



NATIONAL CONGRESS OF AMERICAN INDIANS

May 20, 2013

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RE: IMPLEMENTATION OF THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013

On behalf of the National Congress of American Indians, thank you for the opportunity to comment on the implementation of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).

Section 904 of VAWA 2013 restores tribal inherent authority to prosecute non-Indians who commit domestic or dating violence against Indians in Indian country and is a historic victory for tribes. We would first like to thank the Department of Justice (DOJ) for its leadership on this issue and in partnering with us as we worked to get the bill enacted into law. We look forward to strengthening that partnership as tribal governments proceed with Section 904 implementation, and in all aspects of improving public safety in Indian country.

NCAI is planning a full-day VAWA implementation meeting on June 24th in Reno, Nevada, in association with our regular Mid-Year Conference. We invite all interested tribes, the Department of Justice, and the Department of Interior to participate. It is our hope that our meeting will come at a good time, soon after the promulgation of the DOJ's initial guidelines for the Pilot Project.

In response to the DOJ's invitation to consult, we plan to focus NCAI comments on the process for the Section 908 Pilot Project that would permit tribes to exercise Special Domestic Violence Criminal Jurisdiction (SDVCJ) on an accelerated basis. NCAI's response to each question is listed below, without listing the question, and grouped according to the categories listed in the April 16, 2013 framing paper.

The Justice Department's Process for Considering Requests:

1. As an initial matter, NCAI urges the DOJ to forego a formal rulemaking process to establish the standards for the Pilot Project. The constraints of a two-year time limitation for the Pilot Project means that the DOJ should not draw out the assessment and approval process for tribes wishing to participate in the

accelerated Pilot Project. If Pilot Project participation becomes time-consuming or cumbersome, tribes may simply delay their participation until Section 904's official effective date on March 7, 2015.

Section 908 is not a traditional pilot project for purposes of a study. Instead, it is more of a Piloting Phase to ensure that the first tribal participants are implementing in full compliance with the new law. Because of this, we believe that that the main value of the Pilot Project will lie in (1) collaboration and information-sharing among the Pilot Project Tribes; (2) collaboration with the criminal justice expertise at the DOJ; and (3) collecting the various tribal laws and procedures developed by the pilot tribes implementing Section 904 and sharing that information forward with those tribes who will implement the law after the Pilot phase is completed.

Because of this, we believe the process should be focused on organized collaboration and information-sharing among the pilot tribes. The DOJ must review the justice systems of the participating tribes and ensure that defendant's rights are protected, but this should not require a lengthy regulatory process that could take decisions beyond and undermine the value of the Pilot Project. In a general sense, the key standards are already listed in the DOJ Framing Paper. We encourage a flexible collaborative process and a straightforward certification of well-known criminal procedure standards, so that tribal governments can proceed with the important work of protecting their Native sisters, mothers, and daughters; and holding all perpetrators accountable.

After our initial conversations, it appears that there is a group of tribes with sophisticated justice systems and professional staff who are eager to actively participate in the Pilot Project. We are already two months into the two-year timeframe. We urge the DOJ to start working with interested pilot tribes immediately to facilitate successful implementation on a tribe-by-tribe basis.

2. It would be preferable to rely primarily on tribal "self-certification" because we do not believe that the DOJ has the time or funding for site visits and extensive evaluations. From a procedural standpoint, ensuring the protection of defendant's rights will involve the review of tribal codes, procedures and the qualifications of staff, and all of this can be readily evaluated through a review of documents provided by the tribal government. In addition, tribal self-certification is more consistent with the federal policy of tribal self-determination.
3. The Pilot Project should be open to any tribe who wishes to participate. Interested tribes will self-select, and others can gather information to plan for their implementation. As noted above, we encourage a flexible collaborative process combined with a straightforward certification under well-known criminal procedure standards.

