Testimony of

The Honorable Patrick Leahy

July 24, 2003

Opening Statement of Senator Patrick Leahy
Executive Business Meeting
of the Senate Judiciary Committee
July 24, 2003

Today I begin with a few, sad observations.

First, I note that today is the 5th anniversary of the shootings in the Capitol that took the lives of two fine Capitol Police Officers, Detective John Gibson and Officer Jacob Chestnut. There will be memorial events throughout the day, including one at Arlington National Cemetery this morning and a moment of silence here in the Capitol this afternoon. These were dedicated law enforcement officers who made the ultimate sacrifice protecting the Congress and visitors to our Capitol. We should not and will not ever forget what they and their families have sacrificed.

Secondly, I deeply regret, and I expect the Republican majority will come to regret, the actions of the Committee yesterday. The majority on this Committee turned a blind eye to an ongoing and open investigative matter involving a judicial nominee and overrode the rule that had protected the minority on this Committee for almost 30 years. Yesterday was a sad day for this Committee, for the Senate, for our democracy and for the rule of law.

In addition, the Chairman has proceeded for the first time to notice a hearing on a judicial nominee without both positive blue slips being returned by his home-state Senators. Never once during his earlier tenure as chairman of the Judiciary Committee did he allow a hearing on any judicial nominee when there was an objection from even one of that nominee's home-state Senators. Senator Hatch changed that precedent when he proceeded with the hearing on Carolyn Kuhl earlier this year over the objection of Senator Boxer. He has now chosen to abandon the prior policy and practice by which confirmation hearings were denied to Enrique Moreno and Jorge Rangel of Texas, Judge James Beaty and Judge James Wynn of North Carolina, and so many other outstanding nominees sent to the Senate by President Clinton. The Republican majority has taken advantage of the blue slip by using it against nominees of a Democratic President. This is another rule the Republican majority has decided to change now that a Republican occupies the White House. Their change takes further advantage of the judicial vacancies that Senate Republicans perpetuated during the Clinton years.

There are numerous other abuses. The Committee rule that had previously protected Senators from having a matter come up prematurely has been obliterated by the Republican majority's practice of listing matters before they are ready for consideration and its fixation on "burning the hold" in advance of any use intended by the rule.

This is all part of an unfortunate pattern of Republican activity. We saw it bubble over last week in the House when a Ways and Means Committee meeting devolved into a situation where the Republican Chairman called the police to confront Democratic members. By those standards, maybe Senate Democrats should be thankful that we were not made the subject of police action yesterday. Sadly, some Republican members did make the suggestion of a criminal investigation

of our Democratic staff.

There was a time when this Committee provided some oversight of the Executive Branch and when this Committee, this Senate and this Congress fulfilled its constitutional responsibilities on behalf of the American people to provide a check on the other branches. The Senate and the Congress were intended to provide a source of balance within the government, not act as cheerleaders for the Executive.

Sadly, I also observe that this Committee and the Senate is losing its way. More and more it is becoming a mirror of the House of Representatives in which majority rules and the minority is routinely given short shrift. Those of our newer Members who are from the House apparently think this if fine. The House way is what they know. They are in the majority and like taking advantage of its control. Those of us who respect the Senate and its unique role in our government and those of us who have served in both the majority and the minority understand that rules and practices are adopted to cut both ways. We know that rules adopted to protect the minority are important to the Senate and to the American people. They are not to be taken advantage of when in the minority and then circumvented when in the majority.

Finally, I observe with tremendous disappointment the failure of the Republican majority yesterday to disavow the despicable advertisements, arguments and accusations of religious bigotry that now permeate the debate on nominations. I thanked Senator Chambliss yesterday for his statement in which he distanced himself from such slander.

After the high-handed treatment Democrats received yesterday, we nonetheless proceeded to participate in three hearings through yesterday afternoon. Democrats have demonstrated over and over again our good faith. I recall another dark day for the Senate when Republicans defeated the nomination of Judge Ronnie White on an unprecedented party line vote and Democrats nonetheless allowed the Senate to proceed to a vote on a controversial judicial nominee recommended by Senator Hatch and I proceeded to fulfill my commitment to him and voted in favor of that nomination.

Out of respect to the senior Senator from California I will not make extended remarks at this time. I know that she looks forward to the Committee proceeding on her proposed constitutional amendment. While we do not yet see eye to eye on that matter, as a sign of comity and respect, I will not object to our proceeding today to that debate.

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Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Markup of S.J. Res.1 (Victims Rights Constitutional Amendment)
July 24, 2003

Today, for the third time in five years, the Committee will vote on whether to report a victims' rights constitutional amendment to the Senate. It is telling, I think, that each time we have voted on this proposal, the text has been substantially different, yet each time we have been told, "this

time we've got it right." I know that no one has worked longer and harder than Senator Feinstein to get this right. The problem, after having seen it go through so many versions, is that it may be better suited to a statute that we can adjust more easily as circumstances evolve rather than being locked into the Constitution.

The sponsors of this amendment are well-meaning and are as dedicated to victims' rights as any of us. I respect them and I respect their motivations. If we were voting on the label and not the content, I would be helping to lead the charge for this amendment. I am a former prosecutor. I have seen crime at close range, through the eyes of victims, and I spent years seeking justice for victims. Throughout my time in the Senate I have been on the front lines in fighting for victims' rights. I wish very much that I could support a proposal like this that includes such noble intentions.

