

## PROTECTING CRIME VICTIMS IN FEDERAL APPELLATE COURTS: THE NEED TO BROADLY CONSTRUE THE CRIME VICTIMS' RIGHTS ACT'S MANDAMUS PROVISION

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### INTRODUCTION

In 2004, Congress passed the Crime Victims' Rights Act ("CVRA" or "Act")<sup>1</sup> to dramatically reshape the federal criminal justice system and ensure that crime victims are treated fairly in the criminal process. The Act created a "broad and encompassing" victims' bill of rights,<sup>2</sup> guaranteeing victims (among other things) the rights to notice of court hearings, to attend those hearings, and to be heard at particular hearings, such as plea and sentencing hearings. Congress intended for these rights to give victims the opportunity to participate in criminal justice proceedings, protect their interests, and shape the outcome of those proceedings.<sup>3</sup>

An important feature of the CVRA is its provisions allowing victims to enforce their rights not only in trial courts, but also in appellate courts. Among the enforcement provisions is one guaranteeing a crime victim expedited access to appellate review. The CVRA provides that if the district court denies any relief sought by a crime victim, the victim "may petition the court of appeals for a writ of mandamus. . . . The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed."<sup>4</sup> In enacting this provision, Congress sought to give crime victims genuine rights at all stages in the criminal justice process. As one of the CVRA's co-sponsors explained, "[W]ithout the ability to enforce the [victims'] rights in the criminal trial and *appellate* courts of this country any rights afforded are, at best, rhetoric."<sup>5</sup>

The CVRA's appellate review provision appeared to provide crime victims the same sort of appellate protections as all other litigants—as several courts of appeals have held in reviewing crime victims' petitions.

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1. Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261–62 (2004) (codified as amended at 18 U.S.C. § 3771 (2006)).

2. 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

3. *Id.* at S4263.

4. 18 U.S.C. § 3771(d)(3).

5. 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

Unfortunately, in a recent decision the Tenth Circuit parted company with those other circuits and eviscerated the appellate protections promised to crime victims. In *In re Antrobus*,<sup>6</sup> the Tenth Circuit rejected carefully reasoned decisions from the Second and Ninth Circuits and held that crime victims could only obtain appellate relief if they show that the district court had made a “clear and indisputable” error.<sup>7</sup> The Tenth Circuit believed that, when Congress used the term “mandamus” in the CVRA, it meant to drastically restrict the ability of appellate courts to give crime victims’ relief.<sup>8</sup> The Tenth Circuit’s demanding standard means that, as a practical matter, it will be very difficult (if not impossible) for many crime victims to overturn erroneous decisions of district courts, particularly given that crime victims’ rights law is a new and evolving field in which “indisputable” errors may be hard to prove.

This Article critiques the Tenth Circuit’s *Antrobus* decision, arguing that the Second and Ninth Circuits got it right and the Tenth Circuit simply got it wrong. When victims of crime are denied relief in the district court, they should receive the same sort of appellate protections as other litigants. This increased protection is what the language of the CVRA clearly provides and what Congress plainly intended.

This Article proceeds in three parts. Part I explains the factual background surrounding *Antrobus*. Kenny and Sue Antrobus lost a motion to have their daughter, Vanessa Quinn, recognized as a protected “crime victim” under the CVRA. Thereafter, despite four separate trips to the Tenth Circuit, they were unable to secure a meaningful review of that decision or release of the government’s evidence on the issue. The difficulties Kenny and Sue Antrobus faced in securing appellate protection of their rights will usefully frame the question of how the CVRA should be construed.

In Part II, the Article turns to the background leading up to Congress’s enactment of the CVRA. The CVRA arose out of Congress’s frustration with inadequate protection of crime victims’ rights, in both the trial and appellate courts. Congress designed the CVRA to give victims meaningful and enforceable rights—rights that were to be protected throughout the federal court system.

Part III of the Article then discusses the merits of the Tenth Circuit’s analysis in *Antrobus*. Contrary to the Circuit’s position, the plain language of the CVRA—requiring appellate courts to “take up and decide” crime victims’ petitions—does not mean that crime victims are limited to discretionary mandamus review of their claims, but rather, indicates that crime victims are entitled to ordinary appellate review.

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6. 519 F.3d 1123 (10th Cir. 2008).

7. *Id.* at 1130–31.

8. *Id.* at 1127–30.

Congress did not merely import discretionary mandamus standards into the CVRA, but instead, plainly changed those standards to forge an effective and mandatory appellate remedy for violations of victims' rights. Moreover, the legislative history of the CVRA clearly demonstrates that Congress wanted crime victims to have ordinary appellate review of their claims. The CVRA's legislative history is replete with statements from the legislation's sponsors that the law would require appellate courts to "broadly defend" crime victims' rights and "remedy errors" of lower courts. The Tenth Circuit's crabbed construction of the Act clashes directly with Congress's stated purposes.

The Article concludes by suggesting that the Tenth Circuit should, at the next opportunity, reconsider its position en banc and follow the prevailing view in the courts of appeals. If the Tenth Circuit will not, then the Supreme Court should review the circuit split that the Tenth Circuit's decision created, and side with those circuits that have given crime victims the full measure of protection that Congress intended.

#### I. THE ANTROBUSES' QUEST TO GIVE A VICTIM IMPACT STATEMENT

The Antrobuses' efforts to give a victim impact statement at the sentencing of the man who sold the gun used to murder their daughter produced long and complicated litigation. The history of the litigation is worth recounting, however, because it shows both the importance of victims having effective appellate review of their claims and the difficulties that have arisen in the Tenth Circuit in providing such review. Remarkably, despite four different trips to the Tenth Circuit, the Antrobuses were unable to have the circuit review a district court ruling against them.

##### A. The Issue: Was Vanessa Quinn a "Crime Victim" Protected by the CVRA?

The underlying issue in the *Antrobus* litigation was whether Vanessa Quinn was a protected "crime victim" pursuant to the CVRA. Mackenzie Hunter committed a crime in the summer of 2006, when he illegally sold a handgun to Sulejman Talovic, a juvenile.<sup>9</sup> As Hunter well knew, Talovic could not lawfully possess a handgun because he was a juvenile. In fact, it appears Talovic asked Hunter to obtain the gun for him because he (Talovic) was blocked from buying one. About six months later, on February 12, 2007, Talovic entered the Trolley Square Shopping Center in Salt Lake City, Utah. In the largest mass murder in recent Utah history,<sup>10</sup> Talovic used the handgun and a 12-gauge shotgun

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9. *Id.* at 1124.

10. To qualify "recent" is necessary, because the Mountain Meadows Massacre occurred in Utah in 1857. See generally JUANITA BROOKS, THE MOUNTAIN MEADOWS MASSACRE 69 (Univ. of Okla. Press 1991) (1950); RONALD W. WALKER ET AL., MASSACRE AT MOUNTAIN MEADOWS (2008). The massacre left 120 persons dead, and was probably the largest mass murder in United States history until the Oklahoma City bombings in 1995 and the 9/11 attacks in 2001.

to kill five people and seriously injure four others. A bullet from the handgun Hunter had illegally sold to Talovic killed Vanessa Quinn, daughter of Kenny and Sue Antrobus.<sup>11</sup>

On May 16, 2007, a federal grand jury returned a two-count felony indictment against Hunter: Count I charged him with being a drug user in possession of a firearm,<sup>12</sup> and Count II charged him with unlawful transfer of a firearm to a juvenile with knowledge or reason to know that it would be used in a violent crime.<sup>13</sup> Plea negotiations ensued, and on November 5, 2007, Hunter entered guilty pleas pursuant to a plea agreement. Hunter pled guilty to Count I (drug user in possession of a firearm) and a newly filed misdemeanor criminal charge, alleging unlawful transfer of a firearm to a juvenile (without any allegation about knowledge that the gun would be used in a crime of violence).<sup>14</sup> Under the plea agreement, the Justice Department agreed to move to dismiss the original Count II at the time of sentencing. After entry of the pleas, the district court set sentencing for January 14, 2008.

About a month later, on December 13, 2007, having secured pro bono legal counsel,<sup>15</sup> the Antrobuses filed a motion requesting that the district court recognize their daughter, Vanessa Quinn, as a “crime victim” and the Antrobuses as her representatives under the CVRA.<sup>16</sup> Their motion noted that the indictment charged Hunter with illegal sale of a firearm with knowledge that it would be used to commit a crime of violence. The motion further alleged that, based on an article in the *Salt Lake Tribune* newspaper, Talovic told Hunter that he wanted the handgun to rob a bank. Based on the indictment and the bank robbery discussion, the Antrobuses asked that their daughter be recognized as a “crime victim” under the CVRA.

The CVRA defines a “crime victim” as “a person *directly and proximately* harmed as a result of the commission of a Federal offense.”<sup>17</sup> The Antrobuses argued that there could be no doubt that Vanessa was “directly” harmed when a bullet from the gun Hunter illegally sold to Talovic killed her. The Antrobuses also argued it was clear that this harm was “proximately” caused by Hunter’s crime. Not only did

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11. United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125, at \*1 (D. Utah Jan. 3, 2008); Petition for a Writ of Mandamus Regarding Discovery Issues Pursuant to the Crime Victims’ Rights Act, 18 U.S.C. § 3771(d)(3), at 5, *In re Antrobus*, No. 08-4013 (10th Cir. Jan. 25, 2008).

12. See 18 U.S.C. § 922(g)(3) (2006).

13. See *id.* §§ 922(x)(1)(A), 924(a)(6)(B)(ii).

14. See *id.* §§ 922(x)(1), 924(a)(6)(B)(i).

15. In the interests of full disclosure, I served as lead counsel for the Antrobuses’ legal team in the litigation described in this article.

16. Memorandum in Support of Sue and Ken Antrobus’ Motion to Have Vanessa Quinn Recognized as a Crime Victim, to be Recognized as Her Representative, to Make an In-Court Victim Impact Statement, and to Receive Restitution at 2–3, United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125 (D. Utah Jan. 3, 2008).

17. 18 U.S.C. § 3771(e) (2006) (emphasis added).

