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Subcommittee on the Constitution

Hearing on “Victims’ Rights Amendment”

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I would like to thank Chairman Trent Franks and Ranking Member Jerrold Nadler for inviting the American Civil Liberties Union (“ACLU”) to testify at today’s hearing on “The Victims’ Rights Amendment.” The American Civil Liberties Union (ACLU) is a non-partisan advocacy organization with over a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of equality and justice set forth in the U. S. Constitution and in our laws protecting individual rights.

H.J. Res 106, the constitutional amendment introduced by Chairman Franks, would extend to *all* crime victims the right: (1) to reasonable notice of and to attend public proceedings relating to the offense; (2) to be heard at any release, plea, sentencing, or other such proceeding involving any right established under the amendment; (3) to proceedings free from unreasonable delay; (4) to reasonable notice of the release or escape of the accused; (5) to due consideration of the victim’s safety; and (6) to restitution. Also, crime victims would have standing to fully assert and enforce any of the above rights in court. While this proposed amendment would attempt to codify a role for crime victims in the criminal justice process, the ACLU is concerned that it will be difficult to provide for the rights of victims’ while preserving the constitutional rights of people accused of crimes, whose fundamental liberty interests are directly at stake.

The American Civil Liberties Union opposes H.J. Res. 106, the “Victims’ Rights Constitutional Amendment,” (VRA) because the amendment would profoundly alter the nation’s founding charter. It would fundamentally compromise the Bill of Rights protections for accused persons in every federal, state and local criminal case. The Framers created a two-party adversary criminal justice system, with a public prosecutor, a criminal defendant, and a neutral judge. The Framers were aware of the enormous power of the government to deprive a person of life, liberty and property. The VRA will jeopardize the basic safeguards put in place to protect criminal defendants by infringing on their presumption of innocence and right to a fair trial.

Many of the provisions of the amendment reflect laudable goals, but it is unnecessary to pass a constitutional amendment to achieve them. On October 30, 2004, Congress enacted the Crime Victims’ Rights Act of 2004, legislation that enumerates eight statutory rights for victims of crime. Based on a recent GAO report,¹ few crime victims are asserting their rights under the law and there was little dissatisfaction among crime victims about the rights provided by the federal statute. In addition, every state has either a state constitutional amendment or statute protecting victims’ rights² and the proponents of a constitutional amendment have not made the

¹ U.S. Gen. Accounting Office, *Crime Victims’ Rights Act: Increasing Victim Awareness and Clarifying Applicability to the District of Columbia Will Improve Implementation of the Act* September 29, 2009 [hereinafter GAO Crime Victims’ Rights Act Testimony].

² U.S. Gen. Accounting Office, *Crime Victims’ Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act* 2 (2008) [hereinafter GAO Crime Victims’ Rights Act Report]. (“According to the National Conference of State Legislatures, 33 states have incorporated victims’ rights into their state constitutions, and all 50 states and the District of Columbia have some form of legislation affording rights to crime victims.”)

case that those measures do not protect victims' interests.

Background

There have been several attempts to amend the U.S. Constitution to recognize the role of the crime victim in the criminal justice process, as well as the enactment of statutes to address the subject. Between 1996 and 2003 there were nine hearings held in Congress on amending the Constitution to incorporate victims' rights, but the legislation proposing to amend the Constitution was never brought up for votes in either the House or the Senate³. After several failed attempts to pass a constitutional amendment, Congress did enact statutes that established certain rights for federal crime victims and made funding available to provide services to crime victims.⁴

Over the last 30 years, a number of laws that address the role of the crime victim in the criminal justice system have passed Congress, including the Victim and Witness Protection Act of 1982,⁵ Victims of Crime Act of 1984,⁶ Victims' Rights and Restitution Act of 1990,⁷ Violent Crime Control and Law Enforcement Act of 1994,⁸ Mandatory Victims Restitution Act of 1996,⁹ Victim Rights Clarification Act of 1997,¹⁰ and Crime Victims' Rights Act of 2004.¹¹ Some of these laws provided crime victims with rights as well as directed federal officials to provide victims with services, such as notification of certain public court proceedings.

The Constitution Should Only Be Amended When There Are No Other Alternatives Available.

