2010

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Recommended Citation
Smith, Elliot (2010) "Is There a Pre-Charge Conferral Right in the CVRA?," University of Chicago Legal Forum: Vol. 2010, Article 15. Available at: http://chicagounbound.uchicago.edu/uclf/vol2010/iss1/15

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Is There a Pre-Charge Conferral Right in the CVRA?

Elliot Smith†

INTRODUCTION

The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act ("CVRA") provides victims of crime with eight enumerated rights in relation to the government's prosecution of a federal offense.¹ Among these rights is the "reasonable right to confer with the attorney for the Government in the case."² Unfortunately, the contours of the conferral right are unclear. One commentator has noted: "Most ambiguous of the lot [of victim consultation statutes] is the consultation requirement as stated in the federal statute and in a handful of the state provisions."³ For one thing, from the language granting the right, it cannot be determined when a victim's conferral right attaches. For another, because "there is not even a hint as to what the subject of the contemplated consulting/conferring is expected to be,"⁴ the purpose and scope of the right are hardly obvious.

In broad terms, the question with respect to attachment is whether a victim's conferral right becomes enforceable exclusively after the point at which the government files charges against a defendant, or whether there are circumstances under which the right might attach earlier.

As to the purpose and scope of the conferral right, the particular issue discussed in this Comment is whether victims are entitled to have their views considered by the prosecutor in the case before the prosecutor reaches a plea agreement with the

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² 18 USC § 3771(a)(6).

³ Wayne R. LaFave et al, 5 Criminal Procedure § 21.3(f) at 769 (West 3d ed 2007).

⁴ Id at 769–70.
defendant. The conferral right may be most important to victims at the plea bargaining stage. Although the CVRA provides victims with the right to express their views to the court at plea hearings, the impact of a victim's input may be greater before the prosecutor negotiates a plea agreement that gains momentum and effectively determines the course of the case.

With the “unprecedented frauds that have been exposed during the current financial crisis[,] leaving] in their wake a flood of victims,” the importance of clarifying the scope of victims’ rights and when the rights attach has increased. This is especially true in relation to plea bargaining because the vast majority of federal criminal cases end with the defendant’s guilty plea.

Assuming that the right to “confer with the attorney for the Government in the case” generally provides victims with the right to express their views to the prosecutor before a plea agreement is reached, the point at which the conferral right attaches can take on great importance under certain circumstances. Because of the dynamics of federal guidelines sentencing, plea bargaining sometimes takes place before charges are brought against the defendant.

Of particular interest during the recession is the context of white collar crime, in which the importance of pre-charge plea bargaining cannot be overstated. As one commentator has explained, “whether and when to enter into plea negotiations . . . is the major strategic choice for a defense attorney during the pre-charge period of the criminal defense in white collar cases.” Pre-charge plea bargaining has advantages for white-collar defendants. As a result, “white-collar defense attorneys tend to regard the case that extends past the precharge

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5 See 18 USC § 3771(a)(4).
6 See Michael M. O’Hear, Plea Bargaining and Victims: From Consultation to Guidelines, 91 Marq L Rev 323, 324 (Fall 2007).
8 Charles Alan Wright and Andrew D. Leipold, 1A Federal Practice & Procedure: Criminal § 180 at 284 (West 4th ed 2008).
9 As explained below, most authorities have concluded that victims are generally entitled to express their views to the prosecutor in relation to a prospective plea agreement.
10 LaFave et al, 5 Criminal Procedure § 21.1(h) at 557 (cited in note 3).
12 Id. The government may be less invested in its case during an earlier stage of investigation. The defendant may also increase his chances of favorable treatment because of his early cooperation.
stage as a failure.\textsuperscript{13} Assuming the CVRA's conferral right encompasses a victim's right to be heard by the prosecutor before settlement, victims of white collar crime may be effectively denied the right to confer with the prosecutor if the right does not attach until charges have been filed.

The Fifth Circuit's decision in \textit{In re Dean}\textsuperscript{14} held that the CVRA's conferral right entitles victims to be heard by prosecutors concerning the victims' views on prospective plea agreements and that this right attaches before charges are filed under certain circumstances.\textsuperscript{15} The analysis in \textit{Dean}, however, is contrary to the interpretation given to the conferral right by the Department of Justice in its Attorney General Guidelines for Victim and Witness Assistance (Attorney General Guidelines).\textsuperscript{16} While the Attorney General agrees that prosecutors "should be available to consult with victims about major case decisions, such as . . . plea negotiations,"\textsuperscript{17} the Attorney General Guidelines provide that the right to confer with the prosecutor does not attach until charges are filed.\textsuperscript{18}

The \textit{Dean} decision is brief and is susceptible to criticism for failing to elaborate upon its reasoning. This Comment argues, however, that the court reached a result that is preferable as a matter of policy and defensible as a matter of statutory interpretation. The argument begins in section I.A by setting out the major provisions of the CVRA. Section I.B focuses on case law and other sources bearing on the question of when the victim's right to confer with the attorney for the government attaches. Section I.C focuses on case law and other sources bearing on the scope and purpose of the right to confer. In section II, this Comment argues that the result reached in \textit{Dean}—in other words, that the victim's right to confer attaches to pre-charge plea bargaining—is preferable to the result produced by the Attorney General Guidelines—in other words, that the availability of the right to confer depends on whether the plea bargaining takes place pre- or post-charge. Section II is divided into subsection A, which provides background on the policies implicated by a pre-charge con-

\begin{itemize}
\item \textsuperscript{13} Id at 11.
\item \textsuperscript{14} 527 F3d 391 (5th Cir 2008).
\item \textsuperscript{15} Id at 394.
\item \textsuperscript{17} Id at 29.
\item \textsuperscript{18} Id at 9.
\end{itemize}
ferral right; subsection B, which provides examples of situations in which the lack of a pre-charge conferral right could have an impact on victims; subsection C, which considers the impact of the existence of a pre-charge conferral right on defendants, prosecutors and judges; and subsection D, which argues that the CVRA is open to an interpretation providing for a pre-charge conferral right.

I. THE CVRA'S CONFERRAL RIGHT: WHEN DOES IT ATTACH AND WHAT IS ITS PURPOSE?

A. The CVRA

The CVRA is an important achievement of the crime victims' rights movement—a coalition of crime victims, victims' families, scholars, and politicians who have advocated over the last forty years for greater involvement and more respectful treatment of victims in the criminal justice process. The movement works from the premise that "crimes are committed against individuals just as much as they are against the community," and has been critical of the criminal justice system and actors within the system for inflicting a "secondary harm" on crime victims (the "primary harm" being the act of the criminal offender). The movement complains that victims are too often excluded from phases of investigation, prosecution, and court proceedings in which victims have an interest and to which their participation would be valuable. Rights advocates seek to change the process to one in which, as a prominent academic voice in the movement has put it:

victims follow their own case down the assembly line. Victims consult informally with police and prosecutor. At formal proceedings, when appropriate and in an appropriate manner, victims may speak and address the court. Victims are heard by the prosecutor and the court before

22 Aaronson, 28 Pace L Rev at 625 (cited in note 19).
pretrial dispositions are finalized. Victims may speak at sentencing and at release hearings.\textsuperscript{23}

In the words of the CVRA's primary drafter, Senator Jon Kyl, Congress enacted the CVRA in 2004\textsuperscript{24} to "force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims."\textsuperscript{25} To that end, the CVRA grants eight enforceable rights to "crime victims,"\textsuperscript{26} defined as "person[s] directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."\textsuperscript{27} The eight rights are:

(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.\textsuperscript{28}

\textsuperscript{23} Beloof, 1999 Utah L Rev at 296 (cited in note 21).
\textsuperscript{24} CVRA, 118 Stat at 2261 (2004).
\textsuperscript{25} 150 Cong Rec S10911 (Oct 9, 2004) (statement of Sen Kyl).
\textsuperscript{26} 18 USC § 3771(a).
\textsuperscript{27} 18 USC § 3771(e).
\textsuperscript{28} 18 USC § 3771(a)(1)–(8).
The enumeration of victims' rights is nothing new. In fact, prior to the CVRA’s enactment, the Victims’ Rights and Restitution Act of 1990 (“VRRA”) granted victims most of the rights enumerated in the CVRA, including the “right to confer with [the] attorney for the Government in the case.” The CVRA, although it repealed the rights-related provision of the VRRA, which had been codified at 42 USC § 10606, merely reenacted some rights provided by the VRRA and added others. It should be noted here parenthetically that the VRRA also included a services-related provision, enumerating services to be provided by the government to victims of crime. The services-related portion of the VRRA has been codified at 42 USC § 10607 and remains in force.

