

**TESTIMONY OF SUSAN SMITH HOWLEY**

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**Before the  
Subcommittee on Crime, Terrorism, and Homeland Security  
Committee on the Judiciary  
United States House of Representatives**

**The Crime Victims' Rights Act of 2004**

**September 29, 2009**

Good afternoon, Chairman Scott, ranking member Gohmert, and members of the Subcommittee. My name is Susan Howley, and I am the public policy director for the National Center for Victims of Crime.

The National Center is a nonprofit resource and advocacy organization that will soon celebrate our 25<sup>th</sup> 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. Since our inception, the National Center has been at the forefront of the national effort to create legal rights for crime victims at the state and local levels. In recent years, we have focused on making those rights meaningful and enforceable. I appreciate the opportunity to appear before you this afternoon to address the implementation of some historic victims' rights legislation, the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act of 2004 (CVRA). We supported this Act initially and have monitored its implementation.

Five years later, we can report that the CVRA has had a greater and more far-reaching impact than expected. As you know, the basic rights contained in the CVRA were already part of the federal code. For the most part, however, these rights were found only in title 42, the Public Health and Welfare Code. The CVRA restated those rights, moved them to Title 18, the Criminal Code, and made them enforceable. Both the move to the Criminal Code and the added enforceability have raised the profile of federal crime victims' rights.

The adoption of the CVRA has fostered new respect for victims' rights through all stages of the federal criminal justice process: investigation, prosecution, and corrections. Many of our members who work with victims of federal crimes say they feel more supported in their work and that prosecutors and investigators are increasingly concerned about victims' rights compliance.

The CVRA has led to the development of case law, as described in the recent report of the Government Accountability Office (GAO).<sup>1</sup> It has prompted revisions to the Federal Rules of Criminal Procedure, and has prompted increased attention to victims' rights and interests by the U.S. Sentencing Commission.

Five years after the CVRA's adoption, it makes sense to carefully examine the implementation of this landmark law. We would like to focus our testimony today on four aspects of the legislation: the need to clarify that victims' rights attach prior to the filing of charges, the need to clarify the applicability of the law to proceedings in the District of Columbia, the need to strengthen the Department's compliance program, and the need to reauthorize and refine the grant programs.

### **Applicability of victims' rights prior to charging**

There has been some question as to whether the CVRA's provisions apply prior to the time a defendant is charged with an offense. According to the GAO report, the Department of Justice has determined that the CVRA rights do not apply unless charges are filed.<sup>2</sup> We believe this interpretation is erroneous. The act explicitly requires that those "engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights" provided in the act.<sup>3</sup> The inclusion of the detection and investigation phases clearly indicates that the law encompasses periods prior to the filing of charges.

While many of the rights listed in the CVRA pertain to court proceedings and, thus, apply after the charging of a defendant, others are not so inherently limited. For example, the victims' rights to be treated with fairness and with respect for their dignity and privacy and the right to be reasonably protected from the accused should apply throughout the criminal justice process. In certain cases, the right to confer with the prosecutor should also apply prior to the charging of a defendant. As the GAO report points out, in some federal cases plea negotiations occur prior to indictment.<sup>4</sup> If the victim is to have a meaningful right to be heard before a case is resolved, the right to confer with the prosecutor must attach in such cases prior to the charging of the defendant.

The Department of Justice is reviewing its policy on the applicability of the CVRA pre-charging in light of certain court rulings, according to the GAO report. Depending on the outcome of that review, an amendment to the law may not be necessary. However, we urge the Committee to monitor this issue and, if necessary, clarify the statutory language.

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<sup>1</sup> U.S. Government Accountability Office, "Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Will Improve Implementation of the Act," GAO-09-54 (Washington, DC: December 2008).

<sup>2</sup> *Id.* at 65.

<sup>3</sup> 18 U.S.C. 3771(b)(1)(2009).

<sup>4</sup> *Supra* note 1 at 63-68.

