Recommendations on Combating Sexual Violence Against American Indian and Alaska Native Women Through Fiscal Year 2010 Appropriations

Statement Provided by Sarah Deer

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Honorable Chairman and members of the Committee, my name is Sarah Deer, and I am a citizen of the Muscogee (Creek) Nation. I am a visiting professor of Law at William Mitchell College of Law in St. Paul, Minnesota, and a member of the Native American and Alaska Native advisory council to Amnesty International USA's Stop Violence Against Women campaign. I understand that this is the first Appropriations Committee hearing ever to focus specifically on law enforcement in Indian Country. I applaud you for making this historic moment possible. It is very gratifying for me to take part in it and to provide testimony on sexual violence against American Indian and Alaska Native women.

I will focus my comments on ways that the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) can help combat the epidemic levels of sexual violence against Native women in the United States. I will request increased funding for the BIA and the IHS in the Fiscal Year 2010 Interior and Environment Appropriations bill, as well as specific language on how to tackle this critical human rights problem.

Sexual violence against American Indian and Alaska Native women are violations of our human rights on many levels and are but one example of the significant disparities that exist for American Indian and Alaska Native peoples in accessing health services and justice in the United States. American Indian and Alaska Native women are more than two and a half times more likely to be raped or sexually assaulted than women in the United States in general and one in three will be raped in their lifetime. The vast majority of these crimes will go unpunished.

There are three major challenges to ensuring adequate law enforcement response to sexual violence against American Indian and Alaska Native women that the United States government must urgently address: 1) the difficulty that exists in determining initially whose responsibility it is to respond to violent crime in Indian Country, 2) the lack of appropriate funding for tribal and federal agencies responsible for providing the services necessary to ensure that perpetrators are punished, and 3) the failure, in many cases, of law enforcement officers and health care providers to respond appropriately if and when they do.

In order to achieve justice, survivors of sexual violence frequently have to navigate a maze of tribal, state and federal law. The US federal government has created a complex interrelation between these three jurisdictions that undermines tribal authority and often allows perpetrators to evade justice. Because of a 1978 Supreme Court decision in the case of ***Oliphant v. Suquamish*** which incorrectly ruled that tribal governments have no inherent jurisdiction over non-Indians, non-Indian perpetrators of violent crime such as rape face a different set of laws than do Indian perpetrators of violent crime.

If, for example, a Native woman is raped on tribal lands, the initial questions for law enforcement personnel, and later prosecutors, are: 1) was the perpetrator Native or non-Native? 2) Did the crime occur on Tribal lands, and 3) whose responsibility is it to respond? The answer to these questions will determine which authorities respond and can take weeks or months to figure out. In some cases this has created areas of effective lawlessness which encourages violence while the basic needs of Indian women are ignored.

The ***Oliphant v. Suquamish*** decision represents a fundamental misunderstanding about the nature of tribal authority, and denies victims of sexual violence access to justice and advocacy services. Jurisdictional distinctions based on the Indian status of the accused have the effect, in many cases, of depriving victims of access to justice, in violation of international law. It is of particular concern given that the Department of Justice reports that in at least 86 per cent of cases of rape or sexual assault, the perpetrator was non-Native. The Court, in the ***Oliphant*** decision, did acknowledge that Congress has the authority to clarify and correct this jurisdictional gap.

Some tribal, state and federal law enforcement agencies address these jurisdictional complexities by entering into cooperative agreements. These may take the form of cross-deputization agreements, which allow law enforcement officials to respond to crimes that would otherwise be outside their jurisdiction. For example, when tribal and state agencies enter into such agreements, certain tribal police officers may respond to crimes, including those involving non- Indian perpetrators, committed on state land, and certain state police officers may respond to crimes committed by Indian perpetrators on tribal land.

When tribal agencies enter into such agreements with the federal government, certain tribal officers can exercise federal jurisdiction over non-Indian perpetrators of crimes on tribal land. Particularly in areas where law enforcement agencies have few officers, such cooperative agreements can improve responses to reports of sexual violence by increasing the number of potential responding officers. Part of the problem, however, is that not all BIA officers are aware either of the agreement if one exists, or of their ability to exercise federal jurisdiction over non-Indian perpetrators.

In spite of the positive affect that cross-deputization and other agreements can have on fighting violent crime in Indian Country, <u>my first recommendation to you</u> is to re-recognize the right of tribal authorities to prosecute crimes committed on tribal land, regardless of whether a suspect is Native or non-Native.

<u>My second recommendation</u> is to direct the BIA to recognize in policy and practice that all police officers have the authority to take action in response to reports of sexual violence, including rape, within their jurisdiction and to apprehend the alleged perpetrators, both Native and non-Native, in order to transfer them to the appropriate authorities for investigation and prosecution.

The ability of any law enforcement agency or health care facility to respond to violent crime is in part dependent on the funding they receive annually. Law enforcement officers have a key role to play in ensuring that women who report sexual violence have prompt access to a sexual assault forensic examination. Forensic evidence collected by a health care provider is in turn likely to

play a significant role in the prosecution against perpetrators. In this day and age, a sexual assault prosecution is much less likely to be pursued without forensic evidence, which must be collected in the immediate aftermath of the crime.

