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# FACING THE COMPLIANCE DEADLINE FOR THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT, STATES ARE WEIGHING ALL THE COSTS

*by* LIZ WINIARSKI

In 1981, 6-year-old Adam Walsh was abducted from a Florida mall, never to be heard from again.<sup>1</sup> Walsh's severed head was found two weeks later in a canal over one hundred miles away.<sup>2</sup> The police determined Walsh had been abused and tortured.<sup>3</sup> Two years later, serial killer Ottis Toole confessed to the crime.<sup>4</sup> As Toole later recanted and was never tried in court because of a lack of physical evidence, Walsh's parents struggled to receive closure.<sup>5</sup> Toole eventually died in 1996 of liver failure while serving time in a maximum security

prison in Florida for a separate arson-murder.<sup>6</sup> However, in December 2008, the Hollywood, Florida Police Department officially announced that Toole was in fact Walsh's killer, and the case was closed.<sup>7</sup> Hollywood police chief Chadwick Wagner announced at a press conference that "if Ottis Toole was alive today, he would be arrested for the abduction and murder of Adam Walsh."<sup>8</sup>

On July 25, 2006, the House of Representatives passed the controversial Adam Walsh Child Protection and Safety Act of 2006 (Act).<sup>9</sup> The stated purpose of the Act is to protect the public, in particular children, from violent sex offenders by implementing a more comprehensive system for the registration of sex offenders.<sup>10</sup> The Act mandates state conformity with various aspects of its national sex offender registration system.<sup>11</sup> State failure to "substantially comply" with the provisions of the Act results in a 10 percent reduction of funding under the Omnibus Crime Control and Safe Street Act of 1968 (Byrne grant).<sup>12</sup> However, some states have refused to activate portions of the Act and other states that are in compliance have already encountered a wave of litigation. With a compliance deadline of July 2009, states are carefully weighing the pros and cons of complying with the Act.

#### REACHING INTO TAXPAYER POCKETS: FINANCIAL COSTS OF THE ACT

An important consideration states are making is the financial cost of implementing the Act. The Washington D.C.-based Justice Policy Institute calculated that it will cost Illinois \$20,846,306 to fulfill the Act's requirements the first year of implementation.<sup>13</sup> The estimated cost of implementing the Act takes into account court and administrative costs, law enforcement costs and new personnel.<sup>14</sup> In contrast, by losing 10 percent of the Byrne grants, the state loses only \$850,100.<sup>15</sup> Thus, Illinois stands to save a significant chunk of money by cherry picking the parts of the Act it chooses to comply with.<sup>16</sup>

#### ADDITIONAL BURDENS ON THE STATES: CONSTITUTIONAL CHALLENGES TO THE ACT

Come July, Illinois will most likely be out of compliance with the Act because it only adheres to some of its provisions. The Act stipulates that once a sex offender is registered with the state, his or her status is permanent.<sup>17</sup> Conversely, Illinois currently allows for juveniles in good standing to petition for removal from the registry.<sup>18</sup> To meet good standing eligibility, the sex offender

must keep their registration information current, complete a treatment program and check in with a probation officer.<sup>19</sup> Shauna Boliker, of the Cook County Office of the State's Attorney and Head of the Sex Crimes Unit, acknowledges that this is a tough area of law and that there should be "some uniformity but we need to look at juveniles as a different class from the adult offender."<sup>20</sup>

Boliker's doubts concerning downfalls of the Act's rigid classification system and its failure to account for individual circumstances are illustrated by the story of Ricky. Ricky and Amanda began their consensual high school romance when they met at a club.<sup>21</sup> Ricky thought they were both 16. However, Amanda had lied and was actually 13.<sup>22</sup> After engaging in a consensual sexual relationship, Ricky was convicted of statutory rape because the law classified Amanda as a minor who was legally unable to consent to the act.<sup>23</sup> As a registered sex offender, Ricky has been kicked out of high school, harassed by strangers and neighbors, and is unable to get a job.<sup>24</sup> Further, he is not allowed to cross state lines without telling a parole officer, even for trivial matters such as going to the mall.<sup>25</sup>

