

## United States Senate Committee on Indian Affairs

### Oversight Hearing on Tracking Sex Offenders in Indian Country: Tribal Implementation of the Adam Walsh Act

#### Testimony of the National Congress of American Indians

July 17, 2008

Thank you for inviting NCAI to testify on sex offender registration. Sex offenses are a serious problem on Indian reservations. American Indian and Alaska Native women have a one-in-three chance of being raped in their lifetime.<sup>1</sup> Likewise, high rates of sexual abuse of Native children, particularly in government and church run schools, have long plagued Native communities. The Indian Health Service estimates that one in every four Native girls and one in every seven Native boys will be sexually abused.<sup>2</sup> As tribal leaders know, and this Committee has acknowledged, gaps in criminal jurisdiction and law enforcement on tribal lands have caused sexual predators to target Indian communities.<sup>3</sup> Perhaps no other group in the United States is as effected by, or concerned about, sexual violence and sexual predators as tribal communities.

Unfortunately, federal requirements related to the tracking of sex offenders on tribal lands have become a source of great confusion and frustration for many tribes over the past two years. In 2006, Congress passed two bills addressing sex offender tracking on tribal lands—the Violence Against Women Act of 2005, and, six months later, the Adam Walsh Child Protection and Safety Act. While the tribal provisions in VAWA were developed in close consultation with Indian tribes and are widely supported by tribal governments, the provisions addressing Indian tribes in the Adam Walsh Act were included without any input from Indian tribes and represent a dramatic departure from the way other civil and criminal justice matters are handled on tribal lands.

Indian tribes strongly support Congress's efforts to create a seamless national sex offender registry system. Many tribes had sex offender codes and registries in place prior to the passage of either VAWA or the Adam Walsh Act. NCAI has stated before, however, that the Adam Walsh Act's provision for Indian tribes is structured in a way that undermines its effectiveness, creates

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<sup>1</sup> This is compared with an incidence rate of 1 in 5 for women nationwide. Tjaden and Nancy Thoennes, *Prevalence, Incidence and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey* (November 2000, NCJ 183781), exhibit 7 p. 22, available at <http://www.ncjrs.org/pdffiles1/nij/183781.pdf>.

<sup>2</sup> Department of Health and Human Services, Indian Health Service, Child Abuse Project, available at, <http://www.ovccap.ihs.gov/>.

<sup>3</sup> At a 2006 SCIA Hearing, Chairman John McCain stated that "The Indian Child Protection and Family Violence Prevention Act was enacted in 1990 in response to the findings ... that certain BIA schools had become safe havens for child abusers. The investigation of these crimes revealed that the perpetrators knew that the reporting and investigation of these heinous acts were in such a sorry state that they would rarely be detected." HEARING BEFORE THE COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE ON S. 1899, March 15, 2006.

unnecessary barriers for the tribal and state officials charged with implementing the law, and is an affront to tribal sovereignty (NCAI Resolution ECWS 07-003, *attached*). The delegation of tribal criminal and civil authority to the states contemplated by the Act is an unnecessary complication of the already confusing system of criminal and civil jurisdiction on tribal lands. The law strips a subset of tribes that are subject to state jurisdiction under PL 280 of civil regulatory authority over their members. It also has the potential to create state criminal jurisdiction in non-PL 280 states where it has never before existed. The Act represents a substantial unfunded mandate for tribes, many of whom already suffer from a severe shortage of resources for public safety.

I commend the Committee for proactively addressing implementation of the Adam Walsh Act in Indian Country. The structural defects of the statute require additional Congressional action in order to make the goal of a seamless sex nationwide sex offender tracking system a reality. **NCAI urges the Committee to work with tribes to begin drafting amendments.**

NCAI's testimony today will touch on a number of the challenges tribes are encountering as they attempt to implement the Adam Walsh Act and make recommendations how these challenges can be addressed. I look forward to hearing about the experiences of the tribal witnesses testifying today, and I strongly encourage the Committee to solicit additional testimony from tribes in PL 280 states, tribes that have lands in multiple states, and tribes that rely on the Bureau of Indian Affairs for law enforcement, detention, or tribal courts.

