Implementing VAWA 2022 Tribal Criminal Jurisdiction:

Tribal Legal Code Resource

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Part A: Background Information

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013)[1] included historic provisions reaffirming the inherent authority of Indian Tribes to prosecute non-Indians who commit certain crimes on Tribal lands. The Violence Against Women Reauthorization Act of 2022 (VAWA 2022),[2] which was signed into law on March 15, 2022, further expanded recognition of Tribal authority to prosecute non-Indians. Both VAWA 2013 and VAWA 2022 amended the Indian Civil Rights Act (ICRA), and the Tribal jurisdiction provisions discussed in this resource are codified at 25 U.S.C. §§ 1301-1304.

With the enactment of VAWA 2013 and VAWA 2022, the Federal government has reaffirmed some of the inherent Tribal criminal jurisdiction it had previously limited by statute and U.S. Supreme Court decisions. At the same time, while Congress specifically affirms and recognizes the inherent jurisdiction of Tribes within the wording of the statutes, it also continues to limit that authority in several key ways.[3] Tribes are not required to exercise any of this restored authority. Tribes that *do* want to take advantage of these powers, however, must comply with certain prerequisites set out in the statutes.

VAWA 2013 and VAWA 2022 are very broad statutes covering numerous topics. This resource focuses solely on the Special Tribal Criminal Jurisdiction (STCJ) provisions of VAWA 2022—providing an overview of the inherent Tribal authority recognized by VAWA and exploring ways that Tribes can comply with the requirements of Federal law.

The Background Information provided here in Part A is divided into three chapters:

- Chapter 1: Use of This Resource Guide introduces this resource guide, discussing its purpose and its limitations. For Tribes that wish to exercise STCJ, Chapter 1 also discusses *Drafting Required Codes and Regulations*, and includes some suggestions about ways to approach drafting the required laws and regulations.

- Chapter 2: A Brief History of VAWA then turns to the Tribal jurisdiction provisions of VAWA 2013 and VAWA 2022—briefly discussing the history and requirements of each statute.

- Chapter 3: Does Your Tribe Want to Exercise Enhanced Powers? Because Tribes are not required to exercise any of the inherent powers recognized in the Tribal jurisdiction provisions of VAWA 2013 and VAWA 2022, this chapter provides guidance for Tribes to consider in deciding whether or not they want to implement and exercise this authority.

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[1] Pub. L. No. 113-4, 127 Stat. 54 (2013).

[2] VAWA 2022 was enacted as part of the Consolidated Appropriations Act (H.R. 2471).

[3] Congress and the Supreme Court have the power to recognize and affirm the inherent power of Tribes. Throughout history they have restricted and relaxed restrictions on that power. See Indian Civil Rights Act, 25 U.S.C. § 1301(2), §1304(b.1); *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191 (1978), *U.S. v. Lara*, 541 U.S. 193 (2004).

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Chapter 1: Use of This Resource Guide

What This Resource Guide Can Do

This guide is designed to be a resource for Tribes interested in implementing the Special Tribal Criminal Jurisdiction (STCJ) provisions in Violence Against Women Reauthorization Act of 2022 (VAWA 2022) and exercising criminal jurisdiction over non-Indians. This resource guide focuses on the changes that may be needed in Tribal law should a Tribe elect to implement the statute. It raises concerns and issues that will need resolution in implementation and provides examples from Tribal codes and Tribal court rules.

This resource starts by providing a general overview of the Tribal jurisdiction provisions of Violence Against Women Reauthorization Act of 2013 (VAWA 2013) and VAWA 2022 and their requirements before turning to a more detailed examination of the scope of the jurisdiction that a Tribe can assert and each requirement that must be fulfilled in order to do so. Each chapter provides a variety of questions that a Tribe should attempt to answer in analyzing whether the implementation of STCJ is right for your Tribal nation. Additional resources are referenced and provided.

A Special Tribal Criminal Jurisdiction Sample Code is provided in the appendix of this resource. The sample code should be helpful in providing a full picture of how the law might look and how sections of the law work together. It also includes sections that were not discussed in this resource but are important to include.

> IMPORTANT: It is not recommended that your Tribe adopt any sample code, instead your Tribe should review each of the chapters that provide important information on discussions that should take place before deciding on any changes in your code. If your Tribe decides to implement STCJ, your Tribe can then select sections that fit your specific legal structure, historical background, cultural values, and resources, using the examples provided and the sample code as aids.

What This Resource Guide Cannot Do

Because each Tribe currently has unique laws or codes, it is anticipated that each Tribe that desires to implement STCJ will need to carefully review their current code and then modify their code in such a way that the requirements of VAWA 2022 are met. In some cases, the Tribe's constitution may need to be amended to ensure that criminal jurisdiction over non-Indians is permitted. Tribes that have implemented VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ) provisions and now want to update their codes to implement VAWA 2022, Special Tribal Criminal Jurisdiction (STCJ) can review Tribal Law and Policy Institute's Tribal Code Checklist for VAWA 2013 Implementing Tribes Updating Codes to Implement VAWA 2022 - Special Tribal Criminal Jurisdiction (STCJ). The checklist can be used to review existing Tribal code to identify areas that need to be updated or repealed. This quick reference checklist is intended as a starting place and does not incorporate specific considerations that may be relevant to each Tribal community. This publication does not provide constitutional recommendations but instead focuses on the Tribal code provisions that are most likely to need amendment. This publication poses questions in later chapters regarding a Tribal constitution as it may contain restrictions on jurisdiction or rights granted through the Indian Civil Rights Act (ICRA).

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A Few Words of Caution

The development of administrative rules and protocols is not covered in this resource, but it is a necessary component of STCJ implementation.

This resource guide is not a replacement for training. Even the best law in the world is not effective if people do not understand it and support it. Involvement of people in the lawmaking process is helpful in gathering support, and providing training helps in promoting understanding.

This resource guide also does not discuss the critically important community support and services that are needed for crime victims. While Chapter 12 (Victims' Rights) discusses the importance of including protections for crime victims in your Tribal codes, it is important to note here that victim services programs serving your community are an important part of your community's response to violent crime.

This resource guide is not a model code. Your Tribal community is the best judge of what language will work best for your people and is consistent with the Indian Civil Rights Act. There are advantages and disadvantages to certain kinds of legal language, and not every Tribal government has the same needs or resources. Most importantly, the sample language in this guide is not necessarily consistent with every Tribe's culture, traditional practices, or current criminal code design. The discussion questions are provided to help your Tribe design a code that fits *your* Tribal community.

How Should We Proceed?

Your Tribe should consider different approaches before making a final decision about how to use this resource guide. Some Tribes may spend several days in a row working through the questions and issues. Others may hire a facilitator to help organize meetings and community forums. Your Tribe may want to consider creating a community team to tackle the issue over a longer period. There are many ways to develop a code that meets the needs and customs of your Tribe. Your Tribe should develop a plan that is consistent with your needs, goals, and resources.

Keep in mind that this resource guide provides a very broad overview of important points of law. It does not include every detailed legal issue, so you will probably need to do additional research to develop more detailed laws.

Writing a Tribal code can sometimes be a very long process. Be realistic about the time needed to complete this process. Take the time to do the job right, keeping in mind that you will need to listen to many different opinions.

Tribes interested in implementing STCJ should join the Inter-Tribal Technical-Assistance Working Group on Special Tribal Criminal Jurisdiction (ITWG). More than thirty Tribal governments have begun exercising criminal jurisdiction over non-Indians since VAWA 2013 was first enacted. Most of these implementing Tribes have worked closely with a group of more than sixty other Tribes as part of the ITWG, which has been an important forum for Tribal governments to work collaboratively to develop best practices. The ITWG continues to meet regularly. Many of these Tribes are now working to amend Tribal codes and procedures to reflect the VAWA 2022 changes and expansions. A Tribe considering amendments to its codes and procedures may

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want to begin by reviewing the Tribal Code Checklist for VAWA 2013 Implementing Tribes Updating Codes to Implement VAWA 2022 - Special Tribal Criminal Jurisdiction (STCJ).

Point of Discussion: How Do We Create a Realistic Timeline?

Consider the resources in your community, including:

- How large is our Tribal nation?
- How many people will be involved in writing the code?
- Do we have a budget for training and/or facilitators?
- Who do we want to send as a representative or team to the next ITWG meeting?

A Note on Terminology

Tribal governments use a variety of terms to describe their laws, including statutes, ordinances, and codes. Generally, the term code refers to an organized listing of all laws for a given subject matter, while a specific subsection may be entitled a statute or ordinance. In this resource guide, the terms will be used interchangeably to be relevant to a wide variety of audiences. A Glossary is included at the end of this resource.

This resource guide is divided into five major parts:

1. Background information,
2. Establishing Jurisdiction and Covered Crimes,
3. Due Process and Procedural Requirements,
4. Court Procedures and Requirements, and
5. Helpful Resources.

Part A provides necessary background and context, including a brief history of VAWA, as well as exploring preliminary matters for a Tribe to consider. It also explains how best to use this resource guide.

Parts B and C examine in more detail the requirements Tribes must meet to exercise STCJ in compliance with Federal law. Each chapter in Parts B, C, and D contain four main parts:

1. Overview,
2. Tribal Code Examples,
3. Tribal Code Commentary, and
4. Discussion Questions.

The Overview will introduce you to the section and to the statutory requirements. Reading the overview will give you basic background on the issue addressed in the chapter.

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The Tribal Code Examples provide language from existing Tribal codes and court rules. Whenever possible, this resource includes laws that other Tribes have written to address the STCJ requirements.

After each section of Tribal code examples, Tribal Code Commentary is provided. This commentary is designed to help your Tribe consider the strengths and weaknesses of the Tribal code examples and their possible applicability for your Tribal community.

The Discussion Questions are an important part of this resource guide. They are designed to help you think about important issues and to better select words, process, and procedures that fit your Tribal community.

Part E provides available online resources that may be helpful in further understanding the requirements and purposes of VAWA 2022. This includes websites, articles, government reports, Tribal Code Checklist, the full Indian Civil Rights Act and other information. The glossary provides definitions of words and acronyms that may be helpful. The appendix provides a Special Tribal Criminal Jurisdiction Sample Code for implementation of VAWA 2022.

Drafting Required Codes and Regulations

Who Should Write the Laws?

It is important to think broadly about the community members who may have information that will help draft good laws. The following is a checklist of some people and agencies that may be useful in drafting codes—but each community is different.

- Survivors of domestic violence, sexual assault, sex trafficking, child abuse, stalking and their advocates;
- Tribal prosecutors;
- Tribal attorneys;
- Tribal court personnel;
- Tribal law enforcement/Tribal probation/parole;
- Elders;
- Family services/social services;
- Medical personnel;
- Corrections;
- Defense attorneys/advocates;
- Victim advocates;
- Traditional healers/spiritual leaders;
- Child protective services/Indian Child Welfare Act (ICWA) workers;
- Housing authority;

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- School system;
- Youth council;
- Legal aid;
- Casino/Tribal businesses; and
- Others.

Point of Discussion: What Are the Benefits of Using a Team Approach?

Understanding various perspectives in writing a law is not the only benefit of working with a multidisciplinary team. Other possibilities include:

- Educating more community members,
- Sharing ownership of the problem and responsibility to solve it, and
- Communicating about Tribal values.

Ten Tips for Working as a Team

Writing or revising a Tribal law usually does not happen quickly or easily. Code writing involves a great deal of time, effort, and cooperation. There is not one "right" way to research and draft laws. The following tips come from successful efforts of other Tribal nations.

1. **The primary work should be done by a group of "problem solvers."**

   The effort will not succeed if it simply becomes a process of finger pointing and blaming others for weaknesses in the current law. The best laws are developed one step at a time by a group that is committed to brainstorming and reviewing possible solutions to problems.

2. **There should be equal representation from various Tribal agencies and advocacy programs.**

   Equal representation is important. The code development process is not the "property" of any one agency, discipline, or group.

3. **The work should be completed in a setting of mutual respect.**

   The setting should be a safe environment in which the group can share, learn, and explore. It is okay to acknowledge differences of opinion, but not in a stereotypical or judgmental manner. The safety of women, children, and all members of the community must be respected.

4. **The agenda should be focused upon areas of mutual concern or shared interest.**

   Try to focus on areas of common interest instead of differences. A shared vision (such as "a safe community") can create confidence and trust.

5. **The participants should be willing to examine not just the way things are but also be willing to explore ways to improve the laws.**

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All participants must be willing to explore new ways to help make sure that women, children, and all members of the community are safe. However, different people may have different ideas. Listen to and learn from each other.

6. **The participants should be willing to be creative and persistent.**

   To be successful, you must be willing to be creative and persistent. The process will undoubtedly have frustrations and difficult times. Think "outside the box."

7. **The participants should be willing to share the burden.**

   The participants must also be willing to share the burden of the process by sharing resources, training, technical assistance, and limited available funding, and to alternate locations of meetings and focus groups.

8. **All agencies should be allowed input into draft statutes prior to finalization.**

   All Tribal agencies involved should have a chance to review the draft laws before they are completed. Because each agency will have to follow the law, they need to know what is going to be proposed.

9. **Consider traditional/culturally appropriate strategies.**

   In some cultures, it is important to share and provide food for participants. You will be spending a great deal of time together, so make sure everyone is comfortable. (Please note that there are substantial restrictions on the use of Federal grant funds for food. The safest practice is to use nongrant funds for food. If you are considering using Federal grant funds, be sure to check with your grant manager.)

10. **Expect to spend a great deal of time working together.**

    It cannot be stressed enough that this is a lengthy project, but one that is well worth the effort. Cooperation in creating these new laws will help protect the women and families in your community.

Before You Begin . . .

As your Tribe sits down together to begin the process of implementing STCJ for your Tribe, keep your Tribe's main goal in mind.

Point of Discussion: What Is Our Goal?

Consider writing down your Tribe's ultimate goal and reviewing it at the beginning of each meeting.

Example: Provide greater safety to our community by asserting our sovereignty.

Getting Organized

Your Tribe should review the constitution and bylaws or other foundational legal documents. Keep track of your Tribe's legislative history and consider incorporating it into the law. Reviewing and clarifying the roles of law enforcement, the Tribal court, and the prosecutor may also be helpful. Additionally, it is important to understand the Federal and/or State laws that impact

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your Tribe. Review all the amendments made to ICRA by VAWA 2022, which is included in Part 4 (Helpful Resources) of this guide with notations of the amendments made by VAWA 2013 or VAWA 2022.

It is also important to evaluate the laws that are already in place in your Tribal community. Be sure to analyze the strengths and weaknesses in any current laws. Inserting a "Savings Clause" in your Tribe's amended code can help to ensure that during the time of adoption or following adoption, there is no question as to what happens to the old code cases. An example of a Saving Clause appears in the Tribal Special Tribal Jurisdiction Sample Code in the Appendix.

If appropriate, your Tribe should review its traditions and stories, as well as your Tribal customs, regarding healing and justice. The TLPI resource Listen to the Grandmothers, and in particular the chart on page 37, may be helpful in this exercise. This research may be done by interviewing elders within your Tribal community. In addition, your Tribe can also consult anthropological documentation about your Tribe, historical records, or other Tribes that share similar cultural or linguistic ties.

Point of Discussion: What Documents Should You Review?

Consider creating a binder for all team members that includes:

- Tribal constitution and/or bylaws;
- Current Tribal laws that may be impacted;
- Traditions, customs, and stories (if appropriate);
- Copies of any relevant Tribal court opinions;
- Current law enforcement protocols related to domestic violence, dating violence, protection order violations, sexual violence, stalking, sex trafficking, child violence, obstruction of justice, and assault against Tribal justice personnel; and
- Indian Civil Rights Act with amendments highlighted.

Many times, existing Tribal laws may have originated in the laws from another Tribe or from a city, State, or county. Take the time to go through and review your current laws to:

- Evaluate them for relevance to your particular community and situation,
- Analyze how they have been working,
- Discuss the weaknesses, and
- Determine if they represent how your Tribe wants to respond.

Be prepared to remove or edit entire sections as necessary.

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Chapter 2: A Brief History of VAWA 2013 and VAWA 2022

Overview

Over the past 100 years, a combination of Federal statutes and Federal court decisions have created a complex maze of laws and regulations that make it difficult to address crime committed in Tribal communities and to enforce Tribal court protection orders. The fracturing of criminal jurisdiction in Indian country and Alaska Native Villages across Federal, Tribal, and State governments has undermined safety in Tribal communities.[4]

This fractured jurisdiction creates a great deal of confusion and requires extensive coordination between police departments, prosecutors' offices, court systems, probation/parole offices, and victim service providers. The complex bureaucracy often has a detrimental impact on crime victims and on the ability of all governments to adequately address crime in Tribal communities. Because Tribal governments are not able to prosecute all persons who commit crimes in their territory, Tribes must rely on the Federal and State governments to do so, and those governments are not always focused on prosecuting crime that occurs in Tribal communities.

VAWA 2013 and VAWA 2022 History and Provisions

By enacting Violence Against Women Reauthorization Act of 2013 (VAWA 2013) and Violence Against Women Reauthorization Act of 2022 (VAWA 2022), Congress was reacting to the jurisdictional framework in Tribal communities that makes it particularly difficult to effectively address violence. Since the *Oliphant v. Suquamish* decision in 1978, Federal law has limited the criminal authority of Tribal governments over non-Indians for crimes committed on Tribal lands. Where State or Federal authorities have had responsibility for investigating and prosecuting these crimes, they have often gone unaddressed unless serious injury or death occurred. Even then, Federal reports showed that Federal prosecutors declined more than half the cases referred to them.[5] This has led to particularly devastating rates of violence against Native women, and research shows that a significant portion of that violence is committed by non-Native partners.[6]

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[4] See General Guide to Criminal Jurisdiction in Indian Country (including chart) at http://www.Tribal-institute.org/lists/jurisdiction.htm.

[5] In fiscal years 2005 through 2009, U.S. Attorney's Office (USAOs) resolved about 9,000 of the approximately 10,000 Indian country matters referred to their offices by filing for prosecution, declining to prosecute, or administratively closing the matter. USAOs declined to prosecute 50% of the 9,000 matters. In addition, (1) about 77% of the matters received were categorized as violent crimes, and 24% as nonviolent crimes and (2) declination rates tended to be higher for violent crimes, which were declined 52% of the time, than for nonviolent crimes, which were declined 40% of the time. U.S. Department of Justice Declinations of Indian Country Criminal Matters, GAO-11-167R: Published December 13, 2010. Publicly released December 13, 2010. http://www.gao.gov/products/GAO-11-167R.

[6] According to the National Institute of Justice, U.S. Department of Justice, Office of Justice Programs at least 97% of American Indian/Alaska Native female victims experienced violence at the hand of at least one person not of the same race. André B. Rosay, "Violence Against American Indian and Alaska Native Women and Men," *NIJ Journal* 277 (2016): 38–45, http://nij.gov/journals/277/Pages/violence-againstamerican-indians-alaska-natives.aspx.

Congress enacted, and subsequently amended, VAWA 2013 in part to address this problem. This statute recognizes the inherent authority of Tribes to prosecute non-Indians who commit certain crimes on Tribal lands. The statute also limits Tribal authority in key ways and sets out a series of requirements that Tribes must satisfy if they want to exercise this recognized authority. The Tribal criminal jurisdiction provision of VAWA 2013 was codified as part of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1304,[7] and represents a historic shift in how criminal jurisdiction works on Tribal lands.

For the March 7, 2018, five-year anniversary of the enactment of VAWA 2013, the National Congress of American Indians released a report summarizing how VAWA 2013's landmark provision had been implemented and analyzing its impacts in the five years since it was enacted. In the Five-Year Report,[8] NCAI identified the following four key findings that might be relevant to Tribal policy makers who are considering exercising jurisdiction over non-Indians:

> 1. **Tribes' exercise of criminal jurisdiction over non-Indians helps to combat domestic violence by prosecuting offenders harming their communities.** As noted in the NCAI Five-Year Report[9] many of the non-Indian defendants prosecuted in Tribal Courts had numerous prior contacts with Tribal police, causing a strain on Tribal resources. The Tulalip Tribes, for example, reported that their seventeen non-Indian defendants had a total of 171 contacts with Tribal police in the years prior to passage of VAWA 2013 and their ultimate arrests. Many defendants had criminal records or outstanding warrants. Now State, Federal, and Tribal law enforcement are able, through cooperation and information sharing across jurisdictions, to ensure that defendants with a pattern of dangerous behavior are identified and receive appropriate sentences.[10]
>
> 2. **Tribal Courts uphold the rights of defendants and are committed to their rehabilitation**. The case statistics from the first five years of Tribal prosecutions of non-Indian offenders reveal justice systems not unlike the other criminal justice systems in the United States. Of the 143 arrests of non-Indians, 52 percent resulted in convictions, while 18 percent resulted in acquittals or dismissals. Many Tribes are committed to ensuring that non-Indian defend ants—who are usually partners and parents of Tribal members—get help in addition to punishment. Many Tribal prosecutors expressed the sentiment that these offenders are part of their communities, and therefore the Tribe is committed to ensuring that the defendant also heals. Many Tribes offer batterer-intervention programs. Several Tribes require that every defendant convicted of a domestic violence offense completes a treatment program targeted to their abusive behaviors.[11]

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[7] 25 U.S.C. § 1304.

[8] VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018).

[9] Ibid.

[10] VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians, 10-16 (March 2018).

[11] VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians, 20-21 (March 2018); See, Lower Elwha Klallam Code, art. III, § 16.03.03(4); Choctaw Nation Criminal Code, pt. 1, ch. 18, § 644.

3. **Implementation revealed serious limitations in the law.** VAWA 2013 applied only in cases of protection-order violations,[12] domestic violence, and dating violence. NCAI's Five-Year Report[13] found that the narrow focus of the statute prevented Tribes from prosecuting stranger assaults on women; crimes against children (unless the child is a protected party in a protection order); alcohol and drug crimes; and crimes that occur within the criminal justice system, thereby endangering law enforcement and undermining the integrity of the system. Many of these gaps were subsequently addressed in VAWA 2022. NCAI also found that although Congress has authorized some funding for Tribes it can be expensive for some Tribes to begin exercising criminal jurisdiction over non-Indians.[14] Congress also responded to this concern in VAWA 2022 by increasing the overall funding authorization to support Tribal jurisdiction from $2 million per year to $25 million.

4. **Implementation promotes positive changes.** As Tribes prepare to exercise jurisdiction over non-Indians, many consider more broadly the impact of domestic violence on their communities. They use implementation as an opportunity to go beyond the exercise of criminal jurisdiction under VAWA 2013's requirements and think more holistically about how to improve safety in their communities. Many implementing Tribes have expanded victims' services, or strengthened victims' rights, as a part of their implementation process. The victim supports at each Tribe are discussed at length in the NCAI Five-Year Report.[15]

When VAWA was reauthorized in March 2022,[16] Congress recognized the success of the Tribes who had implemented VAWA 2013 and expanded the recognition of Tribal criminal jurisdiction over non-Indians.[17] Congress also created a pilot project to empower Tribes in Alaska, who had largely been left out of VAWA 2013, to address violence in their communities. As amended by VAWA 2022, ICRA now allows Tribes that meet the statutory requirements to prosecute non-Indians for nine categories of conduct:

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[12] 25 U.S.C. § 1304 (a) 5 - Protection order.—The term "protection order"— (A) means 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 (B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a Pendente lite order in another proceeding, 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.

[13] VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018).

[14] Ibid., 22-32 (March 2018).

[15] Ibid., 32-36 (March 2018).

[16] It once again included a Tribal title, this time as Title VIII.

[17] This included further amendments to 25 U.S.C. § 1304.

Categories of Conduct That Can Be Charged in Tribal Court against Non-Indians:	
1. Domestic violence	6. Stalking
2. Dating violence	7. Sex trafficking
3. Certain protection order violations	8. Obstruction of justice
4. Sexual violence	9. Assault against Tribal justice personnel
5. Child violence	

These categories of conduct are all defined by Federal law and are discussed in detail in Chapter 5 (Covered Crimes). The statute also requires that the crime occurred in Indian country[18] and that the victim be Indian, except if the crime involved obstruction of justice or assault of Tribal justice personnel.

Tribes exercising criminal jurisdiction over non-Indians must provide the defendant with all the applicable rights under the Indian Civil Rights Act.[19] These rights generally include many of the same rights that a Tribe must provide before exercising enhanced sentencing authority under the Tribal Law and Order Act of 2010,[20] including providing an attorney (see Part 3). The Tribe must also provide the defendant with the right to a trial by an impartial jury that is drawn from sources that—

- Reflect a fair cross-section of the community; and
- Do not systematically exclude any distinctive group in the community, including non-Indians.

Finally, the Tribe must also provide to defendants "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."[21] (See Part 3: Including Non-Indians in Jury Pools). All these requirements are summarized in the following table and are discussed in more detail in Part 3.

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[18] VAWA 2022 created a Pilot Program for Alaska where Tribes can exercise jurisdiction in their Alaska Native Village Statistical Area rather than in "Indian country."

[19] 25 U.S.C. § 1304(d)(1)-(2).

[20] Some of these rights are only triggered if the defendant is facing the possibility of jail time, but because this is often difficult to determine at the outset of a criminal case, Tribes who are exercising criminal jurisdiction over non-Indians generally provide these rights in all of their STCJ cases.

[21] 25 U.S.C. § 1304(d)(4).

TLOA and VAWA 2013 Due Process Requirements	TLOA	VAWA
Defendants are provided with effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution.*	X	X
Tribal government provides to an indigent defendant a defense attorney licensed to practice by any jurisdiction in the United States.*	X	X
Defense attorney is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.*	X	X
Judges presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants have sufficient legal training to preside over criminal trials.*	X	X
Any judge presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants is licensed to practice law by any jurisdiction in the United States.*	X	X
The Tribe's criminal law, rules of evidence, and rules of criminal procedure are made available to the public prior to charging the defendant.*	X	X
Tribal court maintains a record of the criminal proceeding, including an audio or other recording.*	X	X
Any defendant sentenced under either act is sentenced to a facility that passes the Bureau of Indian Affairs (BIA) jail standards for enhanced sentencing authority.	X	X
Tribal court provides the defendant the right to a trial by an impartial jury.	X[22]	X
Tribal court ensures that the jury reflects a fair cross-section of the community.		X
Tribal court ensures that juries are drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians.		X
Tribal court ensures that anyone detained under STCJ is notified in writing of his or her rights and responsibilities.		X
Tribal court ensures that a defendant is notified of his or her right to file "a petition for a writ of habeas corpus in a court of the United States."		X
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.		X

[22] Implicit in 25 U.S.C. § 1302(10).

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Chapter 3: Does Your Tribe Want to Exercise Enhanced Powers?

Overview

In enacting the Violence Against Women Reauthorization Act of 2022 (VAWA 2022) Congress declared that if a Tribal government meets certain prerequisites, the Tribe can exercise certain powers that had previously been restricted by the Federal government. The statute does not require Tribes to use the recognized powers, so the first step is for a Tribe to decide whether it wants to use those powers, which may involve assessing whether complying with the Federal requirements is worth the time and expense.

This chapter and these questions are in Part 1 because asking and answering them is part of the process a Tribe may want to follow in deciding whether, and if so how, to comply with the requirements of Special Tribal Criminal Jurisdiction (STCJ). Your Tribe may, however, want to skim these questions, read the rest of this resource guide, and then come back to the questions to start answering them. Many of the questions will make more sense after reading the rest of the chapters in this book, and your Tribe may be able to give more complete answers.

It is important to note that STCJ does not require that Tribes opt in within a certain time period. There is no rush for a Tribe to make the decision that it wishes to implement the required changes. It is also possible for a Tribe to initially decide it does not want to use the powers and then to later change its mind and change its laws to comply with the Federal laws.

In making these decisions, a Tribe should consider whether the recognized powers are consistent with its culture and traditions and the way it approaches its criminal justice system. STCJ increases the Tribe's authority over certain non-Indians who commit crimes in the Tribe's community. But it also requires increased procedural complexity and applies only to the criminal justice system.

In Your Community

- Does your Tribe use incarceration and/or high fines as criminal sanctions?
- Does your Tribe use the criminal justice system to handle these matters or does it use civil sanctions?
- Is violence by non-Indians a problem in your community?
- Are the additional procedural rules under VAWA 2022 consistent with the way your court operates?

If no cultural reason exists for declining to make the changes required to exercise STCJ, the Tribe may also want to consider the following questions. Please note that this is not an exhaustive list; instead, these questions are presented to get the conversations started and direct attention to what are likely to be the major issues.

Does Your Tribe Need These Powers?

- Do you have non-Indians who live and work in your Tribal community? How many non-Indians commit acts of violence in your territory?
- Are non-Indians committing crimes without being punished?

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- Is Tribal law enforcement frequently called to domestic violence, sexual violence, or child abuse situations on your reservation? Do the non-Indian offenders frequently return to the home where they are committing family violence?
- How many non-Indians are likely to be charged if you start exercising STCJ? Will your prosecutor start charging more defendants in Tribal court now that STCJ is available? Would you need more court staff? More prosecutors?

What Changes Would Be Required in Your Criminal Code?

- What changes would you need to make to your criminal laws? To your rules of procedure? To your rules of evidence? Do you currently make all these documents publicly available? Does your court issue written opinions? Are these publicly available?
- Do you have a constitution? Would it need to be amended? What would be the process for doing so?
- Do any of your laws (constitution, statutes, regulations, court decisions) limit jurisdiction over non-Indians?
- What do your current laws say about dating violence, domestic violence, enforcing protection orders, sexual violence, stalking, sex trafficking, obstruction of justice, assault against Tribal justice personnel and child violence? Would they need to be amended to apply to non-Indians? To impose criminal sanctions?
- What changes would you need to make to your criminal laws? To your rules of procedure? To your rules of evidence? Do you currently make all these documents publicly available? Does your court issue written opinions? Are these publicly available?
- What changes would you need to make to your civil laws regarding civil protection orders?
- Do you have a constitution? Would it need to be amended? What would be the process for doing so?

Defense Counsel

- Does the Tribe currently provide lawyers to defendants in Tribal Court who cannot afford one (sometimes called indigent defense)? How many defendants would qualify for a court-appointed lawyer?
- What are the current requirements for attorneys who wish to practice law in your jurisdiction and appear in your Tribal courts? Would those need to be changed? Do you require a licensing system that ensures the competence of attorneys? What ethical standards do you require attorneys to follow? How do you discipline attorneys that do not follow those standards?
- What standards do you currently require of indigent defense counsel? Is that requirement equal to or more protective of defendants' rights than the effective assistance of counsel standards used in the U.S. Constitution?

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- If you implement STCJ, would you provide indigent defense counsel for all criminal defendants (Indian and non-Indian)?

Judges and Courts

- What are the current qualifications required to serve as a judge in your court system? Would those constitute "sufficient legal training" to preside over criminal cases? If not, what changes would you need to make? Do you currently require your judges to be licensed?
- Is your court a court of record? If not, what changes would you need to make?
- Would your judge and court personnel need training on domestic violence dynamics and protocol in the courtroom?

Jury Trials

- What do your current laws, regulations, and court rules say about the jury selection process? How does the process work in your Tribe?
- Does your current jury selection process comply with VAWA 2022's fair cross-section requirement? If not, what changes would be required?
- How would you create a master jury list? What sources what you utilize to create a jury pool? What size jury would you require? What type of jury verdict rules would you require? How would you enforce jury summons?
- Will you use the same jury pool for all crimes or just include non-Indians on the jury for STCJ cases?

Sentencing and Incarceration

- If you sentence defendants to imprisonment, you will need a place to incarcerate them. How many defendants are there likely to be? What facilities are available? What (if any) additional capacity would you need? How will they access health care?

Victims' Rights

- Does your Tribe include victims' rights statutes within the code?
- Does your Tribe provide victim advocates? Do you have victims' services on your reservation?

Habeas Corpus

- How will you notify defendants of their right to file a habeas corpus action in Federal court?
- How will the Tribe prepare to defend a habeas corpus action if a defendant files one?

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Funding the Changes

Complying with all of these requirements will cost both time and money.

- Who will review and propose changes to your laws and procedures?
- Who will train prosecutors, judges, and defense counsel on the new laws and procedures and how they work?
- What funding will be required to make these changes?
- Will you need to pay for any additional prosecutors, judges, defense counsel, and court staff?
- To pay to publish the laws and regulations?
- To process the licensing and educational requirements?
- To implement the jury selection process?
- To implement victims' rights?
- To pay for incarceration? To pay for medical costs of the incarcerated? Where will these funds come from? Is that source of funding stable and reliable?

Possible Alternatives

In considering these questions, a Tribe may also want to consider possible alternatives, which may include the following.

Making No Changes. The existing restrictions on Tribal criminal jurisdiction may not be a problem for your Tribe. You may have other effective ways of dealing with crime or you may not be experiencing the type of behavior they are designed to address. In that case, it may not be worth your time and effort to make the changes. Even if you are experiencing some of these problems, it may not be sufficiently widespread or serious to be worth the time and money to comply with the Federal prerequisites.

Using Civil Infractions and Alternative Sentencing. If your Tribe does not already make use of alternative sentencing (such as community service) or approach certain matters as civil, rather than criminal, infractions, you may want to consider whether those approaches would be more effective or at least effective enough that it is not worth implementing STCJ at this time.

Can Other Parts of VAWA Address the Problem? Special Assistant United States Attorneys (SAUSAs), Tribal prosecutors who are cross-designated and able to bring cases in Federal court, can assist with crime control in Tribal communities. The Tulalip Tribes found that the use of a SAUSA was an important tool in implementing VAWA 2013, as it provided more options along with the ability to negotiate or chose a forum. It continues to be an important tool after implementation, allowing complex cases to be prosecuted in both/either forums. It also provides a mechanism to provide the victim with a more comprehensive treatment of crimes.

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Part B: Establishing Jurisdiction and Covered Crimes

In Part B of the resource, this part reviews the specific requirements in the Violence Against Women Reauthorization Act of 2022 (VAWA 2022),[23] for implementing Special Tribal Criminal Jurisdiction (STCJ) that could require changes in your Tribal code.

It is important to remember that the Federal law creating STCJ is a jurisdictional statute and does not create substantive criminal law. This means that the Federal statute creates a framework for the Tribal court to exercise its inherent jurisdiction, so long as the Tribal court's procedures meet the required due process standards. When a Tribe exercises STCJ, it is enforcing its own Tribal criminal law.

VAWA 2022 specifies nine broad categories of criminal conduct over which Tribes can exercise STCJ:

Categories of Conduct That Can Be Charged in Tribal Court against Non-Indians:	
1. Domestic violence	6. Stalking
2. Dating violence	7. Sex trafficking
3. Certain protection order violations	8. Obstruction of justice
4. Sexual violence	9. Assault against Tribal justice personnel
5. Child violence	

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[23] VAWA 2022 was enacted as part of the Consolidated Appropriations Act (H.R. 2471).

STCJ defendants are not prosecuted under the terms of Federal law; they must be prosecuted as a matter of Tribal law. As a result, it is up to the implementing Tribe to write its code to define these categories of criminal conduct—consistent with Federal law—for purposes of establishing Tribal authority in these areas. It is also up to the Tribe to decide which crimes it wants to include within these nine categories, and how to define each of those individual offenses.

For code drafters this means considering the following:

1. How to clearly establish the Tribe's authority to exercise criminal jurisdiction over any conduct that fits within the nine jurisdictional categories outlined in the Federal statute;
2. Whether the Tribal criminal code includes offenses that adequately capture the conduct the Tribe seeks to criminalize; and
3. Whether the Tribal justice system appropriately safeguards the non-Indian defendant's due process rights as required by Federal law.

The first section of this part (Chapter 4. Jurisdictional Provisions) discusses what changes need to be included in Tribal law for a Tribe to assert jurisdiction in STCJ cases. Chapter 5. Covered Crimes then discusses in detail each of the nine categories of criminal conduct that can be prosecuted in Tribal court. Possible options for amendments to Tribal codes are discussed and examples are provided from Tribes who are exercising STCJ.

The due process and procedural requirements of STCT are addressed in Parts 3 and 4.

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Chapter 4: Jurisdictional Provisions

Overview

A Tribe implementing Special Tribal Criminal Jurisdiction (STCJ) will generally need a provision in the Tribal code that establishes the scope of the Tribe's authority and the Tribal Court's jurisdiction. As you consider how to draft this provision in your Tribal code, it is important to understand the relevant portions of the Federal statute that set the permissible boundaries for the Tribe's exercise of authority under Federal law.

The 2022 Reauthorization of the Violence Against Women Act (VAWA 2022) recognizes a Tribe's inherent authority to exercise criminal jurisdiction over non-Indians for certain crimes, if the Tribe chooses to do so. The statute does this by affirming the inherent authority of a "participating Tribe" over "all persons."

> **25 U.S.C.§ 1304 (b)(1).**
>
> (1) In general
>
> Notwithstanding any other provision of law… the powers of self-government of a **participating Tribe**…include the inherent power of that Tribe, which is hereby recognized and affirmed, to exercise **special Tribal criminal jurisdiction** over all persons.

"Participating Tribe" and "special Tribal criminal jurisdiction" are both defined terms in the Federal law.

> **25 U.S.C.§ 1304 (a)(10) & (14).**
>
> (10) The term "participating Tribe" means an Indian Tribe that elects to exercise special Tribal criminal jurisdiction over the Indian country of that Indian Tribe.
>
> (14) The term "special Tribal criminal jurisdiction" means the criminal jurisdiction that a participating Tribe may exercise under this section but could not otherwise exercise.

While this language broadly recognizes Tribal authority over non-Indians, the statute goes on to include several provisions limiting Tribal authority over non-Indians. The Federal statute limits the Tribe's criminal jurisdiction over non-Indians in three primary ways:

1) Location: Tribal criminal jurisdiction is limited to crimes committed within the Tribe's Indian country.[24]

25 U.S.C.§ 1304(c).

(c) Criminal conduct
A participating Tribe may exercise special Tribal criminal jurisdiction over a defendant for a covered crime that **occurs in the Indian country of the participating Tribe**.

2) Type of Crime: Tribal criminal jurisdiction is limited to certain categories of criminal conduct.

25 U.S.C.§ 1304(c)

(c) Criminal conduct
A participating Tribe may exercise special Tribal criminal jurisdiction over a defendant for a **covered crime** that occurs in the Indian country of the participating Tribe.

25 U.S.C.§ 1304(a)

(5) Covered crime
The term "covered crime" means—

A. assault of Tribal justice personnel;
B. child violence;
C. dating violence;
D. domestic violence;
E. obstruction of justice;
F. sexual violence;
G. sex trafficking;
H. stalking; and
I. a violation of a protection order.

All of these terms (A–I) are defined in the statute. Each of these definitions are discussed in more detail in Chapters 5.1-5.9.

[24] For Tribes who are participating in the Alaska Pilot Program, their jurisdiction is limited to the "Alaska Native Village Statistical Area," rather than Indian country.

3) Victim and Defendant Status: Tribal criminal jurisdiction generally requires that the crime involve an Indian victim, with a few exceptions.

25 U.S.C.§ 1304(b)(4).

(4) Exception if victim and defendant are both non-Indians
A. In general
A participating Tribe may not exercise special Tribal criminal jurisdiction over an alleged offense, other than obstruction of justice or assault of Tribal justice personnel, if neither the defendant nor the alleged victim is an Indian.

Incorporating and Clarifying Federal Law

One of the first questions you will need to answer in drafting the portion of your code establishing jurisdiction is how broadly your Tribe wants to assert jurisdiction. Most Tribes who have chosen to implement STCJ have made the decision, as a matter of Tribal policy, to exercise jurisdiction as broadly as possible and over all the categories of conduct listed in the Federal statute. A Tribe could, however, decide that it wanted to assert jurisdiction over some of the categories of crime, but not others. A Tribe might want to prioritize, for example, crimes against children or domestic violence, but not the other categories, for resource or capacity reasons.

To implement VAWA 2022, your Tribal laws will need to include a jurisdictional provision that is broad enough to cover STCJ and allow criminal jurisdiction over non-Indians. You may find language in your Tribal constitution or Tribal code establishing the jurisdiction of the Tribal court that needs to be amended. Some Tribes, for example, have codes that explicitly limit the Tribe's criminal jurisdiction to Indians or to Tribal citizens.

Note: If your Tribe implemented Violence Against Women Reauthorization Act of 2013 (VAWA 2013) (VAWA 2013), you may have provisions in your Tribal code and/or Tribal constitution that limit your jurisdiction more narrowly than is necessary. For example, you likely have a code provision that authorizes jurisdiction over non-Indians only if the crime involved an Indian victim, or if the offender has specific ties to the reservation, or only for a narrower set of crimes. These Tribal laws, statutes, or constitutional provisions would need to be amended to fully assert Tribal authority as allowed by VAWA 2022. A checklist is provided in the appendix to help you identify necessary changes if you have already implemented VAWA 2013.

Finally, consider carefully where you place your jurisdictional provision within your code. If your goal is to assert jurisdiction as broadly as possible, avoid placing the provision in a section that could appear limited in scope. For example, if the jurisdictional statement appears only within a Domestic Violence title, it may create confusion about whether jurisdiction extends beyond domestic violence-related crimes. In general, your jurisdictional language should be located in a general section of the code and should be easy to find.

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Tribal Code Examples

All of the Tribal code excerpts included in the following text are drafted to allow the Tribe to prosecute a non-Indian for all nine categories of "covered crime" included in VAWA 2022. The codes differ primarily in the level of specificity that is included in the Tribal code itself as opposed to referring to Federal law to establish the boundaries of Tribal jurisdiction. As these examples demonstrate, there can be a trade-off between increased clarity and transparency in Tribal law and ensuring that a Tribe is maximally asserting its sovereignty under Federal law.

Chickasaw Nation Code
Title 5. Courts and Procedures
Chapter 4. Special Tribal Criminal Jurisdiction Over Covered Offenses

SECTION 5-401.1 DEFINITIONS.
The following words have the meanings given below when used in this Chapter:

1. "**Assault of Tribal Justice Personnel**" shall mean any offense in the Chickasaw Nation that involves the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of, the Chickasaw Nation or serving the Chickasaw Nation during, or because of, the performance or duties of that individual in—
   A. preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a Covered Offense;
   B. adjudicating, participating in the adjudication of, or supporting the adjudication of a Covered Offense;
   C. detaining, providing supervision for, or providing services for persons charged with a Covered Offense;
   D. incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a Covered Offense.

2. "**Child"** shall mean a person who has not attained the lesser of—
   A. the age of 18; and
   B. except in the case of sexual abuse, the age specified by the criminal law of the Chickasaw Nation.

3. **"Child Violence**" shall mean the use, threatened use, or attempted use of violence against a Child defined as a criminal offense in the Chickasaw Nation.

4. The terms **"Coercion"** and **"Commercial Sex Act"** shall have the meanings given to the terms in 18 U.S.C. § 1591(e).

5. **"Dating Violence"** shall mean the commission of any criminal offense in the Chickasaw Nation that is committed by a person who is or has been in a social relationship of a

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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.

6. **"Domestic Violence"** shall mean the commission of any criminal offense in the Chickasaw Nation that is committed by

A. a current or former spouse or intimate partner of the victim;
B. a person with whom the victim shares a child in common;
C. a person who is cohabitating with or who has cohabitated with the victim as a spouse or intimate partner; or
D. a person similarly situated to a spouse of the victim under the domestic or family violence laws of the Chickasaw Nation.

7. **"Indian"** shall mean a person who is a member of a federally recognized Indian Tribe.

8. **"Indian Country"** shall have the meaning given to the term in 18 U.S.C. §1151.

9. **"Obstruction of Justice"** shall mean any offense in the Chickasaw Nation that involves interfering with the administration or due process of the laws of the Chickasaw Nation, including any criminal proceeding in the Chickasaw Nation or investigation of a criminal offense under the laws of the Chickasaw Nation.

10. **"Protective Orders"** shall mean:

A. 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
B. any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

11. **"Sex Trafficking"** shall mean conduct within the meaning of 18 U.S.C. §1591(a).

12. **"Sexual Violence"** shall mean any nonconsensual sexual act or contact defined as an offense in the Chickasaw Nation, including in any case in which the victim lacks the capacity to consent to the act.

13. **"Spouse or Intimate Partner"** shall have the meaning given to the term in 18 U.S.C. § 2266.

14. **"Stalking"** shall mean engaging in a course of conduct at a specific person in violation of the laws of the Chickasaw Nation wherein a person engages in a course of conduct that would cause a reasonable person:

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A. to fear for the person's safety or the safety of others; or
B. to suffer substantial emotional distress.

15. **"Violation of a Protection Order"** shall mean an act that:
A. occurs in the Chickasaw Nation; and
B. violates a provision of a Protective Order that—
i. prohibits or provides protection against violent or threatening acts or harassment against, Sexual Violence against, contact or communication with, or physical proximity to, another person;
ii. was issued against the Defendant;
iii. is enforceable by the Chickasaw Nation; and
iv. is consistent with 18 U.S.C. § 2265(b).

SECTION 5-401. 2 EXERCISE OF SPECIAL TRIBAL CRIMINAL JURISDICTION
The Chickasaw Nation elects to exercise Special Tribal Criminal Jurisdiction over the Indian Country of the Chickasaw Nation, under its inherent Tribal sovereignty and in conformity as a "participating Tribe" under 25 U.S.C. § 1304.

SECTION 5-401.3 SPECIAL TRIBAL CRIMINAL JURISDICTION.

A. "Special Tribal Criminal Jurisdiction" shall mean the criminal jurisdiction that the Chickasaw Nation may exercise under this Chapter, but, prior to the enactment of these provisions, was otherwise prevented from exercising under federal law.

B. The Chickasaw Nation may exercise Special Tribal Criminal Jurisdiction over all non-Indian persons for a Covered Offense that occurs within the Indian Country of the Chickasaw Nation.

C. No Special Tribal Criminal Jurisdiction may be exercised over an alleged offense if neither the defendant nor the victim is an Indian, except in prosecution of the Covered Offenses set forth in Section 5-401.5(A) and (E), in which case neither the defendant nor the victim are required to be an Indian.

SECTION 5-401.4 NATURE OF SPECIAL TRIBAL CRIMINAL JURISDICTION.

A. The Chickasaw Nation may exercise Special Tribal Criminal Jurisdiction over all persons as prescribed for herein.

B. Nothing in this Chapter shall be construed to create any federal or state jurisdiction over Indian Country.

C. Nothing herein shall be construed to waive the sovereign rights and immunities of the Chickasaw Nation or otherwise provide for any cause of action against the Chickasaw Nation, except as may be explicitly set forth herein.

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SECTION 5-401.5 COVERED OFFENSES.

A **"Covered Offense"** shall include:

A. Any offense of the criminal laws of the Chickasaw Nation involving Assault of Tribal Justice Personnel;
B. Any offense of the criminal laws of the Chickasaw Nation involving Child Violence;
C. Any offense of the criminal laws of the Chickasaw Nation involving Dating Violence;
D. Any offense of the criminal laws of the Chickasaw Nation involving Domestic Violence;
E. Any offense of the criminal laws of the Chickasaw Nation involving Obstruction of Justice;
F. Any offense of the criminal laws of the Chickasaw Nation involving Sexual Violence;
G. Any offense of the criminal laws of the Chickasaw Nation involving Sex Trafficking;
H. Any offense of the criminal laws of the Chickasaw Nation involving Stalking; and
I. Any offense of the criminal laws of the Chickasaw Nation involving Violation of a Protection Order.

Sault Sainte Marie Tribal Code
Chapter 71: Criminal Offenses
71.302 Persons Under the Tribe's Criminal Jurisdiction.

(1) The criminal jurisdiction of the Tribe shall extend to all Indians, and all other persons over whom the exercise of criminal jurisdiction by the Tribe is authorized or permitted by federal law.

Eastern Band of Cherokee Indians Tribal Code
Chapter 14 – CRIMINAL LAW
Sec. 14-1.1. - Application to persons subject to criminal jurisdiction of the Cherokee Court.

The following criminal offenses and penalties contained herein shall apply to all persons, natural or legal of any kind, over whom the Eastern Band of Cherokee Indians has criminal prosecutorial jurisdiction when such offenses occur within the territorial jurisdiction of the Eastern Band of Cherokee Indians. That territorial jurisdiction shall include all lands held in trust for the Eastern Band of Cherokee and all other lands owned by the Eastern Band of Cherokee.

(a)(1) Beginning on October 1, 2022, the Tribe will exercise special Tribal criminal jurisdiction for all offenses that are covered crimes as authorized in the Indian Civil Rights Act (25 U.S.C. § 1304). All criminal offenses included in C.C. Chapter 14 shall be considered covered crimes if they include any of the following types of criminal offenses: (A) assault of

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> Tribal justice personnel; (B) child violence; (C) dating violence; (D) domestic violence; (E) obstruction of justice; (F) sexual violence; (G) sex trafficking; (H) stalking; or (I) a violation of a protection order.

Tribal Code Commentary

The Chickasaw Nation's code provides the most specificity and includes definitions for each of the nine "covered crimes" in its Tribal code. The Tribe's definitions generally mirror the definitions in Federal law with a few changes aimed at making clear that the offenses that will be charged are defined in Tribal law. In the "Covered Offenses" section, the Tribal code makes clear that the Tribe has the authority to charge any of the offenses in its criminal code so long as the underlying conduct fits within the included definitions for the specific categories of criminal conduct. When a Tribal prosecutor, law enforcement officer, or judge is attempting to implement the law at Chickasaw, they will find all the relevant definitions in Tribal law as they determine which offenses in the Tribal code can be charged against a non-Indian in a particular case.

