

MEMORANDUM

To: Chief Judge James P. Jones, Chair, CVRA Subcommittee
Cc: Judge Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules
Judge Richard C. Tallman, Judge Anthony J. Battaglia, Justice Robert H. Edmunds, Leo P. Cunningham, Esq., Professor Nancy J. King, Jonathan Wroblewski, Professor Sara Sun Beale, John Rabiej, Peter McCabe
From: Thomas P. McNamara, Thomas W. Hillier, II, Amy Baron-Evans
Subject: Preliminary Comments on S. 1749
Date: August 20, 2007

I. General Observations

S. 1749 seeks to usurp the statutory rulemaking process and circumvent Article V of the Constitution by enacting the equivalent of a constitutional amendment for victims under the guise of procedural rules. The statement offered in support of the bill represents that it is needed to implement rights created by the CVRA, but in truth, each of its provisions would create new substantive rights for victims, impose new obligations on judges or prosecutors, and abridge or directly violate defendants' constitutional rights.¹ Taken together, the provisions of S. 1749 would create a system in which the defendant would face not only the public prosecutor acting on behalf of victims to the extent consistent with the public interest, but victims and persons claiming to be victims acting as private prosecutors while being shielded from scrutiny as witnesses, and a judge whose neutrality would be compromised by being charged with various duties on behalf of alleged victims even before the defendant has been convicted of any crime. Further, the statement suggests, without offering a single example from any federal case, that the CVRA has somehow not been implemented. In our experience, the CVRA is being implemented, often to the disadvantage of our clients. The Justice for All Act of 2004 directed the Government Accountability Office to prepare a study of the effect and efficacy of the CVRA by October 2008. The GAO is in the process of conducting that study. Thus, S. 1749 is, among other things, premature.

As noted by Senators Leahy, Kennedy, Kohl, Feingold, Schumer and Durbin in opposing a victim rights constitutional amendment, the “colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as ‘inefficient, elitist, and sometimes vindictive,’” and the “Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard for achieving justice.” *See* S. Rep. No. 108-191 at 68-69, 70 (2003). Indeed, the two-party adversary system, with a public prosecutor, a criminal defendant and a neutral judge, is embedded in the Constitution. In the First, Fourth,

¹ And while the statement suggests that the Committee has already considered and declined the provisions of S. 1749, many of them have never, to our knowledge, been suggested to the Committee.

Fifth, Sixth and Eighth Amendments, and in every reference to criminal procedure in the original Constitution as well, the Framers carefully defined and protected the rights of the accused as against the State. The Framers did not intend that some other entity with equal or greater standing could impinge on those rights.

II. Section by Section Comments²

Victim Representative on Rules Committees – Should not be considered; unnecessary and unworkable

Rules committee meetings are widely publicized and open to the public, proposed rules are published for comment, any interested person or organization may comment, and their comments are considered. Victims' interests are already represented on the Committees by the Department of Justice and its Office for Crime Victims. Despite the time and energy being devoted to victim issues, a relatively small percentage of federal cases involve a victim. If victims are to have a separate representative, then certainly African Americans and Native Americans, who comprise the majority of federal defendants and suffer from racial disparity in the system, should have a separate representative.

Victims and their advocates are not members of a profession specializing in federal criminal law or any particular profession. Indeed, there is no unitary victim community but a variety of groups with different philosophies and agendas. Some believe that retribution is the most important value, others that restitution is more important than lengthy imprisonment, others that restorative justice and reconciliation should be the critical focus, and some focus on particular issues, *e.g.*, Mothers Against Drunk Driving, Murder Victims' Families for Reconciliation. It would be impossible for one person to represent all of these various views, and there is no fair or viable mechanism for appointment of such a representative. If a victim representative ever is appointed, any candidate who has advocated a three-party system should be disqualified.

Rule 1(b)(11) – Definition of Victim – Should not be considered; more than adequately covered; unnecessary; unintended consequences

First, the definition refers to “crime victim’s rights under these rules,” but the rules do not and cannot give victims rights. Second, citation to the statute follows the format of other definitions, *i.e.*, (b)(5), (b)(7) and (b)(8), and is preferable because the rule need not be

² This section assesses whether each provision (1) is good and should be recommended, (2) has possible merit and should be studied further, (3) has been adequately covered in the Committee’s proposed rule changes, or (4) should not be considered because it is not needed, would have unintended consequences, would prejudice the defendant, or for any other reason. These comments are not comprehensive, as we understand there is scant likelihood that any action will be taken on S. 1749 at least during this Congress. If and when it becomes necessary, we will prepare full comments and submit them to Congress and the Judiciary. Mr. Hillier has a standing invitation from Senator Kennedy and Representative Scott to comment on legislation.

amended in the event Congress changes the definition. Third, it is more than adequately covered; the Committee’s proposed Rule 1(b)(11) and Note cite to the first sentence of 18 U.S.C. § 3771(e); the Committee’s proposed Rule 60(b)(2) cites to 18 U.S.C. § 3771(d) and (e). The Note to the Committee’s proposed Rule 60(b)(2) arguably exceeds the CVRA by explicitly allowing a victim’s lawyer to be heard instead of the victim even when the victim is not under 18, incompetent, incapacitated or deceased. *See* 18 U.S.C. § 3771(e). It appears that the Committee gave Judge Cassell what he asked, *see* Cassell, *Treating Victims Fairly* at 21-23 (Jan. 16, 2007), except that it declined to incorrectly indicate that the rules create rights.

Rule 2 – Interpretation – Should not be considered; unnecessary; unconstitutional consequences

Rule 2 already requires “fairness in administration,” as appropriate in the context of our existing system. In that system, only the defendant has a constitutional right to fairness, which means that fairness to the defendant must always trump fairness to the government, an alleged victim, or a victim. *See* U.S. Const. Amend. V. The sole purpose of this proposal is to ensure fairness *to victims* in construing all of the rules. *See* Cassell, *Treating Victims Fairly* at 24 (Jan. 16, 2007). Indeed, Judge Cassell’s argument in support of this proposal is that “Rule 2 has consequences,” and can be “outcome-determinative.”³ *Id.* at 24-25.