Hunter make his illegal sale directly to Talovic, but he specifically foresaw Talovic using the gun to commit a violent crime. That the foreseen crime was a bank robbery, rather than a mass murder, was of no consequence. The Antrobuses explained that the tragic death of Vanessa Quinn (among others) was precisely what Congress intended to prevent by prohibiting illegal trafficking of guns. The Antrobuses, therefore, urged the district court to recognize Vanessa as a “victim” of the defendant’s crime under the CVRA. As her representatives under the CVRA,<sup>18</sup> they sought to deliver a victim impact statement at sentencing, receive restitution for unreimbursed funeral expenses, and express their objections to the dismissal of Count II. Neither Hunter nor the United States filed objections to these motions.

Nonetheless, on January 3, 2008, the district court denied the Antrobuses’ CVRA motion, holding that Hunter’s crime was “too factually and temporally attenuated” from the death of Vanessa Quinn to recognize her as a “victim” of the crime.<sup>19</sup> The district court acknowledged that the Antrobuses had referred to a discussion between Hunter and Talovic about a bank robbery, but deemed this statement “general speculation.”<sup>20</sup> “This type of speculation,” the court concluded, “does not demonstrate the type of knowledge or foreseeability necessary to finding Hunter’s sale of the firearm to a minor to be the proximate cause of Quinn’s death.”<sup>21</sup> Accordingly, the district court held that Vanessa Quinn was not a “victim” of Hunter’s illegal sale of the handgun used to murder her and, therefore, that Vanessa had no rights under the CVRA for the Antrobuses to assert. The district court also denied the Antrobuses’ motion to gain access to information (including an ATF Report) about what Hunter and Talovic had discussed during the sale of the gun.

In one last rebuff of the Antrobuses, the district court further declined to exercise its discretion at sentencing to briefly hear the Antrobuses for even a few minutes. The Antrobuses made the alternative argument that, even if their daughter did not technically fall within the protections of the CVRA, the district court should nonetheless allow them to present a brief victim impact statement at sentencing.<sup>22</sup> The district court, however, while conceding it had authority to hear from the Antrobuses about the murder of their daughter, declined to use its discre-

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18. For deceased victims, the CVRA allows a “representative” to assert the victim’s rights. *See id.* § 3771(b)(2)(D).

19. *Hunter*, 2008 WL 53125, at \*4.

20. *Id.*

21. *Id.* at \*5.

22. The reasons why the Antrobuses wanted to give a victim impact statement are discussed in Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 617–18 (2009).

tionary authority to hear from them because it had “an adequate understanding” of their views.<sup>23</sup>

*B. The Tenth Circuit Erects a Barrier to Review of Victims’ Claims that Fall Short of a “Clear and Indisputable” Error*

Having been stymied by the district court, the Antrobuses sought appellate review of the “crime victim” decision by the district court. They did so by filing a writ of mandamus, the procedural device spelled out in the CVRA.<sup>24</sup> Once again, the Justice Department did not object to the Antrobuses’ petition. Defendant Hunter objected, but only on the ground that the Antrobuses’ factual representations below were not sufficiently substantiated.<sup>25</sup>

The Tenth Circuit denied the Antrobuses’ petition.<sup>26</sup> The court began by stating that it would not follow decisions from the Second and Ninth Circuits, which held that a CVRA mandamus petition provides crime victims with ordinary appellate review.<sup>27</sup> Instead, the court held that the Antrobuses would have to meet a very demanding standard of showing “that their right to the writ is ‘clear and indisputable.’”<sup>28</sup> The court reasoned that Congress had only authorized crime victims to file a “writ of mandamus,” thereby importing with that phrase “traditional mandamus standards” that permit relief “only in extraordinary situations.”<sup>29</sup> Even proceeding on that basis, the court conceded that the case was a “difficult” one.<sup>30</sup> Nonetheless, the court could not “say that the Antrobuses’ right to the writ is clear and indisputable,”<sup>31</sup> because it was not “clear and indisputable” that Vanessa Quinn was a foreseeable victim of Hunter’s criminal firearms sale.<sup>32</sup>

The majority opinion for the court noted that “[o]ne might question whether, with additional discovery, the Antrobuses might have been able to determine whether, in fact, Mr. Hunter knew about Talovic’s intentions and what such knowledge might mean for the foreseeability to Mr. Hunter of Talovic’s crimes.”<sup>33</sup> The concurring opinion from Judge

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23. *Hunter*, 2008 WL 53125, at \*6.

24. 18 U.S.C. § 3771(d)(3) (2006).

25. See Mackenzie Glade Hunter’s Response to Petition for Writ of Mandamus Regarding Discovery Issues Pursuant to the Crime Victims’ Rights Act, 18 U.S.C. § 3771(d)(3) at 2–3, *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (No. 08-4013).

26. *Antrobus*, 519 F.3d at 1126.

27. *Id.* at 1124 (citing *Kenna v. U.S. Dist. Court for Cent. Dist. of Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005)).

28. *Id.* at 1124 (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam)).

29. *Id.* at 1124–25 (internal quotation marks omitted) (quoting *Allied Chem. Corp.*, 449 U.S. at 34–35).

30. *Id.* at 1125.

31. *Id.* at 1126 (internal quotation marks omitted) (quoting *Allied Chem. Corp.*, 449 U.S. at 35).

32. See *id.* at 1125 n.1, 1126.

33. *Id.* at 1125 n.1.

Tymkovich went even further, adding: “In my view, the district court and the government erred in failing to permit the Antrobuses reasonable access to evidence which could support their claim.”<sup>34</sup> The court, however, declined to address the discovery issues, finding that those issues were not raised in the immediate proceeding.

On January 25, 2008, the Antrobuses filed a petition for panel rehearing with suggestion of rehearing en banc. On March 14, 2008, the panel denied the petition, adhering to the “clear and indisputable” standard for conventional mandamus review.<sup>35</sup> In doing so, the panel added additional explanation for its holding. The panel began by stating that the term “[m]andamus is a well worn term of art in our common law tradition.”<sup>36</sup> The panel then reasoned that:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.<sup>37</sup>

In view of the fact that the conventional standard of review for mandamus petitions is “clear and disputable” error, the panel concluded that the same standard of review was appropriate for CVRA petitions. The panel also decided that it had properly applied the standard in rejecting the Antrobuses’ petition. Accordingly, the panel declined to grant a rehearing. The panel also rejected the Antrobuses motion to consolidate the mandamus petition with a parallel appeal that the Antrobuses had filed (discussed in the next section).<sup>38</sup> The petition for rehearing en banc was denied at the same time.

### *C. The Sentencing of Hunter and the Antrobuses’ Efforts to Obtain Information About Plans for a Bank Robbery*

While their petition for rehearing was pending with the Tenth Circuit, the Antrobuses renewed their efforts in the district court to obtain proof of the bank robbery discussion between Hunter and Talovic. On the morning set for sentencing, January 14, 2008, the Antrobuses filed a motion for reconsideration of the district court’s earlier denial of their motion for production of the ATF Report. On that afternoon, however, the district court denied their motion in a written order, on the basis that

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34. *Id.* at 1126 (Tymkovich, J., concurring).

35. *See id.* at 1130.

36. *Id.* at 1127.

37. *Id.* at 1127–28 (internal quotation marks omitted) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

38. *See infra* note 70.

the Justice Department had already certified that it had no such information. The district court stated:

The government previously informed the court that it did not possess any information relevant to Hunter's foreseeability of Talovic's subsequent crime. There remains no basis for this court to question the government's position, and this court will not entertain repeated motions on the same issues, when the effect of those motions [is to] delay a sentencing that is set to proceed.<sup>39</sup>

Later that afternoon, having concluded that the Justice Department possessed no information "relevant" to Hunter foreseeing any crime committed by Talovic, the district court held a sentencing hearing for Hunter. At the hearing, counsel for the Antrobuses first requested that the Justice Department clarify whether the district court's written order was correct in stating that the Department "did not possess any information relevant to Hunter's foreseeability" of misuse of the gun in *any* violent crime—not just the Trolley Square massacre.<sup>40</sup> The following exchange ensued:

Antrobuses' counsel: "The sentence in the Court's order seems to suggest that the government has indicated it has no information regarding the use of the gun in *any* subsequent crime of violence. If that's correct, we need to know that. If it's not—"

Court: "That's my understanding. That's my understanding. Do you want to say anything about that or not?"

Assistant United States Attorney: "Judge, I'd rather not. I think we have built a record. We have made representations."

Court: "The record is the record."<sup>41</sup>

The court then adhered to its position. Thus, based on its understanding that the Justice Department had no information that Hunter knew that Talovic would use the gun in *any* subsequent violent crime, the district court rejected the Antrobuses' efforts to have Vanessa Quinn recognized as a "victim" of Hunter's crime under the CVRA. The district court then proceeded to sentence Hunter without giving the Antrobuses a chance to make a victim impact statement, as would be their right had Vanessa been a "victim" under the CVRA.

On January 25, 2008, the Antrobuses filed a mandamus petition with the Tenth Circuit to compel the Justice Department to turn over documents, including the ATF Report, that would prove Talovic and

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39. United States v. Hunter, No. 2:07CR307DAK, 2008 WL 153798, at \*1 (D. Utah Jan. 14, 2008).

40. Transcript of Sentencing Proceedings at 5, *Hunter*, 2008 WL 153798.

41. *Id.* at 5–6.

Hunter had discussed a bank robbery. After ordering responses, the Tenth Circuit denied the petition—again noting that it had previously established a demanding standard of “clear and indisputable” error review.<sup>42</sup> The basis for the denial appeared to be that the Department had promised to file relevant portions of the ATF Report under seal with the district court and would have no objection to release of the document to the Antrobuses, thereby rendering the Antrobuses’ mandamus petition moot.<sup>43</sup>

Back in the district court, on February 7, 2008, the Justice Department gave notice that it had “filed” the ATF Report under seal.<sup>44</sup> The next day, the Antrobuses filed an *unopposed* motion for release of the redacted ATF Report with the district court. Remarkably, however, even without opposition, on March 17, 2008, the district court tersely denied the motion. The district court stated that although the motion was unopposed, it had not been stipulated to by the Government. The court further stated: “While the court recognizes that it may have discretion to disclose the ATF Report, the court is unwilling to create such a precedent to individuals who are attempting to establish their status as victims of a given offense.”<sup>45</sup>

On March 28, 2008, the Antrobuses filed a motion for reconsideration of the district court’s denial of their unopposed motion for release of the ATF Report. The Antrobuses contended that because the Justice Department had filed the documents under seal, it was obligated to provide “good cause” for the sealing under the court’s local rules, which strictly limit what documents can be filed under seal.<sup>46</sup> The Antrobuses further argued that release of the document was required to correct the record in the case because the district court had previously ruled based on the belief that the Justice Department had no information in its files regarding a bank robbery discussion between Talovic and Hunter, when in fact there had been such a discussion—a fact that the Justice Department well knew.

