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Crime Victims' Rights Amendment: The Need for Constitutional Protection

Introduction and Executive Summary

- The negligent treatment of crime victims has been widely recognized for more than 20 years, and yet today's American criminal justice system continues to virtually ignore the victim. In too many cases, victims are denied the right to be informed and to play a meaningful role in the criminal justice process. For example:
 - Every day, victims are left uninformed about critical proceedings such as bail hearings, plea acceptances, and trials.
 - Every day, victims are denied the ability to speak at key points in the criminal process, including sentencing hearings and bail and parole proceedings.
 - Every day, victims are denied the right to have their safety taken into account before their violator is released.
- In contrast, rights of criminal defendants are well protected. Their lawyers often challenge victims' rights to participate in the justice system, arguing that victims' rights would conflict with defendants' constitutional rights — rights created by constitutional amendments.
- State-level, patchwork efforts to protect victims' rights through court rules, statutes, and even state constitutional amendments have significantly failed. And a federal statute could only apply to federal courts (which handle less than one percent of criminal cases) and would still be subject to override by a defendant's asserted constitutional right. The only way to protect victims is to adopt an amendment to the federal Constitution that recognizes the value society places on crime victims' rights.
- The Senate Judiciary Committee has reported favorably the Kyl-Feinstein Crime Victims' Rights Amendment (S.J. Res. 1). A similar amendment, H.J. Res. 48, is pending in the House. Support for such an amendment is bipartisan and broad — Presidents George W. Bush and Bill Clinton both have endorsed the effort, as has Attorney General John Ashcroft. Most state attorneys general, the National Association of District Attorneys, and victims' rights groups such as Mothers Against Drunk Driving (MADD) agree that only a constitutional amendment will ensure that victims receive the protections they deserve. The Senate should pass the amendment when it reaches the floor.

What Victims' Rights Are Being Deprived?

According to the Department of Justice, more than 5 million violent crimes are committed in America every year.¹ Yet the victims of these crimes have *no* constitutional rights in the criminal justice process, and are frequently denied a right to participate in the delivery of justice in their cases. The rights being denied are several:

- Victims have **no** constitutional right to receive notice of public events related to the criminal prosecution, be that a bail hearing, a trial date, a sentencing hearing, or a later parole hearing.
- Victims have **no** constitutional right to be present during those proceedings, nor to have their voices heard at any stage in the process.
- Victims have **no** constitutional right to receive notice when the criminal who victimized them is released on parole or escapes from prison.
- Victims have **no** constitutional right to have their safety taken into account by courts and parole boards before a criminal suspect or convict is released.
- Victims have **no** constitutional right to protection against unreasonable delays in criminal prosecutions.

Note that even if these rights were respected at a constitutional level, none of them would enable crime victims to control a criminal prosecution or to prevent the justice system from ensuring that all defendants receive fair trials and all convicts are treated humanely. These rights ensure that crime victims are not shut out of the process and that their legitimate interests are considered. As Harvard Law School professor Laurence Tribe and then-Professor (now federal Judge) Paul Cassell have explained, these proposed constitutional rights “are the very kinds of rights with which our Constitution is typically and properly concerned — rights of individuals to participate in all those government processes that strongly affect their lives.”²

Nor are these new rights, but rather the re-establishment of rights. In floor debate on a similar amendment in 2000,³ Senator Feinstein explained that crime victims had these rights at the time of the Constitution’s enactment. At that time, public prosecutors were rare, and crime victims were considered “parties” and acted as their own prosecutors on criminal matters.⁴ The Founders, then, had no need to create special constitutional protections for victims because the modern practice — public prosecutors who act independently of crime victims — was not foreseen. In the meantime, the victims have significantly been shut out of the process.

¹ Criminal Victimization in the United States for 2002, Bureau of Justice Statistics, Department of Justice (December 2003), at Table 1.

² Laurence Tribe and Paul Cassell, “Embed the Rights of Victims in the Constitution,” *Los Angeles Times*, July 6, 1998; see also Committee Report for S.J. Res. 1, #108-191, at 10-11 (hereinafter “Committee Report”).