As intended, the rule would place victims and alleged victims, and the government as well, on the same footing as the defendant with respect to fairness. If fairness to the defendant would interfere with fairness to the victim in his or her view, it would simply be a toss-up as to should prevail. An alleged victim could argue that her right to be “reasonably heard” did not permit cross-examination, that Rule 12.1 did not permit disclosure of her address, that Rule 17 did not permit a subpoena for her mental health records, based on nothing but her co-equal right to fairness under Rule 2. She would actually have the upper hand because she could halt the proceedings and file a mandamus action in the court of appeals, citing Rule 2. Proposed Rule 2 is intended to, and would, tip the constitutional balance.

This is part of the overall strategy to wrest from the CVRA the equivalent of a constitutional victim’s right to due process of law, which began with a floor statement by Senator Kyl, contrary to congressional intent in *rejecting* constitutional rights for victims, *see* 150 Cong. Rec. S10911 (Oct. 9, 2004) (“fairness includes the notion of due process,” and “[t]his provision is intended to direct government agencies and employees . . . to afford them due process”), and has been used by Professor Beloof’s organization as a platform to claim a right to obtain the pre-sentence report and litigate the sentence as the equivalent of a party. *See United States v. Leichner*, No. CR-00568-JFW, Brief of

³ Many of the cases cited by Judge Cassell at pp. 24-25 nn. 125-130 actually reject Rule 2 as a basis for deviating from specific rules. It is accurate, however, that his proposed Rule 2 would have consequences and be outcome-determinative by upsetting the existing constitutional balance.

Amicus Curiae, National Crime Victim Law Institute, in Support of Victim’s Motion for Disclosure of Presentence Report (May 15, 2006).

Rule 4(a) – Consideration of Alleged Victim’s Safety in Issuing Summons Requested by Prosecutor – Should not be considered; inconsistent with CVRA; unconstitutional consequences; waste of time and resources

The CVRA requires the court to ensure that victims are afforded rights under section 3771(a) “[i]n any *court proceeding* involving an offense against the victim.” 18 U.S.C. § 3771(b)(1) (emphasis supplied). The issuance of a summons (or warrant) is not a “court proceeding.” The government is required to make its “best efforts” to see that alleged victims are accorded the rights described in section 3771(a), *see* 18 U.S.C. § 3771(c)(1), which includes ensuring that an alleged victim is reasonably protected from the accused before requesting a summons. We are not aware of any case in which a prosecutor requested a summons when doing so would potentially endanger anyone. Requiring the court to make this determination when the prosecutor already has would be a waste of time and resources. Finally, this rule, like several others, would improperly require the court to determine or assume that the accused is guilty before there is even a court proceeding, thus undermining the presumption of innocence and compromising judicial neutrality.

Rule 4(c)(5) – Notice of Arrest and Initial Appearance and Right to Be Heard at Initial Appearance – Should not be considered; adequately covered to extent permissible; Separation of Powers consequences; expansion of rights to notice and to be reasonably heard in CVRA; potential prejudice to defendant

The Committee’s Rule 60(a)(1) already directs the government to use its best efforts to notify victims of public court proceedings involving the crime, consistent with 18 U.S.C. § 3771(c)(1). It does not require the government to notify victims of an arrest, which is not a public proceeding, nor does the CVRA, and it would violate Separation of Powers for the Judiciary to order the Executive to give notice of something that is not a court proceeding. In any event, the government apparently informs alleged victims of arrests. *See* Attorney General Guidelines for Victim Witness Assistance at 25, May 2005, <http://www.usdoj.gov/olp/final.pdf>. The Committee’s approach in Rule 60(a)(1) is consistent with the statute and also sensible because the government has the relevant information to notify persons whom it would allege to be victims.

The Committee’s Rule 60(a)(3) allows an alleged victim to be reasonably heard at any public proceeding concerning release. The wording of Rule 4(c)(5) – “right of the victim to be heard at the initial appearance” -- suggests an absolute right to be heard at the initial appearance and on any topic by omitting the word “reasonable” and the word “release.” “Reasonably heard” is a legal term of art meaning to bring one’s position to the attention of the court in a manner the court deems reasonable under the circumstances. *See O’Connor v. Pierson*, 426 F.3d 187, 198 (2d Cir. 2005); *Fernandez v. Leonard*, 963 F.3d 459, 463 (1st Cir. 1992); *Commodities Futures Trading Com. V. Premex, Inc.*, 655 F.2d 779, 783 n.2 (7th Cir. 1981). When Congress uses a legal term of art, it is presumed to

intend its traditional meaning. *Morissette v. United States*, 342 U.S. 246, 263 (1952). Thus, in *United States v. Marcello*, 370 F.Supp.2d 745 (N.D. Ill. 2005), the district court rejected the contention that it must hear the victim’s view opposing detention orally where the victim had no knowledge of any material facts and the defendant was presumed innocent. *Id.* at 747 n.5, 750.

Rule 5(a)(3) – Notice of Initial Appearance and Right to Be Heard at Initial Appearance -- Should not be considered; adequately covered to extent permissible; notice provision inconsistent with CVRA; unconstitutional consequences; expansion of right to be heard in CVRA; unwarranted delay and expense

Proposed Rule 5(a)(3) is similar to proposed Rule 4(c)(5), and is unnecessary, adequately covered, and inappropriate for the same reasons, except that instead of raising Separation of Powers concerns by requiring the judge to order the prosecutor to notify alleged victims, this rule would apparently require the judge to notify alleged victims, contrary to the CVRA, compromising judicial neutrality, and violating the presumption of innocence.

This rule is also impractical in suggesting an absolute right to be heard because an initial appearance can take place before a state or local judicial officer under Rule 5(c)(1)(B), or in a district other than the one in which the alleged victim is located under Rule 5(c)(2). A right to be heard at an initial appearance – enforceable through mandamus -- would require the proceedings to wait until the alleged victim arrived, which would conflict with Rule 5(a)(1)’s “without unnecessary delay” provision. The rule would require the court or the government to transport or pay for the transport of the alleged victim to the place where the initial appearance was to be held, or move the initial appearance to the alleged victim. In describing the right “not to be excluded,” Senator Kyl represented that the government would not be responsible for paying for a victim’s travel or lodging. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004).

