



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

**Charles Doyle**  
Senior Specialist in American Public Law

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## Summary

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.

Corresponding amendments to the Federal Rules of Criminal Procedure became effective on December 1, 2008.

This is an abridgement of a report, which with quotation marks, citations, and footnotes, appears as CRS Report RL33679, *Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. 3771*.

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## Background

Section 3771 is the product of a decades-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 pre-existing federal victims' rights legislation. Its enactment followed closely on the heels of discontinued efforts to pass a victims' rights amendment to the United States Constitution.

## 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 difficulties that surfaced during the course of debates over the proposals to amend the United States Constitution. Section 3771 provides an explicit definition:

For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, 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 under this chapter, but in no event shall the defendant be named as such guardian or representative. 18 U.S.C. 3771(e).

Other than the coverage of victims of crime under the laws of the District of Columbia, the definition is by and large the same definition found in the general federal restitution statutes, 18 U.S.C. 3663, 3663A. Commentators have suggested that courts will be able to draw upon the case law developed under the two restitution statutes to determine who qualifies as a victim under Section 3771. Recourse may be somewhat complicated, however, by the presence of additional language in the restitution definitions, or by the references in the restitution statutes to specific persons and the types of harm that qualify for restitution. Nevertheless, the courts do seem likely to consult their experience under the restitution statutes when construing Section 3771's definition of victim. 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," 1 U.S.C. 1. The *2011 AG Guidelines* take the position that governmental entities are not eligible for court enforceable rights, but may be entitled to restitution.

Some courts hold that restitution is only available for harm directly related to the crime of conviction or provided for in some explicit exception such as that available for conspiracies and plea bargains. Other courts will permit restitution based on proximate harm if it is not too remote from the crime of conviction and if there are no unrelated intervening causes or contributors to the harm. Thus for instance, a defendant convicted of bank robbery may be ordered to pay restitution for the damage he caused during his attempted getaway. Restitution is only available for harm related to the crime of conviction. Victims of crimes, other than those for which the defendant is convicted, are not entitled to restitution even if they were victims of offenses that were initially charged with the crime of conviction or are undisputably related to the crime of conviction. The same may hold true for victims under Section 3771. Individuals may lose victim

status under Section 3771 during the course of the criminal proceedings, if charges covering the crimes of which they are the victim are dropped or dismissed even though related crimes continue to be prosecuted.

Like the restitution statutes, Section 3771 states that in the case of a deceased 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 of the deceased are not as such considered victims without more. It implies that the parents and other relatives of an adult homicide victim may assume the victim’s rights under the appointment of the court, but otherwise are entitled to none of Section 3771’s victims’ benefits. The restitution cases may lend some credence to this view. Early case law construing Section 3771 seems to leave the question unsettled.

## **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. It appears to have been the subject of little, if any, judicial attention. One commentator has observed that “the legal significance, if any, of these general provisions is unclear.” At the very least, the section provides an explicit justification for compatible judicial action taken in the interest of victim safety.

## **Notice**

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 notice clause has several distinctive features: (1) the notice rights apply only with respect to *public court proceedings* and *parole proceedings*; (2) the rights attach to those proceedings *involving the crime* but not necessarily to all those related to the crime; (3) victims are entitled to *reasonable, accurate and timely* notice; and (4) victims are only entitled to notice of the release or escape of *the accused*. With regard to this last feature, committee reports on the equivalent language in the proposed constitutional amendment considered the terms “accused” and “convicted” interchangeable. The sponsors of Section 3771 were of the same view.

## **Attendance**

Section 3771 assures victims of the right not to be excluded from any public proceedings involving the crime except where to attend would color their subsequent testimony. It is one area where balancing the interests of victim, defendant, and government may be the most challenging.

## Participation

Unlike the rights to notice and not to be excluded, the right to be heard is a right to participate. The section limits application to reasonable participation in public court and parole proceedings. It does not on its face give victims the right to be heard in closed proceedings or to be heard on other pre-trial motions, at trial, perhaps on appeal, or with respect to related forfeiture or habeas proceedings. Nor does it explicitly give the victim the right to be heard in any particular form.

Section 3771 assures crime victims of the right to reasonably be heard at proceedings where 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.

The sponsors of the legislation seem to have anticipated that the right to be heard at sentencing included the right to be heard orally and did not intend to permit the courts to require participation in writing except when faced with an overwhelming number of victims at the sentencing of a single defendant. Thus far, the courts seem to concur.

## Confer

The Senate sponsors said of the right to confer with the attorney for the government: This right is intended to be expansive. For example, the victim has the right to confer with the government concerning any critical stage or disposition of the case. This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about the concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the government's attorney about proceedings *after charging*. At least some courts appear to believe that exercise of the right must be self-initiated.

## Restitution

The section affords the right to full and timely restitution as provided in law. It seems to confirm rather than enlarge existing law in the area of restitution. Sponsors felt that the rest of section would bolster 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**

Section 3771 continues to describe the right to delay avoidance in limiting terms. Its sponsors suggested that the right was aimed at scheduling delays. Early case law indicates that the courts are sensitive to victims' interest in delay avoidance, but also that in some instances delay may be in the interest of at least some victims.

## **Fairness, Dignity, and Privacy**

This right to be treated with fairness and respect for one's dignity and privacy 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.

## **Responsibilities of the Courts**

At least one court has expressed the view that the provision in Section 3771 that designates the judiciary as an insurer of the rights of victims requires at least some proactive procedure designed to ensure victims' rights. 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.

## **Responsibilities of Other Authorities**

Section 3771 directs 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 to make their best efforts to see that crime victims are notified of, and accorded, the rights the section confers. It specifically instructs prosecutors to advise crime victims that they can seek the advice of an attorney with respect to those rights.

## **Enforcement**

Section 3771 expressly authorizes the government to assert rights on behalf of the victim. The Government's prerogative to assert the rights of a victim apparently includes the right to petition for mandamus when they are denied. Victims also enjoy a right to appeal denial of any their statutory rights using a writ of mandamus. The federal appellate courts are divided over whether review is to be conducted under traditional rules for mandamus review or under less demanding standards.

## **No New Rights for the Accused**

A person accused of the crime may not obtain any form of relief under Section 3771, nor may denial of a right under the section provide grounds for a new trial.

## **Many Victims—One Accused**

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 the section, the court shall fashion a reasonable procedure to give effect to the section that does not unduly complicate or prolong the proceedings.

## **No Damages**

The constitutional amendment proposals generally included a ban on damages. They were thought to not only 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. The sponsors of Section 3771 made no similar statements during the course of debate with respect to the damage ban found in Section 3771, but did point out that other sections of the legislation established a grant program to provide victims with legal assistance. Other Members bemoaned the fact that the section makes no provision for the appointment of counsel for indigent victims.

## **Justice Department Regulations**

Section 3371(f) instructs the Attorney General to promulgate regulations which designated 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 that include Section 3771 matters. The department issued the regulations called for in Section 3771(f) on November 17, 2005, 70 *Fed. Reg.* 69653 (2005)(28 C.F.R. §45.10).

## **Author Contact Information**

Charles Doyle  
Senior Specialist in American Public Law  
cdoyle@crs.loc.gov, 7-6968