STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.
On S.J. Res. 3, a Proposed Victims' Rights Amendment
April 27, 2000

We are here today to discuss two matters that I have cared about for a great many years. The first is crime—more specifically, the victims of violent crime. The second is the Constitution of the United States.

I have devoted most of my life here in the Senate to both the plight of crime victims and the preservation of our constitutional liberties. That is why I have thought long and hard about amending the Constitution to guarantee the victims of crime the elemental rights that they deserve, but too often are denied.

Time and again, I wrote and supported many statutory protections for victims. To cite just a few examples:

• The **1990 Victims Bill of Rights** gave victims a number of important procedural rights, including the right to notice of court proceedings, the right to confer with the prosecutor, and the right to information about the conviction, sentencing, imprisonment, and release of the offender.

• **The 1994 Biden crime law:**

- gave federal victims of sexual and child abuse the right to mandatory restitution;
- gave victims of violent crimes and sexual abuse the right to be heard at the sentencing of their assailants;
- provided special court-appointed advocates for child victims of crime;
- and it also included the piece of legislation closest to my heart: the **Violence Against Women Act** , which provided ground-breaking and sweeping assistance to victims of family violence and sexual assault—and which, I might add, needs to be reauthorized this year through my Violence Against Women Act II bill, which has 46 cosponsors.

• **The 1996 Anti-Terrorism Act** included Hatch-Biden provisions guaranteeing mandatory restitution to all victims of violent federal crimes;

• And, now, I am pleased to support—and urge all of you to support—a constitutional amendment to protect victims' rights.

I am proud of my track record on victims' rights. But I am convinced that federal statutory guarantees are not enough. Judges are simply too quick to conclude, almost reflexively, that the defendant's constitutional rights trump the victim's mere statutory rights, even when conflict is illusory or could readily be resolved. You heard about the difficulties we had after the Oklahoma City bombing with a federal statutory approach to help the victims and their families. Senator Feinstein outlined in detail the chronology of events there, and so I will not repeat them.

But equally important, because more than 95 percent of all crimes are handled at the state level, our federal statutory rights simply do not reach the great majority of crime victims .

Regrettably, the hodge-podge of protections for victims in place at the state level is spotty and inadequate. There is no common denominator of rights that victims are guaranteed in every state of the union. As a December 1998 report by the National Institute of Justice found:

"Enactment of state laws and state constitutional amendments alone appears to be insufficient to guarantee the full provisions of victims' rights in practice."

This report found numerous instances in which victims were not afforded the rights to which they were entitled.
For example, even in states identified as providing "strong protection" to victims' rights, more than 40 percent of victims were not notified in advance of the defendant's sentencing hearing. And more than 60 percent of victims in these strong-protection states did not receive notice of a defendant's pre-trial release.

And so, I have come to the conclusion that it is time to write a basic charter of victims' rights into our Constitution setting a national, uniform baseline of rights for all victims of violent crimes.

Now, one of reasons there were more than 60 drafts of this constitutional amendment is because I insisted on a number of basic changes before I would agree to support it. And with the help of Professor Larry Tribe, I proposed these changes, and the sponsors accepted them.

My three key specific "principles" for drafting the language of the amendment were as follows:

Principle No. 1 : The amendment must set out the specific rights to be accorded constitutional status—the core of which should be rights of participation. Victims should be entitled to the following rights of participation :

• the right to be informed about, and not excluded from, any public proceedings involving the crime;
• the right to make a statement to the court about bail, the acceptance of a plea, and sentencing;
• the right to be informed about, and to participate in, parole proceedings to the same extent as the convicted offender; and
• the right to be informed of an escape or release from custody.

Principle No. 2 : The amendment must not unintentionally hamstring criminal prosecutions. We cannot forget: the best thing for victims is to catch and convict the bad guys; we have to make sure that nothing in the amendment would make that job more difficult.

Principle No. 3 : The amendment must not abridge the rights of the accused. The protections in our Constitution for the accused—such as the right to counsel, the right to a jury of one's peers, and the right against self-incrimination—are there, above all, so that our system does not convict an innocent person. Locking up an innocent person benefits no one—except the guilty.

Let me describe for you a few of the changes on which I insisted, and which I believe makes

this an amendment everyone can and should support:

• Originally, the constitutional amendment would have covered the victims of all crimes. But prosecutors worried that the extension of rights to non-violent crimes—particularly those crimes affecting massive numbers of victims, such as may be the case with mail fraud or environmental crimes—would backfire, making it too difficult, too burdensome, to bring these cases.
I insisted that the amendment be limited to the victims of violent crimes, and that change was made.

• Earlier drafts of the amendment gave victims the right to **"a final disposition of the trial proceedings free from unreasonable delay."** Prosecutors believed that this could allow victims to force them to proceed to trial before they are prepared.

Defense lawyers believed that the language created the risk that the defendant might be forced to proceed to trial without sufficient time to prepare a defense. In other words, this language would have made it both more difficult for prosecutors to get convictions and easier for those defendants who are convicted to overturn their convictions on appeal.

