IMPLEMENTATION OF THE CRIME VICTIMS' RIGHTS PROVISIONS OF THE JUSTICE FOR ALL ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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CONTENTS

JUNE 21, 2006

OPENING STATEMENT

	Page
The Honorable Steve Chabot, a Representative in Congress from the State of Ohio, and Chairman, Subcommittee on the Constitution	1
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on the Constitution	3

WITNESSES

Ms. Debra Culberson, Victim, Blanchester, OH	
Oral Testimony	5
Prepared Statement	8
Ms. Mary Lou Leary, Executive Director, National Center for Victims of Crime	
Oral Testimony	10
Prepared Statement	12
Ms. Julie Goldscheid, Associate Professor, CUNY School of Law	
Oral Testimony	14
Prepared Statement	16
Margaret A. Garvin, Esq., Director of Programs, National Crime Victim Law Institute	
Oral Testimony	20
Prepared Statement	23

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Response from James H. Clinger, Acting Attorney General, to Post-Hearing Questions	45
Response from James C. Duff, Secretary, Judicial Conference of the United States, to written questions from Chairman Chabot	56
Written Statement of the Honorable Collene Thompson Campbell	63
Federal Sentencing Statement of the Honorable Collene Thompson Campbell to U.S. District Judge Cormac J. Carney during the James P. Lewis sentencing	64
United States of America v. United States District Court for the Central District of California, Petition for Writ of Mandamus to the United States District Court for the Central District of California	68

IMPLEMENTATION OF THE CRIME VICTIMS' RIGHTS PROVISIONS OF THE JUSTICE FOR ALL ACT

WEDNESDAY, JUNE 21, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:05 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order.

I would like to welcome everyone to this afternoon's hearing on the Subcommittee on the Constitution. This particular hearing is on the Implementation of the Crime Victims' Rights Provisions of the Justice for All Act.

The "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims Rights Act," which constitutes title I of the Justice for All Act, was the final product of years of effort on the part of a number of us here in the House to pass another measure of the Crime Victims' Rights Constitutional Amendment of which—I sponsored that particular constitutional amendment back in the 106th, 107th and 108th Congresses. When it became clear that passage of a constitutional amendment was not possible in 2004, we worked to create legislation that would protect crime victims' rights by statute in the law if we couldn't do it by constitutional amendment.

That legislation, the Crime Victims' Rights Act, was the first Federal law to truly provide crime victims with dignity and respect through an established and enforceable set of rights. Those rights include the right to be reasonably protected from the accused, the right to be notified of and not excluded from public proceedings involving their case, the right to be heard at release, plea and sentencing proceedings, the right to confer with a prosecutor, the right to full and timely restitution, the right to be free from unreasonable delays in proceedings, and the right to be treated with respect.

The law allows a victim, or the Government, after a Federal district court denies its request for appropriate relief, to apply for a writ of mandamus to a court of appeals to enforce these rights, ensuring that justice is reserved not only for the accused, but also to the thousands of persons whose lives have been impacted by crime, the crime victims and their families.

The Crime Victims' Rights Act is almost 2 years old now, and we're starting to see its impact in the Federal system. In January, the Ninth Circuit Court of Appeals ruled in *Kenna v. United States District Court for the Central District of California* that crime victims have an affirmative right to speak and not just submit written statements at the sentencing phase of a criminal case. This marked the first time that a circuit court of appeals had utilized the mandamus provisions of the act to compel a district court to recognize a victim's rights.

The Ninth Circuit also announced that having failed to take up and consider Mrs. Kenna's petition of mandamus within the mandated 72-hour time frame, it was instituting new procedures to ensure that future Crime Victims' Rights Act mandamus positions were handled in a timely manner.

Recently, the Justice Department promulgated rules pursuant to the act to help ensure that victims' rights are effectively addressed by Federal prosecutors. This includes the creation of an Office of Victims' Rights ombudsman to consider administrative complaints against the executive branch officials for failing to fully enforce the rights guaranteed by the Crime Victims' Rights Act.

In addition, the Office of Victims of Crime at the Department of Justice is preparing to award a grant of $2 million this year to the National Crime Victim Law Institute to provide direct legal representation on behalf of crime victims in the Federal system.

Perhaps most notably, the Department of Justice identified 90 percent more victims in criminal cases than it had in the year prior to the passage of the Crime Victims' Rights Act, and sent out more than 6 million notices of proceedings to victims in fiscal year 2005, more than twice what it had done in the year prior to the passage of the act.

However, the Crime Victims' Rights Act is just part of the story of how the criminal justice system affects crime victims. For example, I worked with Chairman Sensenbrenner and others to insert a provision in the Justice for All Act, section 308, that would provide funds to assist States and localities in testing the DNA of missing persons and unidentified human remains. We worked on this provision, and at the request of a woman who happens to be from our area, from the city of Cincinnati—Ms. Debra Culberson, who is with us today.

Ms. Culberson lost her daughter, Carrie, to a terrible murder. As Mrs. Culberson will testify, the perpetrator is behind bars, but they have not been able to locate or identify her daughter's remains because the murderer refuses to tell authorities where he hid her.

Because of this, Mrs. Culberson has been very diligent in pursuing a national DNA database to help identify missing loved ones and thereby provide at least some closure to these families. I thank and commend her for her work, and she will be testifying here shortly.

Thanks, in part, to her efforts, the National Institute of Justice has provided over $2 million for the DNA testing of unidentified remains, as well as additional funds for an inventory of all unidentified remains in the country. It has also provided funds for creating and distributing a uniform kit for collecting DNA samples from

family members, which will make identification of unidentified remains easier.

This hearing is the product of several months of work that many of us have worked on together and met with or talked to victims and representatives of crime victims in the community, the Department of Justice and the Federal court system to see how the Justice for All Act is being implemented. As a result, we decided to hold this hearing to discuss the act and to introduce legislation to help crime victims collect restitution.

Although the right to full and timely restitution was part of the Crime Victims' Rights Act, we learned that collection rates are very low, and we hope to increase collection efforts through a bill that will be drawn up this week.

The testimony of our witnesses today, as well as written statements that will be submitted by the Department of Justice and the Administrative Office of the U.S. Courts, will show that much progress has been made.

Despite these success stories, much remains to be done to ensure that crime victims' rights are preserved. For example, we'll be submitting for the record the statement of Ms. Colleen Campbell, who, thanks to the Victims' Rights Act, was able to speak at the sentencing last week of the man that defrauded her and her husband, as well as approximately 1,600 other persons, of almost $315 million. Her ability to speak at sentencing was perhaps made poignant by the fact that the Crime Victims' Rights Act was named in part for her son, Scott Campbell, who was murdered.

Unfortunately, the rights afforded to her by the Crime Victims' Rights Act are not afforded by all States, and therefore she was routinely excluded from the trial of her son, as she has been from numerous proceedings involving the killing of her brother and sister-in-law who were murdered in a separate incident.

It's because of policies like this that we ultimately hope to pass a Crime Victims' Rights Constitutional Amendment so that victims throughout the United States both at the State and Federal level can be treated with dignity, the dignity that they deserve.

In the meantime, we're encouraged that the benefits of the Crime Victims' Rights Act at the Federal level will promote efforts to see that these rules are applied in all cases, including those in State court. And we will continue to work with those in the crime victims community to ensure that crime victims are treated in the best manner possible by the criminal justice system.

And I apologize for going over a little bit longer than I normally do. I try to keep my 5 minutes to 5 minutes, but this is an issue that I care very much about, and I know everybody here does.

So I now will yield to the gentleman from New York, Mr. Nadler, the Ranking Member of this Committee, for the purpose of an opening statement.

Mr. NADLER. Thank you. As a Ranking Member, I demand equal time, but I won't take it.

Thank you, Mr. Chairman. I want to join you in welcoming our witnesses here today.

As the Ninth Circuit recently observed, there was a time when victims of crime were expected to behave like good Victorian chil-

dren, seen but not heard. Those days, I think we all agree, are justifiably and, thankfully, over.

Victims of crime are now able to be heard in court, and their voices are heard in the halls of Congress and in our State legislatures, demanding better services to help them deal with the devastating impacts of crime. Whether it is financial loss, physical injury or psychological harm, our criminal justice and social service agencies must continue to become more responsive to the needs of crime victims.

What happens in the court room is important. Punishing wrongdoers and ensuring that they cannot harm others is a key role of the justice system, but victims' needs extend far beyond the walls of our courtrooms and our prisons.

I look forward to a careful examination of the assistance we provide the crime victims, of which the Justice for All Act is only one part. Providing adequate funding for the services we have promised and expanding that assistance where necessary is of paramount importance. I hope we will continue this inquiry to the broader range of victims' issues and services.

We have made much progress, unquestionably, I think it is incumbent on us to do much more.

I again want to join you in welcoming our witnesses. I know that the shifting congressional calendar has proved somewhat frustrating for our witnesses, and I greatly appreciate your—now speaking to the witnesses—flexibility and willingness to be here, when we finally can do it, to assist us in our work.

I thank you, and I thank the Chairman.

Mr. CHABOT. I thank the gentleman for his statement.

Do any other Members wish to make a statement? If not, we'll go ahead and introduce the witness panel. And we have a very excellent panel here this afternoon. We appreciate you all coming.

Our first witness will be Mrs. Debbie Culberson, who is from Blanchester, Ohio. Ms. Culberson is here as an advocate for her daughter, Carrie Culberson, who was murdered by an ex-boyfriend in 1996. Although her daughter's killer has been convicted and remains in jail, he has refused to tell authorities where he put Carrie's body.

Because of Mrs. Culberson's tireless advocacy, we inserted section 308 into the Justice for All Act which provides funds for States and localities to do DNA testing on unidentified human remains.

And we again thank you very much, Ms. Culberson, for being here. And I want to again extend our sincerest sympathies for the loss, and for all the members of the panel that have had tragedies occur in their families.

It's been an honor to get to know Mrs. Culberson over the years and to be able to try to help out in some small way, and we're going to continue to try to do that.

Our second witness is Mrs. Mary Lou Leary, Executive Director of the National Center for Victims of Crime. Prior to serving in this capacity, Mrs. Leary was Senior Counsel to the U.S. Attorney in the United States Attorney's Office for the District of Columbia. She has held numerous positions at the U.S. Department of Justice, including acting as Assistant Attorney General for the Office of Justice Programs and Deputy Associate Attorney General.

Ms. Leary has a B.A. Degree from Syracuse University and an M.A. From Ohio State University and a J.D. From Northeastern University School of Law.

I would also like to add that Ms. Leary's staff at the NCVC were very helpful in providing assistance to this Committee when it was working on the Justice for All Act in the 108th Congress, and we thank you very much for that cooperation.

Our third witness is Professor Julie Goldscheid, Associate Professor at City University of New York Law School. Professor Goldscheid holds a B.S. From Cornell and an M.S.W. from Hunter College School of Social Work and a J.D. from New York University School of Law. She has written widely about violence against women and is active in a number of organizations, including serving as General Counsel of Safe Horizon, an organization committed to victim assistance, advocacy and violence prevention.

And we welcome you here this afternoon, Professor.

Our fourth and final witness is Ms. Meg Garvin, the Director of Programs for the National Crime Victim Law Institute. In that capacity, Ms. Garvin wrote an amicus brief in the *Kenna* case, the first case in which a circuit court of appeals utilized the mandamus provision of the Crime Victims' Rights Act.

And we welcome you this afternoon, Ms. Garvin.

Again, we thank all of our witnesses and look forward to hearing your testimony here this afternoon. And before we start, I would like to bring to your attention the lighting system that we have here. We basically have what is called the 5-minute rule. The green light will remain on for 4 minutes, the yellow light will come on and you have 1 minute to wrap up.

When the red light comes on, we would like you to stop. I won't gavel you down immediately, but we'd like you to try to wrap up as close to that, if at all possible. We hold ourselves to the same 5-minute rule here as well.

And it's the practice of the Committee to swear in all witnesses appearing before it, so if you would all please stand and raise your right hand.

[Witnesses sworn.]

Mr. CHABOT. All witnesses have indicated in the affirmative. And we'll now begin with our first witness.

So, Ms. Culberson, you're recognized for 5 minutes. Now you will need to pull the mike to you, and there's a little button on there to turn it on; we won't start the time until you've actually begun.

You might want to pull the whole box a little closer to you there.

TESTIMONY OF DEBRA CULBERSON, VICTIM, BLANCHESTER, OH

Ms. CULBERSON. Thank you for allowing me to be here before you today, Congressman Chabot, Ranking Member Nadler and Committee Members. I'm asking for your help in getting information out to all who could be affected by this issue.

My daughter, Carrie, was kidnapped and murdered by her ex-boyfriend, Vincent Doan, in August 1996. He was convicted of her murder in '97, even though we have not yet found her remains. His brother, Tracy Baker, was indicted on two charges of obstruction of justice, two charges of tampering with evidence, for which he

was found guilty. He was also charged with gross abuse of a corpse and found not guilty because there was no body. He was sentenced to 8 years in prison and was just recently released.

His father, Lawrence Baker, was indicted on the same charges and was found not guilty. Also indicted on three felony counts was the former Blanchester Chief of Police, Richard Payton. These charges were pled down to misdemeanor charges, and he was found guilty of two charges of dereliction of duty. He was then given a year's back pay, 960 sick hours, which took him up to full retirement with full benefits, which amounted to $86,000, for his role in my daughter's disappearance.

Eight years later, on April 30 of 2004 at 2 p.m., my daughter Christina and I were preparing for a memorial dedication, which was the non-economic term that was to be met for the lawsuit against the Village of Blanchester. This dedication for Carrie was scheduled at 4 p.m. I received a call from a reporter that law enforcement was a mile away from my home digging up a concrete floor searching for my daughter, Carrie.

The dedication was cancelled, and we spent the next 13 days out on the road, including Mother's Day, as they continued their search for Carrie. There were three county sheriff's offices involved, two county prosecutors, the State patrol, FBI, the coroner, a forensic anthropologist, seven different cadaver dogs, and they all worked diligently to find Carrie. Tips claimed that Carrie was dismembered and put into a wood-chipper, and that concrete was poured over her. This is what led the authorities to the barn.

Our search for Carrie continues. Over the last 9½ years, we continue to get leads, most of which are rumors, on the whereabouts of Carrie. Various rumors circulated that she was dismembered and pieces were scattered in the Ohio River, along miles of the interstate; and also that she was—a chain saw was used to cut her up, and she was fed to the family bear; and then this bear was ground up and she was—they ate the hamburgers and called them Carrie burgers.

So, as I said, I've had attorneys who would call me and say that their clients would give us information if I would—if we could help them get out of trouble.

I've talked to law enforcement. I asked them, what do you do when you find human remains? And to my complete shock, I have been told that we don't know what to do with them, so they're put in a box and put on a shelf. And this is the result of having no nationwide protocol for dealing with unidentified human remains.

There is currently no mandate for law enforcement, coroners, medical examiners to test these remains. This leads to my concern. In March of '97 we had a major flood on the Ohio River. If, as we have been led to believe, Carrie's remains were thrown into the Ohio River, piece by piece, her remains could have washed ashore anywhere from Cincinnati to the Gulf of Mexico. And I visualize my daughter's remains in one of those dusty boxes marked unknown simply because there is no protocol.

If you get on the Web site for the National Center for Missing and Exploited Children, you will see pages of unidentified remains. Moneys are being spent on the Innocent Project, which will collect DNA from all convicted felons. It could help solve crimes and prove

innocence or guilt. This is great, but because the dead don't vote or pay taxes, there is no priority in identifying these remains.

The unidentified dead have remained unidentified for a number of reasons; mainly it is the result of low priorities, lack of education and development of protocols used in the discovery of human remains, and, as everywhere, funding. Investigations would probably determine that most of these remains are victims of homicide. Experts estimate that between 40 and 50,000 unidentified human remains are in our country. Given today's technology, this is totally unacceptable for a civilized nation to not have a protocol and treat the remains of its citizens in a more appropriate way.

NCIC Unidentified Persons Database has been in existence since the mid '80's. It has a total of 5,783 entries as of April of 2005, this is just over 10 percent of the estimated 40 to 50,000 unidentified dead that has been reported nationally. Since April of 2005, nearly 98,000 entries are in the database, of which more than 25 percent are considered missing, abductions or homicides.

Currently, there are only six States that mandate testing; those States are California, Florida, New York, Ohio, Pennsylvania and Texas. These States account for most of those entries.

I, along with so many others, have not been able to go through the natural grieving process after the loss of a loved one. This is essential to the healing process that would normally follow. Not knowing what happened or where our loved ones are, we are left to mourn and wonder for the rest of our lives.

I went to the Justice Department 3 years ago to ask for help in the efforts to require mandatory testing, and the creation of a national repository for the missing and unidentified dead. I was told that there was nothing they could do for me at this time because they were going to send out a questionnaire to the coroners and medical examiners, and this was to take about 18 months. But as a result of that meeting, I was asked to attend meetings for the National Missing Persons Task Force sponsored by NIJ.

I have met many experts or stakeholders who are passionate about this, as I am, but have also found out that there are duplicate grants given to study the same issue. Many of these same experts serve on the National Center for Forensic Science, which is a registry for missing persons and unidentified dead; the National Institute of Justice, which put together model legislation—or was put together—missing persons and unidentified dead; and the International Homicide Investigation Association, and their group's recommendations for identifying unidentified persons.

So the same information is being disseminated to these same groups by the same people. Essentially, to me, this is a duplication of services and money.

I've been working with Congressman Chabot for the past 2½ years. He assured me that he would do what he could. He has kept in constant contact with me and continues to help move forward. We have made some progress, but the Nation needs to know that this is a national problem.

The unidentified dead didn't receive any consideration until the need to identify the remains of those who lost their lives, such as in the attack of David Koresh's Branch Davidians in Waco, Texas. David Koresh was identified by DNA.

Then, in the attacks of the Murrah Federal Building in Oklahoma City, and the Twin Towers in New York on September 11th, and most recently, Hurricane Katrina, DNA was used to identify most of those remains. DNA was used to identify the 90-year-old remains of an unknown child who died in the sinking of the Titanic.

The mother of a soldier received information that it could possibly be her son in the Tomb of the Unknown Soldier. And we all know how sacred this gravesite has become, because we have all watched our Presidents lay a wreath there for many years. But the mother needed to know if it was her son. Through DNA testing, it was determined that it was, indeed, her son,

Mr. CHABOT. Ms. Culberson, it won't get much redder.

Do you have—could you wrap it up maybe; and I can get into it with questions maybe to——

Ms. CULBERSON. Sure. Well, essentially what I'm asking for is to mandate the testing of human remains in order to keep the coroners and medical examiners from destroying these remains; and also, to have the testing entered into a national database, and then have the family reference samples in order to match with these remains.

So it just—that's basically why I'm here today.

Mr. CHABOT. Thank you very much. And I apologize for cutting you off.

The bells that went off, we know we have some votes coming up, and we're going to try to get as much in as we can before the votes. And if we can get into—if there were some things you didn't get into, I can get to them in the questions.

Ms. CULBERSON. Surely. I apologize.

[The prepared statement of Ms. Culberson follows:]

PREPARED STATEMENT OF DEBRA CULBERSON

Congressman Chabot, Ranking Member Nadler, and Committee Members,

I am asking for your help in getting information out to all who could be affected by a problem I have encountered.

My daughter, Carrie Culberson, was kidnapped and murdered by her ex-boyfriend, Vincent Doan, in August of 1996. He was convicted of her murder in July of 1997, even though we have not found her remains. His brother, Tracey Baker, was indicted on two charges of obstruction of justice and two charges of tampering with evidence, for which he was found guilty. He was also charged with gross abuse of a corpse and found not guilty because there was no body. He was sentenced to eight years in prison and was just recently released. His father, Lawrence Baker was indicted on the same charges but was found not guilty. Also indicted on three felony counts was the former Blanchester Chief of Police, Richard Payton. These charges were pled down to misdemeanor charges and he was found guilty on two charges of dereliction of duty. He was then given a year of back pay and 960 hours of sick pay which took him up to full retirement with full benefits which amounted to $86,000 for his roll in the disappearance of my daughter.

Eight years later, on April 30, 2004, at 2:00 pm my other daughter Christina and I were preparing for a memorial dedication (one of the non economic terms of a law suit against the Village of Blanchester) for Carrie scheduled at 4:00pm. I received a call from a reporter that law enforcement was a mile away from my home digging up the concrete floor of a barn searching for Carrie. The dedication was cancelled and we spent the next thirteen days (including Mother's Day) on the road watching as three county sheriff's depts., two county prosecutors, State Patrol, FBI, the coroner, a forensic anthropologist and seven different cadaver dogs worked diligently to locate the remains of Carrie. Tips claiming Carrie was dismembered, put into a wood chipper and concrete poured over her is what led authorities to this barn. Our search for Carrie's remains continues.

