



National Victim Center

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Mr. Bruce N. Reed
Assistant to the President for Domestic Policy
Executive Office of the President
West Wing, 2nd Floor
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

April 3, 1998

JOSE/EK -
FYI
B.R

Dear Mr. Reed:

I wanted to let you know that the National Victim Center has sent the enclosed letter and materials to President Clinton explaining our concerns with respect to recent developments on the proposed crime victims' rights constitutional amendment. The revised amendment referred to in these materials was introduced in the Senate as SJR 44, on April 1, 1998.

The National Victim Center does not support the revised crime victims' rights constitutional amendment, for the reasons articulated in the enclosed materials. We do, however, remain committed to securing meaningful and enforceable constitutional rights to all victims of crime.

Should you personally have any questions regarding these developments, or would like to discuss the issues further, please do not hesitate to contact me at 703-276-2880. If I am unavailable, please feel free to talk to my Director of Public Policy, David Beatty, who can be reached at the same number.

Thank you for your attention to this matter.

Executive Director
Susan Herman

<http://www.nvc.org>

Sincerely,

Biden + Penstein 148
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IF IT GETS OUT
BY MID-YEAR)

Susan Herman
Executive Director

enclosures

WARCH, LEAHY, SPECTOR.

Missouri
Children

NOT AG
AG

- IDENTIFY ISSUES
- DISCUSS BOTH SIDES
- SAY WE NEED TIME TO GO RIGHT.



National Victim Center

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March 27, 1998

Board of Directors

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The Honorable William Jefferson Clinton
President of the United States
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Clinton:

On behalf of the staff and Board of the National Victim Center, I would like to thank you for the support, attention and time you and your staff have spent working with us in our collective effort to secure passage of a federal crime victims' rights amendment to the U.S. Constitution. You may be aware that the National Victim Center, as a member of the National Victims Constitutional Amendment Network (NVCAN), has been a leading advocate for the victims' rights amendment (Senate Joint Resolution 6).

As you know, since the amendment's introduction, the efforts to pass this measure have primarily involved a lengthy process of negotiation and compromise between all interested parties. Until recently, the National Victim Center believed that while many of the concessions made during this process weakened the amendment somewhat, none seriously undermined the establishment and protection of the basic rights we sought for crime victims.

However, as you may already be aware, over the past several months, the National Victim Center has been wrestling with the question of whether to accept certain additional proposed changes to the amendment.

The two proposed language changes are:

1. To limit the amendment to violent crime victims; and
2. To add language in Section 2 of the amendment, stating that violation of rights gives no grounds to overturn a sentence or negotiated plea.

After careful consideration, the staff and Board of Directors of the National Victim Center, along with several other members of NVCAN, have concluded that we cannot support the proposed changes. While a majority of NVCAN Board members, and thus NVCAN as an organization, has decided to go forward with this proposal, we wanted to let you know that the National Victim Center will not be supporting those efforts. We do not believe these language changes are in the best interests of crime victims. We want to assure you, however, that the National Victim Center remains committed to passing a federal constitutional amendment that guarantees protection for the rights of all crime victims.

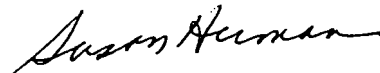
Page Two
National Victim Center
March 27, 1998

The National Victim Center did not come to this decision lightly. It was with extreme reluctance that the National Victim Center chose to select a course that diverges from that chosen by colleagues and fellow amendment advocates with whom we have worked closely for more than a decade and whom we greatly respect and admire. However, given the profound and permanent consequences involved in the passage of an amendment to the U.S. Constitution, we cannot in good conscience support an amendment that we believe is not in the best interests of crime victims.

We believe that a new version of the crime victims' rights constitutional amendment, incorporating the proposed language changes which we do not support, will be introduced into Congress imminently, perhaps as early as the week of March 30th. You will likely be asked for your opinion regarding this new legislation. We have enclosed several discussion papers and legal analyses that were distributed to NVCAN Board members which may inform your thinking at this point. If you or your staff would like to discuss these papers or these issues further, please feel free to contact me or David Beatty, the Center's Director of Public Policy at (703) 276-2880.

Again, we appreciate the thoughtful participation of you and your staff throughout this entire process. We look forward to working with you on this and other victim-related matters in the near future.

Sincerely,



Susan Herman
Executive Director

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The National Victim Center Does Not Support the Proposed Changes to the Crime Victims' Rights Constitutional Amendment

I. Introduction

Advocates for the proposed federal crime victims' rights constitutional amendment were recently asked to agree to new language in order to gain the co-sponsorship of Senator Joseph Biden, a key democratic member of the Senate Judiciary Committee.

The two language changes are:

1. To limit the amendment to violent crime victims; and
2. To add language in Section 2 of the amendment, stating that violation of rights gives no grounds to overturn a sentence or negotiated plea.

After much deliberation, the Board of Directors and staff of the National Victim Center have determined that they cannot support the new version. A brief summary of our reasons is set forth below.

II. The Scope of the Amendment Should Not Be Limited to Victims of Violent Crime.

A. There is no principled reason to deny any victim of crime constitutional rights to participate in the criminal justice system. The National Victim Center is unwilling to say that victims of non-violent offenses are less entitled to justice and less entitled to basic participatory rights than are victims of violent crime. We believe that victims' rights are fundamental rights, and they are not somehow less fundamental for victims of property offenses, who comprise the overwhelming majority of crime victims. The proposed change establishes classes of crime victims and a caste system of constitutionally franchised and constitutionally disenfranchised victims. It is not only legally unsound, it is unfair.

When the National Victims Constitutional Amendment Network (NVCAN) decided last year to agree to change the scope of the amendment from all victims of crime to the language currently contained in SJR 6 ("...crimes of violence and other crimes as defined by Congress"), it represented a *major* concession in the minds of several Board members. Not only were we concerned about preserving the possibility of adding victims of non-violent offenses at a later point, but there was also considerable fear that crimes we call "borderline cases" (i.e., statutory rape, burglary, child exploitation, child molestation, drunk driving, neglect of children or vulnerable adults, exploitation of vulnerable adults, emotional abuse in the context of domestic abuse, etc.) might not be considered "violent," and thus, victims of those crimes would not be protected by the amendment. And while we hoped that utilizing vehicles such as the legislative history of the amendment would secure coverage for the "borderline cases," we took comfort in the fact that if we were wrong, the "...other crimes as defined..." language could be used to insure

their inclusion. The new proposal would remove the phrase “and other crimes as defined by Congress,” thus eliminating the safety net for borderline cases and any window to later include victims of non-violent offenses.

B. There is no practical reason to deny any victim of crime constitutional rights to participate in the criminal justice system. Those in Congress who want to limit constitutional protections to violent crime victims argue that to do otherwise would place intolerable burdens on the system. They fear that the added burden of non-violent victims (particularly mass victimizations, with potentially hundreds of victims), would prove too costly and would overload the system. We know this is not so.

In the case of mass victimizations, the exceptions language in section 3 of the amendment¹ would allow legislatures to provide practical limitations on certain rights. Under that provision, implementing legislation might provide, for example, that the right to be heard would be limited to representative oral statements of a few victims and written statements by any other victims interested in making those statements — in effect the same way legislatures address mass victim cases currently. In addition, the right to notice remains the right to “reasonable” notice: notice that is reasonable under the circumstances of a mass victim case would likely include large meetings, televised notice, etc., means that are not overly burdensome.

Thus, there is no sound policy reason for limiting the amendment to victims of violent offenses, and the National Victim Center has decided it could not in good conscience accept this limitation.

III. The Proposed Language Prohibits Remedies Necessary to Adequately Protect Victims' Rights.

A. If courts cannot overturn a sentence or negotiated plea where a victim's rights at those proceedings were violated, that victim is left with no effective remedy. A victim who was not notified of the sentencing or plea agreement hearing, was not given an opportunity to speak or was not awarded restitution would never have adequate recourse for a denial of those rights unless s/he has the right to demand rehearings. The compromise provision would render this remedy an impossibility for some of the most important of the victims' rights.

While it might be possible to get a *post facto* order against an offending official ostensibly to prevent the *next* victim from being denied their basic rights, that does nothing to remedy the denial of rights of the prior victim(s). Are we willing to accept an amendment which, *by design*, sacrifices the constitutional rights of some for the benefit of others? By contrast, offenders who are denied important procedural and due process rights are not precluded from seeking a new

¹ “Congress and the States shall have the power to ... enact exceptions when required for compelling reasons of public safety or for judicial efficiency in mass victim cases.” SJR 6, Section 3.

hearing. If we are committed to protecting the procedural rights of victims, why should they not have similar remedies available to them when those rights are denied.

B. Congress and state legislatures would not be able to create a *statutory* right of enforcement, such as a right to appeal violations of rights, under the language being proposed. The language limiting enforcement, which states in part that “Nothing in this article provides grounds to,” encompasses the list of rights in section 1. The *rights* will never provide grounds to overturn a sentence or negotiated plea. Proponents of accepting the new language argue that this language merely means that the amendment *standing alone* does not provide that remedy. Our legal analysis has led us to conclude that this language would prohibit *any such remedy*.

IV. Accepting the New Language Actually Harms our Chances to See an Amendment Passed by Congress and Ratified by the States.

Not only does the National Victim Center believe that these changes are bad for crime victims, we believe that these changes harm our chances to pass an amendment. The amendment is already too complicated in the minds of many victim advocates and even members of Congress. It will be harder to sell the public an amendment for “*some* victims” than an amendment for “*all* victims,” and harder to sell advocates an amendment that we *hope* will be enforceable than one that is *automatically* enforceable.