³ An earlier version of this constitutional amendment was debated on the Senate floor in April 2000, but a filibuster was threatened and the amendment was pulled from the floor. See debate on S.J. Res. 3 (106th Cong.) in the *Congressional Record* for April 25-27, 2000.

⁴ Senator Dianne Feinstein, *Congressional Record*, April 25, 2000 (106th Cong., 2nd Sess.), at S2822 (discussing academic research on early American criminal prosecutions). Senator Feinstein amplified this point in a later speech on the floor on May 2, 2000.

S.J. Res. 1 — a Constitutional Amendment to Fix this Problem

Senators Kyl and Feinstein have sponsored S.J. Res. 1, the Crime Victims' Rights Amendment, in order to address the deprivations listed above. (Full text on page 8.) The proposed amendment would provide victims of violent crimes the constitutional rights to be notified of and included in public proceedings. It guarantees a victim's right to be heard at plea, sentencing, reprieve and pardon proceedings. It also recognizes a right to be notified of the release or escape of the accused. Also, responding to slow trials that could be concluded without hindering justice, the amendment gives a victim the right to an interest in proceedings without unreasonable delay and in adjudicative decisions that duly consider the victim's safety. Finally, S.J. Res. 1 grants victims the right to consideration of their just and timely claims for restitution from a convicted defendant: those who pled guilty, are found guilty, or entered a plea of no contest. In short, the Crime Victims' Rights Amendment gives victims basic rights to be informed, present, and heard in the criminal justice system, and it grants constitutional recognition to their important role and status in that system.

Why is a Constitutional Amendment Necessary?

The move to enact a constitutional amendment to protect victims' rights is the result of a decades-long effort — and failure — to provide these protections at the state level and through federal statutes. Given that public support for victims' rights protections is so strong,⁵ it is unsurprising that 33 states have passed a variety of state constitutional amendments protecting victims' rights, and that all 50 states have some form of victims' rights measures at a statutory or court-based level.⁶ But the evidence is clear that these state efforts have failed to provide consistent protections to victims.

Statistical Evidence of State -Level Failures

In the mid-1990s, a study by the National Victim Center found that many victims were still being denied their rights, even in states having what appeared to be strong legal protection.⁷ The study examined four states – two with relatively “strong” victims' rights protections, and two with relatively “weak” protections. The findings were striking:⁸

- Nearly half of the victims (44 percent) in states with strong protections for victims, and more than two-thirds of the victims in states with weak protections, did not receive notice of the sentencing hearing.
- Although the “strong” states had laws requiring that victims be notified of plea negotiations and the “weak” states did not, victims in all four states were equally unlikely to be informed of such negotiations. Laws requiring notification of plea negotiations were not enforced in *nearly half* of the violent-crime cases included in the study.

⁵ For example, when Maryland voters considered a state constitutional amendment to protect victims' rights in 1994, it prevailed with 92% of the vote. Maryland Board of Elections data, on file with Republican Policy Committee.

⁶ See Committee Report at 3.

⁷ U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims' Rights and Services for the 21st Century* 10 (1998); see Committee Report at 13-15.

⁸ See Committee Report at 13-15.

- Substantial numbers of victims in both “strong” and “weak” states were not notified of various stages in the process, including bail hearings (37 percent not notified in strong protection states, and 57 percent not notified in weak protection states); the pretrial release of perpetrators (62 percent not notified in strong protection states, and 74 percent in weak); and sentencing hearings (45 percent in strong, 70 percent in weak).

A later report based on the same database found that racial minorities are most severely affected under the existing patchwork of victims’ protections.⁹

Criminal Defendant s’ Constitutional Claims are Trumping Victims ’ Rights

Given that public support for victims’ rights is so strong, and that all the states have some nominal protection for victims, why is there such a dramatic and ongoing failure? One answer lies in the simple fact that criminal defendants have a plethora of rights that are protected by the Constitution that are applied to exclude victims’ rights. Simply put, our Constitution values criminal defendants’ rights more than crime victims’ rights; indeed, our Constitution does not protect crime victims’ rights at all.