On April 21, 2008, the district court denied the motion for reconsideration. The court stated briefly that the Government “did not file the documents” but merely provided them for *in camera* review.<sup>47</sup> Accordingly, the requirements of the local rules were “inapplicable” and nothing

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42. *In re Antrobus*, No. 08-4013, slip op. at 3, 10 (10th Cir. Feb. 1, 2008).

43. *Id.* at 9 n.2.

44. Notice of Sealed Documents Submitted for *in Camera* Review, *United States v. Hunter*, No. 2:07CR307DAK (D. Utah Feb. 7, 2008). The Report was actually submitted for *in camera* review. *See infra* note 49.

45. *United States v. Hunter*, No. 2:07CR307DAK, slip op. at 2 (D. Utah Mar. 17, 2008).

46. D. UTAH CIV. R. 49-2(b).

47. *United States v. Hunter*, No. 2:07CR307DAK, slip op. at 1 (D. Utah Apr. 21, 2008).

in the Antrobuses' motion persuaded the court to alter its previous ruling.<sup>48</sup>

*D. The Antrobuses' Unsuccessful Parallel Appeal*

Meanwhile, the Antrobuses continued to press for appellate vindication of their right to give a victim impact statement by a separate procedural vehicle—an appeal to the Tenth Circuit of the district court's decision denying their motion to be recognized as the victim's representatives. After the Antrobuses' timely notice of appeal, the Justice Department filed a motion to dismiss for lack of jurisdiction. The Tenth Circuit ordered full briefing on the jurisdictional question and the merits, and the Antrobuses filed their opening brief on May 29, 2008. Two months later, the Justice Department filed its response brief.<sup>49</sup> For the first time, the Justice Department admitted, in a public record, that Talovic had told Hunter while the sale was being negotiated that he wanted the gun to rob a bank. The Justice Department's Statement of the Facts recounted that "Hunter asked Talovic why he wanted a gun, and Talovic said something to the effect that he wanted a gun to use to rob a bank."<sup>50</sup> The underlying basis for that particular recounting of the facts was apparently the ATF Report the Antrobuses had long been seeking, as that specific recitation of the facts did not appear anywhere else in the public record of the case. Curiously, the Justice Department did not include a citation for that sentence in its brief, in contrast to other parts of its statement of facts, and declined to provide the Antrobuses' counsel with any further information about the source of the statement.

Simultaneously with filing its brief in the Tenth Circuit, the Justice Department filed a motion to lodge the ATF report under seal, attaching the ATF Report.<sup>51</sup> The motion stated that the Justice Department was lodging the ATF Report with the Tenth Circuit "in the interest of completeness."<sup>52</sup> The Antrobuses promptly filed an objection to the filing of a sealed document, noting that the Justice Department had failed "to pro-

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48. *Id.* In arguing that the documents had been "filed" with the District Court, the Antrobuses had been relying on a statement made by the Justice Department describing its submission. Yet, on May 30, 2008, after the time for challenging the District Court's ruling in the Tenth Circuit had expired, the Justice Department belatedly filed an "amended notice" regarding the sealed documents. This notice stated that the Government had "inadvertently used the word 'filed' to describe submission of documents for *in camera* review." Amended Notice of Sealed Documents Submitted for *in Camera* Review at 1, *United States v. Hunter*, No. 2:07CR307DAK (D. Utah May 30, 2008).

49. See Brief for the United States, *United States v. Hunter*, 548 F.3d 1308 (10th Cir. 2008) (No. 08-4010).

50. *Id.* at 13 (emphasis added).

51. Motion for Leave to Lodge Under Seal For ex Parte in Camera Review Non-Recorded Documents Submitted to the District Court ex Parte and Under Seal for Its in Camera Review at 1-2, *Hunter*, 548 F.3d 1308 (No. 08-4010).

52. *Id.* at 2. The Justice Department did not disclose that the Antrobuses, through counsel, had been strenuously urging the Department to release the ATF Report as part of its ethical obligation of candor to the court.

vide any justification for [the] sealing.”<sup>53</sup> The Justice Department filed a reply to this objection, stating that until the Tenth Circuit determined that it had jurisdiction, it could not act on the Antrobuses’ objection.<sup>54</sup> In any event, the Justice Department argued that the Privacy Act provided a basis for sealing the document<sup>55</sup>—apparently concluding that the privacy interests of a deceased mass murderer came ahead of the Antrobuses’ interests in learning everything they could about how their daughter was killed.<sup>56</sup>

On September 2, 2008, the Antrobuses filed a motion for remand in light of newly revealed evidence in the government’s files.<sup>57</sup> The Antrobuses explained that the Government’s admission in its response brief was the first public disclosure of the bank robbery conversation between Talovic and Hunter. Because this critical and potentially dispositive fact had been previously concealed, the Antrobuses argued, a remand to permit the district court to consider the evidence was appropriate.

Following oral argument, on December 2, 2008, the Tenth Circuit dismissed the Antrobuses’ appeal.<sup>58</sup> The court concluded that “neither our case law nor the CVRA provide for non-parties like the Antrobuses to bring a post-judgment direct appeal in a criminal case.”<sup>59</sup> The court noted that the CVRA provides for mandamus review of denials of crime victims’ rights, but does not explicitly provide crime victims a right to appeal. Based on this fact, the court reasoned “[t]hat the [fact the] CVRA does not provide for victim appeals is consistent with the well-established precept that ‘only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.’”<sup>60</sup> The court acknowledged that the Antrobuses had cited a series of cases in which various circuits (including the Tenth Circuit itself) had allowed non-parties to take appeals, including appeals in criminal cases. The court found those cases unpersuasive, stating, “There is a common thread in those criminal cases in which courts have permitted non-party appeals:

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53. Appellants’ Objection to Government’s Motion to Seal ATF Report and Motion to Reconsider Provisional Granting of the Motion to Seal at 2, *Hunter*, 548 F.3d 1308 (No. 08-4010).

54. Government’s Reply in Support of August 1, 2008 Motion to Lodge ATF Report *ex Parte* and Under Seal and Opposition to Appellants’ August 13, 2008 Motion to Reconsider Order Provisionally Granting Motion to Lodge ATF Report *ex Parte* and Under Seal at 9, *Hunter*, 548 F.3d 1308 (No. 08-4010).

55. *Id.* at 5–7.

56. As something of an additional fallback position, however, the Justice Department stated if the Court found that it had jurisdiction and if the issue of whether Hunter could foresee Vanessa’s death was not a pure issue of law and if the disclosure of the Report would facilitate the resolution of the foreseeability question, the Government would “defer to the Court’s judgment about the propriety of issuing an order (consistent with Privacy Act Exemption 11 [excluding documents disclosed pursuant to a court order]) disclosing the pertinent portions of the Report to the Antrobuses’ counsel, subject to an appropriate protective order.” *Id.* at 15.

57. See Appellants’ Motion for Remand in Light of Newly-Revealed Evidence in the Government’s Files, *Hunter*, 548 F.3d 1308 (No. 08-4010).

58. *Hunter*, 548 F.3d at 1317.

59. *Id.* at 1316.

60. *Id.* at 1311 (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988)).

the appeals all related to specific trial issues and did not disturb a final judgment.”<sup>61</sup> The court did not explain why the Antrobuses’ challenge to the “victim” ruling was a specific issue apart from the final judgment. Nor did it explain why it would not reach a final conclusion on that issue, which would affect issues apart from the final judgment in the case (such as whether the Antrobuses would receive notice of any parole or other release for Hunter at some later point in time). The court also relied on the fact that the Antrobuses could seek mandamus review as a basis for rejecting their appeal. “To hold otherwise,” the court reasoned, “would effectively grant victims two opportunities to appeal”<sup>62</sup>—although, in its earlier ruling, it took great pains to emphasize that it was not giving the Antrobuses the equivalent of an ordinary appeal.

The court then turned to the Antrobuses’ motion for remand for rehearing in light of the newly-revealed evidence and the Government’s motion to seal the ATF report. On the remand motion, the Tenth Circuit declined to reach the merits “because at this stage a motion for a rehearing should be filed in the district court.”<sup>63</sup> The court noted that it was proper for the Antrobuses to have first sought a remand in the Court of Appeals. “But now that the appeal is no longer pending, the district court is free to grant the relief the Antrobuses seek, and therefore the district court is the proper venue for the motion for a new hearing.”<sup>64</sup> The Circuit concluded that “[b]ecause we are now dismissing the Antrobuses’ appeal, they can—and should—file their motion for a new hearing in light of newly discovered evidence in the district court.”<sup>65</sup>

*E. The Antrobuses’ Final Attempt to Secure a Hearing in Light of the Justice Department’s Newly-Revealed Evidence*

Following the Tenth Circuit’s direct suggestion, the Antrobuses returned to the district court and filed a motion for a new hearing. The Antrobuses explained to the district court that the Justice Department’s newly-revealed information placed the initial ruling—that Hunter could not foresee the use of the gun in a violent crime—in an entirely new light. Once again, however, the Antrobuses were rebuffed by the district court.

On February 10, 2009, in a brief order, the district court denied the Antrobuses’ motion for a new hearing.<sup>66</sup> The district court assumed that it had the authority to grant the motion but declined to do so for two reasons. First, the district court concluded that “the reference in the gov-

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61. *Id.* at 1314.

62. *Id.* at 1315 n.5.

63. *Id.* at 1316.

64. *Id.* at 1317 n.8.

65. *Id.* at 1316–17 (emphasis added).

