Note

The Voices of Victims: Debating the Appropriate Role of Fraud Victim Allocution Under the Crime Victims' Rights Act

Julie Kaster∗

In December 2008, the Securities and Exchange Commission (SEC) charged Bernard Madoff with effectuating a multi-billion dollar Ponzi scheme, the largest in American history.[1] The story made front page news for months.[2] The sheer amount of money involved, combined with the number of duped investors, captured the attention of the American public.[3] U.S. District Court Judge Denny Chin, who presided over Madoff's pretrial hearings, allowed victims to inform the court of their desire to participate in the sentencing proceedings.[4] On March 16, 2009, the day Madoff pled guilty, victims arrived in court, waiting for their chance to speak.[5] Eventually, Judge Chin gave nine victims the opportunity to express their pain and anger in court before the sentencing hearing.[6] One victim grieved: "Last

∗ J.D. Candidate, 2010, University of Minnesota Law School. As with all of my law school endeavors, there are many to thank. I appreciate those who helped and supported me along the way. Your assistance over the last three years is reflected in these pages. A special thank you to my parents, Sandie and Mark Kaster, for their unending love and to my brother, Brandon Kaster, for his wit, charm, and insights. I am quite certain that this Note would never have been published without the overwhelming encouragement of Barry Landy. Thank you for believing in me.

1. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Bernard L. Madoff for Multi-Billion Dollar Ponzi Scheme (Dec. 11, 2008), *available at* http://www.sec.gov/news/press/2008/2008-293.htm.

2. *See, e.g.*, Diana B. Henriques, *Madoff Scheme Kept Rippling Outward, Crossing Borders*, N.Y. TIMES, Dec. 20, 2008, at A1.

3. *Id.*

4. Jayne Barnard, Op-Ed., *Madoff Case: Act Gives Fraud Victims a Voice*, RICH. TIMES DISPATCH, July 2, 2009, http://www2.timesdispatch.com/rtd/news/opinion/op_ed/article/ED-BARNARD02_20090701-180204/277371/.

5. *See* Jonathan Dienst & Michael Clancy, *Bye Bye Bernie: Judge Jails Madoff After Guilty Plea*, NBC CHICAGO, Mar. 16, 2009, http://www.nbcchicago.com/news/us_world/NATLMadoffs-Victims-Want-Answers.html.

6. *See* Barnard, *supra* note 4.

year, my mother died. Now I don't have my mother or my money." Another victim yelled: "Your sons despise you . . . . [You] are an evil lowlife." Judge Chin subsequently sentenced Madoff to 150 years in prison.[7] The desire of Madoff's victims to foment their own brand of verbal justice illustrates a larger issue facing American jurisprudence: what is the appropriate role of victim allocution in cases of financial fraud?

When prosecutors charge a defendant with a violent crime, such as rape or assault, judges routinely allow victims the opportunity to speak at the sentencing hearing.[8] Interestingly, as of 2001, economic crimes represented over twenty percent of the federal criminal docket.[9] Only since 2004, however, have financial fraud victims in federal actions had the statutory right to speak in open court—a process known as allocution.[10] These rights derive from the Crime Victims' Rights Act (CVRA), a federal statute that guarantees the right "to be reasonably heard at any public proceeding in district court involving release, plea, sentencing, or any parole proceeding."[11] As a means to enforce these rights, the CVRA empowers crime victims to petition a higher court for a writ of mandamus if the lower court does not respect their enumerated rights to allocution.[12]

The CVRA presents a major dilemma to judges. The court must protect a defendant's constitutional rights while also ensuring fraud victims statutory empowerment to allocute under the CVRA. The CVRA does not provide a clear framework for judges to determine the prescribed role of fraud victims' allocution. This leaves judges to interpret the reach of the CVRA. Federal appellate courts diverge on (1) how much deference the district courts should have to fashion appropriate procedures under the CVRA, and (2) the proper standard of review for district court decisions.[13]

7. *Id.*

8. DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 625 (2d ed. 2006).

9. Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 56 (2001).

10. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, 18 U.S.C. § 3771 (2006); *see* Barnard, *supra* note 9, at 57 (noting that prior to 2004, the right to allocute was only statutorily available to victims of violent crimes).

11. 18 U.S.C. § 3771.

12. *Id.*

13. *Compare In re* Antrobus (*Antrobus I*), 519 F.3d 1123, 1124–25 (10th Cir. 2008) (arguing that the traditionally high standard of review is appropriate in these cases), *with* Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal.

The right of victims to allocute under the CVRA raises substantial questions about the proper role of victims in a criminal justice system that triumphs constitutional protections for the accused. Courts currently split over the role of the appellate court to review and enforce CVRA rights in the lower court. This Note examines the role of victim allocution within the criminal justice system and argues that Congress should amend the CVRA to more clearly articulate fraud victims' rights.

This Note proceeds in three parts. Part I explores the historic and current role of victims' rights within the federal legal system. Part II analyzes the circuit split on the standard of review for a writ of mandamus under the CVRA. Part III proposes a renewed debate on the role of fraud victims within the criminal justice system and argues that Congress should amend the CVRA by specifically outlining the rights of fraud victims to allocution within that system. The amendment should explicitly empower judges to limit fraud victims' rights to allocution, and only subject that decision to the traditionally high standard of mandamus review at the appellate court.

I. VICTIMS' RIGHTS WITHIN THE ADVERSARY SYSTEM

The role of victims within the criminal justice system—and the ability of victims to seek redress when a district court does not respect their rights—has never been a static concept. First, this Part provides the background necessary to understand the current debate surrounding the desired role of victims in federal criminal cases. It unravels the historic role of victims' rights within a federal legal system that is premised on protecting the constitutional rights of defendants. Next, this Part discusses the history of the victims' rights movement and the passage of the CVRA. Last, it outlines the writ of mandamus process and the circuit split regarding the role of appellate review under the CVRA.

A. THE HISTORIC RIGHTS OF VICTIMS WITHIN THE ADVERSARY SYSTEM

The American judicial system traditionally recognizes the rights of only the criminal defendant and the prosecution in

(Kenna I), 435 F.3d 1011, 1017 (9th Cir. 2006) (holding that the CVRA creates a "unique regime," and thus a lower standard of review is merited).

criminal proceedings.[14] Victims' rights advocates disagree with this traditional notion. Rather, they argue that victims have a distinct interest in criminal proceedings and that their rights should be included in the judicial process.[15] The juxtaposition of these two criminal procedure philosophies sets the stage for the current disagreement over rights of victims under the CVRA.

