

## **Law School Clinical Assistance: Tribal VAWA 2013 Special Domestic Violence Criminal Jurisdiction**

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### Presenters

- Sarah Deer, Professor of Law, 2014 MacArthur Fellow, Co-Director, Indian Law Program, William Mitchell College of Law
- Michelle Demmert, Reservation Attorney, Tulalip Tribes
- Brent Leonhard, Attorney, Confederated Tribes of the Umatilla Indian Reservation
- John Dossett, General Counsel, National Congress of American Indians
- Kelly Gaines Stoner, Victim Advocacy Legal Specialist, Tribal Law & Policy Institute
- Honorable Steve Aycock (Ret.), Judge-in-Residence, National Council of Juvenile and Family Court Judges

Moderators:

- TLPI
- NCAI
- NCJFCJ

## Outline of Presentation

- How Law Clinics Can Assist With Code Drafting
- Overview of Special Domestic Violence Criminal Jurisdiction
- Intertribal Technical-Assistance Working Group (ITWG)
- Tribal Code Checklist
- Comparison of Five Pilot Project Tribes' Codes
- Common Problem Areas in VAWA Code Drafting
- Tribal Legal Resource
- Model Code developed by Three Pilot Tribes
- Questions

## How Indian Law Clinics Can Assist with Code Drafting

- William Mitchell College of Law offers free-codewriting services for tribes as part of the clinical program.
- Benefits: Tribes receive free code-writing assistance (drafting OR revising) and students learn how to work effectively with tribes
- Students can customize “model code” language to be culturally relevant and inclusive

## Overview of Special Domestic Violence Criminal Jurisdiction



### 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 does not change existing federal (or state) jurisdiction.

## 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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## Protection Order Definitions and Prosecution Requirements:

- “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.**”
- 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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## 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
- Additional rights from VAWA
  - Effective assistance of counsel that would be available in federal or state court;
  - Free appointed licensed attorneys for indigent defendants;
  - Law-trained tribal judges who are licensed to practice law;
  - Publicly available tribal criminal laws and rules of evidence and criminal procedure; and
  - Maintain a record of criminal proceeding, including audio or video recording of trial proceedings
- 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 the right to *habeas corpus* and right to petition for stay of detention.

## Pascua Yaqui

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- **21 SDVCJ cases, involving 15 separate offenders.**
  - 6 convictions
- **In the past year, 25% of the tribe’s total domestic violence caseload has involved non-Indian abusers.**
- **18 children under the age of 11 were involved as witnesses or victims.**
- **The 15 non-Indian defendants had over 80 documented tribal police contacts, arrests, or reports attributed to them over the past 4 years.**

## Tulalip Tribes

- **10 cases**
  - 6 convictions
  - 1 dismissed
  - 1 federal
  - 1 pending
  - 28 charges total
- **Law Enforcement has had over 100 contacts with these individuals since 2008.**

## Confederated Tribes of the Umatilla Indian Reservation

- **4 arrests**
  - 3 convictions

**Those who have been convicted are subject to tribal probation, including the requirement to undergo batterer intervention treatment provided by the tribe**

**In 2012, 60% of the cases seen by the Umatilla Victims Services Program were non-Indian**

## Eastern Band of Cherokee Indians

- 1 arrest and conviction

## Intertribal Technical-Assistance Working Group (ITWG)

The DOJ launched the ITWG as a key part of the Pilot Project.

The ITWG is a voluntary working group of tribal representatives who exchange views, information, and advice about how tribes may best exercise special domestic violence criminal jurisdiction (SDVCJ) and combat domestic violence.

Multiple in-person meetings

Webinar series on jury selection, defendant's rights, indigent defense, domestic violence best practices



**ITWG**

Interested in providing code drafting assistance to a tribe looking to implement VAWA SDVCJ?

Email: [vdavis@ncai.org](mailto:vdavis@ncai.org) or [chia@tlpi.org](mailto:chia@tlpi.org)

**Please contact us!**



## Tribal Code Checklist - Mandatory

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- 1) Tribal Constitution
- 2) Definitions and Offenses: Domestic Violence, Dating Violence, Violation of Protection Order
- 3) Rights of Defendants
  - 1) Indian Civil Rights Act
  - 2) Jury Pool to Include Non-Indians
  - 3) Notice of Right to Habeas
  - 4) Right to Counsel
  - 5) Qualifications of Judges
  - 6) Recording of Proceedings
  - 7) Publication of Laws

