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Victims' Rights Amendment in the 106th Congress: Overview of Suggestions to Amend the Constitution

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Summary

Thirty-three states have added a victims rights amendment to their state constitutions. Both the House and Senate Judiciary Committees held hearings on similar proposals in the 106th Congress to amend the United States Constitution (S.J.Res. 3 introduced by Senator Kyl for himself and Senator Feinstein and H.J.Res. 64 introduced by Representative Chabot). The Senate Committee initially reported out an amended version of S.J.Res. 3 without a written report, but issued a report prior to floor consideration of the reported proposal, S.Rept. 106-254. Neither S.J.Res. 3 nor H.J.Res. 64 were ever brought to a vote on the floor. This is an overview of those proposals and is an abbreviated form of *Victims' Rights Amendment: Proposals to Amend the United States Constitution in the 106th Congress*, CRS Report RL30525. Authorities identified there have been omitted here in the interests of brevity

Pro and Con

Arguments put forward in support of an amendment include assertions that:

- The criminal justice system is badly tilted in favor of criminal defendants and against victims' interests and a more appropriate balance should be restored;
- The shabby treatment afforded victims has chilled their participation in the criminal justice system to the detriment of all;
- Society has an obligation to compensate victims;
- Existing statutory and state constitutional provisions are wildly disparate in their coverage, resulting in uneven treatment and harmful confusion throughout the criminal justice system; and

- Existing state and federal law is inadequate and likely to remain inadequate

Critics argue to the contrary that:

- The criminal justice system is not out of balance. The purpose of a criminal trial is to determine the guilt of an accused by allowing an impartial jury to weigh the government's evidence that a crime has been committed and that the accused committed it, against any evidence offered by the defendant; the interests of victims do not fit in the equation; their interests are protected by the right to bring a civil suit against the accused, by court-order restitution if the accused is convicted, and by victim compensation provisions.

- If efficacious, a victims rights amendment would generate considerable uncertainty in the law and flood the federal courts with litigation, could be very costly, and would either jeopardize the rights of the accused (probably in a discriminatory manner) or undermine the government's ability to prosecute.

- If the mischief possible through a victims rights amendment is avoided, the proposal becomes purely hortatory; the Constitution is no place for commemorative decorations.

- It is inconsistent with the basic notions of federalism. Each of the states, through its legislatures and electorate, has decided how victims rights should be accommodated within its criminal justice system. These decisions would be made subservient to a uniform standard that in all likelihood no jurisdiction would have chosen.

Particulars

S.J.Res. 3 and H.J.Res. 64 would have followed the general format favored in the state constitutions. They would have guaranteed victims a right to notice, to attend, and/or to be heard at various stages of the criminal justice process.

Who Is a Victim

The impact of any victims rights amendment depends upon who is considered a victim for purposes of the amendment. S.J.Res. 3 would have covered "victim[s] of a crime of violence, as these terms may be defined by law." H.J.Res. 64 would have applied to "[e]ach individual who is a victim of a crime for which the defendant can be imprisoned for a period of longer than one year or any other crime that involves violence." The obvious difference between the two was that the House Resolution would have covered nonviolent felonies, while the Senate proposal would not.

When Must a Victim Be Notified, Be Allowed to Attend, or Be Heard

Bail

At least in theory, a victim's rights might attach upon commission of the offense. Under the proposals in the 106th and most of the state provisions, the rights attach upon commencement of "proceedings" involving the crime of which the individual is the victim. The most significant of these early proceedings for the victim would likely be the bail hearing for the accused. Only a few states grant the victim the right to be heard at the defendant's bail hearing; a few more permit consultation with the prosecutor prior to the bail hearing. Most allow victims to attend. And virtually all provide either that victims should be notified of bail hearings or that victims should be notified of the defendant's release on bail.

Under existing federal law, victims of alleged acts of interstate domestic violence or interstate violations of a protective order have a right to be heard at federal bail proceedings concerning any danger posed by the defendant. In other federal cases, victims' prerogatives seem to be limited to the right to confer with the prosecutor and notification of and attendance at all public court proceedings. The proposals in the 106th would have given victims the right "to be heard, if present, and to submit a written statement at all such proceedings to determine a conditional release from custody. . . ." and to consideration for their safety "in determination any conditional release from custody."

Plea Bargains

Negotiated guilty pleas account for over 90% of the criminal convictions obtained. For the victim, a plea bargain may come as an unpleasant surprise, one that may jeopardize the victim's prospects for restitution, one that may result in a sentence the victim finds insufficient, and/or one that changes the legal playing field so that the victim has become the principal target of prosecution. Some states' victims rights provisions are limited to notification of the court's acceptance of a plea bargain. More often, however, the states permit the victim to address the court prior to the acceptance of a negotiated guilty plea or to confer with the prosecutor concerning a plea bargain. S.J.Res.3 and H.J.Res. 64 would have required that victims be allowed to address the court before a plea bargain could be accepted in any state or federal criminal or juvenile proceeding.

Speedy Trial

The United States Constitution guarantees those accused of a federal crime a speedy trial; the due process clause of the Fourteenth Amendment makes the right binding upon the states, whose constitutions often have a companion provision. The constitutional right is reinforced by statute and rule in the form of speedy trial laws in both the state and federal realms. Until recently, victims had no comparable rights, although their advocates contended they had a very real interest in prompt disposition. Most of the states have enacted statutory or constitutional provisions establishing a victim's right to "prompt" or "timely" disposition of the case in one form or another. Many have also made efforts to minimize the adverse impact of the delays that do occur by either providing for employer intercession services and/or by prohibiting employers from penalizing victim/witnesses for

attending court proceedings. And most call for the prompt return of a victim's property, taken for evidentiary purposes, as soon as it is no longer needed.

