

## Building Tribal Capacity to Exercise TLOA Enhanced Sentencing and/or VAWA “Special Domestic Violence Criminal Jurisdiction” over Non-Indians

Jerry Gardner, *Executive Director*  
Lauren Frinkman, *Tribal Law Specialist*  
*Tribal Law and Policy Institute*



## Overview of Presentation

- Overview of VAWA Generally
- Role of Amnesty International *Maze of Injustice* Report
- VAWA Reauthorization Signing Ceremony (March 7, 2013)
- Overview of VAWA Title IX (Safety for Indian Women)
- Section 904: New Expanded VAWA “Special Domestic Violence Criminal Jurisdiction” over Non-Indians
- VAWA DV Jurisdiction: Scope and Limitations
- Due Process rights of defendants in TLOA Enhanced Sentencing and VAWA DV Jurisdiction (*TLOA Plus*)
- Clarification of Tribal Authority - Civil Protection Orders
- Sec. 906: Amendments to the Federal Assault Statute
- Lessons Learned from Tribes that have begun to implement TLOA enhanced sentencing provisions
- Implementation and Legal Strategy issues
- Pilot Project and DOJ Consultation

## Violence Against Women Act

- First passed by Congress in 1994. It provided funding towards the investigation and prosecution of violent crimes against women, imposed automatic and mandatory restitution, allowed civil redress, and established the [Office on Violence Against Women \(OVW\) within the Department of Justice \(DOJ\)](#).
- VAWA includes automatic expiration dates. VAWA was reauthorized in 2000, 2005, and 2013.
- In 2005, for the first time, VAWA included a specific Tribal Title (Title IX).

Learn more about VAWA at  
[www.tribal-institute.org/lists/vawa\\_2013.htm](http://www.tribal-institute.org/lists/vawa_2013.htm)

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### The Violence Against Women Act – Title IX: Safety for Indian Women

The Violence Against Women Act (VAWA) was reauthorized for the third time on March 7, 2013. ([Violence Against Women Reauthorization Act of 2013, S. 47, 113th Congress, 2013-2015](#).) VAWA of 2013 includes [Title IX—Safety for Indian Women](#).

Among its provisions, Title IX of VAWA of 2013 authorized "special domestic violence criminal jurisdiction." This jurisdiction authorizes tribes to criminally prosecute non-Indians for the crimes of domestic violence, dating violence, and the violation of protection orders. However, in order for tribes to utilize this criminal jurisdiction, tribes must provide certain enumerated due process protections, including most of the protections required in the Tribal Law and Order Act.

- [Introduction to Violence Against Women Act Reauthorization – Title IX](#)
- [Special Domestic Violence Criminal Jurisdiction](#)
- [Law Takes Effect March 2015](#)
- [Due Process Protection Requirements](#)
- [Special Rule for Alaska](#)
- [Applicability of Other Federal Laws](#)
- [Constitutionality of Title IX](#)
- [Past VAWA Acts](#)

### Resources

[Violence Against Women Act 2013 Signing Ceremony – March 7, 2013](#)

[Video of President Obama Addresses Tribal provisions in VAWA signing Ceremony – March 7, 2013](#)



[NCAI – Reflections on Passage of VAWA and Tribal Provisions, March 7, 2013](#)

**Special Domestic Violence Criminal Jurisdiction Resources**

- [DOJ's One-Page Fact Sheet: VAWA 2013 and Tribal Jurisdiction over Non-Indian Perpetrators of Domestic Violence](#)
- [DOJ Training Paper: Implementation of Sections 904 and 908 of the Violence Against Women Act of 2013](#), April 16, 2013 (regarding the Pilot Project)
- [TLPJ PowerPoint presentation regarding the background and provisions of the special domestic violence criminal jurisdiction in the VAWA of 2013](#)
- [NCAI's Hand-Out Indicating How the Indian Civil Rights Act is Amended by the VAWA 2013](#)
- [NCAI and TLPJ PowerPoint: Implementing the Expanded Jurisdiction Provisions of VAWA in our Tribal Courts](#), April 5, 2013
- [NCAI and TLPJ Recording of Webinar: Implementing the Expanded Jurisdiction Provisions of VAWA in our Tribal Courts](#), April 5, 2013

