

**United States House of Representatives  
Committee on the Judiciary  
Subcommittee on the Constitution**

Statement of

James Orenstein

on

H.J. Res. 48, the Proposed Victims' Rights  
Amendment to the United States Constitution

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Room 2141, Rayburn House Office Building

**I. Introduction**

Mr. Chairman, distinguished Members of the Committee, thank you for inviting me to appear before you today.<sup>1</sup> It is an honor to have a chance to speak with you about a matter as fundamentally important as our Constitution, and to address two issues that mean a great deal to me: the rights of crime victims and the effective enforcement of criminal law. As a federal prosecutor for most of my career, I have been privileged to work closely with a number of crime victims, including those harmed by one of the worst crimes in our Nation's history. I have also been privileged to spend considerable time working with talented people on all sides of the issue to make sure that any Victims' Rights Amendment to the Constitution would provide real relief for victims of violent crimes without jeopardizing law enforcement. I think it may be possible to do both, but I also believe that there are better solutions that do not carry the severe risks to law enforcement inherent in using the Constitution to address the problem. In particular, I believe that the current language of the Victims' Rights Amendment – language that differs in significant respects from the carefully crafted Amendment that came very close to passage in the 106th Congress – will in some cases sacrifice the effective prosecution of violent offenders to achieve marginal and possibly illusory procedural improvements for their victims.<sup>2</sup>

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<sup>1</sup> The views expressed herein are mine alone.

<sup>2</sup> At the Senate Judiciary Committee's hearing on the proposed amendment earlier this year, Mr. Twist grossly distorted my reference to "marginal and possibly illusory procedural improvements" by asserting that it shows I would arrogate to myself the power to decide for bereaved parents "how important it is for them to be in the courtroom during the trial of their son's murderer. I don't want to decide for her, and I don't want my government, in an exercise of hideous paternalism, to decide for her."

Such criticism misses the mark in several important ways. First, I do assume that it is supremely important for such victims to attend trials and obtain other protections already written

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I am currently an attorney in private practice in New York City and an adjunct professor at the law schools of Fordham University and New York University. From February 1990 until June 2001, I served in the United States Department of Justice as an Assistant United States Attorney for the Eastern District of New York. For most of that time, I was assigned to the office's Organized Crime and Racketeering Section, eventually serving as its Deputy Chief. While a member of that section, I prosecuted a number of complex cases against members and associates of La Cosa Nostra, including the successful prosecution of John Gotti, the Boss of the Gambino Organized Crime Family.

In 1996, at the request of the Attorney General, I temporarily transferred to Denver to serve as one of the prosecutors in the Oklahoma City bombing case. I remained in Denver for 18 months to prosecute the trials of both Timothy McVeigh and Terry Nichols, and then returned in the Spring of 2001 to represent the government when McVeigh sought to delay his execution on the basis of the belated disclosure of certain documents. As a member of the OKBOMB task force, I learned first-hand about the many difficulties and frustrations that victims of violent crimes face in our justice system, and I also learned how critically important it is for prosecutors

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into state and federal law – I simply doubt that the proposed amendment will advance either that interest in particular or the overall interest of crime victims in general to see their victimizers brought to justice. To the extent that the addition of laws can advance those interests, I believe a more nuanced statutory approach can do so more effectively.

Second, my point is quite plainly that the amendment may prove to be illusory in that it will accomplish little if anything for victims who suffer unwarranted indignities such as being excluded from trials. Under current laws such victims are generally denied the rights this amendment would establish only if granting such rights would somehow violate the defendant's existing Constitutional rights or, more likely, if judges and prosecutors are failing to observe existing legal duties and to work hard to protect victims. The former will be a rare or non-existent occurrence, but one that the amendment would not affect under the apparently intended meaning of Section 1. The latter represents a failure of education and sensitivity that cannot be combated through the ratification of a constitutional amendment – but which spending legislation can ameliorate by directly promoting better training.

Third, the need to make choices about the scope of victims' rights is inherent in the task of crafting an amendment that would establish such rights. As a result, even proponents of the proposed amendment are quite properly willing to make the kinds of choices for victims that Mr. Twist scorns as "hideously paternalistic." For example, applying Mr. Twist's reasoning would lead to the conclusion that proponents of this amendment – which explicitly protects only victims of "violent" crimes – are willing to decide that attending an accused offender's trial is important for the victims of a minor assault who sustained no injury, but not important for victims who lose their retirement plans or life savings in a non-violent fraud scheme. Such a facile charge would be as unfair to the supporters of an amendment who seek to strike the right balance of interests for crime victims and law enforcement as Mr. Twist's statement is to opponents who share the same goal but believe that the current bill strikes the wrong balance.

and law enforcement agents to zealously protect the interests of crime victims while prosecuting the offenders.

From 1998 to 2001 I served on temporary work details at Justice Department headquarters in Washington, D.C., first as an attorney-adviser in the Office of Legal Counsel, and later as an Associate Deputy Attorney General. In both positions I was a member of a group that worked extensively with sponsors and other supporters of previous versions of the Victims' Rights Amendment. Our goal in doing so was to ensure that if the Amendment were ratified, it would provide real and enforceable rights to crime victims while at the same time preserving our constitutional heritage and – most important from my perspective as a prosecutor – maintaining the ability of law enforcement authorities to serve victims in the single best way they can: by securing the apprehension and punishment of the victimizers.

## **II. The Argument For A Constitutional Amendment: Allowing Congress to Legislate for the States To Achieve A Uniform National Standard**

I have no doubt that law enforcement authorities have historically been far too slow in realizing how important it is to protect the interests of crime victims as investigations and prosecutions. Twenty-one years ago, when President Reagan received the Final Report from the President's Task Force on Victims of Crime, courts, prosecutors and law enforcement officers too often ignored or too easily dismissed the legitimate interests of crime victims. Since then, Congress, the State legislatures and federal and state law enforcement agencies have made great improvements in official laws and policies. Further, thanks largely to effective advocacy by groups representing the victims of crime, officers, prosecutors and judges are much more sensitive now than they were two decades ago to the needless slights our criminal justice system can thoughtlessly impose, and are generally doing better in making sure that the system does not victimize people a second time. But despite such improvements, there is more that can and should be done.

Amending the Constitution to achieve that goal has both risks and benefits, and given the difficulty of curing any unintended adverse consequences, it should properly be considered only as a last resort. Given the legislative progress of the last twenty years, the principal benefit of an Amendment would be the empowerment of Congress to impose uniform national standards on the States. Congress has enacted a wide variety of statutes that protect crime victims. These laws ensure crime victims' participatory rights in the criminal justice system by making sure they are notified of proceedings, admitted to the courtroom and given an opportunity to be heard.<sup>3</sup>

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<sup>3</sup> One of those statutes – the Victims' Rights Clarification Act of 1997, 18 U.S.C. § 3510 – effectively addressed one of the problems often cited by supporters of this bill as showing the need for a constitutional amendment: the decision by the trial judge in the Oklahoma City bombing case to exclude from the courtroom any victim who wished to testify at the penalty phase. As a result of the 1997 law, no victim was excluded from testifying at the defendants' penalty hearing on the basis of having attended earlier proceedings. Further, the trial judge's conduct of the case following enactment of that statute – including his voir dire of prospective victim witnesses and his decision to exclude the testimony of one child victim because its

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They improve crime victims' safety by providing for notification about offenders' release and escape, and by providing for protection where needed. They help crime victims obtain restitution from offenders and remove obstacles to collection. But these measures only apply in federal criminal cases, and cannot protect crime victims whose victimizers are prosecuted by State authorities.

And while every single State has enacted its own protections for crime victims – 32 of them by means of constitutional amendments, and the rest through legislative change – the States have not uniformly adopted the full panoply of protections that this body has provided to the victims of federal crimes.<sup>4</sup> For example:

- Although every State allows the submission of victim impact statements at an offender's sentencing, only 48 States and the District of Columbia also provide for victim input at a parole hearing.
- Despite the prevalence of general victim notification procedures, only 41 States specifically require victims to be notified of canceled or rescheduled hearings.
- There is a similar lack of procedural uniformity with respect to restitution: only 43 States allow restitution orders to be enforced in the same manner as civil judgments.
- Finally, while convicted sex offenders are required to register with state or local law enforcement in all 50 states and the District of Columbia, and all of those jurisdictions have laws providing for community notification of the release of sex offenders or allowing public access to sex offender registration, such notification and access procedures are not uniform.

The ratification of a federal constitutional amendment could eradicate this disparity by empowering Congress to pass legislation that would override State laws and bring local practices into line.<sup>5</sup> The same result, however, could likely be achieved through the use of the federal spending power to give States proper incentives to meet uniform national standards. But unlike reliance on spending-based legislation, using the Constitution to achieve such uniformity carries the risk of unintended adverse consequences to law enforcement.

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admission would have violated the defendant's right to due process – would almost certainly have been exactly the same even if the proposed amendment had been in effect at the time.

<sup>4</sup> Statistics about state victim protection laws are drawn from U.S. Department of Justice, Office for Victims of Crime, "Crime and Victimization in America, Statistical Overview" (Apr. 2002) <[http://www.ojp.usdoj.gov/ovc/ncvrw/2002/ncvrw2002\\_rg\\_3.html#legislative](http://www.ojp.usdoj.gov/ovc/ncvrw/2002/ncvrw2002_rg_3.html#legislative)>.

<sup>5</sup> Of course, Congress would not be required to use such power to bring uniformity to the States, but if it did not do so, the situation would be no different than under current circumstances, where congressional legislation improves procedures only in federal cases and the treatment of victims in other cases is left to the effective but varying protection of the respective States.

### III. **The Proposed Amendment Needlessly Undermines Effective Law Enforcement**

#### A. Background

It is important to emphasize that the potential risks to effective law enforcement are not the result of giving legal rights to victims and placing corresponding responsibilities on prosecutors, judges, and other governmental actors. The changes brought about by improved legislation in this area over the past twenty years have demonstrated that the criminal justice system can provide better notice, participation, protection and relief to crime victims without in any way jeopardizing the prosecution of offenders. To the contrary, I strongly believe that prosecution efforts are generally more effective if crime victims are regularly consulted during the course of a case, kept informed of developments, and given an opportunity to be heard. There are of course occasions when such participation can harm law enforcement efforts, but my experience has been that most crime victims are more than willing to accommodate such needs if their participation is the norm rather than an afterthought.

In most cases, crime victims and prosecutors are natural allies: both want to secure the offender's punishment, and both are better able to work toward that result if the prosecutor keeps the victim notified and involved. But there are a number of cases – typically arising in the organized crime context and in prison settings – where the victim of one crime is also the offender in another, and the kind of participatory rights that this Amendment mandates would harm law enforcement efforts.