Rule 5(d)(3) – Right to be Reasonably Protected, Notice of Release and Conditions –Should not be considered; adequately covered by existing law; notice provision inconsistent with CVRA; constitutional consequences

Title 18 U.S.C. § 3142 already requires the court to take into account “the safety of any person or the community,” which includes an alleged victim’s right to be reasonably protected from the accused.

Requiring the judge to notify the victim of the defendant’s release and any conditions is inappropriate because the CVRA requires the government to notify an alleged victim of release, and such notice may not be given if it would endanger anyone’s safety. *See* 18 U.S.C. § 3771(c)(3). Requiring the judge to carry out this function would compromise the judge’s neutrality and violate the presumption of innocence.

Rule 5(f) – Notice and Right to Participate in Video Conferencing – Should not be considered; adequately covered; notice provision inconsistent with CVRA; expansion of right to be reasonably heard; unconstitutional consequences

This rule would apparently require the judge to give notice of an initial appearance by video conferencing and of a supposed “right to participate.” The function of notifying alleged victims of public proceedings and their rights therein is solely that of the government, as stated in 18 U.S.C. § 3771(c)(1) and the Committee’s Rule 60(a)(1). Requiring the judge to carry out that function would compromise the judge’s neutrality and violate the presumption of innocence.

Use of the word “participate” is not appropriate. The statute gives an alleged victim a right to “be reasonably heard,” as stated in the Committee’s Rule 60(a)(3). “Participate” means something broader, *i.e.*, participation as a party, which would be unconstitutional.

Rule 5.1(a) – Notice of Preliminary Hearing – Should not be considered; notice provision inconsistent with CVRA; adequately covered to extent permissible; unconstitutional consequences

Requiring the magistrate judge to “mak[e] reasonable efforts to give notice to the victim” of a preliminary hearing is contrary to the CVRA in requiring the magistrate judge to give notice, which the CVRA and the Committee’s Rule 60(a)(1) properly assign to the government. The rule would require the magistrate judge to determine that there *is* a victim and who it is, before even a finding of probable cause has been made, and so would violate the requirement that “the existence of probable cause be determined by a neutral and detached magistrate.” *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975).

The rule would also require that the preliminary hearing be held “after” reasonable efforts to give notice are made. This would cause delay which would violate the constitutional requirement that a determination of probable cause be made promptly after arrest to justify the continued detention of a presumptively innocent person. *Id.* at 114-15, 125.

Rule 5.1(d) – Preliminary Hearing Free from Unreasonable Delay in Alleged Victim’s View – Should not be considered; unnecessary; unconstitutional consequences

Requiring the magistrate judge to take into account “the right of the victim to proceedings free from unreasonable delay” when extending the time for a preliminary hearing would be unconstitutional and there is no need for it. The purpose of Rule 5.1(d) is to allow the parties to prepare. As such, it implicates the defendant’s right to due process of law. An alleged victim’s statutory right to proceedings free from unreasonable delay is not an even footing with the defendant’s due process right to prepare as this proposal would have it. As the court reasoned in *United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005), in granting a joint motion to continue the trial over the alleged victim’s objection, Congress did not intend the CVRA to undermine the Speedy Trial Act or to deprive defendants or the government of an adequate opportunity to prepare, the

defendant's right to adequate preparation is of "constitutional significance," and allowing the victim's "discrete interests" to control "runs the unacceptable risk of [the] wheels [of justice] running over the rights of both the accused and the government, and in the end, the people themselves."

Further, the existing rule already requires the district court to consider "the public interest in the prompt disposition of criminal cases." There is a limit of only 10 days on an extension for a preliminary hearing if the defendant is in custody, 20 days if not. We are not aware of any case in which a preliminary hearing was continued for any lengthy period of time.

Rule 9(c)(3) – Initial Appearance After Notice to Alleged Victim – Should not be considered; notice provision inconsistent with CVRA; adequately covered; unconstitutional consequences; delay

This rule is contrary to the CVRA in that it would require a judge, rather than the government, to give notice of an initial appearance. The rule would compromise the judge's neutrality and violate the presumption of innocence. The Committee's Rule 60(a)(1) properly leaves this to the government. The requirement that the initial appearance not take place until "after" reasonable efforts to notify alleged victims would conflict with Rule 5(a)(1)'s "without unnecessary delay" provision.

Rule 10.1 – Notice and Creation of New Rights – Should not be considered; inconsistent with CVRA; would create rights not found in CVRA; unconstitutional consequences; unnecessary; adequately covered by Committee Rule to extent permissible

This entire proposal is already covered in the Attorney General Guidelines for Victim Witness Assistance, May 2005, <http://www.usdoj.gov/olp/final.pdf>. Thus, even if it would not create new rights under the guise of "reasonable notice" and would not violate the Constitution, it would be unnecessary. Those aspects of this proposal that are an appropriate subject of procedural rules to implement the CVRA (as a statutory and constitutional matter) are covered in the Committee's proposed rules.

Rule 10.1(a), which would require the government to "identify" victims "at the earliest reasonable opportunity," is not required by the CVRA. It would violate the Separation of Powers for the Judiciary to order the Executive to identify victims with no connection to any court proceeding. The Committee's Rule 60(a)(1) requires best efforts to give "timely" notice of any public court proceeding involving the crime, which is all that is necessary to implement the CVRA and all that is permissible under Separation of Powers.

Rule 10.1(b) has numerous problems. First, in mandating "reasonable efforts" to give "the earliest possible notice" of various items without specifying who is to carry out this command, the judge would be required to do it if the government did not. In explaining a version of Rule 10.1, which, unlike the version in S. 1749, plainly stated that the government would give notice, Judge Cassell explained that only the government

“knows” the identity of victims at the outset, and the government has a “working relationship” with alleged victims, and so is best situated to take on a role similar to that of counsel, which many victims do not have. Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 B.Y.U. L. Rev. 835, 860-62 (2005). Obviously, it would destroy judicial neutrality to require judges to act in a role analogous to counsel for victims. And, it would violate Separation of Powers for the Judiciary to order the Executive to do so, though the Executive is free to do so, and in fact has chosen to do so.