The Sault Sainte Marie Tribal Code (Sault Ste. Marie), in contrast, simply states that the Tribe can exercise jurisdiction to the extent permitted by Federal law. This approach makes clear that Tribal law applies to all persons in the same way, regardless of Indian status, except as it may be limited by Federal law. When a Tribal prosecutor, law enforcement officer, or judge is implementing the law at Sault Sainte Marie, they will look to Federal law to understand the extent of the Tribe's jurisdiction over non-Indians. It will be particularly important that all the actors in the criminal justice system are trained on the Federal law and how it applies at Sault Sainte Marie.

If Federal law is amended in the future to add additional categories of criminal conduct to the list of covered crimes, the Sault Sainte Marie Tribe would not have to amend its code to begin exercising jurisdiction over those crimes. The Chickasaw Nation, however, would likely need to amend its code.

The Eastern Band of Cherokee Indians code takes a middle approach. The code lists the covered crimes that fall under Tribal jurisdiction but does not define the terms. A Tribal prosecutor, law enforcement officer, or judge who is implementing the law, will likely look to Federal law for definitions of those terms. If Federal law is amended in the future to change those definitions, the Eastern Band of Cherokee would not have to amend its code to reflect those changes. Like the Chickasaw Nation Code, the Eastern Band of Cherokee code does not specify which offenses can be charged against non-Indians but rather makes clear that any violation of Tribal law that fits within the Federal definitions could be charged.

The Chickasaw Nation approach, while potentially more time-consuming for code drafters, has the advantage of having all the relevant laws and definitions included in the Tribal code. This

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means that when a Tribal court judge is interpreting and applying the law, they will be interpreting Tribal law, rather than Federal law and anyone who wants to understand the Tribe's jurisdiction only has to look at Tribal law.

It is possible that a Tribal court's interpretation of Tribal law is more likely to be given deference by a reviewing Federal court than an interpretation of Federal law. However, importing all the Federal definitions and other provisions into Tribal law may serve to federalize Tribal law. It also means that if Federal law changes in the future, the Tribal code will need to be amended.

Applying the Jurisdictional Language from the Tribal Code in Practice

The Federal statutory language governing Tribal jurisdiction over non-Indians is complex and can be confusing. This section discusses how the language you include in your code will be used by the various actors in your justice system.

To determine whether the Tribe can exercise its jurisdiction in a particular case, the Tribe will need to make several important factual determinations:

- Did the crime occur in the Tribe's Indian country?
- What is the Indian status of the offender and of the victim?

Neither of these questions are unique to STCJ and the analysis for each is likely familiar to Tribal justice system actors. The Tribe will also, however, need to make an additional important determination to establish jurisdiction:

- Does the criminal conduct that occurred fall within the scope of one of the "covered crimes" in the VAWA statute as implemented in Tribal law?

This jurisdictional analysis may be more complex. In many cases it could have significant overlap with an analysis of what substantive offense has been committed and what should be charged under Tribal law. It may be a question of both law and fact. It is important to remember, however, that the Federal law creating STCJ is a jurisdictional statute and does not create substantive criminal law. The question whether *criminal conduct* fits within one of the jurisdictional categories specified in Federal law to support the exercise of Tribal jurisdiction is a separate question from whether a specific criminal offense has been committed under the Tribal code.

Having Tribal code provisions that address these points and clearly state what types of conduct the Tribe is asserting jurisdiction over can help ensure that Tribal law enforcement, prosecutors, judges, and the general public understand when the Tribe does or does not have jurisdiction to criminally prosecute a non-Indian.

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Tribal Law Examples

Tulalip Tribal Codes
Chapter 2.25 Criminal Procedures
2.25.010 General Provisions
Criminal Jurisdiction.
[omitted]
[omitted]
…Whether the elements of an offense are sufficient to also prove the jurisdictional requirements of special Tribal criminal jurisdiction is a question of law for the judge to decide. The judge shall include additional jurisdiction elements in the judge's instruction of the jury if necessary to prove jurisdiction.

Eastern Band of Cherokee Indians Rules of Criminal Procedure
Rule 6. – Initial Appearance.
(a) [omitted]
(b) *Procedures.*

(1) *Determining jurisdiction.* The Magistrate shall conduct a hearing to determine whether the defendant is subject to the prosecutorial jurisdiction of the Eastern Band of Cherokee Indians.

The Magistrate shall place the defendant under oath and inquire as follows:

(A) Inquire as to whether the defendant has any quantum of Indian blood and if so, to what degree;

(B) Inquire as to whether the defendant is an enrolled member or is eligible to be an enrolled member of any Federally recognized Indian Tribe and if so, which Tribe; and

(C) Inquire as to whether the defendant is a citizen of the United States.

(D) In addition to the defendant's answers to the above inquiries, the Magistrate may also receive evidence relevant to the above inquiries from any other reliable sources as may be available.

(2) Upon the conclusion of the hearing, the Magistrate shall make findings relative to the above inquiries.

(A) If the Magistrate finds that the answers to questions (A) and (B) are "yes," then the Court has prosecutorial jurisdiction over the alleged acts.

(B) If the Magistrate finds that the answers to question (C) is "no," the inquiry ends there and the Court has prosecutorial jurisdiction over the alleged acts, regardless of the answers to questions (A) and (B).

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(C) If the Magistrate finds that the answer to question (C) is "yes" and the answer to either question (A) or (B) is "no," then the Magistrate must proceed to the inquiry in (D) below.

(D) Special Tribal jurisdiction.

1.The Magistrate must next determine whether each crime alleged is a "covered crime" as defined in the Indian Civil Rights Act. If the alleged crime is a "covered crime" and if the victim is an Indian, then the inquiry ends there and the court has jurisdiction to prosecute the defendant for the crime alleged.

2. If the crime alleged is a "covered crime" and the victim is not Indian, but the charge meets the definition of obstruction of justice or assault of Tribal Justice Personnel in the Indian Civil Rights Act, then the inquiry ends there, and the court has jurisdiction to prosecute the defendant for the crime alleged.

(E) If, after conducting the inquiry proscribed above the Magistrate finds that the Court does not have jurisdiction to prosecute the alleged crime, then the Magistrate shall dismiss the charge and the CIPD shall maintain custody of the defendant and transport the defendant to the appropriate State judicial or law enforcement authorities and file State charges or coordinate transport and transfer of custody of the defendant to the appropriate Federal authority for the filing of Federal charges.

(F) If the defendant exercises his or her right to remain silent, then the CIPD shall maintain custody of the defendant and the Magistrate may determine jurisdiction without the benefit of the defendant's testimony, without prejudice to the defendant's right to challenge jurisdiction at a later date. If the defendant is too intoxicated or impaired for the Magistrate to conduct this inquiry, the Magistrate shall temporarily detain the defendant and order that the defendant appear before the Magistrate on duty on the following day for the conclusion of this proceeding. Nothing herein shall prevent the Magistrate from using evidence relevant to the inquiries regarding jurisdiction from any other reliable sources as may be available and making a determination based solely on those other sources.

(G) Nothing herein shall prevent the Magistrate from continuing the hearing required by this section, detaining the defendant and referring the case to a Judge of the Cherokee Court for a determination of jurisdiction consistent with the provisions of this Rule. Any referral so made shall be scheduled for a hearing before a Cherokee Court Judge within 96 hours.

Tribal Code Commentary

Both the Tulalip Tribes (Tulalip) and the Eastern Band of Cherokee Indians have provided additional guidance to the Tribal court about how jurisdiction will be determined. The Eastern Band of Cherokee Indians makes clear in its Rules of Criminal Procedure that jurisdiction will be determined as an initial matter at the defendant's initial appearance. Similarly, the Tulalip code provision generally treats jurisdiction as a matter of law to be decided by the judge, while also acknowledging the sometimes-complicated interplay between jurisdictional facts and elements of an offense in STCJ cases.

To help understand the distinction between jurisdictional facts and elements of an offense, consider this hypothetical example:

> A non-Indian is arrested for striking his neighbor, who is a 17-year-old Tribal member, on Tribe A's reservation and giving the victim a black-eye. Tribe A wants to arrest the non-Indian and charge them with assault, which is an offense defined in Tribe A's criminal code.

Here's how the jurisdictional analysis would proceed:

- The alleged crime occurred in Indian country.
- Because the case involves a non-Indian defendant and an Indian victim, the Tribe must determine whether the conduct fits within one of the "covered crimes" under Federal law.
- In this example, the most likely category is "child violence" because the victim is under eighteen years old.

Tribe A's criminal code incorporates the VAWA 2022 definition of "child violence," which states:

> *"The term 'child violence' means the use, threatened use, or attempted use of violence against a child."*

To establish jurisdiction, the Tribe must determine whether:

1. The alleged conduct was committed against a person who qualifies as a "child" under Tribal law; and
2. The conduct involved the "use, threatened use, or attempted use of violence."

If the Tribe determines it has jurisdiction, it must then decide what offense to charge. For that, it will look at the specific elements of the assault offense under Tribal law, which defines first-degree assault as:

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"A person is guilty of first degree assault if the individual (1) intentionally (2) causes or attempts to cause (3) serious physical injury to another person."

To secure a conviction, the Tribe will need to prove:

- The offender acted intentionally; and
- The injury caused was a "serious physical injury."

As the following chart illustrates, several factual determinations must be made in this hypothetical case—some relevant to establishing jurisdiction, and others relevant to proving guilt.

Factual Determinations	Jurisdiction	Charging Decision/Guilt
Indian status of offender and victim	x	
Age of victim	x	
Mental state of offender (intentional)		x
Use/threat/attempt of "violence"	x	
Causes or attempts to cause serious physical injury		x

In many—perhaps most—cases, the distinction between jurisdictional facts and elements of the offense may be irrelevant, but understanding this distinction can be important for making sure that codes are drafted as clearly as possible.

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Questions for Consideration

1. Are there any provisions in your existing Tribal law that limit the Tribe's jurisdiction over non-Indians?

2. How broadly does your Tribe assert its jurisdiction over all "covered crimes"?

3. Where in your code do you want to codify your jurisdictional language?

4. Are there additional instructions about determining jurisdiction that you want to address in your code?

5. Should your code address how the elements of a charged offense relate to establishing jurisdiction? Do you want to make clear that determining jurisdiction is a matter of law for the judge and what standard of proof is used for jurisdictional determinations?

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Resources

- Tribal Criminal Jurisdiction over Non-Indians: Violence Against Women Act Reauthorization of 2022

- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.

- Tribal Code Checklist for VAWA 2013 Implementing Tribes Updating Codes to Implement VAWA 2022 – Special Tribal Criminal Jurisdiction (STCJ) - this quick reference checklist has been developed to assist Tribes who successfully implemented VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ) provisions and now want to update their codes to implement VAWA 2022, Special Tribal Criminal Jurisdiction (STCJ). The checklist can be used for Tribes to review their existing Tribal code to identify areas that need to be updated or repealed. This quick reference checklist is intended as a starting place and does not incorporate specific considerations that may be relevant to each Tribal community.

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Chapter 5: Covered Crimes

After passage of Violence Against Women Reauthorization Act of 2022 (VAWA 2022), there are nine categories of criminal conduct that Tribal nations can prosecute against non-Indians:

1. Domestic violence,
2. Dating violence,
3. Criminal violations of protection orders,
4. Sexual violence,
5. Child violence,
6. Stalking,
7. Obstruction of justice,
8. Assault of Tribal justice personnel, and
9. Sex trafficking.

Each of these is a defined term under Federal law and can encompass a range of Tribal criminal offenses. Remember, Special Tribal Criminal Jurisdiction (STCJ) defendants are not prosecuted under Federal law, but rather under Tribal law. As a result, it is your responsibility to draft your Tribal code to define these categories of criminal conduct, decide which crimes to include within the nine recognized categories, and determine how each offense will be specifically defined under Tribal law.

Each of these categories is discussed in more detail in the following sections.

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Chapter 5.1: Domestic Violence

Overview

Domestic violence is one of the three categories of criminal conduct that were originally covered by Violence Against Women Reauthorization Act of 2013 (VAWA 2013). The 2022 Reauthorization of the Violence Against Women Act (VAWA 2022) amended the definition of "domestic violence" slightly to make it more deferential to a Tribe's own criminal laws and to recognize that "domestic violence" can take many forms. As with most of the jurisdictional categories, Tribes can only exercise jurisdiction if the domestic violence offense was committed in the Tribe's Indian country[25] and involved a non-Indian offender and Indian victim.

25 U.S.C.§ 1304 (a)(7).

7) Domestic violence

The term "domestic violence" means any violation of the criminal law of the Indian Tribe that has jurisdiction over the Indian country where the violation occurs that is committed by—

(A) a current or former spouse or intimate partner of the victim;
(B) a person with whom the victim shares a child in common;
(C) a person who is cohabitating with or who has cohabitated with the victim as a spouse or intimate partner; or
(D) a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of the Indian Tribe that has jurisdiction over the Indian country where the violation occurs.

As discussed previously, Special Tribal Criminal Jurisdiction (STCJ) defendants are not prosecuted under the terms of Federal law; they must be prosecuted as a matter of Tribal law. It is up to your Tribe to write its code to define "domestic violence" as a jurisdictional category for purposes of prosecuting non-Indian offenders. It is also up to your Tribe to decide which crimes you want to include within this category, and how to define each of those individual offenses.

Like many of the other STCJ covered crimes, the phrase "any violation of the criminal law of the Indian Tribe that has jurisdiction" in the Federal definition of "domestic violence" mentioned previously makes it clear that specific criminal offenses will be defined in Tribal law. As far as Federal law is concerned, to determine whether a particular Tribal offense falls under the Tribe's jurisdiction using the "domestic violence" jurisdictional category, the key question is whether the victim and the offender have a qualifying relationship. The Federal statute says

[25] For Tribes participating in the Alaska Pilot Program, the crime must have occurred within the Tribes Alaska Native Village Statistical Area (ANSVA) rather than Indian country.

that a Tribe could exercise jurisdiction over a non-Indian for *any* crime committed against a victim who has a qualifying relationship with the offender.

Defining the Jurisdictional Category

As discussed in Chapter 4, your Tribe may want to include a definition of "domestic violence" in its code to define the jurisdictional category. Your Tribe may choose to use a definition that is identical to the Federal definition from VAWA 2022 or you may draft your own definition that is consistent with the parameters set forth in Federal law. Remember, for jurisdictional purposes you cannot go beyond the scope of what Federal law allows.

Note: Your Tribal code may already have a definition of domestic or family violence for other purposes that is broader than the Federal definition of the STCJ "domestic violence" jurisdictional category. Many Tribes, for example, have code provisions that include all familial relationships within a household, including siblings or parents, in a definition of family or domestic violence. You should be careful in your drafting to make sure that you do not create a conflict or confusion with existing provisions elsewhere in your code. Here is an example of how the jurisdictional category of "domestic violence" might be defined to accomplish this goal:

> *Domestic Violence*
> *For purposes of establishing Special Tribal Criminal jurisdiction, the term "domestic violence" means any violation of the criminal law of [TRIBE] that is committed by—*
> *(A) a current or former spouse or intimate partner of the victim;*
> *(B) a person with whom the victim shares a child in common;*
> *(C) a person who is cohabitating with or who has cohabitated with the victim as a spouse or intimate partner; or*
> *(D) a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of the [TRIBE].*

This sample language makes clear when this definition is relevant by including the phrase "for the purposes of establishing Special Tribal Criminal Jurisdiction." It otherwise tracks the Federal definition and would ensure that a Tribe is asserting its jurisdiction as broadly as possible under current Federal law.

If your Tribe has implemented VAWA 2013 and used the prior Federal definition of "domestic violence," you should consider amending that definition of "domestic violence" to avoid unnecessarily limiting the scope of your Tribe's authority.

Typical Offenses

In addition to defining "domestic violence" as a jurisdictional category, you may want to specify which criminal offenses fall within this category. If your Tribe does not already have domestic violence laws in its Tribal code, review TLPI's Tribal Legal Code Resource: Domestic Violence Laws.

There are two different approaches Tribes generally take in drafting domestic violence offenses. Some Tribes have a specific domestic assault or abuse offense or group of offenses

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that involve specified crimes committed against someone with whom the offender has a specified relationship.

Other Tribes, in contrast, have structured their criminal offenses so that *any* crime could receive a domestic violence designation or enhancement if it involved a victim and an offender with a qualifying relationship. Examples of both of these approaches are included in the following text.

Tribal Code Examples

Umatilla Criminal Code

Chapter 1. Definitions, Tribal Courts, Judges, Court Personnel, and Attorneys

Section 1.1.1 Definitions

X. Domestic Violence. For the purposes of exercising criminal jurisdiction over non-Indians, the term "domestic violence" means any violation of the criminal laws of the CTUIR 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 the CTUIR.

Y. Spouse or Intimate Partner. For purposes of exercising criminal jurisdiction over non-Indians, the term "spouse or intimate partner" has the meaning given the term in section 2266 of title 18, United States Code.

Pascua Yaqui Tribal Code Title 4 – Criminal Code (July 22, 2026)
Chapter 1 – Offenses
SUBCHAPTER A – GENERAL PROVISIONS

Section 35 Restored Tribal Criminal Jurisdiction; Covered Crimes; Definitions

(A) Definitions
(1)-(3) omitted

(4) **Covered Crimes.** The term "covered crime" means—

(a)-(c) omitted

(d) **Domestic violence.** The term "domestic violence" means any violation of 4 PYTC § 1-1305 where the violation occurs that is committed by—

(i) spouse or intimate partner of the victim;
(ii) a person with whom the victim shares a child in common;
(iii) a person who is cohabitating with or who has cohabitated with the victim as

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a spouse or intimate partner; or

(iv) a current or former a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of the Indian Tribe that has jurisdiction over the Indian country where the violation occurs.

[SUBCHAPTER P, DOMESTIC VIOLENCE]

4 PYTC § 1-1305 Definitions

(A) "**Domestic violence**" means any act that is a dangerous crime against children as defined in section 2-205 of Title 4 or an offense prescribed in sections [:]

210 - First degree murder,
220 – second degree murder,
230 - manslaughter,
240 – negligent homicide,
310 – abandonment of child,
320 – abuse of a minor,
330 – care of dependent persons,
350 – custodial interference,
360 – exploitation of elderly,
405 - assault,
410 – aggravated assault,
425 - endangerment,
435 - kidnapping,
445 - harassment,
446 – aggravated harassment,
450 – unlawful imprisonment,
460 - stalking,
465 – threatening or intimidating,
470 – disorderly conduct, subsection A, paragraph 1, 2, 3 or 4, 525 – sexual assault,
530 – sexual assault of a spouse,
545 – child abuse,
780 – tampering with communications
785 – criminal trespass,
1035 – criminal damages,
1350 – aggravated domestic violence, or cruelty and neglect of animals under 8 PYTC 6-1-60(A)(3) or (4), if any of the following applies:

(1) The relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household.
(2) The victim and the defendant have a child in common.
(3) The victim or the defendant is pregnant by the other party.
(4) The victim is related to the defendant or the defendant's spouse by blood or court order as a parent, grandparent, child, grandchild, brother or sister or by marriage as a parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-

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grandchild, brother-in-law or sister-in-law.
(5) The victim is a child who resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant.
(6) The relationship between the victim and the defendant is currently or was previously a romantic or sexual relationship. The following factors may be considered in determining whether the relationship between the victim and the defendant is currently or was previously a romantic or sexual relationship:
(a) The type of relationship.
(b) The length of the relationship.
(c) The frequency of the interaction between the victim and the defendant.
(d) If the relationship has terminated, the length of time since the termination.

Tulalip Tribal Codes
Chapter 2.25 Criminal Procedures
2.25.10 General Provisions

(1) Criminal jurisdiction.
[…]
(c) Special Tribal Criminal Jurisdiction. The Tulalip Tribes hereby exercises criminal jurisdiction as a participating Tribe to the fullest extent possible as defined within 25 U.S.C. 1304 as presently constituted or hereafter amended. Tribal Court shall establish a process by Court rule to implement the notice requirement of 25 U.S.C. 1304(g). Whether the elements of an offense are sufficient to also prove the jurisdictional requirements of special Tribal criminal jurisdiction is a question of law for the judge to decide. The judge shall include additional jurisdiction elements in the judge's instruction of the jury if necessary to prove jurisdiction.

[…]

Chapter 4.25 Domestic Violence

4.25.310 Domestic violence or family violence sentencing designation.
This section provides for the designation of a crime as domestic violence (DV) or family violence (FV), which gives notice that the Tribes may seek additional conditions at sentencing. Any crime as defined by TTC Title 3 or within this chapter is considered domestic violence if committed against a current or former intimate partner, or family violence if against a family or household member, and is subject to the provisions of this chapter.

The designation of domestic violence or family violence should not be removed as part of a plea bargain. [Res. 2021-002; Res. 2013-379; Ord. 117 § 1.6, 11-5-2001 (Res. 2001-365)].

4.25.320 Interfering with the reporting of domestic violence or family violence.

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Any person who prevents or attempts to prevent a victim or witness of domestic violence or family violence from calling 911 or the Tulalip Tribal Police or other law enforcement agency, or from obtaining medical assistance or making a report to any Tribal, State or Federal law enforcement official, has committed the crime of interfering with the reporting of domestic violence or family violence.

Interfering with the reporting of domestic violence or family violence is a Class E offense. [Res. 2021-002; Res. 2013-379].

4.25.330 Interfering with the prosecution of domestic violence or family violence.
Any person who prevents or attempts to prevent a witness from testifying in a Court proceeding, or otherwise impedes the prosecution of a case involving domestic violence or family violence, has committed the crime of interfering with the prosecution of domestic violence or family violence.

Interfering with the prosecution of domestic violence or family violence is a Class E offense. [Res. 2021-002; Res. 2013-379].

Eastern Band of Cherokee Indians Code

Sec. 14-1.1. – Application to persons subject to criminal jurisdiction of the Cherokee Court

(a)(1) Beginning on October 1, 2022, the Tribe will exercise special Tribal criminal jurisdiction for all offenses that are covered crimes as authorized in the Indian Civil Rights Act (25 U.S.C. § 1304). All criminal offenses included in C.C. Chapter 14 shall be considered covered crimes if they include any of the following types of criminal offenses: (A) assault of Tribal justice personnel; (B) child violence; (C) dating violence; (D) domestic violence; (E) obstruction of justice; (F) sexual violence; (G) sex trafficking; (H) stalking; or (I) a violation of a protection order.

Sec. 14-40.1. - Domestic violence.

(a) Purpose. The purpose of the domestic violence and dating violence criminal ordinance is to recognize that the crime of domestic violence or dating violence is an extremely serious crime against society, the Tribe, and the families impacted by the violence. The purpose is also to provide the victim of domestic or dating violence the maximum protection from further violence which the law can provide. Furthermore, the purpose of this section is to recognize that the strength of the Tribe is founded on traditional notions of balance among each member of the community and what today we know as healthy families, and that the safety and well-being of victims of domestic and dating violence must be ensured by immediate intervention through actions taken by law enforcement, prosecution, mental health counselors, domestic and dating violence educators, and other appropriate services aimed to hold offenders accountable and restore balance to the victim of violence and the community as a whole.
It is the intent of the Eastern Band of Cherokee Indians Tribal Council that the official

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response to cases of domestic and dating violence is that abuse within these most intimate relationships will not be excused or tolerated. Furthermore, it is the explicit intent of the Eastern Band of Cherokee Indians Tribal Council that domestic and dating violence be prosecuted without requiring that the alleged victim and perpetrator be married, share a residence, or be presently involved in a relationship.

(b) It shall be unlawful to commit the crime of domestic violence which occurs when a person commits one of the following acts against an intimate partner or against a member of such intimate partner's family or household:

(1) Attempting to cause or causing physical harm, bodily injury, or assault to an intimate partner or to a member of such intimate partner's family or household, or to an animal of such intimate partner;

(2) Placing an intimate partner or a member of the intimate partner's family or household in fear of the infliction of physical harm, bodily injury or assault;

(3) Willfully attempting to cause or causing emotional distress to an intimate partner or to a member of such intimate partner's family or household;

(4) Causing an intimate partner or a member of such intimate partner's family or household to engage involuntarily in sexual activity by force, threat of force, or duress; or

(5) Committing any willful violation of a court order intended to protect the intimate partner or a member of such person's family or household;

(6) Committing one of the following offenses, as defined by the Eastern Band of Cherokee Indians Criminal Code, against an intimate partner or to a member of such intimate partner's family or household:

a. Injuring real property (§ 14-10.11);

b. Injuring telephone, wires or other telephone equipment (§ 14-10.14);

c. Criminal trespass (§§ 14-10.15, 14-10.16, and/or 14-10.17);

d. Burglary (§ 14-10.40);

e. Breaking and entering (§ 14-10.41);

f. Criminal mischief (§ 14-10.9);

g. Arson (§§ 14-10.50, 14-10.51, and/or 14-10.52);

h. Assault (§§ 14-40.49, 14-40.50, 14-40.54, 14-40.55, 14-40.56, 14-40.57, 14-40.59, 14-40.60, 14-40.62);

i. Maiming (§ 14-40.14);

j. Discharging a firearm into an occupied building (§ 14-40.15);

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k. Harassment; telephone harassment (§§ 14-25.13 and/or 14-5.3);

l. Kidnapping (§ 14-40.30);

m. False imprisonment (§ 14-40.31);

n. Custodial interference (§ 14-40.32);

o. Homicide (§§ 14-40.40 and/or 14-40.41);

p. Sex offenses - including aggravated sexual abuse, sexual abuse, sexual abuse of minor or ward, abusive sexual contact (§§ 14-20.2, 14-20.3, 14-20.4, 14-20.8);

q. Stalking (§ 14-5.5);

r. Communicating threats (§ 14-5.2);

s. Harassment (§§ 14-5.3 and/or 14-25.13);

t. Weapons law violations (§§ 14-34.10, 14-34.11, 14-34.12, 14-34.13, and/or 14-34.14);

u. Cruelty to animals (§ 14-5.20);

v. Robbery and robbery with a dangerous weapon (§§ 14-10.30 and 14-10.31).

The commission of one of the above-referenced crimes against an intimate partner or against a member of such intimate partner's family or household shall trigger the application of this ordinance.

Tribal Code Commentary

The Confederated Tribes of the Umatilla Indian Reservation (Umatilla) Tribal code includes a definition of "domestic violence" for purposes of exercising STCJ that is the same as the Federal definition. Umatilla does not specify any specific offenses that could be charged, instead repeating the Federal language that any violation of the Tribe's criminal laws could be charged. For STCJ implementation purposes, the Pascua Yaqui Tribe (Pascua Yaqui) code similarly defines the jurisdictional category "domestic violence" in a way that focuses on the relationship between the offender and the victim and largely tracks the Federal definition from VAWA 2022. Pascua Yaqui's definition makes clear, however, which offenses in its criminal code can be charged in that jurisdictional category by referring to 4 PYTC § 1-1305, which is the domestic violence section of its criminal offenses. These two provisions work in tandem to make clear who Pascua Yaqui can exercise jurisdiction over and what specific crimes can be charged.

The Tulalip Tribes (Tulalip) code takes a different approach both with regard to defining the jurisdictional category and with regard to identifying specific offenses that can be charged. Instead of defining the jurisdictional category "domestic violence" in the Tribal code, the code simply refers to the Federal law and states that Tulalip is asserting its jurisdiction "to the fullest extent possible as defined within 25 U.S.C. 1304." The Tulalip code leaves it to Federal law to define the jurisdictional category. Elsewhere in its criminal code, Tulalip has made clear that any crime defined in the Tribal code can be designated as "domestic violence" or "family violence" if the offender and victim have a qualifying relationship. The Tribal code also creates two specific

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offenses to address crimes related to interfering with the reporting or prosecution of domestic violence.

The Eastern Band of Cherokee Indians (EBCI) Code states that the Tribe will exercise STCJ for all offenses that are covered crimes as authorized by 25 USC 1304. Like the Tulalip Code, the EBCI code leaves it to Federal law to define the jurisdictional category "domestic violence." It includes language, however, that helps identify what specific offenses can be charged by referring to Cherokee Code Chapter 14, which includes a definition of "domestic violence" that includes a list of possible offenses.

Questions for Consideration

1. Does your Tribe currently have a definition of domestic violence in its code? If so, how does it differ from the Federal definition?

2. Do you want to define "domestic violence" as a jurisdictional category? What are the pros and cons of doing so?

3. Does your Tribe want to specify what Tribal crimes can be charged under the "domestic violence" jurisdictional category or leave it open to ANY crime that involves a victim and offender with a qualifying relationship? Does your Tribal code currently specify what crimes constitute domestic violence?

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Resources

- TLPI's Tribal Legal Code Resource: Domestic Violence Laws

- Tribal Domestic Violence Courts and Tribal Domestic Violence Dockets - Guide for Development of a Tribal Victim-Centered Specialized Court or Docket to More Effectively Address Domestic Violence Cases.

- For comprehensive information on VAWA 2022 see TribalVAWA.org – Domestic Violence

- First Facilitated Discussion: Domestic Violence, Dating Violence and Protection Order Violations: First Facilitated Discussion Recording (YouTube) and First Facilitated Discussion PowerPoint (PDF)

- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.

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Chapter 5.2: Dating Violence

Overview

Dating violence is one of the three categories of criminal conduct that were originally covered by Violence Against Women Reauthorization Act of 2013 (VAWA 2013). The Violence Against Women Reauthorization Act of 2022 (VAWA 2022) amended the definition of "dating violence" slightly to make it more deferential to a Tribe's own criminal laws and to recognize that "dating violence" can take many forms. As with most of the jurisdictional categories, Tribes can only exercise jurisdiction if the dating violence offense was committed in the Tribe's Indian country[26] and involved a non-Indian offender and Indian victim.

25 U.S.C.§ 1304 (a)(6).

6) Dating violence

The term "dating violence" means any violation of the criminal law of the Indian Tribe that has jurisdiction over the Indian country where the violation occurs that is 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.

The definition of "dating violence" in VAWA 2022 is very similar to the definition of "domestic violence," which was discussed in Chapter 5.1. The primary difference between the two is the nature of the relationship between the offender and the victim. An offender and a victim may have a dating relationship even if they do not have a qualifying relationship under VAWA 2022's domestic violence definition, which generally requires marriage, intimate partnership, cohabitation, or coparenting.

As far as Federal law is concerned, to determine whether a particular Tribal offense falls under the "dating violence" jurisdictional category, the key question is whether the victim and the offender have a qualifying relationship as set out in the definition of dating violence. The Federal statute says that a Tribe could exercise jurisdiction over a non-Indian for *any* crime committed against a victim who has a certain qualifying relationship with the offender.

Defining the Jurisdictional Category

As discussed previously, Special Tribal Criminal Jurisdiction (STCJ) non-Indian defendants are prosecuted under Tribal law. This means it is up to your Tribe to define "dating violence" as a jurisdictional category. As discussed in Chapter 4, you can do this either by referring to the

[26] For Tribes participating in the Alaska Pilot Program, the crime must have occurred within the Tribes Alaska Native Village Statistical Area (ANSVA) rather than Indian country.

Federal definition of "dating violence" in VAWA or by including your own definition of "dating violence" in your code. Remember, for jurisdictional purposes you cannot go beyond the scope of what Federal law allows so your definition should be consistent with the Federal definition even if it is not identical. When a relationship meets the standard to be a "dating" relationship is a factual question that may not always be clear. The VAWA 2022 definition instructs that the nature and length of the relationship should be considered as well as the frequency of interaction. Some courts have found, for example, that a one-time sexual encounter is not sufficient to meet this type of definition. Some Tribes have made clear in their laws that roommates and neighbors are not included in the definition of dating partners. You may want to consider adding additional language to the Federal definition to help clarify what is and is not a dating relationship.

When you are defining a term for jurisdictional purposes, it can be helpful to make clear that is what you are doing. You can do this by including a phrase like "For the purposes of establishing Special Tribal Criminal Jurisdiction, dating violence means" or "For purposes of the exercise of criminal jurisdiction over non-Indians, the term 'dating violence' means…." This will help avoid confusion if you already refer to dating violence in other sections of your code.

Note: If your Tribe has implemented VAWA 2013 and used the prior Federal definition of "dating violence," you should consider amending that definition of "dating violence" to avoid unnecessarily limiting the scope of your Tribe's authority.

Typical Offenses

Like many of the other STCJ covered crimes, the phrase "any violation of the criminal law of the Indian Tribe that has jurisdiction" in the Federal definition of "dating violence" makes it clear that specific criminal offenses will be defined in your Tribal law. It is up to your Tribe to decide which crimes you want to include within this category, and how to define each of those individual offenses. Many Tribes structure their codes so that they can charge any criminal violations that occur between dating partners. Or Tribal codes are drafted so that the same offenses can be charged in "dating violence" and "domestic violence" cases.

Tribal Code Examples

Umatilla Criminal Code

Chapter 1. Definitions, Tribal Courts, Judges, Court Personnel, and Attorneys

Section 1.1.1 Definitions

> W. Dating Violence. For purposes of the exercise of criminal jurisdiction over non-Indians, the term "dating violence" means any violation of the criminal laws of the CTUIR committed by a person who is or has been in a social relationship of a romantic or

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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.

Chickasaw Nation Code

Title 5. Couts and Procedures.

Chapter 4. Special Tribal Criminal Jurisdiction Over Covered Offenses

SECTION 5-401.1 DEFINITIONS

The following words have the meanings given below when used in this Chapter:

[1-4 omitted]

5. "Dating Violence" shall mean the commission of any criminal offense in the Chickasaw Nation that is 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.

[6-15 omitted]

SECTION 5-401.3 SPECIAL TRIBAL CRIMINAL JURISDICTION.

A. "Special Tribal Criminal Jurisdiction" shall mean the criminal jurisdiction that the Chickasaw Nation may exercise under this Chapter, but, prior to the enactment of these provisions, was otherwise prevented from exercising under federal law.

B. The Chickasaw Nation may exercise Special Tribal Criminal Jurisdiction over all non-Indian persons for a Covered Offense that occurs within the Indian Country of the Chickasaw Nation.

SECTION 5-401.5 COVERED OFFENSES

A "Covered Offense" shall include:

[A-B omitted]

C. Any offense of the criminal laws of the Chickasaw Nation involving Dating Violence,

TITLE 17. Offenses and Penalties

SECTION 17-505.1 DOMESTIC VIOLENCE.

A. It shall be unlawful to:

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1. commit an Assault, Battery, or Assault and Battery upon a Domestic or Dating Partner; or
2. commit Assault, Battery, or Assault and Battery upon a parent, a foster parent, a child, a sibling, a person otherwise related by blood or marriage, a person who formerly lived in the same household as the defendant, a person living in the same household as the defendant, or any combination of such persons.

B. A Domestic or Dating Partner within this section means:

1. a current or former spouse or intimate partner;
2. a person with whom the perpetrator shares a child in common;
3. a person who is cohabitating with or has cohabitated with the perpetrator as a spouse or intimate partner; or
4. a person who is or has been in a social relationship of a romantic or intimate nature with the perpetrator, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

C. For purposes of this Article, a Domestic or Dating Partner does not include a neighbor, co-worker, casual acquaintance, or the ordinary fraternization between persons in a business or social context unless otherwise set out above.

Pascua Yaqui Tribal Code Title 4 – Criminal Code (Aug. 2022)
Chapter 1 – Offenses

Section 35 Restored Tribal Criminal Jurisdiction; Covered Crimes; Definitions

(A) Definitions

[(1)-(3) omitted]

(4) Covered Crimes. The term "covered crime" means—

[(a)-(b) omitted]

(c) **Dating violence.** The term "dating violence" means any violation of Pascua Yaqui Tribal law where the violation occurs that is committed by dating partners as defined in 4 PYTC § 1-1305.

4 PYTC § 1-1305 Definitions

(B) "**Dating partners**" means persons who are or have been in a social relationship or a romantic or intimate nature as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

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Santa Clara Pueblo Special Tribal Criminal Jurisdiction Code (updated March 2023)

Article 3: Special Tribal Criminal Jurisdiction and Covered Crimes

[(a)-(b) omitted]

(c) Dating Violence

(1) "Dating Violence" means any violation of the STCJ Code that occurs during a dating relationship which is a social relationship of a romantic or intimate nature. In determining whether parties have a dating relationship, the trier of fact shall consider the length of time the relationship has existed, the nature of the relationship, and the frequency of the interaction between the parties. The STCJ Victim must be an Indian.

(2) Offenses that can be charged against non-Indians over whom the Pueblo asserts jurisdiction for the covered crime Dating Violence include:

(A) Simple assault. It shall be a criminal offense to willfully threaten bodily harm to another person through use of unlawful force or violence or through verbal threats, threats through the social media or written threats and that person reasonably fears the assault.

(B) Assault and battery. It shall be a criminal offense to willfully strike another person or otherwise intentionally inflict bodily injury on another or cause another to harm themselves.

(C) Assault with a deadly weapon. It shall be a criminal offense to assault another, or to attempt to assault another, or to threaten to assault another, or to inflict serious bodily injury, with a deadly weapon.

(D) Assault inflicting serious bodily injury. It shall be a criminal offense to assault another and to inflict serious bodily injury.

(E) Assault by pointing a firearm or weapon. It shall be a criminal offense to intentionally point any firearm or weapon at another, either in fun or otherwise, whether or not the firearm or weapon is capable of discharging a projectile.

(F) False imprisonment. It shall be a criminal offense to knowingly, and without lawful authority, to restrain another so as to interfere with that person's liberty.

(G) Homicide. It shall be a criminal offense to purposely, knowingly, or wrongfully cause the death of another human being; or to cause the death of another human being during or as a result of the commission or attempted commission of a crime; or to recklessly or negligently with disregard of the possible consequence of one's conduct to cause the death of another human being.

(H) Kidnapping. It shall be a criminal offense to intentionally and wrongfully remove another from their place of residence, business, or from the vicinity where he/she is found, or to unlawfully confine or conceal another for a substantial period. A removal, restraint, or confinement is wrongful within the meaning of this section if it is

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accomplished by force, threat, deception, or otherwise without the STCJ Victim's consent, for any of the following purposes:

(1) To hold for ransom or reward, or as a shield or hostage;

(2) To facilitate commission of any offense, or flight thereafter;

(3) To inflict bodily injury, to terrorize or to threaten the STCJ Victim or another.

(I) Maiming. It shall be a criminal offense to wrongfully, purposely, or knowingly deprive a human being of a member of his body or render it useless, or to cut out or off, disable or disfigure any part of the body of another.

(J) Threats. It shall be a criminal offense to willfully threaten to physically injure the person or damage the property of a Native, when the threat is communicated, orally, in writing, or by any other means, and the threat is 14 made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out.

(K) Firearms. It is a criminal offense for a person subject to the STCJ Code to carry a firearm or weapon when they are involved in a dating relationship and the prohibition of carrying a firearm or weapon is included in an Order of Protection issued by any jurisdiction.

Tribal Code Commentary

The Confederated Tribes of the Umatilla Indian Reservation (Umatilla) Tribal code includes a definition of "dating violence" for purposes of exercising STCJ that is the same as the Federal definition. Umatilla does not specify any specific offenses that could be charged, instead repeating the Federal language that *any* violation of the Tribe's criminal laws could be charged so long as the offender and victim have a relationship that fits within the "dating violence" definition.

The Chickasaw Nation (Chickasaw) Code states that the Tribe will exercise STCJ for all offenses that are "covered offenses," which is defined to include offenses involving "dating violence." The Tribal code defines "dating violence" in this section identically to the Federal definition. Like the Umatilla Code, the Chickasaw Code makes clear in its STCJ provisions that the Tribe can charge any violation of the Tribe's criminal laws so long as the relationship between the offender and the victim meets the definition of "dating violence."

In Title 17, the Offenses and Penalties portion of the Chickasaw Code the Tribe outlines a specific "domestic violence" offense that covers both domestic and dating partners. In this part of the Code, Chickasaw makes clear that "a Domestic or Dating Partner does not include a neighbor, co-worker, casual acquaintance, or the ordinary fraternization between persons in a business or social context unless otherwise set out above." This is a helpful example demonstrating that your code may use similar or related terms in different sections for different purposes and it is important to draft carefully to avoid confusion. The fact that there is a specific

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Domestic Violence offense in the Chickasaw Code that encompasses dating partners does not mean this is the *only* offense that can be charged against a non-Indian using the "dating violence" jurisdictional category. Chickasaw has elsewhere made clear that *any* offense can be charged if the victim and offender have a dating relationship.

For STCJ implementation purposes, the Pascua Yaqui Tribe (Pascua Yaqui) code similarly defines the jurisdictional category "dating violence" in a way that focuses on the relationship between the offender and the victim and largely tracks the Federal definition from VAWA 2022. Pascua Yaqui's definition makes clear which offenses in its criminal code can be charged in that jurisdictional category by referring to 4 PYTC § 1-1305, which is the domestic violence section of its criminal offenses. These two provisions work in tandem to make clear who Pascua Yaqui can exercise jurisdiction over and what specific crimes can be charged.

The Santa Clara Pueblo (Santa Clara) adopted a stand-alone STCJ Code rather than integrating STCJ-related provisions throughout its Code more generally. It defines "dating violence" in the same way as the Federal definition and includes a list of offenses that can be charged under that jurisdictional category. The Santa Clara Code makes clear that the question of whether a relationship qualifies as a "dating" relationship is a question of fact that will be determined taking into account the length and nature of the relationship and frequency of interaction.

Questions for Consideration

1. Does your Tribe currently have a definition of dating violence in its code? If so, how does it differ from the Federal definition?

2. Do you want to include a definition of "dating violence" as a jurisdictional category in your Tribal code? If so, will you use the Federal definition? Is there additional guidance you would like to include about what is or is not a dating relationship?

3. Does your Tribe want to specify what Tribal crimes can be charged under the "dating violence" jurisdictional category or leave it open to ANY crime that involves a victim and offender with a qualifying relationship? Does your Tribal code currently specify what crimes constitute dating violence?

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Resources

- First Facilitated Discussion: Domestic Violence, Dating Violence and Protection Order Violations: First Facilitated Discussion Recording (YouTube) and First Facilitated Discussion PowerPoint (PDF)

- For comprehensive information on VAWA 2022 see TribalVAWA.org – Dating Violence

- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.

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Chapter 5.3: Violation of a Protection Order

Overview

"Criminal violation of a protection order" is one of the three categories of criminal conduct that were originally covered by Violence Against Women Reauthorization Act of 2013 (VAWA 2013). The Violence Against Women Reauthorization Act of 2022 (VAWA 2022) made no substantive changes to the relevant 2013 definitions.

25 U.S.C.§ 1304 (a)(11).

(11) Protection order

The term "protection order"—

(A) means 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

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

25 U.S.C.§ 1304 (a)(17).

17) Violation of a Protection Order

The term "violation of a protection order" means an act that—

(A) occurs in the Indian country of a participating Tribe; and

(B) violates a provision of a protection order that—

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating Tribe; and

(iv) is consistent with section 2265(b) of title 18.

As with most of the jurisdictional categories, Tribes can only exercise jurisdiction if the violation was committed in the Tribe's Indian country.[27] Next, the protection order must fall within the Federal definition of a protection order mentioned in the preceding text, which is found at 25 U.S.C. 1304 (a)(11). This definition makes clear that the protection order must meet the

[27] For Tribes participating in the Alaska Pilot Program, the crime must have occurred within the Tribes Alaska Native Village Statistical Area (ANSVA) rather than Indian country.

requirements of the Federal full faith and credit statute.[28] The requirements that activate the Federal full faith and credit clause can be found at 18 U.S.C. 2265(a) and (b).

18 U.S.C. 2265(a) and (b).

(a)Full Faith and Credit.—

> Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian Tribe, or territory (the issuing State, Indian Tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian Tribe, or territory (the enforcing State, Indian Tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian Tribal government or Territory as if it were the order of the enforcing State or Tribe.

(b)Protection Order.—A protection order issued by a State, Tribal, or territorial court is consistent with this subsection if—

> (1) such court has jurisdiction over the parties and matter under the law of such State, Indian Tribe, or territory; and
>
> (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, Tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

Note: There are different full faith and credit requirements for cross-/counterpetitions for a protection order.[29] For more information on full faith and credit please see TribalProtectionOrder.org.

Additionally, the Federal law requires the victim of this crime to be an Indian.[30] A "victim" is defined in the Federal law as a person specifically protected by a protection order the defendant allegedly violated.[31] It is also important to note what remedies in a protection order

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[28] Full faith and credit requires that the Tribal protection order be enforced as it is written by and according to the laws of the enforcing jurisdiction.

[29] *Cross or Counter Petition.—A protection order issued by a State, Tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if— (1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or (2)a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.* 18 U.S.C. 1125 (c).

[30] 25 U.S.C. §1304 (b)(4)(A).

[31] 25 U.S.C. §1304 (b)(4)(B).

fall within the covered crime of "violation of a protection order." A checklist follows for easy reference.

Checklist to determine if an offense can be a "Violation of a Protection Order"
To determine whether a particular offense fits within the federal definition of "Violation of a Protection Order" the key questions are whether:

1. The protection order fits within the federal definition of a protection order found in 25 USC 1304;
2. The act was committed in the Indian country (or Alaska Native Village Statistical Area) of a participating Tribe;
3. The act violates a provision of a protection order that prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
4. The protection order was issued against the defendant;
5. The protection order is enforceable by the participating Tribe; and
6. The protection order is consistent with 18 U.S.C. 2265(b).

Defining the Jurisdictional Category

As discussed in Chapter 4, your Tribe may choose to define "violation of a protection order" in its code for jurisdictional purposes. Doing so may add additional clarification to the scope of the Tribe's jurisdiction to prosecute non-Indians for committing this crime against Native victims. Tribes may also choose to identify some or all the specific offenses that fall within the definition of "violation of a protection order" while other Tribes may choose to permit prosecutorial discretion in determining what Tribal crimes fall within the definition of this covered crime.

It is important to note that the act of committing a violation of a protection order is not restricted to domestic violence protection orders unless the applicable Tribal code requires the elements of domestic violence be demonstrated. For example, "violation of a protection order" may apply to protection orders issued to prevent or prohibit harassment, sexual assault ,and stalking. In addition to the Federal statute mentioned previously, determining what types of protection orders qualify for the covered crime of "violation of a protection order" will be governed by applicable Tribal law and some Tribal codes may require a certain relationship between the petitioner and defendant but that relationship is not required by Federal law.

Including a definition of "violation of a protection order" in the Tribal code for jurisdictional purpose may help clarify that the definition is for purposes of establishing jurisdiction over non-Indians. A Tribe may also want to add language making it clear that a Tribe's jurisdiction over the STCJ covered crime of "violation of a protection order" is not limited to domestic violence related protection orders.

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Violation of a Protection Order

Here is an example of how "violation of a protection order" might be defined to accomplish these two goals:

> For purposes of establishing Tribal jurisdiction over non-Indians, the term "violation of a protection order" is an act that when committed against an Indian in the Indian country of the [TRIBE NAME];
>
> (A)violates a provision of a protection order that:
>
> (i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
> (ii) was issued against the defendant;
> (iii) is enforceable by the [NAME OF TRIBE]; and
> (iv) the court issuing the protection order had jurisdiction over the parties and matter under the law of such State, Indian Tribe, or territory; and reasonable notice and opportunity to be heard was given to the person against whom the order is sought sufficient to protect that person's right to due process.
> (a)In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, Tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.
>
> (B)For purposes of this section a protection order:
> (i) means 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
> (ii) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

Typical Offenses

A Tribe may choose to list some or all of the offenses that fall under the term "violation of a protection order." Examples of typical offenses that could be covered if the mandatory elements of the STCJ crime are satisfied include:

- Violation of a sexual assault protection order;
- Violation of a criminal no-contact order;
- Violation of a harassment no-contact order; and

- Violation of a stalking no-contact order.

  Note: A Tribe may already have an offense called "violation of a protection order" in its code. If it does, the offense may be more narrowly defined than the STCJ jurisdictional definition in the Federal law. For example, a Tribe might require a "a violation of a protection order" to apply only to domestic violence protection orders. The Tribal code should be clear to use the definition of protection order found in 25 U.S.C. §1304 (a)(11) to avoid confusion and an overly narrow interpretation.

  Another important jurisdictional component is the requirement that only certain violations of a protection order are covered by the Federal law. For example, a Tribal code might indicate that a "violation of a protection order" includes all violations of the protection order. This language might lead to an overbroad interpretation of the STCJ statute, which is restricted to violations of the portions of the protection order that "prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person."

Tribal Code Examples

Fort Peck Tribes Comprehensive Code of Justice (updated 6/10/24)
Title 2 – Courts
Chapter 1. The Fort Peck Tribal Court

Section 106. Criminal Jurisdiction of the Court.
[(a)-(b) omitted]

(c) Criminal jurisdiction over non-Indian protection order violations. The Fort Peck Tribal Court is vested with criminal jurisdiction to enforce all provisions of this Code related to violations of protection orders against a non-Indian as identified in Section 106(b)(1) and who has violated a protection order within the Fort Peck Tribes' Indian country provided the protected person is an Indian, and the following conditions are met:
(1) The protection order was issued against the non-Indian;
(2) The protection order is consistent with 18 U.S.C. 2265(b); and
(3) The violation relates to that portion of the protection order that provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, the protected person.

