

**STATEMENT
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EXECUTIVE COMMITTEE
NATIONAL VICTIMS' CONSTITUTIONAL AMENDMENT NETWORK
BEFORE
THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
IN SUPPORT OF
S. J. RES. 44
THE CRIME VICTIMS' RIGHTS AMENDMENT
ON
APRIL 28, 1998**

Mr. Chairman and Senators, thank you for giving me the opportunity to again address the Committee and to express my support for S. J. Res. 44, the proposed Crime Victims' Rights Amendment.

The Movement for Victims' Rights could have no better champions than Senator Jon Kyl and Senator Dianne Feinstein. Their unselfish, principled, and bipartisan advocacy for justice for crime victims symbolizes the very best tradition of the United States Senate. The support which the proposed amendment is receiving, and the tremendous popularity of victims' rights measures generally, in the polls and at the ballot boxes among Republican and Democratic voters, is also hard evidence that a well-reasoned idea, so decent and so right, can transcend party politics.

To you also, Mr. Chairman, the victims' movement acknowledges a great debt of gratitude for your steadfast support over the years and for your willingness to now move forward on this historic proposal.

At the outset, the Committee has a right to know the background I bring to the hearing. I am a former prosecutor. I served for twelve years as the Chief Assistant Attorney General for the State of Arizona. Under then Attorney General Bob Corbin, I supervised the investigation and prosecution of hundreds of criminal cases, dealing with thousands of crime victims. I started the first Attorney General based Victim-Witness Program.

Before joining the Attorney General's Office, I was the principal author of Arizona's Criminal Code. In that code, Arizona adopted the first victims' rights statutes in its history. When it became clear to me years later that statutes were not sufficient to change the culture of the criminal justice system to be more responsive to the rights of crime victims, I authored the Arizona constitutional Victims' Bill of Rights, which our voters approved overwhelmingly in 1990. I was the original author of the Victims' Rights Implementation Act. which our Legislature passed in 1991.

Since these new laws have taken effect, I have represented crime victims, in actions before Arizona courts, to enforce their statutory and state constitutional rights. I have prepared and presented victims' rights training materials and lectures to prosecutors and judges.

I have been in the movement for crime victims' rights since 1974. Some years ago, shortly after the President's Task Force on Victims of Crime issued its report in December, 1982 proposing, *inter alia*, a federal constitutional amendment for crime victims' rights, the victims' movement made a conscious choice to forego pressing for a federal amendment in favor of passing state amendments, testing them in various forms, building up a body of law, and seeing whether they were sufficient. For almost a decade, I have worked with states all across the country in aiding their efforts to establish state constitutional rights for crime victims. I am currently on the Board of Directors of the National Organization for Victim Assistance and the Executive Board of the National Victims' Constitutional Amendment Network.

This experience has convinced me that basic rights to justice and fair treatment for crime victims will never be achieved in our country without an amendment to the United States Constitution. I have been part of efforts to try every other alternative for most of my professional career and, despite our successes, they are simply not enough to restore true balance to our justice system.

Imagine a criminal justice system in which the persons accused of a crime had no right to notice of when the proceedings in their case would to be held, no right to attend those proceedings, and no right to be heard at critical stages. Anyone proposing such a system, or defending it, would be rightly ridiculed and shunned.

Yet this is precisely the fate of most innocent crime victims who are plunged into the criminal justice

system in this country. They have no right to notice of proceedings in their case, and indeed in most parts of the country, rarely receive notice; they have no right to be present in the courtroom during the trial of their case, and indeed are regularly excluded; they have no right to be heard at critical stages, and indeed often are forced into silence by a system that affords them no status other than as evidence. This Kafkaesque world is a nightmare of government-inflicted wounds for the victim; the stark unfairness of it cries out for reform.

The need for this reform seems self-evident. Yet you have heard in testimony and in private correspondence several arguments against the Crime Victims' Rights Amendment. In my testimony I will address some of those arguments and discuss how I think they are mistaken. For convenience, I will present a "Point/Counterpoint" format which addresses the "points" offered in opposition to the proposed amendment, and argues "counterpoints" in support of the proposal.

Point:

"I'm all for victims' rights, but they don't have to be put into the United States Constitution. The Constitution should not be amended for transient public policy purposes when statutes can serve the same end."