Second, Rule 10.1(b) would require notice of rights that victims currently do not have, thus creating substantive rights in the guise of a procedural rule. The test is “whether a rule really regulates procedure,- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). Only two of the items in the list are required by the literal terms of the CVRA – the release of a defendant (but the government *may not* give notice of release if it would endanger the safety of any person, 18 U.S.C. § 3771(c)(3)), and the date and place of sentencing, 18 U.S.C. § 3771(a)(2), and those are covered to the extent permissible by the Committee’s Rule 60(a)(1). The rest of the items are covered by the Attorney General Guidelines, but they are not required by the CVRA, and would infringe on defendants’ rights and create practical problems. Victims are not “entitled to attend” and do not have a “right to attend” proceedings, but only “not to be excluded.” 18 U.S.C. § 3771(a)(3). Victims do not have a right to “make a statement about” pretrial release or acceptance of a guilty or *nolo* plea, but instead a right to be “reasonably heard” at a public proceeding concerning release or plea, 18 U.S.C. § 3771(a)(4), as reflected in the Committee’s Rule 60(a)(3). Nothing in the CVRA requires notice of the “detention status” of a defendant or suspected offender, of the filing of charges, proposed dismissal of charges, placement of the defendant in pretrial diversion or the conditions of pretrial diversion, or post-sentencing notice of the sentence imposed or of BOP’s notification program.

Third, proposed Rule 10.1(b) would give notice to victims of matters in which they have no legitimate interest under our Constitution or the CVRA but (as above) would permit victims to function as private prosecutors and violate defendants’ constitutional rights. It would require notice both “[d]uring the prosecution of the crime,” “*and* whenever reasonable notice is required to be provided under these rules.” (emphasis supplied) In addition to all of the additional notices proposed in S. 1749, this would include, and be enforceable through mandamus, Rule 12(b)(4) (government’s intent to use specific evidence), Rule 12.1 (alibi), Rule 12.2 (insanity defense, expert evidence of mental condition), Rule 12.3 (public authority defense), Rule 15 (deposition), Rule 26.1 (intent to raise issue of foreign law), Rule 32 (notice of pre-sentence interview, notice of pre-sentence report, notice of intention to depart from guideline range, notice of appeal), Rule 32.1 (notice of preliminary hearing when person is in custody for violating probation or supervised release, its purpose, the alleged violation; notice of alleged violation in revocation hearing; notice of modification of conditions sought by defendant), Rule 47 (notice of hearing on motion to be served by party), Rule 49 (written

notice by party, notice of any order on motion by clerk), Rule 58 (notice of right to appeal, notice to appear).

Proposed Rule 10.1(c) is covered by both the Committee's Rule 60(b)(3) and the Attorney General Guidelines.

Rule 11 – Pleas – Should not be considered; covered to the extent required by the CVRA and permissible under the Constitution; unconstitutional consequences

Rule 11(a)(3), (b)(4) and (c)(1) should not be considered because (1) victims have no right under the Constitution or CVRA to have their views considered by a judge in deciding whether to accept a plea, (2) such a right would significantly prejudice defendants in exercising and waiving their constitutional rights, (3) such a right would change the judge's responsibility from assuring that the plea is knowing and voluntary to making a pre-judgment about the sentence, (4) such a right would substantially interfere with prosecutorial discretion, and (5) such a right would have to be created by constitutional amendment.

Rule 11(c)(2) would require the prosecutor to raise the objections of an unrepresented victim to a proposed plea agreement, and as such would create a conflict of interest for the prosecutor. To the extent permissible, this is covered by the Committee's Rules 60(a)(1) and (3).

Rule 12(g) – Notice of Release Upon Dismissal of Defective Charge -- Should not be considered; inconsistent with CVRA; unconstitutional consequences

Under the CVRA, it is the government's duty to notify victims of any release of the defendant unless to do so would endanger the defendant or anyone else. To require the court to notify an alleged victim of a defendant's release when no valid charge exists is not only inconsistent with that portion of the CVRA, but would violate the presumption of innocence and improperly require the judge to play a role analogous to counsel.

Rules 12.1, 12.3 – Compelled Disclosure by Defense Without Reciprocal Discovery from the Government – Should not be considered; Rule 12.1 covered; unconstitutional

The proposed amendments of Rules 12.1 and 12.3 should not be recommended or studied because they would violate the Due Process Clause. *See Wardius v. Oregon*, 412 U.S. 470 (1973); *Smith v. Illinois*, 390 U.S. 129 (1968); *Alford v. United States*, 282 U.S. 687 (1931). As we have explained before, we believe the Committee's Rule 12.1 violates the Due Process Clause. These proposals would go even further by *never* allowing reciprocal discovery of an alleged victim's address or telephone number.

Rule 15 – Depositions - Should not be considered; unconstitutional; would create a new right not found in CVRA

Here is an example in a single rule of what pervades these proposals as a whole – treating alleged victims as parties while shielding them from scrutiny as witnesses. It is difficult to see how such suggestions can be taken seriously.

The proposed amendment to Rule 15(a)(1) would violate the defendant’s right to due process of law and to confront and cross-examine the witnesses against him. Proposed Rule 15(i) is inappropriate because depositions are not public proceedings, and victims are not parties under the CVRA or the Constitution.

Rule 16(a)(4) – Discovery to Victim -- Should not be considered; unconstitutional; would create rights not found in CVRA

Rule 16(a)(4) would (1) treat victims as parties and allow them to act as private prosecutors, (2) expose all manner of confidential information to an alleged victim who has no legitimate interest in receiving it under the CVRA or the Constitution, (3) give alleged victims who are witnesses information with which they could shade or fabricate their testimony, (4) create a right found nowhere in the CVRA.

Rule 17(h)(2) – Subpoenas - Should not be considered; adequately covered; unconstitutional; conflicts with Rule 6(e)

The subject is covered by the Committee’s amendment to Rule 17. The concerns we have expressed with respect to the Committee’s rule – that it sets a dangerous precedent to assume that victims’ “dignity and privacy” is threatened by ordinary procedures designed to facilitate adversarial testing, that it will abridge defendants’ Fifth and Sixth Amendment right against disclosure of defense strategy to the government,⁴ and their Sixth Amendment right to confront and cross-examine without advance disclosure to the witness⁵ -- are even more pronounced with respect to this proposal, as it would *always* require notice to the alleged victim, even when evidence would be destroyed or lost or the defense would be prejudiced by premature disclosure of defense strategy.