Over the past nine and half years we have continued to get leads (most of which are rumors) on the whereabouts of Carrie remains. Various rumors circulated that she was dismembered and the pieces scattered in the Ohio River or along miles of the interstate. Others reported that a chain saw was used to dismember the body and the remains fed to the family BEAR kept at the junkyard. The bear was then killed, ground up and made into "Carrie burgers". I have had attorneys call me and say that their client could give information of Carrie's whereabouts if we would make a deal with them.

I have talked to law enforcement and asked, "What do you do when you find human remains?" To my utter shock and disbelief the answer has been, "We don't know what to do with them, so they are put in a box and put on a shelf". This is the result of having no nation-wide protocol for dealing with unidentified human remains. There is currently no mandate for law enforcement, coroners and medical examiners to test these remains. This leads to my concern. In March of 1997, we had a major flood on the Ohio River. If, as we have been led to believe, Carrie's remains were thrown into the Ohio River piece by piece, in August of 1996, her remains could have washed on shore anywhere from Cincinnati to the Gulf of Mexico. I visualize my daughter's remains in one of those dusty boxes marked "unknown" simply because there is no protocol.

If you get on the website of National Center for Missing and Exploited Children, you will see pages of unidentified remains. Monies are being spent on the "Innocent Project" which will collect DNA from all convicted felons. It could help solve crimes and prove innocence or guilt. This is great, but, because the dead don't vote or pay taxes, there is no priority in identifying these remains. The unidentified dead have remained unidentified for a number of reasons, mainly it is the result of low priorities, lack of education in development of protocols used in the discovery of human remains and as every where funding. Investigation would probably determine that most of these remains are the victims of homicide. Experts estimate there are between 40,000 and 50,000 unidentified human remains in our country. Given today's technology it is totally unacceptable for a civilized nation not to have a protocol and treat the remains of its citizens in a more appropriate way.

NCIC Unidentified Persons Database has been in existence since the mid-eighties. It had a total of 5,783 entries as of April 2005 This is just over 10 % of the estimated 40 to 50 thousand unidentified dead that has been reported nationally. Since April of 2005 nearly 98,000 entries are in the database, of which more than 25% are considered missing, abductions, or homicides. There currently there only six states that mandate testing of remains. Those states are California, Florida, New York, Ohio, Pennsylvania and Texas. These states account for most of the entries.

I, along with so many others, have not been able to go through the natural grieving process after the loss of a loved one. This is essential to the healing process that would normally follow. Not knowing what happened to, or where our loved ones are, we are left to mourn and wonder for the rest of our lives.

I went to the Justice Department three years ago to ask for help in the efforts to require mandatory testing and the creation of a national repository for the missing and unidentified dead. I was told there was nothing they could do to help at that time because they were going to send out a questionnaire to the coroners and medical examiners. This was to take about eighteen months. But, as a result of that meeting, I was asked to attend meetings for the National Missing Persons Task Force sponsored by NIJ. I have met many experts (stakeholders) who are as passionate about this as I am. But, I have also found out that there are duplicate grants given to study the same issue. Many of the same experts serve on The National Center for Forensic Sciences-National registry for Missing Persons and Unidentified Dead, National Institute of Justice-Model legislation for Missing Persons and Unidentified Dead, and the International Homicide Investigator Association-Recommendations for Identifying Unidentified Persons. So, the same information is being disseminated to and by these groups. Essentially, this is duplication of services and monies spent.

I have been working with U.S. Congressman Steve Chabot for the last two and a half years. He has assured me that he would do what he could. He has kept in constant contact with me and continues to help move forward. We have made some progress but, the nation needs to know that this is a national problem. The unidentified dead didn't receive any consideration until the need to identify the remains of those who lost their lives in the attack on David Koresh's Branch Davidian Complex in Waco, Texas. David Koresh was identified through DNA. Then, in the attacks on the Murrah Federal Bldg. in Oklahoma City, Oklahoma and the Twin Towers in New York on September 11th, and most recently Hurrican Katrina. DNA was used to identify many of those remains. DNA was used to identify the 90 year old remains of an unknown male child who died in the sinking of the Titanic. The moth-

er of a soldier received information that it could possibly b her son's remains in the "Tomb of the Unknown Soldier". We all know how sacred this gravesite has become because we have watched our Presidents lay a wreath there for many years, but the mother needed to know if it was her son. Through DNA testing it was determined that it was indeed her son.

DNA may be the only way that I will be able to find my daughter. But unless there is mandatory testing of the unidentified dead on a national level and a national repository for those test results that is accessible to every state and all stakeholders, the unidentified dead will remain unidentified. The stakeholders include coroners, medical examiners, forensic pathologists, forensic anthropologists, forensic odontologists and law enforcement. We also need to educate the families of missing persons that they can go to a local FBI office or their law enforment agency to have a DNA mouth swab taken and the results entered into this national database as a family reference sample. Most of those who have missing loved ones don't know what they can do or where to go for assistance.

DNA may not be the only answer, but once there are no physical descriptors such as eye color, hair color, tattoos, etc. remaining to identify the dead, DNA is the last resort.

We need to have mandated testing of any unidentified dead, a national repository for these test results for all states to be able to access. And we need to educate the law enforcement, all stakeholders and the public. We need to make the public aware of this national problem.

This is why I am asking for your help. I can put you in touch with people who can speak to you on a professional level. I am just a mother with only a high school education and know little about the politics but I have learned a lot in the last nine and a half years only because of the tragic death of my daughter. I have gone through five trials and have learned more about the judicial system than I ever wanted to know.

So, now I am learning the politics of what needs to be done and how to get it done. And you can't get it done without the help of others. A phrase I like and try to live by is "None of us is as good as all of us." by Ray A. Kroc.

Thank you.

Mr. CHABOT. Ms. Leary, you're recognized for 5 minutes.

TESTIMONY OF MARY LOU LEARY, EXECUTIVE DIRECTOR, NATIONAL CENTER FOR VICTIMS OF CRIME

Ms. LEARY. Good afternoon, Chairman Chabot, Ranking Member Nadler and Members of the Subcommittee. I'm Executive Director of the National Center for Victims of Crime; we're a private nonprofit here in D.C. We work nationwide, and have been working for 20 years now to advance the rights and the interests of crime victims.

Among our members are victim—witness assistance unit personnel in U.S. attorneys' offices across the country, and the victim specialists at the FBI offices across the country as well.

I appreciate the opportunity to testify before you today on the Justice for All Act. As you know—and thank you for your compliment—we did support this act initially; and we have monitored its implementation, although it's kind of in its early stages.

The act provided clear and—most importantly, I think—enforceable rights to all direct victims of crime at the Federal level. And even though many of these rights existed previously, they were under title 42 of the Federal Code, the Public Health and Welfare Title. So judges and prosecutors were basically clueless about the existence of these rights in the Federal Code. At the same time, the act strengthened many of those rights, and I think that was very important.

The act addressed enforcement of Federal victims' rights in some significant ways. Attorneys, prosecutors, and victims were given legal standing; it provided procedures for seeking a writ of man-

damus to enforce the rights. There is nothing that will get—as a former Federal prosecutor, I can tell you there is nothing that would get my attention faster than thinking a writ of mandamus may be filed in a case where I didn't honor victims' rights. And the act also required the Attorney General to develop training, guidelines, disciplinary procedures and so on.

In my view and the view of the National Center, moving the rights of crime victims to the Criminal Code and adding remedies for the violation has had a really significant impact on the Federal criminal justice system. Really, before this act, all too often the crime victims' rights were viewed as ancillary to the prosecutorial efforts; but we have been told by our members at the National Center that the effect of this act really has been, and they said, quote, "It's ended some of the hesitancy about victims' rights that attorneys may have had in the past," and that attorneys are asking more questions of the victim/witness staff and, most importantly, really making serious efforts to ensure that crime victims are provided their rights.

One of our members, who is a victim advocate, reported that implementation has resulted in management in Federal prosecutors' offices placing a lot more emphasis on the victims' rights both in training meetings and in in-house memos, and that attorneys are actually taking a more proactive approach to the issue rather than waiting for the victim advocate to come by and knock on the door and say, listen, you need to take care of these victims.

Most importantly, the act also provided the funding that Congress recognized would be crucial if you're going to effectively implement the act. It authorized additional moneys. And when I say "additional," I mean in addition to funding already provided through the VOCA Act. That money was to augment victim/witness programs and to enhance the Federal victim notification system.

We've heard from many of our members that the Justice for All Act has made a big difference in proceedings and in the lives of particular victims. I'll give you a couple of examples that our members provided to us.

In one case, a court failed to provide notice of a sentencing date to the attorney and to the victim advocate in time for them to notify the victim, and they were able to get that sentencing continued to allow the victim to be notified and attend. And in another, the victim drove literally hundreds of miles to attend a sentencing, only to be told he couldn't address the court. But when the prosecutor stood up and talked about the Justice for All Act, the judge then allowed the victim to be heard.

Those are just a couple of examples. One advocate said this law was much needed and very late.

But I want to address three issues that I think I would ask this body to take note of if the act is really to fulfill its promise of justice. First, demands on the victim/witness staff and prosecutors' offices throughout the country have significantly increased, as was anticipated. Actually, the number of identified victims and resulting notification has doubled since implementation of the act.

Unfortunately, it appears that the additional funding that was authorized to meet this increased demand has not been provided. Now we end up with a talented, dedicated victim/witness staff

being turned into data entry clerks because of the notification obligations.

That money needs to get out there so that they can hire in Federal prosecutors' offices other low-level staff who can do the data entry, meet that obligation of notification; and let victims of Federal crimes be served by victim advocates the way they should be.

Secondly, we need to see the money that was authorized for the victim notification system go out there in order to ensure that that system operates efficiently. And that will also take pressure off the victim advocates.

I would also point out that the Justice for All Act did not include victims' rights at the investigatory stage in its language; and it's our understanding that the Department of Justice's interpretation is that these rights do not apply at the investigatory stage. I would not want to be the one to tell a victim, you're not really a victim until the prosecutor decides that an indictment is going to be filed in this case.

The language in title 42, section 10607, is mandatory language, and it says that a victim shall be notified as soon as is practicable after the victim is identified. Surely a victim deserves at least to be notified that an investigation is ongoing, or that we have determined that we are not going to file charges in this particular case.

I don't understand, and I would ask this body to look into, how you square title 42 with a position that the rights do not apply at the investigatory stage.

And finally, there is an issue that needs to be clarified in the statute with respect to the False Claims Act, and that is that it seems that the funding through the false—funding for services that are needed under the Justice for All Act in order to fulfill its promise are not authorized under the False Claims Act; and I would urge Congress to address that.

The last issue is the jurisdiction. Where should you take a mandamus action out of the D.C. Superior Court? Those cases are prosecuted by Federal prosecutors, and there's a question—and it is ambiguous in the language of the statute—whether the mandamus action should go to the D.C. Circuit, the Federal Court of Appeals, or the DCCA, D.C. Court of Appeals, which has jurisdiction over all other criminal appeals in the District of Columbia, which seems like a logical place.

But in any event, it needs to be clarified.

Mr. CHABOT. Thank you very much.

[The prepared statement of Ms. Leary follows:]

PREPARED STATEMENT OF MARY LOU LEARY

Good afternoon, Chairman Chabot, ranking member Nadler, and members of the Subcommittee. My name is Mary Lou Leary, and I am the executive director of the National Center for Victims of Crime. The National Center is a nonprofit resource and advocacy organization that recently celebrated our 20th year of championing the rights and interests of victims of crime. Our members include victim service providers and allied professionals who assist crime victims at the federal, state, and local levels. I appreciate the opportunity to appear before you this afternoon to address the implementation of some historic victims' rights legislation, the Justice for All Act of 2004. We supported this Act initially and have monitored its implementation.

VICTIMS' RIGHTS PROVISIONS

The *Justice for All Act* provided clear and enforceable legal rights to all direct victims of crime at the federal level. While many of these rights existed previously, they were codified primarily in Title 42 of the Federal Code: the Public Health and Welfare title. As a consequence, judges and many others in the criminal justice system remained unaware of their existence. The *Justice for All Act* moved the list of crime victims' rights to Title 18, the Federal Criminal Code.

At the same time, it strengthened many of those rights. For example, under the Act, the rights "to be notified" of court proceedings and the release of the offender became the right "to reasonable, accurate, and timely notice" of such events. The right to restitution became the right to "full and timely restitution." The right to be heard, previously limited to certain victims at certain proceedings, was expanded to "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."

This Act also addressed enforcement of federal victims' rights. Crime victims, their attorneys, and prosecutors were given legal standing to assert victims' rights, and procedures were set out for seeking a writ of mandamus to enforce those rights. The act also required the Attorney General to develop regulations to promote victims' rights through training, disciplinary sanctions for violations of rights, and the designation of an office to receive and investigate crime victim complaints.

Moving the rights of crime victims to the U.S. Criminal Code and adding remedies for their violation has had a significant impact on the federal criminal justice system. Prior to the passage of the Act, victims' rights were viewed as ancillary by many federal prosecutors and administrators. One of our members told us the *Justice for All Act* has "ended some of the hesitancy [about victims' rights] that attorneys may have had in the past," that attorneys were asking more questions of the victim/witness staff and ensuring that crime victims were provided their rights.

Another National Center member who is a victim advocate reported that following implementation of the Act, "[m]anagement has . . . placed more emphasis on victims' rights at in-house meetings and in memos" and that "[a]ttorneys seem to be taking a much more proactive approach to the issue rather than waiting for me to come by and say something to them."

A third person said the *Justice for All Act* "has provided many opportunities to discuss the rights of victims in our office, and I embrace each of those opportunities."

Importantly, the Act also provided the funding that Congress recognized would be crucial to the effective implementation of the victims' rights provision. It authorized an additional $2 million the first year and $5 million each of the following four years to augment victim/witness programs in U.S. Attorneys' offices, and it authorized identical amounts to enhance the federal Victim Notification System. Congress specifically authorized this funding **in addition to** funding already provided through the Victims of Crime Act Fund.

We have heard of several specific cases where the *Justice for All Act* made a difference to a specific victim. In one case, where a court failed to provide notice of the sentencing date to the attorney and advocate in time for them to notify the victim, sentencing was continued to allow the victim to be notified and attend. In another, a victim had driven hundreds of miles to attend a sentencing, only to be told that he could not address the court. In that case, the prosecutor reminded the judge of the crime victims' rights act, and the victim was then given an opportunity to be heard.

We have heard of courts factoring in the victim's right to a speedy disposition of the case in setting a trial date; of prosecutors asserting the victim's right to be heard at a detention hearing in which the judge was likely to release the defendant; and of greater efforts to identify victims and their losses earlier in the case.

One member told us that in her more than 30 years of experience in law enforcement and victim services, "the *Justice for All Act* is . . . the best piece of legislation to help crime victims." Another told us "this law was much needed and very late."

CURRENT ISSUES:

While the *Justice for All Act* has truly benefited victims of federal crime, there are three issues that demand Congress' attention for the Act to fulfill its promise.

First, the demands on victim/witness staff and the federal victim notification system have significantly increased, as was anticipated. The Department of Justice estimates that in the year following passage of the Act, the number of identified victims and resulting notifications has doubled.

Unfortunately, it appears that the additional funding authorized to meet this increased demand was never provided. From around the country, our office has heard

of victim assistants who are simply overwhelmed by the notification requirements, particularly with regard to entering information into the notification system. While the burden on offices increased exponentially, the staffing has not increased.

The implications go beyond an unhappy workforce. Such conditions also mean that victim/witness staff struggling to keep up with data entry responsibilities have less time to provide other crucial victim services, such as accompanying victims to court, conducting safety planning, helping victims with their impact statements, and working with victims seeking restitution to detail their losses. Talented and dedicated victim assistance staff have essentially become data entry clerks, depriving victims of much-needed service.

The solution is clear: Congress must appropriate the money authorized in the *Justice for All Act* for victim/witness staff. This money could support additional clerical staff to ease the data entry burden on victim/witness coordinators and allow them to better meet their other responsibilities to victims.

On a similar front, Congress should provide the additional funding authorized for the Victim Notification System (VNS) to ensure that it operates efficiently, is user-friendly, and can receive information such as revised court dates directly from the federal court computer system.

I do note that, unlike the new grant programs contained within the *Justice for All Act,* the increases in authorization for the victim assistance programs and VNS were not explicitly supportable by moneys collected under the False Claims Act. This Committee may want to amend the statute to clarify that False Claims Act funding is also available to support these two items.

Secondly, the *Justice for All Act* did not include victims' rights at the investigatory stage. However, these rights were established and remain codified under Title 42, Section 10607 of the U.S. Code. That section provides that "[a]t the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation, a responsible official *shall*" identify each victim and provide certain rights and services, including notice of the status of the investigation, the arrest of the accused, the filing of charges, and the release of an offender. Victims' rights must certainly be understood to include notifying a crime victim who has reported an offense of a decision not to file charges in a case.

Because the listing of rights moved to the criminal code does not include these rights at the investigatory stage, they have received uneven attention and have often been neglected in the federal criminal justice system. The National Center strongly urges Congress to clarify that crime victims have the right to be informed of the status of an investigation, the arrest of the accused, and the filing or decision not to file charges. A commitment to victims' rights prior to the filing of charges will also require an authorization of funding to support the collection of crime victim information at this earlier stage in the criminal justice process.

A third issue we've identified regarding implementation of the *Justice for All Act* relates to crime victims in the District of Columbia. The Act states that it applies to victims "directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." Thus, it logically applies to Superior Court cases in the District that are handled by the U.S. Attorney. However, the law is not explicit, nor is it explicit where a victim in such as case would seek a writ of mandamus if his or her rights were denied in the lower court: the D.C. Court of Appeals, the typical appellate court for Superior Court cases, or the U.S. Court of Appeals for the District of Columbia. This matter should be clarified to provide that such a writ would be sought in the D.C. Court of Appeals, which, under D.C. law, D.C. Code § 11–721, has jurisdiction over other appeals of Superior Court rulings in criminal matters brought by the United States.

In summary, the *Justice for All Act* significantly advanced the rights of crime victims at the federal level. However, the Act will not achieve the full measure of justice it promised for victims until Congress provides the funding required for implementation and reaffirms our national commitment to crime victims starting at the investigatory stage.

The National Center stands ready to assist you as you work toward ensuring that justice truly is for "all." Thank you for your attention, and I welcome any questions you may have.

Mr. CHABOT. Professor Goldscheid, you're recognized for 5 minutes.

TESTIMONY OF JULIE GOLDSCHEID, ASSOCIATE PROFESSOR, CUNY SCHOOL OF LAW

Ms. GOLDSCHEID. Thank you.

Good afternoon, Chairman Chabot, Ranking Member Nadler, and other Members of the Subcommittee. Thank you for the opportunity to testify here today.

For over 25 years, I have advocated on behalf of crime victims both in and out of the judicial system. My work has focused on a group of particularly vulnerable crime victims, victims of domestic and sexual violence. From that experience, I commend efforts to enhance victims' rights and to support the services and assistance they need to recover from the crime.

The 2004 Crime Victims' Rights Act helps ensure victims appropriate protection, notice and participation in Federal criminal proceedings. However, the act does not address the greatest needs of the vast majority of victims of crime, the needs for services such as compensation, counseling, shelter and assistance in the wide range of legal issues that they may confront, which bring victims to civil as well as criminal proceedings. And the act also doesn't address enforcement of existing laws and full appropriation of already-authorized expenditures.

As this Subcommittee considers how effectively crime victims' rights are being addressed, it should consider the full range of victims' needs. I will highlight three concerns for the law's implementation, and I direct you to my written testimony for more detail.

First, some of the provisions of the Crime Victims' Rights Act fall short of meeting victims' needs, particularly for those victims with fewer financial resources. For example, the act authorizes victims' participation in criminal proceedings, but it does not make any provision to ensure that victims will be granted time off from work without adverse consequences in order to be able to appear. Absent assurances that victims can attend criminal proceedings without putting their jobs or their incomes on the line, the right guaranteed in the 2004 act may not prove useful to many victims.

