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Crime Victims' Rights Act: A Sketch of 18 U.S.C. § 3771

Updated June 8, 2021

Congressional Research Service
https://crsreports.congress.gov
RS22518

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Section 3771 of Title 18 of the U.S. Code is a statutory bill of rights for the victims of crimes committed in violation of federal law or the laws of the District of Columbia. It defines a victim as anyone directly and proximately harmed by such an offense, individuals and legal entities alike. It does not appear to otherwise include family members of a deceased, child, or incapacitated victim except in a representative capacity.

Numbered among the rights it conveys are: (1) the right to be reasonably protected from the accused; (2) the right to notification of public court and parole proceedings and of any release of the accused; (3) the right not to be excluded from public court proceedings under most circumstances; (4) the right to be heard in public court proceedings relating to bail, the acceptance of a plea bargain, sentencing, or parole; (5) the right to confer with the prosecutor; (6) the right to restitution under the law; (7) the right to proceedings free from unwarranted delays; (8) the right to be treated fairly and with respect to one's dignity and privacy; (9) the right to be informed in a timely manner of any plea bargain or deferred prosecution agreement; and (10) the right to be informed of the statutory rights and services to which one is entitled.

The section directs the federal courts and law enforcement officials to see to it that the rights it creates are honored. Both victims and prosecutors may assert the rights and seek review from the appellate courts should the rights be initially denied.

The section vests no rights in the accused nor does it create a cause-of-action for damages in any instance where a victim is afforded less than the section's full benefits. Moreover, it creates no implicit cause of action for relief for pre-charge violations and may not be construed to impede prosecutorial discretion.

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Introduction

The victims of federal crimes enjoy certain rights to notice, attendance, and participation in the federal criminal justice process by virtue of 18 U.S.C. § 3771. More specifically, the section assures victims that they have:

> (1) The right to be reasonably protected from the accused.
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> (5) The reasonable right to confer with the attorney for the Government in the case.
>
> (6) The right to full and timely restitution as provided in law.
>
> (7) The right to proceedings free from unreasonable delay.
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
>
> (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
>
> (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

Section 3771 is the product of a long effort to afford greater deference to victims in the criminal justice process. It is akin to the victims' bill of rights provisions found in the laws of the various states and augments a fairly wide variety of preexisting federal victims' rights legislation. Its enactment followed closely on the heels of discontinued efforts to pass a victims' rights amendment to the U.S. Constitution. Section 3371 borrows extensively from the language in the federal restitution statutes, which seems appropriate since, in the case of restitution, it simply serves as a reminder of the rights the restitution statutes supply, that is, "the right to full and timely restitution as provided in law."

Background

Legal reform in the name of crime victims began to appear in state and federal law in the 1960s. It can be seen in victim restitution and compensation laws; in the reform of rape laws, drunk driving statutes, and bail laws; and in provisions for victim impact statements at sentencing, to name a few. Over time in many jurisdictions, these specific victim provisions were joined by a more general, more comprehensive victims' bills of rights. Thus, by the close of the 20th Century, 33 states had added a victims' rights amendment to their state constitutions, and each of the states had a general statutory declaration of victims' rights.

In the meantime, Congress had enacted a series of individual victims' rights provisions as well as a general aspirational federal statute, directed to the performance of federal officials. The statute was accompanied by a statement of the sense of Congress encouraging similar action by the states

and by specific directions to the heads of the various federal law enforcement departments and agencies for implementation, both of which remain in effect.

In addition, beginning in the 104th Congress, both houses regularly considered victims' rights amendments to the U.S. Constitution. Unable to reach the consensus necessary for passage, sponsors opted for a statutory substitute, which unlike the "best-efforts" preexisting statute, included enforcement mechanisms (S. 2329, H.R. 5107) The implementing amendments to the Federal Rules of Criminal Procedure, including Rule 60 (victims' rights), became effective on December 1, 2008.

Who Is a Victim?

The definition of "victim," the question of deciding who should be afforded rights and who should not be, was one of the issues that over the years marked the debate during consideration of proposals to amend the U.S. Constitution. The amendment proposals in the 108th Congress (S.J.Res. 1/H.J.Res. 48) opted not to include a specific definition of victim, but referred to the rights as those of the "victims of *violent* crimes." In doing so, they excluded the victims of fraud, regardless of how extensive or devastating the crime, a result some Members considered unsatisfactory.

Section 3771 suffers no such limitation. Instead, it borrowed language from the federal restitution statutes, which, then as now, define a victim as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." Section 3771 adopted the restitution provisions' representational language as well. However, it has nothing comparable to the explicit provision for schemes or conspiracies found in the restitution statutes. Section 3771 is otherwise explicitly more expansive. It encompasses all federal crimes and those of the District of Columbia. The restitution statutes, on the other hand, are more limited. These differences notwithstanding, the courts have consulted their experience under the restitution statutes when construing the definition of victim for purposes of the victims' rights statute.

Persons: Section 3771 and the restitution statutes speak of victims who are "persons" ("'crime victim' means a person"). Although in common parlance, this might be thought to restrict the class of victims to human beings, general usage within the *United States Code* is to the contrary. Unless the context suggests another intent, the word "person" as used in the *United States Code* is understood to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals."

Earlier restitution cases rejected arguments that only human beings could be "victims." Perhaps because the question is considered settled, the argument has disappeared, and later courts have regularly found restitution appropriate for legal entities without commenting upon their want of human status. Section 3771's coverage of legal entities seems to have been generally assumed and with little explicit discussion.

The universal definition of person in 1 U.S.C. § 1 does not mention governmental entities, but they too have been found qualified for restitution under the appropriate circumstances. The *2011 AG Guidelines* take the position that governmental entities are not eligible for "court enforceable rights," but may be entitled to restitution. Section 3771's case law indicates that a governmental entity is not a person entitled to victim's rights under the statute.

Directly and Proximately Harmed

An earlier version of the restitution statutes authorized restitution for injuries and losses resulting from certain offenses but made no mention of direct and proximate harm. "This [earlier] language

suggest[ed] persuasively that Congress intended restitution to be tied to the loss caused by the offense of conviction," the Supreme Court said in *Hughey v. United States*. The implication might have been that restitution was appropriate where the loss would not have occurred but for the offense of conviction. Subsequent amendments both expanded and contracted that implication. Not all persons who suffer a loss as the direct result of an offense are considered victims for purposes of the restitution statutes. The loss must be directly *and proximately* caused by the offense.

