

CRIME VICTIMS' RIGHTS ACT

Mr. KYL. Mr. President, I ask unanimous consent to have printed in the RECORD a letter to Attorney General Holder.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,

Washington, DC, November 2, 2011.

Hon. ERIC H. HOLDER, JR.,

Attorney General, U.S. Department of Justice,
Washington, DC.

DEAR ATTORNEY GENERAL HOLDER: I am writing to follow up regarding my June 6, 2011 letter to you concerning the Justice Department's implementation of the Crime Victims' Rights Act—an Act that I co-sponsored. I am writing to ask why the Justice Department persists in taking the view that the CVRA does not extend rights to crime victims until the formal filing of criminal charges.

As I explained in my earlier letter to you, Congress intended the CVRA to broadly protect crime victims throughout the criminal justice process—from the investigative phases to the final conclusion of a case. Congress could not have been clearer in its direction that using “best efforts” to enforce the CVRA was an obligation of “[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. . . .” 18 U.S.C. §3771(c)(1) (emphasis added). Congress also permitted crime victims to assert their rights either in the court in which formal charges had already been filed “or, if no prosecution is underway, in the district court in the district in which the crime occurred.” 18 U.S.C. §3771(d)(3) (emphasis added).

As you know, it has now been more than four months since I sent the letter to you explaining this clear point. In those four months, I have not received any response from you. Instead, during that time, on October 1, 2011, you promulgated new Attorney General Guidelines for Victims and Witness Assistance. These Guidelines persist in misconstruing the CVRA so that it does not extend any rights to victims until charges have been filed. Your Guidelines state: “CVRA rights attach when criminal proceedings are initiated by complaint, information, or indictment.” Guidelines at 8.

The Guidelines you have promulgated now conflict quite clearly with the CVRA's plain language. This is not simply my view. One court of appeals has addressed the issue of whether the CVRA applies only after charges have been filed. In *In re Dean*, 527 F.3d 391 (5th Cir. 2008), the Department took the position that crime victims had no right to confer with federal prosecutors until the Department had filed a plea agreement in court. The agreement involved a corporation (BP Products North America) whose illegal actions had resulted in the deaths of fifteen workers in an oil refinery explosion. In rejecting the Department's position that it did not have to confer with victims earlier, the Fifth Circuit held that “the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain.” *Id.* at 394.

In spite of this binding decision from the U.S. Court of Appeals for the Fifth Circuit, you have now promulgated guidelines that directly conflict with that decision. As a result, it continues to appear to me (as I noted in my earlier letter) that your prosecutors are failing to extend rights to potentially

thousands of crime victims within the Fifth Circuit in Louisiana, Mississippi, and Texas.

The Fifth Circuit's decision is hardly an outlier. To the contrary, so far as I have been able to determine, the Fifth Circuit's position is supported by all other court decisions that have decided the issue. For example, in *United States v. Rubin*, 558 F.Supp.2d 411, 419 (E.D.N.Y. 2008), the court discussed a claim by various movants that they had been victimized by a criminal fraud. The court explained that CVRA can attach before charges are filed:

Quite understandably, movants perceive their victimization as having begun long before the government got around to filing the superseding indictment. They also believe their rights under the CVRA ripened at the moment of actual victimization, or at least at the point when they first contacted the government. Movants rely on a decision from the Southern District of Texas for the notion that CVRA rights apply prior to any prosecution. In *United States v. BP Products North America, Inc.*, the district court reasoned that because §3771(d)(3) provided for the assertion of 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 in the district in which the crime occurred,” the CVRA clearly provided for “rights . . . that apply before any prosecution is underway.” *United States v. BP Products North America, Inc.*, Criminal No. H-07-434, 2008 WL 501321 at *11 (S.D. Tex. Feb. 21, 2008) (emphasis in original), mandamus denied in part. In *re Dean*, 527 F.3d 391 (5th Cir. 2008). But, assuming that it was within the contemplation and intent of the CVRA to guarantee certain victim's rights prior to formal commencement of a criminal proceeding, the universe of such rights clearly has its logical limits. For example, 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.

Rubin, 558 F.Supp.2d at 419.

United States v. Okun, 2009 WL 790042 (E.D. Va. 2009), also reached the same conclusion that CVRA rights can apply before charges are filed:

Victims have been permitted to exercise CVRA rights before a determination of the defendant's guilt. See, e.g., *United States v. Edwards*, 526 F.3d 747, 757-58 (11th Cir. 2008); *In re Mikhel*, 453 F.3d 1137, 1138-39 (9th Cir. 2006) (per curiam); see also *United States v. Rubin*, 558 F.Supp.2d 211, 418 (E.D.N.Y. 2008) (anyone the government identifies as harmed by the defendant's conduct is a victim). Furthermore, the Fifth Circuit has noted that victims acquire rights under the CVRA even before prosecution. See *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008). This view is supported by the statutory language, which gives the victims rights before the accepting of plea agreements and, therefore, before adjudication of guilt. See 18 U.S.C. §3771(a)(4).

