

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS

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BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED TWELFTH CONGRESS
SECOND SESSION
ON
H.J. Res. 106

APRIL 26, 2012

Serial No. 112-113

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C O N T E N T S

THE RESOLUTION

H.J. Res. 106, Proposing an amendment to the Constitution of the United States to protect the rights of crime victims..... 2

OPENING STATEMENTS

The Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution..... 1
The Honorable Mike Quigley, a Representative in Congress from the State of Illinois, and Member, Subcommittee on the Constitution 54

WITNESSES

Brooks Douglass, Carrollton, TX
Oral Testimony..... 56
Prepared Statement..... 58
Jesselyn McCurdy, Senior Legislative Counsel, American Civil Liberties Union
Oral Testimony..... 66
Prepared Statement..... 68
Paul G. Cassell, Ronald N. Boyce Presidential Professor of Criminal Law, S.J. Quinney College of Law at the University of Utah
Oral Testimony..... 77
Prepared Statement..... 80

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution
Letter from Jan Scully, President, National District Attorneys Association..... 7
Letters from crime victims' organizations and families of crime victims..... 8

APPENDIX

Material Submitted for the Hearing Record

Supplement to the Testimony of Paul G. Cassell, Ronald N. Boyce Presidential Professor of Criminal Law, S.J. Quinney College of Law at the University of Utah..... 202
Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution..... 207

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS

THURSDAY, APRIL 26, 2012

House of Representatives,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:30 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Scott and Quigley.

Staff Present: (Majority) Jacki Pick, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. Franks. First, let me just say thank you to all of you for your patience. We had to vote on the floor, which slowed us down. It has been the proverbial train wreck in slow motion. So thank you for your patience.

Today the Subcommittee on the Constitution examines H.J. Res. 106, the bipartisan victims' rights amendment to the Constitution, also sometimes called the VRA.

[The information referred to follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. Without objection, the Chair is authorized to declare a recess of the Committee at any time and he may have to do that in this case for a few moments.

Victims' rights legislation and amendments have enjoyed broad support at the State and Federal levels, passing by 80 percent margins in the States and securing influential bipartisan support at the highest levels of the Federal Government. Senators Kyl and Feinstein have championed victims' rights in the Senate, and multiple House and Senate hearings have been devoted to advancing victims' rights.

Despite the best efforts of the State and Federal level to bring balance through statutes or State constitutional amendments, these efforts have been proven to be inadequate whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or the mere mention of accused's rights, even when those rights are not genuinely threatened.

As the U.S. Justice Department concluded after careful review of the issue, the existing, quote, ``haphazard patchwork of rules'' is, quote, ``not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.'' The VRA would specifically enumerate rights for crime victims, including the right to fairness, respect, and dignity; the right to reasonable notice of and not to be excluded from public proceedings related to the offense; the right to be heard at any release, plea, sentencing, or other such proceeding involving any right established in the amendment; the right to proceedings free from unreasonable delay; the right to reasonable notice of the release or escape of the accused; the right to due consideration of the crime victim's safety; and the right to restitution. Moreover, the amendment expressly provides standing for the victim to enforce enumerated rights.

Supporters of a victims' rights amendment have included

President George W. Bush, President Bill Clinton, and President H.W. Bush, George H.W. Bush; Attorneys General Janet Reno, John Ashcroft, and Alberto Gonzales; Professor Larry Tribe of the Harvard Law School; the National Governors' Association; 50 State attorneys general; Mothers Against Drunk Driving; the National Association of Parents of Murdered Children; the National Organization for Victims' Assistance; and finally, the National District Attorneys Association, the voice of the Nation's prosecutors.

And on this point I find it ironic that the Democratic-invited witness from the ACLU claims to speak on behalf of Nation's prosecutors when she writes in her testimony that prosecutorial discretion would be compromised by this amendment, and that prosecutors would become less able to convict criminals; that their right to be heard hurts the effort of prosecutors and the cause of victims. In fact, the National District Attorneys Association sent us letters just this week saying just the opposite. And I will quote their letter.

Quote: The National District Attorneys Association, representing America's prosecutors, wishes to express strong support for H.J.Res. 106, the victims' rights amendment. Inclusion of victims' rights in our U.S. Constitution will ensure that victims' rights and crime victims will be treated with fairness, dignity, and respect within our criminal justice system, and if within that system, they will be afforded needed and meaningful rights, including the opportunity to participate at all critical stages of their cases. Inasmuch as America's prosecutors are the staunchest advocates for victims within our criminal justice system, we are proud to advocate on their behalf within the halls of Congress. We call upon this Congress to pass the amendment and the States to ratify it, unquote.

Now I would ask unanimous consent to enter this letter from the NDAA into the record. Without objection.

[The information referred to follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. In addition, my office has received more than 30 letters from crime victims' organizations and the families of crime victims, which we will add to the hearing as well--the record as well.

[The information referred to follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. I would look forward to hearing from the witnesses today on this critical issue, and I thank you all for coming.

I now yield to the Ranking Member, in this case Mr. Quigley, for his opening statement.

Mr. Quigley. Thank you, Mr. Chairman. I would like to thank the Chairman for putting this together and all of our panelists for being here today.