### **Adam Walsh Act Implementation**

The Adam Walsh Act addresses tribes in two key ways. First, the statute created a federal offense for an individual who has been convicted of a sex offense in tribal court who fails to register in the jurisdiction where the offender works, lives, and attends school.<sup>4</sup> The law also requires all jurisdictions to include tribal court convictions for qualifying sex offenses in their registries.<sup>5</sup> Second, Section 127 of the Adam Walsh Act provides a mechanism for a subset of Indian tribes to participate in the national sex offender registration system. Section 127 created two classes of tribes: 1) those subject to PL 280 jurisdiction in MN, WI, NE, OR, CA, and AK, and 2) all other tribes. Tribes in the second category were given one year to pass a resolution stating their intention to comply with the mandates of the Adam Walsh Act. For those tribes that failed to pass a resolution within one year, as well as the PL 280 tribes in the first category, the responsibility to implement the new law was delegated to the state or states in which the tribe's lands are located.

From the outset, the Adam Walsh Act left over half of the tribes out of the national system. It was also deeply problematic that the Adam Walsh Act required Indian tribes to take affirmative action to preserve their existing authority. This set a very dangerous precedent. Due to the hard work of many, of the 212 tribes that were eligible to elect to comply with the law, 198 did so before the July 27, 2007 deadline. An additional 5 tribes passed resolutions delegating their

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<sup>4</sup> 18 U.S.C. § 2250. The Department of Justice has issued Guidelines instructing that this registration requirement have retroactive application. DOJ Interim Rule, 28 C.F.R. § 72.3.

<sup>5</sup> Adam Walsh Child Protection and Safety Act, §111 (6).

responsibilities to the state.<sup>6</sup> It is NCAI's understanding from our communications with tribal leaders, that many of the tribes passed resolutions to preserve their rights under the law and intend to negotiate agreements with the state or other tribes to share the burden of implementation.

As the Committee knows, all states and tribes have until July 27, 2009, or one year from the time that DOJ makes software for implementation available, to come into compliance with the mandates of the Act. The Department of Justice (DOJ) finalized the Guidelines for implementation of the law earlier this month and tribes have had very little time to digest the final Guidelines. To date, there has been very little money made available to assist tribes with implementation of the law. Many tribes have begun discussions with other tribes and the states about how they can work together to best implement the law.

At this point, however, there is still a great deal of confusion. A number of states have complained about the stringent requirements set out in the federal law and have suggested that coming into compliance will be more expensive than accepting a 10% reduction in their Byrne grant funding. It will be very difficult for tribes to comply with the law as a practical matter if the state in which the tribe is located chooses not to comply. In addition, it remains to be seen how the National Tribal Sex Offender Registry authorized in VAWA will be reconciled with the tribal provisions in the Adam Walsh Act. Section 905 of VAWA authorizes \$1 million a year for five years to be granted to a tribe or tribal organization to develop both a national tribal sex offender and order of protection registry.<sup>7</sup> Consistent with the long-standing federal policy of respect for tribal self-determination, this provision is very flexible and would create a voluntary registry available for the use of all tribal governments. Congress appropriated \$940,000 for the Tribal Registry last year, but those funds have not yet been expended by the DOJ.

### ***Procedure for Addressing Tribal Compliance***

One of the major issues that has not yet been addressed by Congress or the DOJ, is the process that will be used to assess tribal compliance with the Adam Walsh Act. Under Section 127(2)(C) of the Act, Congress vested the Attorney General with the authority to assess the compliance of those tribes who have elected to participate as a registration jurisdiction. If the Attorney General finds that the tribe is not in compliance, he has the power to delegate the tribe's authority under the Act to the state. Such a delegation would represent a major infringement on tribal sovereign authority, and Congress' unprecedented decision to vest the Attorney General with this power may well be an unconstitutional delegation of Congress' authority under the Indian Commerce Clause. At the very least, it undermines the government-to-government relationship and long-standing policy of respect for tribal sovereignty on the part of the Congress.