**Tribal Bar Association Resources**

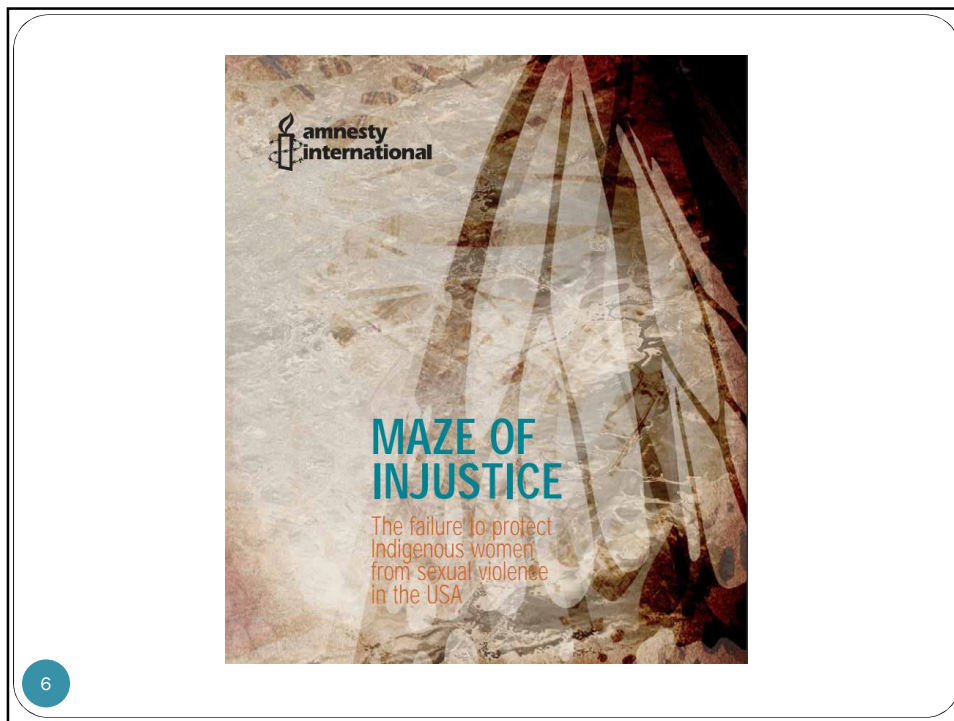
- ["Judicial and Attorney Qualifications, Licensure, and Ethical Standards," PowerPoint](#) by Christine Folsom-Smith, the National Tribal Judicial Center, presented at the American Indian Justice Conference, May 10, 2013.

**Publications, Reports, and Articles**

- [American Bar Association \(ABA\) Resolution Supporting the Reauthorization of VAWA that includes the Tribal Criminal Jurisdiction Provisions - August 6, 2013](#)  
This report, co-authored by TLPJ Executive Director Jerry Gardner and TLPJ Tribal Law Specialist Lauren Frinkman, details the justification for why the ABA supports the tribal provisions of VAWA. This resolution was passed August 6-7, 2012, four months after S.1925 was passed by the Senate on April 26, 2012. Ultimately, the Title IX passed in VAWA 2013 was reintroduced in 2013 in S. 47, passed by the Senate on February 12, 2013, passed by the House on February 28, 2013, and signed into law by President Obama on March 7, 2013.
- [Amnesty International, State of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA](#), *Amnesty International USA (2007)*  
This groundbreaking report detailed for the first time the devastating degree of sexual violence faced by Native women in the United States. In addition, the report details the complex, and subsequently inadequate nature of criminal jurisdiction in Indian country and how that failing system compounds the danger. Statistics from this report were cited in the Congressional Findings of the Tribal Law and Order Act of 2010, and used to support the VAWA 2013 legislation.
- [DOJ Statement on Section 904's Constitutionality](#), 159 Cong. Rec. H705-727-99 (daily ed. Feb. 28, 2013)
- [Thomas J. Perrelli](#), Associate Attorney General testified before the Senate Committee on Indian Affairs concerning the constitutionality of Sec. 904 under the U.S. Supreme Court precedent, *United States v. Lara*. The statement was later inserted into the Congressional Record prior to the House floor vote on VAWA 2013, on February 28, 2013.
- [M. Brent Leachard, Closing a Gap in Indian Country Justice: Oliphant, Lara, and DOJ's Proposed Fix](#), 28 *Harvard Jnl. On Racial & Ethnic Justice* 117 (2012)  
This law review article analyzes whether DOJ's proposed legislative fix to allow tribes to prosecute limited non-Indian domestic violence crimes is legally permissible by closely analyzing the decisions in *Oliphant* and *Lara*. Given the closely circumscribed requirements for the exercise of such power, and past decisions of various justices, this article concludes that it is within Congress' power to recognize the inherent power of tribes to prosecute non-Indians for domestic violence crimes against Indians.
- [National Indigenous Women's Resource Center, Restoration of Native Sovereignty and Safety for Native Women](#), Volume XX, June 2012  
The *Restoration of Sovereignty & Safety* magazine is a publication dedicated to informing tribal leadership and communities of emerging issues impacting the safety of American Indian and Alaska Native women. The June 2012 issue includes extensive legislative history of VAWA 2013, profiles of key advocates, as well as powerful stories regarding the survival of violence against Indigenous women and the impetus for VAWA 2013.
- [Zachary S. Price, Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction](#), 113 *Colum. L. Rev.* 637 (2013)  
This law review article proposes a framework for resolving constitutional questions raised by the Court's recent cases in the areas federal Indian law concerning unregulated local governmental authority. Focusing on the criminal context, this Article considers three issues: (1) whether and under what circumstances Congress may confer criminal jurisdiction on tribal and territorial governments without requiring that those decisions be subject to federal executive supervision; (2) whether double jeopardy should bar successive prosecution by both the federal government and a tribal or territorial government; and (3) what, if any, constitutional procedural protections apply when a tribal or territorial government exercises criminal jurisdiction pursuant to such federal authorization.
- [VAWA Letter from Law Professors - Tribal Provisions](#), April 12, 2012  
Then Dean of New Mexico Law School Kevin Washburn (now Assistance Secretary of Indian Affairs), along with Professors Stacy Leeds, Erwin Chemerinsky, Carole E. Goldberg, Robert N. Clinton, Gloria Valencia-Weber, Matthew L.M. Fletcher, along with forty-three other distinguished law professors, signed onto this letter addressed to Senators Patrick Leahy and Charles Grassley and Representatives Lamar Smith and John Conyers, Jr. The letter writes in support of the tribal provisions, as well as details the constitutionality of the those provisions.
- [Written Comments regarding Government-to-Government Consultation with the Department of Justice on Implementation of the Violence Against Women Reauthorization Act of 2013](#)  
On August 16, 2013, the U.S. Department of Justice (DOJ) invited tribal leaders to participate in a government-to-government consultation regarding how best to structure and implement the voluntary Pilot Project established under Sections 904 and 908 of VAWA 2013. DOJ hosted conference calls with tribal court judges on May 8, 2013, and with tribal leaders generally on May 14 and May 17, 2013. DOJ also accepted written comments. Below are written comments from the National Congress of American Indians, the National American Indian Court Judges Association, and the Tribal Law and Policy Institute.
  - [National Congress of American Indians' Comments](#) - May 20, 2013
  - [National American Indian Court Judges Association's Comments](#) - May 23, 2013
  - [Tribal Law and Policy Institute's Comments](#) - May 20, 2013