V. There is no Necessity to Compromise.

A. Even with the new language changes, there is not a strong chance the amendment would be passed in Congress this year. In recent months, as NVCAN debated the acceptability of the changes currently before us, many members stated that they could support those changes if and only if it ensured passage of the amendment. It now appears that we are further away from congressional passage than we believed last fall. Even those working most closely with this issue in Congress have indicated we have a long way to go to secure passage of this amendment, and that there are more compromises ahead. If we are now being told we are still far away from passage, why make a compromise that we don’t like, especially when that new compromise would likely form the new starting point for any efforts toward an amendment in the next year or so?

B. This is not our last chance in Congress; there will be similar political dynamics, and more favorable grassroots support, in the future. Yes, we have people in very high places that are supportive of an amendment now. But the victims movement keeps growing stronger with the passage of time, and we are successfully convincing more and more political leaders to support strong victims’ rights. Time works *for us* in the long run.

We have seen the victims movement grow in strength. We have also seen the once strident opposition to victims' rights begin to decrease in the criminal justice system, as members of that system develop experience with victims' rights and come to see that, rather than hindering them in their work, victims' rights can actually improve the system's ability to investigate, prosecute, and punish offenders. Why rush to pass an amendment we are less than enthusiastic about, when waiting may allow us the opportunity to get the amendment we really want? Why negotiate from a position of relative weakness today when we could negotiate from a stronger position tomorrow?

The National Victim Center intends to continue to work to secure a federal crime victims' rights constitutional amendment. We will continue to educate criminal justice officials, public officials, the victims movement, and the general public about the importance of a victims' rights amendment. But we will not be working to pass the latest version of the amendment which unacceptably limits the scope and enforcement of victims' rights.

At the National Victim Center, we have spent the past decade monitoring the progress of the victims' rights movement. In particular, we have worked with states amending their own constitutions. We know that the process to secure a strong amendment can take years. We also know from experience at the state level that advocates can compromise on amendments too early, and regret it in the years to follow. If we accept the latest language changes, it will be a mistake that generations of victims may regret as a missed opportunity to secure meaningful and enforceable rights for all victims of crime.

This document consists of excerpts from longer position statements that more fully discuss the points for and against accepting the latest proposed changes. For copies of those longer statements, please contact the National Victim Center's Public Policy Department, at (703) 276-2880, or e-mail Liz Wohlken (Liz@mail.nvc.org) or Susan Howley (Susan@mail.nvc.org).

WHY THE NATIONAL VICTIM CENTER DOES NOT SUPPORT PROPOSED LANGUAGE CHANGES TO THE VICTIMS' RIGHTS CONSTITUTIONAL AMENDMENT LIMITING SCOPE AND ENFORCEABILITY¹

I. INTRODUCTION.

The National Victim Center remains committed to a constitutional amendment for all crime victims that is meaningful and enforceable. Our support for the rights listed in section 1 of the proposed federal crime victims' rights constitutional amendment (SJR 6) remains strong. We believe, however, that the latest proposed language changes compromise our basic principles and do not serve the best interests of crime victims.

Those changes would:

1. Limit the amendment to violent crime victims; and
2. State that a violation of rights gives no grounds to overturn a sentence or negotiated plea.

Many significant officials, including the President and the Attorney General, have not yet addressed these language changes, and we have no indication whether or not they would support them. However, after much deliberation, the National Victim Center has determined that it cannot support these changes to the victims' rights amendment for the reasons set forth below.

II. THE SCOPE OF THE AMENDMENT SHOULD NOT BE LIMITED TO VICTIMS OF VIOLENT CRIME.

It is unacceptable to exclude victims of non-violent offenses from the protection of the Constitution. There is neither a principled reason nor a practical reason to exclude such victims from the purview of the amendment. We do not believe that victims of non-violent offenses would enjoy the effect of such rights as a matter of practice, now or in the future.

¹ This document is a reworking of two internal National Victims Constitutional Amendment Network (NVCAN) memoranda written by the National Victim Center on February 27 and March 9, 1998.

Founded in 1986, NVCAN is a coalition of crime victim advocates and organizations dedicated to the support of constitutional rights for crime victims at the state and federal levels. The National Victim Center has been a member of NVCAN since its inception.

We can find no principled reason for denying to any victim of crime constitutional rights to participate in the criminal justice system. It has always been our assumption that the victims' movement advocates for all crime victims and that all crime victims are our constituents. We have not defined the status of "victimhood" by the nature of the crime committed against an individual, nor the relative harm an individual suffered as a result of a crime. Most victim professionals do not make their advocacy and assistance contingent on such distinctions. Most state victims' rights constitutional amendments are not restricted to certain classes of crime victims.² Our movement has always been one of inclusiveness, reaching out to underserved populations. The particular circumstances of a crime (his life savings were wiped out at gunpoint, hers via computer) do not make one victim more entitled than another to rights to participate in a governmental process that significantly affects their interests. The National Victim Center believes that victims' rights are fundamental rights, and they are not somehow less fundamental for victims of non-violent offenses.

How will we explain to 27 million victims of non-violent offenses³ the political necessities that required us to compromise away their constitutional rights? How do we explain it to the elderly victim who was bilked out of her life savings?

As was noted many years ago, "[I]n the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens..."⁴

The proposed language limiting the scope of the amendment establishes classes of crime victims and a caste system of constitutionally franchised and constitutionally disenfranchised victims. While the distinction here between groups of crime victims does not involve a traditional constitutionally protected class, it is no less inappropriate. The new limitation is not only legally unsound, it is unfair.

When those of us who advocate for crime victims at the national level put ourselves in the position of making decisions on behalf of a very large group of people — in this case, crime victims — the decision making process must be deliberate and fair, and must take into account

² The overwhelming majority of state crime victims' rights constitutional amendments apply to crime victims "as defined by law," and thus do not foreclose by their terms the extension of rights to all victims of crime. The only states that *do* restrict constitutional rights to certain groups of crime victims are Maryland, New Mexico, and Washington.

³ According to the latest government figures, there are almost 37 million crime victims in America each year; 27 million are victims of non-violent offenses. Cheryl Ringel. (1997) *Criminal Victimization 1996: Change 1995-96 with Trends 1993-96*. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics. Page 3.

⁴ Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

the legitimate interests of everyone we represent. We believe that deliberately excluding the vast majority of crime victims is unfair and ignores the legitimate interests of such victims, particularly when it is not clear that the political circumstances require us to do so.⁵ To ignore the wishes of a majority of our constituency would seem contrary to our inherent role as leaders and simply undemocratic.

Arguably, one of the most fundamental goals shared by all victim advocates, service providers and counselors is the empowerment of victims; to provide victims, to the maximum extent possible, the means to recover the power of self-determination and control that is so often ripped from their lives in the aftermath of a crime. The victims' need to satisfy their own sense of justice is often essential in their quest to recover. This desire also serves as the basis for most victims' rights statutes and amendments enacted to date. But an amendment that empowers some victims to a greater degree than others runs contrary to the fundamental principle of empowering *all* victims to the maximum extent possible.

In fact, agreeing to limit for all time the extension of constitutional rights to victims of violent offenses restricts the future evolution of our movement. While it is true that the focus of the movement in recent years has been the violent crime victim, this is itself an expansion from the movement's genesis twenty years ago, when the focus was on women victimized by crime, and from thirty years ago, when there was no focus on victims whatsoever. Many of us envision a growing movement and an inclusive movement, expanding rather than narrowing the classes of persons to whom these rights are provided.

When NVCAN decided over a year ago to accept the alternative language currently contained in SJR 6 ("victims of crimes of violence and other crimes as defined by Congress"), it represented a *major* concession in the minds of several Board members. Not only were we concerned about preserving the possibility of adding victims of non-violent offenses at a later point, but there was also considerable fear that crimes we call "borderline cases" (i.e., statutory rape, burglary, child exploitation, child molestation, drunk driving, neglect of children or vulnerable adults, exploitation of vulnerable adults, emotional abuse in the context of domestic abuse, etc.) might not be considered "violent" and thus those victims would not be protected by the amendment. And while we hoped that utilizing vehicles such as the legislative history of the amendment

⁵ It has been stated that the proposed limitation of the scope of the amendment to victims of crimes of violence is sufficient because it would encompass 95% of the cases in which victims' rights have been litigated. The implication is that only the violent crime cases are important, because they are the only ones in which victims' rights have been litigated. This conclusion is groundless. At best there are only a few dozen cases that have actually been litigated and virtually all of those have occurred in the last decade. We know from our years of experience and research that the number of litigated victims' rights cases is minuscule when compared to the total number of cases where victims of both violent and non-violent offenses have been denied their basic rights. The issue is not the relative percentages of violent and non-violent victims who *have* litigated, but rather those who one believes *should* have the right to assert constitutional rights through litigation.

would secure coverage for the “borderline cases,” we took comfort in the fact that if we were wrong, the “...other crimes as defined...” language could be used to ensure their inclusion. *With this language removed, there would be no such safety net.*

Some proponents of the language changes argue that “violent crime” has broad definitional context and has been judicially interpreted to include many crimes that, at first blush, might not be thought of as “violent.” Thus, the argument continues, we are giving up the rights of comparatively few victims. For instance, it is argued that the “broad” definition of crime of violence contained in the United States Code is instructive.⁶ That may be. However, we find other statutory definitions of crime of violence even more instructive. For instance, Arizona defines violent crimes as any “criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument.”⁷ This definition, which is mercifully short and easy to comprehend, unfortunately includes very few crime victims. What is more problematic, however, is a crime of violence definition like the one used in Maryland. In Maryland, crime of violence includes abduction, arson in the first degree, kidnaping, manslaughter (except involuntary manslaughter), mayhem and maiming (but not always), murder, rape, robbery, carjacking, certain sexual offenses (but not all), use of a handgun in the commission of a felony, an attempt to commit any of the previously listed crimes, and certain, but not all, assaults.⁸ Virtually no “property crime” is included and some obvious crimes of violence are also not included. The Maryland statute is so inclusive of some crimes and exclusive of others, that an unlisted crime is almost certainly not a crime of violence.