Anytime we consider amending the Constitution, we should set the bar as high as the Founders wanted it set. Our job is to carefully examine any proposal to change our national charter - not just its intentions or its title -- and that is why the Founders purposely made it difficult to amend the Constitution, no matter how popular an amendment proposal might sound at any particular moment. The Founders never wanted the process of amending the Constitution to be reduced to voting on bumper sticker slogans, and I hope it never will be.

In the words of James Madison, constitutional amendments should be reserved for "certain great and extraordinary occasions." Amendment is appropriate only where there is a pressing need that cannot be addressed by other means. With all due respect to the distinguished sponsors of this proposal, they have not made the case for why it is necessary.

We do not need a victims' rights amendment to protect victims. To the extent that current victims' rights laws is found wanting, ordinary legislation is not only sufficient to correct it, it is also vastly preferable to amending the Constitution. It is more easily enacted and implemented, more easily corrected or clarified, and more able to provide specific, effective remedies.

I have pointed out why the proposed amendment is unnecessary. That is the best-case scenario. At worst, this amendment could help criminals more than it helps victims. Prosecutors who have testified on this issue have cautioned that the proposed amendment has the dangerous potential to disrupt prosecutorial strategy in criminal cases. The proposed amendment could also undermine fundamental protections for the accused - an issue that I will discuss more fully later this morning, when Senator Durbin offers his amendment.

So why do we need this constitutional amendment? There have been several arguments made, but none comes close to justifying the momentous step of amending the Constitution.

Argument 1: The Need for "Balance"
Perhaps the principal argument for the proposed constitutional amendment is that it will "balance the scales of justice" and "level the playing field" between criminal defendants and crime victims. The crux of this argument is that the criminal justice system is improperly tilted in favor of defendants and against victims, as evidenced by the fact that the Constitution enumerates several rights for the accused, and none, specifically, for victims.

The notion that the Bill of Rights is somehow "out of whack" mistakes the fundamental reason for elevating rights to the constitutional level. The rights enshrined in the Constitution are designed to protect politically weak and insular minorities against governmental tyranny. The Founders crafted these protections not for the benefit of criminals but for each of us - individually, as Americans -- as a counterweight to the potential of government tyranny.

When the government brings criminal charges against a person, he faces the prospect of losing his liberty, property, or even his life. The few and limited rights of the accused in the Constitution are there precisely because it will often be unpopular to enforce them - so that even when we are afraid of a rising tide of crime, we will be protected against our own impulses to take shortcuts that could sacrifice a fair trial of the accused and increase the risk of wrongful conviction.

By contrast, there is no need to grant special constitutional protections to victims to ensure that their interests are preserved and recognized. The public naturally supports victims' rights in law and in practice.

Argument Two: The Need for Uniformity

A second argument for the proposed constitutional amendment is that it offers the only way to fix the "patchwork" of State victims' rights laws. It is not enough that every State already protects the rights of crime victims, whether by statute or by constitutional amendment, or both - those protections should be made uniform nationwide.

But why the pressing need for uniformity in this area? I would agree that there are times when Congress must step in and ensure a uniform national floor with respect to a particular policy issue - competent counsel standards in death penalty cases comes to mind as one such issue.

I find it ironic that some supporters of S.J. Res. 1 have raised the banner of States' rights when it comes to ensuring that those charged with capital offenses are adequately represented, yet cannot abide the "patchwork" of State laws protecting victims. If the States were as unwilling to protect victims as some are to provide capital defendants with competent counsel, I might agree that we need to set a national floor for victims' rights. But States are not unwilling to protect victims - far from it.

Moreover, there are ways to achieve nationwide uniformity without amending the Federal Constitution. For example, Congress could enact spending power-based legislation to get every State to implement a uniform national standard of victim rights. When I asked then-Assistant Attorney General Viet Dinh about this following our hearing on S.J. Res. 1, he acknowledged that "such legislation would do away with one of the main concerns with statutory remedies, the need for uniformity."

Argument Three: Statutes are insufficient

A third argument that has been advanced for amending the Constitution is that victims' rights will never be taken seriously until they are elevated to the level of Federal constitutional rights. In other words, mere statutes are insufficient to protect victims because they lack the "gravitas" of the U.S. Constitution.

This argument shows a remarkable disregard for statutory law, which provides the vast majority of the rights and protections enjoyed by Americans today. It also places undue faith in the power of constitutional rights. You do not need to be a Harvard Law School professor to know that constitutional rights can be, and sadly are, violated all the time.

Amending the U.S. Constitution is a serious business. We should not amend the Constitution as a symbolic gesture - as a way of saying, "listen up ... we really mean it!" When we pass a statute, we also "really mean it." So do State legislators.

I am not saying that existing victims' rights laws are perfect, or that we cannot do more in this area. I have long worked for and led efforts to improve victims' rights and the help our society offers to crime victims. But that is no reason to amend the U.S. Constitution. Rather, as studies have shown, what is needed is sufficient funding and better training for criminal justice personnel.

Conclusion

Let me conclude by saying that the case for a crime victims' constitutional amendment simply has not been made. It has not even come close.

As one who has worked side-by-side with victims in the criminal justice system as a prosecutor, and as one who has worked to advance the rights of victims as a member of this Committee, I ask that we keep our eyes on that goal - of truly expanding the rights of victims, as directly and as swiftly as we can. We can and should do that -- now -- without amending our Constitution to do it.

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