Nottawaseppi Huron Band of Potawatomi (updated 3/16/23)

Note that the Tribe has protection orders for harassment, sexual assault, domestic violence and elder protection. For illustrative purposes, the code applicable to harassment is listed below.
Title VII: Family

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7.4-78 Contempt and violation of harassment protection order; penalties

A. Knowing violation of any harassment protection order subjects the respondent to criminal penalties under this article.
B. Any respondent who is found guilty of violating the terms of the harassment protection order may also, subject to the Court's discretion, be held in civil contempt of court, and the Court may impose such sanctions as it deems appropriate.
C. Violation of a harassment protection order is a Class B misdemeanor.
D. A second or subsequent violation of a harassment protection order is a Class A misdemeanor.

Tribal Code Commentary

In both of the preceding examples, the Tribal codes provide relief for criminal violations of an order of protection. The Fort Peck Tribes (Fort Peck) code generally tracks the Federal statute and declares a jurisdictional intent to prosecute non-Indians for a violation of certain enumerated sections of a protection order, committed against an Indian in Fort Peck Indian country. The code goes on to define the terms "protection order" and Indian country. The code also requires that the protection order meet the requirements of 18 USC §2265(b). The code does not specifically list the types of protection orders that may be prosecuted leaving the options open for the prosecutor.

In contrast, the Nottawaseppi Huron Band of Potawatomi (Nottawaseppi) statute sets forth a variety of different types of protection orders that might fit within the STCJ covered crime of "violation of a protection order." Nottawaseppi lists a variety of different types of protection orders including harassment, sexual assault, domestic violence. Similar to Fort Peck, the Tribe leaves open the list of types of protection order violations that might be available for prosecution under STCJ.

As discussed in Chapter 1, if a Tribe elects to reference specific types of protection orders in the definition of a "violation of a protection order," care should be taken to avoid unintentionally limiting the Tribes "jurisdiction" beyond what would be allowed under Federal law. Recall that the covered crime of "violation of a protection order" does not require a showing of domestic violence or any type of relationship between the petitioner and defendant unless required by Tribal law. Further, the term protection order is very broad and may include many types of protection orders to include criminal noncontact orders or elder abuse protection orders that meet the Federal statutory definition of protection order in 25 U.S.C. 1304 (a)(11).

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Questions for Consideration

1. Does the Tribal protection order fall within 25 U.S.C. 1304 (a)(11)? What types of remedies are provided in Tribal law? Would any of those provisions be covered by the STCJ definition of violation of a protection order?

2. Do you want to list the types of protection orders that fall within the "violation of a protection order" category or leave it up to prosecutors and judges to determine as cases come up? What are some advantages or disadvantages of each approach?

Resources

- For comprehensive information on VAWA 2022 see TribalVAWA.org – Criminal Violation of a Protection Order
- First Facilitated Discussion: Domestic Violence, Dating Violence and Protection Order Violations: First Facilitated Discussion Recording (YouTube) and First Facilitated Discussion PowerPoint (PDF)
- Tribal Protection Order Resources, An Online Resource for Drafting and Enforcing Tribal Protection Orders - A Project of the Tribal Law and Policy Institute: TribalProtectionOrder.org
- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.

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Chapter 5.4: Sexual Violence

Overview

The Violence Against Women Reauthorization Act of 2022 (VAWA 2022) added "Sexual Violence" as a category of criminal conduct that can be prosecuted against non-Indians in Tribal courts. Congress added sexual violence to the law to address the high rates of sexual violence perpetrated against Native victims. Native women are victims of sexual violence at a higher rate than any other population. Research from the National Institute for Justice suggests that 56 percent of Native women and nearly 27.5 percent of Native men have experienced sexual violence in their lifetime.[32]

VAWA 2022 includes a definition of sexual violence that applies for purposes of establishing Tribal jurisdiction.

25 U.S.C.§ 1304 (a)(13).

> **(13)** The term "sexual violence" means any nonconsensual sexual act or contact proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs, including in any case in which the victim lacks the capacity to consent to the act.

Defining the Jurisdictional Category

Under VAWA 2022's definition of sexual violence, a Tribe can exercise criminal jurisdiction so long as the offender engaged in a "nonconsensual sexual act or contact," and this includes incidences where the "victim lacks the capacity to consent." What constitutes a "nonconsensual sexual act," "nonconsensual sexual contact," and a lack of capacity to consent will be key to determining whether your Tribe has jurisdiction in a particular case. These concepts and terms are not, however, specifically defined in VAWA 2022. You may want to define these terms in your Tribal code, or they may already be defined in your code. Some Tribal examples are shared in the text that follows. In addition, you may find guidance about what these terms may mean elsewhere, for example, by looking at how they are defined in Federal and State laws.

Nonconsensual Sexual Act and Sexual Contact

The dictionary definition of nonconsensual is: "not agreed to by one or more of the parties involved."[33] In the circumstances of sexual violence, we are saying the victim has not agreed to the act or contact.

[32] Andre Rosay, Violence Against American Indian and Alaska Native Women and Men, National Institute of Justice Research Report (May 2016), 29.

[33] https://www.dictionary.com/browse/nonconsensual.

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Although VAWA 2022 does not include a definition of "sexual act or contact," Federal law does define the terms in other places for other purposes. These definitions are not applicable to the STCJ-context but might be helpful guidance.

One place where these terms are defined in Federal law is in 18 U.S.C. 2246(2) and (3). If you find this definition acceptable, you could incorporate the actual language into your code. The definitions are:

> (2) the term "sexual act" means—
>
> > (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
> >
> > (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
> >
> > (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
> >
> > (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
>
> (3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

Different definitions are also found in 10 U.S.C. §920: Article 120 (part of the Uniform Code of Military Justice). The definitions are:

> (1) Sexual act.-The term "sexual act" means-
>
> > (A) the penetration, however slight, of the penis into the vulva or anus or mouth;
> >
> > (B) contact between the mouth and the penis, vulva, scrotum, or anus; or
> >
> > (C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.
>
> (2) Sexual contact.-The term "sexual contact" means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

Note that under 18 U.S.C. §2246(2), touching of a person under 16 is a "sexual act" not just "sexual contact." In 10 U.S.C. §920: Article 20, no mention is made of age. Any conduct under that Article is either a sexual act or sexual contact, regardless of age.

Lack of Capacity to Consent

If a person lacks the capacity to consent, even if they agree to the act or contact, it is not considered consensual. A person lacks capacity if their mind is impaired or disturbed in some way, which means they are unable to make a decision at that time. A person may lack the capacity to consent for various reasons.

Some examples:

- Age,
- Mental health conditions,
- Dementia,
- Severe learning disabilities,
- Brain damage, for example, from a stroke or other brain injury,
- Physical or mental conditions that cause confusion, drowsiness or a loss of consciousness, and
- Intoxication caused by drugs or alcohol.

It is important to note that the Federal statute does not contain any specific criminal intent, or *mens rea*, requirement for jurisdictional purposes—only that the act or contact be nonconsensual. If any mental state is imposed, it will likely be established in the Tribal criminal offense. For example, a Tribal criminal offense may specify that the act had to be committed knowingly or recklessly.

Typical Offenses

Various sex crimes may fit under this jurisdictional category. Some examples are:

- Rape,
- Statutory rape,
- Sexual assault,
- Sexual battery,
- Incest, and
- Exploitation of a minor.

If your Tribe does not already have a sexual assault offense in its criminal code, you may want to review TLPI's Tribal Legal Code Resource: Sexual Assault and Stalking Laws: Guide for Drafting or Revising Victim-Centered Tribal Laws Against Sexual Assault and Stalking, as well as TLPI's Tribal Legal Code Resource: Sexual Assault Considerations for Tribal Sexual Assault Code Development both of which discuss these issues in more detail.

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Tribal Code Examples

Pascua Yaqui

TITLE 4 – CRIMINAL CODE CHAPTER 1 – OFFENSES

SUBCHAPTER A GENERAL PROVISIONS

Section 35 Restored Tribal Criminal Jurisdiction; Covered Crimes; Definitions

(A) Definitions:

[(1)-(3) omitted]

(4) **Covered crimes.** The term "covered crime" means—

[(a)-(e) omitted]

(f) **Sexual Violence**. The term "sexual violence" means any nonconsensual sexual act or contact proscribed in Subchapter H, in Chapter 1 of Title 4, including in any case in which the victim lacks the capacity to consent to the act.

SUBCHAPTER H SEXUAL OFFENSES

Section 500 Definitions

In this subchapter, unless the context otherwise requires:

[(A)-(F) omitted]

(G) "Minor" means an individual who has not attained the age of 18 years.

(H) "Oral Sexual Contact" means oral contact with the penis, vulva or anus.

[(I)-(J) omitted]

(K) "Sexual Act" means

(1) Contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(2) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) The penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 18 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(L) "Sexual Conduct" means actual or simulated:

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(1) Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex.

(2) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.

(3) Sexual bestiality.

(4) Masturbation for the purpose of sexual stimulation of the viewer.

(5) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.

(6) Lewd exhibition of the genitals, pubic or rectal areas of any person.

(7) Defecation or urination for the purpose of sexual stimulation of the viewer.

(M) "Sexual Contact" means any direct or indirect fondling or manipulating any part of the genitals, anus, groin, inner thigh, buttocks or female breast.

(N) "Sexual Intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object or manual masturbatory contact with the penis or vulva.

(P) "Sex Offense"

[(1)-(2) omitted]

(3) Offenses involving consensual sexual conduct. An offense involving consensual sexual conduct is not a sex offense for the purposes of this title if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

[(Q)-(Z) omitted]

(AA) "Without Consent" includes the following:

(1) The victim is coerced by the immediate use or threatened use of force against a person or property.

(2) The victim is incapable of consent by reason of mental disorder, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonable been known to the defendant.

(3) The victim is intentionally deceived as to the nature of the act.

(4) The victim is intentionally deceived to erroneously believe that the

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person is the victim's spouse.

Section 515 Sexual Abuse

(A) A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person 14 or more years of age without consent of that person or with any person who is under 14 years of age if the sexual contact involves only the female breast.

[(B) omitted]

Section 520 Sexual Conduct with a Minor

(A) A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under 18 years of age.

(B) Sexual conduct with a minor under fourteen years of age is a class 1 felony and is punishable pursuant to 4 PYTC § 2-205. Sexual conduct with a minor 14 years of age or over is a class 1 felony.

(C) Sexual conduct with a minor who is at least fourteen years of age is a class 1 felony if the person is or was the minor's parent, stepparent, adoptive parent, legal guardian or foster parent or the minor's teacher or clergyman or priest.

Section 525 Sexual Assault

(A) A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.

(B) Sexual assault is a class 1 felony and the person convicted is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement until the sentence imposed by the Court has seen served. If the victim is under 15 years of age, sexual assault is punishable pursuant to 4 PYTC § 2-205.

(C) Notwithstanding the provisions of 4 PYTC § 1-410, if the sexual assault involved the use or exhibition of a deadly weapon or dangerous instrument or involved the intentional or knowing infliction of serious physical injury and the person has previously been convicted of sexual assault, or any offense committed outside the reservation which if committed on the reservation would constitute sexual assault, the person shall be sentenced to the aggravated term of imprisonment and a $5,000.00 fine and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement.

(D) The sentence imposed on a person for a sexual assault shall be consecutive to any other sexual assault sentence imposed on the person at any time.

Section 530 Sexual Assault of a Spouse; Definition; Violation;

(A) A person commits sexual assault of a spouse by intentionally or knowingly engaging in

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sexual intercourse or oral sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another.

(B) A first offense sexual assault of a spouse is a class 3 felony. The judge has discretion to enter judgment for conviction of a class 1 misdemeanor only upon completion of mandatory counseling. Any subsequent sexual assault of a spouse is a class 2 felony and the person convicted is not eligible for suspension or commutation or sentence, probation, pardon, parole, work furlough or release from confinement until the sentence imposed by the Court has been served. Convictions for two or more offenses not committed on the same occasion but consolidated for trial purposes shall not be counted as prior convictions for purposes of this section.

(C) A person convicted under this section may, in the discretion of the Court, be exempt from the registration requirements of Sections 600 & 610 of this chapter.

Section 540 Molestation of Child

(A) A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, with a child who is under fourteen years of age.

Section 560 Commercial Sexual Exploitation of a Minor;

(A) A person commits commercial sexual exploitation of a minor by knowingly:

(1) Using, employing, persuading, enticing, inducing or coercing a minor to engage in or assist others to engage in sexual conduct for the purpose of producing any visual or print medium or live act depicting such conduct.

(2) Using, employing, persuading, enticing, inducing or coercing a minor to expose the genitals or anus or the areola or nipple of the female breast for financial or commercial gain.

(3) Permitting a minor under such person's custody or control to engage in or assist others to engage in sexual conduct for the purpose of producing any visual or print medium or live act depicting such conduct.

(4) Transporting or financing the transportation of any minor through or across the Pascua Yaqui Tribe Reservation with the intent that such minor engage in prostitution or sexual conduct for the purpose of producing a visual or print medium or live act depicting such conduct.

Section 565 Sexual Exploitation of a Minor

(A) A person commits sexual exploitation of a minor by knowingly:

(1) Recording, filming, photographing, developing or duplicating any visual or print medium in which minors are engaged in sexual conduct.

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Bois Forte Band of Chippewa

CHAPTER V – CRIMES AND OFFENSES - GENERAL PROVISIONS [as amended January 2, 2025]

PART B – SPECIAL TRIBAL CRIMINAL JURISDICTION

522. **Special Tribal Criminal Jurisdiction**. Pursuant to 25 U.S.C. § 13041, the Band is a participating tribe in the expansions of tribal criminal jurisdiction authorized by the Indian Civil Rights Act, as amended by the Violence Against Women Act Reauthorization Act of 2022, and exercises its "Special Tribal Criminal Jurisdiction" as follows:

(a) The Band's Special Tribal Criminal Jurisdiction applies to any person in the Band's Indian country;
(b) The Band's exercise of Special Tribal Criminal Jurisdiction applies to offenses that are Covered Crimes, as defined in Section 523, subd. 1-10;

523. **Covered Crimes.** The Band shall exercise its Special Tribal Criminal Jurisdiction under this Chapter over conduct in the Band's Indian country that falls into one or more of the following categories of Covered Crime:

[Subd. 1-5 omitted]

Subd. 6. Sexual Violence is any nonconsensual sexual act or contact proscribed by the Band's criminal law, including in any case in which the victim lacks the capacity to consent to the act. Sexual Violence includes, without limitation, the offenses identified in Chapter 6 Parts C (Sex Crimes) and D (Computer-Aided Sexual Offenses Involving Minors) when committed under the circumstances provided in this subdivision.

PART C – SEX CRIMES

610.01 Definitions.

(a) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion however slight into the genital or anal openings of the complainant's body of any part of the actor's body or any object used by the actor for this purpose, where the act is committed without the complainant's consent, except in those cases where consent is not a defense.

(b) "Sexual contact" includes any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, and committed with sexual or aggressive intent:

(1) The intentional touching by the actor of the complainant's intimate parts;

(2) The touching by the complainant of the actor's, the complainant's, or another's intimate parts effected by coercion or the use of a position of authority, or by inducement if the complainant is under 13 years of age or mentally impaired;
(3) The touching by another of the complainant's intimate parts effected by coercion or the use of authority; or

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(4) In any of the cases above, the touching of the clothing covering the immediate area of the intimate parts.

[(c)-(d) omitted]

(e) "Coercion" means words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon, or hold in confinement, the complainant or another, or force the complainant to submit to sexual penetration or contact, but proof of coercion does not require proof of a specific act or threat.

(f) "Consent" means a voluntary uncoerced manifestation of a present agreement to perform a particular sexual act with the actor.

(g) "Mentally incapacitated" means that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.

(h) "Mentally impaired" means that a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or penetration.

(i) "Physically helpless" means that a person is:

(1) Asleep or not conscious;

(2) Unable to withhold consent or to withdraw because of a physical condition; or

(3) Unable to communicate non-consent and the condition is known or reasonably should have been known to the actor.

(j) "Position of authority" includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act.

(k) "Significant relationship" means a situation in which the actor is:

(1) The complainant's parent, stepparent, or guardian;

(2) Any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt, or

(3) An adult who jointly resides intermittently or regularly in the same dwelling as the complainant and who is not the complainant's spouse.

(l) "Force" means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which:

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(1) Causes the complainant to reasonably believe that the actor has the present ability to execute the threat; and

(2) If the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

(m)"Intimate parts" includes the primary genital area, groin, inner thigh, buttocks, or breast of a human being.

610.02 Criminal Sexual Conduct.

Subd. 1. Prohibited Acts. Whoever engages in sexual penetration with another person or in sexual contact with a complainant under thirteen (13) years of age is guilty of criminal sexual conduct if any one or more of the following circumstances exist;

(a) The complainant is under thirteen (13) years of age and the actor is more than thirtysix (36) months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(b) The complainant is at least thirteen (13) years of age but less than sixteen (16) years of age and the actor is more than forty-eight (48) months older than the complainant and in a position of authority over the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(c) The actor uses force or coercion to accomplish the sexual penetration;

(d) The actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(e) The actor is aided or abetted by one or more accomplices and either an accomplice uses force or coercion to cause complainant to submit or an accomplice is armed with a dangerous weapon and uses or threatens to use the weapon to cause the complainant to submit;

(f) The actor has a significant relationship to the complainant and the complainant was under sixteen (16) years of age at the time of the sexual penetration. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; or

(g) The actor has a significant relationship to the complainant, the complainant was under sixteen (16) years of age at the time of the sexual penetration, and;

(1) The actor or accomplice used force or coercion to accomplish the penetration;

(2) The complainant suffered personal injury; or

(3) The sexual abuse, as defined in Section 614.01, involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act is a defense.

610.03 Sexual Assault.

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Subd. 1. Prohibited Acts. Whoever engages in sexual contact with another person is guilty of sexual assault if any of the following circumstances exist:

(a) The complainant is under thirteen (13) years of age and the actor is more than thirtysix (36) months older than the complainant. The prosecutor is not required to prove that the sexual contact with a complainant under thirteen (13) years of age was coerced. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(b) The complainant is at least thirteen (13) but less than sixteen (16) years of age and the actor is more than forty-eight (48) months older than the complainant and in a position of authority over the complainant. Neither mistake as to the complainant's age or consent to the act is a defense;

(c) Circumstances existing at the time of the sexual contact cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(d) The actor is armed with a dangerous weapon and uses or threatens to use the dangerous weapon to cause the complainant to submit;

(e) The actor uses force or coercion to accomplish the sexual contact;

(f) The actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated or physically helpless;

(g) The actor is aided or abetted by one or more accomplices and the accomplice uses force or coercion to cause the complainant to submit;

(h) The actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual contact. Neither mistake as to the complainant's age nor consent by the complainant is a defense;

(i) The actor has a significant relationship to the complainant, the complainant was under sixteen (16) years of age at the time of the sexual contact, and

(1) The actor or an accomplice used force or coercion to accomplish the contact;

(2) The complainant suffered personal injury; or

(3) The sexual abuse, as defined in Section 614.01, involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; or

(j) The complainant is in official custody or otherwise detained in a hospital, prison or other similar institution and the actor has supervisory or disciplinary authority over the detained person.

610.04 Statutory Rape.

Subd. 1. Prohibited Acts. A person eighteen (l8) years of age or older who engages in a sexual act, with consent, with another person who is fourteen (14) years of age or older but less then

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sixteen (l6) years of age, when the difference between the age of the victim and the age of the offender is two (2) years or greater, commits statutory rape.

610.06 Solicitation of Children to Engage in Sexual Conduct. Whoever, being eighteen (18) years of age or older, commands, entreats, or attempts to persuade an individual under the age of fifteen (15) years to engage in sexual contact or sexual penetration with the intent to engage in such or similar conduct is guilty of a Felony and, upon conviction, may be sentenced accordingly.

PART D – COMPUTER-AIDED SEXUAL OFFENSES INVOLVING MINORS

611.01 Definitions. For purposes of this Part D alone, the following terms shall have the following definitions:

[(a)-(b) omitted]

(c) "Coerce" shall include any of the following:

(1) Causing or threatening to cause serious bodily injury;

(2) Physically restraining or threatening to physically restrain another person;

(3) Abduction or threatened abduction of an individual;

(4) The use of a plan, pattern, or statement with intent to cause an individual to believe that failure to perform an act will result in the use of force against, abduction of, serious harm to, or physical restraining of an individual;

(5) The abuse or threatened abuse of law or legal process; or

(6) Threatening to use or the use of debt bondage or fraud.

(d) "Debt bondage" means inducing an individual to provide commercial sexual activity in payment toward or satisfaction of a real or purported debt.

(e) "Distribute" means to issue, sell, give, provide, lend, mail, deliver, transfer, transmute, distribute, circulate, or disseminate by any means.

(h) "Pornography involving juveniles" is any photograph, videotape, film, or other reproduction, whether electronic or otherwise, of any sexual performance involving a child under the age of eighteen (18).

(i) "Produce" means to photograph, videotape, film, or otherwise reproduce pornography involving juveniles, or to solicit, promote, or coerce any child for the purpose of pornography involving juveniles.

(j) "Sexual conduct" means actual or simulated sexual intercourse, deviant sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or any lewd exhibition of the genitals or anus.

(k) "Sexual performance" means any performance or part thereof that includes actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse, or lewd exhibition of the genitals or anus.

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611.02 Pornography Involving Juveniles.

Subd. 1. Prohibited Acts. It shall be unlawful for:

(a) A person to produce, promote, advertise, distribute, possess, or possess with the intent to distribute pornography involving juveniles; or

(b) A parent, legal guardian, or custodian of a child to consent to the participation of the child in pornography involving juveniles.

Sault Ste. Marie Tribe of Chippewa Indians

CHAPTER 70: CRIMINAL PROCEDURE

70.138 Special Tribal Criminal Jurisdiction.

(1) The Sault Ste. Marie Tribe of Chippewa Indians hereby exercises "special Tribal criminal jurisdiction" as a "participating tribe," as defined within 25 U.S.C.§ 1304 (2022), subject to applicable exceptions defined therein, in the Sault Ste. Marie Chippewa Tribal Court.

[(2)-(4) omitted]

70.139 Special jurisdiction – Criminal conduct applicable.

The Tribe exercises the special tribal criminal jurisdiction of a defendant for criminal conduct that falls into one or more of the following categories:

[(1)-(5) omitted]

(6) Sexual Violence. Any nonconsensual sexual act or contact, including any case in which the victim lacks the capacity to consent to the act.

CHAPTER 71: CRIMINAL OFFENSES

SUBCHAPTER II: DEFINITIONS

71.202 Definitions.

[(1)-(16) omitted]

(17) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.

[(18)-(36) omitted]

(37) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's

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intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

(a) revenge; or
(b) to inflict humiliation; or
(c) out of anger.

(38) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal

intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

(39) “Sexual Violence” means any nonconsensual sexual act or contact proscribed by a statute defined in this Chapter, including any case in which the victim lacks the capacity to consent to the act.

SUBCHAPTER XVIII: SEX CRIMES

71.1801 Criminal Sexual Conduct – First Degree.

(1) Offense. A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) That other person is at least 13 but less than 18 years of age and any of the following:

(i) The actor is a member of the same household as the victim.

(ii) The actor is related to the victim by blood or affinity to the fourth degree.

(iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.

(c) Sexual penetration occurs under circumstances involving the commission of any other crime which would be a felony if committed in the state of Michigan.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes, but is not limited to, any of the circumstances listed in subdivision (vi).

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(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(i) The actor is related to the victim by blood or affinity to the fourth degree.

(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

71.1802 Criminal Sexual Conduct – Second Degree.

(1) Offense. A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) That other person is at least 13 but less than 18 years of age and any of the following:

(i) The actor is a member of the same household as the victim.

(ii) The actor is related by blood or affinity to the fourth degree to the victim.

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(iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

(iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.

(c) Sexual contact occurs under circumstances involving the commission of any other crime which would be a felony if committed in the state of Michigan.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section (1)(a)(vi) above.

(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section (1)(a)(vi) above.

(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(i) The actor is related to the victim by blood or affinity to the fourth degree.

(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

71.1803 Criminal Sexual Conduct – Third Degree.

(1) Offense. A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age and under 18 years of age.

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section (1)(a)(vi) above.

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

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(d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

(e) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

71.1804 Criminal Sexual Conduct – Fourth Degree.

(1) Offense. A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age but less than 18 years of age, and the actor is 5 or more years older than that other person.

(b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(v) When the actor achieves the sexual contact through concealment or by the element of surprise.

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(d) That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person

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was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

(e) The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. A prosecution under this subsection shall not be used as evidence that the victim is mentally incompetent.

(f) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

71.1809 Sexual Exploitation.

(1) A person commits the crime of sexual exploitation if s/he causes another to be exposed to explicit sexual acts, photographs, movies, or any other media, or takes sexually explicit photographs or videos or uses any other media to document same of another and the victim (a) is 17 years old or younger; (b) is unaware of the photograph or videos (other medium used) being taken; or (c) suffers from a mental disease or defect, which renders him or her incapable of appraising the nature of his or her conduct.

71.1810 Accosting, Enticing or Soliciting a Child for Immoral Purpose.

(1) A person commits the crime of accosting, enticing or soliciting a child for immoral purpose if s/he accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual contact or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts.

71.1811 Child Sexually Abusive Material Or Activity.

(1) Definitions:

(a) "Child sexually abusive activity" means a child engaging in a listed sexual act.

[(b)-(d) omitted]

(e) "Listed sexual act" means sexual intercourse, erotic fondling, sadomasochistic abuse,

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masturbation, passive sexual involvement, sexual excitement, or erotic nudity.

(2) A person commits the offense of Child Sexually Abusive Material or Activity if:

(a) he persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or arranges for, produces, makes, copies, reproduces, or finances, or attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child;

Comments on Tribal Codes

All three codes cover sexual acts and conduct as set forth in the Federal statute. All three also include the Federal definition of "sexual violence" in their jurisdictional statement. Pasqua Yaqui Tribe (Pascua Yaqui) and Bois Forte Band of Chippewa (Bois Forte) specify where in their code the Tribal offenses that fall within the sexual violence jurisdictional category can be found. The three Tribal code examples take different approaches with defining key terms. Pascua Yaqui includes a definition of "sexual act." All three codes define "sexual contact." Pasqua Yaqui and Bois Forte also include a definition of "consent."

The specific offenses included in the example codes also differ. Bois Forte has a specific crime with the title of statutory rape. Sault Ste. Marie Tribe of Chippewa Indians (Sault Ste. Marie) criminalizes the act of statutory rape but includes it in a sexual conduct statute. Pascua Yaqui just sets an age limit of eighteen and classifies all sexual contact with someone under eighteen as "Sexual Conduct with Minor."

Pascua Yaqui requires that the conduct be done intentionally or knowingly. If the victim is a minor, it just has to be knowingly done. Neither Bois Forte nor Sault Ste. Marie have a mental state requirement. Bois Forte and Sault Ste. Marie requires that a person knows or has reason to know that the victim is physically or mentally unable to consent.

Questions for Consideration

1. Does your jurisdictional statement define sexual violence in the words of the Federal statute or similar words? Does it identify specific tribal offenses that fall within the definition of "sexual violence"?

2. Does your code adequately indicate what consent or lack of consent means?

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3. Does your Tribe have an existing sexual assault offense or sex crimes offenses in your criminal code?

4. Does your Tribe have a definition of "sexual act" and/or "sexual contact"? Do you want to add one?

5. Does your code set forth the jurisdictional requirements/definition of "sexual violence"?

Resources

- Third Facilitated Discussion: Sexual Violence and Stalking: Third Facilitated Discussion: Sexual Violence and Stalking (YouTube) and Third Facilitated Discussion: Sexual Violence and Stalking (PDF)
- For comprehensive information on VAWA 2022 see TribalVAWA.org – Sexual Violence
- Tribal Legal Code Resource: Sexual Assault and Stalking Laws
- National Tribal Clearinghouse on Sexual Assault (NTCSA) is a comprehensive resource hub that supports our Tribal communities with resources and education dedicated to improving the response to sexual assault.
- Tribal Law and Policy Institute Sexual Assault Publications
- Violence Against American Indian and Alaska Native Women and Men by André Rosay. An National Institute of Justice (NIJ)-funded study shows that American Indian and Alaska Native women and men suffer violence at alarmingly high rates.
- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.

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Chapter 5.5: Child Violence

Overview

The Violence Against Women Reauthorization Act of 2022 (VAWA 2022) marked a critical step forward in protecting Tribal children by recognizing "Child Violence" as a category of covered criminal conduct that can be prosecuted against non-Indians. This milestone was achieved through persistent advocacy from Tribal nations and advocates who underscored the urgent need to safeguard their children.[34] VAWA 2022 includes definitions of both "child violence" and "child."

25 U.S.C.§ 1304 (a)(2) & (3).

2) Child
The term "child" means a person who has not attained the lesser of—
(A) the age of 18; and
(B) except in the case of sexual abuse, the age specified by the criminal law of the Indian Tribe that has jurisdiction over the Indian country where the violation occurs.

3) Child violence
The term "child violence" means the use, threatened use, or attempted use of violence against a child proscribed by the criminal law of the Indian Tribe that has jurisdiction over the Indian country where the violation occurs.

As discussed previously, non-Indian Special Tribal Criminal Jurisdiction (STCJ) defendants are not prosecuted under the terms of Federal law; they must be prosecuted as a matter of Tribal law. A Tribe's exercise of its criminal jurisdiction cannot, however, go beyond what is permitted under Federal law. It is up to your Tribe to write its code to define each jurisdictional category listed in VAWA 2022. It is also up to your Tribe to decide which crimes you want to include within these categories, and how to define each of those individual offenses.

Like many of the other STCJ covered crimes, the Federal definition of "child violence"—which includes the phrase "any violation of the criminal law of the Indian Tribe that has jurisdiction"—makes clear that the specific criminal offenses falling within this category must be defined by Tribal law.

[34] Testimony of the National Congress of American Indians before the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security, Hearing on the Reauthorization of the Violence Against Women Act, March 7, 2019.

For purposes of Federal law, to determine whether a particular Tribal offense falls within the "child violence" jurisdictional category, the key questions are:

1. Is the victim an Indian "child"?
2. Did the criminal conduct involve the use, threatened use, or attempted use of violence?

Notably, the term "violence" is not defined in VAWA 2022. There has been considerable discussion within the Inter-Tribal Working Group on STCJ about whether "violence" refers strictly to physical violence or whether it could also encompass other forms of violence. This issue is discussed further in the text that follows.

Defining the Jurisdictional Category

As discussed in Chapter 4, one of the key drafting decisions your Tribe will need to make is how to define the jurisdictional category of "child violence" in your Tribal code. Many Tribes choose to incorporate a definition that mirrors or closely tracks the Federal language found in VAWA 2022. This approach ensures clear alignment with Federal requirements and can simplify jurisdictional determinations.

However, simply copying the Federal language may not be sufficient for all Tribal communities. One common area for clarification is the meaning of "violence" within the "child violence" definition. Because VAWA 2022 does not define the term "violence," Tribes have discretion to specify whether it refers solely to physical violence or whether it also includes emotional, psychological, or other forms of harm.

Adding this type of clarification can serve several important purposes:

- It provides clearer guidance to Tribal judges, prosecutors, defense counsel, and the community about the scope of the law.
- It reduces ambiguity that could otherwise complicate jurisdictional determinations or criminal prosecutions.
- It allows the Tribe to align its definition of "violence" with community values and priorities, particularly around the protection of children.

We share examples in the following text of how some Tribes have expanded upon the Federal definition to provide greater specificity.

Typical Offenses

In addition to defining "child violence" as a jurisdictional category, you may want to specify which Tribal criminal offenses fall within this category.
While it is possible for most violent crimes to have a child victim, there are some common criminal offenses or crimes that are particularly relevant. These include:

- Criminal child abuse,
- Sexual assault of a child,

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- Kidnapping and abduction of a child,
- Criminal child neglect and endangerment,
- Sex trafficking/commercial exploitation of a child,
- Contributing to the delinquency of a minor, and
- Child pornography.

If your Tribe does not already have criminal offenses in these areas, you may want to consider adding them. TLPI's *Guide for Drafting or Revising Tribal Laws on Crimes against Children* is a helpful place to start.

Depending how your codes are drafted, it may be more or less clear whether offenses in these areas fit within the jurisdictional category of "child violence" as defined in VAWA 2022. Some of these crimes might include physical violence, while others harm children psychologically, sexually, or emotionally.

Because the VAWA 2022 statute has not yet been interpreted by any Federal court, it is up to your Tribe to interpret the law and decide which of your offenses could be charged in the "child violence" jurisdictional category. As discussed in Chapter 4, this can be done by listing specific offenses in your STCJ implementation language or by leaving it to the discretion of Tribal prosecutors and judges.

Tribal Code Examples

Pascua Yaqui Tribal Code Title 4 – Criminal Code
Chapter 1 – Offenses

Section 35 Restored Tribal Criminal Jurisdiction; Covered Crimes; Definitions

(A) Definitions
[(1)-(3) omitted]

(4**) Covered Crimes.** The term "covered crime" means—
[(a)-(b) omitted]

c. **Child violence.** The term "child violence" means the use, threatened use, or attempted use of violence against a child proscribed by the Pascua Yaqui Tribal law.

Umatilla Criminal Code

Chapter 1. Definitions, Tribal Courts, Judges, Court Personnel, and Attorneys

Section 1.01 Definitions

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BB. Child Violence.

For purposes of exercising criminal jurisdiction over non-Indians, the term "child violence" means the use, threatened use, or attempted use of violence against a child as otherwise proscribed by the criminal laws of the CTUIR.

1. For purposes of this paragraph, violence is any act, or failure to act when a duty to act is owed, by an individual that causes physical, sexual, or psychological harm to a child and includes the crime of Endangering the Welfare of a Minor in Sections 4.96(A) and (B).

2. For purposes of this paragraph, the term "child" means a person who has not attained the lesser of:
   a. the age of 18; and
   b. except in the case of sexual abuse, the age otherwise defined by CTUIR law.

Tribal Code Commentary

The Pascua Yaqui Tribe (Pascua Yaqui) Code definition of "child violence" mirrors the Federal definition and makes clear that any violation of Pascua Yaqui law that involves the threat, attempt, or use of violence against a child is covered. What constitutes "violence" and which specific Tribal criminal offenses can be charged is left to the discretion of Tribal justice system officials.

The Confederated Tribes of the Umatilla Indian Reservation (Umatilla) Criminal Code takes a different approach and includes language explaining that for purposes of STCJ "child violence" jurisdiction "violence" can include both acts or failures to act that result in physical, sexual, or psychological harm to a child. Umatilla's code further makes clear that this definition would include the Tribal crime of Endangering the Welfare of a Minor. Umatilla has explained that it was very important to the Tribe to be able to prosecute STCJ cases in which an offender committed domestic violence in the presence of a child or in which a child was otherwise endangered.

Questions for Consideration

1. What is your definition of "child"? Does your current definition cover all the children you want to protect from crimes?

2. How does your Tribe interpret "child violence"? Do you want to include language in the Tribal code making clear whether "child violence" means only physical violence or also includes other types of violence?

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3. Are there specific Tribal offenses that you want to be clear can be considered "child violence"?

4. Are there code provisions that you want to include to protect a child victim during the criminal process (support person can be with the child, testimony by closed-circuit television, etc.)?

Resources

- Fourth Facilitated Discussion: Child Violence and Other Issues Including Habeas Corpus and Exhaustion of Tribal Court Remedies: Fourth Facilitated Discussion: Child Violence and Other Issues Including Habeas Corpus and Exhaustion of Tribal Court Remedies (YouTube) and Fourth Facilitated Discussion: Child Violence and Other Issues Including Habeas Corpus and Exhaustion of Tribal Court Remedies(PDF)
- For comprehensive information on VAWA 2022 see TribalVAWA.org – Child Violence
- Tribal Legal Code Resource: Crimes against Children
- Tribal Law and Policy Institute Publications on Child Abuse and Neglect
- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.
- Testimony of the National Congress of American Indians before the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security, Hearing on the Reauthorization of the Violence Against Women Act, March 7, 2019

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Chapter 5.6: Stalking

Overview

The Violence Against Women Reauthorization Act of 2022 (VAWA 2022) added "Stalking" as a category of criminal conduct that can be prosecuted against non-Indians in Tribal courts. Congress added stalking to the law because of data revealing that 49 percent of Native women and nearly 20 percent of Native men have experienced stalking in their lifetime, and the vast majority of these victims report they have experienced stalking by a non-Indian perpetrator.[35]

Stalking is a serious and dangerous form of abuse that is closely tied to both domestic and sexual violence. Studies consistently show that when stalking behaviors occur, the likelihood of a domestic violence homicide significantly increases.[36] While each case is unique, stalking typically involves a repeated pattern of harassing actions directed at a specific individual. These behaviors can vary widely and may include persistent, unwanted phone calls or messages, unsolicited gifts, following or approaching the person or their family and friends, surveillance or monitoring, damaging property, and making threats.

VAWA 2022 includes a definition of stalking that applies for purposes of establishing Tribal jurisdiction.

25 U.S.C.§ 1304 (a)(16).

> **(16)** The term "stalking" means engaging in a course of conduct directed at a specific person proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that would cause a reasonable person—
>
> **(A)** to fear for the person's safety or the safety of others; or
>
> **(B)** to suffer substantial emotional distress.

Defining the Jurisdictional Category

As far as VAWA 2022's definition of stalking is concerned, a Tribe can exercise criminal jurisdiction so long as the offender engaged in a "course of conduct" directed at a specific person that would cause a "reasonable person" to (1) fear for their safety/the safety of others or (2) to suffer "substantial emotional distress."

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[35] Andre Rosay, Violence Against American Indian and Alaska Native Women and Men, National Institute of Justice Research Report (May 2016), 29.

[36] Stalking Prevention Awareness and Resource Center, "Stalking and Intimate Partner Violence: Fact Sheet," (2018), https://www.stalkingawareness.org/wp-content/uploads/2018/11/Stalking-IPV-Fact-Sheet.pdf, accessed April 3, 2025.

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The terms "course of conduct," "reasonable person," and "substantial emotional distress" are key to determining whether your Tribe has jurisdiction in a particular case, and they are also likely to be elements of your Tribe's stalking offense. These terms are not, however, specifically defined in VAWA 2022. We can find guidance about what they mean elsewhere:

- "Course of conduct" is defined elsewhere in Federal law to mean "a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose."[37]

- Many states include provisions defining "substantial emotional distress" as significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.[38]

- In the context of stalking, the "reasonable person" standard generally refers to a hypothetical reasonable person who knows what the victim knows and has experienced what the victim has experienced.[39]

You may want to consider including definitions of these terms in your Tribal code. You could do this either in your jurisdictional language or in your criminal offense.

Typical Offenses

The most important criminal offense for making use of the stalking jurisdictional category recognized in VAWA 2022 will be a criminal stalking offense. While it is possible that other offenses, like trespassing or harassment, might be able to be prosecuted against a non-Indian under VAWA 2022's stalking definition, this section focuses on Tribal criminal stalking statutes. If your Tribe does not already have a stalking offense in its criminal code, you may want to review TLPI's Tribal Legal Code Resource: Sexual Assault and Stalking Laws: Guide for Drafting or Revising Victim-Centered Tribal Laws Against Sexual Assault and Stalking and its update Tribal Legal Code Resource: Sexual Assault Considerations for Tribal Sexual Assault Code Development, both of which discuss these issues in more detail. There are a number of key issues that should be discussed, understood, and resolved in developing or revising a criminal stalking statute. [40]

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[37] 18 U.S.C. 2266(2).

[38] See, e.g., Washington Administrative Code 504-26-223.

[39] Stalking Prevention, Awareness, and Resource Center, "Responding to Stalking: A Prosecutor's Guide to Stalking," p. 11, https://www.stalkingawareness.org/wp-content/uploads/2020/01/SPA-19.005-Prosecutors-Guide-to-Stalking-00000002-revised.pdf.

[40] Note that in 2023 the U. S. Supreme Court in Counterman v. Colorado addressed a stalking case as a true threat case. True threats cases address "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." The stalking behavior included numerous Facebook messages sent over two years which were perceived as threatening by the victim. The victim had attempted on numerous occasions to block these messages. The Court held that these messages amounted to a category of cases referred to as true threats cases. To sift through First Amendment issues, the Court held that in true threats cases, the State must prove that the defendant has some understanding that the statements made were of a threatening character and the defendant is held to a reckless standard meaning the defendant created a substantial risk that a statement would be perceived as threatening. True threats are not protected by the First Amendment. The Court reversed

- **Intent** – Every criminal code makes clear the mental state, or *mens rea,* that the offender must have for an action to be considered a crime. Mental state, or intent, is generally described either as "specific intent" or "general intent" and can include levels like purposefully, knowingly, recklessly, or negligently. In the context of stalking, specific intent means a stalker must intend to cause the reaction in the victim, such as fear for the victim's safety. General intent means a stalker must intend the actions in which the stalker is engaging (e.g., following, calling, or texting) but not necessarily the consequences of those actions. In a criminal case, the defendant's intent must be proved beyond a reasonable doubt. It is important that your stalking offense establishes what the required mental state is for a stalking offense.[41]

- **Fear and Emotional Distress** – VAWA 2022's definition of stalking refers to a "reasonable person" experiencing fear or emotional distress. Some jurisdictions similarly structure their stalking offense to rely on a "reasonable person" standard, while others require that the stalking victim personally experienced fear. Still others require both: A reasonable person would objectively experience fear *and* this victim did subjectively experience fear. This is the most burdensome way to structure the offense for both the prosecutor and the victim and goes beyond what the VAWA 2022 definition requires. If a prosecutor must prove the victim experienced fear, the prosecutor must call the victim as a witness. This means that the victim must sit in front of the person the victim fears and, in a public setting, describe the fear and the effect of that fear (anxiety or psychiatric problems). This can be retraumatizing. If a reasonable person standard is used, it may not always be necessary for the victim to testify. The prosecutor must show that a reasonable person (not necessarily the victim) would feel fear when exposed to the stalker's actions. Some laws require that the victim fear serious bodily injury or death. However, the VAWA 2022 definition refers to "fear for the person's safety or the safety of others," which could encompass fear of something less than serious bodily injury or death.

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Counterman's conviction and remanded the case to the lower court to determine if the statements were true threats and if the defendant acted recklessly. Since most State stalking statutes include a showing of a pattern of behavior that may involve numerous stalking behaviors, the case is unlikely to impact State court stalking cases. It is unclear whether *Counterman* will apply in tribal courts. For an interesting law review where group of legal scholars argued as Amici, that Counterman was a stalking case and not a true threats case and why that distinction is important see Harvard Law Review Counterman v. Colorado.

[41] In 2023, the U.S. Supreme Court decided *Counterman v. Colorado*, 143 S. Ct. 2106 (2023), which held that the Colorado stalking statute was unconstitutionally vague because it did not require proof of a mental state of recklessness or higher and therefore made it impossible to differentiate between a true threat and constitutionally-protected speech.

- **Acts and Course of Conduct –** Most jurisdictions have a requirement that the behavior be repeated on two or more occasions. The words "course of conduct" can be used to describe the actions. Some places require that the actions take place within a certain time period. Minnesota, for example, defines a pattern of harassing conduct as "two or more acts within a five-year period." The Federal definition in VAWA 2022 does not require a specific time period for the stalking behavior.

Tribal Code Examples

Chickasaw Nation Tribal Code

TITLE 5. Courts and Procedures.

SECTION 5-401.1 DEFINITIONS.

The following words have the meanings given below when used in this Chapter:

[1-13 omitted]

14. "Stalking" shall mean engaging in a course of conduct at a specific person in violation of the laws of the Chickasaw Nation wherein a person engages in a course of conduct that would cause a reasonable person:

[A-B omitted]

C. to fear for the person's safety or the safety of others; or

D. to suffer substantial emotional distress.

SECTION 5-401.5 COVERED OFFENSES.

A "Covered Offense" shall include:

[A-G omitted]

H. Any offense of the criminal laws of the Chickasaw Nation involving Stalking; and

TITLE 17. Offenses and Penalties

SECTION 17-506.6 STALKING.

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A. It shall be unlawful to willfully, maliciously, and repeatedly follow or Harass another person in a manner that:

1. would cause a reasonable person or a Member of the Immediate Family of that person as defined in Subsection E below to feel frightened, intimidated, threatened, harassed, or molested; or

2. actually causes the person being followed or harassed to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

B. Stalking shall be punishable by a fine of not more than five thousand dollars ($5,000), by imprisonment for not more than one (1) year, or both.

C. A second or subsequent conviction of Stalking shall be punishable by a fine not exceeding fifteen thousand dollars ($15,000) or imprisonment not exceeding three (3) years, or both.

D. Evidence that the defendant continued to engage in a Course of Conduct involving repeated Unconsented Contact with the victim after having been requested by the victim to discontinue the same or a different form of Unconsented Contact, and to refrain from any further Unconsented Contact with the victim, shall give rise to a rebuttable presumption that the continuation of the Course of Conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

E. For purposes of this Section:

1. "Harasses" means conduct directed toward a person that includes, but is not limited to, repeated or continuing Unconsented Contact, that would cause a reasonable person to suffer Emotional Distress, and that actually causes Emotional Distress to the victim. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

2. "Course of Conduct" means a series of two (2) or more separate acts over a period of time, however short or long, evidencing a continuity of purpose, which may include any of the following, without limitation:

a. maintaining a visual or physical proximity to the victim,

b. approaching or confronting the victim in a public place or on private property,

c. appearing at the workplace of the victim or contacting the employer or coworkers of the victim,

d. appearing at the home of the victim or contacting the neighbors of the victim,

e. entering onto or remaining on property owned, leased, or occupied by the victim,

f. contacting the victim by telephone, text message, electronic message, electronic mail, or other means of electronic communication or causing the telephone or electronic device of the victim or the telephone or electronic device of any other person to ring or generate notifications repeatedly or continuously, regardless of whether a conversation ensues,

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g. photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim. This subparagraph applies regardless of where the act occurs,

h. sending to the victim any physical or electronic material or contacting the victim by any means, including any message, comment, or other content posted on any Internet site or web application,

i. sending to a family member or member of the household of the victim, or any current or former employer of the victim, or any current or former coworker of the victim, or any friend of the victim, any physical or electronic material or contacting such person by any means, including any message, comment, or other content posted on any Internet site or web application, for the purpose of obtaining information about, disseminating information about, or communicating with the victim,

j. placing an object on or delivering an object to property owned, leased, or occupied by the victim,

k. delivering an object to a family member or member of the household of the victim, or an employer, coworker, or friend of the victim, or placing an object on, or delivering an object to, property owned, leased, or occupied by such a person with the intent that the object be delivered to the victim, or

l. causing a person to engage in any of the acts described in subparagraphs a through k of this paragraph. (PR40-010, 04/17/2023) Constitutionally protected activity is not included within the meaning of "course of conduct."

3. "Emotional Distress" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling.

4. "Unconsented Contact" means any contact with another individual that is initiated or continued without the consent of the individual, or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Constitutionally protected activity is not included within the meaning of unconsented contact. Unconsented contact includes but is not limited to any of the following:

a. following, which includes, but is not limited to, tracking of the movement or location of an individual through the use of a Global Positioning System (GPS) device or other monitoring device by a person, or appearing within the sight of that individual; (PR40-010, 04/17/2023)

b. approaching or confronting that individual in a public place or on private property;

c. appearing at the work place or residence of that individual;
d. entering onto or remaining on property owned, leased, or occupied by that individual;

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e. contacting that individual by telephone;

f. sending mail or electronic communications to that individual; and
g. placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

5. "Member of the Immediate Family" means any spouse, parent, Child, person related within the third degree of consanguinity or affinity or any other person who regularly resides in the household or who has regularly resided in the household within the prior six (6) months. (TL14-002, 4/18/97; PR15-030, 9/23/98; PR39-007, 05/20/22)

E. Whenever a law enforcement agency receives a complaint of stalking and finds that such conduct has occurred, the law enforcement agency shall be required to provide a copy of a Stalking Warning Letter to the accused provided that the victim does not otherwise request that such letter not be served upon the accused.

E. The Stalking Warning Letter shall be served upon the accused in the same manner as a bench warrant. However, nothing shall prohibit arrest and prosecution of Stalking without service of the Stalking Warning Letter.

Pascua Yaqui Tribal Codes (updated August 2022)

Title 4, Ch. 1, Sect. 35. Restored Tribal Criminal Jurisdiction; Covered Crimes; Definitions

[(1)-(3) omitted]

(4) **Covered crimes.** The term "covered crime" means—

[(a)-(g) omitted]

(h) **Stalking.** The term "stalking" means engaging in a course of conduct directed at a specific person proscribed in 4 PYTC § 1-460 where the violation occurs that would cause a reasonable person—

(i) to fear for the person's safety or the safety of others; or

(ii) to suffer substantial emotional distress.

Title 4, Ch.1, Sect. 460. Stalking (Formerly § 1-250)

(A) A person commits stalking if the person intentionally or knowingly engages in a course of conduct that is directed toward another person and if that conduct either:

(1) Would cause a reasonable person to fear for the person's safety or the safety of that person's immediate family member and that person in fact fears for their safety or the safety of that person's immediate family member.

(2) Would cause a reasonable person to fear death of that person or that person's immediate family member and that person in fact fears death of that person or that person's immediate family member.

