

**TESTIMONY OF ADDIE C. ROLNICK, PROFESSOR**  
**WILLIAM S. BOYD SCHOOL OF LAW, UNIVERSITY OF NEVADA, LAS VEGAS**

**BEFORE THE**  
**UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS**

**OVERSIGHT HEARING ON JUSTICE FOR NATIVE YOUTH:**  
**THE GAO REPORT ON “NATIVE AMERICAN YOUTH INVOLVEMENT IN JUSTICE SYSTEMS AND**  
**INFORMATION ON GRANTS TO HELP ADDRESS JUVENILE DELINQUENCY”**

SEPTEMBER 26, 2018

Good afternoon Chairman Hoeven, Vice Chairman Udall, and Members of the Committee. Thank you for inviting me to testify today about Native youth in the juvenile justice system. My name is Addie Rolnick. I am a law professor at the University of Nevada, Las Vegas. For fifteen years, I have been engaged in research, advocacy, and tribal institution-building to improve juvenile justice for Native youth. I thank the Committee for its attention to such an important and oft-ignored issue and for requesting the comprehensive GAO report that we are here to discuss today.

I will focus my remarks today on the September 2018 GAO report entitled Native American Youth Involvement in Justice Systems and Information on Grants to Help Address Juvenile Delinquency. I also include here as an attachment my 2015 testimony before this Committee, which addresses this issue more broadly and contains detailed recommendations for legislative action.

**GENERAL RECOMMENDATIONS**

In 2015, I recommended greater tribal control over juvenile justice, more flexible funding for tribes, more stringent data collection and communication requirements for states and federal agencies, and more research. I reiterate those recommendations again today. After consideration of the GAO Report, I believe the most urgent priorities for Congress must be to:

- Fund targeted research on Native youth, particularly Native youth under tribal jurisdiction. This research should include mapping tribal systems, gathering data on youth outcomes, and evaluating promising tribal juvenile justice programs.
- Require better data collections and more transparency. Specifically, states should be required to collect data on tribal affiliation and should utilize a standard definition (or definitions) of Native American at every stage of data collection. The Bureau of Prisons should be required to disclose to tribes and to the public details about

where children under federal jurisdiction are held and what kinds of services they receive.

- Change the law to make state and federal actors more accountable to tribal governments by (1) amending the Federal Juvenile Delinquency Act to require a waiver of tribal jurisdiction, and (2) require states to notify a child's tribe when that child enters the state juvenile justice system, a requirement that is essential for all Indian country youth and important for Native youth outside Indian country.
- Increase flexible, long-term/renewable grants available to tribes through a direct (not pass-through) funding arrangement. Funding for non-Native organizations desiring to work with Native youth should not decrease the funding available to tribes for the same purpose.

I would be happy to provide the Committee upon request with information on any other aspects of juvenile justice for Native youth. My research in this area is also set forth in the following publications:

- *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. OF LEG. & PUB. POL. 49 (2016), provides a comprehensive overview of Native youth under tribal, state and federal jurisdiction and sets forth specific policy recommendations.
- *Locked Up: Fear, Racism, Prison Economics, and the Incarceration of Native Youth*, 40 AM. INDIAN CULTURE & RESEARCH J. 55 (2016), investigates some of the factors, particularly federal funding incentives, that may contribute to over-incarceration of Native youth under tribal jurisdiction.
- *Native Youth and Juvenile Injustice in South Dakota*, 62 S.D. L. REV. 705 (2017), provides a snapshot of how the overall issues relating to juvenile justice affect tribal youth in South Dakota.
- *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638 (2016), describes why it is important and legally correct for tribes to be the first movers and decision-makers in the context of criminal and juvenile justice, with state and federal jurisdiction functioning as a fallback.
- *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems* (Campaign for Youth Justice, July 2008) is a policy brief on Native youth in tribal, federal, and state juvenile justice systems.

#### THE GAO REPORT

The September GAO report provides an invaluable summary of available information on Native youth in the juvenile justice system from 2010-2016, including information on how many young people came under the jurisdiction of each sovereign,

what offenses were committed by those young people, and what happened to them once they entered the system. I recently reviewed much of the same data for a report on Native girls and juvenile justice (the research was undertaken with the National Crittenton Foundation and was part of the OJJDP's National Girls Initiative), and my commentary draws from that report, which has not been released. Having just finished my own summary and analysis of available federal data, I know that gathering and analyzing this information was not easy. The Committee and the GAO have provided an important service to Indian country by making it available in a single report. Bringing the data together yields several important insights, all of which are consistent with my own review of the data, including:

- The vast majority (89%) of Native youth under federal jurisdiction are boys.<sup>1</sup> Fewer than ten girls were arrested and entered the federal system each year during the study period.
- The districts of South Dakota and Arizona sent more youth into the federal system than any other districts.<sup>2</sup>
- Native youth are significantly *over-represented* at the arrest stage in the state juvenile justice systems of South Dakota and Alaska and at the post-adjudication confinement stage in North Dakota and South Dakota. South Dakota and Alaska have the highest proportion of Native youth of any state (15% and 20% respectively). Native youth make up nine percent of the youth population in North Dakota.<sup>3</sup>
- Native youth are *under-represented* at the arrest stage in the juvenile justice systems of New Mexico and Oklahoma and under-represented at the post-adjudication confinement stage in New Mexico. This is especially significant because Native youth constitute a relatively large share of the youth population in New Mexico (14%) and Oklahoma (12%).<sup>4</sup> These two states are also the only states which require state and local juvenile justice officials to notify and attempt to involve an Indian child's tribe.<sup>5</sup> While this may be unrelated, further inquiry into the reasons for under-representation, and the possible role of tribal notification laws, is warranted.

The Report also suggests that Native involvement in the juvenile justice system has declined, and it details a range of federal funding opportunities that could potentially be used for Native youth. I caution the Committee not to interpret the report as evidence that there is no need to address juvenile justice issues for Native youth. I explain the specific reasons for this in detail below.

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<sup>1</sup> Report, at 45.

<sup>2</sup> Report, at 22.

<sup>3</sup> Report, at 27 n. 41.

<sup>4</sup> Id.

<sup>5</sup> NM Law and Report, OK Law.

## **1. An Overall Decline in Arrests Tells Us Little About Whether Native Youth Are Being Treated Appropriately, Effectively, or Fairly**

The report includes some good news: arrests of Native American youth by state and federal law enforcement agencies appear to have declined somewhat steadily over the six-year period. This is consistent with an overall decline in youth arrests across all racial groups, which researchers have noted over the past decade. It is too early and the information too incomplete to know the reason for this decline, but if it reflects either fewer offenses committed or a turn toward addressing young offenders through less punitive measures, that would be a positive change. I note, however, that arrests appear to have declined consistently during the six-year period except for a brief uptick in 2015. The Report does not indicate why that year is an outlier, nor can it assure us that the decline will continue. Furthermore, as the Native organizations consulted for the Report pointed out, it is likely that state officials are under-counting Native youth or counting them in an inconsistent manner.<sup>6</sup>

A decline in arrest and referrals means that fewer Native youth are coming into the juvenile justice system than in previous years, but I caution the Committee not to conclude based on this report that there is no problem and no need for solutions and financial investment. In 2013 and 2014, two federal reports concluded after substantial inquiries that the juvenile justice systems serving Native youth were “failing” youth and “retraumatizing” them.<sup>7</sup> This has never been a problem of overall numbers. Native youth make up only 1-2 percent of the nationwide youth population,<sup>8</sup> so if relative attention is based only on total numbers, Native youth will always be ignored. In fact, this invisibility is part of what led to the current problem: the federal and state juvenile justice systems were not designed for Native youth, and Native youth fare poorly and are sometimes treated unfairly as a result. Tribal systems, which are designed for Native youth, are unsupported and under-studied. There is little or no communication between jurisdictions and state and local officials are free to ignore or marginalize Native youth and tribal communities without legal or financial repercussion when setting juvenile justice policy.

## **2. The Report Underscores the Lack of Reliable Data and the Need for Further Study, Especially of Youth in Tribal Systems**

As the Report notes, the existing information is incomplete and its dependability is difficult to assess primarily because of small overall numbers of Native youth and because of variation in how the category of Native American is defined across jurisdictions and agencies. Statistics on youth of color depend either on self-identity (what racial box a person checks on a form) or ascribed identity (how an authority figure decides to categorize a person). Both are especially complicated for Native youth. The U.S. Census

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<sup>6</sup> Report, at 29.

<sup>7</sup> Indian Law and Order Commission, *A Roadmap for Making Native America Safer* 149 (2013); Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* 24, 59 (2014).