The real novelty of the CVRA is its enforcement provisions. Government officials involved in the detection, investigation, and prosecution of crime are to “make their best efforts to see that crime victims are notified of, and accorded, the rights” enumerated, and pursuant to the statute, the Attorney General must promulgate regulations to “enforce the rights of crime victims and to ensure compliance by responsible officials.” Courts are charged with the responsibility, “[i]n any court proceeding involving an offense against a crime victim,” to “ensure that the crime victim is afforded the rights described.” Perhaps most importantly, crime victims themselves—or the government or the personal representative of the victim on the victims’ behalf—have the power to assert their rights by motion during the district court’s proceedings or, “if no prosecution is underway, in the district court in the district in which the crime occurred.” As to this distribution of the power to assert CVRA rights, Senator Kyl explained,

The provision also recognizes that, at times, the government’s attorney may be best situated to assert a crime victim’s rights . . . because, at times, the crime victim’s in—

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31 See CVRA § 102, 118 Stat at 2264.
33 18 USC § 3771(c)(1).
34 18 USC § 3771(f)(1).
35 18 USC § 3771(b)(1).
36 18 USC § 3771(d)(3). See also 18 USC § 3771(d)(1).
interests coincide with those of the government and it makes sense for a single person to express those joined interests. Importantly, however, the provision does not mean that the government’s attorney has the authority to compromise or co-opt a victim’s right. . . . The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when.37

If the crime victim is dissatisfied with the disposition of his motion, she can petition the court of appeals for a writ of mandamus,38 a mechanism the drafters included because “[w]ithout the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred.”39 The court of appeals is required to issue or deny the writ within three days from the filing of the petition.40 The circuits are currently split as to the proper standard of review to apply to the district court’s decision.41

A victim’s remedies are limited. In no case can a new trial be ordered for failure to provide a victim her rights.42 The victim can move to reopen a plea or sentence only if her right to be heard was asserted and denied,43 she has petitioned the court of appeals within ten days,44 and, “in the case of a plea, the accused has not pled [guilty] to the highest offense charged.”45

In recognition of the CVRA’s potential to put a substantial burden on the government and the courts when the crime being prosecuted involves a large number of victims, the drafters of the statute provided, in a sort of safety-valve provision, that “where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described . . . the court shall fashion a reasonable procedure to give effect

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37 150 Cong Rec S10912 (statement of Sen Kyl).
38 18 USC § 3771(d)(3).
39 150 Cong Rec S10912 (statement of Sen Kyl).
40 18 USC § 3771(d)(3).
42 18 USC § 3771(d)(5).
43 18 USC § 3771(d)(5)(A).
44 18 USC § 3771(d)(5)(B).
45 18 USC § 3771(d)(5)(C).
to [the CVRA] that does not unduly complicate or prolong the
proceedings."\(^{46}\)

B. When Victims' Conferral Rights Attach

1. The *Dean* decision.

The Fifth Circuit, deciding on victims' mandamus appeal in *In re Dean*,\(^ {47}\) held that a victim's right to confer with the government attorney could, under certain circumstances, attach prior to the government's filing of charges.\(^ {48}\) The *Dean* victims-petitioners (victims of an explosion at a BP Products oil refinery that resulted in fifteen dead and over 170 injured) asked the appellate court to issue a writ ordering the trial court to reject a plea agreement reached between the government and BP Products North America Inc.\(^ {49}\) The ground for the request was that the victims' CVRA rights—namely, the right to confer with the attorney for the government in the case and the right to be treated with fairness—had been violated.\(^ {50}\)

The factual basis for the victim-petitioners' claim was that, prior to the filing of charges, the government and BP Products had engaged in plea negotiations without consulting the victims.\(^ {51}\) Indeed, in a sealed motion to the district court prior to the filing of charges, the government explained that it anticipated reaching a plea agreement with BP Products within one week.\(^ {52}\) The government claimed that the large number of victims made it impracticable to consult with victims prior to reaching an agreement, and that even notifying the victims that an agreement was in the works was problematic. In particular, explained the government, notification would result in extensive media attention to BP Products's admission of criminal responsibility, which could "prejudice BP Products ...[,] impair the plea negotiation process and ... prejudice the case in the event that no plea is reached."\(^ {53}\) Accordingly, the government requested

\(^{46}\) 18 USC § 3771(d)(2).
\(^{47}\) 527 F3d 391 (5th Cir 2008).
\(^{48}\) Id at 394.
\(^{49}\) Id at 392.
\(^{50}\) See id; *United States v BP Products North America Inc*, 2008 WL 501321, *1 (SD Tex 2008).*
\(^{51}\) *BP Products*, 2008 WL 501321 at *1.
\(^{52}\) Id.
\(^{53}\) Id at *2.*
permission to inform the victims of their CVRA rights after the plea agreement was signed.\(^{54}\)

In response, the district court issued a sealed order essentially adopting the government's claims as its own findings and ordering that the victims were not to be notified of their CVRA rights prior to execution of the plea agreement.\(^{55}\) Instead, the government was to provide notice after execution of the plea agreement, at which time the victims would be afforded their CVRA rights.\(^{56}\)

The government and BP Products signed an agreement less than a week later; the government had filed charges under seal in the interim. The district court later rejected the victims' claim that their CVRA right to confer with the government had been violated by this process.\(^{57}\)

The Fifth Circuit disagreed on appeal: "The district court acknowledged that 'there are clearly rights under the CVRA that apply before any prosecution is underway.' Logically, this includes the CVRA's establishment of victims' 'reasonable right to confer with the attorney for the Government.'"\(^{58}\) The Fifth Circuit rejected the government's claim that providing notification to the victims would have been impracticable, and also rejected the contention that potential prejudice to BP Products or impairment of the plea negotiations justified denying victims their right to confer.\(^{59}\) In the view of the court:

> Congress made the policy decision—which we are bound to enforce—that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached. That is not an infringement, as the district court believed, on the government's independent prosecutorial discretion . . . instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion.\(^{60}\)

While the Fifth Circuit ultimately disagreed with the lower court's conclusion, the reasoning that supports the appellate

\(^{54}\) Id.
\(^{55}\) See BP Products, 2008 WL 501321 at *2.
\(^{56}\) Id.
\(^{57}\) See id at *3.
\(^{58}\) Dean, 527 F3d at 394 (alteration in original and citation omitted).
\(^{59}\) Id at 395 (citation omitted).
\(^{60}\) Id.
court's view is set out in the district court's decision in United States v BP Products North America Inc. The reasoning begins by pointing to the fact that section 3771(d)(3) of the CVRA, regarding motions for relief, instructs victims that "the rights described . . . 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 BP Products court reasoned that this language implied that a victim could assert at least some CVRA rights before the government had filed charges, reasoning accepted by the Fifth Circuit.

Turning to the enumerated rights themselves, the district court noted that many are associated with certain units of a prosecution. For example, the right to notice, the right not to be excluded, and the right to be reasonably heard are tied to "public court proceeding[s]," or "public proceeding[s]." In contrast, the rights to be reasonably protected from the accused and to be treated with fairness are not tied to specific stages of a prosecution. The reasonable right to confer is tied, uniquely, to "the case."

The Fifth Circuit concluded that the statutory structure combined with "logic" compelled the conclusion that the conferral right could apply pre-charge. Frankly, the court's claim to have "carefully examined the pleadings, the thorough order of the district court, and the applicable law" notwithstanding, the reasoning of the Dean decision is not very well explained.

2. Some authority on the point at which the conferral right attaches.

While no other court has considered the question presented to the Fifth Circuit in Dean, courts considering the application of

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61 BP Products, 2008 WL 501321 at *11 (emphasis in original).
62 See id.
63 Dean, 527 F3d at 394.
64 BP Products, 2008 WL 501321 at *11–12.
65 18 USC § 3771(a)(2) & (3).
66 18 USC § 3771(a)(4).
67 18 USC § 3771(a)(1) & (8). The court in United States v Rubin, 558 F Supp 2d 411, 420 (EDNY 2008), has pointed out that, having used the word "accused," the drafters of the CVRA must have meant accused by the government.
68 18 USC § 3771(a)(5).
69 Dean, 527 F3d at 394.
70 Id.
CVRA rights in different contexts have rendered decisions that might inform a consideration of whether there exists a pre-charge conferral right in the CVRA. These decisions focus on the term “crime victim” in the CVRA, defined for purposes of the statute as “a person directly and proximately harmed as a result of the commission of a Federal offense.”\(^7\) If, for purposes of the statute, a crime victim comes into being only after charges have been filed, then there can be no pre-charge conferral right, as only “crime victims” are entitled to rights under the statute.\(^7\)

Noteworthy nonjudicial authorities have also made highly relevant contributions towards clarifying the point at which the conferral right attaches.

In *United States v Turner*,\(^7\) a magistrate judge wrote *sua sponte* to clarify what he believed were the court’s obligations to victims under the then recently enacted CVRA.\(^4\) Of particular interest, the magistrate had been informed that there were “persons harmed by . . . uncharged criminal conduct attributed to the defendant,” and he considered his obligations toward them.\(^5\)

The magistrate first sought to interpret the CVRA’s definition of “crime victim” to avoid conflict with the presumption of the defendant’s innocence.\(^6\) The magistrate had identified a problem: the CVRA definition of “crime victim” asks the court to assume one of the issues the jury is responsible for determining once a defendant is charged—in other words, whether a federal offense has occurred. The magistrate reconciled the presumption of innocence with the CVRA’s definition of “crime victim” by interpreting the definition to “include any person who would be considered a ‘crime victim’ if the government were to establish the truth of the factual allegations in its charging instrument,”\(^7\) an interpretation that seemingly precludes the conferral of “crime victim” status on persons harmed by “uncharged” conduct.

Indeed, the magistrate noted the practical, and perhaps constitutional, problems that would be raised by a purported victim’s assertion of rights in relation to “allegations of uncharged conduct [that] will not have been tested even against the relatively low standard of probable cause . . .[,] exacerbating the due

\(^7\) 18 USC § 3771(e).
\(^7\) 18 USC § 3771(a).
\(^7\) 367 F Supp 2d 319 (EDNY 2005).
\(^4\) Id at 320.
\(^5\) Id at 326 (emphasis in original).
\(^6\) Id.
\(^7\) *Turner*, 367 F Supp 2d at 326.
process problem inherent in designating a person as the defendant's 'victim.'"\(^{78}\) Ultimately, however, given the posture of the case, the magistrate had the luxury of "avoid[ing] the pitfall of seeking to determine who is 'actually' a victim."\(^{79}\)

Other courts have not been afforded that choice, having been asked to exclude persons claiming "crime-victim" status under the CVRA. These courts have indeed looked to the conduct underlying the offenses charged by the government to determine whether the purported victim is due CVRA rights.\(^{80}\) It appears, however, that the victims in these cases claimed crime-victim status only in relation to conduct underlying charges that were filed by the government.\(^{81}\) There was no call for the courts to analyze whether the petitioners could claim crime-victim status in relation to uncharged conduct. Consequently, inferring the disposition of these courts toward claims of pre-charge crime-victim status may not be possible based on these decisions. Yet the Turner analysis indicates that some courts might be unwilling to recognize purported crime victims where doing so requires the judge to assume the commission of criminal offenses without the support of at least a prior finding of probable cause. If so, this means the court would not enforce CVRA rights pre-charge.