Second, all authorizations that fund programs for crime victims must be fully appropriated. As you've already heard, the victim notification system improvements that were authorized by the Crime Victims' Rights Act must be fully funded in order to allow victim/witness coordinators to do their jobs and assist victims. And in order to ensure that by enforcing the rights created by this new law, the crime victim compensation and assistance programs that are now funded through VOCA are not shortchanged. It would be ironic, and certainly ill advised, if funding limitations led resources to be taken away from one crime victims' program to fund another.

Similarly, crime victims are at risk of losing critical services and protections if the 2005 VAWA reauthorization provisions are not fully appropriated.

President Bush's proposed fiscal year 2007 budget does not include any funding for these important programs that Congress has authorized. These include direct services for victims of sexual assault, programs for young victims of violence, and services for children exposed to violence.

The proposed budget fails to fund and underfunds other important programs, such as judicial training, and critical legal services that I alluded to before, such as for representation in orders of protection in custody cases, in immigration proceedings, in U-visa and T-visa proceedings. And the funding for much of that type of rep-

resentation is included in the 2005 VAWA reauthorization, and it should be fully appropriated in order to fully meet crime victims' needs.

In addition, the VOCA fund, which, as you know, is comprised of defendants' fines and fees from Federal prosecution, is used to support critical victim assistance and compensation programs nationwide.

As you know, since 2000 Congress has limited how much of the fund can be distributed to the States in a given year in order to ensure that there is a balance left in the fund for years when there are fewer collections. Last year, the President unsuccessfully recommended depleting that reserve and using the money for other budgetary items. As I said, he was not successful, but he has made the same proposal this year. These moneys should be left in the VOCA fund to be used for the crime victim assistance and compensation programs for which they were intended.

Finally, many victims, particularly victims of domestic violence, affirmatively do not want to participate in criminal proceedings; instead, they want help to be able to live safely and economically, independently from their abuser. Many interventions other than those in the 2004 Crime Victims' Rights Act are critical to these crime victims' ability to meet these goals. These include the legal assistance I referred to, shelter programs, support services, ensuring that the social services programs have adequate language proficiency, and other programs, as I said before, many of which are included in the 2005 VAWA reauthorization, but which await appropriation.

Overall, support for this wide range of programs is essential to any comprehensive and effective approach to crime victims' needs. Congress should ensure full funding and vigorous enforcement of all programs within its jurisdiction that provide crime victims compensation, services and assistance.

Thank you.

Mr. CHABOT. Thank you, Professor.

[The prepared statement of Ms. Goldscheid follows:]

PREPARED STATEMENT OF JULIE GOLDSCHEID

Good afternoon, Mr. Chairman, Ranking Member Nadler, and other members of the Committee. Thank you for providing me the opportunity to testify today. My name is Julie Goldscheid. I am an Associate Professor at CUNY Law School, the only public law school in New York City and one of the most diverse law schools in the country. CUNY Law School was founded in 1985 with the mission of training public interest lawyers, and graduates twice as many public interest lawyers as any law school in the country. The views expressed here are my own, and not the views of the law school. They are grounded in my experiences working on behalf of the rights of victims of crime, primarily victims of domestic and sexual violence. Before joining the CUNY Law School faculty, I served as General Counsel of Safe Horizon, the nation's leading victim assistance and advocacy organization, and as a senior staff attorney at Legal Momentum, formerly NOW Legal Defense and Education Fund, where I headed the organization's litigation, legislative and advocacy efforts to end violence against women. I have represented victims of domestic or sexual violence in civil proceedings, including cases brought under the civil rights remedy of the 1994 Violence Against Women Act, which I argued before the U.S. Supreme Court in *United States v. Morrison,* 529 U.S. 598 (2000).

My testimony today concerns Title I of the Justice for All Act of 2004,[1] which addresses Crime Victims' Rights ("2004 Crime Victims' Rights Act" or the "Act").[2] I commend Congress, and this Committee, for your attention to crime victims' needs and your efforts to ensure that crime victims' concerns are appropriately taken into account as part of criminal justice proceedings. The 2004 Crime Victims' Rights Act makes useful steps towards ensuring victims appropriate protection, notice, and participation in the criminal proceedings of their accused. It supplements previously existing laws. However, the Act does not address, nor was it designed to address, the greatest needs of the vast majority of victims of crime—the need for services such as counseling, shelter, and assistance in addressing the range of legal issues they may confront, and for enforcement of existing laws and full appropriation of already-authorized expenditures.

2004 Crime Victims' Rights Act

The 2004 Crime Victims' Rights Act grants victims of federal crimes a spectrum of rights and clarifies that those rights are enforceable in federal court. The rights include the right to be reasonably protected from the accused; to reasonable, accurate and timely notice of proceedings related to the crime, including public court proceedings, parole, release, plea or sentencing; the right not to be excluded from such proceedings unless the court determines that the victim's testimony would be materially altered as a result; the right to confer with the Government's attorney; the right to full and timely restitution; the right to proceedings free from unreasonable delay; and the right to be "treated with fairness" and "with respect for the victim's dignity and privacy."[3] The Act funds legal services to assist victims in enforcing those enumerated rights.[4] The Act also strengthens notification systems to improve the likelihood that victims will be alerted, for example, of upcoming criminal proceedings or of a defendant's imminent release from custody.[5]

These provisions are important and may help victims in their recovery from the economic and psychological harms that crime often produces. For example, in one case the 2004 Victims Rights Act enabled victims who were potential witnesses to be present at trial in a case involving the murder of the victims' family members.[6] In another, the new law enabled the court, *sua sponte,* to give victims of an alleged mail fraud scheme notice of hearings that had taken place without their knowledge.[7] In yet another, the estate of a three-year-old-girl killed by a man who was found guilty of and subsequently pled guilty to voluntary manslaughter was awarded over $300,000 in restitution for the infant's prospective lost wages.[8] The improved notification systems authorized by the Act can go a long way towards allaying victims' concerns that they will not be prepared for a perpetrator's release from custody, and may enable them to make arrangements to participate in proceedings if that is their desire.

Some of the provisions, however, fall short of meeting many victims' needs, particularly those who have fewer financial resources. For example, the Act authorizes victims' participation in criminal proceedings, but does not make any provisions to ensure that they are granted time off from work without adverse consequences. Currently, many states have provisions that encourage employers to facilitate employees' participation in criminal proceedings in which the employee has been a victim.[9] However, in most of these states, employers are only encouraged, not required, to grant this type of employment leave.[10] Even where leave is granted, in most states it is unpaid, and in many states it is limited to a particular number of days, or for attendance at particular types of proceedings.[11] Absent assurances that victims can attend criminal proceedings without facing adverse consequences at their jobs, the right granted in the 2004 Act may not prove useful to the many victims who cannot afford to put their jobs, or their incomes, in jeopardy.

Other victims may not be able to avail themselves of the Act's provisions because they lack the resources to travel to a court proceeding. Victims who reside in other

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[1] Pub. L. 108–405, 118 Stat. 2260 (Oct. 30, 2004).

[2] Title I of the Justice for All Act is the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis and Nila Lynn Crime Victims' Rights Act, codified at 18 U.S.C. § 3771 (2006).

[3] Pub. L. 108–405, 118 Stat. 2260, at Sec. 102(a), codified at 18 U.S.C. § 3771(a)(1)–(4) (2006). These rights are made enforceable through 18 U.S.C. § 3771(d) (2006).

[4] Pub. L. 108–405, 118 Stat. 2260, at ◆103(a), codified at 42 U.S.C. § 10603d (2006).

[5] Pub. L. 108–405, 118 Stat. 2260, at ◆103(c), codified at 42 U.S.C. § 10603e (2006).

[6] *United States v. Johnson,* 362 F. Supp. 2d 1043 (N.D. Iowa 2005).

[7] *United States v. Turner,* 367 F. Supp. 2d 319 (E.D.N.Y. 2005).

[8] *United States v. Serawop,* 409 F. Supp. 2d 1356 (D. Utah 2006).

[9] *See* generally, Legal Momentum, *State Law Guide, Time Off from Work for Victims of Domestic or Sexual Violence,* available at http://www.legalmomentum.org/issues/vio/timeoff.pdf.

[10] *Id.*

[11] *Id.*

states, or other countries, now have a right to participate in hearings or other proceedings, but the Act provides no funding to support their travel if they lack adequate resources to pay for the trip on their own.

Appropriations and enforcement of other federal laws

Perhaps more important to those concerned with victims' rights is the Act's limited scope. Since most crimes are prosecuted in state, not federal court,[12] only a limited number of victims can avail themselves of the Act. For the vast majority of crime victims, other provisions of federal law, such as those contained in the Violence Against Women Act, and the Victims of Crime Act, hold greater potential to help them recover from the crime and live safely. Those laws should be fully funded and efforts should be made to ensure their full enforcement.

VAWA 2005 should be fully funded

Many victims of crime are victims of domestic or sexual violence. In January 2006, Congress enacted the Violence Against Women and Department of Justice Reauthorization Act of 2005 ("2005 VAWA Reauthorization" or 2005 Reauthorization").[13] This reauthorization of the law originally enacted in 1994 renewed many critical programs, such as services for domestic violence victims and programs to improve law enforcement responses, as well as funding for legal services to enable domestic violence victims to obtain protection from an abuser. In addition, it authorized many important new initiatives. For example, among the Act's many provisions, the 2005 Reauthorization for the first time funds direct services programs for victims of sexual assault.[14] It also authorizes programs that would assist young victims of violence,[15] prevention and awareness campaigns directed at the general public,[16] and initiatives to train health professionals, who frequently are in the position of being the first professionals to learn of abuse.[17] The bill protects domestic violence victims from being evicted from public housing and from losing housing subsidies as a result of the criminal acts of their abusers.[18] It aspires to advance victims' economic security by establishing a national resource center on workplace responses to domestic and sexual violence.[19] Importantly, it improves legal protections for victims of trafficking,[20] and directs resources to domestic violence within the Native American community.[21] Other provisions target services to historically underserved communities and aim to enhance culturally and linguistically specific services for victims.[22]

Currently, however, many of these important programs are at risk because funding for them may not be appropriated. As it stands, President Bush's proposed budget for fiscal year 2007 does not include any funding for the important new programs Congress authorized. Even as authorized, the funding levels for many programs fell short of what advocates had determined was needed. Absent full funding, the promise represented by the 2005 VAWA Reauthorization will ring hollow for the countless victims of domestic and sexual violence who otherwise might have been reached.

The VOCA reserve fund should be preserved

Another federal law that is critical to victims of crime is the Victims of Crime Act (VOCA).[23] VOCA established a Fund comprised of defendant fines and fees in federal prosecutions, which is used to support victim assistance and compensation programs nationwide. Since 2000, Congress has limited how much of the Fund can be distributed to the states each year in order to leave a balance in the Fund for years when fewer fines and fees were collected.[24] Last year, the President unsuccessfully

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[12] *See, e.g., United States v. Morrison,* 529 U.S. 598, 618 (2000) ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States . . . Indeed, we can think of no better example of the police power, . . . than the suppression of violent crime and the vindication of its victims.").

[13] Pub. L. 109–162, 119 Stat. 2960 (Jan. 5, 2006).

[14] *See* 2005 VAWA Reauthorization, tit. II, Pub. L. 109–162, 119 Stat. 2960, §§ 201–206.

[15] *See* 2005 VAWA Reauthorization, tit. III, Pub. L. 109–162, 119 Stat. 2960, §§ 301–306.

[16] *See* 2005 VAWA Reauthorization, tit. IV, Pub. L. 109–162, 119 Stat. 2960, §§ 401–402.

[17] *See* 2005 VAWA Reauthorization, tit. V, Pub. L. 109–162, 119 Stat. 2960, §§ 501–505.

[18] *See* 2005 VAWA Reauthorization, tit. VI, Pub. L. 109–162, 119 Stat. 2960, §§ 601–602.

[19] *See* 2005 VAWA Reauthorization, tit. VII, Pub. L. 109–162, 119 Stat. 2960, § 701.

[20] *See* 2005 VAWA Reauthorization, tit. VIII, Pub. L. 109–162, 119 Stat. 2960, §§ 801–834.

[21] *See* 2005 VAWA Reauthorization, tit. VII, Pub. L. 109–162, 119 Stat. 2960, §§ 901–909.

[22] *See* 2005 VAWA Reauthorization, tit. VII, Pub. L. 109–162, 119 Stat. 2960, §§ 120, 121.

[23] 42 U.S.C. § 10601 et seq. (2000).

[24] In 2006, Congress limited the amount that could be disbursed to $625 million. Congress has established these caps despite Administration projections that because of lower deposits, amounts kept in reserve in the fund would be needed to meet VOCA commitments during fiscal years 2006 and 2007. See National Association of VOCA Assistance Administrators, *Victim of*

recommended depleting that reserve and using it for other budgetary items. He has made the same proposal this year. If enacted, the President's budget would take the over $1 billion in fines and fees collected for the purpose of funding victim assistance and compensation programs away from those needed programs. This would mean that in 2008 there would be no VOCA funding left in the reserve for years in which fines and fees collected were inadequate to fund programmatic needs.

Funding from the VOCA account supports many of the personnel charged with implementing the 2004 Crime Victims' Rights Act, including U.S. Attorney victim/witness coordinators, who, among other things, implement the federal victim notification system. VOCA funds also support the crime victim compensation programs that reimburse crime victims for their financial losses resulting from crime, and the assistance programs that offer counseling and support, and help for victims navigating the criminal justice and other benefits programs to help them recover from the crime. These programs are vital to crime victims. Many advocates support removing the caps on VOCA funds entirely, to enable the states to manage the fluctuations in resources as they see fit. However, even if Congress insists on maintaining the caps on disbursements, it should ensure that all the amounts collected to assist crime victims actually goes to the services for which they have been collected.

Victim services programs require comprehensive, coordinated funding and full enforcement

As this Committee, and Congress as a whole, considers a federal statute that aims to assist victims of crime, it should consider the full range of victims' needs and should ensure that all aspects of services are adequately funded. For example, the 2004 Act dramatically increases notification obligations, but does not ensure the allocation of personnel resources to meet those requirements. Current funding for such functions draw on VOCA funds; however, if overall disbursements are limited, increasing funding for compliance with the 2004 Act could jeopardize funding for the ongoing and critical state programs for which there is no other source of support. Congress should ensure that the ongoing state programs, which provide direct and critical services to victims, are not jeopardized by new obligations under federal law.

Beyond participation in criminal proceedings, victims often need counseling and concrete services to help them move on with their lives. Many victims, particularly victims of domestic violence, affirmatively do not want to participate in criminal proceedings and instead want assistance in living safely and in becoming economically independent from their abuser. Victims of crime often benefit from emotional support programs and assistance in recovering from the economic losses that may result from the crime. For example, one study found that in 1992 alone, crime victims lost $17.6 million in direct costs as a result of the crime.[25] The 2004 Crime Victims Rights' Act does nothing to support counseling programs or interventions that help victims obtain crime victim compensation or other benefits for which they might be eligible. Victims also require legal assistance that goes beyond enforcing the rights enumerated in the 2004 Act. For domestic violence victims in particular, representation in order of protection, custody and visitation, housing and employment, and benefits proceedings is critically important and can reduce the risk of future abuse.[26] Legal assistance in immigration proceedings and in proceedings to enforce rights established under the U-visa and related programs also fall far short of victims' needs. Services such as shelter programs and financial support are also high priority.[27] Funding to ensure language proficiency in the services that are offered to victims also is critical to ensuring programmatic success. Overall, support for this wide range of programs is essential to any comprehensive approach to crime victims' needs.

Conclusion

The 2004 Crime Victims Rights Act addresses some of victims' needs in certain circumstances. To most fully address the myriad of challenges crime victims face,

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Crime Act's (VOCA) Crime Victims Fund, available at *http://www.navaa.org/07/docs/VOCA%202007.pdf.*

[25] Patsy A. Klaus, Bureau of Justice Statistics, *The Costs of Crime to Victims,* NCJ-145865 (Feb. 1995), available at *http://www.ojp.usdoj.gov/bjs/pub/ascii/coctv.txt.*

[26] *See, e.g.,* Amy Farmer and Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence,* 21 Contemp. Econ. Pol'y No. 2, 158–172 (2003) (analyzing government data on the incidence of domestic violence and concluding that the provision of legal services to battered women significantly lowers the incidence of domestic violence). 2005 VAWA authorizes funding for this broader range of legal services. *See* 2005 VAWA Reauthorization, tit. I, Pub. L. 109–162, 119 Stat. 2960, §§ 103, 104.

[27] *See, e.g.,* Laura Nichols and Kathryn M. Feltey, *The Woman Is Not Always the Bad Guy,* 9 VAW 784 (July 2003) (survey of women living in a battered women's shelter highlight importance of shelter and assistance with financial support).

Congress should ensure full funding and vigorous enforcement of all federal programs that provide them compensation, services and assistance.

Mr. CHABOT. Ms. Garvin, you're recognized for 5 minutes.

TESTIMONY OF MARGARET A. GARVIN, ESQ., DIRECTOR OF PROGRAMS, NATIONAL CRIME VICTIM LAW INSTITUTE

Ms. GARVIN. Thank you. Thank you, Mr. Chairman and distinguished Members. Thank you for holding this hearing today and for inviting me to present the views of the National Crime Victim Law Institute on the current status of the implementation of the CVRA.

NCVLI is a national resource for the advocacy of crime victims' rights, and provides support to legal clinics across the country, established by Congress and by the Office of Victims of Crime.

I joined NCVLI in February of 2003, and as Director of Programs there, I provide the programmatic oversight to each of the victims' rights programs, including the pro bono clinical program that NCVLI operates.

Prior to joining NCVLI, I clerked for the Honorable Donald P. Lay of the Eighth Circuit Court of Appeals and practiced law in Minnesota.

When President Bush signed the Crime Victims Act into law in October of 2004, a new era in Federal crime victims' rights law was ushered in. The CVRA moved what were largely symbolic, unenforceable aspirations for better treatment of crime victims—that were buried within title 42, as has already been commented on—into the light of title 18 and converted them into enforceable rights.

The CVRA was born of the failure of Congress to pass and refer to the States the proposed Crime Victims' Rights Amendment to the United States Constitution. Critics of that proposed amendment often said they were for crime victims' rights, but that they did not need to be in the U.S. Constitution, that a statute would suffice, that a statute, if it was enforceable, could secure for victims the justice and due process that they sought. The CVRA, then, was intended in part to test that claim.

In addition to creating the new enforceable rights, Congress authorized appropriation to ensure victims' access to enforcement mechanisms. Approximately 20 months have passed since the new law came into effect. The Department of Justice has issued revised AG guidelines which conform to the requirements of the law, the Attorney General has appointed an ombudsman to review and consider compliance issues within the Department of Justice. Law review articles have been written, and Federal courts have issued 25 opinions that are readily accessible. So now is an appropriate time to stop and consider what the initial impact of the CVRA is.

I will address two points: first, the case law to date; and secondly, the clear and present need for Congress to appropriate the funds up to its authorization level.

First, the cases: NCVLI's review of the Federal cases available through electronic research that discuss or mention the CVRA reveals that there are only 25 cases that have issued out of trial and appellate courts across the country. The citation to each of those cases is provided in my written testimony. Of these 25 cases, only three have issued from Federal appellate courts across the country.

And it is in the appellate courts that the true contours of the CVRA will be determined.

I'm going to discuss three of the cases, two out of circuit courts and one out of a district court. The first two cases are particularly revealing of the courts' continuing treatment of crime victims and their rights as lesser rights.

First, a trial court decision that is perhaps the most dismissive of victims right and disrespectful of the CVRA, *United States v. Holland*. In *Holland*, an offender filed a petition objecting to the restitution portion of his sentence. The court held that 9 years after sentencing it retained jurisdiction to alter the restitution obligation pursuant to a different act, the Victim Witness Protection Act. But in conclusion, the court made a statement regarding the CVRA. The court stated, quote, "If the victim believes that the new mushy, 'feel good' statute with the grand title 'Crime Victims' Rights' abrogates"—and now I am no longer quoting—a different court case which held that restitution is penal, then the victim may, of course, mount an appeal.

The callous language of this court acts as a reminder of why crime victims' rights need to be clear and backed by the ability of the victim to seek enforcement.

A second opinion demonstrates more substantive threat to the CVRA, and that is *In Re Huff Asset Mgmt. Co. In R.W. Huff,* the Second Circuit Court of Appeals noted in dicta that "most of the rights provided under the CVRA require an assessment of 'reasonableness.'" From this, the court concluded that the proper standard of review was abuse of discretion.