I need to apologize in advance. There is a markup next door in which I will go vote and come back, so don't take it as any

sort of insult or slight.

Today we consider a subject of great importance to every Member of this House, our responsibility to ensure that victims of crime have their rights respected, their needs met, and that everyone in the criminal justice system plays their part in assisting people who have suffered great harm.

It is especially suitable that we are discussing these vital issues during National Crime Victims' Week. There was a time in this country when victims of crime were not treated respectfully. At times crime victims felt, not without justification, that they were considered almost extraneous to the process.

With great awareness and legal protections enacted at the State and Federal levels, victims receive all kinds of assistance, including counseling, financial assistance, notification, and the respect to which anyone who has suffered harm is entitled. We offer both financial and technical assistance to States to help them provide services to crime victims.

So while we have made great progress, we can and should do much more. We could provide adequate funding for crime victim programs. We could provide proper training and resources to Federal, State, and local law enforcement to ensure that our existing laws, which require notice and assistance to crime victims, are fully enforced.

One thing we can do immediately is to reauthorize and fully fund the Violence Against Women Act, a landmark piece of legislation that provides invaluable resources to victims of some of the most heinous crimes. This vital legislation has not been reexamined in 7 years, and it is in need of some updates to ensure full protection of victims. For instance, the bill needs to be updated to include language that protects gay, lesbian, bisexual, and transgender individuals from discrimination at domestic violence shelters. It also needs to be amended to ensure undocumented workers who are victims of abuse feel safe reporting that abuse to authorities. And finally, the bill must be expanded to give American Indian authorities jurisdiction over non-Indians who have abused Indian women.

As we discuss protecting victims today, I can think of no better way of safeguarding their rights than updating, fully funding, and reauthorizing the Violence Against Women Act to ensure protection of the rights of all victims of abuse.

Crime victims also need to see the guilty parties punished and to be reassured that neither they nor anyone else will have to fear further victimization by that individual. In that regard, I have concerns about this proposed constitutional amendment.

We have heard from law enforcement professionals that it will do more to obstruct the wheels of justice than to provide victims with the assistance they need to put their lives back together. For instance, under most versions of the amendment, victims would have a constitutional right to call for a faster disposition of a matter in their case. While certainly we want to see quick resolution of such cases, allowing the victim to demand a faster trial may infringe on the right of the accused person to adequately prepare. It may also impede the ability of a prosecutor to prepare. Similarly, giving victims the right to attend the entire criminal trial, even if hearing the testimony of other victims, could compromise the victim's testimony,

could jeopardize the fairness of the trial.

We have a law, the crime victims' right law, that achieves all the objectives sought by the proposed amendment. Let's look at improving and fully funding that law before we jump to amend the Constitution.

As Mr. Cassell points out in his testimony, congressional funding for the National Crime Victims Law Institute clinics has been diminished. As a result, six clinics have stopped providing rights, enforcement, legal representation. The CVRA vision of an extensive network of clinics supporting crime victims' rights clearly has not been achieved.

The Crime Victims' Right Act could also be improved by, for example, more clearly defining what is meant to be reasonably heard in court. Offering symbolic gestures to crime victims and weakening legislation that would provide assistance to them is not the best way to help victims of crime. Debating yet another constitutional amendment that we know from long experience is going nowhere will certainly not help victims of crime.

I want to thank the Chairman and welcome our panel today, and I look forward to their testimony. I yield back.

Mr. Franks. And I thank the gentleman.

And without objection, other Members' opening statements will be made part of the record.

I will now introduce our witnesses. Brooks Douglass is a lawyer, a former State senator in Oklahoma, and a film producer and actor. Mr. Douglass' 2010 film, Heaven's Rain, is the true story of the 1979 tragic murder of his parents, Dr. and Pastor R. Douglass and Marilyn Douglass, and the attempted murders of his younger sister and himself.

Two criminals entered the Douglass home, bound the family, raped the 12-year-old daughter, and shot all four members of the family. Only the two children survived.

Mr. Douglass went on to earn his M.B.A., J.D. and an M.P.A. At Harvard's Kennedy School of Government. He now devotes his life to working for victims' rights.

Jesselyn McCurdy is a senior legislative counsel for the American Civil Liberties Union, the ACLU, with a focus on civil liberties in the areas of criminal justice. Prior, she was a counsel for the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security. Ms. McCurdy has also worked as the assistant section director of the American Bar Association Section of Individual Rights and Responsibilities. She was a staff attorney for the American Prosecutors Research Institute, affiliated with the National District Attorneys Association. Ms. McCurdy received her J.D. from Catholic University of America and the Columbus School of Law.

Paul Cassell is an endowed chair at the University of Utah College of Law. Professor Cassell received a J.D. from Stanford University, where he was president of the Stanford Law Review. He clerked for then-Judge Antonin Scalia, D.C. circuit at the time, and for Chief Justice Warren Burger. He then served as an Associate Deputy Attorney General; an assistant U.S. attorney, EDVA in Virginia; and a U.S. district court judge in Utah. Professor Cassell resigned his Federal judgeship to teach and litigate issues to advance victims' rights.

And I would thank all the witnesses for appearing today. We appreciate you taking the time to come out and speak to us on this very important issue.