A loss caused in part by intervening circumstances cannot be said to have been directly and proximately caused by the offense of conviction, unless the intervening cause is related to or a foreseeable consequence of that offense of conviction. Section 3771's use of the phrase "directly and proximately harmed" encompasses the traditional 'but for' and proximate cause analyses.

Crime Charged: Section 3771 and the restitution statutes are similar, however, in that persons—harmed by crimes other than those of conviction in the case of the restitution statutes or other than those that are the subject of a particular proceeding in the case of the victims' rights statute—are unlikely to be able to claim the benefits of a victim. In both instances, individuals may lose or never acquire the benefit of victim status during the course of criminal proceedings, if charges covering the crimes of which they are the victim are dropped, dismissed, or never filed, even though related crimes are or continue to be prosecuted.

The Justice Department's Office of Legal Counsel (OLC) believes "the CVRA is best read as providing that the rights identified in Section 3771(a) are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment) and cease to be available if all charges are dismissed either voluntarily or on the merits (or if the Government declines to bring formal charges after the filing of a complaint)." The *2011 AG Guidelines* make the same point: "[T]he particular charges filed in a case will define the group of individuals with CVRA rights. . . . Absent a conviction, a victim's CVRA rights cease when charges pertaining to that victim are dismissed either voluntarily or on the merits, or if the Government declines to bring formal charges after filing a complaint."

Congress responded to the OLC opinion with a 2015 amendment that assures victims of the right to notification of plea and deferred prosecution agreements. Section 3771, under other circumstances, moreover, has been found to afford the obvious victim of a clearly identifiable federal crime at least some of its benefits notwithstanding the absence of a charge or even a suspect. Other statutes or rules sometimes fill the void when a victim fails to qualify under Section 3771.

Family of Victims

Section 3771, like the restitution statutes, states that in the case of a deceased or incapacitated victim, "the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, *may assume the crime victim's rights*." This suggests that family members are not themselves considered victims. It implies that one of the parents and other relatives of an adult homicide victim may assume the victim's rights, but otherwise they are entitled to none of the rights found in the statute. This is not the case. Family members do not lose their status as victims by virtue of the possible appointment of a representative of the incapacitated or deceased victim.

Crimes Under What Law: Various past proposed constitutional amendments would have covered the victims of crimes committed in violation of state law, the U.S. Code, the Code of Military Justice, the D.C. Code, and/or U.S. territorial codes. Section 3771 is more modest. It applies to the victims harmed as a result of "the commission of a Federal offense or an offense in

the District of Columbia." It clearly does not apply to the victims of state crimes. Section 3771 should probably not be read to extend rights to the victims of the crimes proscribed in any of the territorial codes and the Code of Military Justice. The courts are likely to conclude that Congress did not intend to cover victims of offenses under these codes, since they had been expressly included in earlier proposed victims' rights amendments to the Constitution; since these codes frequently have a victims' rights provision; and since the victims of D.C. crimes are specifically mentioned.

Section 3771 apparently covers victims of juvenile delinquency with respect to misconduct that in the case of an adult offender would have been a violation of federal or D.C. law. Section 3771 rights with respect to juvenile proceedings, however, may depend upon whether the juvenile proceedings are open or closed. Moreover, the *2011 AG Guidelines* assert that federal juvenile delinquency provisions "restrict[] the type of information that may be disclosed to victims about investigations and proceedings regarding juvenile offenders unless the juvenile waives the restrictions or has been transferred for criminal prosecution as an adult."

Who Is Not a Victim

The Accused: *A person accused of the crime may not obtain any form of relief under this chapter*. Some of the constitutional amendment proposals relied on an assertion that "only" victims or their representatives could claim their benefits, but most included an explicit disclaimer in one form or another that barred defendant's use of the proposed amendment. The provision's intent here is apparent, and sparked little debate over the course of its legislative history.

A corporation or other legal entity may incur criminal liability by virtue of the misconduct of a rogue officer or employee. Thus, under some circumstances, the entity might be considered both an offender and a victim, but not here. A corporation may not claim restitution for the losses it incurs as consequences of its executives' misconduct.

The Right to Be Reasonably Protected from the Accused

Section 3771 lists the right to be reasonably protected from the accused first among its victims' rights. Section 3771's components can be traced to a comparable provision in the 108th Congress-proposed constitutional amendments in most instances. This one is a little different. The constitutional amendment proposals spoke of a right to have judicial decisions made with an eye to victim safety. The previous language focused on "adjudicative decisions"; the new language has no such limitation. The earlier language seemed to impose an obligation to guard against threats to victim safety, from whatever source; the new language establishes a right to the victim to be protected from the accused. Use of the term "accused" and portions of the scant legislative history might be read to imply that the right expires with the conviction of the accused, at which point he would ordinarily be referred to as the offender. Nevertheless, the colloquy on the floor between two of the principal Senate sponsors ended with the comment that they considered the term "accused" to mean "convicted" as well. But earlier in their discussion, they summarized the right simply using a trial protection example.

The clause appears to have been the subject of little judicial construction. One court understood the term "accused" to mean that the right does not attach until a person has been "accused by criminal complaint, information or indictment." A second court observed that "[r]egardless of what this right might entail outside the bail context, it appears to add no new substance to the protection of crime victims afforded by the Bail Reform Act, which already allows a court to order reasonable conditions of release or the detention of an accused defendant to 'assure . . . the safety of any other person.'" As will be noted below, victims elsewhere in Section 3771 are

entitled to notice and to be heard with respect to the release of an accused. Moreover, the protection clause provided the stimulus for an amendment to Rules 12.1 and 17(c)(3) of the Federal Rules of Criminal Procedure relating to the disclosure of the addresses and telephone numbers of Government witnesses and to subpoenas for personal or confidential information about victims, respectively.

Notice

> *The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.*
>
> *Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a) . . . . Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.*
>
> *In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.*

Notice allows victims to assert their rights, facilitates their participation, assures them that justice is being done, and affords them the opportunity to take protective measures when the accused is at large. Section 3771's notification rights are subject to several limitations, some explicit, some implicit. The section explicitly excuses a failure to notify victims of the release of an accused when to do so might be dangerous, and it permits the courts to seek reasonable accommodations when the number of victims in a given case precludes strict compliance with the section's demands.

The implicit limitation is constitutional. Under some circumstances, the manner in which notice is provided may intrude upon the rights of the accused to an impartial jury trial or other constitutional rights of the accused. Under such circumstances, the statutory rights of the victim must yield.