While the court was correct that five of eight of the rights include some form of the word reasonable, the leap to its conclusion is quite disturbing. If the rights provided in the CVRA are subject to an abuse of discretion standard, the rights in this country will continue to be subject to the whims and capricious interpretation of each trial court judge, including the one I quoted previously. The result is that victims' rights will once again be rendered illusory instead of enforceable.

There is one Ninth Circuit case that has recognized and given meaning to Congress' intent that crime victims be participants. In *Kenna v. District Court*, which has already been mentioned during this hearing, Patrick Kenna was denied the ability to exercise his right to be heard at the second sentencing proceeding. When Mr. Kenna, unrepresented by counsel, tried to speak, the district court denied him that opportunity stating, quote, "I don't think there's anything that any victim could say that would have any impact whatsoever." After retaining counsel, Mr. Kenna filed a writ of mandamus up to the Ninth Circuit, and that court reversed.

When one considers these cases and the other cases issued to date, it's clear that the courts are affording the rights provided by the CVRA a lesser status and a lesser respect. The net result is that courts are continuing to view crime victims as an interlopers around the criminal justice system.

My second point, which will be brief, is that if the rights provided in the CVRA are to be truly and fairly tested in our court system and the claim of critics of the proposed amendment tested,

they must be fully—this Congress must fully fund the authorizations.

The CVRA authorized funding for a number of enforcement and implementation programs; among those programs was 7 million, fiscal year 2005, and 11 million for fiscal years 2006 through 2009 to the Office for Victims of Crime to support programs providing legal counsel to victims. So far, just short of 2 million out of the initial 7 million has been appropriated. The importance of this disparity should not be overlooked.

I'm going to briefly revisit the *Kenna* case as an example. When Mr. Kenna sat in the gallery of the sentencing of his offender, he was not represented. Unrepresented, he stood and tried to assert his right to speak, his clear right to speak that's stated in CVRA. He was, in essence, told to sit down by the district court. Following sentencing, Mr. Kenna secured pro bono counsel. That counsel was able to navigate a procedural maze of our court system, file a mandamus within the 10-day time period required.

Despite a requirement in the CVRA that the Ninth Circuit act within 72 hours, nothing happened. Instead, Mr. Kenna's counsel had to file a subsequent pleading with the court urging action. Eight months later, the Ninth Circuit finally heard the case and heard oral argument.

It was this legal work that led to the one and only appellate court decision that has interpreted the CVRA positively. The case stands as a clear example of the importance of victims having counsel in the criminal justice system.

NCVLI urges Congress to appropriate the remaining amount available so that more victims like Mr. Kenna can have their day in court, and so that the theory of a strong statute with enforceable rights can be adequately tested. Thank you.

[The prepared statement of Ms. Garvin follows:]

PREPARED STATEMENT OF MARGARET A. GARVIN

STATEMENT

OF

MARGARET A. GARVIN, ESQ.
DIRECTOR OF PROGRAMS
NATIONAL CRIME VICTIM LAW INSTITUTE

BEFORE
THE

CONSTITUTION SUBCOMMITTEE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON THE IMPLEMENTATION OF THE

SCOTT CAMPBELL, STEPHANIE ROPER, WENDY PRESTON, LOUARNA GILLIS, NILA LYNN CRIME VICTIMS RIGHTS ACT
(TITLE 1 OF THE JUSTICE FOR ALL ACT)

JUNE 21, 2006

Mr. Chairman and Distinguished Members:

Thank you for holding this hearing today. I am grateful for the invitation to present the views of the National Crime Victim Law Institute (NCVLI) on the current status of the implementation of the Crime Victims' Rights Act (CVRA).

NCVLI is a national resource for the advocacy of crime victims' rights and provides support to legal clinics across the country established by the Congress and the Office for Victims of Crime in the Department of Justice. I joined NCVLI in February of 2003. As the Director of Programs, I provide programmatic oversight to each of NCVLI's victims' rights programs, including the *pro bono* clinical project funded by Congress through the

Office for Victims of Crime. Part of my work includes writing of *amicus curiae* briefs to courts around the country and providing legal technical assistance to attorneys representing crime victims nationwide. Prior to joining NCVLI, I clerked for the Honorable Donald P. Lay of the Eighth Circuit Court of Appeals and then practiced in a law firm in Minneapolis, Minnesota.

When President Bush signed the Crime Victims' Rights Act into law in October of 2004 a new era of federal victims' rights began. The CVRA moved largely symbolic, unenforceable, aspirations for the better treatment of crime victims that were buried within Title 42 of the United States Code into the light of Title 18 and converted them into enforceable rights.

The CVRA was born of the failure of the Congress to pass and refer to the States the proposed Crime Victims' Rights Amendment to the United States Constitution. Critics of the proposed amendment often said they were "all for victim's rights," but always added that the rights did not need to be in the Constitution. Their position was that statutes would suffice to secure for victims the justice and due process they sought. The CVRA was intended, in part, to test this claim.

In addition to creating new, enforceable rights, Congress authorized the appropriation of money to ensure victim access to enforcement mechanisms. Specifically, in the CVRA Congress authorized the appropriation of money for the operation of free legal clinics so that crime victims could obtain legal services to effectively and vigorously assert and enforce their rights in the courts.

Approximately 20 months have passed since passage of the law; the Department of Justice has issued revised Attorney General Guidelines which conform to the requirements of the new law; the Attorney General has recently appointed an Ombudsman to review and consider compliance

issues within the Department of Justice, as required by the law; law review articles have been published regarding the CVRA; and the Federal courts have issued 25 opinions construing the new law. Now is an appropriate time to stop and consider the initial impact of the CVRA, and to evaluate the effect of these efforts.

I will address two points. First, the case law to date demonstrates that the rights in the CVRA are accorded a lesser respect and deference by the courts than constitutional rights. The result is a continued treatment of victims as interlopers on the criminal justice system. Second, there is a clear and present need for the Congress to appropriate funds up to its authorization level if the new rights are to be fairly tested in a full and fair way within the adversary process that is our criminal justice system.

First, the cases. NCVLI's review of the Federal cases available through electronic legal research that have discussed the CVRA reveals that as of the end of May of this year, 25 cases have issued from Federal trial and appellate courts. The citation to each of these cases can be found at the end of this statement. Of these 25 cases, only three have issued from the federal appellate courts, which is where the true contours of the CVRA will be determined.

Two cases are particularly revealing of the courts' continuing treatment of victims' rights as lesser rights. First, a trial court decision that is perhaps the most dismissive of victims' rights and disrespectful of the CVRA – *United States v. Holland*.[1] In *Holland*, an offender filed a petition objecting to the restitution portion of the sentence. The court held that, nine years after sentencing, it retained jurisdiction to alter the restitution obligation entered pursuant to the Victim Witness Protection Act. In

[1] 380 F. Supp.2d 1264 (N.D. Ala. 2005)

conclusion, while addressing the ramification of its decision, the court stated that if the victim "believes that . . . the new, mushy, 'feel good' statute with the grand title 'Crime Victims' Rights,' abrogated [*United States v. Johnson*, 983 F.2d 216 (11th Cir. 1993) which held that restitution was penal] by including among victims' 'rights', 'the right to full and timely restitution as provided by law, the [victim] may, of course, mount an appeal from the order of June 11, 2005." [2] This callous language acts as a simple reminder of why clear crime victims' rights, backed with the ability the crime victim to seek enforcement, are necessary.

A second opinion demonstrates a more substantive threat to the enforceability of the CVRA – *In re W.R. Huff Asset Mgmt. Co., LLC.* [3] In *W.R. Huff*, the Second Circuit Court of Appeals noted in *dicta* that "[m]ost of the rights provided to the crime victims under the CVRA require an assessment of 'reasonableness.'" [4] From this the court concluded that the proper standard of review for the rights was an abuse of discretion standard. While the court was correct that 5 of the 8 delineated rights in the CVRA include some form of the word "reasonable," the leap to the court's conclusion is disturbing. If the rights provided by the CVRA are subject to an abuse of discretion standard than victims' rights in this country will continue to be subject to the whims and capricious interpretation of each trial court judge, including the judge who described the CVRA as "the new, mushy, 'feel good' statute with the grand title 'Crime Victims' Rights.'" The result – victims' rights will once again be rendered illusory, instead of enforceable as Congress intended.

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[2] *Id.* at 1278

[3] *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555 (2d Cir. 2005).

[4] *Id.* at 563.

There is one Ninth Circuit case that has recognized and given meaning to Congress' intent that the CVRA make crime victims participants in the system. In *Kenna v. District* Court, [5] the victim, Patrick Kenna, was denied by the District Court the ability to exercise his CVRA right to be reasonably heard at the sentencing proceeding of the second of two men who criminally defrauded him. When Mr. Kenna, unrepresented by counsel tried to speak, the district court denied him that opportunity stating, "I don't think there's anything that any victim could say that would have any impact whatsoever." After retaining counsel, Mr. Kenna filed a writ of mandamus. Noting that the CVRA sought to ensure that crime victims were no longer treated "like good Victorian children – seen but not heard," the Ninth Circuit upheld the victim's right and remanded the case. On remand, and upon motion by Mr. Kenna through counsel, the District Court vacated the sentence to allow the victim to exercise his right.

When one considers these cases, and the other cases issued to date, it is clear that courts are affording the rights provided by the CVRA a lesser status and lesser respect than that afforded constitutional rights. The net result is that courts are continuing to view crime victims as a type of trespasser on the criminal justice system.

My second point – If the rights provided by the CVRA are to be truly and fairly tested in the courts and the claim of the critics of the proposed victims' rights amendment be properly tested, Congress must fully fund the authorizations made under the CVRA.

The CVRA authorized funding for a number of enforcement and implementation programs. Among these authorized appropriations -- $7,000,000 for fiscal year 2005 and $11,000,000 for each of the fiscal

[5] *Kenna v. District Court*, 435 F.3d 1011 (9th Cir. 2006).

years 2006-2009, to the Office for Victims of Crime "to support organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims' rights in Federal jurisdictions, and in the States and tribal governments that have laws substantially equivalent" to the CVRA. So far just short of two million has been appropriated out of the initial $7,000,000. The importance of this disparity should not be overlooked.

As an example I turn again to the *Kenna* case. When Mr. Kenna sat in the gallery at the sentencing of his offender, he was not represented by counsel. Unrepresented he stood and tried to assert his right to be heard. He was, in essence, told by the court to sit down. Following sentencing, Mr. Kenna secured *pro bono* counsel and that counsel was able to navigate the procedural maze of our court system and file a mandamus action to the Ninth Circuit Court of Appeals within the short 10 day required time frame. Despite the CVRA's requirement that appellate courts "take up and decide such application forthwith within 72 hours," the Ninth Circuit did not rule on the petition for months. Instead, counsel for Mr. Kenna had to file a subsequent pleading with the court urging action. Then nearly 8 months after filing the petition, counsel for Mr. Kenna participated in oral argument before the Ninth Circuit. All of this legal work led to the one and only appellate court decision that has interpreted the CVRA positively. The case stands as a clear example of the importance of victims having counsel.

NCVLI urges Congress to appropriate the remaining amounts available so that more victims like Mr. Kenna can have their day in court, and so that the theory that a strong statute with enforceable rights can adequately be tested.

Thank you. I will gladly take any questions.

ELECTRONICALLY AVAILABLE CASES CITING THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771, AS OF MAY 2006

1) *In re Kari Ann Jacobsen*, Case No. 05-7086, 2005 Lexis 13990 (D.C. July 8, 2005) (unpublished opinion).

2) *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555 (2d Cir. 2005).

3) *Kenna v. United States District Court,* 435 F.3d 1011 (9th Cir. 2006).

4) *United States v. Blumhagen*, No. 03-CR-56S, 2006 US Dist. Lexis 15380 (W.D.N.Y. 2006) (unpublished opinion).

5) *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047 (N.D. Cal. 2005).

6) *United States v. Croteau*, No. 05-CR-30104-DRH, 2006 U.S. Dist. Lexis 23684 (S.D. Ill. 2006) (unpublished opinion).

7) *United States v. Dengenhardt*, 405 F. Supp. 2d 1341 (D. Utah Dec. 21, 2005).

8) *United States v. Eight Automobiles with Fraudulently Obtained Ohio and New York State Division Of Motor Vehicle Titles*, 356 F.Supp.2d 223 (E.D.N.Y. 2005).

9) *United States v. Guevara-Toloso*, No. M 04-1455, 2005 WL 1210982 (E.D.N.Y. May 23, 2005) (unpublished opinion).

10) *United States v. Holland*, 380 F.Supp.2d 1264 (N.D. Ala. 2005).

11) *United States v. Ingrassia*, 2005 WL 2875220, No. CR-04-0455ADSJO (E.D.N.Y. Sept. 7, 2005).

12) *United States v. Ingrassia*, 392 F. Supp. 2d 493 (E.D.N.Y. 2005).

13) *United States v. Johnson*, 362 F.Supp.2d 1043 (N.D. Iowa 2005).

14) *United States v. Kaufman*, ___ F. Supp. 2d ___, 2005 WL 2648070 (D. Kan. Oct. 17, 2005).

15) *United States v. L.M.*, ___ F. Supp. 2d ___, 2006 WL 855806 (N.D. Iowa March 31, 2006).

16) *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Il. 2005).

17) *United States v. McDaniel*, 411 F. Supp. 2d 1323 (D. Utah 2005).

18) *United States v. Serawop*, 409 F. Supp. 2d 1356 (D. Utah 2006).

19) *United States v. Shelton*, No. 03:02-264, 2006 WL 1094269 (D.Colo. 2006) (unpublished opinion).

20) *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682 (D.N.H. July 22, 2005) (unpublished opinion).

21) *United State v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005).

22) *United States v. Visinaiz*, 344 F.Supp.2d 1310 (D. Utah 2004).

23) *United States v. W.R. Grace*, 401 F.Supp.2d 1057 (D. Montana 2005).

24) *United States v. W.R. Grace*, 408 F.Supp.2d 998 (D. Montana 2005).

25) *United States v. Wilson*, 350 F.Supp.2d 910 (D. Utah 2005).

Mr. CHABOT. Thank you very much, Ms. Garvin.

And before I get into questioning, I think some of the things that you raised are principal reasons why many of us felt that a Victims' Rights Constitutional Amendment was ultimately the answer.

We want this to work, we want this to do what it can for victims. But when you have the criminals' rights that are protected in the Constitution itself—you know, the right not to testify against themselves, to have an attorney, the whole range of things, to have witnesses compelled to come; they're all in the Constitution—if you have the victims over here that are protected by statute, not the Constitution, if the two ever come in conflict with each other, the Constitution is going to trump that statute every time. And that's why I continue to believe that a constitutional amendment should be the case.

But we're not there yet because it takes two-thirds in the House, two-thirds in the Senate and three-fourths of the State legislatures, which unfortunately we just don't have.

Ms. Culberson, if I could begin with you, what obstacles face victims like yourself who are trying to locate the remains of family members?

Ms. CULBERSON. I believe education is a lot of that. In a rural area such as ours, there is little homicide.

And definitely the fact that, again, there is no mandatory testing; and remains are found and they're just put away. And it's just, to me, impossible to believe that we don't—I'm going to phrase it, it is not real popular, but you would think it would be a no-brainer that you would take these remains and test them.

And just the fact that when something like this happens to a person such as myself, we don't know where we need to go to get the information that will help, so we depend on many others to know what we need to do.

Mr. CHABOT. And you have also advocated for a Federal law that would set minimum standards for DNA testing for unidentified human remains.

Why do you believe that a Federal law is more advantageous than simply leaving it up to the States to decide?

Ms. CULBERSON. I think having a national protocol and having all 50 States on the same page at the same time is important because of the possibility of interstate transport of the remains. And I just think we all need to be on the same page at the same time.

Mr. CHABOT. And finally, as you know, the Department of Justice has provided funding for the creation of kits to collect DNA from family members of missing persons through the grants in the Justice for All Act. Would you tell us why the creation of such kits would be important for ultimately helping to locate family members that are missing?

Ms. CULBERSON. We need to have family reference samples put into a database in order to match the remains to a family member. So this is something that is necessary, and it's something that has been moved upon.

Mr. CHABOT. Okay, thank you.

Was there anything else—I did not mean to cut you off in your original testimony, but in trying to keep it as fair as we can, was

there anything that you wanted to say that you didn't have an opportunity to say in your——

Ms. CULBERSON. No, sir. And I apologize, I was looking at the time and numbers rather than the lights. I apologize.

Mr. CHABOT. No problem at all. No need for an apology.

And, Ms. Leary, I'll go to you next if I could. Do you think that the courts and the Justice Department are adequately aware of the new law? And what sort of educational efforts do you think they should be undertaking for judges and prosecutors to make sure that they're aware of the rights of victims?

Ms. LEARY. Well, I think with respect to prosecutors, they're subject to mandatory training all the time—and Federal prosecutors' offices across the country. And I think that the Executive Office of U.S. Attorneys has designed a training program, and it needs sufficient resources and, quote, "manpower," to make sure that the training is presented to AUSAs across the country, and that they're all getting the same message about what the act means.

I am concerned that if part of that training includes an interpretation that the act does not apply in the investigative stage, I would be concerned about that as a content of the particular training because I've already expressed my views on that.

With respect to judges, I would like to see training through the National College for Judges, I think that's a good way to reach them. And you could—for instance, it isn't just the new judges, and they have special training programs for people who are brand new to the bench; but obviously folks who have been on the bench for many, many years and—in fact, maybe they're the ones who need the education most of all, since they've been doing business a certain way for so long.

So I would like to see the National Judicial College get involved in that training as well. And I think the training should include victims and victim advocates, just to bring home the human aspect of the importance of this act.

Mr. CHABOT. Thank you.

Professor I'm running out of time. There was one question I wanted to get to Ms. Garvin, and so I apologize for not getting you at this point.

Ms. Garvin, in your testimony before you spoke of some judges giving short shrift to the Crime Victims' Rights Act, and you even mentioned one judge who had called it "new, mushy, feel good"—"a new mushy, 'feel good' statute with a grand title."

In your view, having already provided victims with mandamus provisions, what can Congress do or what should Congress do at this juncture to ensure that the purposes of the act are met?

Ms. GARVIN. Two things: The first would be appropriating fully, so that victims have attorneys. It is when—part of the case in controversy—the requirement of the Constitution is there because the adversity that is brought in a case is there in part because you have parties who are advocating opposite sides. When a victim has their own attorney in a courtroom, they can adequately present an issue to the court, which is a method of education as well as enforcement.

The second thing, I would say, is to echo what has previously been said, which is education of the judiciary does need to occur also.

Mr. CHABOT. Thank you very much. My time has expired.

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you.

Professor, following up on what was just said, can you elaborate why victims' rights in the Justice for All Act are not appropriate for some victims?

Ms. GOLDSCHEID. Thank you for that question.

Many victims do want to participate in criminal proceedings, and this law goes a long way toward effecting those rights, but many victims in my experience, particularly victims of domestic violence, wish to move on from the crime and the violence that have occurred. And in order to do that, they need help that often brings them to the civil justice system, rather than the criminal justice system.

So while they may need in some cases to be witnesses in criminal proceedings in order to vindicate their rights and their interests if there is a prosecution going on, in many cases, victims need to turn to get, for example, orders of protection; or for domestic violence victims, for example, they frequently have custody cases or there are family law matters for which legal representation is crucial.

The Crime Victims' Rights Act does not address those legal needs at all, and yet for—as I'm sure many of you know, for a vast majority of victims, that is the type of legal representation that can make all the difference in their ability to move on from the crime and move to safety and move to economic independence.

Mr. NADLER. You also said something about some crime victims not wanting to go to court. Could you explain that a little?

Ms. GOLDSCHEID. Sure, thank you.

For domestic violence victims in particular, in many cases, the last thing that they want to do is to have further contact with an abuser. In many domestic violence cases, cases finally come to court after what can be a very long period of a cycle of abuse. And when a victim is finally at the point of perhaps prosecuting or perhaps leaving, in many cases what she—and I'll say she only because many of the cases, most domestic violence is committed against women; certainly not all, but I'll use "she" for convenience purposes—what she wants to do is get away from the abuser.

Batterers are notorious for using the criminal justice system as a way for perpetuating the abuse; it's a way of making unfounded accusations against a battered partner. And so the criminal justice system can become a place for revictimization, which is why many victims, once they've made the decision to leave, what their goal is is to get away from the abuse, which may mean wanting to just move on and not focus on a criminal prosecution.

