing of your strong interest in this issue, we felt we should to put the decision to you.

II. BACKGROUND

You first announced your support for a constitutional amendment for victims' rights in June 1996, at a Rose Garden event attended by victims and Senators Feinstein and Kyl. Your remarks laid out the basic elements needed in a victims' amendment: the right to be told about public court proceedings and to attend them; the right to make a statement to the court about bail and about sentencing; the right to be heard prior to acceptance of a plea bargain; the right to be told about parole hearings and to attend and speak; the right to notice when the defendant or convict escapes or is released; the right to restitution from the defendant; the right to reasonable protection from the defendant; and notice of these rights. You also said the amendment should be self-executing, so it can take effect upon ratification without additional legislation.

As a general matter, the Kyl/Feinstein amendment satisfactorily addresses these principles. But it has four key flaws. The first is that Kyl-Feinstein does not contain language

that expressly preserves the rights of the accused, including the rights set forth in the 5th, 6th, and 8th Amendments. DOJ argues, and we agree, that any amendment must include language stating it should not be construed to deny or diminish the rights of the accused as guaranteed by the Constitution. The second issue is that Kyl-Feinstein would create an improper incursion on executive pardon power by 1) inserting victims into the clemency process and 2) potentially authorizing courts to reopen a pardon, commutation or restriction. DOJ would eliminate the clemency provisions entirely. The third concern is that Kyl-Feinstein would unnecessarily impinge upon law enforcement by permitting exceptions from victims' rights guarantees only where there is a "compelling" governmental interest, a constitutional standard that would effectively prevent law enforcement interests from ever prevailing. DOJ argues the standard should be "significant" government interest. The fourth concern is that Kyl-Feinstein's restitution provisions undercut both finality and law enforcement interests. DOJ would also eliminate these provisions. These concerns are serious and we all agree that if Kyl-Feinstein in its current form were enacted, it would harm our policy interests and damage the Constitution.

Last July, the Vice President expressed his commitment to lead a "national fight" for a victims' rights amendment, but he has not commented on Kyl-Feinstein in particular. As for the victims community, most of the groups strongly back the amendment. Indeed, based on your previous statements, the groups hope you will *support* Kyl-Feinstein and work with the sponsors to iron out our differences. While we are certainly working to address those differences, at this point we could not support Kyl-Feinstein because of the objections described above.

III. ANALYSIS

The issue before you is how our objections should be expressed. Senator Daschle has strongly requested that we use the "oppose" language because he believes a strong signal may be necessary to defeat Kyl-Feinstein on the floor. Legislative Affairs believes we should take our guidance from him. DPC and DOJ, however, believe that "do not support" is the preferable alternative on two counts. First, it would be less likely to antagonize the victims' rights groups to whom we have promised support for an amendment, while still likely achieving Daschle's tactical requirements. Second, it would be more consistent with our previous communications on this issue: we have never used the "oppose" language before, and moving to such a phrasing would fuel the belief already shared by Senator Feinstein and others that we are backing off our commitment to an amendment. While the difference may appear narrow, the nuances will be read closely, particularly by the groups. Because this legislation will likely move next week, we would like to be able to send an Administration views to the Senate tomorrow.

IV. OPTIONS

_____ State in the views letter that we oppose Kyl-Feinstein.

_____ State in the views letter that we do not support Kyl-Feinstein.

_____ Discuss further.

I. INTRODUCTION

The Department of Justice is preparing a views letter on the current version of the Victims Rights Amendment (Kyl-Feinstein) that is currently before the Senate and upon which a vote is expected next week. We are all in agreement that the current version of the Amendment is unacceptable. However, there is disagreement as to how our objection to the Amendment should be characterized in the views letter. DPC and DOJ believe that we should state “**we do not support**” the amendment in its current form. Legislative Affairs believes that we should state that “**we oppose**” the Amendment in its current form. Both sides agree that in any case, we should make clear in the letter that we support a constitutional amendment on victims’ rights and that we are willing to work with the Congress to develop appropriate language. All sides agree that we should also suggest in the letter that we would like to pursue an interim statutory fix until appropriate constitutional language can be worked out.