66. *United States v. Hunter*, No. 2:07CR307DAK, 2009 U.S. Dist. LEXIS 90822, at \*4 (D. Utah Feb. 10, 2009).

ernment's brief to the conversation between Hunter and Talovic does not constitute newly revealed evidence."<sup>67</sup> Second, the district court concluded that its ruling a year earlier denying the Antrobuses unopposed motion for release of the ATF Report constituted a ruling on the merits of whether the report would change its conclusion.<sup>68</sup> The district court did not explain why its earlier ruling did not even mention (much less discuss) the merits of this issue. Nor did the district court explain how it was fair to the Antrobuses to have ruled a year earlier on the merits of a claim that had not been presented by the parties and on which they had not been heard. Nor did the district court explain how it could have possibly had jurisdiction to rule on the merits of the Antrobuses' claim, as the matter was on appeal to the Tenth Circuit at that time, thereby stripping the district court of the ability to rule on the matter.<sup>69</sup>

On February 20, 2009, the Antrobuses filed another mandamus petition with the Tenth Circuit challenging the district court's ruling. In their fourth trip to the Tenth Circuit in just over a year, the Antrobuses explained that the Justice Department's newly revealed evidence placed the central issue of whether Hunter could foresee his gun being used in a crime of violence before the court. The new evidence showed that Hunter was not "surmis[ing] that Talovic might" rob a bank, as the district court had initially ruled,<sup>70</sup> but rather was told directly by Talovic that this was his plan for the gun during the course of Hunter's sale. The Antrobuses also argued, in the alternative, that if the Tenth Circuit was unable to conclude that any district court error was clear and indisputable, then they objected to being forced to satisfy that demanding standard of review. They therefore asserted an objection to this standard to preserve their right to seek further review of the issue.

The Tenth Circuit, however, appeared to want to close the case once and for all, and rebuffed all the Antrobuses' efforts. The court began by reaffirming its "clear and indisputable error" standard of review for mandamus petitions.<sup>71</sup> Moreover, the court gratuitously preempted the Antrobuses' effort to preserve the issue for review in the Supreme Court. The court first noted that the holding was now the "law of the case" because the Antrobuses had not sought certiorari to review the issue earlier.<sup>72</sup> The court did not acknowledge that it had effectively prevented the

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67. *Id.* at \*3.

68. *See id.* at \*3–4.

69. While the Antrobuses appeal of the district court's denial of their motion to have their daughter recognized as a "victim" stripped the district court of jurisdiction to reach the merits of that claim, it did not strip the district court of jurisdiction to rule on their unopposed discovery motion to release the ATF report to them—a matter that the Tenth Circuit had essentially sent back to the district court when it denied the Antrobuses' second mandamus petition. *See In re Antrobus*, 519 F.3d 1123, 1127 (10th Cir. 2008).

70. *See United States v. Hunter*, No. 2:07CR307DAK, 2008 WL 53125, at \*5 (D. Utah Jan. 3, 2008).

71. *In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009).

72. *Id.*

Antrobuses from seeking Supreme Court review earlier by denying their motion to consolidate their parallel appeal with the mandamus petition.<sup>73</sup> The Circuit also stated, in dicta, that it would reach the same conclusion on the petition under either standard of review.

Turning to the merits of the Antrobuses' arguments, the Tenth Circuit did not repeat—or even acknowledge—its earlier statement that the Antrobuses “should” pursue the issue of discovery in the district court. Instead, the court stated that the Antrobuses had failed to articulate a specific legal standard that the district court failed to properly apply.<sup>74</sup> Even if they had provided such a standard, the court continued, the Antrobuses failed to show that the information about the bank robbery was “newly discovered.” The Circuit stated: “The difficulty is that the Antrobuses have not demonstrated that they were unable to present evidence along these very same lines over a year ago, when this litigation began.”<sup>75</sup> Without recounting all of the litigation that the Antrobuses had pursued in an attempt to obtain the ATF Report, the court stated: “Had they made a record showing diligent but stymied efforts on this front, we might have a different case.”<sup>76</sup>

To put the final nail in the coffin, the Tenth Circuit then went on to hold that the Antrobuses did not have any important new evidence. The court stated: “Most generously, then, the Antrobuses’ ‘new evidence’ demonstrates only that Hunter *knew*—rather than just ‘surmised’ that Talovic intended to rob a bank. But that is not so substantial a difference as the Antrobuses insist.”<sup>77</sup>

At this point, then, the Antrobuses' litigation efforts came to an end. To add one last insult to injury, however, the Justice Department (which for more than a year had steadfastly refused to turn over the ATF documents to the Antrobuses because of the Privacy Act and other purported impediments), decided to act on a long-pending Freedom of Information Act request from the *Salt Lake Tribune* for the same documents. The Justice Department released the documents, which lead to a newspaper

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73. See *In re Antrobus*, No. 08-4013, 2008 U.S. App. LEXIS 27527, at \*13 (10th Cir. Feb. 1, 2008). Because the mandamus petition and appeal were not consolidated, any petition by the Antrobuses to the Supreme Court seeking certiorari on the standard of review question for mandamus petitions would have been immediately subject to the attack that the entire petition might have become moot. After all, the Antrobuses might have obtained the same relief they were seeking in their mandamus petition via the vehicle of their parallel appeal. Thus, the Tenth's Circuit's decision denying consolidation (for reasons entirely unexplained) constituted, as a practical matter, a bar to the Antrobuses seeking review in the Supreme Court.

74. *Antrobus*, 563 F.3d at 1097.

75. *Id.* at 1099.

76. *Id.*

77. *Id.* at 1100 (citation omitted) (quoting *United States v. Hunter*, No. 2:07CR307DAK, 2008 WL 53125, at \*5 (D. Utah Jan. 3, 2008)).

article headlined “Notes Confirm Suspicions of Trolley Square Victim’s Family.”<sup>78</sup> The article explained:

Newly released FBI documents say that Sulejman Talovic told a coworker he wanted a gun to commit a bank robbery.

The statement corroborates an argument made by the parents of a Trolley Square victim Vanessa Quinn. Sue and Ken Antrobus have said one of the people who sold Talovic a .38-caliber pistol knew Talovic was going to use it to commit a crime.<sup>79</sup>

The Justice Department released these documents to the media—without first providing them to the Antrobuses, whose daughter was murdered at Trolley Square—and in contravention of its previous representations to the Tenth Circuit that it could not release the documents due to Privacy Act concerns. Conveniently, all of this happened after the Antrobuses’ opportunity to provide the documents to the Tenth Circuit had evaporated because their appeal had come to an end.

In summary, it is worth briefly highlighting the net result of the Antrobuses’ tortuous journey through the courts. After the district court denied their motion to have their daughter recognized as a “crime victim,” they were unable to have the merits of that decision reviewed by the Tenth Circuit, despite four separate attempts. In the first trip, the Tenth Circuit rejected the holdings of (at least) two other circuit courts to erect a demanding “clear and indisputable error” standard of review. Having imposed that barrier, the court then stated that the case was a “close” one but that they would not grant relief—with one concurring judge noting that sufficient proof of the Antrobuses’ claim might rest in the Justice Department’s files. The Antrobuses then returned to the district court, where the Justice Department refused to clarify the district court’s misunderstanding of what information rested in its files. The Antrobuses then sought mandamus review of the question of discovering that information in the Justice Department files, which the Department “mooted” by agreeing to file that information with the district court and not opposing any release to the Antrobuses. But the district court stymied the Antrobuses’ attempt by refusing to grant their unopposed motion for release of the documents.

The Antrobuses then sought appellate review of the district court’s initial “victim” ruling, only to have the Tenth Circuit conclude that they were barred from taking an appeal. The Tenth Circuit, however, said that they “should” pursue the issue of release of the material in the Justice Department’s files in the district court. So they did—only to lose again in the district court. And on a final mandamus petition to the Tenth Circuit,

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78. Nate Carlisle, *Notes Confirm Suspicions of Trolley Square Victim’s Family*, SALT LAKE TRIB., June 25, 2009, available at [http://www.sltrib.com/news/ci\\_12380112](http://www.sltrib.com/news/ci_12380112).

79. *Id.*

the court ruled (among other things) that the Antrobuses had not been diligent enough in seeking the release of the information. With their appeals at an end, the Justice Department chose to release discovery information about the case—not to the Antrobuses, but to the *media*.

The question arises, then, whether Congress intended for those who have been victimized by federal crimes to face such barriers in attempting to assert rights under the CVRA. To answer that question it is useful to examine the background of the Act and Congress's intended purpose.

## II. THE CRIME VICTIMS' RIGHTS ACT: REFORMING THE FEDERAL CRIMINAL JUSTICE SYSTEM TO CONSIDER VICTIMS

### A. *The Victims' Rights Movement and the Federal System*

The CVRA arose from the efforts of the crime victims' movement to gain broad and enforceable rights in the federal criminal justice process.<sup>80</sup> The roots of the CVRA can be traced back to the 1982 Report of the President's Task Force on Victims of Crime. The report concluded:

[T]he criminal justice system has lost an essential balance. . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed.<sup>81</sup>

The Task Force advocated multiple reforms, such as a victim's right to be heard at sentencing.<sup>82</sup> The Task Force also sweepingly proposed a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."<sup>83</sup> In the wake of that recommendation, crime victims' advocates considered how best to achieve that goal. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to go first to the states to enact state victims' rights amendments. They had considerable success with this "states first" strategy<sup>84</sup>: to date, about thirty states have adopted amendments to their own state constitutions,<sup>85</sup> which protect a wide range of victims' rights.

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80. See generally Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 852–924 (2005) [hereinafter Cassell, *Recognizing Victims*]; Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 863 (2007).

81. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982), available at <http://www.ojp.usdoj.gov/ovc/publications/presdtstskforcrprt/87299.pdf>.

82. *Id.* at 63.

83. *Id.* at 114 (emphasis omitted).

84. See S. REP. NO. 108-191, at 3 (2003).

85. See ALA. CONST. art. I, § 6.01; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, §§ 12, 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN.

