



**Submission of the American Civil Liberties Union
to the UN Special Rapporteur on Violence Against Women and Girls
for the UN Study on Violence Against Indigenous Women and Girls**

January 31, 2022

The American Civil Liberties Union (ACLU) is a nonprofit organization founded in 1920 to defend and preserve the individual rights and liberties guaranteed by the Constitution and laws of the United States. With more than 4 million members, activists, and supporters, the ACLU is a nationwide organization that fights in courts, legislatures, international fora, and communities in all 50 states, Puerto Rico, and Washington, D.C., to safeguard everyone's rights in the United States including rights of Indigenous people, people whose constitutional rights have been violated by law enforcement officers, and victims and survivors of gender-based violence.

We appreciate this opportunity to highlight the significant ways that the United States federal government fails to protect Indigenous women from gender-based violence, thus perpetuating gender-based violence and preventing accountability.

Violence Against Indigenous Women in the United States Is Pervasive and Fundamentally Threatens the Equality and Dignity of Indigenous Women.

Indigenous women in the United States face a crisis of sexual violence, kidnapping, disappearance, and murder. More than four in five Indigenous women report being victims of violence, and more than half report being victims of sexual violence.¹ Indigenous women are 2.5 times more likely to experience violent crimes, and at least two times more likely to be raped or sexually assaulted, than women of other ethnicities.² This crisis has been recognized by the United States Supreme Court,³ current and former Presidents of the United States, Indigenous and tribal leaders, and numerous organizations. Furthermore, fear and mistrust of law enforcement prevents Indigenous women from reporting sexual and gender-based violence.

¹ André B. Rosay, Nat'l Inst. of Just., *Violence against American Indian and Alaska Native Women and Men* 43 (May 2016), <https://www.ojp.gov/pdffiles1/nij/249736.pdf>.

² Reviewing the Trump Administration's Approach to the Missing and Murdered Indigenous Women (MMIW) Crisis 15, Hearing Before Subcomm. For Indigenous Peoples of the United States, H. Comm. On Natural Resources, 116th Cong., 1st Sess. (2019), <https://www.congress.gov/116/chrg/CHRG-116hrg37680/CHRG-116hrg37680.pdf>.

³ *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016); see also *Brown v. Polk Cnty., Wisconsin*, 141 S. Ct. 1304, 1307 n.3 (2021).

In a recent submission, the United States acknowledged the scope of violence experienced by Indigenous women.⁴ Most of its discussion on the federal government's responses, however, focused on domestic violence on tribal lands. It did not address the serious legal and institutional barriers to accessing and receiving justice that survivors of all forms of gender-based violence face when they do come forward.

The United States Imposes Restrictions on Tribal Sovereignty That Perpetuate Gender-Based Violence against Native Americans, Particularly Women.

Historically, tribes in the United States have been stripped of authority to pursue cases against non-Native or White perpetrators, even where victims were tribal members.⁵ This was deeply problematic, as the vast majority of Indigenous survivors of gender-based violence described the perpetrator as not Indian.⁶ Because it was unlikely that the federal government would prosecute these cases, non-Native people committed domestic violence and sexual assault against Indigenous people with impunity, leading to high rates of violence on tribal lands.⁷

In 2013, Congress permitted tribes, for the first time, to exercise jurisdiction over certain domestic violence cases committed against Indigenous people on tribal lands.⁸ It has not yet enacted legislation that would authorize jurisdiction in sexual violence cases.

In 2021, the U.S. House of Representatives passed a reauthorization of the Violence Against Women Act, H.R. 1620, that would permit tribes to hold non-Native perpetrators accountable for crimes of dating violence, obstruction of justice, sexual violence, sex trafficking, stalking, and assault of a law enforcement or corrections officer.⁹ The bill would also provide for an annual reporting requirement of statistics on murdered and missing Indigenous women in the United States and a report by the U.S. Comptroller General on law enforcement agencies' responses to reports of missing and murdered Indigenous persons. The Senate, however, has not yet approved this legislation.

The United States Must Eliminate Legal Loopholes to Civil Accountability for Federal Law Enforcement Officers Who Commit Violence Against Indigenous people, Particularly Women

Federal law enforcement in the United States has historically failed to protect against, and has often perpetuated, gender-based violence against Indigenous people—and particularly,

⁴ United States, Combined tenth to twelfth period reports submitted by the United States of America under article 9 of the Convention, due in 2017, ¶¶ 101-11, U.N. Committee on the Elimination of Racial Discrimination, CERD/C/USA/10-12 (Date received June 2, 2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/381/09/PDF/G2138109.pdf?OpenElement>.

⁵ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁶ See Rosay, *supra* note 1.

⁷ U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS (2010), <https://www.gao.gov/assets/gao-11-167r.pdf>.

⁸ Violence Against Women Reauthorization Act of 2013 § 904, 42 U.S.C. § 13701.

⁹ Violence against Women Reauthorization Act of 2021, H.R. Res. 1620, 117th Cong. § 903 (2021).

Indigenous women and girls.¹⁰ Police are often unresponsive to tribal needs, open cases languish, and offenders exploit these gaps to prey on Indigenous women and girls. When federal officers themselves are the perpetrators, it exacerbates these vulnerabilities, makes justice for survivors even more unlikely, and discourages tribal members from seeking assistance from law enforcement.

The federal government has pushed interpretations of the Federal Tort Claims Act (FTCA) to eliminate legal avenues of relief and accountability for Indigenous victims of violence committed by law enforcement. As background, the legal doctrine of “sovereign immunity” prohibits private citizens from suing the United States government for the tortious conduct of federal officers and employees without its consent.¹¹ The FTCA creates an exception by waiving sovereign immunity for the tortious conduct of federal employees when they act within the scope of their employment.¹²

In 2021, the United States government filed a brief in *L.B. v. United States*, asserting that a sexual assault by a federal employee – a law enforcement officer in the Bureau of Indian Affairs – is not within the scope of employment because it is “performed solely for his own benefit.”¹³ The United States asserted this argument even when the federal officer used the authority that the federal government had bestowed on him to commit sexual violence. The implications of this argument are significant for Indigenous people, who are more likely to request assistance from and interact with federal law enforcement officers, such as from the Bureau of Indian Affairs. The United States government’s position, if adopted, would place Indigenous people, and particularly Indigenous women and girls, at even greater risk of violence by sending the message that the federal government need not take any measures to address sexual violence committed by its own officers. Moreover, it would contribute to already-existing distrust of law enforcement among Indigenous communities.

Thank you for the opportunity to provide this information to you. If you have any questions, please feel free to contact Sandra Park, ACLU Women’s Rights Project, spark@aclu.org and Mark Carter, ACLU Racial Justice Program, mcarter@aclu.org.

¹⁰ Indian Law Resource Ctr., *Ending Violence Against Native Women*, <https://indianlaw.org/issue/ending-violence-against-native-women>; see also Angeline Cheek and Lucy Simpson, *We Need Accountability for Those Who Commit Violence Against Women*, ACLU News & Commentary, Oct. 18, 2022, <https://www.aclu.org/news/racial-justice/we-need-accountability-for-those-who-commit-violence-against-native-women>.

¹¹ Congressional Research Serv., *The Federal Torts Claims Act (FTCA): A Legal Overview* (Nov. 20, 2019), <https://sgp.fas.org/crs/misc/R45732.pdf>.

¹² 28 U.S.C. § 2680(h).

¹³ Answer Br. of the United States, *L.B. v. United States of America*, Case No. OP 21-0395 (Mont. filed Dec. 29, 2021).