In the past 220 years, the Federal Constitution has been amended only 17 times. Amending the Constitution is a serious matter and should be reserved for those issues where there are no other alternatives available. H.J. Res. 106 does not meet this standard because there are other alternatives available to protect the interests of crime victims. In fact there is a federal statute currently in place¹² that protects most of the same rights this amendment would create. Thirty-three states have passed constitutional amendments protecting victims' rights and every state has either a state constitutional amendment or statute that protects victims' rights.¹³ If in fact victims are not receiving the benefit of these rights, the answer is not to amend the

³ GAO Crime Victims' Rights Act Report at 14. (2008).

⁴ Id.

⁵ Pub. L. No. 97-291, 96 Stat. 1248 (1982).

⁶ Pub. L. No. 98-473, ch. XIV, 98 Stat. 1837 (1984).

⁷ Pub. L. No. 101-647, tit. V, 104 Stat. 4789 (1990).

⁸ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

⁹ Pub. L. No. 104-132, tit. II, 110 Stat. 1214 (1996).

¹⁰ Pub. L. No. 105-6, 111 Stat. 12 (1997).

¹¹ Pub. L. No. 108-405, tit. I, 118 Stat. 2260 (2004).

¹² The Crime Victims' Rights Act of 2004 18 U.S.C. 3771 (2004)

¹³ See footnote 2 *Supra*

Constitution, but rather authorities should make a greater effort to enforce existing laws.

The Victims' Rights Amendment Erodes The Presumption Of Innocence.

The constitutional protections afforded the accused in criminal proceedings are among the most precious and essential liberties provided in the Constitution. The VRA undermines the presumption of innocence by conferring rights to an accuser at the time in a criminal case when the accused is still presumed to be innocent.

Not every person accused of a crime is actually guilty of committing a crime. But giving the accuser the constitutional status of victim could impact the judge and jury, making it extraordinarily difficult for fact finders to remain unbiased when the “victim” is present at every court proceeding and potentially prejudicing those who will determine guilt or innocence. The VRA makes the accuser a third party in the criminal case, even before a judge or jury has determined that the accuser is actually a “victim.”

The VRA interjects crime victims into the early stages of the criminal justice process before a person is convicted without providing adequate safeguards. Traditionally, victims who are witnesses only testify during pre-trial hearings to the extent that their testimony is relevant. H.J. Res. 106 would give victims “[t]he right . . . to be heard at any release, plea, sentencing or other such proceeding involving any right established by this article.” For example, if a victim is a witness during a bail hearing and makes prejudicial statements, but the accused is unable to cross-examine the victim to verify the credibility and relevance of his statements, the accused’s rights are impacted. Such statements could be relied upon when a judge determines whether to detain a person for months or years prior to trial, during a period of time when the accused is still absolutely entitled to a presumption of innocence. If the charges are dropped or the accused is later found to be innocent, he or she cannot regain those months or years spent in jail before the trial.

The Victims' Rights Amendment Jeopardizes The Right To A Fair Trial.

H.J. Res. 106 would give crime victims a constitutional right to attend the entire criminal trial—even if the victim is going to be a witness in the case. In many instances, the testimony of a prosecution witness will be compromised if the person has heard the testimony of other witnesses. Typically, trial witnesses are barred from the proceedings prior to their testimony for this very reason. Despite the possibility of tainting his or her testimony, H.J. Res. 106 gives the victim a constitutional right to be present—even over the objections of the defense or prosecution.

H.J. Res. 106 would also confer “a right to proceedings free from unreasonable delay.”

Any victim or representative of a victim of a crime has standing under the amendment to intervene and assert a constitutional right for a faster disposition of the matter. While judges will determine when delays are unreasonable, a victim should not have a "right" to infringe on an accused person's right to prepare a defense in a case. Defendants' rights to effective assistance of counsel could be threatened if they are required to go to trial before their attorneys are prepared. Furthermore, such a right could compromise the prosecution's case if it is not ready to proceed to trial, but must do so at the victim's insistence. Under the first scenario innocent people may be wrongfully convicted; under the second scenario guilty people may go free. Most important, protecting the rights of a person accused of a crime would no longer be a preeminent focus of a criminal trial.

The Amendment Could Hinder Effective Prosecutions And Place Enormous New Burdens On State And Federal Law Enforcement Agencies.

Instead of putting their resources towards prosecuting crimes, states would be required under the new amendment to divert resources to make sure that victims are given notice about every hearing and given the opportunity to be heard "at any release, plea, sentencing or other such proceedings."

