

Judicial Qualifications for Tribal Court Judges: VAWA 2022 Tribal Criminal Jurisdiction Series



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The [Tribal Law and Order Act of 2010](#) (TLOA) and the [Violence Against Women Reauthorization Act of 2013](#) (VAWA 2013) amended the [Indian Civil Rights Act](#) (ICRA) to impose qualification requirements on tribal court judges presiding over the prosecution and sentencing of certain cases.¹ In two circumstances this exists: (1) when a tribal court prosecutes a non-Indian defendant (under [VAWA 2022's Special Tribal Criminal Jurisdiction](#) or STCJ)² and the defendant faces the possibility of incarceration or (2) when a tribal court sentences *any* defendant to greater than one year imprisonment (under TLOA's Enhanced Sentencing Authority or TLOA ESA), the presiding judge must meet two requirements proscribed by Federal law:

- (1) have "sufficient legal training to preside over [a] criminal proceeding[]," and
- (2) be "licensed to practice law by any jurisdiction in the United States."³

The second requirement, that the judge be "licensed to practice law by any jurisdiction in the United States," is straightforward and does not require much examination. Judges who preside over criminal cases involving non-Indian defendants or TLOA ESA must be licensed to practice law by any State, territory, or tribal government. Membership in a tribal bar satisfies this requirement.⁴

This paper focuses on the first requirement, that a judge presiding over a criminal case involving a non-Indian defendant or TLOA ESA case have "sufficient legal training to preside over criminal proceedings." This requirement has been the subject of much discussion among the members of the Inter-Tribal Working Group on Special Tribal Criminal Jurisdiction (ITWG) because the term is not defined in either TLOA or VAWA, there are no established Federal

¹ These requirements were unchanged by the amendments included in the 2022 Violence Against Women Act Reauthorization.

² Prior to the amendments included in the 2022 reauthorization of the Violence Against Women Act, tribal criminal jurisdiction over non-Indians was generally referred to as "Special Domestic Violence Criminal Jurisdiction (SDVCJ)," which was the term used in the VAWA 2013 statute. SDVCJ was subsequently replaced by the term STCJ in the VAWA 2022 reauthorization. In general, tribal nations have expressed to us that they do not consider their exercise of criminal jurisdiction over non-Indians to be "special" and find these terms to be offensive. Wherever possible, we refer simply to the tribal exercise of criminal jurisdiction over non-Indians.

³ The Indian Civil Rights Act of 1968, [25 U.S.C. § 1302\(c\)\(3\)](#); [25 U.S.C. § 1304\(d\)](#). It is important to note that ICRA also imposes requirements related to qualifications of defense counsel at 25 U.S.C. § 1302(c)(2) that differ slightly from the judicial requirements discussed in this paper. The defense counsel requirements are more stringent and are not generally considered to allow for the possibility of lay professions.

⁴ "Whether the standard employed is a state, federal, or tribal standard will be a decision for the tribal government." S. 797, 111th Cong. (2009); from an October 2009 Senate report: 111-93, FN 57 (pdf. P 17). [S. REP. NO. 111-93, at 17 n.57 \(2009\)](#).

standards for what constitutes “sufficient legal training,” and this issue has not been the subject of a Federal court decision.⁵

I. “Sufficient Legal Training” Is Best Understood as a Standard That Tribes Must Define for themselves

There are no established Federal standards in the U.S. Constitution or otherwise for what constitutes “sufficient legal training” to serve as a judge. This 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.⁶ 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 misdemeanor cases have relatively little experience and some are not required to be licensed attorneys. In Arizona, for example, there are two types of courts that hear misdemeanor cases: municipal courts and justice courts.⁷ The municipal courts (called city courts or magistrate courts) have jurisdiction over misdemeanor crimes and petty offenses.⁸ The judicial qualifications are determined by city charter, and judges are not required to be attorneys.⁹ Justice courts hear all misdemeanor cases and some justices of the peace conduct the preliminary hearing for felony offenses.¹⁰ To be a justice of the peace, the person must be a registered voter in Arizona, reside in the precinct, and speak English.¹¹ Justices of the peace are not required to be attorneys,¹² but they are required to complete a training, as determined by the State Supreme Court.¹³

Tribal governments are unique in being subject to an undefined Federal mandate that tribal judges have “sufficient legal training.” This term is best understood as a standard (an instruction to “drive safely”), rather than a rule (55 mph is the speed limit). It is up to tribes to determine and define the appropriate judicial qualifications for their communities. This conclusion is supported by Federal case law and legislative history.