Mr. NADLER. The acts that we've passed, the Justice for All Act, the Victims' Rights Act, do they address that at all? Should we be doing something else in this respect?

Ms. GOLDSCHEID. I think the most important thing at this point that Congress can do is to fully appropriate the laws that I men-

tioned in my testimony. And I'm not saying that as a way to be evasive——

Mr. NADLER. It's a question of funding, not further statutes?

Ms. GOLDSCHEID. There are certainly provisions of the programs that could be funded, other provisions that many advocated in support of and were not included in other legal provisions, and I would look mostly to laws such as the Violence Against Women Act reauthorization and, to a certain extent, VOCA in the way I referred to earlier.

From my experience with victims, their concerns focus mostly on the types of programs and services and legal protections that are addressed under other laws, not so much under the Crime Victims' Rights Act.

Mr. NADLER. Let me ask you one specific question I've wondered about for many years, and I'm not sure if it's exactly relevant to this, but we often talk about funding shelters for victims of domestic violence, because obviously the victim can't go back to live with the batterer. But why are we talking about that? Why aren't we talking about taking the house away from the batterer and letting him find shelter?

Ms. GOLDSCHEID. It's an excellent question, and I know many people do talk about. And if you're interested in additional information, I believe that there are service providers who are looking at exactly that type of model. And there are some intervention——

Mr. NADLER. But there are no laws for that as far as I know.

Ms. GOLDSCHEID. There are no laws for that.

What does often happen is, women will get what are called "stay-away orders," where the batterer is ordered to stay away from the house and the victim—again, often a woman—is allowed to stay in the house. But I can't think of any law that mandates that the batterer lose his home.

But that's a good example of the type of civil legal proceedings that are often critical to victims' needs.

Imagine a battered woman who has children, who wants to remain in her home. In order to keep her custody and to retain her ability to stay in her home with her children, she needs to go to court, and that brings her either to family court, or certainly to civil court.

Mr. NADLER. Let me ask one further question.

Mr. CHABOT. The gentleman's time has expired but the gentleman is granted one additional minute.

Mr. NADLER. The President, whoever wants to answer this, the President has again proposed to rescind the crime victim fund's rainy day fund. What would be the impact of doing this, good, bad, indifferent? Anybody. Who wants to answer?

Ms. GOLDSCHEID. I will start briefly. As I addressed in my testimony, and I will let others chime in, that would really be very detrimental to crime victims. Many people who work with the crime victims programs that are funded through VOCA have advocated for lifting the cap on those funds that establishes that rainy day fund; in other words, so that what would happen, instead of creating a fund, all the funds would be distributed to the States and the States would have the responsibility of managing the fluctua-

tions that would result from different levels of prosecutions and fine collections.

Taking those moneys away from these programs would be just devastating to the many programs that really rely on it and need it very desperately for victims' needs.

Mr. NADLER. Ms. Leary, you wanted to comment?

Ms. LEARY. I would also add if you distribute all the funds and take away everything above the cap, you are starting at ground zero for the next funding cycle. That would be devastating.

Mr. NADLER. So you are agreeing it would be devastating to rescind the crime victims' rainy day fund.

Ms. LEARY. In addition, at a meeting we had, several victims organizations met with the Attorney General this morning about a variety of issues and there was some very poignant messages about victims who currently are not getting adequate services because there isn't enough funding as it is, particularly examples of children. Child victims of sex abuse who are on a list and 6 months from now maybe you will get some counseling and family help, that is unacceptable.

Mr. NADLER. That is what the rainy day fund implicates?

Ms. LEARY. It would because it funds all the services. You take that away, I mean we don't have enough money as it is, take that away and it is going to have a serious impact.

Mr. CHABOT. The gentleman's time has once again expired. The Chair would note that it is quite common for this President and other Presidents to not have in their budget funding for various very worthy programs, which then Congress in its wisdom during the course of the year in the appropriations process, which we are in right now, puts the money back in and ultimately when we pass it these programs are funded.

Mr. NADLER. Mr. Chairman, I am hoping that this question and this answer my help to inform the Congress' wisdom in this respect.

Mr. CHABOT. The gentleman has accomplished that. We appreciate the gentleman for bringing it up. We are going to fund this. I can't imagine that we wouldn't. It is a worthy thing, something that's important.

The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman, and thank you ladies for coming before the Committee.

Ms. Culberson, I, like so many of us here on the panel, have no thought or idea of the hurt and the heartache that you have gone through in this situation and I just want to extend to you the appreciation of all of us for your courage to in the midst of your loss do what you could to prevent this kind of tragedy from occurring to other people.

I know that there are a lot of different things that you have dealt with and faced so I suppose my first question, and I am going to ask the rest of the panel members to respond to it as well, if you could be the person to write a one, single, provision in Congress that you knew would pass from this moment as a victim of crime, as someone who's lost a loved one, with all of the myriad abuses that sometimes the system puts upon you, what is one thing that

you would do that you think would address the most egregious or the most hurtful challenge that you face? One thing, the top one.

It is so hard in these situations always to find—we are all about trying to find priorities here but I don't think anyone can point to that better than someone like yourself who has faced it so personally.

Ms. CULBERSON. It is hard to make a list of priorities because obviously my first priority is in finding my daughter. So I think these other ladies would better address that because I obviously have my own agenda, which again would be to find my daughter and it is going to take more than one issue, I believe.

But, again, the reason I am here is to ask for mandatory testing on a national level and then a repository. That would not only help me, but also if you get on the National Center for Missing and Exploited Children and look at all the unidentified, it is unacceptable because we have the technology today to identify these people.

So priorities, again, mine is in finding my daughter. So to list them—so, thank you.

Mr. FRANKS. Thank you, Ms. Culberson.

Ms. Leary, given your experience of having dealt with many victims of crime, if you could put one thing, what would it be? Again, the question is a cogent one because so often times that is the challenge of every government, of every logistical organization is finding the things that matter most because oftentimes we address a lot of the ancillary issues and really don't get to the ones that are of most significance.

I think there is a heart here for the issues that we are facing today that transcend party lines and philosophies and everything else. The challenge is knowing what to do would be the most pressing and the greatest priority.

Ms. LEARY. The National Center for Victims of Crimes has worked on a number of legislative proposals; restitution, and so on. I think that those are all really significant.

I think I would say though that if you make a promise to a victim, fulfill that promise because life is full of broken promises for every victim of crime in this country and so when a statute is passed and it authorizes funding for desperately needed services for crime victims, appropriate that money and make sure that money gets out there because otherwise we're setting them up again and we're breaking promises and victims—even victim service providers are—we're breaking promises to them and they care so desperately about the clients that they serve.

That would be my recommendation, do not make premises that won't be kept.

Mr. FRANKS. Authorizers forever have wanted to make it absolute mandatory law that appropriators had to do exactly what we told them.

Professor Goldscheid.

Ms. GOLDSCHEID. Thank you. I was going to say at this point in time, enforcement. I don't know that there is one magic bullet that will be the answer to victims' needs. I think that many, many improvements have been made in the law and as we stand now from a practical perspective I think one of the most important things that Congress can do is—I mean I would agree to fulfill the prom-

ises that have been made, and I would just emphasize the economic ramifications of crime; that from the victims I have worked with, one of the most devastating aspects in addition to needing support for emotional recovery is to help with the economic ramifications of crime.

So enforcement particularly of restitution, of victims' compensation programs and of course provisions that can help victims move on to economic independence are critical.

Mr. FRANKS. Thank you, Mr. Chairman.

Thank you, ladies. My time has expired.

Mr. CHABOT. We would be happy to extend another minute to Ms. Garvin to answer there. She's chomping at the bit.

Ms. GARVIN. It is mostly an echo, so I will be quick. I want to point out one provision in the CVRA that I think is critical in the appropriation aspect of this, which is what I would recommend, which is the appropriations for supportive legal services in Federal jurisdictions, but there's another provision there and in the States and tribal governments that have substantially equivalent laws to the CVRA.

When the CVRA and other victims rights statutes are fully funded there is the potential that States will come into compliance with these laws and have justice in their own State systems for crime victims, which I believe is the ultimate aim of every victims' rights statute.

Mr. FRANKS. Excellent. That was worth waiting for, Mr. Chairman.

Mr. CHABOT. Thank you very much.

Thank you, Mr. Franks.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, I have always thought, and we've heard this during the testimony, that I think this is as much an appropriations issue as a rights issue because if the prosecutors had half the caseload, they would be much more likely to have some time to politely talk to people rather than being rushed and rude.

Also, if you had more victims' advocates, and that's appropriations, you would have somebody there that could help the victim all the way through the process.

Let me ask a couple of specific questions. Victims of crime compensation, we have heard testimony there's not enough money. How close are we to appropriately funding that so that victims can in fact get some compensation? Does anybody have a number? If not, that's fine, but obviously that would go a long way in helping.

Ms. GOLDSCHEID. We would be happy to look into that.

Mr. SCOTT. The money we appropriate, where does it go? Do victims apply directly there or do we fund organizations that get money that they apply to for compensation?

Ms. GOLDSCHEID. The victim compensation programs are run through the States and so it is really—the funding for them is really twofold. One part of it—one part of the funding goes to actually create a pool of funds that victims can access that can help them pay for their concrete needs resulting from the crime. For example,

for medical expenses, for travel, for lost wages and that kind of thing. Another——

Mr. SCOTT. Where does the victim apply to get the money?

Ms. GOLDSCHEID. At State agencies through staff that are funded through VOCA. So when many of us speak about the importance of retaining the funding for VOCA, that's one of the things that those funds are used for. They fund staff people at local agencies that take complaints, that take applications from people, help guide them through the process and help ensure that those funds—that the applications are processed.

Mr. SCOTT. Some of us have suggested that one way of getting the money is through some of these forfeitures in drug cases, for example. Rather than the money going to the police department, that money ought to go to the crime victims fund, which would create some more funding for the victims. The law enforcement ought to be funded through direct appropriations.

Have any of the organizations suggested that the forfeitures go to the crime victims fund rather than to the law enforcement agencies?

Ms. LEARY. Not that I am aware of. I don't know if that has been suggested. We would be happy to canvass and get back to you.

Mr. SCOTT. One of the things, some of this is speculated, assumed it wouldn't happened, just speculated we might have trouble with the definition of victim; gangs shooting at each other or somebody making false accusations and that kind of thing could create a havoc on who the victim is.

Can you assure us that that has not been a problem, that we don't need to redefine victim? That hasn't been a problem?

Ms. GARVIN. In the case law to date it hasn't been a problem that we've noticed.

Mr. SCOTT. Again, back to the appropriation, just going through the articulated rights, the right to be reasonably protected from the accused, who should pay for that, providing the protection? How do you provide the protection?

Ms. LEARY. I think that protection has to be provided by law enforcement effort. In terms of where the funding should come from, I don't think you're going to get adequate protection if you're going to rely on local police departments to provide that. They simply——

Mr. SCOTT. Are you just looking for a court order? That's what you mean by protection?

Ms. LEARY. No, actually. That's one way. That's one interpretation of protection, that's one way to get it, through a stay away order. But in other instances there may be a need literally for law enforcement to get involved for protection.

Mr. SCOTT. The right to proceedings free from unreasonable delay, one of the reasons we've had complaints about some of the things when we were trying to pass this is from prosecutors who for one reason or another might not be ready for trial and might not want the defendant to be tipped off. Have we had any feedback from prosecutors that that has been problematic?

Mr. CHABOT. The gentleman's time has expired but the witnesses are welcome to answer the question.

Mr. SCOTT. Do people insist on a speedy trial from the outside, not the defendant, not the prosecutor, but the victim insist on a

speedy trial? Have we had complaints from prosecutors that that is maybe complicating the prosecution?

Ms. LEARY. The feedback we've gotten at the National Center does not indicate that. It indicates that in a couple of instances in fact the prosecutor used this act to advocate for it. But I would suggest that perhaps DOJ could address that issue in its statement to the Committee.

Ms. GARVIN. If I may just add quickly, at NCVL we have not heard of that being a problem either and there is case law outside the CVRA that talks about that this right would be balanced against the other interests, the defendant's interest and the Government's interest in being prepared and a judge would have to do the equation there. But we have not heard of a problem with this.

Mr. SCOTT. Mr. Chairman, could I ask another question?

Mr. CHABOT. Yes. Without objection, the gentleman is granted an additional minute.

Mr. SCOTT. The right to be excluded from court, that kind of bumps up against a constitutional right to a fair trial. Have we had any problems with the application of a right not to be excluded?

Ms. GARVIN. There is one case that has addressed the issue of a victim's right to attend under the CVRA and that was a motion by the Government to allow the victim who was also going to be a witness to be present, and it was granted.

The interesting thing about the right to attend is the potential for it to abut the defendant's fair trial right is a bit overstated. There is no case in this country that talks about that head-to-head conflict, and if you go back to the origins of our country victims were allowed to be present throughout the entire prosecution. And there is a recent law review article by Judge Cassell out of the Federal District of Utah addressing this and doing a historical analysis of the right to attend and when it does or does not abut a defendant's right.

Mr. SCOTT. We have been able to apply that right without a problem with cases getting thrown out, without adversely affecting the prosecution?

Ms. GARVIN. That is correct.

Ms. CULBERSON. I am sorry, but I was not allowed to attend. We had four trials, five actually, but I was not allowed to be present for four of those.

Mr. SCOTT. Let me ask Ms. Garvin, are people still excluded?

Ms. GARVIN. They are still excluded because the myth of the head-to-head conflict between these rights still exists and that is part of why education as well as attorney representation is needed for the crime victim so that they can go in and make the legal argument and explain to the courts why this is actually not a conflict.

Ms. LEARY. There may be some issues about a rule on witnesses. If a victim is going to testify or if a family member is going to testify in the trial, there may be a rule on witnesses, which would exclude them because of the concern.

Mr. SCOTT. That's our point. You assume they're going to be a witness.

Ms. GARVIN. The thing there is that a rule is necessarily a lesser legal value than a statute and now there's the CVRA statute that's very clear.

Mr. SCOTT. If the victim is not going to be testifying, of course they would be able to be in court. It is a public trial. But if they are going to testify, that's where the question appears.

Ms. LEARY. It seems ironic that the defendant's fellow gang members may be present for the entire trial and in fact may be sitting in the back of the courtroom. I use the expression, they call it in D.C. Superior Court grittin' on the witnesses, which means making facial expressions and body language that clearly convey a message to the witnesses and they are designed to intimidate, and they can sit in the courtroom the entire time but the actual victim may not be able to. There's irony there.

Mr. CHABOT. Before we conclude I'd recognize myself for purposes of making a couple of points. It is my understanding that oftentimes a defense tactic is to call, for example, a mother or family member from the defense side as if you're going to use that person as a witness and then not call them. Exclude them from the courtroom so there isn't a sympathetic witness that the jury could identify with, for example.

Debra, in your case you said there were five separate trials and you were excluded on all but one?

Ms. CULBERSON. Yes.

Mr. CHABOT. Would you tell us what the circumstances were, what you were told as to why you were excluded under those circumstances?

Ms. CULBERSON. That I was subpoenaed as a witness and, again——

Mr. CHABOT. By the prosecution or defense?

Ms. CULBERSON. Well, by the prosecution in three of them and the defense in one.

Mr. CHABOT. My understanding is there had been incidences of domestic violence by the person who was ultimately convicted of the murder against your daughter. Was that, for example, something you could have testified about?

Ms. CULBERSON. Yes, but we weren't allowed to bring any of that testimony forward because it showed prior history. So we weren't allowed to bring that in.

Mr. NADLER. Mr. Chairman, I am missing something here. If your testimony about, or the presumed testimony, the intended testimony about prior domestic violence was not allowed to be brought in because it was about prior events, and I can see a legal reason why it not be, for what purpose were you subpoenaed by the prosecution, for that testimony or some other testimony?

Ms. CULBERSON. For that testimony. That's the only thing I can testify to.

Mr. NADLER. You were subpoenaed or put on the witness list by the prosecution for that testimony?

Ms. CULBERSON. Yes, sir.

Mr. NADLER. And then kept out of court by whose objection?

Ms. CULBERSON. I apologize, I don't know the legalities of everything but——

Mr. CHABOT. The point is you weren't allowed to be in the courtroom while the murder case of your daughter is going on.

Mr. NADLER. Did you ever actually testify in any of these cases?

Ms. CULBERSON. Yes, I did. As I said, I can only testify to Carrie's character.

Mr. NADLER. So you were kept out in four cases?

Ms. CULBERSON. Yes, sir.

Mr. NADLER. Did you testify in those four cases?

Ms. CULBERSON. Yes. I testified in five. The defendant's family was in all of the trials, present for all the trials.

Mr. NADLER. Were they witnesses?

Ms. CULBERSON. Yes.

Mr. NADLER. They were too?

Ms. CULBERSON. Yes, sir.

Mr. NADLER. How were they present?

Ms. CULBERSON. I couldn't tell you that. I don't know.

Ms. LEARY. If I may, I think this goes to Ms. Garvin's point, which is if you are just going by a general rule anybody on the witness list is not allowed in the courtroom, you're going to have abuse of process, depending who gets subpoenaed by whom, or simply have neglect.

The prosecutor may have thought that he or she would be able to bring in Mrs. Culberson's testimony and then there was a pretrial ruling that said no, you're not going to be allowed do that. But Mrs. Culberson needed an advocate there to say, wait a minute, your Honor, nobody is really thinking about what would be the problem to have her in this courtroom. Let's analyze it and let see what she really would testify to and determine whether that's a problem.

Mr. CHABOT. This is a perfect example why a number of us believe very strongly that a constitutional amendment protecting victims rights is necessary because you have in this case two conflicting theory here; one, they shouldn't be there because it infringes on the defendant's rights to have a fair trial, the other side, the victim's rights, if they're in conflict, well, there's just some statute passed, not mumbo-jumbo but the mushy stuff that we pass or passed at the State legislative levels. In the Constitution it would mean something more substantial and be a better chance that victims would be——

Mr. NADLER. I think Professor Goldscheid looks as if she's chomping at the bit.

Ms. GOLDSCHEID. I would make the quick comment I think other witnesses said earlier, that under the statutory approach, at least in the initial phases of the rollout of this law it doesn't appear that the statute poses a problem that would suggest a need for a constitutional amendment.

Also, many States, if not most States, have State constitutional amendments that do provide for some measure of victims rights, in some cases beyond what has been proposed at the Federal level, and those are rights that victims can look to in order to allow the appropriate balancing.

In a defendant's rights, their liberty is at stake, it is different than a victim's rights to safety and to be heard. We have very different interests that a court would have to balance that will in my view, for what it is worth, can be done with a statutory victims' rights amendment.

Mr. NADLER. Also, Mr. Chairman.

Mr. CHABOT. Without objection.

Mr. NADLER. I would also like to comment, without all the details of a given case, the fact is that if someone is going to be a witness, the traditional rule has usually not always been that if someone is going to be a witness they should not be in the court for the reason they shouldn't see what other people say, which might enable them to change their testimony, et cetera.

Now if someone is a victim, they have a reason to be in court; if they're going to be a witness, there's a reason not to be in court, and depending on the circumstances, those two varying things, those two clashings have to be balanced and in many cases it may be that the testimony is of a nature or the likelihood of there being testimony is of such a nature that the right to be there as a victim outweighs the problem. In some cases it may be the other way around.

A constitutional amendment that says they are always right and they are always wrong is a little rigid and until we see real problems with the implementation of the statute, I wouldn't want to go there.

What I was gathering here, and maybe we ought to have laws, by the way, maybe we do in some States, saying that if someone puts someone on a witness list who is a victim—and in some cases it might not be clear who was the victim. That's also a problem. But let's assume it is clear in a given case. If someone puts someone on the witness list who's a victim, maybe there ought to be some sort of a hearing before the judge as to whether that means—as to whether the claim, if the claim is asserted, the victim ought to be there is implicated here and which outweighs the other on a case-by-case basis.

Maybe we need something like that and maybe States have done something like that, but I think a constitutional amendment that is—it is very difficult to write one and be fair.

Mr. CHABOT. For reasons of clarification let me just read something here from the Crime Victims Rights Act that we passed that is now the law. Rights of crime victims. "A crime victim has the following rights. One of them is the right 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."

So we have dealt with this in the statute. That is one of the statutes we're discussing here today, although that doesn't necessarily mean that it changes our mind relative to the need for a constitutional amendment. But it was dealt with in here.

We have rules in the Committee and that's why this is more getting into a seminar or discussion here as opposed to a Committee hearing but, Mr. Scott, since we've gone a little far here, did you have a point here?