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(B) Stalking under subsection A, paragraph 1 of this section is a class 3 felony. Stalking under subsection A, paragraph 2 of this section is a class 2 felony.

(C) For the purposes of this section:

(1) “Course of conduct”:

(a) Means any of the following:

(i) Maintaining visual or physical proximity to a specific person or directing verbal, written or other threats, whether express or implied, to a specific person on two or more occasions over a period of time, however short.

(ii) Using any electronic, digital or global positioning system device to surveil a specific person or a specific person’s internet or wireless activity continuously for twelve hours or more or on two or more occasions over a period of time, however short, without authorization.

(b) Does not include constitutionally protected activity or other activity authorized by law, the other person, the other person’s authorized representative or if the other person is a minor, the minor's parent or guardian.

(2) “Immediate family member” means a spouse, parent, child or sibling or any other person who regularly resides in a person's household or resided in a person’s household within the past six months.

Santa Clara Pueblo Tribal Code

Article 3: Special Tribal Criminal Jurisdiction and Covered Crimes

(h) **Stalking**

(1) “Stalking” means engaging in a course of conduct directed at a specific person proscribed by the criminal law of the Pueblo that would cause a reasonable person to fear for the person’s safety or the safety of others or to suffer substantial emotional distress. Stalking includes cyberstalking.

(2) A non-Indian over whom the Pueblo asserts jurisdiction can be charged with the criminal offense of Stalking if the person intentionally or knowingly engages in a course of conduct, including maintaining visual or physical proximity or directing any type of threat on two or more occasions toward another person and if that conduct:

(A) Would cause a reasonable person to fear for the person’s safety or the safety of that person’s immediate family member and that person in fact fears for their safety or the safety of that person’s immediate family member; or

(B) Would cause a reasonable person to fear death of that person or that person’s immediate family member and that person in fact fears death of that person or that person’s immediate family member; or

(C) Would cause a reasonable person to suffer substantial emotional distress.

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Tribal Code Commentary

All three Tribes incorporate the VAWA 2022 stalking definition into their jurisdictional statements. The Santa Clara Pueblo (Santa Clara) jurisdictional statement also makes clear that stalking includes cyberstalking. Pascua Yaqui Tribe and Santa Clara both specifically identify their criminal stalking offense as the criminal offense that can be charged in this jurisdictional category.

All three tribes specify the mental state that is required for their stalking offense and take a general intent approach that requires that the actions that make up the course of conduct were undertaken intentionally or knowingly. Chickasaw Nation adds language that the action must also have been undertaken maliciously.

While in several ways, Chickasaw Nation has the most detailed and expansive criminal stalking offense, all three Tribes have structured their stalking offense more narrowly than the VAWA 2022 stalking definition requires. Of course, as sovereign governments, Tribes have the right to do less than what Federal law allows, and there may be Tribal policy reasons for doing so.

Fear

All three Tribes include a reasonable person standard for establishing fear for the person's safety or the safety of an immediate family member. Both Pascua Yaqui and Santa Clara also require, however, that the victim actually experienced fear, which goes beyond what is required by VAWA 2022. As discussed earlier, this places an additional burden on the prosecutor and also possibly the victim.

VAWA 2022 refers to "fear for the person's safety or the safety of others," but all of the Tribal codes listed previously have limited this to fear for the safety of immediate family members. Again, this goes beyond what is required by VAWA 2022 and is worth discussing whether your Tribe wants to protect against stalking behavior that threatens someone outside of the immediate family, like a boyfriend, friend, or co-worker.

Emotional Distress

VAWA 2022's stalking definition requires either that an offender engages in a course of conduct that would have caused a reasonable person to experience fear or substantial emotional distress. Chickasaw Nation and Santa Clara both adopt this approach and include substantial emotional distress in their stalking offense. Neither require that the victim actually experienced substantial emotional distress and instead rely wholly on the reasonable person standard. Pascua Yaqui does not include substantial emotional distress as an alternative to fear in its stalking offense and instead requires that the course of conduct would have caused a reasonable person to experience fear and did cause the specific victim to actually experience fear.

Conduct

All three Tribal codes identify the types of actions that could constitute the course of conduct for a stalking offense. The list included in the Chickasaw Code is the most expansive.

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Questions for Consideration

1. Does your Tribe have an existing stalking offense in your criminal code? If so, how does it compare to the VAWA 2022 definition? Does it address mental state (specific or general intent)?

2. What standard of fear do you have in your statute? Is actual fear required or does your law include a reasonable person standard? Or both? Are any changes needed?

3. Is emotional distress included as an element of the crime as an alternative to the requirement of fear? Are any changes needed?

4. What type of conduct do you include in your stalking offense? Are any changes needed?

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Resources

- Third Facilitated Discussion: Sexual Violence and Stalking: Third Facilitated Discussion: Sexual Violence and Stalking (YouTube) and Third Facilitated Discussion: Sexual Violence and Stalking (PDF)
- TLPI co-hosted a part 1 of 2 Stalking webinar entitled, "Know More, Do More: Identifying and Responding to Stalking." The recording can be accessed here. The PDF of the PowerPoint can be found here.
- TLPI co-hosted a part 2 of 2 Stalking webinar entitled, "Stalking Charges: An Opportunity, Not an Afterthought." The recording can be accessed here. The PDF of the PowerPoint can be found here.
- For comprehensive information on VAWA 2022 see TribalVAWA.org – Stalking.
- Tribal Legal Code Resource: Sexual Assault and Stalking Laws
- Stalking Prevention Awareness, and Resource Center (SPARK) has a worksheet entitled, "Stalking Response Considerations When Working with Native Communities."
- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.
- Violence Against American Indian and Alaska Native Women and Men by André Rosay. A National Institute of Justice-funded study shows that American Indian and Alaska Native women and men suffer violence at alarmingly high rates.

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Chapter 5.7: Obstruction of Justice

Overview

The Violence Against Women Reauthorization Act of 2022 (VAWA 2022) added "obstruction of justice" as a category of covered criminal conduct that can be prosecuted against non-Indians. Notably, VAWA 2022 states that "obstruction of justice" crimes do not have to have an Indian victim to fall under Tribal jurisdiction. This is one of only two crimes where the victim does not have to be an Indian, the other crime is "assault of Tribal justice personnel." "Obstruction of justice" is a broad and long-standing term that has varying definitions in State and Federal laws.

For purposes of Special Tribal Criminal Jurisdiction (STCJ), VAWA 2022 includes a definition of "obstruction of justice."

25 U.S.C.§ 1304 (a)(9).

(9) Obstruction of justice

The term "obstruction of justice" means any violation of the criminal law of the Indian Tribe that has jurisdiction over the Indian country where the violation occurs that involves interfering with the administration or due process of the laws of the Indian Tribe, including any Tribal criminal proceeding or investigation of a crime

Like many other STCJ covered crimes, the phrase "any violation of the criminal law of the Indian Tribe that has jurisdiction" makes it clear that specific offenses will be defined by Tribal law. To determine whether a particular Tribal offense falls within the "obstruction of justice" jurisdictional category, the key question is whether the underlying conduct involves interfering with the administration or due process of the Tribal laws. The statute specifies that this can include interference in "any Tribal criminal proceeding or investigation of a crime," which suggests that interference could also occur outside the criminal context, such as in a civil trial.

The "obstruction of justice" category may be the broadest jurisdictional category included in VAWA 2022, with the potential to encompass a wide range of offenses within a Tribe's criminal code.

Defining the Jurisdictional Category – "Obstruction of Justice"

As discussed in Chapter 4, a Tribe may want to include a definition of "obstruction of justice" for jurisdictional purposes that aligns with the Federal definition. A Tribe may want to add language beyond what is included in the Federal definition to make it even more clear that a Tribe's jurisdiction over "obstruction of justice" is not limited to conduct that obstructs criminal proceedings or investigations. As discussed in Chapter 4, the Tribe should also include language

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making clear that the included definition applies to the determination of jurisdiction over non-Indians to avoid confusion with any offense that may have a similar name.

> Important Note: A Tribe may already have an offense called "obstruction of justice" in its code. If it does, the offense will likely be more narrowly defined than the STCJ jurisdictional definition in the federal law. In this case it may be particularly helpful to define "obstruction of justice" specifically for jurisdictional purposes and identify the offenses that fall within the scope of that definition. This approach can help avoid confusion and an overly narrow interpretation of the scope of the Tribe's jurisdiction.

Here is an example of how "obstruction of justice" might be defined to accomplish these two goals:

> *Obstruction of Justice*
> *For purposes of establishing Tribal jurisdiction over non-Indians, the term "obstruction of justice" means any violation of*
> *a. [insert typical obstruction offenses that are included in the Tribal criminal code- this may include things like perjury, witness tampering, resisting arrest, etc.]*
> *b. [Tribal offense]*
> *c. [Tribal offense]; or*
> *d. any other violation of the criminal law of [TRIBE's NAME] that involves interfering with the administration or due process of the laws of the [TRIBE'S NAME], including in any Tribal criminal or civil proceeding or investigation of a crime.*

Typical Offenses

A Tribe may choose to list some or all of the offenses in the Tribal criminal code that fall under the term "obstruction of justice." As discussed in Chapter 4, if a Tribe elects to reference specific offenses in the definition of a "covered crime," care should be taken to avoid unintentionally limiting the Tribes' jurisdiction beyond what may be permissible under Federal law. Because "obstruction of justice" is such a broad category, Tribal code drafters should make sure that the Tribal code contains the offenses that a Tribe may want to charge.

Examples of typical offenses that could be covered include:

- Perjury,
- Fleeing law enforcement,
- Witness tampering,
- Resisting arrest,
- Harboring fugitives,
- Bribing a witness,
- Destroying evidence,
- Obstructing criminal investigations,
- Disobeying a lawful court order,
- Criminal contempt,
- Assault on a process server,
- Theft or alteration of records,
- Obstruction of a government audit, and
- Making false statements to officials.

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Tribal Code Examples

Chickasaw Nation Code

Title 5 – Courts and Procedures

Section 5-401.1 DEFINITIONS
(1)-(8) omitted.

(9) "Obstruction of Justice" shall mean any offense in the Chickasaw Nation that involves interfering with the administration or due process of the laws of the Chickasaw Nation, including any criminal proceeding in the Chickasaw Nation or investigation of a criminal offense under the laws of the Chickasaw Nation. [5-401.1(9)]

Note: The Chickasaw Tribal code has numerous offenses that likely fit within this definition of "obstruction of justice" in Chickasaw Nation Code, Title 17, Chapter 6, Offenses Against Public Justice. These may be a good model for a Tribe who would like to add additional obstruction of justice offenses.

Pascua Yaqui Tribal Code

(e) Obstruction of justice. The term "obstruction of justice" means any violation of 4 PYTC §§ 1-1120, 1140 or any other criminal law of the Pascua Yaqui Tribe where the violation involves interfering with the administration or due process of the laws of the Pascua Yaqui Tribe, including any Tribal criminal proceeding or investigation of a crime.

Confederated Tribes of the Umatilla Indian Reservation Tribal Code

FF. Obstruction of Justice. For purposes of exercising criminal jurisdiction over non-Indians, the term "obstruction of justice" means any violation of the criminal law of the CTUIR that involves interfering with the administration or due process of the laws of the CTUIR, including any Tribal criminal proceeding or investigation of a crime. [Ch. 1, Sec. 1.01FF]

Note: The CTUIR code includes a number of offenses that likely fit within this definition of "obstruction of justice" in CTUIR Criminal Code, Chapter 4, Part VIII, Crimes Against Public Justice. These may be a good model for a Tribe who would like to add additional obstruction of justice offenses.

Tribal Code Commentary

In these examples, all three Tribal codes use language that generally tracks the Federal definition of "obstruction of justice" in VAWA 2022. In the Pascua Yaqui Tribe code, the Tribe identifies two specific Tribal offenses that fall within this jurisdictional category. The Tribe has

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also included language making clear that these are not the only two offenses that would be covered. The Confederated Tribes of the Umatilla Indian Reservation (Umatilla) and Chickasaw Nation definitions, in contrast, do not list any specific offenses, but instead leave that determination up to the officials who will be implementing the law.

The Umatilla code includes the phrase "for purposes of exercising criminal jurisdiction over non-Indians," which could help underscore that the purpose of this definition is to define the scope of Tribal jurisdiction rather than to define a particular criminal offense and distinguish it from any similarly named offense.

Questions for Consideration

1. Are there any words or parts of the Federal definition that you would like to clarify in Tribal law?

2. What offenses in your Tribal criminal code would be covered by the STCJ definition of obstruction of justice?

3. Are there "obstruction of justice offenses" that need to be added to your Tribal criminal code?

4. Do you want to list Tribal offenses that fall within the "obstruction of justice" jurisdictional category or leave it up to prosecutors and judges to determine on a case-by-case basis? What are some advantages or disadvantages of each approach?

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Resources

- Second Facilitated Discussion: Assault of Tribal Justice Personnel and Obstruction of Justice: Second Facilitated Discussion Recording (YouTube) and Second Facilitated Discussion PowerPoint (PDF)

- For comprehensive information on VAWA 2022 see TribalVAWA.org – Obstruction of Justice.

- The Varying Parameters of Obstruction of Justice in American Criminal Law

- Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities

- Criminal Contempt of Court - FindLaw

- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.

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Chapter 5.8: Assault of Tribal Justice Personnel

Overview

After Violence Against Women Act (VAWA) 2013 was enacted, Tribal nations who had begun prosecuting non-Indians expressed concern that the narrow scope of the VAWA 2013 created a safety concern for Tribal law enforcement and justice personnel. Several Tribes reported cases in which non-Indian domestic violence offenders assaulted Tribal officers and jailers.[42] Because VAWA 2013 recognized Tribal jurisdiction only over the domestic violence offense, the Tribe lacked jurisdiction over these additional crimes and the offender could not be held accountable in Tribal court for assaulting the Tribal officer. Violence Against Women Act (VAWA) 2022 recognized the need for Tribal nations to be able to protect professionals who work as part of the justice system from crime they may experience because of that work, and Congress included "Assault of Tribal Justice Personnel" as a category of covered criminal conduct that can be prosecuted against non-Indians.

25 U.S.C.§ 1304 (a)(1).

(1) The term "assault of Tribal justice personnel" means any violation of the criminal law of the Indian Tribe that has jurisdiction over the Indian country where the violation occurs that involves the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of, that Indian Tribe or serving that Indian Tribe during, or because of, the performance or duties of that individual in—

(A) preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a covered crime;

(B) adjudicating, participating in the adjudication of, or supporting the adjudication of a covered crime;

(C) detaining, providing supervision for, or providing services for persons charged with a covered crime; or

(D) incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a covered crime.

Like many of the other Special Tribal Criminal Jurisdiction (STCJ) covered crimes, the phrase "any violation of the criminal law of the Indian Tribe that has jurisdiction" in the Federal definition of "assault of Tribal justice personnel" makes it clear that specific criminal offenses will be defined in Tribal law. As far as Federal law is concerned, to determine whether a particular offense falls under the Tribe's jurisdiction using the "assault of Tribal justice personnel" jurisdictional category, the key questions are:

[42] NCAI Five Year Report, pg. 27.

1. Did a criminal violation occur that involved the "use, threatened use, or attempted use of physical force"?
2. Is the individual against whom the force was used/attempted/threatened authorized to act for or on behalf of the Tribe or serving the Tribe?
3. Did the violation occur during or because of the performance of the individual's duties to:
    - Prevent, detect, investigate, make arrest, make apprehensions, or prosecute a covered crime?
    - Adjudicate or support the support the adjudication of a covered crime?
    - Detain, supervise, provide services for a person charged with a covered crime?
    - Incarcerate, supervise, provide treatment for, provide rehabilitation services for, or provide reentry services for persons convicted of a covered crime?

It is important to note that this jurisdictional category is limited to cases in which the "assault of Tribal justice personnel" violation can be tied back to another covered crime. To help understand this requirement consider two hypothetical scenarios:

> **Scenario 1:** A non-Indian gets into a fight with his Indian girlfriend at the Tribal casino. When Tribal police respond, the non-Indian pushes the Tribal officer. In this case, the Tribe DOES have jurisdiction over the assault committed against the officer because the underlying offense (domestic violence) is a "covered crime" under VAWA 2022 and the officer was assaulted DURING the performance of his duties related to investigating that covered crime.
>
> **Scenario 2:** A non-Indian gets into a fight with an Indian who he does not know at the Tribal casino. When Tribal police respond, the non-Indian pushes the Tribal officer. In this case, the Tribe *does not* have jurisdiction over the assault committed against the officer because the underlying offense (assault of a stranger) is not a "covered crime."
>
> "Assault of Tribal justice personnel" does not have to occur at the same time as the associated covered crime or during the criminal process for the covered crime. The Federal definition makes clear that "assault of Tribal justice personnel" also includes threats or the use of physical force that occur because of an investigation or prosecution of a covered crime. To better understand these points, consider this scenario:
>
> **Scenario 3:** A non-Indian who was charged and sentenced for domestic violence was recently released from Tribal jail. He sends a letter to the prosecutor who charged him and threatens to "come after him." In this scenario, the Tribe would have jurisdiction to prosecute the threat because the underlying offense of "domestic violence" is a covered crime under VAWA 2022 and the prosecutor is being threatened *because of* the performance of his duties related to prosecuting a covered crime.

Defining the Jurisdictional Category

There has been considerable discussion at the Inter-Tribal Working Group on Special Tribal Criminal Jurisdiction meetings about which Tribal justice professionals are covered by the Federal definition. While the jurisdictional category is called "assault of Tribal justice personnel," it may protect individuals who you do not normally consider "justice personnel." For example, in addition to covering judges and court personnel, it also potentially covers law enforcement, detention staff, probation, staff operating batterer's intervention programs or re-entry

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programming, domestic violence or sexual assault advocates, child protective services workers, and others. Similarly, while this category is called "assault of Tribal justice personnel," the definition refers to use or threatened use of "physical force" rather than assault, which may be significant.

Typical Offenses

In addition to defining "assault of Tribal justice personnel" as a jurisdictional category, some Tribes have created a new offense that mirrors the Federal definition. Others have created specific offenses to protect certain professionals or have made clear that existing offenses can be charged in this jurisdictional category.

Tribal Code Examples

Eastern Band of Cherokee Indians Code of Ordinances

Chapter 14 – Criminal Law

Sec. 14-40.51.1. - Assault of Tribal justice personnel.

(a) The term "assault of Tribal justice personnel" means the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of, the Eastern Band of Cherokee Indians or serving the Eastern Band of Cherokee Indians during, or because of, the performance or duties of that individual in:

> (1) preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a crime of domestic violence; child violence; dating violence; obstruction of justice; sexual violence; sex trafficking; stalking; or a violation of a protection order; or
>
> (2) adjudicating, participating in the adjudication of, or supporting the adjudication of a crime of domestic violence; child violence; dating violence; obstruction of justice; sexual violence; sex trafficking; stalking; or a violation of a protection order; or
>
> (3) detaining, providing supervision for, or providing services for persons charged with a crime of domestic violence; child violence; dating violence; obstruction of justice; sexual violence; sex trafficking; stalking; or a violation of a protection order; or
>
> (4) incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a crime of domestic violence; child violence; dating violence; obstruction of justice; sexual violence; sex trafficking; stalking; or a violation of a protection order.

(b) Unless a person's conduct is covered under some other provision of law providing greater punishment, assault of a Tribal justice personnel shall be punishable by a fine of not less than $1,000.00 and not more than $15,000.00; by a term of imprisonment of not less than 90 days and not more than three years; exclusion for a period of not less than one year nor more than 20 years; or any combination of them.

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Pascua Yaqui Tribal Code

Pascua Yaqui Tribal Code Title 4 – Criminal Code
Chapter 1 – Offenses

Section 35 Restored Tribal Criminal Jurisdiction; Covered Crimes; Definitions

(A) Definitions:

[(1)-(3) omitted]

(4) **Covered crimes.** The term "covered crime" means—

(a) **Assault of Tribal justice personnel.** The term "assault of Tribal justice personnel" means any violation of 4 PYTC § 1-410 where the violation occurs that involves the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of, the Pascua Yaqui Tribe or serving the Pascua Yaqui Tribe during, or because of, the performance or duties of that individual in—

(i) preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a covered crime;

(ii) adjudicating, participating in the adjudication of, or supporting the adjudication of a covered crime;

(iii) detaining, providing supervision for, or providing services for persons charged with a covered crime; or

(iv) incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a covered crime.

Section 410 Aggravated Assault (Formerly §§ 130 & 140)

(A) A person commits aggravated assault if such person commits assault as prescribed by section 405 under any of the following circumstances:

(1) If such person causes serious physical injury to another.

(2) If such person uses a deadly weapon or dangerous instrument.

(3) If such person is eighteen years of age or older and commits the assault on a minor under fifteen years of age.

(4) If such person commits the assault by any means of force that causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part or a fracture of any body part.

(5) If such person commits the assault while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired.

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(6) If such person commits assault as prescribed by section 405 and the person is in violation of an order of protection issued against the person pursuant to sections 1330 & 1335.

(7) If the person commits the assault knowing or having reason to know that the victim is any of the following:

(a) A law enforcement officer, police officer, peace officer or Tribal official, or a person summoned and directed by the officer while engaged in the execution of any official duties.

(b) A firefighter, fire investigator, fire inspector, emergency medical technician or paramedic engaged in the execution of any official duties, or a person summoned and directed by such individual while engaged in the execution of any official duties.

(c) A teacher or other person employed by any school and the teacher or other employee is on the grounds of a school or grounds adjacent to the school or is in any part of a building or vehicle used for school purposes, any teacher or school nurse visiting a private home in the course of the teacher's or nurse's professional duties or any teacher engaged in any authorized and organized classroom activity held on other than school grounds.

(d) A licensed health care practitioner, or a person summoned and directed by the licensed health care practitioner while engaged in the person's professional duties. This subdivision does not apply if the person who commits the assault is seriously mentally ill, or is afflicted with Alzheimer's disease or related dementia.

(e) A prosecutor or lay advocate with the prosecutor's office, while engaged in the execution of any official duties or if the assault results from the execution of the prosecutor's official duties.

(f) A public defender or a lay advocate with the public defender's office or court appointed counsel, while engaged in the execution of any official duties or if the assault results from the execution of the public defender or a lay advocate with the public defender's office or court appointed council's official duties.

(g) A Tribal Court judge or bailiff, while engaged in the execution of any official duties or if the assault results from the execution of the Judge or bailiff's official duties.

(h) A Tribal Council member, while engaged in the execution of any official duties or if the assault results from the execution of the Tribal Council's official duties.

(i) If the person meets both of the following conditions:

(i) Is imprisoned or otherwise subject to the custody of any of the following:

1. Tribal, state or federal department of corrections or detention.

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2. A Tribal, state or federal department of juvenile corrections or juvenile detention.

3. A law enforcement agency.

4. Any other entity that is contracting with the Tribal, state or federal department of corrections or detention, the Tribal, state or federal department of juvenile corrections or detention, a law enforcement agency, another Tribe or state, any private correctional facility, a county, a city or the federal bureau of prisons or other federal agency that has responsibility for sentenced or unsentenced prisoners.

(ii) Commits an assault knowing or having reason to know that the victim is acting in an official capacity as an employee of any of the entities listed in subdivision (1) of this paragraph.

Santa Clara Pueblo Special Tribal Criminal Jurisdiction Code

Article 3: Special Tribal Criminal Jurisdiction and Covered Crimes

The Santa Clara Pueblo STCJ Court is vested with criminal jurisdiction over a non-Indian who commits a crime within the exterior boundaries of Santa Clara Pueblo except as limited by Federal law. Applicable Federal law limits Santa Clara Pueblo jurisdiction to Covered Crimes involving an Indian Victim, except when the alleged criminal conduct involves assault of a Tribal justice personnel or obstruction of justice. Offenses that can be charged against non-Indians in Santa Clara Pueblo for each category of Covered Crimes include:

(a) Assault of Tribal Justice Personnel.
(1) "Assault of Tribal Justice Personnel" means any violation of the criminal law of the Pueblo that involves the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of the Pueblo or serving the Pueblo during, or because of, the performance or duties of that individual in:

(A) preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a covered crime;

(B) adjudicating, participating in the adjudication of, or supporting the adjudication of a covered crime; or

(C) detaining, providing supervision for, or providing services for, persons charged with a covered crime; or

(D) incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a covered crime.

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(2) “Tribal Justice Personnel” may include, but is not limited to, the Santa Clara Pueblo Tribal officials, a law enforcement officer, corrections officer, education staff, teacher, probation officer, parole officer, court monitor, judicial officer, judge, firefighter, emergency medical technician, medical responder, nurse, physician, social worker, clergy, Tribal government employee and Tribal Court staff. Tribal Justice Personnel may include Indians or non-Indians.

(3) Offenses that can be charged against non-Indians over whom the Pueblo asserts jurisdiction for the covered crime “Assault of a Tribal Justice Personnel” include:

(A) Simple assault. It shall be a criminal offense to threaten bodily harm to Tribal justice personnel through use of unlawful force or violence or through verbal threats, threats through the social media or written threats and that person reasonably fears the assault.

(B) Assault and battery. It shall be a criminal offense to willfully strike another or otherwise intentionally inflict bodily injury on another or who shall cause another to harm themselves.

(C) Assault with a deadly weapon. It shall be a criminal offense to assault another, or to attempt to assault another, or to threaten to assault another, or to inflict serious bodily injury, with a deadly weapon.

(D) Assault inflicting serious bodily injury. It shall be a criminal offense to assault another person and to inflict serious bodily injury.

(E) Assault by pointing a firearm or weapon. It shall be a criminal offense to point any firearm or weapon at another, either in fun or otherwise, whether or not the firearm or weapon is capable of discharging a projectile.

Tulalip Tribal Codes
Chapter 4.25 Domestic Violence

4.25.430 Assaulting Legacy of Healing or Children’s Advocacy Center staff.

Any written or verbal threat or any assault upon a person acting in an official or professional capacity in the protection of victims of domestic violence or family violence, sexual assault, stalking or dating violence shall be considered to be an assault of the most serious nature and a Class E offense.

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Tribal Code Commentary

The Eastern Band of Cherokee Indians has created a new offense that mirrors the "assault of Tribal justice personnel" jurisdictional category. As a result, the jurisdictional requirements set forth in VAWA 2022 also become the elements of the new Tribal offense that has been created. The Tribe also had two preexisting offenses, "Assault on law enforcement, probation, or parole officer" (Sec. 14-40.51) and "Assault on a government employee" (Sec. 14-40.53), that could be charged for some of the conduct covered by this jurisdictional category, but not all of it. Both of these offenses also refer to an "assault" rather than "physical force," while the new offense uses the "physical force" language from the Federal statute. Presumably, the Tribe created the new "Assault of Tribal Justice Personnel" offense to make sure that cases did not slip through the cracks and to make clear that the Tribe has criminalized related conduct to the maximum extent allowed under Federal law.

Pascua Yaqui Tribe's code incorporates the Federal definition of "assault of Tribal justice personnel" for jurisdictional purposes and makes clear that the offense that will be charged is the Tribe's aggravated assault offense (Sec. 410). The aggravated assault offense includes assaults against a wide range of individuals, some of whom would fit within the Federal definition and others of whom may not. Because the aggravated assault offense is not an STCJ-specific offense, it also does not have as an element that the assault occurred during or because of duties related to a covered crime. This would, however, still be required for purposes of establishing Tribal jurisdiction.

The Santa Clara Pueblo Code includes the most specificity. It starts with the Federal definition for "assault of Tribal justice personnel" and then includes a non-exhaustive list of who may be considered "Tribal justice personnel." It also includes a list of offenses that can be charged in this jurisdictional category.

As is discussed in earlier chapters, the Tulalip Tribe's code generally asserts that the Tribe has criminal jurisdiction to the maximum extent permitted under Federal law. We have included an excerpt from the Tribal code here to show a specific offense making it a crime to threaten or assault staff working in their child advocacy center or Tribal crime victim services program. This complements other Tulalip Tribe criminal offenses that apply to assaults of law enforcement officers, as well as the Tribe's general assault offense, all of which could be charged in this jurisdictional category depending on the relevant facts. Many Tribes impose higher penalties for assaults of certain professionals than apply to their general assault offense.

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Questions for Consideration

1. Who are the professionals working in your community who you want to be sure are covered under the "assault of Tribal justice personnel" jurisdictional category?

2. What offenses in your criminal code are likely to be charged in this jurisdictional category? Do you want to create any additional offenses? Are the penalties appropriate?

Resources

- Second Facilitated Discussion: Assault of Tribal Justice Personnel and Obstruction of Justice: Second Facilitated Discussion Recording (YouTube) and Second Facilitated Discussion PowerPoint (PDF).
- For comprehensive information on VAWA 2022 see TribalVAWA.org – Assault of Tribal Justice Personnel.
- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.
- Special Domestic Violence Criminal Jurisdiction: Five-Year Report - This report summarizes the results of the first five years of tribal government-expanded criminal jurisdiction over non-Indians under the tribal provisions of the 2013 reauthorization of the Violence Against Women Act (VAWA 2013) (2018).

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Chapter 5.9: Sex Trafficking

Overview

The Violence Against Women Reauthorization Act of 2022 (VAWA 2022) added "Sex Trafficking" as a category of criminal conduct that can be prosecuted against non-Indians. While each jurisdiction may have varying definitions, sex trafficking generally occurs when a commercial sex act is induced by force, fraud, or coercion or in a situation where the person induced to perform a commercial sex act is under the age of eighteen years of age. A commercial sex act can usually consist of any sex act(s) exchanged for anything of value, which can include money, food, shelter, drugs, or anything of value.

Many people think that because it includes the word "trafficking," sex trafficking requires the movement or transportation of the victim from one place to another, but this is not the case. Sex trafficking can occur anywhere, including in private homes, hotels, casinos, truck stops, pow-wow grounds, bus terminals, and shelters. Sex traffickers may be part of organized gangs or criminal enterprises, but they can also be family members, new "friends," community members, business owners, or intimate partners or "boyfriends." No community is immune from sex trafficking.

Some examples of what sex trafficking may look like in your community include:

- A woman has struggled with addiction to meth for more than ten years. Heavily in debt and desperate for drugs, she sells her four-year-old daughter to a local dealer for creating child pornography.

- A recent oil boom near the reservation has brought hundreds of out-of-state workers (mostly men) into the area. The men live in camps (temporary living spaces). Women are tricked into coming to the man camps, where they are held against their will and forced to submit to sexual acts that financially benefit their captors.

- A man promises a fifteen-year-old beer in exchange for sex.

- A man targets a vulnerable teenager by showering her with gifts and attention. She is deeply in love. Soon he tells her he needs her to "be nice to his friends," which means performing sex acts to earn jewelry. This becomes more frequent, and he begins physically abusing her and keeps all the money.

- A teen who identifies as queer runs away from home when his stepfather mistreats him. He camps out in a bus station and meets other runaways who tell him about someone they know who will probably let him stay at his house—for a price.

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For purposes of Special Tribal Criminal Jurisdiction (STCJ), "sex trafficking" is dealt with differently in the Federal statute than all the other covered crimes. *Instead of defining the term and deferring to Tribal law to establish specific criminal offenses, the definition of "sex trafficking" refers you to a Federal statute that defines the elements of a Federal crime.*

25 U.S.C.§ 1304 (a)(12).

(12) Sex Trafficking
The term "sex trafficking" means conduct within the meaning of section 1591(a) of title 18.

Defining the Jurisdictional Category

The VAWA 2022 definition of "sex trafficking" makes clear that Tribes can exercise jurisdiction over conduct that would fall within the scope of 18 U.S.C. §1591(a), which is the Federal sex trafficking statute. To understand what conduct is covered in the "sex trafficking" jurisdictional category for STCJ, we need to examine 18 U.S.C. §1591(a).

18 U.S. Code § 1591 - Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) *[…omitted (sets out federal jurisdictional requirements that aren't relevant)]* recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

Note that there are two separate Federal criminal offenses of sex trafficking: sex trafficking of an adult and sex trafficking of a minor. One of the most important distinctions between the offenses is the proof of force, fraud, or coercion. Sex trafficking of an adult requires proof of force, fraud, or coercion, whereas sex trafficking of a minor does not. Force, fraud, and coercion are legal terms that may vary depending on the jurisdiction and that you may want to address in your Tribal code. 18 U.S.C. §1591(e) provides definitions for "coercion" and other terms used in 18 U.S.C. §1591(a). These include:

- "Participation in a venture" means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1). The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

- "Commercial sex act" means any sex act, on account of which anything of value is given to or received by *any person* (which can include the victim).

- "Coercion" means threats of serious harm to or physical restraint against any person. It also means any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person. The term "coercion" also means the abuse or threatened abuse of law or the legal process.

- "Abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, to exert pressure on another person to cause that person to take some action or refrain from taking some action.

- "Serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

Most of the terms used in 18 U.S.C. 1591(a) are well defined in the Federal law. One that is not is the term "sex act." Best practice would be to define this in your Tribal law if it is not already included in your code. Federal definitions for "sexual act" can be found in several places, none of which apply to the VAWA 2022 statute, but which may be helpful as examples of how the terms could be defined.

In 18 U.S.C. 2246(2) the definition is:

> *(2) the term "sexual act" means—*
>
> > *(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;*
> >
> > *(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;*
> >
> > *(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or*
> >
> > *(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;*

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A different definition can also be found in 10 USC §920: Article 120 (part of the Uniform Code of Military Justice). Here the definitions are:

> *(1) Sexual act.-The term "sexual act" means-*
>
> > *(A) the penetration, however slight, of the penis into the vulva or anus or mouth;*
> >
> > *(B) contact between the mouth and the penis, vulva, scrotum, or anus; or*
> >
> > *(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.*

Note that under 18 U.S.C. §2246(2), touching of a person under 16 is a "sexual act." In 10 U.S.C. §920: Article 20, no mention is made of age. Any conduct under that Article is a sexual act regardless of age.

It is important to note that VAWA 2022's definition of "sex trafficking" says we look to the "conduct" within the meaning of Federal statute 18 U.S.C. 1591(a). "Conduct" starts in 18 U.S.C. 1591(a) with the verbs "recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person." That is the conduct we look to, along with the conduct described in (a)(2) about benefitting or receiving something of value, to see if what has transpired falls within the scope of Tribal jurisdiction.

As long as all the elements of your criminal statute fall within the "conduct" of 18 U.S.C. 1591(a) you can exercise jurisdiction over that crime against a non-Indian Defendant.

Typical Offenses

Your Tribe will likely want to have a sex trafficking offense that aligns with the Federal trafficking offense. Your code may also include offenses that fit within the "sex trafficking" jurisdictional category without being called sex trafficking. For instance, depending on how your tribal offenses are drafted, the following crimes may include all the necessary elements to be prosecuted under STCJ:

- Sex trafficking,
- Promotion of prostitution,
- Solicitation of prostitution,
- Patronizing a prostitute,
- Patronizing a child prostitute,
- Commercial sexual exploitation of a child,
- Promoting commercial sexual abuse of a minor,
- Maintaining a house of prostitution, and
- Online solicitation.

As you work to implement STCJ, you should discuss what types of conduct your Tribe wants to address and whether your existing or proposed Tribal offenses reflect your Tribe's policy priorities. This may present an opportunity for you to update outdated laws and better protect victims. Many older prostitution laws, for example, often punish trafficking victims more harshly than buyers of commercial sex or traffickers. The threat of being prosecuted for prostitution can make a trafficking victim less likely to seek help from law enforcement. Your Tribe may want to update some of those laws to ensure that victims are protected and offenders who exploit others are held accountable. Some jurisdictions have adopted safe harbor laws to protect trafficking victims, particularly children, from being prosecuted for crimes they were forced to commit by their traffickers.

Tribal Code Examples

Umatilla Criminal Code

Chapter 1. Definitions, Tribal Courts, Judges, Court Personnel, and Attorneys

Section 1.01 Definitions

[(A)-(BB) omitted]

CC. **Coercion.** Coercion means:

1. threats of serious harm to or physical restraint against any person;

2. any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

3. the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

4. For purposes of this definition, "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

DD. Commercial Sex Act. "Commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

EE. Covered Crime. For purposes of exercising criminal jurisdiction over non-Indians, the term "covered crime" means:

1. assault of Tribal justice personnel;

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2. child violence;
3. dating violence;
4. domestic violence;
5. obstruction of justice;
6. sexual violence;
7. sex trafficking;
8. stalking; and
9. a violation of a protection order.

[(FF)-(HH) omitted]

II. Sex Trafficking. Sex trafficking means conduct within the meaning of the CTUIR crime of Sex Trafficking (Section 4.11(7)(B)).

Section 4.117. Compelling Prostitution; Sex Trafficking

A. Compelling Prostitution. [Omitted]

B. Sex Trafficking. A person commits the crime of sex trafficking if that person knowingly

1. recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

2. benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion, or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as a felony.

a. For purposes of this subsection, "venture" means any group of two or more individuals associated in fact, whether or not a legal entity; and "participation in a venture" means knowingly assisting, supporting, or facilitating a violation of subsections (1) or (2) above.

b. For purposes of this subsection, in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Tribe need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18. Sex trafficking is a felony.

Chickasaw Code

Title 17 Offenses & Penalties

17-504.6 Sex Trafficking.

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A. It shall be unlawful to knowingly:

1. recruit, entice, harbor, maintain, transport, provide, obtain, advertise, patronize, or solicit another person, while knowing or, except in the case of advertising, in reckless disregard of the fact that force, threats of force, fraud, coercion, or any combination of such means will be used to cause said person to engage in a Commercial Sex Act; or

2. recruit, entice, harbor, maintain, transport, provide, obtain, advertise, patronize, or solicit another person, while knowing or, except in the case of advertising, in reckless disregard of the fact that said person has not attained the age of 18 years and will be caused to engage to engage in a Commercial Sex Act; or

3. benefit, financially or by receiving anything of value, from assisting, supporting, or facilitating a venture that has engaged in an act of recruiting, enticing, harboring, maintaining, transporting, providing, obtaining, advertising, patronizing, soliciting another person, while knowing or, except in the case of advertising, in reckless disregard of the fact that force, threats of force, fraud, coercion, or any combination of such means will be used to cause said person to engage in a Commercial Sex Act; or

4. benefit, financially or by receiving anything of value, from assisting, supporting, or facilitating a venture that has engaged in an act of recruiting, enticing, harboring, maintaining, transporting, providing, obtaining, advertising, patronizing, soliciting another person, while knowing or, except in the case of advertising, in reckless disregard of the fact that said person has not attained the age of 18 years and will be caused to engage to engage in a Commercial Sex Act.

B. Sex Trafficking shall be punishable by a fine not to exceed fifteen thousand dollars ($15,000), by a term of imprisonment not to exceed three (3) years, or by both such fine and imprisonment.

C. In a prosecution under subsection (A)(2) or (A)(4) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Nation need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

D. “Coercion” shall mean:

1. threats of serious harm to or physical restraint against any person;

2. any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to- or physical restraint against any person; or

3. use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

E. “Commercial sex act” shall mean any sex act, on account of which anything of value is given to or received by any person.

F. “Serious harm” shall mean any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the

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surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

G. "Venture" shall mean any group of two or more individuals associated in fact, whether or not a legal entity.

Quapaw Nation Court Codes

Criminal Code (updated 2/6/23)

§166 Sex Trafficking

A. Any person who compels, recruits, harbors, transports, obtains, patronizes, or solicits a person for the purpose of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age, where force, fraud, or coercion is not necessary, is guilty of sex trafficking.

B. "Commercial sex act" means any sex act, on account of which anything of value is given, attempted to be given, planned to be given to, or received by any person.

Tulalip Tribal Codes

Title 3 Criminal Offenses and Infractions

Chapter 3.80 Human Trafficking

3.80.015 Patronizing a child prostitute.

(1) A person commits the crime of patronizing a child prostitute if the person pays, or offers or agrees to pay, a fee to engage in sexual conduct or sexual acts with another person who has not attained the age of 18 years.

(2) "Fee" means something that has economic value and that is exchanged in a transaction that is commercial in character.

(3) Patronizing a child prostitute is a Class F offense.

(4) Patronizing a child prostitute is a registrable sex offense.

3.80.020 Promotion of prostitution.

(1) A person commits the offense of promotion of prostitution if he or she knowingly:

(a) Owns, controls, manages, supervises or otherwise maintains a place of prostitution or a prostitution enterprise; or

(b)Induces, compels, or otherwise causes a person to engage in prostitution or to remain in a place of prostitution; or

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(c) Receives or agrees to receive a fee in return for prostitution activity, other than as a prostitute being compensated for personally rendered prostitution services.

(2) Definitions.

(a) "Fee" means something that has economic value and that is exchanged in a transaction that is commercial in character.

(b) "Place of prostitution" means any place where prostitution is practiced.

(c) "Prostitute" means a person who is promised to engage in or engages in sexual conduct or sexual contact for a fee, regardless of to whom the fee is given or owed.

(d) "Prostitution enterprise" means an arrangement whereby two or more prostitutes are organized to conduct prostitution activities.

3.80.040 Human trafficking.

(1) A person commits the crime of human trafficking by knowingly recruiting, harboring, transporting, providing, selling, or obtaining by any means any person with knowledge or intent that such person be used for labor or services in violation of this chapter.

(2) Human trafficking is a Class F offense.

(3) Conviction and punishment for human trafficking shall be in addition to the punishment provided for any related crimes. Notwithstanding any other provision of law, the Court shall not run a sentence for violating this section concurrently with any other terms of imprisonment.

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Tribal Code Commentary

The Confederated Tribes of the Umatilla Indian Reservation (Umatilla) code is essentially a verbatim rendition of the Federal statute. The only real difference is the Tribal code does not include the definition of "abuse or threatened abuse of law or legal process" and participation in a venture from 18 U.S.C. 1591(c). The Tribe includes a section (c), their penalty statement, and section (d) related to obstruction of enforcement.

The Chickasaw Nation code repeats the Federal language about recruiting, enticing, etc., once for adults – requiring force, fraud or coercion. The code repeats that with the force or fraud language omitted for minors. The code sets out the financial benefit for adults and then for minors. Again, the difference is the adult sections require force or fraud. The Tribe has not included the definitions of "abuse of law or legal process" and "participation in a venture."

The Quapaw Nation code is very condensed but has all the required elements and tracks Federal law. The only definition the Tribe includes here is that of "commercial sex act." None of the Tribal sex trafficking codes include a definition of "sex act."

The Tulalip Tribes do not have a stand-alone sex trafficking offense. Instead, the code includes offenses that cover patronizing a child prostitute, promotion of prostitution, and human trafficking. The "promotion of prostitution" code section requires the person to compel or cause a person to engage in prostitution. It also covers requiring the receipt of a fee. "Fee" is defined as something with economic value. Importantly, promotion of prostitution does not require fraud, force, or coercion, which VAWA 2022 requires for the Tribe to exercise jurisdiction (unless the victim is a minor). Similarly, the human trafficking offense also does not have fraud, force, or coercion as an element. If Tulalip wanted to charge a non-Indian STCJ defendant under this offense for conduct involving an adult victim, the Tribe would need to prove all of the elements of the offense(s) and would also need to establish that the conduct fit within the bounds of the Federal jurisdictional category by proving fraud, force, or coercion.

Questions for Consideration

1. Do you know if sex trafficking is occurring in your community? Do you know where sex trafficking occurs in your Tribal community? Where do you think sex trafficking occurs?

2. Do you have a sex trafficking offense? Do you have prostitution related offenses? Do your current offenses contain all or only some of the conduct outlined in the Federal statute?

3. Are there offenses that fall within sex trafficking conduct that need to be added to your code? Or could be added?

4. Are there definitions within sex trafficking codes, either Federal or Tribal, that you believe need further definitions in your code? What are those? What are some of the advantages or disadvantages of defining these terms?

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Resources

- Fifth Facilitated Discussion: Alaska Provisions and Sex Trafficking: Fifth Facilitated Discussion: Alaska Provisions and Sex Trafficking (YouTube) and Fifth Facilitated Discussion: Alaska Provisions and Sex Trafficking (PDF)
- Sex Trafficking in Tribal Communities and VAWA 2022 Webinar Special Tribal Criminal Jurisdiction - YouTube
- For comprehensive information on VAWA 2022 see TribalVAWA.org – Sex Trafficking.
- Tribal Sex Trafficking Resources: https://www.Tribaltrafficking.org/
- Sex Trafficking in Indian Country: Advocacy Curriculum:

  The Sex Trafficking in Indian Country: Advocacy Curriculum (Curriculum) is designed to introduce information on sex trafficking of Native people, covering topics such as the definition of sex trafficking, red flags, trafficker tactics, screening for sex trafficking, and advocacy roles and responsibilities. The Curriculum consists of three components: Instructor Guide, Participant Workbook, and PowerPoints (2020).

  The Curriculum has not yet been updated to reflect VAWA 2022.

- Overview of VAWA 2013 and VAWA 2022 Tribal Jurisdiction Provisions: Webinar overview of the Violence Against Women Act (VAWA) 2022 Resources (Recorded April 21, 2022) (Video Recording) (PowerPoint PDF). This webinar provides an overview of the Violence Against Women Act Reauthorization bill (VAWA) 2022. The webinar discusses the VAWA 2013 and 2022 Tribal Jurisdiction Provisions.

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Part C: Due Process and Procedural Requirements

Overview

The Indian Civil Rights Act of 1968 (ICRA) extends many protections similar to those found in the U.S. Bill of Rights to individuals under Tribal jurisdiction. These rights are codified at 25 U.S.C. § 1302-1304. The Indian Civil Rights Act has been amended several times since 1968:

- 1986 – Anti-Drug Abuse Act (Pub. L. 99-570) to increase the sentencing limitations.
- 1991 – "Duro-Fix" to overturn to overturn *Duro v. Reina*, 495 U.S. 676 (1990).
- 2010 – The Tribal Law and Order Act of 2010 (TLOA) amended ICRA to require Tribal governments to guarantee an additional set of rights when imposing sentences longer than one year (felony sentences).
- 2013/2022 – Congress again amended ICRA in the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) and Violence Against Women Reauthorization Act of 2022 (VAWA 2022) to require Tribal governments to provide additional due process protections when a Tribe prosecutes non-Indian defendants.

As a result of TLOA and VAWA's amendments to ICRA, Federal law guarantees different rights to defendants in Tribal courts depending on the length of their possible sentence and their Indian or non-Indian status.

Tribes have responded to these differing requirements under Federal law in various ways:

- Some Tribal courts have extended all of the possible due process rights to all defendants, regardless of Indian-status and regardless of the possible length of sentence.
- Some Tribal codes provide some of the Special Tribal Criminal Jurisdiction (STCJ)-required due process protections only to non-Indians.
- Some tribal courts have established a "domestic violence docket," to prosecute domestic violence related crimes; all defendants, regardless of Indian status, are guaranteed the additional due process protections of STCJ. More information on domestic violence courts and domestic violence dockets can be found at: www.home.tlpi.org/domestic-violence-series.

Throughout this document, Tribal court codes will reflect these different models.

This part covers the procedural requirements that need to be adopted by Tribes exercising STCJ. These were discussed earlier in Part 1 and are summarized in the table on the following page. As you can see in this table, there is considerable overlap between the requirements for enhanced sentencing under the TLOA and jurisdiction over non-Indians under VAWA. A Tribe who is implementing STCJ does not have to also implement TLOA enhanced sentencing and vice versa, but if you have implemented one, you are very close to being ready to implement the other.

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TLOA and VAWA 2013 Due Process Requirements	TLOA	VAWA
Defendants are provided with effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution.*	X	X
Tribal government provides to an indigent defendant a defense attorney licensed to practice by any jurisdiction in the United States.*	X	X
Defense attorney is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.*	X	X
Judges presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants have sufficient legal training to preside over criminal trials.*	X	X
Any judge presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants is licensed to practice law by any jurisdiction in the United States.*	X	X
The Tribe's criminal law, rules of evidence, and rules of criminal procedure are made available to the public prior to charging the defendant.*	X	X
Tribal court maintains a record of the criminal proceeding, including an audio or other recording.*	X	X
Any defendant sentenced under either act is sentenced to a facility that passes the Bureau of Indian Affairs (BIA) jail standards for enhanced sentencing authority.	X	X
Tribal court provides the defendant the right to a trial by an impartial jury.	X[43]	X
Tribal court ensures that the jury reflects a fair cross-section of the community.		X
Tribal court ensures that juries are drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians.		X
Tribal court ensures that anyone detained under SDVCJ is notified in writing of his or her rights and responsibilities.		X
Tribal court ensures that a defendant is notified of his or her right to file "a petition for a writ of habeas corpus in a court of the United States."		X
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.		X

*_Note_: These due process protections are required under VAWA _if_ a term of imprisonment of any length may be imposed.

[43] Implicit in 25 U.S.C. § 1302(10).

It is important to note that most of the procedural requirements for exercising STCJ have remained unchanged since VAWA 2013 was enacted. That means that many Tribes have more than ten years of experience successfully meeting these requirements. They have not all done it the same way and have tailored their approaches to best fit the needs of their communities.

