A Brief Rejoinder to the "Briefing on Victims' Rights Amendment"
Hosted by the CATO Institute and the American Civil Liberties Union
April 18, 2000

In the opinion of two supporters of S. J. Res. 3, the Crime Victims' Rights Amendment attending this briefing (Marlene Young and John Stein of the National Organization for Victim Assistance) the panel members expressing their opposition to the Amendment were uniformly serious, articulate, and wrong.

The following is a summary of some of the arguments they made (as best we understood them), with what we believe are accurate corrections:

Allegation 1: The worthwhile values contained in the Amendment can, and therefore, should be advanced through statutes. As evidence, look at the major societal reforms caused by enactment of such statutes as the Civil Rights and Voting Rights Acts of the 1960s.

Answer: The examples cited prove precisely the opposite of the allegation. Those civil rights statutes have nationwide force because they set about to implement specific provisions of the U.S. Constitution. Any Federal statute seeking to implement victims' rights would protect merely the one or two percent of crime victims whose cases fall under Federal jurisdiction – leaving unaffected the 98-plus percent of America's crime victims whose cases fall under state jurisdiction. Until the just claims of all American victims have Constitutional recognition, no Federal statute will have any influence on how average victims are treated.

Allegation 2: There is terrible uncertainty over who would be protected under the Amendment. Would it be just the clerk who was robbed at gunpoint or also the customers at the store?

Answer: There is no uncertainty. The Amendment opens, "SECTION 1. A victim of a crime of violence, as these terms may be defined by law . . ." Congress has written such definitions before and can be trusted to do so again. In the example cited, Congress could exclude mere witnesses to a crime, or could include those who were endangered during a crime. In short, there are no uncertainties that Congress and the courts cannot resolve.

Allegation 3: It is true that today's legal culture has been proven lax in enforcing existing victim rights statutes. That will change in time. Look at the suffragette movement, which took 60 years to see its goals attained. That's what we must tolerate in our democracy.

Answer: It is deplorable that fundamental human rights, such as those now belonging to African-Americans and women, took so long to find their way into the U.S. Constitution. That is an unworthy "tradition" that Congress and the States can and should reject as they consider crime victims' rights.

Allegation 4: The four examples of victims' rights being ignored or denied in the Senate Judiciary Committee's Majority Report were all, in the first instance, isolated and extraordinary cases, and in the second, examples of wrongs that can be cured by statutes.

Answer: These cases were examples of countless cases witnessed by victim advocates – and the same panelist effectively conceded that fact by granting the validity of research that such violations remain commonplace today. So if it is not these case examples that would illustrate the insufficiency of statutes today, it would be other, equally disturbing ones.

Allegation 5: A panelist from Victim Services in New York said that they serve a large, low-income, minority victim population – and they know that many of its victim clients are also at times criminal defendants. So that agency believes it represents its clients best by asserting that victims' rights should always be subordinate to defendants' rights.

Answer: It distresses us that a victim service agency would publicly suppress its advocacy in behalf of its clients in service to the interests of their probable assailants. It bears recalling two critical research findings: the very minority populations whom the panelist "spoke" for are the most vulnerable to violent crime; and in the porous enforcement of existing victim rights laws, the people least likely to have their rights enforced are the very same minority-group victims. Further, leaders in programs serving similar populations – in Los Angeles, Atlanta, and Miami, as examples – strongly disagree with the panelist's views.

Allegation 6: There are inevitable conflicts between victims and defendants. All victim/witnesses in a trial should properly be excluded from the courtroom to avoid prejudice.

Answer: The "great laboratories of the states" have proven the falsity of this allegation. Unlike New York, the majority of states now permit victims in the courtroom, and out of hundreds of thousands of cases tried in this manner, there has never arisen one such claim of "prejudice." Also, the panelist failed to point out that it is normal for prosecutors to bring in his or her witnesses for a pre-trial conference, so typically most of them know what the others' testimony will be. "Tailoring" their testimony to defense statements is also a near-impossibility, since the prosecution case is put on first, with the victim usually an early witness. The defendant, in contrast, with the greatest interest in tailoring testimony, has every constitutionally-protected opportunity to do so.

Allegation 7: Battered women who are convicted of taking retaliatory action against their abusers could be endangered if their "victims" are informed of their release date, as other, unambiguous victims would be.

Answer: That is true, which is why the sponsors wrote in this clause: "Exceptions to the rights

established by this article may be created only when necessary to achieve a compelling interest." The domestic violence example cited is the most common in the extensive legislative record as to why an explicit "exceptions" clause is needed – and will be used to protect their interests.

Allegation 8: The problem being addressed is bureaucratic, not legal: prosecutors are too overburdened to meet their responsibilities to victims.

Answer: No – when a "bureaucratic" problem results in the wholesale denial of victims' statutory rights, it becomes very much a legal problem, too. As Professors Laurence Tribe and Paul Cassell have written, "Rules to assist victims frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's right – even when those rights are not genuinely threatened." It is at the mundane, bureaucratic bowels of the justice system where unappealable harm is inflicted on victims – unappelable because victims have been denied standing to assert their own rights.

Allegation 9: There is vagueness in S. J. Res. 3, as in the right "to consideration of the interest of the victim that any trial be free from *unreasonable delay*."

Answer: This example is the soul of clarity as compared with such Constitutional hallmarks as "due process of law." By its plain terms, no victim could successfully invoke it when delay was needed by either side for case preparation – until the delays are no longer needed but rather had become egregiously dilatory. It is that outrage that deserves Constitutional censure.

Allegation 10: If the Amendment were adopted, Congress would likely turn its back on any future victim concerns, ignoring the ever-present need for more resources to implement victim rights and services.

Answer: Congress would likely do no such thing. On the contrary, most likely, it would strengthen its support of victim compensation and assistance, and would appropriate modest resources to help states and localities come into compliance with the Article – just as Congress has supported compliance efforts with other citizens' rights, including those that were expanded by the Warren Court. We say "modest" compliance assistance regarding the Crime Victims' Rights Amendment because in communities which have fully complied with similar mandates in state constitutions, the costs to government have been negligible.

Allegation 11: The Amendment isn't needed: there are no appellate cases showing that defendants' Constitutional rights have effectively nullified victims' rights. Its only effect would be to trammel on the existing Constitutional rights of defendants.

Answer: The panelists collectively did not dispute major research findings (National Institute of Justice, "Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims," 1996) showing the weak enforcement of existing victims' rights laws – even in states with "strong" statutes buttressed by a state constitutional amendment. In fact, the first panelist conceded these facts while arguing that these should be treated as tolerable infractions of the law (*see* Answer to Allegation 3). These denials of victims' rights routinely occur at a level below court challenge and appellate review (*see* Answer to Allegation 8). So the question is not, where are the appellate cases showing that defendants' rights "trump" victims' statutory and state constitutional rights, but rather, where are the cases showing that victim rights have unfairly harmed defendants' rights?

The answer to both is that humanity of both the victim and the defendant can and should be Constitutionally honored and protected in our justice system – as indeed they were at our Nation's founding and for nearly a century thereafter – when victims were the moving party, not the bureaucracies of law enforcement and prosecution, which arose much later.