In criminal judicial proceedings, the government acts on behalf of the community to ensure justice.[16] The President appoints a U.S. attorney in each judicial district to prosecute crimes.[17] The doctrine of prosecutorial discretion gives prosecutors unyielding power to determine whether to pursue criminal charges, prosecute defendants, or negotiate plea bargains.[18] The Supreme Court recognizes the broad power given to the prosecution and therefore declares statutes unconstitutional if they impermissibly interfere with this power.[19]

The prosecution's goal is to protect the public interest, and as such, the interests of third parties, such as victims, are not directly represented in criminal proceedings. The prosecutor is a "minister of justice," and his duties run to the public and the defendant to ensure a just outcome in the case.[20] While the

14. Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 239 (2008).

15. William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349, 349 ("[V]ictims of violent crime have a stake in the trial that is different from that of the general public or even the prosecutor."); *see also* 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) ("[V]ictims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm.").

16. As John Marshall put it:

> A private suit instituted by an individual, asserting his claim to property, can only be control[l]ed by that individual. The executive can give no direction concerning it. But a public prosecution carried out in the name of the United States, can without impropriety be dismissed at the will of the government.

Representative John Marshall, Speech Delivered in the House of Representatives of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (Mar. 7, 1800), *reprinted in* 4 THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984).

17. Judiciary Act of 1789, ch. 20, § 35, 1 stat. 73, 92; *see also* 28 U.S.C. § 547(1) (2006) (granting U.S. attorneys the responsibility to "prosecute for all offenses against the United States").

18. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 700–01 (2004).

19. United States v. Murphy, 41 U.S. (16 Pet.) 203, 209 (1842) ("[F]rom the very nature of an indictment and the sentence thereon, the government alone has the right to control the whole proceedings and execution of the sentence.").

20. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2003) ("A prosecutor

prosecutor can take into account the general benefits to society in prosecuting a case, he cannot take into account a specific victim's agenda regarding the outcome of the case.[21]

The Constitution has internal checks to ensure that the prosecution does not operate unfairly with respect to the defendant.[22] Indeed, "[o]ne of the animating features of the Constitution is its preoccupation with the regulation of the government's criminal powers."[23] The Framers were mostly concerned with safeguarding the rights of defendants in the criminal justice system—as enumerated throughout the Bill of Rights.[24] A defendant has a general right to a trial that is fair and provides him with due process under the law.[25] Moreover, under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[26] Practically, a criminal defendant has the right to challenge the credibility or veracity of witnesses that speak during the course of a trial or sentencing hearing.[27] Allocution rights under the CVRA may pose challenges to these constitutional protections.

The adversary system has traditionally excluded the rights of nonadversaries within the courtroom,[28] thereby limiting victims from meaningful participation in the judicial process.[29] Generally, courts have disregarded the role of a victim in the

has the responsibility of a minister of justice and not simply that of an advocate.").

21. *See id.* cmt. 5 ("A prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.").

22. U.S. CONST. amends. IV–VI.

23. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012 (2006).

24. *Id.* at 1016–17.

25. U.S. CONST. amend. XIV, § 1.

26. *Id.* amend. VI.

27. *See* Crawford v. Washington, 541 U.S. 36, 36–37 (2004).

28. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *2. Blackstone establishes that wrongs are divisible into private wrongs, those that harm an individual, and public wrongs, those that harm the community. *Id.* Under this argument, criminal acts are public wrongs, and thus the state is responsible for their prosecution. *Id.* at *3.

29. *See* BELOOF ET AL., *supra* note 8, at 11–18. Indeed, until recent times, victims were "seen at best as 'the forgotten [people]' of the system and, at wors[t], as being twice victimized, the second time by the very system to which [they have] turned for justice." William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 650 (1976).

criminal system,[30] except, for example, when determining the proper restitution for a crime victim.[31] Additionally, some federal statutes and rules allow victims to present impact statements or allocute for specific crimes.[32] The strict application of the traditional American adversary system, therefore, has changed over time, and nonparties, such as victims, have gained additional rights within criminal cases.[33]

B. THE VICTIMS' RIGHTS MOVEMENT AND THE PASSAGE OF THE CVRA

The roots of the modern victims' rights movement stem from President Ronald Reagan's interest in the issue and his commission of the President's Task Force on Victims of Crime in 1982.[34] The Task Force's final report presented shocking information about the treatment of crime victims, claiming that victims were persecuted in the courtroom when they were denied access to the proceedings or refused the opportunity to speak.[35] This "secondary victimization"[36] in the courtroom was at the core of the Task Force's recommendation that Congress

30. *See* State v. Rickey, 10 N.J.L. 83, 84 (1828) ("The idea that a private person may be interested in a public prosecution, seems to be utterly discarded in law.").

31. *See id.* at 84–85.

32. *See, e.g.*, FED. R. CRIM. P. 32(i)(4)(B) (violent crimes or sexual abuse); *see also* 18 U.S.C. § 2319A(d) (2006) (copyright infringement); 18 U.S.C. § 3593(a) (2006) (capital sentencing).

33. For example, *qui tam* provisions give private citizens the right to bring actions in the government's name. *See* Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 949 (2007).

34. The Task Force was commissioned to "conduct a review of national, state and local policies and programs affecting victims of crime" and to "advise the President and the Attorney General with respect to actions which can be undertaken to improve . . . efforts to assist and protect victims of crime." Exec. Order No. 12,360, 3 C.F.R. 181 (1983); *see also* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) [hereinafter PRESIDENT'S TASK FORCE], *available at* http://www.ojp.gov/ovc/publications/presdntstskforcrprt/87299.pdf. The Task Force found that the criminal justice system had "lost an essential balance" and "deprived the innocent, the honest, and the helpless of its protection." PRESIDENT'S TASK FORCE, *supra*, at 114; *see also* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 436 (2008).

35. PRESIDENT'S TASK FORCE, *supra* note 34, at 10.

36. *Id.* at 106.

amend the Sixth Amendment to include language protecting the rights of crime victims.[37]

The victims' rights movement sought changes in the adversarial structure to include the interests of victims in judicial proceedings.[38] The movement attempted to secure a constitutional amendment.[39] U.S. Senators Jon Kyl and Dianne Feinstein introduced a proposal to amend the Sixth Amendment to give victims a meaningful right of participation in criminal proceedings.[40] The proposed amendment faced stiff resistance and was never adopted.[41]

37. *Id.* at 114 (proposing the addition of "the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings" to the Sixth Amendment).