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<sup>6</sup> NCAI commends Leslie Hagen, in the SMART Office for her efforts to ensure that Indian tribes receive timely information regarding implementation of the Act. It is vitally important that the SMART Office continue to have a knowledgeable staffer dedicated to implementation of the Act in Indian Country.

<sup>7</sup> Violence Against Women and Department of Justice Reauthorization Act, Pub. L. 109-162, Sect. 905(b), 119 Stat. 2960 (2006) ("VAWA").

If the Attorney General chooses to exercise this authority, it will dramatically change the current scheme of civil and criminal jurisdiction in Indian Country. As a practical matter, such a delegation by the Attorney General will undoubtedly create a great deal of confusion among law enforcement agencies on the ground and will require significant adjustments in the state plan for implementation of the Act. It will also have the potential to destabilize countless carefully negotiated cross-jurisdictional collaborative agreements that currently exist between tribes and the states. This confusion and destabilization could easily undermine the effectiveness of the Act for the protection of both Native and non-Native communities.

Despite these potentially serious consequences, the DOJ Guidelines provide no indication of the process that will be used by the Attorney General to assess tribal compliance and make this delegation. The federal government's unique trust responsibility to Indian nations, the federal policy of promoting and supporting tribal self-determination, and the requirement in EO 13175 that the federal government "shall grant Indian tribal governments the maximum administrative discretion possible," require that Congress revisit this portion of Section 127.

**NCAI recommends that Congress amend the law to remove the provision giving the Attorney General unilateral authority to strip tribal governments of their civil and criminal authority.**

At the very least, the Attorney General must engage in meaningful consultation with Indian tribal governments to develop a process that requires DOJ to provide adequate notice to tribes of their noncompliance and to take all actions that may be necessary to provide technical assistance to help a tribe come into compliance.

### ***The Responsibilities of the Bureau of Indian Affairs***

We are very concerned that the Bureau of Indian Affairs (BIA) is not mentioned in the law nor in the DOJ Guidelines. In many locations the BIA is the primary law enforcement agency for the tribe, and may also operate the tribal court and detention facility. The BIA funds fifty-nine detention facilities on tribal lands, and directly operates twenty.<sup>8</sup> Forty-seven tribal law enforcement programs are BIA-operated, and an additional 154 programs are BIA-funded.<sup>9</sup> Forty-six tribal communities are served by BIA-operated courts.<sup>10</sup> It is unclear from the statute and the Guidelines what role the BIA will play when a tribe opts-in where the BIA has the responsibility for one of these important functions.

**NCAI recommends that Congress clarify that where a tribal government has elected to participate as a registration jurisdiction, the Bureau of Indian Affairs must take all necessary action to assist with tribal implementation of the Act.**

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<sup>8</sup> Guillermo Rivera, Bureau of Indian Affairs, Testimony before the National Prison Rape Elimination Commission, March 27, 2007.

<sup>9</sup> Steven Perry, Bureau of Justice Statistics, "Census of Tribal Justice Agencies in Indian Country, 2002," (Dec. 2005).

<sup>10</sup> *Id.*

### ***Registration of Federal Inmates***

We also have significant concerns about the provisions in the Guidelines exempting federal corrections facilities from the Act's requirement that offenders be registered prior to release from incarceration. SORNA mandates that "an appropriate official shall, shortly before the release of the sex offender from custody, or if the sex offender is not in custody, immediately after the sentencing of the sex offender... ensure that the sex offender is registered."<sup>11</sup> However, under the Guidelines all federal corrections facilities will merely provide the sex offender with notice that the individual must register within three days. Sex offenders in federal prisons are often the worst of the worst. It is irresponsible to release these prisoners without ensuring that they are registered in their home jurisdiction is notified of their release. This provision leaves Indian tribes particularly vulnerable because of the high proportion of offenders whose crimes arose in Indian Country that are incarcerated in federal prisons. Today, over 60% of federal sex offense cases occur in Indian Country and the majority of such offenders will return to Indian reservations.<sup>12</sup>

