

VICTIMS' RIGHTS AMENDMENT

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VICTIMS' RIGHTS AMENDMENT

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HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRTEENTH CONGRESS
FIRST SESSION
ON
H.J. Res. 40

APRIL 25, 2013

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VICTIMS' RIGHTS AMENDMENT

THURSDAY, APRIL 25, 2013

House of Representatives

Subcommittee on the Constitution
and Civil Justice

Committee on the Judiciary

Washington, DC.

The Subcommittee met, pursuant to call, at 11:34 a.m., in room 2237, Rayburn Office Building, the Honorable Trent Franks, (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, DeSantis, Nadler, and Scott.

Staff present: (Majority), John Coleman, Counsel; Sarah Vance, Clerk: (Minority) David Lachmann, Subcommittee Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. Franks. The Subcommittee on the Constitution and Civil Justice will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Today's Subcommittee on the Constitution and Civil Justice examines H.J. Res. 40, the bipartisan ``Victims' Rights Amendment'' to the Constitution, also known as the VRA.

An amendment to the Constitution for the rights of victims was first proposed by President Ronald Reagan's Task Force on Victims of Crime in 1982. The task force wrote, in part--do we have some feedback here? I didn't want you all to miss this quote. It is really a cool quote. [Laughter.]

The task force wrote, in part, ``We do not make this recommendation lightly. The Constitution is the foundation of national freedom, the source of national spirit. But the combined experience brought to this inquiry and everything learned during its process affirmed that an essential change must be undertaken. The fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action.''

Victims' rights legislation 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 at the state and Federal level to bring balance through statutes or state constitutional amendments, these efforts have proven inadequate whenever they come into conflict with bureaucratic habit or traditional indifference or sheer inertia or the mere mention of an 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 ``haphazard patchwork of rules is not sufficiently consistent, comprehensive or authoritative to safeguard victims' rights.''

In light of the inadequacies of our current laws, it is time we amended the United States Constitution to include rights of victims of crime, and it is time for Americans who become victims of crime to have the same rights anywhere in the United States, regardless of the state in which that crime occurs.

The VRA would specifically enumerate rights for crime victims, including the right to fairness, respect and dignity; the right to reasonable notice of and the right not to be excluded from public proceedings related to the offense; the right to be heard at any release, plea, sentencing, or any 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 the escape of the accused; the right to due consideration of the crime victim's safety and privacy; and the right to restitution. Moreover, the amendment expressly provides standing for the victim to enforce the enumerated rights.

Supporters of a victims' rights amendment have included presidents George H. W. Bush, Bill Clinton, George 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 of Victims' Assistance; and finally, the National District Attorneys Association, the voice of the Nation's prosecutors.

Last year, the Phoenix Law Review, at the Phoenix School of

Law, published a special issue containing articles and authors' statements regarding the Victims' Rights Amendment. I would like to ask unanimous consent to put it into the record.

Hearing no objection, so ordered.*

*The material submitted for the record is not reprinted in this hearing record but is on file with the Subcommittee.

The issue is entitled, ``A Proposed Victims' Rights Amendment to the Constitution,' ' and it is dated April 19, 2012.

In addition, my office has received several law review articles, additional written testimony, a proclamation by Governor Brewer of Arizona recognizing this week as Arizona Crime Victims' Rights Week, and letters from victims' rights organizations, including the National District Attorneys Association, the National Organization for Victim Assistance, the National Center for Victims of Crime, and the Justice Fellowship, which we will add to the hearing record as well.**

**The information referred to is available in the Appendix.

I look forward to hearing from the witnesses today on this critical issue, and I will now yield to the Ranking Member, Mr. Nadler, for his opening statement.

[The resolution, H.J. Res. 40, follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Nadler. Thank you, Mr. Chairman. I apologize for being a little late and I thank you for holding the hearing.

First of all, I ask unanimous consent that the statement of the distinguished Ranking Member, Mr. Conyers, be placed in the record.

Mr. Franks. Without objection, so ordered.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Thank you, Mr. Chairman.

Today, we examine the proposed Victims' Rights Amendment to the Constitution, an issue that has come before this Committee many times since the 104th Congress.

The timing of this hearing is especially appropriate as it coincides with the National Crime Victims Rights Week.

This hearing, therefore, provides an excellent opportunity to reflect not just on what has been accomplished, but what more we can do to aid victims of crime.

I continue to have serious reservations about amending the Constitution in order to aid victims or crime. I do not believe a constitutional amendment is necessary, and I am deeply concerned that it will undermine both the rights of defendants, and the ability of law enforcement to do its job.

As we consider the Victims' Rights Amendment, I would like us to keep the following issues in mind.

First, would a constitutional amendment actually provide any

benefit to a victim of crime?

As demonstrated by prior Congresses, there has never been any action on this undertaking because of the cumbersome nature of amending the Constitution.

However, Congress has passed various measures that continue to provide meaningful assistance to victims and that protect their rights.

The Federal Crime Victims Assistance Fund--managed by the FBI and various Justice Department Divisions--provides critical assistance to victims and survivors immediately after the crime.

The Treasury Offset Program is a centralized debt collection program that helps agencies collect delinquent debts owed by criminals and to ensure that they pay restitution to crime victims. To date, these efforts have resulted in more than \$24 million in restitution payments.

The Office for Victims of Crime funds programs to enhance and provide comprehensive services for victims of human trafficking.

The Drug Endangered Children Program is a collaboration among federal, state, and local nonprofit entities and the public to develop best practices to help educate law enforcement, justice system personnel, and service providers about children put in harm's way by family members involved in drugs.

There are also programs funded under the Children's Justice Act and federal funding for victim-witness coordinators in U.S. Attorneys' Offices and the FBI. In addition, federal funds support the Federal Victim Notification System, and state victim assistance formula grants.

These are just a few of the efforts to provide assistance to crime victims.

In contrast, the Victims' Rights Amendment is utterly silent about how it would provide any meaningful counseling, funding, or other assistance that experience has shown is so helpful in the wake of a crime.

The services now being provided to crime victims are invaluable, and it would make sense to augment them.

Yet, while we are wasting time on this Amendment, budget cuts, including the sequester, have reduced the resources available to help victims and law enforcement. We should build on our successes, not undermine them.

Second, we should consider how would this Amendment affect other rights under the Constitution.

In particular, I am very concerned that the Amendment would interfere with the right to a fair trial notwithstanding its broad declaration that the ``rights of a crime victim to fairness, respect, and dignity, [are] capable of protection without denying the constitutional rights of the accused.''

Just because we say it doesn't make it true.

Most troubling, it drastically changes the contours of a criminal trial from one in which the guilt or innocence of a defendant must be determined, instead requiring courts to behave in ways that assume guilt prior to trial.

But other aspects of this Amendment, including actions that would prejudice the jury, or allow a third party to demand that a trial move ahead when the prosecution or the defense are trying to assemble a case, could wreak havoc.

Finally, we should consider what would be the impact of a constitutional amendment on the administration of justice, particularly the effective and expeditious prosecution of criminals.

The Amendment would create numerous opportunities for litigation to interfere with the judicial process.