38. *See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 293–98; John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 204 (1979) ("As the death grip of adversary procedure has tightened around the common law criminal trial, trial has ceased to be workable as a routine dispositive proceeding."); Blondel, *supra* note 14, at 251 ("Legal realism agrees with victims' rights advocates: criminal prosecutions affect private as well as public interests.").

39. William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 39 (1996) (citing Letter from Mary McGhee, co-chair of the Nat'l Victims' Constitutional Amendment Network to William T. Pizzi (Nov. 11, 1995) (on file with the Stanford Journal of International Law)).

40. Senators Kyl and Feinstein introduced S.J. Res. 52 on April 22, 1996. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 589 n.40 (2005). After several changes, S.J. Res. 44 was introduced in the Senate on April 1, 1998. *Id.* at 589. The proposal was also changed in 1999, to S.J. Res. 3, which was sponsored by thirty-three senators. *Id.* at 590. However, after three days of debate on the floor of the Senate, the proposal was withdrawn. 148 CONG. REC. S2679 (daily ed. Apr. 15, 2002) (Statement of Sen. Feinstein) ("Ultimately, in the face of a threatened filibuster, Senator Kyl and I decided to withdraw the amendment."). The last version of the proposal, S.J. Res. 1, was introduced on January, 10, 2003. Kyl et al., *supra*, at 591. For an excellent overview of the history of the proposed amendment, see *id.* at 588–91. *See also* Victoria Schwartz, *Recent Development, The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525, 525 (2005) ("The Victims' Rights Amendment is one of the few amendments that has not only been considered many times, but has also passed the committee level to reach the floor of the Senate.").

41. *See* 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) ("Essentially, bottom line, what we have found after numerous Judiciary Committee subcommittee hearings, committee hearings, markups, putting the victims' rights constitutional amendment out on the Senate floor in a prior session, taking it down because we didn't have the votes, beginning anew in this session, going through the processes in committee, and recognizing that we didn't have the 67 votes necessary for a constitutional amendment—both Senator Kyl and I, as well as the victims and their advocates, de-

Victims' rights advocates, including the sponsors of the proposed amendment, thereafter altered their tactics and lobbied for a substantive federal law to ensure victims' rights in the courtroom.[42] Earlier attempts at federal legislation promised broad rights to victims,[43] but lacked enforcement mechanisms to guarantee that victims could hold a court accountable if the court did not respect their rights.[44]

Responding to the impotency of these early laws, Congress passed the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act in 2004.[45] Section 102(a) of the CVRA provides a laundry list of victims' rights, including the right to reasonable notice, access, and ability to be reasonably heard at any public court proceeding.[46] In cases with multiple victims, the CVRA directs courts to create "reasonable procedure[s]" to ensure victims' rights without complicating or prolonging the judicial proceedings.[47]

The new legislation aspired to address the problems that plagued previous victims' rights legislation.[48] In a departure

cided that we should compromise."). The constitutional amendment failed for a variety of reasons, which could include that it would "change basic principles that have been followed throughout American history," that it would "lay waste to the criminal justice system," and that it would "trivialize" the Constitution. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 481. Cassell, however, concluded that none of these reasons were valid. *Id.*

42. Kyl et al., *supra* note 40, at 591.

43. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253–55 (current version at 18 U.S.C. § 3663 (2006)) (allowing the court to award restitution to victims of specific offenses, such as property, medical expenses, and physical therapy); Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, tit. V, 104 Stat. 4820, 4820–23 (codified as amended at 42 U.S.C. §§ 10601–10608 (2006)) (providing victims substantive and procedural rights to receive information about the offender); Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 204, 110 Stat. 1227, 1227–29 (codified as amended at 18 U.S.C. § 3663A (2006)) (mandating court-ordered restitution for certain violent crimes).

44. United States v. McVeigh, 106 F.3d 325, 335 (10th Cir. 1997) (preventing victims from exercising their statutory right to attend the trial because they lacked a remedy under the statute to enforce their rights); *see also* Douglas E. Beloof, *Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kozinski in* Kenna *and Judge Cassell in* Degenhardt, 19 FED. SENT'G REP. 36, 36 (2006) ("The message of the *McVeigh* opinion is that if victims were to have standing Congress would have to explicitly provide it.").

45. Pub. L. No. 108-405, § 102, 118 Stat. 2260, 2261–64 (codified at 18 U.S.C. § 3771 (2006)).

46. 18 U.S.C. § 3771(a)(1)–(8) (2006).

47. *Id.* § 3771(d)(2); *see also* Giannini, *supra* note 34, at 456 n.113.

48. *See, e.g.*, H.R. REP. NO. 108-711, at 4 (2004), *reprinted in* 2004

from past victims' rights legislation, an additional section of the CVRA specifically instructs the district court to respect the rights of victims[49] and provides recourse for victims if they feel the district court has violated their rights.[50] Specifically, if the district court refuses to recognize a victim's right to allocute, or any other right enumerated in the statute, then the CVRA provides that victim the right to petition the court of appeals for a writ of mandamus.[51]

C. AN ENFORCEMENT MECHANISM STEEPED IN HISTORY AND ENTRENCHED IN A CIRCUIT SPLIT

While the CVRA represents the current incarnation of the rights of crime victims, its enforcement mechanism is steeped in history.[52] As such, an understanding of the writ of mandamus, combined with a discussion of the appellate standards of review, is necessary when dissecting the disagreement among circuits over the proper role of the CVRA. Additionally, an overview of the circuit split regarding the writ of mandamus is warranted to understand this complex issue.

The writ of mandamus is an extraordinary writ in which a high court compels an inferior court to exercise authority where it failed to perform its duty or function.[53] The Supreme Court, and all other courts established by Congress, have the power to issue writs of mandamus.[54] Traditionally, however, issuance of

U.S.C.C.A.N. 2274, 2277; 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). *See generally* Fern L. Kletter, Annotation, *Validity, Construction, and Application of Crime Victims' Rights Act (CVRA), 18 U.S.C.A. § 3771*, 26 A.L.R. FED. 2D 451, 462–66 (2008) (discussing the background of the CVRA).

49. 18 U.S.C. § 3771(b)(1).

50. *See id.* § 3771(d)(3).

51. *Id.*; *see also* FED. R. APP. P. 21(a)(2) (providing the format for the mandamus petition).

52. *See generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595, 598–624 (1973) (describing Supreme Court mandamus cases between 1957 and 1967).

53. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34–35 (1980) (per curiam).

54. All Writs Act, 28 U.S.C. § 1651(a) (2006) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *see also* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 114 (1975) ("Pursuant to [28 U.S.C. § 1651(a)], the circuit courts of appeals may issue, *inter alia*, writs of mandamus to the district courts . . . .").

the writ suggested that a lower court "usurped power or clearly abused its discretion."[55] Courts view the writ, therefore, as a drastic remedy and utilize it only in extraordinary situations.[56]

In general appellate proceedings the standard of review is less stringent than mandamus review.[57] The standards of review at the appellate level can be divided into three categories: questions of law are reviewed de novo,[58] questions of fact are reviewed for clear error,[59] and discretionary matters are reviewed for abuse of discretion.[60] The abuse of discretion standard is the most ambiguous standard as it requires the appellate court to look for grossly unsound or unreasonable decisions of the trial court.[61] Review under this standard is generally deemed the most deferential to the lower court.[62]

For some issues, the statutory language plainly articulates the appropriate level of review.[63] If the standard is not clearly outlined in the statutory language, however, then the appropriate standard of review is often ascertained by examining the historical trend of appellate practice in that area of the law.[64] The CVRA's reference to the writ of mandamus has led to a circuit split: two circuits currently consider interlocutory review under an abuse of discretion standard,[65] while three circuits

55. *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562 (2d Cir. 2005) (citing *In re* von Bulow, 828 F.2d 94, 97 (2d Cir. 1987)).

56. *Allied Chem. Corp.*, 449 U.S. at 34; Will v. United States, 389 U.S. 90, 95–96 (1967); Giannini, *supra* note 34, at 442; Kyl et al., *supra* note 40, at 619.

57. *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 562.

58. Pierce v. Underwood, 487 U.S. 552, 558 (1988). In a de novo review process, the higher court relies on the record of the trial court, but reviews the trial court's decisions without deference. BLACK'S LAW DICTIONARY 106 (8th ed. 2004).

59. *Pierce*, 487 U.S. at 558. Under the clear error standard, the higher court reviews questions of fact and looks for decisions made by the trial court that are unquestionably erroneous. BLACK'S LAW DICTIONARY 582 (8th ed. 2004).

60. *Pierce*, 487 U.S. at 558.

61. BLACK'S LAW DICTIONARY 11 (8th ed. 2004).

62. Haugh v. Jones & Laughlin Steel Corp., 949 F.2d 914, 916–17 (7th Cir. 1991) ("Abuse of discretion is conventionally regarded as a more deferential standard than clear error . . . .").

63. *See, e.g.*, Administrative Procedure Act § 2, 5 U.S.C. § 552 (2006) ("In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter *de novo* . . . .") (emphasis added).

64. *Pierce*, 487 U.S. at 558.

65. *In re* Kenna (*Kenna II*), 453 F.3d 1136, 1137 (9th Cir. 2006) (per curiam); *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562–63 (2d Cir. 2005).

use the traditionally higher mandamus standard of review.[66] The Supreme Court has yet to accept a case dealing with this circuit split.[67]

II. THE INTERSECTION OF CONGRESSIONAL INTENT AND JUDICIAL IMPLEMENTATION: A TRAIN WRECK WAITING TO HAPPEN

Ascertaining the proper standard of review for decisions relating to allocution under the CVRA requires an understanding of Congress's intent combined with a normative conclusion as to the proper role of victims in the criminal justice system. This Part dissects Congress's intent in passing the CVRA and reviews the current circuit split. The failure of Congress to clearly articulate the role of appellate review in CVRA allocution decisions could overload scarce judicial resources and imperil the constitutional rights of defendants.

A. CONGRESSIONAL INTENT: THE LACK OF CLARITY MEANS THAT THE HIGHER STANDARD OF REVIEW MAY BE OUT OF REACH

This Part analyzes the plain language of the CVRA and Congress's intent with respect to the standard of review for writs of mandamus issued under the Act. Through this lens, there is strong evidence that the CVRA only contemplates the traditionally high standard of appellate review in granting a petition for a writ of mandamus.

1. The CVRA's Plain Meaning

One of the foremost canons of statutory interpretation is that when the language in the statute is plain, then that meaning controls.[68] The CVRA specifically calls for the use of a writ of mandamus.[69] Therefore, under the plain meaning analysis, it

66. *In re* Dawalibi, 338 F. App'x 112, 114 (3d Cir. 2009) (per curiam); *In re* Antrobus (*Antrobus II*), 563 F.3d 1092, 1097 (10th Cir. 2009); *In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008) (per curiam); *see also In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009) ("We need not resolve the question of the proper standard of review . . . because petitioner is entitled to relief under the stricter, traditional mandamus standard of review."); *In re* Stewart, 552 F.3d 1285, 1288–89 (11th Cir. 2008) (per curiam).

67. *See generally* Petition for Writ of Certiorari at *8–12, *In re* Local # 46 Metallic Lathers Union v. United States, No. 09-670 (Nov. 6, 2009), 2009 WL 4726610 (arguing that the Supreme Court should review denials of CVRA mandamus).

68. *Cf.* Crandon v. United States, 494 U.S. 152, 160 (1997).

69. 18 U.S.C. § 3771(d)(3) (2006).

is necessary to ascertain the plain definition of a writ of mandamus and determine the specific standard of review associated with it. The writ of mandamus is a historically significant legal remedy, providing for a drastic remedy that is only invoked in extraordinary situations.[70] This history connotes an extremely high standard of review.[71]

The plain meaning of the standard for the writ is further supported by analyzing what Congress chose *not* to state in the bill.[72] Congress specifically included the words "writ of mandamus" in the legislation, in lieu of other terms such as "immediate appellate review" or "interlocutory appellate review."[73] Congress thus included a term that has an important historical meaning and specifically excluded terms that would have changed the level of review. Since the term mandamus has an accustomed meaning, which connotes extremely deferential review to district court decisions, this meaning should control.[74] Therefore, the plain meaning of the writ of mandamus within the CVRA is clear. However, even if critics find ambiguity with Congress's use of the phrase "writ of mandamus," the legislative history also supports the conclusion that Congress meant to have appellate courts utilize the traditionally high standard of review in CVRA cases.

2. Congressional Discussion Does Not Support a Lower Standard of Review

Closely examining the words that were included and excluded from the CVRA suggests that the courts should employ the traditionally high standard of review associated with the writ of mandamus. This argument is strengthened further by

70. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980) (per curiam). As the Tenth Circuit noted, "[m]andamus is a well worn term of art in our common law tradition." *In re* Antrobus (*Antrobus I*), 519 F.3d 1123, 1127 (10th Cir. 2008).