Each of the witnesses' written statements will be entered

into the record in its entirety. And I would ask each of the witnesses to summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

Before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn. So if you would please stand.

[Witnesses sworn.]

Mr. Franks. Thank you. Please be seated.

Also, to the witnesses, please turn on your microphone before speaking. That nearly gets about half of the witnesses.

And I would recognize our first witness for 5 minutes. Mr. Douglass, thank you for being here, sir.

TESTIMONY OF BROOKS DOUGLASS, CARROLLTON, TX

Mr. Douglass. First, thank you, Chairman Franks, for considering this issue and for giving me the honor to come before this Committee and testify. As you said, it is an incredibly important issue. And really what I wanted to do was tell a little bit about my story, and you eloquently presented most of it, or a lot of it, for me.

But as you said, in 1979, Glen Ake and Steven Hatch came to my front door. I let them in to use the phone. They over the next few hours, hog-tied us all face down on our living room floor in our home, took turns raping my 12-year-old sister Leslie, and then sat down and ate the dinner that my mother had been fixing, and then shot us all in the back and left us for dead. My mother and father both died there in front of me. And Leslie and I were able to get out of the house, get to--drive to a doctor's house and get medical help.

That began our experience with the criminal justice system, beginning right at the start of speaking to the Oklahoma Highway Patrol, even when we didn't know if we were going to survive or not.

About 6 weeks later Glen Ake and Steven Hatch were caught. They had also killed two people in south Texas. That time they shot them with a shotgun so they made sure they finished them off. I went on to college. Well, they were both tried within a year and given the death sentence.

Over the next few years, I went on to college, was called back three times in the course of those 4½ years that I was in college to testify again against Steven Hatch in particular. In my senior year the Glen Ake case was heard by the U.S. Supreme Court. It was reversed and remanded for a new trial, which was held 7 years after the original trial--after the murders, and he was given life sentences at that time with possibility of parole because there was no life without parole in Oklahoma.

So all told--we went back and testified then. All told, my sister and I testified nine different times against these guys that committed the crime. Seventeen years later, in 1996, Steven Hatch was finally executed.

There were things that happened within the system, like the day we got out of the hospital, when we were discharged, we were handed a bill for over \$500 that included the rape exam kit that was used on my sister Leslie to collect evidence of

the rape. There was no provision in the law to reimburse us for that. I paid \$117 to get my car back that had been impounded as evidence, and there was no provision in the law to reimburse us.

In 1990, I was elected to the State senate, and as I said in my statement, I would love to say it is for lots of noble reasons, but the fact is I just needed a job, and there was an opening. So I ran at 26 and was elected, and was 27 when I took office and, you know, had the chance to--or I went on the judiciary committee about a year later or the appropriations committee. And I was on the subcommittee that funded the judiciary. Just then I got a call from a reporter saying--and I was avoiding victims' rights. I just wanted to pretend it wasn't an issue, I think, and didn't want to look like a crusader. So I didn't take that up until I got this call saying that the Hatch case was now the slowest-moving case on death row in Oklahoma. After 13 years it was on the third step of a nine-step appellate process, and a lot of it was because for 2 years the Oklahoma Court of Criminal Appeals had lost the file in the case.

So going on the appropriations committee right then, I had a chance to discuss this with the chief judge and, you know, keeping it as impersonal as I could, but at the end of the day, I couldn't help myself. I finally said, you know, until you guys find that file, get a decision handed down, and I really don't care what the decision is, you had better learn how to do your job with a number 2 pencil and a big cheap writing tablet because that is all you are going to have. And fortunately the other Members of the Subcommittee agreed with me. But miraculously they got the decision handed down within about 30 days.

Our experiences, you know, in dealing with the criminal justice system, there are a lot of things that I did as a senator. There were 28 pieces of legislation that I initiated, I sponsored, that got signed into law in Oklahoma, including one of them being a constitutional amendment, as you mentioned.

The problem is that they are routinely ignored when it is not convenient for the court and even the prosecution. The prosecution does the best that they can. They have victim-witness coordinators. They try to do what we have asked them to do in the statute. But, yeah, there have been multiple times, one as recently as a few months ago, where I got a call from a victim who was not allowed to give a victim impact statement.

So I see that my time is up, and I will take whatever questions you have.

[The prepared statement of Mr. Douglass follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. Well, thank you, Mr. Douglass, very much. And your testimony that you ran at 26 and elected at 27 also happens to be my own testimony in the legislature, and I would just caution you that that can lead to some pretty frightening ends. So you might want to be careful there.

Mr. Douglass. They just told us where the bathroom was for about a year.

Mr. Franks. Ms. McCurdy, I would now recognize you, ma'am, for 5 minutes.

AMERICAN CIVIL LIBERTIES UNION

Mr. McCurdy. Thank you, Mr. Chairman.

I would like to thank----

Mr. Franks. Ms. McCurdy, could you pull that microphone a little closer to you?

Mr. McCurdy. Thank you.

I would like to thank Chairman Franks, Ranking Member Nadler, and also acknowledge my former boss Representative Scott for inviting the American Civil Liberties Union to testify at today's hearing on the victims' rights amendment.