## **Applicability to cases tried by federal prosecutors in the District of Columbia**

We recommend that Congress clarify the internal inconsistencies within the CVRA regarding its applicability to cases tried by federal prosecutors in the District of Columbia. The Act’s definition of “victim” states that it applies to those harmed “as a result of the commission of a Federal offense or an offense in the District of Columbia.”<sup>5</sup> However, other provisions cause confusion. For example, the provision regarding motions for relief and writs of mandamus to enforce victims’ rights refers to cases in the district court and to petitions to the court of appeals.<sup>6</sup> However, many of the cases tried by federal prosecutors in the District of Columbia are brought in the D.C. Superior Court, and appealed to the D.C. Court of Appeals. Similarly, the section regarding the prosecutor’s ability to assert the rights of the victim on appeal is written in terms of the district court’s denial of a victim’s right, rather than district court or D.C. Superior Court.<sup>7</sup> We recommend Congress make the necessary technical amendments to clarify the applicability of the CVRA to cases prosecuted by the U.S. Attorney in D.C. Superior Court.

## **Promoting compliance**

One of the clearest findings from the GAO’s report is that the compliance system created by the Department of Justice is inadequate. We know from years of observations regarding victims’ rights at the state level that meaningful enforcement is the key to promoting compliance—even though sanctions are rarely ordered. The existence of a meaningful avenue for enforcement gives agencies and officials a reason to focus on crime victims’ rights in the face of many competing priorities.

The GAO found that victims are not regularly informed of their rights to file a complaint or seek an attorney. Moreover, if a victim files a complaint alleging a violation of rights, the complaint must be directed to a person in the agency that is the subject of the complaint. This creates the potential for, and appearance of, a conflict of interest.<sup>8</sup>

The Department’s response to the GAO report states that the CVRA does not require it to inform victims of their ability to file motions or petitions to enforce their rights, or their ability to submit complaints.<sup>9</sup> The CVRA does, however, clearly require prosecutors to advise crime victims that they can seek the advice of an attorney with regard to their legal rights.<sup>10</sup> We urge Congress to add a provision under section (a) to give victims the right to be informed of their legal rights, including the right to seek legal advice or file a complaint with the Department.

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<sup>5</sup> 18 U.S.C. § 3771(e)(2009).

<sup>6</sup> 18 U.S.C. § 3771(d)(3).

<sup>7</sup> 18 U.S.C. § 3771(d)(4).

<sup>8</sup> *Supra* note 1 at 36.

<sup>9</sup> *Supra* note 1 at 137.

<sup>10</sup> 18 U.S.C. 3771(c)(2).

We also agree with the GAO that the current configuration of the compliance office is insufficient to fulfill its purpose. The Victim's Rights Ombudsman (VRO) is placed within the Executive Office for United States Attorneys (EOUSA). EOUSA has no authority over or, indeed, connection to, many entities within DOJ that are responsible for implementing victims' rights, including the Federal Bureau of Investigation, the Federal Bureau of Prisons, and the Parole Commission. Even for Offices of U.S. Attorneys, EOUSA is largely viewed as a resource, rather than an authority.

To avoid actual or apparent conflict of interest, states have given special attention to the placement of their victims' rights compliance entities. Some provide initial screening by a Department of Justice or Department of Public Safety employee, but complaints are reviewed by a committee or board with broad representation among criminal justice and victim service professionals. The South Carolina Crime Victims' Ombudsman is in the governor's office. The Connecticut Crime Victim Advocate reports to the governor as well. The Alaska Office on Victims' Rights is in the legislative branch.

At the federal level, we recommend the ombudsman's office report to the Deputy Attorney General (DAG). The DAG has clear authority over senior-level employees and attorneys throughout DOJ.<sup>11</sup> At the very least, the VRO should be situated within the Office of Professional Responsibility (OPR), which has jurisdiction to investigate allegations of professional misconduct made against DOJ attorneys, investigators, or law enforcement personnel where the allegations relate to the exercise of an attorney's authority to investigate, litigate, or provide legal advice. OPR also has authority to investigate other matters when requested or authorized to do so by the Attorney General or the DAG.<sup>12</sup> In addition, OPR reports directly to the Attorney General or, whenever appropriate, to the DAG, the Associate Attorney General, or the Solicitor General.<sup>13</sup>

The location of an enforcement office within an administration sends a message to governmental agents and employees as well as the general public of the importance an administration places on victims' rights compliance.

The process through which aggrieved crime victims seek redress should also be more user-friendly. Significantly, state-level compliance programs provide assistance to victims in completing and submitting complaint forms.<sup>14</sup> In offering assistance to victims early in the process, state compliance programs have found that many complaints can be resolved quickly, by providing information or connecting a victim with the proper official or by making a simple phone call to the agency in question. That same initial point of contact can assist victims who wish to file a complaint in filling out the form clearly and completely.

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<sup>11</sup> 28 C.F.R. § 0.15 (2009).

