May 23, 2013

Mr. Sam Hirsch, Deputy Attorney General

Mr. Tony West, Acting Associate Attorney General

Mr. Tracy Toulou, Director, Office of Tribal Justice

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530

Re: Consultation on Pilot Project, VAWA §§ 904 & 908

Dear Sirs:

The National American Indian Court Judges Association (NAICJA) appreciates the opportunities both orally and written to provide comments on the implementation of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). As an initial matter, NAICJA supports the comments submitted by the National Congress of American Indians and the Tribal Law and Policy Institute. We will try to supplement, not repeat, those organizations’ comments. In general, we support the approach of allowing tribal self-certification regarding the components required to participate in the Pilot Project. We realize however that the Department of Justice has a responsibility to exercise due diligence in its assessment of a tribe’s capacity to participate in the Pilot Project and exercise SDVCJ on an accelerated basis. Thus, where appropriate, we offer suggestions in addition to self-certification that include extrinsic evidence of compliance.

The below comments are in response to the “framing paper” posing questions regarding specifically the implementation of Section 904 and 908. The actual text of the question is followed by our response.

Adequate Safeguards to Protect Defendants’ Rights:

1. What factors should the Justice Department consider in making this determination? We agree that tribal self-certification is the preferred method. Assuming that the Indian Civil Rights Act (ICRA) set in place “adequate safeguards” to protect defendants’ rights under Federal Law, the factors should relate to ICRA’s text. It should be kept in mind that tribal governing documents (including tribal constitutions, civil rights and criminal codes) may establish additional rights that exceed ICRA’s requirements.
2. In criminal proceedings in which the tribe exercises SDVCJ, the new statute requires that 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.
   1. How can a requesting tribe demonstrate compliance with this requirement? We concur that tribal self-certification is the preferred method. The tribe can supply a copy of the tribal constitutional provision, tribal code provision, tribal court rule or administrative order, etc. that defines the tribal court’s jury pool.
   2. How should the people belonging to “the community” be defined for these purposes? Will the answer vary by tribe? The “community” should be defined by each tribe and it is expected that there will be variances in the scope of each. The Pilot Project application should require the tribe’s definition to be stated.
   3. What steps should a requesting tribe take to maintain an accurate, updated list of all potentially eligible jurors for SDVCJ cases? Practically speaking, the requesting tribe will not need to access the jury pool list until a jury trial is scheduled. The accuracy and frequency of updates will depend on the sources from which the pool is drawn. Generally speaking if tribal enrollment and residency records and motor vehicle registration are the basis for the pool, then immediately prior to holding the jury trial the most recent records should be accessed and verified against any existing jury pool list.
   4. What steps should a requesting tribe take to ensure non-Indian participation in jury pools for SDVCJ cases? The statute does not require a participating tribe “to ensure non-Indian participation in jury pools,” rather the requirement is the pool reflect a fair cross-section of the “community” (as tribally defined) and not systematically exclude any distinctive group in the community, including non-Indians. The tribe in addition to self-certification, can provide a copy of the tribal constitutional provision, tribal code provision, tribal court rule or administrative order, etc. that defines the tribal court’s jury pool. A review of the governing tribal provisions will establish that there is no lawful systemic exclusions of any group of individuals.

The Justice Department would appreciate hearing examples from tribes that already have non-Indians serving on their juries. The Native American Rights Fund’s National Indian Law Library (NILL) has the United States’ largest collection of tribal constitutions and codes. NILL has digitized the indexes of the collection and may be able to assist in researching the composition of tribal court juries in order to identify examples that include non-Indian jurors.