Okun, 2009 WL 790042 at *2.

Also agreeing that at least some CVRA rights apply before charging is *In re Peterson*, 2010 WL 5108692 (N.D. Ind. 2010). The court acknowledged that some rights in the CVRA do not apply before charges have been filed. But the court also specifically held that “a victim's right to be treated with fairness and with respect for [his or her] dignity and privacy,” 18 U.S.C. §3771(a)(8), may apply before any prosecution is underway and isn't necessarily tied to a “court proceeding” or “case.” *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *United States v. BP Products North America, Inc.*, 2008 WL 501321 (S.D. Tex. 2008).” *Peterson*, 2010 WL 5108692 at *2.

The most recent court decision to carefully review the Justice Department's position is

Jane Does #1 and #2 v. United States, No. 08-80736-CIV-MARRA/JOHNSON (S.D. Fla. Sept. 26, 2011). In that case, the court flatly rejected the Department's claim that rights attach only after charges are formally filed:

The Court first addresses the threshold issue whether the CVRA attaches before the government brings formal charges against the defendant[.] The Court holds that it does because the statutory language clearly contemplates pre-charge proceedings. For instance, subsections (a)(2) and (a)(3) provide rights that attach to “any public court proceeding . . . involving the crime.” Similarly, subsection (b) requires courts to ensure CVRA rights in “any court proceeding involving an offense against a crime victim.” Court proceedings involving the crime are not limited to post-complaint or post-indictment proceedings, but can also include initial appearances and bond hearings, both of which can take place before a formal charge. . . .

Subsection (c)(1) requires that “Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights in subsection (a).” (Emphasis added). Subsection (c)(1)'s requirement that officials engaged in “detection [or] investigation” afford victims the rights enumerated in subsection (a) surely contemplates pre-charge application of the CVRA.

Subsection (d)(3) explains that the CVRA's enumerated rights “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.” (Emphasis added). If the CVRA's rights may be enforced before a prosecution is underway, then, to avoid a strained reading of the statute, those rights must attach before a complaint or indictment formally charges the defendant with the crime.

Id. at *3-4.

In sum, the plain language of the CVRA—and every reported court decision I have been able to find—all clearly indicate that the CVRA does extend rights to crime victims even before charges are filed. Yet in spite of this, the Justice Department has apparently prepared a new form letter to be sent to victims that specifically tells crime victims that they lack any rights in federal criminal cases before charges have been filed in federal court. As I understand it, this letter will be sent to victims in federal cases around the country (including victims in the Fifth Circuit, the Eastern District of New York, the Eastern District of Virginia, the Northern District of Indiana, and the Southern District of Florida) telling them that they should “[p]lease understand that these rights only apply to victims of the counts charged in federal court. . . .”

Compounding the confusion is the fact that your own Guidelines make it a matter of policy to confer with victims about plea negotiations even before charges have been filed. The new Attorney General Guidelines for Victims and Witness Assistance specifically state: “In circumstances where plea negotiations occur before a case has been brought, Department policy is that this should include reasonable consultations prior to filing a charging instrument with the court.” Guidelines at 41. I can only assume that this new policy has been put in place to avoid the outrageous situations that occurred in the *Dean* case and the *Jane Does* case, where prosecutors did not confer with victims before the Government reached final agreements with defendants. But the policy would seem to be a complete dead letter if you

never notify victims that they have a right under the CVRA to confer with the prosecutors.

In light of all this, I am writing to ask you several questions. First, when will you send an answer to the questions I raised in my June 6, 2011 letter? Second, why is the Department failing to follow the CVRA's plain language, as interpreted by these court decisions, and delaying extending crime victims their CVRA rights until after formal charges have been filed? And third, what is the Department doing to implement the Fifth Circuit's binding decision in *In re Dean* that crime victims can have rights under the CVRA even before criminal charges are filed?

Sincerely,

JOHN KYL,
United States Senator.

AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT
CDBG FUNDING

Mr. CONRAD. Mr. President, as the chairman and ranking member of the Transportation-HUD appropriations subcommittee are aware, I, along with Senators HOEVEN, LEAHY, SANDERS, BLUNT, MENENDEZ, LAUTENBERG, GILLIBRAND, BAUCUS and SCOTT BROWN have filed an amendment, Senate amendment No. 839, to add \$600 million in supplemental community development block grant, CDBG, funding. We deeply appreciate the inclusion of \$400 million in supplemental CDBG funds to aid communities impacted by disasters this year. However, given the magnitude of the damage just in my State of North Dakota from flooding this year, I am deeply concerned that this level of funding will not meet the needs. As many of my colleagues know, the city of Minot, ND, was devastated by a historic flood that impacted more than 4,100 homes and forced the evacuation of 11,000 people. The road to recovery will be long. CDBG offers an important component of the flood recovery effort to assist with buyouts and assistance to homeowners and businesses to repair the damage. My State alone has identified a need of at least \$235 million for CDBG funds. We would like to work with the chairman and the ranking member of the subcommittee in conference to make sure there are sufficient resources for CDBG to meet the needs that exist in my State as well as others most impacted by this year's disasters.