When a mob soldier decides to cooperate with the government, he typically pleads guilty as part of his agreement, and in some cases then goes back to his criminal colleagues to collect information for the government. If his disclosure is revealed, he is obviously placed in great personal danger, and the government's efforts to fight organized crime are compromised. Under this Amendment, such disclosures could easily come from crime victims who are more sympathetic to the criminals than the government. To illustrate that perverse kind of alliance: When I was working on the case against mob boss John Gotti, ten weeks before the start of trial, Gotti's underboss, Salvatore Gravano, decided to cooperate and testify – but for weeks after he decided to do so he was still in a detention facility with Gotti and other criminals and at grave risk if his cooperation became known. Luckily, that did not happen. But there were clearly victims of Gravano's crimes who would have notified Gotti if they could have done so. Gravano had, at Gotti's direction, killed a number of other members of the Gambino Family. Shortly after Gravano's cooperation became known, some of the murdered gangsters' family members filed a civil lawsuit for damages against Gravano – but not Gotti – and sought to use the civil discovery procedures to collect impeaching information about Gravano before the start of Gotti's trial. That their agenda was to help Gotti was demonstrated by the fact that when Gravano pleaded Gotti into the lawsuit, the problem disappeared.

Some argue that this problem of victim notification of cooperation agreements in organized crime cases is cured by the fact that the cooperating defendant's plea normally takes place in a non-public proceeding. While this may be true in a small number of cases, it is generally an unreliable solution. First, the standard for closing a public proceeding is

exceptionally high, *see* 28 C.F.R. § 50.9, and as a result cooperators' guilty pleas are rarely taken in proceedings that are formally closed to the public.<sup>6</sup> Instead, it is usually necessary to take such a plea in open court and protect the need for secrecy by scheduling it at a time when bystanders are unlikely to be present and by not giving advance public notice of the plea. Such pragmatic problem-solving would not work under the proposed Amendment, because victims allied with the targets of the investigation would be entitled to notice. Second, the Amendment's guarantee of the right to an adjudicative decision that considers the victim's safety might make courts reluctant to release a cooperating defendant to gather information without hearing from victims at the bail proceeding.

In the prison context, incarcerated offenders who assault one another may have little interest in working with prosecutors to promote law enforcement, but may have a very real and perverse interest in disrupting prison administration by insisting on the fullest range of victim services that the courts will make available. If, as discussed below, the current language of the Amendment creates a right to be present in court proceedings involving the crime, or at a minimum to be heard orally at some such proceedings, prison administrators will be faced with the Hobson's choice between cost- and labor-intensive measures to afford incarcerated victims their participatory rights and foregoing the prosecution of offenses within prison walls. Either choice could undermine orderly prison administration and the safety of corrections officers.<sup>7</sup>

The risk to law enforcement thus arises not from the substantive rights accorded to crime victims, but rather from the use of the Constitution to recognize those rights. As discussed below, there are two basic ways in which the Victims' Rights Amendment, as currently drafted, could undermine the prosecution and punishment of offenders: first, it may not adequately allow for appropriate exceptions to the general rule; and second, its provisions regarding the enforcement of victims' rights may harm prosecutions by delaying and complicating criminal trials. Both types of problems are uniquely troublesome where the source of victims' rights is the Constitution rather than a statute, and both are exacerbated by the likely effect on the interpretation of this bill resulting from its differences with prior versions of the Amendment. I will address the general interpretive issue first and then discuss in turn the specific problems for law enforcement and prison administration caused by particular portions of the current bill. In addition, I have appended to this statement my responses to written questions concerning the

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<sup>6</sup> For example, in light of the important First and Sixth Amendment interests at stage, federal regulations require prosecutors to secure the express permission of the Deputy Attorney General before seeking or even consenting to a closed court proceeding. 28 C.F.R. § 50.9(d)(1).

<sup>7</sup> One possible solution to the prison problem would be for Congress to exercise its enforcement power to exclude incarcerated offenders from the class of victims protected by the Amendment. Such an approach would be overbroad, and arguably inconsistent with the purpose of Section 4, which is designed to "enforce" rather than restrict the Amendment. *See, e.g., Saenz v. Roe*, 426 U.S. 489, 508 (1999) ("Congress' power under § 5 [of the Fourteenth Amendment], however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

likely effects of the proposed amendment posed by Senator Leahy following the Senate Judiciary Committee's hearing on the Senate Version of the proposed amendment, S.J. Res. 1, on April 8, 2003, in the hope that it will be helpful to members of the Committee with similar questions.

B. Interpreting The Amendment In Light Of Its Legislative History

Proponents of the current bill assert that it reflects years of study and debate, and that it embodies compromises reached after much effort by supporters and critics alike.<sup>8</sup> As someone who was involved in those efforts, I can tell you that while the current bill is unquestionably the product of good-faith effort by its supporters, and does indeed incorporate some improvements suggested by others, it does not fully reflect the years of work that have gone into efforts to serve both crime victims and our Constitutional heritage. To the contrary, as explained below, the current version of the Amendment discards several important compromises that were crafted in an earlier version that was endorsed by this Committee, and thereby exacerbates the risks to effective law enforcement.

During the time I worked for the government, I was fortunate enough to work with a number of very talented and dedicated attorneys from the Justice Department, Congress, and victims' advocacy groups to refine the language of the Victims' Rights Amendment. I became involved in the effort while an earlier version, S.J. Res. 44, was pending in the 105th Congress. By that time a great many issues had been resolved, and only a few remained. Some, though not all, potentially implicated very practical law enforcement concerns about the conduct of criminal trials and the administration of prisons. Over the course of several months, most of those remaining concerns were addressed. By the time that S.J. Res. 3 of the 106th Congress was favorably reported by the Senate Judiciary Committee (S. Rep. 106-254, Apr. 4, 2000 (the "Senate Report")), virtually every word in the bill had been crafted and vetted with an eye to achieving a careful balance of meaningful victims' rights and the needs of law enforcement.

Much of the language adopted in S.J. Res. 3 to address law enforcement concerns has been changed or deleted in the current version.<sup>9</sup> Even if Congress were writing on a blank slate, I would have some concerns about some of the language in H.J. Res. 48. But you are not writing on a blank slate, and that fact exacerbates the potential law enforcement problems created by some of the provisions of this bill. As you know, when legislation contains ambiguous language,

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<sup>8</sup> See, e.g., Statement of Steven J. Twist, General Counsel, National Victims Constitutional Amendment Network, Before the Subcommittee on the Constitution, Federalism, and Property Rights, Committee on the Judiciary, United States Senate, in Support of S. J. Res. 1, The Crime Victims' Rights Amendment at 9 (Apr. 8, 2003) ("Twist Statement") ("These efforts have produced the proposed amendment which is now before you. It is the product of quite literally seven years of debate and reflection. It speaks in the language of the Constitution; it has been revised to address concerns of critics on both the Left and the Right, while not abandoning the core values of the cause we serve.").

<sup>9</sup> The changes first appeared in S.J. Res. 35 of the 107th Congress, the substantive terms of which were identical to those of the current bill.

most judges will resolve the ambiguity in part by looking at the legislative history and in part by applying certain assumptions about legislative intent.

Thus, for example (and as discussed below), the remedies provision of the current bill no longer contains an explicit prohibition – as the earlier version of the Amendment did – forbidding a court from curing a violation of a victim’s participatory rights by staying or continuing a trial, reopening a proceeding or invalidating a ruling. If the current version of the Amendment is ratified, courts interpreting it might rule that this was a deliberate change and that any ambiguity on the issue must therefore be resolved in favor of allowing such remedies – remedies that could well harm the prosecution’s efforts to convict an offender.

C. Exceptions And Restrictions, And The Need For Flexibility In Law Enforcement And Prison Administration

There are unquestionably times when providing victims with the substantive participatory rights set forth in the Amendment will be inconsistent with the interests of a successful prosecution or prison administration. For example, providing notice and an opportunity to be heard with regard to the acceptance of the guilty plea of a potential cooperating witness – that is, a criminal who is willing to testify against more serious offenders in exchange for leniency – may in some cases risk compromising the secrecy from other offenders necessary to the successful completion of such an agreement. This is particularly true in the organized crime context, where the victims may themselves be members of rival criminal groups. Likewise, in the case of prison assaults, there may be cases where accommodating the participatory rights of the victim inmate will unduly disrupt the safe and orderly administration of the prison. I am confident that the sponsors of this bill and other victims’ rights advocates agree that such exceptions are appropriate. The problem is that the current language may not allow them.

1. The “Restrictions” Clause Generally

The current bill allows victims’ rights to be “restricted” “to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.” Like its predecessor (which allowed “exceptions” to “be created only when necessary to achieve a compelling interest”), the current version allows courts to provide flexibility in individual cases rather than relying on Congress to prescribe uniform national solutions. The current bill also improves on the S.J. Res. 3 by expanding the scope of circumstances in which courts can allow for such flexibility. The earlier bill’s limitation of exceptions to those “necessary to achieve a compelling interest” would likely have triggered “strict scrutiny” by reviewing courts, as a result of which virtually no exceptions would likely be approved. However, some of the language changes may harm the law enforcement interest in flexibility, as discussed below.

a. “Restrictions” rather than “Exceptions”

Given the current bill’s use of the word “restrictions” in contrast to the earlier bill’s use of “exceptions,” I am concerned that courts will interpret a “restriction” to mean something other than an exception to the general rule. An “exception” plainly refers to a specific situation in which the substantive rights that would normally be accorded under the amendment need not be

vindicated by the courts at all. If a “restriction” is interpreted to mean something different – such as, for example, a limitation on the way the right is to be afforded in a particular situation rather than an outright denial – the unintended effect might be harmful to law enforcement. For instance, in the case where it makes sense not to notify one gang member who is the victim of another one’s assault that the latter is about to plead guilty and cooperate, an “exception” approved by the court would allow the prosecutor not to provide notice at all, whereas the “restriction” might nevertheless require some form of notice – which might endanger the cooperating defendant and compromise his ability to assist law enforcement.<sup>10</sup>

- b. Prison administration may not fall within “the administration of criminal justice.”

Because so many of the victims who would be given rights under this Amendment are themselves offenders, it is critically important that the bill provide sufficient flexibility in the context of prison administration. One approach that would work in the prison context – but that would likely fail to provide sufficient flexibility to prosecutors – would be simply to have no “exceptions” language in the Amendment at all. In the context of the First Amendment, for example, courts have held that the legitimate needs of prison administration justify reasonable limitations on free expression rights, despite the fact that the First Amendment contains no provision for exceptions and is absolute in its phrasing.<sup>11</sup> But if the Amendment is to provide for exceptions or restrictions in some circumstances, prison administrators might have to do far more than show reasonable needs for relief, and would instead have to meet the explicit standard set forth in the Amendment.

As noted above, the current bill improves upon its predecessor by expanding on the “compelling interest” standard for exceptions. However, if courts do not interpret “the administration of criminal justice” broadly, the legitimate needs of prison administrators might nevertheless be sacrificed. Although I would likely disagree with an interpretation of the phrase that excluded prison administration, such an interpretation is certainly possible. Given that habeas corpus proceedings challenging the treatment of prisoners are treated as civil cases and are collateral to the underlying criminal prosecutions, it would not be unreasonable for a court to conclude that the needs of prison administrators are not included within the phrases “public safety” or “administration of criminal justice” and that prison-related restrictions of victims rights must therefore pass strict scrutiny under the “compelling necessity” prong of the Section 2.