II. BACKGROUND

To be filled in by DPC

III. SUBSTANTIVE OBECTIONS TO THE PROPOSED VRA

The draft views letter of the Department of Justice raises four concerns about the proposed VRA amendment. These concerns are serious and we all agree that if the present version of the VRA were enacted, it would both harm our policy interests and damage the Constitution.

The first concern is that the proposed VRA does not contain language that would expressly preserve the rights of the accused, including the constitutional rights of defendants set forth in the 5th, 6th, and 8th Amendments. For this reason, DOJ asserts that the Amendment must have language that states that the VRA should not be construed to deny or diminish the rights of the accused as guaranteed by the Constitution. The second issue is that the proposed VRA would create an improper incursion on the President (and Governors’) pardon power by 1) inserting victims into the clemency process by mandating notice and the right to be heard and 2) by potentially authorizing courts to reopen a pardon, commutation or restriction if the Amendment’s requirements were not met. Accordingly, DOJ contends that the clemency provisions should be eliminated entirely. The third concern is that the proposed VRA would unnecessarily impinge upon law enforcement by allowing exception from victims’ rights guarantees only where there exist “compelling” governmental interests, a constitutional standard that would effectively prevent law enforcement interests from ever prevailing. DOJ argues the standard should be changed to “significant” government interest. The fourth is that the proposed

VRA has restitution provisions that undercut both finality and law enforcement concerns. DOJ would also eliminate these provisions.

IV. ANALYSIS

As noted previously, we are all in agreement that the proposed VRA is unacceptable in its current form. The issue before you is now our opposition should be expressed. Senator Daschle has strongly requested that we use the “we oppose” language because he believes that a strong signal may be necessary to defeat the Amendment. Legislative Affairs believes we should take our guidance from him but that we need to make clear that our opposition is only to this particular version of the VRA and that we would support an Amendment which addresses our concerns. DPC and DOJ, however, believe that stating “we do not support” is the preferable alternative on two counts. First, it would be less likely to antagonize the victims rights groups to whom we have promised support for an amendment. Second, it would be more consistent with our previous communications on this issue. As they argue, we have never used the “we oppose” language and moving to this approach would fuel the belief already shared by Senator Feinstein and others on the Hill that we are backing off our commitment to an amendment.

The critical political question, to which there is no clear answer, is whether using the “we oppose” language is necessary to defeat the proposed VRA. The risks of having the proposed VRA pass are considerable and enacting this version into a permanent part of the Constitution would be disastrous. There are thus strong reasons to err on the side of defeating the Amendment. On the other hand, we have a history of supporting a VRA in some form and to *risk the appearance of distancing* ourselves from that position at this late point in the Administration would expose us to considerable criticism.

APR-10-2000 14:23



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DATE

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The Honorable Trent Lott
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Mr. Majority Leader:

I write to convey the views of the Department of Justice on S.J. Res. 3, a resolution setting forth the text of a proposed Victims' Rights Amendment (VRA) to the Constitution, which was voted out of the Committee on the Judiciary on September 30, 1999, and sent to the full Senate. The Department continues to have significant concerns with four aspects of S.J. Res. 3.

* As you know, the President and the Attorney General both strongly support a victims' rights amendment that will ensure that victims have a voice in the criminal justice system. At the same time, this Administration believes that our constitutional system, which the Framers established after much deliberation and debate, has served our nation well for more than 200 years and should not be lightly altered. See Statement of President Clinton in Support of Victims' Rights Constitutional Amendment (June 25, 1996). Our support for the VRA has rested on the premise that the Amendment would not undermine existing constitutional provisions; thus, our first concern has been that the resolution lacks an express provision preserving the rights of the accused. In light of our role as the chief federal law enforcement agency, our support has also depended on the Amendment not hampering effective law enforcement; accordingly, our second concern has been the unduly stringent standard for creating exceptions to the Amendment's applicability where necessary to promote the interests of law enforcement. We are committed to an amendment that gives real rights to victims while satisfying these basic criteria. This letter augments our previous letter of June 17, 1998 (enclosed), regarding the then-current S.J. Res. 44, in which we noted the above-mentioned concerns. This letter also reflects further concerns we have about the Amendment's application to the pardon power and the reopening of restitution that we discussed with committee staff before markup in September.