In addition to undermining public safety, this provision in the Guidelines will substantially shift the cost burden of initial registration from the federal government to the tribes. The responsibility of initially registering an incarcerated offender, including the collection of DNA and fingerprints, is a responsibility that clearly lies with the federal government under the Act. At a consultation session with tribal leaders on July 31, 2007 federal representatives stated that the federal prisons could not register offenders because there is no federal registry. Many tribes, however, also do not currently have registry systems in place. The costs that would be associated with developing the federal infrastructure necessary to fulfill this responsibility are no greater than the cost the Indian tribes will incur in building the same infrastructure.

**NCAI strongly recommends that Congress clarify that federal corrections facilities, like state and tribal facilities, are required to ensure that offenders are entered into the registry before their release.**

### ***Tribes Not Acting as "Registration Jurisdictions"***

Even in those places where tribal governments did not have the option of participating as a registration jurisdiction under Section 127 of the Act, or in cases where the tribe opted-out, the tribal government will play an important role in the successful implementation of the national sex offender registration system. Although the statute treats tribes and states as if they are interchangeable, the state simply cannot fulfill all of the responsibilities of tribal governments. For example, even where a state has the authority under the Act on tribal lands, tribal courts will still have the responsibility of notifying offenders of their registration obligation. Tribal detention facilities will still be housing offenders. The state will need access to tribal codes in order to include the text of the law violated by the offender in the state registry. Most importantly, tribal or BIA law enforcement officers will still be the officers most likely to be in need of information about the whereabouts of registered offenders for investigation purposes and

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<sup>11</sup> Adam Walsh Child Protection and Safety Act, § 117 (a)(3).

<sup>12</sup> Report of the Native American Advisory Group, United States Sentencing Commission 2 (Nov. 4, 2003), available at <http://www.ussc.gov/NAAG/NativeAmer.pdf>.

best positioned to assist registration personnel with tracking down non-compliant offenders. In many places the states do not have the infrastructure in place in tribal communities to successfully implement the requirements of the Adam Walsh Act. Alaska officials, for example, have expressed concerns that they simply will not be able to implement the Adam Walsh Act in the Native villages.

The DOJ has attempted to mitigate the problems created by the exclusion of a subset of tribes subject to PL 280 jurisdiction in Section 127. In the Guidelines DOJ clarifies that nothing in the law prohibits a tribe whose authority has been delegated to the state under Section 127 from carrying out registration and notification programs consistent with their sovereign authority to do so, so long as it does not interfere with the state's responsibility under the Adam Walsh Act. The Guidelines further clarify that nothing in the law precludes the states and tribes from agreeing that tribal authorities will play some role in carrying out state registration and notification functions.

While this is an important clarification, it leaves those tribes that were excluded from participation under Section 127 dependent on the goodwill of the state. NCAI has heard from a number of tribes that they are experiencing resistance when they attempt to negotiate a sharing of responsibilities with the states. In addition, throughout the Guidelines provisions are included requiring the sharing of information between "jurisdictions" of an offender's whereabouts or updates to registration information. Indian tribes who have not opted-in under Section 127 have the same law enforcement and public safety need to receive this information as do other jurisdictions. Unfortunately, the definition of "jurisdiction" in the statute would leave them out and, as a result, the local law enforcement agency would not have the information it needs to keep the community safe.

