STATEMENT

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NATIONAL VICTIMS' CONSTITUTIONAL AMENDMENT NETWORK

BEFORE

THE

COMMITTEE ON THE JUDICIARY

CONSTITUTION SUBCOMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

IN SUPPORT OF

H. J. RES. 64

THE CRIME VICTIMS' RIGHTS AMENDMENT

FEBRUARY 10, 2000

Mr. Chairman and Members, thank you for giving me the opportunity to address the Subcommittee and to express my support for H. J. Res. 64, the proposed Crime Victims' Rights Amendment.

At the outset permit me to describe for the Subcommittee my background in this area. 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 state 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 so that it might 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, over the last two and one-half decades, has convinced me that only an Amendment to the United States Constitution will bring about the reform our law needs if crime victims are to be treated with the fundamental fairness that a decent society should extend. In my testimony I would like to elaborate on this point in three ways; first, by reviewing the rights that we propose, next by discussing why they need to be in the U. S. Constitution, and finally by responding to some of the arguments that have been offered in opposition to the proposal.

I. The Rights Proposed

1. Right to notice of proceedings

Despite the fact that simple notice of proceedings is regarded universally as an element of fundamental fairness for anyone involved in the justice system, crime victims are not given any notice of criminal justice proceedings in too many jurisdictions across this country.

Witnesses before your full committee and before the Senate Judiciary Committee have given compelling testimony about the devastating effects on crime victims who learn that proceedings in their case were held without any notice to them. What is most striking about this testimony is that it comes on the heels of a concerted efforts by the victims' movement to obtain notice of hearings. In 1982, the President's Task Force on Victims of Crime recommended that victims be kept appraised of criminal justice proceedings. Since then many state provisions have been passed requiring that victims be notified of court hearings. But those efforts have not been fully successful. A recent Department of Justice Report [*New Directions from the Field: Victims' Rights and Services for the 21st Century* (1998) hereinafter "*'98 Report*"] found that not all states had adopted laws requiring notice for victims, and even in the ones that had, many had not implemented mechanisms to make such notice a reality. At 13.

To fail to provide simple notice of proceedings to criminal defendants would be unthinkable; why do we tolerate it for crime victims?

The right to be "informed" of proceedings is fundamental to the notions of fairness and due process that ought to be at the center of any criminal justice process. Victims have a legitimate interest in knowing what is happening to "their" case, and such information can sometimes allay a victim's fears about the whereabouts of a suspect or defendant.

Surely it is time to protect this fundamental interest of crime victims by securing an enduring right to notice in the Constitution.

2. Right to attend

The Crime Victims Rights Amendment will also guarantee that victims have the right to attend ("not be excluded from") court proceedings. This also builds on the recommendations for the President's Task on Victims of Crime, which concluded that victims "no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule provided for the exclusion of witnesses, be permitted to be present for the entire trial." Allowing victims to attend trials has a variety of benefits for victims. The victim's presence may help to heal the psychological wounds from the crime. Giving victims the right to be present also helps them to reassert control over their own lives, a dignity that criminals have often impaired by the criminal act. Victims can even

further the truth-finding process "by alerting prosecutors to misrepresentations in the testimony of other witnesses." While some have argued that a victim's exclusion is needed to avoid the possibility of tailored testimony, this concern can be addressed in other ways such as having the victim testify first or relying on pre-trial statements to police officers or the grand jury. Moreover no party in a civil case is excluded from the courtroom even when they are witnesses and we do not value truth any less in civil cases than we do in criminal cases. After several hearings on the Victims Rights Amendment, the Senate Judiciary Committee recently concluded that there is "no convincing evidence that a general policy [of] excluding victims from courtrooms is necessary to ensure a fair trial."

This conclusion is consistent with the findings of the *'98 Report*, "There can be no meaningful attendance rights for victims unless they are generally exempt from [witness sequestration rules]. Just as defendants have a right to be present throughout the court proceedings whether or not they testify, so too should victims of crime."