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Preserving the Existing Constitution

As we stated in our previous letter, we believe that, to ensure the protection of existing constitutional guarantees, the VRA should contain language that expressly preserves the rights of the accused. To that end, we urged that the following language be added: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution."

Moreover, we are concerned that new language that has been added to the proposed VRA would further alter our existing constitutional framework. Section 1 of S.J. Res. 3 has been amended to grant victims the right "to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence." This provision would create an unprecedented incursion on the President's exclusive power to grant pardons, commute sentences and remit restitution. See U.S. Const. art. 2, § 2, cl. 1 (pardon power); Schick v. Reed, 419 U.S. 256, 263-64 (1974) (commutation power falls within the pardon power); see also Knote v. United States, 95 U.S. 149, 153-155 (1877) (pardon power includes authority to remit unpaid financial obligations imposed as part of a sentence). The Supreme Court has observed that "the draftsmen of [the pardon clause] spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed.'" Schick, 419 U.S. at 263. The Court has also observed that "whoever is to make [the pardon power] useful must have full discretion to exercise it." Ex parte Grossman, 267 U.S. 87, 121 (1925). In addition, we note that this provision could encroach upon the clemency powers of governors in states where their authority is also plenary.

S.J. Res. 3 does more than simply diminish the control over pardons that the Framers vested in the President; it does so in particularly significant ways. The proposed language would require the President to give victims notice and an opportunity to submit a statement (Section 1), and would arguably permit a court to reopen a pardon, commutation, or remission of restitution (Section 2). It also seemingly would authorize Congress to regulate the pardon power in some respects by granting Congress "the power to enforce [the VRA] by appropriate legislation," rather than reserving enforcement authority to the President (Section 3). By contrast, under our existing constitutional framework, the President is free to determine the procedures for his Administration's handling of executive clemency requests so that he may receive the information he deems necessary, including input from victims and others. The current

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procedures are set out at 28 C.F.R. §§ 1.1-1.10. The Department is presently exploring how, and under what circumstances, additional victim interests can be best integrated into the Department's advisory role in counseling the President as he makes decisions about clemency. new?

Furthermore, the pardon provision differs from the rest of the VRA, which focuses on criminal proceedings. Although other provisions of the VRA would give victims rights in proceedings in which defendants have rights, the pardon provision would grant victims rights in a setting in which no one - including defendants - has ever possessed rights, and that has always been controlled entirely by the President. The Framers assigned this power wholly to the President, and we oppose any amendment that would encroach upon it.

Law Enforcement Concerns

As we have noted previously, we are concerned that the very high standard for exceptions to the Amendment's victims' rights guarantees in Section 3 of S.J. Res. 3 would render the government unable to remedy the practical law enforcement problems that may arise under the Amendment. We believe that the authority to create exceptions should exist where necessary to promote a "significant" government interest, rather than the "compelling" interest required by the current draft. It is important that the VRA be flexible enough to permit effective and appropriate responses to the variety of difficult circumstances that arise in the course of implementing the Amendment. This concern is explained in more detail in our letter of June 17, 1998. like
but?

Our last issue concerns the addition of restitution to the list of proceedings and rulings subject to retrospective relief. We believe that any remedies provision should strive to make rights of victims real and enforceable, while ensuring that society's and victims' interests in finality and effective law enforcement are not undermined. Measured against these objectives, we believe Section 2 of S.J. Res. 3 is overly broad and would unduly disrupt the finality of sentences. The current language would appear to permit a victim to reopen the restitution portion of a sentence for any reason at all, at any time, even after a sentence has been served in full. The problems for law enforcement that could be caused by this provision include, for example, the possibility that because of the limited economic means of many defendants, restitution awarded to some victims at sentencing might have to be decreased to accommodate subsequent claims by victims who come forward after sentencing; the potential that defendants will litigate the

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reopening of a restitution order without the reopening of other parts of the sentence; and the difficulty in reaching and defending plea agreements in light of possible reopenings of and changes in the terms of restitution. In our view, these issues constitute serious obstacles to including restitution among the matters subject to retrospective relief.