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<sup>10</sup> Similarly, in a mass-victim case, a pragmatic decision to allow only a limited number of representative victims speak at a hearing would almost certainly be considered a reasonable “exception” to the individual victim’s right to be heard, but could not fairly be characterized as a mere “restriction” of that individually-held right.

<sup>11</sup> See, e.g., Shaw v. Murphy, 532 U.S. 223, 229 (2001); Turner v. Safley, 482 U.S. 78, 89 (1987).

## 2. Specific Flexibility Problems

### a. The right “to be heard”

One of the most important participatory rights for crime victims is the right to be heard in a proceeding. As in earlier versions, the current version properly limits this right to public proceedings so as not to jeopardize the need for security and secrecy in proceedings that are not normally open to the public. However, certain language changes from the earlier version compromise that limitation, and certain other changes discard the important flexibility achieved by allowing victim input to come in the form of written or recorded statements.

The corresponding language in S.J. Res. 3 accorded a victim of violent crime the right “to be heard, if present, and to submit a statement” at certain public proceedings.<sup>12</sup> In contrast, the current bill provides a right “reasonably to be heard” at such proceedings. While the drafters may have intended no substantive difference, I believe that the courts will interpret the change in language to signal the opposite intention. Specifically, I would expect some courts to interpret the deletion of “submit a statement” to signal a legislative intent to allow victims actually to be “heard” by making an oral statement. Nor do I think the use of the term “reasonably to be heard” would alter that interpretation; instead, I believe courts would likely reconcile the two changes by interpreting “reasonably” to mean that a victim’s oral statement could be subjected to reasonable time and subject matter restrictions.<sup>13</sup> If the above is correct then prison officials might face an extremely burdensome choice of either transporting incarcerated victims to court for the purpose of being heard or providing for live transmissions to the courtroom.

A related problem would extend beyond prison walls. Because the difference between the previous and current versions of the Amendment suggest that a victim must be allowed specifically to be “heard” rather than simply to “submit a statement,” a victim might persuade a court that the “reasonable opportunity to be heard” guaranteed by the current version of the Amendment carries with it an implicit guarantee that the government will take affirmative steps, if necessary, to provide such a reasonable opportunity. This undermines the intent of the Amendment’s careful use of negative phrasing with respect to the right not to be excluded from public proceedings – a formulation designed to avoid a “government obligation to provide funding, to schedule the timing of a particular proceeding according to a victim’s wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings.”<sup>14</sup> Further undermining that intent is the fact that unlike its predecessor, the current version of the Amendment does not include the phrase “if present” in the specification of the right to be heard.

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<sup>12</sup> The 2000 version also provided the same right at non-public parole hearings “to the extent those rights are afforded to the convicted offender.” There is no corresponding participatory right under the current proposed Amendment.

<sup>13</sup> Such an interpretation of legislative intent would be consistent with the Senate Judiciary Committee’s explanation of the corresponding language in S.J. Res. 3. See Senate Report at 34.

<sup>14</sup> Senate Report at 31.

b. Providing notice of ancillary civil proceedings.

Section 2 provides that “[a] victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime . . . .” Some public proceedings “involving the crime” are civil in nature, and normally proceed without any participation by the executive branch of government. Here again, the change in language from S.J. Res. 3 could be problematic: that bill used the phrase “relating to the crime,” which the Senate Judiciary Committee noted would “[t]ypically . . . be the criminal proceedings arising from the filed criminal charges, although other proceedings might also relate to the crime.” Senate Report at 30-31. A court interpreting the current bill might conclude that the change from “relating to” to “involving” was intended to make it easier to apply the Amendment to proceedings outside the criminal context.

Thus, for example, if an offender murders multiple victims and the survivors of one victim bring a civil suit for damages against the offender, this Amendment would give the non-suing victims’ relatives an affirmative right to notice of the public proceedings in the lawsuit – without specifying who must provide the notice. The only possible candidates are the plaintiff (who is herself a crime victim and should not be burdened by this Amendment), the court (which is already overburdened and may lack the information necessary to provide the required notice), and the law enforcement agencies that investigated and prosecuted the crime. It seems inevitable (and correct) that this burden would fall to law enforcement under the Amendment – a burden that is totally unrelated to improving the lot of crime victims in the criminal justice system and that would further deplete the already strained resources of prosecutors and police, assuming that they even have sufficient knowledge of the ancillary suit to fulfill the obligation.

Two possible solutions seems likely to be unsatisfactory. First, the problem of providing notice in ancillary civil suits would be eliminated by changing “any public proceeding” to “any public criminal proceeding.” However, such a change would likely exclude habeas corpus proceedings, which are considered civil in nature, despite the important role they play in the criminal justice system. Second, as explained above, I believe it is doubtful that Congress could eliminate the problem under the “restrictions” authority in the last sentence of Section 2. As noted above, such restrictions are reserved for matters of “public safety . . . the administration of criminal justice [and] compelling necessity.” The burden associated with providing notice in civil suits is plainly not a matter of public safety and would almost certainly fail to withstand the strict scrutiny that the “compelling necessity” language will likely trigger. And if the burden is held to be a sufficiently “substantial interest in the . . . administration of criminal justice” to warrant use of the restriction power, then it seems likely that virtually any additional burden to law enforcement or prison officials would justify a restriction – making the rights set forth in the Amendment largely illusory. Because I doubt that the courts would interpret the restriction power to be so broad, I am concerned that there would be no legislative mechanism available to cure this problem.

D. Potential Adverse Effects on Prosecutions

One of the criticisms of the previous version of the Victims’ Rights Amendment was the length and inelegance of its language. The substantive rights in Section 1 were set forth in a series of very specific subsections resembling a laundry list, and the remedies language of

Section 2 set forth a bewildering series of exceptions to exceptions.<sup>15</sup> But while the language of the current bill is more streamlined and reads more like other constitutional amendments than its predecessor, it achieves such stylistic improvement at the expense of clarity, which could result in real harm to criminal prosecutions.

For the most part, this problem arises from the interplay of two clauses: the “adjudicative decisions” clause in Section 2 (recognizing the “right to adjudicative decisions that duly consider the victim’s safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender”) and the remedies clause in Section 3 (“Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages.”). The former suggests that all of the victims’ listed interests – in safety, the avoidance of delay, and restitution – are at stake and must therefore be considered in every adjudicative decision; the latter, by deleting specific language from S.J. Res. 3, suggests the possibility of interlocutory appeals of any such adjudicative decision that does not adequately consider all of the victim’s interests. In combination, these two aspects of the bill could greatly disrupt criminal prosecutions.

#### 1. Adjudicative decisions

The 2000 version of the Amendment included in its list of crime victims’ rights the following three items: the right “to consideration of the interest of the victim that any trial be free from unreasonable delay;” the right “to an order of restitution from the convicted offender;” and the right “to consideration for the safety of the victim in determining any conditional release from custody relating to the crime.” The interest in a speedy trial was generalized – it was not tied to a specific stage of the prosecution, much less to every such stage. Such language allowed courts the freedom to interpret the right to apply in proceedings at which the trial schedule was at issue.<sup>16</sup> The interest in restitution was specifically tied to the end of the case, at which point the victim’s interest would be vindicated by the issuance of an appropriate order.<sup>17</sup> And the interest in safety was explicitly tied to bail, parole and similar determinations.<sup>18</sup>

In contrast, the current language appears to require the consideration of all the listed interests in the context of any “adjudicative decision” that a court (or, presumably, a parole or

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<sup>15</sup> *See, e.g.*, 146 Cong. Rec. S2984 (daily ed. Apr. 27, 2000) (statement of Sen. Leahy) (“Let us call that ‘the tax lawyer’s provision,’ since it is so obscure that I think only someone who has spent half their life plumbing the depths of the tax code could understand it. It would certainly be the first triple negative in the United States Constitution.... Regardless of how it is ultimately interpreted, this intricate web of exceptions is not the stuff of a Constitution.”)

<sup>16</sup> See Senate Report at 36.

<sup>17</sup> This provision gave courts sufficient flexibility by allowing an order of only nominal restitution if there was no hope of satisfying the order and by conferring no rights with regard to a particular payment schedule. Senate Report at 37.

<sup>18</sup> See Senate Report at 37-38.

pardon board) makes in connection with a criminal case. Indeed, it is precisely because of the contrast with the earlier formulation that such an interpretation is plausible. And if that interpretation proves to be correct, then courts and prosecutors will have to grapple with a number of questions, the resolution of which could make the prosecution of offenders a far lengthier and complicated process. For example:

- Must every “adjudicative decision” in a criminal case examine the effects of the ruling on the right to restitution?
- Must a victim be heard on disputes about jury instructions because the result, by making conviction more or less likely, may affect her safety-based interest in keeping the accused offender incarcerated?
- Does a crime victim have the right to object to the admission of evidence on the ground that it might lengthen the trial?

Examples could be multiplied, and undoubtedly some would be more fanciful than others. But given the change in language from the previous bill, and given the countless adjudicative decisions that are made in every criminal prosecution, it seems inevitable that the current version of the Amendment could cause real mischief in criminal prosecutions.

## 2. Remedies

The potential for unintended adverse consequences is magnified by the change in language regarding remedies. This is one of the most challenging issues in crafting a Victims’ Rights Amendment: the need to make crime victims’ rights meaningful and enforceable while at the same time preserving the finality of the results in criminal cases and also avoiding interlocutory appeals that could harm the interests of speedy and effective prosecution. The balance that was struck in S.J. Res. 3 recognizes that a crime victims have a variety of interests that can be protected in a variety of ways. Generally speaking, the remedies provision of S.J. Res. 3 recognized that a crime victim’s interest in safety – which is at stake in decisions regarding an accused offender’s release on bail – should be capable of vindication at any time, including through a retrospective invalidation of an order of release. On the other hand, a victim’s participatory rights can effectively be honored by prospective rulings without the need to reopen matters that were decided in the victim’s absence.

Thus, for example, if a victim were improperly excluded from a courtroom during the consideration of a motion in limine to exclude evidence, it would make more sense to allow the victim to obtain appellate relief in the form of a prospective order to admit the victim to future proceedings than a retrospective one that would vacate the evidentiary ruling so that the matter could be re-argued in the victim’s presence. Moreover, it would plainly be contrary to the interests of effective law enforcement if a victim could obtain a stay or continuance of trial while the interlocutory appeal of described above was pending. The remedies language of S.J. Res. 3,

inelegant as it was,<sup>19</sup> would have prevented such anomalous results. The more streamlined language of the current bill – by deleting the prohibitions against staying or continuing trials, reopening proceedings, and invalidating ruling – would not.

#### **IV. Legislation Can Achieve The Desired Results Without Risking Effective Law Enforcement**

While I believe, for the reasons set forth above, that ratification of the proposed Constitutional amendment would incur unwarranted risks for law enforcement, I do not believe that this body lacks a useful alternate course of action. To the contrary, the substantive benefits to be achieved by the bill – in particular, the creation of a national standard of crime victims’ rights that courts, prosecutors and police would be legally bound to respect – can and should be achieved through federal legislation. Such legislation would be appropriate under the proposed Amendment – as made clear by the enforcement power contemplated in Section 4 – but there is no need for Congress to wait for the Amendment to be ratified to take such action. To the contrary, Congress has previously used its power to pass a number of valuable enhancements of victims’ rights over the last twenty years,<sup>20</sup> and can do so again both to fill the remaining gaps in federal law and to provide proper incentives for the States to improve their own laws. Such legislation could provide crime victims across the country with the respect, protection, notification and consultation they deserve, while at the same time preserving the flexibility essential to effective law enforcement.