We have heard in the past from prosecutors and some victims rights advocates about the danger of giving so wide a group of individuals the

right to sue.

For example, a person who had abused a woman for 20 years, and who was ultimately stabbed by her, would enjoy the full range of newly created constitutional rights under this Amendment.

A victim who objected to the prosecution's strategy, or the decision by a prosecutor to wait for additional evidence, for example, could sue and assert that his or her constitutional rights had been violated under this Amendment.

There are many reasons why, over the years, we have never advanced this constitutional amendment, and that we have sought legislative and administrative means of protecting the rights of victims, and assisting them in the aftermath of crime.

I want to thank the witnesses for attending. I look forward to their testimony.

Thank you, Mr. Chairman. I yield back.

Mr. Nadler. Thank you. Thank you, Mr. Chairman.

Mr. Chairman, 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 the role that everyone in the criminal justice system must play in assisting victims 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, and not without justification, that they were considered almost extraneous to the process. With greater awareness and legal protections enacted at the state and Federal levels, victims now 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 more. We could provide more funding for crime victims' programs. We could provide the training and resources necessary to ensure that our existing laws, which require notice and assistance to crime victims, are fully enforced.

One thing we did recently that will help crime victims was to put an end to the delays and obstructionism that held back the reauthorization of the Violence Against Women Act. The resources that that act provides to victims of some of the most heinous crimes is invaluable.

Crime victims also need to see the guilty party is 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 serious 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. It will certainly spark extensive litigation in our already over-burdened criminal justice system, and it may provide an opportunity for people who do not have the best of motives to cause terrible trouble in prosecutions.

Our first obligation to crime victims is to provide assistance, but we must do the job right. Constitutional amendments may make for great headlines, but they are no

substitute for the resources victims and law enforcement need. Offering symbolic gestures to crime victims and stonewalling legislation that would provide assistance to them is not the way to help victims of crime.

Cutting funding for victim assistance programs, as the sequester legislation has done in the name of fiscal austerity, is certainly not the way, and I hope that my colleagues will remember that when we take up the Balanced Budget Constitutional Amendment later this year. For example, the Crime Victims Fund was established by the Victims of Crime Act to provide funding for state victim compensation and assistance programs. The CVF, the Crime Victims Fund, provides funding for discretionary grants for private organizations' assistance, the Federal Victim Notification System, funding for victim assistance staff within the FBI and the executive office of the U.S. Attorney, funding for the Children's Justice Act Program, and compensation for victims of terrorism. It is funded through criminal fines, forfeited appearance bonds, penalties and special assessments collected by the U.S. Attorney's Office, Federal courts, and the Federal Bureau of Prisons.

Since 2002, Congress has allowed gifts, bequests and donations from private entities to be deposited into the CVF. For fiscal year 2012, Congress set the CVF distribution cap at \$705 million. For fiscal year 2013, the Obama Administration requested an increase in the CVF cap by \$365 million, to a total of \$1.07 billion, but Congress limited funding to \$705 million. According to OMB, the sequester resulted in the loss of approximately \$36 million to that reduced number. This means real less services to victims of crimes.

So if we are to measure Congress' commitment to crime victims in terms of providing them with actual assistance instead of by rhetoric, then this Congress and the reckless budget cutters simply don't measure up.

Amending the Constitution is also difficult, as it should be. We have only had, since the Bill of Rights was added in 1791, 17 amendments to the Constitution, three of them in the aftermath of the Civil War. So since the Civil War, only about a dozen.

In the case of this proposed amendment, this Committee, much less this House, has not even acted on it. We do hold hearings every Congress, but that is the end of it. Debating yet another constitutional amendment that we know from long experience is going nowhere will certainly not help victims of crime. We will hold a hearing, we will talk about it today, and that will probably be the end of it. Judging from past experience, Republican congresses will hold this hearing, we will never mark up a bill, we will never pass it, and certainly the Senate won't look at it. That will help no one. Certainly it won't help victims of crime. Legislation that protects victims' rights and improves services would help victims of crime. I hope that we can work together to improve and expand those services in the future.

I want to join the Chairman in welcoming our panel today, and I look forward to their testimony. I thank the Chairman and the witnesses, and I yield back the balance of my time.

Mr. Franks. I thank the gentleman.

We would now yield to the Chairman of the Committee, Mr. Goodlatte from Virginia. However, Mr. Goodlatte is not here at the moment. So without objection, if he arrives, we will allow him to make his statement at that time. Otherwise, we will

place his statement in the record.

I would now yield--let's see, I think Mr. Conyers' amendment or his opening statement will be placed in the record as well.

Let me now introduce our witnesses.

Bill Montgomery is the County Attorney for Maricopa County, Arizona. Mr. Montgomery is a West Point graduate, decorated Gulf War veteran, former Deputy County Attorney, and a professional prosecutor. Mr. Montgomery earned his J.D. from Arizona State University College of Law, graduating magna cum laude and receiving the Order of the Coif. As a prosecutor with the Maricopa County Attorney's Office, he quickly gained a reputation as an aggressive prosecutor. Mr. Montgomery has helped shape legislation designed to protect victims of crime and reform child protective services, resulting in the creation of the Office of Child Welfare Investigations, and he continues to be a passionate advocate for crime victims' rights in Arizona.

Glad you are here, Bill.

John W. Gillis is a former veteran, Los Angeles police officer, a former National Director of the Office of Victims of Crime in the U.S. Department of Justice, and a champion for the rights of crime victims. Following the 1979 murder of his daughter, Louarna, Mr. Gillis became a founding member of Justice for Homicide Victims, JHV, and the Coalition of Victims' Equal Rights. Mr. Gillis was nominated by President George W. Bush and confirmed by the U.S. Senate in September, 2001, as the National Director, Office for Victims of Crime, U.S. Department of Justice. In addition to a Master of Science degree in public administration, University of Southern California, he holds a B.A. degree in political science from California State University at Los Angeles. He has studied law at Glendale College School of Law, and Mr. Gillis serves as Chief of the Maricopa County Attorney's Office Victims Services Division, and on the Board of Directors at the National Crime Victim Law Institute.

Thank you for being here, sir.

Professor Robert Mosteller--is that Mosteller? I know no one has ever gotten that wrong before. Professor Robert Mosteller is an Associate Dean for Academic Affairs at the J. Dixon Phillips Distinguished Professor of Law at the University of North Carolina School of Law. Professor Mosteller holds a B.A. in history from the University of North Carolina, where he was President of the Phi Beta Kappa, a Master's in public policy from Harvard, and a J.D. degree from Yale. After clerking on the United States Court of Appeals for the Fourth Circuit with Judge J. Braxton Craven, he worked for 7 years with the Washington, D.C. Public Defenders Service, where he was Director of Training and Chief of the Trial Division.

