**THE MUSCOGEE (CREEK) NATION SUPREME COURT**

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| **CITIZENSHIP BOARD OF THE MUSCOGEE (CREEK) NATION,** | |
| **Appellant,** | **Case No. SC-2023-10** **(District Court Case No. CV-2020-34)** |
| **vs.** | |
| **RHONDA K. GRAYSON and JEFFERY D. KENNEDY,** | |
| **Respondents.** | |

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**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF ON BEHALF OF REPRESENTATIVE MAXINE WATERS TOGETHER WITH REPRESENTATIVES JOYCE BEATTY, YVETTE CLARKE, EMANUEL CLEAVER, DANNY DAVIS, SYLVIA GARCIA, AL GREEN, STEVEN HORSFORD, HENRY C. "HANK" JOHNSON, JR., BARBARA LEE, GREGORY MEEKS, BRAD SHERMAN, RASHIDA TLAIB, AND ANY OTHER MEMBER OF THE U.S. HOUSE OF REPRESENTATIVES WHO MAY JOIN**

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COMES NOW, Congresswoman Maxine Waters (D-CA) with Representatives Joyce Beatty (OH), Yvette Clarke (NY), Emanuel Cleaver (MO), Danny Davis (IL), Sylvia Garcia (TX), Al Green (TX), Steven Horsford (NV), Henry C. "Hank" Johnson, Jr. (GA), Barbara Lee (CA), Gregory Meeks (NY), Brad Sherman (CA), and Rashida Tlaib (MI), and any other Members of the U.S. House of Representatives who may join ("Members"), by and through their attorney, Mr. Chase McBride of McBride & McBride – Lawyers of Oklahoma, and respectfully request leave to file an amicus curiae brief in the above captioned matter. Such matter relates to appellant Citizenship Board's neglect of the Constitutionally assigned duties of the United States Congress in the establishment and abrogation of treaties between the United States and other sovereign

nations. The Members of the U.S. House of Representatives recently learned that the Citizenship Board of the Muscogee (Creek) Nation ("Citizenship Board") has taken the unprecedented position before this Court, citing a 1941 opinion letter by the Solicitor of the Department of the Interior, that Creek Freedmen may be excluded from citizenship by the Muscogee (Creek) Nation ("Muscogee-Creek Nation") pursuant to the Oklahoma Indian Welfare Act.

As the Members will set forth in their amicus brief if granted leave to submit, allowing an opinion letter by the Solicitor of the Department of the Interior to represent an implicit abrogation of the 1866 Treaty with the Creeks ("1866 Treaty"),[1] would set a dangerous precedent usurping the exclusive role of Congress and endanger the confidence of sovereign tribal nations in the obligations set forth in treaties. The law is well settled that the United States Congress exclusively possesses the Constitutional authority to abrogate a treaty between the United States and another sovereign.[2] The United States Supreme Court has stated that "in the absence of explicit statement 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'"[3]

In interpreting whether Congress has abrogated treaties with tribal nations, the United States Supreme Court has required an explicit showing of clear intent, because "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *See United States v. Dion*, 476 U.S. 734, 738 (1986) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."). Recent decisions in *Cherokee Nation*

[1] Treaty with the Creeks, 1866, Creek Nation-U.S., June 14, 1866, 14 Stat. 785.
[2] *See, e.g.,* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) ("The power exists to abrogate the provisions of an Indian treaty...When... treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress...").
[3] United States v. Dion, 476 U.S. 734, 739 (1986).

*v. Nash*, 267 F. Supp. 3d 86 (D.D.C. 2017) and *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), further support this legal interpretation and together provide the appropriate analytical framework for assessing claims of abrogation. The decision in *Nash* laid the foundation for the United States Supreme Court's 2020 decision in *McGirt v. Oklahoma* (*McGirt*), in *McGirt v. Oklahoma*, the United States Supreme Court ruled that Article 3 of the 1866 Treaty signed by the Muscogee-Creek Nation, which established boundaries for what is the Muscogee-Creek Nation Reservation land today, was still in effect because Congress never explicitly abrogated that part of the 1866 Treaty. 140 S. Ct. 2452, 2460 (2020). More specifically, Congress has never passed legislation explicitly abrogating the Creek Freedmen's right to Muscogee-Creek Nation citizenship included in Article 2 of the 1866 Treaty. Thus, a 1941 opinion by an administrative agency within the executive branch cannot abrogate a treaty. Further, allowing administrative agencies to abrogate treaties between the United States and the Muscogee-Creek Nation, as the Citizenship Board has argued, not only misconstrues the interplay between the Oklahoma Indian Welfare Act and Article 2 of the 1866 Treaty, but also has severe consequences that could render all treaties between the United States and tribal nations practically unenforceable. Indeed, the 1941 opinion did not have the foresight of the *Nash* and *McGirt* decisions and fundamentally does not assess the obligations to Freedmen and their descendants under the 1866 treaties. Moreover, to date, despite years of litigation by various Freedmen, a preliminary review finds no court opinion that has held that Congress abrogated Article 2 of the 1866 Treaty.

