



NATIONAL CONGRESS OF AMERICAN INDIANS

July 24, 2013

Kevin Washburn
Assistant Secretary for Indian Affairs
U.S. Department of Interior
1849 C Street, NW
Washington, DC 20240

Hilary Tompkins
Solicitor
U.S. Department of Interior
1849 C Street, NW
Washington, DC 20240

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NCAI HEADQUARTERS

1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

Re: Authority of tribal law enforcement to detain and arrest non-Indians

Dear Assistant Secretary Washburn and Solicitor Tompkins:

On behalf of the National Congress of American Indians, I write to request your assistance in addressing the legal authority of tribal law enforcement personnel to detain and arrest non-Indian criminal suspects in Indian country and to urge you to issue guidance or a Solicitor's opinion to clarify existing law in this area.

As you know, the recent reauthorization of the Violence Against Women Act (VAWA 2013) restored concurrent tribal criminal jurisdiction over all persons who commit crimes of domestic violence, dating violence, and violations of protection orders in Indian country. VAWA implementation has brought to light that there is often confusion regarding a larger question of whether tribal and BIA law enforcement officers have the authority to detain and arrest non-Indian suspects who commit crimes of any type in Indian country—at least until such time as public order is restored and the offender can be transferred to the appropriate authorities.

Many tribal law enforcement officers believe that they have no authority to detain or arrest non-Indians, even if a crime is being committed in their presence. We have been told that this is consistent with training facilitated by the BIA. This creates a dangerous situation in which tribal law enforcement officers may arrive at a crime scene but believe they are powerless to act once they realize the perpetrator is non-Indian. It creates a vicious cycle in which the victims stop reporting crime because they believe that the tribal police are unable to stop the violence.

The Supreme Court has addressed the authority of tribal law enforcement to detain non-Indians, holding that tribes possess "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands," and therefore "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." Duro v. Reina, 495 U.S. 676, 696-97, (1990). In addition, two circuit court opinions have further illuminated the scope of tribal authority to detain non-Indians. See U.S. v. Terry, 400 F.3d 575, (8th Cir. 2005) (holding that tribal law enforcement authorities have the power to detain non-Indian offenders, in that case overnight, until they are handed over to the proper authorities) and U.S. v. Becerra-Garcia, 397 F.3d 1167, (9th Cir. 2005) (holding that tribal authorities have the power to stop vehicles to investigate violations of tribal law). Taken together, these cases demonstrate that tribal law enforcement officers do, in fact, have authority to detain non-Indian offenders for a reasonable period of time in order to protect public safety, prevent further offenses, and turn the offender over to the appropriate law

enforcement jurisdiction for prosecution. Nonetheless, there is still a great deal of confusion among tribal law enforcement surrounding this point, and this confusion is a detriment to public safety.

Our hope is that guidance from DOI headquarters will emphasize two points. First, that tribal and BIA police are authorized to arrest or detain any person, consistent with the restrictions against unreasonable search and seizure in the Indian Civil Rights Act. Second, that tribal police may take individuals suspected of criminal activity into custody to ensure public safety first, and then let the lawyers sort out prosecution details later.

It is not difficult to foresee that VAWA's recognition of tribal jurisdiction over non-Indians in domestic violence cases may create confusion for tribal police unless clear guidance is provided. For example, a tribal police officer arrives at a crime scene potentially involving domestic violence, alcohol, drugs, weapons, and the safety of children and bystanders. The police officer likely will not be able to rapidly and accurately make a determination if the perpetrator is Indian or non-Indian—and if non-Indian, then if he is married to the Indian victim, or subject to a protective order, or in a “social relationship of a romantic or intimate nature...as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved...” See 25 U.S.C. 1304. Under long-standing Supreme Court precedent, a tribal law enforcement officer should be focused on restoring public safety—and not the “sufficient ties” requirements under VAWA's Special Domestic Violence Criminal Jurisdiction component.

The guidance should extend to all persons, and not only domestic violence offenders. Recently, at the NCAI Mid-Year Conference in Reno, we heard from Nevada tribes that the regional solicitor's office is questioning their authority to arrest non-member Indians—an issue that was resolved by Congress 20 years ago. We have also heard from some officers that it is pointless for them to detain a non-Indian because the BIA detention facility will not hold the individual for even a short period of time. We regularly hear from tribal police that they “can't touch” a non-Indian criminal offender. This common view is not only legally incorrect; it threatens public safety for tribal communities. (See attached news article).

We respectfully request that your office develop guidance or a legal opinion to clarify tribal law enforcement detention and arrest authority over non-Indian suspects. Such an opinion will increase public safety on tribal lands. We also request that you direct the BIA law enforcement training academy to review its training materials to ensure they accurately reflect the law in this area. VAWA 2005 amended the federal code to permit BIA law enforcement to make a warrantless arrest in misdemeanor cases of DV if they have “reasonable grounds” to believe the individual committed a DV offense. The BIA should also issue guidance to its officers creating a presumption that an arrest will be made in a DV case and a presumption against dual arrests. Finally, we request that you review BIA detention policies to ensure that tribes are able to hold non-Indians taken into custody pending transfer to another jurisdiction.