Section 3771 originally had one curious omission. Until amended to include Section 3771(a)(10), it did not give victims the right to notification of their rights; it merely imposed an obligation upon Government officials to "make their best efforts to see that crime victims are notified" of them.

This notification of the rights was a component of the early constitutional amendment proposals, which followed the lead of several state constitutions and statutes. It was originally seen as a victim's counterpart to the *Miranda* warnings enjoyed by an accused and as a prerequisite if the proposed amendments were to function effectively. There were objections, however, that the warnings were out of character with the other rights conveyed by the Constitution and might pose implementation problems—objections that apparently ultimately prevailed, since the provision was not included in later proposals.

Section 3771(a)(2)'s notice clause, in this respect and others, is essentially the same as its forerunner in the 108th Congress resolutions to amend the Constitution. It differs slightly in that it makes special provisions for parole proceedings and insists that notice be "accurate" as well as "reasonable and timely." Moreover, unlike its predecessors, the clause is accompanied by language that imposes an obligation on the Government to advise victims of their rights under the section and to inform them that they may consult an attorney concerning those rights.

The notice clause has several distinctive features:

- the notice rights apply only with respect to *public court proceedings* and *parole proceedings*;
- the rights attach to those proceedings *involving the crime* but not necessarily to all those related to the crime;
- victims are entitled to *reasonable, accurate and timely* notice; and
- victims are entitled to notice of the release or escape only of *the accused.*

Public Proceedings

The public proceedings limitation has been a feature of the victims' rights proposals for some time. When the proceedings are closed at the discretion of the court, however, the presence of the statutory rights may reinforce an inclination to nevertheless approve victim notification of their existence and outcome. "Public proceedings" for purposes of Section 3771 are those that involve written, rather than oral, presentations to the court.

Parole Proceedings

Congress abolished parole for those convicted of federal crimes committed after November 1, 1987. Parole for felonies under the laws of the District of Columbia was abolished pursuant to congressional command effective August 5, 2000.

Involving the Crime

The breadth of the phrase "*involving* the crime" used to describe the public proceedings covered by the notification right may raise questions too. The phrase clearly contemplates more than trial. Pretrial and post-trial hearings involving motions to dismiss, to suppress evidence, to change venue, to grant a new trial, and any of the host of similar proceedings that flow to or from a criminal trial seem to come within the term's meaning. The Senate reports' discussion of proceedings "*related to* the crime" in earlier versions, for instance, specifically mentioned appellate proceedings.

The same reports indicate that, at least at one time, covered release proceedings were understood to include those involving "a release [from custody] of a defendant found not guilty of a crime by reason of insanity and then hospitalized in custody for further treatment." Crime relatedness, understood in such terms, would presumably carry victim notice rights to a fairly wide range of civil and quasi-civil proceedings (*e.g.*, habeas and civil forfeiture proceedings, and extradition hearings, to name but a few).

Historical proposals, which speak in terms of "proceedings *related* to the crime," were thought to perhaps embody notice rights for the victims of a defendant's past crimes, and victims of charges that had been dropped or dismissed, as well as victims of charges that had resulted in acquittal. The change to "proceedings *involving* the crime" might be considered a repudiation of that construction.

The Senate Judiciary Committee, however, indicated that no such repudiation was intended in the case of the proposed constitutional amendment, and stated simply that the "public proceedings are those 'relating to the crime.'" In doing so, it might be thought to have embraced earlier descriptions of proceedings related to the crime, even though the Committee's examples in the 108th Congress were much more modest in some places. Section 3771 was the subject of a colloquy on the floor between its Senate sponsors, which is somewhat ambiguous but seems to

confirm the proceedings as to which notice is due include appellate proceedings. Section 3771 eliminates the speculation previously possible that the rights might be available in an administrative context, such as in administrative immigration proceedings, by confining the proceedings covered to "court" and parole proceedings.

Reasonable, Accurate, and Timely Notice

The inclusion of a "timeliness" requirement to the notice right seems significant, because it would appear to greatly reduce the prospect of "reasonable" but ineffective notice. Yet the committee report issued after its addition in the constitutional amendment proposal makes no note of it and continues to describe the obligation in the same terms used prior to the change. Under pre-addition proposals it was unclear whether reasonableness was to be judged by the level of official effort or by the effectiveness of the effort. The Senate reports noted that heroic efforts were not expected but due diligence was. But the obvious purpose for the right to notice was to provide a gateway to the amendment's other rights. Even without the addition of the clarifying "timely" requirement, what was reasonable might have been judged by whether the efforts were calculated to permit meaningful exercise of the amendment's other rights.

The Senate reports, however, explained that in rare circumstances notice by publication might be reasonable, although if judged by existing due process standards such notice might not have been adequate in ordinary circumstances. Notice given after a proceeding was conducted might have seemed unreasonable because the want of timely notice might constitute an effective exclusion from the proceedings or might defeat the right to make a victim impact statement. The addition of a timeliness requirement seems to reduce the possibility of "reasonable" but untimely notification. The same might be said for the new demand that notice be "accurate." It might seem difficult to imagine how notice could be considered either timely or reasonable, if for want of accuracy it effectively defeated a victim's opportunity to exercise his or her rights. One court has suggested that the "accuracy" modification was made to ensure that victims are kept advised of schedule changes.

In the context of release notifications, the most vexing reasonableness questions may arise should the right extend both to the accused and to the convicted as discussed below. In some instances, such as the right to notification of the release of a prisoner following full service of his sentence, Section 3771 may require notification of victims who would not previously have been entitled to notification and whose identity and location are therefore unknown to custodial authorities.

Application may be challenging in the area of bail as well. The section grants both a right to consideration of the victim's safety and a right to reasonable notice, attendance, and comment. Under earlier circumstances it might not be unusual for an accused to be released on recognizance or bail before authorities could reasonably be expected to provide victims with timely notice. It may be that the section contemplates postponement of the accused's initial judicial appearance until after victims can be notified and can be given a reasonable period of time to prepare and present their views.

Early constitutional amendment proposals seemed to explicitly anticipate that a failure of timely notice in a bail context could be rectified by recourse to the provision in the amendment that permitted the bail decision to be revisited at the behest of a victim. The section contains no such explicit provision, but nothing in the section precludes revisitation—other than abandonment of the earlier explicit provision, perhaps.

Release or Escape of the Accused

Section 3771 refers to notice of the release or escape of *the accused*. The implication is that there is no right to notice of a release or escape following conviction, since at that point the defendant is "convicted" rather than "accused." If this is the section's meaning, the consequences of the change are considerable. The administrative burdens associated with notifying victims every time an inmate is released from custody are not insignificant. This is especially true if the section is construed to apply to the future release or escape of prisoners convicted of crimes committed prior to its effective date.