## Code Checklist – Additional Items to Consider

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- 1) Victim's Rights and Safety
- 2) Mandatory Arrest and Protection Orders
- 3) DV Offender Gun Bans
- 4) Notice and Community Engagement
- 5) Police Guidance on Non-Indian Detention
- 6) Jury Selection Plan
- 7) Separate DV Court or Docket
- 8) Extended Sentencing Authority
- 9) Tribal Habeas
- 10) Tribal Court Code or Rules

## Comparing the Five Pilot Tribal Codes

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- **Jury Pools**
  - Umatilla, Pascua Yaqui, Tulalip – same jury pool for all crimes
  - Ft. Peck & Sisseton – non-Indians included only in SDVCJ
- **Right to Counsel**
  - Umatilla, Pascua Yaqui, Tulalip – indigent counsel for all
  - Ft. Peck – counsel guaranteed for SDVCJ and domestic abuse
  - Sisseton – indigent counsel for all “if available” but guaranteed for SDVCJ
- **Judicial**
  - All five of the pilot tribes have at least one state-barred judge. However, the long-time chief judge of the Fort Peck Tribal Court is not state-barred. Instead, this judge has an undergraduate degree, is licensed in tribal court, and has two certificates from judicial college for “Tribal Judicial Skills” and “Special Court Trial Skills.”

## Comparing the Five Tribal Pilot Codes

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- **Victim’s Rights/Protection**
  - All five tribes have substantial protections for victims
  - Fort Peck and Tulalip have DV Court or Docket to focus solely on DV cases – advantage in providing services
  - Umatilla has automatic protection orders
  - Tulalip and Umatilla have DV arrest requirement
  - Umatilla has a Family Violence Program that provides community-based advocacy to domestic violence victims.
  - Fort Peck also has a Family Violence Resource Center that provides comprehensive services to domestic violence and sexual assault victims.
- **Notice – all five tribes provided public notice**

## Questions?



## Common Problem Areas When Drafting Codes for VAWA

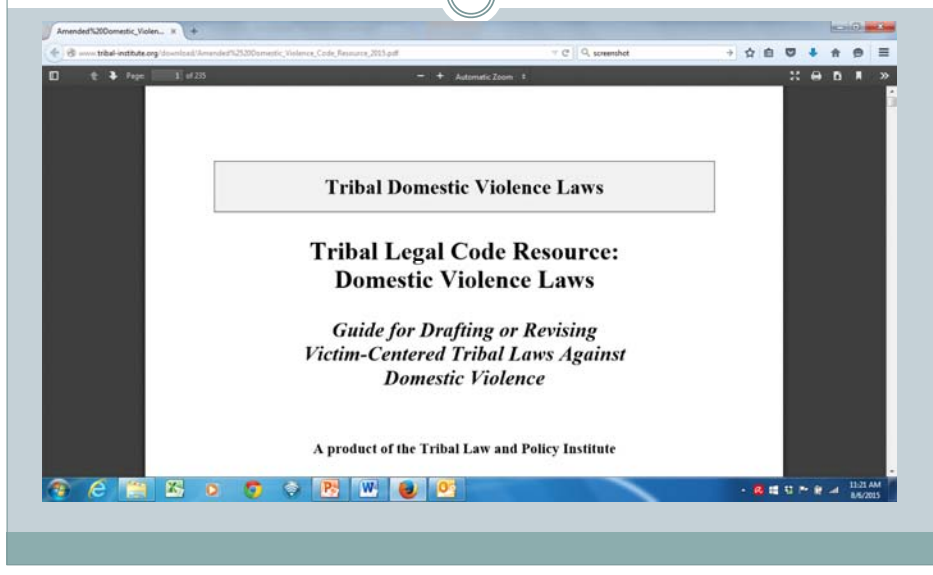


- Make sure there isn't a barrier in the Tribe's constitution.
- Consider how things will look to a federal judge reviewing a habeas claim.
- Determine how going to deal with potential *tribal* equal protection claim- this will guide how you structure the code. (all given same rights, special dv docket, etc.)
- Ensure prosecution is required to plead and prove BRD all jurisdictional elements. Consider developing form pleading documents or template to ensure this is explicitly done and in the record.
- Keep an eye out for VAWA 2013's definition of DV versus existing tribal definitions. "Violence committed" and Castleman's footnotes. FFC for protection orders (ensure tribe's protection orders are FFC compliant).
- Timely notification of new habeas corpus rights.
- Right to defense counsel on appeal.
- How long court maintains the record.
- Tribal habeas- to ensure tribal exhaustion for issues that might not arise from a direct appeal.
- Comprehensive Rules of Evidence.
- Criminal Procedure- speedy arraignment and speedy trial.