We have votes here on the floor in a moment.

Mr. SCOTT. My question originally was whether or not Ms. Culberson originally testified. I think we cleared that up. Let me just comment that the discussion we're having shows why the constitutional amendment is inappropriate because you would have to be balancing a defendant's right to a fair trial with the victim's

right, and in fact balancing them necessarily would denigrate the defendant's rights.

With the statute, the victim would have all the rights so long as it does not impinge on the defendant's rights, and I think that's the appropriate place to be.

Mr. CHABOT. What you're doing there is you're putting the criminal's rights, the defendant's rights above that of the victim, and many of us believe they ought to at least be equal and, if not, more tilted to the victim.

Mr. SCOTT. You can say equal but you are denigrating the defendant's rights. He's on trial. And if you're suggesting that there are other considerations and some of his rights ought to be reduced, then say that.

Mr. CHABOT. We're not suggesting reducing, we're suggesting increasing the rights of the victim.

Mr. SCOTT. You can do that with a statute. So long as you do not reduce the defendant's rights.

Mr. CHABOT. We now have votes on the floor.

Ms. Culberson, did you have a comment?

Ms. CULBERSON. I just wanted to say to him that the defendant's actions is what put him in that position. The victim is actually innocent——

Mr. NADLER. The defendant's presumed actions because the defendant is also presumed innocent at that point.

Ms. CULBERSON. Yes, sir, I apologize. So, again, we're not being allowed any rights for something that wasn't our doing.

Mr. CHABOT. The victim was clearly innocent all along.

Mr. SCOTT. You have gang crimes, you don't know who's telling the truth.

Mr. CHABOT. I am talking about the cases we've dealt with here today in particular. There was no question about those.

Again, we generally have a little more formal way that we run these meetings but we appreciate the indulgence of our excellent witness panel here this afternoon. I think you have helped us very much and I have to say that this is one of the issues that has been dealt with for the most part on a fairly bipartisan manner. We might disagree on whether we need a constitutional amendment or not, but we agree that victims rights should be protected and it is good to see that in this Committee in particular because we're pretty much on the opposite sides on most issues.

But the panel has been very helpful. We appreciate your telling us about the implementation of the acts that we've been dealing with this afternoon and we'll take that into consideration in future legislation.

If there's no more business to come before the Committee, we're adjourned. Thank you.

[Whereupon, at 2:38 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSE FROM JAMES H. CLINGER, ACTING ATTORNEY GENERAL, TO POST-HEARING QUESTIONS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 19, 2006

The Honorable Steve Chabot
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed the Department of Justice's responses to questions directed to the Department of Justice following the Subcommittee's June 21, 2006 oversight hearing on "The Implementation of the Crime Victims' Rights Provisions of the Justice for All Act."

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. Please do not hesitate to call upon us if we may be of additional assistance.

Sincerely,

James H. Clinger

James H. Clinger
Acting Assistant Attorney General

Enclosure

cc: The Honorable Jerrold Nadler
Ranking Minority Member

Questions for the Record
Subcommittee on the Constitution
House Committee on the Judiciary
Oversight Hearing on
"The Implementation of the Crime Victims' Rights Provisions
of the Justice for All Act"
June 21, 2006

Question 1. Have there been any problems or issues enforcing any of the crime victims rights enumerated in the bill?

The full impact of the Crime Victims' Rights Act (CVRA) on the criminal justice system and the role of victims within it remains to be seen. Less than two years after its enactment, however, the effect is unmistakable. The Department is identifying more victims in its cases than ever before. The number of identified victims in federal criminal cases increased 90% in the first year after the CVRA passed. The number of victim notifications sent through the Department's Victim Notification System (VNS)[1] doubled in the year after the Act passed, to a total of almost six million notices sent in Fiscal Year (FY) 2005, and already almost four million sent in the first half of FY 2006. Those in the Department who work most closely with victims have seen the CVRA's impact firsthand: in the first quarter of FY 2006 alone, the average Victim Witness Coordinator in a United States Attorney's Office had 480 direct contacts with victims, excluding VNS notifications. And victims are taking part in criminal proceedings in higher numbers than ever before, attending proceedings, conferring with the prosecution, and exercising their right to address the court at sentencing.

On the other hand, fulfilling the CVRA's requirements is not always easy. Victim Witness Coordinators in the U.S. Attorney's Offices report spending 30-40% of their time on victim notification alone. Notification can be difficult, especially in cases with a very large number of victims, such as securities fraud cases, where even identifying the victims is problematic. In all cases, providing timely notice of the defendant's initial appearance is difficult. These problems are compounded when, for example, a target not yet indicted offers to enter a pre-indictment plea of guilty at an initial appearance, in order to take advantage of the acceptance of responsibility criteria for purposes of a reduction in sentence, or to plead guilty to an information charging crimes that might be difficult or time-consuming for the Government to prove at trial. Typically in these situations, the Government's investigation will not yet have identified potential victims, and public notice of a possible guilty plea would be improperly prejudicial in any event, because the defendant retains the right to change his or her mind. Similar problems with affording advance victim notification and consultation also arise when a defendant makes

[1] The VNS was used by U.S. Attorney's Offices before enactment of the CVRA, but the Executive Office for United States Attorneys (EOUSA) has modified the system to facilitate compliance with the CVRA.

his or her offer to plead guilty post-indictment valid only at the defendant's initial appearance.

As noted below in response to Question 4, the Department is taking steps to streamline and expedite the notification process through, for example, exploring ways to link the VNS with the courts' Electronic Case Filing system (ECF). This would reduce time and error from the notification process.

The provision of victims' rights would, of course, be aided by additional resources. The increased workload imposed by the CVRA makes it challenging for victim witness personnel in the U.S. Attorneys' Offices to continue to provide a high level of victim service. In addition, victims would likely benefit from more uniform and extensive training for court personnel regarding victims' rights. Finally, as noted in the response to Question 8 below, issues have arisen under the CVRA with regard to cooperators' pleas and the CVRA's application to actions in the District of Columbia Superior Court.

Question 2. How is the implementation of the Department's regulations that were promulgated pursuant to the CVRA going? How many complaints have been filed with the new Ombudsman?

The Department has established a new Office of the Victims' Rights Ombudsman in EOUSA. The Department also has implemented "Procedures to Promote Compliance with Crime Victims' Rights Obligations," *see* 28 C.F.R. § 45.10, and selected its first Victims' Rights Ombudsman (VRO). Under the program, victims of federal crimes can file a complaint against any attorney, investigator, law enforcement officer, or other employee with any division or office of the Department of Justice whose regular course of duties includes direct interaction with crime victims. Components covered under the program include employees in each of the United States Attorneys' Offices, as well as the Department's Antitrust Division; the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the Federal Bureau of Prisons; the Civil Division's Office of Consumer Litigation; the Civil Rights Division; the Criminal Division; the Drug Enforcement Administration (DEA); the Environmental and Natural Resources Division; the Federal Bureau of Investigation (FBI); the Tax Division; and the U.S. Marshals Service.

The Department has been actively promoting this program and making it easily accessible to crime victims who wish to file complaints. The VRO has met with and solicited input from victims' advocacy groups and other government organizations involved with the provision of services to crime victims to ensure that the program would address victims' concerns. The VRO also has set up a comprehensive website at www.usdoj.gov/usao/eousa/vr for crime victims who wish to file complaints. The site provides information about the program, an explanation of the rights to which victims are entitled, detailed procedures for filing complaints, and useful links to both governmental and private victim service resources. In addition, the VRO has developed a standard complaint form, which is available electronically and in hard copy, both in English and in Spanish. Similar information about the complaint process, contained on websites and in

written material, is available to crime victims through their U.S. Attorney's Office or the Department component offices listed above. The U.S. Attorneys' Offices also are providing crime victims, during the early stages of the criminal justice process, with informational brochures that describe their rights as crime victims, including the opportunity to file complaints against Department employees. At the same time, Department attorneys and victim staff providers are being trained about the provisions and requirements of the CVRA.

Since the VRO complaint process was established with the express purpose of allowing victims to request corrective or disciplinary action against Department employees who may have failed to provide victims with their rights, victims who are considering filing a complaint are directed to first contact the local office where the alleged violation occurred, and to file their complaints with that office. All of the U.S. Attorneys' Offices and Department components have chosen Victims' Rights Points of Contact (POCs) to review and investigate victim complaints. Most are senior supervisory personnel with substantial experience in federal criminal prosecution and victims' rights. The VRO has issued internal guidance to the POCs that addresses the requirements of the program and their responsibilities, and has developed a training video. Both before and after complaints are filed, the POCs are responsible for speaking with the victims about the victims' concerns that the office has not discharged its responsibilities. The POCs will conduct the initial investigations of all crime victim complaints that provide specific and credible information demonstrating that one or more of the victim's rights listed in the CVRA has been violated, and will report those results to the VRO for final determination.

The VRO will notify victims whether or not a violation of their rights has been found. If the VRO determines that an employee failed to provide a victim with one or more rights to which the victim is entitled, she will require the employee to complete a course of training on victims' rights. If the VRO determines further that the employee wantonly or willfully failed to provide the victim with one or more rights, the VRO also will recommend a range of disciplinary sanctions to the head of the office where the employee is located. The range of potential disciplinary action included informal discipline, written reprimand, suspension, demotion, and removal. The head of the office where the employee is located, or another official designated by DOJ regulations, will be the final decision-maker regarding the disciplinary sanction to be imposed. Finally, the VRO may also refer to the Department's Office of Professional Responsibility and to the Office of the Inspector General any matters that come to light in an investigation to the extent such matters fall under those offices' respective jurisdictions.

Thus far, seven complaints have been filed under the VRO program, and an additional 20 inquiries (by e-mail and/or telephone) have been directed to the VRO. The complaints filed have not qualified for consideration in the program for a variety of reasons, including: (1) the complaint was filed by defendants; (2) the complaint was filed against local, not federal law enforcement officials; (3) the complaint was filed by individuals who were unable to establish they were "victims" in a federal case; or (4) the alleged misconduct occurred prior to the enactment of the CVRA. The vast majority of inquiries about the program have been made by individuals seeking guidance on obtaining victims'

services from state or federal authorities. Even though the program is not designed for the provision of crime victims' services, the VRO has made referrals to appropriate crime victim offices. Some of the inquiries were resolved by referrals to POCs who were able to follow up with these individuals.

Question 3. Our witnesses repeatedly urged Congress to fully fund the authorized amounts under the CVRA. Last year, the Senate Appropriations Committee criticized the Department for its funding requests, and, ultimately, authorized $1.974 million for programs to support crime victims under the CVRA. This year, the Department requested $9.96 million for Justice for All implementation with $4.96 million going to notification systems and $5 million going to provide legal counsel and support systems for victims. Assuming that Congress appropriates these monies as requested, how does the Department plan on utilizing the funds? Finally, what is the status of the $1.974 million in grants that were appropriated for this fiscal year?

The Department's FY 2006 appropriations designated the National Crime Victim Law Institute (NCVLI) as the recipient of the $1.974 million in CVRA grant funds. This funding will allow NCVLI to enhance the services of the federal crime victim legal clinic in Arizona and establish new clinics in Maryland and South Carolina. The three clinics will provide legal counsel and support services for victims in federal criminal cases. Funds will also support CVRA training and technical assistance for criminal justice professionals, the production of legal briefs on federal victims' rights, and coordination of services to federal crime victims. A portion of the funds may also be used for program evaluation.

On April 27, 2006, NCVLI submitted the grant application, and the grant was awarded on September 15, 2006.

Of the $9.96 million the Department requested for FY 2007, $5 million would be used to build on the NCVLI's work from FY 2006. The funds would be used to support the clinics in Arizona, Maryland, and South Carolina, and to establish at least two additional federal legal clinics. The Department's Office for Victims of Crime will work closely with NCVLI to identify sites for the new clinics.

The remaining $4.96 million would be used to enhance the federal victim notification system to meet the significantly increasing demand. The Department is implementing the CVRA and the Attorney General Guidelines for Victim and Witness Assistance requirements that victims receive timely notifications of any public court proceeding or any parole proceeding. Successful efforts by DOJ components to meet these requirements have substantially increased the number of notifications delivered. Victim notifications sent by DOJ more than doubled in the first year after the CVRA passed -- from 2.7 million in FY 2004 to 5.7 million in FY 2005. In the first half of FY 2006, 3.9 million notices have already been sent.

In addition, an Attorney General directive requires that the entire Department begin using EOUSA's victim notification system. The requested funds would help the Department meet the steadily increasing demands on the system and ensure that all its components are able to use the system successfully, particularly for cases with large numbers of victims.

Question 4. What steps, if any, is the Department taking to integrate its computer system with those at the courts to help facilitate notification to victims of hearings?

Victim notification has taken on new importance since passage of the CVRA. Victims are entitled to "reasonable, accurate, and timely notice" of every public court proceeding involving the crime. 18 U.S.C. § 3771(a)(2). The number of notifications provided to victims doubled in the year after the CVRA passed, and are on track to triple this year. The Department recognizes the immense burden placed upon those providing victim notifications due to these increases, and is attempting to find ways to streamline and expedite the notification process. One possible way to do this is by linking the VNS directly with the courts' Electronic Case Filing (ECF) system.

Currently, to provide a notice to a victim, the following actions typically must occur:

1. The court sets the hearing date.
2. The courtroom deputy enters the hearing into the court's ECF.
3. ECF generates an electronic notice to the Assistant U.S. Attorney (AUSA) and defense attorney identified on the court's docket.
4. The AUSA provides the electronic notice to a docket clerk in his or her office.
5. The U.S. Attorney's docket clerk enters the notice into the office's case tracking system.
6. EOUSA's VNS pulls information from the case tracking system overnight and generates a proposed victim notification.
7. The Victim Witness Coordinator at the U.S. Attorney's Office reviews the proposed notification the next morning, verifies its accuracy, and clears it for notification, either by printing and mailing a letter or generating an electronic notice.

This process can take considerable time, and contains multiple points at which human error can forestall the process. If notices could instead go directly from ECF to the VNS, crucial time could be saved, and the potential for human error could be reduced.

In August 2005, representatives from EOUSA met with representatives from the Administrative Office of the U.S. Courts (AOUSC) regarding the feasibility of establishing a data exchange protocol between the VNS and ECF. At that time, AOUSC indicated that any such link would be too administratively difficult to implement, particularly without any direct statutory mandate. Nonetheless, AOUSC invited a formal written proposal specifying the details of such a data exchange and identifying the statutory basis, if any, for proceeding with such a project. Following the meeting with AOUSC, and in connection with developing such a proposal, EOUSA next began working at the local level with a United States Attorney's Office and a local District

Court to determine what administrative and technical difficulties might be encountered in any VNS/ECF data exchange of victim-related information. Early signs showed support for the concept and a desire to work together on the part of both the court and the prosecutors, but difficulty in accomplishing the project without support at the headquarters level.

EOUSA and AOUSC formed a working group in March 2006 to explore in more detail the technical aspects of such a data exchange. Early indicators from the working group are that a link would not be as difficult as initially expected. At the Judicial Conference's annual meeting in September, the Conference agreed to support the proposed link, on the condition that EOUSA bear the cost of the data transfer and system conversion, and that participation be optional for each judicial district. EOUSA has begun implementing the technical aspects of the conversion, which require software changes to its case tracking systems, as well as to the VNS and ECF. This project will be time-consuming, but in those judicial districts that participate, the data interchange will greatly benefit victims and those who assist them through a faster, more accurate, and streamlined notification process.

Question 5. The CVRA was intended to augment and not supplant other rights afforded to victims in the United States Code. With that in mind, what is the Department's position with respect to victims' rights during the investigation of the crime? Specifically, what steps does the Department take to notify victims of the status of an investigation, the arrest of a suspect, or the filing of charges against a suspect as outlined in 42 U.S.C. § 10607(c)(3)?

The Department is committed to ensuring that victims receive the rights and services to which they are entitled at every step of the criminal justice process. During the investigative stage, the Department complies with the mandatory requirements in 42 U.S.C. §10607 by ensuring that victims are identified and provided with requisite information at the earliest possible time, unless a brief delay is necessary to safeguard a sensitive investigation. Services at the investigative stage may include emergency assistance, crisis intervention, transportation to critical appointments, employer and creditor intervention, return of personal property, and referrals. Moreover, substantial efforts are made to notify victims of an arrest and bond hearing in a timely manner. In addition, the U.S. Attorney's Office or Department component prosecuting the case notifies victims of the filing of charges through the VNS. That notice includes notification of the victims' rights under the CVRA.

Question 6. What steps is the Department taking to notify crime victims of their rights?

The CVRA requires Department employees to make their best efforts to see that victims are notified of their rights. 18 U.S.C. § 3771(c)(1). Beginning in December 2004, EOUSA modified the VNS to provide the notice of rights under the CVRA in all new cases. For pre-existing cases, the VNS user is prompted to include the rights notification in the next notice provided to the victim. The rights notification is also contained in the

VNS website (the Victim Internet System), as well as on the websites of many Department offices and components. In addition, the Department distributes brochures containing the rights notification, and victims may be notified of their rights in discussions with Department employees.

Question 7. What steps is the Department taking to educate prosecutors and other officials of crime victims' rights to fully implement the CVRA?

Soon after passage of the CVRA, the Department took steps to ensure that those who would be responsible for its implementation were aware of the protections it afforded to victims. In November 2004, the Deputy Attorney General distributed Department-wide a memorandum containing preliminary guidance on the CVRA. In December 2004, a presentation on the Act was aired on the Justice Television Network (JTN), which is broadcast to U.S. Attorneys' Offices nationwide. In January 2005, EOUSA held training on the CVRA. Organized as a "train the trainers" conference, attendees (including one victim witness coordinator from each U.S. Attorney's Office as well as representatives from the FBI, ATF, DEA, the Department's Criminal and Civil Rights Divisions, the U.S. Postal Inspection Service, and Immigration and Customs Enforcement) were given guidance to use to train personnel in their respective home offices. Those home office trainings have been taking place across the country since then. In February 2005, another JTN presentation on the CVRA was aired, this time containing an ethics section and a live question-and-answer portion.

It was also important to disseminate information on the CVRA to the Department's highest levels of management, to ensure that office policies were crafted to ensure compliance with the Act. For that reason, training on the CVRA was provided at the 2005 U.S. Attorneys' Conference, as well to the U.S. Attorneys' Offices' Criminal Chiefs, Civil Chiefs, and Appellate Chiefs Working Groups.

In May 2005, the revised Attorney General Guidelines for Victim and Witness Assistance were issued, including the new protections set forth in the CVRA, as well as new and specific guidance on assisting child victims and victims of terrorist attacks, human trafficking, identity theft, and domestic violence. EOUSA conducted four trainings on the revised Attorney General Guidelines in the summer of 2005. Participants were the victim witness staff and one attorney from each U.S. Attorney's Office, including many First Assistant United States Attorneys and Criminal Chiefs. In addition, attorneys and victim witness personnel from the Criminal, Civil, Antitrust, and Civil Rights Divisions of the Department, attended as well as representatives from the FBI, ATF, DEA, the U.S. Postal Inspection Service, and the Federal Bureau of Prisons. In all, a total of approximately 500 Department personnel attended these trainings.

In addition, since April 2005, training on the CVRA and the Attorney General Guidelines has been incorporated into training of all new Assistant United States Attorneys. It also has been incorporated into EOUSA's training on Sexual Assault, Health Care Fraud, and other subject-specific areas.

Also in April 2006, a 30-minute training video on the Attorney General Guidelines was released. Copies were sent to each United States Attorney's Office, the Criminal and Civil Rights Divisions of the Department, FBI, ATF, DEA, the U.S. Marshals Service, the U.S. Postal Inspection Service, Immigration and Customs Enforcement, the Bureau of Indian Affairs, and the Federal Bureau of Prisons.

Question 8. What suggestions, if any, does the Department have for improving the CVRA?

The Department would suggest only a few minor modifications to guarantee that the criminal justice system continues to run smoothly while affording victims the rights they deserve.