As is required under this Court's rules, the interests of the Members are stated more specifically as follows. Congresswoman Waters and other Members of Congress have previously advocated for upholding equal citizenship rights of the descendants of Freedmen of the Five Tribes, including the Creek Freedmen, as guaranteed under the respective 1866 treaties of the Five

Tribes. *See, e.g.*, H.R. 4637, 117th Cong. (2021) introduced by Rep. Danny Davis (D-IL) and Rep. Sheila Jackson Lee (D-TX), calling on the federal government to sever all relations with the Muscogee-Creek Nation of Oklahoma until Creek Freedmen are recognized as citizens of the Muscogee-Creek Nation as required by 1866 Treaty); Oversight Hearing on Select Provisions of the 1866 Reconstruction Treaties between the United States and Oklahoma Tribes; Hearing before the S. Comm. on Indian Affairs, 117th Cong. (2022) (including Congressional testimony by Rep. Maxine Waters (D-CA), Chairwoman, H. Comm. on Financial Services, in support of the restoration of full citizenship rights to Creek Freedmen)[4]; Hearing before the U.S. House Comm. on Fin. Serv., 117th Cong., entitled "NAHASDA Reauthorization: Addressing Historic Disinvestment and the Ongoing Plight of the Freedmen in Native American Communities" (2021) (including opening statement by Rep. Maxine Waters (D-CA) outlining the plight of the Freedmen of the Five Tribes, including the Creek Freedmen, and proposing a solution to ensure federal housing funds cannot be used to exclude descendants of Freedmen of the Five Tribes, such as Creek Freedmen, from tribal citizenship)[5]; Letter from the Congressional Black Caucus ("CBC") to Senator Harry Reid (March 13, 2008) (signed by current CBC members Rep. Barbara Lee (D-

[4] The Lawyers' Committee for Civil Rights Under Law and NAACP Legal Defense and Educational Fund referenced this hearing in a letter urging the Bureau of Indian Affairs to "honor their legal and moral obligations to the living descendants of Creek Freedmen" and identify a path to ensure full MCN citizenship. *See* Letter from Damon T. Hewitt, President and Executive Director, Lawyers' Committee for Civil Rights Under Law, and Janai Nelson, President and Director-Counsel, NAACP Legal Defense and Education Fund to Bryan Newland, Assistant Secretary, Indian Affairs, U.S. Department of Interior (Sept. 20, 2023) (Ex. A.)

[5] While Rep. Waters seeks to fight against the Five Tribes of Oklahoma's unlawful discrimination against their Freedmen in violation of the Tribes Reconstruction Treaties of 1866, Rep. Waters is also a major supporter of Native American sovereignty and issues, evidenced by her introducing a bill to reauthorize the Native American Housing Assistance and Self-Determination Act of 2024 earlier this year. *See, e.g.*, H.R. 6949, 188th Cong. (2024); National Low Income Housing Coalition, Rep. Waters Introduces Bill to Reauthorize NAHASDA in House, (Feb. 5, 2024), https://nlihc.org/resource/rep-waters-introduces-bill-reauthorize-nahasda-house.

CA), Rep. Danny Davis (D-IL), Rep. Yvette Clarke (D-NY), Rep. Maxine Waters (D-CA), Rep. Sheila Jackson Lee (D-TX), Rep. Henry C. "Hank" Johnson, Jr. (D-GA), and Rep. Emanuel Cleaver (D-MO)) (Ex. B); Letter to U.S. Attorney General Eric Holder (April 30, 2009) (signed by current CBC members Rep. Barbara Lee (D-CA), and Rep. Sheila Jackson Lee (D-TX), requesting that the Department of Justice Civil Rights Division commence a full-scale investigation into the Five Tribes' systematic expulsion of its Freedmen citizens in violation of their treaties, voting, and civil rights) (Ex. C)). As Members of the United States Congress, proposed Amici seek to protect their Constitutionally assigned plenary power to consider, establish, and expressly abrogate treaties of the United States, and ensure that such authority is not fortuitously denigrated. The rights of the Members to weigh in on whether to abrogate treaty rights for which they have so valiantly sought to uphold constitutes a tangible harm that should be more fully developed in an amicus curiae brief in this proceeding. More importantly, Members of Congress have an unassailable stake in preserving the plenary power of Congress to legislate in the area of Indian law.[6]

Congresswoman Waters and other Members who may join have demonstrated urgency by promptly moving for leave to file as amicus curiae shortly after obtaining actual notice of interest in the instant action. Specifically, the Members had no reason to be aware of this interest until the Citizenship Board filed their brief for the first time referencing the 1941 letter and arguing that the letter abrogated the Muscogee-Creek Nation's 1866 Treaty with the United States. Furthermore,

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[6] "We have also noted that principles inherent in the Constitution's structure empower Congress to act in the field of Indian affairs." *Haaland v. Brackeen*, 599 U.S. 255, 143 S. Ct. 1609, 1628 (2023) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." (quoting *Morton v. Mancari*, 417 U.S. 535, 551–552 (1974))).

as non-parties, the Members lacked the necessary information to track docket entries in order to file within the time frame set out in the rules. Upon actual knowledge of the congressional interest, however, the Members complied with the multi-layered internal rules of the House of Representatives and filed this Motion as swiftly as possible.

