

June 4, 1997

Mr. Doug Werth
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Doug:

This letter is in response to your inquiry concerning the implications of the full faith and credit provisions of 18 U.S.C. § 2265. Subsection (a) of that statute provides:

Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing state or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

Subsection (b) of the statute requires that the protection order to be enforced has been issued by a court having jurisdiction over the parties and matter, and that reasonable notice and opportunity to be heard have been given to the person against whom the order is issued.

The difficulties in applying this statute become apparent when we look at the language of Idaho Code § 39-6312, which is part of our Domestic Violence Crime Prevention Act:

(1) Whenever a protection order is granted under this chapter and the respondent or person to be restrained had notice of the order, a violation of the provisions of the order or of a provision excluding the person from a residence shall be a misdemeanor

(2) A peace officer may arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, if the person restrained had notice of the order.

Idaho Code § 19-603(6) also allows for arrest without a warrant for violations of Idaho Code § 39-6312, based upon probable cause, even where the offense did not occur in the presence of the officer.

Your questions concern the interaction between these federal and state statutes. First, may a person be convicted under Idaho Code § 39-6312 where the protection order violated was issued by another state, despite that statute's reference to protection orders "granted under this chapter"? Second, do the powers of arrest arising from § 39-6312 apply to violations of protection orders issued by other states? And, third, what is the extent of Idaho's full faith and credit obligation under 18 U.S.C. § 2265?

We have concluded that: (1) A person probably cannot be convicted for a violation of Idaho Code § 39-6312 where the underlying order was issued by another state. (By "another state," I refer to Indian tribes and "states," as defined in 18 U.S.C. § 2266, other than Idaho.) (2) The arrest powers emanating from § 39-6312 do not apply to violations of orders issued in another state, although other sources of arrest power may be available in such situations. (3) Under the full faith and credit provision of 18 U.S.C. § 2265, a protection order issued by another state must be enforced in the same manner as any other civil order issued by an Idaho court. In particular, violations of such an order may be punished as a contempt. Further, the order of another state may form a basis for the issuance of a protection order under chapter 63 of title 39, which would in turn trigger the penalty and arrest provisions of § 39-6312.

A definitive answer to the first question is difficult in view of the absence of relevant legislative history reflecting congressional intent and the scarcity of case law since the adoption of 18 U.S.C. § 2265 in 1994. A search has failed to yield anything indicating whether Congress intended that state statutes making it a crime to violate one state's protection orders must also be applied to protection orders of other states. No cases have been found in which a state has attempted to apply a statute like Idaho Code § 39-6312 to a violation of an out-of-state protection order. *But see, People v. Hadley*, — N.Y.S.2d —, 1997 WL 225140 (N.Y. Crim. Ct. April 7, 1997) (holding that protection order issued in New Jersey could form basis for prosecution for criminal contempt in New York, where acts violating protection order took place in New York; citing 18 U.S.C. § 2265); *Eileen W. v. Mario A.*, 644 N.Y.S.2d 452, 456 (N.Y. Family Ct. 1996) (noting, without elaboration, that New York protection order would be enforceable in New Jersey under 18 U.S.C. § 2265).

It might be argued that the language of 18 U.S.C. § 2265 requires Idaho to apply all of its enforcement provisions for protection orders, including those set out in Idaho Code § 39-6312, to out-of-state protection orders. On the other hand, courts have recognized the power of the states to define and punish criminal offenses:

The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. . . . Thus, “[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each ‘is exercising its own sovereignty, not that of the other.’”

Heath v. Alabama, 474 U.S. 82, 89-90, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985) (citations omitted).

In addition, the full faith and credit clause of article IV, section 1 “[h]istorically . . . has been applied in the context of civil disputes. . . . [W]hether the clause applies to criminal matters ‘is not at all clear’” Gillis v. State, 633 A.2d 888 (Md. 1993), *cert. denied*, 511 U.S. 1039, 114 S. Ct. 1558, 128 L. Ed. 2d 205 (1994); *see generally*, Nelson v. George, 399 U.S. 224, 90 S. Ct. 1963, 26 L. Ed. 2d 578 (1970); Huntington v. Attrill, 146 U.S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 (1892). In view of these considerations, it is doubtful whether Congress has the power to essentially rewrite a state criminal statute such as Idaho Code § 39-6312 to make it apply to a situation where it otherwise would not. Still more doubtful is whether Congress intended such a result in adopting 18 U.S.C. § 2265, particularly in the absence of explicit language within the statute or legislative history reflecting such an intent.