Professor Doug Beloof is a law professor at Lewis and Clark School of Law. Professor Beloof is a graduate of the University of California at Berkeley and received his J.D. from Northwestern School of Law of Lewis and Clark College. Professor Beloof began his law career clerking for Justice Thomas H. Tongue of the Oregon Supreme Court. As Director of the Multnomah County Victims' Assistance Program, he worked on establishing procedures to assist victims of crime. He has been a prosecutor and a criminal defense attorney, as well as practicing tort law as a plaintiffs and defense attorney. Professor Beloof has published a casebook, Victims and Criminal

Procedure, which won a national award for writing in victimology and the law. He has published numerous articles about civil liberties for crime victims and also the book Victims' Rights, a Documentary and Reference Guide.

Thank you, Professor, for being here.

Each of the witness' written statements will be entered into the record in their entirety, so I would ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

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

[Witnesses sworn.]

Mr. Franks. Let the record reflect that the witnesses answered in the affirmative.

I would now recognize our first witness, and please turn the microphone on before you start speaking.

Mr. Montgomery?

TESTIMONY OF WILLIAM G. MONTGOMERY,
MARICOPA COUNTY ATTORNEY

Mr. Montgomery. Thank you, Mr. Chairman. Dear Mr. Chairman and Members of the Committee, thank you for the opportunity to appear in support of House Joint Resolution 40, the Victims' Rights Amendment, and let me also offer my gratitude to the Chairman and to Congressman Jim Costa for their continuing work on behalf of victims of crime.

For the criticism regarding partisanship in our Nation's capital, this legislation offers a ready antidote, a bipartisan approach to protecting our fellow citizens when they are harmed by crime, and this is truly a bipartisan cause. In the thousands of police reports I have read over the years as a prosecutor, I have never read of an instance in which a perpetrator checked the party affiliation of someone before victimizing them.

In addition to serving as a prosecutor, I have also worked as a victim rights attorney, advocating for crime victims in state and Federal courts. Currently, I am the elected county attorney, called a district attorney in other jurisdictions, and lead an office serving 4 million people in Maricopa County, Arizona. I am authorized over 300 prosecutors and have another 40 to 50 civil litigation attorneys on staff. Annually, we prosecute roughly 35,000 felonies.

Accordingly, my observations of the status of victim rights is based on firsthand experience in a courtroom and in working directly with victims of crime. When I tell you that patronizing arguments in opposition to the Victims' Rights Amendment are based on false assumptions and disingenuous hypotheticals, I am speaking from that firsthand experience.

As for concerns over acknowledging the victim of a crime as a victim in the courtroom, let me simply state they are unfounded. It does not shift the government's burden of proof or relieve the jury of their duty to find the facts in any given case to determine whether this victim was harmed by this particular defendant in the manner as alleged by the

government. The argument that a victim's right to proceedings free from unreasonable delay ignorantly claims that trials will proceed in violation of a defendant's due process rights. This is an example of rights that can work in parallel without offense to either a defendant or a victim. A defendant has a right to a speedy trial but will not move faster than their attorney can prepare, and neither will the prosecution. Delays due to the needs of discovery or witness availability are not impacted.

Those are reasonable delays. In my experience, victims understand that. They do not seek to push trials where the danger of a retrial can affect a just outcome.

As for the argument that a constitutional right for a victim to be present throughout a trial would affect the defendant's right to a fair trial, I can only say that this argument is as false and disingenuous as the hypotheticals offered in support in written testimony presented to this Committee.

For the record, Abner Louima was never prosecuted for an offense stemming from his initial contact with police. The charges were dropped in his case, and the police officers who harmed him were sent to prison.

As for Rodney King, he was never charged for his high-speed flight from police, and the two officers involved in beating him were imprisoned.

But, as we have seen, ever since the cause of constitutional rights for victims of crime began, opponents will go to great lengths to scare lawmakers away from justice for all.

Why is a victims' rights amendment necessary? Because the inconsistent approaches to crime victim rights across our country is unacceptable for a Nation that pledges justice for all and not justice for some or justice only for the accused. What rights would a victim of the Boston Marathon bombing have if the case went to trial in a Massachusetts state court? They would have no constitutional rights to assert whatsoever, and the Supreme Judicial Court of Massachusetts has stated that a crime victim has no judicially cognizable interest in the prosecution of another.

What about the parents of children lost in the tragedy of Newtown? What if the perpetrator had been tried in state court? There, they would be able to assert state constitutional rights, unlike in Boston, just 149 miles away in an adjoining state. However, the Supreme Court of Connecticut, in reviewing their Constitution, noted a review of the language of the Victims' Rights Amendment discloses that the amendment, while establishing many substantive rights for crime victims, does not include a right to appeal.

As for the loss of life in Tucson, Arizona from a shooting that also affected a former Member of this House, had the perpetrator gone to trial in Federal court, the crime victims would have had fewer guaranteed rights than if the case had been tried in one of our state courts following our Victims' Bill of Rights. Nevertheless, any contest between state statutory or constitutional rights and Federal constitutional rights, or Federal statutory rights and Federal constitutional rights, the result is the same. Victims lose.

To those who hesitate or shy away from amending our Constitution to protect victims, I would say, with all due respect, it is a good thing they were not in the first Congress

that provided us with a Bill of Rights. It is good they were not in the 38th Congress that ended slavery, or the 39th Congress that asserted rights to equal protection and due process. It is good they were not in the 66th Congress that extended the right to vote to women, and it is good that they were not in the 87th Congress that ended the poll tax. You see, through the long course of our history, the great injustices in America have ended with constitutional justice.

In closing, let me note that Sir Winston Churchill once observed that Americans can always be counted on to do the right thing after we have tried everything else. We have tried everything else. I encourage your support for the Victims' Rights Amendment.

[The prepared statement of Mr. Montgomery follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. Well, thank you, sir, very much.

And now, Mr. Gillis, we would recognize you, sir, for 5 minutes.

TESTIMONY OF JOHN W. GILLIS, MARICOPA COUNTY ATTORNEY'S
OFFICE'S VICTIM SERVICES DIVISION

Mr. Gillis. Thank you, Mr. Chairman. Mr. Chairman and distinguished Members of the Committee, thank you for the opportunity to address you on the very important issue of rights for crime victims. As we hear so often, becoming a crime victim is not something one aspires to achieve through training and education. Although many people become unintended victims of crime each day, our United States Constitution fails to specifically provide basic rights to those individuals who are victimized.

The victims are young and old. They are rich and poor. They are people of all ethnicities and colors. But our Constitution treats them all the same. It completely ignores them.

In 1979, my 22-year-old daughter, Louarna, was murdered by a gang member who wanted to move up in the gang hierarchy. Getting into the upper echelon was a long, tough climb for an ambitious gang member. The shortcut was an assault on a police officer or a member of the officer's family. He took the shortcut and murdered my daughter. He drove her to an alley where he shot her in the back of the head execution style, and then emptied the revolver in her back as she laid on the ground. He knew who she was because he had attended school with her, and he knew I was a police officer.

But within a few months after the murder, he was in custody, and a few months thereafter the trial began. During the course of the trial, my wife and I were not allowed in the courtroom for any testimony. We were relegated to sitting on the bench in the hallway while the defendant's family, friends and others were seated in the courtroom. We had to endure the sneers and jeers each time they walked past.

There are still jurisdictions within the United States where victims of crime wait in hallways, back rooms, and

outside the courthouses because they are not welcome by our criminal justice system.

