

**STATEMENT  
OF  
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BEFORE  
THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
CONCERNING  
A CONSTITUTIONAL AMENDMENT PROTECTING  
THE RIGHTS OF CRIME VICTIMS  
ON  
APRIL 16, 1997**

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Mr. Chairman and Distinguished Members of the Committee, I am pleased to be here today to discuss the pressing need to approve a constitutional amendment protecting the rights of crime victims.

My background in this area is as follows. I am a Professor of Law at the University of Utah College of Law, where I teach criminal procedure among other subjects. I have written and lectured on the subjects of crime victims rights. I serve on the executive board of the National Victim Constitutional Amendment Network, an organization devoted to bringing constitutional protection to crime victims across the country.

I also a member of the Utah Council on Victims, the statewide organization in Utah responsible for monitoring the treatment of crime victims in the courts of our state. In 1994, I was chair of the Constitutional Amendment Subcommittee of the Council, where I helped to draft and obtain passage of the Utah Victims Rights Amendment. Since the passage of the Amendment, I have been involved in efforts to insure that the rights it confers are enforced. I also currently represent 89 victims of the Oklahoma City bombing in their efforts to obtain the right to watch court proceedings, a subject I will discuss shortly. I have also represented crime victims in several cases attempting to enforce their rights.

By way of further background, from 1988 to 1991, I served as an Assistant United States Attorney in the Eastern District of Virginia, where I was responsible for prosecuting federal criminal cases and working with the victims in those cases. From 1986 to 1988, I served as an Associate Deputy Attorney General at the United States Department of Justice, handling various matters relating to criminal justice. I have also served as a law clerk to then-Judge Antonin Scalia and Chief Justice Warren E. Burger. I graduated from Stanford Law School in 1984, where I served as President of the *Stanford Law Review*.

I have previously provided extensive testimony to this Committee supporting the Victims Rights Amendment, which will not be repeated here. In my testimony today, I will address the question of why a *constitutional* provision is required to provide effective enforcement to the rights of crime. On this subject, I have direct experience in litigating victims rights in both federal and state courts. It is clear from that

experience that many of the problems that confront crime victims arise on the "front lines" of the criminal justice system and never find their way into published appellate court decisions. It is therefore particularly important for this Committee to be apprised of how crime victims are treated in the hurly-burly, everyday world of the criminal system, not in the more rarified air of appellate litigation. Unfortunately, my experience with crime victims leads me to conclude that nothing short of a constitutional amendment will protect their rights.

In my testimony today, I will cover three points. First, I will review the victim's litigation in the Oklahoma City bombing case. Second, I will recount other victim's litigation I have been involved with. Finally, I review two letters from law professors and practitioners that have apparently been sent to the Committee.

## **I. The Oklahoma City Bombing Case**

The Oklahoma City bombing case provides a perfect illustration of why a constitutional amendment is required to protect the rights of crime victims. As this Committee is well aware, Congress recently passed and the President signed a statute protecting the rights of the bombing victims to observe the trial and provide impact testimony at sentencing. On the surface, then, it would appear that their rights have been protected. In fact, the reality is that today in Denver and Oklahoma City many of these victims will not observe court proceedings. Their rights have been reduced to paper promises because they are not constitutionally protected.

To support this strong claim, I will first present a specific chronology of the events surrounding the case, limiting my discussion to the treatment of the victim's right to attend court proceedings. I hope that this dry recital of the legal twists and turns will not conceal the emotional roller coaster these victims have been forced to ride.

### *A. Proceedings in the Case.*

As this Committee is well aware, defendants Timothy McVeigh and Terry Nichols have been charged with perpetrating perhaps the most serious act of terrorist violence in our nation's history: the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, which killed 168 people and injured hundreds more. During a pre-trial hearing on a motion to suppress on June 26, 1996, the District Court *sua sponte* issued a ruling precluding any victim who may be called upon at sentencing hearing to testify about the bombing's impact from observing any proceeding in this case. The court based its ruling on Rule 615 of the Federal Rules of Evidence - the so-called "rule on witnesses." It announced: "I think it is appropriate to invoke Rule 615 now in connection with this hearing; but also, it will be in effect continuously. My view of Rule 615 is that no witness should be present during any of the proceedings; and by that, I mean unless it's been recognized and agreed to, no witness who may appear in any pretrial hearings, hearings on motions, trial, or any sentencing hearing."

The Department of Justice immediately asked that the court exempt from this ruling victims of the bombing who would not be "factual witnesses at trial," but who might testify at a sentencing hearing about "the impact on their lives" of the bombing. The court denied the United States' request, "invoke[d] the rule as announced," and gave the victims who were then in the courtroom (surviving family members of those killed in those blast or those who were themselves injured) until the conclusion of the lunchbreak to choose whether they would watch the rest of the proceedings or leave and remain eligible to be a sentencing witness. In the scant time given to make this wrenching decision, some of the witnesses opted to watch the proceedings; others decided to leave Denver to remain eligible to provide impact testimony.

On July 29, 1996, the Department of Justice asked the district court to reconsider its order excluding victim-witnesses. The Department explained that the court was without power to exclude the victims under Rule 615, because the rule had been superseded by the Victims' Bill of Rights. Defendants McVeigh and Nichols opposed the Government's motion for reconsideration and the United States filed a reply.

On September 30, 1996, 35 victims and survivors of the bombing filed a motion asserting their own

standing to raise their rights under the Victims' Bill of Rights and, in the alternative, seeking leave to file a brief on the issue as *amici curiae*. The motion was accompanied by a memorandum arguing that the victims were entitled to observe the trial and testify at sentencing. The victims noted that the district court had apparently overlooked the Victims Bill of Rights, which guaranteed victims (among other rights) the "right to be present at all public court proceedings, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." The victims also noted that in 1996 Congress had passed, as part of the Anti-Terrorism Bill, the Closed Circuit Proceedings for Victims Provision. The provision reads: "[I]n order to permit victims of crime to watch criminal trial proceedings, . . . the court shall order closed circuit television of the proceedings . . . for viewing by such persons the court determines have a compelling interest in doing so." The victims also relied on a First Amendment right of access to court proceedings.