At least one court, in United States v Grace,\(^{82}\) has explicitly disagreed with the Turner court's contention that the CVRA's definition of crime victim and the presumption of innocence are in conflict, explaining:

It is unnecessary . . . to assume that the person(s) the government accuses of committing a federal offense in fact did so. A court need only assume that the federal offense alleged has occurred, and then identify, if possible, who was directly and proximately harmed as a result of the commission of the offense.\(^{83}\)

\(^{78}\) Id at 327.

\(^{79}\) Id.

\(^{80}\) See, for example, In re Rendon Galvis, 564 F3d 170, 175-76 (2d Cir 2009); In re Stewart, 552 F3d 1285, 1287-88 (11th Cir 2008); United States v Grace, 597 F Supp 2d 1157, 1159 (D Mont 2009), vacated, 2009 WL 5697923 (D Mont 2009); United States v Sharp, 463 F Supp 2d 556, 563-65 (ED Va 2006).

\(^{81}\) See Rendon Galvis, 564 F3d at 175-76. See also Stewart, 552 F3d at 1288-89; Grace, 597 F Supp 2d at 1159; Sharp, 463 F Supp 2d at 557-58.

\(^{82}\) 597 F Supp 2d 1157 (D Mont 2009).

\(^{83}\) Id at 1162.
Under this interpretation, the identity of the defendant, or even whether an offender has been identified at all, is irrelevant. Given the posture of the case, however, the *Grace* court proceeded to determine whether there were identifiable victims by "assum[ing] the commission of the federal offenses the government allege[d] in the Superseding Indictment."84

As before, inferring the *Grace* court's disposition towards a claim of pre-charge crime victim status proves difficult because the government asserted that crime victims were entitled to recognition only in relation to the offenses charged.85 It is nonetheless conceivable under the *Grace* formulation that a court could adjudicate a contested assertion of crime victim status in the absence of government-filed charges and a formal probable cause determination. It appears no court (other than the *Dean* court) has done so, even where the opportunity might have presented itself.86

Approaching the issue from a third angle, the court in *United States v Atlantic States Cast Iron Pipe Co*87 explained that the definition of "crime victim" in the CVRA is derived from the definition of "victim" in the Victim and Witness Protection Act ("VWPA") and Mandatory Victims Restitution Act ("MVRA").88 The court made the connection between the definitions based on a law review article authored by the primary drafter of the CVRA and two coauthors, who explained that "[t]he CVRA's definition of a crime victim is based on the federal restitution statutes."89

Both the VWPA and MVRA have been interpreted to require courts to look to the offense of conviction to determine the identity of victims entitled to restitution.90 The *Atlantic States* opinion concluded that a court adjudicating "crime-victim" status under the CVRA must engage in a similar exercise.91 The court's reasoning suggests that the filing of charges is necessary before a person can be classified as a crime victim entitled to CVRA

84 Id at 1163.
85 Id at 1159.
86 See, for example, *Rubin*, 558 F Supp 2d at 419 ("Quite understandably, movants perceive their victimization as having begun long before the government got around the filing the superseding indictment.").
87 612 F Supp 2d 453 (D NJ 2009).
88 Id at 460–62.
89 Id. See also *Kyl, Twist, and Higgins*, 9 Lewis & Clark L Rev at 594 (cited in note 20).
91 Id at 469–70.
rights. The court, however, given the postconviction posture of the case, did not directly consider the issue of whether a person could make a valid assertion of crime-victim status prior to charging.

Noteworthy nonjudicial sources have also offered interpretations of who qualifies as a CVRA “crime victim” and the nature of the entitlement provided by the conferral right. The government, in its update of the Attorney General Guidelines for Victim and Witness Assistance,92 defines a CVRA “crime victim”93 as “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia if the offense is charged in Federal district court.”94 This interpretation explicitly requires an offense to be actually charged before “crime-victim” status attaches to harmed individuals.95 Apparently the Department of Justice is revisiting this definition in light of Dean.96

In contrast, in a 2005 article by the CVRA's primary drafter, Senator Jon Kyl, and two coauthors, the authors wrote that “most of the rights guaranteed by the CVRA apply in the context of legal proceedings following arrest and charging,” but “other important rights are triggered by the harm inflicted by the crime itself.”97 The latter “arise without regard to the existence of legal

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93 The Attorney General Guidelines for Victim and Witness Assistance actually sub- stitute the term “victim” for “crime victim.” Id at 9.
94 Id (citation and quotation marks omitted). Under the Attorney General Guidelines for Victim and Witness Assistance, a victim nevertheless must be informed of their CVRA rights “at the earliest opportunity after detection of a crime.” See id at 23. For this proposition, the Guidelines cite 18 USC § 3771(c), which requires “[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in detection, investigation, or prosecution of crime” to “make their best efforts to see that crime victims are notified of, and accorded,” their CVRA rights. Id. One might ask how notification at the earliest opportunity after detection is possible when, for purposes of the Guidelines, a CVRA “crime victim” does not exist until the “offense is charged in Federal district court.” Id at 9.
95 It is possible that definition of “crime victim” in the Attorney General Guidelines for Victim and Witness Assistance is intended merely to distinguish between victims of crimes under the District of Columbia criminal code that would be tried in District of Columbia courts, and victims of Federal crimes that would be tried in Federal district courts. If this were the case, however, then the phrase “if the offense is chargeable in Federal district court,” would probably have been employed.
proceedings.” To these authors, “crime victims” exist and have enforceable CVRA rights before an offense has been charged.

However, the Justice Department, Senator Kyl, and his co-authors agree that there is no pre-charge CVRA right to confer with the prosecutor. In fact, the source that argues most forcefully against a pre-charge conferral right is the legislative history of the CVRA, notably the statement of the CVRA’s primary drafter, Senator Kyl, on the right to confer:

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 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.99

Confirming that the statement was no slip of the tongue, Senator Kyl again characterized the reasonable right to confer as one that attaches “after charging” in a subsequent floor statement on the CVRA.100 Further, in 2005, Senator Kyl and two coauthors explained: “While most of the rights guaranteed by the CVRA apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself.”101 As examples of the latter, the authors listed the right to be treated with fairness, the right to be reasonably protected from the accused, and the right to be treated with respect for the victim’s dignity and privacy.102 In contrast, with respect to the right to confer, the article quoted Senator Kyl’s floor statement (including the “after charging” language) with approval.103

The article explains that the conferral provision of the CVRA is a supplement to 42 USC § 10607, enacted as part of the VRRA, which also contained the conferral right that preceded the CVRA.104 Section 10607(c), entitled “Services to victims,” pro-

98 Id.
100 150 Cong Rec S10911 (statement of Sen Kyl).
102 Id.
103 Id at 610.
104 In fact, the Kyl, Twist, and Higgins article says that the CVRA’s conferral right is “taken from § 10606(b)(5) of the former VRRA.” Kyl, Twist, and Higgins, 9 Lewis & Clark
vides for a series of one-way exchanges in which a "responsible official" "inform[s]" or "notifi[es]" victims of certain events, starting at least at the point of "investigation" and continuing post-trial. According to the article, "the scope of the conferral right is still governed by the limited notice and information provisions of 42 USC § 10607(c), but is expanded to include consultation in all criminal proceedings." Thus the authors apparently envision a conferral right that is synonymous with the one-way exchanges pursuant to section 10607(c) prior to the filing of charges, but which blooms into a two-way exchange afterwards.

This interpretation is consistent with that of the Department of Justice. The Attorney General Guidelines explain that the government's responsibility for providing victims with certain information and notifications in accordance with 42 USC § 10607 begins with the "report of the crime and extend[s] through the prosecution of the case." During the "investigation stage," prior to the filing of charges, an "investigative agency" is responsible for carrying out the government's responsibilities under 42 USC § 10607. There is no mention of consultation or conferral rights during this stage. When charges are filed, the "prosecution stage" commences, and the prosecutor assumes responsibility for certain duties under 42 USC § 10607 and for affording victims their conferral rights.