Over one-third of the United States have not amended their constitutions in order to provide victims in their state the right to be present in court proceedings. These states don't see the need for victims to have the right to be heard or the right to be treated with fairness and dignity. Over one-third of the states still treat victims as second-class citizens who are not deserving of constitutional rights.

The murderer of my daughter was tried for first-degree murder, and that made him eligible for the death penalty. Eleven jurors voted for first-degree and one juror voted not guilty. As we prepared for the second trial, the defendant pled guilty to second-degree murder, and that allowed him to avoid the death penalty. I was not present for the plea, I was not present for the defendant's sentencing, nor was I allowed to make an impact statement. These events were important to me and my family, and I know these events are important to the majority of America's crime victims.

Every crime victim in the United States should be guaranteed the right to be present, the right to be treated with dignity and respect, and the right to be heard should be a basic right under the Constitution. My experience as a crime victim in the criminal justice system is not unique and it is experienced by tens of thousands of crime victims across America. Like most victims, I tell my story not for sympathy or pity. I tell my story to let others know I speak from experience when I say the system needs a fix.

Two days after the September 11, 2001 terrorist attack, I was confirmed by the Senate as Director of the Office for Victims of Crime. During my first days as director, I was completely immersed in the nuances of working with many states that had victims and next-of-kin from the terrorist attack. Each state had different variations and protocol for working with victims and next-of-kin, and those variations still exist. Mass victimization events such as 9/11 and the shootings at Virginia Tech and Northern Illinois University and Delaware State University and the Boston Marathon bombing involved victims from multiple states and highlight the need for a U.S. constitutional amendment.

There are literally tens of thousands of individuals who are victimized outside their states of residence. With the expanding use of the Internet, including social media, there are no geographic boundaries. Child sexual predators reach across state lines in search of their victims. Rapists and pedophiles use social media to reach across state lines to find their victims. The pool for identity theft victims is nationwide.

Our best hope for protecting the victims' rights is a constitutional amendment, and I am optimistic that the bill will move from this Committee. My optimism is based on the fact that Members of this Committee have steadfastly supported the rights of women, the rights of children, and the rights of minorities. So I am optimistic that this Committee will support rights for victims.

This constitutional amendment would be the capstone for the individuals and groups you have fought so hard to protect. This amendment is for people who do not have the power. This amendment is for people who do not have the funds, the people who do not have the will, and the people who do not have the

wherewithal to individually fight for their rights. Thank you.
[The prepared statement of Mr. Gillis follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. Thank you, Mr. Gillis.
I would now recognize Professor Mosteller for 5 minutes.

TESTIMONY OF ROBERT P. MOSTELLER, PROFESSOR, UNIVERSITY OF
NORTH CAROLINA SCHOOL OF LAW

Mr. Mosteller. Chairman Franks and Members of the Subcommittee, thank you for this opportunity to testify. I urge you not to adopt H.J. Res. 40. Victims of crime deserve society's support. My opposition is only to amending the Constitution with unnecessary or harmful provisions.

We have amended the Constitution very rarely and should do so only for compelling reasons, which are not present. Indeed, there is a mismatch between the legitimate goals of the VRA and when a constitutional amendment is needed.

The VRA has three main goals. The first is participatory rights such as notice of hearings. This goal is broadly embraced and protected through states' constitutions and legislation. When not fully enforced, it is because of lack of resources and inertia. These provisions are not trumped by defendants' rights. Constitutionalizing them does not accomplish full enforcement.

The second, providing support, has largely disappeared from later generations of the VRA. Earlier versions provided victims the affirmative right to be protected, for instance, but not the VRA. Damage awards against the government have been eliminated. Constitutionalizing is either a non-issue or unprecedented.

The third is damage to defendants' rights. Of the three purposes, only when a Bill of Right guarantee is denied by a victim's right is a constitutional provision required. The Crime Victims' Rights Act recognizes a provision of the VRA that can deny defendants' rights. Instead of an unequivocal right to presence, it authorizes exclusion of victims who were witnesses if the court determines their testimony would be materially altered. The infamous cases of Abner Louima and Rodney King show the danger of unequivocal presence. As I clearly stated in my written testimony, but for the clear medical evidence and the videotape, Louima and King were on their way to being charged with assaulting police officers. The true perpetrators would have been beneficiaries of the VRA.

Imagine the four officers who beat King having the constitutional right to be present to coordinate their lies. No exception is recognized even when the alleged victims provide the only evidence that a defendant is guilty. Louima, King, hundreds of DNA exonerations, and the Duke lacrosse case demonstrate an essential problem with the amendment. We know at the beginning of the case the identity of the accused because that status is directly the result of being charged. However,

we do not know for sure who is the victim, and more frequently whether this defendant is responsible. The effect of the amendment is to write into the Constitution the error of some in the Duke lacrosse case, rushing to judgment. The language in the preamble, the rights of a crime victim being capable of protection without denying constitutional rights of the accused, does not eliminate the problem. It has three plausible interpretations.

First, it may simply declare the drafters' intent that no conflict exists between these two rights. That doesn't eliminate the damage; it authorizes it.

Second, it can be read that when conflicting, the rights of the victim and the defendant will be balanced. Balance here means diminished, another description of denied.

The third can be read that whenever a conflict is found between the two sets of rights, defendant's constitutional rights will prevail. Only this interpretation eliminates the potential damage, and it should be added to the provision.

I note two practical problems. First, the definition of the VRA is extraordinarily broad with respect to ``victim.'' It draws no distinction between felonies and misdemeanors or between crimes of violence and crimes that harm property. In the Federal system, misdemeanors play only a minor role. But in states, prosecutors' offices must handle a huge volume, and courts as well, with incredible speed. The North Carolina Victims' Rights Act limits covered crimes among low-grade felonies and misdemeanors, and in misdemeanors it covers only domestic violence. This Federal amendment obliterates those fine distinctions. It would add cost and harm efficiency to over-worked and under-funded state criminal justice systems without offsetting benefits.

Second, crime victims are given an unqualified right to restitution. This is not a right to an order of restitution from the convicted offender in an earlier version. It guarantees restitution and places no limit on the entity subject to paying restitution. A broad definition of ``victim'' and an unlimited restitution right would have serious consequences. Let me give you one example.

In North Carolina, many traffic offenses, such as speeding, are misdemeanors. A simple traffic offense now with speeding involved would become a covered offense with mandatory restitution.

In sum, the VRA would harm cost-effectiveness without materially increasing participatory rights and victim support, and it would write a rush to judgment into the Constitution.

[The prepared statement of Mr. Mosteller follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. Thank you, Professor.

Now we will recognize Professor Beloof for 5 minutes.

TESTIMONY OF DOUGLAS E. BELOOF,
LEWIS & CLARK LAW SCHOOL

Mr. Beloof. Thank you, Chairman Franks, honorable Ranking Member. Thank you for the opportunity to speak today. I am here to support the Crime Victims' Rights Amendment to the United States Constitution, House Joint Resolution 40. For my framework, I adopt the framework of Professor Laurence Tribe, distinguished professor of constitutional law at Harvard, also a noted Democrat.