The crime victims' rights movement was also able to prod the federal system to recognize victims' rights. In 1982, Congress passed the first federal victims' rights legislation, the Victim and Witness Protection Act, which gave victims the right to make an impact statement at sentencing and provided expanded restitution.<sup>86</sup> Since then, Congress has passed several acts further protecting victims' rights, including the Victims of Crime Act of 1984,<sup>87</sup> the Victims' Rights and Restitution Act of 1990,<sup>88</sup> the Violent Crime Control and Law Enforcement Act of 1994,<sup>89</sup> the Antiterrorism and Effective Death Penalty Act of 1996,<sup>90</sup> and the Victim Rights Clarification Act of 1997.<sup>91</sup> Other federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses.<sup>92</sup>

Among these, the Victims' Rights and Restitution Act of 1990 ("VRRRA") is worth briefly highlighting because its flaws created an impetus for Congress to ultimately enact the CVRA. The VRRRA purported to create a comprehensive list of victims' rights in the federal criminal justice process. The act commanded that "[a] crime victim has the following rights,"<sup>93</sup> and then listed various rights in the process. Among those were the right to "be treated with fairness and with respect for the victim's dignity and privacy,"<sup>94</sup> to "be notified of court proceedings,"<sup>95</sup> to "confer with [the] attorney for the Government in the case,"<sup>96</sup> and to attend court proceedings, even if called as a witness, unless the victim's testimony "would be materially affected" by hearing other testimony at trial.<sup>97</sup> The statute also directed the Justice Department to make its "best efforts" to ensure that victims received their rights.<sup>98</sup>

While the VRRRA appeared to promise sweeping rights to crime victims, it never successfully integrated victims into the federal criminal

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CONST. art. XV, § 15; LA. CONST. art. I, § 25; MD. CONST. art. XLVII; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, ¶ 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m.

86. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248.

87. Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

88. Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, § 502, 104 Stat. 4789, 4820, *repealed by* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260.

89. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

90. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

91. Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12.

92. *See, e.g.*, Child Victims' and Child Witnesses' Rights, 18 U.S.C. § 3509 (2006).

93. Victims' Rights and Restitution Act of 1990 § 502(b).

94. *Id.* § 502(b)(1).

95. *Id.* § 502(b)(3).

96. *Id.* § 502(b)(5).

97. *Id.* § 502(b)(4).

98. *Id.* § 502(a).

justice process and was generally regarded as something of a dead letter. Along with “standing” problems (discussed below), one likely reason for the ineffectiveness of the VRRRA was that it was curiously codified in Title 42 of the United States Code—the title dealing with “Public Health and Welfare.” As a result, the statute was generally unknown to federal judges and criminal law practitioners. Federal practitioners reflexively consult Title 18 for guidance on criminal law issues. More prosaically, federal criminal enactments are bound together in a single West publication—the *Federal Criminal Code and Rules*. This single publication is carried to court by prosecutors and defense attorneys and lies on the desk of most federal judges. Because West Publishing never included the VRRRA in this book, the statute was essentially unknown to even the most experienced judges and attorneys.

*B. The Tenth Circuit’s Thwarting of Victim’s Rights in the McVeigh Case*

The prime illustration of the ineffectiveness of the VRRRA comes from the Oklahoma City bombing case. Coincidentally, this notorious example of a court decision denying victim’s substantive justice came from the Tenth Circuit, which denied victims of the bombing any right to seek appellate review of denials of their claims. Because Congress specifically singled out the Tenth Circuit’s decision in *McVeigh* as one of the decisions it specifically intended to overrule with the CVRA, it is worthwhile to briefly discuss that decision here.<sup>99</sup>

*McVeigh* arose from a pre-trial hearing on a motion to suppress, during which the district court *sua sponte* issued a ruling precluding any victim who wished to provide victim impact testimony at sentencing from observing any proceeding in the case. Each victim would have to choose one or the other: watch the trial or be eligible to testify at the sentencing phase. The court based its ruling on Rule 615 of the Federal Rules of Evidence, the so-called “rule on witnesses.”<sup>100</sup> In the hour that the court gave to victims to make this wrenching decision about testifying, some of the victims opted to watch the proceedings, while others decided to return home and remain eligible to provide impact testimony.<sup>101</sup>

Thirty-five victims and survivors of the bombing then filed a motion asserting their own standing to raise their rights under federal law

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99. United States v. McVeigh, 157 F.3d 809, 814–15 (10th Cir. 1998). See generally Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 515–22 (1999) (discussing this case in greater detail).

100. Transcript of Suppression Hearing at 4–5, United States v. McVeigh, No. 96-CR-68-M (D. Colo. June 26, 1996) (citing FED. R. EVID. 615).

101. See *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 73 (1997) [hereinafter *Hearing*] (statement of Marsha A. Kight).

and, in the alternative, seeking leave to file a brief on the issue as *amici curiae*.<sup>102</sup> The victims noted that the district court apparently overlooked the bill of rights contained in the VRRRA. The VRRRA promised victims (among other rights) the right “to be present at all public court proceedings . . . unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.”<sup>103</sup>

Prompted by the victims’ motion, the district court then held a hearing to reconsider the issue of excluding victim witnesses.<sup>104</sup> The court first denied the victims’ motion asserting standing to present their own claims, allowing them only the opportunity to file as *amici curiae*.<sup>105</sup> After argument by the Justice Department and the defendants, the court denied the motion for reconsideration.<sup>106</sup> It concluded that victims present during court proceedings would not be able to separate the “experience of trial” from “the experience of loss from the conduct in question,” and, thus, their testimony at a sentencing hearing would be inadmissible.<sup>107</sup>

The victims then filed a petition for writ of mandamus in the Tenth Circuit seeking review of the district court’s ruling.<sup>108</sup> Because the procedures for victims’ appeals were unclear, the victims also filed a parallel appeal in the Tenth Circuit (the Justice Department likewise sought both mandamus and appellate review).

Three months later, a panel of the Tenth Circuit rejected, without oral argument, both the victims’ and the United States’ claims on jurisdictional grounds. With respect to the victims’ challenges, the court concluded that the victims lacked “standing” under Article III of the Constitution because they had no “legally protected interest” to be present at the trial, and consequently, had suffered no “injury in fact” from their exclusion.<sup>109</sup> In addition, the Tenth Circuit rejected, on jurisdictional

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102. See Motion of Marsha and H. Tom Kight [et al.] . . . and the National Organization for Victim Assistance Asserting Standing to Raise Rights Under the Victims’ Bill of Rights and Seeking Leave to File a Brief as Amici Curiae, United States v. McVeigh, No. 96-CR-68-M (D. Colo. Sept. 30, 1996). I represented a number of the victims on this matter on a *pro bono* basis, along with able co-counsel of Robert Hoyt, Arnon Siegel, Karan Bhatia, and Reg Brown at the Washington, D.C., law firm of Wilmer, Cutler, and Pickering and Sean Kendall of Boulder, Colorado. For a somewhat more complete recounting of the victims’ issues in the case, see my statement in *Hearing, supra* note 101, at 106–13 (statement of Paul G. Cassell), and my analysis in Cassell, *supra* note 98, at 515–22.

103. 42 U.S.C. § 10606(b)(4) (2006). The victims also relied on a similar provision found in the authorization for closed circuit broadcasting on the trial, *id.* § 10608(a), and on a First Amendment right of access to public court proceedings. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

104. See Transcript of Hearing on Motions, United States v. McVeigh, No. 96-CR-68-M (D. Colo. Oct. 4, 1996).

105. *Id.* at 499–500.

106. *Id.* at 519.

107. *Id.* at 517.

108. See Petition for Writ of Mandamus, United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997) (No. 96-1484).

109. *McVeigh*, 106 F.3d at 334 (per curiam).

grounds, the appeal and mandamus petition filed by the United States.<sup>110</sup> Efforts by both the victims and the Justice Department to obtain a rehearing were unsuccessful,<sup>111</sup> even with the support of separate briefs urging rehearing from 49 members of Congress, all six Attorneys General in the Tenth Circuit, and some of the leading victims groups in the nation.<sup>112</sup>

### C. Victims' Efforts to Pass a Federal Constitutional Amendment

Because of the problems with the statutory protection of victims' rights, victims' advocates decided in 1995 the time was right to press for a federal constitutional amendment. They argued that the statutory protections could not sufficiently guarantee victims' rights. In their view, such statutes had "frequently fail[ed] to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."<sup>113</sup> As the Justice Department reported:

[E]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past twenty years, and many states have responded with state statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.<sup>114</sup>

To place victims' rights in the Constitution, victims' advocates (led most prominently by the National Victims Constitutional Amendment Network<sup>115</sup>) approached President Clinton and Congress about a federal amendment.<sup>116</sup> On April 22, 1996, Senators Kyl and Feinstein introduced

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110. *Id.* at 336.

111. Order Entered March 11, 1997, at 2, *McVeigh*, 106 F.3d 325 (No. 96-1484) (denying rehearing).

112. See *Hearing*, *supra* note 101, at 106-13 (1997) (statement of Paul G. Cassell); Cassell, *supra* note 99, at 518 n.207. In the meantime, the victims, supported by the Oklahoma Attorney General's Office, sought remedial legislation in Congress clearly stating that victims should not have to decide between testifying at sentencing and watching the trial. The Victims' Rights Clarification Act of 1997 was introduced to provide that watching a trial does not constitute grounds for denying the chance to provide an impact statement. The legislation, however, had an abortive implementation, as the district court refused to squarely state that it he would be bound by the law and, as a result, the victims were unable to make clear decisions about whether to watch the trial or to sit out and preserve their eligibility to be an impact phase witness. Cassell, *supra* note 99, at 519.

113. Laurence H. Tribe & Paul G. Cassell, Op-Ed., *Embed the Rights of Victims in the Constitution: A Proposed Amendment Protects Victims, Without Running Roughshod over the Rights that Are Due the Accused*, L.A. TIMES, July 6, 1998, at B5.

114. *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Attorney Gen.).

115. See National Victims' Constitutional Amendment Passage, <http://www.nvcap.org> (last visited Apr. 16, 2010).

116. For a comprehensive history of victims' efforts to pass a constitutional amendment, see Jon Kyl, Steven J. Twist & Stephen Higgins, *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, 583-91 (2005).

a federal victims' rights amendment with the backing of President Clinton.<sup>117</sup> The intent of the amendment was to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation."<sup>118</sup> The proposed amendment embodied seven core principles: (1) the right to notice of proceedings, (2) the right to be present, (3) the right to be heard, (4) the right to notice of the defendant's release or escape, (5) the right to restitution, (6) the right to a speedy trial, and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: standing.<sup>119</sup> The proposed amendment, however, never gained the necessary supermajority support required to move it through Congress.<sup>120</sup>

Faced with the difficulties of amending the U.S. Constitution, victims' rights advocates eventually relented. The CVRA resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than pursuing the (at that time unattainable) dream of a federal constitutional amendment. In April 2004, victims' advocates met with Senators Kyl and Feinstein to decide whether to push again for a federal constitutional amendment. Concluding that the proposed amendment lacked the required supermajority, the advocates decided to press instead for a far-reaching federal statute protecting victims' rights in the federal criminal justice system.<sup>121</sup> In exchange for backing down from the constitutional amendment in the short term, victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights.<sup>122</sup> This "new and bolder" approach not only created a bill of rights for victims, but also provided funding for victims' legal services and created remedies when victims' rights were violated.<sup>123</sup> The victims' movement would then be able to see how the statute worked in future years before deciding whether to continue to push for a federal constitutional amendment.<sup>124</sup>

The legislation that ultimately passed—the CVRA—gives victims "the right to participate in the system."<sup>125</sup> It lists various rights for crime

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117. S.J. Res. 52, 104th Cong. (1996).