**Links**

- [American Bar Association \(ABA\) VAWA](#)
- [Department of Justice's \(DOJ\) Office of Violence Against Women \(OVW\) - Tribal Communities](#)
- [Department of Justice's \(DOJ\) Tribal Justice and Safety - Violence Against Women Act \(VAWA\) Reauthorization 2013](#)
- [National Congress of American Indians' \(NCAI\) Violence Against Women Act](#)



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March 8, 2013 Statement of  
Acting Associate Attorney General Tony West  
at Federal Advisory Task Force

*We have had a lot to celebrate the last couple days, and yesterday I was proud to witness President Obama sign the reauthorization of the Violence Against Women Act into law. The reauthorization not only includes the provisions that Vice President Biden fought so hard for 20 years ago to protect all women, but **it also includes the critical tribal jurisdiction provisions to help Indian tribes combat violence against Native women.** From the time non-Indians first came to this continent, and right up through the founding of our Nation, Indian tribes routinely exercised authority over all individuals who committed acts of violence on Indian lands. In 1978, in the **Oliphant v. Suquamish Indian Tribe** case, the U.S. Supreme Court took that power away, holding that tribes lacked criminal jurisdiction over non-Indians, absent express authorization from Congress. Last week, thanks largely to your efforts, we got that authorization, and **now perpetrators of domestic and dating violence will be held accountable, whether they're Indian or non-Indian.** And countless Indian women will enjoy safer lives as a result.*

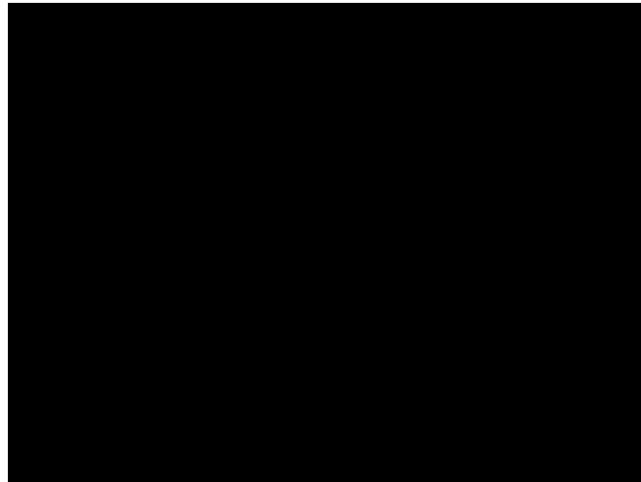
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President Obama Signing VAWA  
on March 7, 2013



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## President Obama on the Tribal Provisions in VAWA 2013



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[http://youtu.be/kMX3j6VX\\_rY](http://youtu.be/kMX3j6VX_rY)

## VAWA 2013 Title IX – Safety for Indian Women

- Section 901: Grants to Indian Tribal Governments
- Section 902: Grants to Indian Tribal Coalitions
- Section 903: Consultation
- **Section 904: Tribal Jurisdiction over Crimes of Domestic Violence**
- **Section 905: Tribal Protection Orders**
- Section 906: Amendments to the Federal Assault Statute
- Section 907: Analysis and Research on Violence Against Indian Women
- **Section 908: Effective Dates; Pilot Project**
- Section 909: Indian Law and Order Commission; Report on the Alaska Rural Justice and Law Enforcement Commission
- Section 910: Special Rule for the State of Alaska

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## VAWA Section 904: Tribal Jurisdiction over Crimes of Domestic Violence

- Section 904 of the re-authorization of the Violence Against Women Act (VAWA) of 2013 makes several amendments to the Indian Civil Rights Act (ICRA) of 1968.
- Most notably, it authorizes tribes to exercise “special domestic violence criminal jurisdiction” over non-Indians.
  - A “participating” tribe is a tribe that has opted to exercise this special domestic violence criminal jurisdiction.