Nevertheless, the committee report in the 108th Congress suggests that in the equivalent language of the proposed constitutional amendment, the Senate Judiciary Committee considered the terms "accused" and "convicted" interchangeable and intended no change from earlier more generously worded proposals:

> The release [that triggers a notification requirement] must be one "relating to the crime." This includes not only a release after a criminal conviction but also, for example, a release of a defendant found not guilty of a crime by reason of insanity and then hospitalized in custody for further treatment, or a release pursuant to a habitual sex offender statute, S.Rept. 108-191 at 35.

Moreover, the section probably cannot fairly be read to cut off the rights it promises upon the return of a guilty verdict (when the defendant ceases to be an "accused" because of his conviction), since it grants victims explicit rights at sentencing, and at parole proceedings.

Section 3771(c)(3)'s notification right may be limited when notification would be dangerous. The section's sponsors, however, urged that the limitation be invoked judiciously.

Attendance

> *The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.*

Section 3771(a)(3) promises victims a limited attendance right, that is, a right not to be excluded from public court proceedings unless attendance would color their subsequent testimony.

The Constitution promises the accused a public trial by an impartial jury and affords him the right to be present at all critical stages of the proceedings against him. It offers victims no such prerogatives. Their status is at best that of any other member of the general public and, in fact, the Constitution screens the accused's right to an impartial jury trial from the over exuberance of the public.

Moreover, victims are even more likely to be barred from the courtroom during trial than members of the general public. Ironically, the victim's status as a witness, the avenue of most likely access to pretrial proceedings, is the very attribute most likely to result in exclusion from the trial.

Sequestration, or the practice of separating witnesses and holding outside the courtroom all but the witness on the stand, is of ancient origins and "consists merely in preventing one prospective witness from being taught by hearing another's testimony." The principle has been embodied in Rule 615 of the Federal Rules of Evidence and in state rules that adopt the federal practice.

Rule 615, however, lists among its exceptions, the fact that the witness's presence at trial is authorized by statute, and Section 3771(3) qualifies under that exception. Section 3771(a)(3)'s attendance-right language is comparable to that found in the earlier "best efforts" statute which

recognizes the right of victims "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." Section 3771 also operates in conjunction with 18 U.S.C. § 3510, which declares that in federal capital cases, victims who attend a trial are not disqualified from appearing as witnesses at subsequent sentencing hearings absent a danger of unfair prejudice, jury confusion, of the jury being misled, or as constitutionally required. In other federal criminal cases, victims may be excluded from trial only as constitutionally required or by operation of Section 3771(a)(3).

Section 3771(a)(3) is more limited than the constitutional amendment proposals, which with early exceptions afforded a general right not to be excluded. It was suggested that the phrase "not to be excluded" in the amendment proposals was used to avoid the claims that the proposal would entitle victims to transportation to relevant proceedings or to have proceedings scheduled for their convenience or to free them from imprisonment to attend proceedings. In this it would be unlike a defendant's right to attend. Yet like a defendant's right to attend, the use of the phrase has been thought to permit exclusion of the victim for disruptive behavior, excessive displays of emotion, and other forms of impropriety for which a defendant might be excluded.

As in the case of notification, the legislative history of constitutional amendment proposals indicates that the section plays no role in what public proceedings can be closed even though that action denies victims' notice, attendance, and allocution rights. It suggests that a victim has little ground to object if a decision is made to close a traditionally public proceeding.

On the other hand, the section conveying the right is reinforced by a later section in which the courts are instructed to make every effort to ensure the fullest possible victim attendance. Together they require the trial attendance of victims unless the court "finds by clear and convincing evidence that it is highly likely, not merely possible, that the victim-witness will alter his or her testimony" if allowed to attend prior to testifying. At least initially, Section 3771(a)(3) apparently did not serve as a source for successful defendant objections to the attendance of victim/witnesses in judicial proceedings.

Participation

> *The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding*.

Unlike the rights to notice and not to be excluded, the right to be heard is a right to participate. The section describes the proceedings at which it may be invoked with greater particularity: "public proceeding"; "in the district court"; and "involving release, plea, sentencing, or [] parole." The "reasonably heard" language seems to provide the courts with flexibility to be exercised consistent with this and other rights. It is in these respects and others very much like the amendment proposals in the 108th Congress.

Reasonably Heard

The right to be reasonably heard raises three possible issues: (1) is it a right to comment or to command?; (2) does the right include the right to select the method of communication—orally or in writing?; and (3) are there limitations on the information the victim has the right to convey? When the comment or command issue arose in connection with the proposed constitutional amendments, the Senate Judiciary Committee reports answered that the right was not a veto but an opportunity to present relevant information. Section 3771's legislative history is silent on the question, but any contrary construction would appear to have constitutional implications.

The evolution of the "reasonably heard" language complicates the method of communication issue. At one time, the proposed constitutional amendments spoke of a right to be "heard, if present, and to submit a statement." When the phrase "if present, and to submit a statement" was dropped and the right defined as the right to be "reasonably heard," one hearing witness expressed concern that the courts would construe the new language to convey an absolute right to make an oral statement.

The Senate Committee report specifically denied that the language in the proposed amendment was intended to create a right to transportation to the trial, but this very point has already been a source of judicial division. One district court and one appellate panel believe that the right to be reasonably heard, at least at sentencing, gives the victim the right to make an oral statement; at least in a bail context, another district court believes it includes no such right and that courts may limit the presentation to written presentations; and in yet a third view, an uncertain member of the appellate panel suggests that reason may limit the right in some sentencing contexts.

Nevertheless, it is certainly difficult to argue that the sponsors of Section 3771 believed the right to be heard could be confined to a written statement, particularly at sentencing, in the absence of an overwhelming number of victims:

> This right of crime victims not to be excluded from the proceedings provides a foundation for the next section, section 2, (a)(4), which provides victims the right to reasonably be heard at any public proceeding involving release, plea, or sentencing. This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an independent participant in the proceedings.

As to the content of the victim's communication, the legislative history is sparse. The committee reports on the proposed amendments speak of the courts' discretion to reasonably limit the length and content of the victim's communication. Hearing witnesses opined that the right in the proposed amendment embodied the right "to make a recommendation regarding the appropriate sentence to be imposed, including in capital cases." The clearest statement of intent comes from the Senate colloquy: "When a victim invokes this right during plea and sentencing proceedings, it is intended that [] he or she be allowed to provide all three types of victim impact—the character of the victim, the impact of the crime on the victim, the victim's family and the community, and sentencing recommendations."