**NCAI strongly recommends that Congress amend the Adam Walsh Act to remove the arbitrary distinction made in Section 127 and allow all tribes to participate in the national sex offender registration system on an equal basis.**

#### ***Federal Database Access and Technology Infrastructure***

The Adam Walsh Act will require tribes to have access to the National Sex Offender Registry (NSOR) maintained by the FBI and other federal criminal information databases. Currently, Indian tribes can access the federal databases only by going through the state in which the tribe is located. Some tribes have been able to negotiate agreements with state governments to gain this access. These agreements vary between states with some states charging substantial sums or requiring criminal information sharing before granting access to the tribes. Many tribes have been unable to negotiate an agreement with the state and remain shut out of the federal criminal databases. Indian tribes have been advocating for direct access to the federal database for years, and a provision was included in VAWA stating that the "Attorney General shall permit Indian law enforcement agencies, in cases of domestic violence, dating violence, sexual assault, and stalking, to enter information into Federal criminal information databases and to obtain

information from the databases.” However, the FBI continues to assert that tribes can only access the databases by negotiating with the state.<sup>13</sup>

A census of tribal justice agencies conducted by the BJS in 2002 found that fifty-four tribes were submitting information on tribal sex offenders to the National Sex Offender Registry.<sup>14</sup> However, less than 12% of tribes were electronically connected to jurisdictions off the reservation, nearly half of tribal justice agencies reported that they do not have access to the National Criminal Information Center database, and only fourteen tribes reported that they were routinely sharing crime statistics with the state or local governments or the FBI.<sup>15</sup> In addition, the vast majority of tribal law enforcement agencies are still using ink and paper fingerprinting techniques that will have to be upgraded to LiveScan technology before tribes can comply with SORNA.

**NCAI recommends that Congress clarify that the FBI must permit tribal law enforcement agencies to directly access the federal criminal information database.**

### *Resources and Timelines*

Perhaps the biggest challenge facing tribal communities attempting to implement the Adam Walsh Act is the cost. Because of a desire to preserve tribal authority vis-à-vis the states, many tribes have opted-in as registration jurisdictions under Section 127 even though they likely will not have the capacity to meet the onerous requirements set out in SORNA without a substantial expenditure of resources. As noted above, tribes also face substantial technological and infrastructure deficits. The states have had over a decade to build the sex offender management systems that will be modified and updated to comply with the new law. Many tribes, however, are starting from scratch, and it will be extremely costly for Indian tribes to build the infrastructure necessary to comply with the law’s mandates. To date, very little money has been made available from the Department of Justice to assist tribes in complying with the law. In addition, appropriations for implementing the law were cut in FY 2008 from more than \$20 million to just over \$4 million, making it increasingly unlikely that significant funding will be made available prior to the 2009 compliance deadline. As a result, many tribal governments may be forced to divert limited tribal public safety resources away from other priorities. Or, more likely, they will be compelled to opt-in and then submit their sovereign authority to states. The statute currently allows for 2 one-year extensions of the deadline, but the burden will be on the tribe to apply for such an extension.

**In light of the delays in the promulgation of the Guidelines, the limited nature of the funding available, and the practical reality that many tribes are playing catch up, NCAI recommends that Congress extend the compliance deadline for Indian tribes. NCAI also strongly recommends that Congress appropriate funds specifically for tribal implementation of the Adam Walsh Act.**

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<sup>13</sup> Comments of the Federal Bureau of Investigation at the “Government-to-Government Consultation on Violent Crime in Indian Country,” March 5, 2008.

<sup>14</sup> BJS Census of Tribal Justice Agencies, 2002.

<sup>15</sup> Id.

## **Conclusion**

The tribal governments represented by NCAI share the federal government's commitment to protecting our communities and citizens from sexual predators. In fact, prior to the Adam Walsh Act, many Indian tribes had adopted sex offender registry codes. NCAI and our tribal members also worked successfully to include a provision in the Violence Against Women Act of 2005 to create a National Tribal Sex Offender Registry so that Indian tribes could share information with one another and improve our ability to track dangerous offenders. We have no doubt that there are solutions to the many challenges and concerns outlined above, however finding those solutions will require bringing all of the necessary stakeholders together to develop solutions that will work for the diverse tribal governments across the nation.