⁵ 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. Coriz*, 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).

⁶ United States Courts, *FAQs: Federal Judges*, www.uscourts.gov/faqs-federal-judges; Federal Judicial Center, *Magistrate Judgeships*, www.fjc.gov/history/judges/magistrate-judgeships.

⁷ Azcourts.gov, *Limited Jurisdiction Courts*, www.azcourts.gov/guidetoazcourts/Limited-Jurisdiction-Courts.

⁸ *Ibid.*

⁹ Azcourts.gov, *City Courts*, www.azcourts.gov/AZ-Courts/City-Courts.

¹⁰ Azcourts.gov, *Justice Courts*, www.azcourts.gov/AZ-Courts/Justice-Courts.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Ariz. Code of Judicial Administration, Part 1. Ch. 3, § 1-302 I. 5. (Requirements for Judges).

The U.S. Supreme Court opinion in *Santa Clara Pueblo v. Martinez*¹⁴ that it is up to tribes to interpret ICRA applies here. In *Santa Clara Pueblo*, the Court recognized that Congress passed ICRA with a commitment to tribal self-determination and emphasized that ICRA must be read against the backdrop of tribal sovereignty and the independence of tribal courts.¹⁵ The Court noted that there were two purposes of ICRA: strengthen individual Indians’ position vis-à-vis the tribe and promote the well-established Federal policy of furthering Indian self-government.¹⁶ Determination of who is eligible to serve as a judge is a necessary aspect of self-government and Congress’ intent in amending ICRA remains the same: “protect tribal sovereignty from undue interference.”¹⁷

Indeed, the legislative history of TLOA and VAWA demonstrate that Congress enacted these laws in an effort to strengthen tribal government. Congress first addressed qualifications for tribal court judges in the predecessor bills to enactment of the Tribal Law and Order Act of 2010.¹⁸ A Senate Report explaining these provisions noted that Congress had received comments that it should expressly require State-licensure and graduation from an accredited law school. In explaining its decision not to adopt these suggestions, the report went on to list seven states that do not require attorneys to graduate from an accredited law school to practice law or serve as a judge.¹⁹ Congress clearly made the determination that tribes, like the states, are the appropriate authority to determine what “sufficient legal training” means for the judges in their courts.²⁰ Importantly, Congress’ intent with the requirements was to protect defendant’s due process rights while also acknowledging and strengthening tribal self-government.²¹

II. Documents and Resources That May Help Guide Tribes’ Conversations around Judicial Qualifications

Shortly after passage of VAWA 2013, the U.S. Department of Justice (DOJ) issued a notice in the Federal Register for tribes interested in participating in a pilot project that would allow some tribes to begin exercising criminal jurisdiction over non-Indians.²² The notice

¹⁴ 436 U.S. 49 (1978).

¹⁵ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 65 (1978).

¹⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (citations omitted).

¹⁷ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978).

¹⁸ S. 797, 111th Cong. (as introduced by Senate, April 2, 2009), Sec. 304(a).

¹⁹ [S. REP. NO. 111-93, at 17 n.57 \(2009\)](#) (noting that Congress received comments that it should require state licensure and graduation from an accredited law school). See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66–70 (1978) (analyzing the multiyear legislative history of ICRA as evidence of Congress’ ultimate intent).

²⁰ *Ibid.*

²¹ *Ibid.* “The intent of the section 304 licensing requirements for public defenders and tribal court judges respects the dual purposes of the Indian Civil Rights Act to protect the rights of individuals before tribal courts, and to acknowledge and strengthen tribal self-government.”