It is unclear how much weight a judge will give to the views of a crime victim if he or she objects to an action of the prosecutor or judge. What if a victim opposes a negotiated plea agreement? Over 90 percent of all criminal cases are resolved through negotiation rather than going to trial. Even a small increase in the number of cases going to trial would burden prosecutors' offices. There are many reasons why prosecutors enter into plea agreements such as allocating scarce prosecutorial resources, concerns about weaknesses in the evidence, or strategic choices to gain the cooperation of one defendant to enhance the likelihood of convicting others. Prosecutorial discretion would be seriously compromised if crime victims could effectively obstruct plea agreements or require prosecutors to disclose weaknesses in their case in order to persuade a court to accept a plea. Ironically, this could backfire and result in the prosecution being unable to get a conviction against a guilty person, which would not serve society's or victims' interests.

The Amendment Would Impose Requirements On States That Many Will Not Be Able To Meet.

Under H.J. Res. 106, law enforcement would be constitutionally required to make reasonable efforts to find and notify crime victims or their representatives every time a case went to trial, every time a criminal case was resolved, and every time a prisoner was released from custody. To comply with H.J. Res. 106, some jurisdictions will need to send out hundreds of thousands of notification forms. This will impose significant new costs on the states. Regardless

of how efficient a state tries to be, it will be difficult to provide notice to the accuser in a timely manner. For example, when a person accused of a crime must be presented for arraignment within 48 hours or arrest, it will be difficult to provide notice to victims.

When a state fails to fulfill its duty to provide notice, what remedies would be available to the “victim”? Section one reads, “Nothing in this article provides grounds for a new trial or any claim for damages.” However, this still leaves open the possibility that the victim could reopen a case if he or she disagreed with a plea agreement. It also leaves open the possibility of seeking injunctive relief against the judge, prosecutor or police when they fail to follow through with every requirement under the amendment.

Section one of H.J. Res. 106 may also authorize appointment of counsel for victims. The section reads, “The crime victim or the crime victim’s lawful representative has standing to fully assert and enforce these rights in court.” The term “lawful representative” is undefined, and could be interpreted as meaning an attorney. If victims are entitled to have attorneys represent them, then in order to extend this right equally across the board, the state will have to subsidize the cost of attorneys for those who cannot afford to hire their own.

State and federal criminal justice systems are in crisis because they are unable or unwilling to provide adequate counsel for indigent accused persons. The additional cost of providing counsel to victims as well as defendants in criminal cases would be prohibitively expensive. Adding the financial burden of providing counsel to victims will likely further limit defendants’ access to counsel. It will tax an already severely overtaxed system, make it less likely for accused persons to retain adequate counsel, and therefore increase the likelihood of wrongful conviction.

The Crime Victims’ Rights Act (CVRA) of 2004

On October 30, 2004, the Crime Victims' Rights Act (CVRA) was enacted, establishing eight rights for federal crime victims and two mechanisms to enforce those rights. The following rights were established by the legislation:

- (1) “to be reasonably protected from the accused”
- (2) “to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused”
- (3) “not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding”
- (4) “to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”

- (5) the “reasonable right to confer with the attorney for the Government in the case”
- (6) “to full and timely restitution as provided in law”
- (7) “to proceedings free from unreasonable delay”
- (8) “to be treated with fairness and with respect for the victim’s dignity and privacy”¹⁴

Congress enacted the CVRA after another version of the victims’ rights constitutional amendment failed.¹⁵ The fundamental objection to the 2003 version of the victims’ rights constitutional amendment was that it would have replaced the two-party adversary system the Framers created with a three-party system in which criminal defendants would face both the public prosecutor and one or more private prosecutors (i.e. victims) with rights equal to or greater than the rights of the accused. In passing the CVRA instead of the constitutional amendment, Congress intended to preserve the system the Framers created -- with a public prosecutor charged with acting in the public interest, a criminal defendant with the full panoply of constitutional rights, and a neutral judge.¹⁶

Few Victims Have Asserted Their Rights Under The CVRA And Those that Have Are Generally Satisfied

The CVRA also directed General Accounting Office (GAO) to conduct an evaluation of the implementation of the CVRA. GAO reviewed, among other things: “(1) efforts made to implement the CVRA, (2) mechanisms in place to ensure adherence to the CVRA, (3) key issues that have arisen in the interpretation of the CVRA by the federal courts and (4) perspectives of criminal justice system participants on the CVRA.”¹⁷ GAO found that, the Department of Justice (DOJ) and the federal judiciary have updated internal guidelines, trained DOJ staff and judges, provided victims with services such as emergency housing for protection, and proactively asked victims if they would like to speak in court in order to implement the CVRA.¹⁸

GAO found that very few victims have asserted their CVRA rights in court. Of the hundreds of thousands of cases charged in the U.S. district courts over the 5-year period GAO studied, it found 49 instances in which victims, or victims’ attorneys or prosecutors on behalf of victims, asserted CVRA rights by filing a motion with the district court.¹⁹ Also, GAO found 27

¹⁴ 18 U.S.C. § 3771(a).