(1) **Cases in the District of Columbia Superior Court**

The CVRA was intended to apply to actions prosecuted in the District of Columbia Superior Court, which is the trial court for the District of Columbia, and the Department provides victims in such cases with the rights within its ability to provide. To ensure that victims in those cases are provided all of the rights under the CVRA, however, it may be necessary to modify the language of the statute to some extent. For example, victims are granted "[t]he right to be reasonably heard at any public proceeding *in the district court* involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4) (emphasis added). Other portions of the statute refer to "court of appeals" and the "Federal Rules of Appellate Procedure." 18 U.S.C. § 3771 (d)(3). However, rulings of the D.C. Superior Court are reviewed by the District of Columbia Court of Appeals, not the federal appellate court, as suggested by the current language of the statute. Victims in D.C. Superior Court cases would benefit from a clarification regarding application of these provisions by an amendment to the definitions in 18 U.S.C. § 3771(e) that included the following: "For cases prosecuted by the United States in the Superior Court of the District of Columbia, the terms 'court' and 'district court' mean the Superior Court of the District of Columbia and the term 'court of appeals' means the District of Columbia Court of Appeals for purposes of this chapter."

(2) **Cooperator Pleas**

The CVRA gives crime victims the right to "reasonable, accurate, and timely notice of," and the right not to be excluded from, all public court proceedings involving the crime. *See generally* 18 U.S.C. § 3771(a). Further, the CVRA gives crime victims the right to be reasonably heard at any public proceeding in the district court involving a plea. 18 U.S.C. § 3771(a)(4). Thus, in the typical case, the Department provides victims with prior notice of any scheduled plea hearing and also informs victims of their right to be heard at the proceeding. An issue arises, though, when the defendant who is entering a guilty plea is doing so as part of an agreement to cooperate with the Government. Entering into a plea can put the cooperating defendant in grave danger from the other defendants in the case, and from other people in jail or the community. Informing the victim about the plea may place the cooperator in more danger because the victim may

exercise his or her right to publicize the information, or may make the information known, even inadvertently, to others who would seek to do the cooperator harm. Providing such notice also can create a severe hindrance to law enforcement efforts by jeopardizing an ongoing investigation.

For example, in gang prosecutions, victims of shootings or murders are many times gang members themselves. Telling a gang member "victim" that a member of an opposing gang is entering a guilty plea and agreeing to cooperate can often lead to the victim informing members of the cooperator's gang about the cooperation. Gang members frequently view the Government as a mutual enemy and are willing to join forces to defeat the Government's efforts. In addition to seriously curtailing investigation of the crime, cooperating gang members are at a high risk for intimidation, threats, and assaults. In a recent prosecution of a large drug gang for RICO violations including 31 homicides, cooperating gang members were threatened and shot after entering cooperation agreements and plea bargains with the Government. In that case, one cooperator was shot and paralyzed after pleading guilty and being released to make undercover drug buys for the Government, while another cooperator was stabbed in prison after he pled guilty and agreed to cooperate with the Government. Both assaults were in retaliation for the cooperation and were an attempt to silence the cooperators.

Under the CVRA, victims' rights to notification, not to be excluded, and to be heard, apply only at "public" court proceedings. *See* 18 U.S.C. § 3771(a). Accordingly, one suggested approach to preserving the safety of a pleading cooperating defendant and protecting ongoing investigations is to ask the court to seal the plea proceeding. In that situation the plea hearing would not be a "public" proceeding and thus the CVRA would not require notification to the victim about the proceeding. However, such an option would not appear practicable. Department policy, which is based on a strong presumption against closing proceedings, requires express authorization of the Deputy Attorney General before a prosecutor may seek or consent to closure of criminal proceedings. *See* United States Attorney's Manual § 9-5.150. Moreover, federal judges are frequently reluctant to seal proceedings *sua sponte*, and generally have been overruled by the appellate courts in cases where they have not conducted proceedings in open court. *See, e.g., United States v. Alcantara*, 396 F.3d 189 (2d Cir. 2005) (vacating and remanding plea and sentencing proceedings conducted in Judge's robing room based on First Amendment concerns).

The CVRA does recognize the existence of some safety issues involved in notification, stating that "[n]otice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person." 18 U.S.C. § 3771(c)(3). Since pleas, sentences, and other types of proceedings also may raise broader safety and law enforcement concerns, the notice of release exception is too narrowly drawn to achieve its intended effect. The ability of the Department to protect cooperators and others whose safety is threatened, as well as to ensure investigative efforts are not hindered, could be enhanced if the words "of release" were stricken and the words "or compromise an ongoing investigation" were added to the end of subsection (c)(3).

Question 9. To date, the National Institute of Justice has issued a grant of $2.235 million to the University of North Texas for DNA testing of unidentified human remains. How many positive identifications of remains have been made under this program?

The National Institute of Justice (NIJ) and the University of North Texas are working with medical examiners, coroners, and law enforcement agencies throughout the country to identify and collect unidentified human remains for testing. The project team is working to gather DNA samples of family members of missing persons. All of these DNA profiles will be loaded into the FBI's Missing Persons DNA index in the hope that matches can be made and cases solved.

As of July 2006, 55 positive identifications have been made. Five of those cases represent "cold hits" in which the identifications would never have been possible without the DNA analysis and the use of the FBI's Missing Persons DNA index.

Question 10. The NIJ has given a grant of $415,493 to the University of North Texas to create a sample collection kit for unidentified remains and relatives of missing persons. How many of these kits have been distributed? How many of these kits have been used?

NIJ awarded funding to the University of North Texas to develop two standardized sample collection kits. One kit provides a safe and effective means for obtaining oral DNA samples from family members. The number of family reference sample kits distributed is over 4,000. To date, 1,600 family reference samples and 80 direct reference samples (additional materials from the missing person) have been received.

A second kit has been developed for the collection, transportation, and storage of unidentified human remains samples. To date, over 500 unidentified human remains kits have been distributed. 680 sets of unidentified human remains will be processed with funds from NIJ. These include the 500 sets of unidentified remains collected with NIJ-funded kits as well as 180 sets of remains collected using kits developed with funds from the State of Texas. The University of North Texas has received unidentified remains from 144 different medical examiners, coroners, or law enforcement agencies.

11. When can Congress expect to receive the inventory of unidentified remains that is being conducted by the Bureau of Justice Statistics?

The Bureau of Justice Statistics (BJS) expects to release findings from its Census of Medical Examiners and Coroners' Offices in late 2006. These findings will include the total number of cases of unidentified human decedents presently on record with all medical examiner and coroner offices in the Nation.

RESPONSE FROM JAMES C. DUFF, SECRETARY, JUDICIAL CONFERENCE OF THE UNITED STATES, TO WRITTEN QUESTIONS FROM CHAIRMAN CHABOT

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

July 28, 2006

Honorable Steve Chabot
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
H2-362 Ford House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter concerning the June 21, 2006, oversight hearing on the implementation of crime victims' rights under the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CVRA) by the House Subcommittee on the Constitution of the Committee on the Judiciary.

In your letter, you asked six specific questions. Below, I have provided answers to each of these questions.

1. **Aside from the Ninth Circuit, are there any other federal courts that have implemented or are contemplating rules changes to fully implement the CVRA?**

The CVRA is self-executing and no changes to circuit court local rules are required to implement it fully. However, the Ninth Circuit and at least two other courts of appeals have local procedures to address the very short time deadlines imposed by the law. The Third Circuit has issued a standing order regarding "Petitions for Writs of Mandamus Pursuant to 18 U.S.C. § 3771(d)(3), Crime Victims' Rights Act." The Fourth Circuit has adopted a new Local Rule 21(d), "Petitions for Writ of Mandamus Pursuant to 18 U.S.C. § 3771, Crime Victims' Rights." The Third Circuit standing order states:

> A petition for writ of mandamus filed pursuant to 18 U.S.C. § 3771(d)(3), the Crime Victims' Rights Act, shall bear the caption "PETITION FOR WRIT OF MANDAMUS PURSUANT TO 18 U.S.C. § 3771(d)(3), CRIME VICTIMS'

> RIGHTS ACT." Before filing such a petition, the petitioner's counsel, or the petitioner if appearing pro se, must notify the clerk's office of the Court of Appeals that such a petition will be filed, and must make arrangements for filing and immediate service of the petition on this court and the relevant parties. Such notification must be by telephone (215-597-2995). The clerk will notify the government when a petition is received. The government shall file a response to the petition within twenty-four hours of notification by the clerk unless the clerk directs otherwise. The government is responsible for notifying additional victims of the proceedings. Any additional victims wishing to join in the action, must file their petitions within twenty-four hours of case opening.
>
> A failure to notify this court ahead of time that such a filing is being made will constitute consent to the five-day continuance permitted in 18 U.S.C. § 3771(d)(3) and may be construed as a waiver of the time limits prescribed by the statute.

Fourth Circuit Local Rule 21(d) states:

> A petition for writ of mandamus asserting the rights of a crime victim pursuant to 18 U.S.C. § 3771(d)(3) shall bear the caption "PETITION FOR WRIT OF MANDAMUS PURSUANT TO 18 U.S.C. § 3771, CRIME VICTIMS' RIGHTS." Before filing such a petition, the petitioner must notify the Court of Appeals that such a petition will be filed and must arrange for immediate service of the petition on the relevant parties. Such notification must be by telephone call to the Office of the Clerk during normal office hours (804-916-2700).
>
> A failure to comply with these requirements will adversely affect the Court's ability to decide the petition within 72 hours as required by 18 U.S.C. § 3771(d)(3).

The Administrative Office of the United States Courts (AO) is aware of other circuits that have considered enacting local rules, but they have concluded that their existing procedures are sufficient to meet the requirements of the CVRA. As for the district courts, a review of the local rules posted on the individual court websites does not show that any courts have found it necessary to adopt local rules.

2. **Have any of the rights in 18 U.S.C. § 3771 proven difficult to enforce?**

At this time, the AO and the Judicial Conference have no information to indicate that the rights afforded to crime victims under the CVRA have in general proved difficult to enforce.

On October 27, 2005, the AO transmitted its first annual report to Congress on "the number of times that a right established in Chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to Chapter 237 of title 18, and the result reached." Justice for All Act of 2004, § 104(a), 18 U.S.C. § 3771 note (Supp. I 2005). The report indicated only a very small number of instances in which a court found it necessary to deny rights asserted by a victim.

3. **What changes, if any, is the Judicial Conference considering to the Federal Rules of Criminal Procedure to promote compliance with the CVRA? Has the Judicial Conference considered the article by Judge Paul Cassell in the BYU Law Review[1] in which he argues that the Federal Rules of Criminal Procedure should be rewritten to reflect not just the letter of the CVRA, but also the spirit of that law?**

At its January 6-7, 2006 meeting, the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee) approved the recommendation of the Advisory Committee on Criminal Rules to publish for public comment proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, and new Rule 60 to implement the CVRA, codified at 18 U.S.C. § 3771. The proposed amendments will be published on August 15, 2006, for a six-month public comment period expiring February 15, 2007. In addition to receiving written comments, the Committee will schedule public hearings for anyone wishing to testify on the proposals.

The proposed amendment to Rule 1 would implement § 3771(e), incorporating the definition of "victim" into the rules. The amendment to Rule 12.1 implements § 3771(a)(1) and (8) to require a defendant raising an alibi defense to establish a need for a victim's address and telephone number before the court orders its production. Rule 17 would be amended to implement § 3771(a)(8) to require a court order before the defendant may subpoena a third party to produce personal or confidential information about the victim. Rule 18 would be amended to implement § 3771(8) to require a court to consider the convenience of a victim – as well as the convenience of the defendant and witness – in setting the place for trial within a district.

Several amendments to Rule 32 are proposed to implement various CVRA provisions. Under the amendments, the presentence report must include information pertinent to restitution whenever the law permits the court to order restitution. The broader definition of "victim" is used throughout the amended rule. The right of a victim "to be reasonably heard" in a judicial sentencing proceeding is explicitly asserted.

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[1] Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. Rev. 835 (2005).

Proposed new Rule 60 implements several provisions of CVRA. Under the new rule, the government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public proceeding involving the crime. The new rule sets out a victim's right to attend a public court proceeding involving the crime and the victim's right to be reasonably heard at a proceeding involving the release, plea, or sentencing involving the crime. It contains provisions governing the enforcement of victims' rights, including who may assert these rights and where they may be asserted. The new rule also incorporates the statutory provisions limiting relief.

The advisory committee will consider any comments and testimony submitted on the proposals at its spring 2007 meeting. In accordance with the Rules Enabling Act rulemaking process (28 U.S.C. §§ 2071-2077), the proposals are scheduled to be reviewed by the Standing Committee in June 2007, the Judicial Conference in September 2007, and, if approved, transmitted to the Supreme Court in October 2007 for its consideration. The Court would have until May 1, 2008, to prescribe the rules, which would then take effect on December 1, 2008, unless Congress takes action otherwise.

On March 2, 2005, Judge Paul Cassell sent a lengthy memorandum to the advisory committee proposing 25 changes throughout the rules (including two new rules) in response to the CVRA. (The memorandum became the basis for Judge Cassell's law review article.) The advisory committee considered the memorandum at its April 4-5, 2005, meeting and formed a subcommittee to prepare recommendations implementing the CVRA. The advisory committee considered the subcommittee's recommendations at its October 24-25, 2005, meeting.

The CVRA enumerates a number of specific rights. It also contains general language stating that victims have a "right to be treated with fairness." The memorandum advocated using this general right to fairness as a springboard for a variety of victims' rights not otherwise provided for in the CVRA. The advisory committee concluded that the Federal Rules of Criminal Procedure should implement, but not go beyond, the specific statutory provisions that Congress enacted.

The CVRA reflects a deliberate congressional balance among the rights of a defendant, the discretion afforded to the prosecution, and the new rights afforded to a victim. In light of this careful statutory balance, the committee believed that it would be inappropriate to create new victims' rights not based on the express statutory language. Congress neither directed nor requested the rules committee to rewrite, by adding to, this recently enacted statute. Avoiding rulemaking that might be viewed as circumventing Congress's decisionmaking on the precise questions presented is consistent with comity and with the limits of the Rules Enabling Act. Instead, the advisory committee has recommended proposed amendments that faithfully and effectively implement the rights Congress did afford.

The CVRA is a complex piece of legislation. The advisory committee anticipates that as the statute is applied to the myriad cases and situations that come before the courts, issues and answers will emerge. It may then be appropriate to develop additional rules based on this experience and consensus. The advisory committee, fully aware of the importance of the statute and Congress's intent that victims receive fair treatment, will carefully monitor developments in the field, as courts implement the new statute. It is premature, however, to attempt to develop new rules to further "reflect . . . the spirit of that law" without this experience and guidance.

The advisory committee's decision to rely on case-law development of the general provisions in CVRA is consistent with longstanding rulemaking principles. Ordinarily, statutory provisions are not incorporated into the rules. A statute stands on its own and is fully effective. Duplicating statutory provisions in the rules often invites confusion. Unless the rule is a mirror image of the statute, any difference between the two can be seized upon to demonstrate a difference in meaning, resulting in unwanted litigation. Yet the structure of the rules, and the style conventions that are used, often require language different from the statutory language. Moreover, problems can arise during the time when the rules and the statute diverge because of delays incurred in amending the rules to parallel a revision of the statute enacted by Congress in the future.

Finally, under the Rules Enabling Act, a rule may not "abridge, enlarge or modify any substantive right." Drafting rules that enlarge or modify substantive rights is outside the rulemakers' province. The rules committees go to great lengths to ensure that proposed rules are consistent with the Rules Enabling Act restrictions, recognizing that the rules supersede a conflicting statute. Amending the Federal Rules of Criminal Procedure to extend victims' rights to proceedings not provided for in the CVRA presses upon the limits of the Rules Enabling Act. The rules committee is unable to propose rules to extend or add to the substantive rights created in the CVRA, absent direction from Congress to do so and in advance of any case law development.

4. **One of our witnesses indicated that some judges may have a negative view of the CVRA. For example, Judge Acker of the Northern District of Alabama wrote that the CVRA was a "new, mushy, 'feel good' statute with [a] grand title."[2] What programs does the Administrative Office have in place to educate judges regarding victims' rights and, specifically, the CVRA?**

The AO has educated personnel in the courts about their obligations to report cases in which crime victims attempt to assert their rights under the CVRA and are denied. In a memorandum dated December 15, 2004, then AO Director Mecham notified all district and appellate judges, district and circuit executives, and district and appellate clerks of their reporting

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[2] *United States v. Holland*, 380 F. Supp.2d 1264, 1279 (N.D. Ala. 2005).

requirements under the CVRA. Another memorandum about this topic was transmitted on July 15, 2005, and a third was transmitted on February 23, 2006.

The AO has also ensured that CVRA reporting obligations are included as part of the training and orientation provided for district and appellate clerks, and emphasized in the orientation provided to new chief judges. It is believed that these educational efforts are effective. The AO has been notified that CVRA rights have been discussed at some length by circuit executives throughout the country.

The Federal Judicial Center, the research and primary education agency within the federal judicial system, has posted a comprehensive review of the CVRA on the judiciary's J-Net intranet. This review provides the reader with an overview of the Act, identifies and explains the affected sections of the *Benchbook for U.S. District Court Judges*, describes other issues that may arise under the CVRA, summarizes cases that have involved the CVRA, and provides the complete text of 18 U.S.C. § 3771.

5. **What steps, if any, are courts taking to integrate their computer systems with those at Department of Justice to help facilitate notification to victims of hearings?**

Under the CVRA, all federal crime victims have the right to "reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime[.]" 18 U.S.C. § 3771(a)(2). Effective October 30, 2004, the statute requires DOJ and other federal law enforcement agencies to "make their best efforts to see that crime victims are notified of, and accorded" all their CVRA rights, including the right to notice of relevant hearings. 18 U.S.C. § 3771(c)(1). The Act requires courts to "ensure that the crime victim is afforded the[se] rights[.]" *Id.* at § 3771(b).

The Department of Justice's Victim Notification System (VNS) currently notifies victims by mail, e-mail, facsimile, or telephone, or via its website, www.notify.usdoj.gov/index.jsp. The system uses hearing information manually entered by U.S. Attorney's Offices across the country into DOJ's central Legal Information On-Line System (LIONS) case tracking system. With the passage of the CVRA, victims in every criminal case must be notified of every public hearing. As of December 2005, the VNS included more than a million victim names.

On August 11, 2005, representatives from DOJ's Executive Office for United States Attorneys (which operates the VNS) met with AO staff to request the judiciary's assistance in carrying out the statute's new victim notification requirements. AO staff suggested that it could be possible for the courts to send VNS a nightly electronic feed of all relevant case data from its

electronic docket system that crime victims would require in order to attend a hearing. In March 2006, AO and DOJ staff met and discussed the data feed proposal, identifying the data and data format.

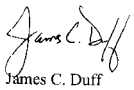
Three committees of the Judicial Conference have endorsed different aspects of the collaboration between the AO and DOJ. First, as a matter of policy, the Committee on Criminal Law endorsed the data feed as a positive step to provide information to crime victims. Second, the Committee on Information Technology found no concerns about the security of the transfer. Third, the Committee on Court Administration and Case Management has considered DOJ's request to waive the Public Access to Court Electronic Records (PACER) fees typically associated with government access to CM/ECF. JCUS-MAR 93, pp. 11-12. Fee exemption is typically limited to specific, narrow categories. JCUS-SEP 03, p. 14. The Committee on Court Administration and Case Management is currently making its recommendation to the Judicial Conference for consideration at the latter's September 2006 Session.

6. **What suggestions, if any, does the Judicial Conference have for improving the CVRA?**

The Judicial Conference, the judiciary's policy-making body, has not considered changes to the CVRA. As described above, the committees of the Conference are, on an ongoing basis, reviewing the ways courts are faithfully implementing the law.

I hope that the preceding information will be useful. If you have any additional questions or if you should require any additional information, please do not hesitate to contact Cordia A. Strom, Assistant Director, Office of Legislative Affairs at (202) 502-1700.

Sincerely,



James C. Duff
Secretary

cc: Honorable Jerrold Nadler
Ranking Member, Subcommittee
on the Constitution

WRITTEN STATEMENT OF THE HONORABLE COLLENE THOMPSON CAMPBELL

Chairman Chabot, Ranking Member Nadler and Committee Members:

As the first victim of crime to be allowed to deliver a statement in a federal court during sentencing of a convicted felon, I thank the legislators who worked to bring forth this meaningful action, paving the way for better equality for the rights of victims in their pursuit of fairness and balanced justice.

Our family is one of the hardest hit victims of crime in the nation. We do not want to be perceived as whimpering or looking for sympathy. Our desire is to bring to you just a small sample of the "real world" of a crime victim, furnishing you with accurate and experienced information acquired during a quarter of a century of continually being treated unjustly as compared to the accused criminals who have destroyed the lives of good hard working citizens.