²² Although the tribal criminal jurisdiction provision of VAWA 2013 was generally not effective until March 7, 2015, VAWA 2013 included a pilot project period, during which tribes could implement SDVCJ on an accelerated basis with approval from the U.S. Attorney General.

included several questions intended to guide tribes in the interpretation and satisfaction of the requirements, including the subject of legal training for judges.²³ With regard to legal training for tribal judges, the notice asked whether the tribe had a law, rule, or policy that defines what constitutes sufficient legal training to preside over criminal proceedings. This suggests that the DOJ understood the statute to require that a tribe have determined the appropriate qualifications for a judge presiding over a criminal case with a non-Indian defendant, and not that the statute imposes a specific qualification. The notice also describes several metrics that a tribe might use to determine whether a judge is appropriately qualified to preside over criminal cases involving non-Indian defendants and TLOA ESA cases. The notice reads:

Qualifications of Licensed Judges: In answering the following questions, it may be helpful to focus on each individual judge who presides over criminal proceedings in the tribe's courts. Where is the judge licensed to practice law (including state and tribal jurisdictions)? What legal training to preside over criminal proceedings has the judge received? How many years of experience does the judge have in practicing law and in serving on the bench? How do the judges' licenses, legal training, and experience compare to those of the state or local judges who preside over similar criminal proceedings in cases arising in or near the tribe's Indian country?

Legal Training for Judges: Does the tribe have any law, rule, or policy defining what constitutes sufficient legal training to preside over criminal proceedings? Are the judges who preside over the tribe's criminal proceedings provided with and required to attend continuing legal education?²⁴

Specifically, the DOJ noted that it "anticipates that [the questions] may be further discussed by members of the [ITWG] in collaboratively developing tribal best practices."²⁵

Tribal Approaches to Meeting the Judicial Qualifications Requirement

As with any other governance decision, the judicial qualifications requirements will vary from tribe to tribe. Many of the tribes exercising criminal jurisdiction over non-Indian defendants 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

²³ [Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 35961 \(June 14, 2013\).](#)

²⁴ [Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 35961, 35970-71 \(June 14, 2013\).](#)

²⁵ [Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 35961, 35969 \(June 14, 2013\).](#)

defendants have “sufficient legal training.” These tribes may include more specific qualifications in court rules or job postings.

Fort Peck Assiniboine and Sioux Tribes

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 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 each tribal applicant to ensure they would meet all of the requirements of the Federal statute, including the judicial qualification requirement.

The Fort Peck Tribes Comprehensive Code of Justice (CCOJ)²⁶ addresses judicial qualifications in Title 2, Chapter 3 as follows:

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 or Science degree from an accredited college in law and criminal justice or similar field of study, or 4 years judicial experience; be at least 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.

Sec. 308(b) of CCOJ further addresses training for judges who do not have a law degree as follows:

²⁶ Fort Peck Tribal Court, *Fort Peck Tribes Comprehensive Code of Justice*, [fptc.org/comprehensive-code-of-justice-ccoj](http://fptc.org/comprehensive-code-of-justice-cco/).

(b) If a judge does not have a Juris Doctorate, they must complete 40 hours of training annually, with a minimum of 5 of those hours in research and writing.

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.²⁷ 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."²⁸

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 that 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."

²⁷ *Fort Peck Tribes v. Kemp*, AP#723, ¶¶ 11–14 (May 10, 2017).

²⁸ *Fort Peck Tribes v. Kemp*, AP#723, ¶ 12 (May 10, 2017).

Suquamish Tribe

The Suquamish Tribe takes a slightly different approach. The Tribe requires its judges to be a graduate of an accredited law school and also defines sufficient training and experience not by a set number of hours, but rather by the knowledge acquired. Judicial qualifications are set out in its code as follows:

3.3.1. Qualifications. Each judge of the Suquamish Tribal Court must be thirty-five (35) years of age or over, of good moral character, and may not have ever been convicted of a felony or convicted of a misdemeanor within the year immediately preceding appointment. Each judge must be a graduate of an accredited law school and licensed to practice law in any jurisdiction, and have sufficient training or experience to be capable of performing the duties of the office. Training or experience is sufficient if it has resulted in a working knowledge of the law, including the attributes of tribal sovereignty; tribal, state, and federal jurisdiction; due process; civil and criminal procedure; evidence; and legal research and writing.²⁹