On October 4, 1996, the District Court held a hearing on the issue of excluding victim witnesses. The court first denied the victims' motion asserting standing to present their own claims, but granted their motion to file their brief as *amici curiae*. After hearing argument by the Department of Justice and by the defendants, the Court then denied the motion for reconsideration. It concluded that victims present during court proceedings would not be able to separate the "experience of trial" from "the experience of loss from the conduct in question," and, thus, their testimony at a sentencing hearing would be inadmissible. Unlike the original June 26 exclusion ruling, which was explicitly premised on Rule 615, the October 4 ruling was more ambiguous, alluding to concerns under the Constitution, the common law, and the rules of evidence:

The Supreme Court not so long ago ruled that in state court proceedings in capital cases, the introduction of victim impact testimony was a violation of the Constitution and the Eighth Amendment. That ruling has been changed. But . . . it's not at all clear as to how it has been changed. . . .

[The victims place] great reliance on the Congress and its legislative purpose and language of the [Victims Rights] Act. And reference is made here that Congress did not pass a defendant's Bill of Rights.

Of course, it's not necessary for the Congress to pass a defendant's Bill of Rights. That's what the Constitution does in the Bill of Rights amendments in the Constitution. . . .

And the argument is made as a legalistic argument [by the victims] . . . that this Congressional enactment [the Victims' Bill of Rights, 42 U.S.C. §10606(b)] was subsequent to Rule 615 and, therefore, the Court should interpret Rule 615 as having been in some fashion amended by this statute.

Well, you know, Rule 615, the enactment of the Federal Rules of Evidence, is not the first time that courts have excluded witnesses under a sequestration order. That clearly predated the Federal Rules of Evidence, and I think has been a part of the common law of evidence since there has been a common law of evidence. And it goes back through history beyond the history of the republic. . . .

And I adhere to my ruling previously made and deny the motion for reconsideration.

The victims then filed a petition for writ of mandamus in the U.S. Court of Appeals for the Tenth Circuit seeking review of the district court's ruling. The victims also took an appeal from the ruling. Serving along with me as co-counsel on that appeal have been Robert F. Hoyt, Arnon D. Siegel, and Karan K. Bhatia of the Washington, D.C. law firm of Wilmer, Cutler and Pickering, and as local counsel Sean Kendall, Esq., of Boulder, Colorado. At the same time, the Department of Justice also appealed the ruling. The Tenth Circuit consolidated all of the proceedings and granted expedited review. An *amicus* brief supporting the victims was filed by the National Victims' Center, Mothers Against Drunk Driving, the National Victims' Constitutional Amendment Network, Justice for Surviving Victims, Inc., Concerns of Police Survivors, Inc., and Citizens for Law and Order. A separate supporting *amicus* brief was filed by the Criminal Justice Legal

Foundation.

On February 4, 1997, a panel of the Tenth Circuit rejected "without oral argument" both the victims' and the United States' appeals on jurisdictional grounds. With respect to the victims' appeal, the court concluded that the victims lacked "standing" under Article III of the Constitution because they had no "legally protected interest" to be present at the trial and consequently had suffered no "injury in fact" from their exclusion.

The panel held that the Victims' Bill of Rights - guaranteeing victims the "right to be present at all public court proceedings related to the offense" - created no legally protected interest for three reasons: (1) it only obligates the Department of Justice to use its "best efforts" to secure these rights, and did not bind the judiciary; (2) it qualifies the victim's right to be present in cases where "the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial"; and (3) it contains a provision precluding a "cause of action" for the statute's violation, which (the panel concluded) strips victims not only of the right to sue for money damages but also standing to raise any of the rights granted therein.

The panel did not discuss the victims' rights under the Closed Circuit Proceedings for Victims Provision, except to observe in a footnote that "[t]his statute does not materially impact our construction and application of [the Victims' Bill of Rights], or our standing analysis generally."

Finally, with respect to the victims' First Amendment rights, the panel concluded that the "structural interests" served by the First Amendment right of access to criminal trials recognized in *Richmond Newspapers, Inc. v. Virginia*, do not embrace a victim's right of access. Instead, the panel held, the interests served by the right of access "are satisfied by . . . a publicly open trial, regardless of the personal attendance of any particular individual."

The Tenth Circuit also rejected, on jurisdictional grounds, the appeal by the United States. The court concluded that the statute authorizing interlocutory appeals by the government did not extend to witness sequestration orders. With respect to authorization for appeals of "final" judgments, the court concluded that the "collateral order" doctrine did not apply. While the order excluding the victims might appear to be collateral to and separate from the proceedings, the order was "not independent from the ongoing criminal prosecution out of which the government's appeal arises." Accordingly, the court found that it lacked jurisdictional authorization to review the government's appeal.

The Department of Justice had also sought mandamus review of the issue of the exclusion of the victims. The court noted that mandamus review was available for criminal rulings, particularly those that were "egregious, unauthorized, and prejudicial." However, without elaboration, the court held that "we are unpersuaded this case present the appropriate vehicle to permit such review."

Both the victims and the United States then filed petitions for review by the entire Tenth Circuit. The victims noted that the Closed Circuit provision was designed, as the Senate sponsor explained, to "allow and actually provide for closed circuit TV viewing of the trial proceedings in the Oklahoma bombing case." The panel, however, never considered the victims' standing under this provision. The victims sought rehearing on that point and on their standing to raise claims under the Victims Bill of Rights. The victims noted that the only authority cited by the panel to support its conclusion was *United States v. Kelley*, which held that victims lacked standing to appeal unfavorable restitution orders under the Victim and Witness Protection Act. The victims observed that the panel was apparently unaware that *Kelley* was effectively overruled by Congress in the very same law that adopted the Closed Circuit Proceedings for Victims provision. In the Antiterrorism and Effective Death Penalty Act of 1996, Congress rejected the court's decision on restitution, explicitly authorizing victims to collect on restitution orders.

Forty-nine members of Congress, including several members of this Committee, also filed a brief in support of the bombing victims. The brief asked for rehearing of the question of victim standing under the Victims Bill of Rights, observing that Congress had passed the provisions to "establish a series of victims rights." If

the panel decision was left in place, the congressional brief warned, "the victims of federal crimes will never be heard in court concerning violations of *their* rights under the *Victims* Bill of Rights."

The petitions were also supported by an *amicus* brief filed by all six of the Attorneys General within the Tenth Circuit. The brief explained that the district court's order was creating "an 'important problem' for the administration of justice within the Tenth Circuit." The Attorneys General explained that, "by refusing the review the district court order, the panel has left in place federal authority for a defendant to cite that allowing surviving family members to attend the guilt phase and later testify at sentencing violates witness sequestration rules, and perhaps constitutional principles." As a result, the Attorneys General explained:

surviving family members of homicide victims and other serious crimes are now faced with a terrible dilemma. They can attend the trial of the accused, but only at the expense of giving him an argument to raise on appeal that could conceivably lead to reversal of his sentence. Alternatively, they can avoid giving him that issue, but only by forfeiting their right to attend the trial or by declining to provide impact testimony. Such a cruel choice should not be thrust upon those who have already suffered a terrible loss . . . .

