

Testimony of Professor Douglas E. Beloof
Before the Subcommittee on Crime Terrorism and Homeland Security
Concerning the "Crime Victims' Rights Act" of 2004
September 29th, 2009

Mr. Chair and Honorable Members. Thank you for the opportunity to testify before you once again, it is an honor and a privilege. I am testifying in my capacity as a Professor of Law and an expert on victim law and the CVRA.

My name is Douglas Beloof, I am a Professor of Law at Lewis and Clark Law School in Portland, Oregon. I have authored the only casebook on crime victims in criminal procedure and written many articles on the subject. I am a former violent crimes prosecutor. The United States Senate Judiciary Committee has recognized me as an expert on crime victim law. I have received an award from the United States Attorney General for Innovation in Services to Victims of Crime. I am the founder and for ten years was the first director of the National Crime Victim Law Institute. I am presently a Board member of that organization.

I assisted in the drafting of the Crime Victims Rights Act (CVRA) of 2004. You may remember that an Amendment to the United States Constitution providing for Victims' Rights had been proposed, this effort was turned into a statutory proposal by victims rights groups in exchange for the statutory CVRA which was supposed to provide for enforceable rights for victims of crime and for funding to test enforceable victims rights in federal and state court. Such funding was also designed to encourage states to develop enforceable victims rights. Right now, the CVRA represents a broken promise to Crime Victims in several essential aspects.

First, the funding in the CVRA has never been forthcoming. Instead small appropriated amounts in one category of funding has trickled out. In this category, there was to be 7 million the first year for legal services and 11 thereafter. Funding close to this level has never occurred. While the Office for Victims of Crime is to be commended for it's excellent work in managing

the much smaller amount of funding that was forthcoming, this year there is no funding at all for any part of the CVRA, despite the fact that recent legislation has re-authorized it. Even the small amounts appropriated for legal services are no longer available.

Authorization without appropriation dooms the CVRA experiment. The slim framework of legal clinics built to provide legal services to victims under the CVRA, and state law equivalents is on the brink of collapse. Without it the CVRA and the state equivalents of the CVRA will have no champions and, as a result are likely doomed to mediocrity or even failure. Funding is the most critical part of the experiment that was the CVRA. An experiment that has barely gotten off the ground because of a failure to fund. This despite Congressional authorization for the funds.

Second, there is a split of authority in the courts that threatens to end practical enforcement of crime victims' rights. The dispute is over whether the standard of review is that of an appeal or that of a mandamus. A standard of review of appeal guarantees meaningful review in all cases where victims rights are violated. On the other hand the standard of review of mandamus means that remedy will rarely be available to crime victims. The CVRA was intended by congress to provide redress for rights violations. Congress should act to resolve the split of authority, reinvigorate victims' rights by making clear that the standard of review for victims rights violation is that of an appeal.

Third, the United States Justice Department has taken a variety of positions that are adverse to both the letter and spirit of crime victims' Rights. The most critical of these is the Department's position on the standard of review the position that the standard of review is that of mandamus. As I just mentioned, as a practical matter, a mandamus standard of review drastically reduces the enforce-ability of these rights. And, in those federal courts where the Justice

Department's position has prevailed, federal courts have declined to reach the merits of the victims rights violation. On the other hand where the appellate standard of review applies remedies for victims' rights violations have been forthcoming.

On the other hand, there have been some cases in which the Justice Department has worked cooperatively with crime victim lawyers to assure victims rights in federal trial courts. Given the underfunded amount put towards legal services to crime victims, I can tell you only anecdotally that when federal and state prosecutors seek to meaningfully comply with the rights and works with crime victims lawyers, there is generally success. This is a far more common occurrence in the states than in federal prosecutions. However, there have been some very successful collaborations with the Justice Department.

While there are no doubt those within the Justice Department who embrace crime victims' rights, unfortunately others within the United States Justice Department do not. There remains substantial institutional resistance to enforceable victims' rights as evidenced both by the effort to prevent a strong standard of review that I have already mentioned and as demonstrated in several reported cases in which the Department has sought to diminish these rights.

Perhaps, the most egregious violation occurred in the criminal prosecution of British Petroleum. There the prosecutors sought to strike a plea deal with British Petroleum. British Petroleum was indicted after an explosion at one of its sites, killed people. Rather than seek to consult the manslaughter victims families about an appropriate plea deal, the Justice Department in collaboration with defense counsel for British Petroleum went to the trial court and obtained a secret order that purported to allow the Justice Department to enter into a secret plea deal by suspending the application of the CVRA. The 5th Circuit Court recognized the victims' right to

confer with the government about the plea bargain before it was struck and wrote “the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and ascertained the victims’ views on the possible details of a plea bargain.”

Another case involved a mortgage fraud. People seeking mortgages were made to pay money towards their mortgage which was an illegal payment. The victims sought to get the Justice Department to acknowledge these people as victims under the CVRA, Justice refused and sought to deny these people victim status. The 11th Circuit sided with the victims, and stated that clearly these people met the definition of victim under the CVRA. In conclusion the panel wrote, “ Although the 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.]” Not content to comply with the Circuit Panel’s ruling, the Justice department sought review in front of the entire 11th circuit bench, a request that recently declined.

Members of Congress should ask the present Attorney General to revisit the approach to crime victims’ rights that some in the department have taken, particularly as to the standard of review and encourage the Department to follow not only the letter, but the spirit of the CVRA.

As critical as I am of the unfortunate positions taken by the Department of Justice, the most regrettable shortcoming is the failure of Congress to fund the CVRA. Many in the victim community are now asking themselves and each other whether putting aside the drive for a constitutional amendment was worth the trade for an unfunded CVRA and a CVRA that may largely be without meaningful remedy. Many are talking of reviving the Victims’ Rights Amendment because of the broken promise the CVRA is coming to represent. I am beginning to share that view.

In closing, I would like to praise the Office for Victims of Crime which has worked

diligently and with heartfelt commitment to do what they can, with the limited resources at their disposal to fulfill the promise of victims' rights. I am very grateful for their professionalism and dedication. The Office for Victims of Crime and the community of victims' rights lawyers could do far more with adequate funding, and will achieve very little if Congress provides no funding.