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FROM:

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PAGES:

6 to follow

DATE:

4/26/2000

COMMENTS:

Rehnquist & the Judicial
Conference letters.

Supreme Court of the United States
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THE CHIEF JUSTICE

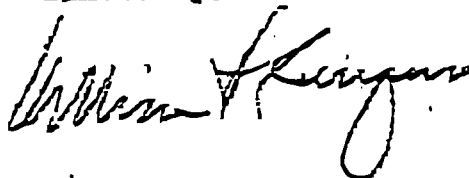
April 23, 1997

Judy Clarke
President
National Association of Criminal Defense Lawyers
10 North Post
Suite 700
Spokane, Washington 99201

Dear Ms. Clarke.

I have received your letter of March 21st, commenting on various measures pending in Congress relating to the judiciary. The Judicial Conference has recently taken a position in favor of making provision for victims' rights by statute, rather than by constitutional amendment; this would have the virtue of making any provisions in the bill which appeared mistaken by hindsight to be amended by a simple act of Congress.

Sincerely,



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April 17, 2000

Honorable Charles E. Schumer
United States Senate
313 Hart Senate Office Building
Washington, D.C. 20510

Re: S.J. Res. 3, the Victims' Rights Amendment

Dear Senator Schumer:

Thank you for your letter requesting the views of the Judicial Conference of the United States regarding S.J. Res. 3, the Victims' Rights Amendment to the Constitution. On behalf of the Judicial Conference, I appreciate the opportunity to have its viewpoint considered as the Senate takes up this important legislation.

In March of 1997, the Judicial Conference resolved to take no position at that time on the enactment of a victims' rights constitutional amendment. However, if the Congress decides to affirmatively act in this area, the Judicial Conference strongly prefers a statutory approach as opposed to a constitutional amendment.

A statutory approach would allow all participants in the federal criminal justice system to gain experience with the principles involved without taking the unusual step of amending our nation's fundamental legal charter, with its concomitant application to the various state systems. Many of the principles contemplated in S.J. Res. 3 represent a significant change in our criminal justice system, literally realigning the interests of defendants and victims, as well as the process by which criminal cases are adjudicated. The rights and protections heretofore afforded to citizens under the Constitution were largely part of the fabric of the law well-known and understood by the Founding Fathers, while many of

Honorable Charles E. Schumer

Page 2

the concepts in the victims' rights area are largely untested, at least in the federal system. It could take years for a settled body of law and judicial administration to evolve. A statutory approach would accommodate this process.

A statutory approach would also vitiate the potential specter of significant federal court involvement in the operations of the state criminal justice systems under a victims' rights constitutional amendment. Finally, a statutory approach is more certain and immediate, an advantage to victims. Conversely, an amendment potentially would not be effective for many years, awaiting the ponderous and uncertain ratification process required under Article V.

While S.J. Res. 3 appears to have less potential adverse impact on the federal judiciary than some previous amendment proposals, there remain a number of fundamental concerns:

● **Classes of Crimes and Victims To Which the Amendment Will Apply**

Under S.J. Res. 3, the proposed amendment will apply to any person who is a "victim of a crime of violence, as these terms may be defined by law." It is not clear from the proposed amendment whether these terms are to be defined by Congress, the states or through case law. The term "crime of violence," which is commonly utilized in legal parlance, has many meanings under state and federal law. Thus, it is unclear as to which specific crimes this provision would actually apply. This problem is magnified by the fact that this provision applies to misdemeanor cases, the number of which is particularly large in the state courts. Failure to provide a clear and practical definition of this term may well result in protracted and unnecessary litigation that will likely take years and great expense to resolve.

Closely associated with this issue is the question of what classes of persons will qualify as a "victim." We note that the proposed amendment includes no definition of victim. This leaves many fundamental questions unanswered, including:

- Must a person suffer direct physical harm to qualify as a victim?
- Is it sufficient if the person has suffered pecuniary loss alone?
- What if the person is alleging solely emotional harm? Is that enough to qualify him or her as a victim?
- Are family members of a person injured by a crime also victims?
- Suppose that a defendant is accused of committing a series of ten violent armed robberies. Due to evidence strength and efficiency considerations, the prosecutor sends only six of those cases to the grand jury. Are the other four injured persons victims under the proposed amendment?
- Suppose an agreement is reached whereby the defendant agrees to plead guilty to just one of the cases. Are the other nine injured persons victims under these circumstances? Will the answer affect a prosecutor's ability to obtain plea agreements from defendants?

Honorable Charles E. Schumer
Page 3

Extending the definition of victim to those who claim emotional harm from criminal offenses dramatically exacerbates the potential impact of this proposal. The number of persons who could claim to be emotionally harmed by significant, well-publicized crimes could be quite large. Moreover, substantial litigation could result from the requirement of restitution, especially in cases involving non-economic injury. Finally, cases involving large numbers of victims, particularly victims of terrorist acts, are particularly troubling. Providing the rights enumerated in the proposed amendment to large numbers of victims could overwhelm the criminal justice system's ability to perform its primary function of adjudicating guilt or innocence and punishing the guilty.