The VAWA 2013 statute originally created a pilot project that allowed some Tribes to implement the law earlier with special permission from the U.S. Attorney General. To participate in the Pilot Project, Tribes submitted an application to the United States Department of Justice (U.S. DOJ), which demonstrated compliance with all of VAWA 2013's procedural requirements. Five Tribes were approved by DOJ to participate in the original VAWA 2013 Pilot Project:

- Confederated Tribes of the Umatilla Indian Reservation,
- Pascua Yaqui Tribe,
- Tulalip Tribes,
- Assiniboine and Sioux Tribes of the Fort Peck Reservation, and
- Sisseton-Wahpeton Oyate Tribe.

We have often drawn on examples from these Tribes' codes in this section because of the thorough review and subsequent approval they received from the U.S. DOJ. Despite the changes made in VAWA 2022, the applications from the original Pilot Project Tribes continue to be helpful to Tribes contemplating implementation who are looking for examples about how to meet the due process requirements of ICRA for prosecuting non-Indians.

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Chapter 6: Publication of Laws and Rules

Overview

Prior to exercising Special Tribal Criminal Jurisdiction (STCJ), the Indian Civil Rights Act (ICRA) requires that a Tribe must make its criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure available to the public.

> **25 U.S.C.§ 1302.**
>
> **(c) Rights of defendants**
>
> …the Indian Tribe shall—
>
> 4) prior to charging the defendant, ***make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances)*** of the Tribal government

Given the serious consequences of a criminal conviction, it is a fundamental principle of due process and fairness that laws must be clearly written, publicly accessible, and provide adequate notice to individuals of what is required or prohibited. This means that before any non-Indian can be formally accused of breaking a Tribal law, the Tribe must make sure that the laws governing criminal offenses, how evidence is handled in court, and the procedures for trying criminal cases are available to the public. This is important because it ensures that everyone, including defendants, attorneys, and community members, can clearly understand the rules that govern criminal justice within the Tribe. It also likely includes making available any regulations or official documents that help interpret the laws, such as court decisions or other materials that explain how the laws should be applied.

Additionally, the Tribe must make rules available that govern how criminal trials are conducted, including when a judge should step aside from a case due to conflicts of interest or bias, known as "recusal." These rules ensure fairness in the legal process by providing guidelines on when a judge may need to disqualify themselves. In short, the Federal law requires that Tribal governments create transparency and provide clear guidance on how criminal cases will be handled, making it possible for everyone involved to know the rules and understand the legal process.

The Federal statute does not specifically define what constitutes "publicly available." However, as a general rule, it is likely sufficient if the Tribe's documents are as readily accessible as comparable State documents. This means the laws, rules, and interpretive materials could be published in books available at law libraries, included in legal databases, or made available online. When making these decisions, it is important to consider the Tribe's budget. While Tribes are not required to provide these documents for free, they cannot charge a disproportionately large fee for access. This ensures that the necessary information is reasonably accessible to the public without creating financial barriers.

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Few Tribes have specific laws or rules relating to how they will make their laws and codes publicly available. The creation and maintenance of a system of publication is often considered an administrative process. To meet the requirement of Federal law, some Tribes include in their code a provision that simply mirrors the Federal language and states that the laws must be publicly available.

The following are two examples of Tribal code publication provisions included in a Tribal code. Because the Federal requirement specifically mentions the need to have provisions for recusing judges, several examples of recusal provisions in Tribal codes are also included.

Tribal Code Examples

Examples of Provisions for Publication of Laws and Rules

Pascua Yaqui Tribe Tribal Code
TITLE 1 – GENERAL PROVISIONS
CHAPTER 4 – CODE REVISIONS

Section 70 Publication and Distribution (1 PYTC § 4-70)

(A) The Code Reviser shall, on a monthly basis beginning on the date on which the Revised Tribal Code is adopted, update the Tribal Code and post an electronic version of the updated Tribal Code on the Pascua Yaqui Tribe official web site and internal intranet website.

(B) The Code Reviser shall, on a semi-annual basis beginning on the date on which the Revised Tribal Code is adopted, prepare, arrange, and collate a hardcopy version of the Tribal Code for the permanent files of the Code Reviser, which shall be available for viewing upon request.

(C) The complete Tribal Code including all updates shall be available online in an electronic format as noted above in subsection (A). The Code Reviser shall give information on how to access the Tribal Code online to all requesters.

Sisseton-Wahpeton Oyate Code of Laws
Title 23 – Amended Criminal Procedure Code
Chapter 8 – Rights of Defendants in Criminal Cases

23-08-03
(4) Prior to charging the defendant, the Tribe shall make publicly available the criminal law, rules of evidence, and rules of criminal procedure.

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Examples of Provisions for Recusing Judges

Eastern Band of the Cherokee Indians Tribal Code
(version Dec. 11, 2024)

Chapter 7 – Judicial Code
Sec. 7-15. - Conflict of interest.

Any Justice or Judge with a direct personal or financial interest in the outcome of any matter shall recuse himself or herself, and failure to recuse shall constitute grounds for impeachment and removal from office.

Gila River Indian Community Criminal Code
(Amended May 15, 2013)
Chapter 15. Criminal Procedure

5.1514. Change of Judge.

A. For Cause. Any party may move the court for a change of judge based on any of the following grounds:

1. That the judge is interested in the action;

2. That the judge is a kin or related to either party;

3. That the judge is a material witness to the action; or

4. That the party making the motion has cause to believe and does believe that on account of the bias, prejudice, or interest of the judge, he cannot obtain a fair and impartial trial.

B. A judge, other than the challenged judge, shall hear the motion for change of judge. If the hearing judge determines by a preponderance of the evidence that grounds exist for change of judge for cause, the matter shall be reassigned to another judge.

Entitlement. Each party has the right to a change of judge.

Gila River Indian Community Rules of Criminal Procedure
RULE 10. CHANGE OF JUDGE.

Rule 10.1. Change of Judge.

a. Change of Judge for Cause. Any party may file a motion verified by affidavit of the moving party alleging the specific grounds for change of judge.

1. The grounds which may be alleged for change of judge shall be subject to the requirements in the GRIC Code § 5.1514.A.

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2. Within 10 days after discovery that grounds exist for change of judge, but not after commencement of trial, any party may file a motion verified by affidavit of the moving party alleging the specific ground for change of judge.

3. Except for commencement of trial, no event occurring before discovery of the grounds shall constitute a waiver of rights to change of judge for cause.

4. Allegations of interest or prejudice which prevent a fair and impartial hearing may be preserved for appeal.

5. The court shall set the matter for hearing, which shall be held within 10 days after filing of the motion for change of judge.

6. The Chief Judge shall assign the matter to a judge ("hearing judge") other than the challenged judge, who shall hear the motion for change of judge and decide the issues by preponderance of the evidence. The hearing judge shall provide his findings to the Chief Judge within five days of the hearing. The Chief Judge will either assign the case back to the original judge if the hearing judge finds by preponderance of the evidence that no grounds exists for change of judge, or will make a new assignment if the hearing judge finds by preponderance of the evidence that grounds exists for change of judge for cause.

b. Change of Judge upon Request. Each side in a criminal case is entitled as a matter of right to a change of judge. Each case, whether single or consolidated, shall be treated as having only two sides; except that when two or more parties on a side have adverse or hostile interests, the Chief Judge may allow additional changes of judge as a matter of right. The right to a change of judge for entitlement does not apply to petitions for postconviction relief or remands for sentencing.

1. A party may exercise his right to change of judge for entitlement by filing a pleading with the court entitled "Notice of Change of Judge," signed by counsel or advocate, if any, stating the name of the judge to be changed. The Notice of Change of Judge shall include an avowal that the request is made in good faith and not: for the purpose of delay; to obtain a severance; to interfere with the reasonable case management practices of a judge; to remove a judge for reasons of race, gender, or religious affiliations; for purposes of using the rule against a particular judge in a blank fashion by the prosecutors or defense attorney or advocate; to obtain advantage or avoid disadvantage in connection with a plea bargain or at sentencing, except as allowed under Rule 17.

2. A Notice of Change of Judge shall be filed within 10 days after arraignment. If the party fails to file the notice within 10 days after arraignment or participates in any contested matter in the case before the challenged judge the party loses the right to change of judge under entitlement. The Chief Judge shall reassign the case to a new judge within five days after filing of a Notice of Change of Judge, and the clerk shall provide written notice of the reassignment which names the new judge to the parties within five days of the reassignment.

When a motion or request for change of judge is timely filed under this rule, the challenged judge shall proceed no further in the action, except to make such temporary

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orders as may be necessary in the interests of justice before the motion or request of change of judge is decided.

Tulalip Tribal Code (Current through November 1, 2024)
Title II. TRIBAL JUSTICE SYSTEM
Chapter 2.05 Tribal Court

2.05.060 Disqualification of Judges and Magistrates.

(1) As a Matter of Right. A defendant, or other party, to any legal proceedings may accomplish one automatic change of assignment of the case from one Judge or Magistrate to another upon filing an affidavit of prejudice with the Court, stating that the Judge assigned to the case is prejudiced against their case. Such affidavit shall be in written form and must be filed with the Court within 10 days of assignment or reassignment of the trial Judge or before any discretionary ruling, whichever comes first. Rulings made at arraignment, the first appearance, or the initial bail hearing shall not be considered discretionary rulings for purposes of this rule.

(2) For Cause. A defendant, or other party, to any legal proceedings may accomplish a second change of assignment of the case from one Judge or Magistrate to another upon filing an affidavit of prejudice with the Court. A Judge shall be disqualified for cause if an affidavit alleging interest or prejudice that would prevent a fair and impartial trial is ruled to be founded by a preponderance of the evidence after review by the Chief Justice of the Tulalip Court of Appeals. If an affidavit alleging interest or prejudice that would prevent a fair and impartial trial is filed against the Chief Justice of the Tulalip Court of Appeals, the Chief Justice shall recuse him- or herself from the matter. Such affidavit shall be in written form and must be filed by the party alleging such interest or prejudice within 10 days of discovery of the facts supporting the affidavit, unless good cause is shown for later filing.

(3) Recusal. A Judge may recuse himself or herself upon grounds that he or she deems sufficient.

Tribal Code Commentary

"Publicly Available" Requirement

While Federal law requires that Tribal laws are "publicly available" this is not something that necessarily needs to be addressed in the Tribal code. The Sisseton-Wahpeton Tribal Code is an example of how the Federal requirement can be adopted as part of the Tribe's law by simply reiterating that the laws will be made publicly available before STCJ is exercised.
The Pascua Yaqui Tribal Code provides a more detailed provision for publication and distribution of the Code. It includes a provision detailing the process by which the Code is to be made publicly available. Title 1 § 4-70 indicates that a Code Reviser is to update the Code monthly using the Internet and maintain a hardcopy on a semi-annual basis.

Most Tribes use the Internet to make their criminal laws, rules of evidence, and rules of criminal procedure publicly available. Some, including the Gila River Indian Community, do this by posting pdf documents on the Tribe's own website. The Gila River Indian Community Code

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(including the criminal laws, rules of evidence, and rules of criminal procedure) is available on their community website as posted pdf documents. The community also reports that they have hard copies of the code available at the Tribal library, jail, and the seven district service centers throughout the reservation. The Gila River Indian Community has included legislative history of the criminal code within its criminal code.

Other Tribes use code publishing services to help make their codes publicly available. The Eastern Band of Cherokee, for example, has listed its code (including criminal laws, rules of evidence, and rules of criminal procedure) online through a third-party code publishing service. As is typical with these types of services, Eastern Band is charged a monthly fee and users can view, print, and e-mail the code for free. The Tribe also keeps copies of their Tribal code (including the criminal laws, rules of evidence, and rules of criminal procedure) at their Tribal building. Copies of the code are also distributed to all of the Tribal programs. The code is available to the public in all of these locations.

Judicial Recusal Provisions

A Tribe may articulate in either its code or its court rules the circumstances in which a judge should recuse himself or herself from presiding over a case. These will generally involve circumstances in which the judge has a personal or financial stake in the outcome of the case or for other reasons cannot be fair or impartial. The details of the procedures for recusal are not usually contained in the statute but rather are usually found in the court rules or judicial standards of conduct.

The example from Eastern Band of Cherokee illustrates a typical code provision regarding judicial recusal.

The excerpt from the Salt River Pima-Maricopa rules illustrates a typical procedure for handling recusal situations.

The Tulalip Code goes into more detail, providing parties with a right to one automatic change of judge if the party files an affidavit within the specified time stating that the judge assigned to the case is prejudiced. The party may be entitled to a second reassignment of the case if the party is able to demonstrate prejudice. A judge may also choose to recuse “himself or herself upon grounds that he or she deems sufficient.”

The excerpt from the Gila River Indian Community code and rules illustrates more fully the relationship between statutory provisions regarding recusal and rules of procedure implementing those provisions. Note that the rules of procedure provide more detail about the process, including the paperwork that must be filed, the time for filing it, and the hearing on the matter.

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Questions for Consideration

The following questions are meant to guide you to ensure the requirements of public availability of code, rules of court, rules of evidence, rules of procedure, and legislative history are met, as required by VAWA 2022.

1. Does your nation publish its laws, court rules, and rules of procedure and rules of evidence? If so, where? Are they easily accessible? If not, will your nation place any requirements of publication in its code?

2. Does your current code require publication of code, rules, legislative history, etc.?

3. Does your nation currently have a method by which legislative history can be accessed by the public? If so, discuss and describe the method?

4. Do you currently have rules regarding the recusal of judges? If so, are they publicly available? Are they effective? If not, how should they be amended?

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5. What is your plan to make each of these items publicly available?
    - Tribal Code
    - Rules of Evidence
    - Rules of Criminal Procedure
    - Court Rules
    - Court decisions or other interpretive documents

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Chapter 7: Defense Counsel Requirements

Overview

A Tribe exercising criminal jurisdiction over non-Indians is required by Federal law to provide an attorney to any defendant who faces a term of incarceration and cannot afford one (this is commonly referred to as being "indigent").

> **25 U.S.C.§ 1302 (c) Rights of defendants**
>
> …the Indian Tribe shall—
>
> (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
>
> (2) at the expense of the Tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

Court-appointed attorneys must provide effective assistance, be licensed, and meet professional standards.

Your Tribe may already have a system for providing representation to defendants. If so, you should review that system to make sure it fits the standards required by the Indian Civil Rights Act of 1968 (ICRA). Tribes should also be aware that while Federal law requires that attorneys be provided to defendants who cannot afford one, Tribes are free to provide an attorney to every defendant, if they wish to do so. The main reason to limit who gets a court-appointed attorney is the cost to the Tribe of providing one.

The three key parts of ICRA to remember with respect to defense counsel in Special Tribal Criminal Jurisdiction (STCJ) cases are that:

1. The Tribe must provide an attorney to every indigent person charged with a STCJ crime at the Tribe's expense;
2. The attorney must be licensed to practice law by a licensing board that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys; and
3. The court must ensure that the attorney provides, at a minimum, effective assistance of counsel equal to that of the U.S. Constitution.

In Your Community

- How will your nation define indigent?
- What will be cost effective in providing indigent defense in your nation: contract attorneys, public defender's office, or something else?
- How will your nation ensure that defense attorneys are competent?

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Providing Indigent Counsel

The process for appointing a defense attorney usually begins when the defendant is charged with a crime and first appears in court. At that point, the defendant can request a court-appointed attorney. The court will review the Tribe's requirements for eligibility and appoint an attorney if the defendant qualifies.

The first question for a Tribe, then, is to determine who will be eligible for a court-appointed lawyer. This includes determining whether all defendants in Tribal court will have access to court-appointed attorneys or if it will be limited only to STCJ defendants who face incarceration, which is the minimum requirement under ICRA. Tribes who are exercising criminal jurisdiction over non-Indians have taken different approaches to this and examples of these approaches are discussed in the text that follows.

The Tribe will also need to determine how it will define "indigent." That is, when will a defendant be considered too poor to hire his or her own attorney? Tribal approaches to this question are also discussed in the following text.

Once a Tribe has decided who will qualify for a court-appointed defense attorney, the Tribe must decide what system it will use for appointing an attorney. Several types of systems exist. The three most common systems are a Tribal public defender office, a contract system, and a pro bono or required service system.

If the Tribe has a public defender's office, the court will appoint that office to represent the defendant. A public defender system is one in which the Tribe establishes a special office and hires attorneys to work as attorneys for defendants who cannot afford their own lawyers. The benefit of a public defender system is that the attorneys are specialized in criminal defense work and the cost of running the office is more predictable. There are two disadvantages to a public defender system. First, a Tribe needs to be able to accurately predict how many defendants will require a court-appointed lawyer, and that number must be sufficient to require full-time defense attorneys. It must also be a consistent number of defendants. Second, there must be a way to handle what are called "conflicts." There are times when an attorney will not be able to represent a particular client because doing so would be an ethical conflict. If the attorneys in the public defender office cannot represent a defendant, the Tribe must have an alternate means of appointing an attorney.

The usual way to handle conflicts is to have a contract system. A contract system can also be an alternative to having a public defender office at all. A contract system means the Tribe has entered into an agreement with an attorney (or attorneys). The agreement provides that the attorney will accept court appointments to serve as defense counsel and sets the fees that the attorney will receive in return for that work. The main advantage to a contract system is that the Tribe only has to pay the attorney when the attorney is needed. If a Tribe does not require a full-time defense attorney, this can be a more cost-effective alternative. The disadvantages are that contract attorneys may not be as skilled at criminal defense work and that the costs are not as predictable.

A third type of system is one in which attorneys who are members of the Tribal bar association are required to take turns accepting court appointments to serve as defense counsel. This service is usually "pro bono," which means the attorney donates his or her time. These pro bono or required service systems do not usually work very well because it is difficult to ensure the

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attorney has the skills required to do criminal defense work and that the attorney has sufficient time to spend on the case.

No matter what system the Tribe chooses to use, it must ensure that the attorneys who serve as defense counsel meet the minimum standards required by ICRA. Those standards have two parts: a basic competency standard and a licensing requirement.

Licensing Requirement for Court-Appointed Attorneys

ICRA requires that court-appointed attorneys in STCJ cases be licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys. Tribes have a number of options for satisfying these requirements, including:

1. Creating its own Tribal licensing procedure,
2. Requiring membership in a State bar association, and
3. Requiring membership in the bar association of another Tribe (provided that Tribal bar satisfies the requirements).

While some Tribes use lay advocates or lay defenders in their courts, these individuals will not meet the requirements of the ICRA if they are not licensed attorneys.

Effective Assistance of Counsel

ICRA requires that a Tribe provide an STCJ defendant with a right to effective assistance of counsel at least equal to that required by the U.S. Constitution. The Federal and State courts have developed a large body of law defining what "effective assistance of counsel" means. To prove ineffective assistance of counsel, a defendant must show not only that the attorney was deficient but also that there is a reasonable probability that the outcome of the proceeding would have been different if their attorney had not been deficient.[44] This is known as the *Strickland* test.

A Tribe may choose to adopt the standard used by the Federal and State courts or to create its own standard for effective assistance of counsel. This could be done in the code or through decisions in Tribal court cases. A Tribe may also choose to adopt the same test but apply it differently. But at a minimum it must meet the *Strickland* test and any changes to that test the U.S. Supreme Court may make in the future.

Tribal Code Examples

STATUTES of the CONFEDERATED TRIBES of the UMATILLA INDIAN RESERVATION
(Amended June 26, 2023)
CRIMINAL CODE AND PROCEDURES

[44] *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that the right to counsel under the Sixth Amendment includes the right to effective counsel, however in order for a decision to be overturned a defendant must show a sufficient likelihood that the deficient representation prejudiced the defense, depriving them of a fair trial).

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Chapter 3. CRIMINAL PROCEDURE
PART VI. SENTENCING

Section 3.28. DEFENDANT'S RIGHTS

A. Every defendant is entitled to those rights enumerated in the Indian Civil Rights Act, 25 U.S.C. 1302.

B. Every defendant has the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.

C. The Tribes shall provide any indigent defendant, at trial and on appeal, the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States, including Tribes, provided that jurisdiction applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.

Confederated Tribes of the Umatilla Indian Reservation of Oregon Rules of Court
GENERAL RULES OF THE COURT
(Rules 1 – 10 Omitted)

Rule 11 Advocates or Attorneys

a. Any person appearing in Tribal court may be represented by a duly admitted advocate or attorney. The person shall authorize his or her representation in writing and request permission of the court to allow such representation. The presiding judge shall approve or deny the request.

b. Any person who is an active member in good standing of any Tribal or state bar association is eligible for admission to the bar of the Umatilla Tribal Court.

c. Application for admission shall be made by filing an admission fee of $100.00 and a petition setting forth: name, birth date, sex, residence/office address, general and specific legal education and experience, reference from one bar association member with whom they are personally acquainted, any past or pending disciplinary actions to which she may be subject, any other information as required by the court.

d. If the court is satisfied that the applicant is of good moral character and professional standing, the petition shall be granted and the applicant may take the oath of admission.

Confederated Tribes of the Umatilla Reservation
Criminal Court Directive VAWA (Effective January 22, 2014)

1. Public Defender Eligibility. Every indigent criminal defendant has a right to be represented by an attorney free of charge. Typically, the court will appoint a public defender regardless of income if a defendant requests representation. However, in the event future resources limit the ability of the Court to provide counsel to everyone, the following schedule will apply to the determination of eligibility for a public defender. It is based on 150% of the 2014 federal poverty level. The Court also

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reserves the right to appoint a public defender to any criminal defendant even if they exceed income qualifications.

# of Persons in Family/Household	
1	$17,235
2	$24,265
3	$29,295
4	$35,325
5	$41,355
6	$47,385
7	$53,415
8	$59,445
For Each Additional Person Add $6,030	

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Pascua Yaqui Tribe Tribal Code
TITLE 3 – COURTS AND RULES OF COURT
PART II – RULES OF COURT
CHAPTER 2-2 – RULES OF CRIMINAL PROCEDURE (adopted July 27, 2022)

SUBCHAPTER F RIGHTS OF THE DEFENDANTS

Section 410 Right to Counsel (3 PYTC § 2-2-410)

(A) At the initial appearance the defendant shall be informed of his right to be represented by counsel in any criminal proceeding at his own expense, except in those petty offenses such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty. The right to be represented shall include the right to consult with counsel as soon as feasible after a defendant is taken into custody, at reasonable times thereafter and sufficiently in advance of a proceeding to allow adequate preparation therefore.

(B) An indigent defendant shall be entitled to have an attorney or a Tribal court advocate appointed to represent him or her at the Tribe's expense in any criminal proceeding in which the Tribe is seeking punishment by loss of liberty. At the initial appearance, the Tribe shall inform the Court whether or not the Tribe seeks punishment by loss of liberty. If the Tribe elects to seek punishment by loss of liberty at any time subsequent to the initial appearance, the Tribe shall notify the Court not later than thirty days before trial, and counsel shall be appointed by the Court.

(C) If the charges facing an defendant could result in loss of liberty of one year or more or a fine of greater than $5,000, or the defendant is facing any length of imprisonment and is charged under 25 U.S.C. §1304, then the defendant shall have the right to an attorney licensed to practice law in both the Pascua Yaqui Tribal Courts and in any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys. If the defendant is determined to be indigent, then the Court will appoint such licensed attorney at the Tribe's expense.

(D) A defendant may waive his or her rights to counsel in writing, after the court has determined that he or she knowingly, intelligently and voluntarily desires to forego them. A defendant may withdraw a waiver of the right to counsel at any time, but will not be allowed to repeat any proceeding already held solely on the grounds of the waiver and consequent lack of counsel.

Section 420 Determination of Indigence (3 PYTC § 2-2-420)

(A) The term "indigent" as used in this Chapter means a person who is not financially able to employ counsel.

(B) A defendant desiring to proceed as an indigent shall complete under oath a questionnaire concerning that defendant's financial resources, on a form approved by the Chief Judge. The defendant shall be examined under oath regarding defendant's financial resources by the judge presiding at the defendant's initial hearing.

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(C) After a determination of indigence or non-indigence has been made by the court, if there has been a material change in circumstances, either the defendant, the appointed attorney, or the prosecutor may move for reconsideration of that determination.

Section 430 Manner of Appointment (3 PYTC § 2-2-430)

(A) Whenever counsel is appointed, the court shall enter an order to that effect, a copy of which shall be given or sent to the defendant, the attorney appointed, and the prosecutor.

(B) The public defender shall represent all persons entitled to appointed counsel whenever he or she is authorized by law, and able in fact to do so.

(C) If the public defender is not appointed, an attorney or advocate under contract with the Tribe to provide conflict criminal defense services shall be appointed to the case.

(D) On appeal of a matter requiring appointment of counsel under 3 PYTC § 2-2-310 (B), the trial or Appellate Court shall appoint new counsel for a defendant legally entitled to such representation when prior counsel has been permitted to withdraw.

Fort Peck Tribes Comprehensive Code of Justice
Title 2 - Courts
Chapter 5. Attorneys and Lay Counselors.

Sec. 503. Right to counsel.

Any person at his/her own expense may have assistance of counsel in any proceeding before the Tribal Court. The Tribal Court in its discretion may appoint counsel to defend any person accused of a crime.

Chapter 6. Tribal Court Prosecutor and Public Defender (amended by resolution 8/17/23)

Sec. 608. Office of Tribal public defender

The Tribal Executive Board may appoint a Tribal public defender and any assistants it deems necessary by majority vote of those voting at a meeting of the Tribal Executive Board at which a quorum is present.

Sec. 609. Qualifications

(a) To be eligible to serve as Tribal public defender or assistant defender, a person shall

(1) Be at least twenty-one (21) years of age;

(2) Be of high moral character and integrity;

(3) Not have been dishonorably discharged from the Armed Services;

(4) Be physically able to carry out the duties of the office; and

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(5) Successfully completed, during their probationary period, a bar examination administered as prescribed by the Tribal Executive Board;

(6) A public defender who has a Juris Doctor degree from an ANA accredited law school, passed the Fort Peck Bar Exam, taken the oath of office and passed a background check is sufficiently qualified under the Indian Civil Rights Act to represent a defendant imprisoned more than one year and any defendant charged under the Tribes' Special Tribal Criminal Jurisdiction.

Title 6 - Criminal Procedures
Chapter 4. Arraignment and Release
Sec. 401. Arraignment.

(Sections a – c Omitted)

(d) If the accused is arraigned pursuant to the Fort Peck Tribes Special Tribal Criminal Jurisdiction over non-Indians, the accused has the right to obtain counsel at the expense of the Fort Peck Tribes and the right to a reasonable continuance to obtain counsel. The right to appointed counsel continues through the appeals process.

Title 7 – Criminal Offenses
Chapter 2. Crimes Against Persons
Subchapter E. Crimes Against the Family

Sec. 249. Special Tribal criminal offense.

(Sections a – c Omitted)

(f) Rights of Defendants. In any criminal proceeding in which Special Tribal Criminal Jurisdiction is exercised, the defendant shall be entitled to:

(1) All applicable rights under the Indian Civil Rights Act, 25 U.S.C. 1301-1304;

(2) If a term of imprisonment of any length may be imposed, the Tribal Court shall:

(A) Provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(B) At the expense of the Fort Peck Tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys…

Tribal Code Commentary

The Confederated Tribes of the Umatilla Indian Reservation Code states that the Tribes will provide an attorney to any indigent defendant both at trial and on appeal and articulates the standards set out in the relevant ICRA provision. The Umatilla Tribes then go on to provide more detail in the court rules about the qualifications of attorneys. This approach provides flexibility, as court rules are often easier to update and change than statutes. The effective assistance of counsel standards will often be addressed more fully by the courts in opinions. In practice Umatilla contracts out cases to local State bar licensed attorneys who practice criminal defense

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in surrounding communities. The Umatilla Court has also issued a directive detailing income requirements to be considered indigent. In practice, Umatilla reports that they generally appoint State-licensed public defenders to any criminal defendant that requests one, including on appeal.

The Pascua Yaqui Tribal Code entitles an indigent defendant in any criminal matter that involves "punishment by loss of liberty" to a court-appointed attorney. For more serious offenses or charges brought under STCJ there is a heightened requirement that the appointed attorney be licensed in both Pascua Yaqui Tribal Courts and any jurisdiction of the United States.

The Fort Peck Tribes guarantee counsel for anyone who cannot afford it for crimes under STCJ. The right to counsel continues through the appeals process.

Questions for Consideration

The following questions are meant to guide you in writing the sections of your Tribal code and court rules to meet the requirements of ICRA that relate to defense attorneys in STCJ cases.

1. Does your current code or court rules include provisions related to the appointment of defense counsel in criminal cases?

2. If you currently have no system to provide defense attorneys, does your Tribe plan to provide defense attorneys for indigent defendants only? For defendants in STCJ cases only? What is an estimate of the number of defendants needing representation? What funds are available to meet that need?

3. Does your Tribe currently have minimum requirements to appear as a defense attorney in Tribal court? If so, what are they? Do they involve licensure? Graduating from law school?

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4. What method of providing a defense attorney may be cost effective in your nation based on your anticipated need? Public defender office? Contract for defense attorney? Pro bono defense attorney?

5. How will you assure competency of defense counsel? Will you require a State license, a bar examine from your nation, requirements of continuing legal education, or other method of ensuring competency?

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Chapter 8: Judicial Qualifications

Overview

The Indian Civil Rights Act (ICRA) requires that the judge in a Special Tribal Criminal Jurisdiction (STCJ) case must meet certain requirements.

> **25 U.S.C.§ 1302 (c) Rights of defendants**
>
> …the Indian Tribe shall—
>
> 3) require that the judge presiding over the criminal proceeding—
>
> (A) has sufficient legal training to preside over criminal proceedings; and
>
> (B) is licensed to practice law by any jurisdiction in the United States;

The first requirement is that a judge presiding over a criminal case involving a non-Indian defendant have "sufficient legal training to preside over criminal proceedings." This has been the subject of much discussion among the members of the Inter-Tribal Working Group on Special Tribal Criminal Jurisdiction (ITWG).[45] What constitutes "sufficient legal training" is not defined in ICRA, there are no established Federal standards for what constitutes "sufficient legal training," and this issue has not been the subject of a Federal court decision.[46]

The requirement is best understood as a standard that Tribes must define for themselves, and most Tribes already set standards for judicial qualifications. To satisfy ICRA for STCJ cases, however, those standards must include requirements designed to ensure that a judge has sufficient legal training to preside over criminal proceedings. This standard does not apply to all members of the Tribal judiciary, but only to the particular judge who is presiding over a criminal case involving a non-Indian defendant. A Tribe may, however, decide to apply these training requirements more broadly.

There are no established Federal standards in the U.S. Constitution or otherwise for what constitutes "sufficient legal training" to preside over a criminal trial or serve as a judge. There is no similar Federal requirement that applies to Federal or State court judges. For the most part, Federal judges are not required to be lawyers or even have a law degree. Without a Federal mandate, States set their own judicial qualifications through State law or court rules. Many States require their judges to be lawyers, but some State court judges who preside over

[45] For a more in-depth analysis of the judicial qualifications requirement, please see TLPI, "Judicial Qualifications for Tribal Court Judges: VAWA 2022 Tribal Criminal Jurisdiction Series," June 2024.

[46] We are aware of only two Federal court decisions addressing the judicial qualification requirement. Both cases arose out of a Tribe's exercise of TLOA enhanced sentencing and in both cases, the district court concluded that the Tribe had violated 25 U.S.C. § 1302(c)(3) because the presiding judge was not licensed to practice law (the second requirement). *Johnson v. Tracy*, 2012 WL 4478801, (D.AZ 2012) (Tribe arguing that TLOA, which went into effect after the alleged crimes, but before the trial, should not apply to the case); *Coriz v. Rodriguez*, 347 F. Supp. 3d 707, (D. NM) (Tribe arguing that TLOA is only triggered if any single offense carries a sentence of more than one year, regardless of the total sentence imposed).

misdemeanor cases have relatively little experience and numerous States allow lay judges, who are not required to be licensed attorneys, to preside in certain courts.[47]

As with any other governance decision, the judicial qualifications requirements will vary from Tribe to Tribe. Many of the Tribes exercising STCJ require their judges to be a member of a State bar and to have graduated from an accredited law school. Others set out different requirements. Sometimes these requirements are explicitly included in Tribal codes or constitutions. Other codes, however, simply restate the Federal standard and require that judges presiding over criminal cases involving non-Indian defendants have "sufficient legal training." These Tribes may include more specific qualifications in court rules or job postings.

As for the licensing requirements, Tribes have a number of options for satisfying those, including:

1. Creating their own Tribal licensing procedure,
2. Requiring membership in a State bar association, or
3. Requiring membership in the bar association of another Tribe.

A Tribe may want to use the same licensing process for judges and defense attorneys or may choose to use separate standards. It is worth noting that judges must only be licensed to practice law in any jurisdiction in the United States, while defense counsel are subject to more stringent requirements. They must not only be licensed but also their licensing body must apply appropriate standards and ensure both the competence and the ethical (professional responsibility) duties of its attorneys.

This difference between judges and attorneys is not unique to the language of ICRA. Most States have a different set of standards for qualification of judges and qualification of attorneys. Judges may be members of the bar association, but judicial standards of conduct are usually set by court rule or statute. Allegations that a judge has violated those standards are usually heard by a different organization than the one that hears allegations against attorneys. There will often be a statutory committee to review judicial conduct, and sometimes that authority is placed in the Tribal council (although the latter is potentially fraught with separation of powers issues).

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[47] See, e.g., New York State Commission on Judicial Conduct, 2019 Annual Report, Town and Village Courts, "Town and village court justices are the only judges in New York State who do not have to be lawyers admitted to the practice of law. Of the roughly 1,830 presently in office, approximately 700 have gone to law school. The rest, *i.e.* the non-lawyers, are often referred to as 'lay justices.' This system of local magistrates, which harkens back to the colonial era when lawyers were relatively few and far between, is not unique to New York. Numerous other States, such as Texas, Arizona, Nevada, Colorado, Louisiana, South Carolina and Mississippi, have non-lawyer justices presiding in certain lower courts," https://cjc.ny.gov/Policy.Statements/town_&_village_courts.html.

Tribal Code Examples

Eastern Band of the Cherokee Indians Tribal Code
(Enacted April 19, 2022)
Chapter 7. JUDICIAL CODE

Sec. 7-14. - Judicial qualifications.

(a) The Chief Justice of the Supreme Court and the Chief Judge of the Trial Court shall be attorneys licensed by the North Carolina State Bar and members in good standing of the practicing bar of the Eastern Band of Cherokee Indians. No person shall serve as a justice or judge who has ever been convicted of a felony or other crime of moral turpitude in any jurisdiction, convicted of any crime involving embezzlement, fraud, bribery or theft against the Eastern Band of Cherokee Indians, removed by impeachment from any office, or resigned from any office while under official investigation for impeachment.

(b) All persons appointed as associate justices of the Cherokee Supreme Court and as associate judges of the Cherokee Tribal Court shall also be attorneys licensed by and in good standing with the North Carolina State Bar. This subsection shall not apply to persons appointed and confirmed before the effective date of this amendment.

(Sec. 7-15. Omitted)

Sec. 7-16. - Removal by impeachment.

(a) The Ethics Commission shall have the sole power to remove Judges and Justices by impeachment, and any other power delegated by law. The Ethics Commission shall be comprised of five members, who shall be the Principal Chief, Vice-Chief, Chairperson of the Tribal Council, Vice Chairperson of the Tribal Council, and the Chairperson of the Community Club Council. A judge or justice subject to impeachment proceedings shall be given reasonable notice of the charges and shall address the Ethics Commission in a public hearing. An affirmative vote of four members of the Ethics Commission shall be required to remove by impeachment under this section.
(b) The Ethics Commission shall choose from among its own members an officer to preside over an impeachment of a judge or justice. Impeachment proceedings shall be open to the public. A resignation tendered by a person subject to pending impeachment proceedings shall be deemed an affirmative judgment for removal by impeachment. Judgment to remove by impeachment shall be final and not subject to judicial review.
(c) A judgment to remove by impeachment rendered by the Ethics Commission shall include disqualification to hold future office, disqualification to be employed in any governmental capacity by the Eastern Band of Cherokee Indians, and may include denial of certain rights, benefits, or privileges as an enrolled member of the Eastern Band of Cherokee Indians. A judgment to remove by impeachment shall be final and jeopardy shall not attach so that an impeached official may be bound over for prosecution, trial, conviction, and sentencing in a court of law. The Eastern Band of

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Cherokee Indians may initiate a civil action in the Judicial Branch to seek restitution of any funds wrongfully acquired by an individual removed by impeachment.

Statutes of the Confederated Tribes of the Umatilla Indian Reservation
Chapter 2. Judicial Appointments and Qualifications

(As Amended through Resolution No. 13-020 (July 1, 2013))

SECTION 2.02. Eligibility

A. Any person over 21 years of age shall be eligible to serve as a Chief or Associate Judge.

B. All judges shall serve a probationary one-year term. The Board of Trustees may appoint any person who has performed satisfactorily during the probationary period and who is otherwise qualified, to a term of ten (10) years.

C. No candidate shall ever have been convicted of a felony or, within one year past, of a misdemeanor involving moral turpitude. An eligible candidate must be of high moral character and physically sound.

D. Any judge presiding over a criminal trial shall be a member in good standing of any state bar and a graduate from an accredited law school.

Chapter 3. Criminal Code and Procedures

(As Amended through Resolution No. 23-059 (June 26, 2023))

PART VI. SENTENCING

SECTION 3.28. DEFENDANT'S RIGHTS

[(A.) –(C.) omitted)

D. In any criminal proceeding, the presiding judge shall:

1. have sufficient legal training to preside over criminal proceedings; and

2. be licensed to practice law by any jurisdiction in the United States, including the Tribes.

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Gila River Indian Community Rules of Criminal Procedure
(Amended May 15, 2013)
Rule 41. Judicial Education

Rules 41.1 Purpose

The protection of the rights of Community members depends upon the existence of an independent and competent judiciary. The task of maintaining judicial competence depends on the willingness of the judiciary itself to assure that its members are knowledgeable and skilled and that the judges are trained in the application of legal principles. For purposes of Rule 41 a judge shall include the chief judge; associate judges; appellate court judges, and judges pro tempore (visiting judges) appointed on a full-time, part-time or on-call basis to preside over criminal proceedings.

Rule 41.2 Educational Requirements

a. Initial Educational Requirements. Before initial case assignment, a judge shall have completed a minimum of 30 hours of instruction in substantive, procedural and evidentiary laws, including at least two hours of judicial ethics, from an accredited program.

b. Ongoing Educational Requirements. Each fiscal year after the initial year of taking office or of initial appointment, judges shall complete a minimum of 15 hours of instruction in substantive, procedural and evidentiary laws, including at least two hours of judicial ethics, from an accredited program.

c. Enhanced Sentencing Requirements. A judge presiding over criminal proceedings where a defendant is subject to more than one year of incarceration shall:

    1. Be licensed to practice law by any jurisdiction in the United States; and

    2. Have sufficient legal training to preside over criminal proceedings. Sufficient legal training is considered satisfied after completing a minimum of 40 hours in criminal substantive, procedural and evidentiary laws, from an accredited program.

d. Program Accreditation. Attendance at an education program sponsored by the following shall be presumed to meet standards and be accredited:

    1. Judicial College of Arizona;

    2. National Judicial College;

    3. National Tribal Judicial Center;

    4. Programs accredited by Arizona's Committee on Judicial Education and Training;

    5. Any accredited law school;

    6. Local, state or national bar association.

e. Judicial education shall address relevant areas such as judicial competence, performance, case management, opinion writing and administration.

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f. Certification.

1. A judge shall file an affidavit certifying compliance with Rule 41.2(a) and (b) with the court administrator, or designee, for each fiscal year beginning October 1 and ending September 30, not later than October 31 of each fiscal year.

2. The court administrator, or designee, shall forward to the Legislative Standing Committee no later than November 30 of every fiscal year, the names of any judge that does not fulfill the requirements of Rule 41.2(a) and (b), and thereafter upon request by the Community Council or any Community member.

3. For appointment of cases under Rule 41.2(c), a judge shall forward a copy of his/her license to practice law issued by any jurisdiction in the United States and an affidavit certifying compliance with Rule 41.2 (c)(2), which shall be substantiated by certificates of attendance, to the court administrator, or designee, prior to appointment.

4. The court administrator, or designee, shall notify the chief judge when a judge does not meet the requirements of Rule 41.2 (c). The chief judge, in consultation with the court administrator, shall ensure that all judges appointed to cases where a defendant is subject to more than one year of incarceration, meet the requirements under Rule 41.2(c), and may reappoint case assignments to ensure compliance with Rule 41.2(c).

Tulalip Tribal Code (Current through Nov. 1, 2024)
Title II. TRIBAL JUSTICE SYSTEM
Chapter 2.05 Tribal Court

2.05.040 Judges.

The Tulalip Tribal Court shall consist of a Chief Judge and such Associate Judges as needed, whose duties shall be regular and permanent, as fixed and determined by the Board of Directors. No person shall exercise the judicial authority of the Tulalip Tribes in any Tulalip Tribal Court, Employment Court, Gaming Court, or other Court under this code or any other Tulalip ordinance or regulation unless and until such person has been appointed by the Board of Directors in accordance with this chapter. Judges shall receive such compensation as is set by resolution of the Board.

(1) Eligibility. To be eligible to serve as a Judge of the Tribal Court, a person must:

(a) Be over 25 years of age;

(b) Never have been convicted or found guilty of a felony in any Federal or State Court or of a Class E offense under Tulalip Tribal law;

(c) Within the previous five years, not have been convicted of a misdemeanor in any Tribal, Federal, or State Court;

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(d) Be of high moral character and never have been convicted of any offense involving moral turpitude;

(e) Be either a Judge from any Federally recognized Indian Tribe, licensed to practice before the Washington State Bar Association, or any other qualified person appointed by the Tribal Board of Directors, or possess a J.D. from an accredited law school; and

(f) Be a member in good standing of the Tulalip Bar.

To be eligible to serve as Chief Judge of the Tribal Court, a person must also possess administrative experience in addition to the requirements included in this section.

[(2.) and (3.) omitted)

(4) Powers and Duties. Judges shall have the authority to act in all matters within the jurisdiction of the Tulalip Tribal Court. Justices shall have authority to act in all matters within the jurisdiction of the Court of Appeals. No Judge or Justice shall be qualified to act as such in any case where the Judge has any direct interest or wherein any relative by marriage or blood, in the first or second degrees, is a party.

(5) Removal. During tenure in office, Judges or Justices may be suspended, dismissed, or removed for cause by the Board of Directors. . . .

(6) Felony Crimes. To be eligible to preside over all stages of a felony criminal case, the Judge must: (a) have sufficient legal training to preside over criminal proceedings; and (b) be licensed as an attorney in the State of Washington or other state.

Fort Peck Tribes Comprehensive Code of Justice (updated June 10, 2024)
Title 2 – Courts.
Chapter 3. Justices and Judges

Sec. 301. Qualifications.

To be eligible to hold the office of justice or judge, a person must have an Associate of Arts degree or Bachelor of Arts degree from an accredited college in law and justice or similar field of study; be at least twenty five (25) years of age; not have been convicted of a felony; not have been dishonorably discharged from the Armed Forces; be physically capable of carrying out the duties of the office; have successfully completed a judge's qualifying examination administered as prescribed by the Tribal Executive Board; and in the opinion of the Fort Peck Tribal Executive Board be of sound judgment and good character and possess a reputation for honesty, fairness and impartiality. To be eligible to hold the position of Chief Justice, a person must also have a degree in law from an accredited law school and be a member in good standing of the bar of any state or federal court. Between equally qualified candidates for a position as judge or justice, preference shall be given to an Indian candidate. Any person otherwise qualified may be appointed as a justice on a probationary basis prior to taking the judges qualifying examination. Any such person shall take and pass the judges qualifying examination during his/her probationary period.

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Title 7 – Criminal Offenses
Chapter 2. Crimes Against Persons
Subchapter E. Crimes Against the Family

Sec. 249. Special Tribal criminal offense.

(f)

[(A) and (B) omitted)

C. Require that the judge presiding over the criminal proceeding has sufficient legal training to preside over criminal proceedings; and is licensed to practice law by any jurisdiction in the United States.

Tribal Code Commentary

The Eastern Band of Cherokee requires that its judges be licensed by the North Carolina State Bar and members in good standing of the practicing bar of the Eastern Band of Cherokee Indians. The statute gives the Ethics Committee the power to remove judges. The Tribal code does not contain an explicit requirement that the judge have sufficient training to preside over criminal trials. The North Carolina bar requires that attorneys possess a law degree, however, which should be sufficient to meet the training requirement.

The Confederated Tribes of the Umatilla Indian Reservation Code explicitly requires that its judges be graduates of an accredited law school. The Umatilla Code also requires membership in good standing of a State bar, but it accepts membership in any State bar, unlike the Eastern Band of Cherokee who limited licensure to the bar of the State in which they are located. The Umatilla Criminal Code describes standards for judges in criminal proceedings with the exact wording of ICRA.

Gila River Indian Community does not require its judges to have a law degree, but it has established a very detailed set of rules regarding judicial education. Those standards require a minimum amount of educational instruction prior to being assigned a case as well as a continuing education requirement. For cases subject to enhanced sentencing, the Tribal criminal procedure rules do require that judges be licensed to practice law in any jurisdiction in addition to the legal training requirement. Because the judicial qualification requirement is the same for enhanced sentencing as it is for STCJ, this is an example of how judicial educations requirements could be drafted in the STCJ context as well. Gila River has also defined what topics are acceptable to fulfill the educational requirement and which programs are deemed to be accredited. The code also establishes a procedure for judges to certify they have satisfied the requirement.

The Tulalip Tribes code establishes several alternative requirements for serving as a judge. Possessing a Juris Doctorate from a law school is only one option. Tulalip also requires heightened requirements for judges presiding over felony cases.

The Fort Peck Tribes' approach to judicial qualifications is a particularly helpful example for three reasons: (1) Fort Peck has a code that clearly sets forth judicial requirements, including for judges who have not attended an accredited law school (sometimes referred to as "lay judges"); (2) Fort Peck has a Tribal appellate decision directly addressing judicial qualifications in a criminal case with a non-Indian defendant; and (3) Fort Peck was a Pilot Project Tribe—meaning

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they were authorized by the U.S. DOJ to begin exercising criminal jurisdiction over non-Indians before the VAWA 2013 statute went into effect nationwide. As part of the Pilot Project approval process, the U.S. DOJ examined Fort Peck's laws and processes to ensure they would meet all of the requirements of the Federal statute, including the judicial qualification requirement.

Fort Peck requires all judges to take a qualifying examination administered by the Tribal Executive Board. Fort Peck's code states that the judge presiding over special Tribal criminal proceedings are required to have sufficient legal training and be licensed to practice law by any jurisdiction in the United States. In a 2017 decision, the Fort Peck Court of Appeals addressed the sufficient legal training requirement of 25 U.S.C. § 1304. In *Fort Peck v. Kemp*, the court of appeals reversed the trial court's ruling that the arraignment judge was not qualified to preside over the proceeding because they did not attend an accredited law school. The court reviewed the relevant Fort Peck Tribal Code provisions regarding judicial qualifications and training requirements and concluded that the presiding judge had satisfied them.[48] The court pointed out that the Fort Peck judicial qualifying exam included a bar component sufficient to meet the licensure requirement and that: "[a]bsent any federal statutory provision that would impose additional requirements, the 'sufficient legal training' standard is met so long as the Tribal judge satisfies the annual training requirements imposed by the Fort Peck Tribes."[49]

Although no Federal court has examined the Fort Peck Tribes approach to judicial qualifications, the U.S. DOJ was aware that the Tribe had a judge who did not attend an accredited law school and was not State licensed when it submitted its pilot project application. For each judge presiding over a criminal case involving a non-Indian defendant, the pilot project application questionnaire required a description of the judge's legal training and a list of jurisdictions in which the judge was licensed to practice law. The Fort Peck Tribes' application included the following description:

> The Honorable Richard Jackson has been the Chief Judge of the Fort Peck Tribal Court for the past 10 years. He is licensed to practice in the Fort Peck Tribal Court. He has a Bachelor of Arts degree. He has two certificates from the Judicial College in Reno, Nevada; one in Tribal Judicial Skills and one in Special Court Trial Skills. For the past 10 years he has met the Code requirement of 40 hours of annual training. He presides over criminal trials on a weekly basis and has presided over two homicide trials.

Fort Peck's response to the question included both a description of the judge's experience presiding over cases and a description of his formal educational courses and training. The Department of Justice approved Fort Peck's application, which suggests DOJ was satisfied that Judge Jackson had sufficient legal training to preside over criminal cases with non-Indian defendants. Also, it demonstrates a deference to the Tribe's established rule regarding what qualifies as "sufficient legal training."

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[48] *Fort Peck Tribes v. Kemp*, AP#723, ¶¶ 11-14 (May 10, 2017).

[49] *Fort Peck Tribes v. Kemp*, AP#723, ¶ 12 (May 10, 2017).

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Questions for Consideration

The following questions are meant to guide you in writing the sections of your Tribal code to satisfy ICRA's requirements relating to the qualifications of judges hearing STCJ cases.

1. How many judges does your Tribal court have? What are the required qualifications to be a judge? Do all judges have to satisfy the same standards?

2. Do you currently have any licensing requirements for your judges? If so, what are they?

3. Do you want to heighten the requirements for judges hearing STCJ cases? If so, how?

4. What will be your requirement to ensure that the judge is competent to hear criminal cases? A law degree? A license to practice law from a particular State or any State? Specific types of training such as training available from the Judicial College?