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## Purposes of Section 904

- Decrease the incidence of crimes of domestic violence in Indian country
- Strengthen the capacity of Indian tribes to exercise their sovereign power to administer justice and control crime
- Ensure that perpetrators of domestic violence are held accountable for their criminal behavior.

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## What VAWA Section 904 Covers



- A participating tribe may exercise “special domestic violence criminal jurisdiction” over a non-Indian defendant for
  - Acts of domestic violence or dating violence that occur in the Indian country of the participating tribe; and
  - Violations of Protection Orders that are violated in the Indian country of the participating tribe.

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## VAWA Section 904 Definitions: *Dating and Domestic Violence*

- 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 between the persons involved in the relationship.”
  - Note: This definition would *NOT* likely be interpreted to cover a single “hook-up”.
- 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- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.”

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25 U.S.C. § 1304 (a)(1)-(5)



## VAWA Section 904 Definitions: *Protection Order*

- “any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and
- includes any temporary or final order issued by a civil or criminal court, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of the person seeking protection.”

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## Requirements in order to criminally prosecute for Violation of Protection Orders under VAWA § 904

- Special Domestic Violence Criminal Jurisdiction over violation of protection orders applies *only* if the violation is of the portion of the protection that
  - Protects against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
  - Was issued against the defendant;
  - Is enforceable by the participating tribe; and
  - Is consistent with 18 U.S.C. § 2265(b), governing Full Faith and Credit given to Civil Protection Orders
    - Includes jurisdictional and notice requirements

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## What VAWA 2013 Section 904 Does NOT Cover

- Victim and Defendant are both non-Indian - A tribe may not exercise special domestic violence criminal jurisdiction if neither the defendant nor the alleged victim is an Indian.
- Non-Indian Defendant Lacks Sufficient Ties to the Indian Tribe – Defendant must either
  - Reside in the Indian country of the participating tribe;
  - Be employed in the Indian country of the participating tribe; or
  - Be a spouse, intimate partner, or dating partner of a tribal member, or an Indian who resides in the Indian country of the participating tribe.
- The crime did not take place in the Indian Country of a participating tribe
- Tribe chooses not to exercise this VAWA 2013 section 904 jurisdiction

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## What VAWA Section 904 Does NOT Cover – Sexual Assault



- Special domestic violence criminal jurisdiction does NOT directly cover sexual assault.
  - Note, if sexual assault occurs within the context of domestic violence, dating violence, or a violation of a protection order, then the defendant *can* be prosecuted, but only for those three distinct crimes (that is, the perpetrator is not directly charged with sexual assault)
  - Sexual assault between two strangers is NOT covered.
  - Sexual assault which does not meet the limited legal definitions of domestic violence or dating violence is also not covered (that is, if the perpetrator and victim know each other but are not either “*in a social relationship of a romantic or intimate nature with the victim*” (dating violence definition) or “*the current or former spouse or intimate partner of the victim*” (domestic violence definition), then the sexual assault is also NOT covered.

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## What VAWA Section 904 (and 905) Does Not Cover- Alaska



### VAWA SEC. 910. SPECIAL RULE FOR THE STATE OF ALASKA.

(a) *Expanded Jurisdiction.*--In the State of Alaska, the amendments made by sections 904 and 905 [i.e. recognition of civil dv jurisdiction over "any person"] shall only apply to the Indian country (as defined in section 1151 of title 18, United States Code) of the Metlakatla Indian Community, Annette Island Reserve.

(b) *Retained Jurisdiction.*--The jurisdiction and authority of each Indian tribe in the State of Alaska under section 2265(e) of title 18, United States Code (as in effect on the day before the date of enactment of this Act)--

- (1) shall remain in full force and effect; and
- (2) are not limited or diminished by this Act or any amendment made by this Act.

(c) *Savings Provision.*--Nothing in this Act or an amendment made by this Act limits or diminishes the jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in the State of Alaska.

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## What VAWA Section 904 Does Not Cover External and Practical Limitations



- While Congress has authorized this special domestic violence criminal jurisdiction over non-Indians, tribes may nevertheless be otherwise restricted or at least currently unable to assert this expanded jurisdiction.