71. *See Antrobus I*, 519 F.3d at 1124–25.

72. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 854 (4th ed. 2007) ("The notion is one of negative implication: the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced.").

73. *See Antrobus I*, 519 F.3d at 1124.

74. Bd. of County Comm'rs v. EEOC, 405 F.3d 840, 845 (10th Cir. 2005) ("We assume that Congress knows the law and legislates in light of federal court precedent.").

dissecting the congressional debate on this bill.[75] The sponsors of the CVRA wanted it to be a transformative bill, but the legislative history leading to its passage undermines any contention that Congress intended to redefine the judicial standard of review of the writ of mandamus.

The CVRA's congressional history is instructive. Senators Kyl and Feinstein drafted the CVRA as "compromise legislation" because they were unable to secure a constitutional amendment.[76] To pass the bill it had to simultaneously accomplish two goals: first, it had to placate those who believed the bill would undermine the adversary system,[77] decrease the importance of the Bill of Rights,[78] and allow vengeance to reign in the judicial sphere,[79] and second, it had to address the shortcomings of previous victims' rights legislation by including a statutory enforcement mechanism.[80] Thus, the sponsors were careful to draft the bill in such a way that ensured independent judicial rights for victims[81] without infringing on the constitu-

75. *See* Toibb v. Radloff, 501 U.S. 157, 162 (1991) ("[A] court appropriately may refer to a statute's legislative history to resolve statutory ambiguity . . . .").

76. *See* Kyl et al., *supra* note 40, at 591.

77. *See* S. REP. NO. 108-191, at 68–69 (2003) ("[The] colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as 'inefficient, elitist, and sometimes vindictive.' . . . [T]he Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard for achieving justice." (citation omitted)); *id.* at 70 ("[W]e have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy.").

78. *Id.* at 56 ("Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights to a politically popular group of citizens at the expense of a powerless minority. . . . Never before . . . have we . . . guarantee[d] rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights.").

79. *Id.* at 85–86; *see also* AMY BARON-EVANS, ADMIN. OFFICE OF THE U.S. COURTS, DEFENDING AGAINST THE CRIME VICTIMS RIGHTS ACT 3 (2007), http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf ("Opposition was also based on the recognition that if victims were allowed to drive the criminal process, their desire for vengeance and lack of expertise would lead to unfair and unreliable results.").

80. *A Bill Proposing an Amendment to the Constitution of the United States To Protect the Rights of Crime Victims: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 41 (1997) (statement of Janet Reno, Att'y Gen. of the United States).

81. Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal. (*Kenna I*), 435 F.3d 1011, 1013 (9th Cir. 2006) ("The [CVRA] sought to . . . mak[e] victims independent participants in the criminal justice process.").

tional rights of defendants.[82] To pass the CVRA with an enforcement mechanism, the sponsors of the bill were forced to include the writ of mandamus with its traditionally high standard of review over district court decisions.[83] Anything less would have been objectionable.

Victims' rights advocates turn this argument on its head by contending that the enforcement mechanism of a writ of mandamus was meant to give victims enforceable rights without altering the fundamentals of the Constitution.[84] They argue that the inclusion of the writ of mandamus was not only meant to appease victims' rights advocates, but also as an expression of a true compromise that gave victims actual, enforceable rights.[85] For that reason, they argue, a lower standard of review was intended.[86] This argument is flawed, however, as it fails to appreciate the practical constraints of this "compromise" legislation and the fact that the CVRA sponsors were capable of including only a writ of mandamus remedy due to its high standard of review.[87]

82. *See* United States v. Turner, 367 F. Supp. 2d 319, 333 n.13 (E.D.N.Y. 2005) ("The CVRA plainly strikes a different balance, and it is fair to assume that it does so to accommodate [those legislators who opposed the constitutional amendment]."); 150 CONG. REC. S4266 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("After 8 years of work on the Federal constitutional amendment, supported by President Bush and the Attorney General, we were able to schedule, after we passed the bill through the Judiciary Committee, that constitutional amendment for floor action today. Knowing we would not have the 67 votes to pass it, we decided it was time to get something tangible in statute to protect the rights of victims, and accompanying it could be a modest appropriation of money to help actually support these victims in court when that was necessary and called for.").

83. *Cf.* 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

84. *See* Emma Schwartz, *Giving Crime Victims More of Their Say*, U.S. NEWS & WORLD REP., Dec. 24, 2007, at 28, 29 ("[Victims' rights advocates] say the victims' rights laws are not uniformly enforced on a federal level . . . .").

85. *Cf.* 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

86. *See* Steven Joffee, *Validating Victims: Enforcing Victims' Rights Through Mandatory Mandamus*, 2009 UTAH L. REV. 241, 251 ("[T]he CVRA's enforcement provision entitles crime victims to ordinary appellate review of district court decisions denying any of their eight enumerated rights.").

87. When the CVRA came before Congress, it was meant to be a transformational bill—one that dramatically altered the treatment of crime victims in the federal criminal justice system. *See id.* at 245. It was designed to be a "broad and encompassing" statutory victims' bill of rights. 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). However, given this lofty goal, the actual debate surrounding the bill is scarce. *See Turner*, 367 F. Supp. 2d at 323 n.3. The lack of true discourse on the bill makes it difficult

There was limited debate on the issue of the writ of mandamus on the Senate floor.[88] Senator Feinstein specifically said that the inclusion of the writ of mandamus implied "a new use of a very old procedure" that would allow a crime victim to "immediately appeal a denial of their rights by a trial court to the court of appeals."[89] Senator Feinstein also indicated that the writ of mandamus would be a tool for crime victims—a means to ensure that the trial court followed the rights outlined in the CVRA.[90] Senator Kyl briefly touched on the use of the term "writ of mandamus" within the statute.[91] He explained that within the CVRA the writ of mandamus would ensure appellate review of victims' rights.[92] If this enforcement mechanism was not included in the statute, he explained, then "a victim [would be] left to the mercy of the very trial court that may have erred."[93] These statements by the sponsors of the CVRA show that they intended to provide the traditional level of review for appellate court review of CVRA writ of mandamus petitions. The lack of discussion by any Senator to alter the standard of review demonstrates that there was no congressional intent to create a unique regime under the CVRA.