Cherokee Nation of Oklahoma

The Cherokee Nation of Oklahoma addresses judicial qualifications in Article VIII, Section 3 of its constitution:

Section 3. Judges of the District Court shall be citizens of the Cherokee Nation, and shall be admitted to practice law before the highest Court of any state of the United States, and shall be appointed by the Principal Chief and confirmed by the Council to serve terms of four (4) years each. In the event of a judicial vacancy due to death, resignation, or removal from said office, any successor duly appointed and confirmed shall only serve the balance of the term of the vacancy being filled.³⁰

The Cherokee code additionally states that: “Any citizen of Cherokee Nation who is a member in good standing of a State bar association who has never been convicted of a felony shall be eligible for appointment as District Judge.”³¹

²⁹ Suquamish Tribe, *Suquamish Tribal Code*, suquamish.nsn.us/home/government/suquamish-tribal-code/.

³⁰ Cherokee Nation, *Constitution of the Cherokee Nation*, www.cherokee.org/media/lufapi1/constitution-of-the-cherokee-nation-1999-online.pdf.

³¹ Cherokee Code, Title 2, Chapter 20, Section 2.

Grand Traverse Band of Ottawa and Chippewa Indians

The Grand Traverse Band of Ottawa and Chippewa Indians addresses judicial qualifications specifically for criminal cases involving non-Indian defendants in its court rules, Subchapter 8.500, SDVCJ Jury, Rights, and Pool:

Rule 8.502 Trial Court Judges. Trial court judges presiding over SDVCJ cases will be law-trained and licensed by a tribal, federal, or state jurisdiction in the United States. In the event the presiding judge is not a licensed attorney, the Court will appoint a specially appointed SDVCJ Judge that is law trained and licensed by a tribal, federal, or state jurisdiction in the United States to preside over the SDVCJ case.³²

Determination and Documentation of the Appropriate Judicial Qualifications

The Federal requirement of “sufficient legal training to preside over a criminal proceeding” likely includes training and experience in the tribe’s criminal laws, rules of evidence, and criminal procedure, including rules regarding recusal.³³ But a tribe may decide that there are other subject matters that judges should be trained in, including traditional or customary knowledge, ethics, victims’ rights, domestic violence, etc. Training can take many forms including licenses and certifications, experience presiding over proceedings, lectures, and webinars and classes.

Regardless of the standards that a tribe may choose to establish to comply with the Federal requirement, the tribe should consider how to best document a judge’s qualifications. Whether in a motion for disqualification or on appeal, a presiding judge’s qualifications may be litigated. It will be useful to develop a code provision, court rule or standard practice that governs how the presiding judge’s qualifications, ongoing experience, training, and certifications will be established or documented.

III. Other Information and Resources

There are a wide variety of trainings and courses available for tribal court judges. The National American Indian Court Judges Association is an important resource that offers training and technical assistance.³⁴The National Council of Juvenile and Family Court Judges also offers training through the National Judicial Institute on Domestic Violence, including workshops and classes

³² Grand Traverse Band of Ottawa and Chippewa Indians, *SDVCJ Jury, Rights, and Pool*, www.gtbindians.org/downloads/sdvj_jury_rights_and_pool.pdf.

³³ The Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(c)(4) lists the documents that must be made publicly available to defendants in these types of cases: (1) criminal laws, (2) rules of evidence, and (3) rules of criminal procedure, including rules governing recusal of judges.

³⁴ The National American Indian Court Judges Association, www.naicja.org/.

focused on domestic violence cases.³⁵ The National Judicial College in Reno, Nevada has a robust curriculum,³⁶ and training in criminal procedure is otherwise widely available. There are a variety of resources for self-study as well, including two publications from the Tribal Law and Policy Institute (*Introduction to Tribal Legal Studies*, 3rd edition and *Tribal Criminal Law and Procedure*, 2nd edition).

³⁵ National Judicial Institute on Domestic Violence, njudv.org/.

³⁶ The National Judicial College, www.judges.org/.