3. Right to be heard

Victims also should be given the right to be heard at appropriate points in the criminal justice process. The Crime Victims Rights Amendment does not propose to make victims "co-equal parties in the criminal justice process" free to speak whenever they wish. Instead, the proposed Amendment extends to victims the right to be heard at certain crucial proceedings where they have useful information to provide. One such point is a hearing to determine whether to accept plea bargains. As Professor Beloof has explained in his excellent casebook on victims' rights:

The victim's interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provides them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine which need to be discussed with the prosecutor. . . . The victim may have a particular view of what . . . sentence [is] appropriate under the circumstances. . . . Similarly, because judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.

Victims also deserve to be heard at bail and other release hearings. By informing courts of the risks posed by criminal defendant, victims allow judges to reach appropriate decisions on pretrial release. This is not to say that victims should be able to dictate to judges whether and on what terms a defendant should be release. But it is to say that victims should have, while not a veto, at least a voice in the process. The failure of the system to hear from victims of crime at this stage has sometimes lead to tragic consequences from release decisions, consequences that might well have been averted if the judge had heard from the affected victims.

Victims should be heard before a judge imposes sentence. This furthers fundamental due process, for "[w]hen the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak." While all states now recognize some form of a victim's right to be heard at sentencing, shortfalls remain. A federal constitutional amendment would clearly vindicate a victim's right to be heard in all these areas.

Similarly, victims should be heard before any post-conviction early release is allowed. Without victim testimony the releasing authority may be unaware of the true danger posed by the inmate seeking release, or the true nature of the crime that the inmate committed. In my own state the story of Patricia Pollard, fully set forth in the Senate Record, is compelling evidence of the importance of this right.

4. Right to notice of escape or release

Victims also should be given the right to be notified whenever a defendant or a convicted offender is released or escapes. Without such notice, victims are placed at grave risk of harm. As the Department of Justice recently explained, "Around the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many cases, the victims were unable to take precautions to save their lives because they had not been notified of the release." The risk of attack is particularly serious in cases involving domestic violence. By providing victims with a right to "reasonable notice," the constitutional amendment would help alert such victims to potential dangers. This is the very least that a decent society owes to its victims of violence.

5. Right to consideration of the victim's interest in a trial free from unreasonable delay

Victims should also be given a right to consideration for their interest in a trial "free from unreasonable delay." In today's criminal justice system, defendants are often able to prolong the start of trials for no good reason. Let me make plain that I am not speaking here of delays for legitimate reasons. But there can be no doubt that in a number of cases defendants have sought -- and obtained -- delay for delay's sake. The Senate Judiciary Committee recently concluded that "efforts by defendants to unreasonably delay proceedings are frequently granted, even in the face of State constitutional amendments and statutes requiring otherwise." Such practices should be eliminated by plainly recognizing a victim's interest in a trial brought to a conclusion without "unreasonable delay." This right does not conflict with defendants' rights; defendants have, of course, long enjoyed their own right to a "speedy trial."

The '*98 Report* noted, "Repeated continuances cause serious hardships and trauma for victims as they review and relive their victimization in preparation for trial, only to find the case has been postponed." For victims, "[t]he healing Process cannot truly begin until the case can be put behind them. This is especially so for children and victims of sexual assault or any other case involving violence." President's Task Force on Victims of Crime, *Final Report* 75 (1982).

6. Right to an order of restitution

As the Senate Judiciary Committee recently found, "Crime imposes tremendous financial burdens on victims of crime. . . . In 1991, the direct economic costs of personal and household crime was estimated to be $19.1 billion, a figure that did not include costs associated with homicides." [Senate Judiciary Report on S. J. Res. 44, 1998]. While courts have long had the power to order restitution for crime victims it remains one of the "most underutilized means of providing crime victims with a measurable degree of justice." '*98 Report*. To be sure many defendants will not be able to fully discharge a restitution order. But even nominal restitution can have beneficial effects for the victim. Our fundamental law should embody this fundamental value.

7. Right to have safety considered

Under current law the safety of the victim is not always considered when release decisions are made. Often the only consideration, in pre-trial releases, is the likelihood that the defendant will appear when required. This systemic failure threatens real harm to crime victims. When this consideration is required in every court release orders will be more sensible and victims will not unwittingly be put in harm's way.