Moreover, the only legislative debate with respect to this bill stemmed from a scripted exchange between the sponsors of the bill,[94] a short speech by Senator Kyl,[95] and a description of the bill in the House Judiciary Committee Report.[96] In a case discussing the CVRA, one court noted that "[n]owhere in [this] legislative history . . . does one find the debate or exchange of ideas that more frequently accompanies the art of law-

to conclude that lawmakers wanted to alter the historically accepted use of the writ of mandamus in the remedial provisions of the law. *Cf.* Dewsnup v. Timm, 502 U.S. 410, 419–20 (1992) ("[W]here the language [of the statute] is unambiguous, silence in the legislative history cannot be controlling.").

88. *See* 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

89. *Id.*

90. *Id.*

91. 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

92. *See id.*

93. *Id.*

94. *See* 150 CONG. REC. S4263–64 (daily ed. Apr. 22, 2004) (statements of Sens. Kyl and Feinstein).

95. *See* 150 CONG. REC. S10,910–13 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

96. *See* H.R. REP. NO. 108-711, at 10–11 (2004), *reprinted in* 2004 U.S.C.C.A.N. 2274, 2283.

crafting."[97] Additionally, some Senators expressed reservations that the CVRA had not undergone a more thorough examination.[98] The lack of debate on this bill makes it hard to conclude that lawmakers wanted to alter the historically accepted use of the writ of mandamus.

The CVRA was overwhelmingly passed in both the House and the Senate.[99] That the sponsors were able to secure this level of support, given the strong opposition to a constitutional amendment for victims' rights, lends credence to the argument that Congress did not view this bill as highly controversial. Given the historical relevance of the writ of mandamus, and the plain meaning of this well-defined legal term, there is no evidence that Congress intended to create a unique regime and change the standard of review of the writ of mandamus under the CVRA.

B. CONFLICTED CIRCUIT COURTS FAIL TO CAPTURE THE ESSENTIALS

Circuit courts divide over the proper role of the appellate courts in granting the writ of mandamus in CVRA cases. The Second and Ninth Circuits hold that the lower, abuse of discretion standard is appropriate in CVRA cases.[100] For example, in *Kenna v. U.S. District Court for the Central District of California*, a father and son pled guilty to a large fraud scheme.[101] At the father's sentencing hearing, the victims exercised their rights under the CVRA to allocute and spoke about the hardship caused by the father-defendant.[102] At the son's sentencing hearing, however, the judge refused to listen to the victim

97. United States v. Marcello, 370 F. Supp. 2d 745, 749 (N.D. Ill. 2005).

98. *See, e.g.*, 150 CONG. REC. S4272 (daily ed. Apr. 22, 2004) (statement of Sen. Leahy) (Senator Leahy, while supporting passage of the CVRA, noted that "we had so little opportunity to work on crafting the crime victims' statute. I would have liked to have gotten the views of the Office for Victims of Crime and other components of the Department of Justice, for example. . . . [We had] no time to hold hearings on it or improve the bill in Committee.").

99. *See* Kyl et al., *supra* note 40, at 593 ("House Resolution 5107 passed the House by a vote of 393 to 14. . . . [It] passed the Senate by unanimous consent.").

100. *See* Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal. (*Kenna I*), 435 F.3d 1011, 1017 (9th Cir. 2006); *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 564 (2d Cir. 2005).

101. *Kenna I*, 435 F.3d at 1012–13 (emphasis added).

102. *Id.* at 1013.

statements because he had "listened to the victims last time."[103] The victims filed a petition for a writ of mandamus.[104]

The appellate court noted that "[t]he CVRA creates a *unique regime* that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute."[105] Under this framework, the court of appeals granted the writ of mandamus and demanded that the district court allow the victims to speak at the son's sentencing hearing.[106] The court noted that the CVRA was meant "to make victims full participants in the criminal justice system," and "puts crime victims on the same footing" as "[p]rosecutors and defendants [who] already have the right to speak at sentencing."[107]

As evidenced by the court in *Kenna*, the Second and Ninth Circuits have effectively created a "unique regime" under the CVRA where the writ of mandamus takes on a new meaning and gives broad power to victims to allocute.[108] Under this regime, the appellate court must entertain *all* petitions for a writ of mandamus under the statute and the district court's discretionary power over allocution decisions is limited. These circuits, therefore, alter the traditionally discretionary nature of the writ in this context.

Several other circuits, however, strongly disagree with the circuits that alter the standard of review for writs of mandamus. Specifically, the Third, Fifth, and Tenth Circuits hold the traditional mandamus standard should be employed when determining whether to issue the writ under the CVRA.[109] This was explicitly discussed in *In re Antrobus*, when several victims felt that the district court had not respected their rights.[110] The victims filed a petition for a writ of mandamus with the appellate court.[111] The appellate court, using the traditional mandamus standard of review, denied the writ.[112]

103. *Id.*
104. *Id.*
105. *Id.* at 1017 (emphasis added).
106. *See id.* at 1018.
107. *Id.* at 1016.
108. *See id.* at 1017.
109. *In re* Dawalibi, 338 F. App'x 112, 114 (3d Cir. 2009) (per curiam); *In re* Dean, 527 F.3d 391, 391 (5th Cir. 2008); *In re* Antrobus (*Antrobus I*), 519 F.3d 1123, 1127 (10th Cir. 2008).
110. *Antrobus I*, 519 F.3d at 1123.
111. *Id.* at 1124.
112. *Id.* at 1124, 1126.

C. THE RIGHTS OF FRAUD VICTIMS TO ALLOCUTE IN THE ADVERSARIAL SYSTEM

The lack of debate on the enforcement provision in the CVRA makes it particularly troubling that certain appellate courts are now expanding the use of the writ of mandamus in unusual ways to augment the rights of financial fraud victims to allocution.[113] While the CVRA gives courts the ability to fashion appropriate procedures for allocution when there are multiple crime victims,[114] appellate courts are decreasing the district court's discretion by employing a unique regime for the writ of mandamus.[115] This section argues that although fraud victim allocution does serve a beneficial purpose, judicial economy and potential constitutional concerns require that district courts have the power to limit victims' rights when appropriate.

1. The Benefits of Allocution

Crime victims' rights to allocution are beneficial to both the victim and the court.[116] Victim allocution provides information to the sentencer,[117] benefits the victim by providing an outlet for anger and grief,[118] gives the defendant an opportunity to understand the impact of his crime,[119] and improves society's perception of sentencing.[120] Additionally, allocution is a tool to (1) empower the victim, (2) educate the defendant, and (3) inform the court.[121]

These arguments for a victim's right to allocution apply just as forcefully to fraud victims as to victims of violent crimes.[122] In cases of federal fraud, judges would be aided by

113. *See, e.g.*, Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal. (*Kenna I*), 435 F.3d 1011, 1017 (9th Cir. 2006).