Further, we believe the inclusion of restitution in Section 2 is not necessary in light of existing legislation providing relief for victims who are denied restitution or whose restitution is inadequate. If a federal court fails to impose restitution in accord with controlling statutes, the government can appeal the unlawful sentence without impairing the defendant's Double Jeopardy rights. See 18 U.S.C. § 3742(b); United States v. DiFrancesco, 449 U.S. 117, 137 (1980). Likewise, the States can legislatively protect victims in this regard by authorizing state prosecutors to appeal criminal sentences that do not satisfy state restitution statutes. Congress and the States can also enact legislation to address perceived gaps in current laws without going so far as to amend the Federal Constitution.

We appreciate the Committee's willingness to work with the Department on issues relating to the Victims' Rights Amendment last year, and we look forward to working with you in the coming year. Successful resolution of these four concerns would ensure full Administration support of S.J. Res. 3. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert Raben
Assistant Attorney General

Enclosure



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

CRIME -
VICTIMS RIGHTS ~~AMENDMENT~~

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I write to convey the views of the Department of Justice concerning S.J.Res. 3, the current draft of the Victims' Rights Amendment (VRA). As you know, the President and the Attorney General have both expressed strong support for a victims' rights amendment that will bring balance to the criminal justice system. We are committed to continuing to work with Congress, state and local prosecutors, federal and state judges, victims and victims' groups, and others involved in the criminal justice system as we develop an amendment that gives real rights to victims and preserves the protections of the accused. Such an amendment must be flexible enough to permit prosecutors, judges, and other justice system actors to deal appropriately and effectively with the variety of difficult circumstances that arise in the course of a criminal case. This letter augments our previous letter of June 17, 1998 (enclosed) concerning the then-current S.J.Res. 44, in which we noted our serious concerns regarding two issues.

First, we believe the VRA should contain language that expressly preserves the rights of the accused. To that end, we urged that the following language be added: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution." Second, we believe that the authority to create exceptions should exist where necessary to promote a 'significant' rather than a 'compelling' government interest. We appreciate the Committee's willingness to work with the Department on these issues last year, and feel

we must reiterate our concerns. We enclose and incorporate by reference our previous letter, in which the Department's position on these two issues is set out in detail.

We also informed you in that letter that the Department was in the process of reviewing new language in Section 2 of the VRA, which added restitution to the list of proceedings and rulings subject to retrospective relief. On the basis of our review of S.J.Res. 3 restitution language, and, for the reasons outlined below, we recommend that the words "or restitution," appearing on page 3, line 6, of S.J. Res. 3 as introduced in the Senate, be deleted from the amendment.

Finally, we recommend that the language in Section 1 regarding right to notice and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence be deleted. This language has been added since last year, and we have not previously had an opportunity to comment.

Restitution

After careful review of this issue, the Department recommends deleting the words "or restitution" from Section 2 of S.J.Res. 3. We believe that the amendment's remedies language should strike an appropriate balance between making the rights of victims real and enforceable, and ensuring that society's and the victims' interests in finality and effective law enforcement are not adversely affected. Accordingly, the Department proposed language that allowed for retrospective relief only for bail or parole proceedings, which are subject to reopening under current law, or where necessary to vindicate rights in future proceedings. The language included in S.J. Res. 3 risks upsetting that delicate balance by allowing sentences to be reopened, potentially years after they were imposed, to remedy violations of the right to an order of restitution.