Counterpoint:

If there is one thing certain in the victims' rights debate, it is that these words, "I'm all for victims' rights but . . .," are heard repeatedly. Implicit in them is an acknowledgment that the current state of the law is inadequate to protect crime victims; that the goals of changing that law and providing "rights" for victims are justified. The words stand as evidence that there is virtual unanimity on the question of whether crime victims should be afforded, in fact, critical notices, presence, elocution, restitution, and considerations for safety and no unreasonable delay. So the debate appears to be not over *whether* these protections should be in the law.

It seems the opposition wants to embrace the ends of the movement without its means; like a failing dieter who wants to embrace a thinner body, without restrained consumption.

The truth is that the opposition's prescriptions for statutory fixes have been tried and found wanting. Neither federal nor state statutes have worked.

As Attorney General Reno testified before the House Committee on the Judiciary, "efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate." The best federal statutes have proven inadequate to the needs of the Oklahoma Bombing victims as Professor Cassell's testimony today ably demonstrates.

The statutes in my state were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate. Our courts have already stated the obvious, "When the defendant's constitutional right to due process conflicts with the Victim's rights" the defendant wins. Of course we do not seek to diminish the rights of those accused of offenses, nothing in the proposal before you would, but without parity in the Constitution, crime victims will always be second-class citizens and their rights will never be accorded the respect and protection they would and should otherwise receive.

The criminal justice system that has evolved since our founding is today simply inadequate to meet the needs of the whole people. It has come to be respectful, perhaps more than ever, of the rights of those accused or convicted of crimes. It serves the interests of the professionals in the system fairly well -- the judges, lawyers, and police, probation, and jail officers. But it does not serve the whole of the people well because it forgets the victim.

When James Madison took to the floor and proposed the Bill of Rights during the first session of the First Congress, on June 8, 1789, "his primary objective was to keep the Constitution intact, to save it from the radical amendments others had proposed" In doing so he acknowledged that many Americans did not yet support the Constitution.

"Prudence dictates that advocates of the Constitution take steps now to make it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them."

The fact is, Madison said, there is still "a great number" of the American people who are dissatisfied and insecure under the new Constitution. So, "if there are amendments desired of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens," why not, in the spirit of "deference and concession," adopt such amendments?

Madison adopted this tone of "deference and concession" because he realized that the constitution must be the "will of all of us, not just a majority of us." By adopting a bill of rights, Madison thought, the constitution would live up to this purpose. He also recognized how the Constitution was the only document which could likely command this kind of influence over the culture of the country. Our goals are perfectly consistent with the goals that animated James Madison. There is a view in the land that the constitution today does not serve the interests of the whole people in matters relating to criminal justice. And the way to restore balance to the system, in ways that become part of our culture, is to amend our fundamental law.

[The Bill of Rights will] have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community ... [they] acquire, by degrees, the character of fundamental maxims. . . as they become incorporated with the national sentiment

Critics of the proposed amendments claimed they were unnecessary, especially so in the United States, because states had bills of rights. Madison responded with the observation that "not all states have bills of rights, and some of those that do have inadequate and even 'absolutely improper' ones." Our experience in the victims' rights movement is no different.

Professor Tribe has observed this failure : "[T]here appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach" As a consequence he has concluded that crime victims' rights "are the very kinds of rights with which our Constitution is typically concerned."

After years of struggle, we now know that the only way to make respect for the rights of crime victims "incorporated with the national sentiment," is to make them a part of the sovereign instrument of the whole people, the Constitution.

Point:

"I'm all for victims' rights, but the proposed amendment is 'an assault on federalism as it has been defined for more than two centuries.'"

Counterpoint:

The full quote from Prof. Raskin continues, "No aspect of public policy, with the possible exception of education, has been more jealously guarded by the states and localities than the investigation and prosecution of common law crimes and the structuring of the accompanying criminal justice process." The federalism concern also has been expressed by others.

The criminal justice system which Prof. Raskin describes does not exist. In many important matters the Constitution of the United States has come to dictate to the states the "structuring" of their "criminal justice process." Certainly Prof. Raskin knows this and indeed supports it. Through the Fourteenth Amendment, the courts have structured the criminal justice process in each state to be respectful and protective of the rights established in the Bill of Rights for persons accused and convicted of crimes. The incorporation of these rights through the Fourteenth Amendment, and their applicability to the states, has been accepted within our federal system in order to secure a national threshold of fair treatment. Why should not the same deference be given to the rights of crime victims as is given to the rights of accused or convicted offenders?

