that the money authorized in 1404D for the Director of the Office for Victims of Crimes "for the support of organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims' rights in Federal jurisdictions, and in States and tribal governments . . ." is intended to support the work of the National Crime Victim Law Institute at the Law School at Lewis and Clark College in Portland, Oregon, and to replicate across the nation the clinics that it is supporting, fashioned after the Crime Victims Legal Assistance Project housed at Arizona State University College of Law and run by Arizona Voice for Crime Victims. The Director of OVC should take care to make sure that these funds go into the support of these programs so that crime victims can receive free legal counsel to enforce their rights in our federal courts. Only in this way will be able to fully and fairly test whether statutes are enough to protect victims' rights. There is no substitute for testing these rights in our courts to see if they have the power to change a culture that for too long has ignored the victim.

Let me comment briefly on the provision on reports. Under (a), the Administrative Office of the U.S. Courts to report annually the number of times a right asserted in a criminal case is denied the relief requested, and the reasons therefore, as well as the number of times a mandamus action was brought and the result of that mandamus.

Such reporting is the only way we in the Congress and other interested parties can observe whether reforms we mandate are being carried out. No one doubts the difficulty of obtaining case-by-case information of this nature. Yes, this information is critical to understanding whether federal statutes really can effectively protect victim's rights or whether a constitutional amendment is necessary. We are certain that affected executive and judicial agencies can work together to implement effective administrative tools to record and amass this data. We would certainly encourage the National Institute of Justice to support any needed research to get this system in place.

One final point. Throughout this Act reference is made to the "accused." The intent is for this word to be used in the broadest sense to include both those charged and convicted so that the rights we establish apply throughout the criminal justice system.

TITLE IV

Mr. HATCH. Before we agree to send this bill to the House, there are a number of concerns raised with respect to the capital-counsel section of Title IV that I would like to address with my colleagues. I know that this title has been of particular concern to my friend from Texas, Senator CORNYN.

Mr. CORNYN. I thank the Senator. I do have a number of concerns about the Innocence Protection Act. Namely, I am concerned that under this bill, states effectively are required to adhere to a Federal regulatory system, answering to the Department of Justice, for defense and prosecution representation in State capital cases. However, I have been encouraged by recent modifications to the bill that lead me to believe a greater balance has been struck between ensuring strong capital representation systems and supporting the prosecution and sentencing of violent criminals. Senator HATCH, is it your belief that such a balance has been struck?

Mr. HATCH. That is my belief. And let me first say that I appreciate the concerns of the Senator from Texas as well as those of Senators KYL and SESSIONS, each of whom have worked very hard on this important issue. You bring to the debate a wealth of experience in this area, having served as Attorney General of your home State of Texas and as a Judge, and you have worked tirelessly on this, and I thank you for it.

The recent modifications to the bill are a great improvement. The bill is the result of the hard work and dedication of many on both sides of the aisle. Most importantly, we have significantly reworked this bill so as to address the legitimate concerns you, Senators KYL and SESSIONS as well as others have raised.

Specifically, we made some changes to the capital representation section of the Innocence Protection Act. We worked with the House to add language similar to language in the amendment that you offered in the Judiciary Committee language that would require that a large majority of the funding in this area to go to the trial level, rather than to the appellate or habeas litigation. This shift in funding allocation is a further safeguard against your concerns that funds might go to particular advocacy groups because they typically become involved in these cases at the appellate level.

Mr. CORNYN. On this issue—the issue of capital representation, I note that there is a provision in place negotiated by Majority Leader DELAY and other members of the Texas delegation in the House designed to protect the capital representation system that is in place in Texas? Do I understand that correctly?

Mr. HATCH. Yes. Section 421(d)(1)(C) was added specifically to ensure that Texas, or any other State with a similarly structured system, would qualify as an "effective system" under the statute. This provision has been referred to as the "Texas carve-out" throughout debate over this bill. It is appropriate in light of the changes Texas enacted in order to improve its capital-representation system just 3 years ago.

Mr. CORNYN. I thank the Senator. I share the perspective that Texas' system is preserved as a so-called "effective system" under the statute. And that is critically important. As you point out, in 2001, the Texas Legislature passed the Texas Fair Defense Act to overhaul Texas' indigent criminal defense system. The legislation passed ensures prompt appointment of an attorney for indigent criminal defendants, provides guidelines on method of appointment for counsel, establishes minimum standards for appointed attorneys in capital cases, and provides both State resources and oversight of county's indigent defense systems through a State Task Force on Indigent Defense. It is this system or any future version of it that specifically is intended to be protected by this language, is it not?