⁶ 18 U.S.C. 16. Several cases have been cited in support of the argument that the definition of crime of violence under the United States Code encompasses many borderline crimes. We do not find those cases very strong. The *Reyes-Castro* case cited was an attempted sexual abuse case presented in the context, not of crime victims’ rights, but rather a deportation hearing of the offender who was an alien — and the court found that the act itself, sexual assault of a child, obviously carried with it the *risk* of violence — hardly a novel theory (*United States v. Reyes-Castro*, 13 F.3d 377 (10th cir. 1993)); *Aragon* involved the definition of a crime of violence in the context of The Travel Act (18 U.S.C. Sec. 1952) and the question of whether the jury should decide, for Travel Act prosecution purposes, whether the crime is one of violence (*United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993)); and *Flores* is a Federal Sentencing Guidelines case and concerns the question of whether six prior convictions for burglary meets the definitions of a “career offender” — with the court forced to look to a 1925 Texas statute definition of a crime of violence; in short, none of these cases are remotely connected to the issue of whether a crime *victim* has suffered a crime of violence for the purposes of the *victim*’s constitutional rights. (*United States v. Flores*, 875 F.2d 1110 (5th Cir. 1989).

⁷ Arizona Code § 13-604.04 (1997).

⁸ Maryland Annotated Code Art. 27, § 643B (1997).

The point of all this, however, is not to dispute the legal analysis of the proponents of the language changes but rather to suggest that what constitutes a crime of violence can and almost certainly will be subject to judicial interpretation, with some of the decisions giving victims of nonviolent crime constitutional protections and some decisions denying such victims constitutional protections.

It has been stated that in accepting the limitation to victims of crimes of violence we would be “....doing the best we could for the overwhelming majority of crime victims....” When the overwhelming majority of crime victims are *non-violent crime victims*, we believe they would say that accepting a compromise version of an amendment that excludes them is far less than the best we could do. We believe the “best we could do” for them is to choose not to accept the new language.

There is no practical reason to exclude non-violent crime victims from the protections of the constitutional amendment. Those in Congress who want to limit constitutional protections to violent crime victims argue that to do otherwise would place intolerable burdens on the system. They fear that the added burden of non-violent victims (particularly mass victimizations with potentially hundreds of thousands of victims), would prove too costly and would overload the system. We know from experience that this is simply not the case.

First, the most “burdensome” aspect of the amendment would be the requirement to keep crime victims informed. More and more jurisdictions are beginning to use automated notification systems, for which the largest expense is the startup cost. The cost of adding other crime victims to such programs once they are in place is very modest. Congress is already considering providing funding for more such automated systems.

In the case of mass victimizations, the exceptions language in section 3 would allow legislatures to provide limitations on rights.⁹ In fact, one of the primary reasons for including the exceptions language has been the mass victim cases. Under that provision, we anticipate that implementing legislation will provide, for example, that the right to be heard would be limited to representative oral statements of a few victims and written statements by any other victims interested in making those statements — in effect the same way legislatures address mass victim cases currently.

In addition, the right to notice remains the right to “reasonable” notice: notice that is reasonable under the circumstances of a mass victim case would likely include large meetings, televised notice, etc. — means that are not overly burdensome. Finally, as a further safeguard for those concerned about the burdens of instantly encompassing all crimes, current language already

⁹ That language provides that “The Congress and the States shall have the power to ... enact exceptions when required for compelling reasons of public safety or for judicial efficiency in mass victim cases.” SJR 6, Section 3.

provides that victims of violent crimes are covered immediately and victims of other crimes are to be added over time.

Thus, there is no sound policy reason for limiting the amendment to victims of violent offenses.

Victims of non-violent offenses will not be given the same rights as victims of violent crimes as a matter of practice. It has been stated that after constitutional rights are guaranteed for victims of violent crime, those responsible for implementation will choose to extend those rights to victims of other crimes as a matter of policy or by statutory mandate. Thus, it is argued, even though non-violent crime victims will not enjoy the benefits of such provisions as a matter of constitutional right they will be afforded such advantages as a practical matter.¹⁰ We disagree.

Proponents of the new language assert that we can rely on statutes to rectify the deficiencies in the constitutional amendment and protect the interests of victims of non-violent offenses. Again, we disagree. The primary reason crime victim advocates have pursued a constitutional amendment for victims' rights, rather than settling for statutory equivalents, is that a constitutional amendment is qualitatively and quantitatively different than statutes. To support the proposed limitation of rights for non-violent crime victims is the equivalent of suggesting that we can address victims' rights by statutes alone. In contrast to the proposed limitation, the current language of SJR 6 would allow Congress to extend *constitutional* rights to victims of non-violent offenses, rights that are qualitatively different from statutory rights.

It has also been argued that court challenges to denials of victims' rights will be brought by victims of violent crime, and that the precedents set by those cases will "probably be readily extended to victims of property crimes." There is nothing to indicate this result is likely. In many of these anticipated cases, courts will be ruling on the constitutional rights of crime victims, and will probably balance victims' constitutional rights against the constitutional rights of the accused. Those decisions will not likely encompass victims of crime who are not within the purview of the constitutional amendment.

While we may disagree on the practical effect of this amendment on victims of non-violent offenses, there can be no doubt that those victims would never have true constitutional rights. Since their rights and interests would not enjoy the same constitutional protection as those granted to violent crime victims, their "rights" under an amended Constitution would be little

¹⁰ It was also suggested that the implementation of a violent crime victims' rights amendment would create a "mindset" favorable to non-violent victims, as, for example, judges "become used to ordering full restitution." To expect judges to voluntarily extend to non-violent crime victims restitution rights they have often ignored and even actively resisted belies experience. It would be the equivalent of expecting the courts to extend jury trials to offenders of petty thefts simply because offenders of more serious crime have that right as a matter of constitutional law. As we know, this has not occurred.

better than they are now: i.e., rights that are defined and exist at the whim of the state legislatures or Congress and local criminal justice officials.

It has also been argued that in the fullness of time, all crimes, including those currently considered non-violent crimes, will be considered violent crimes. While the meaning of words does evolve over time, particularly through judicial interpretation, there are limits to the likely evolutionary process. To assume that words will take on their opposite meaning seems overly optimistic.¹¹ If non-violent and violent crime were to be interpreted as the same, the word “violent” would have no meaning as used in the constitutional amendment. Whatever meaning may be attributed to it by popular culture or even policy leaders, judges will assume that, when written, the word violent had some meaning and at the very least was not used as a synonym for its opposite “non-violent.” And of course there would be considerable legislative history and contextual evidence to support that contention.

III. THE REMEDIES AVAILABLE UNDER THE PROPOSED LANGUAGE CHANGES DO NOT ADEQUATELY PROTECT VICTIMS’ RIGHTS.

“It is a vain thing to imagine a right without a remedy...” *Ashby v. White*, 2 Ld. Raym. 938, 953 (1703).

The proposed language would insert, “Nothing in this amendment shall provide grounds to ... overturn a sentence or negotiated plea.” This language leaves a victim with no effective remedy for many important rights. In addition, Congress and state legislatures would not be able to create a statutory right of enforcement, such as a right to appeal violations of rights, under the language being proposed.

If courts cannot overturn a sentence or negotiated plea where a victim’s rights at those proceedings were violated, that victim is left with no effective remedy. A victim who was not notified of the sentencing hearing, was not given an opportunity to speak and was not awarded restitution would never have adequate recourse for a denial of those rights unless s/he has the right to demand rehearings. The new language would render this remedy an impossibility for these important victims’ rights. Unless victims have a constitutional right to a rehearing to balance the offender’s due process rights to have the outcomes of such proceedings stand, victims who are initially denied their rights at sentencing or at the acceptance of a plea will be forever precluded from exercising those rights.

¹¹ There are countless examples of courts refusing to compromise on the fair and appropriate meaning of a word. As one example, courts have found that “shall” does not mean “may” or “should.” See *Carter v. Commissioner*, 784 F.2d 1006, 1009 (9th Cir. 1986); *CSX Corporation v. United States*, 926 F. Supp. 223, 226 (E.D.Va. 1996); *Occidental Petroleum Corp. v. Commissioner*, 82 T.C. 819, 819 (1984).

In principle, victims could be granted other dispensations or compensation for having been denied their rights (i.e., legislation creating ombudsman offices that can investigate complaints against criminal justice system officials, etc.) but that would not alter the fact that those victims were denied their basic rights at the point and the time when it mattered most. What is the value of a constitutional right that denies its intended beneficiary the one remedy that would guarantee that the right is fully enforced?

It has been argued that victims could still file injunctive actions against officials who have a record of denying victims' rights, but injunctions rely upon documenting patterns of abuse, are time consuming and are often expensive and procedurally difficult class actions. Moreover, while it might be possible to get a *post facto* order against an offending official ostensibly to prevent the *next* victim from being denied their basic rights, that does nothing to remedy the denial of rights of the prior victim(s). Are we willing to accept an amendment which, *by design*, sacrifices the constitutional rights of some for the benefit of others?

