

June 7, 2006

Report on the Proposed Violence Against Children Act of 2006

Introduction

The Violence Against Children Act of 2006 proposed by Professor Marci Hamilton of the Cardozo School of Law, was designed with the purpose “to better protect children from childhood sexual abuse, to better inform and warn people of sexual predators who prey on children, and to better ensure that perpetrators and those who facilitate such abuse are deterred and punished.” This proposed act includes five separate provisions. This memo analyzes each of these provisions below.

Provision 1: Creation of a National Database

The first provision of the VCA seeks establishment of an easily accessible national register of those who have been convicted of a crime of childhood sexual abuse, or related crimes, and of reported civil cases involving claims of childhood sexual abuse. This provision has already been partially addressed by H.R. 4472, the Children’s Safety and Violent Crime Reduction Act of 2006, introduced on 12/08/05 by Rep. James Sensenbrenner (R- WI).

H.R. 4472 passed the house on March 8, 2006. Most recently, the bill was read in the Senate for a second time and placed on the Senate Legislative Calendar under general orders. A major provision of H.R. 4472 is to require each state, territory, and federally recognized Indian tribe to maintain a sex offender registry. In addition, it requires the attorney general to: 1) maintain a National Sex Offender registry at the Federal Bureau of Investigation; 2) maintain the Dru Sjodin National Sex Offender Public Website; 3) establish a Sex Offender Management Assistance Program; 4) carry out a demonstration project on the use of electronic management devices to monitor sex offenders; 5) assist jurisdictions in apprehending sex offenders who violate registration requirements; and 6) make registration enforcement grants.

Update: signed into law by President Bush on July 27, 2006 and renamed the *Adam Walsh Child Protection and Safety Act of 2006*.

The current National Sex Offender Database is run by the Department of Justice at www.nsopr.gov. However, this website appears in need of an overhaul. The DOJ site only acts as a transfer point to direct viewers to participating state websites. Information on the various state websites is not under the control of the DOJ, which cautions that it cannot guarantee the accuracy of the information. In addition, the information on each state’s website is inconsistent. For example, in Massachusetts you can only access level three sex offenders (classified as most dangerous) while being directed to contact your local police department for a complete list of offenders or further information. Alternatively, the District of Columbia lists much more comprehensive information. H.R. 4472 addresses these inconsistencies and inadequacies and provides more comprehensive information to the public. Thus, H.R. 4472 seems to achieve the stated goal of the VCA to create a more comprehensive national database and to better inform and warn people of child sex predators.

VCA also proposes requiring a database of information on pending charges or indictments involving crimes of childhood sexual abuse, a provision not addressed by H.R. 4472. On one hand, this proposal could be another good way to consistently update the legal status of those who re-offend. However, this proposal could also be problematic, the fear being that if a suspect is truly innocent, it would severely tar their reputation by being posted on a sex offender website. In reality, the reputation of an accused will be effected anyway based on

media reports and the public record of court proceedings.

VCA would also require the tracking of interstate movement of persons convicted of childhood sexual abuse crimes including the transportation of underage girls for the purpose of marriage and statutory rape. This proposal is also addressed by H.R. 4472. Title IV of H.R. 4472 imposes mandatory life sentences for repeat sex offenses for travel with intent to engage in illicit sexual conduct, illicit sexual conduct in foreign places, or use of interstate travel to transmit information about a minor. In addition, section 504 of H.R. 4472 increases criminal penalties and imposes mandatory sentences for crimes involving the transportation of individuals under age 18 across state lines and in foreign places to engage in prostitution or other illicit sexual activity. This provision also comports with a modernized national database and makes it easier to avoid losing track of sex offenders who move from state to state.

Update: signed into law by President Bush on July 27, 2006 and renamed the Adam Walsh Child Protection and Safety Act of 2006.

VCA also proposes a register of all civil cases involving charges of childhood sexual abuse. This is also a provision of the VCA that would expand upon what has been passed in H.R. 4472. Currently no state maintains a database of civil childhood sex abuse claims, and requires perusal of the court's public records. The National Crime Victim Bar Association is an example of an independent organization keeping such a database; however this is accessible by paid subscription only. Maintaining a public civil database would make this information more accessible for concerned residents. A national civil database might also be helpful to keep track of perpetrators and organizations that may no longer be subject to a criminal statute of limitations.