The victims' rights constitutional amendment introduced by the Chairman would extend various rights to all crime victims. This amendment would profoundly alter the Nation's founding charter. It would fundamentally compromise the Bill of Rights protections for accused persons in every Federal, State, and local criminal case.

While the proposed amendment would attempt to codify a role for criminal victims in the criminal justice process, the ACLU is concerned that it will be difficult to provide the rights of victims while preserving the constitutional rights of people accused of crimes whose fundamental liberty interest is directly at stake.

The Framers created a two-party adversarial criminal justice system with the public prosecutor, a criminal defendant, and a neutral judge. The Framers were aware of the enormous power of the government to deprive a person of life, liberty, and property. The VRA will jeopardize the basic safeguards put in place to protect criminal defendants by infringing on their presumption of innocence and right to a fair trial.

In the past 220 years, the Federal Constitution has been amended only 17 times. Amending the Constitution is a serious matter and should be reserved for those issues where there are no other alternatives available. Many of the provisions of the victims' rights amendment reflect laudable goals, but it is unnecessary to pass a constitutional amendment to achieve them.

On October 30, 2004, Congress enacted the Crime Victims' Rights Act of 2004, legislation that enumerates eight statutory rights for victims of crime. In addition, every State has either a State constitutional amendment or statute protecting victims' rights.

The constitutional protections afforded the accused in criminal proceedings are among the most precious and essential liberties provided in the Constitution. The VRA undermines the presumption of innocence by conferring rights to an accuser at the time in a criminal case when the accuser is still presumed innocent. Not every person accused of a crime is actually guilty of committing a crime, but giving the accuser the constitutional status of victim could impact the judge and jury, making it extraordinarily difficult for fact-finders to remain unbiased when the victim is present at every court proceeding, and potentially prejudicing those who will determine guilt or innocence.

The VRA makes the accuser a third party in a criminal case even before a judge or jury has determined the accused is actually a victim.

The VRA would give crime victims a constitutional right to attend the entire criminal trial, even if the victim is going to be a witness in the case. In many instances, the testimony

of a prosecution witness will be compromised if the person has heard the testimony of other witnesses. Typically trial witnesses are barred from the proceedings prior to their testimony for this very reason. Despite the possibility of tainting his or her testimony, the VRA gives the victim a constitutional right to be present, even over the objections of the defense or prosecution.

The crime victims' rights was established in October of 2004, establishing eight rights for Federal crime victims and two mechanisms to enforce those rights. Congress enacted CVRA after another version of the victims' rights constitutional amendment failed. In passing the CVRA instead of a constitutional amendment, Congress intended to preserve the system the Framers created, with the public prosecutor charged with acting in the public interest, and a criminal defendant with a full panoply of constitutional rights, and a neutral judge.

The CVRA also directed the General Accounting Office to conduct an evaluation of limitations of the CVRA. GAO found that there were very few victims having asserted their CVRA rights in court.

According to the GAO, several key issues have developed since the implementation of the CVRA that require the courts to interpret provisions of the law. For example, it is unclear whether the CVRA applies to victims of local offenses prosecuted in the District of Columbia. It is also unclear what stage of the criminal justice process the CVRA rights begin to apply and what standard of appellate review should be used for writs of mandamus. These should all be noncontroversial changes that Congress could make to the legislation in order to facilitate and exercise the victims' rights without passing a constitutional amendment.

The VRA would give victims rights at least equal the defendants' constitutional rights; however, some of these same rights are given in the statute.

The ACLU opposes any effort to enact a victims' rights constitutional amendment because it would undermine the presumption of innocence and the right to a fair trial for the accused.

Mr. Franks. Thank you, Ms. McCurdy.

[The prepared statement of Ms. McCurdy follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. And I would now recognize Professor Cassell for 5 minutes.

TESTIMONY OF PAUL G. CASSELL, RONALD N. BOYCE PRESIDENTIAL
PROFESSOR OF CRIMINAL LAW, S.J. QUINNEY COLLEGE OF LAW AT THE
UNIVERSITY OF UTAH

Mr. Cassell. Thank you, Mr. Chairman and distinguished Members of the Committee. I am pleased to be here today----

Mr. Franks. Professor Cassell, let us try to pull that a little closer. I know it is always----

Mr. Cassell. Is that better there?

Mr. Franks. Not much. Is the microphone on?

Mr. Cassell. Is the microphone on? Is it on now? Is that working?

Mr. Franks. Not very well, sir. Let us try to pull it even

closer.

Mr. Cassell. All the way up here. Is that better?

Mr. Franks. I guess it will have to work. Yes, sir.

Mr. Cassell. All right. Mr. Chairman and distinguished Members of the Subcommittee, I am pleased to be here today to testify in support of House Joint Resolution 106, the victims' rights amendment.

The victims' rights amendment would expand civil liberties by adding a bill of rights for crime victims to our Federal Constitution. In doing so, the victims' rights amendment would build on the experience of more than 30 States who have all amended their constitutions to add protections for victims' rights.

Now, while these efforts have been valuable, they have not been fully successful in protecting crime victims. As Attorney General Janet Reno reported after a comprehensive review by the Justice Department, these significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.