Such a bill is now pending in the Senate: The Crime Victims Assistance Act of 2003, Title III, Subtitle B of S. 22. Although this hearing is not about that bill, it is worth noting that the pending Act would, by means of the provisions of Part 1, implement all of the substantive rights embodied in S.J. Res. 1 that have yet to be included in federal law, as well as others, and would strengthen enforcement of all federal victims rights. It would also, through the funding and pilot program provisions of Part 2, encourage States to improve their own laws. There may well be alternatives to the specific provisions of the pending legislation – and in particular, there may be stronger measures available to encourage States to enact victim protection laws that meet federal standards – but regardless of any alternatives there are at least two advantages that this legislative approach has over the proposed Constitutional amendment.

First, because the Crime Victims Assistance Act is a statute, it can properly be drafted as such, and thereby achieve the balancing of the interests of crime victims and law enforcement that a more generally worded constitutional amendment necessarily lacks. As noted above, some critics of S.J. Res. 3 objected to the length, inelegance and statute-like specificity of some of its

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<sup>19</sup> “Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial.”

<sup>20</sup> See Attorney General Guidelines for Victim and Witness Assistance, App. D (2000) (listing 15 federal laws) <<http://www.ojp.usdoj.gov/ovc/publications/infores/agg2000/agguidel.pdf>>.

provisions. The current version largely avoids such problems and reads more like other constitutional amendments, but only at the rather significant price of risking harm to law enforcement, as explained above. The fundamental problem is that there is no short and elegant way to describe the kinds of cases where the “victim” of one crime is also the offender (or allied with the offender) in another – i.e., the kinds of cases where providing the full panoply of victims’ rights can do more harm than good. Nor is there a short and elegant sentence that precisely separates the kinds of remedial actions crime victims should be able to take to enforce their rights from those that would unduly delay trials and jeopardize convictions. As a statute, the Crime Victims Assistance Act can more precisely draw such distinctions.<sup>21</sup>

Second, a statute is easier to fix than the Constitution. If legislation intended to strike the proper balance of law enforcement and victims’ needs proves upon enactment to be ineffective in protecting one interest or the other – that is, if it gives an unintended windfall to offenders by being too rigid or if it gives insufficient relief to victims by being too susceptible to exceptions – then the statute can be changed through the normal process. If a Constitutional amendment proves to have similar problems, it is all but impossible to remedy, because any change requires the full ratification process set forth in Article V of the Constitution.

Accordingly, there seems to be no good reason for Congress to consider amending the Constitution without first – or, at a minimum, simultaneously – enacting legislation that can both improve the protection of crime victims in both State and federal cases and minimize the unforeseen and unintended risks to effective law enforcement. Congress would almost undoubtedly seek to enact similar legislation pursuant to its enforcement power if the Amendment were ratified, and it will be no less effective if enacted now. More important, if the legislative approach proves effective, it would allow Congress to provide all the protection crime victims seek without needlessly risking society’s interest in effective law enforcement.

Proponents of this bill sometimes dismiss concerns about a constitutional amendment’s effects on law enforcement and prison administration as niggling doubts that would attend any ambitious attempt to improve the system. They argue that such concerns “make the perfect the enemy of the good” and question the bona fides of those who articulate them.<sup>22</sup> But these proponents themselves too easily dismiss a better solution that has not yet been tried and that may make the risks inherent in a constitutional amendment unnecessary. If supporters of victims’ rights, among whose number I count myself, allow the desire for the symbolic victory of a constitutional amendment to distract them – and to distract Congress – from passing spending-

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<sup>21</sup> It is no answer to assert that similar line-drawing could be achieved under the Section 4 enforcement power that the proposed amendment would grant Congress. Because the effectiveness on such rules to protect law enforcement interests relies on the ability to carve out exceptions to the general grant of rights to crime victims, the portions of S. 22 that allow for such exceptions might well be deemed unconstitutional if the proposed Amendment were ratified.

<sup>22</sup> *See, e.g.*, Twist Statement at 2 (“critics are always heard to counsel delay, to trade on doubts and fears, to make the perfect the enemy of the good. Perhaps some would prefer it if crime victims just remained invisible.”).

based legislation that could achieve all of their substantive goals more effectively and more easily than this bill, and with less risk to effective law enforcement, they run the risk of making the flawed the enemy of the perfect.

**V. Conclusion.**

Our criminal justice system has done much in recent years to improve the way it treats victims of crime, and it has much yet to do. But in trying to represent crime victims better, we must never lose sight of the fact that the single best way prosecutors and police can help crime victims is to ensure the capture, conviction, and punishment of the victimizers. In my opinion as a former prosecutor, the current version of the Victims' Rights Amendment to the United States Constitution achieves the goal of national uniformity for victims' rights only by risking effective law enforcement. By doing so, it ill serves the crime victims whose rights and needs we all want to protect.

I will be happy to answer any questions the Committee may have.

## **APPENDIX: Responses to Questions by Senator Leahy for Jamie Orenstein**

1. *Supporters of the proposed amendment have argued that it simply seeks to place victims' rights on the same constitutional footing as the rights of the accused. If you were still a prosecutor, and S.J. Res.1 had been passed and ratified, would you be able to argue that, in fact, victims' rights trump those of the accused?*

**Response:** Either as a prosecutor or a victim's counsel, I could make several arguments.<sup>1</sup> First, I could argue that a court must interpret the amendment as having been ratified with a full understanding of pre-existing amendments, and therefore, necessarily, with an intent to have the latest-ratified one trump in cases of direct conflict. In other words, if two amendments passed at different times are capable of producing irreconcilably inconsistent rights for different parties, then the framers of the later-ratified amendment must have intended that one to prevail. Had they intended otherwise, I could argue, they would have so stated in the amendment itself – particularly because they would have known of the canon of construction that in the absence of such limiting language would assume the primacy of the later, more specific law. But this amendment contains no such language – it has only a preamble that predicts a conflict of rights will never arise. That preamble either provides no guidance about how to resolve a conflict should the prediction prove wrong, or, as discussed below, would lead a court to rule that the victim's right must trump the defendant's.

Second, I could compare the distinction in last sentence of Section 1 between the words “denied” and “restricted” to similar distinctions in several earlier constitutional amendments. Compare S.J. Res. 1, 108th Cong. § 1 (2003) (“The rights of victims ... shall not be denied by any State or the United States and may be restricted only as provided in this article”) with U.S. Const., amend. IX (referring to rights being “den[ied]” or “disparage[d]”), *id.*, amend. XV, § 1 (referring to rights being “denied” or “abridged”), *id.*, amend. XIX (same), *id.*, amend. XXIV, § 1 (same), and *id.*, amend. XXVI, § 1 (same). I could then contrast that long-recognized distinction between denying and restricting rights with the carefully limited assertion in the preamble to Section 1 of the proposed amendment that victims' rights are “capable of protection without *denying* the constitutional rights of those accused of victimizing them.” S.J. Res. 1, 108th Cong. § 1 (emphasis added). I could argue that given the provision's two references to the concept of denying rights, one of which is plainly grounded in an assumption that denial and

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<sup>1</sup> Under Section 3, “[o]nly the victim or the victim's lawful representative may assert the rights established by this article.” As a result, prosecutors might be deemed no longer to have standing to advance any argument based on an assertion of a victim's rights – thereby potentially undermining useful victim-assistance statutes such as 42 U.S.C. § 10606 (requiring prosecutors to use “best efforts” to secure certain rights for victims). It is thus more likely that a victim's retained counsel would make the arguments summarized in this response. Moreover, unlike a federal prosecutor who might be constrained by the adoption of Justice Department policy to avoid advocating certain interpretations of the amendment, a victim's private counsel would be free – and duty-bound – to assert a robust view of the victim's rights.

restriction are different concepts, the framers of the amendment must have contemplated that courts could restrict a defendant's constitutional rights in order to vindicate the rights of the victim, provided that in doing so it did not completely deny the defendant's rights. Moreover, even an outright denial of the defendant's rights would be preferable to a burden on the victim's rights, as the preamble to Section 1 is deliberately phrased as an observation rather than a mandate.

Third, and perhaps most obviously, I could argue that while Section 1 may be susceptible of several different interpretations, the one construction that *cannot* have been intended is that a defendant's constitutional right must trump in cases of conflict with a victim's right. Such a construction is plainly not intended because the sponsors have repeatedly declined to adopt alternative phrasing to make that result an explicit requirement of the amendment. *See, e.g., S. Rep. 106-254, at 43, 72-73 (2000)*. By reviewing the legislative history of the amendment, I could argue that the court could find a legislative intent in S.J. Res. 1 not to allow a defendant's constitutional right to trump should a conflict arise, and that therefore the victim must prevail.

Moreover, I could also use the same legislative history to help refute the defendant's best argument – namely, that the preamble to Section 1 precludes the possibility of the victim's rights trumping the defendant's. If a judge found that a right established by the proposed amendment was in fact irreconcilably in conflict with the defendant's constitutional rights, the defendant would point to the preamble to argue that it forbids allowing the victim's right to trump. In effect, the defendant would be arguing that the victim's substantive right already found to be within the provisions of Section 2 was trumped not simply by operation of his own constitutional rights, but by the terms of the preamble to Section 1.

In response, I could argue as follows that the preamble's drafter did not intend such an interpretation. The preamble was drafted by Harvard Law School Professor Laurence H. Tribe. *See Statement of Steven J. Twist in support of S. J. Res. 1, the Crime Victims' Rights Amendment, at 14 (Apr. 8, 2003) ("Twist Statement")*. Only one other amendment to the Constitution – the Second – contains a preamble that does not itself define or limit any rights. I could argue that it is no mere coincidence that the author of the preamble to Section 1 had closely studied the meaning of such prefatory language and concluded that it could *not* trump substantive rights. *See Laurence H. Tribe and Akhil Reed Amar, Well-Regulated Militias, and More, N.Y. Times, Oct. 28, 1999 ("the Second Amendment reference to the people's 'right' to be armed cannot be trumped by the Amendment's preamble")*. The obvious implication would be that Prof. Tribe modeled the preamble to Section 1 on the structure of the Second Amendment precisely to avoid letting a defendant's right trump a victim's should a conflict ultimately arise.

The preamble would thus serve as a potentially useful interpretive tool for the defendant in arguing that no conflict existed, but would not assist the court in resolving a conflict once it was found to exist. For example, as explained below in response to Question 5, there is uncertainty about whether the proposed amendment is intended to give a victim the right to tell the jury in a capital case how she thinks the defendant should be sentenced. Because the Constitution currently forbids such statements, the defendant would argue that the preamble to Section 1 is a valuable interpretive tool that should persuade the court to avoid a conflict of rights by interpreting Section 2 to establish a right "reasonably to be heard" at a sentencing proceeding that does not include the right to make a sentencing recommendation. If the court

rejected that argument and determined that the framers of the amendment intended to confer a right of victim allocution, then a conflict would plainly exist between the victim's constitutional right and the defendant's. At that point, it appears to be Prof. Tribe's view that the victim's Section 2 right to be heard could not be trumped by the observation in the preamble to Section 1.