Further, the proposal conflicts with Rule 6(e), as it apparently applies to grand jury subpoenas.

⁴ See *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *Weatherford v. Bursey*, 429 U.S. 554, 558 (1977); *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004); *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995).

⁵ See *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 893 (D.C. Cir. 1999); *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985); *United States v. Bohle*, 445 F.2d 54, 75 (7th Cir. 1971). See also Fed. R. Evid. 613(a) (cross-examiner need not show witness document from which s/he is cross-examining, abrogating “Rule in Queen Caroline’s Case”); *Kirby v. United States*, 174 US 47, 55 (1899) (Confrontation Clause permits impeachment “in every mode authorized by the established rules governing the trial or conduct of criminal cases.”).

Rule 17.1 – Pretrial Conference -- Should not be considered; would create a right not found in CVRA; would treat alleged victims as parties; interfere with business of pretrial conference

The CVRA does not give alleged victims a right to attend or be heard at pretrial conferences. Defendants do not usually attend pretrial conferences. The purpose of a pretrial conference is for the lawyers for the parties (the United States and the defendant) to work out discovery, scheduling and other practical matters. Alleged victims are not parties. A constitutional amendment would be necessary to make them so. Their presence would interfere with the business to be done.

Rule 18 – Place of Prosecution and Trial -- Should not be considered; covered by Committee’s Rule; no basis in CVRA; unintended consequences

The language is nearly identical to the Committee’s amendment of Rule 18, except that the Committee’s rule prefaces “victim” with “any” in recognition that not every case involves a victim. As we have said before, this rule has no basis in the CVRA because alleged victims do not have a “right to attend,” and this will only encourage mandamus actions by non-testifying alleged victims and impose unwarranted hardship on the parties, witnesses and judges.

Rule 20(a)(2) & (d)(1)(E) – Transfer for Plea and Sentencing - Should not be considered; not found in CVRA; inconsistent with CVRA; unconstitutional; would interfere with prosecutorial discretion; delay

The CVRA did not create a right to have the government “consult” an alleged victim before agreeing to the defendant’s wish or consent to transfer. It would violate the defendant’s rights to give victims a say in the matter. Ordering the government to “consult” an alleged victim would interfere with prosecutorial discretion, inconsistent with 18 U.S.C. § 3771(d)(6), and violate Separation of Powers. It would create delay at a time-sensitive stage.

Rule 21(e) – Transfer for Trial -- Should not be considered; no basis in CVRA; prejudice to defendant’s right to a fair trial; unintended consequences

The CVRA does not give alleged victims a right to have their views considered in a transfer decision. The rule would significantly prejudice the defendant in transfers for prejudice. In transfers for convenience, a non-testifying alleged victim’s interests would take precedence over the convenience of the defendant, the prosecutor and testifying witnesses, as only that person would have the right to file, or threaten to file, a mandamus action. This, like the Committee’s Rule 18, would create a “right to attend,” and require funds to pay for attendance.

Rule 23(a)(3) – Jury or Nonjury Trial -- Should not be considered; no basis in CVRA; unconstitutional

The CVRA does not create any right for alleged victims to have their views considered in whether a defendant may waive her Sixth Amendment right to jury trial. Such a right would require a constitutional amendment.

Rule 28 – Interpreters -- Should not be considered; already allowed

Rule 28 already allows appointment of an interpreter for a victim or anyone else.

Rule 32 – Victims as Parties to Defendants’ Sentencing -- Should not be considered either because already covered or no basis in CVRA and unconstitutional

Rule 32(b)(1)(B) is already covered by the Committee’s Rule.

Rule 32(b)(3) is unnecessary because Rule 32(d)(2)(B) already requires that the presentence report contain information that “assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed,” and the Attorney General Guidelines already require that a responsible official notify victims of this provision and how to communicate with the Probation Officer. *See* Attorney General Guidelines for Victim Witness Assistance at 32 (May 2005), <http://www.usdoj.gov/olp/final.pdf>.

Rule 32(c)(2)(F) is already covered in Rule 32(d)(2)(B).

Rule 32(c)(3)(C) is already covered by the existing language, “or others.” Changing the rule to specify “the victim” would mislead probation officers to believe that victims have a special entitlement to have information about them excluded from the pre-sentence report. A victim may then be permitted to speak at the sentencing hearing, with no notice of his or her contentions. Or, the Probation Officer may include it in the recommendation to the judge, which in most districts is kept secret from the parties. The defendant would be deprived of “thorough adversarial testing” – which includes notice and a meaningful opportunity to test the allegations against him at sentencing -- which is required by the current rules and Due Process of Law, and without which the sentence is unreasonable. *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007); *Burns v. United States*, 501 U.S. 129, 136-37 (1991).

Rules 32(d)(2)(B) (requiring disclosure of the presentence report to the victim, in full or redacted, with burden on others to establish need for redaction), (e)(1) (requiring government or victim’s attorney to object to the presentence report on behalf of victim), (h)(1)(C) (requiring court to allow victim to comment on probation officer’s determinations and other matters relating to appropriate sentence), (h)(1)(D) (permitting victim to make new objections at any time for good cause) are without basis in the CVRA and unconstitutional. These proposals would directly institute a three-party system, making the victim a full party to the proceedings and requiring the defendant to face two adversaries. As such, they are plainly unconstitutional. *See Defending Against the Crime Victims Rights Act* at 19-23 (May 5, 2007),

http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf. There is no authority for this in the CVRA, and it was never intended by Congress, even when considering the failed constitutional amendment. *Id.* There is a strong presumption of confidentiality in the pre-sentence report for sound policy reasons – including privacy, confidentiality, safety, and the need for the free flow of information to the judge -- established by decades of experience reflected in a mountain of caselaw rejecting disclosure to third parties. *Id.* at 23-24. The defendant’s right of access to the pre-sentence report, itself of fairly recent vintage and based on the defendant’s right to due process of law, provides no basis for disclosing it to anyone else. *Id.* Under our adversary system, a victim’s only legitimate role with respect to the presentence report is to provide information *to* the probation officer, which is more than adequately covered by existing rules and statutes. *See* Rule 32(d)(2)(B); 18 U.S.C. § 3664(d)(2), (5), (e). These proposals would create undue expense and delay.