<sup>8</sup> Report, at 27 n. 41.

counts American Indian and Alaska Native youth in two ways. The first category, “AI/AN-only” includes only those people who self-identify as American Indian or Alaska Native.<sup>9</sup> The second category, “AI/AN-plus” includes AI/AN-only people plus those who self-identify as American Indian or Alaska Native along with any other racial categories.<sup>10</sup> Including multi-racial people *doubles* the number of people in the AI/AN category nationwide (from 1 percent to 2 percent),<sup>11</sup> so accurate numbers require understanding which group forms the best baseline for the issue in question. State and local data may not distinguish between single-race and multi-race identifiers, making it difficult to tell who is being counted. Moreover, self-identity measures may also include many youth who identify as Native, but do not legally count as American Indian and may not be affiliated with any tribe, effectively overstating the number of youth who would be affected by a jurisdiction-based reform and potentially skewing statistics about the experiences of Native girls. There is evidence that, in some contexts, people who are not tribally affiliated and who do not publicly identify as Native American will so identify on official forms, especially when given a multi-racial option.<sup>12</sup>

The legal Indian category, which includes youth affected by special tribal jurisdictional rules, does not depend on self-identity; it depends instead on tribal affiliation. The way the Native category is defined, including whether it relies on self-identity, official ascription, or legal Indian status, varies across jurisdiction, agency, and decision point. It is important to understand that we may be counting different young people each time we repeat a statistic about “Native youth.”<sup>13</sup>

The Report also contains very little information on Native youth under tribal jurisdiction, a population I estimate to be at least 1/3 of all system-involved Native youth. Many of the national datasets used to measure risk factors, system involvement, and outcomes among youth in the delinquency system do not gather data from tribal law enforcements agencies, tribal courts, or tribal facilities. If they do include tribal agencies, they may only receive data from a handful of tribes. The Bureau of Justice Statistics plans to conduct a census of tribal law enforcement agencies and recently finished collecting data for an update to its survey of tribal court systems, which was last conducted in 2002. Each will collect data from approximately 300 tribal agencies.<sup>14</sup> Without tribal data, it is also difficult to know how well tribal systems are meeting young people’s needs and which reforms may be needed there.

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<sup>9</sup> Tina Norris et al., *The American Indian and Alaska Native Population: 2010, 2010 Census Briefs* (United States Census Bureau, 2012): 3–5.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> D’Vera Cohn, “American Indian and White, but not ‘Multiracial,’” *FactTank: News in the Numbers*, Pew Research Center, June 11, 2015, <http://www.pewresearch.org/fact-tank/2015/06/11/american-indian-and-white-but-not-multiracial/>.

<sup>13</sup> The authors thank Neelum Arya for insight on the issue of how Native youth are counted in juvenile justice statistics.

<sup>14</sup> *Tribal Crime Data Collection Activities, 2017* (United States Department of Justice Bureau of Justice Statistics, 2017).

There is currently no single source of information on youth who are involved in tribal juvenile justice systems but are not held in secure confinement, and there is scant documentation of the types of non-detention options available in tribal justice systems. In addition to a national picture of these young people, there is a need for in-depth case studies of individual tribal juvenile justice systems. Such studies will yield more detailed information about Native youth under tribal jurisdiction, identify variation among tribes and regions, and help identify the programs and practices that work for Native youth, including Native girls.

### **3. The Report Suggests that Racial Disparities in Detention and Confinement Persist in State Systems**

According to the Report, Native youth are over-represented at the arrest stage in the justice systems of seven states.<sup>15</sup> This over-representation was at least five percentage points higher in four states and at least 15 percentage points higher in two states. The states with the worst disparities (Alaska and South Dakota) are also the states in which Native youth make up the largest share of the population compared to other states.<sup>16</sup> Three of the states in which Native youth are over-represented (Alaska, Minnesota and Oregon) are Public law 280 states, which means that those states have jurisdiction over Native youth within and outside of Indian country.

This over-representation is significant because, at the national level, available data over the last 10-15 years has shown that Native youth are arrested at largely the same rates as other youth. They are, however, over-represented in arrests for certain offenses, generally low-level and alcohol and drug related offenses. The report confirms this as well: Native youth nationally are over-represented among arrests for alcohol offenses, and the top four offenses for which Native youth were arrested were larceny/theft, alcohol-related offenses, assault, and status offenses.

Greater disparities emerge at the pre-adjudication detention and post-adjudication confinement stages. Given the offenses for which Native youth are most likely to be arrested, one might expect that they would be under-represented among youth who are detained, placed out of home, and confined. This is because juvenile justice experts agree that detention and confinement should be reserved for violent and serious offenders. Yet, the Report indicates that Native youth are over-represented among youth in post-adjudication confinement<sup>17</sup> in 16 states.<sup>18</sup> This over-representation was at least 5 percentage points higher in six states and at least 15 percentage points higher in North Dakota and South Dakota. The Report does not focus on pre-adjudication detention, but my own research has shown that, despite the overall decline in detention for all youth, the Native-white disparity in detention has in some cases worsened.

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<sup>15</sup> These states are: Alaska, Minnesota, Montana, North Dakota, Oregon, and Wyoming. Report, at 33.