The authors and supporters of the Crime Victims' Rights Amendment are sympathetic to the demands of federalism and deeply respect the role of the states. The proposal does not infringe these important values. Indeed, because the amendment specifically grants to the states the power to "implement and enforce" its provisions, the amendment makes explicit the role of a state in fashioning implementation details special to its own circumstances. Faithfulness to the principles of federalism are clearly evident in this proposal.

However, as long as the Constitution establishes a floor of rights for defendants it will be proper for the same Constitution to establish a floor of rights for victims. As Attorney General Reno testified in the House:

First, unless the Constitution is amended to ensure basic rights to crime victims, we will never correct the existing imbalance in this country between defendants' constitutional rights and the haphazard patchwork of victims' rights.

Point:

"I'm all for victims' rights, but the costs of this amendment will be staggering and local criminal justice systems will be crippled as a consequence."

Counterpoint:

This criticism is often made by those who have no direct knowledge of the costs of

providing rights for crime victims and who have not thought through clearly enough the actual fiscal impact of the proposed amendment. Let them come to Arizona. Our state constitutional amendment has been in effect since November 1990 and the costs have been minimal and manageable. Consider the proposed rights themselves. S. J. Res. 44 proposes that in cases of violent crimes each victim would have the rights to:

- *reasonable notice of . . . all public proceedings . . .*
- *reasonable notice of a release or escape from custody relating to the crime*
- *reasonable notice of the rights established*

Some costs are associated with these rights, but how and where they fall will be dependant on each state's decision. In some states the duty to provide notice of proceedings could fall on the prosecutor, as in my state, while in others the duty may fall to the courts. The costs will vary with the kind of notice provided. In some places victims may receive notice by mail, while in others notice may be provided by the victim calling a central phone number. In either case the costs are not staggering.

More importantly, it is right that victims be given these notices. No similar right of a defendant would be denied on the basis of cost. None should be for crime victims.

- *be heard . . . at all public proceedings (and certain non-public parole proceedings) to determine a release from custody, an acceptance of a negotiated plea, or a sentence;*

No costs are associated with allowing the victim the right to speak at proceedings that are already held. There are those who argue that this right to be heard regarding pleas will result in far fewer pleas and far more trials. There is no evidence of this happening anywhere. In Arizona the trial rate has remained unaffected.

- *consideration for the interest of the victim in a trial free from unreasonable delay;*

No costs are associated with requiring the court to take these matters into consideration. To the extent it helps avoid unreasonable delays in the trial it may save costs.

- *restitution from the convicted offender;*

No significant costs are associated with the requirement to order restitution. Victims typically will submit proof of economic losses to the court and restitution orders are simply made a part of sentencing. If amounts are contested the issues are resolved during sentencing proceedings that are already held.

- *consideration for the safety of the victim in determining any release from custody;*

Requiring courts or parole authorities to consider the safety of the victim will not impose significant costs. It may result in more carefully crafted release conditions for the accused or convicted offender, but so be it.

The cost argument is a red-herring. Costs are modest, and moreover, appropriate when viewed in light of

the important interests at stake. Not one of these critics would dare suggest a cost litmus test for defendants' rights. None should be imposed on crime victims. Let the critics come to Arizona.

Point:

"I'm all for victims' rights, but this proposal will undermine the rights of defendants."

Counterpoint:

Nothing in S. J. Res. 44 will limit the fundamental rights of defendants.

Giving to the victim the right to certain notices infringes no right of a defendant. Allowing the victim the right to be present does not "substantially undermine" any constitutional right of a defendant. Allowing the victim the right to speak at release, plea, or sentencing proceedings does not deny a constitutional right to a defendant, but it does allow the court to make more informed and just decisions. Defendants do not have a constitutional right to refuse or avoid restitution for the economic losses they cause to their victims. Defendants have a right to effective counsel, but they have no right to unreasonably delay proceedings and requiring the court to consider the interests of the victim in a trial free from *unreasonable* delay does not deny any constitutional right to a defendant. Defendants have no right to prohibit the court or parole authority from considering the safety of the victim when making release decisions and requiring the safety of the victim to be considered does not infringe any right of the defendant.