Given the legislative history of the preamble to Section 1 – the repeated rejection of alternate language prohibiting the denial or diminishment of defendants' rights as well as the drafter's view that a preamble cannot trump the language establishing substantive rights – I could argue that the court should interpret the clause as an optimistic prediction that victims' and defendants' rights could be harmonized, but a prediction lacking the force of law. And if the prediction proved incorrect, I could argue that the court would not only be free to conclude that the victim's rights must prevail in cases of conflict, but that it would be bound to do so.

2. *To what extent would S.J. Res.1 give victims the right to stay or continue a trial once it is underway? To what extent would it allow victims to reopen a proceeding or invalidate a ruling?*

Response: The current bill deletes explicit language from a previous version that prohibited such unwanted delays and appeals. See S.J. Res. 3, 106th Cong. § 2 (2000) (“[n]othing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling”). The deleted language was expressly drafted “because of the concern that a broad judicial remedy might allow victims to inappropriately interfere with trials already underway.” S. Rep. 106-254, at 40. By deleting the prohibition against such forms of relief, the current version of the proposed amendment plainly authorizes courts to grant victims' requests to stay trials, reopen proceedings, and invalidate rulings to remedy violations of victims' rights. Two examples of how that change could affect criminal cases are set out below.

(1) Assume that in a capital case, the judge determines that allowing a particular victim to testify at the penalty phase will violate the defendant's right to due process. Under S.J. Res. 3, the trial could not be stayed pending the victim's appeal of the exclusion order, but under the current proposal, it could. Such a delay would at a minimum complicate the sentencing process, and could possibly undermine the prosecution's efforts to secure a death sentence. Among other problems, the delay could result in the loss of some of the jurors who decided the defendant's guilt, thereby requiring the empanelment of a new sentencing jury.

(2) Assume that a defendant is sentenced without prior notice to the victim. Under the current proposal, the defendant's sentence could be vacated and remanded for a new sentencing hearing on notice to the victim. This resentencing – which would require the allocation of resources from the court, the prosecutor, the Marshal and possibly prison officials – would either result in the same sentence or a different one. If the sentence was the same, and the remedy for the violation of the victim's right would have in essence been a formality.<sup>2</sup> If the result was a

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<sup>2</sup> Describing such a remedy as a “formality” is not intended to disparage the underlying right. Victim notification in advance of sentencing is unquestionably an important value, and taking steps to ensure the victim's participation in sentencing will normally promote the interests of

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more severe sentence, the defendant could claim a violation of the Double Jeopardy clause of the Fifth Amendment.

3. *Mr. Twist writes that the restrictions clause in section 2 of the proposed amendment “settles what might otherwise have been years of litigation to adopt the appropriate test for when, and the extent to which, restrictions will be allowed.” Do you agree?*

Response: I do not agree. To the contrary, the meaning of several phrases in Section 2 – such as “when...dictated,” “to the degree dictated,” “substantial interest,” “public safety,” “administration of criminal justice,” and “compelling necessity,” – as well as the way each interacts with the others will have to be determined on a case-by-case basis. Even if some of those phrases have taken on a generally accepted judicial gloss in other contexts, it can hardly be considered a “settled” matter that courts will uniformly apply the same interpretation when those phrases are inserted for the first time into the federal Constitution.

Further, as the hearing demonstrated, there are widely differing views on the implication of the difference between the term “restrictions” in the current version of Section 2 and the corresponding use of the word “exceptions” in the 2000 version of the proposed amendment. Some supporters of the amendment appeared to treat the two concepts as synonymous. *See, e.g.,* Statement of Viet D. Dinh, Assistant Attorney General, Office of Legal Policy, United States Department of Justice, Before the Committee on the Judiciary, United States Senate, Concerning Proposed Victims’ Rights Constitutional Amendment, at 4 (Apr. 8, 2003) (asserting that Section 2 allows for the “overriding” of victims’ rights in specified circumstances). As set forth in my written statement and at greater length below, I believe the terms have different meanings. “Overriding” a victim’s right – for example, by denying an individual victim the right to be heard at a hearing in order to accommodate practical considerations in a mass-victim case – constitutes an “exception” to that right but cannot fairly be described as a mere “restriction.”

There is little reason to assume that prosecutors, victims’ counsel, defense attorneys and judges will find it any easier to achieve consensus on the meaning of Section 2 than have the several legislators and witnesses who have already debated it. As a result, it seems inevitable that the language of Section 2 would lead to years of litigation that ultimately could cause more frustration and dissatisfaction for the crime victims the proposed amendment is intended to help.

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justice. However, the drafters of S.J. Res. 3 and this Committee decided in 2000 that allowing a resentencing as a remedy for the violation of a victim’s notification right did not strike the proper balance between that value and the competing interest of society’s need for finality. *See S. Rep. 106-254, at 40.*

4. *How would the difference between the words “restrictions” and “exceptions” affect the ability of courts or law enforcement to function in (A) mass victim cases like Oklahoma City and (B) organized crime cases like Gotti?*

Response: My response to each part of the question is based not only on the two words’ different definitions, but also on the history of this proposed amendment. The word “exceptions” was used in a version previously endorsed by this Committee but has deliberately been replaced in the current bill with the word “restrictions.” *Compare* S.J. Res. 3, 106th Cong. § 3 (“Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest”) *with* S.J. Res. 1, 108th Cong. § 1 (“The rights of victims of violent crime ... shall not be denied ... may be restricted only as provided in this article”) *and id.*, § 2 (“These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.”).

(A) Mass victim cases. In a mass victim case, the difference between the two words would most likely be a problem for courts (or parole boards or clemency review panels) in honoring the individual victim’s right “reasonably to be heard” at certain public proceedings.<sup>3</sup> This right differs in substance from the corresponding right conferred in an earlier version, which was the right “to be heard, if present, and to submit a statement” at such proceedings. S.J. Res. 3, 106th Cong. § 1. I have explained in my previous written statement how the change in phrasing makes it more likely that the current formulation could be interpreted to confer on victims an affirmative right to be present (thereby obliging the government to transport indigent and incarcerated victims to court) and to make an oral statement (“be heard”) rather than simply “submit” a written one. *Cf.* S. Rep. 106-254, at 34 (explaining the substantive limitations provided by the terms “if present” and “submit a statement”).

The distinction between “restrictions” and “exceptions” exacerbates this problem in mass victim cases. As a practical matter, courts will sometimes be simply unable to allow every victim to be heard. The pragmatic approach generally adopted in such cases is to hear from a representative cross-section of victims. If the amendment permitted “exceptions” to victims’ rights in appropriate circumstances, this pragmatic approach would plainly be constitutional (assuming the courts agreed that the exclusion was “dictated by a substantial interest in ... the administration of criminal justice”). But such a solution would not work under an amendment that permits “restrictions” but not “exceptions.” A victim excluded from the representative group in this scenario could plainly show that her right reasonably to be heard had been “denied,” in violation of Section 1. The fact that others with similar interests had been allowed to speak might fairly be considered an appropriate “restriction” on the *collective* interest of all

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<sup>3</sup> The right not to be excluded from public proceedings in mass victim cases would likely be accommodated relatively easily, through the use of closed-circuit television. While this would “affect” courts by requiring the alteration of some rules (for example, the Supreme Court would presumably be required to abandon its traditional prohibition of cameras when hearing arguments in mass victim cases), such changes need not inherently undermine courts’ ability to function.

victims in being heard, but the proposed amendment creates rights for *individual* victims, not a group.

Moreover, courts might well rule that allowing the excluded victim to submit a statement would not cure the problem because Congress chose to confer a right “reasonably to be heard” rather than a right to “be heard, if present, and submit a statement.” Given the distinction, the word “reasonably” could be read to permit the court to impose appropriate limitations on, for example, scheduling, duration of the live presentation, and subject matter, but not to silence the victim entirely in favor of the submission of a prepared statement. A victim permitted only to submit a statement has not been permitted “reasonably to be heard” – she has not been “heard” at all – and accordingly her right has been “denied” rather than merely “restricted.”

Notwithstanding the obvious difference between “exceptions” and “restrictions,” Mr. Twist assumes the proposed amendment will be interpreted to provide sufficient flexibility. He bases this view on his reading of *Maryland v. Craig*, 497 U.S. 836 (1990). See Twist Statement at 33-34 & n.50. In *Craig*, the Supreme Court took up “‘the question whether any exceptions exist’ to the ‘irreducible literal meaning of the [Sixth Amendment’s Confrontation] Clause: ‘a right to meet face to face all those who appear and give evidence at trial.’”” 497 U.S. at 844 (emphasis and citations omitted). It answered that question in the affirmative, based on a conclusion that such a face-to-face meeting is not “an indispensable element of the Sixth Amendment’s guarantee” of confrontation. *Id.* at 849.

While it is conceivable that Mr. Twist’s optimistic extrapolation from the result in *Craig* could ultimately prove correct, I believe the Supreme Court’s reasoning in that case would more likely lead it to *disagree* with the view that the “restrictions” clause provides the level of flexibility Mr. Twist anticipates. First, in *Craig* the Supreme Court explicitly assumed that the issue whether the Sixth Amendment allows for any “exceptions” to its literal meaning was a “question.” There can be no such “question” under the proposed victims’ rights amendment, because (1) unlike the Sixth Amendment, it flatly states that the rights established for victims “shall not be denied,” and (2) its sponsors deliberately replaced a provision allowing limited “exceptions” with one allowing only limited “restrictions.” Second, even assuming there is such a question under the victims’ rights amendment and that it would be answered with the same “indispensable element” standard as in *Craig*, the result might be different. A court could easily hold that actually being heard is indeed an indispensable element of a victim’s individual right “reasonably to be heard” – an element that is not satisfied simply by allowing someone else with presumptively similar views to speak. Such a common-sense interpretation, while wholly consistent with *Craig*, would forbid a pragmatic cross-section approach in mass victims cases.

(B) Organized crime cases. In organized crime cases, the most likely adverse affect of the distinction between “restrictions” and “exceptions” arises in the context of cooperation agreements under which one gangster agrees to plead guilty and then, upon release on bail, surreptitiously to gather information about others. In many such cases, the prospective cooperator has previously committed violent crimes in which the victims are themselves criminals. The amendment would confer on such victims “the right to reasonable and timely notice of” the cooperator’s guilty plea, the same right with respect to the cooperator’s bail hearing, and “the rights not to be excluded from ... and reasonably to be heard” at both. Those

rights can be “restricted” in certain circumstances (which I assume for purposes of this answer would exist in this context) but not “denied.”