C. The Purpose and Scope of the Right to Confer

The ambiguity of the purpose and scope of the CVRA's conferral provision can be contrasted with state provisions clearly providing that victims' conferral rights relate to "a negotiated plea," "plea agreement," "plea bargaining," "guilty plea," or "changing of a plea," and which make clear that the purpose of the right is for the prosecutor to determine victims' "views," "opinion," or "objection" to the plea. Also in contrast with some state conferral provisions, the Federal provision is unclear on

\[L Rev at 609 (cited in note 20). See also VRRA § 503, 104 Stat at 4820, codified at 42 USC § 10607.\]
\[105 42 USC § 10607(c).\]
\[106 Kyl, Twist, and Higgins, 9 Lewis & Clark L Rev at 609 (cited in note 20).\]
\[107 US Department of Justice, Attorney General Guidelines for Victim and Witness Assistance at 22 (cited in note 16).\]
\[108 Id.\]
\[109 Id at 22-26.\]
\[110 Id at 26-30.\]
\[111 LaFave et al, 5 Criminal Procedure § 21.3(f) at 769-70 (cited in note 3).\]
whether the prosecutor has a duty to seek out the views of victims, or whether it is the victim who must assert his or her right.\(^{112}\)

The nature of the consultation between victim and prosecutor receives no elaboration in the CVRA. Nor is it clear what limits are imposed by the CVRA provision commanding, “Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”\(^{113}\) Senator Kyl, however, specifically alluded to the interpretive provision in relation to the conferral right in his floor statement.\(^{114}\)

Statements by CVRA sponsors indicate that they envisioned a broad conferral right, while disclaiming any purpose to “give the crime victim any right to direct the prosecution.”\(^{115}\) According to Senator Kyl, the “right is intended to be expansive,” and includes “confer[ral] with the government concerning any critical stage or disposition of the case,” but the “right . . . is not limited to these examples.”\(^{116}\) In general, “[p]rosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions.”\(^{117}\)

The Department of Justice also views the conferral right as relatively expansive in relation to plea negotiations under most circumstances. Elaborating upon the victim’s “reasonable right to confer with the attorney for the Government in the case,” the Attorney General Guidelines explain that “prosecutors should be available to consult with victims about major case decisions, such as . . . plea negotiations,”\(^{118}\) unless there is an “appropriate, articulable reason” for not being available.\(^{119}\) The Guidelines also

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\(^{112}\) See id at 781–82.

\(^{113}\) 18 USC § 3771(d)(6).

\(^{114}\) 150 Cong Rec S10911 (statement of Sen Kyl).

\(^{115}\) 150 Cong Rec S10911 (statement of Sen Kyl).

\(^{116}\) Id.

\(^{117}\) Id. It should be noted here that plea negotiations constitute a “critical stage” when they take place after charging, while plea negotiations that precede charging do not because the right to counsel has not yet “attached” (although courts and commentators have denounced this result, which they nevertheless view as inevitable given the Supreme Court's jurisprudence on attachment of the right to counsel). See LaFave et al, 5 Criminal Procedure § 21.3(a) at 695–97 (cited in note 3). Case “disposition” generally includes reaching a plea agreement with a defendant. Black's Law Dictionary 539 (West 9th ed 2009).

\(^{118}\) US Department of Justice, Attorney General Guidelines for Victim and Witness Assistance 29 (cited in note 16).

\(^{119}\) Id at 8.
instruct that a “responsible official”¹²⁰ “should make reasonable efforts to notify identified victims of, and consider victims’ views about, prospective plea negotiations.”¹²¹ But prosecutors should confer only to the extent doing so is reasonable under the circumstances.¹²² Factors relevant to the reasonableness determination are:

(a) The impact on public safety and risks to personal safety.

(b) The number of victims.

(c) Whether time is of the essence in negotiating or entering a proposed plea.

(d) Whether the proposed plea involves confidential information or conditions.

(e) Whether there is another need for confidentiality.

(f) Whether the victim is a possible witness in the case and the effect that relaying any information may have on the defendant’s right to fair trial.¹²³

As for the courts, the Dean court viewed the conferral right expansively, holding that it required prosecutors to “ascertain the victims’ views on the possible details of a plea bargain” before ultimately exercising their discretion to enter into a plea agreement, though not necessarily before entering into negotiations.¹²⁴ The court dismissed the assertion that requiring prosecutors to consult the victims violated the CVRA’s command that “[n]othing in [the CVRA] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”¹²⁵ The court viewed the conferral process and the prosecutor’s exercise of discretion to enter into a plea agreement

¹²⁰ Id at 26. The “responsible official” during the “prosecution stage” is generally the US Attorney for the district.

¹²¹ Id at 30 (again, unless there is an “appropriate, articulable reason” for not doing so).


¹²³ Id at 30.

¹²⁴ Dean, 527 F3d at 394–95 (“[T]he victims should have been notified of the ongoing plea discussions and should have been allowed to communicate meaningfully with the government, personally or through counsel, before a deal was struck.”) (emphasis added).

¹²⁵ 18 USC § 3771(d)(6).
as separate events, connected only by the possibility that the confer-
ferral process would inform (not interfere with or limit) the
ultimate exercise of discretion.\textsuperscript{126}

The court’s decision in \textit{United States v Heaton}\textsuperscript{127} also
suggests a broad conferral right in relation to plea bargaining,
although the issue was not before the court. In the case, the
prosecutor filed a motion to dismiss a charge against a defendant
charged with enticing a minor to engage in unlawful sexual ac-
tivity.\textsuperscript{128} The court refused to grant the motion until the govern-
ment had submitted a document “recount[ing] the victim’s views
on the dismissal.”\textsuperscript{129} The court explained that “the crime victims’
right to be treated with fairness and dignity applies . . . broadly
to all aspects of the criminal justice system—including the
court’s decision whether to grant the government’s motion to
dismiss.”\textsuperscript{130} According to the court, “the only way to protect the
victim’s right to be treated fairly and with respect for her dignity
is to consider the victim’s views on the dismissal.”\textsuperscript{131} The court
said the conferral right served as a “convenient mechanism,”
enabling the court to learn the victim’s views from the prosecutor
after the prosecutor conferred with the victim.\textsuperscript{132}

The court explained that it imposed the duty to confer on the
prosecutor because of the court’s own duty to consider the vic-
tim’s views before granting the government’s motion to dis-
miss.\textsuperscript{133} It should be noted, however, that the CVRA makes no
distinction between the duties owed to victims by courts and
prosecutors. Any duty the court imputes to itself should fall
equally on the prosecutor, independently of the court making the
prosecutor the court’s instrument for relaying the victim’s views.

Although victims’ conferral rights in relation to plea bar-
gaining were not at issue in \textit{Heaton}, the decision has interesting
implications for the conferral right for at least two reasons.\textsuperscript{134}
First, its reasoning can be readily extended from the context in

\textsuperscript{126} See \textit{Dean}, 527 F3d at 395.
\textsuperscript{127} 458 F Supp 2d 1271 (D Utah 2006).
\textsuperscript{128} Id at 1271.
\textsuperscript{129} Id at 1273.
\textsuperscript{130} \textit{Heaton}, 458 F Supp 2d at 1272.
\textsuperscript{131} Id.
\textsuperscript{132} Id at 1273.
\textsuperscript{133} Id.
\textsuperscript{134} Incidentally, the decision is also interesting for a third reason—it connects the
right to confer with the right to be treated with fairness, the latter right said to exist
prior to charging even by those who have said the right to confer itself does not. See \textit{Kyl,
which the judge considers granting a motion to dismiss to the context in which the judge decides to accept or reject a plea agreement. That is, if a CVRA provision did not already provide victims with the right to speak directly to the court before the judge accepts a plea agreement, a court following the logic of Heaton would impose on the prosecutor the affirmative duty to report the victim's views on the plea agreement to the court before the court passed judgment on it.

Second, the decision can be read to place an affirmative duty on judges and prosecutors to consult with victims before agreeing to a case disposition. Even though victims do have the right to speak directly to the court at plea proceedings, the presence of a mechanism allowing the court to perform its duty toward victims without the aid of prosecutors does not alleviate prosecutors of their independent duty to consider victims' views before entering into plea agreements. Under the CVRA, the obligations of courts and prosecutors towards victims are not meaningfully distinguishable: courts are to ensure crime victims are afforded their rights; prosecutors are responsible for making their best efforts to accord the same rights. If the court cannot respect the victim without hearing his or her views before accepting a plea, then it follows that a prosecutor cannot respect the victim without hearing his or her views before executing a plea agreement. In sum, the right to confer (at least when the right is viewed in conjunction with the victim's right to be treated with fairness) provides the victim with a substantial opportunity to inform the prosecutor's thinking with regard to plea negotiations.

In contrast to the Dean and Heaton courts, other courts have stressed the limits of the right to confer. For example, the Second

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135 18 USC 3771(a)(4).
136 In fact, the court would undoubtedly have more reason, since it has greater discretion to reject a plea agreement than to reject a prosecutor's request to dismiss. Compare Wright and Leipold, 1A Federal Practice & Procedure: Criminal § 171 at 152–53 (cited in note 8) (entering a plea), with Charles Alan Wright, Nancy J. King, and Susan R. Klein, 3B Federal Practice and Procedure: Criminal §§ 811–12 at 317, 328 (West 3d ed 2004) (dismissal by prosecution).
137 18 USC § 3771(b)(1).
138 18 USC § 3771(c)(1).
139 The Heaton court also imposed the obligation of reaching out on the prosecutor, not the victim. This seemingly makes the conferral right (at least when coupled with the right to be treated with fairness) broader than the CVRA sponsors intended it to be. The sponsors intended for prosecutors merely to "be available" to victims. 150 Cong Rec S10911 (statement of Sen Kyl).
Circuit in *In re W.R. Huff Asset Management*140 explained: "Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement. The CVRA requires only that the court provide victims with an opportunity to be heard."141

It is not clear whether the Second Circuit meant this statement to be consistent with a conferral right in relation to plea bargaining. All authorities would agree with the *W.R. Huff* court that the conferral right does not give crime victims veto power over the exercise of prosecutorial discretion. This understanding of the conferral right, however, is not inconsistent with the idea that prosecutors have some degree of obligation towards a victim seeking to confer. Indeed the court in *W.R. Huff* noted that "no petitioner has alleged that it asked the Government to confer with it and was denied the opportunity to do so,"142 indicating that its analysis might have been different if that was in fact the allegation.