¹⁵ 150 Cong. Rec. at S4262 (Apr. 22, 2004) (“It is clear to me that passage of a Constitutional amendment is impossible at this time.”) (statement of Sen. Feinstein).

¹⁶ See *United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005)

¹⁷ Pub. L. No. 108-405, tit. I, 118 Stat. 2260 (2004).

¹⁸ U.S. Gen. Accounting Office, *Crime Victims’ Rights Act: Increasing Victim Awareness and Clarifying Applicability to the District of Columbia Will Improve Implementation of the Act September 29, 2009* [hereinafter GAO Crime Victims’ Rights Act Testimony].

¹⁹ *Id* at 12

petitions for writs of mandamus that were filed with the appellate courts, most of which were in response to motions denied in the district court.²⁰

Victims' attorneys and federal judicial officials gave several possible reasons for the small number of motions filed by victims, including the fact that victims are satisfied with how they were treated. Some suggested that victims could be intimidated by the judicial process or too traumatized by the crime to exercise their rights in court.²¹ Nevertheless, most thought that a lack of awareness of this enforcement mechanism was the reason so few motions were filed. The results of GAO's victim survey are consistent with the belief that victims lack this awareness about the process. One hundred and thirty four (134) of the 236 victims who responded to the question regarding filing motions reported that they were not aware they could file a motion to assert their rights, and an additional 48 did not recall whether they were aware.

The results were mixed as to the overall effect that the CVRA has had on victims, the DOJ and judicial officials. Most of those surveyed indicated that CVRA has improved victim treatment. For example, 72 percent of the victim-witness professionals who responded to GAO's survey thought that the CVRA has resulted in at least some increase in victim attendance at court proceedings.²² Others interviewed thought that the federal government and the courts were treating victims well before the implementation of the Act. Victims responding to GAO's survey also reported mixed views on their knowledge of, and satisfaction with, the provision of various rights. 141 of the 167 victims who responded to GAO's survey question regarding participation in the judicial process reported that they did not attend any of the proceedings related to their cases, primarily because it was too far to travel to the court or they were not interested in attending. Thus, crime victims are rarely asserting their statutory rights and are not expressing concerns or dissatisfaction with their rights established in accordance with the CVRA.

Improvements Should Be Made To CVRA As Opposed To Considering a Constitutional Amendment

According to GAO, several key issues have developed since the implementation of the CVRA that require the courts to interpret provisions of the law, including "(1) when in the criminal justice process CVRA rights apply, (2) what it means for a victim to be 'reasonably heard' in court, and (3) what legal standard should be used to review victim appeals of district court decisions."²³ Although it is not unusual for courts to interpret different aspects of a new law after they are enacted, Congress could also address the issues that have emerged during implementation of the CVRA with legislation. For example, it is unclear whether the CVRA applies to victims of local offenses prosecuted in the District of Columbia Superior Court. Also,

²⁰ *Id.*

²¹ *Id.* at 13.

²² *Id.* at 17

²³ *Id.* at 14

Congress could clarify at what stage of the criminal justice process CVRA rights begin to apply and what standard of appellate review should be used for writs of mandamus. Finally, it is important for victims to understand what being “reasonably heard” means under the law—whether it means a written statement or the ability to speak at a proceeding? These should all be noncontroversial changes that Congress could make to the legislation in order to facilitate the exercise of victims’ rights.

Conclusion

H. J. Res. 106 would give victims’ rights at least equal to defendants’ constitutional rights. However, the 2004 CVRA also gives victims most of these same rights under the law, while effectively protecting the rights of the accused, whose liberty interests are directly at stake. The ACLU opposes any effort to enact a victims’ rights constitutional amendment because the VRA would undermine the presumption of innocence and the right to a fair trial for the accused. Moreover, because few crime victims are asserting their rights under CVRA in court and even fewer are expressing dissatisfaction with the law, there is little evidence to justify the need for a constitutional amendment providing the same rights as those provided in the statute.