The proposed crime victims’ rights do *not* infringe on criminal defendants’ constitutional rights. While a criminal defendant may not want a crime victim in the courtroom during sentencing, or to provide a statement at a bail hearing, for example, there is no constitutional right for a defendant to exclude such participation. Professor Tribe commented on the victims’ dilemma when they come into conflict with “*any mention* of an accused’s rights, regardless of whether those rights are genuinely threatened.”¹⁰ Yet, as Professor Tribe has said, the proposed amendment “fully protect[s] defendants’ rights and accommodate[s] the legitimate concerns that have been voiced about prosecutorial power and presidential authority.”¹¹

Prosecutors strongly support this constitutional amendment, as the endorsements from the National Association of District Attorneys and 45 state attorneys general show.¹² But prosecutors — chiefly interested in guaranteeing the conviction of criminal defendants — understandably will brush aside the victim’s interests if they fear that the court will rule that the defendant’s rights have somehow been violated. Thus, some victims of the Oklahoma City Bombing were told that if they attended the trial, they could jeopardize the conviction of Timothy McVeigh.¹³ It is abhorrent that crime victims are forced to stay away from the trials of their violators because, by attending, they might empower the criminal suspect to bog down a trial with challenges to their presence. Rather, the reasonable participation of those who were violated should be core constitutional rights.

⁹ National Victim Center, “Statutory and Constitutional Protection of Victims’ Rights: Implementation and Impact on Crime Victims -Sub-Report: Comparison of White and Non-White Crime Victim Responses Regarding Victims’ Rights,” June 5, 1997, at page 5; see Committee Report at 14.

¹⁰ See Committee Report at 14 (emphasis added).

¹¹ Letter from Professor Laurence Tribe, April 8, 2003 (on file with Senate Judiciary Committee).

¹² See discussion of endorsements on pages 5-6 below, as well as lists of supporters at www.nvcap.org.

¹³ See Committee Report at 21. See also discussion of Oklahoma City case in *Congressional Record*, April 25, 2000, at S2828, S2900.

Victims' Rights Are Not Taken Seriously Enough

It is a sad truth that victims' rights, despite their recognition at the state level, simply are not taken sufficiently seriously by the criminal justice system. As one law professor testified, victims receive little protection "whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."¹⁴ Even opponents of the amendment have acknowledged this fact. The then-president of the National Legal Aid and Defenders Association testified to the House Judiciary Committee that state constitutional amendments "have been treated as mere statements of principle that victims ought to be included and consulted." She further explained that "a State constitution is far . . . easier to ignore than the Federal one."¹⁵

The statistical analysis presented above demonstrates this to be the case, and so do tragic anecdotal reports from the states. For example, in July 2000 in Arizona, a 79-year old man was beaten to death with a baseball bat while walking his dog. Despite a 1990 Arizona constitutional amendment guaranteeing the victim the right to appear at bail hearings, the victim's wife and son were never notified of the hearing, and the suspect was set free pending trial.¹⁶ Similarly, in Maryland, when Cheryl Rae Resch was beaten to death by her husband, her mother was not notified of the killer's release two-and-one-half years into a ten-year sentence, despite a Maryland constitutional amendment supposedly guaranteeing her the right to be notified.¹⁷

Whether due to bureaucratic indifference or due to concerns about convicts' and defendants' possible claims, these state efforts have proven woefully inadequate at protecting victims' rights.

Who Supports the Crime Victims' Rights Amendment?

Support for a constitutional amendment to protect victims' rights can be found across the political spectrum, and includes past and present elected officials, state and local law enforcement officials, and victims' rights advocates.¹⁸

Law Enforcement Officials

The need for federal constitutional protection has been recognized at the highest level of law enforcement, including every administration since Ronald Reagan's. The current administration, for example, has stated, "The Department [of Justice] has reviewed the proposed amendment in light of our prosecutorial function within the criminal justice system, our commitment to fundamental fairness and justice for defendants, and our support of the rights of crime victims," and has concluded that the amendment "advances all of these interests."¹⁹ President Clinton's Attorney General, Janet Reno (herself a former local district attorney), testified that "to operate effectively, the criminal justice system relies on victims to report crimes committed against them, to cooperate with law enforcement authorities investigating crimes, and to provide evidence at trial. *Victims will be that*

¹⁴ See Committee Report at 14.

¹⁵ Testimony of Ellen Greenlee, President, National Legal Aid and Defenders Association, to House Judiciary Committee, July 11, 1996, available at <http://www.house.gov/judiciary/110.htm>.