On the other hand, the court's statement could be read to imply that the conferral right is rendered unnecessary by the victim's right to speak to the court during proceedings related to a plea. If that is the proper reading of the decision, then a victim's right to influence the plea negotiation process—as opposed to merely requesting that the judge accept or reject the plea agreement after it has gained substantial momentum—is nonexistent.

II. AN ARGUMENT FOR A PRE-CHARGE CONFERRAL RIGHT IN RELATION TO PLEA NEGOTIATIONS

In the words of the primary drafter of the CVRA, "[w]hen a case is resolved through a plea bargain without the victim's knowledge or participation, a grave injustice has been committed by the authorities."143 In accordance with this vision, this Comment argues that, as a matter of policy, the conferral right should attach to pre-charge plea bargaining, and that, as a matter of statutory interpretation, finding a pre-charge conferral right in the CVRA is defensible.

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140 409 F3d 555 (2d Cir 2005).
141 Id at 564 (emphasis added).
142 Id. It should be noted that the government was apparently operating under special "multiple crime victim" procedures. Id at 559.
143 Kyl, Twist, and Higgins, 9 Lewis & Clark L Rev at 602 (cited in note 20).
Despite the CVRA's lack of clarity respecting the purpose of the "reasonable right to confer," the weight of authority points to the conclusion that victims of crime have the right to confer with prosecutors before they reach a plea agreement with a defendant, so long as charges have already been filed. The precise contours of the right are more difficult to identify, but the current policy of the Department of Justice provides that prosecutors "should notify identified victims of, and consider victims' views about, prospective plea negotiations," so long as doing so is not unreasonable in the sense of posing a safety risk, being logistically impracticable, undermining the negotiations themselves, threatening the need for confidentiality, or prejudicing the defendant.144 Much less clear is whether victims possess a conferral right prior to the prosecutor's filing of charges.

This Comment takes the position that a victim's right to express his views to the prosecutor with regard to a prospective plea agreement should not be predicated on the timing of plea negotiations. Giving victims a pre- and post-charge conferral right eliminates the prospect of victims being arbitrarily deprived of the right to confer, and is therefore more consistent with the purpose of the CVRA to treat victims with dignity and respect. Supplying a pre-charge conferral right also goes some distance toward closing a loophole that would allow a "prosecutor to [sic] busy to care enough" to avoid having to consult victims by choosing to negotiate a plea before filing charges.145

That said, there is significant force pushing against an interpretation of the CVRA that provides for a pre-charge conferral right, namely statements of the drafters of the CVRA indicating that the right to confer is more limited in scope.146

The discussion begins in subsection A with a brief background of the purported value of the conferral right in relation to plea bargaining. Subsection B provides some examples of instances in which the lack of a pre-charge conferral right could have adverse consequences for victims. The consequences of a pre-charge conferral right from the standpoint of defendants, prosecutors and judges are addressed and put in perspective in subsection C.

145 150 Cong Rec S4262 (statement of Sen Feinstein). See also Stephen J. Schulhofer, The Trouble with Trials; the Trouble with Us, 105 Yale L.J 825, 847-48 (Dec 1996).
146 150 Cong Rec S10912 (statement of Sen Kyl).
This Comment, however, does not seek to fully reexplore the merits or demerits of entitling victims of crime to consult with prosecutors respecting plea agreements, matters which have been discussed elsewhere.\textsuperscript{147} Rather, it is taken as given that Congress has decided to grant victims this right (while acknowledging the ambiguity of the right’s scope) in order to remedy a perceived deficit in the prosecutor’s performance of his duty to do justice for all, including the victim.\textsuperscript{148}

Subsection D defends an interpretation of the CVRA that does not permit the timing of plea negotiations to deprive victims of the conferral right.

A. The Case for a Victim’s Right to Confer with the Prosecutor in Relation to Plea Negotiations

Figures in the victims’ rights movement have long advocated for increased victim involvement in the process that produces negotiated guilty pleas.\textsuperscript{149} While some have argued that the victim’s right to speak to the court at the plea hearing is adequate protection of victims’ interests,\textsuperscript{150} others have argued for the right to consult with the prosecutor in relation to the negotiation of a guilty plea.\textsuperscript{151} The latter commentators have argued that the plea hearing is a point in time at which “the plea agreement has already gained considerable momentum,” making the victim’s voice less effective.\textsuperscript{152} Thus the value of victim participation at plea and sentencing hearings may prove illusory in those cases when the disposition of a case is effectively predetermined by the terms of a plea agreement.\textsuperscript{153}

Advocates of a consultation requirement argue that it improves the criminal justice system in a number of ways. Consultation can promote a victim’s acceptance of the outcome of his case—even when the victim disagrees with the outcome on sub-

\textsuperscript{147} See, for example, O’Hear, 91 Marq L Rev at 323–24 (cited in note 6); Sarah N. Welling, Victim Participation in Plea Bargains, 65 Wash U L Q 301, 305–06 (1987).

\textsuperscript{148} 150 Cong Rec S 4262 (statement of Sen Feinstein) (noting a “dramatic disparity between the rights of defendants in our constitution and laws, and the rights of crime victims and their families” in order “to illustrate that our government, and our criminal justice system, can and should care about both the rights of accused and the rights of victims”).

\textsuperscript{149} See O’Hear, 91 Marq L Rev at 323, 326 (cited in note 6); Welling, 65 Wash U L Q at 302 (cited in note 147).

\textsuperscript{150} Welling, 65 Wash U L Q at 346–47 (cited in note 147).

\textsuperscript{151} See O’Hear, 91 Marq L Rev at 324 (cited in note 6).

\textsuperscript{152} Id.

\textsuperscript{153} See id.
stantive grounds—so long as he is given a voice, and treated with fairness, care, dignity, and respect.154 Ultimately, a consultation requirement may improve perceptions of the fairness of the criminal justice process and the rule of law throughout society at large.155 On a more practical level, victims have an interest in restitution awards and in case disposition,156 and these interests should not be ignored. Victims sometimes possess important information (perhaps even exculpatory information) that should be known by the parties to the plea negotiations.157 This information may speak to the defendant's guilt or innocence, or it may be useful in determining a proper sentence to recommend to the court.158 Finally, victims' rights advocates see consultation as a good on its own terms, as a process that vindicates the "value of the victim."159

According to the Attorney General Guidelines, victims of crime do not have the right to confer with the prosecutor before charges have been filed against the defendant.160 This is a gap in the scheme for giving victims conferral rights. A victim's interest in consulting with the prosecutor when a pre-charge plea agreement is negotiated is the same as when an agreement is negotiated post-charge. The pre-charge/post-charge distinction is arbitrary from the perspective of the victim, and inconsistent with the purpose of the CVRA to provide "[f]air play for crime victims, meaningful participation of crime victims in the justice system [and] protection against a government that would take from a crime victim the dignity of due process."161

B. Situations in Which Victims May Be Denied the Conferral Right Because Plea Negotiations Take Place Before Charges Are Filed

It is not uncommon for prosecutors and defendants to opt to bargain over a plea pre-charge rather than post-charge, perhaps

154 Id at 326–27.
155 See O'Hear, 91 Marq L Rev at 328 (cited in note 6).
156 See Welling, 65 Wash U L Q at 307 (cited in note 147).
157 See O'Hear, 91 Marq L Rev at 328 (cited in note 6).
158 Id at 328–29.
161 150 Cong Rec S4264 (statement of Sen Kyl).
incidentally or intentionally denying a victim the conferral right. Pre-charge plea bargaining can occur because the filing of charges constrains prosecutors and defendants under the US Sentencing Guidelines,\textsuperscript{162} which remain influential despite their advisory status.\textsuperscript{163} Prosecutors and defendants know that because the Guidelines favor sentencing based upon an "offender's real conduct," in many cases the judge will consider the conduct underlying all of the charges in fashioning the defendant's sentence, even if some of the charges themselves have been dropped through plea bargaining.\textsuperscript{164} To avoid bringing the conduct of the defendant to the attention of the court, and thereby increase bargaining flexibility, the parties may opt to bargain prior to the filing of charges. At this time, "the prosecutor may be more flexible... because no formal position on a charge has yet been taken;" internal review procedures are less onerous than for dropping a charge already filed; and facts that may be disadvantageous to the defendant have not yet emerged.\textsuperscript{165} However, the crime victim's interest in bringing her concerns and information to the attention of the prosecutor will be undermined by this process if there is no pre-charge conferral right in the CVRA.

As noted in the introduction to this Comment, essentially all white collar criminal plea bargaining occurs pre-charge. Without a pre-charge conferral right, white collar crime victims will be completely deprived of the right to express their views to the prosecutor.

C. The Consequences of a Pre-Charge Conferral Right from Various Criminal Justice Perspectives

Of course, victims are not the only actors with interests in the criminal justice system. Victims' rights also have an impact on defendants, judges and prosecutors.

There are reasonable arguments for denying victims the right to confer in relation to plea negotiations, all animated by the idea that the right undermines the proper roles of other figures in the criminal justice system.\textsuperscript{166} Thus it has been argued

\textsuperscript{162} LaFave et al, 5 Criminal Procedure § 21.1(h) at 554–57 (cited in note 3).
\textsuperscript{163} See Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 Yale L.J 1420, 1495–96 (2008).
\textsuperscript{165} LaFave et al, 5 Criminal Procedure § 21.1(h) at 557 (cited in note 3).
\textsuperscript{166} For a discussion of potential problems with the CVRA regime generally, see Erin C. Blondel, Victims' Rights in an Adversary System, 58 Duke L.J 237 (2008).
that it is "unwise to confuse the prosecutor's function [to repre-
sent society] by obliging him or her to consider the victim's
interests." It has also been said that victims' rights may con-
tribute to ethical lapses by prosecutors at the expense of defen-
dants. A consultation requirement may hinder the efficiency
with which prosecutors negotiate pleas. A victims' rights re-
gime that gives standing to victims may lead to novel litigation
that strains judicial resources. It also can put judges in the awk-
ward position of vindicating victims' rights despite what
prosecutors and defendants regard as their best interests. The
benefits of the victim's right to confer are not won costlessly, and
some may wonder if they are worth the potential losses.