We believe using writs of mandamus as a preventive measure when a violation of rights is anticipated is not an adequate substitute for a post-violation remedy, since such actions depend on receiving advance warning that a judge will violate the victim's rights. While this was fairly easy to anticipate in the Oklahoma City bombing case, with expert legal counsel for the victims and aggressive victim advocacy coupled with a drawn-out time frame for the court proceedings, what opportunity will the average victim have to bring these advance petitions for writs of mandamus? Furthermore, seeking such writs beforehand is tantamount to an aggressive preemptory strike. We have already seen instances where crime victims were reluctant to fight strenuously for their rights because they were unwilling to risk antagonizing the court or the prosecutor by challenging denials of their rights. Why should victims have the burden of protecting their rights before the fact of violation? Will they be obliged to take such actions in every case?

Proponents of the new language argue that enforcement is not vital because the remainder of the amendment will provide sufficient education of officials to prevent violations. We know from experience that training is insufficient to prevent many violations. For victims' rights to be meaningful, training must be coupled with enforcement. Furthermore, only a portion of the violations of victims' rights are due to ignorance. What about the far more common case when a victim is denied a right purely due to an oversight? Victims fall through the administrative cracks for a wide variety of fairly innocent reasons: their address was lost, a clerk forgot to inform them of a schedule change, the person in charge of notice was out sick, etc., etc. What about the official who intentionally disregards the victims' rights? The "rehearing remedy" serves as a safety net to ensure victims are eventually granted their rights, no matter what the reason those rights were initially denied. Nothing will give those charged with implementing such rights more incentive to comply than ensuring that they will have to revisit the issue again if they fail in their duty to provide those rights. Offenders who are denied important procedural and due process rights are not precluded from seeking a new hearing. If we are committed to protecting the

procedural rights of victims, why should they not have similar remedies available to them when those rights are denied?

It has been noted that the proposed new restrictions on enforcement do not impact the enforcement of many of the rights in the amendment, such as the right to speedy trial. However, the proposed limitation of enforcement affects those rights which are at the core of victims' interests: the right to participate in that proceeding where decisions are made regarding the disposition of the case.¹²

It has also been argued that judges could hold an additional hearing without affecting the sentence or plea, just to give victims a chance to speak. We do not believe this remedy would satisfy many victims. Victims want to be heard when it counts, not just heard. Victims deserve meaningful participation in the criminal justice system, not simply a cathartic experience.

Congress and state legislatures would not be able to create a statutory right of enforcement, such as a right to appeal violations of rights, under the language being proposed. From our reading, the language in section 2 limiting enforcement, which states in part that "Nothing in this article provides grounds to," encompasses the list of rights in section 1. The *rights* will never provide grounds to overturn a sentence or negotiated plea. Proponents of accepting the language changes argue that this language merely means that the amendment *standing alone* does not provide that remedy. We believe this language prohibits *any such remedy*.

We believe this enforcement limitation leaves no possibility that violations of these core rights can result in overturning a sentence or negotiated plea. Congressional proponents of the change apparently do not want to allow the possibility of Congress passing a similar remedy by statute, since NVCAN's request to include language providing that this restriction stands "except as provided by appropriate legislation" has already been rejected. Because a draft of the amendment with that "exceptions" language was previously circulated, the legislative history will reflect that language creating the possibility of legislative action was rejected. This can and will be used against us in any situation in which we attempt to correct the denial of these core rights. It is highly unlikely we will get strong legislative history in our favor on this point, because those who oppose such a remedy will include their statements in the record.¹³

¹² We disagree with those who argue that the limitation on enforcement (i.e., "Nothing in this article shall provide grounds for the victim to ... overturn a sentence or negotiated plea...") will not prevent a trial court from correcting its own errors. Since the term "overturn" is not defined in Black's Law Dictionary, we are not confident that it will be interpreted as limited to the actions of an appellate court, but fear it might also encompass a trial court's reversal of its own ruling. Even if the term "overturn" is eventually determined to exclude a trial court's action with regard to its own ruling, we are unwilling to leave the matter in the hands of the very court that originally denied the right.

¹³ It has been implied that friends of the amendment in Congress will dominate if not monopolize the creation of the amendment's legislative history and that any "contrary views will be likely few and far between." We have several responses. First, the legislative history of the amendment is already in the making. Previous versions are a

Even if our interpretation is wrong, and the language of the amendment would not preclude such statutory remedies as a right to appeal a sentence or plea agreement, those remedies will still be merely statutory. NVCAN has always argued that statutes are insufficient to protect victims' rights. Statutes lack permanence, and they lack strength. Congress and state legislatures can easily limit or change such statutory remedies in the future. When a victim's statutory right to a rehearing on a sentence comes up against a defendant's constitutional right to due process, when the legislative history clearly reflects that Congress rejected such rehearings as an automatic remedy, how can we have the confidence that courts will ever rule in favor of the crime victim?

Moreover, if we can't get Congress' approval, or the approval of even certain key Senators, for such a remedy in the amendment, why are our chances so much greater to get approval of the remedy in the form of a statute? While we would need only a simple majority for passage of a statute, rather than 2/3 needed for the amendment, strong opponents will continue to be strong opponents. If some in Congress believe they have to have this limitation because of the objection of the prosecutors, we must assume prosecutors will fight equally hard to prevent a statutory version of this remedy. Those opponents will point to the language of the amendment to prove that such a remedy is not desirable policy.

Reliance on statutory remedies will also lead to further inequities between the states. Since the amendment prohibits civil suits for damages, the most powerful remedy remaining is the right to a rehearing where one's rights were denied. Victims would clearly have stronger rights in states that provided a remedy of rehearing than in states where they were limited to filing complaints with ombudsmen. We would in effect still have the "patchwork quilt" of crime victims' rights that the amendment is supposed to resolve.

The existence of the limitations on enforcement of crime victims' constitutional rights will in itself mean that victims' rights are not of equal merit with other constitutional rights. It has been argued that other constitutional rights are honored in the absence of specific enforcement provisions. It must be noted that those other amendments (providing the right to freedom of speech, freedom of the press, etc.) do not contain *restrictions* on the enforceability of those rights. It would be a great victory to have an amendment that only included a list of rights, under which complete enforceability would be presumed.

key component of legislative history. Already those versions will show that this restriction on enforcement was specifically added, and that language allowing for the creation of statutory exceptions was specifically rejected. Secondly, it would be false to assume that senators and representatives who are hostile to the bill will not be doing everything in their power to use the legislative history to limit the purview of the amendment. We remember strong testimony by congress members in opposition to the amendment during congressional hearings — with C-Span and national network cameras rolling. We also know that legislators will be able to make floor statements and press releases lauding victims' rights, generally, while clearly outlining the limitations of this amendment.

We have long argued that supporters of a federal victims' rights constitutional amendment want meaningful and enforceable rights for victims of crime. Now some seem to be arguing that as long as the rights are listed, enforcement is not significant.¹⁴

IV. ACCEPTING THESE CHANGES ACTUALLY HARMS OUR CHANCES TO SEE AN AMENDMENT PASSED BY CONGRESS AND RATIFIED BY THE STATES.

Not only does the National Victim Center believe that these changes are bad for crime victims, we believe that these changes harm our chances to pass an amendment. The amendment is already too complicated in the minds of many victim advocates and members of Congress, and difficult to articulate to the public. To add the further encumbrance that the amendment only applies to "some" victims and that there is no automatic right of enforcement for the individual victim makes this amendment a very tough sell. We already have indications that the movement will not accept these limitations.¹⁵

Limiting the remedies as proposed would mean that victims in states that already have strong laws and a strong constitutional amendment would be no better off than they are currently. Limiting the scope of the amendment would likely mean that we could not count on the non-violent crime victim constituency to assist with the passage and ratification of the amendment. It will be harder to sell the public an amendment for "*some* victims" than an amendment for "*all* victims," and harder to sell an amendment that we hope will be enforceable than one that is automatically enforceable.

¹⁴ Proponents of accepting the language changes also argue that the ability to have a rehearing on the acceptance of a negotiated plea, or a rehearing on a sentence is already prohibited by the language of SJR 6, which states that violation of rights does not provide grounds to "challenge ... a conviction ... or to compel a new trial." This is not an indication that we should compromise further, but rather an indication that we should conduct more legal research before agreeing to any limitations on the victims' rights.

¹⁵ In an attempt to determine whether NVC's position opposing these changes accurately reflected the consensus of our constituency, we polled a small sample of active state coordinators about the proposed limitations. They were all opposed to the changes, some so strongly they felt they could no longer continue to advocate for the amendment if these changes were incorporated.

IV. **THERE IS NO NEED TO COMPROMISE.**

There is no need to accept the proposed language changes. Acceptance of this language will not ensure that the amendment passes Congress this year. In addition, we believe there will be similar political and more favorable grassroots support in the future.

Even with the language changes, passage of the amendment is not likely this year. In recent months, as NVCAN debated these new language changes, many members stated that they could support these changes only because they thought it would go a long way toward ensuring passage of the amendment. It now appears that we are further away from congressional passage than we believed last fall. Many of our strongest supporters on the Hill have indicated that many more compromises will be necessary to gain the support the amendment will need to pass in the current Congress. Even if we accept this and other compromises to come, some of our congressional supporters still predict that the amendment faces an uphill battle in both the House and the Senate. Some have even raised the possibility that some of our current co-sponsors might withdraw their support if we weaken the amendment.

