

TESTIMONY OF PROFESSOR DOUGLAS E BELOOF
BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE OF
THE UNITED STATES HOUSE OF REPRESENTATIVES

APRIL 25, 2013
113th Congress, 1st Session

Honorable Chairman Franks and Distinguished Members,

Thank you for the opportunity to speak with you today. I am here to support H.J. Res 40, the Victims' Rights Amendment to the United States Constitution.

This Amendment contains the values that everyone in this room agrees upon – that crime victims should be treated with dignity and respect in the criminal process. However, experience teaches that this can only happen for every victim, in every case, if crime victims have enforceable rights. In order for rights to be honored, victims need recourse to remedy. For, without enforceable rights, victims' rights are merely paper promises. And, this is the cruelest kind of promise, assuring victims they have rights, only for them to discover that they do not. This was the lesson of the Oklahoma City Bombing case, a case in which many victims could not observe the trial.

After the bombing, an effort to pass a Victims' Rights Amendment occupied several years, culminating in the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. 3771. The experiment with the CVRA is a decade old. What has been learned strongly supports this renewed effort to provide crime victims' constitutional rights. Moreover, lessons learned from those early drafts of the amendment led to this version, which is much improved.

I concur with Professor Tribe's framework for determining when rights should be added to the Constitution: Where there is "a needed recognition of a basic human right, where a) the right is one that people widely agree deserves serious and permanent respect b) the right is one that is insufficiently protected under existing law, c) the right is one that cannot be adequately protected through purely political action such as state or federal legislation and/or regulation, d) the right is 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 the national and state governments, and e) the right would be judicially enforceable without creating open-ended or otherwise acceptable funding obligations." Statement of Professor Laurence H. Tribe, Harvard University Law School, in A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings Before the Senate Judiciary Committee, 105th Cong., 1st session (1997). To this list I would add f), that no actual constitutional rights of the accused would be violated.

(A) THE PEOPLE WIDELY AGREE THAT VICTIMS' RIGHTS DESERVE SERIOUS AND PERMANENT RESPECT.

Victims' state constitutional rights exist in more than two-thirds of the states. When referred to the people, these amendments are voted in by overwhelming margins. Passage rates are typically in the 75 to 90 percent range. Douglas E Beloof, *The Third Wave of Victims' Rights: Standing, Remedy and Review*, 2005 B.Y.U. L. Rev. 255, 341 n. 421 (collecting

passage percentages in individual states).

At the federal level, the Crime Victims' Rights Act of 2008, 18 U.S.C. 3771, initially passed in the Senate by a vote of 96 to 1. In the House the bill was somewhat modified and passed by a 393 to 14 margin in the House. The bill then passed the Senate by unanimous consent and the President signed it into law.

Outside of Congress, support for the Amendment is strongly bipartisan. Forty nine governors, 50 state attorney generals and the National District Attorneys Association all support it. These organizations and elected officials come from both parties and hold views on other issues across the political spectrum. The organizations that support the Amendment, for example Mothers Against Drunk Driving and Parents of Murdered Children, are nonpartisan. Presidents Clinton and Bush, as well as their Attorneys General supported an amendment. In my home state of Oregon it was a Democrat Attorney General and a Democrat majority in both Houses that made Oregon state's constitutional victims' rights enforceable. Harvard Professor Laurence Tribe, who represented Al Gore in *Bush v. Gore* before the Supreme Court, has endorsed and participated in prior drafts, some of his language carries over into the current draft.

Clearly, there is wide agreement that victims' rights deserve serious and permanent respect.

(B) THE RIGHT IS ONE THAT IS INSUFFICIENTLY PROTECTED UNDER EXISTING LAW. AND, C) THE RIGHT IS ONE THAT CANNOT BE ADEQUATELY PROTECTED THROUGH PURELY POLITICAL ACTION SUCH AS STATE OR FEDERAL LEGISLATION.

Fundamentally, the objective of victims' rights is to include victim 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 the rights varies widely and too frequently they are honored in the breach.