¹⁶ See articles discussing case by Amanda Halligan and Inger Sandal in the *Arizona Daily Star* on July 17, 18, 19, and 20, and August 29, 2000.

¹⁷ See *Congressional Record* (April 25, 2000), at S2823.

¹⁸ For a complete list see www.nvcap.org, the National Victims' Constitutional Amendment Passage's website.

¹⁹ Testimony of Assistant Attorney General Viet Dinh before the Senate Judiciary Committee, April 8, 2003; see Committee Report at 8.

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.”²⁰

This federal support is fully complemented by support from the states. Indeed, observers who resist a constitutional amendment on federalism or “states’ rights” grounds may find instructive the support of the bipartisan group of 45 state attorneys general. These chief law enforcement officers penned a letter to amendment sponsors Kyl and Feinstein, explaining, “Some have argued that federal constitutional rights of victims will infringe on important principles of federalism; however, we respectfully disagree. Each of our state criminal justice systems accommodates federal rights for defendants. To provide a similar floor of rights for victims is a matter of basic fairness.”²¹ And in 1997, the National Governors’ Association passed a resolution, 49-1, to support a federal crime victims’ rights amendment.²²

Joining these state attorneys general in supporting a crime victims’ amendment are major law enforcement groups such as the National Association of District Attorneys (representing 30,000 local prosecutors) and the national Fraternal Order of Police (the nation’s largest organization of sworn law enforcement officers, representing more than 300,000 officers). Additional supportive law enforcement groups include:

*International Assoc. of Chiefs of Police
American Correctional Association
National Troopers’ Association
Federal Law Enforcement Officers’ Assoc.
California District Attorneys’ Association
California Correctional Peace Officers Assoc.*

*National Criminal Justice Association
American Probation and Parole Assoc.
International Union of Police Associations
National Association of Police Organizations
Florida Prosecuting Attorneys’ Assoc.*

Crime Victims and their Families

This amendment is strongly supported by those very people who have suffered most directly—the crime victims themselves. These victims have the concrete, personal experience of trying to work through the criminal justice system, and have seen how “leaving the issue to the states” has failed them. Supportive groups include:

*Mothers Against Drunk Driving
Justice for Murder Victims
National Organization for Victims Assistance
Colorado Org. for Victim Assistance
Pennsylvania Coalition Against Rape
Concerns of Police Survivors (COPS)
Maryland Crime Victims Resource Center*

*Parents of Murdered Children
We Are Homicide Survivors
Nat’l Assoc. for Missing and Exploited Children
Racial Minorities for Victim Justice
Doris Tate Crime Victims Bureau
KlaasKids Foundation
Mothers Against Violence in America*

²⁰ Statement of Attorney General Janet Reno in the Senate Judiciary Committee, April 16, 1997; see Committee Report at 8.

²¹ Letter signed by 45 state attorneys general from the National Association of Attorneys General, March 29, 2004 (copy on file with Senate Republican Policy Committee).

²² Resolution of National Governors’ Association, Winter 1997 (copy on file with Senate Republican Policy Committee).

Inside each of these organizations are stories of loss, accompanied in many cases by an ongoing sense of betrayal by the justice system that shut them out.²³

Conclusion

Despite the well-meaning intentions of judges, prosecutors, and many other state and local officials who fundamentally agree that crime victims need these basic protections, crime victims today are not receiving that fair treatment. The reason for that failure is that victims' rights lack the fundamental constitutional protection provided to defendants in the same criminal justice system. To correct that imbalance, the only solution is to enact this constitutional amendment.

²³ For testimonials from victims, see discussion in Committee Report at 9-10, 18.

Text of the Crime Victims' Rights Amendment

S. J. Res. 1

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

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States:

Article —

SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.

SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.

SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.

SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.

SECTION 5. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 7 years from the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.”

Senate sponsors include: Senators Allard, Bayh, Breaux, Bunning, Chambliss, Collins, Cornyn, Craig, DeWine, Feinstein, Graham, Grassley, Hagel, Hutchison, Inhofe, Kyl, Landrieu, Lieberman, Lincoln, Lott, McCain, Miller, Smith, Snowe, Stevens, and Wyden.