For the law enforcement interest to be vindicated in this context, the victims must receive *no* notice of the cooperator’s plea or release, at least until well after the fact. Alerting the victims to these events would endanger the cooperator and undermine his ability to assist law enforcement by collecting evidence. But in most cases, alerting such victims would likely be unavoidable under the proposed amendment.<sup>4</sup> The best argument I could make as a prosecutor in this scenario would be that the court should for good cause postpone the notice required by the amendment, much as it is empowered to do under the wiretap statute, 18 U.S.C. § 2518(8)(d). Such a postponement could be characterized alternately as a “reasonable” form of notice or an appropriate “restriction” on the victim’s right.

Such an argument would likely fail. Even if the delayed notice could be considered “reasonable,” it could not be considered “timely,” which the amendment would also require. *See* Twist Statement at 19 (“‘Timely’ notice would require that the victim be informed enough in advance of a public proceeding to be able reasonably to organize his or her affairs to attend.”). Moreover, taking affirmative steps to delay notice would effectively exclude the victim from the proceeding – that would be the precise point of the delay – and would unquestionably make it impossible for the victim reasonably to be heard with respect to the plea or the cooperator’s release. In short, the victim’s rights would plainly have been “denied,” in violation of Section 1.

None of that would be a problem if the amendment permitted “exceptions,” as the facts would likely be held to implicate a substantial interest in public safety or the administration of criminal justice. But the amendment allows only “restrictions” that do not “deny” a victim’s rights – and the necessary restrictions would in most cases do just that.

5. *One of the concerns voiced by supporters of the amendment is that some victims who lost family members in the Oklahoma City bombing did not have a right to testify at McVeigh’s sentencing hearing because they opposed capital punishment and the prosecutors refused to call them to testify at the penalty hearing. Would this amendment have allowed these victims to testify, and if so, how would that have affected the case?*

Response: The proposed amendment would have guaranteed each bombing victim “the right ... reasonably to be heard at public ... sentencing ... proceedings.” As explained below,

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<sup>4</sup> There appears to be considerable disagreement as to whether this problem can be avoided by closing the court for cooperators’ plea and bail proceedings, thereby rendering the proceedings non-public and not subject to the proposed amendment. As noted in my written statement, my experience is that organized crime prosecutors rarely seek such closure due to the high barriers erected by the First and Sixth Amendments. Of course, my experience may be atypical. The Department of Justice could shed valuable light on the matter by providing information about how often prosecutors have previously sought and received the permission of the Deputy Attorney General, pursuant to 28 C.F.R. § 50.9, to ask for or acquiesce in the closure of a courtroom in the context of a prospective cooperator’s guilty plea or bail proceeding.

there are a number of different ways that language could have been implemented in the bombing case due to (1) the unique procedures in capital cases, (2) the qualitative difference between victim impact testimony and victim allocutions (and the important constitutional distinction between the two), and (3) the uncertainty about what the amendment's supporters intend. Depending on which of the several plausible alternative interpretations had prevailed, the effect on the Oklahoma City case would likely either have been nothing at all (*i.e.*, the victims would have had no additional rights with respect to the sentencing process) or a potentially adverse effect on the prosecution's efforts to secure just punishment for the bombers.

(1) Defining the "sentencing proceeding". Capital cases have two separate proceedings after a verdict of guilt, either or both of which might properly be considered a "sentencing proceeding" for purposes of the proposed amendment. Under federal law, for example, there are two separate district court proceedings that follow a determination of a defendant's guilt of a capital crime. First, there is a "penalty phase" hearing, usually conducted before the same jury that determined guilt, at which the parties seek to establish or contest the existence of facts that aggravate or mitigate the crime. *See* 18 U.S.C. § 3593(b); 21 U.S.C. § 848(i). Subsequently, there is a separate proceeding at which the judge imposes sentence, taking into account any recommendation resulting from the penalty phase. *See* 18 U.S.C. § 3594; 21 U.S.C. § 848(l).

Arguably, both could be considered "sentencing proceedings," but it is also possible to make the case for either one as the sole "sentencing proceeding" under the proposed amendment. The penalty phase is arguably the only "sentencing proceeding," because, as a practical matter, that is where a decision-maker vested with discretion to act upon the recommendations it hears (usually a jury) determines the defendant's sentence. Alternatively, the judge's imposition of sentence after the jury's discharge is arguably the only "sentencing proceeding," among other reasons because it is where sentence is actually imposed and because a judge can in limited circumstances override the jury's penalty phase recommendation. The issue becomes even murkier in those States, such as Alabama, that allow the trial judge to override the jury's sentencing recommendation.

Although the question would plainly have to be revisited in the unique context of this amendment, the Supreme Court has previously characterized the penalty phase of a capital case as a proceeding that "is in many respects a continuation of the trial on guilt or innocence of capital murder." *Monge v. California*, 524 U.S. 721, 732 (1998). Given that the proposed amendment establishes a victim's right to be heard at a sentencing proceeding but not at the trial, the *Monge* view suggests that the proposed amendment would confer a right to be heard at the imposition of sentence but *not* at the penalty phase.

(2) Defining the subject matter of the "right reasonably to be heard". A victim can provide two different kinds of information with respect to sentencing. First, a victim can provide factual "impact" evidence about the harm resulting from the defendant's crime. Second, a victim can give an allocution stating her personal opinion about how the defendant should be punished. The proposed amendment does not specify whether right reasonably to be heard at a sentencing proceeding includes a right of allocution as well as the right to present impact testimony.

Under current law, victims in a capital case are already generally permitted to give impact testimony. *See* 18 U.S.C. § 3593(a); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

However, such testimony must currently remain within certain limits to avoid conflicts with the rights of the defendant. As the Court noted in *Payne*, the admission of particularly emotional impact testimony can in some cases render the penalty phase fundamentally unfair, in violation of a defendant's right to due process. In such cases, admitting the testimony can lead to a reversal of the resulting sentence. *See id.* at 825 (majority opinion), 831 (O'Connor, J., concurring).

Whereas the Constitution generally permits victim impact testimony, it currently forbids victims from giving a penalty phase jury their opinions regarding sentencing or the defendant. *See Booth v. Maryland*, 482 U.S. 496, 508-09 (1987); *Payne*, 501 U.S. at 830 n.2 (noting that *Booth's* prohibition regarding victims' opinions was not disturbed in overruling the ban on impact testimony); *id.* at 833 (O'Connor, J., concurring) (noting same); *Hain v. Gibson* 287 F.3d 1224, 1238-39 (10th Cir. 2002) (collecting cases noting same); *Lynn v. Reinstein*, No. CV-02-0435-PR, 2003 WL 21147287 (May 19, 2003) (noting same) (this was the case that hearing witness Duane Lynn mentioned was pending before the Arizona Supreme Court as of April 8, 2003). Thus, if the proposed amendment were read to give victims the right to allocute at the penalty phase, there would be a conflict between the rights of the victim and the accused, despite the assurance to the contrary in Section 1.<sup>5</sup>

(3) Differing statements of legislative intent. Some supporters of the proposed amendment appear to intend that the victim's right to be heard with regard to sentencing in a capital case would be consistent with existing constitutional law. For example, during the question-and-answer portion of at the hearing on April 8, 2003, Senator Feinstein described "the limited rights that we're giving an individual" in the proposed amendment and explained each of the substantive rights under Section 2. With respect to the right to be heard, the Senator said that "essentially what we're trying to do is say ... that you have a basic constitutional right ... to make an impact statement," but made no mention of a right of allocution.

Others, however, appear to anticipate a broader right that would overrule the portion of *Booth* that the Supreme Court preserved in *Payne*. For example, Mr. Twist takes the position that "[t]he right to be heard at sentencing includes the right to make a recommendation regarding the appropriate sentence to be imposed, including in capital cases." Twist Statement at 30.

This Committee's 2000 report could arguably be read to support either position, although on balance it appears to accept the existing *Booth-Payne* prohibition against victims making sentencing recommendations to a penalty phase jury. *See S. Rep. 106-254*, at 33-34 (stating that the proposed amendment would "enshrine in the Constitution the Supreme Court's decision in

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<sup>5</sup> Even where the victim's allocution would recommend against imposition of a death sentence, the result could be the injection of a constitutionally impermissible level of arbitrariness into the overall use of capital punishment. The latter risk could arise because a defendant's exposure to the death penalty would be dependent on the fortuity of the views of a murder victim's relatives about capital punishment and their willingness and ability to express those views in court. Such arbitrariness could not only form the basis of a constitutional claim in the particular case where the opinion was admitted, but could lead to a systemic challenge to the death penalty in all cases.

*Payne*” and acknowledging that “the victim’s right to be heard at sentencing will not be unlimited, just as the defendant’s right to be heard at sentencing is not unlimited today”).<sup>6</sup> Such a view is bolstered by the text of the current version of the proposed amendment, which flatly asserts that the rights it confers are “capable of protection without denying the constitutional rights of [the] accused.” Given existing Supreme Court case law, that assertion can be true in this context only if the limited right to make an impact statement described by Senator Feinstein is intended, rather than the broader right described by Mr. Twist.

(4) Possible effects on the Oklahoma City bombing case. At each of the Oklahoma City bombing trials, the prosecutors selected certain victims to testify at the penalty phase – *i.e.*, the factual hearings under 18 U.S.C. § 3593(b) – to help establish certain aggravating factors in support of the government's attempt to secure a death sentence.<sup>7</sup> Some of the many victims who had hoped to testify were necessarily excluded by this selection process. With respect to those who were called as penalty phase witnesses, the court required the prosecutors to limit the testimony to factual information concerning the impact of the bombing on their lives. The witnesses were not permitted to offer an opinion as to how the defendants should be sentenced, and were also instructed to avoid certain factual areas that the court ruled would be so emotionally charged as to violate the defendants’ due process rights.

In the *McVeigh* case, the jury recommended death, and the court imposed that sentence at a separate proceeding. In the *Nichols* case, the jury was discharged without making a sentencing recommendation, and the court thereafter decided to impose life imprisonment. Before deciding Nichols’ sentence on June 4, 1998, the court heard allocutions from several victims who had not previously testified in the penalty phase (including some who had opposed a death sentence), all of whom made moving and eloquent statements regarding both the impact of Nichols’ crime and their recommendations as to his sentence.

As summarized below, the proposed amendment would likely have affected these outcomes in one of three ways. First, it might have made no difference at all. Second, it might have prevented the prosecutors from securing McVeigh’s death sentence and had no effect on

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<sup>6</sup> To the extent that the Committee anticipated that a victim’s right of allocution in a capital case would simply parallel the defendant’s, it should be noted that neither the Federal Death Penalty Act nor the federal Constitution gives a capital defendant the right to allocute at the penalty phase (as opposed to testifying subject to cross-examination), although the federal courts have not spoken with one voice on the issue and some states grant such a right under their own laws. *See, e.g., United States v. Hall*, 152 F.3d 381 (5th Cir. 1998) (defendant has no right to allocute; summarizing state practices); *but see United States v. Chong*, 104 F. Supp.2d 1232 (D. Haw. 1999) (defendant does have right to allocute). Of course, to the extent that some courts do permit capital defendants to allocute without cross-examination before a penalty phase jury, establishing a parallel right for victims would require the denial of the defendant’s constitutional right, as recognized in *Booth* and preserved in *Payne*, to exclude such victim allocutions.

<sup>7</sup> Several other victims were called during the guilt phase of each trial to help establish factual elements of the charged offenses.