If we are now being told we are still far away from passage, why make such a huge compromise which not only won't get us close to passage but will also form the basis of any new lobbying efforts? Once a deal is struck to accept these language changes, it will be difficult to retract from this language even if the amendment does not move forward until next year or the year after.¹⁶

This is not our last chance in Congress; there will be similar political dynamics, and more favorable grassroots support, in the future. Yes, we have a President, an Attorney General, and many congress members who are supportive of an amendment now. But the victims movement keeps growing stronger with the passage of time, and we are having considerable success convincing more and more political leaders to support strong victims' rights. Time works *for us* in the long run.¹⁷

¹⁶ It has been suggested that some of our allies in the Senate who favor the new language will resent us for not accepting this compromise. We believe that they are reasonable and experienced lawmakers who understand the strength of our commitment to our cause, and will not hold it against us. While they may be reluctant to champion our cause because they cannot support it as fully as we would want them to, they are not likely to become our adversaries over this issue. They have been supporters of crime victim issues for many years, and we can expect to continue to work together on other such issues in the future.

¹⁷ It has been argued that if we do not move forward with an amendment in this session, we will receive negative press that will make it more difficult for us to return next year or in the next few years. This is not necessarily so. As an example, the balanced budget amendment, which generally received more media attention than the victims' rights amendment, was raised and defeated a number of times, and was generally stronger each time it was raised, despite headlines decrying a loss of steam or even defeat.

We have seen the victims movement steadily grow in strength since its beginning over two decades ago.¹⁸ We have also seen the once strident opposition to victims' rights begin to decrease in the criminal justice system, as members of that system develop experience with victims' rights and come to see that, rather than hindering them in their work, victims' rights can actually improve the system's ability to investigate, prosecute, and sentence offenders. Why rush to pass an amendment we have such strong reservations about, when waiting may allow us the opportunity to get an amendment we really want? Why negotiate from a position of relative weakness today when we could negotiate from a stronger position tomorrow?

It is also important to remember that to secure passage and ratification of an amendment, we must have strong support both in Congress *and* in the states. The process of educating victim advocates about the amendment has been slow, but it is now beginning to take hold. When the amendment was first introduced in 1996, only a small group of advocates had heard of the amendment or knew why it was important. In 1997, more advocates learned about the amendment. Today the National Victim Center is still receiving calls from crime victim advocates who, for the first time, realize the importance of the amendment and want to get involved. The victims movement is therefore not only growing in strength, but also still growing in its understanding of the need for the federal amendment. With more time to build grassroots support, and to organize and lobby lawmakers, we may be in a position to secure an amendment that does not compromise victims' rights. Our inability to do so up till now sends a clear message that we are not ready.

At the National Victim Center, we have spent the past decade monitoring the progress of the victims' rights movement. In particular, we have worked with states amending their own constitutions. We know that the process to secure a strong amendment can take years. We have also seen states compromise too early, and regret it in the years to follow. Advocates in Virginia have come to believe that they acted too hastily in agreeing to a weak amendment. Advocates in Texas are having to live with what in retrospect proved to be an unnecessary concession — eliminating the right to be heard at sentencing from their constitutional amendment.

It is true that NVCAN has supported state amendments even when they were weaker than we would want. However, we had three good reasons for providing such support. The first is that

¹⁸ We have also heard arguments that with time, we will become victims of our own success: that states will pass strong statutes and constitutional amendments which will then be used to show a federal constitutional amendment is not needed. If strong statutes will indeed make the case that a federal amendment is not needed, then so be it. We should all be satisfied with any outcome that means victims have meaningful and enforceable rights. However, that outcome is unlikely. Rather, in states with strong victims' rights, many victims will continue to be denied their rights, just as they are now. If states make victims' rights stronger and more enforceable, we anticipate the development of case law pitting victims' statutory rights against the constitutional rights of the accused, and those court decisions would definitively prove that a federal amendment is needed to give the courts the ability to balance the rights of the victims with the rights of defendants.

we knew there was some possibility that states themselves could go back and strengthen them later (as California is currently considering). We also thought the form of the state amendment should be finally determined by advocates in that state, rather than NVCAN. But most importantly, no matter how weak any amendment was, we knew we always had the chance to adopt a strong amendment to the United States Constitution that would protect victims' rights where state amendments fell short.

Unlike the state experience, if we get it wrong the first time, there is no going back. Victims would for the foreseeable future be limited to a constitutional amendment that is weaker than we might otherwise have obtained. It will be a mistake that generations of victims may regret as a missed opportunity to secure meaningful and enforceable rights for all victims of crime.

V. CONCLUSION.

Finally, we take exception to the characterization of the National Victim Center's position in support of SJR 6 as support for an "ideal" or "perfect" amendment. We are already far from the "ideal amendment" with SJR 6. For the National Victim Center this is not a choice between the *ideal* amendment and a *less than ideal* amendment; it is the choice between a *less than ideal* amendment and a *bad* amendment — one that disenfranchises a majority of victims and denies the rest the ability to enforce the specific rights it grants by its terms.

Conversely, those advocates who support the new language argue that the choice is between the *less than ideal* and *nothing*. To espouse that view, you must assume not only that it is "this or nothing" but also that it is "now or never." As we have argued above, we believe that our movement will continue to grow in strength, and as it does, we will be in a better position to secure meaningful and enforceable rights for all victims of crime.

Thus, for all of the reasons stated above, the National Victim Center believes it is not in the best interests of crime victims to support the new language changes to the federal crime victims' rights constitutional amendment.



Department of Justice

STATEMENT

OF

JANET RENO

ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

S.J.RES. 6

CONSTITUTIONAL AMENDMENT TO PROTECT THE

RIGHTS OF CRIME VICTIMS

PRESENTED ON

APRIL 16, 1997

Testimony of the Attorney General
Victims' Rights Constitutional Amendment

Good Morning. I appreciate the opportunity to appear before this Committee to express this Administration's views regarding an amendment to the United States Constitution to guarantee fundamental rights for the victims of violent crimes.

Mr. Chairman, I know that you and each member of this Committee share with the President and me a deep and abiding respect for the Constitution. That profound document reflects the true genius of this nation's Founders, and its enduring vitality over the last 200 years is a testament to that genius. This Administration does not lightly endorse any effort to amend the Constitution. In fact, we recognize that, as is the case with any treasure of enduring value, this Nation should proceed only with the greatest caution to alter its fundamental charter.

It is also important to recognize, however, that in their genius, those same Founders also anticipated that for a nation to survive and prosper, it must reserve the opportunity to alter its fundamental charter through a well-ordered process. Article V of the Constitution provides such a process. That process has been used successfully, but sparingly, throughout our nation's history. This Administration firmly believes that the guarantee of fundamental rights for the victims of violent crime requires that we employ that process once again.

I am here today to explain why the Administration believes that a constitutional amendment provides the best means to protect the rights of violent crime victims. I also would like to describe the progress that has already been made to achieve this goal, as well as the issues that remain unresolved.

The Rationale for a Constitutional Amendment

As the President said on June 25 of last year, in announcing his support for a constitutional amendment to protect the rights of crime victims:

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

The President and I have longstanding interests in and commitments to safeguarding and bolstering the rights of victims of crime. The President's involvement in this area dates back to his days as Attorney General for the State of Arkansas, and he has remained steadfast since then. I, too, have long been an advocate of treating victims with the respect and dignity they

deserve. While serving as State Attorney in Dade County, Florida, I had the opportunity to learn how important it is to give crime victims an opportunity to be heard. I also learned that we can accord victims dignity and respect without breaching the constitutional protections our system guarantees those who stand in criminal jeopardy. During my time in Dade County, I also supported a victims' rights amendment to the Florida Constitution.

Based on our personal experiences and the extensive review and analysis that has been conducted at our direction, the President and I have concluded that an amendment to the Constitution to protect victims' rights is warranted. We have come to that conclusion for a number of important reasons.

First, unless the Constitution is amended to ensure basic rights to crime victims, we will never correct the existing imbalance in this country between defendants' irreducible constitutional rights and the current haphazard patchwork of victims' rights. While a person arrested or convicted for a crime anywhere in the United States knows that he is guaranteed certain basic minimum protection under our nation's most fundamental law, the victim of that crime has no guarantee of rights beyond those that happen to be provided and enforced in the particular jurisdiction where the crime occurred.

A victims' rights amendment would ensure that courts will give weight to the interests of victims. When confronted with the need to reconcile the constitutional rights of a defendant with the statutory rights of a victim, many courts often find it easiest simply to ignore the

legitimate interests of the victim. A constitutional amendment would require courts to engage in a careful and conscientious balancing to determine whether a particular victim's participation would adversely affect the defendant's rights. The result will be a more sophisticated and responsive criminal justice system that both protects the rights of the accused and accommodates, to the maximum extent possible, the interests of victims.

Second, efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past twenty years, and many states have responded with state statutes and constitutional provisions that seek to guarantee victim's rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights. Rather than form a minimum baseline of protections, the state provisions have produced a hodgepodge of rights that vary from jurisdiction to jurisdiction.

In addition, state efforts often have not been able to protect crime victims from feeling re-victimized by a criminal justice system that is at times insensitive to their needs. In one case, for example, the victim notified the court that she wished to provide a victim-impact statement in open court, as was her right under the state's constitutional amendment. The judge denied her request because he said he had a "busy docket." Similar instances of mistreatment of victims by the system have occurred across the country.

Rights that are guaranteed by the federal Constitution receive greater recognition and respect. If a victims' rights amendment is adopted, a permanent, uniform baseline of rights for crime victims will be in force in each and every state.

Third, the victims' rights amendment that the President and I envision will do no more than secure for crime victims the same type of rights that are secured for others elsewhere in the Constitution. The rights that we believe should be protected by a constitutional amendment primarily are intended to guarantee crime victims the opportunity to participate in proceedings related to the crimes committed against them.

