

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Edward W. Nottingham

Criminal Case No. 05–cr–00545–EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

ORDER DENYING UNITED STATES' MOTION REGARDING VICTIMS

This matter comes before the court on the Government's motion (#438) asking the court to enter an order which would authorize the Government to provide a specified notice (set forth in the Government's proposed order) to persons who "may be" — the Government's words — victims of the offenses of which Defendant has been found guilty. Under the Government's proposal, the persons receiving the notice could then write the clerk of this court requesting, *inter alia*, the right to be heard at sentencing. The court believes that the Government's proposal confuses and conflates the tasks which Congress has assigned primarily to the Executive Branch in the Crime Victims' Rights Act, 18 U.S.C. § 3771 (2007), with the tasks which Congress has assigned primarily to the Judicial Branch. The motion, as currently formulated by the Government, will therefore be denied.

While the Crime Victims' Rights Act does require the court "[i]n any court proceeding" to "ensure that the crime victim is afforded" certain specified rights, 18 U.S.C. § 3771(b), the overall structure of the Act as a whole makes clear that the primary obligation to identify crime victims and give them the notice which is a predicate to the right to be heard resides in the Executive Branch:

Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights [afforded crime victims by the Act].

Id., § 3771(c)(1). The Government, together with victims and/or their lawyers, may assert the rights of crime victims. *Id.*, § 3771(d). Finally, the Attorney General of the United States has been directed to promulgate regulations to enforce the rights of crime victims and ensure compliance with the Act. *Id.*, § 3771(f). The Government, not the court, has employees whose duties are to assist crime victims in various ways, and it is the law enforcement agencies, not the court, which is the likely first point of contact with crime victims in most cases.

The Government's motion implicitly acknowledges that some obligation to provide notice lies with the Executive Branch by noting that the United States Attorney for the District of Colorado has posted information concerning victim rights on the office's web site. The Government did not seek the court's input or approval for that posting, and the court finds nothing in the law requiring it to have done so. Similarly, there is nothing in the law suggesting that the court should approve the other types of notice proposed by the Government. Nothing in

the motion, the response, or the law requires this court to pass upon the adequacy or propriety of the various forms of notice proposed.

The Government's motion and proposed order contemplates that any person who receives notice and wishes to be heard at sentencing should notify the clerk of this court. The clerk would collect the statements and forward them to the parties, who would then formulate some sort of procedure for the hearing. The court regards this as another mis-allocation of responsibility between the two branches of government — and cumbersome as well. As noted, the Government has employees whose duties include working with crime victims, communicating with them, and notifying them of court dates. It has the authority to assert victims' rights. It is therefore up to the Government to identify victims, to notify them, and to coordinate their appearance in court.

After the Government has identified and notified the victims, it is the court's obligation, under the Act, to allow that they "be reasonably heard at . . . sentencing." *Id.*, § 3771(a)(4). "In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a)," the court is obliged to "fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." *Id.*, §3771(d)(2). As the Government concedes, this is plainly a case where the number of victims, plus the difficulty in identifying them, makes it impractical to accord all of them the right to be heard, and the court so finds.

Because of the number of victims, the court will fashion a reasonable procedure to give effect to the Act that will not unduly complicate or prolong the sentencing hearing. The court will

hear from victims for no more than one and one-half hours at the sentencing hearing. For purposes of this hearing, at least, the court rejects the Government's expansive definition of the term "victim." The Act defines the term "victim" to mean "a person directly and proximately harmed as a result of the commission of," *id.*, § 3771(e), the insider trading offenses of which Defendant has been found guilty. It would appear to the court that any person who bought Qwest shares on the days when Defendant was selling the shares could reasonably be regarded as a victim of the offense, assuming the purchaser's circumstances were such that a loss were suffered.

The Act does not say what the court is required to do to allow victims to be "reasonably heard" at sentencing. In the circumstances presented here, the court doubts that it would be useful or helpful for them to stand up and make unsworn statements unguided by the checks inherent in the adversary process. Any victim wishing to be heard will therefore take an oath and present testimony in question-and-answer form, with the questions coming from the victim's own attorney (as contemplated by the Act, *see id.*, § 3771[d]) or from the Government's attorneys. The Government will coordinate the order of appearance and may limit and/or eliminate testimony if necessary to comply with the time limits set forth here.

SO ORDERED.

Dated this 23rd day of July, 2007.

BY THE COURT:

s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
Chief United States District Judge