Nichols' life sentence. Third, it could have made the death sentence imposed on McVeigh – and on Nichols, if the statements permitted under the amendment had moved the jury to recommend such a sentence – vulnerable to reversal on appeal.

Assuming the right would not have applied in the penalty phase (*i.e.*, assuming that “sentencing ... proceeding” means only the imposition of sentence under 18 U.S.C. § 3594), there would have been no effect. Victims were already entitled to be heard at the imposition of sentence even without the proposed amendment.

Assuming the right would have applied in the penalty phase, its likely effect depends on whether the right to be heard would have included the right to make recommendations to the jury, or only to provide impact statements. If the latter, there would again have been no effect, as victims were in any event permitted to make such statements. Since the question assumes the exclusion of witnesses who would have recommended a non-death sentence – rather than the exclusion of witnesses with factual information pertaining to the aggravating and mitigating factors at issue – I must assume for purposes of this part of my answer that such witnesses, or at least the recommendation portion of their testimony, would have been excluded in any event.<sup>8</sup>

The most difficult problem arises if the proposed amendment would have permitted victims to make sentencing recommendations to a penalty phase jury. If hearing from the victims who preferred a non-death sentence would have swayed the jury, then the effect of the amendment would have been to frustrate the government's effort to punish McVeigh with death for having committed what was at the time the worst crime ever committed on American soil.

On the other hand, if the jury had not been so swayed (as I believe is more likely), the result in McVeigh's case would have been the same: a death sentence. However, whereas the death sentence imposed without such victim allocutions survived all appellate and collateral challenges, it could have been vulnerable to reversal if it had been secured in part through testimony that violated McVeigh's constitutional rights. *See United States v. McVeigh*, 153 F.3d 1166, 1216-22 (10th Cir. 1998) (rejecting challenges to impact testimony and noting that McVeigh did not claim a violation of the limitations in *Booth* left untouched by *Payne*).

The potential for mischief would have been even greater in Nichols' case, where the jury never reached the point of considering any arguments for or against the death penalty. Having failed to reach a unanimous factual conclusion as to whether Nichols' level of intent in committing the crime sufficed to permit imposition of the death penalty, *see* 18 U.S.C. §

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<sup>8</sup> The amendment might have resulted in testimony by *additional* victims if the selection of some representative victims to the exclusion of others were deemed unconstitutional for reasons described in response to Question 4. In that case, the likely effect on the outcome would have been either nothing (if the sentences were the same) or an adverse impact on the prosecution's efforts (if, for example, McVeigh's death sentence were reversed on appeal because the additional impact testimony made the overall effect so overwhelming as to violate due process, *see Payne*, 501 U.S. at 831).

3591(a)(2), the *Nichols* jury was discharged without making any sentencing recommendation.<sup>9</sup> Presumably, in those circumstances, the addition of victims' opinion testimony to the penalty phase could have had no effect on the outcome.

But if the victims had been permitted to make recommendations (which would likely have strongly favored execution), and if the outcome had been different, it could only be because the victims' moving pleas for justice had affected the way the jurors decided *factual* issues. In other words, the only difference the proposed amendment could have made would have been one that led jurors to make a factual decision on the basis of emotion rather than evidence. Such a result would plainly be contrary not only to the jurors' legal duty and to existing constitutional protections, but also to the promise of the preamble to Section 1 of the proposed amendment.

6. *At the hearing, Assistant Attorney General Dinh stated that the proposed amendment's failure to define key terms like "victim" and "crime of violence" could be handled by means of legislation under the section 4 enforcement power. He added that the Supreme Court has addressed the use of the similar enforcement power under the 14th Amendment. Do you agree that Congress's power to "enforce" a constitutional provision carries with it the power to define constitutional terms?*

Response: I do not agree. Like Mr. Twist, I understand the Supreme Court to have ruled that "[t]he power to enforce is not the power to define." Twist Statement at 38 (citing *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)). In recent years, the Supreme Court as well as some lower courts have issued several decisions interpreting the enforcement provision of the Fourteenth Amendment, upon which Section 4 of the proposed amendment is modeled. Those cases state that Congress is not empowered, under the guise of "enforcing" a constitutional amendment, either to diminish the rights of the persons it was designed to protect or to impose substantive new restrictions on State governments. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) (stating that the task of assessing the constitutionality of Enforcement Clause legislation requires the court to determine whether the statute "is in fact ... an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations"); *Saenz v. Roe*, 526 U.S. 489, 508 (1999) ("Congress' power under § 5, however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)); *Boerne*, 521 U.S. at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.... It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."); *see also Nanda v. Bd. of*

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<sup>9</sup> Mr. Twist is thus mistaken when he cites *Nichols*' life sentence as support for the proposition that "many juries decline to return death sentences even when presented with powerful victim impact testimony." Twist Statement at 26 (quoting Paul G. Cassell, Professor of Law, University of Utah College of Law, Statement Before the Committee on the Judiciary, United States Senate, Responding to the Critics of the Victims' Rights Amendment (Mar. 24, 1999)). The *Nichols* jury did not "decline" to recommend a death sentence; it simply did not reach the issue.

*Trs. of the Univ. of Ill.*, 303 F.3d 817, 827 (7th Cir. 2002) (“Congress’ enforcement power must stop short of redefining the States’ substantive obligations under the Fourteenth Amendment.”).

Given this case law, any attempt by Congress to use the enforcement power to define the proposed amendment’s key terms would likely be held invalid. Such legislation would necessarily either restrict the rights of some persons who might otherwise be considered victims of violent crimes, or expand the substantive obligations of States whose laws would otherwise exclude certain persons from the protected class of victims. Assume, for example, that in State A the term “crime of violence” is defined (either through State legislation or judicial interpretation of the amendment) to include both burglary and a driving-while-intoxicated offense resulting in injury within its definition of the term “crime of violence,” while the same term is defined in State B to exclude both of those offenses. In this scenario, the class of protected victims would be broader in State A than in State B. But assume that Congress enacted legislation, purporting to rely on its Section 4 enforcement power, to define “crime of violence” to include vehicular offense but exclude burglary. Such legislation would run afoul of both *Saenz* (because the exclusion of burglary would “restrict, abrogate or dilute” the constitutional rights of burglary victims in State A) and *Boerne* (because the inclusion of the vehicular offense would decree the substance of otherwise non-existent restrictions on State B).

I believe the view expressed by Assistant Attorney General Dinh with which both Mr. Twist and I disagree – *i.e.*, the view that the enforcement provision itself includes the power to define key constitutional terms – is the product of the lengthy history of this proposed amendment and the several attempts to approach the difficult question of definition. It is important to set out that history in some detail so that the Committee can appreciate why the current reliance on the Section 4 enforcement provision alone appears to be predicated on an interpretation of *Boerne* that was untested and optimistic when first formulated by the Justice Department in 1998, and has been rendered unreliable by subsequent Supreme Court decisions.

The Supreme Court decided *Boerne* in 1997. The sponsors of the proposed amendment subsequently introduced a new version that provided, “The Congress and the States shall have the power to *implement and* enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when necessary to achieve a compelling interest.” S.J. Res. 44, 105th Cong. § 3 (Apr. 1, 1998) (emphasis added). The Justice Department recognized that the new language was aimed at preserving the power to define key terms, but opined that such an approach would be superfluous under the narrow reading of *Boerne* the Department favored:

We understand that the word “implement” was added to ensure that Congress would have the authority to define key terms such as “victim” and “crime of violence” after [*Boerne*]. In *Boerne*, the Supreme Court held that Congress did not have the power under the enforcement clause of the Fourteenth Amendment to decree the substance of the rights conferred by that amendment. Notwithstanding *Boerne*, we believe that the enforcement power would give Congress authority to define key terms in the proposed amendment. We believe that *Boerne* is best read in light of its context: an attempt by Congress to reinstate a constitutional standard of decision that the Supreme Court had expressly rejected.

Letter dated June 2, 1998, from L. Anthony Sutin, Acting Assistant Attorney General, to the Honorable Orrin G. Hatch, attachment at 4 (“DOJ 1998 Letter”) (citation omitted).

Thus, in assuming that the Supreme Court will interpret the enforcement power to include the power to define substantive constitutional terms, Assistant Attorney General Dinh appears to be relying on the Department’s 1998 analysis. But in the years since that view was articulated, the Supreme Court, in assessing the validity of federal laws enacted under the Fourteenth Amendment’s enforcement provision, has repeatedly invoked reasoning that exceeds the limitation of *Boerne* that the Department anticipated in 1998. See, e.g., *Nevada Dep’t of Human Res. v. Hibbs*, No. 01-1368, 2003 WL 21210426 (U.S. May 27, 2003) (“*Boerne* ... confirmed ... that it falls to this Court, not Congress, to define the substance of constitutional guarantees”); *Kimel*, 528 U.S. at 81 (“The ultimate interpretation of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”) (citing *Boerne*, 521 U.S. at 536); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637-48 (1999) (invalidating Patent Remedy Act because the historical record and the scope of the act’s coverage demonstrated that it was not merely remedial or prophylactic, but changed States’ substantive obligations). Given this subsequent case law, I believe that the broader interpretation of *Boerne* that prompted the amendment’s sponsors to add the word “implement” in 1998 has prevailed, and that an enforcement provision alone cannot be relied upon to empower Congress to define the key terms of the proposed amendment.

Despite the need for something other than an enforcement provision, the current version of the amendment contains *nothing* else that could be construed as granting Congress the power to define key terms. As noted above, the sponsors of S.J. Res. 44 first sought to overcome *Boerne* by giving Congress the power to “implement” as well as enforce the amendment. After the Justice Department expressed a concern that such language might itself cause unanticipated problems, see DOJ 1998 Letter, attachment at 5, the sponsors deleted “implement” and added a provision stating explicitly that the key terms were to be “defined by law.” See S. Rep. 105-409, at 38-39 (1998). That approach was retained in the 2000 version of the amendment. See S.J. Res. 3, 106th Cong. § 1. In reporting that bill to the full Senate, the Committee appears to have continued to assume, as a result of *Boerne*, that the enforcement provision alone would *not* be interpreted to allow Congress to define key terms, but that the “defined by law” provision would empower Congress, the States, and the courts to provide definitions controlling within their respective jurisdictions. See S. Rep. 106-254, at 28; see also *id.* at 46 (additional views of Sens. Kyl and Feinstein) (“the ‘law’ that will serve to define these terms will typically be State law”).

When the proposed amendment was reintroduced in the 107th Congress as S.J. Res. 35, the “defined by law” provision – which had been criticized in the 2000 Senate debate – was excised. As a result, for the first time since the decision in *Boerne*, the enforcement clause was the *only* provision in the proposed amendment under which Congress could hope to enact legislation defining key terms that would control in the States. This Committee issued no report on that bill, and the same approach – deleting the “defined by law” provision and relying solely on the enforcement provision for the definition of key terms – was retained in the current bill.