118. S. REP. NO. 108-191, at 1–2 (2003); *see also* S. REP. NO. 106-254 (2000) (listing recommendations for the federal victims' rights amendment).

119. S.J. Res. 65, 104th Cong. (1996).

120. *See* Cassell, *Recognizing Victims*, *supra* note 80, at 856–923 (collecting comprehensive legislative history).

121. Kyl et al., *supra* note 116, at 591–92.

122. 150 CONG. REC. S4260–61 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

123. *Id.* at S4263 (statement of Sen. Feinstein).

124. *Id.* at S4263–66 (statement of Sen. Kyl); *see also* Alberto R. Gonzales, U.S. Attorney Gen., Prepared Remarks at the Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (transcript available at <http://www.hoover.org/research/conferences/3022346.html?show=transcript>) (indicating a federal victims' rights amendment remains a priority for President Bush).

125. 150 CONG. REC. S4263 (statement of Sen. Feinstein). For a description of victim participation, *see* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999).

victims in the process of prosecuting the accused, including the right to be notified of court hearings, the right to attend those hearings, the right to be heard at appropriate points in the process, and the right to be treated with fairness.<sup>126</sup> Rather than relying merely on the “best efforts” of prosecutors to vindicate the rights, the CVRA also contains specific enforcement mechanisms.<sup>127</sup> Most important, the CVRA directly confers standing onto victims to assert their rights, a flaw in the original VVRA.<sup>128</sup> The Act provides that rights can be “assert[ed]” by the “crime victim or the crime victim’s lawful representative, and the attorney for the Government,”<sup>129</sup> and explicitly provides that the victim (or the government) may appeal any denial of a victim’s right through a writ of mandamus on an expedited basis.<sup>130</sup> Senator Kyl explained that “[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.”<sup>131</sup>

The CVRA also broadly provides that courts must “ensure that the crime victim is afforded” the rights given by the new law.<sup>132</sup> These changes were intended to make victims “an independent participant in the proceedings.”<sup>133</sup> And the sponsors of the legislation took a shot directly at the Tenth Circuit, warning courts in the future not to give the same sort of chary construction of the new victims’ rights law:

It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process. This legislation is meant to ensure that cases like the *McVeigh* case [do not recur], where victims of the Oklahoma City bombing were effectively denied the right to attend the trial[,] and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims’ law that this bill replaces.<sup>134</sup>

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126. 18 U.S.C. § 3771(a) (2006).

127. *Id.* § 3771(c)–(d).

128. *Cf.* Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 350–55 (2005) (identifying this as a pervasive flaw in victims’ rights enactments).

129. § 3771(d)(1).

130. *Id.* § 3771(d)(3).

131. 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); *see also* Kyl et al., *supra* note 116, at 619 (finding that CVRA alters general rule that mandamus is a discretionary remedy).

132. § 3771(b)(1).

133. 150 CONG. REC. S10,911 (statement of Sen. Kyl).

134. *Id.*

## III. VICTIMS' APPELLATE RIGHTS UNDER THE CVRA

In light of the history and purpose of the CVRA, we can now consider the Tenth Circuit's ruling in *In re Antrobus*<sup>135</sup> that crime victims must prove "clear and indisputable" error in order to obtain any review in the appellate courts. Given Congress's plan to "correct, not continue, the legacy of the poor treatment of crime victims in the criminal process," it would be rather surprising to find that the CVRA contained such a demanding level of proof. In fact, neither the language, structure, nor legislative intent behind the CVRA supports such a conclusion. Instead, Congress intended to give crime victims the same sort of access to the nation's appellate courts as other litigants obtain.

*A. The Plain Language of the CVRA Gives Crime Victims Ordinary Appellate Review*

The linchpin of the *Antrobus* decision is the Tenth Circuit's conclusion that the "plain language" of the CVRA dictates a higher standard of review than would ordinarily be available on appeal. The Tenth Circuit reasoned that, in using the term "mandamus" in the CVRA, Congress intended to impose on victims various limitations that sometimes attach to mandamus petitions. The court ultimately held that "mandamus is a 'drastic' remedy that is 'to be invoked only in extraordinary situations,'"<sup>136</sup> and therefore, the *Antrobus*es—and all other crime victims following after them in the Tenth Circuit—had to show that their right to the writ was "clear and indisputable."<sup>137</sup>

The Circuit's review of the "plain language" of the statute was remarkably truncated. It focused on the term "mandamus" in the Act, without carefully reviewing the structure of the statute. The relevant provision in the CVRA not only provides victims with an opportunity to seek a writ of mandamus, it also guarantees that the courts of appeals must take up and decide the application:

Motion for relief and writ of mandamus—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. *If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus.* The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure.

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135. 519 F.3d. 1123 (10th Cir. 2008). Given the tortuous history of the litigation involving the *Antrobus*es, for convenience in the remainder of this Article I use the designation "*Antrobus* decision" to refer to the Tenth Circuit's first opinion, denying the *Antrobus*es relief because of the "clear and indisputable" error standard.

136. *Id.* at 1124 (quoting *Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 34 (1980)).

137. *Id.* at 1126.

*The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.* In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.<sup>138</sup>

*Antrobus* rested its holding on the single word “mandamus” appearing in this provision, while ignoring the broader setting. Had the court looked at the word in context, it would have seen that Congress intended a different sort of appellate regime than that constructed by the Circuit—one that gives crime victims a right to appellate review even in routine cases.<sup>139</sup> As the Ninth Circuit stated in *Kenna v. United States District Court for Central District of California*:

[T]he CVRA contemplates active review of orders denying victims’ rights claims even in routine cases. The CVRA explicitly gives victims aggrieved by a district court’s order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.<sup>140</sup>

The Ninth Circuit is not alone in its construction. The Second Circuit has also held that “[u]nder the plain language of the CVRA . . . Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court’s decision denying relief under the provisions of the CVRA”<sup>141</sup> and, therefore, “a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus.”<sup>142</sup>

One significant hurdle that a petitioner bringing an ordinary writ of mandamus faces is that review of the petition is a matter of judicial discretion.<sup>143</sup> By contrast, under the CVRA, the right to appellate review is non-discretionary. Section 3771(d)(3) provides that “[t]he court of ap-

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138. 18 U.S.C. § 3771(d)(3) (2006) (emphasis added).

139. For an excellent, if somewhat briefer, exposition of this argument, see Steven Joffe, Note, *Validating Victims: Enforcing Victims’ Rights through Mandatory Mandamus*, 2009 UTAH L. REV. 241, 249–55 (2009).

140. 435 F.3d 1011, 1017 (9th Cir. 2006).

141. *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562 (2d Cir. 2005).

142. *Id.*

143. See, e.g., *Rios v. Ziglar*, 398 F.3d 1201, 1206 (10th Cir. 2005) (“Once the petitioner has established the prerequisites of mandamus relief, the court may exercise its discretion to grant the writ.”); *In re BellSouth Corp.*, 334 F.3d 941, 979 (11th Cir. 2003) (“[Ordinarily, the] issuance of a writ of mandamus lies in large part within the discretion of the court.” (internal quotation marks omitted) (quoting *United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979))).

peals *shall take up and decide* such application forthwith within 72 hours after the petition has been filed.”<sup>144</sup> Clearly, Congress put in place for crime victims something other than traditional mandamus review. As one leading authority on crime victims’ rights recognized in discussing the CVRA’s mandamus provision:

[T]he problem in review of victims’ rights is not the unavailability of writ review, but rather the discretionary nature of writs. The solution to the review problem is to provide for nondiscretionary review of victims’ rights violations. . . . One could not credibly suggest that criminal defendants’ constitutional rights are to be reviewed only in the discretion of the court. Crime victims’ rights should be similarly respected. The solution of Congress in [the CVRA] is excellent, providing for a nondiscretionary writ of mandamus.<sup>145</sup>

Because Congress in the CVRA expressly altered conventional legal principles that otherwise might apply to review of a mandamus petition, the Tenth Circuit’s reliance on the rule of statutory construction involving “borrow[ed] terms of art”<sup>146</sup> was an obvious mistake. Congress certainly borrowed the term “writ of mandamus” as the tool for crime victims to obtain quick review of trial court actions. But it plainly sought to forge that tool into a powerful remedy that would fully protect crime victims. Moreover, that rule of statutory construction must give way to the canon of construction requiring remedial legislation to be constructed “liberally to facilitate and accomplish its purposes and intent.”<sup>147</sup>

Other provisions of the CVRA also indicate that the statute provides ordinary appellate review. The CVRA directs that “[i]n *any* court proceeding”—presumably including appellate proceedings—“the court shall *ensure* that the crime victim is afforded the rights described in [the CVRA].”<sup>148</sup> The congressional command that appellate courts “ensure” that crime victims are “afforded” their rights would be fatally compromised if those courts were confined to examining lower court proceedings for clear and indisputable errors. Indeed, if the *Antrobus* litigation shows anything, it is that the Tenth Circuit never ensured that the Antrobuses were provided the rights the CVRA promised them. In rejecting their initial mandamus petition, the Tenth Circuit described the issue of whether the district court had clearly and indisputably erred as a “difficult” one<sup>149</sup>—strongly suggesting that the court would have ruled in the Antrobuses’ favor had the “crime victim” issue been squarely before it

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144. 18 U.S.C. § 3771(d)(3) (2006) (emphasis added).

145. Beloof, *supra* note 128, at 347.

146. *In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008).

147. *Elliott Indus. Ltd. P’ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1118 (10th Cir. 2005) (internal quotation marks omitted) (quoting *State ex rel. Stratton v. Gurley Motor Co.*, 737 P.2d 1180, 1185 (N.M. Ct. App. 1987)).

148. § 3771(b)(1) (emphasis added).