1. In criminal proceedings in which the tribe exercises SDVCJ and a term of imprisonment of any length is or may be imposed, the new statute requires that the tribe, at the expense of the tribal government, provide an indigent defendant 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. How should the Justice Department evaluate whether a jurisdiction applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys? The common understanding of the term “attorney” would include only persons who attended law school and passed a bar examination. Frequently, admission to and good standing in the highest court of the state in which the tribe is located (or in some instances, in any state) is a requirement for tribal court admission. In such an instance, the Department will have to respect and rely on the state bar licensing authority in the same way that the tribal court does. Evidence of a system to ensure the competence and professional responsibility can be supplied in the form of the tribal law, tribal court rule or administrative order that establishes a grievance and disciplinary system for tribal bar members. In addition, tribal provisions that afford comity to state bar disciplinary actions indicates tribal efforts to ensure competence and to exclude attorneys not performing to professional licensing standards.
2. In criminal proceedings in which the tribe exercises SDVCJ and a term of imprisonment of any length is or may be imposed, the new statute requires that the judge presiding over the criminal proceeding both is licensed to practice law and has sufficient legal training to preside over criminal proceedings. How should the Justice Department evaluate whether a judge’s legal training is sufficient to preside over criminal proceedings? This is a difficult standard to articulate. No such evaluation is necessary for many county and state court judges—some of whom may not be law school graduates or attorneys. Until 1981, one did not have to be an attorney in order to be elected to serve on the North Carolina Supreme Court. Currently non-lawyers can serve as magistrate judges in South Carolina. Moreover, in state courts of general jurisdiction, a judge whose law practice prior to taking the bench focused on non-criminal matters, will be expected to expeditiously undertake self-study to become competent to hear criminal matters. There is critical need for tribal judicial training resources, particularly for judges in TLOA and future SDVCJ courts. A certification by a nationally respected tribal judicial education organization awarded to a tribal judge after completing a course of classroom and experiential study, could be developed that could be prima facia evidence of sufficient legal training. In lieu of that, the Department should use a flexible tribal self-certification approach in which the tribe articulates what legal education and experience the judge who will be exercising the SDVCJ jurisdiction possesses.
3. The new statute requires tribes to provide to defendants in SDVCJ proceedings “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise [SDVCJ] over the defendant.” Are there rights other than those enumerated in the Indian Civil Rights Act of 1968, as amended by the Tribal Law and Order Act of 2010 and by VAWA 2013, that a requesting tribe should provide to non-Indian defendants in SDVCJ cases? This is a problematic requirement because tribes generally are not required to comply with U.S. constitutional principles, rather only those set forth in ICRA. In the criminal context however there may not be a wide disparity as many of the same provisions are required under each. Interestingly, the right to a jury trial under VAWA 2013 is more available than under the Sixth Amendment to the U.S. Constitution. “Petty offenses” where imprisonment of less than six months is the maximum penalty are excluded from the federal jury trial guarantee.
4. How can a requesting tribe establish that it guarantees the equal protection of its laws to Indian defendants who are not subject to SDVCJ? In addition to tribal self-certification, the tribe can provide a copy of the tribal constitutional provision or tribal law that articulates the equal protection guarantee.
5. Should the Justice Department assess the capacity of the requesting tribe in SDVCJ cases to effectively investigate, prosecute, and sentence domestic-violence offenses, dating-violence offenses, and criminal violations of protection orders in a manner that ensures victim safety and offender accountability? If so, how should this be evaluated? Requiring a tribe to demonstrate that its justice system “ensures victim safety and offender accountability” is outside the requirements of Sections 904 and 908 and should not be included in the Justice Department’s assessment.
6. Should the Justice Department, in coordination with the Department of the Interior, assess the capacity of the requesting tribe to jail or imprison defendants in SDVCJ cases? If so, how should this be evaluated? Unless required by the specific terms of VAWA, it should not be a requirement of the Justice Department’s assessment. We adopt the analysis of TLPI regarding the delays in BIA approvals of tribal correctional facilities. It would be appropriate for a tribe to be required to state in its application where it plans to incarcerate SDVCJ defendants.
7. Should the Justice Department consider whether the requesting tribe’s chief prosecutor has developed formal or informal policies with the relevant U.S. Attorney’s Office (or, where the State has concurrent jurisdiction, the relevant state or local prosecutors) for coordination, cooperation, abstention, and/or deferral in cases where more than one government seeks to investigate or prosecute the same defendant for substantially the same act or acts? Again, this is beyond the scope of VAWA’s SDVCJ requirements and thus should not be a requirement. Where, however, such policies exist, a tribe could be encouraged to provide information about those policies to bolster its application.