Possible restrictions include:

- Congressional Recognition/Settlement Acts that specifically limit jurisdiction over non-Indians
- Limitations within Tribal Constitutions or Tribal Code
- Tribes not currently exercising criminal jurisdiction

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## VAWA Section 908 Effective Date of VAWA Section 904



- Tribes may *not* exercise special domestic violence criminal jurisdiction for 2 years (March 7, 2015).
- There is a limited exception for tribes that request to operate a *pilot program* from the Attorney General.
- ***Justice Department will be present at the NCAI Mid-Year Meeting, Monday, June 24<sup>th</sup>: Implementing VAWA's Jurisdictional Provisions and TLOA's Expanded Sentencing Authority***

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## VAWA Section 904 Due Process Requirements

- Before exercising jurisdiction, tribes must provide added due process protections.
- Special Domestic Violence Jurisdiction under VAWA requires ALL of the same due process protections included within the Tribal Law and Order Act (TLOA).
  - (TLOA – expands tribes' ability to sentence defendants from 1 year and a \$5,000 fine to 3 years and a \$15,000 fine.)
  - *Note:* TLOA due process protections are only required IF a term of imprisonment *may* be imposed.
- In addition to the TLOA requirements, VAWA requires several other due process protections.

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## Tribal Law and Order Act

Public Law 111–211, H.R. 725, 124 Stat. 2258, enacted July 29, 2010, being signed into law by President Barack Obama



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## TLOA Background

- Primary Causes of Indian Country Violence:
  - Underfunded tribal justice systems
  - Broken and Divided System
    - Handcuffed tribal justice systems
    - Lack of federal accountability
    - Jurisdictional maze
- TLOA sought to address system and funding

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## TLOA Congressional Findings

- Sec. 202: Congress finds that—
  - (5)(A) domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions;
  - (B) 34 percent of American Indian and Alaska Native women will be raped in their lifetimes;
  - (C) 39 percent of American Indian and Alaska Native women will be subject to domestic violence

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## TLOA Overview

- Increased Federal Accountability
- Increased Tribal Authority
- Authorized increased Tribal funding, but only authorization (virtual funding) – not appropriations (actual funding)
- Established Tribal Law and Order Commission

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## TLOA Local Control: Expanding Tribal Court Authority

- *Result: Section 234. Tribal Court Sentencing (25 U.S.C. 1302)*
  - Enhanced tribal court sentencing authority
    - 1-3 years imprisonment, \$15,000 fine, or both
    - 9-year cap on stacked sentencing
  - Tribal courts can stack sentences
  - Protections for accused where D is subject to 1+ year imprisonment
    - Licensed counsel for indigent defendants
    - Licensed / law trained judges
    - Trial must be recorded (audio or video)
    - Must publish laws, rules of evidence/procedure
    - Sentencing options: tribal, BOP, state, alternatives

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## TLOA Enhanced Sentencing Due Process Requirements

- Defendant has right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution
- Tribal Government will provide indigent defendants assistance of defense attorneys licensed to practice law
  - by ANY jurisdiction in the United States
  - that applies appropriate professional licensing standards and effectively ensure the competence and professional responsibility of its licensed attorneys.
    - This can potentially include tribal bar associations.

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## TLOA Enhanced Sentencing Due Process Requirement

- Judge presiding over the criminal proceeding
  - Has sufficient legal training to provide over the criminal proceeding; and
  - Is licensed to practice law by ANY jurisdiction in the United States
    - Note, this does not require a license to practice law from a state.
- The tribe's criminal law (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure are made publicly available; and
- Maintain a record of the criminal proceeding.

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U.S. Department of Justice

U.S. Department of Interior



### Tribal Law and Order Act (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems



August 2011



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## VAWA Section 904 DV Jurisdiction Additional Due Process Requirements

- Defendants have the *right to petition a federal court for habeas corpus* to challenge any conviction and to stay detention prior to review.
- Any non-Indian defendant has the *right to a trial by jury* drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians.
- Any Indian tribes that has ordered the detention of anyone under the special domestic violence criminal jurisdiction provision has a *duty to notify* that person of all their rights.
- Defendants must be provided “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.

NOTE: These due process protections are required *only* if a term of imprisonment of any length may be imposed.

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## Considerations for Complying with Due Process Protections under TLOA/VAWA

- No Need to Entirely Transform Court
  - Only the “criminal proceeding” must comply with the judge, defense counsel, recording, and jury requirements. Thus, a tribe can ensure that a certain proceeding is compliant, while other proceedings comply only with the relevant tribal law and ICRA.
- Licensed Judge and Defense Counsel
  - Licensing can be from ANY jurisdiction, including tribal bar associations (with additional licensing standards required for Defense Counsel, but not for the Judge)

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## Limitations on Utilizing TLOA Enhanced Sentencing and/or VAWA Criminal Jurisdiction

Limitations	TLOA	VAWA
<u>Particular Offenses Only:</u> Defendant must either (1) previously have been convicted of same or comparable offense by any jurisdiction in U.S.; or (2) is being prosecuted for a “felony” (an offense that would be punishable by more than 1 year imprisonment if prosecuted by U.S. or any of the States).	✓	
<u>Particular Offenses Only:</u> Defendant must be prosecuted for either (1) domestic violence, (2) dating violence, or (3) violation of a protection order.		✓
<u>Particular Defendants Only:</u> Defendant must have sufficient ties to the community, which could be either (1) residence on the reservation, (2) employment on the reservation, or (3) a relationship with a tribal member or Indian resident.		✓