Mr. HOEVEN. Mr. President, we have seen flooding of historic proportion in North Dakota this year, and, as you know, other States have also sustained severe damages from hurricanes, tornadoes, wildfires and a range of natural disasters. In Minot, my hometown, friends and neighbors were forced to evacuate their homes and live day-to-day in makeshift accommodations. Some are not yet in temporary FEMA housing as winter approaches. Almost as severe as the impact of the floodwaters, however, is the anxiety of not knowing when and how much help is forthcoming from the federal govern-

ment. The State of North Dakota, local communities, and the Federal Government are already providing extensive assistance, but uncertainty over housing and infrastructure persists in the aftermath of this disaster. We took an important step forward in the Appropriations Committee 6 weeks ago when we approved \$400 million in supplemental CDBG funding, which goes directly to help with housing for people who have lost their homes. We are grateful to the subcommittee for approving that appropriation, but I am here to tell you there is more to be done. We look forward to working with subcommittee Chairwoman MURRAY and Ranking Member COLLINS to ensure that we do all we can to maximize CDBG assistance to those in need, not just in North Dakota, but across the Nation.

Mr. LEAHY. Mr. President, some of the worst damage caused by disasters around the country has been to the houses, mobile homes and apartments where families have built their lives and made their homes. In Vermont, entire mobile home developments were washed away in Hurricane Irene's fury. Where homes once stood, now lies a path of damage, destruction and heartbreak. Our small State's ability to build new homes depends greatly on support from Federal safety net programs, like the \$400 million in emergency community development block grant funding that we have worked to include in this bill. While this emergency funding is a first step in addressing the urgent housing needs of States like Vermont that have been struck by natural disasters, we know that much more will be needed to help our decimated towns and communities, and their citizens, get back on their feet. I look forward to working with the chairman and ranking member of the subcommittee to ensure that homeowners, businesses and towns have the assistance they need to begin the long rebuilding process. I have not seen damage and destruction of this magnitude in Vermont in my lifetime. Vermont and other states that were hit by Irene are stretched to the limit right now, and just as the victims of past disasters throughout the country were able to rely on their fellow Americans' help in their time of need, so should Vermonters be able to count on a helping hand when they need it most.

Mrs. MURRAY. Mr. President, I recognize the incredible impact of the disasters in your States and other States across the country this year and agree that CDBG is an effective tool in helping aid recovery efforts. The Senators from North Dakota and the Senator from Vermont have been strong advocates for this badly needed assistance. I pledge to work with them to ensure that communities impacted by this year's disasters have the support they need to recover.

Mr. BLUNT. Mr. President, over the past year, Missouri and the entire country have faced numerous natural

disasters that devastated the livelihoods of people in our communities. As we work to rebuild, the scope of these events has placed unusual logistical and financial pressures on rebuilding efforts. Disaster community development block grants provide communities with vital short-term and long-term recovery funds that pick up where FEMA funding leaves off. The \$400 million that is included in the transportation; housing and urban development appropriations bill is a step in the right direction. I am thankful for the opportunity to join with Chairman MURRAY, Ranking Member COLLINS and my other colleagues in expressing the importance of these funds for the communities rebuilding after disaster. I look forward to continuing our work together to make sure that disaster community development block grants get the funds necessary to meet disaster needs in Missouri and throughout the country.

Ms. COLLINS. Mr. President, disasters have affected nearly every State this year, and several States were hit particularly hard with devastating tornadoes and historic flooding. CDBG disaster recovery funding is an important tool that has helped States and communities address recovery needs related to infrastructure, housing, and economic development. I recognize that supplemental CDBG funding is important for communities recovering from disasters, and I look forward to working with my colleagues to help communities throughout the Nation.

Mr. CONRAD. Mr. President, I thank the chairman and the ranking member for their support. We look forward to working with them to ensure our communities have the resources necessary to recover from these devastating disasters.

EMERGENCY JUDICIAL RELIEF ACT

Mr. GRASSLEY. Mr. President, I would like to alert my colleagues that I intend to object to any unanimous consent agreement for the consideration of S. 1014, the Emergency Judicial Relief Act of 2011. While the sponsors of the legislation adopted one amendment I offered during debate in the Judiciary Committee, and that amendment improves the legislation, the bill remains deeply flawed and I cannot support it.

I oppose S. 1014 in its current form for a number of reasons, and I will just briefly describe them here. First, I believe strongly that we should analyze critically any expansion of the Federal Government, and first and foremost, determine whether there is a more efficient and cost effective way to allocate taxpayer resources. This is especially true during a time when our Federal debt is at historic levels.

In its current form, this legislation creates 10 new judgeships and converts two judgeships from temporary to permanent. The legislation does not pay