

**United States Senate
Committee on the Judiciary**

Testimony of

Marsha A. Kight

S.J. Res.35, the Proposed Victims' Rights
Amendment to the United States Constitution

I sat through the hearing on Wednesday, July 17, 2002 and heard testimony for and against SJ Res. 35. Julie Goldscheid and others proposed, rather than constitutional rights for victims, that there be more funding of victims' services programs.

As you know, on April 19th, 1995, my daughter, Frankie Merrell, was violently murdered in the bombing of the Alfred P. Murrah Federal Building in Oklahoma City. After having heard the testimony, I want to share my views.

How many more of our citizens have to be slaughtered before we unite and cease to tolerate violence in our country? How many of our sons and daughters, brothers and sisters, friends, spouses, mothers and fathers have to fall victim to violence before we end the indignities in our courts to which victims are subjected every day?

I have experienced first hand these indignities. For me this debate is neither about money nor abstract constitutional theory. It is not about what the lawyers or the law professors or the experts have to say. For me, this debate is about my daughter and the voice that I must now be for her.

I am not in favor of taking rights away from accused or convicted offenders. Nothing in the language of this amendment will do so. Courts will always be able to protect the rights of defendants. Rather, I plead for fairness by asking you to expand upon the rights that all Americans enjoy. Civil liberties, which are sorely lacking for victims, are recognized as fundamental for everyone.

Let me remind the Committee of what happened to me and to all the victims from the Oklahoma City bombing case.

On a June 1996 morning, Judge Richard P. Matsch informed family members and survivors who were seated in his courtroom that they had the duration of the lunch hour recess to decide whether they would remain as observers of the trial, either in the Denver courtroom or in Oklahoma City on closed-circuit television, or participate as impact witnesses during the penalty phase of the trial. He informed us we could not do both even though the laws written by Congress appear on their face to permit both. For victims who had lost their loved ones, this was a shocking, painful moment and yet another victimization – this time by the judicial process.

Although a grueling decision like this normally requires very careful thought, every family member and survivor tearfully made his or her choice during the lunch hour. Many, who had just arrived for the hearings, left in dismay, excluded from the most important judicial process of their lives and in the history of this nation.

I chose to remain, and upon return to Oklahoma City, began seeking a way to reverse Judge Matsch's decision on behalf of all family members and survivors of the bombing, as well as all victims of crime.

Paul Cassell, then a Utah attorney and professor of law, took up our plight and filed a *writ of mandamus* in the Tenth Circuit Court of Appeals in Denver, Colorado, asking that the Court rescind Judge Matsch's order. Without a hearing, the Appeals Court's three-judge panel ruled that the 89 victims named in that petition, along with the National Organization for Victim Assistance, did not have standing to have their rights vindicated.

We then filed an *En Banc* petition asking that all judges in the Tenth Circuit Court of Appeals review this decision. Once again, we were denied a voice.

Knowing the time constraints before the trial, the decision was made by all concerned to take our case to the United States Congress. Justifiably, H.R. 924 passed the House of Representatives and the Senate and was signed by President Clinton in less than two weeks' time.

In a non-partisan act, President Clinton and Congress took a giant step toward the fair treatment of victims by enacting the "Victim Rights Clarification Act of 1997." We were hopeful that the will of the people would now prevail in the courtroom. We were wrong.

Judge Matsch did rescind his Order; however, incredibly, he left open the possibility that victims might still be excluded during the sentencing phase if they choose to remain in the courtroom throughout the trial. He determined that there could be a Constitutional defect in the new law and that our hearing the trial testimony could improperly influence the impact testimony of some individuals. Judge Matsch concluded that the time to hear these challenges would come after the conviction, if ever there was such a time.

Due to the cloud over his ruling, on April 4th, 1997, we filed another motion seeking clarification, stating that victims' impact witnesses continue to confront the choice of the exclusion of their impact testimony or remaining eligible to testify at the cost of losing the right to observe the trial. The prosecutors advised us that, notwithstanding your new law, victims should not view the trial proceedings if they wished to be heard at sentencing.

The victim's right to be heard must be made as sacred as the defendant's right to counsel. It must be protected as the accused right to remain silent. It must be given the same consideration as an indigent criminal who has the right to free representation.

Society itself is harmed by violent crime. Only the victims of a criminal act can testify to both the physical and emotional pain it causes. Just as defendants have the right to introduce mitigating circumstances at sentencing and parole hearings, victims must have the right to share the impact of crime on their lives with presiding officials.

The right of victims to present impact statements at all appropriate stages of the judicial process must be absolute. My personal experience may be instructive.

I attended the trials involving my daughters murder, but not because I did not want to testify at the sentencing hearing, but because I wanted to speak for myself, Frankie and my granddaughter and other victims whom I came to know. However, the prosecution team told me, under the current rules, I was ineligible to be an impact witness because I was, (and remain) a member of a minority group, those who oppose the death penalty.

Had a Constitutional Amendment already been passed, I could have accepted an implementation regulation limiting the number of impact witnesses, since 2,500 of us qualified as victims of this

crime. I could have accepted that a random drawing to speak could result in my exclusion from the process. What I could not accept is some ideological, religious, or philosophical test that automatically excludes people like I from speaking

Crime victims are liberals and conservatives, rich and poor, for and against the death penalty, vengeful and forgiving, weak and strong, black, white and every color in between. None of us should be barred from speaking as a result of our views or social status.

The best-funded victim witness programs cannot establish rights where there are none. No amount of money could have opened the doors to the courthouse. The law itself silenced me. This debate is not about silver. It is about justice.

Please accept this as my testimony for the record.

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