Research has shown that the crime victims most likely to be deprived of their rights under the current patchwork regime are racial minorities, residents of inner cities, and the poor. Only an unequivocal constitutional mandate will translate paper promises into real guarantees for crime victims.

The victims' rights amendment builds on the fact that there is a national consensus that crime victims deserve respect in our criminal justice process. It would protect basic rights, like the right to be notified about court hearings, the right to attend those hearings, and the right to be heard at relevant points in the process, like bail hearings, plea hearings and sentencing. These are the kinds of rights that our Constitution is typically and properly concerned about, the rights of individuals to participate in governmental processes that seriously affect their lives. As President Clinton explained in endorsing the victims' rights amendment, participation in all forms of government is the essence of democracy.

Criticisms of the amendment are often based on uninformed speculation about how the language might be misinterpreted or misapplied by courts. But as I detail at greater length in my written testimony, the victims' rights amendment draws on the experience in the various States and Federal legislation that is out there. For example, the victims' rights amendment begins by promising all victims that their rights to, quote, fairness, respect, and dignity shall not be denied or abridged by the United States or any State. Similar provisions are found in the Crime Victims' Rights Act and in the State constitutions of Arizona, Idaho, Illinois, Maryland, New Jersey, Texas, Wisconsin, and my home State of Utah. State and Federal courts have taken that language and applied it without the kinds of difficulties that have been speculated by the ACLU or other opponents. I have never heard any serious argument about giving--against giving victims the right to be treated with fairness, dignity, and respect in the process, and these rights should be enshrined in our Constitution.

Now, sometimes it is argued, as it has been this afternoon, that crime victims' rights will come at the expense of defendants' rights. But House Joint Resolution 106 is a very carefully crafted measure that adds victims' rights that would coexist alongside with defendants' rights. For example, paralleling a defendant's Sixth Amendment right to a speedy

trial, House Joint Resolution 106 gives victims the right to proceedings free from unreasonable delay. According to Harvard law professor Larry Tribe, who has endorsed a version of the amendment, these rights cannot collide since, by definition, they are both designed to bring matters to a close within a reasonable period of time.

Now Mr. Quigley was wondering whether or not this right would be used to force prosecutors to go to trial before they were ready or defense attorneys to go before they were fully prepared. It would not. The victims' rights amendment simply extends to victims the right to proceedings free from unreasonable delay. If a prosecutor or defense attorney needs additional time, they certainly would be entitled to receive it under the amendment.

Now, the amendment specifically addresses the concern about protecting the legitimate interests of criminal defendants by identifying crime victims' rights as those, quote, capable of protection without denying the constitutional rights of the accused. This language was included in the amendment at the suggestion of Harvard law professor Larry Tribe. And I noticed that in neither Ms. McCurdy's prepared remarks or her testimony this afternoon does she even mention this direct language, let alone explain how courts could somehow ignore it and deny rights to criminal defendants. It is hard to understand how the amendment could be used to deny defendants their rights when the explicit text provides exactly the opposite.

While the amendment would not in any way interfere with the legitimate interests of criminal defendants, it would protect vital interests of crime victims. It would protect victims from being excluded from court proceedings, proceedings that they desperately want to attend to learn all they can about crimes that have been committed against them. It would guarantee victims the right to be heard at bail, plea, and sentencing hearings not to veto the decisions that judges would make in those hearings, but simply to have a voice in the process. And it would mandate that victims receive reasonable notice of the release or escape of accused persons or defendants, which can sometimes be literally a matter of life or death for victims who need to take appropriate steps to protect themselves against criminals on the street.

These rights are not controversial. They command broad bipartisan support, which is why President Clinton first proposed a victims' rights amendment and later saw it endorsed by President George Bush. Public opinion polls consistently show overwhelming majorities of Americans want constitutional protection for crime victims' rights.

Now, I understand that in Washington today, delay has occurred on some issues because of partisan disagreement on how to proceed, but I hope there will be no delay in moving forward with the victims' rights amendment. The Framers of the Constitution undoubtedly believed that victims of crime would receive adequate respect in our criminal justice system. Because experience has not vindicated that expectation, it is now necessary to add a corrective amendment to our Constitution, the victims' rights amendment.

Mr. Franks. Thank you Professor Cassell.

[The prepared statement of Mr. Cassell follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. And I will now begin the questioning time by recognizing myself for 5 minutes. I again appreciate all of you for your testimony.

Mr. Douglass, I will begin with you. I have had the opportunity to hear many different witnesses express very moving testimony, but I will say to you, sir, that your testimony here today was one of the most moving and compelling that I have heard as the Chairman of this Committee. And I will suggest to you that your parents would be and are quite proud of you for your performance and presence here today.

Mr. Douglass. Thank you.

Mr. Franks. And I would ask you, if you would, to describe real-life examples that you have discovered in your own life or experience where existing crime victims statutes or State constitutional amendments have failed to provide the protections that they promised to crime victims.

Mr. Douglass. Certainly. Thank you, Mr. Chairman. I will give one example.

After we passed the initial victims' rights act in Oklahoma--and that included, actually amended in 1992, the U.S. Supreme Court handed down a decision saying that victim impact statements were constitutional. About a year later, after our statute had passed, I got a call from someone that I knew in Tulsa, Oklahoma. His mother had been murdered, and they had held the trial, and the person--someone had just been convicted of committing that murder.

