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May 20, 2013

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United States Department of Justice
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Re: Implementation of VAWA Reauthorization Act of 2013

On behalf of the Tribal Law and Policy Institute (TLPI), we would like to thank you for the opportunity to comment on the implementation of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). We would first like to thank the Department of Justice (DOJ) for its involvement in the historical enactment of VAWA 2013. We look forward to working with DOJ in the months and years ahead as tribal governments and tribal justice systems proceed with VAWA 2013 Section 904 implementation. We would especially like to thank DOJ for specifically including tribal court judges in the tribal consultation process.

In response to the DOJ's invitation to consult, we have focused TLPI's comments on the Section 908 Pilot Project that would permit tribes to exercise Special Domestic Violence Criminal Jurisdiction (SDVCJ) on an accelerated basis in response to questions posed by DOJ in their "Framing Paper." Moreover, TLPI would like to take this opportunity to state complete support for the written comments of the National Congress of American Indians (NCAI) in NCAI's May 20, 2013 letter which we periodically reference in the following comments.

Acknowledging the Over-Arching Importance of Tribal Sovereignty

It is important to acknowledge and address the over-arching importance of Tribal Sovereignty in the SDVCJ Pilot Project as well as throughout the entire SDVCJ implementation process. Section 904 of VAWA 2013 restored tribal inherent authority to prosecute non-Indians who commit domestic violence, dating violence, or violate certain protection orders against Indians in Indian country. Constitutionally speaking, the power of tribes to exercise such criminal jurisdiction and the power of Congress to authorize such jurisdiction has been blurry, complex, and controversial. As a scholar recently noted, this is in part because the Constitution is itself unclear:

> Tribal or territorial prosecution always depends on governmental decisions at two separate levels of government. On the one hand, the longstanding judicial gloss on the Constitution's

> sparse text on tribes and territories supports allowing these communities substantial self-governance, and in practice local tribal and territorial governments decide for themselves whether to prosecute particular cases within their jurisdictions. On the other hand, under the entrenched doctrine of federal plenary power over tribes and territories, the federal government always bears some constitutional responsibility for the actions of tribal and territorial governments, if only because Congress could have chosen to bar the jurisdiction exercised by tribal or territorial authorities.[1]

The success of this Pilot Project depends upon successful collaboration between federal officials and the participating tribes as well as between the participating tribes. Thus, it is essential to acknowledge the dichotomy of the two separate sovereign governments, with two separate histories, motivations, and agendas through this Pilot Project, as well as the long and challenging road that tribes have been forced to endure in order to re-establish even this limited inherent prosecutorial authority.

For example, it is worth noting the subtle difference in describing Congress' action in enacting SDVCJ as an "authorization"[2] versus "recognition." In a similar legislative act, Congress recognized tribes' authority to prosecute nonmember Indians for criminal acts committed in Indian country in legislation known as the "*Duro*-fix." The U.S. Supreme Court analyzed this congressional action in *U.S. v. Lara*, 541 U.S. 193 (2004) and held that Congress had recognized the inherent powers of tribal governments, not delegated federal powers.[3] "The Constitution's 'plenary' grants of power" authorize Congress to "enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority."[4] But, these Congressional actions are actions imposed upon the bedrock of inherent tribal sovereignty. Acknowledging this distinction, while admittedly subtle, can have wide implications regarding tribal trust of and respect towards federal officials' efforts to implement SDVCJ. We therefore urge DOJ to not only be cognizant that SDVCJ is a Congressional *recognition* of a tribe's authority that is *inherent*, but also its overarching implications upon the collaboration that will be required between participating tribes and the Justice Department.

Similarly, we agree with NCAI's expressed concern that DOJ be more cognizant concerning equal and consistent capitalization of the terms "tribe" and "tribal" in relation to similarly situated terms referring to state and federal governments.

Adequate Safeguards to Protect Defendants' Rights:

1. TLPI agrees with NCAI that it is most appropriate for tribes to determine through a self-certification process the contours of their own safeguards to protect defendants' rights, as tribes have diverse traditions and justice systems within their communities.

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[1] Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 726 (2013).

[2] U.S. Department of Justice, "Implementation of Sections 904 and 908 of the Violence Against Women Reauthorization Act of 2013" "Framing Paper", 1 (April 16, 2013) (" …Congress expressly *authorized* tribes to fill part of the jurisdictional gap involving non-Indian perpetrators created by the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)." (emphasis added))

[3] 541 U.S. at 193.

[4] *Id*. at 202. *See* Kevin Washburn, et. al., Letter to Congress, "Constitutionality of Tribal Government Provisions in VAWA Reauthorization" (April 21, 2013) *available at* www.tribal-institute.org/lists/vawa_2013.htm.

