

Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence:

A Webinar Discussion on DOJ's Final Notice and Application Questionnaire



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Tuesday, December 3, 2013 ◦ 2:30 p.m. EST

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Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence

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Panelists: *John Dossett*, NCAI

Hon. Steven Aycok, NCJFCJ

Chia Halpern Beetso, TLPI

Q & A: *Sam Hirsch*, Deputy Associate Attorney General,
DOJ

Moderator: *Natasha Anderson*, NCAI

VAWA Special Domestic Violence Criminal Jurisdiction – Section 904

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VAWA 2013 affirmed tribal inherent authority to exercise criminal jurisdiction over non-Indians who commit domestic violence, dating violence, or violations of protection orders in Indian country

- Exercising special DV criminal jurisdiction is entirely voluntary and elective.
- Special DV criminal jurisdiction is concurrent with existing federal (or state) jurisdiction.

VAWA 2013 Pilot Project

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Section 908(b)(1) provides that tribes generally cannot exercise this authority until at least two years after enactment— March 7, 2015.

But Section 908(b)(2) establishes a “Pilot Project” that authorizes the Attorney General to grant a tribe’s request to be designated as a “participating tribe” prior to March 2015 , if the tribe’s criminal justice system has adequate safeguards to protect defendants’ rights.

Experiences and work of the pilot tribes can be shared with future participating tribes.

Phase One – Intertribal Working Group

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Tribal Working Group –

- ✓ As of November, 39 tribes have submitted preliminary expressions of interest, 2 in-person meetings, a series of webinars, code development and document sharing;
- ✓ A tribe is not required to participate in the Working Group, but can join at any time by sending a short letter to DOJ.
- ✓ Workgroup will continue through Phase Two.

Tribal VAWA Working Group

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August 2013: 1st In-Person Meeting at the
National Advocacy Center in Columbia, South Carolina

Tribes Represented on the Intertribal Working Group

1. Cherokee Nation
2. Chickasaw Nation
3. Colorado River Indian Tribes
4. Confederated Tribes of the Umatilla Indian Reservation
5. Eastern Band of Cherokee Indians
6. Eastern Shawnee Tribe of Oklahoma
7. Gila River Indian Community
8. Fort Peck Assiniboine & Sioux Tribes
9. Hopi Tribe of Arizona
10. Kickapoo Tribe of Oklahoma
11. Menominee Tribe of Wisconsin
12. Mississippi Band of Choctaw Indians
13. Muscogee (Creek) Nation
14. Nez Perce Tribe
15. Nottawaseppi Huron Band of the Potawatomi
16. Oneida Tribe of Indians of Wisconsin
17. Pascua Yaqui Tribe of Arizona
18. Passamaquoddy Tribe
19. Pauma Band of Mission Indians
20. Penobscot Nation
21. Pokagon Band of Potawatomi Indians
22. Prairie Band Potawatomi Nation
23. Pueblo of Isleta
24. Pueblo of Laguna
25. Pueblo of Santa Clara
26. Quapaw Tribe
27. Quinault Indian Nation
28. Sac and Fox Nation
29. Salt River Pima-Maricopa Indian Community
30. Sault Ste. Marie Tribe of Chippewa Indians
31. Seminole Nation of Oklahoma
32. Sisseton-Wahpeton Oyate of the Lake Traverse Reservation
33. Spokane Tribe
34. Standing Rock Sioux Tribe of North and South Dakota
35. Suquamish Indian Tribe of the Port Madison Reservation
36. Three Affiliated Tribes of the Fort Berthold Reservation
37. Tulalip Tribes of Washington
38. White Earth Nation
39. Winnebago Tribe of Nebraska

Issue List

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- Tribal Code Development
- Jury Selection and Judicial Requirements
- Criminal Defense and Defendant's Rights
- Law Enforcement Arrest Authority Guidance
- Law Enforcement Training
- Detention Policies at Interior
- Habeas Corpus and Legal Challenges
- Coordination with U.S. Attorneys
- Victims' Rights and Victims' Safety
- Access to Criminal Databases
- Resources