Arguments pointing to the costs of victims' rights, however,
challenge the wisdom of providing victims the "reasonable right
to confer" (and sometimes the wisdom of the broader victims' rights regime) in toto. They do not speak to the question of why
the interests of defendants, prosecutors, and judges would be
weightier or more deeply harmed pre-charge as opposed to post-
charge. It is worth considering here whether providing the right
to confer in the pre-charge context promises to be significantly
more costly than doing so after charges have been filed.

1. A pre-charge conferral right's consequences for the
defendant.

It is not clear that a pre-charge conferral right conflicts with
the defendant's rights, provided that a post-charge conferral
right already exists. The argument that judicial recognition of
"crime victims" prior to charging is in conflict with the presump-
tion of innocence does not stand up to scrutiny. First, as the
Grace court argued, to determine the identities of CVRA crime
victims, a court only needs to assume that a Federal offense has
occurred. The court does not need to make assumptions
respecting the identity of the person who committed the offense,
at least no more than it must do so after charges are filed and

167 Welling, 65 Wash U L Q at 346–47 (cited in note 147).
169 See Gegan and Rodriguez, 8 St John's J Legal Comm at 232–33 (cited in note 161).
172 Grace, 597 F Supp 2d at 1161–62.
before a jury decides guilt or innocence, as is now routinely done under the CVRA.\textsuperscript{173}

Second, the major protection afforded to the defendant by the presumption of innocence is achieved by putting the burden of proving the defendant's guilt on the government and by guiding the factfinder in the weighing of evidence at trial.\textsuperscript{174} It is hard to see how recognizing "crime victims" before charges are filed would make it more difficult for the court to ensure the presumption of innocence protects the defendant in these ways—again, provided that a post-charge conferral right already exists.\textsuperscript{175}

Third, as with all CVRA rights accorded to victims, the corresponding duties directly fall on the court and the government, not the defendant. If the court and government managed their dual obligations to the defendant and the victim ineffectively or unfairly, certainly the defendant would be injured. However, there is no reason why the risk of ineffective or unfair balancing of interests is heightened before charging as opposed to after.

2. A pre-charge conferral right's consequences for the prosecutor.

As for prosecutors, they currently make a case-by-case reasonableness determination respecting the appropriateness of affording victims conferral rights after charging.\textsuperscript{176} It is not clear why doing the same before charging would be so fundamentally different as to warrant a per se rule against conferral.

A larger challenge is posed by the prospect of pre-charge litigation initiated by a person purporting to be a victim and challenging the government's refusal to confer. For example, the government might contest the person's victim status; contest the person's claim that there is a prosecutor for the government in the case; or simply feel it would not be reasonable to consult with the person even though the person is a victim and the prosecution is engaged in plea bargaining. If such litigation were initiat-

\textsuperscript{173} Id.
\textsuperscript{174} 22A CJS Criminal Law § 959 (2010).
\textsuperscript{175} Compare Sierra Elizabeth, The Newest Spectator Sport: Why Extending Victims' Rights to the Spectators' Gallery Erodes the Presumption of Innocence, 58 Duke L J 275 (2008) (arguing that defendants can be prejudiced by the presence of victims' families in the spectator gallery during trial).
\textsuperscript{176} US Department of Justice, Attorney General Guidelines for Victim and Witness Assistance at 30 (cited in note 16).
ed, circumstances can be imagined in which it could pose a threat to the secrecy of an ongoing investigation.

It is likely, however, that this threat is largely theoretical. On a general level, it is probably the rare case in which the victim seeks to undermine the investigative efforts of the government without a compelling reason.\textsuperscript{177} Even if victims were wont to more aggressively challenge the government, the likelihood of a victim interfering with an investigation by way of instituting a pre-charge proceeding pursuant to 18 USC § 3771(d)(3) is low. If the circumstances surrounding the Dean case are any guide, the case in which a victim is aware that prosecutors are engaged in pre-charge plea negotiations without her input will be exceedingly rare. In Dean, the victims were intensely interested in the government's prosecution efforts,\textsuperscript{178} yet were unaware of the government's negotiations with BP Products. As in Dean, victims will most likely find out about negotiations after the fact when court proceedings are already underway. The victim's claim, if meritorious, will only have the effect of increasing the scrutiny with which the judge considers a proposed plea agreement—an unsatisfactory remedy from the victim's standpoint, no doubt, but one that could, over time, provide the government with the incentive to seriously consider the interest in of the victim in plea negotiations. In sum, it is not likely that investigations will suffer from victims' interference as a result of a pre-charge conferral right, as victims have neither the desire nor the means to interfere.

3. A pre-charge conferral right's consequences for the judge.

Judges could also be put in a more difficult position by a pre-charge conferral right. The pre-charge/post-charge distinction provides a bright-line rule—the victim asking the court to enforce her right to confer before charges have been filed is out of luck, even if the prosecutor and defendant engage in plea negotiations.

Recognizing a pre-charge conferral right would replace the bright-line rule with at least two questions that are more difficult to answer before charges are filed than after: (1) is the

\textsuperscript{177} Even assuming individuals were so disposed, presumably a court could use its inherent authority to discourage frivolous claims. See generally Chambers \textit{v} NASCO Inc, 501 US 32 (1991).

\textsuperscript{178} \textit{US v BP Products North America Inc}, 610 F Supp 2d 655, 726 (SD Tex 2009).
person asserting the violation of the reasonable right to confer a "crime victim" for purposes of the CVRA, and (2) is there a "prosecutor for the government in the case"?

The idea that there could be disputes as to the identity of victims is hardly novel. The Advisory Committee Notes to the 2008 amendment of Rule 1 of the Federal Rules of Criminal Procedure contemplate that "[u]pon occasion, disputes may arise over the question whether a particular person is a [CVRA crime] victim. Although the rule makes no special provision for such cases, the courts have the authority to do any necessary fact finding and make any necessary legal rulings." To resolve these disputes, courts generally determine whether the purported harm suffered by the person claiming crime victim status was directly related to the conduct underlying the offenses alleged in the charging instrument.

Without a charging instrument, the fact finder determining whether a victim is entitled to confer with a prosecutor would have to find a substitute basis upon which to establish whether a federal offense had occurred and that there was a prosecutor in the case. Were a purported "crime victim" to assert that she was denied the right to confer with the government regarding plea negotiations, the court presumably would have to ask the prosecution whether it indeed had engaged in negotiations and, if so, to state the criminal conduct underlying the negotiations. Based on this information, the court could proceed to determine whether the purported victim was "directly and proximately harmed" by the conduct underlying the offenses being bargained over.

The procedural posture of such a case would be irregular. The court in United States v Rubin alluded to the difficulty and danger in deciding when the CVRA duties of the government arise before charges are filed:

[The realm of cases in which the CVRA might apply despite no prosecution being "underway," cannot be read to include the victims of uncharged crimes that the government has not even contemplated. It is impossible to expect the government, much less a court, to notify crime victims of their rights if the government has not verified to at

179 FRCrP, App Rule 1, Advisory Committee Notes (2008).
180 See, for example, Rendon Galvis, 564 F3d at 175–76; Stewart, 552 F3d at 1287–88; Grace, 597 F Supp 2d at 1159; Sharp, 463 F Supp 2d at 563–65.
181 18 USC § 3771(e).
least an elementary degree that a crime has actually taken place.\textsuperscript{182}

Indeed the CVRA is not a mechanism for the courts to force prosecution on the government based on the allegations of an aggrieved individual;\textsuperscript{183} in all but extraordinary cases the separation of powers precludes this.\textsuperscript{184} Rather, the CVRA attaches the conferral right only to those cases in which a federal offense has occurred \textit{and} it can be said that there is a prosecutor pursuing the case.

The court need not overstep its institutional bounds, however, if it bases its assumption that a federal offense has occurred and its determination that there is “an attorney for the government in the case” on the fact that the government’s prosecutor \textit{is engaged} in negotiations with a defendant regarding charges of which the government is convinced the defendant is guilty. The court should have no difficulty thus equating plea negotiations with the filing of charges, considering the United States Attorney’s Manual (USAM) requires prosecutors to have an adequate factual basis for the charges in relation to which they seek a conviction at trial, or to which a defendant will be asked to plead, whether pre- or post-charge.\textsuperscript{185}

If indeed the prosecutor is engaged in pre-charge plea bargaining, he should possess no shortage of information with which to help assist the judge decide whether there is a CVRA “crime victim” who is being deprived of her conferral right. The prosecutor who chooses to initiate prosecution by engaging in pre-charge plea bargaining must know the charge or charges he is bargaining over in order to have the defendant plead guilty to “the most serious readily provable charge \textit{[or charges]} consistent

\textsuperscript{182} Rubin, 558 F Supp 2d at 419.
\textsuperscript{183} 18 USC 3771(d)(6).
\textsuperscript{184} See Inmates of Attica Correctional Facility v Rockefeller, 477 F2d 375, 379 (2d Cir 1973).
\textsuperscript{185} See US Department of Justice, \textit{United States Attorneys’ Manual} 9-27.300 (DOJ 2007), online at \url{http://www.justice.gov/usao/eousa/foia_reading_room/usam/} (visited Aug 11, 2010) (“[O]nce the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.”); id at 9-27.330 (“Before filing or recommending charges pursuant to a precharge plea agreement, the attorney for the government should consult the plea agreement provisions of USAM 9-27.430, thereof, relating to the selection of charges to which a defendant should be required to plead guilty.”); id at 9-27.430(A) (“The defendant should be required to plead to a charge or charges: 1. That is the most serious readily provable charge consistent with the nature and extent of his/her criminal conduct; 2. That has an adequate factual basis.”).
with the nature and extent of [the defendant's] criminal conduct."  