2. We agree with the NCAI that disseminating copies of tribal code that have already been developed by tribes regarding the requisite due process protections, including the jury summons process, is an effective strategy towards enabling tribes to efficiently enact their own code. This is especially true considering the need to respect individual tribal histories and cultural interpretations of justice, and thus the need to resist introducing a "model code."

3. We suggest consulting tribes which have implemented a tribal bar association, such as the Navajo Nation, and providing overall guidance and resources for other tribes. Since it is neither feasible nor appropriate to establish a "one size fits all" process, a tribal self-certification process would be needed in which each individual tribe meeting this licensing standard explain how they "apply appropriate professional licensing standards" and "effectively ensure the competence and professional responsibility of its licensed attorneys". Please note however that this higher licensing standard does not apply to the judge – it is only required for defense counsel. Moreover, many tribes may choose at least initially to simply require that defense counsel be state licensed.

4. Since it is neither feasible nor appropriate to establish a "one size fits all" process for determining whether an individual judge's legal training is sufficient to preside over criminal proceedings, a tribal self-certification process would again be needed in which each individual tribe explains how they will meet this standard.

5. As discussed above, the constitutionality of congressional recognition of tribal sovereign authority is a long, complex, and most likely incomplete history. However, as recently as 2004, the U.S. Supreme Court noted in *U.S. v. Lara* that Congress does in fact have the constitutional power to recognize a tribe's inherent authority to exercise criminal jurisdiction, and that this power stems from Congress's plenary power over federal Indians affairs.[5] This plenary power is distinct from the constitutional requirements for due process required by the federal and state governments included in the Bill of Rights. This is evidenced by the inapplicability of federal notions of due process within Indian country.[6] Instead, Congress used its plenary power to enact the Indian Civil Rights Act of 1968,[7] to impose federal-like notions of due process, but not the exact same requirements. A major implication of this distinction is that federal case law interpreting federal due process protections are equally inapplicable.

   Relying on *Lara*, there do not appear to be any other rights whose protection is necessary under the Constitution in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise SDVCJ over the non-Indian defendant.

6. Self-certification.

7. Self-certification.

[5] 541 U.S. at 202.
[6] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978).
[7] Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C.§§ 1301-1304 (1968).

8. The Tribal Law and Order Act (TLOA) of 2010,[8] includes most of the due process protections as required under VAWA 2013 if a tribe chooses to exercise TLOA's enhanced sentencing authority. If a defendant is sentenced under the enhanced sentencing authority, a tribe may sentence the defendant to serve that sentence in a tribal correctional facility, so long as that facility has been approved by the Bureau of Indian Affairs (BIA) for long-term incarceration, in accordance with guidelines to be developed by the BIA.[9] However, as of this date, the BIA has only disseminated a *draft* version of these guidelines.[10] At least one tribe, the Gila River Indian Community, who has attempted to obtain this BIA approval for their tribal correctional facility, is still awaiting approval. The failure to effectively implement this process, much less develop finalized guidelines, directly impacts the ability of tribes to effectively administer justice and control crime. Given this inability to establish final correctional facility guidelines in the nearly 3 years since TLOA enactment, we do not think it would be feasible or appropriate for DOJ to include a correctional facility evaluation requirement within the limited time period of this Pilot Project. If necessary, self-certification could again be utilized.

9. As discussed above, the coordination between jurisdictions is essential to successful community safety, as well as successful implementation of SDVCJ. Given the long and arduous history of tribes and tribal justice systems, however, it is not uncommon for either tribes or states to be reluctant to establish Memorandums of Understanding (MOU) or Memorandums of Agreement (MOA) with neighboring jurisdictions. While we recommend that the Pilot Project participating tribes share relevant MOUs and MOAs, we do not think it would be appropriate for DOJ to in any way require that a tribal prosecutor develop these policies in order to be selected for the Pilot Project, especially given that the lack of these coordination policies may well be beyond their control.

The Justice Department's Process for Considering Requests:

1. We agree with NCAI's recommendation for DOJ to forego a formal rulemaking process to establish the standards for the 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. This delay hurts not only the potential participating tribe because of the delay in prosecuting offenders, but also hurts all tribes by minimizing access to shared information. We further agree with NCAI that the Pilot Project is not a traditional pilot project for purposes of a study. Instead, this Pilot Project is intended to ensure that the first tribal participants are implementing in full compliance with the new law. We agree with NCAI that the main value of the Pilot Project lies in
    (1) collaboration and information-sharing among the Pilot Project Tribes;
    (2) collaboration with the criminal justice expertise at the DOJ; and

[8] Tribal Law and Order Act (TLOA)of 2010, Pub. L. No. 111-211, §202(a)(5) (2010).
[9] TLOA, Sec. 234(d)(1)(A).
[10] Bureau of Indian Affairs, Office of Justice Service, "BIA Adult Detention Facility Guidelines (Draft)," Dec. 2010, *available at* tloa.ncai.org/documentlibrary/2011/02/BIA%20Adult%20Detention%20Facility%20Guidelines%20Dec%202010%20SOL.pdf.