The Attorneys General also warned that "unnecessary litigation can be expected in a number of serious criminal cases" unless the district court's order was reviewed and reversed.

The National Victim Center, Mothers Against Drunk Driving, the National Victims Constitutional Amendment Network, and several other leading victims organizations also filed an *amicus* brief seeking rehearing. The brief noted that the panel decision "will now preclude anyone from exercising any rights afforded under the Victims' Bill of Rights and has basically removed it from the books, without any significant likelihood that the issue will arise again."

Despite the pleas from the victims, the Department of Justice, 49 members of Congress, all six Attorneys General in the Tenth Circuit, and a number of the nation's leading crime victims organizations, the Tenth Circuit refused to even rehear the case in an order entered March 11, 1997, two judges dissenting.

In the meantime, the victims, supported by the Oklahoma Attorney General's Office, sought remedial legislation in Congress. On March 6, 1997, the House Subcommittee on Crime met and approved H.R. 924, the Victim Allocution Clarification Act of 1997. The Act was designed to clarify the rights of sentencing witnesses to observe trials and provide impact testimony by providing that the judges could not sequester from the trial victims whose only role in the proceedings was to provide impact testimony at sentencing. The bill also specifically applied to "pending" cases, such as the Oklahoma City bombing case. On March 12, 1997, the full House Judiciary Committee favorably reported the bill.

On March 18, 1997, the full House considered H.R. 924. Twenty-five Attorneys General from around the country submitted a letter in support of the bill, observing that the district court ruling, "if left uncorrected, will deprive numerous family members of victims the chance to observe the trial and learn the facts surrounding the bombing, or worse, force them to forego the right to testify in the event of a penalty hearing on the impact of this horrendous crime and the value of their loved ones." Representative McCollum, a sponsor of the legislation, observed the painful choice that the district court's ruling was forcing on the victims:

As one of the Oklahoma City survivors put it, a man who lost one eye in the explosion, "It's not going to affect our testimony at all. I have a hole in my head that's covered with titanium. I nearly lost my hand. I think about it every minute of the day." That man, incidentally, is choosing to watch the trial and to forfeit his right to make a victim impact statement. Victims should not have to make that choice.

Representative Lucas also reported similar harmful effect on victims of the bombing:

For many victims, the healing process is two fold. These men and women desperately want to

know what activities led to this terrorist attack. In the words of one victim, "When I saw my husband's body, I began a quest for information as to exactly what happened. The culmination of that quest, I hope and pray, will be hearing the evidence at trial." This woman, and many others like her also want the opportunity to express the pain and devastation this act has brought to their lives. They want the chance for their story to be heard; to know they played an important part in ensuring a punishment equal to the crime. They want, and need, to express their loss in their own words.

There was no substantive opposition to the proposal in the reported floor debate, although two representatives rose to express concern about the application of the amendment to pending cases. The amendment passed by a vote of 414 to 13.

The next day, the Senate considered the measure. Senator Nickles noted that the Oklahoma City bombing victims had been given two choices: "They can view the trial in Denver or in Oklahoma City, or they could participate in the sentencing phase of the trial. . . . [M]any wanted to do both. They should not have to make that decision." Similarly, Senator Leahy said that clarification was needed to avoid thrusting "this painful choice upon victims in this country." The Act passed the Senate by unanimous consent.

The next day, March 20, 1997, President Clinton signed the measure into law, explaining that "when someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in."

On March 21, 1997, the victims filed a motion with the district court in Denver alerting the court to the new law. The motion explained that, in light of the new law, the court's earlier sequestration order was invalid. The victims also sought a hearing on the application of the new law to the proceedings at hand.

On March 25, 1997, the district court entered a new order on victim-impact witness sequestration. The court noted that constitutional questions had arisen about the act during the congressional debates. However, "any motions raising constitutional questions about this legislation would be premature and would present issues that are not now ripe for decision." Moreover, the court held in a critical passage:

If there is a conviction, the court can protect against any prejudicial effect from victim impact witnesses' attendance at the trial, including the closed circuit telecast of the trial proceedings, by permitting voir dire of victim witnesses outside the presence of the jury before they testify. All interests, including the public interest in proceeding with Mr. McVeigh's trial, can be accommodated by construing Public Law 105-6 as simply reversing the presumption of prejudicial effect on victim impact testimony of observation of the trial proceedings. Thus, the distinction between the effects of the crime and conviction and any effects from the adjudicative process will still be preserved if this court now reverses the exclusionary order, permits observation of the trial proceedings by potential penalty phase victim impact witnesses and reserves ruling on the admissibility of the testimony of particular witnesses who observed any part of the trial proceedings.

The district court also refused to grant the victims a hearing on the application of the new law, concluding that its ruling rendered the request "moot."

Since that ruling, the Oklahoma City victim impact witnesses have had to make a painful decision about what to do. It appears that, at this time, most of the victim impact witnesses have decided *not* to observe the trial because of ambiguities and uncertainties in the court's ruling. Because the court has noted potential constitutional problems with the law, they can attend the trial only by running an identifiable risk that their impact testimony will be excluded. The Department of Justice has apparently met with many of the impact witnesses, advised them of these substantial uncertainties, and noted that observation of the trial creates a possibility of exclusion of impact testimony.

On April 4, 1997, the victims filed a motion for clarification of the judge's order. The motion noted that

"[b]ecause of the uncertainty remaining under the Court's order, a number of the victims have been forced to give up their right to observe defendant McVeigh's trial. This chilling effect has thus rendered the Victims Rights Clarification Act of 1997 . . . for practical purposes a nullity." The motion is still pending.

*B. Lessons from the Oklahoma City Bombing Victims Litigation.*

I have recounted the details of the Oklahoma City bombing litigation in detail so that there can be no doubt about the abysmal treatment of these crime victims. Statutory protection of their rights has been tried - and has failed.