114. *See* 18 U.S.C. § 3771(d)(2) (2006).

115. *See, e.g.*, *Kenna I*, 435 F.3d at 1017.

116. *See* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 619–25 (2009) (discussing justifications for victim impact statements).

117. *See* PRESIDENT'S TASK FORCE, *supra* note 34, at 76–77 ("A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim.").

118. *See* Cassell, *supra* note 116, at 621 ("[E]ven if a victim has nothing to say that would directly alter the court's sentence, a chance to speak still serves important purposes. . . . '[Victim] allocution is both a rite and a right.'" (quoting United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349 (D. Utah 2005))).

119. *Id.* at 624.

120. *Id.*

121. Giannini, *supra* note 34, at 444.

122. *See* Barnard, *supra* note 9, at 57.

understanding the severity of the defendant's crimes.[123] Strong evidence also exists that victims of financial crimes would reap benefits from allocution in the form of public acknowledgement of their pain.[124] As seen by the victims' intense desire to allocute at Madoff's hearings and the response of Judge Chin, the allocution of these fraud victims was instrumental in Madoff's sentencing.[125] The diverse benefits of victim allocution, however, must be weighed against the potential harms of unlimited victim allocution to the defendant and to the court.

2. The Harms of Allocution to Defendants

While a victim's right to allocution has broad benefits, it is not without potential drawbacks. Importantly, the constitutional rights of defendants must supersede the statutory right of fraud victims to allocute.[126] First, a victim's right to allocution could arguably interfere with a defendant's right to due process. Notably, courts recognize that victim statements must not unduly prejudice the defendant or cause confusion for the judge.[127] "Information overload may . . . lead to unfair sentencing. As the amount of information and the number of people testifying at a sentencing hearing increases, so does the risk of unjust punishment."[128] The manner in which victims allocute may also unduly influence a judge; overly passionate words or images that are presented by a victim may lead to harsher sentencing by the judge. Therefore, courts must be wary of any system of allocution that could prejudice courts against the defendant and undermine his right to due process.

Second, allocution by victims may raise Confrontation Clause concerns. Defendants will argue that they have a right under the Sixth Amendment's Confrontation Clause to chal-

123. *See id.* at 62.

124. *See id.* at 52.

125. *See* Barnard, *supra* note 4 ("[T]he nine victims who spoke, and the scores of others in the courtroom, had a powerful impact on the judge. In entering the sentence, he re-told the story of one victim, a recent widow, who had gone to Madoff's office to thank him for looking out for her family's funds. 'You're safe,' Madoff assured her. Judge Chin also noted the thousands of 'life decisions'—about retirement, college savings, health care for parents, and where and how to live—victims had made in reliance on Bernie Madoff.").

126. *See generally* Barkow, *supra* note 23, at 1012 (discussing the threat of legislation violating the constitutional rights of defendants).

127. *See, e.g.*, State v. Muhammad, 678 A.2d 164, 176 (N.J. 1996).

128. Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 223 (1995).

lenge the veracity of a victim's statement.[129] Indeed, many questions arise with respect to a defendant's right to challenge a victim's statement. It is important to determine whether the defendant has a right to cross-examine a victim who makes an oral statement.[130] Additionally, issues abound about whether the defendant would have an opportunity to challenge evidence that is proffered by the victim or to give a rebuttal.[131] As such, the information provided by the victim during allocution may raise both due process and Confrontation Clause issues.

3. The Harms of Allocution to the Judicial System

In addition to the constitutional concerns raised by allocution, unlimited victim allocution, especially in crimes involving financial fraud, has drawbacks for the judicial system. Specifically, in financial fraud cases there are often many victims, and therefore, the right to allocution is likely to result in repetitive statements.[132] Additionally, allowing many victims to allocute will take substantial time to complete.[133] Victims may have similar stories to espouse, and they may present evidence that is duplicative of that which was already received during trial.[134] Judicial economy requires that the court be allowed to limit the number of victims that can allocute and the manner in which they can allocute in these cases.

Overall, the plain meaning of the CVRA and the congressional history surrounding its passage support the conclusion that Congress meant to impose the traditionally high standard of review on petitions for mandamus under the CVRA. Even with that congressional history, however, courts divide on whether victims' rights should create a unique regime in which fraud victims would enjoy a lower standard of review for their rights to allocution. While there are strong arguments that

129. David E. Aaronson, *New Rights and Remedies, The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 658 (2008); *see also* Crawford v. Washington, 541 U.S. 36, 64–65 (2004) (suggesting that allocutions are testimonial in nature and therefore implicate the Sixth Amendment's Confrontation Clause).

130. JEFRI WOOD, FED. JUDICIAL CTR., THE CRIME VICTIMS' RIGHTS ACT OF 2004 AND THE FEDERAL COURTS 8 (2008), http://www.fjc.gov/public/pdf.nsf/lookup/cvra0806.pdf/$file/cvra0806.pdf.

131. *Id.*

132. *See* Barnard, *supra* note 9, at 65 ("[R]equiring a court to entertain the testimony of an economic victim or a group of victims will inevitably take up some scarce court time.").

133. *Id.*

134. *Id.* at 66.

support victim allocution, the potential for harm to the defendant and the judicial system require a clearer standard of review. In the current moment of widespread financial fraud, Congress should amend the CVRA to more clearly identify the rights of fraud victims to allocute—as well as the rights of the court to limit such allocution.

III. AMENDING THE CVRA TO CREATE MORE REASONABLE PROCEDURES FOR FRAUD VICTIMS' ALLOCUTION

The current articulation of the CVRA attempts to address the potential problems of allocution by including language that allows courts to create "reasonable procedure[s]" to ensure victims' rights without complicating or prolonging the judicial proceedings when there are multiple victims.[135] Appellate courts are not giving full effect to this deferential language. For instance, the Ninth Circuit in *Kenna* disregarded this language by employing a "unique regime" for the writ of mandamus and using its power to force the district court to allow allocution for the victims.[136]

Given the potential drawbacks of unlimited allocution, this Part proposes that Congress amend the CVRA to specify the contours of victims' rights to allocution.[137] Specifically, this Part outlines an amendment to the CVRA in which fraud victims would have the right to allocute, but which also more clearly identifies the right of the district court to limit fraud victims' allocution. This Part also contends that the CVRA should identify that a judge's decision with regard to fraud victim allocution should only be subject to the traditionally high standard of mandamus review on appeal.