Mr. HATCH. That is absolutely my understanding.

Mr. CORNYN. So under the DeLay proviso, Texas will not have to change a thing in order to receive grants under this bill—it is automatically pre-qualified?

Mr. HATCH. Absolutely. In fact, it is my understanding that at least half a dozen other states also will automatically pre-qualify for funding under this proviso.

Mr. CORNYN. I thank the Senator. This so-called "Texas carve-out" is critical to my support for this bill. Without the carve-out, Texas and other States like it would not qualify for Federal grant funds, even though they already have an "effective system" for capital representation. And, without the carve-out, Texas and other States like it would have no incentive to apply for Federal grant funds because the Federal grant funds to be received would not exceed the State funds that would have to be spent to become eligible. On the other hand, because of the "carve-out," Texas and other States like it can keep appointment power with locally-elected judges, maintain their own innovations designed to improve—not make impossible—the effective representation of capital defendants, and avoid the need for the creation of a new, needlessly expensive, centralized bureaucracy often times controlled by those who oppose the death penalty such as was the case with the former capital defense Resource Centers that were disbanded by Congress in the 1990's.

Mr. HATCH. I would say that the "carve-out" is a compromise that is consistent with past Federal assistance to the States' criminal justice systems, and it sets appropriate limits on the level of Federal involvement in the administration of the death penalty at the state level.

Mr. CORNYN. Thank you for your work on this, Mr. HATCH, and for helping to ensure that my home State of Texas qualifies as having an "effective system for providing competent legal representation" under the legislation.

I have two other questions for you. In the new postconviction testing remedy created by this legislation for Federal prisoners—at what apparently will be section 3600(g) the bill allows the court

to order a new trial if a DNA test result, in light of all of the other evidence, establishes, and I quote, "by compelling evidence that a new trial would result in an acquittal." As you recall, the standard for granting new trials in what can sometimes be old cases was much debated during the Judiciary Committee's consideration of this bill. The Committee almost voted in favor of changing this standard of proof from "would result in acquittal" to "did not commit the crime," and some discussed a middle option of raising the standard from preponderance of the evidence to "clear and convincing evidence." Ultimately, we chose to defer addressing this issue until negotiations on a final package with the House of Representatives. And in the end, we chose neither of the standards discussed, but instead opted for elevating the standard of proof to "compelling evidence."

We discussed at the time why "compelling" would be the best term of art for setting a standard for reopening litigation of an issue. In particular, we looked to two cases that tell us what "compelling" means in this context—cases that give us confidence that we have set a high bar that will not allow the probably guilty to receive a new trial—and go free if a new trial proves impossible—and also will not allow defendants to seek new trials on the basis of evidence that they could have presented all along. As the Chairman of the Committee that reported this bill and the Senate companion bill's lead sponsor, I think that you can speak with some authority on this matter, and clarify for the record the thinking that went into the House and Senate's selection of the word "compelling." Would you do so?

Mr. HATCH. I would be pleased to do so. In choosing the term "compelling," we relied on previous interpretation of that term in cases such as United States v. Walser, a 1993 case out of the Eleventh Circuit. That court analyzed a previous jury's decision—and whether it disadvantaged the defendant—under a standard of "compelling prejudice." The court there made clear that it could not find "compelling prejudice" if "under all the circumstances of [the] particular case it is within the capacity of jurors" to reach the proper result—in the case of this bill, to find that the defendant committed the crime. If, in light of the DNA test, it would not be within the capacity of jurors to conclude that the defendant is guilty, a new trial must be granted under 3600(g). But if they could possibly find guilty, no new trial is allowed. As the Eleventh Circuit explained, under the "compelling" standard, if a decision is "within the jury's capacity"—if it is reasonably possible—then "though the task be difficult [for the hypothetical jury], there is no compelling prejudice"—or in our case, no compelling evidence requiring a new trial.

