

Testimony of

The Honorable Viet D. Dinh

April 8, 2003

Good morning Mr. Chairman, and distinguished members of the Committee. Thank you for the opportunity today to reiterate the support of the Department of Justice and the Administration for S.J. Res. 1, the Crime Victims' Rights Amendment. As President Bush stated on April 16, 2002, "The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do. And the Feinstein-Kyl Crime Victims' Rights Amendment is the right way to do it."

Both the President and the Attorney General strongly support guaranteeing rights to victims of violent crime, and we agree with the sponsors that these rights can only be fully protected by amending the Constitution of the United States. S.J. Res. 1 is the right way to do it because it strikes the proper balance between the rights of victims and the rights of criminal defendants.

As the principal Federal law enforcement agency, the Department of Justice is keenly aware of the effects that the Crime Victims' Rights Amendment would have on the landscape of the criminal justice system. There is no doubt that, were the amendment to pass, it would prompt significant adjustments in how Federal, State and local prosecutors discharge their responsibilities. Accordingly, the Department has reviewed the proposed amendment in light of our prosecutorial function within the criminal justice system, our commitment to fundamental fairness and justice for defendants, and our support of the rights of crime victims. We believe the language of the proposed amendment properly advances all of these interests.

The amendment would protect victims' rights before all levels of government in the United States. At least thirty-three States have recognized the importance of granting constitutional guarantees to victims of crime by amending their State constitutions. Additionally, most States have passed statutory protections for victims of crime. The proposed amendment respects the role of State and local governments because it does not bar them from providing additional or broader rights to victims. Instead, it provides a floor rather than a ceiling of the rights to be afforded to victims of crime.

Although there have been State and Federal legislative efforts to grant victims many of the rights contained within this amendment, in our view the statutory rights of crime victims are at times subjugated to the rights of criminal defendants. One example is the Oklahoma City bombing trial of Timothy McVeigh, where the judge barred victims from attending the trial because of the possibility that they might later be called to testify at sentencing. This decision forced victims to choose either to testify at sentencing against the man accused of murdering their loved ones, or to witness his trial. They faced this untenable choice even though 42 U.S.C. § 10606(b)(4) provides victims a right to be present at "all public court proceedings related to the offense." Although the prosecutors, the Department of Justice, and various State Attorneys General asked the court to reconsider, the decision stood. And when the victims attempted to vindicate their

rights under Federal law, the court ruled that they lacked standing to challenge the adverse decisions. Congress intervened and passed the Victims' Rights Clarification Act of 1997. However, it is impractical and unrealistic to expect that Congress can and will intervene to pass legislation each time a victim is denied his or her right to participate in the criminal justice system.

State efforts to protect the rights of crime victims also have proved as inadequate as Federal legislation. Even where States have passed strong victims' rights statutes or ratified victims' rights amendments to their constitutions, these efforts to secure victims' rights have been limited, undermined, or nullified by judicial decisions. This was best illustrated in a study conducted by the National Institute of Justice in 1998. After surveying more than 1,300 crime victims, the study concluded that although "[s]trong victims' rights law make a difference, . . . even where there is strong legal protection, victims' needs are not fully met." Consequently, the Department strongly supports the effort to amend our Federal Constitution to provide the highest possible level of protection for victims of violent crime.

I would like to summarize briefly the provisions of the amendment and articulate our understanding of and support for each of them:

Section 1 sets forth the important principle that the rights of victims of violent crime are "capable of protection without denying the constitutional rights of those accused of victimizing them." This section serves as a preamble and simply declares the rights of victims of violent crime "are hereby established," without further specification. The substantive rights granted by the amendment and the restrictions thereon are enumerated in section 2. Although as a preamble, this section does not confer upon victims any specific rights, the Department strongly supports the proposition it espouses: that the rights of both victims and accused can be protected and accommodated in the constitutional structure.

The Department believes that all victims of crime deserve to be treated with fairness and dignity in the criminal justice system. By focusing on victims of violent crime, however, the proposed amendment recognizes the more detrimental effects that violent crime has on the most vulnerable of victims.

The Department strongly supports the grant of specific constitutional rights to ensure that victims of violent crime have a voice in the criminal justice system. Section 2 delineates these rights in three categories and provides a specific standard for any restriction of these rights. This section defines the scope and strength of the rights to be established by the proposed amendment and, in the Department's view, advances the rights of victims while protecting the constitutional rights of the accused and ensuring the proper, orderly administration of criminal justice.

? "[T]he right to reasonable and timely notice of public proceedings involving the crime and of any release or escape of the accused."

This guarantee recognizes the importance of allowing victims the opportunity to be apprised of matters that concern their victimization. The "reasonable and timely notice" language places the responsibility of providing notice on the governmental entity but would not make prosecutors or courts the guarantors against circumstances that may prevent the victim from receiving actual

notice. The reasonable notice requirement also allows the government to rely upon the current contact information provided by the victim or his or her representative. There are a number of situations where an actual notice requirement might prove untenable, such as in crimes involving mass casualties and where a victim has moved away without informing law enforcement officers or prosecutors. By guaranteeing notice to "public proceedings," moreover, the proposed amendment preserves flexibility for situations where prosecutorial and judicial concerns, for necessity, require that proceedings be closed to the public.

? "[T]he rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings."

For years, victims and their advocates have complained that the criminal justice system is indifferent to their interests because they are excluded from public proceedings that affect their well-being. The Department agrees with these sentiments. We therefore strongly support the right of victims of violent crime not to be excluded from public proceedings involving the crime.

