

Before Manslaughter, Was There Rape?

Documents Show the FBI Gave Janklow a Pass

By **STEPHEN HENDRICKS**

On December 8 South Dakota's at-large representative, Republican Bill Janklow, was convicted of manslaughter in the second degree. For speeding through a stop sign and killing a motorcyclist, he could receive up to a decade in a prison that for two decades he had overseen as governor and attorney general.

This is not the first felony of which Janklow has been accused, only the first of which he has been convicted. In 1967 he was alleged to have raped a Lakota girl on South Dakota's Rosebud Indian Reservation. This much has been known for years. But newly found papers show what Indians have long suspected but never been able to prove: The FBI cleared Janklow of the rape in three investigations that were more charitable than rigorous. The story goes to the heart of the FBI's curious Indian history, a history that swerved between casual neglect and pathological subversion.

But first Janklow. When he was accused of rape in 1967, police with the Bureau of Indian Affairs investigated, with results not made public, then passed the case to the FBI. (Under federal law, tribal cops may make only token investigations of most felony complaints. Final investigative authority, in a nice bit of colonial panache, lies with the FBI.) The results of the FBI's inquiry were also unknown, but based on them the U.S. attorney declined to prosecute.

Six years later prosecutor Janklow famously won riot convictions of leaders of the American Indian Movement. On the strength of this, he stumped for state attorney general in 1974. A month before the election, AIM resurrected the rape charge in the court of the Rosebud Sioux Nation. The court ordered the BIA and FBI, both of which were covertly and overtly sabotaging AIM, to surrender their investigative files. They did not. The court ordered Janklow to appear for a hearing. He did not. The court took testimony nonetheless and concluded it was "satisfied that the rape allegations

against Janklow are properly proven for the purposes of the hearing held today." But tribal dominion over non-Indians is slight, and the judge could do no more than expel Janklow from the tribal bar. A week later, two of three South Dakota voters elected Janklow attorney general.

In 1975 President Ford nominated Janklow to the board that oversees federal legal aid programs. Before his confirmation hearing, the White House asked the FBI to vet him. The Bureau found him clean. But at his hearing, AIM again cried rape, and Janklow abruptly left the Senate committee room moments before he was to testify. Puzzled staff searched for him for hours before dis-

covered old court records involving Janklow. In them, Jancita Eagle Deer said that on a Saturday night Janklow drove her four miles outside the town of Mission, raped her in his car, then drove her back. The drive lasted 50 minutes. Confronted, Janklow agreed with the eighth-grader's story, minus the rape. But a day later, without explanation, Janklow said the drive was only 15 minutes, enough to get to and from the darkened field but too short for rape. Three witnesses bolstered his alibi, yet two claimed to be with Eagle Deer, in different places, during the alleged rape. (The third witness was a teenage sister of one of the others.)

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covering he was on a plane back to Pierre. Days later Janklow reconsidered, the Senate asked the FBI to make a third investigation, and again he was cleared. In committee Alan Cranston, the liberal Californian, agreed there was "absolutely no substantiation in any way for any one of the charges," a phrase Janklow is given to quoting.

But early this year, when Janklow was seated for his first term in the House, *Indian Country Today* columnist Suzan Shown Harjo (prompted by activists Hank Adams and David Harris) suggested the rape allegation had not been adequately scrutinized. Soon thereafter I suggested to Janklow's spokesman that since the FBI files exonerated Janklow, releasing them could put the matter to rest. He agreed and promised copies but reneged after conferring with the Congressman. My requests to the FBI, BIA, and U.S. attorney also proved barren: All deny having the files.

I found the files anyway in 20-year-

There is no sign the FBI noticed the conflicting alibis, much less asked Janklow or his witnesses about them. John Penrod, the agent on the case, now retired, told me it would have been standard to note such contradictions in writing. He didn't. Nor did he collect physical evidence, like clothes; search the car; or look for tire tracks, important because Janklow said he merely U-turned at field's edge while Eagle Deer said he drove farther in and parked. Penrod explained that the U.S. attorney opposed such legwork: "You'd wait to see if he wanted to prosecute, then gather that kind of evidence." But a decision to prosecute could take weeks, by which time any evidence that could still be found would be tainted. (The assistant U.S. attorney on the case, Ronald Clabaugh, denied Penrod's claim, but Penrod worked the reservation for nine years and was adamant.)

Wesley Swearingen, a 25-year FBI agent from that era and author of the

whistleblowing *FBI Secrets*, said he “can’t imagine” any agent not collecting physical evidence immediately. But he adds, “If the U.S. attorney isn’t hot on prosecuting rape on a reservation, the agent could feel he’s wasting his time.” Swearingin compared his work investigating bank robberies, where “a squad would go immediately to the bank, two agents would do nothing but dust for prints and look for fibers, others would interview witnesses, and another would work outside.” It would not surprise most Indians that the FBI valued deposits more than their lives.