S.J.Res. 3 and H.J.Res. 64 would have entitled victims to consideration of their interests "that any trial be free from unreasonable delay." Courts might well have used the same test for this standard that they have used when testing for unacceptable delay under the speedy trial and due process clauses: "length of delay, reasons for the delay, defendant's assertion of his right, and prejudice to the defendant."

Trial

The Sixth Amendment promises the accused a public trial by an impartial jury. It promises victims little. Their status is, at best, no better than that of any other member of the general public for Sixth Amendment purposes and, in fact, the Constitution screens the accused's right to an impartial jury trial from the over exuberance of members of the public. Moreover, victims who are also witnesses are even more likely to be barred from the courtroom during trial than members of the general public. About a third of the states now permit victims to attend all court proceedings regardless of whether the victim is scheduled to testify; another group allows witnesses who are victims to attend subject to a showing as to why they should be excluded; a few leave the matter in the discretion of the trial court; and some have maintained the traditional rule — witnesses are sequestered whether they are victims or not.

S.J.Res. 3 and H.Res. 64 would have invested victims with the right "to notice of, and not to be excluded from, all public proceedings relating to the crime," state and federal, juvenile and adult. They made no explicit provision for instances where the victim is also a witness. Nor did they indicate how unavoidable conflicts between the rights they conveyed and the constitutional rights of the accused (at least as they exist until ratification) were to be resolved.

Sentencing

The most prevalent of victims' rights among the states is the right to have victim impact information presented to sentencing authorities. There is, however, tremendous diversity of method among the states. Many call for inclusion in a presentencing report prepared for the court in one way or another, often supplemented by a right to make some form of subsequent presentation as federal law permits. Some are specific as to the information that may be included; some permit the victim to address the court directly; others do not.

S.J.Res. 3 and H.J.Res. 6 would have afforded victims the right "to be heard . . . and to submit a written statement at all such proceedings to determine . . . a sentence." They proposal did not address the question of whether relevancy, repetition, or any other limitation might have been imposed upon exercise of the right.

Enforcement

Experience among the states suggests that enforcement may be the stumbling block for any proposed amendment, since there seem to be few palatable alternatives. It is possible to draft the amendment to the United States Constitution so that victims' rights

enforcement is paramount. Legal proceedings conducted without honoring victims rights would be rendered null; sentencing hearings rescheduled and conducted anew; plea bargains rejected; trials begun again; unfaithful public servants exposed to civil and criminal liability; inattentive governmental entities made subject to claims and court orders. A few proponents suggest that enforcement should be limited to the equitable powers of the courts. This would appear to have been the intent with respect to S.J.Res. 3 and H.J.Res. 64 which would have denied victims a cause of action or grounds to interrupt a criminal trial and otherwise leaves crafting of enforcement mechanisms to Congress and the state legislatures.

Legislative Powers

S.J.Res. 3 and H.J.Res. 64 would have conferred legislative authority in two ways. First, they would have empowered Congress to define the class of victims entitled to claim rights under the amendment. Second, they would have vested Congress with the authority enforce their provisions “through legislation” but subject to the caveat that in doing so Congress craft exceptions to the rights created by the amendment “only when necessary to achieve a compelling interest.” Earlier proposals explicitly recognized a greater state legislative role.

Conflicts With Other Constitutional Provisions or With State Law

The question of the states’ legislative powers to implement the victims’ rights amendment suggests another question. How much, if any, of existing victims rights law would survive an amendment?

Under the present state of the law, statutory and state constitutional provisions are confined by the United States Constitution, U.S.Const. Art. VI, cl.2. When their advocates have said nothing in them imperils defendant’s rights under the United States Constitution, they are right; nothing could. But an amendment to the United States Constitution stands on different footing. It amends the Constitution. Its very purpose is to make constitutional that which would otherwise not have been constitutionally permissible. It may uniformly subordinate defendants’ rights to victims’ rights. It may require any conflicting law or constitution precipe, state or federal, to yield. Even in the absence of a conflict, it may preempt the field, sweeping away all laws, ordinances, precedents, and decisions — compatible and incompatible alike — on any matter touching upon the same subject. It may have none or some of these consequences depending upon its language and the intent behind its language.

Few advocates have explicitly called for a “king-of-the-hill” victims rights amendment, but the thought seems imbedded in the complaint that existing law lacks uniformity. How else can universal symmetry be accomplished but by implementation of a single standard that fills in where pre-existing law comes up short and shaves off where its generosity exceeds the standard? Proponents of S.J.Res. 3 and H.J.Res. 64 spoke of both the need to establish a minimum victims’ rights standard and the need for uniformity.

The principles of construction called into play in the case of a conflict between a victims' rights amendment and rights established elsewhere in the Constitution are similar those used to resolve federal-state conflicts.

Intent of the drafters is paramount. The courts will make every effort to reconcile apparent conflicts between constitutional provisions, but in the face of an unavoidable conflict between a right granted by an adopted victims rights amendment and some other portion of the Constitution, the most recently adopted provision will prevail.

The proposals in the 106th Congress were designed to eliminate the unfair treatment that results because the criminal justice "system . . . permits the defendant's constitutional rights always to trump the protections given to victims," yet to do so in a manner that would "not deny or infringe any constitutional right of any person accused or convicted of a crime." In instances of unavoidable conflict between victim and defendant rights, this seemed to mean the prosecution must yield. The text of the two hardly defeated this interpretation with the assurance that the "only the victim or the victim's lawful representative shall have standing to assert the rights" created by the amendment, since the rights of the accused come not from the victims' rights amendment but from the Sixth Amendment or some other source within the Constitution.