Rule 32(g) (victim impact statement to serve as notice of departure; requiring government to advise of any ground victim deems basis for departure) likewise would elevate the victim to the status of a party. In addition, this would provide insufficient notice to the defendant and therefore violate the right to due process of law. It would violate Separation of Powers and conflict with 18 U.S.C. § 3771(d)(6) to require the government to provide notice of an argument that the victim believes is a ground for departure, whether or not the government believes it is a valid ground for departure.

Rules 32(h)(4)(B), which would require the court, before imposing sentence, to permit a victim “to speak or submit any information about the sentence,” has no basis in the CVRA and would violate the Due Process Clause. The Committee’s Rules 32(i)(4)(B) and 60(a)(3) adequately and accurately implement the CVRA right to be “reasonably heard” at sentencing.⁶ This proposal, by giving victims an absolute right to “speak” and present “information,” would create a special and unconstitutional status for victims, where they would function as a party but not be subject to adversarial testing, and would remove any judicial discretion to disallow or limit an oral statement even in unusual circumstances. This proposal would explicitly require the judge to allow victims to provide “any information” (no matter how unreliable, inflammatory, repetitious, etc.) at the last minute and apparently without being placed under oath, without notice to the defendant or a meaningful opportunity to test the information or to litigate the often complex question of whether the person *is* a victim. The practical and constitutional problems with this approach, including specific examples, are laid out in detail in

⁶ In his statement in support of S. 1749, Senator Kyl complained that the Committee’s Rule 32 in requiring a right to “be reasonably heard” followed the statutory language but not his floor statement amending the statutory language, an obviously incorrect application of the rules of statutory construction. He also contended that the Committee’s rule “contravenes” the *Kenna* and *Degenhardt* decisions. *Kenna* does contain some unfortunate language and faulty reasoning due to the fact that the defendant was not allowed to participate in the mandamus action, but even so did not hold that victims have an absolute right to speak. *Degenhardt* appears to have been manufactured by Judge Cassell in order to create a split in authority while *Kenna* was pending. For a discussion of these cases, *see Defending Against the Crime Victims Rights Act* at 15-16 (May 5, 2007), http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf.

Defending Against the Crime Victims Rights Act at 13-18 (May 5, 2007),
http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf.

Rule 32.1 – Revocation or Modification of Probation or Supervised Release -- Should not be considered; adequately covered; notice provision inconsistent with CVRA; would expand rights to notice and to be reasonably protected beyond CVRA; unintended consequences; unconstitutional consequences

Rule 32.1(a)(1), which would require notice to the victim (of what -- the violation, the original crime?) by someone (the court, the government?) should not be considered. The Committee's Rule 60(a)(3) already requires the government to notify victims of "any public court proceeding involving the crime," as required by the CVRA. The CVRA does not require the court to give notice of any proceeding, nor does it require the government to give notice of proceedings that do not involve "the crime" against the victim. This proposal would apparently require notice to the victim of the crime for which the defendant is on probation or supervised release, even when the alleged violation is not a crime against that person or any person, *e.g.*, failing a urine test, a DUI. The CVRA's requirement of notice of any release of the accused does not support this proposal either, as it would require notice that the defendant, who was *not* in custody, *is* in custody. The CVRA does not give victims a right to be reasonably heard at an initial appearance of a person in custody for an alleged violation of probation or supervised release that is not a crime of which the person is an alleged victim.

Rule 32.1(a)(6), which would require the magistrate judge to consider the right of the victim to be reasonably protected (from whom?) should not be considered. Rule 32.1(a)(6) already requires the defendant to establish that s/he "will not . . . pose a danger to any other person," and 18 U.S.C. § 3143(a) already requires the magistrate judge to make that finding by clear and convincing evidence. To the extent this proposal is attempting to require the magistrate judge to consider protection of the victim of the original crime anytime a person is alleged to have violated conditions of probation or supervised release – no matter what the alleged violation – it is inconsistent with the CVRA, which requires the court to ensure that the crime victim is reasonably protected from the accused in a court proceeding involving an offense against a crime victim. *See* 18 U.S.C. § 3771(a)(1), (b)(1).

Rule 32.1(b)(3), which would require the court to notify the victim before a revocation hearing, should not be considered. The CVRA gives victims, and alleged victims, a right to notice and "not to be excluded," from public proceedings "involving the crime," which does not include a revocation hearing that involves no crime or a different crime. To the extent the alleged violation is a crime against an alleged victim, the government, not the court, is required to give notice to that alleged victim. *See* 18 U.S.C. § 3771(c)(1). To require the court to give such notice would compromise judicial neutrality and violate the presumption of innocence. The Committee's Rule 60(a) covers all that is required by the CVRA or constitutionally permissible.

Rule 33 – Victim Notice and Right to Be Heard on Motion for New Trial -- Should not be considered; no basis in CVRA; unconstitutional; unnecessary and irrelevant

The CVRA does not give victims a right to be heard or to notice on a motion for new trial. The matters of which notice is required are covered in the Committee’s Rule 60(a)(1), with the obligation to give such notice on the government as required by the CVRA. Victims and alleged victims have nothing relevant to say on such a motion. The proposal would give them the status of a party, or perhaps a greater status than a party, since the government is not explicitly allowed to be heard, yet a victim could enforce this “right” through mandamus. This proposal would violate defendants’ constitutional rights.

Rule 34(a) – Victim Notice and Right to Be Heard Before Arresting Judgment -- Should not be considered; no basis in CVRA; unconstitutional; unnecessary and irrelevant

There is no basis in the CVRA for this rule. A victim or alleged victim has nothing to say about whether an indictment charges an offense or the court has jurisdiction. The proposal would give victims and alleged victims the status of a party, and thus violate defendants’ constitutional rights.