A. THE NEED FOR CONGRESSIONAL DEBATE AND DISCUSSION ON VICTIMS' RIGHTS

According to the founders, the role of Congress and the reason for a representative form of government is "to refine and

135. 18 U.S.C. § 3771(d)(2) (2006); *see* Giannini, *supra* note 34, at 456.

136. Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal. (*Kenna I*), 435 F.3d 1011, 1017 (9th Cir. 2006).

137. Indeed, studies of the CVRA since its enactment show that while it has some effect, a better enforcement mechanism is essential to its success. *See* DEAN G. KILPATRICK ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 1 (1998), *available at* http://www.ncjrs.gov/pdffiles/173839.pdf.

enlarge the public views."[138] Congress's deliberative role is meant to create legislation through a process of argumentation and debate, in which weak ideas are disposed of and only those ideas that garner enough support are able to survive.[139]

With regard to the current articulation of the CVRA, this process utterly failed. The role of Congress as the locus of national debate, combined with the lack of clarity under the CVRA, shows that Congress must revisit this issue. This deliberative body must fully consider the practical implications of including victims' rights in the courtroom. Only through this process will crime victims, courts, and the country gain a real understanding of what role nonparty victims should play in the criminal justice system.[140]

It is important that Congress remain in control of these changes to the CVRA. Even though this issue manifests itself in a circuit split, the Supreme Court is not the appropriate forum to determine the proper role of crime victims to allocute. First, judges must focus on the case in front of them.[141] Accordingly, judges should not be put in the position of de facto policy makers by framing the policy implications of the broad rights of crime victims. Second, judges are not immune from the social and political pressures that might attend controversial cases.[142] Even where judges act with the greatest impartiality, there is a risk that the perception of siding with victims' rights can undermine the proceedings and lead to a prejudicial effect on the defendant.[143] Thus, leaving the important question of the nature, extent, and ability to enforce victims' rights with an uncertain judiciary may result in judges with agendas setting the national rules regarding the rights of crime victims.

138. THE FEDERALIST No. 10, at 21 (James Madison) (Roy P. Fairfield ed., 1981).

139. *See* George E. Connor & Bruce I. Oppenheimer, *Deliberation: An Untimed Value in a Timed Game*, *in* CONGRESS RECONSIDERED 315, 317–18 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993).

140. *Id.*

141. *See* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1189 (2005).

142. *Id.*

143. *Id.*

B. SUBTLY LIMITING THE ROLE OF ALLOCUTION IN FRAUD CASES

Given the potential problems of unlimited victim allocution during fraud cases, Congress should amend the CVRA to explicitly state the rights of fraud victims to allocute—and the rights of the court to end such allocution. Under a revised version of the CVRA, a judge could still create a "reasonable procedure" to ensure fraud victims' the right to allocute without complicating or prolonging the judicial proceedings when there are multiple victims.[144] As such, under the statute, victims would realize the benefits of allocution at the trial court level, including providing information to the judge and using the process as a cathartic release.

The existence of a reasonable procedure, however, has proven to be an insufficient safeguard. In *Kenna*, the appellate court all but ignored the ability of the district court to fashion reasonable procedures and granted the victims the writ of mandamus using a new, lower standard of review.[145] Therefore, the newly amended CVRA should recognize the need for district court judges to maintain control over the courtroom and protect the constitutional rights of defendants. As such, the statute should state that judges may justifiably limit the rights of fraud victims to allocute if their allocution threatens the constitutional rights of defendants or provides duplicative evidence that burdens the judicial resources of the court. This statutory language would give judges more latitude to create reasonable procedures by giving them sensible reasons to limit the rights of fraud victims to allocute.

Additionally, under the revised statute, victims should still have the right to petition the court for a writ of mandamus, but the appellate court would be required to review such a petition using the traditionally high standard for mandamus. This higher standard of review is appropriate for two reasons. First, as previously discussed, there is no evidence that Congress intended to create a unique regime for mandamus review under the CVRA. Therefore, it is inappropriate for courts to unilaterally alter the traditional writ. Second, judicial economy and defendants' constitutional rights require that fraud victims' rights to allocute be limited, if necessary. In fraud cases, the

144. 18 U.S.C. § 3771(d)(2) (2006); *see also* Giannini, *supra* note 34, at 456.

145. *See* Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal. (*Kenna I*), 435 F.3d 1011, 1017 (9th Cir. 2006).

number of victims is often substantial, giving rise to repetitive evidence that a judge should be able to limit at his discretion. As such, there is strong evidence that appellate court review of mandamus petitions for fraud victim allocution should be limited to the traditionally high standard of review.

Congress should amend the CVRA in a manner that provides victims with rights while championing the constitutional protections of the defendant and working within the adversarial system. Amending the CVRA to outline explicitly the rights of fraud victims to allocute and giving district courts more latitude to fashion reasonable procedures provides a workable solution. Such an amendment is urgent given the current state of the economy and the plethora of financial fraud cases. Now is the moment that Congress must clearly delineate the role of crime victims in federal fraud cases—the proposed amendment to the CVRA clearly accomplishes this goal.

CONCLUSION

The economic collapse of 2008 witnessed the greatest explosion of financial fraud cases in recent memory. Madoff's victims—as well as the victims of the thousands of other Ponzi schemes—often employ their rights under the CVRA to allocute during a defendant's sentencing hearing. Unfortunately, the rights of fraud victims to allocute and the ability of the judge to fashion reasonable procedures is ambiguous under the CVRA. The current circuit split as to the proper standard of appellate review highlights this uncertainty as courts wrestle with whether victims' rights to allocution should be absolute or whether the district court truly has the power to fashion such reasonable procedures as it deems fit.

The benefits of allocution are well known, but the constitutional rights of defendants as well as the judicial economy of the court must temper victims' rights to allocution. Past congressional action on this issue has failed to capture the controversies that are inherent in this problem. Congress must act to amend the CVRA to delineate explicitly the rights of fraud victims to allocute and the rights of judges to maintain control over their courtrooms. Congress must articulate victims' rights to allocute, but it must temper those rights by clearly identifying a court's right to limit allocution. Given the current economic environment and the large number of financial fraud cases, it is imperative that Congress act to clarify the rights of fraud victims to allocute within the criminal justice system.