Phase Two – Federal Response to Tribal Requests

Application Questionnaire Published November 29th. When a tribal request is received, the Department will take the following steps:

- 1) Application shared with relevant components at Justice and the Interior.
- 2) DOJ will post notice on web site and announce expedited telephonic consultation for affected tribes.
- 3) DOJ may make follow-up inquiries.
- 4) DOJ and the Interior will review the application.
- 5) If needed and if funding is available, DOJ may provide training or technical assistance.
- 6) DOJ personnel will recommend to Associate Attorney General whether the requesting tribe should be designated as a participating tribe.
- 7) If recommendation is positive, DOJ will consult with requesting tribe to establish commencement date. May be conditioned on additional training or technical assistance.
- 8) Associate Attorney General may designate the tribe as a participating tribe. The Department will publish notice and the tribe's final Application Questionnaire.

VAWA Special Domestic Violence Criminal Jurisdiction – Section 904

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- **Domestic violence**—violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic laws of the Indian tribe.
- **Dating violence**—violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction.
- **Violation of Protective Orders** - violation of a court order that prohibits violent or threatening acts, harassment, contact, communication or proximity to another person.

VAWA Special Domestic Violence Criminal Jurisdiction – Jurisdictional Requirements

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- Within “Indian country” – 18 U.S.C. 1151
- Tribe may not exercise special DV criminal jurisdiction if both the victim and the defendant are non-Indians.
- Defendant must have sufficient ties to tribal community
 - resides in Indian country; or
 - is employed in Indian country; or
 - is a spouse or intimate partner of an Indian residing in Indian country or a tribal member.

VAWA Special Domestic Violence Criminal Jurisdiction – Due Process Requirements

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- Tribal court ensures “all applicable rights” under the Indian Civil Rights Act – Section 1302
- If any term of imprisonment, all rights described in TLOA for enhanced sentencing
 - Right to counsel, law trained judge, recorded proceedings and published laws.
- Tribal court must provide the right to a trial by an impartial jury.
 - Drawn from sources that reflect a fair cross-section of the community, including non-Indians.
- Tribal court must ensure defendants are timely notified of right to *habeas corpus* and right to petition for stay of detention.

VAWA Special Domestic Violence Criminal Jurisdiction – Implementation

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Goals of Implementation:

- 1) Create an effective deterrent
- 2) Provide authority for early intervention and rehabilitation
- 3) Protect Native women by incarcerating offenders

Tribes will need to implement the law effectively with criminal and procedural codes, professional policing and investigations, victims' services, prosecutions, defense counsel, law-trained judges and due process in tribal courts.

A Historic Victory for Tribes: Putting It Into Action



THE APPLICATION QUESTIONNAIRE

Please send the completed Application Questionnaire, along with any attachments, by e-mail (or, if necessary, by mail), to:

Office of Tribal Justice
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
E-Mail: OTJ@usdoj.gov

Questions, please contact Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, at (202) 514-8812.

- A tribe may apply at any time before March 7, 2015.
- All applications received at any time within 30 days after November 29 will be given the same priority consideration.
- Completely and accurately answer all questions and attach all relevant legal materials.

The Right to Trial by an Impartial Jury

1. In a criminal proceeding in which the Tribe will exercise SDVCJ, will the Tribe provide to the defendant the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross section of the community and do not systematically exclude any distinctive group in the community, including non-Indians? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

The Right to Effective Assistance of Counsel

2. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution? Please answer “Yes” or “No.”
Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

The Right to Indigent Defense Counsel

3. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe provide to each indigent defendant, at no cost to the defendant, the right to the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

4. For each licensed defense attorney that the Tribe anticipates will be appointed to represent an indigent defendant in a criminal proceeding in which the Tribe will exercise SDVCJ during the Pilot Project (i.e., prior to March 7, 2015) and in which a term of imprisonment of any length may be imposed, please provide a list of all jurisdictions in which the defense attorney is licensed to practice law. Please provide a separate list of jurisdictions for each attorney (who can be identified either by name or anonymously as “Attorney 1,” “Attorney 2,” etc.).