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Resources for Judicial Qualifications

- Judicial Qualifications for Tribal Court Judges: VAWA 2022 Tribal Criminal Jurisdiction Series
- Fourth Facilitated Discussion: Child Violence and Other Issues Including Habeas Corpus and Exhaustion of Tribal Court Remedies (YouTube) and Fourth Facilitated Discussion: Child Violence and Other Issues Including Habeas Corpus and Exhaustion of Tribal Court Remedies(PDF)
- Tribal Domestic Violence Courts Fact Sheet
- Tribal Domestic Violence Dockets Fact Sheet
- Tribal Domestic Violence Courts and Tribal Domestic Violence Dockets
- Prosecutor Sexual Assault Protocol
- Tribal Court Judges Bench Book: Tribal Judicial Guide for Navigating Sexual Assault Cases

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Part D: Court Procedures and Requirements

A Tribe planning to exercise criminal jurisdiction over non-Indians must ensure that certain court procedures and processes are used in these cases. This section of the resource focuses on those requirements.

Chapter 9. Court of Record discusses the requirement to maintain an adequate record of court proceedings. Chapter 10. Including Non-Indians in Jury Pools deals with the standards required in jury trial under VAWA 2013. Federal Habeas Review and Tribal Exhaustion is discussed in Chapter 11. Right to Federal Habeas Corpus Review, Notice, & Tribal Exhaustion Requirement.

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Chapter 9: Court of Record

Overview

The Indian Civil Rights Act (ICRA) requires that a Tribe exercising Special Tribal Criminal Jurisdiction (STCJ) must maintain an appropriate record of all court proceedings. This does not mean that the Tribal court must maintain a record of all its proceedings, but it is required to do so in STCJ cases. Many Tribes maintain a record of all proceedings.

> **25 U.S.C.§ 1302 (c) Rights of defendants**
>
> …the Indian Tribe shall—
>
> **(5)** maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

The primary function of a court record is to provide a record of proceedings for possible review by an appellate court. The record generally includes evidence introduced by the parties, copies of all papers filed by the parties, and an audio or video recording of the proceedings (appearances, hearings, trial), which is generally reduced to a transcript on appeal. This record must be kept for a period to be determined by the Tribe, although it clearly must be kept for as long as any appeal or habeas corpus action is possible. After that time frame the evidence may be returned to the parties or destroyed.

It is very important to note that the Tribal court must also be able to produce an audible recording and/or certified transcript of the hearing. Otherwise, a Federal court would likely find that the Tribal court did not meet the court of record requirement.

Many Tribal courts are courts of record in criminal cases and no change in their statutes are required, but every Tribe should look closely at the process and equipment being used in preserving evidence and recording the proceedings.

In Your Community

- What changes may be needed to ensure an accurate record for appeal?
- What equipment or staffing will assure an accurate record?
- How can you organize your records in order to produce them easily?

Many courts have specific court rules dealing with the quality and type of equipment that must be used to record proceedings and have other requirements to ensure an accurate record is preserved for the requisite period of time. These rules would generally not be in a statute but would be in court rules that are developed by the chief judge or other appropriate authority. Authorization for the judge to develop court rules could appear in the statute.

Court rules can be easily changed and updated to consider technology and process. Review of court rules in your Federal district or State courts could be helpful in your development of rules.

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Tribal Code Examples

Statutes of the Confederated Tribes of the Umatilla Indian Reservation
(Amended June 26, 2023)
CRIMINAL CODE AND PROCEDURES
Chapter 3. CRIMINAL PROCEDURE
Part 7. GENERAL PROVISIONS

SECTION 3.33. COURT REPORTER AND TRANSCRIPTS.

All trials shall be recorded by a Court Reporter. Any party wishing a transcript of the trial shall bear the cost therefore.

SECTION 3.34. COURT RECORDS AND FILES.

All Court records and files shall be in the custody of the Clerk of the Court under the discretion and supervision of the Chief Judge.

Note: Court Directive #4 – allows indigent defendants a copy free of charge. (See Chapter 8.)

Eastern Band of the Cherokee Indians Tribal Code
((Enacted April 19, 2022)
Chapter 15 - CRIMINAL PROCEDURE

APPENDIX A. - THE CHEROKEE RULES OF CRIMINAL PROCEDURE

Rule 7: Pretrial Proceedings

a. Omitted

b. Recording of Proceedings. All criminal proceedings before the Cherokee Court shall be recorded.

Rule 30: Service, Filing, and Records

[(a.)- (c.) omitted)

d. Records: The Clerk shall keep records in the form prescribed by the Chief Justice, entering in the records every Court Order or Judgment and the date of entry.

Tribal Code Commentary

The statute or rule requiring that criminal proceedings are recorded appears in different places in Tribal codes. Sometimes it appears in the section establishing and empowering the court and other times it appears in the Rules of Criminal Procedure of a Tribe.

The Confederated Tribes of the Umatilla Reservation has a provision requiring that all trials be recorded by a court reporter. A court reporter is an individual trained to provide a verbatim transcript of proceedings. A person with court reporter credentials is not required by ICRA, but

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use of a court reporter does provide assurance of authenticity and accuracy due to their training and certification.

The Eastern Band of Cherokee placed a simple statement in their Rules of Criminal Procedure indicating that all criminal proceedings are recorded. It would be left to the judge or court administration to determine the equipment and procedure to ensure accuracy and authenticity of the recording. The clerk of court is responsible for maintenance of all court records.

Questions for Consideration

The following questions are meant to guide you in writing the sections of your Tribal code and court rules relating to preserving an accurate record of a criminal case.

- What procedures are currently followed for preserving the trial record? For what period? Who is responsible for monitoring these?

- Are the procedures adequate to accurately preserve the record for possible appeals? If not, what needs to change? Discuss what you want to put in your code and what will be in court rules.

- Do you want specific standards for equipment used in recording? Do you want to use court reporters? Who will be responsible for preserving the record?

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Chapter 10: Including Non-Indians in Jury Pools

Overview

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) amended the Indian Civil Rights Act (ICRA) to ensure that non-Indian criminal defendants in Tribal courts have the right to a trial by an impartial jury that does not exclude non-Indians and is a fair representation of the community.

> **25 U.S.C.§ 1304 (d) Rights of Defendants**
>
> …the participating Tribe shall provide to the defendant—
>
> (3) the right to a trial by an impartial jury that is drawn from sources that—
>
> (A) reflect a fair cross section of the community; and
>
> (B) do not systematically exclude any distinctive group in the community, including non-Indians

This requirement applies when a non-Indian who is criminally prosecuted in Tribal court faces possible imprisonment, meaning the charged offense as imprisonment as a possible penalty. Complying with ICRA's jury requirements for STCJ cases may include changes to the Tribal code and also to court practices and procedures. Some Tribes have statutes that allow only their Tribal members to serve on juries. If your Tribe has a law like this, it will need to be changed to exercise STCJ. You may want to reiterate the ICRA language in the preceding text in your Tribal code.

Creating a jury system that implements the code language may be more complex. The process by which a jury is selected can be divided into two stages: determining who is eligible to be summoned to serve on a jury (often referred to as the jury pool) and determining who will actually serve on a particular jury.

A court will keep a list of who is eligible to serve on a jury and will summon a number of people from that list to come to court on the day a jury trial is scheduled. The judge and the attorneys will then question the potential jurors to select ones that can decide the case at hand fairly and impartially.

Applying the ICRA jury provision in STCJ cases requires defining the "community" from which the jury pool will be drawn. In State and Federal courts, the community is defined as the jury-eligible population residing within the boundaries of the geographic area served by the court. The most common source of prospective juror names and addresses in State and Federal courts are the lists of registered voters, licensed drivers, and State identification card holders who reside within the geographic area served by the court.[50]

[50] Paula Hannaford-Agor, Center for Jury Studies, "An Overview of Contemporary Jury System Management," p. 6, (2011), https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0021/7725/contemporaryjurysystemmanagement.pdf.

For some Tribal courts, however, communities are not wholly or even primarily confined within geographic boundaries. They often include enrolled members of the Tribe regardless of where they reside. For some Tribes, Indian country consists of a patchwork of communally held properties and individual parcels of land distributed across multiple counties or States in which large numbers of non-Indians reside with little or no relationship to the Tribal community.

Determining what lists could be used in your community and whether those lists or combination of lists "fairly represent your community" is important. It is critical that the process not exclude any distinctive group, including non-Indians.

Just as they cannot be excluded from the jury pool, members of distinctive groups also cannot be systematically excluded from sitting on the jury. This means that the process by which a jury is selected (including both peremptory challenges and challenges for cause) must be examined.[51] Review of court rules and procedure on jury selection in adjoining counties or the Federal district may also be helpful, although you are not required to do it the same way. It is important you carefully consider a process that is workable for your nation, considering its size, population, and resources.

Although this guide is focused on drafting Tribal statutes, it is important to review both court rules and rules of procedure to understand the entire process used by a particular Tribe and ensure it complies with the jury requirements in STCJ cases.

Tribal Code Examples

Statutes of the Confederated Tribes of the Umatilla Indian Reservation
(Amended June 26, 2023)
CRIMINAL CODE AND PROCEDURES
Chapter 3. CRIMINAL PROCEDURE
Part IV. Pretrial

SECTION 3.19. JURY

A. Eligibility, List, Record of Service. Any resident within the boundaries of the Umatilla Indian Reservation of the age of 18 or over is eligible to be a juror regardless of race or Tribal citizenship. A list of eligible jurors shall be kept by the Clerk of the Court and a record of each juror's service as a juror shall be noted thereon.

B. Selection of Jury Panel. In January of each year, the Judge shall select at least 50 names from the list of eligible jurors and each shall be notified of his or her selection. This selected list shall comprise the trial jury list for the ensuing year from which jury panels shall be selected from time to time. A jury panel shall consist of not less than 18 names.

[51] Included under additional resources is the link to the ABA Principles for Juries and Jury Trials, which may be helpful in developing rules and process that meet fairness standards, although many of the suggestions may not fit small community standards in much of Indian country.

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C. Time and Manner of Notification. Those persons who are selected to serve on a jury panel shall be notified at a reasonable time prior to the trial date and the notice shall state the date, time, place and title of the proceeding for which they shall serve.

D. Exemption from Jury Service. For good cause shown, the Judge may exempt any person from jury service. The Judge shall order the exemption be either permanent or for a specified period of time. If the exemption is temporary, the name of the prospective juror shall be returned to the annually selected jury list for possible selection for another panel at the expiration of the exemption. In the Court's discretion, the name of a person with a temporary exemption may be removed for that year from the selected list of jurors. If the exemption is permanent, the name of the person shall be removed from the list of eligible jurors.

(SECTION 3.20. Omitted)

SECTION 3.21. TRIAL BY JURY

A. The defendant shall have the right to a trial by a jury of his peers composed of not less than six persons and one alternate unless such right has previously been waived. The prosecution has the burden of proving beyond a reasonable doubt that the defendant is guilty as charged.

B. Selection of the Jury.

1. Voir Dire. The prosecution and defense, in that order, shall have the opportunity to ask questions of the prospective jurors as they are individually called upon by the court to determine if there is any reason why a particular candidate should not be seated as a juror. Either party may question the propriety of any question asked by the other party of a prospective juror and it shall be within the discretion of the Court to rule on the propriety of the question.

2. Challenges. When both sides have completed their voir dire questioning of the six prospective jurors and the one alternate, they shall confer privately with the Judge and state all challenges they have to make against any prospective juror.

   a. Peremptory Challenges. Both parties shall have four peremptory challenges with which they may disqualify any prospective juror and need not state any reason for doing so.

   b. Challenges for Cause. When it is established that any prospective juror is prejudiced, biased or otherwise unable to sit as a fair and impartial juror, he may be disqualified by a challenge for cause by either side. The allowance or disallowance of a challenge for cause shall be within the discretion of the Court. The number of challenges for cause by either party is unlimited.

3. Oath to Trial Jury. After the six members and one alternate of the jury have been selected and seated, the Court shall administer an oath by which the jury swears that it will act fairly and impartially in the trial it will hear.

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Tulalip Tribal Code (Current through Nov. 1, 2024)
Title II. TRIBAL JUSTICE SYSTEM
Chapter 2.05 Tribal Court

2.05.110 Juries.

(1) Jury Pool. A list of eligible jurors shall be prepared by the Court. The eligible juror list shall be updated from time to time, but no less than once in each year. The Court shall provide for the selection of names of persons eligible for service as jurors. Jurors shall be 18 years of age or older and, notwithstanding any other law of the Tulalip Tribes or any of its agencies, shall be chosen from the following classes of persons:

(a) Tribal members living on or near the Tulalip Indian Reservation;

(b) Residents of the Tulalip Indian Reservation; and

(c) Employees of the Tulalip Tribes or any of its enterprises, agencies, subdivisions, or instrumentalities who have been employed by the Tribes for at least one continuous year prior to being called as a juror.

(2) Formation of Jury. Juries will be comprised of six jurors. A person may be excused from serving on a jury upon good cause shown under oath to a Judge. Jurors whose employers provide for compensated leave for jury service shall not be excused by the Court because of work-related responsibilities, except under extraordinary circumstances. The Judge shall consider the needs of the Court to maintain an adequate jury pool before allowing jurors to be excused for employment reasons. Members of the Board of Directors shall be exempt from serving on juries during their terms of office.

(a) Random Selection. The Clerk of the Court will randomly select a minimum of 25 names from the jury pool.

(b) Juror Summons. The Court shall issue summons and thereby notify persons selected for jury service. Persons selected for jury service shall be summoned by mail or personal service. Persons who do not appear after proper notice of jury service shall be subject to contempt of Court.

(3) Selection (Voir Dire). After summoning jurors and before trial, or at a time designated by the Court, the Clerk shall notify the Court and counsel of the names of the members of the jury pool appearing for selection. In selecting a jury from among the panel members, the initial questioning of the jurors shall be conducted by the Judge in order to determine whether each prospective juror is capable of being fair and impartial. Questions to be asked by the Court include whether a panel member:

(a) Is directly related to any person involved in the action, including, but not limited to, the parties, counsel, alleged victims, or any prospective witness;

(b) Is or has been involved in any business, financial, professional, or personal relationship with a party or alleged victim;

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(c) Has had any previous involvement in a civil or criminal lawsuit or dispute with a party or alleged victim;

(d) Has a financial or personal interest in the outcome of the action before the Court; or

(e) Has formed an opinion as to the defendant's guilt.

When the Court determines that a juror is prejudiced or cannot act impartially, the juror shall be excused. After questioning by the Judge, both parties may question the jurors using the struck jury system. Either party may question the jurors concerning the nature of the action, including burden of proof in criminal cases and the presumption of innocence. The Judge may limit examination of jurors when the Judge believes such examination to be improper or unacceptably time consuming.

(4) Challenges. All challenges must be made to the Tribal Court before the jury is empaneled and sworn. When a potential challenge for cause is discovered after the jury is sworn, and before the introduction of any evidence, the Court may allow a challenge for cause to be made.

(a) For Cause. Each party shall have unlimited challenges for cause. Each challenge must be tried and determined by the Court at the time the challenge is made.

(b) Peremptory. Each party shall have two peremptory challenges. In criminal cases where defendants are tried together, the prosecution and defense shall each be entitled to one additional peremptory challenge. In civil cases involving multiple parties, additional challenges may be allowed at the discretion of the Court.

(5) Motion to Discharge.

(a) Venire or Jury. Any objection to the manner in which the venire or jury has been selected or drawn shall be raised by motion to discharge.

(b) Court's Ruling. It shall be the duty of the Court to conduct a hearing on any motion to discharge. The burden of proof shall be on the movant. If the Court finds that the venire was improperly selected or drawn, the Court shall order a new venire. If the Court finds that the jury was improperly selected or drawn, the Court shall order the jury discharged and the selection or drawing of a new jury.

(6) Conflicts of Interest. No person shall be qualified to sit on a jury panel in the Tribal Court in any case where that person has a direct interest or wherein any relative, by marriage or blood, in the first or second degree is a party; nor shall any party be required to use a peremptory challenge to remove a person not qualified to serve as a juror under this section. This section shall not be construed as the sole cause upon which a juror may be challenged for cause, and other conflicts of interest shall be considered by the Judge.

(7) Emergency Additions. In the event there is a shortage of jurors, the Court may call upon anyone eligible to serve as a juror in the case without giving any advance notice.

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(8) Fees. Every person who is required to attend Court for selection or service as a juror shall be entitled to fees for each day, unless otherwise compensated through Tribal ordinance, as set by resolution of the Board of Directors.

(9) Juror Oath. The jury shall be sworn in by the Court. Any juror who violates the oath may be held in contempt of Court.

(10) Conduct of Jury During Trial. Once empaneled, jurors shall be instructed by the Judge that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon, until the issues of the case are finally submitted to them. Jurors may be allowed to take notes, in the discretion of the Court. At each adjournment recess prior to submission of the case to the jury, jurors' notes shall be collected by the Bailiff and the Judge shall instruct the jurors as to whether they may separate or must remain in the care of the Bailiff or other proper officer of the Court.

Pascua Yaqui Tribal Code (May 2024)
TITLE 3 – COURTS AND RULES OF COURT
PART II – RULES OF COURT
Chapter 2-2 Rules of Criminal Procedure

Section 670 Jury Trials (3 PYTC 2-2-670)

(A) Any person accused of a crime for which more than six months imprisonment is specified in the Tribal Code as a possible penalty shall be granted a jury trial, upon his or her request.

(B) The procedures for jury selection shall be as provided in 3 PYTC 2-1-160. However, the jury fees shall not be assessed to either the defendant or the Tribe.

(C) Juries for criminal trial shall consist of six jurors and one alternate. The verdict must be unanimous.

(D) When a jury has been selected, the judge shall administer to the jurors the following oath: "You and each of you do solemnly swear or affirm that you will well and truly try the issues relative to the cause now on trial according to the law and the evidence under the pains and penalty of perjury."

(E) If a case be continued, the jury shall then be notified of the new date for trial and no further notice to them of such date is required. The penalty for failure to appear at the time to which the trial is continued is Contempt of Court.

Section 160 Jury Trials (3 PYTC 2-1-160)

(A) Omitted.

(B) To be eligible to serve as a juror, a person must be a Tribal member, a spouse of a Tribal member, an employee of the Pascua Yaqui Tribe or its enterprises, and/or a permanent resident of the Pascua Yaqui Reservation. A juror must be 18 years of age or older, never have been convicted in any court of a felony, and must not at the time

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the list is made, or at the time of trial, be holding the office of Tribal judge, Tribal police officer, or Tribal Council member, nor be a witness or a party in the matter before the court.

(1) Permanent Resident: A permanent resident of the reservation is person who rents, owns, or otherwise resides in a dwelling place on the reservation and who resides in that dwelling place other than seasonally or periodically, , and who intends to make the reservation his or her permanent home for the indefinite future, and who does not claim residence in any other location for any purpose. A non-member may be a permanent resident of the reservation for the purposes of this section.

(2) Tribal Member: Tribal members must meet the qualifications in section (B) above, and be residents of the State of Arizona, with preference given to residents of Pima, Pinal, Santa Cruz and Maricopa Counties. Tribal members residing outside those counties or outside Arizona may be qualified for jury duty. The Tribal members who reside outside the geographic area described above may serve jury duty by filing a statement of juror eligibility.

(3) Non-member Spouse of a Tribal Member: A spouse of Tribal Member is a person who is married to a Pascua Yaqui Tribal member and otherwise meets the juror qualifications found in this section (B).

(4) Employee of the Pascua Yaqui Tribe or its Enterprises: An employee of the Pascua Yaqui Tribe or its enterprises shall be a full-time employee of the Tribe or its Enterprises who has completed his or her probationary period and meets the jury qualifications found in this section (B).

(C) Jurors for trial shall be selected from a list of eligible jurors prepared from the Pascua Yaqui Tribal Census Roll and non-member and employee statistics.[52]

(1) The list of eligible jurors will be provided by Tribal Council, or a designee thereof, and submitted to the Tribal Court no later than July 20th of each year.

(2) The clerk of the court shall eliminate those persons who do not meet the qualifications set forth above in subparagraphs (B) (1) and (B) (2).

(D) Selections of panel; jury summons; failure to appear; excuse from jury duty.

(1) Not less than 20 days before the date set for the beginning of a jury trial, the chief judge shall draw from the master jury list, at random, the number of names specified by Rule of Court for a civil jury trial of the type scheduled. The clerk of the court shall then issue and cause to be served upon each person who was selected a jury duty summons.

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[52] The juror list will be compiled from the records of Human Resources, the Enrollment Department, and the Housing Department. This will fulfill the requirements of VAWA 2013 and the code provisions mentioned previously. (Application of the Pascua Yaqui Tribe VAWA Pilot Project Questionnaire on Tribal Criminal Jurisdiction.)

(2) The jury summons shall notify the person being summoned to appear in court on the date set for the beginning of the trial, one hour before the time set for the trial.

(3) Failure of a person served with a jury summons to appear shall constitute contempt of court and the summons shall contain a warning to that effect.

(4) Any person for whom jury service would be a severe hardship may be excused from service by the judge, but such excuse from jury duty shall be disfavored. Severe hardship may include, but is not limited to:

(a) Having to travel more than 150 miles one-way,

(b) Having to stay overnight in order to serve upon a jury, when such has not been ordered by the court or presiding judge as a condition of sequestering the jury,

(c) Interference with work which would cause severe financial hardship on the person, and

(d) Interference with other duties to another court of law.

(E) On the day of the trial, the clerk shall deposit in a ballot box ballots containing the names of each of the summoned potential jurors who have appeared by the time set for their appearance. Those persons whose names are in the ballot box shall be known as the jury panel. After the judge calls the court to order, the names of 14 members of the jury panel, shall be drawn from the ballot box, at random, who shall then be seated in the jury area. The clerk shall make a list of the names in the order in which they are called.

(F) Removal for cause; examination by court, parties.

(1) After the first 14 members of the jury panel have been seated, the judge shall examine each of them as to their qualifications, and excuse any who appear to him or her to be biased, prejudiced, unable to fairly and effectively perform the duties of a juror or otherwise not qualified to serve as a juror. The judge shall permit the parties or their counsel to similarly examine and ask for the removal of jurors for cause, without any limit to the number of jurors so challenged or removed, except that all such challenges must be made in good faith. The judge shall excuse any juror he or she believes to be unqualified, directing him or her to leave the jury area. The names of such persons shall be crossed off the list by the clerk.

(2) After all disqualified jurors have been excused from the jury area; enough additional ballots shall be drawn by the clerk to replace the disqualified persons with members of the jury panel. The clerk shall add their names to the list in the order in which they were called. The procedure for challenge for cause shall continue until 14 qualified persons are seated in the jury area.

(G) After the 14 qualified persons have been seated in the jury area, each party shall have the right to remove any three persons from the jury without stating any reason. The

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parties shall alternately remove jurors, or waive their turn to do so, until they have exhausted their peremptory challenges.

(H) The clerk of the court shall then read aloud the first seven names on the list and those persons shall be jurors for the trial. The clerk shall also read aloud the eighth name on the list, and that person shall be an alternate juror for the trial. The alternate juror shall act in all respects as a juror, except that he or she shall not participate nor vote during jury deliberation unless one of the other jurors has been excused by the judge during the course of the trial.

(I) The list of eligible jurors shall be provided to the Tribal Court by the Tribal Council or a designee thereof, and shall not be released to any other person.

(J) The list of jurors called for jury duty at any particular time shall remain confidential and shall not be released to anyone except the parties or their counsel, but only on the day that trial is to begin, and only for the purposes of selecting a jury.

(K) The clerk of the court shall secure the list of eligible jurors and the list of jurors summoned for jury duty in a safe or other secure place to which no one else has access.

Fort Peck Tribes Comprehensive Code of Justice
Title 6 - Criminal Procedures
Chapter 5. Trial Proceedings

Sec. 507. Right to jury trial.

(a) Any person accused of a crime punishable by imprisonment shall be granted a jury trial, upon his/her request made in writing before or at the pretrial conference. Any person charged pursuant to 7 CCOJ 244 and/or 249 shall automatically have their case set for a jury trial.

A defendant waives his/her right to a jury trial if the defendant fails to appear at the scheduled jury trial. Waiver of the jury trial will result, without delay, in a bench trial in absentia for misdemeanor charges and a scheduled bench trial for felony charges. A jury shall consist of at least 6 members of the Reservation community selected at random from a list of eligible jurors prepared each year by the Court.

(b) An eligible juror is an Indian person who has reached the age of 18 years, is of sound mind and discretion, has never been convicted of a felony, is not a member of the Tribal Executive Board, or a judge or justice, officer or employee of the Court or an employee of the Reservation police force or Reservation jail, and is not otherwise disqualified according to standards established by the Court.

(1) Where the Tribes are exercising Special Tribal Criminal Jurisdiction under the Violence Against Women Reauthorization Act of 2022, an eligible juror is any resident within the boundaries of the Fort Peck Reservation of the age of 18 or over, regardless of race or Tribal citizenship, is of sound mind and discretion, has never been convicted of a felony, is not a judge or justice, officer or employee of

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the Court or an employee of the Reservation police force or Reservation jail, and is not otherwise disqualified according to standards established by the Court.

(c) A list of at least 21 resident Indians, and in the case of the Tribes exercising Special Tribal Criminal Jurisdiction, a list of at least 21 non-member residents of the Reservation, who are eligible for jury duty shall be prepared and maintained by the clerk.

(d) Under the supervision of the presiding judge, a panel of jurors shall be drawn by lot from the jury list. A trial jury shall consist of 6 qualified jurors selected from a panel of 12 eligible persons taken from the jury list, none of whom has an interest in the case, or is related as spouse, parent, brother or sister to any of the parties or their attorneys. If the jury panel is exhausted before a sufficient number of jurors are selected for the trial jury, additional jurors shall be drawn by lot from the jury list for the panel until a trial jury is selected.

(e) The judges of the Court shall have the power to issue subpoenas, through regular mail, to compel the attendance of members of the jury panel and of trial jurors. Subpoenas shall be signed by the judge issuing them.

(f) The judge assigned to the case shall have the power to excuse persons from jury duty on account of sickness, disability or other good cause.

(g) Each party may question members of the panel of prospective jurors for the purpose of selecting a trial jury.

(h) In criminal cases, in addition to disqualifying jurors for cause as determined by the judge, the prosecution and the defendant, each side shall be entitled to 3 peremptory challenges without assigning any cause. Where there is more than one defendant, they must join in a challenge before it can be made unless the Court, for due cause shown, shall permit otherwise, or shall permit each defendant to exercise 2 peremptory challenges.

Tribal Code Commentary

The Confederated Tribes of the Umatilla Reservation Tribal Code (Umatilla) provides that any resident of the Umatilla Nation is eligible for jury service. A list of eligible individuals is maintained by the clerk of court. The statute does not indicate where the clerk gets the names of individuals who are residents that become a part of the jury pool. However, the pool is drawn from the voting records of the district that is a rough overlay of the reservation. Selection is manual and random. In January of each year a pool of fifty potential jurors is selected by the judge from that list. These fifty residents serve as the jury pool for that year. They are notified of their selection to the trial jury list for the year from which jury panels of not less than eighteen names are selected for a trial.

The remainder of the Umatilla statute relating to juries describes how a jury is selected at trial. The statute allows for the questioning of prospective jurors by the attorney for each the prosecution and the defense and exclusion of jurors for cause when there is some evident bias. Four peremptory challenges that required no reason for exclusion are allowed for each the prosecution and the defense. Six members and one alternate are seated for a trial.

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The Tulalip Tribal Code instructs the court to prepare and update a list of eligible jurors (the jury pool). The list would include the following classes of people: Tribal members living on or near the reservation; residents of the Tulalip Reservation; and employees of the Tulalip Tribes or any of its enterprises, agencies, subdivisions, or instrumentalities who have been employed by the Tribes for at least one year continuously prior to being called as a juror. From this jury pool the clerk of court randomly selects twenty-five names for a potential jury panel. The persons selected are summoned by mail or personal service to appear at a designated time. If they fail to appear they are subject to contempt of court action.

The Tulalip Code instructs the judge to first question potential jurors, screening for bias or impartiality. Specific questions appear in the code. The code is also specific about eliminating relatives from the jury panel, at least those that are of the first or second degree by marriage or blood to any party. We can probably assume that this probably also includes the relatives of the victim in a criminal case, as well as any person who might have a direct interest in the case.

The Tulalip Code provides for a motion to discharge, which is the method that a party would question the manner in which a jury venire (pool) was selected. If a motion is raised, the judge would be required to conduct a hearing and if the judge finds that the jury was improperly selected, a new one would be impaneled.

Challenges for cause and peremptory challenges are described in the statute. In the event the court finds it is short of jurors, the statute allows the court to call anyone eligible to serve without any advance notice so that the case can move forward. The court provides daily fees for jurors, the amount is established by the Board of Directors.

Pascua Yaqui Tribe (Pascua Yaqui) differentiates between crimes punishable by imprisonment and general crimes in which a defendant can request a jury trial for a fee. Those carrying the possibility of imprisonment are guaranteed a jury trial by making a request in writing at least 30 days before trial date. The Tribe draws potential jurors from different Tribal departments which includes spouses of Tribal members, employees of Tribal entities, and permanent residents of the reservation. Pascua Yaqui uses this process for all jury pools including for those defendants not necessarily facing enhanced sentencing nor being prosecuted under Special Criminal Domestic Violence Jurisdiction (SDVCJ).

The Pascua Yaqui Tribal Code further describes the process of jury selection, including rules for dismissing and excusing jurors, the court's authority to summon and punishment for failure to appear.

The Fort Peck Tribes maintain two separate jury pools depending on whether the case is an STCJ offense or not. For STCJ the court clerk is instructed to maintain a list of at least 21 non-member residents of the Reservation in addition to the usual list of 21 resident Indians.

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Questions for Consideration

The following questions are meant to guide you in writing the sections of your Tribal code or rules that incorporate ICRA jury requirements for STCJ cases.

1. Examine any code sections or rules relating to juries. What are your current procedures in selecting a jury pool? Does your jury pool currently include non-member Indians? Does your jury pool currently include non-Indians?

2. Is there a random process that selects potential jurors from the jury pool for the jury panel? Do you currently have a process for enforcing jury summons? If so, is it a civil process or a criminal process?

3. If you currently do not have non-Indians in your jury pool, what could be the source of names and addresses of potential jurors? Are there potential sources of information with names and address for residents of your nation? Should all Tribal employees be obligated to serve on a jury?

4. Who will be responsible for maintaining a list of potential jury pool candidates?

5. What is the process your nation will use in randomly selecting from the jury pool and summoning those selected?

6. Will you have the same process for all cases or a different process for STCJ cases?

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Resources for Including Non-Indians in Jury Pool

Fair Cross Section and Tribal Jury Composition: VAWA 2022 Tribal Criminal Jurisdiction Series
Explores the origins and implications of the fair cross-section requirement, drawing on relevant Federal jurisprudence, particularly the landmark U.S. Supreme Court case *Duren v. Missouri.* It also addresses some of the practical challenges tribes face in defining their communities and assembling representative jury pools. By examining these legal frameworks and practical considerations, this publication provides guidance to Tribal governments about how they can effectively implement the jury provisions of VAWA 2013 while maintaining fairness and upholding community values.

The Center for Jury Studies provides useful resources to help judges and court staff improve jury management operations and procedures. The Center has experience evaluating demographic representations of jury pools to ensure a fair cross section for the local community and provides relevant information and Best Practice Guides. For Tribes looking to improve the administration of jury selection, their tools for best practices and consultations to ensure effective compliance for jury service systems.

For more information on how to establish a jury list, please see Jury Managers' Toolbox: Characteristics of an Effective Master Jury List, by the National Center for State Courts (2009).

For more information on ways to enforce jury summons, please see Jury Managers' Toolbox: Best Practices for Jury Summons Enforcement, by the National Center for State Courts (2009).

For further information on conducting jury trials, please see Principles for Juries and Jury Trials, by the American Bar Association (2005).

Principles for Juries and Jury Trials provides nineteen American Bar Association approved principles that define fundamental aspirations for management of a jury system.

State Court Organization 2004, Bureau of Justice Statistics, D. Rottman and S. Strickland, pp. 218–27 (August 2006). The comparison charts starting on page 218 provide comparison information on juries and on various topics including jury pools, qualifications, selection process, jury pay, peremptory challenges, etc

For further information on jury selection and fair cross section in your community the following webinar slides may be of assistance:

- Developing an Effective and Defensible Jury Plan for Tribal Courts, presented September 13, 2013.
- Developing an Effective and Defensible Jury Plan for Tribal Courts Part II, presented September 13, 2013.
- Jury Managers' Toolbox: A Primer on Fair Cross Section Jurisprudence, by the National Center for State Courts (2010).

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Jury Selection Plan Examples

- U.S. District Court for District of Minnesota
- State of North Dakota Courts
- U.S. District Court for District of South Dakota

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Chapter 11: Right to Federal Habeas Corpus Review, Notice, and Tribal Exhaustion

Overview

The Indian Civil Rights Act (ICRA) guarantees to defendants in Tribal courts a right to file a habeas corpus petition in Federal court and to petition that court for a stay of detention. This statute makes clear, however, that the writ will not be granted if the defendant has failed to first exhaust Tribal court remedies.

This provision is generally addressing a Federal right that will be guaranteed in Federal court. As such, it does not necessarily require any amendments to the Tribal code. A Tribe is required by Federal law, however, to give notice to the defendant of their Federal habeas rights. This could be done as a matter of court practice or procedure, or you may want to include a provision in your code that requires that notice is given to Special Tribal Criminal Jurisdiction (STCJ) defendants and explains how that will be done. A Tribe may also want to address what constitutes Tribal exhaustion in its own laws to help guide a reviewing Federal court who is considering a Federal habeas petition from a Tribal detainee.

25 U.S.C. § 1303

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe.

25 U.S.C. § 1304

(f) Petitions for writs of habeas corpus

(1) In general. After a defendant has been sentenced by a participating Tribe, the defendant may file a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title.

(2) Requirement. An application for a writ of habeas corpus on behalf of a person in custody pursuant to an order of a Tribal court shall not be granted unless —

(A) the applicant has exhausted the remedies available in the Tribal court system;

(B) there is an absence of an available Tribal corrective process; or

(C) circumstances exist that render the Tribal corrective process ineffective to protect the rights of the applicant.

(g) Notice; habeas corpus petitions

A participating Tribe that has ordered the detention of any person has a duty to timely notify in writing such person of their rights and privileges under this section and under section 1303 of this title.

Some general background regarding appeals and habeas corpus petitions may be helpful in understanding this provision. A defendant accused of a crime in Tribal court has rights guaranteed by both Tribal law and Federal law. Defendants who are convicted and sentenced,

and who believe their rights were violated or the outcome of their case was wrong, can appeal their conviction through the procedures established by the Tribal government and its courts. This is often referred to as the "direct" appeals process.

To ensure that Tribal courts properly interpret and apply the rights guaranteed to defendants under Federal law, the Federal government has also established a mechanism for defendants to seek limited Federal court review of Tribal court proceedings. This is known as "habeas corpus" or the "indirect" appeals process. Since its enactment in 1968, ICRA has explicitly stated that "the privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe."[53]

The writ of habeas corpus is a legal remedy with deep historical roots, predating the establishment of the United States. It originated as a safeguard to ensure that individuals are not unlawfully imprisoned. Habeas corpus is generally reserved for situations involving grave injustice or unlawful detention, rather than serving as a routine avenue for re-litigation of a case. For instance, with very few exceptions, Federal courts will not entertain a habeas corpus petition from a State court unless the defendant is in custody, alleges a violation of Federal rights, and has first provided the State court an opportunity to address and resolve the alleged issue.

Section 1304(f)(2) of ICRA, which was added as part of the Violence Against Women Reauthorization Act of 2022 (VAWA 2022), imposes specific limitations on a Federal court's ability to grant habeas petitions filed by STCJ defendants challenging their detention by a Tribe. A Federal court can only grant such a petition after the petitioner has been sentenced and either exhausted all available remedies within the Tribal court system or has demonstrated that something is defective in the Tribal court corrective process. This is commonly referred to as the "Tribal exhaustion doctrine" and its inclusion in VAWA 2022 is an important recognition of Tribal sovereignty and respect for Tribal courts.

To make sure that your Tribal court is handling appeals whenever possible, it is important to review your Tribal appellate processes and to consider possibly adopting a Tribal habeas provision. These are important mechanisms for the Tribe to assert its authority to interpret and apply its laws, reflecting its cultural values, traditions, and legal principles. A thoughtfully designed Tribal appeals process reinforces the legitimacy and integrity of the Tribal court system and may help define exhaustion.

Some Tribes have their own Tribal habeas corpus statutes and examples are provided in the following text.

Duty to Timely Notify Defendant of Rights and Privileges

ICRA requires Tribes that are exercising STCJ to provide notice in writing to defendants of their rights. There is a debate about whether the notice requirement included in 1304(e) refers to *all* of the due process protections guaranteed by the Indian Civil Rights Act or only to the defendant's right to file a habeas petition in Federal court and to petition for a stay of detention. There is no Federal court case or other authority that has interpreted this provision, but as a matter of practice, many of the Tribes who are prosecuting non-Indians in their court are taking

[53] 25 U.S.C. § 1303.

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a cautious approach and are providing notice of all of the ICRA rights in writing to STCJ defendants.

Many Tribes have developed a form that includes all the defendants' rights listed in ICRA. Most have also adopted court processes requiring that the presiding judge goes over the list of rights with the defendant to ensure that the rights are understood. Two forms are provided in the appendix by two Tribes exercising STCJ: Confederated Tribes of the Umatilla Indian Reservation and Tulalip Tribes Notice of Rights Under the Indian Civil Rights Act

It is important to note that the Tribal court should also be prepared to clearly document that the required written notice was provided. Otherwise, a Federal court hearing a challenge to the Tribal exercise of STCJ may presume that the required notice was not provided. Many Tribes require the defendant to sign a copy of the rights confirming that they have been informed of their rights.

The requirement that a STCJ defendant is given notice of their rights is something that may or may not be included in the Tribal code. It could be addressed in court rules or practice, but it must be adhered to. Some examples of court codes and rules that have specifically addressed this requirement are included in the following text.

Tribal Code Examples

Examples of Provisions for Ensuring Notification of Rights

Tulalip Tribal Codes
Chapter 2.25 Criminal Procedures

2.25.010 General Provisions
…

(C) Special Tribal Criminal Jurisdiction. The Tulalip Tribes hereby exercises criminal jurisdiction as a participating Tribe to the fullest extent possible as defined within 25 U.S.C. 1304 as presently constituted or hereafter amended. Tribal Court shall establish a process by Court rule to implement the notice requirement of 25 U.S.C. 1304(g). Whether the elements of an offense are sufficient to also prove the jurisdictional requirements of special Tribal criminal jurisdiction is a question of law for the judge to decide. The judge shall include additional jurisdiction elements in the judge's instruction of the jury if necessary to prove jurisdiction.

Statutes of the Confederated Tribes of the Umatilla Indian Reservation
(As Amended through Resolution No. 23-059 (June 26, 2023))

Section 3.28 Defendant's Rights

A. Every defendant has the privilege of the writ of habeas corpus in a court of the United States to test the legality of their detention by order of the Confederated Tribes.

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1. Every defendant who is detained in jail or arraigned by the court shall be informed of their federal habeas rights, including the right to stay detention, by being given a written copy of 25 USC §1302, 25 USC §1303 and 25 USC §1304.

Eastern Band of Cherokee Indians Tribal Code

Chapter 15 – Criminal Procedure

Sec. 15-7. - Indian Civil Rights Act.

The Eastern Band of Cherokee Indians adopts all the protections afforded in Title 25, Chapter 15 of the United States Code, as amended.

The Cherokee Rules of Criminal Procedure

Rule 6. – Initial Appearance

(d) Procedures

…

(1) Advising of rights. The Magistrate shall advise the defendant and make findings that the defendant understands:

(A) That he or she has the right to remain silent;

(B) That he or she cannot be compelled to testify in this case;

(C) That he or she has the right to a speedy trial;

(D) That he or she has the right to a public trial;

(E) That he or she has the right to confront the witnesses against him or her:

(F) That he or she has the right to call witnesses on his or her own behalf;

(G) That, if he or she wishes, witnesses for his or her behalf may be compelled to attend by subpoena served by the CIPD or other law enforcement agency;

(H) That he or she has the right to be represented by counsel,

(I) That counsel will be appointed for him or her, upon request, if he or she cannot afford counsel and is likely to face an active term of incarceration if convicted;

(J) That he or she has the right to trial by jury;

(K) That he or she has the right to appeal the final judgment of the Cherokee Court to the Cherokee Supreme Court; and

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(L) That he or she has the right to file a Petition for Habeas Corpus to the Cherokee Supreme Court and then to the Federal Court under procedures in the Indian Civil Rights Act.

Tribal Code Commentary

The Tulalip Tribal Code references the requirement in Federal law that Tribal court defendants be give notice of their rights and instructs the Tribal court to develop a process via court rule to ensure appropriate notice is given.

The Confederated Tribes of the Umatilla code provision, in contrast, contains greater specificity in the code itself and directs that all defendants be notified of their rights by being given a written copy of ICRA. Umatilla also has an extensive Tribal habeas process in Section 3.47 of their Criminal Code that is a model for Tribes who want to consider adding a Tribal habeas process.

The Eastern Band of Cherokee Indians includes a general statement in its code that all ICRA rights are guaranteed, which would include the provision requiring notice of rights. The Tribe then expands on this in the Court Rules that direct the Magistrate at an initial hearing to review the rights with a defendant.

Questions for Consideration

The following questions are meant to guide you in writing the sections of your Tribal code that ensures that the defendant receives notice of his rights to file a writ of habeas corpus in Federal court and stay detention.

1. Do you currently notify defendants of their rights? If so, at what stage of the process does it occur? Is notice given in writing?

2. Do you need to develop laws that expressly require notification of STCJ defendants of their right to file a petition for habeas corpus in Federal court? If not, how will you ensure that the defendant receives the required notification in writing?

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3. In case of a Federal court challenge, how will you ensure that the Tribal court is able to prove that STCJ defendants received the required notification? Do you want to require the Defendant to sign as proof of notice?

4. Does your Tribe currently have an appellate court? Does it have a Tribal habeas statute? Would it be helpful to add either or both of these to ensure that the Tribe has a mechanism for handling any appeals?

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Chapter 12: Victims' Rights

Overview

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) and Violence Against Women Reauthorization Act of 2022 (VAWA 2022) recognize Tribal jurisdiction while ensuring due process protections for non-Indian defendants in Tribal courts. Many Tribes implementing these laws also strengthen their Tribal codes to protect victims' rights and amplify victims' voices in the justice process. While not required for Tribes under Federal law, Tribal victims' rights codes are vital and should be included in drafting efforts. For a comprehensive guide, see the *Tribal Law and Policy Institute's 2022 Condensed Guide for Drafting Tribal Victim's Rights Codes*.

Victim-Centered Approach

Victim-centered policies prioritize victims' needs, ensuring services are delivered compassionately, sensitively, and in a culturally respectful manner. This approach affirms that victims may accept or reject services and make key decisions about their legal concerns. Victim-centered protections are voluntary, not mandatory, and codes should reflect that victims assert their rights at their discretion.

The following list of "core victim's rights" are provided as examples of rights commonly found in the criminal legal process.

Core victim rights include:

- **The right to be treated with fairness, dignity, sensitivity, and respect**: Victims deserve treatment that upholds their dignity, demonstrates respect, and ensures fairness. This right is especially critical for victims of sexual assault and sex trafficking.

- **The right to be present at criminal justice proceedings:** Victims should have the opportunity to observe the justice process, including but not limited to trials, sentencing, and parole hearings. Some jurisdictions specify that victims may attend any proceedings where the defendant has a right to be present. If your Tribal code allows for witness sequestration, consider including an evidentiary exception that permits victims to remain in the courtroom unless a court determines their testimony may be influenced by others.

- **The right to be heard in the criminal justice process:** This right generally includes the right to confer with the prosecutor and submit a victim impact statement at sentencing, parole, and other similar proceedings. You may also want to require the prosecutor to obtain the views of the victim before a disposition is final or even require the prosecutor to certify that he or she has consulted with the victim before a plea can be accepted.

- **The right to be informed of proceedings and events in the criminal justice process:** Victims should receive timely notice of key events, including the offender's release or escape. It may also include available benefits and services, and access to records, referrals, and other information.

- **The right to protection from intimidation and harassment:** This right may take the form of a generally stated right to protection or may include specific protective measures. Most jurisdictions have made it a crime to intimidate victims or witnesses. Examples of protective measures include criminal no-contact orders; police escorts to and from court; secure waiting area separate from the accused and his/her family, witnesses, and friends during court proceedings; witness protection programs; residence relocation; and denial of bail or imposition of specific conditions of bail (e.g., no-contact orders).

- **The right to restitution from the offender:** "Restitution" commonly refers to payment in the form of damages, but it can also refer to the return or repair of property stolen or damaged in the course of the crime.

- **The right to privacy:** Consider how to protect victim privacy in criminal justice documents, compensation records, and court testimony, as well as contact information provided for notification purposes. Statutory protections often include (1) prohibition against compelling testimony related to personal information in open court; (2) exclusion or limited disclosure of victim identifying information in criminal justice records (law enforcement reports, court materials and prosecution documents); and (3) protection from release of addresses and/or phone numbers provided for notice purposes.

- **The right to apply for crime victim compensation:** Every State and Federal jurisdiction, and many Tribal jurisdictions have created a government program designed to reimburse victims of violent crime for their out-of-pocket expenses relating to the crime. It is up to you to determine the types of costs that will be compensated, but common reimbursable expenses include medical expenses, counseling expenses, lost wages, funeral expenses, crime scene remediation, and property damage repairs.

- **The right to the prompt return of personal property seized as evidence:** In an effort to avoid depriving the victim of their property for the months or even years it may take to appeal or retry a case, you may want to impose specific time requirements for the return of property or authorize a photograph of the item to be used as evidence. Some Tribal communities have cultural practices about what needs to happen to the clothing of a victim of a crime that should be respected and considered.

- **The right to a speedy trial and other proceedings free from unreasonable delay:** Many jurisdictions require that, in ruling on a continuance requested by a party, the court must also consider the impact of the delay on the victim. Additionally, several jurisdictions give priority to certain types of cases, including domestic violence.

- **The right to enforcement of these rights and access to other available remedies:** Many jurisdictions create specific mechanisms through which Tribes can ensure that victims' rights are enforced.

These rights form the foundation of victim protections in the justice system, but Tribal nations have the sovereignty to tailor their laws to best serve their communities.

A Tribe can incorporate victim's rights either as a standalone section or chapter within a Tribal code, or as victim's rights provisions throughout the code. A standalone comprehensive victim's rights code or chapter demonstrates the Tribe's dedication to protecting victims' rights and may help ensure that everyone is aware of the rights.

The first step in designing the Tribal code to address victim's rights is to define the term "victim." For example, will the term include adult and child victims or only adult victims? Will the term encompass other individuals such as a spouse, next-of-kin, or family members to assert victim's rights on behalf of an incapacitated victim? Note that this term may vary across jurisdictions.

The second step to drafting is to determine the types of crime that will trigger the victim's rights protections.

Finally, the code will need to specify the rights that will be afforded to crime victims.

Tribal Code Examples

- ***Defining Victim*:** The Pascua Yaqui Tribe in Title 4, Chapter 5 of the Criminal Code under "Victims Rights" defines a victim as a person who a criminal offense has been committed against, or if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for the offense or is the accused. A person ceases to be a victim upon the acquittal of the defendant or upon the dismissal of the charges against the defendant as a final disposition

- ***Types of Crimes Triggering Victim's Rights*:** The Sault Ste. Marie Tribe of Chippewa Tribal Code in Chapter 75 "Crime Victims Rights" indicates that a "crime" means a violation of the Tribal code of the Sault Ste. Marie Tribe of Chippewa Indians for which the offender, upon conviction, may be punished by imprisonment or fine.

- ***Right to Be Treated with Fairness, Dignity, Sensitivity, and Respect**:* In Title 4, Chapter 5, the Pascua Yaqui Tribal Code states that a victim of crime has a right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.

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- ***Right to Attend Hearings:*** In Chapter 6, Section 10 the Kenaitze Indian Tribe notes that a victim of domestic violence has the right to be present at all hearings of the Tribal Court on the matter, either in person or telephonically.

- ***Right to Compensation:*** In Title 5, Chapter 5.5, the Confederated Tribes of Colville notes that a victim of crime involving domestic violence is entitled to be informed of how to apply for victim's compensation, and to apply for such funds.

- ***Right to be Heard:*** In Title 4, Chapter 5, the Pascua Yaqui Tribe states that the victim's rights statutes shall be construed to preserve and protect victims' rights to justice and due process and the victim has a right to be heard, upon request, at any proceeding involving a post arrest release decision, a negotiated plea, or sentencing. The victim has a right to confer with the prosecution, upon request, before or after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.

- ***Right to Be Informed:*** In Article IV, Chapter 4, the Colorado River Indian Tribes states that a victim of domestic or family violence is entitled to be informed of all hearing dates and continuances, to receive a copy of the arresting officer's report at no cost and the prosecutor must notify the victim in writing of the victim's rights set forth in the code.