Rule 35(a) – Victim Notice and Right to Be Heard Before Correcting or Reducing Sentence -- Should not be considered; no basis in CVRA; unconstitutional; unnecessary and irrelevant

The CVRA does not require notice of or an opportunity to be heard on a Rule 35 correction or reduction of sentence. These are matters on which victims have nothing to say. The rule would give victims the status of parties, and thus violate defendants’ constitutional rights. It would also interfere with prosecutorial discretion and law enforcement objectives.

Rule 36 – Victim Notice of Clerical Error -- Should not be considered; no basis in CVRA; unnecessary

The CVRA does not require notice to victims of the correction of a clerical error. Even assuming that there might be a case in which there is good reason to give victims notice of clerical error, Rule 36 provides for “any notice [the court] deems appropriate.”

Rule 38(e)(1) – Notice and Opportunity to Be Heard on Stay Pending Appeal of Sentence Providing Restitution or Notice and Explanation to Victims -- Should not be considered; no basis in CVRA; unconstitutional consequences; would defeat purpose of the rule

The CVRA does not provide for victims to be given notice of or to be heard on motions for stay pending appeal. The purpose of a stay under Rule 38(e)(1) is to avoid the defendant paying restitution or giving notice that ultimately may not be required if the conviction or sentence is overturned. The primary question for the court is the likelihood of success on appeal, a legal matter about which victims have nothing to say. Victims might argue that they want restitution even though the conviction or sentence may be overturned, but that would be irrelevant to the question before the court. Requiring notice to victims of a stay of a sentence requiring notice would defeat the very purpose of the stay. An order of explanation of the conviction, based on a victim's demand, would violate the defendant's Fifth Amendment right to remain silent.

Rule 43.1 – Victim's Presence -- Should not be considered; no basis in and conflicts with CVRA; adequately covered to the extent required or permissible; improper notice requirements; unconstitutional

Rule 43.1(a) would create a "right to attend," while the CVRA created a right "not to be excluded." 18 U.S.C. § 3771(a)(3). That part of proposed Rule 43.1(a) that accurately reflects the CVRA is covered by the Committee's Rule 60(a)(2). We agree with Mr. Cunningham that no rule should tie the requirement that the reasoning be clearly stated on the record to the outcome, but the Committee adopted that approach in its Rule 60(a)(2) over our objection.

Rule 43.1(b) would improperly require the court to undertake extraordinary measures to give notice to victims and alleged victims, thus enlisting the judge as counsel to the victim, compromising judicial neutrality, and violating the presumption of innocence. The CVRA places the obligation to give notice on the government, which is covered by the Committee's Rule 60(a)(1). Subdivision (2) makes no sense.

Rule 43.1(c) would require the court, in a case where the number of victims makes it "impracticable" to afford all of them "the right to be present," a right not contained in the CVRA, to "fashion a procedure to facilitate the attendance of the victims," which is by definition "impracticable" and is contrary to the CVRA, which requires a "reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." The multiple victims issue is covered, to the extent required by the CVRA and the limitations of common sense, by the Committee's Rule 60(b)(3).

Rule 43.1(d) incorrectly states that rights to be heard are "established by these rules." It refers to a "right to attend" that does not exist in the CVRA. It would create a new right to be heard "on any matter affecting the rights of the victim" at any proceeding the victim supposedly has a "right to attend." It would violate defendants' rights in numerous ways, including by requiring them to face a second adversary on whatever issue a victim deemed to affect his or her "rights," enforceable through mandamus. The rule would create chaos.

Rule 44(d) – Appointment of Counsel for Alleged Victims -- Should not be considered; no basis in CVRA; unconstitutional; impractical; unintended consequences, including budgetary consequences

Most fundamentally, the Judiciary should not support this proposal because its purpose and effect is to create a three-party system. The Sixth Amendment is the basis for appointment of counsel for indigent defendants. This proposal would create the equivalent of a constitutional right to counsel for victims – enforceable through mandamus -- and end up requiring defendants to face two prosecutors paid by the federal government.

It appears that appointing a private prosecutor even as the *only* prosecutor in a case involving an alleged violation of the general criminal laws would be unconstitutional. In *Young v. United States ex rel. Vuitton Et Fils*, 481 U.S. 787 (1987), the Supreme Court made clear that the only context in which it is permissible for a court to appoint a private prosecutor is to initiate contempt proceedings to vindicate the court’s authority, not to vindicate the general criminal laws, and then only if the public prosecutor declines and the private prosecutor is “as disinterested as a public prosecutor who undertakes such a prosecution.” *Id.* at 796, 800, 801, 804, 805-06, 808. Relying on its supervisory power to avoid reaching the constitutional question, the Court held that appointment of an interested prosecutor even for a contempt action was an error so fundamental and pervasive that it was not subject to harmless error review. *Id.* at 809-14 & n.21. *See also* Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 Am. U. L. Rev. 754, 755 (1976) (condemning the appointment of private prosecutors as “outdated, unnecessary, unethical and perhaps unconstitutional”); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511 (1994) (concluding that “the use of private prosecutors is unethical and violative of a defendant's constitutional rights . . . and creates, at the very least, an unacceptable appearance of impropriety.”).

The Committee has already recognized that only Congress can appropriate funds for counsel for victims, and many of the practical problems with such a proposal. We would add that if Defender offices must litigate against two prosecutors in a large number of cases, defendants’ rights will suffer unless Defender offices receive substantial additional funding to hire additional AFPDs.

Rule 46(k) -- Right to Be Heard and Have Views and Protection Considered in Release Decisions -- -- Should not be considered; would expand right to be reasonably heard beyond CVRA; adequately covered to the extent required or permissible; unnecessary; conflicts with Bail Reform Act; unconstitutional

Rule 46(k) would create a right of alleged victims to be heard regarding any decision to release the defendant, require the court to consider alleged victims’ “views” and right to be reasonably protected from the accused in making that decision, including in petty

cases, and a right to have the court facilitate a hearing in open court by representative victims.

