December 20, 2012

The Honorable Eric Cantor, Majority Leader
The Capitol, H-329
United States House of Representatives
Washington, D.C. 20515

Dear Majority Leader Cantor:

As you know, tribes are seeking to curb a longstanding epidemic of violence against Native women. The NCAI Task Force on Violence Against Women has worked steadily on the Violence Against Women Act for many years, and in this reauthorization cycle we have worked on the problem of domestic violence committed by non-Indians on reservation. In the Senate we reached a bipartisan and narrowly tailored solution to this significant public safety concern. We greatly appreciate your efforts to reach a resolution in the House, but we feel that we are running into roadblocks with the drafting process. We appreciate the efforts to work in a back and forth manner, but we are having difficulties with misunderstandings of federal Indian law and the development of so many new and overlapping procedures. Through this, we remain committed to working toward a solution that protects Native women from violence. Unfortunately, the latest draft (December 18, 2:09pm) falls short of those goals.

Yesterday afternoon, we had a two hour conference call on the latest House draft of the VAWA tribal provisions with a very large group of tribal leadership. Tribal leaders viewed the draft as a construct that would bolster the ability of abusers to game the criminal justice system, the very problem we are now trying to solve. The system outlined in the proposed draft would make a dangerous system even worse.

Tribes are dealing with felony violence in domestic situations – such as beatings and rapes of young native women by non-Native boyfriends, some of whom are engaged in drug trafficking and understand that they are untouchable under the current system of law on Indian lands. The draft requires referral to the U.S. Attorney. U.S. Attorneys currently decline 67% of sexual abuse and related cases. If a case is declined at the federal level the felony crime would go back to tribal court as a misdemeanor – where the defendant can immediately remove the case back for the U.S. Attorney for a dismissal. Even if the U.S. Attorney is interested in prosecuting, the offender would likely be set free until the U.S. Attorney can obtain a grand jury indictment, which can take months. Until that indictment is obtained, the offender is often set free to walk the very community that he haunts. The federal criminal justice system is simply not equipped to handle local crimes, and this is the primary reason that tribes seek local control over these crimes that are plaguing our communities.
There was also significant concern about the injection of Public Law 280 into the draft. P.L. 280 is an old federal law from a policy era that Congress has long since repudiated that decimated the criminal justice systems in parts of Indian country. That law delegated federal criminal jurisdiction to certain states, and it varies regionally because of exclusions, opt-in provisions, and retrocessions. The draft offhandedly implicates expansions of P.L. 280, when the thrust of federal Indian policy for over 40 years has been to respect and foster local tribal authority.

In addition, the House draft would arm domestic violence offenders with the broad right to sue tribal justice officials acting within the scope of their duties. Domestic violence offenders are often abusive people who tend towards malicious disruption. Tribal courts are important institutions, but they are not large institutions with bottomless funding to fight federal lawsuits. Tribal courts would be very vulnerable under this provision.

Finally, the draft classifies the authority that tribes would exercise over non-Native offenders of domestic violence as a delegation of federal authority. This again provides offenders with serious legal challenges, including double jeopardy and other constitutional problems with both state and federal overlapping delegations. Again, tribes would be forced to prosecute felonies as misdemeanors, and then let felons walk free. In addition, a delegation of federal authority – if it can ever be found constitutional – must come with a entirely new federal bureaucracy and regulatory regime to oversee local tribal law enforcement, prosecutors, public defenders, judges, and other justice officials, all of which must be funded by Congress. A delegation is simply unworkable.

We engaged judiciary committee staff from both chambers in discussions over the VAWA tribal provisions well over a year ago, passed a strong bill through the Senate eight months ago, and saw a first draft from House Judiciary regarding the tribal jurisdictional provisions just this week. Our preference is that the House of Representatives simply take up the tribal provisions from the bi-partisan Senate bill, or H.R. 6625, the Issa/Cole bill.

As examples of some of the difficulties we are finding with the latest House draft:

- We only get to see one subsection, and the subsection number keeps changing. Title IX of the VAWA is devoted to issues on Indian reservations, but we don’t know what other provisions are being added or taken out. Other sections contain very important programmatic provisions that should remain in any final bill.
- The Senate bill provided for an authorization of $5 million to assist Indian tribes in implementation, and that authorization has entirely disappeared.
- We’ve agreed to a removal provision in the Issa/Cole bill to protect defendants’ rights, but that provision apparently didn’t go far enough – we are now being told to submit to intrusive and time consuming federal oversight, delegation language that will render the legislation unconstitutional, and tribal officials must be subjected to unlimited lawsuits in federal court by domestic violence offenders.
• Public Law 280 is a complicated law from the termination era in the 1950’s, and we keep seeing drafts that misconstrue its provisions and attempt to impose it on more tribal governments.

• We received arguments that tribes must accept a delegation because a delegation is found in the Adam Walsh Child Protection and Safety Act of 2006. However, the tribal authority to implement sex offender registries is a simple authorization: “(1) IN GENERAL- A federally recognized Indian tribe may, by resolution or other enactment of the tribal council or comparable governmental body-- (A) elect to carry out this subtitle as a jurisdiction subject to its provisions....” 42 U.S.C. 16927. Tribal leaders could be satisfied with a simple authorization, but then we are told that is unacceptable.

• We understand the intention to limit tribes to “offenses punishable by a term of imprisonment of one year or less.” But there are so many federal, state, and tribal criminal assault offenses with such a variety of sentences attached, it would create great procedural difficulties.

• There may be a misunderstanding of how long it takes for federal prosecutors to make a decision on charging a crime. It usually involves months of investigation and a grand jury process. In that time, the offenders go free and continue to terrorize and harm Native women victims.

Tribal leaders cannot agree to provisions that undermine the purpose of the legislation, and we have such a strong obligation to protect Native women. The current proposed amendments would compound the jurisdictional challenges. Our preference is that the bipartisan tribal provisions from the Senate bill be taken up in the House. H.R. 6625, the Issa/Cole bill is also very strong. We are willing to keep working on any process that will lead to greater protections. We continue to have great hope and confidence that, with your leadership, Congress will take action to protect Native women before the end of the year.

Sincerely,

Jefferson Keel
President