- **Enforcement**

The proposed amendment states that nothing "in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling." Unlike some previously introduced victims' rights constitutional amendment proposals, S.J. Res. 3 does not stipulate that a victim has no grounds to challenge a charging decision. This addition would be a significant and valid limitation. Allowing victims to challenge a prosecutor's charging decision could result in significant operational problems. We suggest that Congress also consider modifying the proposed amendment to prohibit a victim from challenging a "negotiated plea." Permitting the challenge of a proposed plea interferes with the prosecutor's ability to obtain convictions of defendants whose successful prosecution may rest on the cooperation of another defendant. Guilty pleas are sometimes also negotiated because the prosecution witnesses are, for various reasons, not as strong as they appear to be on paper. Also, the sheer volume of cases would generally overwhelm any prosecutor's office and the courts unless the vast majority were settled. Permitting challenge to a prosecutor's judgment regarding an accepted plea could lead inadvertently to a failure to secure a conviction. The significance of this issue should not be underestimated.

- **Federalism**

The matter of victim enforcement raises significant federalism concerns. While the proposed amendment includes provisions that bar monetary damages as a remedy, it appears that victims may be able to seek injunctive relief against *state officials* for violation of their new constitutional rights. Such claims, almost inevitably filed in federal courts, could cause significant federal court supervision of state criminal justice systems for the purpose of enforcing the amendment. These conflicts between federal courts and state governments would be avoided by a statutory approach to victims' rights.

- **Administration of Justice Exception**

S.J. Res. 3 permits Congress to create exceptions to the proposed amendment "when necessary to achieve a compelling interest." While this is a very valid and useful provision, Congress should carefully consider the need for a further exception based on adverse impact on the administration of justice. Inevitably, courts will handle cases where the rights of victims collide with the functional

Honorable Charles E. Schumer

Page 4

administration of justice. Such cases might fall into two general categories. The first category relates to the very real practicalities of the administration of justice. One example would be an action involving exceptionally large numbers of possible victims wishing to attend the proceedings and overwhelming any available courtroom or other suitable location. A similar problem would be encountered if large numbers of victims wished to exercise their rights to allocution at sentencing, unduly prolonging the proceedings and pushing back other cases that need to be heard. The second category of cases are those in which the rights of victims, exercised under certain circumstances, may have a substantive effect upon the rights of defendants or others, impairing due process or the right to a fair trial. An example of such a case would be if a victim wished to both attend the trial and testify at the guilt phase, even though the trial judge had ordered all witnesses sequestered. This could impair the fundamental integrity of the trial.

Congress should consider modifying the proposed amendment to allow a judge, while recognizing the rights of the victims to the extent practicable, to provide for exceptions in individual cases when required for the orderly administration of justice. Congress may also wish to consider modifying the proposed amendment to additionally allow Congress to statutorily enact exceptions in "aid of the administration of justice." At the very least, Congress should provide an exception permitting the sequestration from trial proceedings of a victim who will appear as a witness at the guilt phase of the trial. This could be accomplished through a general provision in the proposed amendment stating that the victim's rights should not "interfere with the constitutional rights, including due process rights, of the person accused of committing the crime." It could also be accomplished through a more narrow provision, similar to that in the Wisconsin Constitution, by the addition of a phrase allowing sequestration when "necessary to a fair trial for the defendant." Another approach, similar to that taken under the Constitution of Florida, would add a phrase allowing sequestration "to protect overriding interests that may be prejudiced by the presence of the victim."

• Speedy Trial Considerations

The proposed amendment includes a victim's right to "consideration of the interest of the victim that any trial be free from unreasonable delay." Determining the meaning of this phrase and how it interacts with existing speedy trial provisions should be a fertile source of diversionary litigation.

In federal court, the sixth amendment right to a speedy trial and the Speedy Trial Act, see 18 U.S.C. §§ 3161 - 3173, not only guarantee the defendant's right to a speedy trial, but also recognize the public's, and therefore the victim's, interest in swift justice. However, the Speedy Trial Act also recognizes several legitimate bases to postpone trial, including plea negotiations. See 18 U.S.C. § 3161. This mechanism is an integral part of the criminal justice system, balancing the desirability of a speedy trial with the realistic requirements of a fair proceeding.

Honorable Charles E. Schumer
Page 5

How is this right to consideration of the interest of the victim that any trial be free from unreasonable delay to be enforced? Will the victim have a right to seek relief from unreasonable delay? A motion to move the case faster would require a collateral hearing to determine the extent of the delay and whether it is unreasonable. The victim would then be in an adversarial position to the prosecutor and perhaps to the presiding judge. Would another judge be required to make the determination? Would a federal judge be asked to pass judgment on the efficiency of a state court?

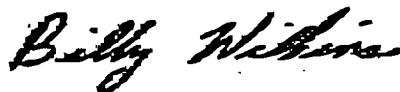
With ever increasing criminal dockets and limited prosecutorial and judicial resources, victims in several cases on the same docket, insisting upon speedier proceedings, could potentially cause severe internal conflicts within units of the same court.

• Notice

It is important that the responsibility for providing notice of proceedings and of the release or escape of a defendant be appropriately allocated to the prosecution, law enforcement agencies, or corrections agencies as is the law and practice in virtually all the states providing for victims' rights. Many of the rights under the proposed amendment must attach long before a defendant is formally charged in court. The judiciary would not have access to much of the information necessary to provide the required notice. It has neither the personnel nor resources to provide such notice to large numbers of victims or to provide the specialized types of victim assistance that is available from the first line of contact that victims have with the criminal justice system. The situation is likely no better — and possibly worse — in the state courts.

Once again, I thank you for the opportunity to express the views of the Judicial Conference on this important issue. If you have any questions regarding the matters discussed herein, please do not hesitate to contact me. I may be reached at 864/233-7081. If you prefer, your staff may contact Dan Cunningham, Legislative Counsel at the Administrative Office of the U.S. Courts. He may be reached at 202/502-1700.

Sincerely yours,



William W. Wilkins, Jr.