Prosecutors at this stage can also be expected to know the factual basis (including information respecting victims) for the charges being bargained over, since the plea agreement must have an adequate factual basis and because prosecutors are supposed to consider the effect of a plea on the "victim's right to restitution" prior to entering into negotiations. With the help of the prosecutor, the court should be well-equipped to make the necessary determinations.

While the procedural posture for determining pre-charge CVRA rights is exceptional, resolution of the relevant issues merely requires the court to engage in a somewhat novel form of factfinding. It should also be repeated that it is unlikely that a court will often be asked to adjudicate these matters since even the attentive victim will be in a poor position to know whether or not the government is engaged in plea bargaining.

D. As a Matter of Statutory Interpretation, It Is Reasonable to Find a Pre-charge Conferral Right in the CVRA

1. "Crime victims" exist pre-charge under the CVRA.

An interpretation of the CVRA that does not make the conferral right depend on the government's filing of charges builds on a number of points that have already been made by courts. It begins with the observation that the CVRA contemplates the existence of "crime victims" prior to the government filing charges. That is, because "[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 afforded, [their CVRA] rights," the statute seems to envision the existence of "crime victims" during the stages of detection and investigation of crime, in addition to during the prosecution stage. Likewise, because crime victims are given the power to assert CVRA rights in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court

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186 Id at 9-27.430(A). See also id at 9-27.330 (providing guidelines for engaging in pre-charge plea bargaining).
187 Id at 9-27.430(A).
188 Id at 9-27.420(A)(12).
189 See Dean, 527 F3d at 394.
190 18 USC § 3771(c)(1) (emphasis added).
in the district in which the crime occurred," there must be "crime victims" to assert their rights when no prosecution is underway.

Familiar canons of statutory interpretation urge courts to avoid interpreting one provision of a statute inconsistently with the policies or necessary assumptions of other provisions. The CVRA definition of "crime victim" relates the harm of a purported victim to the "commission of a Federal offense," which might at first be thought synonymous with charges alleged or proven by the government. However, to be consistent with the policies and assumptions of other CVRA provisions, whether or not the "commission of a Federal offense" has occurred must not be conditioned upon the filing of charges. The CVRA definition of "crime victim" must be squared with the policy of the "enforcement" and "best efforts" provisions quoted above to recognize crime victims prior to the filing of charges.

Courts have suggested arguments for limiting "crime-victim" status to those persons who have been harmed by charged conduct, but these are unpersuasive. The weakness of an interpretation of the CVRA that seeks to avoid conflict with the presumption of innocence has already been addressed.

Similarly unpersuasive is the argument that the definition of "crime victim" requires the filing of charges because the definition of the term has been borrowed from the VWPA and MVRA statutes under which courts determine victim status by looking to the charges of conviction. To begin with, the claim that the CVRA's definition of "crime victim" is based on the definition of "victim" in the restitution statutes was not made in the legislative chambers. Rather, it was made in a law review article subsequent to the passage of the CVRA, and thus its persuasive force as legislative history should be discounted accordingly.

More importantly, while the interpretation given to the restitution statutes can certainly inform the interpretation given to the CVRA, it can do so only to a degree. The restitution statutes define "victim," in relevant part, as "a person directly

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191 18 USC § 3771(d)(3).
192 Norman J. Singer, Statutes and Statutory Construction § 46.05 (West 6th ed 2000).
193 18 USC § 3771(e).
196 See Atlantic States, 612 F Supp 2d at 460–62.
197 See Kyl, Twist, and Higgins, 9 Lewis & Clark L Rev at 594 (cited in note 20).
and proximately harmed as a result of the commission of an offense for which restitution may be ordered," whereas "crime victim" in the CVRA means a “person directly and proximately harmed as a result of the commission of a Federal offense.”

The “directly and proximately harmed” language is in fact identical in the restitution statutes and the CVRA, and interpretation of the language in the former may indeed serve as a “helpful guide” for interpreting the meaning of the same language in the latter. However, the restitution statutes will not be helpful in determining the meaning of “the commission of a Federal offense,” which is the language that matters to the question of whether there is a pre-charge conferral right. In the restitution statutes, “the commission of an offense” means the offense of conviction. If the CVRA is to have any effect at all, “the commission of a Federal offense” must refer to something other than the offense of conviction. The restitution statutes are unhelpful for determining what that something is.

Seeking guidance to the meaning of “victim” or “crime victim” in other parts of the Federal Code is likewise unhelpful. The victims’ rights statutes in the Code are inconsistent when it comes to fixing the point at which victim status attaches. In general, the meaning of “victim” or “crime victim” in the various statutes depends heavily on the purpose of the respective legislation.

However, reading the CVRA in pari materia with the statute that is arguably the CVRA’s most relevant analogue indicates that crime victim status should not be conditioned on the filing of charges. The statute is 42 USC § 10607, enacted as part of the VRRA. Also enacted as part of the VRRA was the section later codified at 42 USC § 10606, the predecessor of the CVRA, which the CVRA repealed. The predecessor and successor statutes substantially overlap in the rights they provide crime victims.

198 18 USC §§ 3663(a)(2) and 3663A(a)(2).
199 18 USC § 3771(e).
200 Sharp, 463 F Supp 2d at 562.
201 Id.
204 Compare 42 USC § 10606, repealed by the CVRA, 118 Stat 2261 (2004), with 18
Indeed, 42 USC § 10606 granted to victims a conferral right identical to that contained in the CVRA.\textsuperscript{205}

It is reasonable to read the CVRA and VRRA \textit{in pari materia} given their similar subject matter and the contemporaneous passage of what later became 42 USC §§ 10606 and 10607.\textsuperscript{206} Reading the statutes parallel to each other reveals the following. In 42 USC § 10607, “victim” means “a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime.”\textsuperscript{207} In context, the CVRA’s “commission of a Federal offense” is not meaningfully different from § 10607’s “the commission of a crime” other than the latter being more comprehensive (presumably including victims of crimes that have not yet been determined to be Federal in nature). Yet, in stark contrast to the use of the term in the restitution statutes, the definition of “victim” in 42 USC § 10607 necessarily contemplates the existence of “victims” not only prior to conviction but also prior to charging.\textsuperscript{208} That is, no conviction or even a charging instrument needs to be in place before it can be said there has been “the commission of a crime” for purposes of 42 USC § 10607. The services to be afforded victims by the government under the statute are rendered beginning with the \textit{investigation} of the crime itself.\textsuperscript{209}

The argument for looking to 42 USC § 10607 to inform the meaning of “crime victim” in the CVRA might have been stronger had the definition of “victim” in the VRRA not been limited to the section that later became 42 USC § 10607.\textsuperscript{210} Unhelpfully, “crime victim” was undefined in what became 42 USC § 10606, although it should be noted that 42 USC § 10607 cross-references the former 42 USC § 10606 in a way that arguably makes “victim” in the latter synonymous with “crime victim” in the former.\textsuperscript{211}

\textsuperscript{205} 42 USC § 10606, repealed by the CVRA, 118 Stat 2261 (2004).
\textsuperscript{206} Norman J. Singer and J.D. Shambie Singer, 2B \textit{Statutes and Statutory Construction} §§ 51.1–51.3 (West 7th ed 2008).
\textsuperscript{207} 42 USC § 10607(e).
\textsuperscript{208} See 42 USC § 10607(b)(1) (“At the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation, a responsible official shall identify the victim or victims of a crime.”).
\textsuperscript{209} 42 USC § 10607(c)(3).
\textsuperscript{210} 42 USC § 10607(e).
\textsuperscript{211} 42 USC § 10607(c)(3)(D) (“During the investigation and prosecution of a crime, a responsible official shall provide a victim the earliest possible notice of the scheduling of each court proceeding that the witness is either required to attend or, under section 10606(b)(4) of this title, is entitled to attend.”).
Regardless, the point is simply that it is difficult to understand why Congress would have conceived of crime victims differently in the sections of the VRRA that became 42 USC §§ 10606 and 10607. It probably did not. Since there is no indication Congress intended the CVRA to be narrower than 42 USC § 10606, an interpreter should look to 42 USC § 10607 to inform the meaning of the CVRA. Since victims under 42 USC § 10607 necessarily exist pre-charge, this opens up the possibility that they exist at that point under the CVRA as well. The fact that provisions of the CVRA seem to contemplate the existence of pre-charge crime victims increases the probability that this is indeed the correct interpretation of the statute.

2. A “case” does not require the filing of charges under the CVRA.

Of course, even if there is such thing as a CVRA “crime victim” prior to the government’s filing of charges, it would not matter for the sake of the victim’s conferral right if, by keying the conferral right to “the case,” Congress limited the right to the post-charge context. A “case” is commonly defined as a “civil or criminal proceeding, action, suit, or controversy at law or in equity,” a definition that would seem, in the criminal context, to require charges filed by the government. But it is not clear the CVRA uses “case” in this sense. Case could be used in the statute in its more general sense as “a specific occurrence or matter requiring discussion, decision, or investigation, as by officials or law-enforcement authorities.”

