ACLU
AMERICAN CIVIL LIBERTIES UNION
Maine

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April 14, 2022

The Honorable Raul Grijalva
Chairman
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515
naomi.miguel@mail.house.gov

The Honorable Bruce Westerman
Ranking Member
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515
ken.degenfelder@mail.house.gov

RE: ACLU, ACLU of Maine and ACLU Indigenous Justice Working Group[1] Urge House Committee on Natural Resources to Pass HR 6707, Advancing Equality for Wabanaki Nations Act

Dear Chairman Grijalva and Ranking Member Westerman:

The American Civil Liberties Union, the American Civil Liberties Union of Maine and the American Civil Liberties Union Indigenous Working Group strongly urge you to pass out of the House Committee on Natural Resources, and send to the House floor for a vote of the full House of Representatives, H.R. 6707, Advancing Equality for Wabanaki Nations Act, which was introduced by Representatives Jared Golden and Chellie Pingree. We appreciate the hearing on the bill held by Indigenous Peoples of the United States Subcommittee Chair Teresa Isabel Leger Fernandez, and urge the full committee to now take up the bill.

For more than four decades, a warped and oppressive legal framework has structured Wabanaki[2] life. Since 1980, when Congress enacted the Maine Indian Claims Settlement Act ("MICSA") and Maine enacted the Maine Implementing Act ("MIA"), Maine has treated Wabanaki Nations not as the sovereigns they are, but as municipalities with a legal status akin to that of Bangor, Lewiston, and other Maine towns and cities. The result is an unrivaled injustice for the Wabanaki Nations as other tribal nations have

[1] The ACLU Indigenous Justice Working Group consists of staff from ACLU affiliates and ACLU National, with experience and expertise working alongside Indigenous peoples and movements. The ACLU Indigenous Justice Working Group is committed to a vision of Indigenous Justice that includes the freedom and ability of Indigenous people to exercise their rights and sovereignty of themselves, their people, and their land; the freedom to engage in traditional ways of governing, being, healing, and knowing; learning and celebrating their cultures, languages, traditions, and heritages by their ceremonies and other practices.

[2] The term Wabanaki refers to the Wabanaki Confederacy, which is comprised of the Abenaki, Mi'kmaq, Maliseet, Passamaquoddy, Penobscot nations.

benefited from federal laws designed to improve Indigenous health and welfare. Wabanaki people and tribes have been left behind.

Wabanaki Nations have not had the protections of important federal laws that provide specific protections for other tribal nations. Specifically, the Wabanaki Nations have been denied the protections of:

- the Violence Against Women Act, which would have helped mitigate the hemispheric crisis of missing and murdered Indigenous women and girls on Wabanaki territory;
- the Stafford Act, which would have made funds available to Wabanaki Nations that declare a state of emergency in response to natural disasters or public health emergencies, and which Wabanaki Nations have already been denied, including to address the opioid crisis in Indigenous communities; and
- the Clean Air Act, Clean Water Act, and other environmental laws, which would have helped restore regulation of natural resources to their original stewards, first nations.

To be sure, H.R. 6707 would not retroactively ensure that Wabanaki nations can take advantage of these laws. It would simply ensure that Wabanaki nations can benefit from future legislation that Congress enacts specifically for the benefit of tribal nations. And, it would ensure that the Houlton Band of Maliseet Indians and the Mi'kmaq Nation can enjoy the rights granted by the Indian Child Welfare Act ("ICWA"), which would help remedy the harmful and long-running practice of cultural genocide of Indigenous peoples. The Passamaquoddy tribe and Penobscot Nation can already avail themselves of ICWA. There is simply no good reason to deny Wabanaki nations the benefits of ICWA and future federal laws. In so doing, this legislation would help put Wabanaki nations on equal footing with other tribal nations in the country.