- ***Right to Privacy:*** In Title 10, Chapter 10.15, the Yurok Tribal Code notes that victims of any crime that has been filed with the court that directly or indirectly involves domestic abuse, sexual assault, stalking or dating violence has the right to be treated with fairness and respect for the victim's dignity and privacy, the right to present the disclosure of confidential information or records to the defendant or anyone acting on behalf of the defendants that could be used to locate or harass the victim or the victim's family or which discloses confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential.

- ***Right to Protection:*** In Title 10, Chapter 10.15, the Yurok Tribal Code notes that a victim of the crime of domestic violence has a right to go to the Tribal Court and file a petition requesting any of the following orders for relief:

    - Restraining the attacker from contacting you or your children;
    - Directing your attacker to leave your household;
    - Preventing your attacker from entering your residence, school, business, or place of employment;
    - Awarding you or other parent custody of the children;
    - Directing the noncustodial parent to pay child support;
    - Obtain a protection order in State court; and

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    - Restraining the defendant from contacting the victim utzing any and all electronic communications via social media, cell phone, voicemail, text, and other types of technology.

- ***Right to Restitution**:* In Title 6, Chapter 3, Subchapter 3, the Muscogee (Creek) Nation notes that a victim of crime has the right to receive restitution for the losses sustained as a direct consequence of any criminal conduct.

- ***Right to Return of Property**:* In Chapter 75, the Sault Ste. Marie Tribe of Chippewa Tribal Code states that the law enforcement having the responsibility for investigating a reported crime shall promptly return to the victim property belonging to that victim that is taken in the court of the investigation with some exceptions noted.

- ***Right to a Speedy Trial:*** In Title 4, Chapter 5, the Pascua Yaqui Tribe notes that a victim of crime has a right to a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.

- ***Right to Have the Victim's Rights Enforced:*** In Chapter 9 the Little Traverse Bay Band of Odawa Indians states that upon the request of a victim the prosecutor must ask the court to enforce the rights of the victim.

Making Victim's Rights Codes Meaningful

When drafting victims' rights codes, it is important to have a clear process for the enforcement of the rights and to identify the person/agency responsible for notifying the victim of their rights and asserting the victim's rights upon the request of the victim. Training across justice system actors is also vital.

Victims may enter the Tribal criminal justice system by making initial contact with a variety of disciplines including community-based victim advocates, law enforcement, and Tribal courts. To inform victims of their rights, it is necessary that all first responders, service providers, and court personnel are fully aware and trained on codes pertaining to victims' rights. Ultimately, the majority of disciplines in a criminal justice system will likely have responsibilities to uphold the victim's rights and work collaboratively when possible to promote delivery of victim-centered services.

Victim advocates are critical to assisting victims in navigating criminal legal processes and working with criminal justice systems professionals to protect victims. Victim advocates, whether community-based or systems-based, should be included in the drafting and implementation of victims' rights codes.

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Questions for Consideration

The following questions are meant to guide you in writing the sections of your Tribal code that protect and promote the rights of crime victims.

1. Does your Tribal code currently include any victims' rights provisions? Is there anything missing?

2. How will you define "victim" in your Tribal laws? Will it include family members? Which crimes will trigger your victims' rights provisions?

3. Are there any applications of Tribal customs, beliefs, or traditions that may be relevant?

4. What will be the process for a victim of crime who is seeking enforcement of the Tribal victims' rights you are drafting?

Resources for Victims' Rights

- Tribal Law and Policy Institute, Pocket Guide: Tribal Victim Advocacy in Criminal Cases, November 2022.
- Tribal Law and Policy Institute, Tribal Legal Code Resource: Victim's Rights, Condensed Guide for Drafting Tribal Victim's Rights Codes, November 2022.
- Tribal Law and Policy Institute, Domestic Violence Laws: Guide for Drafting or Revising.
- Breaking Barriers: The Role of Community-Based and System-Based Victim Advocates.
- Hagen, Leslie, "Crime Victims in Indian Country and the Rights They Are Owed." Webinar, July 29, 2019. NIWRC.org, accessed March 30, 2025.

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Part E: Appendix

This section provides a description of and links to online resources to help in developing Tribal codes and further understanding Special Tribal Criminal Jurisdiction (STCJ). Some of the resources help in understand key issues that may need to be addressed during implementation.

1. Special Tribal Criminal Jurisdiction Resources

2. Indian Civil Rights Act as Amended by VAWA 2022

3. Tribal Code Checklist (2013 to 2022)

4. Special Tribal Jurisdiction Sample Code

5. Tulalip Foundation Request for Applications for Indigent Criminal Conflict Attorney Services

6. Tulalip Consultant Contract for Indigent Conflict Defense Legal Services

7. Confederated Tribes of the Umatilla Indian Reservation Notice of Rights and Privileges

8. Tulalip Tribes Notice of Rights under the Indian Civil Rights Act

9. Glossary

10. Acronyms

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1. Special Tribal Criminal Jurisdiction Resources

A. Resources Developed by Tribal Technical Assistance Providers

- Tribal Criminal Jurisdiction over Non-Indians:Violence Against Women Act Reauthorization of 2022 provides general guidance to assist Tribes in making an informed decision concerning the possible exercise of Tribal criminal jurisdiction over non-Indians. Considerations for exercising criminal jurisdiction over non-Indians are examined including both the benefits and challenges of exercising criminal jurisdiction over non-Indians. Information is provided concerning the experiences of the implementing Tribes and the role of the Intertribal Technical-Assistance Working Group (ITWG). Extensive information is provided concerning resources available to Tribes interested in exercising this jurisdiction. This publication is part of a two-part series on enhanced Tribal authority, the other publication will discuss Tribal Law and Order Act enhanced sentencing authority. See www.TribalVAWA.org, including, for more information concerning VAWA 2022 and the Special Tribal Criminal Jurisdiction provisions.

- Special Domestic Violence Criminal Jurisdiction Pilot Project Report National Congress of American Indians, with assistance from the Tribal Law and Policy Institute. The reauthorization of the Violence Against Women Act in 2013 created the Pilot Project, which was comprised of five Tribes: the Confederated Tribes of the Umatilla Indian Reservation, Pascua Yaqui Tribe, Tulalip Tribes of Washington, Assiniboine and Sioux Tribes of Fort Peck, and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in North Dakota. These Tribes exercised Special Domestic Violence Criminal Jurisdiction, which restored their partial power to criminally prosecute non-Indians for domestic and dating violence offenses and criminal violations of protection orders. The Pilot Project Report provides a brief account of the activities during the Pilot Project period from February 2014 to March 2015 and shares recommendations for next steps (2015).

- VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five year Report National Congress of American Indians. This report summarizes the results of the first five years of Tribal government-expanded criminal jurisdiction over non-Indians under the Tribal provisions of the 2013 reauthorization of the Violence Against Women Act (VAWA 2013) (2018).

B. Congressional Hearings

1. The Need to Reauthorize the Violence Against Women Act, March 20, 2018 (this is a webcast).

2. Reauthorization of the Violence Against Women Act, March 7, 2019 (this is a webcast).

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3. Restoring Justice: Addressing Violence in Native Communities through VAWA Title IX Special Jurisdiction, December 8, 2021 (this is a webcast).

C. Proposed Congressional Reauthorizations

1. Violence Against Women Reauthorization Act of 2019 (H.R. 1585) (Introduced in the House March 7, 2019, and passed/agreed to in the House. Passed by recorded vote: 263-158 on April 4, 2019).

2. Violence Against Women Reauthorization Act of 2019 (S. 2843) (Introduced in the Senate November 13, 2019).

3. Violence Against Women Reauthorization Act of 2019 (S. 2920) (Introduced in the Senate November 21, 2019).

4. Violence Against Women Reauthorization Act of 2021 (H.R. 1620) (Introduced in the House March 8, 2021. Passed/agreed to in the House: Passed by Yeas/Neas: 244-172 on March 17, 2021)

D. Government Documents/Reports

1. Federal Register, vol. 78, no. 230, p. 71645, Nov. 29, 2013 - Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence—This final notice establishes procedures for Indian Tribes to request designation as participating Tribes under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, under the voluntary Pilot Project described in the Violence Against Women Reauthorization Act; establishes procedures for the Attorney General to act on such requests; and solicits such requests from Indian Tribes.

2. Federal Register, vol. 78, no. 115, p. 35961, June 14, 2013 - Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence—This notice proposes procedures for an Indian Tribe to request designation as a participating Tribe under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, pursuant to the voluntary Pilot Project described in section 908(b)(2) of the Violence Against Women Reauthorization Act of 2013 (''the Pilot Project''), and also proposes procedures for the Attorney General to act on such a request. This notice also invites public comment on the proposed procedures and solicits preliminary expressions of interest from Tribes that may wish to participate in the Pilot Project.

3. Federal Register, vol. 88, no. 69, p. 21459, April 11, 2023 - Special Tribal Criminal Jurisdiction Reimbursement—This interim final rule will implement the new Tribal Reimbursement Program within the Department of Justice's Office on Violence Against Women (OVW) by providing details on how it will be administered, including eligibility,

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frequency of reimbursement, costs that can be reimbursed, the annual maximum allowable reimbursement per Tribe, and conditions for waiver of the annual maximum.

4. Tribal Pilot Project Applications Approved by DOJ The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Confederated Tribes of the Umatilla Indian Reservation, Pascua Yaqui Tribe of Arizona, Sisseton Wahpeton Oyate of the Lake Traverse Reservation, and Tulalip Tribes of Washington submitted application questionnaires to become "participating Tribes" and to approve their accelerated implementation of Special Domestic Violence Criminal Jurisdiction. These applications were granted by the Department of Justice prior to March 7, 2015.

E. Online Resources

1. www.TribalVAWA.org is a website developed by TLPI as a resource for VAWA Special Tribal Criminal Jurisdiction. It contains an overview of the Violence against Women Reauthorization Act of 2022: Tribal Criminal Jurisdictions over Non-Indians, covered crimes under VAWA 2022, Frequently Asked Questions, news, webinars and resources, events, funding information, and information for the Inter-Tribal Technical Assistance Working Group.

2. TLPI Tribal Provisions of VAWA 2022 Resource Page is a webpage developed by TLPI to share information and resources relative to VAWA 2022 Special Tribal Criminal Jurisdiction. It contains news, events, webinars, and other helpful information.

3. www.TribalProtectionOrder.org is a website intended to serve as an online resource pertaining to drafting and enforcing Tribal protection orders. Note that each Tribe is unique with respect to Tribal constitutions and codes. The reader should consult the specific Tribal constitution and Tribal codes for additional requirements regarding drafting and enforcement of Tribal protection orders.

4. "Considerations in Implementing VAWA's Special Domestic Violence Criminal Jurisdiction and TLOA's Enhanced Sentencing Authority—A Look at the Experience of the Pascua Yaqui Tribe" compiled by Alfred Urbina, Attorney General, Pascua Yaqui Tribe and Melissa Tatum, Research Professor of Law, The University of Arizona James E. Rogers College of Law. This publication shares the Pascua Yaqui experience of implementing VAWA SDVCJ and examines what factors Tribes should consider in deciding to exercise VAWA SDVCJ (2014).

5. "Implementing VAWA 2013," M. Brent Leonhard, *The Federal Lawyer*, Vol. 62, Issue 9, pp. 52–58, October/November 2015. This article discusses a brief history of criminal jurisdiction in Indian country, violence against Native American women, VAWA Special

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Domestic Violence Criminal Jurisdiction, and the Confederated Tribes of the Umatilla Indian Reservation experience implementing VAWA SDVCJ.

6. "Implementing VAWA 2013," M. Brent Leonhard, *ABA Human Rights Magazine*, Vol. 40, No. 4, 2014. This article discusses a brief history of criminal jurisdiction in Indian country, violence against Native American women, VAWA Special Domestic Violence Criminal Jurisdiction and the Confederated Tribes of the Umatilla Indian Reservation experience implementing VAWA SDVCJ.

7. "Simple checklist for Law Enforcement Officers," National Congress of American Indians. This short checklist sets out steps to investigate non-Indian domestic violence against an Indian.

8. ITWG Webinars ongoing webinar series on key areas of SDVCJ implementation, including defendants' rights issues, VAWA 2013's fair cross-section requirement and jury pool selection, and victims' rights.

9. "Crime and Governance in Indian Country," Angela Riley, *UCLA Law Review,* Vol. 63, pp. 1564–1637. This article offers the first comprehensive assessment of the Tribal Law and Order Act and the reauthorization of the Violence Against Women Act, respectively, to show how they relate to one another on the ground and the implications for Tribal sovereignty and self-determination (2016).

10. Ten Principles of a Public Defense Delivery System, American Bar Association, Standing Committee on Legal Aid and Indigent Defense (2002). Principles and considerations in maintaining a public defense system.

11. Lessons from Gideon, Erwin Chemerinsky, 122 Yale Law Journal 2676 (2013). *Gideon v. Wainwright*, 372 U.S. 336 (1963) holds that the Sixth Amendment right to counsel requires that State governments provide an attorney to all indigent defendants facing a possible prison sentence. The article explores the shortcomings of this unfunded mandate.

12. State Court Organization 2004, Bureau of Justice Statistics, D. Rottman and S. Strickland, pp. 218–27 (August 2006). The comparison charts starting on page 218 provide comparison information on juries and on various topics including jury pools, qualifications, selection process, jury pay, peremptory challenges, etc.

13. Principles for Juries and Jury Trials provides nineteen American Bar Association–approved principles that define fundamental aspirations for management of a jury system.

14. Center for Jury Studies disseminates information that helps judges and court staff improve jury management through technical assistance contracts, educational programs, and public outreach.

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15. Harvard Law Review, Recent Legislation Note provides a profile of VAWA 2013, Special Domestic Violence Jurisdiction, Vol. 127, No. 5 (March 2014). Discusses the history of the Federal and Tribal governments and provides the legal history relative to Tribal criminal jurisdiction.

16. UCLA Law Review, Two-Tiered Program of the Tribal Law and Order Act, Seth Fortin, 61 UCLA L. Rev. Disc. 88 (2013). Provides an overview of the reasons and need for TLOA with references to VAWA 2013.

F. Training and Technical Assistance and Funding Resources

1. Tribal Law and Policy Institute, if you are interested in joining the ITWG or have questions about implementing Special Tribal Criminal Jurisdiction please email the Tribal Law and Policy Institute at tribalvawa@tlpi.org.

2. Office on Violence Against Women (OVW) Tribal Jurisdiction Grant Solicitation, this program is authorized by the Indian Civil Rights Act of 1968 (codified as amended at 25 U.S.C. § 1304(h)(2)). The OVW Special Tribal Criminal Jurisdiction Grant Program (Tribal Jurisdiction Program) (CFDA # 16.025) supports Tribes in their efforts to exercise special Tribal criminal jurisdiction (STCJ) over non-Indians who commit "covered crimes" within the Tribe's jurisdictional boundaries and provides technical assistance for planning and implementing changes in their criminal justice systems necessary to exercise the jurisdiction. "Covered crimes" are limited to assault of Tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violation of a protection order. Grant recipients are committed to exercising the jurisdiction to ensure that victims find safety and justice and that non-Indians who commit covered crimes within their jurisdiction are held accountable.

3. OVW Tribal Jurisdiction Grant Alaska Specific, this targeted special initiative solicitation under the Tribal Jurisdiction Program is designed to assist Alaska Native Tribal governments, or consortia of Alaska Native Tribal governments, that plan to seek designation by the Attorney General as participating Tribes able to exercise jurisdiction over non-Indians through the Alaska Pilot Program for STCJ, which was established by the Violence Against Women Act Reauthorization Act of 2022, 25 U.S.C. § 1305(d).

4. The Special Tribal Criminal Jurisdiction (STCJ) Reimbursement Program (Tribal Reimbursement Program), reimburses Tribal governments for expenses incurred in exercising Special Tribal Criminal Jurisdiction (STCJ) over non-Indians who commit certain "covered crimes" on Tribal lands. The Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022) recognized the inherent power of participating tribes to exercise STCJ and establishes a pilot program under which the Attorney General may designate up to five Alaska Tribes per calendar year as participating Tribes to exercise STCJ over all persons present in the Tribe's village.

VAWA 2022 authorized this reimbursement program to reimburse participating tribes for expenses incurred in exercising STCJ. After consulting with tribes, OVW issued implementing regulations for the program. Read the implementing regulations.

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OVW will post notices of reimbursement opportunity for this program in Grants.gov as well as on the OVW's Open Solicitations webpage. You can also sign up to receive emails as an alert when new solicitations for this and other OVW programs are open.

5. Office on Violence Against Women (OVW) Funding is a webpage that provides funding information to organizations and communities working to end gender-based violence. It provides general information about how to apply for OVW grants and cooperative agreements, learn about grant opportunities and how to manage a grant after it's awarded, and access valuable resources for applicants. This includes the Tribal Governments Program, which enhances the ability of Tribes to respond to violent crimes against Indian women, enhance victim safety, and develop education and prevention strategies.

6. Bureau of Justice Assistance (BJA) Funding is a webpage that provides information about funding through a variety of different programs. See the webpage to access currently available opportunities, learn about funding webinars, apply to become a peer reviewer, find information about previously available solicitations, and see award details. This includes Coordinated Tribal Assistance Solicitation (CTAS) Purpose Area 3–Tribal Justice Systems Program, Tribal Healing to Wellness Courts, Tribal Courts, Alaska, Violent Crime, Tribal Corrections, and Tribal Civil and Criminal Legal Assistance Program (TCCLA).

7. Office for Victims of Crime (OVC) Funding is webpage that provides information about discretionary grants that are used to fund national-scope demonstration projects and training and technical assistance delivery to enhance the professional expertise of victim service providers. Such grants can be awarded to States, local units of government, Tribal communities, individuals, educational institutions, and private nonprofit organizations. Additionally, OVC is charged by Congress with administering set-aside funds from the Crime Victims Fund for a Tribal Victim Services Set-Aside program that provide support to Tribal communities to enhance services for victims of crime

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2. Indian Civil Rights Act

25 U.S.C. §§ 1301-1305, as amended by VAWA 2022

The Cornell Law School website has a useful online version of the Indian Civil Rights Act: 25 U.S. Code Subchapter I - GENERALLY | U.S. Code | U.S. Law | LII / Legal Information Institute (cornell.edu)

Text of Indian Civil Rights Act

The Indian Civil Rights Act of 1968 (ICRA) (see Federal Laws), 25 U.S.C.§§ 1301-1305 (ICRA), provides as follows:

§ 1301. Definitions

For purposes of this subchapter, the term-

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

§ 1302. Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses

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against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)

(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
(2) is being prosecuted for any offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2)A t the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(1) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense
In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section
Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

§ 1302a. Bureau of Prisons tribal prisoner program

(1) In general
Not later than 120 days after March 15, 2022, the Director of the Bureau of Prisons shall establish a program under which the Bureau of Prisons shall accept offenders convicted in tribal court pursuant to section 1302 of this title (as amended by this section), subject to the conditions described in paragraph (2).

(2) Conditions

(A) In general
As a condition of participation in the program described in paragraph (1), the tribal court shall submit to the Attorney General a request for confinement of the offender, for approval by the Attorney General (or a designee) by not later than 30 days after the date of submission.

(B) Limitations
Requests for confinement shall be limited to offenders convicted of a violent crime (comparable to the violent crimes described in section 1153(a) of title 18) for which the sentence includes a term of imprisonment of 1 or more years.

(C) Custody conditions
The imprisonment by the Bureau of Prisons shall be subject to the conditions described in section 5003 of title 18, regarding the custody of State offenders, except that the offender shall be placed in the nearest available and appropriate Federal facility, and imprisoned at the expense of the United States.

(D) Cap
The Bureau of Prisons shall confine not more than 100 tribal offenders at any time.

(3) Rescinding Requests

(A) In general
The applicable tribal government shall retain the authority to rescind the request for confinement of a tribal offender by the Bureau of Prisons under this paragraph at any time during the sentence of the offender.

(B) Return to tribal custody
On rescission of a request under subparagraph (A), a tribal offender shall be returned to tribal custody.

(4) Reassessment

If tribal court demand for participation in this program exceeds 100 tribal offenders, a representative of the Bureau of Prisons shall notify Congress.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

§ 1304. Tribal jurisdiction over covered crimes

(a) Definitions
In this section:

(1) Assault of Tribal justice personnel
The term "assault of Tribal justice personnel" means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of, that Indian tribe or serving that Indian tribe during, or because of, the performance or duties of that individual in–

(A) preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a covered crime;

(B) adjudicating, participating in the adjudication of, or supporting the adjudication of a covered crime;

(C) detaining, providing supervision for, or providing services for persons charged with a covered crime; or

(D) incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a covered crime.

(2) Child
The term "child" means a person who has not attained the lesser of–

(A) the age of 18; and

(B) except in the case of sexual abuse, the age specified by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.

(3) Child violence
The term “child violence” means the use, threatened use, or attempted use of violence against a child proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.

(4) Coercion; commercial sex act
The terms “coercion” and “commercial sex act” have the meanings given the terms in section 1591(e) of title 18.

(5) Covered crime
The term “covered crime” means–

(A) assault of Tribal justice personnel;

(B) child violence;

(C) dating violence;

(D) domestic violence;

(E) obstruction of justice;

(F) sexual violence;

(G) sex trafficking;

(H) stalking; and

(I) a violation of a protection order.

(6) Dating violence
The term “dating violence” means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is 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.

(7) Domestic violence
The term “domestic violence” means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is committed by–

(A) a current or former spouse or intimate partner of the victim;

(B) a person with whom the victim shares a child in common;

(C) a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner; or

(D) a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of the Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(8) Indian country
The term “Indian country” has the meaning given the term in section 1151 of title 18.

(9) Obstruction of justice
The term “obstruction of justice” means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves interfering with the administration or due process of the laws of the Indian tribe, including any Tribal criminal proceeding or investigation of a crime.

(10) Participating tribe
The term "participating tribe” means an Indian tribe that elects to exercise special Tribal criminal jurisdiction over the Indian country of that Indian tribe.

(11) Protection order
The term “protection order”—

(A) means 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

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(12) Sex trafficking

The term “sex trafficking” means conduct within the meaning of section 1591(a) of title 18.

(13) Sexual violence

The term “sexual violence” means any nonconsensual sexual act or contact proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country

where the violation occurs, including in any case in which the victim lacks the capacity to consent to the act.

(14) Special tribal criminal jurisdiction

The term "special Tribal criminal jurisdiction" means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(15) Spouse or intimate partner

The term "spouse or intimate partner" has the meaning given the term in section 2266 of title 18.

(16) Stalking

The term "stalking" means engaging in a course of conduct directed at a specific person proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that would cause a reasonable person–

(A) to fear for the person's safety or the safety of others; or

(B) to suffer substantial emotional distress.

(17) Violation of a protection order

The term "violation of a protection order" means an act that–

(A) occurs in the Indian country of a participating tribe; and

(B) violates a provision of a protection order that–

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of title 18.

(b) Nature of the criminal jurisdiction

(1) In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe, including any participating tribes in the State of Maine, include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special Tribal criminal jurisdiction over all persons.

(2) Concurrent jurisdiction
The exercise of special Tribal criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) Applicability
Nothing in this section—

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) Exception if victim and defendant are both Non-Indians

(A) In general
A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense, other than obstruction of justice or assault of Tribal justice personnel, if neither the defendant nor the alleged victim is an Indian.

(B) Definition of victim
In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special Tribal criminal jurisdiction based on a violation of a protection order, the term "victim" means a person specifically protected by a protection order that the defendant allegedly violated.

(c) Criminal conduct
A participating tribe may exercise special Tribal criminal jurisdiction over a defendant for a covered crime that occurs in the Indian country of a participating tribe.

(d) Rights of defendants
In a criminal proceeding in which a participating tribe exercises special Tribal criminal jurisdiction, the participating tribe shall provide to the defendant—

(1) all applicable rights under this Act;
(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;
(3) the right to a trial by an impartial jury that is drawn from sources that—

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

(4) 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 Tribal criminal jurisdiction over the defendant.

(e) Petitions to stay detention

(1) In general
A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.

(2) Grant of stay
A court shall grant a stay described in paragraph (1) if the court—

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(f) Petitions for writs of habeas corpus

(1) In general
After the defendant has been sentenced by a participating tribe, the defendant may file a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title.

(2) Requirement
An application for a writ of habeas corpus on behalf of a person in custody pursuant to an order of a Tribal court shall not be granted unless –

(A) the applicant has exhausted the remedies available in the Tribal court system;

(B) there is an absence of an available Tribal corrective process; or

(C) circumstances exist that render the Tribal corrective process ineffective to protect the rights of the applicant.

(g) Notice; habeas corpus petitions
A participating tribe that has ordered the detention of any person has a duty to timely notify in writing such person of their rights and privileges under this section and under section 1303 of this title.

(h) Reimbursement and grants to Tribal governments

(1) Reimbursement

(A) In General
The Attorney General may reimburse Tribal government authorities (or an authorized designee of a Tribal government) for expenses incurred in exercising special Tribal criminal jurisdiction.

(B) Eligible expenses
Eligible expenses for reimbursement under subparagraph (A) shall include expenses and costs incurred in, relating to, or associated with–

(i) investigating, making arrests relating to, making apprehensions for, or prosecuting covered crimes (including costs involving the purchasing, collecting, and processing of sexual assault forensic materials);
(ii) detaining, providing supervision of, or providing services for persons charged with covered crimes (including costs associated with providing health care);
(iii) providing indigent defense services for 1 or more persons charged with 1 or more covered crimes; and
(iv) incarcerating, supervising, or providing treatment, rehabilitation, or reentry services for 1 or more persons charged with 1 or more covered crimes.

(C) Procedure

(i) In general
Reimbursement authorized under subparagraph (A) shall be in accordance with rules promulgated by the Attorney General, after consultation with Indian tribes, and within 1 year after Match 15, 2022.

(ii) Maximum reimbursement
The rules promulgated by the Attorney General under clause (i)–

(I) shall set a maximum allowable reimbursement to any Tribal government (or an authorized designee of any Tribal government) in a 1-year period; and
(II) may allow the Attorney General–
(aa) to establish conditions under which a Tribal government (or an authorized designee of a Tribal government) may seek a waiver to the maximum allowable reimbursement requirement established under subclause (I); and

(bb) to waive the maximum allowable reimbursement requirements established under subclause (I) for a Tribal government (or an authorized designee of a Tribal government) if the conditions established by the Attorney General under item (aa) are met by that Tribal government (or authorized designee).

(iii) Timeliness of reimbursements

To the maximum extent practicable, the Attorney General shall–

(I) not later than 90 days after the date on which the Attorney General receives a qualifying reimbursement request from a Tribal government (or an authorized designee of a Tribal government)–

(aa). reimburse the Tribal government (or authorized designee); or

(bb). notify the Tribal government (or authorized designee) of the reason by which the Attorney General was unable to issue the reimbursement; and

(II) not later than 30 days after the date on which a Tribal government (or an authorized designee of a Tribal government) reaches the annual maximum allowable reimbursement for the Tribal government (or an authorized designee) established by the Attorney General under clause (ii)(I), notify the Tribal government (or authorized designee) that the Tribal government has reached its annual maximum allowable reimbursement.

(D) Eligibility for participating tribes in Alaska

A Tribal government (or an authorized designee of a Tribal Government) of an Indian tribe designated as a participating Tribe under subtitle B of title VIII of the Violence Against Women Act Reauthorization Act of 2022 shall be eligible for reimbursement, in accordance with this paragraph, of expenses incurred in exercising special Tribal criminal jurisdiction under that subtitle.

(2) Grants

The Attorney General may award grants to Tribal governments (or authorized designees of Tribal governments), including a Tribal government (or an authorized designee of a Tribal government) of an Indian tribe designated as a participating Tribe under subtitle B of title VIII of the Violence Against Women Act Reauthorization Act of 2022–

(A) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special Tribal criminal jurisdiction, including for—

(i) law enforcement (including the capacity of law enforcement, court personnel, or other non-law enforcement entities that have no Federal or State arrest authority agencies but have been designated by an Indian tribe

as responsible for maintaining public safety within the territorial jurisdiction of the Indian tribe, to enter information into and obtain information from national crime information databases);

(ii) prosecution;

(iii) trial and appellate courts (including facilities maintenance, renovation, and rehabilitation);

(iv) supervision systems;

(v) detention and correctional facilities (including facilities maintenance, renovation, and rehabilitation);

(vi) treatment, rehabilitation, and reentry programs and services;

(vii) culturally appropriate services and assistance for victims and their families; and

(viii) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(B) to provide indigent criminal defendants with licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes covered crimes;

(C) to ensure that, in criminal proceedings in which a participating tribe exercises special Tribal criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(D) to accord victims of covered crimes rights that are similar to the rights of a crime victim described in section 3771(a) of title 18, consistent with Tribal law and custom.

(i) Supplement, not supplant

Amounts made available under this section shall supplement and not supplant any other Federal, State, or local government amounts made available to carry out activities described in this section.

(j) Authorization of appropriations.

(1) In general

There is authorized to be appropriated $25,000,000 for each of fiscal years 2023 through 2027–

(A) to carry out subsection (h); and

(B) to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

(2) Limitations

Of the total amount made available under paragraph (1) for each fiscal year, not more than 40 percent shall be used for reimbursements under subsection (h)(1).

§ 1305. Tribal jurisdiction in Alaska

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(a) In general
Subject to title II of Public Law 90–284 (25 U.S.C. 1301 et seq.) (commonly known as the "Indian Civil Rights Act of 1968"), Congress recognizes and affirms the inherent authority of any Indian tribe occupying a Village in the State to exercise criminal and civil jurisdiction over all Indians present in the Village.

(b) Tribal civil jurisdiction to enforce protection orders

(1) In general

A court of any Indian tribe in the State shall have full civil jurisdiction to issue and enforce protection orders involving any person in matters–

(A) arising within the Village of the Indian tribe; or
(B) otherwise within the authority of the Indian tribe.

(2) Inclusions
The full civil jurisdiction to issue and enforce protection orders under paragraph (1) includes the authority to enforce protection orders through–

(A) civil contempt proceedings;

(B) exclusion of violators from the Village of the Indian tribe; and

(C) other appropriate mechanisms.

(c) Special Tribal criminal jurisdiction

(1). In general
Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed under subsection (a), the powers of self-government of a participating Tribe include the inherent power of the participating Tribe, which is hereby recognized and affirmed, to exercise special Tribal criminal jurisdiction over a defendant for a covered crime that occurs in the Village of the participating Tribe.

(2). Concurrent jurisdiction
The exercise of special Tribal criminal jurisdiction by a participating Tribe shall be concurrent with the jurisdiction of the United States, the State, or both.

(3) Exception if victim and defendant are both non-Indians

(A) In general
A participating Tribe may not exercise special Tribal criminal jurisdiction over an alleged offense of a covered crime, other than obstruction of justice or assault of Tribal justice personnel, if neither the defendant nor the alleged victim is an Indian.

(B) Definition of victim

In this paragraph and with respect to a criminal proceeding in which a participating Tribe exercises special Tribal criminal jurisdiction based on a violation of a protection order, the term "victim" means a person specifically protected by the protection order that the defendant allegedly violated.

(d) Pilot program for special Tribal criminal jurisdiction over persons who are not Indians

(1). Establishment

Subject to title II of Public Law 90–284 (25 U.S.C. 1301 et seq.) (commonly known as the "Indian Civil Rights Act of 1968"), there is established a pilot program under which the Attorney General, subject to paragraph (5), shall designate not more than 5 Indian tribes per calendar year as participating Tribes to exercise the special Tribal criminal jurisdiction described in paragraph (6) over all persons present in the Village of the Indian tribe.

(2) Procedure

At any time during the 1-year period beginning on March 15, 2022, and annually thereafter, an Indian tribe may request the Attorney General to designate the Indian tribe as a participating Tribe under paragraph (1).

(3) Designation of participating tribes

(A) In general

The Attorney General, in consultation with the Secretary of the Interior and affected Indian tribes, shall establish a process to designate Indian tribes to participate in the pilot program, which process shall–

(i) require that preference shall be given to Indian tribes occupying Villages–

(I) the populations of which are predominantly Indian; and

(II) that lack a permanent State law enforcement physical presence;

(ii) require that for each Indian tribe requesting to be designated as a participating Tribe, the Attorney General makes a determination that the criminal justice system of the Indian tribe has adequate safeguards in place to protect defendants' rights, consistent with section 204(d) of Public Law 90–285 (25 U.S.C. 1304(d)) (commonly known as the "Indian Civil Rights Act of 1968"); and

(iii) be subject to such other criteria as the Attorney General considers to be appropriate to achieve the purposes of this subtitle.

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(B) Designation
The Attorney General shall designate Indian tribes to participate in the pilot program under paragraph (1) using the process established under subparagraph (A).

(4) Intertribal participation

(A) In general
2 or more participating Tribes (or the Tribal organization (as defined in section 5304 of this title) of the participating Tribe, if the Tribal organization is exercising delegated authority from the participating Tribe)–

(i) may elect to participate jointly in the pilot program by providing shared resources to carry out the purposes of the pilot program; and

(ii) on making an election pursuant to clause (i), shall be considered to be a single participating Tribe for purposes of the maximum number of participating Tribes under paragraphs (1) and (5).

(B) Additional participating tribes

(i) In general
Additional participating Tribes may elect to join an established intertribal partnership under subparagraph (A) at any time after the intertribal partnership is established.

(ii) Application
An intertribal partnership that additional participating Tribes elect to join pursuant to clause (i) shall be considered to be a single participating Tribe for purposes of the maximum number of participating Tribes under paragraphs (1) and (5).

(5) Maximum number of participating tribes

(A) In general
Except as provided in subparagraph (B), the Attorney General may designate not more than 30 Indian tribes to participate in the pilot program.

(B) Exception
The limitation under subparagraph (A) shall not apply if the Attorney General submits to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives, and publishes in the Federal Register, a written notice of the intention to designate additional Indian tribes as participating Tribes, including the rationale for the designation, by not later than the date that is 180 days before the date of designation.

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(6) Description of jurisdiction
Congress recognizes and affirms that an Indian tribe selected to participate in the pilot program as a participating Tribe may exercise, subject to paragraph (7), special Tribal criminal jurisdiction with respect to covered crimes.

(7) Rights of defendants
In exercising special Tribal criminal jurisdiction under the pilot program, a participating Tribe shall provide to each defendant all rights described in section 204(d) of Public Law 90–284 (25 U.S.C. 1304(d)) (commonly known as the "Indian Civil Rights Act of 1968").

(e) Sentences
In a criminal proceeding in which an Indian court of a participating Tribe, in exercising special Tribal criminal jurisdiction with respect to a covered crime, imposes a sentence of imprisonment of more than 1 year on a defendant pursuant to section 202(b) of Public Law 90–284 (25 U.S.C. 1304(d)) (commonly known as the "Indian Civil Rights Act of 1968"), the Indian court may require the defendant–

(1). to serve a sentence–

(A) in a Tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines set by the Bureau of Indian Affairs;

(B) at the expense of the United States, in the nearest appropriate Federal facility pursuant to the Bureau of Prisons Tribal Prisoner Program established under section 1302a(c)(1) of this title; or

(C) at the expense of the participating Tribe and, subject to section 204(f)(1) of Public Law 90–284 (25 U.S.C. 1304(d)) (commonly known as the "Indian Civil Rights Act of 1968"), reimbursable by the Attorney General, in a detention or correctional center approved by the State or a local government of the State pursuant to a memorandum of agreement between the participating Tribe and the State or local government of the State; or

(2) to serve another alternative form of punishment, as determined by the Indian court pursuant to Tribal law.

(f) Memoranda of agreement
The Attorney General and the Secretary of the Interior may enter into such memoranda of agreement with participating Tribes and the State as are necessary and appropriate–

(1) to coordinate respective law enforcement activities;

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(2) to share equipment and other resources;

(3) to establish cross-deputization arrangements;

(4) to coordinate appropriate training activities; and

(5) to address any other matters that will facilitate the successful implementation of the pilot program, including intergovernmental agreements regarding–

(A) the incarceration of convicted persons; and

(C) cooperation in the investigation and prosecution of crimes.

(g) Alaska Tribal Public Safety Advisory Committee

(1) Establishment

Not later than 1 year March 15, 2022, the Attorney General, in consultation with the Secretary of the Interior, affected Indian tribes, and the State, shall establish a committee, to be known as the "Alaska Tribal Public Safety Advisory Committee" (referred to in this subsection as the "Committee").

(2) Membership
The Committee shall consist of 1 or more representatives from–

(A) participating Tribes and Indian tribes aspiring to participate in the pilot program;

(B) Federal, Tribal, State and local law enforcement; and

(C) Tribal nonprofit organization providing victim services.

(3) Duties
The Committee shall focus on–

(A) improving the justice systems, crime prevention, and victim services of Indian tribes and the State; and

(B) increasing coordination and communication among Federal, Tribal, State, and local law enforcement agencies.

(4) Travel expenses
A member of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, while away from their homes or regular places of business in the

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performance of services for the Committee.

(5) Nonapplicability of FACA
The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Committee.

(6) Authorization of appropriations
There are authorized to be appropriated to carry out this subsection such sums as may be necessary for the period of fiscal years 2023 through 2027, to remain available until expended.

(h) Report to Congress
Not later than 5 years after March 15, 2022, the Attorney General, in consultation with the Secretary of the Interior and affected Indian tribes, shall submit to Congress a report describing the results of the pilot program, including an explanation of any modifications to law necessary to facilitate improved law enforcement in Villages.

(i) Applicability

Nothing in this subtitle–

(1) limits, alters, expands, or diminishes the civil or criminal jurisdiction of the United States, the State, any subdivision of the State, or any Indian tribe in the State;

(2) creates or eliminates any Federal or State criminal jurisdiction over a Village; or

(3) affects the authority of the United States of any authority delegated by the United States to the State to investigate and prosecute a criminal violation in a Village.

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3. Tribal Code Checklist for VAWA 2013 Implementing Tribes

Updating Codes to Implement VAWA 2022 - Special Tribal Criminal Jurisdiction (STCJ)

This quick reference checklist has been developed to assist Tribes who successfully implemented VAWA 2013's Special Domestic Violence Criminal Jurisdiction *(SDVCJ) provisions and now want to update their codes to implement* VAWA 2022, Special Tribal Criminal Jurisdiction *(STCJ). The checklist can be used as you review your existing Tribal code to identify areas that need to be updated or repealed. This quick reference checklist is intended as a starting place and does not incorporate specific considerations that may be relevant to each Tribal community.*

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Implementing Language

1. Does your VAWA 2013 Tribal code language limit your jurisdiction to domestic violence, dating violence, and criminal violations of protection orders? If so, this needs to be amended to reflect the broader scope of covered crimes in VAWA 2022.	☐ Yes	☐ No

- *For many Tribes, the answer to this question will be "yes" because Tribal jurisdiction under VAWA 2013 was limited to three categories of criminal conduct instead of nine. Some Tribes, however, may have included very general language stating that the Tribe can exercise jurisdiction to the full extent allowed by Federal law.*

- *VAWA 2022 specifies nine broad categories of criminal conduct over which Tribes can exercise STCJ: domestic violence, dating violence, criminal protection order violations, child violence, sexual violence, stalking, sex trafficking, obstruction of justice, and assault of tribal justice personnel. It is up to the implementing Tribe to write its code to define these categories of criminal conduct—consistent with Federal law—for purposes of establishing Tribal authority in these areas. You may want to include the VAWA 2022 definitions for each of these categories in your Tribal code, or you may want to change or clarify them to reflect your Tribe's policy goals. Just remember, you cannot go beyond the authority that is recognized in Federal law.*

TLPI's STCJ Implementation Code Drafting Manual, Chapter 4 has more on this topic.

2. Is there language in your current Tribal code or constitution that limits jurisdiction over non-Indians to individuals who live or work in the Tribe's Indian country or are in a qualifying relationship with a tribal member? If so, repeal this.	☐ Yes	☐ No

- *VAWA 2013 required non-Indian defendants to have certain ties to the Tribal community. This requirement was removed in VAWA 2022 and is no longer needed in your Tribal code.*

3. Is the language that implemented VAWA 2013 codified in a generally applicable section of your Tribal code? If not, change where it is codified.	☐ Yes	☐ No

- *Because VAWA 2013 limited Tribal jurisdiction primarily to domestic violence cases, many Tribes codified their implementation language in the Domestic Violence portion of their code. VAWA 2022 is much broader, and your implementing language should be put in a more general section of your code.*

4. Does your VAWA 2013 implementing language include a definition of "domestic violence" that reads "The term 'domestic violence' means violence committed by…"? If so, consider amending this definition.	☐ Yes	☐ No

- *VAWA 2022 amended the definition of "domestic violence" to be more deferential to your Tribal laws and to recognize the full range of abusive conduct that can take place.*
- *The VAWA 2022 definition of domestic violence reads "The term 'domestic violence' means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is committed by…" [25 USC 1304(a)(7)]*

TLPI's STCJ Implementation Code Drafting Manual, Chapter 5.1 has more on this topic.

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5. Does your VAWA 2013 implementing language include a definition of "dating violence" that reads "The term 'dating violence' means violence committed by…"? If so, consider amending this definition.	☐ Yes	☐ No
○ *VAWA 2022 amended the definition of "dating violence" to be more deferential to your Tribal laws and to recognize the full range of abusive conduct that can take place.* ○ *The VAWA 2022 definition of dating violence reads "The term 'dating violence' means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is committed by…"* [25 USC 1304(a)(6)] TLPI's STCJ Implementation Code Drafting Manual, Chapter 5.2 has more on this topic.		
6. Does your current Tribal code have criminal offenses that fall within each of the nine categories of criminal conduct that VAWA 2022 recognizes as subject to tribal jurisdiction? If not, consider adding new criminal offenses that can be charged.	☐ Yes	☐ No
○ *VAWA 2022 is a jurisdictional statute and does not create substantive criminal law. This means that the Federal statute creates a framework for the Tribal court to exercise its inherent jurisdiction, and when a Tribe exercises STCJ, it is enforcing its own Tribal criminal law. It is up to your Tribe to decide which criminal offenses it wants to include within the nine categories of criminal conduct recognized in VAWA, and how to define each of those individual offenses.* TLPI's STCJ Implementation Code Drafting Manual has more discussion on offenses that could fit within each of the nine categories in Chapters 5.1-5.9.		
7. Does your current Tribal code have language requiring that defendants be given notice of their rights under the Indian Civil Rights Act? VAWA 2022 clarified that this notice must be given in writing.	☐ Yes	☐ No
○ *VAWA 2022 requires that defendants are given notice of their rights under the Indian Civil Rights Act, including their Federal habeas rights. This notice must be in writing.* TLPI's STCJ Implementation Code Drafting Manual has more on this in Chapter 11.		

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Quick-Reference Overview of VAWA 2022 Statutory and Due Process Requirements

In order for a Tribe to exercise Special Tribal Criminal Jurisdiction (STCJ), a Tribe must ensure that the following statutory and due process requirements are met:

	Statutory and Due Process Requirement(s)	Legal Source of Requirement	Code Manual Reference
1	A defendant subject to STCJ must be accused of a qualifying offense that falls within one of nine listed categories of conduct. (Updated by VAWA 2022).	25 U.S.C. § 1304 (c)	Chapters 5.1–5.9
2	Defendants must be provided "effective assistance of Counsel" at least equal to that guaranteed by the United States Constitution. (Unchanged by VAWA 2022).	25 U.S.C. §1302 (c)(1)	Chapter 7
3	The Tribe must provide "indigent defense" to qualifying defendants. Indigent defense counsel must be an attorney licensed in any jurisdiction in the United States. (Unchanged by VAWA 2022).	25 U.S.C. §1302 (c)(2)	Chapter 7
4	The jurisdiction licensing the defense attorney must apply "appropriate professional licensing standards" and ensure both competency and professional responsibility. (Unchanged by VAWA 2022).	25 U.S.C. §1302 (c)(2)	Chapter 7
5	Presiding judges must have sufficient training to preside over criminal trials. (Unchanged by VAWA 2022).	25 U.S.C. §1302 (c)(3)(A)	Chapter 8
6	Presiding judges in criminal proceedings must be licensed to practice law by any jurisdiction in the United States. (Unchanged by VAWA 2022).	25 U.S.C. §1302 (c)(3)(B)	Chapter 8
7	Tribal rules of criminal procedure, rules of evidence and criminal laws must be publicly available prior to charging of a defendant. (Unchanged by VAWA 2022).	25 U.S.C. §1302 (c)(4)	Chapter 6
8	Tribal Court must maintain a record of the criminal proceeding including a recording of the trial proceedings. (Unchanged by VAWA 2022).	25 U.S.C. §1302 (c)(5)	Chapter 9
9	The Tribe must provide a right to a trial by an impartial jury that is drawn from sources that reflect a fair cross-section of the community and do not exclude any distinctive group, including non-Indians. (Unchanged by VAWA 2022).	25 U.S.C. §1304 (d)(3)	Chapter 10
10	The Tribe must give the defendant notice of their rights, in writing, under the Indian Civil Rights Act, including the right to file a habeas petition in Federal court. (Updated by VAWA 2022).	25 U.S.C. §1304 (g)	Chapter 11

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4. Special Tribal Jurisdiction Sample Code

Note The Special Tribal Criminal Jurisdiction (STCJ) Sample Code is one example of what a stand-alone VAWA 2022 implementation code could look like. The hypothetical code meets Federal requirements and includes all necessary components for implementation of STCJ. The sample code is NOT the only way, or even the best way, to draft a VAWA 2022 compliant code. Please note that this code contains policy choices that may not align with a Tribal community's values or legal framework—and that are not required by Federal law. These decisions should be carefully reviewed and discussed. To support this process, annotations highlighting key areas are included.

CHAPTER 1: SPECIAL TRIBAL CRIMINAL JURISDICTION

Sect. 1 Purpose
Sect. 2 Exercise of Special Criminal Jurisdiction
Sect. 3 Special Tribal Criminal Jurisdiction
Sect. 4 Definitions
Sect. 5 Nature of Special Tribal Criminal Jurisdiction
Sect. 6 Covered Offenses
Sect. 7 Rights Applicable
Sect. 8 Defendant's Right to Federal Habeas Corpus Relief.
Sect. 9 Fees, Costs, and Expenses
Sect. 10 Severability
Sect. 11 Savings Clause

CAUTION: We generally do not recommend that Tribes rely on sample or model codes when drafting their own laws. Each Tribal government has distinct needs, and every Tribal community has its own values, traditions, and legal priorities that should be reflected in its laws.

That said, in response to specific requests, we are providing this sample code to illustrate one example of what a stand-alone VAWA 2022 implementation code could look like. We believe the following hypothetical code meets Federal requirements and includes all necessary components for implementation of STCJ. The sample is NOT the only way, or even the best way, to draft a VAWA 2022 compliant code.

Please note that this code contains policy choices that may not align with your community's values or legal framework—and that are not required by Federal law. These decisions should be carefully reviewed and discussed. To support this process, we have included annotations highlighting key areas. We have also cross-referenced the forthcoming STCJ Tribal Code Drafting Resource for deeper analysis and guidance.

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SECTION 1. Purpose.

Domestic violence, sexual violence, child abuse, stalking, sex trafficking, and other violent crimes are serious crimes against society, the [TRIBE], and the family. Victims of crime deserve the maximum protection from further violence that the law, and those who enforce the law, can provide. Furthermore, the strength of the [TRIBE] is founded on healthy families, and the safety of community members, especially women and children, must be ensured by immediate intervention of law enforcement, prosecution, education, treatment, and other appropriate services when physical, sexual, psychological, and emotional violence occurs.

It is the intent of the [TRIBE] that the official response to crime in the community shall stress the enforcement of the laws to protect victims and to hold perpetrators accountable, which will, in turn, communicate the [TRIBE'S] values that criminal behavior will not be excused or tolerated. This in turn will promote healing of community members, families, and the [TRIBE] where possible, and promote cultural teachings and traditional [TRIBE] values so as to nurture nonviolence and respect within families and the community.

It is the [TRIBE]'s intention to assert its jurisdiction fully to protect its citizens and community. This includes prosecuting crimes that obstruct justice or are committed against the [TRIBE'S] justice system professionals. Such crimes threaten not only the health and welfare of the [TRIBE] but also its political integrity and economic security. This chapter shall be interpreted and applied to give it the broadest possible scope to carry out these purposes.

SECTION 2. EXERCISE OF SPECIAL TRIBAL CRIMINAL JURISDICTION

The [TRIBE] elects to exercise Special Tribal Criminal Jurisdiction over the Indian country [or Village] of the [TRIBE], under its inherent tribal sovereignty and in conformity as a "participating tribe" under 25 U.S.C. § 1304.

SECTION 3. SPECIAL TRIBAL CRIMINAL JURISDICTION

"Special Tribal Criminal Jurisdiction" shall mean the criminal jurisdiction that the [TRIBE] may exercise under this Chapter, but, prior to the

Section 1 Drafter's note:

This section is not required by Federal law but including it can be helpful. If there are cultural values or practices you would like to reference, they could be included here.

Section 2 Drafter's note:

Your Tribal code likely defines the Tribe's territorial jurisdiction somewhere and you may want to cross-reference that section here. For most Tribes in Alaska, this section would reference the Village or Alaska Native Village Statistical Area instead of Indian country.

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enactment of these provisions, was otherwise prevented from exercising under Federal law.

The [TRIBE] may exercise Special Tribal Criminal Jurisdiction over all non-Indian persons for Covered Conduct, as defined in Section 6, that occurs within the [TRIBE's] Indian country [or Village].