Further, a defendant charged with a criminal violation of Idaho Code § 39-6312 predicated upon violation of an out-of-state protection order could well argue that the statute failed to give him notice that he could be so charged. Such a defendant might even concede that Idaho should extend the protection of that statute to cases such as his, in view of the language of 18 U.S.C. § 2265, but that the state had simply failed to do so.

It therefore appears likely that our courts would refuse to allow a conviction under Idaho Code § 39-6312 for violation of a protection order issued by another state.

The second question is whether the laws of arrest under Idaho Code § 19-603(6) would apply to violations of protection orders issued by other states. Since there would probably be no criminal violation of Idaho Code § 39-6312 in these situations, an arrest based on a violation of that statute would not be possible. Some commentators have stated that officers should arrest in these situations based upon an out-of-state protection order. *See* Lutz and Bonomolo, How New York Should Implement the Federal Full Faith and Credit Guarantee for Out-of-State Orders of Protection, 16 Pace L. Rev. 9 (1995); Paziotopoulos, Violence Against Women Act: Federal Relief for State Prosecutors, 30 Prosecutor 20 (1996). They do not state, however, for what offense the arrest would be

made, nor do they weigh the sorts of problems presented by statutes such as Idaho Code § 39-6312.

Of course, even in these situations, an arrest without a warrant for an offense occurring out of the presence of the officer will often be possible under Idaho Code § 19-603(6). That statute permits such arrests not only for violations of Idaho Code § 39-6312, but for assault, battery, domestic assault or battery and stalking. Further, officers could assist the victim in making a citizen's arrest for an offense that was not committed in the officers' presence. *See* Idaho Code § 19-606 (person making arrest may summon others to aid in arrest); Moxie v. State, 662 P.2d 990 (Alaska Ct. App. 1983); People v. Johnson, 76 Cal. Rptr. 201 (Cal. Ct. App. 1969); People v. Sjosten, 68 Cal. Rptr. 832 (Cal. 1968) (officers acted properly in assisting citizen with arrest).

Further, the Violence Against Women Act created federal felony offenses for crossing a state line with intent to injure, harass or intimidate a spouse or intimate partner, and intentionally committing a crime of violence or causing injury to such person, 18 U.S.C. § 2261, and crossing a state line with intent to violate a protection order and subsequently engaging in such conduct, 18 U.S.C. § 2262. State officers may arrest for federal offenses. Idaho Code § 19-603 (authorizing officers to arrest for felony based upon reasonable cause; not restricting such arrests to state felonies); Marsh v. United States, 29 F.2d 172 (2d Cir.), *appeal dismissed*, 277 U.S. 611, 48 S. Ct. 563, 72 L. Ed. 1015 (1928), *cert. denied*, 279 U.S. 849, 49 S. Ct. 346, 73 L. Ed. 992 (1929) (opinion by L. Hand, J., holding that state officer was authorized to arrest for federal offense); Department of Public Safety v. Berg, 674 A.2d 513 (Md. 1996) (discussing Marsh and later cases reaching same result). This will often provide an additional basis for arrest and subsequent prosecution by federal authorities.

With regard to your final question—the extent of Idaho's full faith and credit obligation under the federal statute—the out-of-state order should be regarded as an order of an Idaho court, and violation of the order may therefore result in contempt proceedings under Idaho Code § 7-601(5). An example of a case approving a criminal contempt prosecution based upon an out-of-state protection order is People v. Hadley, — N.Y.S.2d —, 1997 WL 225140 (N.Y. Crim. Ct. April 7, 1997), cited previously. Further, the out-of-state order could assist in obtaining an Idaho protection order.

As you suggest, this area may be appropriate for legislation. Statutes allowing arrests and prosecutions for the violation of out-of-state protection orders, and providing officers with immunity for such arrests, should be considered. *See* Klein, Full Faith and Credit: Interstate Enforcement of Protection Orders Under The Violence Against Women Act of 1994, 29 Family L.Q. 253, 260-62 (1995) (discussing Oregon statutes). (I am enclosing a copy of this article.) This is something that we should discuss further.

Please contact me if I can be of further assistance.

Sincerely,

MICHAEL A. HENDERSON
Deputy Attorney General
Chief, Criminal Law Division