To those who doubt this claim, listen well to what the victims of the bombing - those from whom the statute was passed - have said about their painful position. One victim put her concerns about the district judge's ruling this way:

I find myself once again in a dilemma. It is of great important to me to be able to testify and at that time be allowed to finally tell my story in as complete a manner as possible. However, I find I am very fearful that either all or part of my testimony could be eliminated if I exercise my newly-given right to view the testimony in this trial. This fear comes from having no knowledge of the basis upon which you will make your decision that testimony has been impact by having view the trial or closed circuit. . . . I can assure you that there is no evidence that will be presented at trial that will remotely have the impact on me that the murder of my husband in such a violent way and living the past two years and the rest of my life without him as has had.

Another victim expresses her concerns this way:

I am confused as to the current ruling of the court regarding victim impact witnesses in the courtroom. It is my understanding that the court has ruled that an impact witness may attend the trial, but that the court would determine whether viewing any part of the trial would "materially affect" testimony. If it was found that the testimony was materially affected, the testimony would be excluded. As a potential impact witness, I would like the opportunity to attend portions of the trial and to testify as an impact witness. However, as it stands, I have to make the excruciating choice between testifying only in the sentencing phase and attending even one minute's worth of the trial

Whatever happens in the courtroom has little bearing whatsoever upon what the impact of this crime has been for me. No matter what the reasons, what the methods, what person or persons perpetrated the crime, no matter how one victim died and one survived, it changes nothing in my daily life. The only impact this crime has on me occurred two years ago at 9:02 a.m. on April 19, 1995.

I believe it is important that I attend the portions of the trial that I am able to. Doing so will let me see the evidence presented, unfiltered by the media.

These are but two of many of the victims who are not able to observe the trial. The simple fact is that, for them and most of the victim impact witnesses, the promises in the Victims Rights Clarification Act of 1997 (among other statutes) have been broken. They will *not* observe the trial of defendant Timothy McVeigh because of lingering doubts about the constitutional viability of a statute passed specifically to protect their rights. The votes of 414 members of the House, the unanimous approval in the Senate, the signature of the President - all have been insufficient to obtain for them an unequivocal right to observe the trial and provide impact testimony. For the rest of their lives, the chance to see for themselves testimony from those most knowledgeable about the terrible events of the bombing has been lost.

Not only have the victims been denied their right to observe the trial, but perhaps equally astonishing is that the fact that they have yet to be able to speak even a single word in court, through counsel, on this issue. Through counsel, the victims sought to argue in the district court that they had standing to be heard under

what is, after all, the *Victims* Bill of Rights; the district court denied them standing to be heard. In the Tenth Circuit, they sought oral argument on the merits of the district court's order excluding them; the Tenth Circuit, without argument, refused to reach the merits of their claim. The victims then sought rehearing and argument on this critical issue before the Tenth Circuit en banc, supported by 49 members of Congress and all the Attorneys General in the Tenth Circuit, among others; the Tenth Circuit refused to grant rehearing. After passage of the new Act of Congress, the victims sought to be heard before the district court on this issue of vital importance to them. The victims even were able to cite legislative history that specifically stated that the House Judiciary Committee "assumes that both the Department of Justice and victims will be heard on the issue of a victim's exclusion, should a question of their exclusion arise under this section." The district court denied their request as "moot," even though many of the victims are being forced to forfeit their right to attend because of lack of clarity in the judge's ruling.

Some might claim that this treatment of the Oklahoma City bombing victims should be written off as atypical. However, there is every reason to believe that the victims here have been far *more* effective in attempting to assert their rights than victims in less notorious cases. The Oklahoma City bombing victims have been mistreated while the media spotlight has been on, when the nation has been watching. The treatment of victims in forgotten courtrooms and trials is certainly no better, and in all likelihood much worse. To begin with, the Oklahoma City bombing victims have had five lawyers working to press their claims in court - a law professor familiar with victims rights, three lawyers at a prominent Washington, D.C. law firm, and a local counsel in Colorado - as well as an experienced and skilled group of lawyers from the Department of Justice. The victims' separate, private representation has been handled on a *pro bono* basis. In the normal case, it may will be impossible for victims to locate a lawyer willing to pursue complex and unsettled issues about their rights without compensation. Moreover, it must be remembered that crime most often strikes those in perhaps the worst position to retain counsel. Crime disproportionately victimizes the poorest members of our society. Victimization rates for teenagers and young adults, for households with less than \$7,500 annual income, and for persons living in inner cities are among the highest for any demographic groups. Moreover, litigating claims concerning exclusion from the courtroom or other victims rights promises to be quite difficult. For example, a victim may not learn that she will be excluded until the day the trial starts. Filing timely appellate actions in such circumstances promises to be practically impossible. It should therefore come as little surprise that the Oklahoma City case was the first case in which victims sought federal appellate court review of their rights under the Victims Bill of Rights, even though that statute was passed in 1990.

The undeniable, and unfortunate, result of that litigation has been to establish - as the only reported federal appellate ruling - a precedent that will make effective enforcement of the federal victims rights statutes quite difficult. It is now the law of the Tenth Circuit that victims lack "standing" to be heard on issues surrounding the Victims Bill of Rights and the Closed Circuit Broadcasting for Victims Provision and that the Department of Justice may not take an appeal for the victims under either of those statutes. For all practical purposes, the treatment of crime victims rights in federal court in Colorado, Kansas, New Mexico, Oklahoma, and Wyoming has been remitted to the unreviewable discretion of individual federal district court judges. The fate of the Oklahoma City victims does not inspire confidence that all victims rights will be fully enforced in the future. Even in other Circuits, the Tenth Circuit ruling, while not controlling, could well have persuasive value. If so, the Victims Bill of Rights will become a dead letter.

The Oklahoma City bombing victims would never have suffered these travails if the Victims Rights Amendment had been the law of the land. First, the victims would never have been subject to sequestration. The Amendment guarantees all victims the constitutional right "not to be excluded from all public proceedings relating to the crime." This would have prevented the sequestration order from being entered in the first place. Moreover, the Amendment affords victims the right "[t]o be heard, if present, at a public . . . trial proceeding to determine a . . . sentence . . ." This would have protected the victims' right to provide impact testimony. Finally, the Amendment provides that "the victim shall have standing to assert the rights established by this article." This would have guaranteed the attorneys representing the victims the opportunity to be heard at critical points in the proceedings.

Tragically, it is probably too late in the day to do anything that will restore the rights of the Oklahoma City bombing victims to observe the trial and provide impact testimony. Their mistreatment by the system will remain one undeniable legacy of that case. But what happened to them should never, ever happen again to crime victims in this country. This case provides compelling evidence that a constitutional amendment protecting crime victims is desperately needed.