Public Court Release Proceedings

Section 3771 and the amendment proposals have spoken of the right to be heard in "release" proceedings from the beginning. There seems to be little dispute that the term contemplates the right to be heard at bail proceedings. What other proceedings, if any, the term encompasses is a question complicated by the qualifiers with which successive proposals surrounded the release-related right.

Past amendment proposals once conveyed a right to be heard at public proceedings relating to a *conditional* release from custody and, to the extent the inmate enjoyed a right to be heard, at closed parole hearings. Later versions simply conveyed a right to be heard at public release proceedings. The clear implication was that under the later proposals, victims had no right to be heard at closed parole hearings, regardless of whether the inmate had a right to be heard. On the other hand, the new formulation seemed to open a wider range of proceedings to victim allocution.

There was always some ambiguity over whether conditional release proceedings meant proceedings where release might be granted if certain conditions were met *before* release, like acquittal at trial, or proceedings where release bound the accused or convicted offender to honor certain conditions *after* release, like bail, or both. In any event, in bygone proposals the Senate Judiciary Committee read "conditional" in the phrase "*conditional* release *from custody*," as a word of limitation.

Thus, by removing the words "conditional" and "from custody," the proposals and consequently Section 3771 perhaps should be understood to allow victims the right to be heard on most pretrial motions as well as most post-trial, pre-appellate petitions, or at least any that might result in a release of the accused or the convicted offender from jeopardy. For example, it might support an argument that the section gives victims the right be heard at trial by the trier of fact (judge or jury) on whether the defendant should or should not be convicted on any of the charges at issue (*i.e*., at least limited trial participation, although the committee report denied any such intent).

It may seem more logical to suggest that proceedings to which the right attaches are only those where the issue of whether the defendant should be released is squarely addressed—bail proceedings and habeas proceedings under 28 U.S.C. § 2255—and not proceedings where the issues addressed may be resolved in a manner that leads to the defendant's release. Yet at least one commentator has suggested that the right to be heard in release proceedings includes the right to be heard upon motions to dismiss charges. The comment comes in a discussion of the changes in the Federal Rules of Criminal Procedure appropriate to implement the section. Under one such proposed change, the court would be required to consider the victim's views before it ruled on a motion to dismiss charges, a "proposed change [that] would implement a victim's right to be 'treated with fairness' and to be heard at any proceeding 'involving release' of the defendant." The same logic would appear to support a victim's right to be heard in suppression hearings and other pretrial motions.

Section 3771(a)(4)'s reach does not seem to extend to all proceedings, regardless of how expansively "release" is construed. The right attaches to public proceedings. In theory, therefore, it does not apply in grand jury proceedings or proceedings, such as those involving juveniles, which are closed at the court's discretion. The right attaches to public proceedings "in the district court." Section 3771(a)(4), in theory, therefore, does not apply in appellate proceedings whether relating to bail or otherwise. Section 3771(d)(3), however, affords victims the right to seek appellate review from a denial of their rights in the form of mandamus. Section 3771(b)(2)(a) affords them the right to be heard in habeas proceedings.

Even where the right appears to otherwise apply on its face, some courts may be reluctant to postpone the defendant's initial appearance or release hearings to fully accommodate the right.

Plea Bargains

Victims have a special interest in the right to be heard before the court accepts a plea agreement. Negotiated guilty pleas account for well over 95% of the criminal convictions obtained. Plea bargaining offers the Government convictions without the time, cost, or risk of a trial, and in some cases a defendant turned cooperative witness. It offers a defendant conviction but on less serious charges, and/or with the expectation of a less severe sentence than if he or she were convicted following a criminal trial, and/or the prospect of other advantages controlled, at least initially, by the prosecutor—agreements not to prosecute family members or friends, or to prosecute them on less serious charges than might otherwise be filed; forfeiture concessions; testimonial immunity; entry into a witness protection program; and informant's rewards, to mention a few.

For the victim, a plea bargain may come as an unpleasant surprise, one that may jeopardize the victim's prospects for restitution; one that may result in a sentence the victim finds insufficient; and/or one that changes the legal playing field so that the victim has become the principal target of prosecution.

Section 3771 assures crime victims of the right to reasonably be heard at proceedings when a plea bargain is accepted. The right only attaches to the acceptance of plea bargains in open court (*i.e.*, at public proceedings). The right clearly does not vest a victim with the right to participate in plea negotiations between the defendant and the prosecutor, which are neither public nor proceedings. By the same token, the right to be heard is not the right to decide; victims must be heard, but their views are not necessarily controlling. It remains to be seen whether the existence of the right in open court will lead to more proceedings being closed to avoid the complications of recognizing the right.

Sentencing

At common law, victims had no right to address the court before a sentence was imposed upon a convicted defendant. The victim's right to bring the crime's impact upon him to the court's attention was one of the early goals of the victims' rights efforts. The Supreme Court has struggled with the propriety of victim impact statements in the context of capital punishment cases, ultimately concluding that they pose no necessary infringement upon the rights of the accused.

The federal courts have concluded from this that in capital cases, victim impact statements are constitutionally precluded from including "characterizations and opinions about the crime, the defendant, and the appropriate sentence." Section 3771 cannot trump a defendant's constitutional rights, if the two cannot be accommodated. *Payne*, however, spoke to the Eighth Amendment considerations that apply in a capital case. Eighth Amendment limitations in a noncapital context are not necessarily the same.

In non-capital cases, as noted earlier, the sponsors of the legislation seem to have anticipated that the participation right included the right to be heard orally, except perhaps when a court faced an overwhelming number of victims at the sentencing of a single defendant in which case recourse to Section 3771(d)(2) might be appropriate. Thus far, the courts seem to concur. The right to be heard at sentencing does not include the right to have the victim's impact statement included in the presentence report as long as the statement is presented and considered by the court. Nor does it include a right to disclose the content of the presentence report.

Parole and Pardon

Section 3771 gives victims the right to be heard at parole proceedings. As noted earlier, parole is not part of the federal criminal justice process relating to any crime committed after November 1, 1987; the same is true of felonies committed in violation of the laws of the District of Columbia after August 5, 2000. The parole laws in effect prior to those dates continue to apply with respect to federal offenses committed before November 1, 1987, and to felonies under the laws of the District of Columbia committed before August 5, 2000. Sections 3771(a)(2) and (a)(4), nevertheless, entitle victims to notification of and an opportunity to be heard at any parole hearing conducted for pre-abolition offenders.