When considered in the light of reason, and not emotion, vague assertions that "fundamental constitutional rights will be undermined," have little value other than to inflame the debate; the amendment is not an assault on the fundamental rights of the defendant. In the justice system throughout the country, rights for those involved are not "a zero-sum game." Rights of the nature proposed here do not subtract from those rights already established, they merely add to the body of rights that we all enjoy as Americans.

Professor Tribe concurs in this analysis when he writes, "*no actual constitutional rights of the accused or of anyone else would be violated by respecting the rights of victims in the manner requested.*"

Crime victims seek balance -- that victims' rights will not automatically be trumped every time a defendant offers a vague and undefined "due process" objection to the victims' participatory and substantive rights. S. J. Res. 44 will achieve this fairness and balance.

Point:

"I'm all for victims' rights, but giving the victim a right to be present in the courtroom will lead to perjured testimony by the victim."

Counterpoint:

The imbalance of the present system is evident in this criticism. The argument goes that victims must be excluded during trial, and perhaps at some pre-trial stages, just like other witnesses, so they will not hear other testimony and conform their own to it. Defendants, of course, may be witnesses in their own trials, but they have a right to be present which overrides the rule of exclusion. The same rules should apply to

the crime victim. Typically those rules now make exception so that the prosecution is allowed to keep even the principal investigator in the trial without exclusion, but no exception is made for the victim.

And what of the fear of perjury? Consider the civil justice system. If a lawsuit arises from a drunk driving crash, both the plaintiff (the victim of the drunk driver) and the defendant (the drunk driver) are witnesses. Yet both have an absolute right, as parties in the case, to remain in the courtroom throughout the trial. Do we value truth any less in civil cases? Of course not. But we recognize important societal and individual interests in the need to participate in the process of justice.

This need is also present in criminal cases involving victims. How can we justify saying to the parents of a murdered child that they may not enter the courtroom because the defense attorney has listed them as witnesses. This was a routine practice in my state, before our constitutional amendment. And today, it still occurs throughout the country. How can we say to the woman raped or beaten that she has no interest sufficient to allow her the same rights to presence as the defendant? Closing the doors of our courthouses to America's crime victims is one of the shames of justice today and it must be stopped.

Victims in my state have had this unqualified right to be present since November 1990. Based on our actual experience the fears of the critics are unfounded.

Point:

"I'm all for victims' rights, but the right to have the victim's interest in a trial free from unreasonable delay will force both prosecutors and defendants to trial too early."

Counterpoint:

Nothing in the amendment will cause this result. The key phrase is "unreasonable delay." Giving the state an adequate time to prepare its case is not "*unreasonable* delay." The state is already under time deadlines by virtue of the defendant having a right to a speedy trial and the various acts which implement that right.

The defendant has a constitutional right to effective counsel and to be effective the defendant's counsel needs an adequate time to prepare, to review the evidence, the case file, and interview certain witnesses. Giving the defendant's counsel an adequate time to prepare is not an "*unreasonable*" delay.

The Arizona Constitution has given crime victims a right to both "a speedy trial or disposition" and a "prompt and final conclusion of the case after the conviction and sentence." It has been the law for the last eight years and I am aware of no case in which either the state or the defendant has been forced to trial before they were ready. The fears of the critics are unfounded.

What the amendment in Arizona has done, and what the federal amendment will do, is allow, in the typical case, the court to have a constitutional context in which to balance the legitimate rights of the defendant to effective counsel and due process, with the rights of the victim to some reasonable finality.

Defendants often seek continuances, and then seek to exclude the time of those continuances from the speedy trial rules that would otherwise control the processing of the case. Because these speedy trial rules run to the benefit of the accused, when the accused asks that they be waived, courts are often loath to deny the requests. This is especially true when no countervailing interest in reasonable finality is

preserved and protected.

And yet, unreasonable delay is not a mere scheduling problem. It is an all too often painful agony for the victim, who must continue to re-live the crime and confront the defendant. Allowing a reasonable balance between both of the legitimate interests of the defendant and the victim to be *considered* by the court is the goal of the amendment.

Nothing in the proposed amendment gives the crime victim the power to force any case to trial before it or the defense is ready.

Point:

"I'm all for victims' rights, but the right of the victim to have safety considered when making release decisions will result in a constitutional right to imprisonment even after a sentence has been served."

Counterpoint:

As the law professors phrased this objection, "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."