Provision 2: Conditional Spending Statute

Part two of the proposed VCA seeks to condition the receipt of federal funds for health and welfare spending (including Medicare and Medicaid) on states enacting the following provisions: 1) abolition of statutes of limitations under state law for all criminal and civil child sex abuse claims; 2) retroactive abolition of statutes of limitations under state law for a minimum of two years for all civil claims of past incidents of sexual abuse; 3) mandatory reporting by all professionals including clergy of any personal knowledge of child abuse gained within the scope of their employment; or 4) reporting of data on all persons convicted or charged with child abuse crimes and on relevant civil cases to the agency referenced in (provision 1 of VCA).

In order for the proposed conditional spending statute to be Constitutional, it must follow the guidelines set forth in *South Dakota v. Dole*. The condition set by Congress must in pursuit of the general welfare, and the conditions on federal spending must be related to the concern being addressed by the legislation. Here, the condition is certainly in pursuit of the general welfare in that it is designed to prevent sexual abuse of minors. However, there is question as to whether the withholding of health and welfare funding, including Medicare and Medicaid is sufficiently related to achieving this goal. Withholding funds from areas such as Medicare or Medicaid, while certainly attracting the states attention, might further raise issues of commandeering. Especially in areas such as crime, courts have expressed concern over obliterating the distinction between federal and state regulation. States must be able to maintain a real choice in whether or not to enact the legislation. If the percentage of funds withheld is enough to devastate federal spending on the health and welfare of a state's citizens, an issue may arise as to whether the states actually have

a choice in this manner.

Provision 3: Revocation of Tax-exempt status

Provision three of the VCA refers to the revocation of tax-exempt status for organizations furthering child abuse. This provision seems to be already covered by the current rules of the IRS. All IRC section 501(c)(3) organizations including churches and religious organizations must abide by certain rules including that the organization's "purposes and activities may not be illegal or violate fundamental public policy."

Here, if laws, even of the state level, were passed to require employees of these organizations including clergy to report sexual abuse, then these organizations could lose their protected status through non-reporting. Furthermore, there is obviously a strong public policy in favor of preventing the sexual abuse of minors. Even if the particular state does not criminalize the failure to report sexual abuse, it is arguable that this oversight constitutes a violation of fundamental public policy and should thus result in revocation of tax-exempt status.

Provision 4: Civil RICO Amendment

This provision of the VCA would amend Section 1964(c) of the Racketeer Influenced and Corrupt Organizations (RICO) Act, which refers to Civil Remedies for racketeering. Currently the act reads as follows:

18 U.S.C 1964(c) Any person injured in his business or property (AMENDED LANGUAGE WOULD BE INSERTED HERE) by reason of violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

The amendment would add "or person who is a victim of childhood sexual abuse" immediately after the word "property" on the first line (see above). For reference, section 1962 specifically refers to prohibited activities.

Section 1964 provides civil relief only to injuries to property or business and not to physical harm. The proposed amendment however may be difficult to enact here because section 1964 uses the general language of "any person injured in his business or property" rather than specific language such as any person injured by robbery, rape, assault, etc." It appears that Congress has decided to previously limit specific crimes to the criminal RICO provisions. However, an alternative solution if there is difficulty in inserting the specific language "child sex abuse" might be to amend the statute to read "any person injured in his business, property, or in his person..." This would allow someone injured either physically or emotionally by childhood sexual abuse to take advantage of the civil remedies offered by 18 U.S.C. 1964.

Provision 5: Criminal RICO Amendment

18 U.S.C. 1961 refers to definitions of racketeering activity. The VCA's amendment to this section would expand the definition of racketeering activity to include childhood sexual

abuse. Section 1961 has been amended on numerous occasions, most recently in 2003, in order to expand the definitions of racketeering activity. Unlike section 1964, Congress has previously amended this section to include specific crimes.

The definition of “racketeering activity” already holds some protections for children by including 18 U.S.C. 2260 (prohibition of sexually explicit depictions of a minor for importation into the United States and prohibition of using a minor to engage in sexually explicit conduct in order to depict visual depiction of that conduct). However, this does not address the majority of sex crimes committed against children.

PAGE

PAGE 3