The constitutional amendment proposals in the 108th Congress provided victims with a right to be heard at public pardons proceedings. Section 3771 has no such provision. The right to be reasonably heard applies to public court proceedings. The Constitution vests the pardoning power in the President, and the power is exercised through an administrative process that does not

involve public court proceedings. Section 3771(a)(2) entitles victims to notice of the release of the prisoner pursuant to the President's pardoning power.

For federal crimes committed after November 1, 1987 (after August 5, 2000 for D.C. offenses), Congress replaced parole with supervised release, a term of supervision after release from prison that courts impose initially at the time of sentencing. As noted elsewhere, victims have a right to be reasonably heard at sentencing.

Confer

The reasonable right to confer with the attorney for the Government in the case.

This is a right not found in the constitutional amendment proposals. The statute might be read to afford a right to confer beginning with the commission of the offense, including with regard to the manner in which the investigation is conducted and the decision as to what charges to bring and against whom. The Senate sponsors of the section, however, described an extensive but more limited right.

Initially, at least some courts appeared to believe that the exercise of the right must be self-initiated. The obligation, however, rests with the government, and the courts are bound to ensure that it is honored. Even before Congress made application more explicit, case law suggested that the right to confer attached before formal charges had been filed, and that the failure to confer might provide a victim with the right to have an unconferred plea agreement set aside, as noted earlier. The right to confer, however, does not extend to a right to access to the prosecution's investigative files, nor to the Probation Services' pre-sentencing report.

Restitution

The right to full and timely restitution as provided in law.

Section 3771's restitution language, like that of many of its other elements, is reminiscent of the constitutional amendment proposals in the 108th and 107th Congresses, which spoke of a right "to full and timely restitution." Those proposals were very different from earlier proposals. They did not establish a right to restitution in so many words. They did not explicitly convey a right to have proceedings reopened for failure to accommodate a victim's right to restitution. Instead, for the first time they spoke of just and timely claims to restitution, two concepts that could be subject to several interpretations.

The first victims' rights proposals promised either a right "to an order of restitution from the convicted offender," or a right "to full restitution from the convicted offender." Subsequent proposals opted for the right to a restitution order. The proposals appeared to make restitution orders mandatory as a matter of right. The scope of the right was unstated. Although the proposals applied to juvenile proceedings, the use of the term "convicted offender" might have been construed to limit their restitution command to criminal convictions and therefore not reach findings of delinquency.

Restitution orders in a nominal amount or subject to priorities for criminal fines or forfeiture or other claims against the defendant's assets might have seemed inconsistent with the decision to elevate mandatory victim restitution to a constitutional right. Their legislative history indicate these early proposals did "not confer on victims any rights to a specific amount of restitution, leaving the court free to order nominal restitution. . . . The right conferred on victims [was] one to an 'order' of restitution. With the order in hand, questions of enforcement of the order and its priority as against other judgments [were] left to the applicable Federal and State law."

The committee reports, however, continuously suggested that the right might include the right to a pretrial restraining order to prevent an accused from dissipating assets that might be used to satisfy a restitution order. The right also might have extended to prevent dissipation in the form of payment of attorneys' fees for the accused, since the accused has only a qualified right to the assistance of counsel of his choice.

What was a right to a restitution order prior to the 107th Congress became the right to consideration of just and timely victims' claims, appropriate to the circumstances, weighed against the interests of others, and perhaps only applicable during proceedings on other matters. At first glance, it appeared that as long as the victim's interest in just restitution when asserted in a timely manner was recognized, the amendment proposals left the law of restitution unchanged.

Yet insertion of the word "just" for the first time in the restitution component of the amendment proposal presumably called for consideration of such factors when appropriate. Moreover, it probably precluded restitution claims by the "ripped-off" drug dealer or others victimized in the course of their own illegal conduct at least in some circumstances.

Historical proposals explicitly allowed victims to reopen final proceedings in vindication of their right to restitution. That language disappeared and in its place was a reference to "timely" claims to restitution. The implications were obvious, but the statement quoted above seems to suggest that "timeliness" may be judged by the date of the injury, the date of sentencing, or the date on which the offender had the resources to begin paying restitution.

Section 3771 adds the phrase "as provided in law" to the right and substitutes "full and timely" restitution for "just and timely" restitution. With the changes, the section seems to confirm rather than enlarge existing law in the area of restitution. Sponsors felt that elsewhere the section bolsters the victim's restitution interest by ensuring the victim's rights to notice, consultation, and participation. One appellate court has pointed out that the promise of "full" restitution extends only as far as the law provides, a fact that "makes it clear that Congress recognized that there would be numerous situations when it would be impossible for multiple crime victims to the same set of crimes to be repaid every dollar they had lost."

Reasonable Freedom from Delay

The right to proceedings free from unreasonable delay.

The U.S. Constitution guarantees those accused of a federal crime a speedy trial; the due process clause of the Fourteenth Amendment makes the right binding upon the states, whose constitutions often have a companion provision. The constitutional right is reinforced by statute and rule in the form of speedy trial laws in both the federal and state realms.

"Ironically, however, the defendant is often the only person involved in a criminal proceeding without an interest in a prompt trial. Delay often works to the defendant's advantage. Witnesses may become unavailable, their memories may fade, evidence may be lost, changes in the law may be beneficial, or the case may simply receive a lower priority with the passage of time."

Until recently, victims had no comparable rights, although their advocates contended they had a very real interest in prompt disposition. Some victims sought to put a traumatic episode behind them; some wanted to see justice done quickly; some hoped simply to end the trail of inconveniences and hardship that all too often fell to their lot as witnesses.

A few states have since enacted statutory or constitutional provisions establishing a victim's right to "prompt" or "timely" disposition of the case in one form or another. The federal statutory victims' bill of rights did not include a speedy trial provision, but Congress has encouraged the states to include a right to a reasonably expeditious trial among the rights they afford victims.

Section 3771(a)(7) seems to convey a more generous right than its predecessors in the proposed constitutional amendments. Yet in spite of what might appear to be an evolutionary development, the right has been described at each stage in much the same terms; throughout the years it was suggested that perhaps the standards used to judge the defendant's constitutional speedy trial right govern here as well.