149. *Antrobus*, 519 F.3d at 1125.

without deferential review. In addition, Judge Tymkovich concurred (without disagreement from the majority) to decry the Justice Department's lack of cooperation with the Antrobuses, noting that the evidence to prove the Antrobuses' case "may well be contained in the government's files. Sadly, the Antrobuses were not allowed a reasonable opportunity to make a better case."<sup>150</sup> But it is one thing to describe a family's plight in the courts as a sad one and entirely another thing to do something about it—in other words, to use appellate court power to ensure crime victims a reasonable opportunity to vindicate their rights. By hiding behind a heightened standard of review, the Tenth Circuit shirked its own legal obligation to "ensure" that the Antrobuses' legal rights were "afforded" to them.

This same provision in the CVRA also requires that "[t]he reasons for any decision denying relief under this chapter shall be clearly stated on the record."<sup>151</sup> The basis for this provision, as one of the legislation's sponsors stated in the legislative history, is that "requiring a court to provide the reasons for denial of relief is necessary for effective *appeal* of such denial."<sup>152</sup> If Congress had envisioned mere cursory review for clear and indisputable errors, it would have had no reason to add this provision.

The CVRA also broadly commands that crime victims must "be treated with fairness" throughout the criminal justice process.<sup>153</sup> Victims are not treated fairly if, as one of the sponsors of the CVRA noted, they are "left to the mercy of the very trial court that may have erred."<sup>154</sup> Leaving crime victims without meaningful appellate review deprives victims of the promised right to be treated with fairness.

Moreover, the Tenth Circuit's review of the Antrobuses' petition under traditional mandamus standards leads to an absurd result. Section 3771(d)(4) of the CVRA provides that "[i]n 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."<sup>155</sup> This provision gives the government the right (if the defendant appeals) to take a cross-appeal of an alleged error by the trial court—a cross-appeal that would presumably receive ordinary appellate review.<sup>156</sup> But this means, under the *Antrobus* holding, that the Government can obtain more thorough appellate review of a denial of a *victim's* right than

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150. *Id.* at 1127 (Tymkovich, J., concurring).

151. § 3771(b)(1).

152. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

153. § 3771(a)(8).

154. 150 CONG. REC. S10,912 (statement of Sen. Kyl).

155. § 3771(d)(4) (emphasis added).

156. *See id.* The Justice Department appears to have undercut the effectiveness of this provision by declining to take even a single cross-appeal (as far as I am aware) under this provision in the more than five years since the CVRA's enactment.

the victim, or her representatives, could obtain on mandamus review. Additionally, the Tenth Circuit's holding would also penalize a crime victim for (as in the *Antrobus* case) exercising her right to independent legal counsel rather than having the government assert an error.<sup>157</sup>

Finally, the *Antrobus* opinion violates a cardinal rule of statutory construction that a statute's provision should not be interpreted so as to be "meaningless, redundant, or superfluous."<sup>158</sup> *Antrobus* interpreted the language "the movant may petition the court of appeals for a writ of mandamus" to mean only that the movant may petition for an ordinary writ of mandamus. But before Congress enacted the CVRA, a crime victim could (like anyone else) petition for a writ of mandamus under the All Writs Act.<sup>159</sup> Thus, under the Circuit's interpretation, the CVRA mandamus provision is superfluous.

When the *Antrobuses* raised this superfluity point in their petition for rehearing, the Tenth Circuit briefly responded by arguing that it was interpreting the CVRA's appellate review provision to give victims "considerably more rights than they would otherwise have."<sup>160</sup> But the only new right that the Circuit listed was a right for "putative crime victims [to] receive a decision from the court of appeals within 72 hours."<sup>161</sup> This right to a decision within 72 hours is spelled out in a separate sentence from the right to file a mandamus petition,<sup>162</sup> meaning that the Tenth Circuit (at a minimum) rendered the sentence giving victims the right to file a mandamus petition entirely superfluous. Moreover, the Tenth Circuit never gave any explanation for the language that appears in the same sentence as the 72-hour-decision requirement—that the "court of appeals shall take up and decide such application forthwith."<sup>163</sup> This language can only be read as altering the discretionary nature of mandamus review—something that the Tenth Circuit avoided by simply ignoring the language entirely.

For all of these reasons, under the plain language of the CVRA, ordinary appellate review applies to crime victims' petitions.

#### *B. Congress Clearly Intended Ordinary Appellate Review for Crime Victims Under the CVRA*

Not only does the plain language of the CVRA clearly demonstrate that ordinary appellate review applies to crime victims' petitions under

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157. See § 3771(c)(2).

158. *Andersen v. Dir., Office of Workers' Comp. Programs*, 455 F.3d 1102, 1106 (10th Cir. 2006).

159. 28 U.S.C. § 1651 (2006). For an example of a victim's mandamus petition, see *Petition for Writ of Mandamus, United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997) (No. 96-1484).

160. *In re Antrobus*, 519 F.3d 1123, 1129 (10th Cir. 2008) (Tymkovich, J., concurring).

161. *Id.*

162. See § 3771(d)(3).

163. *Id.*

the CVRA, but the legislative history leaves no doubt whatsoever that Congress intended this result. Indeed, one of the most remarkable things about the *Antrobus* decision is that the Tenth Circuit seems to have deliberately ignored the legislative history—not discussing (or even citing) the specific statements made by the legislation’s sponsors.

Like other circuits and the Supreme Court, the Tenth Circuit has historically looked to legislative history to resolve ambiguities in a statute.<sup>164</sup> Although the Tenth Circuit did not explain why it declined to review the legislative history of the CVRA in *Antrobus* (history that had been specifically proffered by the Antrobuses<sup>165</sup>), presumably, the reason was that the Tenth Circuit found no ambiguity in the plain language of the CVRA. But when the Antrobuses filed their petition with the Tenth Circuit, three other circuits had already addressed the question of the standard of review—and all three had *unanimously* reached the opposite conclusion of the Tenth Circuit.<sup>166</sup> While it is surely possible that all three circuits were wrong, it is hard to believe that they had all misread a statute that unambiguously directed the opposite conclusion.<sup>167</sup>

The reason the Tenth Circuit needed to blind itself to the legislative history is that even a quick peek would have left absolutely no doubt that Congress intended to give crime victims the same appellate protections that other litigants receive. One of the CVRA’s two co-sponsors (Senator Kyl), for example, specifically described the CVRA as encouraging appellate courts to “broadly defend” victims’ rights and as providing a right to an “appeal”:

[W]hile mandamus is generally discretionary, this provision [18 U.S.C. § 3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims’ rights is just as important as the initial assertion of a victim’s right. This provision ensures review and encourages courts to *broadly defend* the victims’ rights.

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164. See, e.g., *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 410 (2002) (looking to legislative history to resolve ambiguity); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) (same).

165. See Petition for Panel Rehearing with Suggestion of Rehearing en Banc at 2, *Antrobus*, 519 F.3d 1123 (No. 08-4002).

166. See *Kenna v. U.S. Dist. Court for Cent. Dist. of Cal.*, 435 F.3d 1011, 1017–18 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 561–63 (2d Cir. 2005); see also *In re Walsh*, 229 F. App’x. 58, 60 (3d Cir. 2007) (citing and following the Second and Ninth Circuit decisions, and holding that the CVRA makes “mandamus relief . . . available under a different, and less demanding, standard” than the ordinary mandamus petitioner would have to meet). Since the Tenth Circuit’s decision in *Antrobus*, two other circuits have weighed in on the standard of review issue. The Eleventh Circuit followed the Second, Third, and Ninth Circuits in reviewing a crime victims’ petition under conventional appellate standards. *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008). On the other hand, the Fifth Circuit, without explanation of its own, simply followed the Tenth Circuit’s *Antrobus* decision. *In re Dean*, 527 F.3d 391, 393–94 (5th Cir. 2008).

167. The legal commentators on the statute also read it to provide regular appellate review. See 20A JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 321.14 (3d ed. 1997 & Supp. 2009) (“[B]ecause Congress has chosen mandamus as the mechanism for review under the CVRA, the victim need not make the usual threshold showing of extraordinary circumstances to obtain mandamus relief.”); *Belooof*, *supra* note 128, at 347.

Without 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. This country's appellate courts are designed to *remedy errors of lower courts* and this provision *requires them to do so* for victim's rights.<sup>168</sup>

Likewise, the other co-sponsor (Senator Feinstein) said the mandamus provision "provides that [the appellate] court shall take the writ *and shall order the relief necessary to protect the crime victim's right*,"<sup>169</sup> leading Senator Kyl to agree that crime victims must "be able to have denials of those rights reviewed at the appellate level, and to have the appellate courts *take the appeal* and order relief."<sup>170</sup>

In *Antrobus*, the Tenth Circuit described the term "mandamus" as a "borrow[ed] term[] of art in which are accumulated the legal tradition and means of centuries of practice." But as explained by Senator Feinstein, the CVRA was designed "to be *a new use* of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of their rights by a trial court to the court of appeals . . . ."<sup>171</sup>

It is well settled that statements made by the sponsors of congressional legislation "deserve[] to be accorded substantial weight in interpreting the statute."<sup>172</sup> These remarks make clear that Congress would have wanted the *Antrobus*'s petition reviewed under ordinary appellate standards. It is impossible for appellate courts to "broadly defend" victims' rights and "remedy errors of lower courts" under the CVRA if they are confined to granting mandamus petitions only where the right to obtain the writ is "clear and indisputable." A crime victim is not allowed to "immediately appeal a denial of his rights" if all he can obtain in the appellate courts is deferential review for clear and indisputable errors. Congress's clear undeniable goal was to give crime victims the same appellate protections other litigants receive.

While ignoring this clearly expressed congressional intent, the Tenth Circuit inferred a contrary congressional intent by reasoning that "Congress could have drafted the CVRA to provide for 'immediate appellate review' or 'interlocutory appellate review,' something it has done many times."<sup>173</sup> On this point, the court was simply mistaken: Congress

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168. 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added); see also Kyl et al., *supra*, note 116, at 619 (noting that the CVRA alters the general rule that mandamus is a discretionary remedy).

169. 150 CONG. REC. S4270 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

170. *Id.* (statement of Sen. Kyl) (emphasis added).

171. *Id.* S4262 (statement of Sen. Feinstein) (emphasis added).

172. Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976); accord *Kenna v. U.S. Dist. Court for Cent. Dist. of Cal.*, 435 F.3d 1011, 1015–16 (9th Cir. 2006) (giving substantial weight to remarks of Senators Feinstein and Kyl to interpret the CVRA).