## Due Process Protections Required by TLOA and/or VAWA

TLOA and VAWA Due Process Requirements	TLOA	VAWA
1. Defendants are provided with effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution.*	✓	✓
2. Tribal government provides, at their expense, to an indigent defendant a defense attorney licensed to practice by any jurisdiction in the United States.*	✓	✓
3. Defense attorney is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.*	✓	✓
4. Judges presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants have sufficient legal training to preside over criminal trials.*	✓	✓
5. Any judge presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants are licensed to practice law by any jurisdiction in the United States.*	✓	✓

\*Note: These due process protections are required under TLOA. But, they are only required under VAWA if a term of imprisonment of any length may be imposed.

TLOA and VAWA Due Process Requirements		TLOA	VAWA
6.	The tribe's criminal law, rules of evidence, and rules of criminal procedure are made available to the public prior to charging the defendant.*	✓	✓
7.	Tribal court maintains a record of the criminal proceeding, including an audio or other recording.*	✓	✓
8.	Any defendant sentenced to greater than 1-year imprisonment to be served in a tribal facility, that facility must pass the BIA jail standards for long-term incarceration.	✓	
10.	Tribal court provides the defendant the right to a trial by an impartial jury.		✓
11.	Tribal court ensures that the jury pool reflects a fair cross section of the community.		✓
12.	Tribal court ensures that juries are drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians.		✓

\*Note: These due process protections are required under TLOA. But, they are only required under VAWA if a term of imprisonment of any length may be imposed.

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TLOA and VAWA Due Process Requirements		TLOA	VAWA
13.	Tribal court ensures that anyone detained under the special domestic violence criminal jurisdiction is "timely notified" of his/her rights and responsibilities.		✓
14.	Tribal court ensures that a defendant is notified of their right to file "a petition for a writ of <i>habeas corpus</i> in a court of the United States."		✓
15.	Tribal court ensures that "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 special domestic violence criminal jurisdiction over the defendant" are provided.		✓
16.	Tribal court ensures that "all applicable rights under the special domestic violence criminal jurisdiction provisions" are provided.		✓

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## \$5 million authorized to assist with implementing VAWA Section 904

- VAWA authorizes the Attorney General to award grants to the governments of Indian tribes to
  - strengthen tribal criminal justice systems to assist in exercising special domestic violence criminal jurisdiction
  - to provide indigent criminal defendants with effective assistance of licensed defense counsel
  - to ensure that jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and
  - to assist victims of domestic violence, dating violence, and violations of protections orders.
- However, funds have not yet been actually appropriated.

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## Clarifying Full Tribal Civil Jurisdiction to Issue and Enforce Tribal Protection Orders against *All Persons*

- Section 905 of VAWA Title IX fulfills the intent of VAWA 2005 regarding tribal civil jurisdiction to issue protection orders.
- VAWA 2005 intended for tribes to have full civil authority to issue and enforce protection orders against Indians and non-Indians alike. Unfortunately, at least one federal court has suggested that tribes lack civil jurisdiction to issue and enforce protection orders against non-Indians who reside on tribal lands. That ruling undermines the ability of tribal courts to protect victims.
- Section 905 of VAWA Title IX carries out the congressional intent of VAWA 2005 by clarifying that every tribe has full civil jurisdiction to **issue** and enforce protection orders *against all persons* regarding matters arising on tribal lands, and that such orders are entitled to full faith and credit by non-tribal jurisdictions.

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## Old VAWA 2005 (*still applies to Alaska*)

### **18 U.S.C. § 2265. Full faith and credit given to protection orders**

(e) Tribal Court Jurisdiction.— For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.

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## New VAWA 2013 Section 905: Clarifies Full Civil Jurisdiction to *Issue and Enforce* Tribal Protection Orders Over *All* Persons

- *In addition to VAWA Section 904 authority to criminally prosecute violators of protection orders, VAWA Section 905 clarifies tribal court civil protection order jurisdiction:*

“full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe or otherwise within the authority of the Indian tribe.”