In the beginning, proposals sometimes actually spoke of a victims' *speedy trial* right, and in other instances preferred to describe it as the right to have "*proceedings* resolved in a prompt and timely manner." Proposals in the 105th Congress continued the split, some focused on the beginning and completion of trial; others on a finality of the proceedings. In the following Congress, the proposals all called for "consideration of the victim's interest in a *trial* free from unreasonable delay." In this form, the right was one relevant only in a trial and pretrial context. The proposals seemed to carry the implication that the right could only be claimed in conjunction with other proceedings (e.g., "considered" in the context of a defense or Government motion for a continuance, but not a defendant's motion for a new trial), but not necessarily provide grounds for a free-standing victim's motion when the question of timing was not otherwise before the court.

In the 108th Congress, the formulation referred to "the right to adjudicative decisions that duly consider the victim's . . . interest in avoiding unreasonable delay." Some of the words were new. The phrase "adjudicative decisions" replaced "trials" and "proceedings"; "duly consider" appeared instead of "consideration"; and "avoiding unreasonable delay" stood where "free from unreasonable delay" once was. Yet at least some of the concepts seemed to remain constant. Reasonable delays were too countenanced; unreasonable delays tolerated only if they are outweighed by other interests. The Supreme Court's speedy trial jurisprudence was to be used as a guide for what was reasonable.

On the other hand, the new wording left other questions unanswered. Were victims to have the right to be heard prior to any decision that might either cause or reduce delay? One hearing witness expressed concern that the right to consideration of the interest might include the right to voice the interest on questions other than scheduling: "Does a crime victim have the right to object to the admission of evidence on the ground that it might lengthen the trial?" Yet, the amendment's language did not necessarily create a right to assert the interest. The delay-avoidance interest triggered a right to consideration. Interests elsewhere in the amendment triggered a right to be heard. And the right to be heard related to matters of "public release, plea, sentencing, reprieve, and pardon proceedings," not to matters of scheduling, motions, and other pretrial and trial proceedings that were just as likely to produce delay. Courts might have concluded the differences were significant.

Section 3771(a)(7) continues to describe the right to delay avoidance in limiting terms, but apparently more expansively than its forebears: "the right to proceedings free from unreasonable delay." Its sponsors suggested than the right was aimed at scheduling delays particularly.

The case law indicates the courts are sensitive to victims' interest in delay avoidance; that in some instances delay may be in the interest of at least some victims; and that the provision "appears to add little if anything substantive to existing law. . . except that it does appear to confer . . . the right to object to delay and ask the Court to hold both government and defendant to what the Speedy Trial Act already requires."

Fairness, Dignity, and Privacy

The right to be treated with fairness and with respect for the victim's dignity and privacy.

This right rarely found explicit expression in the proposed constitutional amendments, although it clearly lies at the heart of all of them. The same language appears in the earlier federal "best

efforts" statute, and a similar right is featured in many of the state constitutional and statutory victims' rights provisions. Only victims, however, may claim the right. Yet Section 3771(a)(8) and the rationale it reflects have given rise to other victim prerogatives under other federal statutes and rules.

Unlike other rights drafted to apply only with respect to public proceedings, the right to be treated fairly and with respect for a victim's dignity and privacy applies throughout the criminal justice process. It does not, however, bar the Government or a defendant from advancing legitimate arguments simply because they might offend the victim. A trial court's sealing of the record—thereby preventing the victim from determining whether his rights had been honored and then failing to act upon his motion to open the record—is inconsistent with the victim's right to fair treatment and respect for his dignity. On the other hand, the same considerations may warrant honoring victims' requests to be heard on motions to redact their identifying information from emails to be disclosed on discovery.

Notice of Plea and Deferred Prosecution Agreements

> *The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.*

The Justice for Victims of Trafficking Act added this to the inventory of victims' rights. It is something many understood to be a component of the original right to be heard (*i.e.*, "the right to be . . . heard at any . . . proceeding . . . involving . . . [a] plea"). The Justice Department, however, believed that the right attached only after a defendant had been formally charged, by which point plea bargaining has often already been completed. The provision is designed to correct any misunderstanding for the benefit of victims. The reference in the new right to a "timely manner" seems to negate any suggestion that notification may occur after the court has accepted the plea or deferred prosecution agreement.

Notice of Section 3771 Rights and Statutory Services

> *The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. § 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.*

This, too, the Justice for Victims of Trafficking Act added to the inventory of victims' rights. It, too, is something that may have been thought implicit from the beginning, given the commands elsewhere in the statute. Section 3771(c)(1), for example, has declared from the beginning that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded the rights described in subsection (a)." Section 3771(a)(10) now supplements the command with an explicit right.

Responsibilities of the Courts

Section 3771(b) assigns federal courts responsibility in two areas. One deals with the obligations that follow from the rights granted to the victims of crimes under the laws of the United States and the District of Columbia. The other addresses obligations that federal courts conducting federal habeas corpus proceedings owe the victims of state crimes.

Generally

> *In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3) [relating to victims' right not to be excluded from judicial proceedings], the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.*

None of the proposed constitutional amendments featured an equivalent. It has no counterpart in the earlier federal "best efforts" provision. At least one court has expressed the view that "the provision requires at least some proactive procedure designed to ensure victims' rights," while noting the apparent primacy of the right to attend. The trial court's obligation to "ensure" victims' rights seems to set its responsibilities a notch above the "best efforts" level of obligation imposed upon other officials.

Habeas Corpus

> *In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).*

The history of the proposed constitutional amendments sheds little light on the scope of the provision since habeas corpus language dropped out of the proposals early on. Section 3771(b)(2), moreover, was not part of the original legislation, but was inserted by the Adam Walsh Act. It passed through the legislative process virtually without comment.

Section 3771(b)(2) provides the victims of state offenses limited rights when the offender seeks federal habeas corpus relief. It comes with its own, more tightly drawn definition of "victim": "'crime victim' means the person against whom the State offense is committed, or if that person is killed or incapacitated, that person's family member or other lawful representative." It affords these victims a limited range of rights that relate to matters within the control of the federal courts: attendance rights; the right to be heard; protection from unreasonable delays; the right to fair and respectful treatment; and the right to enforce those rights. The right to be heard seems to consist of the right to brief and possibly argue points of law, since the usual form of a victim's right to be heard, an impact statement, has no real place in a habeas proceeding. In this context, the victim is treated as an amicus rather than an intervener, at least at the district court level. Section 3771(b)(2) vests enforcement authority in the victim or the victim's representative, but not in state or federal government officials.

Section 3771(b)(2)'s most interesting feature may be the absence of a right to notice. It does not list a federal right to be notified of federal habeas proceedings among the rights it provides. The section further absolves federal executive branch officials of any obligations under the habeas provision.