The Right to a Law-Trained, Licensed Judge

5. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe provide to the defendant the right to a criminal proceeding presided over by a judge who has sufficient legal training to preside over criminal proceedings and is licensed to practice law by any jurisdiction in the United States? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

6. For each judge that the Tribe anticipates will preside over a criminal proceeding in which the Tribe will exercise SDVCJ during the Pilot Project (i.e., prior to March 7, 2015) and in which a term of imprisonment of any length may be imposed, please provide (a) a brief description of the judge's legal training to preside over criminal proceedings, and (b) a list of all jurisdictions in which that judge is licensed to practice law. Please provide a separate answer for each judge (who can be identified either by name or anonymously as "Judge 1," "Judge 2," etc.).

The Right to Publicly Available Tribal Laws and Rules

7. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe, prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

The Right to Records of the Criminal Proceeding

8. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

The Right to Timely Notice of Federal Habeas Corpus Rights

9. Will the Tribe provide to each person detained by order of the Tribe timely notice of the person's rights and privileges to file in a court of the United States a petition for a writ of habeas corpus under 25 U.S.C. 1303 and a petition to stay further detention under 25 U.S.C. 1304(e)? Please answer "Yes" or "No." Please provide relevant legal materials detailing the safeguards that the Tribe's criminal justice system has in place to protect this right to timely notice.

Other Rights Protected by the Indian Civil Rights Act of 1968

10. In a criminal proceeding in which the Tribe will exercise SDVCJ, will the Tribe provide to the defendant all applicable rights under the Indian Civil Rights Act of 1968, as amended, including but not limited to
- (a) the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, and not to be subjected to a warrant unless it was issued upon probable cause, was supported by oath or affirmation, and particularly described the place to be searched and the person or thing to be seized;
 - (b) the right not to be twice put in jeopardy for the same offense;
 - (c) the right not to be compelled to be a witness against himself;
 - (d) the right to a speedy and public trial;
 - (e) the right to be informed of the nature and cause of the accusation;
 - (f) the right to be confronted with the witnesses against him;
 - (g) the right to have compulsory process for obtaining witnesses in his favor;
 - (h) the right to be free from excessive bail;
 - (i) the right to be free from excessive fines;
 - (j) the right against cruel and unusual punishments;
 - (k) the right to the equal protection of the Tribe's laws;
 - (l) the right not to be deprived of liberty or property without due process of law;
 - (m) the right not to be subjected to an ex post facto law; and
 - (n) the right to a trial by jury of not less than six persons?

Please answer "Yes" or "No." Please provide relevant legal materials detailing the safeguards that the Tribe's criminal justice system has in place to protect these rights.

Tribal Criminal Jurisdiction

11. Will the Tribe exercise SDVCJ over a defendant only for criminal conduct constituting, within the meaning of 25 U.S.C. 1304, either (a) an act of domestic violence or dating violence that occurs in the Indian country of the Tribe, or (b) an act that occurs in the Indian country of the Tribe and violates the portion of a protection order that (1) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; (2) was issued against the defendant; (3) is enforceable by the Tribe; and (4) is consistent with 18 U.S.C. 2265(b)?* Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

* A protection order issued by a state, tribal, or territorial court is consistent with 18 U.S.C. 2265(b) if “such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and . . . reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.” 18 U.S.C. 2265(b).

12. In a criminal proceeding in which the Tribe will exercise SDVCJ, will the Tribe convict a non-Indian defendant at trial only if the Tribe proves that the alleged victim is an Indian?

Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

13. In a criminal proceeding in which the Tribe will exercise SDVCJ, will the Tribe convict a defendant at trial only if the Tribe proves that the defendant resides in the Indian country of the Tribe; is employed in the Indian country of the Tribe; or is a spouse, intimate partner, or dating partner either of a member of the Tribe or of an Indian who resides in the Indian country of the Tribe? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

Other Considerations

14. This final question is optional. If the Tribe believes it would be helpful to the Departments of Justice and the Interior in fulfilling their statutory duties related to the Pilot Project, the Tribe may provide any additional information or relevant legal materials addressing the Tribe's readiness to commence exercising SDVCJ on an accelerated basis while protecting defendants' rights, consistent with 25 U.S.C. 1304. Additional information or relevant legal materials may focus on any of the following topics:
- (a) the Tribe's history of compliance with the Indian Civil Rights Act of 1968, as amended;
 - (b) the Tribe's recent history, following the 2010 enactment of 25 U.S.C. 1302(b)–(c), of imposing total terms of imprisonment of more than one year;
 - (c) the Tribe's formal or informal policies for coordinating with federal or state criminal investigators and prosecutors in cases where the Tribe may have concurrent criminal jurisdiction;
 - (d) the Tribe's efforts to combat domestic violence and dating violence, including issuing and enforcing protection orders;
 - (e) the Tribe's efforts to protect the rights and safety of victims of domestic violence and dating violence;
 - (f) the Tribe's methods for summoning, selecting, and instructing jurors;

Other Considerations *continued*

- (g) the Tribe's efforts to strengthen law enforcement, prosecution, trial and appellate courts, probation systems, detention and correctional facilities, alternative rehabilitation centers, culturally appropriate services and assistance for victims and their families, criminal codes, rules of criminal procedure, rules of appellate procedure, rules of evidence, and the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases;
- (h) the Tribe's needs for training, technical assistance, data collection, and evaluation of the Tribe's criminal justice system;
- (i) the date on which the Tribe would like to commence exercising SDVCJ under the Pilot Project;
- (j) the Tribe's plans to notify the public before commencing to exercise SDVCJ; and
- (k) any other pertinent topic that the Tribe would like the Departments of Justice and the Interior to consider when reviewing the Tribe's Application Questionnaire.

Certifications

The completeness and accuracy of this Application Questionnaire must be certified by :

- (1) the **chief executive officer** of the Tribe (e.g., the tribal chairperson, president, governor, principal chief, or other equivalent official);
- (2) the **chief judicial officer** of the Tribe (e.g., the tribal chief justice, chief judge, or other equivalent official);
- (3) the **chief legal officer** of the Tribe (e.g., the tribal attorney general, attorney, general counsel, or other equivalent official); and
- (4) the person authorized by the Tribe's governing body to be the Tribe's **point of contact** (POC) for the Department of Justice in this application process. The POC may be either one of the three officers listed above or a fourth individual selected by the Tribe's governing body.

Each of these individuals must sign and certify the Application Questionnaire. (See Notice for format of certifications.)

Technical-Assistance Providers

- ❖ The **National Congress of American Indians (NCAI)** is the largest and oldest organization of American Indian and Alaska Native tribal governments in the nation, serving the broad interests of tribal governments and communities.
- ❖ The **Tribal Law and Policy Institute (TLPI)** is an Indian owned and operated non-profit corporation designed to promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples.
- ❖ The **National Council of Juvenile and Family Court Judges (NCJFCJ)** is one of the largest and oldest judicial membership organizations in the nation.

Technical-Assistance Providers

- ❖ Primary **NCAI** Contact: Natasha Anderson, NCAI Staff Attorney
National Congress of American Indians (NCAI)
Tel. 202.466.7767 ext. 201 | nanderson@ncai.org
- ❖ Primary **TLPI** Contact: Chia Halpern Beetso, TLPI Tribal Law Specialist
Tribal Law and Policy Institute (TLPI)
Tel. 323.650.5467 | chia@tlpi.org
- ❖ Primary **NCJFCJ** Contact: Hon. Steve Aycock, Judge-in-Residence
National Council of Juvenile and Family Court Judges (NCJFCJ)
Tel. 775.784.6012 | steven_aycock@ncjfcj.org

PROTECT NATIVE WOMEN!

Thank you for your time.

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