By guaranteeing victims the right to be heard in the specified public proceedings, the amendment recognizes that victims should have an important voice in the criminal justice system and that expression of their voice both furthers the interests of justice and contributes to the victims' ability to cope with the crimes perpetrated against them. The "reasonably to be heard" language allows the judge or decision-maker to exercise his or her discretion to decide whether the right to be heard would best be satisfied orally or in writing, personally or through representatives.

? "[A]nd the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender."

The Department supports granting victims of violent crime the right to due consideration of certain interests that go to the very heart of their victimization--their safety, interest in finality, and restitution from their offenders. This clause ensures that in adjudicative decisions, including decisions of parole boards, proper consideration will be given to the three substantive interests enunciated. By limiting the clause to adjudicative decisions, the amendment properly does not regulate internal and deliberative decisions by law enforcement and prosecutorial personnel.

The Department is committed to ensuring the finality of judgments, and thus supports limiting restitution claims to those that are "just and timely." In previous versions of a proposed constitutional amendment, there was no such limitation. The result would have been to allow considerations of claims that were not warranted by the facts or were raised long after the adjudication of responsibility for the crime.

? "These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."

Among the primary functions of the Department is the administration of the criminal justice system. In order to discharge this function, the Department believes that prosecutors and law enforcement officials must retain a certain amount of flexibility to carry out their duty to bring offenders to justice in a timely and efficient manner. In addition, we are cognizant of these same considerations faced by State and local entities in the administration of their duties. Therefore,

our major concern with a constitutional amendment protecting the rights of victims is that our prosecutorial and law enforcement responsibilities are not unnecessarily burdened so as to impair our ability to prosecute criminals. This is especially true in cases involving thousands of victims, such as acts of terrorism or mass violence. In those cases, it would be exceedingly difficult, if not impossible, both to prosecute the defendants successfully and to ensure that the rights of each of the several thousand victims are individually protected.

I would like to thank the sponsors for acknowledging this concern. The proposed amendment, in the Department's view, protects the rights of victims and ensures the proper investigation and prosecution of crime by allowing for restrictions only where there is a substantial interest in public safety or the administration of criminal justice.

The Department agrees with the two-tiered approach contained in the exceptions clause of section 2. The Department fully supports the lower standard for overriding victims' interests ("substantial interest") when the matter concerns public safety or the administration of justice, while requiring the higher standard ("compelling necessity") for other possible justifications. Where the interest that competes with a victim's right is one that implicates public safety or the administration of justice, the "substantial interest" test strikes the proper balance between the competing concerns. For other types of interests, the more stringent "compelling necessity" test is the right standard to employ.

Although we support granting these rights as outlined above and trust that the proper enforcement mechanisms will be forthcoming in implementing legislation, the Department strongly supports the language contained in section 3 which states: "Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder."

The point and purpose of this amendment is to provide constitutional rights to victims, not to provide additional constitutional rights to criminal defendants. We would oppose any new cause of action that would be detrimental to our prosecutors and detrimental to the efficient management of the criminal justice system. State and local prosecutors would also be adversely affected if this amendment could be used in such a way as to hold them responsible when a victim felt that his or her rights were being deprived. The Department supports the need to protect the finality of judgments and believes that judgments should not be disturbed by the passage of this amendment. The Department also believes that the proposed amendment should not be used as a tool to slow down criminal proceedings (such as the use of injunctive relief to delay a proceeding) that would ultimately benefit the criminal defendant. Remedies for a violation of the rights specified in the proposed amendment should be unrelated to the outcome of the case.

Furthermore, the Department's view is that the amendment should confer standing only on those for whom it was intended to benefit. Therefore, the limiting language in the final sentence of this section is both appropriate and necessary. It precludes a criminal defendant from asserting the rights of victims under theories of third-party standing.

The Department fully supports the language contained in section 4 of the amendment, which provides that "Congress shall have the power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons."

Although the amendment is self-executing to a large extent, and therefore the rights are seemingly enforceable even in the absence of specific legislation, the Department welcomes any implementing legislation that Congress may deem appropriate. It is the Department's hope that Congress, when considering any implementing legislation, will strive to minimize the difficulties that could arise if Federal, State and local prosecutors were unable to predict what their proper response should be in certain situations. The Department looks forward to working with the Congress on such implementing legislation.

In addition, the Department strongly supports the limiting language that will prevent Congress from enacting legislation that would affect the President's power to grant reprieves and pardons. The President's reprieve and pardon power under Article II of the Constitution is plenary and is in no way affected by the proposed amendment.

The Department fully supports section 5's limitation on the ratification period to seven years from the time Congress submits the amendment to the States. The limitation is necessary to ensure that the ratification period does not remain open in perpetuity, possibly outliving the intent and circumstances of its original passage by the Congress. In addition, the Department supports the 180 day lapse period between the time of ratification and the time that the rights conferred will take effect. This language allows sufficient time for notifying all parties impacted by the amendment of its requirements and ensures that the proper framework is in place to accommodate the rights of victims.

Thank you once again for allowing me to appear before you today to voice the support of the President and the Department for this important measure. For too long, victims have been silenced by a criminal justice system that does not fully protect their rights, and I would like to thank Senators Kyl and Feinstein for their continued pursuit of this important objective. The Department looks forward to working with the Congress in the future to see that this measure is passed and to assisting in fashioning appropriate implementing legislation.