The Justice Department’s Process for Considering Requests: The questions above focus on ***substantive*** requirements. The Justice Department is also interested in hearing from tribes about the ***process*** for request and approval when a tribe would like to participate in the Pilot Project and exercise SDVCJ on an accelerated basis.

1. What process should the Justice Department use in making its assessment? What constraints does the Pilot Project’s two-year time limit impose? NAICJA concurs with the recommendations of NCAI and TLPI. If the process is too onerous and intrusive, tribes may simply delay until March 7, 2015 when Section 904 becomes effective. The value that could be generated by the Pilot Project through the creation of learning collaboratives and development of sample tribal codes and procedures would be lost.
2. Would it be preferable to have a process that requires Justice Department personnel to make site visits and engage in extensive investigation into a requesting tribe’s criminal-justice system? Or would it be preferable to rely primarily on tribal “self-certification,” that is, a process in which the requesting tribe provides written answers to detailed questions about its criminal-justice system, the tribe’s leader, attorney, and chief judicial officer certify the completeness and accuracy of the answers, and Justice Department personnel rely principally on these answers and thus need to engage in only limited follow-up inquiries? It would be more in accordance with the government-to-government relationship and principles to primarily rely on tribal self-certification. Moreover the Justice Department more than likely does not have the staff or financial resources to conduct multiple site visits and “extensive investigation.” Understanding that the Justice Department has a due diligence responsibility however, it should be able to conduct follow-up inquiries when assessing a tribe’s application.
3. How should the Justice Department balance the desire to maximize tribal participation in the Pilot Project with the desire to maximize the opportunity for tribes to collaboratively develop “best practices,” plan programmatic reforms, and revise criminal codes and rules of criminal procedure, in order to minimize the risk that a Pilot Project tribe applies the new statute in a manner that arguably violates Federal law? NAICJA concurs with the reasoning of NCAI and TLPI. It should be noted that tribes that wish to participate in the Pilot Program are most likely those that already have adequate systems, codes and rules. The Pilot Program tribes most likely will be leaders in exercising SDVCJ and can serve as peer mentors to tribes who need to make systemic or procedural revisions.
4. Should the Justice Department create a panel of tribal experts to participate in the assessment process? What would be the best approach to creating such a panel? There should be a panel of tribal experts to participate in the assessment process. The panel should include tribal court judges and others who have served in or appeared before a tribal justice system. Tribal elected officials responsible for making financial decisions should also be included. The Justice Department should seek recommendations from tribal justice-serving organizations such as NAICJA, TLPI and the Northern Plains Tribal Judicial Institute and the National Judicial College’s Tribal Judicial Institute. The panel should reflect the diversity of national regions and size (both large and small tribes being represented.)
5. Would it be preferable for the Justice Department to encourage the development of a ***single*** model for criminal code provisions and rules of criminal procedure that all tribes exercising SDVCJ could adopt? Or would it be preferable for the Justice Department to facilitate intertribal efforts to develop ***multiple*** model code provisions and model rules, with different versions tailored to each participating tribe’s particular needs, preferences, and traditions? As stated previously, it is likely that the tribes that are approved for exercising SDVCJ will already have adequate codes and rules in place. The Pilot tribes should be asked to share those documents with other tribes (they may be part of the public record anyway and subject to the Freedom of Information Act.) In addition to making these acceptable codes and rules available to non-Pilot Project tribes, a checklist of VAWA’s requirements to guide tribes in their development could be very helpful. Adding annotations to the checklist from the Pilot tribes codes and rules would be especially beneficial. Out of respect for tribal self-determination, self-governance and competence, the Justice Department should not get into the business of tribal law development.
6. How should Pilot Project tribes’ experiences developing best practices for exercising SDVCJ, including new tribal criminal code provisions and rules of criminal procedure, be collected and shared with other (non-Pilot Project) tribes that may wish to commence exercising SDVCJ in 2015 or beyond? Can the Justice Department facilitate this information-sharing among tribes? Information can be shared through existing tribal justice serving organizations’ websites and list serves (especially NAICJA, NILL and TLPI.) The Department of Justice, perhaps the Office of Tribal Justice, should set up a dedicated website. NCAI should also be included as a partner in the information sharing. A convening of the Pilot Tribes should be held at which reflections, lessons learned and best practices are chronicled and published.
7. What role should the Department of the Interior play in considering tribal requests to participate in the Pilot Project and exercise SDVCJ on an accelerated basis? The Department of the Interior should serve in advisory role. Their input regarding financing what may be new expenses for a tribal court (law trained judges, defense attorneys and an increase in jury trials, appeals and petitions for writs of habeas corpus) and tribal correctional facilities could be valuable. By including DOI, it will be in a position to raise awareness of the Administration of the unmet tribal justice system funding needs.
8. Should the Justice Department develop a mechanism and metrics for evaluating the Pilot Project? If so, what should be evaluated? How should success be defined? Due to the fact that this is not “pilot” project in the usual sense, in that tribes will be able to exercise SDVCJ in 2015 regardless of the performance of the Pilot Project tribes, it’s difficult to see the goal of an evaluation if limited to VAWA implementation. Nonetheless, an evaluation process may be useful in the event that future restoration of tribal court jurisdiction is contemplated by Congress. For example, if Congress were to consider a legislative fix to *Oliphant.* Success may include such elements as: number of tribes entering the Pilot Project who continue to exercise the jurisdiction into 2015 and beyond, determining the number of tribes that benefitted from learning from the Pilot Program tribes which assisted them to undertake SDVCJ in 2015, the number of challenges to tribal court convictions and the outcomes of the writs of habeas corpus. The most important indicators of success will be those that show decreases in domestic and sexual violence crimes, decreases in victimization of Native women and children, and increases in community safety and well-being.
9. Please identify any recent Federal pilot program or demonstration project that was particularly well structured and implemented. The Tribal Self-Governance demonstration project is an example of a successful pilot project in Indian Country.