He called me and said that they were all getting ready to give their victim impact statements, and the judge literally said, I am not going to hear it. So the prosecutor went in and argued the Supreme Court decision and our statutes and said, you have to hear this testimony. And he just said, I am not going to do it. So they had called me and asked me to call the judge and discuss it with him, which I did. And the judge basically said, I don't think it is constitutional, and I am not going to hear it. I don't like being told what to do in my courtroom.

And the upshot was, what are you going to do about it? And to make a long story short, I wound up bringing in the Court of Criminal Appeals chief judge. We had a conversation with him, and I said the same thing to both of them. I said, well, I understand you have a job to do. You don't want to be told what to do in your courtroom. And I have a job to do as a State senator, and now I am going to do mine. I said, I am going to go down and I am going to get staff. I am going to author a bill that creates a review committee, and what their job will be is to review decisions dealing with crime victims' rights, and if they find that you have wrongfully denied a victim of one of their rights under the statutes or the Constitution of Oklahoma, they are going to ultimately have the power to take away your pension.

Well, you know, pretty quickly he decided then that--I don't know if it would be constitutional for me to do that or not, frankly, but I didn't have to file the bill. He wound up actually deciding it was a good idea to hear the victim impact testimony.

But there have been countless--even after I left the senate, just as I think I said in my testimony a few months ago, a judge, a sitting judge who I went to law school with, and maybe it wasn't a very good law school, but at the end of the day, he just said, I don't think it is constitutional. He

doesn't bother looking up Supreme Court decisions. As you mentioned in your initial statement, just the mention of the constitutional rights of the accused is enough for them. Whether it has any basis or not, the victims' rights are ignored.

As I have said many, many times from the senate floor in Oklahoma, we have a system that literally steps over the body of the victim to read the criminal his rights, or the suspect his rights, and as long as there is not equal footing, as long--the victims will continue to be second-class citizens in our system.

Mr. Franks. Well, thank you, Mr. Douglass, very much. And I again appreciate your presence here today, sir.

Professor Cassell, it seems I have been mispronouncing your name, and I apologize. But how widespread, in your opinion, is the problem described by Mr. Douglass; that is, this failure of State victims' rights laws to protect crime victims? And I suppose I should add, what reason is there for thinking that if a Federal constitutional amendment were enacted, that the protection of crime victims' rights would improve?

Mr. Cassell. Let me address both of those questions. There was a comprehensive Justice Department review done by Attorney General Janet Reno, and she found that the State enactments failed to fully safeguard victims' rights because they were not sufficiently consistent, comprehensive, or authoritative. She relied in part on a National Institute of Justice study that looked at, I think, eight different States to see how the State amendments were being implemented, and they found significant problems. For example, fewer than 60 percent of crime victims were notified of sentencing hearings, and fewer than 40 percent of victims were notified of pretrial release.

Now, those error rates are simply astounding. I mean, I wonder what the Committee would do if it found out, for example, that even 5 percent of criminal defendants were not getting their right to be represented by counsel or something along those lines. I am assuming there would be hearings and immediate steps taken to rectify the situation. But that is the level of the problem that is out there.

Now, we have heard some discussion, too, about the Federal system and the new Crime Victims' Rights Act. I wanted to say just a couple of words about that. Let us remember that the Federal Crime Victims' Rights Act applies to fewer than 5 percent of the criminal prosecutions in this country. Most of the prosecutions are done at the State and local level, and certainly most of the violent crimes or extremely violent crimes, such as the one Mr. Douglass is talking about, are handled by State and local prosecutors. So the Federal system, I think, is a little bit unusual. But even here the General Accounting Office found significant situations, such as the fact that less than half of Federal victims were even aware that they had a right to confer with Federal prosecutors.

So that is the level of the problem that we have out there. A constitutional amendment would immediately change the culture. The kinds of examples we have been hearing about today simply wouldn't happen. You don't see judges ignoring a defendant's right to counsel, because they are taught that in law school, they know it is in the Constitution, and they respect it. The same kind of change would happen if we passed a victims' rights amendment.

Mr. Franks. Well, thank you, Professor. And related to your

testimony about the Janet Reno study, did I hear it--was it Janet Reno?

Mr. Cassell. Yes.

Mr. Franks. Okay. From my memory on that part, that she has been accused of being part of a right-wing conspiracy here.

But with that I would yield to Mr. Quigley for 5 minutes for questions.

Mr. Quigley. Thank you, Mr. Chairman.

Mr. Douglass, I apologize for being out of the room when you testified. One of the few absolute responsibilities we have here is voting, and I was next door doing that. But I read your testimony. It is quite compelling and very important for us to appreciate.

To all of our panelists, having been in the trenches of the justice system as a criminal attorney at 26 in California and Chicago for 10 years, probably 220 trials, I can tell you it isn't easy. We all speak of a balance, but the balance is played out every day.

And, Professor, when I talk about my reservations, it comes from that experience, because after I left that work, I was a Cook County commissioner on the litigation committee. Our first act was to deal with a lawsuit of four men, the Ford Heights Four, who went to jail or on death row. One was lined up on death row. One was raped in prison. And it was the wrong guys, right? In Illinois--we talk about the balance, the horrific unfortunately goes to both sides.