8. Notice of these rights

Just as defendants are provided notice of their rights, so to should crime victims be advised of theirs. Again this is an element of simple fairness. In my state since the enactment of our state constitutional rights for crime victims this notice has been provided simply and efficiently.

9. Standing to assert rights

For rights to be real they must be enforceable. The Standing Clause will give victims the right to stand before any judge in the country and make a claim for the enforcement of the rights secured.

II. The Necessity for a Constitutional Amendment.

Even the Amendment's most ardent critics usually say they support most of the rights in principle. 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. But while supporting the rights "in principle," opponents in practice end up supporting, if anything, mere statutory fixes that have proven inadequate to the task of vindicating the interests of victims. 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 even highly publicized victim injustices, as Professor Cassell's writing about the plight of the Oklahoma City bombing victims has ably demonstrated.

In my state, statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights -- even when those rights are not genuinely threatened." The experience in my state is, sadly, hardly unique. A recent study by the National Institute of Justice found that "even in States where victims' rights were protected strongly by law, many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution." The victims most likely to be affected by the current haphazard implementation are, perhaps not surprisingly, racial minorities.

A group calling itself "Citizens for the Constitution"[hereinafter "Citizens"] has organized under the auspices of The Century Foundation's Constitution Project. Their purpose is to call for restraint in the consideration of Amendments to the U. S. Constitution. In their recent pamphlet, *"Great and Extraordinary Occasions": Developing Guidelines for Constitutional Change*, the group propounds eight guidelines which, they argue, should be satisfied before any constitutional amendment would be justified. The "Citizens" raise some questions, in the commentary following their guidelines, about the Crime Victims' Rights Amendment. Applying these rigorous Guidelines, however, despite the reservations of the "Citizens" themselves, demonstrates unequivocal support for case for the Amendment. I would like to direct the Subcommittee's attention to these eight guidelines, which the "citizens" offer in the form of eight questions.

1. Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?

Yes.

Even as the Constitutional rights of persons accused or convicted of crimes address issues of "abiding importance," so to do the proposed rights of crime victims. The legitimate rights of the accused to notice, to the right to be present and the right to be heard or remain silent, the right to a speedy and public trial, or any of the other rights are surely no more enduring than the legitimate interests of the victim to notice, presence, or the right to be heard, or any of the other rights proposed by the amendment. Surely no one could persuasively argue that the rights of the innocent victim were less important or enduring.

Indeed, it is precisely because these values for victims are of enduring, or "abiding" importance that they must be protected against erosion by any branch or majoritarian will. That they do not exist today broadly across the country is evidence that they are not adequately protected despite general acceptance of their merit.

2. Does the proposed amendment make our system more politically responsive or protect individual rights?

Yes.

Clearly the proposed amendment is offered to "protect individual rights." *That is its sole purpose.*

The "Citizens" however, suggest that Congress should ask "whether crime victims are a 'discreet and insular minority' requiring constitutional protection against overreaching majorities or whether they can be protected through ordinary political means. Congress should also ask whether it is appropriate to create rights for them that are virtually immune from future revision. Let's review these two questions.

"[O]rdinary political means" have proven wholly inadequate to establish and protect the rights reviewed above. If this were not so they would exist and be respected in every state and throughout the federal government. The evidence that

they are not is as compelling as it is overwhelming. Why is this so? Are crime victims unpopular? No, but as a class they are ignored; their interests subordinated to the interests of the defendant and the professionals in the system. And those interests are entrenched as deeply as any in this society. Crime victims become "discreet and insular" by virtue of their transparency. If this were not so we would not be here for our rights would be secure.

3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?

Yes.

The "Citizens" write, 'The proposed victims' rights amendment raises troubling questions under this Guideline. Witnesses testifying in Congress on behalf of the amendment point to the success of state amendments as reason to enact a federal counterpart. But the passage of the state amendments arguably cuts just the other way; for the most part, states are capable of changing their own law of criminal procedure in order to accommodate crime victims, without the necessity of federal constitutional intervention. While state amendments cannot affect victims' rights in federal courts, Congress has considerable power to furnish such protections through ordinary legislation. Indeed, it did so in March 1997 with Public Law 105-6 . . . which allowed the victims of the Oklahoma City bombing to attend trial proceedings."