4. Should the DOJ choose to create a panel to facilitate an “assessment” process, NCAI believes it is imperative that tribes have significant participation on such a panel. Tribes actively participating in the Pilot Project should also take part in their own evaluations. As noted above, the Pilot Project is time limited so any assessment process must be relatively quick and fitted to the timeframe.
5. The development of a single model for criminal code provisions and rules of criminal procedure is discouraged. It has been said by many, there is no “one-size-fits-all”. Just as with state and local governments, there are multiple methods for meeting many common criminal procedure standards. Tribes who create their own codes and procedures are more likely to take ownership, and their solutions will be more suited the characteristics of each tribal community.
6. As noted above, one of the most significant values of the pilot phase will lie in documenting the development of codes and procedures by the pilot tribes and sharing that information forward to those tribes who will implement beyond March of 2015. In partnership with organizations such as the Native American Rights Fund (NARF), the National American Indian Court Judges Association (NAICJA), and the Tribal Law and Policy Institute (TLPI), NCAI is eager to help facilitate this type of information-sharing among tribes.

In partnership with TLPI, NCAI recently submitted a grant application to the Office on Violence Against Women to develop a website devoted to VAWA implementation resources as well as to create a listserv to facilitate information-sharing among Pilot Project tribes.

7. The Department of the Interior should definitely be included, but their participation may be driven by the particular issues that arise. For example, we anticipate that Interior detention facilities and their policies will need attention. In general, it may be important to be thoughtful about which DOI officials can address various issues: detention services, law enforcement training, data collection, etc. In this respect, the Pilot Project will be able to best utilize Interior leadership in their various responsibility areas.
8. For evaluation of the Pilot Project, NCAI recommends the following could be considered:
 - Number of tribes expressing initial interest in participating in the Pilot Project.
 - Number of tribes receiving final approval to participate in the Pilot Project.
 - Degree of active information-sharing and collaboration among the pilot tribes and the Department of Justice. (Examples of listservs, working groups, etc.)
 - Eventually, measurement of relevant crime rates on reservations (i.e., dating violence, domestic violence, and violations of protection orders).

9. The Tribal Self-Governance demonstration project in the 1990's is an example of a pilot project that was particularly successful. Today, there are well over 300 tribal governments who are actively implementing self-management of Interior and Indian Health Service programs, and who have dramatically improved the quality and efficiency of services.

NCAI interviewed Cyndi Ferguson, who was the Self-Governance Coordinator for Jamestown S'Klallam, was deeply involved in the coordination of the Self-Governance Pilot Project in the 1990's and continues to be involved in implementation and coordination of Tribal Self-Governance. We asked about how they implemented the pilot project, and she discussed three matters that may be of relevance for this VAWA pilot:

Face to Face Meetings – In the early years when there were only ten tribes involved, they would have face-to-face meetings on a regular basis. The participating tribes would often meet in advance of meeting with Interior, and would share draft documents and ideas. Often the meetings were hosted by one of the pilot tribes. As the pilot project expanded, they would have regional meetings in different parts of the country.

Face to face meetings for VAWA implementation may be more difficult because of budget constraints. Internet communications should be maximized. But, it seems important to have occasional collaborative meetings for the pilot, particularly if we can reduce costs by piggy-backing on existing meetings. NCAI is planning a full-day VAWA implementation meeting on June 24th in Reno, Nevada, in association with our regular Mid-Year Conference. We invite all interested tribes, the Department of Justice, and the Department of Interior to participate.

Self-Governance Coordinator – Each of the pilot tribes designated a “Self-Governance Coordinator” who was the principle point of contact and who worked daily on the project. Tribal leaders were also deeply involved, but the designated staffing was very important for communications and collaborative work. A Point of Contact at each pilot project tribe also seems important to facilitate communications for the Section 908 pilot project.

Communication and Education Outreach Office – In the early years, the Self-Governance Coordinators became overwhelmed with requests for information and assistance from tribes entering into the program. They established a consortium of four tribes received a contract with Interior to host a Communication and Education Outreach Office. Some of the key functions of this office were to serve as a central location to share documents and respond to inquiries, to serve as a repository of long-term document management, to host an annual meeting, and basic education and outreach to new program participants. This office continues to function very effectively, and much more information can be found at www.tribalselfgov.org.