You and the members of the House and Senate are to be commended for passing the federal Crime Victims' Rights Act, signed by President Bush into law October 30, 2004. We were honored that the name of our murdered son, Scott Campbell, was selected, with others, to have the Act named for him.

It was extraordinary how the timing of our statement fell into place, as it wasn't planned or anticipated. But, apparently it was in God's plan that we, Scott's mother and father, were to be the first to stand before a federal judge to make a statement in the sentencing of the criminal.

The question may be asked, "Did our statement during sentencing change the fact that the felon had stolen our retirement, our grandchildren's education funds, the reward fund for information leading to the gunman in the murders of my brother and sister-in-law, Mickey and Trudy Thompson, or the total loss of our deceased seventeen year-old grandson, Brian Scott's Memorial Fund, nor the fact that 1602 other folks, mostly retires lost their life savings?" The answer is "no". Nothing changed financially for any of the victims because of our sentencing statement. However, did it give the sentencing judge a better representation of the impact caused by the fraud on the victims? Absolutely, yes! We were able to offer the judge, in front of the perpetrator, a realistic and true picture of his twenty-year crime spree and the damage caused by this huge scam that hurt so many.

Honest law-abiding citizens are grateful for the federal "Crime Victims' Rights Act" that could have meaningful influence on the one-percent of crimes committed in our country, which fall under the federal jurisdiction. However, we also need to be deeply concerned about justice for the *other ninety-nine percent* of crimes tried in state courts and the resulting victims who do not share equal rights and where, in fact, in many cases the victims have no rights.

As a family that has suffered the sad experience of horrible crimes at both the federal and state level, we remain deeply concerned regarding the injustice and devastation that crime victims are forced to endure at the state level. The realization that about sixteen *thousand* murders are committed annually within the jurisdiction of state government should certainly bring into sharp focus the horrible reality that accused criminals have twenty-three rights in our U. S. Constitution and crime victims have not one single right. At the time our U. S. Constitution was drafted, it made sense to make certain the accused had rights. Because, in those times, victims represented themselves: they were notified, present in the courtroom and were allowed to be heard, among other rights. It is a much different time today and it is far-past time to consider the victim's lack of rights. (Note: Referring to sixteen thousand homicides yearly does not reflect on the millions of other violent crimes that creates more victims.)

Our family, along with millions of others, have been deeply hurt and impacted by the disproportionate justice system that gives, not just "more", but all rights to an evil killer and none to their victim and their families.

We, the mother and father of a murdered son, were excluded from the courtroom during all three trials of his murderers, while the killers' family sat inside and were present during all proceedings. The defense used their usual scheme that we were to be a witness. Naturally, we were the last people the defense truly wanted on the witness stand. However, as is customary all across our nation, the defense was able to pull off another fraud against the victim's next of kin.

Following the first conviction of one of our Son's killers, we were not notified of an appellant hearing, and therefore, we did not know the case had been overturned until we were informed by the media that the murderer of our Son, who was charged with first degree murder with special circumstances, had been released back into society in opposition to the state constitution.

In addition, it has been more than eighteen years since my only sibling and his wife, Trudy and Mickey Thompson, were murdered and we have yet to get to trial. We have been in court sixty-four times and still do not have a trial date, because

we, the victim, do not have a right for a speedy trial, only the accused has that right. And, again, I'm told the defense has me on their witness list so they can exclude me from the trial, and therefore, I would be unable to inform the prosecutor if lies are being told under oath.

In our family's world, our only Son was brutally murdered, strangled and thrown into the Pacific Ocean and we never found his body. Our brother and sister-in-law were shot to death in their driveway as they were leaving home to go to work. We have had our retirement and lifetime savings stolen. We have not given up on the hope of justice as we continue to work with law enforcement, prosecutors, legislators and victims to help balance the scales of justice. We have accepted key roles in local, state and federal government. Fortunately, many are trying to improve our out-of-balance justice system, but more legislators must help and not permit outside influence, such as pressure by defense attorneys to manipulate and influence their thinking and their votes.

If you look at the statue of Lady Justice holding the scales of justice, you will note her eyes are covered. I would guess that even she does not want to witness the inequities now taking place in our justice system. We tie the hands of our police and continue to give evil criminals all the rights as they persist to demean our law enforcement protectors.

We have made a notable, but small start for victims at the federal level, however, it is critical for our legislators to strongly pursue adding a Victims Rights Amendment to our U.S. Constitution. Only, "one percent" fairness to victims of crime is not adequate or acceptable for the citizens of this great nation.

For this record, I would call your attention to a DVD nearly completed, designed and intended to help train victims to understand and better work with law enforcement to help solve cases. This information is being supplied to help fill the huge void, as unlike the accused, there is no one to direct a crime victim how best to proceed in being helpful and not damaging the case.

The victims' information DVD is being developed by the California Peace Officer Standards and Training (POST), where I happen to be completing my third term as Chairman. In the two-hour presentation the film utilizes judges, a public defender, victims of violent crime and prosecutors who have volunteered their time. No person is prepared to be a victim of crime and we hope this presentation will increase understanding, decrease misconceptions and help victims to endure the horrible pain and experience with pride and courage that will help bring justice.

I respectfully request, that just for a moment as you read this statement that you, as an American, try to put yourself in the undesirable position of being forced to undergo the horrible tragedy of your closest loved one being murdered. I guarantee that if you are a honorable person with loyalty and integrity that no matter the depth of your pain, your first desire is to help bring justice for the crime. However, because you would have no victim's rights, you would be excluded from contributing to bring forth justice.

On the battlefield we teach and encourage our American Servicemen to exercise courage, integrity, loyalty and to fight for what is right. Why then, do we not "permit" our crime victims to have the same right? Instead they are nearly mandated to abandon their murdered loved one. There are those of us who choose to display honor, courage and contribute to the fight for justice.

How would you feel if it was your murdered loved one? If possible, or if you were needed, wouldn't you want to be a small part of helping to bring justice for your murdered loved? We ask our legislators to help supply us the tools.

FEDERAL SENTENCING STATEMENT OF THE HONORABLE COLLENE THOMPSON CAMPBELL TO U.S. DISTRICT JUDGE CORMAC J. CARNEY DURING THE JAMES P. LEWIS SENTENCING

Your Honor:

As all victims can confirm, it is tremendously difficult to stand before the court and publicly speak about the financial and emotional pain that James P. Lewis has caused. It is embarrassing and agonizing and no matter what we now do, or say, it won't change the devastation that this individual has perpetrated. However, we feel it is our duty, as good citizens to furnish you with a tiny amount of information that may assist you in your very important and meaningful sentencing decision. Today, the victims are trying to do the honorable thing by giving you the human and painful facts that are not available elsewhere. The injured parties want to make certain that James Lewis never has the opportunity to again destroy the lives of good people.

In addition to our family, twenty-three other families who are victims of James Lewis have requested that I speak on their behalf, six are standing here with me, some are too old and too ill to make the trip. I believe I am also speaking for the 1602 other families who have been financially devastated by James Lewis.

Your Honor, thank you for letting our voices be heard. We hope and pray that information regarding some of our sad experiences and true realities will aid you in your decision.

Because of the despicable actions of this individual the majority of his victims can never recover financially, nor can we live the life that we had planned and worked our lifetime to achieve.

Lewis' victims were not stupid people. We asked questions and he responded with "carefully crafted" documents and lies for answers. We received encouraging information and very timely reports through the U. S. Mail, they too were lies and fraud generated by James Lewis. We visited his office numerous times, talked with him and his staff and believed we had asked the appropriate questions. We even asked the tough question, "What would happen to our investments in case of his untimely death", and were reassured with his answer. We searched for possible unethical behavior. Your Honor, this man is an all-time great "con-artist", there is absolutely no question regarding that issue.

Lewis has deceived, lied and intentionally swindled and defrauded countless hard working honest citizens.

Your Honor, today, we're asking that you not allow this heartless thief to also "con" you, as he has so many of us.

We request that you not reduce his sentence because he "pled guilty" and, therefore, he was able to have twelve of his fourteen felony counts dropped. Remember, his guilty plea came only after a nationwide search for him, where he was chased down and arrested as he attempted to flee the country. And, we all know Lewis was very aware that evidence had piled up against him for his many years of committing cold-blooded fraud. It is clear and unmistakable that his only remorse is the fact that he was caught and now must face incarceration for his evil acts.

Every person who makes investments understands there are risks. Risks of business failures, or a down turn in the economy. However, with James Lewis, it had *nothing* to do with business, or the economy, it had to do with his deception, lies, infidelity and his implausible betrayal of employees, family, friends and clients.

For nearly *two decades,* Lewis' crimes have been selfish, mean-spirited and calculated. He is the worst kind of criminal, he does not deserve leniency in *any* form.

Lewis' criminal acts were not just fleeting, or spur of the moment. His deceit and thievery were malicious and carefully planned on a daily basis for nearly two decades.

Your Honor, this "so called" man, who takes from children and little old ladies, has earned and certainly deserves, at the very least, the maximum prison sentence of thirty years, please don't give him less time.

He cruelly stole the money that families had saved for the education of their children, grandchildren, old age and even their own funerals.

He stole our only Granddaughter, Melissa's, wedding gift, a gift that we had been working to save for *23 years,* ever since her birth. It was saved to give a good start to Melissa and her chosen husband and it was a large down payment to purchase their first home and it was to be a Christmas surprise. The beginning of that savings was left to her by her Uncle Scott, our Son, upon his death in 1982. It is ironic that the "Scott Campbell et al Crime Victims' Rights Act" signed by the President, October 30, 2004, is the Federal Act giving victims the right to be heard at sentencing, like today. The Federal CVRA was named after Melissa's Uncle Scott, our Son. Yes, the same Scott that originated the beginning funds for Melissa's wedding gift! Obviously, that Christmas, pre-wedding gift was to have great sentiment and the announcement of their gift was already wrapped with loving words and to be a surprise and given on Christmas morning to Melissa and the man who was soon to become her husband. We were so excited but, sadly, Christmas Eve, the surprise was on us, as we read in the newspaper that, the gift which had taken "Melissa's life time" to save, had been stolen by James Lewis. Your Honor, Melissa is standing with me here today.

Lewis also squandered our grandson, Edward Mickey's educational money and Eddie is due to enter college this fall. This is Eddie's mother, Shelly and I just spoke to Eddie on the phone and he wanted you to know that his thoughts and prayers are with us here in this courtroom today. As if that wasn't enough, James Lewis ruthlessly consumed the educational funds saved for little six-year old twins, John and Jenna Graupman whose Mother and Father are both fighting cancer.

On top of all his other cruel acts, James Lewis, knowingly and callously stole the very large fund that we had offered as a reward for information leading to the ar-

rest and conviction of all those involved in the murders of my Brother and Sister-in-law, auto racing legend Mickey Thompson and his wife Trudy. Lewis knew what those funds were earmarked for, but he didn't care!

In 2001, during another tremendous heartbreaking time, we wrote a letter and also trustingly spoke with Lewis about the tragic accidental death of our 17-year old grandson, Brian Scott Campbell. (Brian's mother, Shelly, is standing here, next to me.) We remember the day well! With painful tears running down our cheeks, Gary and I explained to Lewis that we wanted to create a Brian Campbell Memorial Foundation fund "In memory of Brian" and give college scholarships to students who were doing "good things for other people", just like Brian had always done.

James Lewis knew exactly what he was doing when he latched onto that meaningful scholarship fund. Prior to our knowledge of the Lewis fraud, we had previously announced several recipients of the scholarships. Like all the other accounts, Brian's Memorial Foundation account money was gone. However, because, we had announced the scholarship recipients, we of course, still honored our commitment to give the scholarships, even though Lewis, himself, had taken the scholarship moneys.

Prior to learning of the fraud and our huge loss, we felt we were in good shape financially and we wanted to share and give to others. . . .

An example: In my honor and to surprise me, my very good husband of 55 years, Gary, volunteered to donate $140,000 that would build a stage in the City Park of San Juan Capistrano, for the entire community to enjoy. After his commitment to building a stage and before his actual donation was made, we learned of Lewis's theft of all our funds from all of our accounts. No one in town knows the problem that Lewis caused us, or that the stage money was hard for us to obtain, but unlike James Lewis, we are people of our word and the funding for the stage was made to the City and the stage was built and is being enjoyed.

Lewis' thievery forced our only daughter, Shelly, to sell her new home. Also invested with Lewis, was sizable amounts of money for retirement for our good friends Socorra Quezada and Carol Day, (both here with me today), plus, Bill Marcel, (the gentleman on my right) lost a sizeable amount of money along with seven other wonderful and loyal friends and relatives that lost their retirement savings, along with us.

Oh yes, Your Honor, we have worked extremely hard all of our lives and I believe we are very generous and giving people, and Lewis hurt our family and friends "big time."

James Lewis did not make a mistake in investing our money, he didn't invest it at all and he never intended to invest it. He just stole it. He knowingly and maliciously lied and deceived his unsuspecting victims by robbing them of their assets. Among many other disloyal acts, he squandered "our money" on buying his girlfriends multimillion dollar homes, financed by *"us"*, his victims.

From the day Gary and I were married, at only 18, we began saving to help our family and to assist others. In order to plan for the future we denied ourselves expensive clothes, vacations and fancy automobiles and we saved for the time when we could no longer work. That time has come, but along with hundreds of other retirees, Lewis stole our hard earned nest egg and our retirement fund.

Lewis didn't commit his crimes in a fit of passion, in anger or without thought. For more than nineteen years, that's more than 6,700 nights he went to sleep, scheming how he could steal money and recruit more victims with his convincing lies, all the while, knowing full well sooner or later he was going to make his victims suffer.

Well, we are suffering and yet, all those thousands of nights, James Lewis could sleep and carouse while he was sucking the life-blood from his victims. He committed these acts with full knowledge of the devastation his lies and his own selfish personal life style of luxury would cost his victims. *That, Your Honor, is an evil man.*

It is painful and I don't like standing up here whimpering, and talking about our personal life. And, pleases know, I have only slightly touched on "our real world of grief and damage" James Lewis has caused to our family and hundreds of others. Multiply the damage by his 1602 victims just like us, the damage and devastation is huge.

James Lewis is still in his mode of a full-time con artist, a swindler, a cheat and now he is lying to the court and trying to buy "time-off" from incarceration in prison by admitting guilt and showing remorse. He talks about the Bible and his closeness to God. This is the same man, that along with his other victims, he double-crossed his Mormon friends and left many without their retirement nor money for the future. He has no shame.

Your Honor, I hope the court has the courage to do what hundreds of us were unable to do. Stop James Lewis from being successful with another con job, and further exercising his proven deceit in his disgraceful attempt to shorten his prison sentence.

James Lewis has proven to be the ultimate malicious mean spirit. He has earned and deserves the maximum sentence provided by law, which is thirty years.

Your Honor, in prison, he will still have more than he left many of his victims, as he will have housing, food, attorneys and medical care, all paid for with our tax dollars.

Thank you for allowing me to be heard on behalf of those standing here with me, plus the long list of Lewis' victims. I will be happy to answer questions.

Following are Victims of James P. Lewis who asked me to speak on their behalf.

Edward Mickey Fischermann
Melissa Campbell
Shelly Campbell
Gary Campbell
Brian Scott Campbell Memorial Scholarship Foundation
Carol M. Day
Socorro Quezada
Karen Maxwell
Ron and Carol Campbell
Jena Lynn Graupman
John Edward Graupman
Peter and Sharyn Buffa
William Marcel
Rod Millen
Scott Heinila
Gayle Hickey Burke
Kendal Carre
Denise Dee Piazzo
JoAnne McCaslin
Tami Salcido
Bob Neilson
Chuck and Elsie Neilson

FILED

JUL 07 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: IOURI MIKHEL, UNITED STATES OF AMERICA, Petitioner, V. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, IOURI MIKHEL; JURLIUS KADAMOVAS; PETRO KRYLOV; NATALYA SOLOVYEVA, Real Parties in Interest.	No. 06-73376 D.C. No. CR-02-00220-DT OPINION AND ORDER

Petition for Writ of Mandamus to the United States
District Court for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Filed July 7, 2006

Before: HAWKINS, THOMAS, and SILVERMAN, Circuit Judges.

PER CURIAM:

06-73376

The United States petitions for a writ a mandamus ordering the district court to permit certain crime victims to observe in its entirety the murder trial in which they will testify, pursuant to the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771. For the reasons explained below, we grant the United States' petition in part.

Defendants are charged, in pertinent part, with kidnaping for ransom and then murdering five people who lived in the Los Angeles area. On May 16, 2006, the United States filed an unopposed motion in limine to permit the family members of the murder victims – including those who were to testify – to witness the defendants' trial in its entirety. The district court denied the motion and held that

> During the guilt or penalty phase of the trial any victim or relative of victim may observe the trial. Now, if that person is going to testify in the guilt phase of the trial, that witness will be excluded until called as a witness. After testifying, that witness may remain. During the penalty phase, the same procedure will be followed.

The court explained that its ruling served to prevent collusive witness testimony and to ensure proper courtroom decorum. The United States petitioned this court for a writ of mandamus.[1]

In recognition of the substantial deference afforded trial courts in these matters, our rules have traditionally provided that non-party witnesses cannot listen to the trial testimony of other witnesses. FED. R. EVID. 615. Rule 615, however, recognizes an exception for "a person authorized by statute to be present." *Id.* And, it turns out, Congress created just such an exception for crime victims when it enacted the CVRA and gave crime victims "[t]he right not to be excluded from any . . . public court proceeding." 18 U.S.C. § 3771(a)(3).[2] A crime victim, however, does not have an absolute right to witness a trial at the expense

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[1]Although the United States is clearly not the "victim" in this case, it is proper that the government bring this petition because § 3771 provides that "the attorney for the Government may assert the rights described in subsection (a)." 18 U.S.C. § 3771(d)(1).

[2]The definition of a "victim" under the CVRA is not limited to the person against whom a crime was actually perpetrated. Rather, the term "victim" includes any "person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e). When the victim is deceased, "the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights." *Id.* Thus, the family members of the murder victims in this case are themselves victims for purposes of § 3771.

of the defendant's rights. A district court may exclude a victim-witness from the courtroom if the court finds by "clear and convincing evidence . . . that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." *Id.* That said, even where a victim-witness may be properly excluded pursuant to § 3771(a)(3), "the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding." 18 U.S.C. § 3771(b).

In this case, the district court excluded the victim-witnesses without determining whether their testimony would be "materially altered" were they allowed to witness the entire trial. Nor does it appear that the district court considered whether there were "reasonable alternatives" that would enable the victim-witness to attend the trial pursuant to § 3771(b).

While the district court's summary exclusion of the victim-witnesses may have been proper under Rule 615 prior to the enactment of the CRVA, *see generally United States v. West*, 607 F.2d 300 (9th Cir. 1979), the CVRA abrogated Rule 615, at least with respect to crime victims. A mere *possibility* that a victim-witness may alter his or her testimony as a result of hearing others testify

is therefore insufficient to justify excluding him or her from trial.[3] Rather, a district court must find by clear and convincing evidence that it is *highly likely*, not merely *possible*, that the victim-witness will alter his or her testimony. *See United States v. Johnson*, 362 F. Supp. 2d 1043, 1056 (N.D. Iowa 2006) (permitting victim-witnesses to testify when "each of these witnesses appears likely to testify during the 'merits phase' only as to discrete factual events surrounding the disappearance of the murder victims and to identify certain clothing and other items recovered during various searches, which are not matters susceptible to 'material alteration' from hearing the testimony of other witnesses").[4]

Thus, we grant the United States' petition in part and instruct the district court to consider whether clear and convincing evidence proves that the victim-

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[3]Because there is always a *possibility* that one witness will alter his testimony based on the testimony of another, were this the standard, a district court could without exception exclude crime victims, and Congress's intent to abrogate Rule 615 with respect to crime victims would be rendered meaningless.

[4]The government argues that the testimony of the victim-witnesses it intends to call will be analogous to the testimony given by the victim-witnesses in *Johnson*. Because the district court did not consider the victim-witnesses' intended testimony and there is no evidence of the contents of that testimony in the record before us, we express no opinion as to the merits of the government's argument.

witnesses' testimony will be "materially altered" if they are allowed to attend the trial in its entirety. We decline to order the district court to allow the courtroom presence of the victim-witnesses, or to provide any other specific instructions. Rather, we simply remand the issue for reconsideration by the district court in light of this opinion and the requirements of CVRA. We do not reach the merits of any other issue.

PETITION GRANTED IN PART; REMANDED.

06-73376

COUNSEL

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