First, for a constitutional amendment to be appropriate, the people must widely agree that victims' rights deserve serious and permanent respect. Victims' state constitutional rights exist in more than two-thirds of the states, and I only need to reference the Chair's introductory remarks to reveal how accepted they are across the country. Clearly, there is wide agreement that victims' rights deserve serious and permanent respect.

Second, the right is one that is insufficiently protected under existing law and cannot be adequately protected through political action such as legislation. Fundamentally, the objective of victims' rights is to include victims' interests in the culture of the criminal justice system. Experience has shown that to change the inertia of the system, a constitutional amendment is needed. While many laws providing for rights exist, enforcement of those rights varies widely, and too frequently they are honored in the breach.

In my written testimony, I provide examples of these problems under Federal legislation. Professor Paul Cassell and former Federal Judge Paul Cassell has submitted written testimony that also provides examples of how victims' rights under statute have been honored in the breach. The point of the examples is not to deride the Justice Department or the courts. Contrary to these examples, there are many fine Federal prosecutors who routinely comply with victims' rights, and both the Clinton and Bush-era Justice Departments supported a crime victim's rights amendment. Rather, these examples reveal how statutory rights can be ignored with impunity. Moreover, the examples reveal that under the CVRA, often no remedy is provided by the courts.

On the other hand, defendants' constitutional rights are far less likely to be ignored simply because the rights are constitutional. Prosecutors universally respect defendants' rights precisely because defendants' rights are constitutional rights safeguarded by the Supreme Court. The same will occur when victims' rights are in the Constitution.

Next, a right must be one whose inclusion in the U.S. Constitution would not distort or endanger basic principles of the separation of powers among the Federal branches or the division of power between national and state governments. Separation of powers is, of course, enhanced by the amendment as the Bill of Rights is historically the place for important rights.

While Federalism is an important value, this amendment poses no threat to it. The Supreme Court dictates the baseline of defendants' rights for all the states as a Federal matter. Individual rights in criminal procedure is already Federal and has been for decades. There is no hint, even in dicta, even by the most ardent of Federalists on the Supreme Court, that the Supreme Court will ever change this reality. Consistent with this constitutional reality, victims' rights are appropriately placed in the Federal Constitution because the Federal

Constitution is the baseline of individual rights in criminal procedure in this country. Thus, the ongoing exclusion of victims' rights from the Constitution actually reduces the importance of victims' rights. Moreover, including victims' rights in the Constitution works no new damage to Federalism principles. Without a constitutional amendment, there is no national baseline for victims' rights.

Next, the right would be judicially enforceable without creating open-ended or otherwise acceptable funding obligations. One of the weakest arguments made against victims' rights has been that the administrative sky would fall. This argument has been made over and over, over the 35 years that victims have been trying to secure meaningful rights in this Nation. There is enough experience with victims' rights now, both in the states and under the Crime Victims' Rights Amendment federally, to know that the sky will not fall in the administration of justice.

In the 10 years since the passage of the Crime Victims' Rights Act, for example, the sky has remained firmly in its heavens. A review of the case law in that 10-year period reveals nothing that could credibly be described as overwhelming the administration of justice. Quite the contrary, the number of appellate and district court opinions is very small. To be sure, trial courts more frequently accommodate victims' rights than appellate court, but there is no empirical evidence that the courts have been clogged by victims' rights.

Finally, no actual constitutional rights of the accused should be violated by the amendment. In terms of conflicts with defendants' rights, in the 10 years of cases under the Crime Victims' Rights Act, there has been no Federal appellate court case that has found a conflict with the defendants' constitutional rights. In fact, the period of time Federal courts have had to find conflict is far greater than 10 years, yet no cases have found conflict with the defendants' rights.

As to accommodating the defendants' rights, the bill says, ``Victims' rights, being capable of protection without violating the rights of the accused, shall not be denied or abridged by the United States or any state.'' This language was provided by Professor Tribe.

I believe that the only way to change an entrenched criminal justice process is for there to be a constitutional amendment. I urge you to favorably vote this bill out of Committee. Thank you, Mr. Chair.

[The prepared statement of Mr. Beloof follows:]

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

Mr. Franks. Thank you, Professor Beloof.

Thank you all for your testimony.

We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes.

Mr. Gillis, in addition to your personal testimony, I want you to know your personal testimony was very powerful to me. The presence of you and your wife here today is an inspiration, and I am sorry for your loss, and I am grateful that you have

chosen to try to turn it into something that will help prevent others from dealing with the same kind of loss.

Mr. Gillis. Thank you.

Mr. Franks. Can you describe real-life examples for existing crime victims' statutes or state constitutional amendments that have failed to provide the protections that they promised to crime victims?

Mr. Gillis. I think I would have to refer to my case, which is still active. Although the defendant was sentenced to life in prison, he has filed numerous appeals, and just within the past year there was another appeal that has delayed his parole hearing. We have no idea what the appeal is about. We only know that we had a parole hearing and it has been offset, and we are scheduled to do another hearing.

So this has occurred throughout the time that he has been sentenced. It has been a drag financially on both my family and other victims who have to attend these hearings. We are not notified when a hearing is going to occur. Whenever I am notified, we just have to pack up. We are notified for the parole hearing, but we are not notified when there are appeals, and we are not notified when any other legal actions take place. So it is a personal issue also, and it happens to many victims across the country.

Mr. Franks. Yes, sir. Well, thank you.

Mr. Montgomery, in your written testimony you state that, ``Too often, the concern as to whether the rights of victims of crime should be given the protection of our Constitution has been premised on the false calculus that any rights accorded to a crime victim must necessarily result in fewer rights for a criminal defendant.''

Why will the protection of victims' rights not infringe on the rights of criminal defendants?

Mr. Montgomery. The very simple answer, Mr. Chairman, is that victims have the same interest in a just outcome as an accused does. At the end of a particular case, you want to make sure that you have the right person who committed the crime. You want to make sure that they are sentenced to a just sentence. You don't want to have to come back and do that again. As Mr. Gillis just told the Committee and told the Chair, victims want to be done with a case and know that it was handled and the harm that was done has been addressed, and then allow them to move on with their lives as best they can.

Additionally, I had to sit and listen with amusement to the speeding ticket restitution example. You don't create a victim when you are speeding, unless it is yourself because of the fine you have to pay. Restitution is provided to a victim who has been harmed by a criminal offense. If someone hurts somebody as a result of speeding, they are usually charged with aggravated assault. But unfortunately, these are the kinds of examples that are offered, not from people who actually have experience in advocating in court and dealing with the balance between victim's rights and a defendant's rights that prove, day in and day out, with the 35,000 felonies my jurisdiction deals with, 100,000 misdemeanors on average, we do it every day.

Mr. Franks. Yes, sir. Thank you.

Professor Mosteller, the right not to be excluded from public proceedings relating to the offense is a critical component of the Victims' Rights Amendment. Mr. Gillis recounted that after a gang member murdered his daughter, he

and his family were relegated to a bench in the hallway of the courtroom during the trial while the defendant's family and friends were seated in the courtroom. Mr. Gillis and his family endured ``sneers and jeers each time they walked past them.''