No Special Tribal Criminal Jurisdiction may be exercised over an alleged offense if neither the defendant nor the victim is an Indian, except in prosecution of Covered Offenses set forth in Section 6(A)(1) [Assault of Tribal Justice Personnel] and (E) [Obstruction of Justice], in which case neither the defendant nor the victim are required to be an Indian.

SECTION 4. DEFINITIONS

The following words have the meanings given below when used in this Chapter:

A. For the purpose of establishing Special Tribal Criminal Jurisdiction, "Assault of Tribal Justice Personnel" shall mean any violation of the law of the [INSERT TRIBE] that involves the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of, the [TRIBE] or serving the [TRIBE] during, or because of, the performance or duties of that individual in—
   1) preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a Covered Offense;
   2) adjudicating, participating in the adjudication of, or supporting the adjudication of a Covered Offense;
   3) detaining, providing supervision for, or providing services for persons charged with a Covered Offense;
   4) incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a Covered Offense.

B. "Child" shall mean a person who has not attained the lesser of—
   1) the age of 18; and
   2) except in the case of sexual abuse, the age specified by the criminal law of the [TRIBE].

Section 4 Drafter note: The definitions included in this section mirror the definitions in VAWA 2022. See Chapter 4 of the Code Drafting Manual for a discussion about different approaches Tribes have taken to incorporating these definitions into the Tribal code.

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C. For the purpose of establishing Special Tribal Criminal Jurisdiction, "Child Violence" shall mean any violation of the law of the [TRIBE] that involves the use, threatened use, or attempted use of violence against a Child.

D. For purposes of this section, "violence" includes any act, or any failure to act where a duty is owed, by an individual that causes physical, psychological, sexual, or emotional harm to a child;

E. For the purpose of establishing Special Tribal Criminal Jurisdiction, "Dating Violence" shall mean any violation of the law of the [TRIBE] that is 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.

F. For the purpose of establishing Special Tribal Criminal Jurisdiction, "Domestic Violence" shall mean any violation of the law of the [TRIBE] that is committed by

1) a current or former spouse or intimate partner of the victim;
2) a person with whom the victim shares a child in common;
3) a person who is cohabitating with or who has cohabitated with the victim as a spouse or intimate partner; or
4) a person similarly situated to a spouse of the victim under the domestic or family violence laws of the [TRIBE].

G. "Indian country" shall have the meaning given to the term in 18 U.S.C. §1151 [OR RELEVANT TRIBAL CODE SECTION].

H. For the purpose of establishing Special Tribal Criminal Jurisdiction, "Obstruction of Justice" shall mean any violation of the law of the [TRIBE] that involves interfering or attempting to interfere with the administration or due process of the laws of the [TRIBE], including

Section 4.D Drafter Note:.
This language is not included in the Federal definition but is an attempt to define "violence" as it is used in VAWA 2022. For a discussion of this issue, see Chapter 5.4 of the Code Drafting Manual.

Drafter Not Section 4.H:.
The language "or attempting to interfere" is not included in the Federal definition, and it is likely that attempts are covered regardless of whether this is added. Therefore, it is likely not necessary but you may want to consider including it.

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any Tribal civil or criminal proceeding or investigation of a criminal offense under the laws of the [TRIBE].

I. "Protective Orders" shall mean:

1) 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

2) any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

J. For the purpose of establishing Special Tribal Criminal Jurisdiction, "Sex Trafficking" shall mean conduct within the meaning of 18 U.S.C. §1591(a).

K. For the purpose of establishing Special Tribal Criminal Jurisdiction, "Sexual Violence" shall mean any violation of the law of the [TRIBE] that involves a nonconsensual sexual act or contact, or attempted act or contact, including in any case in which the victim lacks the capacity to consent to the act.

L. "Spouse or Intimate Partner" shall mean
1) a spouse or former spouse,

2) a person who shares a child in common, and

3) a person who cohabits or has cohabited as a spouse,

4) a person who is or has been in a social relationship of a romantic or intimate nature, as determined by the length of the

Section 3.K Drafter note:
This language is not included in the Federal definition, and it is likely that attempts are covered regardless of whether this is added. Therefore, it is likely not necessary but you may want to consider including it.

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relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

5) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the [TRIBE] or the jurisdiction in which the incident occurred or where the victim resides.

M. For the purpose of establishing Special Tribal Criminal Jurisdiction, "Stalking" shall mean a violation of the law of the [TRIBE] that involves engaging in a course of conduct at a specific person in violation of the laws of the [TRIBE] wherein a person engages in a course of conduct that would cause a reasonable person:

1) to fear for the person's safety or the safety of others; or

2) to suffer substantial emotional distress.

N. For the purpose of establishing Special Tribal Criminal Jurisdiction, "Violation of a Protection Order" shall mean a violation of the law of the [TRIBE] that involves an act that:

1) occurs in the Indian country [or Village] of [TRIBE]; and

2) violates a provision of a Protective Order that—

i. prohibits or provides protection against violent or threatening acts or harassment against, Sexual Violence against, contact or communication with, or physical proximity to, another person;

ii. was issued against the Defendant;

iii. is enforceable by the [TRIBE]; and

iv. is consistent with 18 U.S.C. § 2265(b).

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SECTION 5. NATURE OF SPECIAL TRIBAL CRIMINAL JURISDICTION

The [TRIBE] may exercise Special Tribal Criminal Jurisdiction over all persons as prescribed for herein.

Nothing in this Chapter shall be construed to create any Federal or State jurisdiction over Indian country.

Nothing herein shall be construed to waive the sovereign rights and immunities of the [TRIBE] or otherwise provide for any cause of action against the [TRIBE].

SECTION 6. COVERED OFFENSES

A "Covered Offense" shall include:

1. Any offense included in the criminal laws of the [TRIBE] that could be charged against an individual for conduct involving Assault of Tribal Justice Personnel. This includes but is not limited to [LIST TRIBAL CRIMINAL OFFENSES THAT YOU WANT TO BE SURE ARE INCLUDED];

2. Any offense included in the criminal laws of the [TRIBE] that could be charged against an individual for conduct involving Child Violence. This includes but is not limited to [LIST TRIBAL CRIMINAL OFFENSES THAT YOU WANT TO BE SURE ARE INCLUDED];

3. Any offense included in the criminal laws of the [TRIBE] that could be charged against an individual for conduct involving Dating Violence. This includes but is not limited to [LIST TRIBAL CRIMINAL OFFENSES THAT YOU WANT TO BE SURE ARE INCLUDED];

4. Any offense included in the criminal laws of the [TRIBE] that could be charged against an individual for conduct involving Domestic

Section 5 Drafter note: This language is not required by Federal law and is likely not necessary, but you may want to include it.

Section 6 Drafter note: Not all Tribes have chosen to identify specific offenses that fit within each category. For a discussion about this choice, see Chapter 4 of the Code Drafting Manual.

Section 6.A 1 Drafter note: For more information about each of the covered offense categories included here, see Chapter 5 of the Code Drafting Manual.

If your Tribe has a section or title of its code that outlines Criminal Offenses, you may want to reference it here and throughout this section.

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Violence. This includes but is not limited to [LIST TRIBAL CRIMINAL OFFENSES THAT YOU WANT TO BE SURE ARE INCLUDED];

5. Any offense included in the criminal laws of the [TRIBE] that could be charged against an individual for conduct involving Obstruction of Justice. This includes but is not limited to [LIST TRIBAL CRIMINAL OFFENSES THAT YOU WANT TO BE SURE ARE INCLUDED];

6. Any offense included in the criminal laws of the [TRIBE] that could be charged against an individual for conduct involving Sexual Violence. This includes but is not limited to [LIST TRIBAL CRIMINAL OFFENSES THAT YOU WANT TO BE SURE ARE INCLUDED];

7. Any offense included in the criminal laws of the [TRIBE] that could be charged against an individual for conduct involving Sex Trafficking. This includes but is not limited to [LIST TRIBAL CRIMINAL OFFENSES THAT YOU WANT TO BE SURE ARE INCLUDED];

8. Any offense included in the criminal laws of the [TRIBE] that could be charged against an individual for conduct involving Stalking. This includes but is not limited to [LIST TRIBAL CRIMINAL OFFENSES THAT YOU WANT TO BE SURE ARE INCLUDED]; and

1. Any offense included in the criminal laws of the [TRIBE] that could be charged against an individual for conduct involving Violation of a Protection Order. This includes but is not limited to [LIST TRIBAL CRIMINAL OFFENSES THAT YOU WANT TO BE SURE ARE INCLUDED];

SECTION 7. Defendants Rights Applicable.

It is the policy of [TRIBE] to provide all defendants the full protection of the laws. Therefore, in all proceedings in which the [TRIBE] is exercising Special Tribal Criminal Jurisdiction, all defendant rights required by 25 USC 1304 (d) and afforded herein shall apply. These rights include the following:

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A. Rights of the Defendant. In all criminal proceedings, the defendant shall have the following rights:

B. To be free from excessive bail and cruel punishment;

C. To be informed of the nature of the charges pending against him or her and to have a copy of those charges;

D. To confront and cross-examine all prosecution or hostile witnesses;

E. To compel by subpoena the attendance of any witnesses necessary to defend against the charges;

F. To have a speedy and public trial by Judge or a jury, unless the right to a speedy trial is waived or the right to a jury trial is waived in writing by the defendant;

G. To appeal any final decision of the Tribal Court to the Tribal Court of Appeals;

H. To not be twice put in jeopardy for the same offense;

I. Not to be required to testify, and no inference may be drawn from a defendant's exercise of the right not to testify; and

J. Right to Counsel.

1. All defendants subject to Special Tribal Criminal Jurisdiction, if a term of imprisonment of any length may be imposed, have the right to effective assistance of counsel meeting the requirements of 25 U.S.C. 1302
.
2. An indigent defendant, if a term of imprisonment of any length may be imposed, shall be provided the assistance of a defense attorney meeting the requirements of 25 U.S.C. 1302 at the expense of the tribal government.

Section 7.J.2 Drafter note: This is drafted so that all indigent defendants will be provided an attorney by the Tribe. You may want to do this another way. See Chapter 7 of the Code Drafting Manual for discussion.

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K. Right to Jury Trial. A defendant subject to Special Tribal Criminal Jurisdiction has a right to a trial by jury of six fair and impartial jurors drawn from the community. A defendant may waive the right to a jury trial in a written, voluntary statement to the Court. All jury verdicts must be unanimous.

L. Jury Pool. A list of eligible jurors shall be prepared by the Court. The eligible juror list shall be updated from time to time. It shall reflect a fair cross-section of the community, and not systematically exclude any distinctive group in the community, including non-Indians. The Court shall provide for the selection of names of persons eligible for service as jurors. Jurors shall be 18 years of age or older and, notwithstanding any other law of the [TRIBE] or any of its agencies, shall be chosen from the following classes of persons:

1. Tribal members living on or near the Tribe's [lands/Indian country/Alaska Native Village Statistical Area];

2. Residents of the Tribe's [lands/Indian country/Alaska Native Village Statistical Area];

3. Employees of the [TRIBE] or any of its enterprises, agencies, subdivisions, or instrumentalities who have been employed by the [TRIBE] for at least one continuous year prior to being called as a juror; and

4. Any other spouse of a tribal member who registers for jury service.

[Any other groups you identify as members of your community].

M. To have a judge presiding over the criminal proceeding:

1. Who has sufficient legal training to preside over criminal proceedings; and

2. Who is licensed to practice law in any jurisdiction in the United States;

Section 7.L Drafter note: Your Tribe may want to include different groups in the jury pool. See Chapter 10 for discussion about what is required.

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N. Writ of Habeas Corpus.

1. Availability of Writ in Tribal Court

i. Except as provided in subsection ii below, every person within the jurisdiction of the [TRIBE] imprisoned or otherwise restrained of liberty may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from imprisonment or restraint.

ii. The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense by a court of competent jurisdiction and has exhausted the remedy of appeal, nor is it available to attack the legality of an order revoking a suspended or deferred sentence. Moreover, a person may not be released on a writ of habeas corpus due to any technical defect in commitment not affecting the person's substantial rights.

iii. When a person is imprisoned or detained in custody by the [TRIBE] on any criminal charge for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail upon averring that fact in his petition, without alleging that he is illegally confined.

2. Issuance of Writ.

i. Application for a writ of habeas corpus is made by petition signed either by the party for whose relief it is intended or by some person on the petitioner's behalf, and must be filed with the Clerk of the Court. It must specify:

a) That the petitioner is unlawfully imprisoned or restrained of liberty;

b) Why the imprisonment or restraint is unlawful; and

c) Where or by whom the petitioner is confined or restrained.

Section 7.N Drafter note: Providing for a writ of habeas corpus in Tribal court is not a requirement of Federal law but may be a good idea. See chapter 11 for discussion.

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ii. The parties to a writ, namely the Prosecutor, Chief Judge of the Tribal Court, and the Chief of Police, must be named. All parties must be named if they are known or otherwise described so that they may be identified.

iii. The petition must be verified by the oath or affirmation or declaration under penalty of perjury that the contents of the declaration are true to the best of the declarant's belief of the party making the application.

3. Granting of the Writ. Any Justice of the Tribal Court of Appeals may grant a writ of habeas corpus upon petition by or on behalf of any person restrained of liberty within the Justice's jurisdiction. If it appears to such Justice that a writ ought to issue, it shall be granted without delay, and may be made returnable to the Court of Appeals.

4. Time of Issuance and Requirements for Service.

   i. A writ of habeas corpus or any associated process may be issued and served on any day at any time. The writ should be served on the Tribal Prosecutor and Chief Judge of the Trial Court.

   ii. The writ must be served upon the person to whom it is directed. If the writ is directed to a Tribal agency or employee, a copy of the writ must be served upon the Tribal Prosecutor.

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iii. The writ must be served by a Tribal Police Officer, or any other person directed to do so by the Justice or the Court, in the same manner as a civil summons, except where otherwise expressly directed by the Justice, the Court, or the employee of any correctional facility in which the petitioner is held.

5. Return of the Writ. The Prosecutor or his or her designee shall make a return and state in that return:

   i. Whether the person is in custody or under that person's power of restraint; and

   ii. If the person is in custody or otherwise restrained, the authority for and cause of the custody or restraint; or

   iii. If the person has been transferred to the custody of or otherwise restrained by another to whom the party was transferred, the time and place of the transfer, the reason for the transfer, and the authority under which the transfer took place.

   The return must be signed and verified by affirmation.

6. Hearing. The prosecutor/police/jailer (Chief Judge) commanded by the writ shall cause the petitioner to be brought before the Court as commanded by the writ unless the petitioner cannot be brought before the Court without danger to the petitioner's health. Sickness or infirmity must be confirmed. If the Court is satisfied with the truth of the writing, the Court may proceed and dispose of the case as if the petitioner were present or the hearing may be postponed until the petitioner is present. Any law enforcement officer may bring the person as directed. Unless the Court postpones the hearing for reasons of the petitioner's health, the Court shall immediately proceed to hear and examine the return. The hearing may be summary in nature. Evidence may be produced and

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compelled as provided by the laws governing criminal procedures and evidence.

7. Refusal to Obey Writ Is Contempt. If the person commanded by the writ refuses to obey, that person must be adjudged to be in contempt.

8. Disposition of Petitioner. If the Court finds in favor of the petitioner, an appropriate order must be entered with respect to the judgment or sentence in the former proceeding and any supplementary orders as to reassignment, retrial, custody, bail, or discharge as may be necessary and proper. If the Court finds for the prosecution, the petitioner must be returned to the custody of the person to whom the writ was directed.

9. Right to a Speedy and Public Trial. A defendant not released from jail pending trial shall be brought to trial not later than [X] days after the date of arraignment. A defendant released from jail, whether or not subjected to conditions of release pending trial, shall be brought to trial not later than [X] days after the date of arraignment. The court can extend the trial date applicable under this section for good cause shown.

SECTION 8. DEFENDANT'S RIGHT TO FEDERAL HABEAS CORPUS RELIEF

A. At the Initial Appearance, the Court shall provide the Defendant with written notification of his rights under 25 USC 1303 and 1304 including his right:

   1. to file in a court of the United States a petition for a writ of habeas corpus under 25 U.S.C. § 1303; and

   2. to petition the Court to stay further detention pending determination of a habeas corpus petition in a court of the United States.

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SECTION 9. Rights

A. If you are the victim of a crime of domestic violence you have the right to go to the Tribal Court and file a petition requesting any of the following orders for relief:

1. An order restraining your attacker from contacting you or your children;

2. An order directing your attacker to leave your household;

3. An order preventing your attacker from entering your residence, school, business or place of employment;

4. An order awarding you or the other parent temporary custody of a minor child or children;

5. An order directing the party not granted custody to pay support of minor children. You can obtain a copy of the officer's report at no cost to you. You also have the right to obtain a protection order in State court. The forms you need to obtain an order for protection can be obtained from the Clerk of the Court; or

6. An order to restrain the defendant from contacting the victim with any and all electronic communication via social media, cell phone voice, voicemail, text, and other related technology.

B. Generally, any victim of a crime that has been filed in Court that directly or indirectly involves domestic abuse, sexual assault, stalking, or dating violence, has the following rights:

1. The right to be reasonably protected from intimidation, harassment, and abuse, throughout the criminal justice process;

2. The right to reasonable, accurate, and timely notice of any Court proceeding, or any probation proceeding, involving the crime or of any release or escape of the accused;

Section 9 Drafter Note:

This is not required by Federal law but is important. You may already have these rights established elsewhere in your code. For more information about drafting a Tribal crime victims' rights code, see TLPI's Condensed Guide for Drafting Tribal Victim's Rights Codes and Chapter 12 of the Manual.

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3. The right to not be excluded from any such Court proceeding, unless the Court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;

4. The right to be reasonably heard at any public proceeding in the Court involving release, plea, sentencing, or any probation proceeding;

5. The right, within reason, to confer with the prosecuting attorney in the case;

6. The right to proceedings free from unreasonable delay;

7. The right to be treated with fairness and with respect for the victim's dignity and privacy;

8. The right to prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law;

9. The right to refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents;

10. The right to the prompt return of property when no longer needed for the prosecution of the case;

11. The right to be notified whether or not criminal charges will be filed;

12. The right to have access to a domestic violence advocate, and for that access to be strictly confidential; and

13. The right to appoint a lawful representative should the victim be physically or emotionally unable to exercise any right listed in this

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section. The representative must not be a witness in the case. The victim may revoke this designation at any time.

SECTION 10. Fees, Costs, and Expenses

Upon conviction, a Defendant shall be required to pay all incarceration fees, Court costs, restitution, counseling costs, class fees, treatment program fees or any other fees or costs associated with the case, or as otherwise ordered by the Court.

SECTION 11. Severability

If any part, or parts, or the application of any part of this chapter is held invalid, such holding shall not affect the validity of the remaining parts of this chapter. The [Tribal Council] hereby declares that it would have passed the remaining parts of this chapter even if it had known that such part or parts or application of any part thereof would be declared invalid.

SECTION 12. Savings Clause

This chapter takes effect on the date approved by the [Tribal Council] and does not extinguish or modify any civil or criminal liability or enforcement of such penalty or forfeiture that existed on or prior to the effective date of this chapter and such code shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such civil or criminal action, enforcement of any penalty, forfeiture or liability.

Section 10 Drafter note: This may already be addressed in your code more generally. This is not required by Federal law.

Section 11 Drafter note: This is not required by Federal law but is helpful to include.

Section 12 Drafter note: This is not required by Federal law but is helpful to include.

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5. Tulalip Request for Indigent Criminal Conflict Attorney Services

REQUEST FOR APPLICATIONS: Three to four Grant Funded Indigent Conflict Criminal Defense Contracts will be awarded.

APPLICATION DUE DATE: December 2, 2010

BACKGROUND INFORMATION:

The Tulalip Tribes Foundation, a Tribal Non-profit agency, requests proposals for the provision of criminal conflict counsel services.

The Tulalip Tribes has a nationally recognized and award winning Tribal court system that is known for its competence and its innovative approach to the legal needs of its community. As the court has grown, so too has the need for conflict criminal defense counsel for indigent clients. Currently, the University of Washington, Tribal Defense Clinic is the primary provider of legal defense. Due to conflict issues, the Clinic cannot represent all eligible defendants. Therefore, conflict counsel is regularly appointed.

Period of Performance: January 3, 2011 to December 31, 2011.

QUALIFICATIONS AND WORK PERFORMANCE EXPECTATIONS:

Those who are qualified to submit proposals are:

1. Members in good standing of the Tulalip Tribal Bar, or
2. Members in good standing of the Washington State Bar Association
3. Those who demonstrate a willingness to take the Tulalip Bar within one month of receiving notice of intent to contract with the attorney pursuant to this request (passage of the Tulalip Bar test will be required before the contract will be awarded), and
4. Five years' experience in criminal law and trial practice is preferred; however, a minimum of two years is expected.

Individuals providing criminal defense work will be responsible for providing competent representation. Such will include:

1. A comprehensive understanding of the Tulalip Code and case law, and other applicable federal and state law as it relates to criminal practice in the Tulalip Tribal Court.
2. Appropriate initial client contact.
3. Timely and ongoing factual and legal analysis of the case, development of case strategy, and review of the case prior to the scheduled court date.
4. Effective ongoing contact and communication with the client.
5. Appropriate contact with other parties in the Tulalip criminal justice system, to include the prosecution, probation, treatment providers, etc.
6. Conducting plea negotiation on behalf of the client.

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7. Representation of the client at a variety of hearings, which could include first appearance, arraignment, bail hearings, pre-trial, trial readiness and motion hearings, bench and jury trials, and sentencing.

8. Arrival at court 15 minutes prior to the start of all scheduled calendars.

9. Representation of the client through case disposition, except as otherwise determined by the court.

10. Submission of timely invoices to the Court Director, Wendy Church.

11. Ensuring that clients complete a survey at the end of representation.

12. Provision of case statistics and other data necessary for grant reporting on a quarterly basis in an approved format. Such will not include confidential information or information covered by the attorney client privilege.

13. Provision of any other appropriate service necessary for competent criminal defense representation.

Successful applicants will be required to enter into a contract with the Tulalip Foundation and will be independent contractors, not employees of the Tribes. As such, they will be required to maintain their own malpractice insurance. In addition, successful bidders will be required to adhere to the Washington Rules of Professional Responsibility, any Tulalip Court Code of Ethics; Ordinance 49, Section 1.8 and other applicable laws governing representation.

SUBMISSION OF APPLICATIONS:

Please submit six (6) copies of the proposal. One (1) copy must have original signatures. The application, whether hand or mail delivered, must be received by Wendy Church, Court Director, no later than 4:00 p.m. on December 3, 2010.

NO OBLIGATION TO CONTRACT

The Request for Applications does not obligate Tulalip Foundation to contract for services specified herein. The Tulalip Foundation also reserves the right to cancel or reissue the Request for Applications in whole or in part prior to execution of a contract.

APPLICATION CONTENTS: Interested individuals should provide a resume, references, and a detailed written description of work experience. In light of the qualifications described above. Such should include:

1. written description of the applicant's experience and knowledge in the following areas:
    a. Tribal courts
    b. Tribal communities
    c. Criminal law,
    d. Tribal and related federal law
    e. Criminal defense.

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2. Specify the organization structure of the law firm or solo practitioner's law office, including staff and resources.

3. Provide a detailed resume for the attorney addressing experience and qualifications related to this proposal.

4. Provide three references. Inclusion of the reference in your proposal is also an agreement that the Tulalip Foundation may contact the named reference. The Foundation may contact any companies or individuals, whether offered as references or otherwise, to obtain information that will assist the Foundation in evaluating the Application. The Foundation retains the right to use such information to make selection decisions. Submittal of a proposal is agreement that the Foundation may contact and utilize such information.

EVALUATION AND AWARD

The Foundation reserves the right to award the contracts to the applications that best meet the needs and interest of the Foundation. Evaluation of responsive proposals will be in accordance with the requirements stated herein and any addenda issued. Selection will be based upon the qualifications of the proposer and the proposal(s) that will suit the needs and interests of the Foundation. Indian Preference applies to the award of this contract in accordance with applicable regulations and policies.

COMPENSATION

Required Information – Your proposal must provide the following:

- Agreement to the hourly rate of $75 per hour with a maximum of $1,000 per case.
- Request for Application Schedule:
- Issue Request: November 2, 2010
- Deadline for Submittal of Proposals: Thursday, December 2, 2010
- Interview for Qualifying Candidate if necessary: Friday, December 10, 2010, between 1 and 5 pm.
- Contract Start Date: Monday, January 3, 2011

All successful applicants will be required to attend an all-day training on January 21, 2011. CLE credits will be sought for such training and the training will include one hour of Ethics.

These contracts will replace the existing process for the appointment of conflict counsel services at the Tulalip Tribes. However, it is anticipated that on occasion additional appointment of conflict counsel will be necessary, which will follow the existing rotation assignment procedures.

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6. Tulalip Contract for Indigent Conflict Defense Legal Services

6406 Marine Drive. - Tulalip, WA 98271
Phone: 360 / 716-4000

FOR INDIGENT CONFLICT DEFENSE LEGAL SERVICES

The Tulalip Foundation (hereafter "Foundation" desires to contract with independent attorneys to provide conflict criminal defense counsel services in the Tulalip Tribal Court; and _____, an attorney licensed to practice law in the State of Washington and a member of the Tulalip Bar, and as an independent contractor, is interested in contracting with the Foundation for the provision of conflict criminal defense services (hereafter "Attorney"). In consideration for the mutual benefits to be derived and the promises and conditions contained herein the above parties CONTRACT AND AGREE as follows:

I. PURPOSE OF AGREEMENT

The purpose of the Contract is to provide criminal defense services to indigent defendants charged with offenses or at risk of a loss of liberty or liberty interest in the courts of the Tulalip Tribes. The Foundation has received a Grant from the Bureau of Justice Assistance for Tribal Civil and Criminal Legal Assistance Grant pursuant to BJA-2010-2676 and 78. THIS IS A GRANT FUNDED CONTRACT AND CONTINUED FUNDING IS DEPENDANT ON CONTINUED RECEIPT OF GRANT FUNDING.

II. TERM

The term of this Contract shall be 12 months from January 3, 2011 and this Contract shall terminate by its own terms on December 31, 2011. Payments made or work completed after the termination of the term of this Contract shall not cause this Contract to be renewed. Renewal shall be at the absolute discretion of each of the parties.

III. INDEPENDENT CONTRACTOR STATUS

The express intention of the parties is that the Attorney is an Independent Contractor and not an employee, agent, joint venture or partner of the Foundation. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employee and employer between the Attorney and the Foundation. The Attorney is not precluded by this contract from engaging in the practice of law beyond the scope of this Contract.

IV. PERSONAL SERVICES OF ATTORNEY CONTRACTED

This Contract is for the personal professional services of the Attorney. The Attorney shall not assign or subcontract this Contract in whole or in part to any other attorney without first obtaining written consent of the Court Director. In no event may a case be transferred, assigned, or subcontracted to other legal counsel for a fee or other compensation except as provided under this Contract.

V. CASES ASSIGNED AND CASELOAD

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Cases will be assigned by a court defined process. The court will determine the number and type of cases assigned.

VI. SPECIAL CONDITIONS

The following special conditions apply to this agreement and, unless otherwise indicated, supersede any conflicting provision of this Contract.

A. PHYSICAL OFFICE REQUIRED/COMMUNICATION: The Attorney presently and regularly maintains an office for the practice of law at _____ the Attorney's current local office telephone and fax numbers are _____ and_____, respectively. The Attorney's current office/work e-mail address is _____. Throughout the entire term of the Contract, the Attorney will continue to maintain an office, telephone, fax, and e-mail address.

B. PROFESSIONAL LIABILITY INSURANCE: The Attorney agrees to maintain professional liability insurance for the Attorney and all employees for any and all acts which occur during the course of his or her representation of clients pursuant to this Contract. The Attorney will provide proof of insurance to the Court Director by January 31, 2011.

C. CLE AND OTHER TRAINING: Attorney agrees to participate in any court required training and maintain his or her continuing legal education credits at Attorney's own expense.

D. WSBA DISCIPLINARY PROCEEDINGS: The Attorney will immediately report any formal disciplinary proceedings and/or any admonishment, censure, or any other formal discipline by the Washington State Bar Association or by another state or Tribal jurisdiction or court to the Court Director. If the circumstances underlying such matters negatively reflect on the Attorney's duty and ability to effectively and competently render legal services under this Contract, it is grounds for termination of this Contract. Suspension or disbarment is grounds for immediate suspension and/or termination of this Contract.

E. CLIENT FILES: The Attorney will establish and maintain organized, orderly, and complete files for each case. Such files shall contain copies of all correspondence, orders, plea offers, discovery, memos and briefs, and other documents, and pleadings related to the case. Such files shall be promptly updated. They shall be immediately transferred to new counsel whenever the case(s) is transferred for any reason. Files will be kept for a period of seven (7) years after closing.

F. CLIENT COMMUNICATION/INTIAL MEETINGS: The Attorney will establish and maintain client contact, keep the client informed of the progress of the case, provide the client with copies of court orders, and be accessible to the client for legal advice and consultation throughout judgment, disposition, acquittal or otherwise as determined by the court. The Attorney acknowledges that it is the Attorney's duty to initially meet and confer with a client as soon as reasonably possible following appointment. Without limiting that duty, if earlier contact is required under the circumstances, the Attorney shall meet in person with an in-custody client as soon as possible after appointment and must meet with client prior to the pre-trial hearing.

G. DUTY TO PROVIDE COMPETENT REPRESENTATION: Attorney is responsible for providing competent representation. Such representation shall include, but not be limited to, a

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comprehensive understanding of Tulalip Criminal law; maintaining appropriate client communication, as outlined in the preceding paragraph; establishing and maintaining contact with the client's treatment providers (if any); establishing and maintaining contact with persons who are serving in the capacity as a Guardian Angel; developing and implementing a defense strategy that is consistent with the facts, the law, and the attorney's ethical obligations; negotiating resolutions to cases, where appropriate; representing the client at a variety of hearings, including bench and jury trials; reviewing the assigned case prior to each scheduled hearing after the first appearance; arriving at least fifteen minutes before each court hearing; maintaining appropriate contact with other parties in the Tulalip criminal justice system, to include the prosecution, probation, etc., and completing any case pending as of the date of contract termination.

H. CASELOAD REPORTS: The Attorney will provide to the Court Director:

1. Within ten (10) days following each calendar month a list of cases assigned during the preceding month, including the client name, cause number, nature of the charge, date assigned, and offense class (if any) will be provided on the invoice;

2. The Court Director may request and the Attorney will thereafter provide a case closing report within five (5) days of the transfer, withdrawal, judgment or other completion of a case assigned under this Contract. The report will be on a form provided by the Court Director.

3. On request of the Court Director, the Attorney shall provide a list of open cases assigned under this Contract, including client, court cause numbers, case type, date assigned, duration or 'age' of the case, and next court date.

I. CLIENT SURVEYS: At the conclusion of each case, the Attorney shall request each client represented to fill out a survey about the client's satisfaction with the representation received. Such should be done on a form provided to the Attorney by the Court Director. These surveys are part of the Grant reporting requirements and are material to the contract.

In addition to any other remedy, failure to provide such reports mentioned herein may result in suspension by the Court Director of all or part of any payment due Attorney.

VII. <u>COMPENSATION</u>

In consideration of the professional services made available and provided under the Contract, The Foundation will pay the Attorney as follows:

A. BASIC CASELOAD: The hourly rate used is $75 per hour, not to exceed $1,000 per case. Any payment beyond these limits per case requires the written prior approval of the Court Director, which would require a specific request for the number of hours and reasons for exceeding the case limit.

B. TRAVEL REIMBURSEMENT: Travel time shall not be billed under this contract.

C. PROCEDURES FOR PAYMENT: The Attorney shall submit monthly invoices on a form provided by the Court Director, which will include the information required in VI H by the 10th of each month. The Attorney will be paid within 30 days of a submitted invoice.

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VIII. OTHER DEFENSE SERVICES AND EXPENSES

A. COSTS: All normal office expenses including local and long distance telephone cost, copier, fax, postage, consumable supplies, travel within the Tulalip Tribes, general clerical support, and general overhead expenses are included in the Attorney's basic fee provided under this Contract. The Court Director may allow reasonable and necessary out of pocket expenses in extraordinary circumstances upon proof of the cost accrued or expended. All significant or extraordinary expenses must be requested in writing and approved in advance.

IX. TERMINATION OF CONTRACT

A. TERMINATION FOR CAUSE: The Foundation may terminate this contract immediately for cause, if in the sole determination of the Court Director, the Attorney is not providing adequate legal services or is in material non-compliance with the terms of this Contract. In termination for cause, the Court Director may direct that some or all pending cases be assigned to other counsel. In such circumstances, the Attorney shall promptly but in no event later that three (3) days after notice of termination for cause, identify to the Administrator any pending cases in which special circumstances exist, such as imminent trial schedule, lengthy or complex course of litigation, special client circumstances. In the event the Court Director and Attorney cannot agree on reassignment or retention of particular cases, the matter shall be referred to the presiding judge for determination of the issue of assignment of counsel. The Attorney will be responsible for the completion of all cases not reassigned. Monies billed and owing to the Attorney shall be paid within 15 days after submission of the final bill.

B. OTHER TERMINATION: Either party may terminate this Contract upon ten day (10) days advance written notice for any reason. The Attorney shall be responsible for completion of all cases assigned before that time and shall not withdraw or transfer such cases to other counsel unless otherwise directed by the Court Director.

X. TAX RESPONSIBILITIES

Both parties acknowledge that the contract prosecutor is not an employee for federal or state tax purposes. Both parties acknowledge that the Tribes shall not assist with any federal or state income tax withholdings or make any tax contributions on behalf of the contract prosecutor.

XI. OTHER PROVISIONS

A. The Attorney shall keep confidential all information regarding the Foundation received as a result of his or her performance of his or her duties under this Contract.

B. This Contract is subject to the provisions of Ordinance 60, the Tribal Employment Rights Ordinance. Consultant, in subcontracting and employment, shall conform to the provisions of Ordinance 60.

C. Contractor shall be admitted to practice in Tulalip Tribal court.

D. Contractor shall adhere to the Washington Rules of Professional Responsibility, any Tulalip Court Code of Ethics, the Tulalip Rules of Professional Responsibility for non-lawyer spokespersons; Ordinance 49, Section 1.8 and other applicable laws governing representation

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XII. GOVERNING LAW

This contract and all disputes arising hereunder shall be governed by and construed in accordance with the laws of the Tulalip Tribes and enforceable only in the Tulalip Tribal Courts. This provision does not waive any immunity the Foundation may have.

XIII. INTEGRATED AGREEMENT

This Contract embodies the entire agreement between the Foundation and The Attorney. No verbal agreements, conversations, or understandings with any officer, agent or employee of the Foundation prior to the execution of this contract shall affect or modify any of the terms, conditions or obligations contained in any documents comprising this Contract.

XIV. MODIFICATION

After signature by the parties, this Contract may be modified, amended, or extended only upon written agreement of the parties.

_____ _____

For the Foundation DATE

_____ _____

Attorney DATE

Name of Firm: _____

Address:

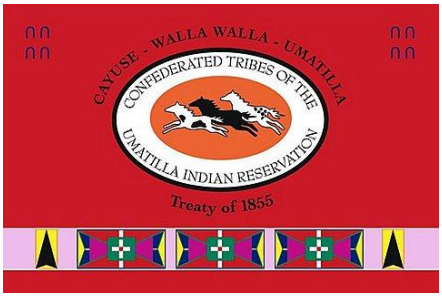
_____

Social Security # or Tax ID #

(*please provide as it is necessary for Income Tax reporting purposes*)

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7. Confederated Tribes of the Umatilla Notice of Rights and Privileges

NOTICE OF RIGHTS AND PRIVILEGES UNDER 25 U.S.C §1302, 25 U.S. Code §1303, AND 25 U.S.C. §1304

25 U.S. Code §1302. Constitutional Rights

(a) In general

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)

(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

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(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed

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by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) [1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

25 U.S. Code §1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

25 U.S. Code §1304. Tribal Jurisdiction over Covered Crimes of Domestic Violence

(a) Definitions

In this section:

(1) ASSAULT OF TRIBAL JUSTICE PERSONNEL

The term "assault of Tribal justice personnel" means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves the use, attempted use, or threatened use of physical force

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against an individual authorized to act for, or on behalf of, that Indian tribe or serving that Indian tribe during, or because of, the performance or duties of that individual in—

(A) preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a covered crime;
(B) adjudicating, participating in the adjudication of, or supporting the adjudication of a covered crime; or
(C) detaining, providing supervision for, or providing services for persons charged with a covered crime; or
(D) incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a covered crime.

(2) CHILD

The term “child” means a person who has not attained the lesser of

(A) the age of 18; and
(B) except in the case of sexual abuse, the age specified by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.

(3) CHILD VIOLENCE

The term “child violence” means the use, threatened use, or attempted use of violence against a child proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.

(4) COERCION; COMMERCIAL SEX ACT

The terms “coercion” and “commercial sex act” have the meanings given the terms in section 1591(e) of title 18, United States Code.

(5) COVERED CRIME

The term “covered crime” means—

(A) assault of Tribal justice personnel;
(B) child violence;
(C) dating violence;
(D) domestic violence;
(E) obstruction of justice;
(F) sexual violence;
(G) sex trafficking;
(H) stalking; and
(I) a violation of a protection order.

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(6) Dating Violence

The term “dating violence” means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is 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.

(7) Domestic Violence

The term “domestic violence” means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is committed by –

(A) a current or former spouse or intimate partner of the victim;
(B) a person with whom the victim shares a child in common;
(C) a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner; or
(D) 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 violation occurs.

(8) Indian country

The term “Indian country” has the meaning given the term in section 1151 of title 18, United States Code.

(9) OBSTRUCTION OF JUSTICE

The term “obstruction of justice” means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves interfering with the administration or due process of the laws of the Indian tribe, including any Tribal criminal proceeding or investigation of a crime.

(10) Participating tribe

The term "participating tribe” means an Indian tribe that elects to exercise special tribal criminal jurisdiction over the Indian country of that Indian tribe.

(11) Protection order

The term “protection order”—

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or

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harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a Pendente lite order in another proceeding, 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.

(12) SEX TRAFFICKING

The term "sex trafficking" means conduct within the meaning of section 1591(a) of title 18, United States Code.

(13) SEXUAL VIOLENCE

The term "sexual violence" means any nonconsensual sexual act or contact proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs, including in any case in which the victim lacks the capacity to consent to the act.

(14) Special tribal criminal jurisdiction

The term "special tribal criminal jurisdiction" means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(15) Spouse or intimate partner

The term "spouse or intimate partner" has the meaning given the term in section 2266 of title 18, United States Code.

(16) STALKING

The term "stalking" means engaging in a course of conduct directed at a specific person proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that would cause a reasonable person—

(A) to fear for the person's safety or the safety of others; or

(B) to suffer substantial emotional distress.

(17) VIOLATION OF A PROTECTION ORDER

The term "violation of a protection order" means an act that—

(A) occurs in the Indian country of a participating tribe; and

(B) violates a provision of a protection order that—

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i. prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
ii. was issued against the defendant;
iii. is enforceable by the participating tribe; and
iv. is consistent with section 2265(b) of title 18, United States Code.

(b) Nature of Criminal Jurisdiction

(1) In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 203 [25 USC § 1301 and 1303, respectively], the powers of self- government of a participating tribe, including any participating tribes in the State of Maine, include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special tribal criminal jurisdiction over all persons.

(2) Concurrent jurisdiction

The exercise of special tribal criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) Applicability

Nothing in this section—

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or
(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) Exception if Victim and Defendant are both non-Indians

(A) In general. A participating tribe may not exercise special tribal criminal jurisdiction over an alleged offense, other than obstruction of justice or assault of Tribal justice personnel, if neither the defendant nor the alleged victim is an Indian.

(B) Definition of victim. In this paragraph and with respect to a criminal proceeding in which a participating tribe exercises special tribal criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by a protection order that the defendant allegedly violated.

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(c) Criminal Conduct

A participating tribe may exercise special tribal criminal jurisdiction over a defendant for a covered crime that occurs in the Indian country of the participating tribe.

(d) Rights of Defendants

In a criminal proceeding in which a participating tribe exercises special tribal criminal jurisdiction, the participating tribe shall provide to the defendant—

(1) all applicable rights under this Act;
(2) if a term of imprisonment of any length may be imposed, all rights described in section 202(c) [25 USC 1302(c)];
(3) the right to a trial by an impartial jury that is drawn from sources that—
  (A) reflect a fair cross section of the community; and
  (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
(4) 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 tribal criminal jurisdiction over the defendant.

(e) Petitions to Stay Detention

(1) In general.
A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 203 [25 USC § 1303] may petition that court to stay further detention of that person by the participating tribe.

(2) Grant of stay.

A court shall grant a stay described in paragraph (1) if the court—

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(f) Petitions for Writs of Habeas Corpus

(1) In General.

After a defendant has been sentenced by a participating tribe, the defendant may file a petition for a writ of habeas corpus in court of the United States under section 203.

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(2) Requirement.

An application for a writ of habeas corpus on behalf of a person in custody pursuant to an order of a Tribal court shall not be granted unless

(A) the applicant has exhausted the remedies available in the Tribal court system;
(B) there is an absence of an available Tribal corrective process; or
(C) circumstances exist that render the Tribal corrective process ineffective to protect the rights of the applicant.

(g) Notice; Habeas Corpus Petitions

A participating tribe that has ordered the detention of any person has a duty to timely notify in writing such person of their rights and privileges under this section and under section 203.

I received a copy of this notice on _____, 20_____.

Defendant's signature: _____

Defendant's name (print):_____

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8. Tulalip Tribes Notice of Rights Under the Indian Civil Rights Act

IN THE TULALIP TRIBAL COURT
FOR THE TULALIP INDIAN RESERVATION
TULALIP, WASHINGTON

THE TULALIP TRIBES A Federally-Recongnized Indian Tribe, Plaintiff, v. DOB: Defendant.	NO. NOTICE OF RIGHTS UNDER THE INDIAN CIVIL RIGHTS ACT TPD Incident No.

As a defendant charged with a crime under special tribal criminal jurisdiction, you have the following rights. These rights must be provided to you in writing after you have been ordered detained by Tulalip Tribal Court. 25 USC § 1304(g).

General Rights of Defendants (25 USC § 1302 (c))

In a criminal proceeding in which a participating tribe exercises special tribal criminal jurisdiction, the participating tribe shall provide to the defendant—

1. all applicable rights under this Act (25 USC § 1301-1304);
2. if a term of imprisonment of any length may be imposed, the tribe shall:
    a. provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
    b. at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
    c. require that the judge presiding over the criminal proceeding—
        i. has sufficient legal training to preside over criminal proceedings; and
        ii. is licensed to practice law by any jurisdiction in the United States;
    d. prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
    e. maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.
3. the right to a trial by an impartial jury that is drawn from sources that—

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

4. 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 tribal criminal jurisdiction over the defendant.

Petitions to Stay Detention *(*25 USC § 1304(e))

1. In general.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 203 [25 USC § 1303] may petition that court to stay further detention of that person by the participating tribe.
2. Grant of stay.—A court shall grant a stay described in paragraph (1) if the court—
    (A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
    (B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

Petitions for Writs of Habeas Corpus *(*25 USC § 1304(f) and 25 USC § 1303)

1. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

2. After a defendant has been sentenced by a participating tribe, the defendant may file a petition for a writ of habeas corpus in a court of the United States.

3. Requirement.— An application for a writ of habeas corpus on behalf of a person in custody pursuant to an order of a Tribal court shall not be granted unless --

(A) the applicant has exhausted the remedies available in the Tribal court system;

(B) there is an absence of an available Tribal corrective process; or

(C) circumstances exist that render the Tribal corrective process ineffective to protect the rights of the applicant.

Constitutional Rights *(*25 USC § 1302(a)&(b))
No Indian tribe in exercising powers of self-government shall—

1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

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3. subject any person for the same offense to be twice put in jeopardy;
4. compel any person in any criminal case to be a witness against himself;
5. take any property for a public use without just compensation;
6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
7. (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

   (B) A tribal court may only subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

   1. Has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
   2. Is being prosecuted for any offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

   (C) A tribal court may not impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

   (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
9. pass any bill of attainder or ex post facto law; or
10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

I HEREBY CERTIFY THAT I HAVE BEEN PROVIDED A COPY OF THE ABOVE RIGHTS.

_____

Defendant's Signature, Date and Time

☐ Defendant refused to sign. ☐ Defendant refused to take a copy.

_____

Authorized Witness Signature, Date, and Time

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9. Glossary

A

Action: Term that in usual legal sense means lawsuit.

C

Civil Jurisdiction: The power of the court to hear and decide civil actions.

Civil Law: Laws relating to private rights and remedies as opposed to criminal law.

Common Law: A system of law that is derived from judges' decisions rather than legislation.

Competent: Properly qualified; adequate.

Concurrent: Together, at the same time. In legal parlance: having the same authority.

Contempt: An act that obstructs a court's work or lessens the dignity of the court.

Conviction: In a criminal action, the finding that the defendant is guilty of the crime.

Criminal Justice System: The network of courts and tribunals that deal with criminal law and its enforcement.

Custom: Regular behavior (of persons in a geographical area or type of business) that gradually takes on legal importance so that it will strongly influence a court's decision.

D

Declination: A formal refusal.

Disposition: A final settlement or result.

E

Elements: The basic parts of a crime or civil action that must be proven.

Enhanced Penalties: Greater or increased penalties as a result of aggravating factors.

Exclusive Jurisdiction: The power that a court or other tribunal exercises over an action or over a person to the exclusion of all other courts; that forum in which an action must be commenced because no other forum has the jurisdiction to hear and determine the action.

Exemption: Freedom from a general duty; a privilege allowed by law; immunity from certain legal obligations.

Exhaustion Doctrine: When a non-Indian company or individual is seeking to challenge the jurisdiction of a Tribal court, it must first raise those challenges in Tribal court, not Federal court. Even if the Tribal court first rejects these challenges, the person making these claims must first exhaust all chances to appeal that rejection in the Tribal legal system before coming to the Federal court.

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Explicit: Fully developed or described.

F

Felony: A crime of a more serious nature than a misdemeanor. Under many State statutes it is punishable by more than a year in prison or even death.

H

Habeas Corpus: (Latin for "You shall have the body.") A legal action filed to protect a person from unlawful detention.

I

Indigency: A level of poverty with real hardship and deprivation.

Inherent: Used in resource as inherent jurisdiction or inherent power; natural authority not derived from another; powers originating from the nature of government or sovereignty that are not dependent on being granted by another government.

Injunction: A judge's order to a person to do or refrain from doing a particular thing. An injunction may be preliminary or temporary (until the issue can be fully tried in court), or it may be final or permanent.

J

Judiciary: The branch of government that interprets the law; the branch that judges.

Jurisdiction: Legal authority. A government's power to exercise authority over persons and things within its territory.

M

Misdemeanors: Any offense lower than a felony and generally punishable by fine, penalty, forfeiture, or imprisonment. Oftentimes misdemeanors are punishable by less than one year of imprisonment.

P

Per Capita: (Latin for "by head.") By the number of individual persons, each equally.

Perpetrator: One who commits an offense or crime.

Petition: A written request or application to a court that it takes a particular action, for example, a petition for protection order.

Prejudice: Bias or preconceived opinion.

Probation: A sentence of a convicted offender, released into the community under supervision of a probation officer.

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Pro Bono: Work that is performed for the public good without charge, especially legal work for a client with low income.

Prosecutor: The public official who presents the government's case in criminal law.

Protocol: The rules of correct or appropriate behavior for a particular group of people in a particular situation. For example, the police protocol for handling domestic violence.

R

Recusal: Disqualification or removal of a judge from hearing a case due to actual or potential bias or conflict of interest.

Respondent: The person against whom an appeal is taken or against whom a motion is filed.

Restitution: Giving something back; making good for something.

Revoking: Reversing a legal decision.

S

Sanctioned: Admonished, cautioned, or reprimanded. A sanction is a penalty or punishment attached to a law so that it is obeyed.

Sentencing: The phase of a criminal proceeding after the offender is found guilty, when the punishment is imposed.

Sovereign Immunity: A government's freedom from being sued.

U

Unanimity: The condition of being unanimous; complete agreement within a group.

W

Waive: To voluntarily give up a right.

Ward: A person, especially a child, placed by the court under the care of a guardian.

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10. Acronyms

BIA: Bureau of Indian Affairs

BJA: Bureau of Justice Assistance

BOP: Bureau of Prisons

CLE: Continuing Legal Education

DOI: Department of Interior

DOJ: Department of Justice

ICRA: Indian Civil Rights Act

ICWA: Indian Child Welfare Act

ILOC: Indian Law and Order Commission

ITWG: InterTribal Technical-Assistance Working Group on Special Domestic Violence Jurisdiction

NCAI: National Congress of American Indians

NCIC: National Crime Information Center

OVW: Office on Violence Against Women

SART: Sexual Assault Response Team

SAUSA: Special Assistant United States Attorney

SDVCJ: Special Domestic Violence Criminal Jurisdiction

STCJ: Special Tribal Criminal Jurisdiction

TLOA: Tribal Law and Order Act

TLPI: Tribal Law and Policy Institute

VAWA: Violence Against Women Act

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