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## New VAWA 2013 – Section 906

### Section 906 –

#### Amendments to the Federal Assault Statute

Gives federal prosecutors more tools to effectively combat 3 types of assault frequently committed against women in Indian Country by amending the federal code to include the following assault crimes:

- Assault by strangling or suffocating –
  - Max 10-year offense
- Assault resulting in substantial bodily injury –
  - Max 5-year offense
- Assault by striking, beating, or wounding –
  - Max 1-year offense

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## DOJ Indian Country Investigations and Prosecutions Report: 2011-2012

**DOJ report shows federal prosecutors tackling more criminal cases in Indian Country**



The Bismarck Tribune, Tom Stromme/Associated Press - FILE--North Dakota's U.S. Attorney Tim Purdon speaks during a press conference in Bismarck, N.D., in this May 28, 2013 file photo. Purdon, chairman of a subcommittee that reports to the attorney general on American Indian issues, has cited a drug trafficking case on the Standing Rock Reservation in South Dakota as evidence that federal prosecutors have been taking on

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## DOJ Indian Country Investigations and Prosecutions Report: 2011-2012

- Overall, a majority of Indian country criminal investigations opened by the FBI were referred for prosecution.
- Overall, a majority of Indian country criminal cases opened by the United States Attorneys' Offices were prosecuted
- In 2011, just under 37% (1,041) of all Indian country submissions for prosecution (2,840) were declined by United States Attorneys' Offices (USAOs). In 2012, USAOs declined 31% (965) of all (3,145) Indian country submissions for prosecution.

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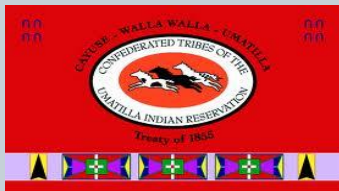
## Tribes Implementing TLOA

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## Umatilla Implemented in March 2011

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- Provide public defenders to everyone, law-trained tribal-member judge for 30+ years, hearings are recorded, laws are on public website, etc....
- Amended criminal code to define felonies and make defendants' rights under TLOA explicit.
- Approved by Law and Order Committee, went to Board of Trustees work session twice, advertised in paper for tribal member input, and presented to the General Council for input and approval.
- Thus far, two people have been placed in the BOP TLOA Pilot Program.

## Hopi Tribe Implemented in August 2012

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- Hopi Law Enforcement Task Team is created.
- Community Involvement.
- Hopi Tribal Council 2013 Agenda
  - Detention Facility
  - Alternatives to Incarceration
  - Bureau of Prisons
  - Trained Law Enforcement
  - Tribal Council appropriated funds without federal funds for the Public Defender Office
  - Investigators for Prosecutor and Public Defender's Office



## Gila River Indian Community TLOA Implementation in Progress

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- **Revising the Criminal Code**
  - Community workgroup
  - Code development
- **Satisfying TLOA's requirements**
  - For every felony offense, citation to state or federal law(s) provided for comparability requirement
  - Judge requirement hurdles
  - State-licensed defense attorneys already provided
  - Developed indigent defense standards for non-Indians
- **Tribal jails – long-term incarceration**
  - BIA approval required (must comply with BIA guidelines for tribal jails)
  - Community currently putting together submittal packet to BIA
- **Anticipated Implementation Date**
  - Draft Criminal Code expected to be passed in May, with felony sentencing to commence in January 2014
  - Allows departments to fully prepare and jail to obtain BIA approval

## VAWA Special Domestic Violence Criminal Jurisdiction -- Implementation

- **Goals of Implementation**
  - Create an effective deterrent
  - Provide authority for early intervention and rehabilitation
  - Protect Native women by incarcerating offenders

To implement the law effectively, tribes will need

- Criminal and procedural codes, and
- Professional
  - policing and investigations,
  - Prosecutions,
  - Defense counsel,
  - Law-trained judges,
  - Victims' services, and
  - Due process in tribal courts.

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## VAWA Special Domestic Violence Criminal Jurisdiction – Implementation

### Keys to Effective Implementation

- Information-sharing among tribes
- Tribal community engagement
  - Education, development of community support, and involvement of non-Indians
- Code and procedure development
- Jury summons process
  - “Fair cross-section” requirement
- Dealing with non-Indian prisoners

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## VAWA Special Domestic Violence Criminal Jurisdiction – Legal Strategy

- May take time to unfold – remember the *Duro*-fix.
- Necessitates: good facts, clean boundaries, evidence beyond a reasonable doubt, and solid implementation of codes, juries, procedures, due process and indigent defense requirements.
- Difficult case or litigious defendant → refer to USAO and drop tribal prosecution
- Build legal support for new law (law-review articles and education of the federal bench).

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## Pilot Project

- Sec. 908 (2) –
  - (A) In general—At any times during the 2-year period beginning on the date of enactment of this Act, an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe under section 204(a) of Public Law 90-284 on an accelerated basis.
  - (B) Procedure—The Attorney General may grant a request under subparagraph (A) after coordinating with the Secretary of the Interior, consulting with affected Indian tribes and concluding that the criminal justice system of the requesting tribe has adequate safeguards in place to protect defendants' rights, consistent with section 204 of Public Law 90-284.