We want to make sure—above all—that we get the right criminal, and that we don't convict an innocent person. And we also want to make sure that the great police power of the government is not exercised in heavy-handed, over-reaching ways that threaten the constitutional liberties of all of us.

And so I insisted on modifying that language so that victims have the right **"to consideration of the interest of the victim that any trial be free from unreasonable delay."**

This is an important change. This means—in plain English—that before granting a third, fourth, or fifth continuance, judges in every state—from Delaware to Utah to California—must take into account the inconvenience and hardship to a victim and must proceed with the trial unless there is a good reason to wait.

What this does not mean is that judges must push lawyers to try cases before they're ready.

• Next change: prosecutors and others worried that with the old drafts, a defendant could withdraw his plea or a judge could be forced to throw out a sentence after it had been accepted, jeopardizing the government's ability to get a conviction of guilty defendants.

I insisted on new language that makes it clear that nothing in the amendment provides grounds to overturn a sentence or negotiated plea.

• Finally, I was concerned with earlier drafts that the amendment could be perceived as giving a victim's rights a higher constitutional standing than those of the criminal defendant—in other words, that victims' rights would be perceived as trumping defendants' rights. Section 2 of an earlier draft stated that nothing in the amendment would **"provide grounds for the accused or convicted offender to obtain any form of relief."**

I insisted that we change that language, and with the help of Professor Tribe, we redrafted Section 2 and removed that restriction on the rights of the defendant.

While the language is clear that nothing in the amendment itself gives rise to a claim of damages against the United States, a State, a political subdivision, or a public officer or employee, at the same time, it does nothing to bar defendants from obtaining relief for violations of their own constitutional rights.

And let me comment further about the rights of the accused—an issue that I know gives some of you pause about this amendment. I have spent my entire career in the U.S. Senate looking out for the rights of the criminal defendant. There is an obvious and natural tension in the system between protecting the rights of the criminal defendant and ensuring that law enforcement is effective, and I have always worked to achieve a balance between these competing interests.

I say to you that this constitutional amendment, with the changes upon which I have insisted, strikes that balance. Judges will have the power under this amendment to strike a balance.

I keep hearing critics of the amendment say that defendants' rights will not be adequately protected if this amendment becomes part of the fabric of our Constitution.

For example, we heard testimony before the Judiciary Committee and statements on the Senate floor giving examples of how judges routinely—almost reflexively—exclude victims from the courtroom when they are potential witnesses in the case, whether it be at trial or at sentencing. Critics of the amendment contend that maybe that is how it should be, and they complain that the amendment would change that presumption of exclusion.

These critics argue that the presence of victim-witnesses at trial will undermine the defendant's right to a fair trial by giving the victims the opportunity to observe the other witnesses testify and tailor their testimony accordingly.

I submit to you that that is not as it should be. That is not how it needs to be. The witness sequestration rule is a prophylactic measure rather than a constitutional imperative. The purpose of the rule can be accomplished through defense cross-examination of fact witnesses, defense argument about the opportunity to tailor, and jury instructions, without categorically excluding victims from the trial.

There is nothing that remarkable about the scenario of one witness having the opportunity to listen to the testimony of others: the defendant who is a witness has that opportunity. And the defendant who is a witness is also open to cross-examination and argument by the prosecutor that he had the opportunity to tailor his testimony.

Just last month, the Supreme Court ruled in a case called *Portuondo v. Agard* , that despite the fact that a defendant has the constitutional right to be present at his trial, the prosecutor was entitled to comment in her closing argument on the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony. This same type of argument would be available in cases where the victim-witness is present during the trial.

The constitutional amendment takes away nothing from the rights of the defendant. If the defendant's constitutional rights actually conflict with the participatory rights the amendment

would guarantee the victim—and I submit to you that these conflicts would be few and far between—the judge is permitted under this amendment to balance these competing interests and grant exceptions where necessary.

Let me repeat: a constitutional amendment for victims does not mean that victims' rights will take precedence over defendants' rights.

Both the criminal defendant and the victim can and should have the chance to participate at trial and at other related public proceedings. There should be a balance. This amendment permits courts to balance.

A constitutional amendment is needed to set a national floor of rights for all victims of violent crimes. In every state—as well as in the federal system—the doors of the criminal justice system must be opened to victims—to make sure that they are meaningful participants, and not just spectators, in a system that has for too long kept them on the outside looking in.

With a victims' constitutional amendment, we will be telling prosecutors and judges, loud and clear: victims must be respected and included. They have rights— constitutional rights—that must be taken into account during the entire case.

I believe that the contradiction that many people see between the rights of defendants and the rights of victims is a false one. Our Constitution is not a zero-sum game. We do not diminish the rights of defendants by recognizing the rights of victims.

And that is why I cosponsored this amendment. This amendment will give the victims of crime a voice and a measure of dignity and respect in the criminal justice process.