Deleting the words "or restitution" from section 2 of S.J. Res. 3 overturn current law providing legislative relief to victims who are denied restitution, or whose restitution is inadequate. In addition, Congress or the states also could enact legislation providing additional relief to such victims. Under current federal law, if a sentencing court fails to impose restitution in accord with controlling statutes, the government can appeal the unlawful sentence without impairing the defendant's Double Jeopardy rights. See 18 U.S.C. § 3742(b);

United States v. DiFrancesco, 449 U.S. 117, 137 (1980). Likewise, the states can legislatively protect victims in this regard by allowing the prosecution to appeal criminal sentences that do not satisfy state restitution statutes.

Pardon Authority

Section 1 of S.J.Res. 3 has been amended to grant victims the right "to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence." The Department opposes this language because it would unduly restrict the President's pardon authority. This provision would constitute an unprecedented incursion on the President's power under the Constitution to grant pardons and commute sentences. See U.S. Const. art. 2, § 2, cl. 1 (pardon power); see also Schick v. Reed, 419 U.S. 256, 263-64 (1974) (commutation power falls within the pardon power). The amendment also potentially could affect the President's power under the Pardon Clause to remit unpaid restitution. See Knote v. United States, 95 U.S. 149, 153-155 (1877); Osborne v. United States, 91 U.S. 474, 477-478 (1875); Memorandum for Margaret Colgate Love, Pardon Attorney, Office of the Pardon Attorney, from Walter Dellinger, Assistant Attorney General, Re: Effect of a Presidential Pardon (June 19, 1995) (remission of restitution falls within pardon power). The Supreme Court has observed that "the draftsmen of [the pardon clause] spoke in terms of a 'prerogative of the President, which ought not be 'fettered or embarrassed.'" Id. at 263. The Court has also observed that "whoever is to make [the pardon power] useful must have full discretion to exercise it," Ex parte Grossman, 267 U.S. 87, 121 (1925), and that "[o]ur Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it." Id. The requirement that victims be identified, notified, and then given an opportunity to submit a statement before the President grants a pardon (or commutes a sentence or remits restitution) could significantly restrict the time and manner in which he exercises his authority. It is also worth noting that, although other provisions of the VRA would give victims rights in settings in which defendants have rights, the pardon provision grants victims rights in a setting in which no one - including defendants - has ever possessed rights. We also note that because S.J.Res. 3 is a constitutional amendment, the restrictions on pardon authority also apply to the governors of the fifty states.

We look forward to continuing our discussions with the

Committee on these concerns. Should you have any questions,
please do not hesitate to contact me.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

Enclosure

THE WHITE HOUSE
WASHINGTON

DOMESTIC POLICY COUNCIL

FACSIMILE FOR: Bmcc / Cathy

DATE: _____

TELEPHONE: _____

FAX: 62878

FACSIMILE FROM: LEANNE SHIMABUKURO

TELEPHONE: (202) 456-5574

FAX: (202) 456-7028

NUMBER OF PAGES (INCLUDING COVER): 7

COMMENTS: Draft views letter. I believe they
revised it again last night but
this is the most recent version I have.

SEP-21-1999 10:56



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

Version 2

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On June 17, 1998, the Department wrote to communicate the views of the Department of Justice on the then-current draft of S.J. Res. 44, the Victims' Rights Amendment (VRA). At that time, we informed you that the Department was in the process of reviewing new language in Section 2 of the amendment, which added restitution to the list of proceedings and rulings subject to retrospective relief.

Since that time, the VRA has been re-introduced as S.J. Res. 3, which is nearly identical to S.J. Res. 44. I am writing today to inform you that the Department has completed its review of the restitution language in S.J. Res. 3, and, for the reasons outlined below, recommends that the words "and restitution," appearing on page 3, line 6, of S.J. Res. 3 as introduced in the Senate, be deleted from the amendment. In addition, in anticipation of the Judiciary Committee's impending consideration of S.J. Res. 3, I am writing to provide the Department's views on language recently added to Section 1 of S.J. Res. 3 concerning Presidential pardon authority.

I also note that the lead sponsors of S.J. Res. 3 worked to incorporate a number of the Department's changes to the VRA last year, and those changes have made a substantial improvement in the amendment. The Department, however, still has significant concerns regarding two issues addressed last year: preserving the rights of the accused, and ensuring adequate exception authority. I refer you to our letter of June 17, 1998 (enclosed) for the Department's views on these issues.