The development of a coordinating function for sharing documents and outreach is important to consider. As we noted above, a key function of the pilot project is that the

initial participants will develop new codes and procedures and then later participants are able to take advantage of that work and learning. NCAI is developing proposals for coordination through a listserv, a website, and occasional meetings.

Adequate Safeguards to Protect Defendants' Rights:

Generally, NCAI believes it is most appropriate for individual tribes to offer the initial comments in reference to the questions/issues listed under this subheading, as the tribes have diverse traditions and justice systems in their communities. That said, we would note with respect to question 2, our research shows there are several tribes that already incorporate non-Indians into their jury pools, including Tulalip Tribes, Umatilla, Sac and Fox Nation in Oklahoma, Navajo Nation, Fort McDowell Yavapai Nation, White Mountain Apache, and Pascua Yaqui Tribe. As the Pilot Project develops, NCAI is interested to work with the Department and assisting in outreach to obtain copies of their jury summons processes and discuss these matters with them further. Additionally, with respect to question 9, we feel that direct responses from individual tribes will be most useful because the level of local cooperation and agreements between tribes and their respective states vary.

Consultation with "Affected Indian Tribes":

While NCAI does not have strong views on this issue, "Affected Indian Tribes" could be defined as neighboring tribes to the tribe that is requesting participation in the Pilot Project. It would seem cumbersome and unnecessary to consult every possibly affected tribe on each tribe's application. Because the Pilot Project involves criminal prosecution of non-Indians, there may not be significant effects on other tribes.

However, consultation with other tribes will be particularly important if the Department plans to deny an application in a way that will establish a precedent for other tribes. We don't anticipate that these situations will arise, but down the road we strongly encourage consultation if the Attorney General is faced with a decision to deny an application prior to March of 2015.

Communication with other stakeholders may be important at certain phases of implementation. For example, we anticipate that the DOI and the Indian Health Service will play a role. In P.L. 280 states, some communication with local law enforcement may be important. We encourage inter- and intra-agency communication during the implementation phase of VAWA 2013's SDVCJ.

Other Potential Issues:

As the pilot project develops, funding for tribal participation in public safety is extraordinarily important. We greatly appreciate the DOJ's efforts and assistance in working with Congress to increase funding for tribal law enforcement.

Secondly, implementation by tribal governments is closely related to legal strategies for defending the new law from legal challenges. Particularly in the early cases, it will be important

to have compelling evidence and clear compliance with due process to avoid facts that could undermine legal arguments. NCAI encourages close collaboration between tribal prosecutors and the various U.S. Attorneys. If there is a difficult case or a litigious defendant, it could be referred to the U.S. Attorney for prosecution.

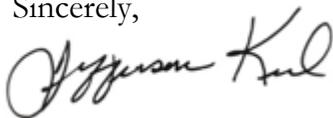
Third, the legal strategy should also include a concerted effort to build judicial support for the new law, and the DOJ is continually involved with the federal judiciary. Federal judges will be more favorable towards the new law if they have an understanding of Congress's authority in Indian affairs, the jurisdictional maze that hinders federal and state prosecution, and the domestic violence statistics in Indian country. These educational efforts should have a very strong legal and factual basis, and we hope to work collaboratively with the DOJ on these endeavors.

A Side Note on Punctuation and Tribal Sovereignty:

Throughout the framing paper, the terms “federal” and “state” are capitalized, even when they do not appear in a proper name. Our understanding of the normal rules of punctuation is that these terms are capitalized only when used in a proper name, as in “the Federal Government.” It could be that the rationale for capitalizing these terms is that these are sovereign governments, and the intention is to show respect for their governmental status. If this is the case, we note that the terms “tribe” and “tribal” are not capitalized in the framing paper, that tribal governments are recognized in the U.S. Constitution, and for these purposes should be treated in a manner similar to the Federal and State governments.

If you have any questions or comments about this document, please contact NCAI General Counsel John Dossett (jdossett@ncai.org) or Staff Attorney Natasha Anderson (nanderson@ncai.org).

Sincerely,



Jefferson Keel
President
National Congress of American Indians