It gets worse. Eagle Deer raised her complaint the Sunday after the Saturday drive, but she wasn’t taken to a doctor till Monday. Much of the Indian Health Service was (and to a lesser but still troublesome degree is) peopled by doctors who were inexperienced or unable to get jobs elsewhere. The young doctor who saw Eagle Deer was fresh from med school. He had to find a book on how to do a rape exam. Even after his cramming, he didn’t know that a 36-hour lapse between sex and exam would sharply cut the odds of finding semen, that rape could occur absent semen, that he should swab for semen outside the vagina, or that he should look for foreign pubic hairs. When Eagle Deer complained of a tender thigh, he didn’t see a possible connection with sexual assault. And because he never looked for bruises or scratches beyond the pubic area, he completely missed the nickel-sized hickey on her breast (visible in investigative photos), which she credited to Janklow. There was no semen, the doctor said, hence no rape. Penrod and assistant U.S. attorney Clabaugh agreed and closed the 1967 file.

Andrea Smith, a Tsalagi (Cherokee) professor of Native American and women’s studies at the University of Michigan, finds the attorney’s decision depressingly par. Her attempts to study rape prosecutions in Indian Country have been frustrated because “not one U.S. attorney will tell me the number of rape complaints they receive or prosecute.” When Smith researched one southwestern reservation, she found no rape prosecutions for 2000, and she says she will never forget the Justice Department official in the late Clinton years who said only two U.S. attorneys nationwide

would prosecute reservation rapes. “If it’s this bad today,” Smith says, “imagine what it must have been back then.”

There is nothing in the 1967 investigation to suggest the FBI or U.S. attorney gave favorable treatment to Janklow *per se*. He appears to have benefited “merely” from an attitude that alleged crimes against Indians — perhaps particularly when the accused were white — were nothing to exert oneself over. But the 1975 investigations, before Janklow’s Senate confirmation, smell of something worse. By then South Dakota had become the most important theatre in the war between the American Indian Movement and federal and state governments. The FBI, for its part, infiltrated and illegally wiretapped AIM. It gave armor-piercing bullets to right-wing squads that beat and killed AIM members, then half-heartedly investigated the violence. Under its auspices, AIM was framed with crimes large and small, witnesses were intimidated into giving false testimony, exculpatory evidence was withheld. In much of this, US attorneys were complicit. More than one federal judge would eventually characterize the federal tactics as “arrogant,” “deliberate misconduct,” “in bad faith,” and “to be condemned.” Janklow, who once said the way to deal with AIM leaders was “to put a bullet in their head,” worked in step with the feds. The peak of the struggle came in mid-1975, neatly coinciding with Janklow’s confirmation. If the Bureau could look the other way on political murders, why couldn’t it do likewise for a mere rape charge against a political ally?

The FBI’s motive will probably never be discovered, but the new documents make clear the FBI gave Janklow a pass. It could do so with impunity because the White House and Senate, after letting themselves be snookered, vouched for the FBI’s work. The President’s counsel, citing “45 interviews in several different states, comprising some 375 FBI agent hours,” called the 1975 investigations “extensive.” Senator Cranston called them “fair and thorough ... complete.” Liberal Republican Senator Jacob Javits said they “vindicated [Janklow] completely.” But in truth the FBI files are very thin. At least 28 of the 45 interviews were of the “Is the nominee a Communist?” type, standard to

background checks of the period and irrelevant to the alleged rape. Of the remaining 17, it is not clear how many dealt with the rape (the files are heavily redacted). But it is plain the interviews were brief, their content minimal. Of the few witnesses from 1967 who were reinterviewed, no new ground was covered. Most damningly, there is no record that the FBI spoke with any of the original fact-finders: Neither agent Penrod, then still in the FBI’s employ; assistant U.S. attorney Clabaugh; the young doctor; nor the BIA cop (who, incidentally, believed Eagle Deer) recalled visits from the FBI in 1975. Nor is there any sign that the obvious screamers in the case, like Janklow’s shortened drive, the shoddy rape exam, or the lack of physical evidence, were explored.

Jonathan Steinberg and Donald Elisburg reviewed the investigation for the Democrat-controlled Senate committee. Steinberg, now a federal judge, claimed (dubiously) that it would be improper for a jurist to discuss such past work. Elisburg, hazy on details, was certain the charge was taken seriously. “But it would also be fair to say,” he allowed, “that the level of intensity of scrutiny was definitely not where it is now. It was much more, not casual, but collegial in dealing with nominations.”

During the 1975 reinvestigations, speeding joyriders ran over Eagle Deer on a rural Nebraska highway. She was supposed to have been traveling by car from South Dakota to Iowa, but she died on foot one hundred miles off route. Her ride was never found. Contemporary reports put her shortly before her death with a man matching the description of Douglass Durham, the most notorious of the FBI’s infiltrators of AIM. In a 2000 report, the Bureau said it didn’t investigate Eagle Deer’s death because Nebraska police had jurisdiction (in fact, the Bureau has jurisdiction over both possible kidnappings and the acts of its informers), and the Nebraska investigation found Jancita Eagle Deer was the victim of an unfortunate vehicular accident. Twenty-eight years later, Indians may be forgiven for finding irony in the undoing of Janklow by a similar accident.

Stephen Hendricks is writing a book on the struggle between Indians and the federal government.