A. HR 6707 Would Meaningfully Recognize the Inherent Sovereignty of Wabanaki Nations

This bill would not solve all the state-created problems that beset Wabanaki nations. It would, however, mark an important step forward in the recognition of Indigenous sovereignty, a strong and long-standing principle in our constitutional jurisprudence. At its base, "[s]overeignty is a legal word for an ordinary concept – the authority to self-govern."[3] Indeed, long before the United States became a country or Maine became a state, the Wabanaki nations operated as self-regulating sovereign governments. The U.S. Constitution recognizes Indian tribes as distinct governments, U.S. Const. art. I, § 8, cl. 3, and "only Congress can abrogate or limit an Indian tribe's sovereignty." *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999). Early in Supreme Court jurisprudence, the Court recognized Indian tribes as "nations" who entered into treaties with the federal government. *See, e,g.*, *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831). The Supreme Court continues to acknowledge tribes as separate and independent political entities from states. *See, e.g., Plains Commerce Bank v.*

[3] National Congress of American Indians, Tribal Governance, *available at* http://www.ncai.org/policy-issues/tribal-governance (last viewed on Feb. 18, 2020).

Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008) ("For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities'") (internal citations omitted).

Over the years, the Supreme Court has recognized "[t]he tradition of Indian sovereignty over the reservation and tribal members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980) (citing *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481–483 (1976)). "[T]his tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." *Id.* (citing, *e.g.*, Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*; the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq*.). The purpose behind the Indian Reorganization Act, for example, was to provide "a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). Overall, "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe*, 448 U.S. at 144 (citations omitted).

There is nothing in federal Indian law that justifies Maine's unique relegation of Wabanaki Nations to the status of municipalities. The only basis is in MICSA, an act of Congress. This bill, HR 6707, another act of Congress, will help undo decades of injustice.

B. HR 6707 Will Likely Reduce Litigation By Incorporating Federal Law

A concern often raised to prevent the expansion of Wabanaki sovereignty is that increased legal independence from state law could increase the risk of litigation between the state and Tribal nations. On the contrary, incorporation of federal laws will likely help forestall litigation. Federal statutory, treaty, and common law is the default law governing the 574 federally recognized tribes in the country.[4] By contrast, current Maine law imposes a unique state-centered approach that makes disputes more difficult to resolve outside of court, due to the absence of any comparable body of precedent. Incorporating Federal law would provide a clearer foundation for resolving any future disputes. Moreover, enhancing tribal sovereignty by passing this bill would help to resolve many of the well-founded complaints that have led to litigation in the past.

Conclusion

[4] National Congress of American Indians, Tribal Nations & the United States: An Introduction, available at http://www.ncai.org/about-tribes (last accessed Feb. 18, 2020).

H.R. 6707 aligns with the nationwide trend toward enhancing tribal sovereignty.[5] For at least the past 25 years, the United States, numerous state and local governments, and countries around the world have dedicated themselves to protecting and promoting the rights of Indigenous peoples. This is reflected, for instance, in the signing by every member of the United Nations (including the United States) of the United Nations Declaration on the Rights of Indigenous Peoples. This commitment stems from a recognition that many Indigenous peoples were treated unjustly and unfairly and that all of us have an obligation and moral duty to promote Indigenous recovery and recognize Indigenous rights. In Alaska, for instance, as recently as 1988, the Alaska Supreme Court held that the Native villages in Alaska are "not self-governing or in any meaningful sense sovereign." *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 34 (Alaska 1988). Eleven years later, however, that court reversed itself and held that the Native villages in the State possess the inherent powers of self-government. *John v. Baker*, 982 P.2d 738 (Alaska 1999). The Tribal nations in Maine are among those who suffered mightily at the hands of the United States, and still do. The improvements provided by H.R. 6707 are both reasonable and modest, and not a single one of them is different than the legal status and benefits the vast majority of other tribes already possess.

We strongly urge you to pass H.R. 6707, rectifying some mistakes of the past and better recognizing the inherent sovereignty of the Wabanaki nations.

Sincerely,

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[5] The trend in Federal law in recent decades has been to enhance tribal sovereignty and self-determination. *See, e.g.*, Report on Federal Laws Enacted After Oct. 10, 1980, 2020 Commission Report Appendix N. L.D. 2094 would extend the protections of these laws to the Tribal Nations. *See* L.D. 2094, § 24.

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