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Restitution

After careful review of this issue, the Department recommends deleting the word "restitution" from Section 2 of S.J.Res. 3. It is unclear whether the drafters of S.J. Res. 3, by including the reference to restitution in the amendment, intended to permit a court to order restitution retrospectively only in those cases where the sentencing court failed altogether to do so. The current language is not so limited. Rather, the current language would appear to permit a victim to reopen the restitution portion of a sentence for any reason at all, at any time. For example, a victim could seek to reopen a sentence by asserting that his or her right to an order of restitution implicitly includes a right to adequate restitution and that the restitution ordered was inadequate. Virtually every award of restitution is potentially subject to such a claim. The current language would also appear to permit a challenge to restitution to be made at any time, even far into the future when restitution to other victims has already been collected and distributed. The language might also be interpreted to allow a victim who had improperly been excluded from or silenced at the sentencing hearing to reopen the sentencing proceedings, even if full restitution had been ordered.

From the beginning, our goal in crafting remedies language has been to strike an appropriate balance between making the rights of victims real and enforceable, and ensuring that society's and the victims' interests in finality and effective law enforcement are not adversely affected. Accordingly, the Department proposed language that allowed for retrospective relief only for bail or parole proceedings, which are subject to reopening under current law, or where necessary to vindicate rights in future proceedings. The language included in S.J. Res. 3 risks upsetting that delicate balance by allowing sentences to be reopened, potentially years after they were imposed, to remedy violations of the right to an order of restitution.

This potential for disruption is more serious than it may initially appear. Under current law, the various components of the sentence in a criminal case are a "bundle" of interdependent judgments. There are thus cases that hold that the invalidation of one part of a sentence allows the court on remand to change other parts of the sentence (e.g., the invalidation of a mandatory 5-year sentence under 18 U.S.C. § 924(c) (using a gun

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in connection with a crime of violence) allows the court on remand to increase the prison sentence for the related violent crime to reflect the use of the gun). While the amendment might be interpreted to permit only the modification of the restitution order, this is by no means certain. If the "bundle" view of sentencing prevails, at least two different kinds of problems could occur. First, a court might offset the increased restitution imposed at resentencing by reducing the defendant's prison term. Second, a victim who was improperly excluded from the sentencing hearing might, upon obtaining a sentencing remand, persuade the judge to increase not only the restitution order but the prison term as well - which would plainly undermine current Double Jeopardy protections.

It is important to note that deleting the provision related to restitution from S.J. Res. 44 will not prevent Congress or the states from providing legislative relief to victims who are denied restitution, or whose restitution is inadequate. Under current law, if a sentencing court fails to impose restitution in accord with controlling statutes, the government can appeal the unlawful sentence without impairing the defendant's Double Jeopardy rights. See 18 U.S.C. § 3742(b); United States v. DiFrancesco, 449 U.S. 117, 137 (1980). Likewise, the states can legislatively protect victims in this regard by allowing the prosecution to appeal criminal sentences that do not satisfy state restitution statutes.

Victims should not be encouraged to delay in bringing restitution issues before the court until after a case is otherwise completed. Removing the restitution language, however, will not deny victims any rights. To the contrary, removing the language makes the amendment clearer and advances important concepts.

First, deleting the restitution language will not leave victims without a remedy. Under the Mandatory Victims' Restitution Act (MVRA), federal courts are required to order defendants to pay restitution to victims of most federal crimes of violence and most federal property crimes, including crimes of fraud or deceit (18 U.S.C. § 3663A). Victims who discover additional losses after the restitution order is issued are given sixty days from the discovery of the additional losses to petition the court to show "good cause" for an amended restitution order (18 U.S.C. § 3664(d)(5)). States are free to pass similar legislation to allow victims of state crimes to be able to seek

restitution for additional losses.