## **II. Treatment of Victims in Other Cases.**

I have spent so much time discussing the Oklahoma City bombing case because of its notoriety and because of the specific congressional interest in treatment of the victims there. As the Committee is aware, in many other cases around the country victims have been mistreated. What follows are vignettes from a few cases where I have personally represented victims of crime. They are not intended to be "worst case" examples. Instead, they reflect my experience in the last several years in attempting to see that the rights of victims are respected in the criminal justice process. In each of these cases, it is clear that other-than-constitutional protection for victims rights leaves much to be desired.

### *A. Johnson v. Rodriguez.*

In *Johnson v. Rodriguez*, Robert Tier, Robert Hoyt and I represent the American Alliance for Rights and Responsibilities, the National Victim Center, the National Organization for Victim Assistance, and other crime victims' organizations attempting to defend the rights of crime victims to provide letters to parole officials in Texas. The facts are as follows: Daniel Johnson and various inmates in the Texas prison system have challenged the constitutionality of a Texas statute requiring the Texas Board of Pardons and Parole to (1) notify crime victims that the perpetrator of a crime against them is being considered for parole, (2) allow those victims to submit a written statement, and (3) consider such statements in determining whether or not to recommend parole. As is the case with all information obtained by the Board in connection with a parole decision, these victim statements are classified as "confidential and privileged" and are not disclosed to inmates.

A federal district court determined that this statutory scheme violated the Equal Protection Clause of the Fourteenth Amendment and enjoined the Board from accepting or considering victim statements for any purpose when making parole decisions. The district court acknowledged that the standard of review for the challenge was only whether the statutory scheme was "rationally related to a legitimate state interest . . . ." However, the court found the authorization for protest letters failed even that minimal scrutiny. The district court concluded that "inmates who receive protest letters of any kind are treated differently from those who do not. Obviously, an inmate's potential for protest letters is unpredictable; this fact, coupled with the unpredictability of the contents of the letters, leads to disparate results among prisoners." The district court also determined that "the statutes requiring the identity of victims and the contents of parole files be kept confidential each separately meet the rational scrutiny test; however, when these statute operate in combination with the statutes allowing protest statements to be received and considered without rebuttal, equal protection violations occur."

The Texas Department of Corrections took an appeal to the Fifth Circuit, and we filed a supporting *amicus* brief. We noted that, along with expanding victim involvement in the criminal justice system, an increasing problem of victim and witness intimidation had emerged. Because of such concerns, many states deny prisoners access to a victim impact statement. As a Texas parole board employee explained, without some protection for the letter "the victims would be in such fear that they would not perhaps write protest letters." Victims would justifiably be concerned about the possibility of physical abuse and even death at the hands prisoner denied early release. The district court's opinion acknowledged these concerns and cited no conflicting or contradictory evidence. Yet, without explanation, the district court simply determined that it was irrational for the Texas legislature to give greater weight to the victims' concern about personal security than to the inmate's desire to have access to the information. In November 1996, the Fifth Circuit held oral argument on the question. A decision is pending.

## B. *State v. Beltran-Felix*

In *State v. Beltran-Felix*, I represented a woman who is the mother of three children and the grandmother of five. Three years ago, Gloria was sodomized and raped during the armed robbery of a store where she worked. Her co-workers, who had been bound by her attackers, were just a few feet away during the assaults. During the trial of the men who attacked her, Gloria asked permission of the judge to sit in the courtroom, a right guaranteed to her under the recently-passed Utah Victims Rights Amendment. The trial judge permitted her to watch the trial, a right that any member of the public would have. Gloria testified as a witness at trial, along with her co-workers, all of whom identified the defendants. The defendants, by the way, were apprehended with stolen property from the robbery. The defendants were convicted.

All of this is as it should be under the new state constitutional amendment. Yet one of the defendants in the case appealed to the Utah Court of Appeals, raising as his lead argument the contention that admitting the victim to trial under the Utah Victims Rights Amendment "violated the Appellant's right to Due Process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." On behalf of Gloria, the Utah Council on Victims, and a number of other law enforcement, social service, and rape victim support organizations, I filed an *amicus curiae* brief arguing that the appellant's contention was without merit. We further asked that the court of appeals to issue a definitive ruling that "prevailing law clearly permits victims in the courtroom." The Utah Court of Appeals rejecting the defendant's claim, explaining: "There is no suggestion that the critical elements of the case turned upon G.L.'s testimony, or that any of G.L.'s other testimony was revised to conform with that of the earlier witnesses."

The Court of Appeals then added the following footnote:

We are concerned our analysis may give rise to constitutional challenge every time a victim is allowed to remain in the courtroom during a criminal trial. Accordingly, we reiterate the observation made in *Rangel*, that "inconsistent statements of witnesses, whether they be by the actual victim or others, are in many cases simply a credibility factor that the finder of fact must weigh in determining the outcome." *Rangel*, 866 P.2d at 612 n. 6. Other Utah cases support this type of analysis, although none of them explicitly considered constitutional issues. *See State v. Bonza*, 72 Utah 177, 269 P. 480, 482 (1928) (finding no prejudice from trial court's refusal to exclude sister of rape victim from courtroom, noting "[t]here is no absolute right to have witnesses excluded during the progress of a trial.") . . . .

The result in *this* particular case, then, was to uphold the victim's right to attend the trial. However, the language in the footnote in the decision creates an intolerable burden on crime victims throughout Utah in future cases. As a result of the court's admonition, crime victims will now have to decide whether to exercise their right to attend a trial at the expense of giving the defendant an issue to raise on appeal and to possibly even overturn his conviction. While the court's opinion suggested that successful challenges to a victim's presence would be unusual, it gave little guidance to courts and victims about when such circumstances would arise.

As I wrote after the decision, "Crime victims should not have to ponder such dilemmas. The voters of Utah overwhelmingly gave them a state constitutional right to attend trials and other public proceedings." However, the fact remains that until a further clarification is received from the Utah courts - clarification that has not been provided in several other cases as well - victims will have to struggle with this issue. The only way to clearly end this dilemma for crime victims is through a federal constitutional amendment.

## C. *State v. Burr*.

This case involved allegations of the child sexual assault against a defendant Benjamin Burr. He was acquitted of the charges, and I do not wish to revisit that question here. However, what is disturbing is the length of time involved disposing of those charges. The victim in the case, Michael, was about five years old at the time of the alleged abuse. Here are the proceedings in the case.

June 1995:

Victims' family report abuse to the proper authorities.

Nov. 3, 1995:

Defendant arraigned.

