

Testimony of  
**Mr. James Orenstein**

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I. Introduction

Mr. Chairman, distinguished Members of the Committee, thank you for inviting me to appear before you today. 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.

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 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 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. 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. 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. 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.

### 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 impleaded 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. 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. 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.

## 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. 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. Even if Congress were writing on a blank slate, I would have some concerns about some of the language in S.J. Res. 1. 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, 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.

### 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. 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.

## 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. 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. 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."

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.

### 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. 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. 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. And the interest in safety was explicitly tied to bail, parole and similar determinations.

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 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, 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, 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 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.

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. 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-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: The 2000 Version of the Victims' Rights Amendment (from S. J. Res. 3, 106th Congress)

SECTION 1. A victim of a crime of violence, as these terms may be defined by law, shall have the rights:

to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;

to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;

to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence;

to reasonable notice of a release or escape from custody relating to the crime;

to consideration of the interest of the victim that any trial be free from unreasonable delay;

to an order of restitution from the convicted offender;

to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and

to reasonable notice of the rights established by this article.

SECTION 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. 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. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

SECTION 3. The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

SECTION 4. This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States.