By protecting the rights of free speech, free press, peaceable assembly and petition for redress of grievances, the First Amendment guarantees all Americans the opportunity to participate in our country's political and social discourse. The most basic participatory right in democracy -- the right to vote -- has been the subject of four constitutional amendments, which have guaranteed that right to adult citizens regardless of race, gender, financial means or age.

In the criminal justice context, all affected individuals, except for the victims of crime, are afforded some basic constitutional rights. The defendants have the right to be informed of the accusation against them, the right to be represented by counsel, and the right to confront those witnesses who testify against them. The Constitution provides the community affected by a crime both access to public court proceedings and the opportunity to participate as jurors in

criminal trials. Ironically it is the ones most directly affected by a crime -- the victims -- who have no guaranteed constitutional rights.

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

Several of the rights we would guarantee in such an amendment would provide law enforcement with additional benefits on top of the benefit of victims' increased resolve to participate in the process. If victims are notified of public proceedings and allowed to attend, they will be able to alert prosecutors to distortions of fact in defendants' and defense witnesses' testimony. Allowing victims to be heard during critical phases of the trial will increase the likelihood that courts will engage in better decision-making. Victim testimony can provide courts with additional relevant information and impress upon them that an actual human being has suffered as a result of the defendant's conduct. Having had an opportunity to be heard, victims likely will be better able to accept a court's decision, whatever it may be. Notice of release of the defendant or offender will enable victims to take precautions that may prevent the commission of more crime. By holding offenders financially responsible through restitution for

the harm they caused, they will be more clearly required to acknowledge and accept responsibility for that harm.

Moving Forward

Having made a commitment to seeing a constitutional amendment adopted, this Administration has been hard at work to deal with the range of important issues that must be addressed in moving forward to put such an amendment in place.

Last spring, Senators Kyl and Feinstein introduced in the Senate a resolution proposing language for a victims' rights amendment. In that way, and in so many other ways, Senators Kyl and Feinstein have demonstrated truly impressive leadership on this issue. Their commitment has served as a beacon for those in this nation who have a vision of a justice system which accords crime victims the respect they deserve. I hope other members of this Committee will join with them in this important effort. I should also note that Congressman Hyde of Illinois introduced two proposed amendments in the House.

After announcing his support for the amendment, the President directed his Administration to work with Congressional staff, affected organizations, and interested citizens to craft an amendment that would ensure the following rights for victims:

Right to notice of public court proceedings and to attend them;

Right to be heard;
Rights relating to parole hearings;
Right to notice of release or escape;
Right to an order of restitution;
Right to protection from the defendant; and
Right to notice of these rights.

The President made clear that the amendment should be drafted with great caution to ensure that it does not impede legitimate law enforcement functions or work inadvertently to provide defendants and convicted offenders with tools or arguments that could impair the criminal justice process. We must never lose sight of the fact that the very best way the criminal justice system can serve victims is to bring responsible criminals to justice while providing due process to all concerned.

Once the President announced his support for a victims' rights amendment, I in turn, asked then-Associate Attorney General John Schmidt and Assistant Attorney General Eleanor D. Acheson to review the proposed resolutions and discuss our concerns with Congressional staff. I know they have met on several occasions with Senators Kyl and Feinstein and their staffs. Those meetings helped to identify important issues that must be addressed in drafting an amendment and to educate everyone at the table. In January of this year, Senators Kyl and Feinstein introduced a new amendment -- S.J. Res. 6 -- that reflects those discussions. I commend the Senators and their staffs on the hard work that has taken place to date.

There is still much work to be done. Our efforts at the Department of Justice have included gathering input from a wide variety of sources, particularly the law enforcement community. We have sought guidance from not only the United States Attorney's Offices nationwide, but also state prosecutors through organizations like the National Association of District Attorneys and the National Association of Attorneys General. I know that each and every member of this Committee has district attorneys and attorneys general in their states who have sought to meet the needs of victims, and I encourage you to work with them and to seek their input as you move forward with this important amendment.

Our efforts at the Department also have included productive discussions with victims' rights organizations that cut across and through all partisan and ideological lines. These groups are not out to achieve any extraneous political objectives or to foster public relations victories. Rather, they are real people -- typically family members of victims -- who are driven by a wholehearted belief that the criminal justice system must neither disregard nor neglect the rights of crime victims. These groups have encouraged me, correctly so, to support a victims' rights amendment that protects victims and gives them a voice at critical stages of court proceedings.

The Administration is 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 accorded to 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.

Issues to be Resolved.

During our discussions with Senators Kyl and Feinstein, certain outstanding issues were identified. We will need to decide, for example, whether the amendment will give constitutional rights to victims of all crimes or only to victims of some subset of crimes such as violent crimes. We will need to address how these rights will be enforced within our justice system. In addition, we must determine whether victims should have a right to a disposition of proceedings relating to the crime free from unreasonable delay. And we need to derive a way to ensure the amendment has enough flexibility to ensure protection of these rights while protecting against unintended consequences.

There is one additional issue I would like to bring to your attention. Any attempt to create rights for individuals requires a commitment of resources. The problem with many state efforts to provide rights for victims is that they have not been accompanied by the resources required to make those rights meaningful. A federal constitutional amendment will require the creation of effective systems of notification and other efforts that could be costly. While the text of an amendment is not the place to address such resource concerns, we must recognize that these issues exist and commit ourselves to deal with them if we truly seek to achieve the full measure of what a victims' rights amendment can offer.

Conclusion

I look forward to working with you and your staffs to address these and other important issues. I am confident that we can achieve the balance that is so important in this area. I would be pleased to answer any questions the Committee may have.

Total Pages: 20

LRM ID: REJ444

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

Monday, April 27, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: James J. Jukes (for) Assistant Director for Legislative Reference *Rjones*

OMB CONTACT: Ronald E. Jones

PHONE: (202)395-3386 **FAX:** (202)395-3109

SUBJECT: **JUSTICE** Testimony on SJRES44 Constitutional Amendment to Protect the Rights of Crime Victims

DEADLINE: 5:00 pm today Monday, April 27, 1998 

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The attached testimony is for a Senate Judiciary hearing scheduled for tomorrow, April 28th.

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105TH CONGRESS
2D SESSION

S. J. RES. 44

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

IN THE SENATE OF THE UNITED STATES

APRIL 1, 1998

Mr. KYL (for himself, Mrs. FEINSTEIN, Mr. BIDEN, Mr. LOTT, Mr. THURMOND, Mr. TORRICELLI, Mr. BREAUX, Mr. GRASSLEY, Mr. DEWINE, Mr. FORD, Mr. REID, Mr. GRAMM, Mr. MACK, Ms. LANDRIEU, Mr. CLELAND, Mr. COVERDELL, Mr. CRAIG, Mr. INOUE, Mr. BRYAN, Ms. SNOWE, Mr. THOMAS, Mr. WARNER, Mr. LIEBERMAN, Mr. ALLARD, Mrs. HUTCHISON, Mr. D'AMATO, Mr. SHELBY, Mr. CAMPBELL, Mr. COATS, Mr. FAIRCLOTH, Mr. FRIST, Mr. SMITH of New Hampshire, Mr. GREGG, Mr. HAGEL, Mr. HELMS, Mr. SMITH of Oregon, Mr. HUTCHINSON, Mr. INHOPE, Mr. MURKOWSKI, Mr. BOND, and Mr. GRAMS) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

- 1 *Resolved by the Senate and House of Representatives*
- 2 *of the United States of America in Congress assembled*
- 3 *(two-thirds of each House concurring therein), That the fol-*
- 4 *lowing article is proposed as an amendment to the Con-*
- 5 *stitution of the United States, which shall be valid for all*
- 6 *intents and purposes as part of the Constitution when*

1 ratified by the legislatures of three-fourths of the several
2 States within seven years from the date of its submission
3 by the Congress:

4 "ARTICLE —

5 "SECTION 1. Each victim of a crime of violence shall
6 have the rights to reasonable notice of, and not to be ex-
7 cluded from, all public proceedings relating to the crime—

8 "to be heard, if present, and to submit a state-
9 ment at all public proceedings to determine a release
10 from custody, an acceptance of a negotiated plea, or
11 a sentence;

12 "to the foregoing rights at a parole proceeding
13 that is not public, to the extent those rights are af-
14 forded to the convicted offender;

15 "to reasonable notice of a release or escape
16 from custody relating to the crime;

17 "to consideration for the interest of the victim
18 in a trial free from unreasonable delay;

19 "to an order of restitution from the convicted
20 offender;

21 "to consideration for the safety of the victim in
22 determining any release from custody; and

23 "to reasonable notice of the rights established
24 by this article.

3

1 "SECTION 2. Only the victim or the victim's rep-
2 resentative shall have standing to assert the rights estab-
3 lished by this article. Nothing in this article shall provide
4 grounds for the victim to challenge a charging decision
5 or a conviction; to overturn a sentence or negotiated plea;
6 to obtain a stay of trial; or to compel a new trial. Nothing
7 in this article shall give rise to a claim for damages against
8 the United States, a State, a political subdivision, or a
9 public official.

10 "SECTION 3. The Congress and the States shall have
11 the power to implement and enforce this article within
12 their respective jurisdictions by appropriate legislation, in-
13 cluding the power to enact exceptions when necessary to
14 achieve a compelling interest.

15 "SECTION 4. The rights established by this article
16 shall apply to all proceedings that begin on or after the
17 180th day after the ratification of this article.