Nov. 21, 1995:

Roll call for defendant; preliminary hearing set for Dec. 19, 1995.

Dec. 19, 1995:

Victims come to court. Preliminary hearing canceled because defense counsel was considering a settlement and wanted to talk over details. New preliminary hearing set for February 8, 1996.

February 8, 1996:

Victims come to D.A.'s office for preliminary hearing. Defense attorneys call D.A. to request continuance. D.A.'s office rejects in view of Michael's preparation to testify. Then D.A.'s office receives another call that defense counsel is sick. Deputy District Attorney (D.D.A.) appears along with another member of defense counsel's firm and previous attorney for Burr. D.D.A. cites victims' rights provisions to speedy conclusion. Preliminary hearing canceled because of illness of defense counsel. Judge continued the case but attempts to accommodate victims' interests. New preliminary hearing set for February 13.

February 13, 1996:

Preliminary hearing held. Michael testifies. Victim's mother testifies. Defense counsel asks for recess because of time of day (4:00 p.m.) because two more hours of questions for the mother were anticipated and because of scheduling conflict. Preliminary hearing continued until February 23.

February 22, 1996:

D.D.A. notified that defense counsel could not appear for February 23rd preliminary hearing because of other scheduling problems. (Victims' family had canceled a trip to San Francisco to attend the February 23rd preliminary hearing, as previously mentioned in open court)

February 23, 1996:

Preliminary hearing canceled. New preliminary set for April 16, 1996.

April 16, 1996:

Victim's mother cross-examined for less than 10 minutes. Defense counsel did not have extensive questions. Briefing on bind-over established. Hearing set for May 28, 1996.

May 28, 1996:

D.D.A. appears. Defense counsel not prepared to proceed; had not filed memorandum. New briefing set for June 13, 1996.

June 13, 1996:

Briefs filed; hearing held; defendant bound over.

June 24, 1996:

Defendant appeared before District Court. Trial date set for Oct. 29, 1996. October 29th date canceled because defense counsel involved in the another trial and has not had time to prepare.

October 21, 1996:

Court meeting to schedule new trial. January 7 trial date set.

December 23, 1996:

Pre-trial conference (not on the record - in chambers). Defense counsel asks for continuance. Wanted more time to respond to prosecution's motion in limine (filed three weeks earlier) and because new prosecutor would need more time. D.D.A. says victim's family wants closure and promises to remain on the case if her absence (new job) would in any way delay proceedings. Defense counsel also indicates he typically takes vacation the week after Christmas. Judge refuses to continue.

Early January:

Case reassigned to new judge.

January 7, 1997:

Trial starts before new judge and new D.D.A. Michael testifies and concludes testimony. Trial ends for the day at noon. Victim's mother scheduled to be the next witness. Husband and two sisters all there. Judge says motions will be considered the next morning.

January 8, 1997:

Defense counsel asks for dismissal based on inadequate evidence to support the bindover. Denied. Judge agrees to allow appeal of issue of standard of review for bindover determinations. Further trial proceedings stopped.

January 16, 1997:

Meeting to review appeal in judge's chambers. D.D.A. and defense counsel present. Paul Cassell enters appearance on behalf of the victims, requests expedited hearing on victims' speedy trial rights. Asks for hearing to be scheduled while all attorneys are present. Judge says that scheduling, if a hearing is necessary, can be done by phone.

January 17, 1997:

Hearing on victims' motions scheduled for January 21 at 2:00 p.m.

January 21, 1997:

Hearing held. Judge agrees that victims have the right to be heard, but delays start of trial for unspecified period of time. Sets later hearing to schedule resumption of trial date.

February 3, 1997:

Further hearings held on resumption of trial. Cassell attempts to assert victim's right to be heard on speedy trial issue, but told by judge "we're fully staffed now" with prosecutor and defense attorney arguing the issue. Case set for trial at time when victims had previously scheduled vacation.

February 28, 1997:

Bench trial resumes.

Early March, 1997:

Defendant acquitted.

These events show that it took more than fifteen months to try a child sexual assault case for a series of reasons that seem to give short shrift to crime victims interests. The Utah Constitution and other provisions of Utah law give victims a right to a speedy trial, especially in cases involving children.

*D. State v. Saunders*

This case involved, perhaps not coincidentally, another charge of child sexual assault that was dragged out for some considerable period of time. I will not recount all of the details concerning how the case was repeatedly delayed, but did want to report to the Committee one particularly poignant moment in the case. On the following page is a copy of the "Dear Mr. Judge" letter that my client, a nine-year-old girl I will call "Betty" here, asked me to present in opposition to a defense request for yet another delay of the proceedings. The judge, nonetheless, continued the case. He reasoned that, if the defense attorney said that he needed two additional weeks to review two-pages of notes from a therapist who had interviewed the victim, then it was not for the court to "tell a lawyer how to try a case." (The prosecution thought that, at most, the review would take a few minutes and was willing to delay the start of the case for a day.) Interestingly, the hearing on whether to start the trial had been delayed by one day for another reason. The judge's clerk had called from St. George, Utah, a popular tourist destination in our state, to ask the prosecutor and defense attorney if anyone minded if he came back to town a day late. The parents of the victim weren't sure what to do, but were told by those they consulted not to "rock the boat."

During the two-week delay to review the two pages of notes, the defense counsel sought access to all the other notes taken by the psychiatrist during sessions with Betty. The psychiatrist had previously testified that only those two pages were relevant to the underlying incident. At the hearing on whether the psychiatrist could be ordered to produce the additional notes, I appeared on behalf of the victims to attempt to argue that the materials were protected. The judge, however, ruled that I could not present any "legal" arguments on that subject because the prosecutor also planned to make legal arguments. I was limited to presenting purely factual information on the trauma that might occur to the victims. The judge ultimately concluded that there was no legal authority preventing further disclosure of the files. The defendant, the next day, agreed to a new plea offer of a misdemeanor, a result that avoided disclosure of the files. The impression of the victim's mother from all this was: "You have already been victimized, and you end up going through the victimization again from the system you are in. So what happens is, with all these choices, you end up trying to maintain integrity and security and sanity in hopes that the truth will come out and you feel good about the result. It is very hard. I don't know if we would go through it again."

#### *E. The Need for Constitutional Protection.*

It is clear that the victims rights at issue in these cases would have been handled differently if the Victims Rights Amendment were in place. In *Johnson v. Rodriguez*, the victims would have had a constitutionally protected right to submit information to the Texas parole board. In *State v. Beltran-Felix*, the court could not warn future victims that they watch trials at their peril. And in the two child sexual assault cases just discussed, victims would not have been subject to repeated delays without concern for their interests.