As the Walser case also explains, you look to the trial transcript to decide what constitutes "compelling" evidence. Obviously, it is the defendant's burden to produce this evidence by other means if there is no trial transcript. If the defendant pleaded guilty, and received the inevitable benefits that come with a plea agreement, he cannot later turn the lack of a record against the State. It remains the defendant's burden of both persuasion and production to show that it would not have been possible for the jury to have concluded that he is guilty. This is again implicit in the adoption of the term of art "compelling"—as Walser elaborates, under the "compelling" standard, "absent evidence to the contrary, we presume that the jury" could properly reach the result that it did.

The other case to which I believe that you referred is the Seventh Circuit's 1979 decision in NLRB v. Austin Development Center, which makes clear that previously available evidence is not "compelling" evidence. The relevant passage from that case for our purposes was that only "[t]he discovery of new evidence is a compelling circumstance justifying relitigation. The proffer of evidence not presented earlier, however, will not justify relitigation where it is not shown that the evidence was unavailable at the time of the prior proceeding." In other words, for our purposes, if the DNA evidence that a prisoner relies on is something that would have been available to him earlier, it does not qualify as "compelling" evidence justifying a new trial. If he failed to seek a test when he could have, he cannot later use that test result to argue for a new trial, once witnesses have died or become unavailable or had their memories fade, and other evidence has deteriorated and disappeared. To allow a new trial under these circumstances would be fundamentally unfair to society and its interest in the finality of criminal judgments. As some of my colleagues have noted, Federal Rule of Criminal Procedure specifically limits its liberal new-trial rule to new evidence discovered within 3 years. Implicit in that limit is the judgment that the same evidence cannot carry the same weight in a new trial motion if it is brought at a later time. By adopting the "compelling" standard in this bill, we make that same judgement, and we protect these same societal interests.

I hope that this conforms to your previous understanding of this provision and clarifies matters for the record, Senator. We have chosen a tough standard here—in fact, I believe tougher than all those that we have discussed previously. This is not a standard that will grant new trials to people who probably did it—and then allow them to walk free when prosecutors are unable to try them after the passage of time. I hope that you can have confidence in that, Senator.

Mr. CORNYN. It does conform to my previous understanding and I do have confidence in it, Senator. Thank you. I regret taking up the Senate's time on this busy day, but I do have one other question, and this pertains to the bill's changes to CODIS and NDIS, the DNA index systems. It is my understanding that this bill places no limits on what States can upload into CODIS—that is, into their own databases.

Mr. HATCH. That is correct.

Mr. CORNYN. I also would like to clarify which profiles states are required to have expunged from NDIS—the national-exchange database—as a condition of access. The bill allows States to upload anything that is collected "under applicable legal authorities"—that is, that States or local governments collect under their own laws or policies. An exception is made, however, for two categories—unindicted arrestees and elimination-only samples. Then later, the bill provides that States must seek expungement of samples if, and I quote, "the person has not been convicted of an offense of the basis of which that analysis was or could have been included in the index, and all charges for which the analysis was or could have been included in the index have been dismissed or resulted in acquittal."

It is my understanding that, just as what will now be U.S. Code subsection (d)(2)(A)(i) requires that a person's analysis be expunged if it was originally uploaded on the basis of a criminal conviction and that conviction is overturned, this new subsection (ii) will require the analysis of the acquitted arrestee (or one for whom charges have been dismissed) to be expunged—but only if the analysis originally was or could have been included because he was an arrestee.

Mr. HATCH. That is correct. The new limitation that you noted—the new subsection 14132(d)(2)(A)(ii) corresponds to the limited "unindicted arrestee" category in the new (a)(1)(C). It does not apply to DNA analyses uploaded under other "applicable legal authorities." Our intent was to provide States with maximum flexibility in exchanging DNA profile information through NDIS. The only exception that we made in this bill was for arrestees, who had DNA samples taken from them involuntarily, and who, because of those circumstances, we give the right to have those samples withdrawn from NDIS.

Mr. CORNYN. As you know, I am a strong believer in the power of DNA to solve crimes. I want to see the United States develop as broad and as powerful a DNA database as possible. The States have a strong interest in solving past crimes. I also believe that there is no reason to exclude DNA from CODIS simply because charges against an arrestee are dismissed or he is acquitted—fingerprints are kept in such cases, and there is no reason to treat DNA differently than fingerprints. The bill bars States from keeping an arrestee's DNA sample if charges are dropped or he is acquitted. There is no reason to do so. Experience shows that felony arrestees—even those who are