Before they got rid of the death penalty, they exonerated more people on death row through DNA and so forth than they executed. So if no one cares about that aspect from the issue of justice, the county had to settle the Ford Heights case for \$36 million.

So that no one thinks this is just about the alleged perpetrators' rights being taken away, being put on death row, we want to get this right because the victims want the right people punished. So my concern, Professor, is we got to get this right. And when it comes to speedy trials, you say--you quoted someone from Harvard saying they can't collide. Well, they do. And I am telling you, it is not easy to sort out, you know? We put people on the bench. Some are good, and some are bad.

But you have to appreciate from a veteran's point of view, I have seen haste make horrible mistakes. I mean, how do you balance that out with the language that you are trying to address here beyond just that word ``unreasonable,' ' which courts struggle with?

Mr. Cassell. Well, I was a Federal prosecutor for 4 years, and I was a Federal district court judge for 5 years, so I have been in the trenches as well and have seen a number of the cases that are out there.

I think I agree with Harvard law professor Laurence Tribe. He was the law professor that I was quoting. And the idea here is not to take away rights from criminal defendants, but to expand rights for crime victims.

So let us talk about the one you have been pointing to, and the language, I think, is very carefully drafted. It says that crime victims would have the right to proceedings free from unreasonable delay. And by definition, and the situation in which the prosecutor needs to prepare a case or the defendant needs to collect evidence, that would be reasonable delay. But we have all seen situations--I am sure you have--where delay is

happening for delay's sake or for no good reason at all. The amendment would give a victim a right to go in and say, wait a minute, Judge, we need to get this case moving along.

The other thing I should point out is that there are a number of States--and my prepared testimony actually lists them--that already have in their State constitutions a constitutional right to proceedings free from unreasonable delay. So the fact that these States have been able to provide these rights without the kinds of problems that I think some have been suggesting bodes very well for the Federal constitutional amendment.

Mr. Quigley. And I appreciate what you are saying. I still think, though, beyond the simple words of what you are trying to do, every case is unique, and every case is bound upon that. And I think to a certain degree you are creating unrealistic expectations that with the stroke of a pen and the passage of a constitutional amendment, judges are going to have a much easier time sorting out that troubling aspect of this right now, and that is lost witnesses, complicated data, experts' cost, pending litigation. You know, perhaps much better than I, a dozen other reasons that this could be held off and could be extraordinarily complicated, and we get it wrong both ways. You know, it is something we struggle with.

I just have fears that it is hard to do the most important thing we do, and that is seek justice, with the language that has to be so broad as a constitutional amendment, and you want to be balanced. But I just think it is harder than that, what you have tried to explain here in just these few minutes, and there is just so much at stake in our attempts to do so, because, again, it does the victims no good to have a hearing--to have a trial take place, and we get the wrong people.

But I will yield back.

Mr. Franks. Thank you, Mr. Quigley.

We will now recognize Mr. Scott for 5 minutes.

Mr. Scott. Thank you, Mr. Chairman.

I think we all want dignity, respect, and protection for our witnesses, and the question is whether the constitutional amendment would create more problems than it solves. Professor Cassell mentioned the State measures. They are all subservient to the Federal Constitution.

You also mentioned the right to counsel and how that is not ignored. Well, a right to counsel, if you violate that, that is reversible error. That is why the judge has to pay attention to that. There is nothing in here that creates any remedy that is apparent. I guess mandamus.

If you really want to provide respect, dignity, consultation, protection, what we ought to do is have more victim advocates, more prosecutors so they have actual time. A lot of State prosecutors come in with a stack of files. They don't have time to talk to anybody, so of course they are going to be rude. If you had more prosecutors and more marshals to provide protection. Unfortunately the budget that we are trying to work under this year eliminates a lot of the funding for the victims' advocates, cuts the Department of Justice budget significantly, and has about a 10 percent cut for the marshal services. So who is going to be doing the protection?

Let me ask a couple of questions, because some of this is all in theory, and I just want to know what this kind of looks like.

If a victim has, in fact, been disrespected and goes in the

court and presents a case--it says any court, so I assume if it is a State court proceeding, they can go into Federal court to make the case that they are being disrespected in State court. What does a judge do? Does a prosecutor get subpoenaed to testify, no, I didn't disrespect them?

Mr. Cassell. The way the enforcement would work is if there was a problem in State court, the victim would go into State court to address that.

Mr. Scott. Well, it says in here any court, enforce those rights in any court, has a standing to enforce these rights in any court.

Mr. Cassell. So you would have standing to enforce them in both State and Federal court.

Mr. Scott. So you would go to Federal court and present to a judge that you are being disrespected in State court?

Mr. Cassell. You would go initially, though, to the State court, because the State court is the--you have to exhaust remedies before you can proceed to some other forum to vindicate your rights. And the way that this would work--again, there are real-world examples of a right to be treated with respect, and my prepared testimony collects specific examples.

For example, in a child pornography prosecution, if somebody is showing the pornography around in ways that are not respectful to the victim, the victim can go to that judge and say, wait a minute, these materials should be kept under seal, only disclosed to people that have a need to see that information. That is the kind of enforcement that becomes possible if a Federal constitutional amendment----

Mr. Scott. Well----

Mr. Cassell [continuing]. Around the country.