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## Pilot Project

- Like Section 904, the purpose of Section 908 is to
  - Decrease the incidence of crimes of domestic violence in Indian country
  - Strengthen the capacity of Indian tribes to exercise their sovereign power to administer justice and control crime
  - Ensure that perpetrators of domestic violence are held accountable for their criminal behavior.
- Pilot Project focuses on the exercise of Special Domestic Violence Criminal Jurisdiction
- March 2013 – March 2015

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## Pilot Project and DOJ Consultation

- On May 8<sup>th</sup>, 14<sup>th</sup>, and 17<sup>th</sup> of 2013, DOJ consulted with tribal court judges and tribal leaders re: the Pilot Project.
- DOJ's "Framing Paper" posed questions, including:
  - How can a tribe prove compliance with due process requirements?
    - Whether there are procedures to ensure an impartial jury is drawn from fair-cross section of community?
    - Whether a Tribal Bar Association has appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys?
    - Whether a judge's legal training is sufficient to preside over criminal proceedings?
    - Are there rights beyond ICRA, TLOA or VAWA 2013 that a tribe must provide to non-Indian defendants that are "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"?

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## Pilot Project and DOJ Consultation Cont.

- Should DOJ assess the capacity of the requesting tribe to jail or imprison defendants in SDVCJ cases?
- Process of Implementing the Pilot Project
  - Should DOJ rely primarily on tribal "self-certification"?
  - How should DOJ balance the desire to maximize tribal participation with the desire to maximize the opportunity for tribes to collaboratively develop "best practices"?
  - Should DOJ encourage the development of a *single* model for criminal code or instead develop *multiple* model codes?
  - Should the Pilot Project be evaluated?

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## Pilot Project and DOJ Consultation Cont.

- Numerous tribal court judges and leaders participated on telephonic consultations, as well as submitted written comments to DOJ.
- Numerous tribal organizations sent written comments, including the National Congress of American Indians (NCAI), the Tribal Law and Policy Institute (TLPI), and the National American Indian Court Judges Association (NAICJA).
- You can read NCAI, TLPI, and NAICJA's written comments, as well as the DOJ's "Framing Paper" at
  - [www.tribal-institute.org/lists/vawa\\_2013.htm](http://www.tribal-institute.org/lists/vawa_2013.htm)

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## Upcoming Event



### 2013 NCAI Mid Year Conference



NCAI Mid-Year Meeting – June 24-27, 2013 – Reno, NV

Monday, June 24<sup>th</sup> →

#### **Implementing VAWA's Jurisdictional Provisions and TLOA's Expanded Sentencing Authority**

This Pre-Meeting will provide a forum for tribes who wish to participate in VAWA 2013's Special Domestic Violence Criminal Jurisdiction Pilot Project to discuss strategy and exchange ideas for implementation. The Pre-Meeting will also discuss the related issue of continued implementation of enhanced sentencing authority under the Tribal Law and Order Act.

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## Tribal Law and Policy Institute

The Tribal Law and Policy Institute (TLPI) is a Native American owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples.

Tribal Court Clearinghouse

[www.tlpi.org](http://www.tlpi.org)

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## Tribal Law and Policy Institute Current Projects



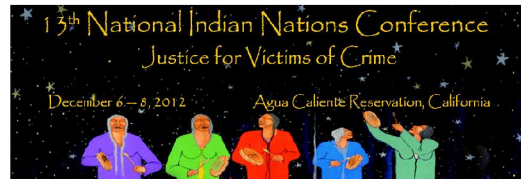
### **Walking on Common Ground: Collaborative Promising Practices:**

Under a grant from the Bureau of Justice Assistance, TLPI launched the current [www.WalkingOnCommonGround.org](http://www.WalkingOnCommonGround.org) website into an on-going permanent comprehensive resource highlighting tribal/state collaboration promising practices and providing resource toolkits to assist those wishing to replicate.

TLPI will identify specific tribal state court forum promising practices (along with establishing tribal state court forum learning/mentoring sites) and publicize these promising practices and how to replicate through both hard copy and on our website. In addition, TLPI is identifying specific Public Law 280 promising practices (along with establishing Public Law 280 learning and mentoring sites) and publicizing how to replicate them through our website and in hard copy.

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## Tribal Law and Policy Institute Current Projects



**National Indian Nations Conference Justice for Victims of Crime**- TLPI has successfully designed, developed, and delivered a national conference for Victims of Crime in Indian Country in Palm Springs, California, in December [2002](#), [2004](#), [2006](#), [2008](#), [2010](#), and the [2012 Conference](#) under a grant from the Office for Victims of Crime.

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## www.NRC4Tribes.org

The screenshot shows the homepage of the National Child Welfare Resource Center for Tribes (NRC4Tribes). The header features the organization's name and logo, along with navigation links: Home, About Us, NRC4Tribes Services, Children's Bureau T/TA Network, Children's Bureau, and Contact Us. A main content area includes a 'Welcome to the NRC4Tribes' section with a brief description of the center's mission, a 'Request Technical Assistance' button, and links for 'Events and Announcements', 'Child Welfare Events', 'Children's Bureau Announcements', and 'Tribal Child Welfare in the News'. Below this is a 'Resources & Tools' section with links for Tribal Child Welfare Practice, Tribal Child Welfare Funding, Foster Care and Adoption, Indian Child Welfare Act, Legal and Judicial, and NRC4Tribes Resources. At the bottom, there is a 'SEARCH BY TRIBE' section with a dropdown menu and a map of the United States.

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Questions?



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