Why should crime victims be barred from having a constitutional right to be present at a public trial?

Mr. Mosteller. Crime victims should not be barred except in very, very, very rare cases. With respect to what the amendment declares, it has a right to be present with respect to the bail hearing----

Mr. Nadler. Can you turn on your mic, Professor?

Mr. Mosteller. I'm sorry. It has a right to be present which affects public proceedings with respect to plea, sentencing, and release. With respect to release, no issue whatsoever. With respect to sentencing, other than capital cases, no issue whatsoever. With respect to plea, no issue whatsoever. The issues come when we are dealing with the trial in front of the jury, and it is a situation that only involves a problem if the victim is a witness. If there are multiple victims and they can be present during the time the testimony is being taken by one so that the other can hear, it suggests a problem with respect to the fairness of the trial.

I am not inventing this problem by any means out of thin air. We have basically the right with respect to the statute that says the victim has a right to be present unless the judge finds that there is going to be a material effect on the testimony. Then the victim can be excluded. That is a statute that the United States Congress passed. So it recognized in writing, and it is one of the reasons there isn't a problem with respect to the Crime Victims Act. That issue was the one that was taken out of the picture.

With respect to sentencing in death penalty cases, Payne v. Tennessee overruled Booth v. Maryland, but it did not overrule Booth v. Maryland with respect to whether or not a victim has the right to issue a conclusion with respect to the sentence. This amendment may well change not only the right to be heard but what you can say.

Mr. Franks. Thank you, sir.

I now recognize the Ranking Member for questions.

Mr. Nadler. Thank you, Mr. Chairman.

Before I begin, I want to thank Mr. Gillis for his testimony. I think he expressed in the most eloquent way the devastating and lasting impact that crime, especially crimes of such unspeakable violence and cruelty, has on its victims. It is a reminder of how important it is for all participants in the criminal justice system, the courts, prosecutors, law enforcement, Congress and state legislatures, to ensure that the rights and needs of crime victims are both respected and addressed, and I hope that this hearing will help us understand how we can best improve these efforts.

Now, Professor Mosteller, other witnesses today have argued, in the language of the amendment, that the rights of a crime victim to fairness, respect and dignity, being capable of protection without denying constitutional rights of the accused, shall not be denied or abridged by the U.S. or any state. Do we need to worry about such conflicts between the rights of the accused and the rights conferred on victims in this amendment despite that language? And if so, could you give us some examples?

Mr. Mosteller. Yes, we do. With respect to two of those

rights, the right to respect and dignity, there is no conflict whatsoever. With respect to matters like notice, there is no effect whatsoever. But there is another word in it, and it is a general word, and it is ``fairness.'' Fairness can also mean due process. It says fairness, and then it says moreover, and it lists other rights.

With respect to those other rights, I have spent some time with respect to the presence at the proceeding, the presence at the proceeding. In addition to that, the issue with respect to a speedy trial, a speedy trial for the victim, against undue delay. Most prosecutors, almost all prosecutors are trying to move it forward, but there are people who behave badly. Mike Nifong in the Duke lacrosse case behaved very badly. He delayed discovery. You have an argument. It is unreasonable delay. The constitutional amendment does not say unreasonable delay by the defendant. It says unreasonable delay and that can be compromised by the prosecution as well. And I mentioned a third one----

Mr. Nadler. It could compromise the right of the accused to a fair trial is what you are saying?

Mr. Mosteller. With respect to enough time to prepare testimony. You can say this will be limited and it will be rare, and I would acknowledge it. But you cannot say that there is no danger.

Mr. Nadler. Thank you. Now, why would a court exclude a victim from a courtroom under certain circumstances? Well, you said if the victim is a witness, maybe multiple victims, to have them in the courtroom might give an opportunity to coordinate--alleged victims, because you could be wrong about who is a victim. In the Duke case, for instance, you said that had they all been present in the courtroom, they could have coordinated their testimony?

Mr. Mosteller. Yes, and that would be the problem. And with respect to the normal situation in which a victim is not a witness, there should be no exclusion.

Mr. Nadler. Well, could a victim act in such a way as to prejudice the jury other than that situation?

Mr. Mosteller. Absolutely.

Mr. Nadler. How so?

Mr. Mosteller. By excessive emotional outbursts. That is a limitation upon the right even of the defendant to be present. A defendant can be excluded. So these are common-sense limitations.

Mr. Nadler. Now, a defendant has a constitutional right to be present unless the judge chooses to exclude him because of his conduct. Under this amendment, would the judge have the discretion to exclude a victim or an alleged victim because of his conduct?

Mr. Mosteller. I would hope so. It would suggest that, at least as I read Mr. Montgomery's testimony, that that could not even be an admonition to----

Mr. Nadler. I'm sorry. It was suggested it could or could not?

Mr. Mosteller. Couldn't deny, that it shouldn't even be an admonition, that you are not supposed to----

Mr. Nadler. So, in other words, the wording of this amendment as it is worded might, in fact, in your judgment, preclude the judge from excluding an alleged victim who was behaving in a way that might prejudice the trial?

Mr. Mosteller. It could. I would hope that the reasonable application would avoid that problem.

Mr. Nadler. But one doesn't know.

Mr. Mosteller. Pardon?

Mr. Nadler. But one doesn't know.

Mr. Mosteller. One doesn't know.

Mr. Nadler. Thank you. Now, Professor Beloof cites two cases that seem relevant to the text of the proposed amendment. The Antrobus this case involved a mass shooting in which the victims were denied victim status by the court. In the murder of border patrol agent Brian Terry, Professor Beloof states that the Terry family was similarly denied victim status. In both instances, Professor Beloof points out that the CVRA, that is the Act, the Crime Victims' Rights Act, the definition of victim ``depends on whether the harm was a direct and proximate cause of the conduct.'' That is the same language used in the text of the proposed amendment. Section 2 of the amendment reads, ``A crime victim includes any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act which, if committed by a competent adult, would constitute a crime.''

It seems to be exactly the same. So it seems that it wouldn't solve the problem. Would you comment?

Mr. Mosteller. It wouldn't solve that problem, and, in fact, this version added ``proximate cause.'' It did not exist until this version. So if you went back to the version that was in this chamber last year----

Mr. Nadler. But never mind last year's version. This version?

Mr. Mosteller. This version has proximate cause and it. The version last year did not have proximate cause in it. It makes it just the same, and it does not guarantee any discovery right or any other right that would eliminate the problem.

Mr. Nadler. Thank you.

My time has expired.

Mr. Franks. Thank you, and I will now recognize the gentleman from Ohio for 5 minutes for questioning.

Mr. Chabot. Thank you very much, Mr. Chairman.

Professor Mosteller, let me start with you, if I can. In the United States Constitution, there are a number of rights of the criminal defendant which are stated very plainly, the right to a jury trial, the right not to have to self-incriminate himself or herself, and a number of other things, right in the U.S. Constitution. Now, the innocent victim, the victim's family, they may be protected by a state constitution or perhaps a state statute, but not in the Constitution. That is what the intention of this is, to put the two at least on an equal footing.