(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.

We also agree with NCAI that the process should be focused on organized collaboration and information-sharing among the pilot tribes. We recommend that the Pilot Project tribes be encouraged to meet at least quarterly, via conference call, to discuss their implementation process, share relevant tribal code and other documents, and report on

(1) charges brought against non-Indians under VAWA 2013;
(2) successful convictions;
(3) ongoing challenges;
(4) and result of any writs of habeas corpus brought against the tribe.

It is important to note that we recommend that this reporting be for the use of other Pilot Project tribes to form a coordinated effort towards overall successful implementation, and potentially subsequently for all tribes intended to implement SDVCJ. Reporting should not be required, and reporting should not be directly to DOJ. We agree with NCAI that this process should be a flexible collaborative process.

2. We agree with NCAI that it would be preferable for DOJ to rely primarily on tribal "self-certification" because of the limited time left within this two-year Pilot Project. As noted above, self-determination can include the review of a tribe's written application regarding their compliance with VAWA 2013's due process protections, including tribal codes, procedures, and qualifications of staff. Further, this process is more consistent with tribal self-determination and with respecting tribes' inherent authority to exercise this criminal jurisdiction.

3. We agree with NCAI that the Pilot Project should be open to any tribe that wishes to participate. We note that the desire to maximize collaboration can often conflict with an "open universe" policy. However, we agree with NCAI that interested tribes will most likely self-select, and that others can gather information to plan for their implementation. In this vein, if a potential tribe were to apply to participate in the Pilot Project, but facially exhibited incomplete compliance with all of VAWA's due process protection requirements, we recommend "delaying" a decision as to their participation. A delay would allow interested tribes to still gather information, while avoiding unnecessary precedents as to the DOJ's assessment of a tribe's "readiness," as well as avoid the potential for a tribe to simply avoid the Pilot Project altogether and wait to implement after March 7, 2015.

4. We agree with NCAI that tribes should have significant participation on any "expert panel" assembled to participate in the assessment process. Ideally, this panel would include individuals who currently or have previously participated in a tribal justice system.

5. As noted above, we discourage the creation of a single model criminal code. Instead, it would be preferable to develop multiple model code provisions, or instead simply disseminate codes that have been approved for participation in the Pilot Project. As NCAI

notes, "Tribes who create their own codes and procedures are more likely to take ownership, and their solutions will be more suited [to] the characteristics of each tribal community."[11]

6. As noted above, we recommend that Pilot Project tribes be encouraged to participate in at least quarterly conference calls in order to share information and prosecutorial efforts. We believe, along with NCAI, that one of the most significant values of the pilot phase will lie in documenting the development of codes and procedures by pilot tribes and sharing that information with tribes who will implement SDVCJ after the pilot phase. In partnership with organizations such as the NCAI, the Native American Rights Fund (NARF), and the National American Indian Court Judges Association (NAICJA), TLPI is eager to help facilitate this collaboration by hosting the quarterly conference calls, organizing and disseminating the shared information through a security-protected website and/or listserv, and helping to gather "best practices."

8. For evaluation of the Pilot Project, TLPI recommends not only tracking the number of tribes that apply for and participate in the Pilot Project, but that there also is a measurement of the number of non-Indian defendants charged and convicted under SDVCJ (i.e. the number of offenders that are "brought to justice"), as well as the number of writs of habeas corpus filed and the results. The Pilot Project reflects not only an opportunity to successfully implement SDVCJ and pave the way for further tribes to implement SDVCJ, but it also presents an opportunity to prepare for the potential federal court attacks against the use of SDVCJ by tribes via writs of habeas corpus. By encouraging tribes to share their use of SDVCJ with each other, we can better prepare for this future litigation. However, we similarly note that it would be best for this information-sharing to be *encouraged*, not *required*.

9. Advisory role

10. We agree with NCAI that the Tribal Self-Governance demonstration project is an appropriate example of a successful pilot project.

If you have any questions or comments about this document, please contact TLPI Executive Director, Jerry Gardner (jerry@tlpi.org) and/or TLPI Tribal Law Specialist, Lauren Frinkman (lauren@tlpi.org).

Sincerely,

Jerry Gardner, Executive Director
Tribal Law and Policy Institute

[11] National Congress of American Indians, Letter to Mr. Tony West, Acting Associate Attorney General and Mr. Tracy Toulou, Director, Office of Tribal Justice, "Re: Implementation of the Violence Against Women Reauthorization Act of 2013," 3 (May 20, 2013).