18 "SECTION 5. The rights established by this article
19 shall apply in all Federal and State proceedings, including
20 military proceedings to the extent that Congress may pro-
21 vide by law, juvenile justice proceedings, and proceedings
22 in any district or territory of the United States not within
23 a State."

○

4/27/98 9:00 am

DRAFT STATEMENT
OF
RAYMOND C. FISHER
ASSOCIATE ATTORNEY GENERAL
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING
S.J. RES. 44 (VICTIMS' RIGHTS AMENDMENT)

Good afternoon. I appreciate this opportunity to appear before the Committee to express the Administration's views on an amendment to the United States Constitution to guarantee rights for victims of crime.

The Administration's Support for a Victims' Rights Amendment

Mr. Chairman, I know that you and each member of this Committee share with the President, the Attorney General, and me a deep and abiding respect for our Constitution. This Administration does not lightly endorse any effort to amend this enduring document. We recognize that the Nation should proceed only with the greatest caution to alter its fundamental charter.

In their wisdom, our Nation's founders did acknowledge the need for a mechanism to alter the Constitution, but only through a well-ordered and demanding process. Article V provides such a

process. That process has been used successfully only 27 times in our Nation's 222-year history. Today, I reaffirm this Administration's belief that the guarantee of rights for the victims of crime requires that we employ that process once again.

My Own Commitment

My own commitment to this cause derives from the pain I shared with victims of violent crime and their families, in the years immediately preceding my recent arrival at the Department of Justice. As a member, and later as president, of the Los Angeles Police Commission, I saw and heard—at funerals and privately—the anguish of the families of police officers, some of whom had been killed in the line of duty. Those experiences not only etched in my mind the profound loss and grief of the families, but also underscored for me the vital need to ensure that victims and their survivors are an integral part of the criminal justice process.

The Rationale for a Constitutional Amendment

Unfortunately, as the President and Attorney General have previously indicated, our national experience is that victims' rights laws already on the books have proved inadequate to the

task. I would like to summarize very briefly four specific reasons, provided by the Attorney General in earlier testimony, for supporting an amendment to the Constitution to protect victims' rights.

First, we must correct the existing imbalance in this country between defendants' constitutional rights and the current haphazard patchwork of victims' rights. A Victims' Rights Amendment would ensure that all courts will give weight to the interests of defendants and victims, instead of simply ignoring victims' interests, as is too often the case today.

Second, the state legislative route to change has proven less than adequate in according victims their rights. Rather than form a minimum baseline of protections, the state provisions have produced a patchwork of rights that vary from jurisdiction to jurisdiction. Rights that are guaranteed by the Constitution will receive greater recognition and respect, and will provide a uniform, national baseline.

Third, the Victims' Rights Amendment that we envision will secure for crime victims a set of participatory rights similar in some respects to others elsewhere in the Constitution. The Constitution provides the community affected by a crime both access to public court proceedings and the opportunity to participate as jurors in criminal trials. Ironically, it is those most directly affected by a crime—the victims—who today

have no guaranteed constitutional rights.

Fourth, a Victims' Rights Amendment would benefit not only crime victims but also law enforcement. Victims will be much more willing to play their crucial role in the process of prosecuting criminals if they receive the respect accorded by a constitutional amendment securing their rights.

Moving Forward

We have taken great strides toward our goal of developing a Victims' Rights Amendment in the almost two years since the President's endorsement. The Department of Justice has worked with your staffs to address various legal and policy issues. We also have conducted extensive outreach efforts—with victims and victims' advocacy groups; federal, state and local prosecutors; federal and state judges; corrections officials; and civil rights groups, among others.

Simultaneously, Senators Kyl and Feinstein have worked tirelessly to develop the proposal currently before us. We commend them for their truly impressive leadership on this issue. We believe that the current proposal reflects substantial progress on issues of importance to us.

Earlier this month, when the revised amendment was announced, the Attorney General directed my office and the Office

of Policy Development, under Assistant Attorney General Eleanor D. Acheson, to lead the Department's efforts in analyzing and responding to this proposal. Senior staff members from our offices and from the Department's Office of Legislative Affairs met just last week with staff members of Senators Feinstein, Kyl and Biden to raise and discuss our outstanding issues and concerns. These discussions have been productive, allowing us to refine—and then provide—several specific suggestions. I have attached for the record a list of the concerns that we have identified and, where possible, our corresponding suggestions. I would like to touch briefly on a few of them, by way of example.

The current proposal does not address the issue of the impact of the Victims' Rights Amendment on the fundamental rights of a defendant to a fair trial. The Attorney General has previously stated that the amendment should include "language stating clearly that the rights the amendment creates shall not be applied in a manner that violates those irreducible rights to which a criminal defendant is constitutionally entitled." We want to ensure that, in our effort to provide victims with rights they manifestly deserve, we do not erode the rights of the accused as provided for in the Constitution. The attachment to my testimony contains our suggested language for achieving this important goal.

We also believe that one of the primary justifications for

an amendment is the need to create a uniform national baseline of rights for crime victims. Crime victims currently face a hodgepodge of rights that vary from jurisdiction to jurisdiction. The goal of creating a minimum baseline of protections will not be achieved if states are given independent authority "to enforce" the amendment, "to implement and enforce" the amendment, or to create exceptions. Accordingly, and as described in greater detail in the attachment to my testimony, we believe it important that only Congress be granted authority to enforce and make exceptions to the rights specified in the amendment.

One of the most difficult issues we have faced relates to the remedies accorded victims if their rights are infringed. We need to give victims rights that are real and enforceable, but we also need to avoid interfering with legitimate prosecutorial interests and to promote finality in the criminal justice process. We strongly agree with the provisions of the proposed amendment that make clear that victims may not challenge the vast majority of prosecutorial decisions. This is an issue to which we have devoted a great deal of careful thought and attention, and, as the Attorney General has previously testified and as the attachment indicates, we believe that rights under the amendment should be enforced through prospective means only. We look forward to working with the Committee to develop appropriate language to address this issue.

The attachment to my testimony identifies the other issues with which we have concerns and summarizes those concerns. In the spirit of drafting a constitutional amendment in which each word will take on enormous significance, we offer, to the extent possible, specific suggestions that we believe will strengthen the amendment and will minimize unintended consequences. Again, we are eager to continue our work together with this Committee as we move toward our mutual goal.

There is another issue of which you are already aware, but which bears repeating. Any attempt to create rights for individuals requires a commitment of resources. Many state efforts to provide rights for victims have proven ineffective because they have not been accompanied by the resources required to make them meaningful. A Victims' Rights Amendment will require the creation of effective systems of notification, and other efforts, that will be costly. While the text of the amendment is not the place to address such resource concerns, we must recognize that they exist and commit ourselves to deal with them.

Finally, I want to address the Administration's continuing efforts to keep its commitment to victims of crime, even as we ~~together~~ push aggressively for a Victims' Rights Amendment. The Attorney General has issued specific directives to the Department's law enforcement agencies and prosecutors concerning

the implementation of victims' statutory rights. Moreover, as you know, the Administration has transmitted to the Congress a legislative package that will establish key rights for victims in federal cases. These rights include the right to be present throughout all public court proceedings to the maximum extent permitted by the Constitution and the right to be heard both orally and in writing concerning release decisions, plea acceptance and sentencing. We are pleased that Senators Kennedy and Leahy also have proposed a legislative package to establish rights for victims in federal cases, and we look forward to working with them on building this crucial bridge to the Victims' Rights Amendment.

What victims want is a voice, not a veto, in our criminal justice system. We must ensure that they have that opportunity.

I would be pleased to answer any questions the Committee may have.

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Legislative Proposals**S.J. Res. 44****April 27, 1998**

The goal of the President and the Attorney General has been to craft a constitutional amendment to secure certain basic rights for crime victims without impeding law enforcement or giving defendants unintended advantages. We are eager to continue to work with the Committee to achieve our mutual goal of securing a Victims' Rights Amendment.

Preserving the Constitutional Right to a Fair Trial

DOJ Legislative Proposal: The following language, which is based on the Ninth Amendment, should be placed in a new section:

The enumeration in this article of victims' rights shall not be construed to deny or diminish the rights of the accused as guaranteed by this constitution.

Rationale: The Attorney General testified at a House Judiciary Committee hearing June 1997 to the need to craft the victims' rights amendment that protects the fundamental protections of those accused of crimes. While conflicts between victims' rights and the protections accorded defendants by the Bill of Rights and the Fourteenth Amendment will likely be rare, the Attorney General testified that in those rare instances "we must as a society ensure that a fair trial is not jeopardized." The victims' rights amendment accordingly should include "express language stating clearly that the rights the amendment creates shall not be applied in a manner that violates those irreducible rights to which a criminal defendant is constitutionally entitled." S.J. Res. 44 does not contain such language.

National Uniformity

DOJ Legislative Proposal: In Section 3 of S.J. Res. 44, delete "and the States."

Rationale: In testimony before the House and Senate Judiciary Committees, the Attorney General testified that a primary justification for the amendment is the need to create a uniform national baseline of rights for crime victims. This goal will not be achieved if states are given independent authority to enforce the amendment, to implement and enforce the amendment, or to create exceptions. Moreover, the states will retain their authority under the 10th Amendment to regulate their courts and will be free to legislate concerning victims' rights as they see

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fit, consistent with the Constitution and Congressional enforcement of the amendment. Accordingly, the Department recommends that the reference to states be deleted, and that the authority to enforce the amendment, and to pass exceptions, be limited to Congress.