We are talking about right now the criminal defendant who has oftentimes taken away the loved one of a family, a person who has done something clearly wrong, something heinous. They are protected. They get the best protection possible from the U.S. Constitution. The innocent victim, the person who hasn't done anything wrong, and their family, no protection whatsoever in the U.S. Constitution, I would argue an oversight. Great document, an oversight there. The only way we can change that is to amend it. Our founders put in there a mechanism for us to do that. We have been trying to do it for years, and that is what we are trying to do today.

Oftentimes, if the U.S. Constitution says one thing and a state statute says something else, if there is a discrepancy, and sometimes there is, the U.S. Constitution is going to trump

the state statute every time. A lot of us believe that is just not fair. That is why we want to change this.

Would you disagree with anything I have said? And if so, what?

Mr. Mosteller. I would disagree with your statement of equalizing. The status of the criminal defendant, when he is charged, and as justice Scalia said with respect to the confrontation clause, you don't deny confrontation because you think the testimony was reliable; you don't deny a fair trial, a jury trial, because the judge decides that the defendant is guilty. We do not know whether the defendant is guilty at that moment.

Our framers set up a system in a situation in which the full power of government comes down against a charged defendant, suffering the possibility of his life or liberty being destroyed, he is given process rights that lead to fairness, that protect the individual----

Mr. Chabot. Reclaiming my time, as I have a limited amount of time, let me turn to Professor Beloof, and also to Mr. Montgomery. Would you like to respond to the question that I asked? And perhaps, if you would like to, to the Professor's answer?

Mr. Beloof. I agree with it. I agree with it, and I disagree with much of what my colleague, Professor Mosteller, says about the substantive issues of this amendment. I don't believe the defendant's rights will be trampled in any way. The idea that somehow victims attending trial will destroy defendant's rights I disagree with.

First of all, there are police reports that lock down these witnesses statements. There are grand jury testimony that locks down these witness statements, leaving tremendous capacity for defense attorneys to destroy the credibility of witnesses. Moreover, witnesses in a trial, their attendance in a trial on more than one occasion has revealed the testimony on the stand is untrue. So barring witnesses from the courtroom actually encourages the lack of truth telling.

So this is not a one-sided issue in any regard.

As to Professor Mosteller's testimony that this has dropped a variety of things, this is in response to genuine and considered criticism in the Senate that the last version looked too much like a statute and not enough like a constitutional amendment. So we focused on the core.

Mr. Chabot. Thank you. I am almost out of time. So, Mr. Montgomery, instead of going to you, if I could go to Mr. Gillis.

Again, we all feel great pain for what you and your family have gone through, but let me ask you this. One of the great injustices was the fact that you were unable to go in and see what was going on, listen to what was going on, and your daughter was taken from you, and the perpetrator and the families in connection, gang members, were in there. You did not get the opportunity to speak at a number of the proceedings on behalf of, for example, sentencing and what you felt. What would you have told the court had you been given the opportunity to make a statement? What sort of input do you think your daughter and yourself should have been able to give the court?

Mr. Gillis. I think we could have talked about how it had impacted the family. We could have also talked about what we knew about the defendant from the community. But let me also

talk about us being barred from the court, having us sit in the hallway because they thought that we could be possibly a witness. It wasn't because we were a witness to anything. We were not percipient witnesses to anything. So we just sat in the hall because the defense did not want us in, and in most cases I find, during my experience as a law enforcement officer and the other experiences I have had with the criminal justice system, the defense usually does not want the victim in court because sometimes the victim has information that they can give to the prosecutor that will help direct the case. So it is one less individual that the defense has to worry about.

But most victims want to see the right person prosecuted for the crime. They don't want to see somebody unjustly accused or unjustly convicted of a crime. So keeping victims out of the court, it just doesn't make sense.

Mr. Chabot. Thank you very much.

I yield back, Mr. Chairman.

Mr. Franks. Thank you, Mr. Chabot.

I would now yield to the gentleman from Virginia, Mr. Scott, for 5 minutes.

Mr. Scott. Thank you.

Mr. Montgomery, we don't need a Federal constitutional amendment to force you to treat people with dignity and respect, do we?

Mr. Montgomery. Mr. Chairman, Mr. Scott, no, but I understand what my oath is, and I understand what my duty is in the criminal justice system. So it actually is a part of how I carry forward my duties. But I would still say to that point, the oath I took of office was to uphold the U.S. Constitution and our state constitution and the laws thereof, and we do have a victims' bill of rights in Arizona that requires me to treat a victim with fairness, respect, and dignity.

But for those who didn't go through the victims' rights seminar I went through, who don't have the same appreciation, our criminal justice system does not institutionalize that kind of treatment as much as we institutionalize the treatment of defendants.

Mr. Scott. Well, is there a difference in how victims are treated in states with a constitutional amendment and without a constitutional amendment?

Mr. Montgomery. I believe that there is. If you are in a state without a constitutional amendment, when it is convenient to ignore a victim, when it is convenient to handle a case without taking into account----

Mr. Scott. Well, exactly what happens----

Mr. Montgomery [continuing]. Whatever it is that they regard, they do so.

Mr. Scott. And I am sure when you have a constitutional amendment, some of the witnesses are ignored and disrespected. What does the victim who is disrespected then do?

Mr. Montgomery. Well, within the State of Arizona and those states that do provide the ability to appeal, that information is brought to the attention of the court, and I can certainly tell you----

Mr. Scott. Which court? The same court? This thing says any court. I don't know what that means, you can enforce these rights in any court. Does that limit it to the court that the case is actually pending in, or can you go to another judge?

Mr. Montgomery. Mr. Scott, I think what you would do is you would follow the same process that we follow in the United

States and in all courts where initially you bring it before the court in which the incident or the matter is initially to be heard and then follow the regular appellate process. That is what we do in Arizona, and it works very well.

Mr. Scott. And is there any priority for those cases?

Mr. Montgomery. It depends. Within the Federal Crime Victims' Rights Act, appellate courts, if the matter in question is at a district court level, have to rule on a mandamus quickly. In our state courts----

Mr. Scott. Does that take precedence over other pending cases?

Mr. Montgomery. I believe that it does. They have to rule on the mandamus quickly, and that is important. What we have to keep in mind here is that we were talking about a criminal justice system where we are trying to make sure that the truth-seeking function is honored and that at the end of it a crime victim, then, when communicating to other members of our community, when communicating with their family members the resolution of the case, can say, you know what, I got harmed, and our criminal justice system took care of me, and it worked, and it was good.

Mr. Scott. I am just trying to figure out how this thing works, because if somebody doesn't think the prosecutor, the case is going quickly enough, how do you ascertain the reasonableness of a delay?

Mr. Montgomery. Sure. Mr. Scott, we have a very well-developed body of jurisprudence on speedy trial rights for defendants. The corollary to that, then, is in looking at instances in which a victim might assert an unreasonable delay, and I will give you a great example. I will contrast it, too.

In an instance in which a defense attorney has not been able to complete interviews of witnesses and I have a victim asking me when is this going to go to trial, and I have personally prosecuted hundreds of cases, I will tell them our trial date was originally set for June. However, there are five more witnesses we need to interview, so we are going to have to delay it to complete that. That sets a reasonable delay.