Cory Rayburn Yung, Professor at John Marshall Law School and author of the blog "Sex Crimes," argues that the uniform standards of the Act fail to differentiate among the diversity of sex offenses.<sup>26</sup> According to the Act, individuals convicted of kidnapping or false imprisonment of a minor without a sexual element present must also register.<sup>27</sup> The implications of this are illustrated in *People v. Fuller*, an Illinois Appellate Court case in which the Act's rigid classification system was upheld. In *Fuller*, the court upheld the lower court's decision requiring a defendant to register as a sex offender although no claims of sexual misconduct or even contact with the children were made against the defendant.<sup>28</sup> He was merely convicted of stealing a van occupied by two children.<sup>29</sup> After weighing the evidence, Presiding Judge Cohen determined that promoting public safety was served by the registration system.<sup>30</sup>

Illinois is not alone in its recent flood of litigation over the Act. Other states are also experiencing a rise in their court and administrative costs as offenders have started challenging the constitutionality of the Act's classification system in courts across the country. In Nevada, the American Civil Liberties Union (ACLU) challenged the constitutionality of the Act on behalf of 12 anonymous sex offenders, arguing that the law imposes cruel and unusual punishment in violation of the 8th Amendment of the Constitution and is too

restrictive.<sup>31</sup> The ACLU argued that by classifying sex offenders into three tiers based on the crimes committed, punishments are not individually tailored.<sup>32</sup> Nevada's old system categorized sex offenders by their risk of re-offending.<sup>33</sup> The consequences of the new system are extraordinary; registration on the sex offender list is for life and there is a heavy stigma attached to this label.<sup>34</sup> As a result, a federal judge issued an order preventing Nevada's sex offender law from being implemented until these Constitutional issues were resolved.<sup>35</sup>

Another constitutional challenge prompted by the Act relates to its retroactive implementation. A February 2007 regulation by the Illinois Attorney General mandated that all convicted sex offenders register with the state, even those who were convicted before the passage of the Act.<sup>36</sup> In *U.S. v. Dixon*, defendants Dixon and Carr challenged their individual convictions for failing to register for interstate travel.<sup>37</sup> As opposed to uniformly applying the Act's provisions, the U.S. 7th Circuit Court elected to acquit Dixon but uphold Carr's conviction.<sup>38</sup> The Court's decision to be flexible in applying the Act was based on the dates of Dixon's and Carr's individual charges, stating that parties need "reasonable time" to adapt to the Attorney General's regulation.<sup>39</sup> The Court's holding reflects the analysis that in Dixon's case, five months was a reasonable time to expect compliance with a regulation, and in Carr's case, six weeks was not.<sup>40</sup>

#### TAKING PUNISHMENT OUT OF JUDGES' HANDS: HOW THE ACT VIOLATES THE SEPARATION OF POWERS DOCTRINE

Furthermore, because punishments are not being individually tailored and are mandated by Congress through the Act, critics argue that the separation of powers doctrine is not being met. Yung asserts that legislatively-mandated punishments are "taking it out of the judges' hands and making it a one-sided spit ball."<sup>41</sup> This sentiment is echoed in a class action lawsuit filed in Ohio, which alleges that by allowing the Ohio Attorney General to engage in sentencing instead of a judge, the role of the judiciary is being encroached upon.<sup>42</sup> The firm representing the appellant sex offenders announced that it intends to file similar motions attacking the Act on several fronts in other counties,<sup>43</sup> and Communications Director for Ohio Attorney General Marc Dann said that several similar challenges to the Act have already been filed.<sup>44</sup>

Yung believes that this is the only the beginning and that courts will soon be flooded with cases challenging the Act.<sup>45</sup> While these lawsuits may result in the overbroad punishment of sex offenders, leading to appeals and the expenditure of more taxpayer money, arguably this inefficient and costly method of challenging the Act is the only way to distinguish the Ottis Tooles from the Rickys under its rigid provisions.



*Former Rep. Mark Foley, far right, at the White House Rose Garden signing ceremony for the Adam Walsh Child Protection and Safety Act of 2006 on July 27, 2006. White House photo by Paul Morse, available at [http://newsblogs.chicagotribune.com/shared/image.html?photos/uncategorized/white-house\\_adam\\_walsh\\_1.jpg](http://newsblogs.chicagotribune.com/shared/image.html?photos/uncategorized/white-house_adam_walsh_1.jpg).*

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## NOTES

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3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

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8 *Id.*

- 9 Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat 587 (2006).
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*
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- 15 *Id.* (based off Illinois' 2006 Byrne grant, which the U.S. House of Representatives estimates will be equivalent to the funding appropriated in 2006).
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- 17 *Id.*
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- 29 *Fuller*, 756 N.E.2d at 279.
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- 40 *Id.*
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44 *Id.*

45 Telephone interview with Cory Rayburn Yung, *supra* note 26.