<sup>12</sup> See Office of Professional Responsibility, Fiscal Year 2006 Annual Report, <http://www.usdoj.gov/opr/annualreport2006.pdf> (accessed Sept. 24, 2009).

<sup>13</sup> 28 CFR § 0.39 (2009).

<sup>14</sup> See, for example, Alaska Admin. Code tit. 23, § 10.010 (2009), and the Web sites of the Colorado and South Carolina programs, <http://dcj.state.co.us/ovp/VRA.html> and <http://www.oepsc.gov/cvo/file.html> (accessed Sept. 24, 2009).

Another flaw in the structure of the DOJ compliance procedure is that it provides no avenue for review of a case. Instead, the regulation states that the VRO is the final arbiter.<sup>15</sup> The CVRA does state that the regulations created by the department to promote compliance should “[p]rovide that the Attorney General or his designee shall be the final arbiter of a complaint.” However, there could be a method for internal review within DOJ. For example, in Colorado, either party can request an appeal of the decision or findings of the first authority, the Victim Rights Subcommittee, to the full Governor’s Coordinating Committee. Similarly, if the VRO were within the Office of the DAG or within OPR, a victim or official could seek an appeal or review of results from the DAG. The DAG already receives reports of the outcomes of investigations by OPR, and so would be a logical position for review.

The extent to which these changes would require congressional action depends in large part on the outcome from the working group created by the Department to respond to the GAO’s findings.

### **Legal assistance grants**

We also urge Congress to reauthorize the grant programs contained within the CVRA. We wish to draw special attention to two of those programs.

The CVRA’s drafters understood that its provisions would increase the burden on victim assistants at the federal level. Therefore, the Act authorized \$2 million for FY 2005 and \$5 million for FY 2006 – 2009 to “United States Attorneys Office for Victim/Witnesses Assistance Programs.” To our knowledge, such funding has never been appropriated.

We know from our conversations with our members who work in the federal system, as well as information provided in the GAO report, that the increased notification duties have been especially burdensome on victim assistants. Not only is the workload draining, the data entry duties keep highly skilled victim assistants from providing the important services for which they have been trained: providing support and referrals, accompanying victims to court, assisting victims with their impact statements and requests for restitution, and other services. The GAO notes that the Department has provided some internal resources for data entry, but more is needed. This grant program may need to be amended to specifically authorize the use of funding for data entry contract positions. It should also be amended to extend funding availability to victim assistants at the investigation stage, who also bear a significant data entry burden related victim identification and notification.

We also support continued and expanded funding for organizations that provide legal counsel and assistance for victims’ rights enforcement in criminal cases. Such funding has been used to create victims’ rights clinics, which help to change the legal landscape for victims by asserting victims’ rights in the courtroom and creating case law. These actions are important components of a full implementation of victims’ rights, helping to establish the scope and strength of statutory and constitutional rights.

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<sup>15</sup> 28 CFR 45.10(c)(7)(2009).

Legal assistance is also important for individual victims. While several states have entities that can receive and investigate a crime victim's complaint about violations, those processes are often time-consuming. To provide immediate relief—for example, where a victim's ability to remain in the courtroom during trial is at issue—victims must have the ability to assert those rights in court, and that ability is usually meaningless unless victims have the assistance of legal counsel.

Calls to our National Crime Victim Helpline show why this grant program should be reauthorized and expanded. Victims regularly tell us they believe their rights are being violated, but too often we have no place to send them for specialized legal assistance. Just last week we received a call from the mother of a 12-year-old sexual assault victim who, in the two years the prosecution had been pending, had never been contacted by the prosecutor's office despite her repeated calls to request information. She learned too late that the case had resulted in a plea bargain. With no information or encouragement from the prosecutor's office, she wrote and submitted a victim impact statement for the upcoming sentencing hearing. She has no confidence she will be allowed to speak. Although our staff counseled her about advocating for herself, this victim clearly needed a knowledgeable attorney to help her assert her rights—her state has no victims' rights clinic.

The CVRA provided that both of these grant programs—providing funding for victim assistance at the federal level and supporting legal assistance for victims—could be funded from amounts collected through actions under the False Claims Act. To our knowledge, this source has not been tapped for these programs. We continue to believe it is a viable source of funding.

## **Conclusion**

We thank you again for the opportunity to testify this afternoon. The National Center would be pleased to provide its assistance as you work to refine or reauthorize provisions of this historic Act.