I was one of those witnesses the "Citizens" referred to. They should have read all my testimony. Let me repeat again one of my statements, "In my state, the statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights -- even when those rights are not genuinely threatened." (Quoting Prof. Lawrence Tribe on the proposed amendment).

Moreover our courts have now made explicit in a series of cases (cited in Hearing Report on S. J. Res. 6, April 16, 1997, Senate Judiciary Committee) what was always understood: namely that the U. S. Constitutional rights of the defendant will always trump any right of the victim without any fair attempt to balance the rights of both.

On the Oklahoma City bombing point that the "Citizens" make they should have read the whole testimony of Prof. Paul Cassell who convincingly demonstrates how the statute cited by the citizens was inadequate to the task of fully protecting even these high profile and compelling victims. The law didn't work for them. How much less must it work for victims who don't have the clout to get an act of Congress passed? That "other means," to use the "Citizens" phrase, have simply proven inadequate is concurred in by a broad consensus that includes the Justice Department, constitutional scholars of the highest regard from both ends of the political spectrum, the President, the Vice President, the platforms of both major political parties, and bi-partisan coalition of Members and Senators, and crime victim advocates throughout our country.

4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves in tact?

Yes.

The proposed rights are perfectly consistent with the constitutional doctrine that fundamental rights for citizens in our justice system need the protection of our fundamental law.

5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?

Yes.

The text of the proposed amendment grants to crime victims constitutional standing to stand before any judge in the country and seek orders protected the established rights. This is the essence of enforceability.

6. Have the proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?

Yes.

More than simply "think through" the proposal, proponents of the CVRA have taken roughly two decades of experience with state statutes and constitutional provisions to develop a very refined understanding of the limits of state and federal law, the need for a federal amendment, and how that amendment would work in actual practice and be interpreted. No other constitutional amendment has had this degree of vetting.

7. Has there been full and fair debate on the merits of the proposed amendment?

Yes.

The Congress has had the amendment under consideration since 1996. There have been major hearings in both bodies on multiple occasions. The record of debate and discussion throughout the country is extensive.

8. has congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?

Yes.

See the "Resolved" Clause which introduces H. J. Res. 64.

The proposed amendment passes the test of the "Citizens" Guidelines. More importantly, it is fully faithful to the spirit and design of James Madison.

The "Citizens'" pamphlet, *Great and Extraordinary Occasions,* takes its name from a line in *The Federalist* No. 49, authored by James Madison. There Madison rightly argued for restraint in the use of the amendment process. But of course he rose above rightful restraint to propose the first twelve amendments.

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 substantial evidence 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 [the rights], 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 Madison's 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. Not all states have constitutional rights, nor even adequate statutory rights. There are 32 state constitutional amendments and they are of varying degrees of value. See Appendix A.

Harvard Professor Lawrence Tribe has observed this failure : " . . . there 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. Just as James Madison would have done it.

III. Selected Arguments in Opposition and Responses

"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.'"

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. Nothing in the proposed amendment denies to the states their rightful authority to define and implement the rights as they see fit, subject only to the unifying review of the U. S. Supreme Court. Moreover, the power of the Congress to enforce the provisions of the amendment are limited by the understanding given to the word "enforce" in recent Supreme Court decisions, *e.g. City of Boerne.* This jurisprudence is important to our understanding of the role of the states within their respective jurisdictions. For a fuller discussion of this point see the Senate Judiciary Report on S. J. Res. 44

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 earlier 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."

"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."

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. H. J. Res 64 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. It may save lives.

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.

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

Nothing in H. J. Res. 64 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.

"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."

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.

"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."

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 nine 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, albeit inadequately, 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.

"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."

As certain objecting 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 shall have the rights to . . . consideration for the safety of the victim in determining any conditional 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.

"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."

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 Senate Judiciary Committee in 1996 addresses this point in more detail.

"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."

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."

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

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 H. J. Res. 64, to right the wrongs inflicted upon crime victims by government-sanctioned neglect. 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 bi-partisanship; please 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.