Mr. Scott. Let us get back to disrespect. If you are in court and approved your case, can you subpoena the prosecutor?

Mr. Cassell. You wouldn't need to subpoena the prosecutor. The prosecutor would be right there during the proceedings, and so you would assert----

Mr. Scott. Now, if you are in any court, you can go into any court and--so let us say the judge is the problem, and you want to go into another court to show that you are being disrespected. And you present it to the court: Won't return phone calls, didn't notify me of this and that. Is that an ex parte proceeding? Can you go ex parte in Federal court?

Mr. Cassell. No, you don't go ex parte. Again, there are real-world examples of how these rights are handled, and you don't go to a different court, you don't subpoena the judge. Just as you pointed out, if a defense attorney is not appointed for a defendant, you don't go and subpoena----

Mr. Scott. No. That is reversible error. You don't have to worry.

If you have shown that you are being disrespected, what is the remedy?

Mr. Cassell. Well, the remedy is to correct the disrespect.

Mr. Scott. And if they don't do it, what is the remedy?

Mr. Cassell. The remedy then is to go to the appellate court and say the lower court is not following the directive in the United States Constitution. Again, there are real-world examples.

Mr. Scott. Is that an ex parte proceeding?

Mr. Cassell. No. It is a judicial proceeding that is handled with notice to both sides with service of process on both sides.

Mr. Scott. And you don't have enough prosecutors to begin with. So they are sitting up in all these other courts.

Unreasonable delay. How will a judge determine whether or not the delay is reasonable or not?

Mr. Cassell. Right. There would be typically a four-factor balancing test. In my prepared remarks, I indicate the four factors that the judges have used. And remember, defense attorneys now----

Mr. Scott. I am running out of time. So if the delay is because the prosecutor's witness has disappeared, and the defense doesn't know about it, or refuses to testify, or the prosecution has lost the evidence and is trying to find it, would that be an open trial with the defendant there listening to the proceedings as to why they haven't gone forward?

Mr. Cassell. The question would be for the judge whether the delay was reasonable or not, and a record would be made on that. In certain situations records can be made in sealed proceedings. So that is how that issue would be handled.

Mr. Scott. Well, I mean, so the defendant would have the opportunity to hear that the prosecutor's case has all fallen apart, and that is why they are asking for a continuance?

Mr. Cassell. That is the way it happens today in many cases.

Mr. Scott. No, they just--the defendant knows he did it, so he doesn't want--if the prosecutor wants a continuance, fine with me.

Now you have got an idea that the witness isn't going to show up, and the victim says it is unreasonable delay. And the judge says, this is unreasonable; Mr. Prosecutor, why aren't you going forward? Then what does the prosecutor say?

Mr. Cassell. All I can say, Congressman, is that that has not been a problem, for example, in my home State of Utah, where there is such a right. And that is probably why the National District Attorneys Association just this week endorsed the amendment saying it would actually strengthen the prosecution.

Mr. Scott. Mr. Chairman, can I ask one additional question?

Mr. Franks. Without objection, please.

Mr. Scott. The language in section 1 starts off with the rights of the crime victim, fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused. Do you interpret that as being a priority for rights of the accused or a statement, in fact, that you can provide fairness, respect, and dignity without denying the constitutional rights? Is that a question of fact, a statement of fact, or a statement of priority?

Mr. Cassell. What it is is a statement of coexistence, that both victims' rights and defendants' rights can coexist without compromising each other. The language, I should point out, was drafted by Harvard law professor Laurence Tribe, again who is frequently cited as one of the leading advocates for civil liberties in this country. So we think the language would actually work very well to make sure that both defense interests and crime victims' interests are----

Mr. Scott. Well, my question is if there is--if somebody believes there is a conflict, would the right of the accused trump the rights of the victim? Or is this a statement of--trying to be a statement of fact that there is, in fact, no conflict, and that the crime victims' rights will be respected notwithstanding any denying of constitutional rights to the

accused?

Mr. Cassell. It does not provide a basis for denying defendants' rights. It does not provide a basis for denying victims' rights. It says that both rights can coexist. And again, nobody has provided a real-world example of how the rights are going to interfere with the defendants' interests.

Mr. Franks. Mr. Scott, I am going to have to ask you to leave it there, sir. I have got a vote in the Committee next door that I have got to--and that means I am going to have to be pretty direct here.

But we have had a good hearing, and I want to thank all of the witnesses for coming. And, without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond to as promptly as they can so that their answers may be made a part of the record.

Without objection, all Members will have 5 legislative days within which to submit any additional materials for inclusion into the record.

With that, again, I sincerely thank the witnesses. I thank the Members and observers. And this hearing is now adjourned.

[Whereupon, at 3:25 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Material Submitted for the Hearing Record

Supplement to the Testimony of Paul G. Cassell, Ronald N. Boyce
Presidential Professor of Criminal Law, S.J. Quinney College of Law at
the University of Utah

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Material submitted by the Honorable Trent Franks, a Representative in
Congress from the State of Arizona, and Chairman, Subcommittee on the
Constitution

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]