As currently drafted, S.J. Res. 44 gives both Congress and the states the power to "implement and enforce" the amendment, which includes the power to enact exceptions to achieve a compelling interest. The draft also provides that Congress and the states shall have this power "within their respective jurisdictions." This latter phrase appears to insulate state action from Congressional interference or regulation. Thus, both as to how the amendment is "implemente[d] and enforce[d]" and as to the exceptions created, victims' rights under the amendment will likely vary from state to state and between the state and federal levels, and Congress will be unable to enforce national uniformity. In addition, even the interpretation of other constitutional provisions could vary from jurisdiction to jurisdiction under the existing draft.

Enforcing the Amendment

DOJ Legislative Proposal: In section 3 of S.J. Res. 44, delete "implement and."

Rationale: S.J. Res. 44 gives Congress and the states power to "implement and enforce" the amendment. While we cannot be sure how courts will interpret the word "implement," we are concerned that the term could give Congress and the states plenary authority to interpret the amendment, or at least the power to interpret the amendment to provide victims greater rights than the courts, in interpreting the amendment, would provide. Either possibility would constitute a change in constitutional practice by giving Congress and the states authority with respect to victims' rights that they does not have under any other amendment to the Constitution.

This is particularly problematic because it may give Congress and the states the power, in interpreting victims' rights, to diminish defendants' constitutional rights. Even addition of language explicitly protecting defendants' rights likely would not solve the problem since Congress and the states would presumably have the power to interpret this language as well.

Finally, even without "implement and," we assume that Congress will be granted the authority to "enforce" the amendment. We believe that, even after City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the authority of Congress to enforce the amendment

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by appropriate legislation would include the authority to provide by legislation that, for example, the term "victim" for purposes of the amendment includes family members of homicide victims.

Encouraging Ratification

DOJ Legislative Proposal: The language requiring three-fourths of the states to ratify the amendment within seven years from the date of its submission by Congress currently appears in the body of the "Resolved" clause. The Department recommends that the language be moved to the body of the amendment, either as part of Section 4, or as a new section.

Rationale: By placing the seven-year limit in the "Resolved" clause, rather than the text of the amendment, Congress may have the authority to extend the time limit for ratification beyond the seven-year mark. If it appears in the text of the amendment, Congress may not extend the time limit. In order to keep pressure on the states to ratify the amendment and to ensure the most expeditious ratification, the seven-year time limit should appear in the text, rather than the "Resolved" clause, of the amendment.

Territories

DOJ Legislative Proposal: Section 5 of S.J. Res. 44 should be amended to read as follows: "The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia, and any commonwealth, territory, or possession of the United States."

Rationale: S.J. Res. 44 is intended to ensure that victims of crime in the territories of the United States are covered by the amendment, but the language in the current draft does not achieve the desired result. In addition, the current draft would not ensure that the immunities provision would apply to the territories. Finally, the reference to "all" proceedings in the current draft may create confusion because most of the rights granted to victims apply only in public proceedings. Accordingly, the word "all" should be deleted.

Victim's Representative

DOJ Legislative Proposal: In section 2 of S.J. Res. 44, delete "victim's representative."

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Rationale: S.J. Res. 44 provides that the "victim's representative" has standing to assert the victim's rights. Since this language gives victims' representatives, in addition to victims, substantive rights, it may be possible for a victim to designate a representative even when the victim is capable of exercising the right(s) himself or herself. Further, it is unclear who would qualify as a "representative" and who would be authorized to select the person, thus creating the possibility that the victim's representative might be aligned with the defendant and thereby create obstacles to effective prosecution. Finally, because "victim" is not defined in the amendment, use of the phrase "victim's representative" may impact the definition of victim. For example, use of the phrase "victim's representative" may suggest that family members of homicide victims are not themselves victims.

Avoiding Adverse Consequences for Law Enforcement and Preserving Flexibility to Create Exceptions

DOJ Legislative Proposal: In section 3 of S.J. Res. 44, delete "compelling interest" and use the following language for the exceptions power: "to enact exceptions when necessary to achieve a significant interest."

Rationale: The Department has strongly supported the inclusion of authority in the amendment for Congress to make exceptions to the rights set forth in the amendment. The exceptions authority is necessary for cases involving, among other things, mass victims, culpable victims, cooperating defendants, or incarcerated victims.

S.J. Res. 44 requires that exceptions be "necessary to achieve a compelling interest." "Compelling interest," which is a term of art that is part of strict scrutiny review under the Equal Protection Clause and the First Amendment, is potentially very difficult to meet. Given existing Supreme Court case law, we cannot predict with certainty whether the contemplated exceptions to victims' rights would serve a compelling interest. However, because strict scrutiny is the strictest test of government action under the Constitution, courts are likely to interpret the language in the amendment as substantially restricting the ability of Congress to enact exceptions. We are concerned that "compelling interest" may set too high a standard.

The alternatives to "compelling interest" are either another existing constitutional standard, such as intermediate scrutiny, applicable to gender-based remedies, or a standard that is not tied to an existing constitutional standard. The latter resolution is preferable. Use of an existing standard such as

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intermediate scrutiny would import into victims' rights factors and considerations that were developed in an entirely different context, in this case gender-based discrimination. Use of a standard not tied to an existing constitutional standard means that courts will examine exceptions made by Congress on a case-by-case basis, building up a body of law over the course of time that will be firmly rooted in the context of victims' rights.

Immunity from Damages Actions

DOJ Legislative Proposal: In section 2 of S.J. Res. 44, modify the final clause to read as follows:

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

Rationale: S.J. Res. 44 bars damages actions against various government entities and "public official[s]." We have two concerns with this provision. First, the term "public official" may not reach lower-level government employees. Second, the amendment would appear to permit the creation of statutory causes of action.

Enforcing the Ex Post Facto Clause

DOJ Legislative Proposal: In section 4 of S.J. Res. 44, add the following clause:

The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

Rationale: The right to restitution in the S.J. Res. 44 may be inconsistent with the ex post facto clause if the right is applied to crimes committed prior to the adoption of the amendment. Restitution can fall within the ex post facto clause if it is deemed "punishment." Most courts have concluded that restitution under federal statutes constitutes "punishment." The amendment should state expressly that it applies prospectively with respect to restitution in order to preserve with certainty the values protected by the ex post facto clause.

Language Recommendations

Because we are considering a constitutional amendment, each word of the proposal assumes great significance. The following

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are several specific drafting proposals designed to alleviate ambiguity.

1. Section 1, clauses 2 and 7: Neither of these clauses is limited by the phrase "relating to the crime" that is included in clauses 1 and 4. This phrase should be added to clauses 2 and 7 in order to make clear that the rights accorded victims apply only with respect to the crime of which they were victims.

2. Section 1, clause 1: This clause grants victims the right not to be excluded from "all public proceedings relating to the crime." In order to avoid a possible interpretation that a victim could be excluded from some but not all proceedings, we recommend that "all" be changed to "any".

3. Section 1, clause 1: Clause 1 grants rights to "Each victim" while clause 5 mandates consideration of the interest of "the victim". This lack of parallelism leaves open the possibility that "each" victim will be able to assert the interests of other victims. We recommend that "Each" be changed to "A."

4. Section 4: This section states that the amendment applies to "all proceedings" that begin on or after 180 days after ratification. The reference to "all proceedings" is problematic because (1) many of the rights apply only in public proceedings, and (2) not all of the rights are tied to proceedings (for example, the right to notice of escape or release). We recommend that the language be changed to read: "This article shall take effect on the 180th day after the ratification of this article."

5. Release: Section 1, clause 2 grants victims the right to be heard in connection with "a release from custody" and clause 7 gives victims a right to have their safety considered in determining "any release from custody." Neither of these two references to release from custody is limited to discretionary release, thus leaving open the possibility that victims will have the enumerated rights when a defendant is released following an acquittal at trial, a dismissal of the charges, or the completion of a sentence. We would be pleased to work with the Committee to resolve this issue.

6. Section 1, clause 5: This clause grants victims the right "[t]o consideration for the interest of the victim in a trial free from unreasonable delay." We agree that this right should be couched in terms of consideration of the victim's interest. However, as drafted, this language may suggest that victims have an interest in having a trial even when one would

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otherwise not occur. We would be pleased to work with the Committee to craft language to remove this ambiguity.

Preserving Effective Law Enforcement - Remedies

The issue of remedies for violations of victims' rights has been one of the most difficult to resolve. As the Attorney General stated in her testimony before the Senate Judiciary Committee last April, the Department believes that victims' rights should be vindicated through prospective remedies, not by reopening completed proceedings, to avoid adverse effects on effective law enforcement. S.J. Res. 44 goes further in this direction than previous drafts, but also illustrates the difficulty of attempting to resolve this issue by enumerating proceedings that cannot be reopened. For example, it is not clear that "challenging" (a conviction) is the same as "overturning" (a sentence or plea). It is not clear that the prohibition on "compel[ling]" a new trial would prohibit "seek[ing]" a new trial. The prohibition on obtaining a stay of trial may suggest that other proceedings can be stayed. In addition, the draft appears to preclude the government from seeking relief on behalf of victims. These are only a few of the difficulties with the present draft. It may be better to identify specifically the permitted relief rather than to enumerate proscribed relief. We would be happy to work with the Committee to craft language that strikes the proper balance between making victims' rights real and enforceable and minimizing interference with effective law enforcement.

Securing the Resources Necessary to Make Victims' Rights A Reality

While this issue will not be addressed in the amendment itself, a commitment to devote the resources necessary to make the rights granted by the amendment a reality for victims is essential. The Department spends millions of dollars each year to provide victims their statutory rights. We will work with the Committee to address the resource issue, both for the federal government and the states, as Congress' consideration of the amendment continues.