This would create a new substantive right for victims not found in the CVRA, *i.e.*, the right to a hearing when the parties agree on release and there would not otherwise be a hearing, and the right to have one's "views" taken into account in the court's decision. The Committee's Rule 60(a)(3) goes as far as the CVRA allows, stating that the victim has a right to "be reasonably heard at any public proceeding in the district court concerning release." Being "reasonably heard" on the issue of release does not include the right to be heard on matters that are irrelevant to the court's decision, such as the victim's "views" of the strength of the prosecution's case not based on personal knowledge. *United States v. Marcello*, 370 F.Supp.2d 745 (N.D. Ill. 2005).

The Bail Reform Act, which the courts have been applying successfully for decades, already requires that the court take into account "the safety of any person or the community," which includes an alleged victim's right to be reasonably protected from the accused.

This rule would conflict with the Bail Reform Act and abridge defendants' constitutional rights in various ways. For example:

- The Bail Reform Act complies with the Due Process Clause in part because it carefully limits the circumstances under which detention may be imposed, in particular, arrest for "the most serious of crimes," not petty offenses. *United States v. Salerno*, 481 U.S. 739, 747, 751 (1987).
- A person may not be held based on danger to a person or the community if he is not charged with a crime enumerated in 18 U.S.C. § 3142(f)(1), which does not include petty offenses and many felonies, such as fraud. *See United States v. Ploof*, 851 F.2d 7 (1st Cir. 1988); *United States v. Himler*, 797 F.2d 156 (3d Cir. 1986). The only basis for detaining a defendant charged with an offense not listed is risk of flight.
- The Bail Reform Act requires that if the court determines that release on personal recognizance or unsecured appearance bond will not reasonably assure the appearance of the person or will endanger any person or the community, it must release the person subject to a condition that the person not commit a crime and "the least restrictive further condition, or combination of conditions" that will "reasonably" assure the person's appearance and the safety of any person and the community, and in making that determination, must take into account a list of factors, which does not include the alleged victim's "views." 18 U.S.C. § 3142(c), (g).
- A victim's "view" that the defendant should be detained or that certain conditions should be imposed will often not be based on any of the limited set of considerations under the Bail Reform Act.
- If the government wishes to put a victim on as a *witness*, it may do so. If so, the victim's statements must be produced under Rule 46(j), and the victim must be placed under oath and subject to cross-examination under 18 U.S.C. 3142(f)(2). The Bail Reform Act complies with the Due Process Clause in part because it

- provides for a “full-blown adversary hearing,” including cross-examination of witnesses, before a “neutral decisionmaker,” in which the government must establish by “clear and convincing evidence” that no conditions can assure appearance and the safety of the community or any person. *Salerno*, 481 U.S. at 750, 751-52. This proposal would make an end run around constitutionally necessary adversarial testing, and would compromise the neutrality of the judge and violate the presumption of innocence.
- The Bail Reform Act complies with the Due Process Clause in part because it requires an immediate hearing if the government seeks detention with continuances limited to 5 or 3 days. *Salerno*, 481 U.S. at 747. This proposal would require delay while alleged victims are located and given notice. Further, if the court declined to detain the defendant based on the victim’s “views,” the victim, in his or her sole discretion, could halt the proceedings and force the continued detention of the defendant while litigating a frivolous mandamus action.

Rule 47(a) – Consideration of Victim “Views” on Government’s Motion to Dismiss – Should not be considered; no basis in CVRA; unconstitutional; would interfere with prosecutorial discretion

No such right is found in the CVRA. A person who believes him or herself to be a victim of a crime the prosecutor has decided not to prosecute (because, for example, it is not a crime as a matter of law, there is insufficient evidence of a crime, the defendant has assisted law enforcement, etc.), has nothing relevant to say on a motion to dismiss. The proposal would give such persons the status of parties, and permit them to make irrelevant arguments, in violation of defendants’ constitutional rights. The rule would interfere with prosecutorial discretion.

Rule 49(a) – Service of Papers on Victims -- Should not be considered; no basis in CVRA; unconstitutional consequences; unintended consequences including undue expense, delay and confusion

This rule would go well beyond the CVRA to treat victims and alleged victims as if they were parties. Serving every paper in the case would invite victims to believe that they could be “heard” on every aspect of the case. This would create chaos and require the defendant, and the government and court as well, to waste scarce time and resources responding to victims. The rule would undermine the right to effective assistance of counsel.

The Committee’s Rule 60(a)(1) and (3) goes as far as statutorily and constitutionally permissible by requiring the government to give notice of public proceedings involving the crime and a right to be “reasonably heard” at public proceedings involving the crime concerning release, plea or sentencing.

Serving copies of every paper filed in a criminal case to every victim or alleged victim would be costly, create delay, and invade the privacy of the defendant and others in

documents filed under seal. All public documents filed with the court are available to any interested member of the public.

Rule 50 – Right to Be Heard on Motions to Continue -- Should not be considered; no basis in CVRA; unconstitutional; unnecessary

The rule would create a “right to be heard” regarding any motion for continuance, a right not found in the CVRA. It would give victims the equivalent of the defendant’s constitutional right to a speedy trial. As in the proposed amendments to Rule 5.1, this rule would upset the balance among the government’s right and obligation to prepare its case, the defendant’s right to a speedy trial, and the defendant’s due process right to prepare a defense. Congress did not intend this, *see* 150 Cong. Rec. S4260-01 at S4268 (Apr. 22, 2004) (statement of Sen. Feinstein) (victim’s “right to proceedings free from unreasonable delay. . . does not curtail the Government’s need for reasonable time to organize and prosecute its case. Nor is [it] intended to infringe on the defendant’s due process right to prepare a defense.”), and it would be unconstitutional. *United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005) (“Congress, in enacting the CVRA did not mean to undermine the Speedy Trial Act . . . nor to deprive either criminal defendants or the government of a full an adequate opportunity to prepare for trial. The defendant's right to adequate preparation is, of course, of constitutional significance . . .”).

Rule 51 – Preserving Claimed Error -- Should not be considered; no basis for a rule of this breadth in CVRA; adequately covered to extent required; unconstitutional consequences; unintended consequences

There is no basis for this rule in the CVRA. It would unconstitutionally elevate alleged victims to the status of parties, inviting them to make objections of any nature throughout the proceedings, requiring the defendant to respond and judges to rule, and generally creating chaos and delay. The Committee’s Rule 60(b) provides the procedure through which victims must preserve the limited set of rights created by the CVRA.