Mr. Scott. Well, that is reasonable in your mind. Suppose it is not reasonable in the victim's mind, if they say why don't you get to work and do the work and get it done?

Mr. Montgomery. Sure, and the victim can certainly bring that to the court's attention, at which point----

Mr. Scott. Do they have a right to a hearing on that issue?

Mr. Montgomery. Oh, they have a right. When you are going to have a court hearing at which a motion to continue is going to be heard, because the defendant has a right to be there, a victim in Arizona has a right to be there, and also has a right to be heard on that point, and it happens all the time.

Mr. Scott. And what could be a perfunctory motion in agreement with the defendant and the prosecutor now becomes a full-blown hearing.

Mr. Montgomery. And there are times when search and seizure issues are so apparent on their face, but we still give the defendant their hearing. I don't think it is unreasonable at all to give the victim of a crime 2 minutes to be heard on an issue. But let me give you an example of an unreasonable delay.

Mr. Scott. Wait a minute. Why do you limit it to 2 minutes? I mean----

Mr. Montgomery. It really doesn't take that much time. Having practiced in court, like I said, over several hundred

felonies, it doesn't take much time to permit a victim to be heard on the record. Five minutes isn't a whole lot of time, either.

Mr. Scott. Do they get to bring witnesses on what's reasonable? I mean, you are trying to determine whether a delay is reasonable or not.

Mr. Montgomery. Sure. There is no need for witnesses. You are talking about the conduct of the case. You have counsel for each side there. You have the judge, who is sitting on the case there. Here is an unreasonable delay, though, and I would say this is why we need this in the Federal Constitution. In a homicide case in which a young child was brutally murdered, the defense attorney actually asked for a continuance for 3 weeks so that she could go on her annual shopping trip to go buy shoes. The only thing more offensive than someone trying to delay it was the fact that the court granted it.

Mr. Scott. Well, perhaps the court could decide maybe you have a problem getting your witness to court and you want to delay. The defendant doesn't know why you want to delay. You are just agreeing to a continuance. Do you have to articulate in court that your witness is not available, or your evidence, you have lost your evidence? Do you have to articulate that in court so that the court could rule on whether or not the continuance is reasonable or not?

Mr. Montgomery. Mr. Scott, if I lost evidence and I am trying to delay a trial from starting, I believe I have committed an ethical violation when I know I can't proceed. In the instance of being able to try to find a witness----

Mr. Scott. Wait a minute. You are looking for the evidence.

Mr. Montgomery. Well, that is different than saying I lost it.

Mr. Scott. Okay. Well, you don't have it, and you have to articulate in open report, ``Your Honor, we are not ready because we don't have enough evidence to proceed,'' and the defendant ends up objecting to a continuance, so we are still trying to find evidence. Do you have to articulate that in court? I mean, the victim is saying let's go, let's go, and you are in open court. They have a right to be there.

Mr. Montgomery. And I don't have a problem with that. If I am going to tell the court, ``Judge, I am not ready for trial today''--but the other thing to keep in mind is that most states also have a last-day setting in which a defendant has to be tried. If I am asking for a continuance and I am still within what is known as a reasonable time, I have 150 days to try a defendant of a felony who is in custody in Arizona. If I am moving from the 120th day to the 149th day, I am still within the timeframe to do it, and I am going to have a conversation with the victim.

The victim in Arizona has the right to confer with the prosecutor before the case gets resolved. I am talking to them. I am letting them know what is going on. I am also talking to the defense attorney.

Mr. Scott. And if they are not satisfied, do they have the right to an appeal?

Mr. Montgomery. Yes, they can. They can assert their rights in trial court and they can special action in Arizona those rights to an appellate court, and this does happen on occasion. There are times when I, as the elected prosecutor in Maricopa County, will file an appeal on behalf of a crime victim to an appellate court to advocate for their rights. I am no more able

to violate their constitutional rights in Arizona than I can a defendant's constitutional rights, and we do it every day.

Mr. Franks. Without objection, the gentleman from New York is granted 1 minute for questions.

Mr. Nadler. Thank you. I would like to ask Mr. Montgomery, and ask Professor Mosteller to comment also. The amendment says the crime victim shall have the right to various things and to restitution. That is a very open concept. So my question is, how would this work? What are the limits of it, if any? Who enforces it? How do you measure the restitution? Who is responsible for it? Let's assume that the culprit, the defendant, is adjudged guilty, is destitute. And finally, let's assume that the culprit goes to jail for 30 years or a long period of time, and when he comes out, does he then owe \$30,000 even though he has no money? I mean, how does this work?

Mr. Montgomery. Sure. I can offer our experience in Arizona, where we do have a constitutional right to restitution. At the conclusion of the case, the judge can enter a criminal restitution order against the defendant, ordering restitution for economic loss caused by the criminal conduct.

Mr. Nadler. Only economic loss?

Mr. Montgomery. It is economic loss, correct. So you look at whether or not the victim lost work because they had to come to court. Let's use an easy example of, say, an instance in which maybe someone stole a victim's car and then crashed it. They can get the replacement cost for that vehicle.

Mr. Nadler. We know how to measure economic loss.

Mr. Scott. Who pays it?

Mr. Nadler. Who pays it?

Mr. Montgomery. The person responsible. And in terms of holding a defendant fully----

Mr. Nadler. Let's assume he doesn't have the means. Then what?

Mr. Montgomery. Get to work.

Mr. Nadler. And if he goes to jail?

Mr. Montgomery. You should not be able to avoid responsibility for your criminal conduct because you say you don't have money. You had better get out there and work.

Mr. Nadler. And in a serious crime, you go to jail for 30 years. So do you delay the restitution for 30 years?

Mr. Montgomery. No. They get to work in prison, and from their earnings, restitution is forwarded to the victim of crime.

Mr. Franks. The gentleman's time has expired, but if he wants to ask Professor Mosteller a question, then he can.

Mr. Mosteller. We don't know what it would mean in the Federal Constitution. Words like this are unprecedented. ``To restitution'' is different than it was in the previous version. It used to be in one version ``to an order of restitution from the convicted defendant.'' Is this a right to monetarily be made whole by someone? And you have a constitutional right that says ``to restitution.'' Eighty percent of the people are indigent. What will it mean down the road? We don't have these kinds of rights in our United States Constitution. They do exist in some state constitutions, but it is unprecedented.

Mr. Nadler. It doesn't say just economic.

Mr. Franks. The gentleman's time has expired.

Mr. Mosteller. It does not say economic, and it does not say from whom.

Mr. Franks. The gentleman's time has expired.

Mr. Nadler. Thank you.

Mr. Franks. I might make the observation that if someone is to be held liable for economic loss, it probably should be the convicted offender rather than the victim.

With that, this concludes today's hearing. I want to thank all of the witnesses for attending. You have been very responsive and very insightful.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

I thank the witnesses, and I thank the Members, and I thank the audience for their attendance today.

And with that, this hearing is adjourned.

[Whereupon, at 12:43 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Material Submitted for the Hearing Record

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

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