Second, under current law, all money received from a convicted defendant is required to be disbursed in the following order: special penalty assessments, restitution to victims, all other fines, penalties, costs and other payments required under the sentences (18 U.S.C. § 3612(c)). Courts take restitution orders into consideration in determining appropriate fine amounts from defendants who can't afford to pay both. If a victim is permitted to reopen proceedings to revisit restitution, the court may issue a revised restitution order, thus impairing the defendant's ability to pay fines previously assessed or even encouraging the court to decrease the amount of the fine. This may work to the detriment of victims in general because fines paid by defendants are deposited in the Crime Victims' Fund (42 U.S.C. § 10601(b)). Money from the Crime Victims' Fund is distributed throughout all fifty states and the District of Columbia and is used to fund victim's services organizations and victims' compensation programs. Revisiting the restitution issue could impact the amount of money available to assist all victims, not just victims of crimes that are prosecuted. For these reasons, deleting the restitution language is recommended. We would be happy to work with the Committee on this issue.

Pardon Authority

Since its introduction, Section 1 of S.J.Res. 3 has been amended to grant victims the right "to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence." The Department opposes this language because it would unduly restrict the President's pardon authority. This provision would constitute an unprecedented incursion on the President's power under the Constitution to grant pardons and commute sentences. See U.S. Const. art. 2, § 2, cl. 1 (pardon power); see also Schick v. Reed, 419 U.S. 256, 263-64 (1974) (commutation power falls within the pardon power). The amendment also potentially could affect the President's power under the Pardon Clause to remit restitution. See Memorandum for Margaret Colgate Love, Pardon Attorney, Office of the Pardon Attorney, from Walter Dellinger, Assistant Attorney General, Re: Effect of a Presidential Pardon (June 19, 1995) (remission of restitution falls within pardon power). The Supreme Court has observed that "the draftsmen of [the pardon clause] spoke in terms of a 'prerogative of the President, which ought not be 'fettered or embarrassed.'" Id. at 263. The Court has also

observed that "whoever is to make [the pardon power] useful must have full discretion to exercise it," Ex parte Grossman, 267 U.S. 87, 121 (1925), and that "[o]ur Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it." Id. In contrast, the requirement that victims be identified, notified, and then given an opportunity to submit a statement before the President grants a pardon (or commutes a sentence) could significantly restrict the time and manner in which he exercises his authority. It is also worth noting that, although other provisions of the VRA would give victims rights in settings in which defendants have rights, the pardon provision grants victims rights in a setting in which no one - including defendants - has ever possessed rights. We also note that because S.J.Res. 3 is a constitutional amendment, the restrictions on pardon authority also apply to the governors of the fifty states.

While the Department opposes any restriction on the President's power under the Constitution to pardon, S.J. Res. 44, as currently drafted, is particularly problematic. Courts could conceivably read it to require prior notice and an opportunity to submit a statement even in cases in which a pardon, commutation, or remission of restitution is never granted. Because in the great majority of cases, there is no likelihood that clemency will be granted, a rule mandating victim notification in every case in which a pardon or commutation has been "proposed" would serve no purpose, while in many instances having the perverse effect of causing victims groundless concern about a presidential act that will never occur.

Another problem is that the notification requirement presupposes that the President can identify all victims -- a task which in itself may be considerably burdensome. In many cases, the absence of readily identifiable victims, the passage of time, or the vast number of persons arguably affected by the particular crime could hinder the President's ability to identify and notify victims in a timely manner. As it is currently written, the amendment provides no guidance for such circumstances and allows only Congress to create exceptions under a very exacting standard. The Department has previously objected to the amendment's exceptions provision, see Letter from L. Anthony Sutin, Acting Assistant Attorney General, to Orrin G. Hatch, Chairman, Senate Committee on the Judiciary (June 17, 1998) (stating that the current formulation of the exceptions clause would not provide adequate flexibility), but that provision would

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present particularly significant difficulties here since it would deny the President needed flexibility in exercising a power assigned exclusively to him.

We look forward to continuing our discussions with the Committee to resolve this and other issues that remain of concern to the Department. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

The Honorable Jon Kyl

The Honorable Dianne Feinstein

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