A few case examples, from both the Bush and Obama administrations, under the Crime Victims' Rights Act, prove the point:

(1) In a criminal prosecution of British Petroleum for negligent homicide at an oil plant in Texas that killed 15 workers and injured more than 170 others, the Assistant U.S. Attorneys violated the surviving victims' rights by intentionally concealing a lenient plea agreement from the victims.¹ The Assistant U.S. Attorneys, in secrecy from the victims went to the trial court to obtain an order that the victims would be denied their rights under the Act. The federal court of Appeals ruled that the Assistant U.S. Attorneys had acted illegally and admonished it stating, "the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain." Nevertheless, the courts did not remedy the violation.

(2) In the *Antrobus* case, involving the illegal sale of a handgun that resulted in the murder of 5 people and serious injury of four others in a shopping mall in Utah, the Assistant U.S.

¹ In re Dean, 527 F.3d 391 (5th Cir. 2008).

Attorneys refused to reveal to the victims the statement made by the killer to the gun seller when the gun was purchased that he intended to commit a robbery. This statement likely would have established the murdered girl's family as victims under the act and allowed them to speak at sentencing. The victims were denied victim status by the courts and not allowed to speak at sentencing.² Again, the courts provided no relief.

(3) In the *Jane Does v. United States* case, Assistant U.S. Attorneys took the position that it had no obligation to tell girls who were victims of a sexual assault by billionaire Jeffrey Epstein that it was reaching a secret “non-prosecution” agreement with Epstein as part of a lenient plea arrangement. The U.S. Attorneys remarkably took the position that victims had no right under the CVRA to be treated fairly or to be told that the charges were going to be bargained away – all because the Assistant U.S. Attorneys had made the decision to reach a secret deal with the sex offender before formally filing charges against him. The federal district court hearing the matter curtly dismissed the Department's argument, explaining that “the government's interpretation ignores the additional language throughout the statute that clearly contemplates pre-charge protections”³ Either directly or indirectly, two federal circuit courts have also rejected the position, that the assistant U.S. Attorneys can strip crime victims of their rights by the simple expedient of not obtaining a grand jury indictment.⁴

(4) In a case involving victims of mortgage fraud, Assistant U.S. Attorneys took the position that these citizens were not victims under the Crime Victims' Rights Act.⁵ The Eleventh Circuit criticized the Assistant U.S. Attorneys, opining that, “Although the [victims'] petition does not seek relief against the Assistant United States Attorney prosecuting the case, we expect that attorney to be mindful of the obligations imposed by” the CVRA.

(5) In the botched “Fast and Furious” operation that led to the slaying of Border Patrol Agent Brian Terry, the Assistant U.S. Attorneys filed pleadings actually arguing that Terry was not a “victim” of illegal guns sales that lead to his murder. The Assistant U.S. Attorneys also refused to provide the Terry family with any discovery about the circumstances surrounding the murder so that they could argue to the court that they deserved rights under the CVRA. Ultimately, the

² See Cassell, Paul G. Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision.” 87 Denver Law Review 599 (2010). Paul Cassell is a Law Professor and former federal judge). Whether the Antrobus family fits under the CVRA definition of “victim” depends on whether the harm was the direct and proximate cause of the conduct.

³ *Jane Does #1 and #2 v. United States*, –F.Supp.2d–, 2011 WL 4793213 at *4 (S.D. Fla. Sept. 26, 2011).

⁴ *In re Dean*, 527 F.3d 391 (5th Cir. 2008); See *In re Stewart*, 552 F.3d 1285 (2008)(that rights attach before charging is an implicit prerequisite of the ruling).

⁵ *In re Stewart*, 552 F.3d 1285 (2008).

Department reassigned the case from the District of Arizona to another prosecutor, and the Terry family was forced to settle its CVRA case for a promise from the Justice Department that it “recommend” to the Court that the Terry family receive rights under the CVRA as a matter of discretion.⁶

The point of these examples is not to deride the Justice Department. 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 victims’ rights amendment. Rather, these examples reveal how statutory rights can be ignored with impunity. Moreover, these 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.

D) THE RIGHT IS 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 THE NATIONAL AND STATE GOVERNMENTS.

Separation of powers is 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 defendant’s rights for all the states. Individual rights in criminal procedure are already federal and have been for decades. There is no hint, even in dicta, 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.