Thank you for your consideration of this request. If you have any questions, please do not hesitate to contact me or staff John Dossett (jdossett@ncai.org) or Natasha Anderson (nanderson@ncai.org)

Sincerely,



Jefferson Keel

<http://abcnews.go.com/Politics/battered-indian-tribal-women-caught-legal-limbo/story?id=16365091&singlePage=true#.T7WcQo5QS70>

Battered Indian Tribal Women Caught in Legal Limbo

By [SERENA MARSHALL](#) (@SerenaMarsh)

May 17, 2012

Spousal abuse would land the perpetrator in jail anywhere in the country. But on some Indian reservations U.S. laws give tribal police no jurisdiction over non-tribal abusers. States have no jurisdiction on tribal lands.

As a result, abused women go unprotected. Legislation to fix the problem has passed both houses of Congress, but in differing forms. Until the two sides in Washington can find agreement, battered women on tribal lands will remain in a legal limbo and their abusers know it.

"He started flaunting it; what are you going to do? Who's going to arrest me? I dare you to call the police. I'll call the police for you. And he did," said a 45-year-old woman who asked to remain anonymous out of concerns for her safety.

Two days after her wedding the southern-Indian tribal member was punched in the face by her new husband. She was on her way to her mother's house and he didn't want her to go.

"I tried to push him away and in that very minute he snapped... he punched me. And I can remember his hands in my hair, and in the gravel, and a lot of blood that came from my nose or my lip," she said.

She was a six-generation tribal member; her husband, an Anglo from a city nearby. More than 50 percent of native women have non-Indian husbands.

Like so many battered woman it took her two months to accept that something was wrong and go for help. But when she did, her pleas for protection and safety were met with silence from the authorities.

What was hardest for the mother of two—who sent her kids to live with their father from a previous marriage due to the constant abuse—was how her husband's thinking "became grandiose" because no one could arrest him, convict him, or protect her from his ever-increasing bouts of violence.

"When we were dating he was perfect," she said looking back on their six-week romance.

She and her husband were living on a tribal reservation in Southwest Colorado, and because her husband was not a tribal member she was told there "wasn't much that the tribal police could do to a non-tribal member." She was given the same response from local and state officials in Colorado -- that because they were on tribal lands, they could not respond and have no jurisdiction.

What was most astonishing for the victim was that her house was just 50 yards from non-tribal property, where Colorado and United States laws apply.

"If we drove back to my house, even if the abuse was conducted on state grounds, it was tribal property again, so they [police] would come and ask questions but would say because we are now on the reservation they can't do anything," the victim explained.

"The message I was getting that was very clear is the tribe couldn't charge him or arrest him because he was non-native. The non-native police couldn't arrest him because he was white, married to a native woman living on the reservation."

Native women in the US face epidemic abuse rates. According to the National Task Force to End Sexual and Domestic Violence Against Women, 34 percent of native women will be raped in their lifetime and 39 percent will be the victim of domestic violence. According to a 2010 GAO study, the feds decline to prosecute 67 percent of sexual abuse and related matters that occur in Indian country.

"Right now you are untouchable if you commit a violent crime on tribal lands," Devon Boyer, sergeant at arms for the Shoshone-bannock tribes and a former tribal law enforcement officer, told ABC News.

Under the Violence Against Women Act (VAWA) the problem could be solved, unless legislators in the House remove the provisions that would protect Native woman and give control to native police.

Under the Senate bill, tribal police would gain control over all persons committing domestic violence and dating violence on tribal lands, while clarifying tribal civil jurisdiction over non-Indians.

"It would solve a lot of the problems to have local control as the outside does, it will send the same message that you can't get away with it," Boyer said.

The House bill, [which passed Wednesday](#), and was put forth by House Republicans, removes local, tribal enforcements against domestic violence but allows battered Native woman to file a suit in U.S. district court for protection against their abusers, providing them with legal recourse.

Gays and lesbians would not be explicitly protected under the House bill either. The House Republican alternative to the Senate-passed VAWA even removes a provision that sets new reporting standards for domestic violence on college and university campuses. That measure was so non-controversial on the Senate side that it wasn't even discussed there.

Democrats spoke on the House floor Wednesday against the Republican VAWA bill and in support of the bi-partisan Senate bill. "Isn't that our value, to protect every individual?" asked House Democratic Whip Steny Hoyer. "We hold these truths to be self-evident, that all individuals are endowed by their creator. Shouldn't we protect all individuals? Not exclude some?"

When asked about the House bill, Boyer said, "it puts native people on reservations on a second priority; that they are not people and therefore they would rather protect the nontribal members committing those crimes than punish them to the same extent than if the crimes were done in their home, to their people."

"This is an extremely dangerous bill" that victims' rights advocates "shouldn't go anywhere near," Lisalyn Jacobs of the National Task Force to End Sexual and Domestic Violence Against Women told Roll Call.

As for the 45-year-old southern-Indian tribal member, her abuse only stopped after her husband came to her work with 9mm gun.

"His intentions I know to this day were to shoot and kill me," she said.

Luckily, her coworker pushed her out of the way of the shots. After the shooting her husband fled and was not captured for two weeks.

The DA offered him a plea deal for driving without a license—a felony, whereas domestic violence is a misdemeanor for a first-time offender.

"When I asked (the DA) 'why aren't you bringing up the past assaults' I was told it's because he was never prosecuted. The tribe never did and county never did. So this (the shooting) was his first offense."

Her now ex-husband is serving his sentence for driving with a revoked license.

Today, she begs for legislators to "be our voice so we're not silenced out because we are silenced say when the system doesn't work for us."

ABCs' Tom Shine contributed to this report.