Responsibilities of Other Authorities

> *Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).*
>
> *The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).*

Section 3771(c)(1) replicates the language of 42 U.S.C. § 10606(a) (2000 ed.) with the addition of the notification in italics above. Section 3771(c)(2) is new and was added in recognition of the fact that the interests of the Government and the interests of the victim may not always coincide. The Department of Justice's implementing regulations create a complaint procedure and enforcement mechanism to ensure compliance. None of the proposed constitutional amendments had a provision comparable to either of these provisions.

Enforcement

Who

> *The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a).*

Section 3771(d)(1) is an expansion of the related proposals contained in the proposed constitutional amendments. They contained an exclusive provision and made no mention of governmental representation. Section 3771(d)(1) grants standing to victims and their representatives, and it expressly authorizes the Government to assert rights on behalf of the victim. The legislative history confirms the impression that "representatives" include both victims' attorneys and those standing in the stead of a legally unavailable victim; and it negates somewhat the implication that anyone other than the actual victim enjoys ultimate control of the victim's rights. Some of the cases note the propriety of prosecutors asserting victims' rights. Finally, the CVRA creates no implicit right to a cause of action for judicial relief "outside the confines of a preexisting proceeding."

Mandamus and Appeal

> *Motion for relief and writ of mandamus. – The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.*
>
> *In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.*

Section 3371 rather clearly implies that victims have no right to be heard on appeal other than through mandamus and habeas. The right to be heard is couched in terms that limit both the forum ("in district court") and the proceedings ("release, plea, sentencing or any parole"). Moreover, elsewhere the Government is entrusted with the responsibility to espouse the victim's rights on appeal, apparently as a matter of discretion.

Section 3771(d)(3) is more explicit than any of the proposed constitutional amendments. Furthermore, it contemplates interlocutory appeals with stays or continuances of pending criminal

proceedings of no more than five days. Early constitutional amendment proposals limited the use of stays and later proposals were simply silent on the issue.

The provision's Senate sponsors apparently saw the availability of mandamus as a means of appellate review. In other contexts, mandamus is more limited; it is a "drastic and extraordinary remedy reserved for really extraordinary cases."

The government's prerogative to assert a victim's rights includes the right to appeal and to petition for mandamus relief on a victim's behalf.

Limitations

One Accused—Too Many Victims

> *In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.*

Section 3771(a)'s rights, including the right to notice, are subject to a limitation when the court finds it impractical because of the sheer number of victims to fully accommodate them all. Section 3771(d)(2) has no counterpart in any of the proposed constitutional amendments. The committee reports accompanying the amendments acknowledged that the right to "reasonable" notice might be honored less thoroughly in cases involving hundreds of victims than in cases involving only a few. The same might have been said (but was not) of the right to be "reasonably" heard and the right not to be excluded. The amendments instead afforded the courts flexibility to deal with cases involving hundreds of victims or other unusual circumstances.

Section 3771(d)(2) deals with the challenge more explicitly; both the language used and the legislative history make it clear that when compelled to invoke the statute, the courts are expected to adopt alternative procedures in the spirit of the reduced right.

No New Trial

> *In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged*.

Proponents of the proposed constitutional amendment wrestled with the question of the circumstances, if any, under which criminal proceedings could be reopened to correct a denial of a victim's rights. At first, they suggested that relief could only be granted prospectively; specific judicial decisions could not be postponed or reopened. Later, they yielded a bit and allowed bail and restitution proceedings to be revisited, but otherwise made the prospective nature of relief even more explicit. Finally, they simply left the question for legislative resolution except for a prohibition on new trials.

Section 3771(d)(5) provides the safeguard for a different reason. Double jeopardy would not bar a new trial in the case of a clash with a victim's statutory right. However, in the absence of such a clause, ordering a new trial for denial of a victim's right might afford a convicted defendant a second chance at acquittal.

Section 3771(d)(5) limits the opportunity to revisit plea and sentencing proceedings. It says nothing about bail, restitution, or other trial proceedings, all of which are thus presumably subject

to the statute's expedited, five-day stay and mandamus procedure. Moreover, on its face it permits a plea agreement when the accused has pled to the highest crime charged, but should the agreement be reopened, the statute promises the victim no more than the right to advise the court on the question of whether the agreement should be accepted.

Section 3771(d)(5)'s 14-day deadline is not jurisdictional and does not preclude a petition for mandamus relief from a lower court's denial of victim restitution.

No Damages and Prosecutorial Discretion

> *Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.*

Section 3771(d)(6) has two components—(1) a denial of any intent to create a cause of action for damages against the United States or its officers or employees and (2) a denial of any intent to impair prosecutorial discretion. The constitutional amendment proposals generally included a similar ban on damages. They were thought not only to bar a cause of action for damages on behalf of aggrieved victims but also to preclude requests for the appointment of counsel to represent indigent victims or for payment of attorneys' fees for retained counsel. Section 3771's sponsors made no similar statements during the course of debate, but did point out that other sections of the legislation established a grant program to provide victims with legal assistance. Other Members regretted the fact that the section makes no provision for the appointment of counsel for indigent victims.

Since then, the courts have confirmed that the statute creates no cause of action for damages against the United States or its officials; negates the possibility of a *Bivens* action; and provides no grounds for a claim against the United States.

At first glance, damages and prosecutorial discretion might seem an odd pairing, but they both limit the remedies available for a violation of a victim's rights. Moreover, some of the early proposals to establish a constitutional victims' rights amendment grouped damages and prosecutors' charging authority with other limitations. None of them, however, featured the broad prosecutorial discretion shield now found in the statute. The House Judiciary Committee added the prosecutorial discretion language late in the legislative process, perhaps at the behest of the Justice Department, and it passed without comment.

Section 3771(d)(6)'s prosecutorial discretion limitation, in the words of the courts, "gives victims a voice, not a veto," but that does not mean that victims' rights stand at the prosecutor's convenience or that only the prosecutor's voice will be heard. Nevertheless, it precludes enforcing a victim's demand that prosecutors initiate forfeiture proceedings, or prosecute additional charges for which an individual believes he is a victim.

Justice Department Regulations

> *Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.*

Section 3371(f) instructs the Attorney General to promulgate regulations that designate an official to receive victim complaints concerning performance under the section, training for Justice Department employees, and disciplinary sanctions for willful and wanton violations. The

Department of Justice issued revised victim assistance guidelines in May 2005 and again in October 2011. The Department issued the regulations called for in Section 3771(f) on November 17, 2005.

Author Information

Charles Doyle
Senior Specialist in American Public Law

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