As noted above, Mr. Twist – one of the amendment’s primary drafters and supporters – disagrees with Assistant Attorney General Dinh and accepts that “[t]he power to enforce is not the power to define.” Twist Statement at 38 (citing *Boerne*). However, he does not see a limited

enforcement power as cause for concern. Quoting from the prior report by this Committee, he writes that “the *States* will, subject to Supreme Court review, flesh out the contours of the amendment by providing definitions of ‘victims’ of crime and ‘crimes of violence.’” Twist Statement at 38 (quoting S. Rep. 106-254 at 41) (emphasis added). When the Committee made that observation in 2000, it was correct: the *States* would indeed have had the power to define key terms – under the “defined by law” provision. *See* S. Rep. 106-254 at 28. Now, however, it is not: Mr. Twist’s observation no longer holds true because the “defined by law” provision has been deleted and the Section 4 enforcement provision empowers only “Congress,” not the States. *See* S. Rep. 106-254, at 46 (additional views of Sens. Kyl and Feinstein) (noting that a proposal that “explicitly extended enforcement power to both Congress and the States .... did not garner the broad consensus necessary to survive” in the draft approved by the Committee).

In short, there are only three basic ways the key terms of this amendment can be defined: (1) by federal legislation that controls all jurisdictions, (2) by a combination of federal and State statutes that control within their respective jurisdictions, or (3) by judicial interpretation. The first option is plainly best suited to the apparent goals of the amendment’s supporters because it avoids a patchwork of rights across jurisdictions, and because clear and detailed legislative definitions will help avoid a long and uncertain wait for the courts to develop common-law definitions. But that approach is not available under the language of the current bill because the enforcement power – the only remaining plausible source of such legislative authority after the deletion of “implement” and “defined by law” – does not include the power to define key terms.

The second option, combining federal and State legislation, may be the next best in that it avoids the delay and uncertainty of judicial interpretation. But that option simply reproduces the “patchwork” problem the amendment is designed to overcome. Moreover, it is no longer available as the result of the deletion of the “defined by law” clause from the 2000 version.

As a result, I believe it is most likely that the third approach would prevail by default, meaning that the amendment’s key terms would be defined piecemeal by individual judges interpreting the new constitutional language. Such interpretation would undoubtedly be informed by the varying definitions of the terms in pre-existing State and federal law,<sup>10</sup> and would therefore likely produce different interpretations of the same federal constitutional right that would be controlling within the courts’ respective jurisdictions. Such judicial interpretation might ultimately lead to the Supreme Court’s creation of a uniform national definition, but the process of developing such a definition – the contours of which cannot be predicted with any certainty – would likely require years of litigation and produce a patchwork of inconsistent rights for crime victims in the interim. As a result, ratification of the proposed amendment would simply replace one patchwork of State laws protecting crime victims with another. But unlike

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<sup>10</sup> Even within a single jurisdiction, the amendment’s terms can mean different things in different contexts. In the federal system, for example, manslaughter is a “crime of violence” for purposes of determining whether a defendant should be sentenced as a career offender, *see* U.S.S.G. § 4B1.2(a), cmt. n.1 (2002), but is not necessarily such a crime for other purposes such as determining his immigration status. *See Jobson v. Ashcroft*, 326 F.3d 367, 372-73 & n.5 (2d Cir. 2003); *Dalton v. Ashcroft*, 257 F.3d 200, 207 (2d Cir. 2001).

the current patchwork – which at least preserves a uniform statutory definition applicable within all federal courts – ratification of the proposed amendment would produce an interim patchwork of rights not only from one State to another, but also from one federal jurisdiction to another.

7. *At the hearing, Assistant Attorney General Dinh described the rights established under the proposed amendment as “self-executing.” To what extent are the flexibility problems you described a result of the rights being self-executing, and is there a way to avoid such problems while still achieving the amendment’s goals?*

Response: Virtually all of my concerns about flexibility arise directly or indirectly from the fact that the rights established in the proposed amendment are self-executing. Because the substance of those rights would be established by the amendment itself, the only certain and effective way to provide flexibility is for the amendment itself to identify explicitly the circumstances in which the rights can be restricted or denied. In other words, by making the rights self-executing, the amendment makes it imperative for Congress to predict what circumstances may require what level of flexibility, and how the language it uses to preserve such flexibility will in fact be interpreted by the courts – and to get it right the first time.

There are at least two ways to avoid this problem, neither of which has yet been tried. The first, as set forth in my earlier statement, is to address the problem of non-uniformity in the States through spending-based federal legislation. However, some supporters of a constitutional amendment respond that spending-based legislation is insufficient because (a) some States may forego funding so as to preserve a lower level of protection for victims,<sup>11</sup> and (b) such legislation, unlike a constitutional amendment, would not have the symbolic value needed to change a judicial culture that too often ignores or mistreats crime victims.

Thus, the second way to avoid the problems associated with the establishment of self-executing constitutional rights accommodates both of those concerns. The pending bill would amend the Constitution by giving specific affirmative rights to the undefined class of crime victims, and would give Congress the power to enforce (but not define or limit the scope of) those rights. As an alternative, the Constitution could instead be amended simply by expanding the legislative power under Article I, Section 8 so as to allow Congress to pass victims’ rights laws that control in State as well as federal proceedings. I have appended to this response an example of such an alternative amendment. This approach could solve several problems:

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<sup>11</sup> Given the fact that every State has already shown a willingness to alter its laws to improve the rights of crime victims, and given the fact that ratification of the proposed amendment would in any event require the overwhelming approval of State legislatures, this concern appears counter-intuitive. It also seems inconsistent with the confidence in the effectiveness of such financial incentives that Congress has shown on a variety of critically important matters, most recently with respect to the national Amber Alert system. *See* Pub. L. 108-21, tit. III, §§ 301-304, 42 U.S.C. §§ 5791-5791c (2003). In any event, enacting spending legislation would not foreclose a later constitutional amendment if some States failed to respond to the federal financial incentive.

The “patchwork” problem. There is little disagreement that Congress has improved the rights of crime victims in federal cases, but has been unable to make such laws applicable in the several States (which, as a result, have a patchwork of more or less effective laws). By explicitly granting Congress the power to legislate for the States in this limited area, the alternative amendment would cure the “patchwork” problem in the most direct possible manner, and without the risk that some States might choose not to accept the changes, even at the risk of losing federal funding. It would also avoid the problem of different States adopting different definitions of the class of victims to be given rights under the federal Constitution.

The “culture” problem. While many supporters of an amendment readily concede that most of the injustices and indignities suffered by victims are already prohibited by existing laws, they believe that a constitutional amendment would help simply by virtue of the fact that it would better sensitize prosecutors and judges to the importance of honoring existing guarantees of victims’ rights. To the extent they are right, it seems likely that any constitutional amendment specifically designed to help crime victims would have the desired effect. Any such amendment would represent only the 18th time in over two centuries that our nation has reached the extraordinarily broad level of consensus required under Article V of the Constitution to alter our fundamental law. Further, any such amendment would plainly highlight the importance of affording legal protections to an identified group – victims of violent crimes – in a way comparable to very few other groups in our society.

The “conflicting rights” problem. Supporters of the proposed amendment are confident that it would not be interpreted to diminish the historic constitutional rights that all individuals now enjoy under the Bill of Rights. Some others have raised the concern that such confidence may prove to be misplaced. To the extent that the supporters of the current draft might be proved wrong, it will likely be because of the self-executing nature of victims’ rights. But if the Constitution is amended simply by expanding Congress’ power to legislate, it will be easy for courts to interpret the resulting legislation like other laws that cannot and do not purport to abridge other constitutional rights. However, once the Constitution is amended explicitly to protect crime victims, it will not be easy for courts to do what supporters of the amendment have cited as a problem in past cases: adopt a default practice of reflexively ignoring victims’ rights so as to guard against inadvertently infringing a criminal defendant’s rights. To the contrary, a defendant claiming (for example) that his rights would somehow be harmed by the vindication of a victim’s specific participatory right, affirmatively established by legislation under the amendment, would likely bear the heavy burden of demonstrating the conflict. Further, if the observation set forth in the preamble to Section 1 of the current bill is correct, no defendant could possibly meet that burden and thereby trump the victim’s right.

The “definition” problem. As noted above and in my prior written statement, I believe it is unlikely that the courts would interpret the proposed amendment to allow Congress to use its enforcement power to define the scope of victims’ rights by defining key terms such as “victim” and “crime of violence.” The importance of the issue is magnified if the rights are self-executing, because the uncertainty about who will be deemed to enjoy rights under the

amendment makes it even harder to provide in advance for appropriate exceptions and remedies – as must be done if the rights are self-executing.<sup>12</sup>

The “flexibility” problem. Although there are differing views about the extent to which courts may allow pragmatic limitations on victims’ rights, there is widespread agreement that some such limitations are necessary for mass-victim cases and cases where there is reason to believe the victims may seek affirmatively to frustrate law enforcement efforts. As noted above, an amendment establishing self-executing rights has only one chance to strike the right balance. But if the amendment simply empowers Congress to enact appropriate legislation, there is no such problem: any statute that proves either too rigid or too flexible can be amended. Further, given Congress’ commendable history of passing at least 15 separate victim’s rights statutes in the last two decades, there is little reason to fear that Congress will not take advantage of its new-found ability to export to the States the protections that have proved so effective in the federal arena.

The “remedies” problem. As noted in my earlier written statement, it is particularly difficult to set out in the text of the Constitution itself a limitation on the remedies available to victims whose rights are violated. If the rights are self-executing, some such limitation must be spelled out, as statutory or common-law limits would likely prove ineffective. But once we try to make the limitations on remedial action explicit, it seems our only choices are bad ones: If we choose a nuanced recitation that addresses the full range of foreseeable circumstances, the language will necessarily be inelegant. By opting for more elegant phrasing that speaks the language of the Constitution, we sacrifice clarity. And both approaches carry an obvious risk of unintended consequences. However, if the rights are not self-executing, but are conferred by legislation that the amendment empowers Congress to pass, then there is no need for the Constitution itself to address the issue of remedies at all – Congress can effectively tackle that issue in its implementing legislation.

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<sup>12</sup> In my sample alternative draft, Congress is explicitly given the power “reasonably to define” key terms for purposes of the amendment. Such language makes it clear that the terms are to be defined in the first instance by Congress rather than through judicial development of a common law, but uses “reasonably” to provide a judicial check on a legislative power to define constitutional rights that might otherwise be interpreted as unlimited.

## ADDENDUM

*The following is one example of an alternative approach to amending the Constitution to protect the rights of crime victims without establishing self-executing constitutional rights.*

### JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States:*

#### **`Article--**

`SECTION 1. The Congress shall have the power, through appropriate legislation, reasonably to define the terms “victim” and “violent crime” for purposes of this article and to ensure that a victim of a violent crime: receives reasonable and timely notice of public proceedings under the laws of the United States or any State involving that crime and of any release or escape of the accused offender; is not excluded from such public proceedings; is permitted reasonably to be heard at such public proceedings involving the accused offender’s release, plea, sentencing, reprieve, or pardon; and enjoys the right to adjudicative decisions in such proceedings that duly consider the victim’s safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the convicted offender.

`SECTION 2. Nothing in this article shall affect the President's authority to grant reprieves or pardons, or deny or diminish any right guaranteed by this Constitution.

`SECTION 3. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 7 years from the date of its submission to the States by the Congress.'.