173. *In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008).

has not used those phrases “many times.” In fact, neither the Westlaw nor Lexis federal statutory databases contain even a single use of either one of those phrases. The reason the phrase “*immediate* appellate review” (for example) does not appear is easy to discern: the phrase is something of an oxymoron. Detailed provisions in the Federal Rules of Appellate Procedure require appeals to proceed by way of notice in the district court followed by preparation of transcripts, designation of a record, and a specific briefing schedule that runs at least 70 days. Writs of mandamus are burdened by none of these requirements. In light of the existing appellate rules, Congress could not guarantee “*immediate* appellate review” of crime victims’ petitions without overhauling the rules to eliminate delay. Indeed, in the isolated statutes allowing interlocutory government appeals in criminal cases, Congress has usually required the appropriate United States Attorney to personally “certif[y] to the district court that the *appeal is not taken for purposes of delay*.”<sup>174</sup> This certification requirement reveals Congress’s understanding that appeals risk delay, rather than provide prompt review.

When the Antrobuses pointed out in their petition for rehearing that the Tenth Circuit was flatly wrong in stating that Congress had used the phrases “*immediate* appellate review” and “interlocutory appellate review” “many times,” the court responded, but not by acknowledging that its earlier statement was wrong. Instead, in its amplified opinion denying rehearing, the court simply switched phrases without admitting its earlier mistake, noting “[a]nd, although it is only a rough measure, a computer-aided search of the United States Code indicates that the phrase ‘interlocutory appeal’ appears 62 times, and the word ‘interlocutory’ appears 123 times in the same sentence as the word ‘appeal.’”<sup>175</sup> This new, carefully-hedged claim does not address the Antrobuses’ point that an *immediate* interlocutory appeal would be quite difficult to structure under the appellate rules. Instead, the court proved (at most) that an interlocutory appeal would be possible in some circumstances.

Moreover, the Tenth Circuit used the curious locution that the phrase “appears” in a “search” of the U.S. Code because it could not assert that Congress had provided for an interlocutory appeal 123 times or even 62 times. In fact, most of the times the phrase appears in the search is because the statutory database has some description of an already-existing interlocutory process or secondary commentary—rather than the actual creation of such a process.<sup>176</sup>

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174. 18 U.S.C. § 3731 (2006) (emphasis added); *see also id.* § 2518(10)(b) (allowing government appeal of motion to suppress under wiretap act only where U.S. Attorney certifies the “appeal is not taken for purposes of delay”); *cf. id.* 18 U.S.C. app. 3, § 7 (allowing government to take an interlocutory appeal of order releasing classified information).

175. *Antrobus*, 519 F.3d at 1129 (Tymkovich, J., concurring).

176. *See, e.g.*, David D. Siegel, *Practice Commentary*, 9 U.S.C.A. § 16 (West 2010) (discussing public policies surrounding “interlocutory appeals”); 1ST CIR. BANKR. APP. PANEL R. 8003-1

The Tenth Circuit was correct in stating that Congress has provided for an “interlocutory appeal” in a few circumstances, most notably in cases involving evidentiary rulings against the government in criminal cases.<sup>177</sup> But Congress presumably eschewed granting crime victims a potentially open-ended right to an “appeal” in the CVRA because the courts might have construed it as making crime victims actual parties to criminal prosecutions. Allowing a victim to take an “appeal” suggests that victims could attack anything in a criminal trial or judgment not to their liking. Although the CVRA does provide crime victims the right to “re-open a plea or sentence,”<sup>178</sup> the right to re-open was designed to permit courts to remedy a violation of a victim’s rights, not to allow victims to broadly challenge anything and everything not to their liking in the outcome of criminal prosecutions. Thus, it is not surprising that Congress would have chosen a different word than “appeal” to describe the appellate right given to crime victims, while at the same time taking steps to ensure that the appellate right was every bit as effective as conventional appellate rights. The Tenth Circuit failed to fairly evaluate Congress’s intent in adopting the CVRA.

*C. Mandamus Petitions in Other Contexts Receive More Generous Review When Important Rights Are at Stake*

One last point is worth brief discussion. Mandamus petitions are a common vehicle for third-parties whose rights are affected in the criminal process to seek review of an issue affecting them. In these other contexts, third parties receive the functional equivalent of an appeal even though they proceed by way of mandamus.<sup>179</sup>

Perhaps the best example of mandamus petitions providing the functional equivalent of an appeal comes from news media mandamus petitions challenging court closure orders in criminal proceedings. Like crime victims’ petitions under the CVRA, such petitions involve attempts by non-parties to assert important rights in an underlying criminal action. Yet courts of appeals have not typically subjected these petitions to “clear and indisputable” review, as this would leave First Amendment freedoms subject to the vagaries of trial court judges.<sup>180</sup> For example, in the Fourth Circuit, to obtain relief from courtroom closure orders, news

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(providing bankruptcy rules for “interlocutory appeal”); Federal Reserve System Hearing Rules, 12 C.F.R. § 263.17 (2009) (Federal Reserve rules on interlocutory appeals).

177. See, e.g., 18 U.S.C. § 2339B(f)(5) (2006) (providing for government appeals of rulings regarding disclosure of classified information at trials).

178. *Id.* § 3771(d)(5).

179. See, e.g., *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639 (8th Cir. 2001). See generally Steven Wisotsky, *Extraordinary Writs: “Appeal” by Other Means*, 26 AM. J. TRIAL ADVOC. 577, 588–89 (2003).

180. See 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3936.3 (2d ed. 1969 & Supp. 2009) (discussing writ review of media claims and concluding that “regular [appellate] review [of such claims] is justified by the profound interests . . . in public access to information about judicial proceedings”).

organizations are required to seek a writ of mandamus, rather than being permitted to file an appeal, and such closure orders are then reviewed *de novo*.<sup>181</sup>

The Tenth Circuit also requires the news media to proceed by way of writ of mandamus to assert First Amendment rights in ongoing criminal proceedings.<sup>182</sup> While the standard the Circuit employs to review such petitions is not completely clear, it typically reaches the underlying legal merits of a news media claim on mandamus review.<sup>183</sup> Even in the one instance where the Tenth Circuit applied the “clear and indisputable” standard in news media claims, it did so only after reaching the merits of the petitioner’s claim. In *Journal Publishing Co. v. Mechem*,<sup>184</sup> the Tenth Circuit *granted* the writ “[b]ecause Judge Mechem’s order was impermissibly overbroad,” and therefore, “Journal Publishing has a clear and indisputable right to an order of mandamus reversing the decree.”<sup>185</sup> Of course, the only way the court could find that the order was “impermissibly overbroad” was for it to *first* reach the claim’s legal merits. This is consistent with conventional mandamus practices, where appellate courts reach the underlying claim in deciding whether “clear and indisputable” error occurred below.<sup>186</sup> In *Antrobus*, however, the Tenth Circuit bypassed this entire process by never actually deciding whether Vanessa Quinn was a “victim” under the CVRA.

#### CONCLUSION

As Congress has recognized, “without the ability to enforce the rights in the . . . *appellate courts* of this country any rights afforded [to crime victims] are, at best, rhetoric.”<sup>187</sup> The Antrobuses’ journey through the courts sadly confirms this point. Although the district court’s conclusion that the Antrobuses’ daughter was not a “crime victim” rested on

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181. See *In re Charlotte Observer* (Div. of Knight Publ’g Co.), 882 F.2d 850, 852 (4th Cir. 1989) (“[W]e consider it technically appropriate to review the orders at issue pursuant to our power under the All-Writ Act. . . . [O]ur review is essentially *a de novo* consideration of the constitutionality of the magistrate’s directly operative closure order . . . .”); see also *In re Providence Journal Co.*, 293 F.3d 1, 9, 11 (1st Cir. 2002) (dismissing appeal papers, then proceeding to review on writ the district court decision “under the First Amendment’s heightened standard of review”).

182. *United States v. Gonzales*, 150 F.3d 1246, 1250 & n.1 (10th Cir. 1998).

183. See, e.g., *id.* at 1254 (“[This case] requires an analysis of whether the documents are subject to the [Albuquerque Journal’s] First Amendment and common law rights of access, and whether the district court clearly violated a legal duty in its assessment of how those rights apply to the documents.” (second alteration in original) (internal quotation marks omitted) (quoting *United States v. McVeigh*, 119 F.3d 806, 810–11 (10th Cir. 1997))); *McVeigh*, 119 F.3d at 812 (considering whether “the district court orders satisfy the First Amendment standard”); *Combined Commc’ns Corp. v. Finesilver*, 672 F.2d 818, 821 (10th Cir. 1982) (reaching merits of television station’s mandamus petition without imposing a higher standard of review).

184. 801 F.2d 1233 (10th Cir. 1986).

185. *Id.* at 1237.

186. *Gov’t of Virgin Islands v. Douglas*, 812 F.2d 822, 832 n.10 (3d Cir. 1987) (“The ‘clear and indisputable’ test is applied *after* the statute has been construed by the court entertaining the petition.” (emphasis added)).

187. 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

shaky foundations, the Antrobuses were unable to secure full review of that decision despite making four separate trips to the Tenth Circuit. Instead, the Circuit would only tell the Antrobuses that, proceeding under the standard of clear and indisputable error, they had presented a “close case” and it was (as one concurring judge put it) “sad” that the district court and the Justice Department had not given them the full opportunity to make their case by revealing the facts of the case. These expressions of concern, of course, did nothing to vindicate the Antrobuses’ rights. To the Antrobuses, their promised right to make a victim impact statement on behalf of their murdered daughter was mere rhetoric.

Congress did not intend for victims to be treated so unfairly. To the contrary, Congress’s clear intent in enacting the CVRA was to provide effective and enforceable rights for crime victims through the criminal justice system—including the nation’s appellate court system. Hopefully, in a future case, the Tenth Circuit en banc will reverse its unfortunate decision in *Antrobus* and provide crime victims with the appellate protections that Congress intended for them to have. If the Tenth Circuit will not act on its own, the final word on this subject should come from the Supreme Court. With a clear circuit split now existing on this important issue, Supreme Court review is necessary and appropriate. When that review comes, the Court should read the CVRA as Congress clearly intended and ensure that crime victims’ rights receive the same appellate protections that all other litigants receive.