Thus, the ongoing exclusion of victims’ rights from the constitution reduces the importance of victims’ rights. Moreover, including victims rights’ in the constitution works no new damage to federalist principles. See, Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims Rights Amendment*, 1999 Utah L. Rev 479, 531 et seq.

Without a constitutional amendment there is no national baseline for victims’ rights. For example, in the recent Boston Marathon Bombing case, should the defendant recover to face charges, federal charges will provide victims’ rights that are, at least, potentially enforceable.

⁶ *United States v. Avila*, No 2:11-Cr-00126, doc. #394 (D. Ariz. Jan. 31, 2012). Whether the Terry family fits under the CVRA definition of “victim” depends on whether the harm was the direct and proximate cause of the conduct. It clearly was, as ATF agent John Dodson testified at the House Committee on Oversight and Government reform, June 15, 2011: “I had no question that the individuals we were watching were acting as straw purchasers and that the weapons they purchased would soon be trafficked to Mexico and locales along the western border, where they would be used in violent crime if we did not intervene. However we did not intervene.”

However, under Massachusetts law, rights remain unenforceable on review in state courts. Such disparate treatment of crime victims, simply because of the venue in which a crime occurred, makes little sense.

E) 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. Nothing could be further from the truth. There is enough experience with victims’ rights now both in the states and under the CVRA to know the sky will not fall in the administration of justice around crime victims’ rights. In the ten years since the passage of the CVRA, the sky has remained firmly in the heavens. A review of the case law in that ten year period reveals nothing that could credibly be described as overwhelming the administration of the criminal process. See, 26 ALR Fed 2d 451 (collecting cases under the CVRA).

Quite the contrary. The number of federal appellate and district court opinions on the CVRA in ten years is miniscule. *Id.* The average number of reported appellate cases in each state is similarly small. *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R.5th 343 (collecting state cases).

To be sure, it is the trial courts that more frequently accommodate victims’ rights. However, there is no empirical evidence from courts, state or federal, that victims’ rights have clogged the courts. Finally, states already have victims’ rights, either constitutional or statutory, so much of the infrastructure already exists in the states to accommodate a federal constitutional right.

F) NO ACTUAL CONSTITUTIONAL RIGHTS OF THE ACCUSED WOULD BE VIOLATED BY THE AMENDMENT.

In terms of conflicts with defendants’ rights, in the ten 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 appellate courts have had to find a conflict is far greater than 10 years. Many states had victims’ rights as early as 1982. Yet, in all that time, no federal appellate court has held that any state victims’ right violates defendants’ United States Constitutional rights.

The reason for this is straightforward, the CVRA was written carefully to avoid conflict with defendants’ rights. The same is true of state constitutional rights for crime victims. Likewise, the Amendment before you has been carefully drafted to avoid conflict with a defendant’s constitutional rights. In this regard the Amendment before you states, “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.” H. J. Res. 40, pg 2 lines 3-4.

Human Rights Watch, a well-respected NGO, has published a report on crime victims' rights in America noting the ability to secure defendants' rights while providing for victims' rights as well:

“Many people have strong interests in the functioning of the criminal justice system: victims of crime, witnesses, those accused of committing crimes, and society at large, which requires the fair and effective administration of justice. In recent decades, both internationally and inside the United States, there has been a growing demand that greater attention be paid to the interests and rights of victims of crime as well as to ensuring their access to justice.

Unfortunately, the public debate on this topic too often casts the rights and interests of victims and defendants as a zero-sum game in which safeguards for defendants' rights—such as the presumption of innocence and the right to a fair trial—come at the expense of victims, and improvements in the treatment of victims impinge on defendants' rights. While there can be tensions between the legitimate interests of victims and defendants, a criminal justice system based on human rights standards can safeguard the rights of both while advancing justice and the rule of law.” Human Rights Watch, *U.S. Policy and International Standards on the Rights and Interests of Crime Victims*, 1 (2008).

I agree with this assessment. This amendment does safeguard the rights of both defendants and victims while advancing justice and the rule of law. I urge you to favorably vote this bill out of committee.