It is noteworthy in this regard that the CVRA distinguishes a “case” from a “proceeding.” In two provisions, the concepts

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212 18 USC § 3771(a)(5).
213 Black’s Law Dictionary 243 (West 9th ed 2009). See also Random House Webster’s Unabridged Dictionary 321 (Random House 2d ed 2001) (listing one definition of “case” as “a suit or action at law”).
215 Compare 18 USC § 3771(a)(2) (a crime victim has 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”); 18 USC § 3771(a)(3) (a crime victim has 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”); 18 USC § 3771(a)(4) (a crime victim has the “right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”); 18 USC § 3771(a)(7) (a crime victim has the “right to proceedings free from unreasonable delay”); with 18 USC § 3771(a)(5) (a crime victim has the “reasonable right to confer with the attorney for the Government in the case”).
might appear to merge, but not necessarily so. That is, 18 USC § 3771(d)(2) reads: "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 . . . the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." \(^{216}\) 18 USC § 3771(d)(4) reads: "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." \(^{217}\) One reading of these provisions might equate "case" and "proceeding," but another interpretation reads the provision so that "a case" encompasses "a proceeding." The results are ambiguous.

As before, because of the contemporaneous passage and similar subject matter of the sections of the VRRA that became 42 USC §§ 10606 and 10607, it is reasonable to read the CVRA in pari materia with 42 USC § 10607. In 42 USC § 10607, the use of the word "case" inarguably contemplates more than a proceeding, action, suit, or controversy. \(^{218}\) Section 10607(a) reads:

> The head of each department and agency of the United States engaged in the detection, investigation, or prosecution of crime shall designate by names and office titles the persons who will be responsible for identifying the victims of crime and performing the services described in subsection (c) of this section at each stage of a criminal case. \(^{219}\)

The services in section (c) include providing the victim with notice of the status of the investigation of the crime, \(^{220}\) arrest, \(^{221}\) and filing of charges. \(^{222}\) A CVRA "case" must also include these stages if the statutes are to be read consistently.

3. A pre-charge conferral right under the CVRA does not create an inconsistency between statutes.

Approaching the CVRA from another angle, an interpretation of the conferral right that makes the statute incompatible

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\(^{216}\) 18 USC § 3771(d)(2) (emphasis added).

\(^{217}\) 18 USC § 3771(d)(4) (emphasis added).

\(^{218}\) VRRA § 503, 104 Stat 4820, codified at 42 USC § 10607.

\(^{219}\) 42 USC § 10607(a) (emphasis added).

\(^{220}\) 42 USC § 10607(c)(3)(A).

\(^{221}\) 42 USC § 10607(c)(3)(B).

\(^{222}\) 42 USC § 10607(c)(3)(C).
with 42 USC § 10607 should be disfavored. This is a serious challenge to finding a pre-charge conferral right in the CVRA. A pre-charge conferral right seems to fit uncomfortably with 42 USC § 10607's requirement that the government notify the victim of the "status of the investigation of the crime,"223 the "filing of charges against a suspected offender"224 and the "acceptance of a plea of guilty or nolo contendere or the rendering of a verdict after trial."225 Nowhere in 42 USC § 10607 does it say the victim is to be notified that a plea agreement is being reached, pre- or post-charge. Rather, 42 USC § 10607 contemplates victim notification of the acceptance of a plea agreement, an event that obviously takes place after negotiations have already occurred and the opportunity to confer with the government has passed.

For the purposes of illuminating when the conferral right attaches, however, the seeming incompatibility between a pre-charge conferral right and 42 USC § 10607 is inconsequential. If 42 USC § 10607's notice after-the-fact regime is incompatible with a pre-charge conferral right, it is just as incompatible with the existence of a conferral right after charges have been filed. That is to say, if there is an incompatibility, it is between 42 USC § 10607 and the notion that victims have the right to confer with prosecutors in relation to plea negotiations at all, not between 42 USC § 10607 and the timing of the attachment of the conferral right.

If the after-the-fact notification regime of 42 USC § 10607 is viewed as incompatible with the CVRA's provision of a conferral right, the statutory scheme as a whole begins to look absurd.226 The better interpretation views the after-the-fact notification provisions of 42 USC § 10607 and the CVRA's rights-granting provisions as independent and valuable provisions on their own terms that should be given effect if reasonably possible.227

223 42 USC § 10607(c)(3)(A) (such notification is appropriate "to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation").
224 42 USC § 10607(c)(3)(C).
225 42 USC § 10607(c)(3)(F).
226 To put the matter in its most extreme light, under 42 USC § 10607 the government is required to notify the victim of "the rendering of a verdict after trial," 42 USC § 10607(c)(3)(F), and of "the sentence imposed on an offender," 42 USC § 10607(c)(3)(G). If 42 USC § 10607's after-the-fact notification is incompatible with the conferral right, then the conferral right is effectively crowded out from the time of investigation through conviction. The legislature could not have intended this result.
4. A pre-charge conferral right under the CVRA does not impair prosecutorial discretion.

Finally, interpreting the CVRA to provide for a pre-charge conferral right should be disfavored if doing so interferes with prosecutorial discretion, contrary to the prohibition that "[n]othing [in the CVRA] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." A proper understanding of the purpose and scope of the conferral right, however, makes clear that the prosecutor's exercise of discretion is not curtailed, either pre- or post-charge. The CVRA is not intended to stop actors within the criminal justice system from making "decisions that victims of crime do not like." Accordingly, the conferral right gives the victim no power to direct the prosecution. Rather, the CVRA is intended to eliminate the problem of victims being "kept in the dark by prosecutors to [sic] busy to care enough," and to give victims the opportunity to "participate in the process where the information that victim's [sic] and their families can provide may be material and relevant." Thus, the conferral right "is only a requirement that the government confer in some reasonable way with . . . victims before ultimately exercising its broad discretion," not a fetter on that discretion.

More problematic for the interpretation of the CVRA advocated by this Comment is the prospect of a court having to adjudicate regarding a purported "crime victim's" entitlement to confer with the prosecutor before the government has filed charges. Such a contest could pit the victim against the government.

One might take pause because courts have been reluctant to second-guess the decision of prosecutors not to pursue alleged criminal conduct, even where the private parties urging prosecution raise serious questions respecting the exercise of prosecutorial discretion. The reluctance is grounded in separation of powers principles and the supposition that the courts would be poor monitors of the exercise of prosecutorial discretion. Adjudication of failure-to-prosecute claims may also "threaten to

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228 18 USC § 3771(d)(6).
229 150 Cong Rec S4262 (statement of Sen Feinstein).
230 150 Cong Rec S10911 (statement of Sen Kyl).
231 150 Cong Rec S4262 (statement of Sen Feinstein).
232 Dean, 527 F3d at 395.
233 See Inmates of Attica, 477 F2d at 379.
chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."\textsuperscript{235} Such litigation may give the private party discovery access to the government's files and perhaps grand jury records, both of which would normally be secret to protect the reputation of the innocent.\textsuperscript{236}

Despite the seeming similarity, there are important distinctions between a failure-to-prosecute claim and a crime victim's assertion of CVRA rights as they relate to prosecutorial discretion. In contrast to the person alleging the prosecutor's wrongful failure to prosecute, the person asserting CVRA rights does not ask the court to evaluate the prosecutor's decision. Rather than ask the court to decide what the prosecutor should or should not have done, the purported victim asks the court to take notice of what the prosecutor is doing or has done, namely, negotiating a plea agreement in relation to a federal offense of which she was the victim. The court need only take cognizance of the federal offense, and determine whether the purported victim was directly and proximately harmed.\textsuperscript{237} Because the prosecutor's decisions are not being second-guessed by the judiciary (other than, of course, the prosecutor's decision to deny CVRA rights to the purported victim), the process does not raise separation of powers concerns. In contrast to the adjudication of a failure-to-prosecute claim, inquiry into whether a person is a crime victim does not engage the court in a standardless evaluation of "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities . . . " and other factors "not readily susceptible to the kind of analysis the courts are competent to undertake."\textsuperscript{238} No doubt the adjudication of contested crime victim status will to some extent reveal to the court the federal offenses being bargained over. It will probably not, however, "chill" the decisionmaking process of prosecutors or reveal enforcement policy because the propriety of the process or policy is not at issue in such a proceeding, unlike in a failure-to-prosecute action.

\begin{itemize}
  \item \textsuperscript{235} \textit{Armstrong}, 517 US at 465.
  \item \textsuperscript{236} \textit{Inmates of Attica}, 477 F2d at 380.
  \item \textsuperscript{237} 18 USC § 3771(e).
  \item \textsuperscript{238} \textit{Armstrong}, 517 US at 465.
\end{itemize}
CONCLUSION

The current recession has already brought major crimes to light and promises to reveal more. In many cases, the victims associated with these crimes will want to assert their rights under the CVRA, including the right to confer with the attorney for the government in the case, to the greatest extent possible. Unfortunately, the statute is less than clear respecting the earliest point at which a victim might assert his right to confer, and respecting the character of the right once it applies.

The Dean court concluded the conferral right allows victims to express their views on a prospective plea agreement to a prosecutor, even when charges have not yet been filed against a defendant. It has been the goal of this Comment to show that this result is both preferable from a policy standpoint and defensible as a matter of statutory interpretation. In general, if the goal of providing crime victims with rights is to treat them with respect and dignity, legislatures and courts should hesitate to predicate the exercise of those rights on distinctions that are arbitrary from the standpoint of victims.