# NATIONAL CONGRESS OF AMERICAN INDIANS

## The National Congress of American Indians Resolution #ECWS-07-003

### Title: Urging Congress to Amend Section 127 of the Adam Walsh Act

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**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, according to Department of Justice statistics, 1 in 3 Native women will be sexually assaulted in her lifetime; and

**WHEREAS**, tribal governments are committed to fulfilling their responsibility to protect and promote public safety on tribal lands and a number of tribes have developed innovative strategies for tracking sex offenders on tribal lands; and

**WHEREAS**, on July 27, 2006 Congress passed the Adam Walsh Act, which created a National Sex Offender Registry and Notification System; and

**WHEREAS**, Section 127 of the Adam Walsh Act addresses Indian tribes and was included without any hearings, consultation or consideration of the views of tribal governments and current tribal practices; and

**WHEREAS**, Section 127 forces tribal governments to affirmatively elect to comply with the mandates of the Act by July 27, 2007 or *the state in which the tribe is located will be given jurisdiction to enforce the Act and would then have the right to enter tribal lands to carry out and enforce the requirements of the Act*; and

**WHEREAS**, tribal governments in the mandatory P.L. 280 states would be forced to relinquish civil jurisdiction to the states for limited purposes under the Act; and

**WHEREAS**, the Act requires tribes who elect to comply with the Act, to maintain a sex offender registry that includes a physical description, current photograph, criminal history, fingerprints, palm prints, and a DNA sample of the sex offender; and

**WHEREAS**, the tribal provisions of the Adam Walsh Act make no reference to the National Tribal Sex Offender Registry authorized in Title IX of the reauthorization of the Violence Against Women Act passed in 2005 that was developed in consultation with Tribal governments and is more consistent with principles of tribal sovereignty; and

**WHEREAS**, Congress has failed to appropriate any money to develop the National Tribal Sex Offender Registry, nor to assist tribes into developing the systems necessary to comply with the mandates of the Adam Walsh Act and is unlikely to do so prior to the July 27, 2007 deadline for tribes to opt-in; and

**WHEREAS**, the Department of Justice has not yet issued any regulations or guidance for implementation of the Act and it seems increasingly unlikely that any such guidance will be promulgated prior to the July 27, 2007 deadline; and

**WHEREAS**, the provision in the Adam Walsh Act that gives states enforcement authority essentially delegates federal law enforcement authority on many reservations where no such delegation has occurred for any other area of law and states are not currently exercising criminal jurisdiction; and

**WHEREAS**, requiring tribes to take affirmative action to avoid an expansion of state jurisdiction on tribal lands represents an unprecedented diminishment of tribal sovereignty and will likely result in an expansion of state jurisdiction that will unnecessarily complicate the already confusing system of criminal jurisdiction on tribal lands and diminish cooperation between states and tribes on law enforcement; and

**WHEREAS**, the existing scheme of criminal jurisdiction on tribal lands is sufficient to fully enforce the registration requirements of the Adam Walsh Act without the provision delegating federal enforcement authority to the state in places where states do not currently have this authority; and

**NOW THEREFORE BE IT RESOLVED**, that the NCAI does hereby call upon the Congress to amend the Adam Walsh Act to remove the existing tribal provisions and engage in a process of consultation with tribal governments to determine how best to include tribal nations in the national sex offender registry; and

**BE IT FURTHER RESOLVED**, that the NCAI does hereby call upon the Congress to remove the arbitrary July 27, 2007 deadline for tribes to elect to participate; and

**BE IT FURTHER RESOLVED**, that NCAI calls upon Congress to strike the portion of the Adam Walsh Act that delegates federal enforcement authority under the statute to the states; and

**BE IT FINALLY RESOLVED**, that NCAI calls upon Congress to appropriate sufficient funds for tribes to develop registration systems that will comply with the mandates of the Adam Walsh Act and for the development of the National Tribal Sex Offender Registry, and calls upon the Department of Justice to authorize tribal registration numbers.

**CERTIFICATION**


The foregoing resolution was adopted by the Executive Council at the 2007 Executive Council Winter Session of the National Congress of American Indians, held at the Wyndham Washington and Convention Center on February 26-28, 2007 with a quorum present.



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President

**ATTEST:**



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Recording Secretary