Consultation with “Affected Indian Tribes”: The new statute requires the Justice Department to consult with “affected Indian tribes” before granting or denying any tribe’s request to participate in the Pilot Project and exercise SDVCJ on an accelerated basis.

1. Which tribes would be sufficiently “affected,” so that the Justice Department should consult with them about a request from a particular tribe? “Affected” tribes may be tribes that share borders or a close proximity to a tribe wishing to participate in the Pilot Project. Other potentially affected tribes could be those that could be impacted by increased tribal court-related and correctional facility costs where multiple tribes share a court system or facility. The Pilot Project tribe-applicant could be required to state which other tribes they believe could be affected by their undertaking of the SDVCJ.
2. What form should that consultation take? The Justice Department should give the potentially affected tribes notice of the application to exercise SDVCJ and an opportunity to provide input both through in-person meetings on their territory and in writing.
3. Should other nontribal stakeholders have an opportunity to provide input? If so, who? VAWA does not require consultation with nontribal persons or entities. It may be beneficial to alert neighboring jurisdictions, the courts and law enforcement, that a tribe is applying to be Pilot Project. This will help clarify jurisdiction ahead of time and may prompt the tribal, federal and state entities to coordinate responses.

Other Potential Issues: Are there other constitutional, legal, or policy issues that the Justice Department should consider as it establishes the procedures for tribes to request participation in the Pilot Project and for the Justice Department to grant or deny them? Challenges to the tribal court’s exercise of SDVCJ over non-Indian defendants in federal court seem inevitable. The Justice Department should consider if and how it will participate in those federal court proceedings to defend the tribal provisions of VAWA. Pilot Project tribes should be provided with a clear statement of the Justice Department’s policy. Part of the tribal application process may include an inquiry about the tribe’s ability to defend the tribal court actions (especially the tribal court presiding judge) in federal court. Tribal courts are already chronically underfunded. The 1993 Tribal Justice Act which would have provided millions in tribal court base funding has not be funded. Thus appropriation of the authorized funding (and more) for the SDVCJ, is essential to the success of this effort.

Again, thank you for the respect you have shown to the tribal judiciary by engaging in this consultation. NAICJA looks forward to providing support to tribal courts who wish to be in the Pilot Project. If you have any questions or need additional information, please contact NAICJA President Jill E. Tompkins.

Respectfully yours,



Justice Jill E. Tompkins *(Penobscot)*

President, Board of Directors

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