<sup>16</sup> Report, at 27 n. 1.

<sup>17</sup> Confinement data used in the report is based on the Census of Juveniles in Residential Placement, but the Report authors excluded youth who were being held pending trial or adjudication. Report, at 27 n.40.

<sup>18</sup> These states are: Washington, Oregon, Utah, Nebraska, Oklahoma, Iowa, Wisconsin, Mississippi, New Hampshire, Maine, Montana, Wyoming, North Dakota, South Dakota, Minnesota, and Alaska. Report, at 35.

Of particular concern is the relationship between status offenses and out of home placement. The Juvenile Justice and the Tribal Law and Policy Institute issued a report in 2014 finding that Native youth are more likely to be detained and placed out of home for status offenses than other youth.<sup>19</sup> We found that this disparity was apparent at both the detention and confinement stages, and that it was even greater for Native girls. This should be an area of serious concern, as federal law prohibits locking up youth for status offenses and experts recommend against out-of-home placement.

Finally, as the Report notes, Native involvement in state juvenile justice systems was greatest in states with a higher-than-average Native youth population.<sup>20</sup> This suggests that, where Native youth are visible, they not treated fairly by the justice system. Indeed, my research suggests that while overall rates of youth involvement in the justice system may be declining, the disparities faced by Native youth are in many cases worsening.

#### **4. The Report Reveals a Substantial Reduction in the Number of Native Youth in the Federal System, but Does Not Provide Details About the Kinds of Placements, Programs, and Services Available to Youth Under Federal Jurisdiction**

The Report's findings on Native youth in state and local systems are generally consistent with my own findings. The data included for the federal system, however, is new. Because the Bureau of Prisons and federal law enforcement agencies do not make data publicly available, the latest publicly accessible data for youth in the federal system was from prior to 2011.<sup>21</sup>

The data presented show a striking decline in the number and share of Native youth under federal jurisdiction. For example, the number of Native youth arrested by federal officials in 2016 is one third of what it was in 2010.<sup>22</sup> Native youth also appear to make up a much smaller share of youth in the federal system at every stage than they did in previous years. Table 5 shows the percent of youth in the federal system who were Native American at the custody/detention, adjudication, and post-adjudication confinement stages for 2010-2016, and at no time did Native youth make up more than 30 percent of all youth in the federal system. By contrast, Native youth accounted for about 40 percent of youth arrested by federal officials between 1999 and 2008.<sup>23</sup> While it is possible that the differences between the 2011 report and the 2016 report are due to methodological or dataset variation, or to a larger number of non-Native youth entering the federal system, the Report suggests that it is due instead to an overall decline in Native youth under federal jurisdiction. I am cautiously optimistic about this, but I encourage the Committee to inquire

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<sup>19</sup> Coalition for Juvenile Justice & Tribal Law & Policy Institute, American Indian/Alaska Native Youth & Status Offense Disparities: A Call for Tribal Initiatives, Coordination & Federal Funding (2015).

<sup>20</sup> Report, at 21.

<sup>21</sup> William Adams, et al., Tribal Youth in the federal; System, Final Report (Revised) (2011).

<sup>22</sup> Report, at 21.

<sup>23</sup> Adams, at 39.

further with the responsible agencies and affected tribes to determine the reasons for such a change.

The Report does not include information about where young people under federal jurisdiction are held and what kinds of programs and services are available to them. The Bureau of Prisons does not directly operate any juvenile facilities, so youth are sent to one of the state, local, or private facilities with which BOP contracts. The Report indicates that BOP oversees eight such facilities, but does not name them or describe their location or characteristics.<sup>24</sup> We still know very little about the qualitative experience of Native youth under federal jurisdiction. This is frustrating because federal agencies have this information, but do not make it widely available.

#### **5. The Review of Available Grants Illustrates the Continuing Need for Flexible, Consistent Funding for Tribal Juvenile Justice Systems**

To adequately address juvenile delinquency in a manner that reflect tribal community priorities, cultural practices, and geographic circumstances, tribes must have access to flexible, stable funding for all aspects of tribal juvenile justice systems, particularly treatment and alternatives to detention. The Report details more than 100 grant programs that could be used for Native youth. However, of the grant programs described in the report, very few are targeted to Native youth and/or available to tribes as direct applicants. Many of them are short-term grants and provide only a small amount of funding. These are not the kind of grants that allow tribes to create and sustain innovative programming. In addition, many of the listed programs have not been funded since 2015. The list of potential programs is informative, but it should not be viewed as evidence that tribes are receiving the resources they need; they are not.

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<sup>24</sup> Report, at 45 n. 55.