## Questions?



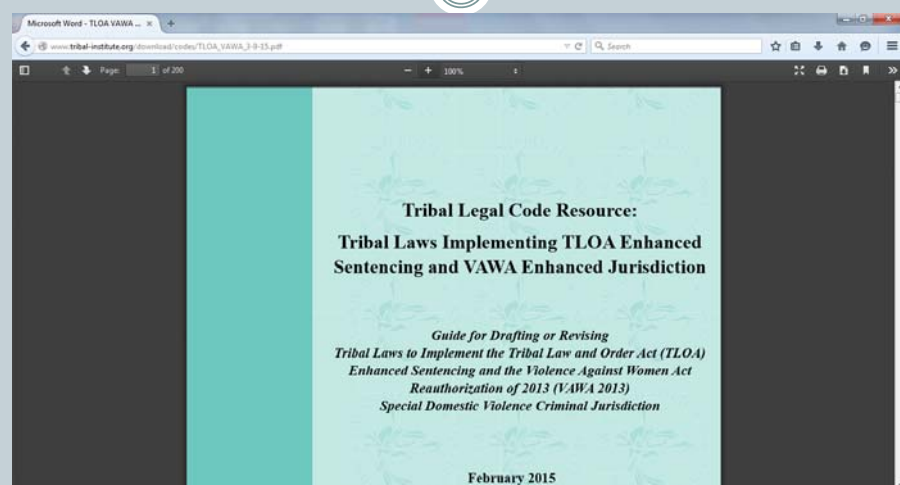
## Domestic Violence Laws (www.tlpi.org)



## Domestic Violence Laws

- General Provisions
- Jurisdiction
- Criminal Domestic Violence Statutes
- Protection Orders
- Family Law and Child Custody
- Education and Batterer Intervention

## Tribal Legal Code Resource ([www.tlpi.org](http://www.tlpi.org))



## Part I

- Chapter 1. Introduction
- Chapter 2. How to Use this Resource as a Guide
- Chapter 3. A Brief History of TLOA and VAWA 2013
- Chapter 4. Does Your Tribe Want to Exercise Enhanced Powers?
- Chapter 5. Drafting Required Codes and Regulations

## Part II

Examines the codes, laws and rules.

- Codes, Laws, and Rules
- Chapter 6. Types of Offenses and Defendants
- Chapter 7. Publication of Laws and Rules

## Part III

- Chapter 8. Defense Counsel
- Chapter 9. Judges
- Chapter 10. Establishing a Tribal Bar Association

## Part IV

- Chapter 11. Court of Record
- Chapter 12. Jury Trials
- Chapter 13. Sentencing Options
- Chapter 14. Stay of Detention Pending Habeas Review

## Part V

### Helpful Resources:

- Indian Civil Rights Act, as amended by TLOA and VAWA 2013
- Model Tribal Code Court Rules
- Tulalip Domestic Violence Court Rules
- Tulalip Request for Application of Indigent Criminal Conflict Attorney Tulalip Indigent Conflict Attorney Contract

## Tribal Domestic Violence Special Jurisdiction Model Code

- Setting up a DV Court, a tribe could get around the issue of the jury composition and ensuring that the non-Indian participants in a pool are limited to this type of case.
- Purpose/Creation of Court
- Definition of SDVCJ
- Rights included
- Jurisdiction
- Statute of limitations
- Nonwaiver of sovereign immunity
- Severability
- Savings



## Questions?



## Resources



- Tribal Code Checklist- <http://www.ncai.org/tribal-vawa/getting-started/code-development-checklist>
- Tribal Legal Resource-<http://www.tribal-institute.org/codes/TOLA-VAWA-Guide.html>
- SDVCJ Model Code
- Domestic Violence Laws Resource- [http://www.tribal-institute.org/download/Amended%2520Domestic Violence Code Resource 2015.pdf](http://www.tribal-institute.org/download/Amended%2520Domestic%20Violence%20Code%20Resource%202015.pdf)
- Protection Order One Pager
- [www.tribalprotectionorder.org](http://www.tribalprotectionorder.org)
- [www.ncai.org/tribal-vawa](http://www.ncai.org/tribal-vawa)
- Join the ITWG, email: [tribal-vawa@NCAI.org](mailto:tribal-vawa@NCAI.org)



## Indian Law Clinics and Code Drafting

- Please feel free to use the resources outlined in the webinar.
- Contact NCAI, TLPI, NCJFC to connect with tribes who could use assistance in code drafting.

Thank you!