The conclusion I draw from these cases is that, without federal constitutional protection for the rights of crime victims, victims around the country face the functional equivalent of hand-to-hand combat to establish each and every right in each and every jurisdiction. A "business as usual" mindset pervades the system. Moreover, trial judges have been conditioned from years of legal training and experience to focus on the claims of prosecutors and defendants - not crime victims. The statutory and state constitutional protection for crime victims rights has made things better in the system. But unfortunately, without federal constitutional protection, there will always be nagging questions and problems of implementation. That is the consistent message I have heard from those experienced in the field. That is certainly my experience in the cases I have handled.

### **III. Letters from Law Professors and Practitioners.**

The Committee has apparently received two letters from law professors and practitioners criticizing the proposed victims rights amendment. As a law professor with some expertise in this area, it may be appropriate for me to offer my observations on their concerns.

#### *A. The Process That Produced The Letters.*

The signatures on the letters the Committee has received appear to have been generated, in no small

measure, through posting on various Internet lists for law professors. As a result, signatures could be gathered with literally the push of a button. Of course, there is nothing inherently wrong with such a procedure. But that process can produce a substantial number of signatories without extended deliberation or discussion of the issues.

Strong reasons suggest at least some of the signatures were gathered based on incomplete or inadequate information. With respect to the 1996 letter, after the request for signatures was posted to one discussion list, one professor wrote: "Before any of us sign on the letter circulated today, I think it would be helpful for someone to pos[t] the actual text of the amendment as it now stands." In response, no text was posted, although interested persons could apparently write in to get a copy. Fortunately, this problem appears to have been reduced in 1997, as at least some of the solicitations contained the text of the proposed amendment as well.

The signatories also constitute a tiny fraction of the more than 8,000 law professors in the country, much less of all law professors "and practitioners" as the signatories are styled. Very few of the signatories appear to have published scholarly works specifically on the subject of victims rights. Some appear to have little, if any, specific expertise in the subject of victims rights, or even in the subjects of criminal procedure, evidence, or constitutional law.

This fact becomes important when one recalls that most law school curricula spend little, if any time, discussing the rights of crime victims. An illustration of the absence of victims from the nation's law schools is provided by one of the leading and most widely used textbooks on criminal procedure in the country, Professors Kamisar, LaFare, and Israel's *Modern Criminal Procedure*. While the text spans some 1698 pages, specific discussion of "victims right" appears on only one page. Even there, the discussion is solely as to how, in some states, the search and seizure exclusionary rule has been modified in victims rights provisions - not discussion of the issues raised by the proposed federal victims rights amendment. Another illustration comes from evidence courses, where issues pertaining to the sequestration of crime victims appear to have generally escaped notice. The textbook I use, for example, does not mention the issue.

As a result, I think the Committee is entitled to ask whether the professors sending the letter have any specific knowledge about crime victims rights. Concern on this point can only grow when some of the specific assertions in the letters are examined, as I do below. It is, accordingly, noteworthy that some of the most prominent law professors and academics who have specifically published or lectured on the subject of victims' rights - e.g., Professor George Fletcher at Columbia, Professor William Pizzi at Colorado, and Professor John DiIulio at Princeton - or have specific background in the field of victims' rights - e.g., Professor Jimmy Gurule at Notre Dame - or have written on the subject of constitutional amendments - e.g., Professor Laurence Tribe at Harvard - have all endorsed the Victims' Rights Amendment in principle.

The letters also contain a series of what can only be described as far-fetched arguments, giving the appearance that their intent is to alarm and incite, rather than to discuss and inform. In neither of their letters do the law professors provide any constructive suggestions about how to modify the language of the proposed amendments to avoid the parade of horrors they present. Nor do they offer suggested legislation to deal with the problems that crime victims have been encountering throughout the system. This failure to advance the discussion in a positive direction may lead more than a few to wonder about the law professors' representations that they "commend the desire to help crime victims" and, indeed, that they even "share the desire to help crime victims."

### *B. The Substance of the 1996 Letter.*

While the process that generated the letters raises questions about how much attention they should receive, the substantive arguments in them cast further doubt. Let me turn first to the 1996 letter.

1. Assertion: "The amendment is completely unnecessary to give states power to give states power to give victims rights."

Response: Far from being "completely unnecessary," the Victim Rights Amendment is desperately needed to protect states that have extended rights to crime victims. The Department of Justice recently conducted an extensive review of this issue. Associate Attorney General John R. Schmidt reported the Department's findings:

It is clear that even a coordinated effort to secure victims' rights by other means inevitably would be fragmentary, uneven and inadequate for the foreseeable future. While the victims' rights movement has sought legal reforms promoting victims' rights at the state level for the past two decades, few states have passed laws that effectively provide for the full range of rights that we think are appropriate.

Even where states have passed strong victims' rights statutes or ratified victims' rights Constitutional amendments, their efforts have sometimes been undermined or nullified by judicial decisions. Courts may believe that victims' rights under state law are inconsistent with the state constitution. Even amending the state constitution to protect victims' rights only gets over one hurdle, as courts may hold that these rights are trumped by rights of the defendant under the federal Constitution. Thus, in a substantial class of cases, such rights of victims as the right to attend proceedings and the right to address the court concerning sentencing have been reduced to paper promises.

To be sure, one might disagree with the Department of Justice's careful assessment of the question. But what is striking about the law professors claim is its failure to engage, in any serious way, the arguments advanced by the Department or supporters of the Victims Rights Amendment.

2. Assertion: "Invoking the very real concerns of victims of crime to amend the Constitution in a manner that could substantially undermine fundamental protections for individuals against unreasonable governmental intrusions, including protections against arbitrary taking of liberty, property, life, and forced confessions, threatens our commitment to individual rights."

Response: This highly inflammatory statement has nothing to do with the purposes of the amendment. It is almost mind boggling to try and understand how the proposed Victims Rights Amendment could somehow be interpreted as having anything to do with, for example, the right to be free from forced confessions. The victims' movement is not asking for - and has never asked for - a right of police officers to forcibly extract confessions. Given this inaccurate representation about what the proposed amendment does, it is astonishing that the letter received so few signatures.