An examination of the text of the proposed amendment quickly disposes this criticism. The amendment provides that "[e]ach victim of a crime of violence shall have the rights to . . . consideration for the safety of the victim in determining any release from custody. . . ." When a sentence "has been completely served," as the law professors posit, there is no "determining" to be done in connection with the release. The release happens by operation of law and the expiration of the original sentence. No discretionary decision is permitted and hence no "consideration" would be given to the safety of the victim on the matter of the release itself. There may be discretion with respect to the conditions of a release and, of course, then the safety of the victim should always be considered. Sadly, it rarely is. The law professors have simply failed to understand the proposal.

Others have argued that the same safety consideration should not be given to pre-trial release decisions. For most of our recent history the only relevant standard for a court's pre-trial release decision was whether or not the defendant would appear when required. Safety of the victim was not a factor, indeed not allowed to be considered. Recent changes in some states have allowed dangerousness to the victim or the community to be considered when making pre-trial release decisions. However, even these changes have proven inadequate to require consideration for the safety of the victim when fashioning conditions of pre-trial release because they are couched in terms of the defendants rights and not the victims. The time for this imbalance to end is now.

Point:

"I'm all for victims' rights, but the terms of this amendment are too vague to have any meaning," or in the alternative, "I'm all for victims' rights, but this amendment is so specific it reads more like a statute than an amendment."

Counterpoint:

Both criticisms, each contradicting the other, have been made. Neither is true. The amendment proposed is specific enough to make real change in the justice system and is still written to properly reflect the language and patterns of the Constitution.

If all the rights of the defendant were incorporated into one amendment, it would be longer and one could argue, both more specific in some cases and much more general in others, than this proposal. The rights there are as long and as specific as they need to be, as are these.

In this connection, some also argue that the proposed amendment is fatally flawed because it does not specifically define who the "victim" is. For some purposes the definition of the victim is self-evident and even without a statutory definition the court could determine who the victim was by resort to the elements of the charged offense. My testimony before the Committee in 1996 addresses this point in more detail.

Point:

"I'm all for victims' rights, but this amendment reverses the presumption of innocence; a person is not a victim until there is a conviction."

Counterpoint:

From NOW's Legal Defense and Education Fund comes: "A victims' rights amendment would undermine the presumption of innocence by naming and protecting *the victim* before a crime is proven." (Emphasis added.)

That it was impossible for the Fund to complete that sentence without again referring to the person against whom the crime has been committed as "the victim" is evidence of the rhetorical problem here. But it is just that, merely a rhetorical problem having nothing to do with the presumption of innocence.

If a defendant's liberty can be taken away before trial and conviction without undermining the presumption of innocence, surely our justice system can provide the simple rights for crime victims enumerated in this proposal. The proposal has nothing to do with the burden of proof the government bears before a jury may convict an accused of an offense. That is what the presumption of innocence is all about. Nothing in this proposal reverses or undermines it in any way.

Conclusion

There are undoubtedly other "points" I have overlooked in this Statement. Some are made now by supporters of constitutional rights who say the amendment has compromised too much -- that the limit on the amendment's scope which now applies only victims of violent crimes is unacceptable, as are the limits on judicially created remedies in Section 2.

But the critics are wrong. The time of the critics is passed. The time for statecraft is at hand.

Our country, our Constitution, and each of its Amendments, were born of compromise, not compromise on issues either trivial or superficial, but fundamental issues, ones born of convictions deeply held. Jefferson called the Bill of Rights "half a loaf." But he supported it. Governor Randolph of Virginia was originally opposed to the Constitution and sought a new constitutional convention. In the end, because he

believed the greater good was served by union, he was an ardent supporter of the plan and rose in stature as a statesman. The Constitution was born of a profound statecraft, one that rejected the hordes of nay sayers and recognized that the Constitution must be universal, adapted to meet the needs of the "whole people."

Today, for crime victims, this promise that the Constitution would become "the sovereign instrument of the whole people" lies hollow and unfulfilled. The founders would not recognize our system of justice, which has grown in utter disregard of the victims.

Nothing about this injustice is inevitable or unchangeable. We have the power, through S.J. Res. 44, to right the wrongs inflicted upon crime victims by government-sanctioned neglect. As I urged the Committee two years ago, now is the time to summon the will and the decency to change the course of justice and establish rights for crime victims.

This is the call to statecraft; do not be timid in the face of great injustice. The American people will hail your achievement and greet this new amendment with a profound sense of gratitude.