In order to ensure that women have access to these critical forensic examinations- as a first response to crimes- women must be able to get to a hospital or clinic where their injuries can be assessed. If a Native woman does report the assault to law enforcement, the responding officers have a duty to take her to a health care facility. In accordance with the Department of Justice guidelines for sexual assault forensic exams, the forensic exam should be provided to women who request it even if they have not yet made the decision to report the crime to law enforcement. However, we need to ensure that advocates and law enforcement officials have transportation resources – and that there will be a trained forensic examiner at the facility once they arrive.

The U.S. Departments of Justice (DOJ) and Interior have both repeatedly acknowledged that there is inadequate law enforcement in Indian Country and identified underfunding as a central cause. According to DOJ, tribes only have between 55 and 75 percent of the law enforcement resources available to comparable non-Native rural communities. It is no coincidence that the violent crimes rates in Indian country are proportionally much higher.

My third recommendation is to continue to increase funding to the BIA specifically for increased law enforcement on tribal lands and transportation and to direct the BIA to train every law enforcement officer on how to respond to such cases including his/her responsibility to immediately transport victims to a health care facility.

The per capita health expenditure for Native Americans continues to be less than half that for non-Natives in the United States. The lack of appropriate funding for IHS affects American Indian and Alaska Native women's ability to obtain a properly and sensitively administered sexual assault forensic examination. The Native American Women's Health Education Resource Center in 2005 found that 44 percent of IHS facilities lacked personnel trained to provide emergency services in the event of sexual violence.

Sexual Assault Nurse Examiners, known as SANEs, are health care providers with advanced education and clinical preparation in collecting forensic examination in cases of sexual violence. SANEs and other IHS staff who have been trained to respond to sexual assault cases, including on the administration of forensic examinations, can play a critical role in bringing perpetrators to justice.

Law enforcement authorities are then responsible for storing the evidence gathered and having it processed and analyzed by laboratories. Amnesty International has received several reports of mistakes made at this stage of the process, including improper storage and loss and destruction of the evidence before forensic analysis had been carried out. Undergoing a rape examination in the days following sexual violence is often a very difficult experience for women. Improper handling, loss or destruction of evidence, particularly evidence that may have been highly emotionally and physically challenging to provide, is unacceptable.

My fourth recommendation is to increase funding to the IHS in the amount of $908 million as recommended by NCAI and ensure that $25 million go to SANE programs in IHS facilities.

But the devastating reality is that if critical forensic evidence collected during a sexual assault forensic examination cannot be submitted in a court of law by the prosecution, we might as well not be conducting forensic examinations in this country at all. Another major hurdle to prosecuting cases of sexual assault against Native women concerns the testimony of IHS employees as witnesses in criminal cases. There are many cases in which tribal, state, and sometimes even federal prosecutors are simply ignored when they subpoena IHS employees for testimony. There are some fairly complicated federal guidelines that govern the procedure for IHS witness approval, and the process can also be lengthy. The only way a prosecutor can introduce forensic evidence in a prosecution is to have the person who collected it testify under oath. When an IHS employee is not available to do so, it is as if the evidence was never collected to begin with.

The rules and limitations are not supposed to apply in cases where the United States is a party. Nonetheless, I am aware of some misunderstandings wherein even federal prosecutors have been ignored. This is also a significant problem in tribal or state prosecutions which are dependent on IHS testimony. The process is apparently confusing and counter-intuitive. Additionally, the ultimate decision to permit testimony in such cases lies in the hands of the Office of General Counsel (OGC) of the Department of Health and Human Services (DHHS). That decision will be made based on whether it considers the subpoena to be appropriate or valid. There are no standards that we are aware of or that are publicly available and that outline how OGC determines whether a subpoena is appropriate or valid.

One section of the Code of Federal Regulations states explicitly that "No employee or former employee of the DHHS may provide testimony or produce documents in any proceedings . . . unless authorized by the Agency head . . . after consultation with the Office of the General Counsel, that compliance with the request would promote the objectives of the Department."

Since criminal prosecutions are not considered central to the interests of the DHHS- they can be, and often are, declined. It has been reported that there have been specific instances in which OGC has told IHS staff in general not to respond to subpoenas. Tribal prosecutors who are taking pro-active measures to prosecute sex crimes under tribal law are thus denied the critical evidence they need to be successful.

My fifth and final recommendation is to direct the IHS to issue a report to Congress on how the OGC determines whether a subpoena is "valid and appropriate." It is critical that the IHS improve its national policy regarding the process for responding to subpoenas in criminal cases and find that the public health crisis of sexual assault against American Indian and Alaska Native women fits squarely within the mission of the Department.

Thank you for inviting me to testify before you today. Thank you for the work you have done so far. And I look forward to working with you in the future to stop this epidemic of sexual violence against American Indian and Alaska Native women.