3. Assertion: "The direct and indirect costs of the amendment could be enormous."

Response: For so bold a claim, it is surprising that no supporting documentation or evidence is cited. This dearth of support becomes even more glaring when one recalls that more than 20 states already have victims rights amendments that contain some of the supposedly budget-busting provisions. The real world experience from these states suggests that added costs to improve victim participation in the process are quite modest. For example, materials collected during the effort to bring a victims amendment to Utah revealed the following fiscal impact on courts:

Arizona - no noticeable fiscal impact to the courts

Colorado - no monetary impact to the courts

Kansas - no cost to the courts

Washington - no noticeable fiscal impact to the courts.

4. Assertion: "If victims exercise the right to object to a plea bargain under S.R. 52 [sic - S.J. Res. 52 apparently intended], they could force prosecutors to try cases even if the evidence cannot support the

original charges."

Response: Under S.J. Res. 52, victims have no right to "force" prosecutors to try cases even where the evidence cannot support the original charge. They only have the right to be "heard" on whether the court should accept a proposed plea bargain. After hearing from the victim, the court then makes the decision whether to accept the plea, as it would certainly be inclined to do where the evidence would not support the original charge.

5. Assertion: "Pressure for speedy trials and final resolutions could force prosecutors to try cases before they have adequate evidence to convict an accused and place pressures on trial and appellate courts to reach decisions without due deliberation."

Response: Defendants already have a constitutional right to a speedy trial. If they could use it to "force" prosecutors to try cases before the evidence was ready, they would already do so. They cannot deploy the speedy trial right in this fashion, of course, because courts understand that the right must be construed to give prosecutors a reasonable chance to prepare. Similarly, on the appellate level, no one is asking for courts to reach decisions "without due deliberation." Victims have simply sought for a final resolution "free from unreasonable delay." Surely due deliberation does not amount to unreasonable delay.

### *C. The Substance of the 1997 Letter.*

The law professor's 1997 letter likewise is filled with dubious claims.

1. Assertion: "[T]he right of victims to attend proceedings can be protected by statute as shown by . . . the recent federal legislation that mandates that victims be allowed to attend if they will be testifying during the sentencing phase of the proceedings."

Response: In fact, the converse is shown. The rights of the Oklahoma City bombing victims have not been protected by the newly passed federal legislation.

2. Assertion: The victim's right to a final disposition free from unreasonable delay "could be used to deny defendant needed time to gather and present evidence essential in order to demonstrate their innocence."

Response: Interestingly, in the 1996 letter, the Committee was told exactly the opposite - that this right would somehow be used "to force prosecutors to try cases before they have adequate evidence." Neither of these conflicting claims is true. Victims only seek a final resolution of cases free from "unreasonable" delay. Time to gather essential evidence to demonstrate innocence is hardly "unreasonable" delay. The citation-free letter from the law professors fails to provide any evidence that comparable provisions in state constitutions and statutes are creating problems for criminal defendants (or prosecutors, for that matter).

3. Assertion: "Prosecution efforts also could be hampered by the ability of crime victims to submit [statements on plea bargains]."

Response: A victim's right to be heard before plea is already the law in many states, yet the law professors provide no reports of prosecutors being hampered. This is likely because this "hypothetical" problem, while perhaps interesting as a classroom discussion point, has not manifested itself in the real world. For example, it is the unqualified conclusion of the Maricopa County prosecutor - who prosecutes in a large metropolitan area (Phoenix) under one the most expansive victims rights amendments in the country (which specifically includes a right of the victim to be heard before a plea is accepted) - that "[c]onstitutional rights for victims will not obstruct prosecutors." Problems do not frequently arise from giving victims a right to be heard because most plea bargains reflect a reasonable resolution of the case. In the unusual instance where plea bargaining authority is being abused, the victim's right to be heard serves as a valuable safety valve. It is also important to remember that even in those cases where the victim's views are heard but not accepted by the judge, the victim may still leave the process more satisfied than if there was no opportunity for victim participation at all.

4. Assertion: The amendment creates enforcement authority that "could be used to negate the right of criminal defendants in an effort to protect crime victims."

Response: Enforcement authority is a rather standard feature of state victims rights amendments, yet the professors provide no examples of enforcement authority being employed in this fashion. This is no doubt because the right to "enforce" a right for a crime victim does not create a right to "negate" rights for criminal defendants. The weakness is the professor's claim is demonstrated by the fact that they choose not to offer any specific illustrations of the hypothesized dangers. It is also interesting that in their 1996 letter, the professors appeared to make the opposite claim: that victims would be left with "few, if any, remedies for violations of . . . [the] rights enumerated."

5. Assertion: "The proposed Amendment . . . would . . . allow a victim of a crime to argue that it is *unconstitutional* to release a person from prison even though the sentence had been completely served."

Response: A victim could possibly, as the law professors carefully put it, "argue" this far-fetched point, but the argument would plainly fail. The right conferred by the proposed Amendment is to have the victim's safety considered at the time a decisionmaker is "determining" a release from custody. If the sentence has already been determined and served, there is nothing further to be considered.

6. Assertion: "The ability of the states to decide for themselves is denied by this Amendment."

Response: This concern for federalism will strike some as equivalent to "confirmation conversion," given that many of the signatories to the letter have lauded, for example, Supreme Court decisions by the Warren Court federalizing a whole host of criminal procedure questions (e.g., the exclusionary rule and Miranda warnings). The victims' movement has consistently maintained that it merely seeks equal treatment. If defendant's rights are constitutionalized and applied throughout the country, then victims' rights should be too. It is also important to remember that three-quarters of the states will have to ratify any proposed amendment before it takes effect.

These are some of the more obvious problems with the letter. The careful reader familiar with the proposed Victims' Rights Amendment will no doubt see many more. In its deliberations, Congress should, of course, weigh all points of view and all competing concerns. The right of the law professors, no less than other citizens, to provide information to Congress deserves our full respect. But Congress should not give any special weight to misinformed, inaccurate, or inflammatory criticism - such as that unfortunately found in the "law professors" letters.

### **Conclusion**

The United States Supreme Court has recognized that "in the administration of criminal justice, courts may not ignore the concerns of victims." Yet to crime victims, it has appeared in recent years that courts and others in the criminal justice system have been doing just that. Some level of victim frustration with the system is inevitable. But the examples of victims' problems reported to this Committee, both here and in other testimony, suggest substantial justification for frustration with the current patchwork of protections outside the Constitution.

Something more simply must be done. Congress should approve the Victims Rights Amendment and send it on its way to the states for ratification. Our criminal justice system already provides ample rights for the accused and the guilty; it can - and should - do the same for the innocent.