The Members are aware of Rule 17(C)(1) of this Court's Appellate Rules of Procedure which describes the open record process that went into effect on December 1, 2023 ("Open Records Rule"). Even though that process permits non-parties the opportunity to receive updates on any pending (non-sealed) case, such a request by the Members would not have included detailed information about the contents of the filing. Therefore, even though the Brief of the Appellant in which the abrogation argument was first raised has been available since mid-January 2024, the Members would not have received specific notice of the reference to the 1941 letter in the Citizenship Board's brief. Accordingly, the Members could not have known within "fifteen (15) days" of their interest in this matter warranting intervention.

Further, the current Open Records Rule became effective December 1, 2023, which post-dates the Order of Docketing Notice and Filing Schedule and Order Staying Enforcement of the District Court's September 27, 2023 Order and Opinion in this case. The governing open record rule in place prior to December 1, 2023, lacks any reference to accessing court orders on its website.

For the reasons set forth herein, Congresswoman Maxine Waters with Representatives Joyce Beatty (OH), Yvette Clarke (NY), Emanuel Cleaver (MO), Danny Davis (IL), Sylvia Garcia (TX), Al Green (TX), Steven Horsford (NV), Henry C. "Hank" Johnson, Jr. (GA), Barbara Lee (CA), Gregory Meeks (NY), Brad Sherman (CA), and Rashida Tlaib (MI), and Members of Congress who may join respectfully request this Court grant leave to file an amicus curiae brief in

the above captioned case to address the Citizenship Board's proposed theory of implicit treaty abrogation.

Respectfully Submitted,

Chase McBride, JD/MBA
Attorney at Law
OBA # 32061, CNBA# 1124
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# EXHIBIT A

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

LDF Legal Defense Fund

September 20, 2023

The Honorable Bryan Newland
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240
Via Email – bryan.newland@ios.doi.gov

Re: Muscogee Creek Nation Exclusion of Creek Freedmen from Citizenship

Dear Assistant Secretary Newland,

The Lawyers' Committee for Civil Rights Under Law and NAACP Legal Defense and Educational Fund write to urge the Bureau of Indian Affairs (BIA) to encourage the Muscogee Creek Nation (MCN) Citizenship Board and David Hill, the Principal Chief of the MCN, to honor their legal and moral obligations to the living descendants of Creek Freedmen and collaboratively identify a path that will ensure full MCN citizenship and its attendant rights and privileges for the living descendants of Creek Freedmen otherwise eligible for MCN citizenship.

Article 2 of the Treaty of 1866 guarantees Creek Freedmen and their descendants "all the rights and privileges of native citizens" of the MCN, including "an equal interest in the soil and national funds," and that the "laws of [MCN] … give equal protection to all such persons," regardless of "race or color."[1] Unfortunately, the MCN is currently refusing to abide by its treaty obligations and is denying equal citizenship rights to Creek Freedmen, despite no congressional abrogation of Article 2 of the Treaty of 1866 and a federal court decision holding that nearly identical language in the 1866 Treaty with the Cherokee Nation created a right to equal citizenship for the Cherokee Freedmen.[2]

As organizations committed to racial justice, we decry MCN's unlawful exclusion of the Creek Freedmen and their descendants from tribal citizenship based solely on their race. Secretary Haaland and the U.S. Department of Interior (DOI) have publicly affirmed that similar exclusions of Freedmen from tribal citizenship bound by analogous post-Civil War treaties violates the tribes' treaty obligations. The DOI has not hesitated to encourage Tribal Nations to respect the rights of the Freedmen and the United States under those treaties including, where appropriate, weighing in on the scope of those treaty rights in recent judicial proceedings.[3]

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[1] Treaty Between the United States and the Creek Nation of Indians art. 2, June 14, 1866, 14 Stat. 786 [hereinafter Treaty of 1866].
[2] *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 139 (D.D.C. 2017).
[3] *See Nash*, 267 F. Supp. 3d at 86. *See also Seminole Nation of Oklahoma v. Norton*, 232 F. Supp. 2d 122, X (D.D.C. 2002).

We applaud Secretary Haaland's support for the Cherokee Nation's recognition of the citizenship rights of the Cherokee Freedmen. In particular, we concur with Secretary Haaland's encouragement that "other Tribes [] take similar steps to meet their moral and legal obligations to the Freedmen."[4] We further commend you for reaffirming Secretary Haaland's approach in your recent statement before the U.S. Senate Committee on Indian Affairs, in which you recognized that "there remain issues to be resolved" with respect to "the status of the Freedmen" in the MCN and that the DOI "look[ed] forward to working on those important issues with the Tribes."[5] We call on you to exercise your authority to urge the MCN to recognize the full rights and privileges of Creek Freedmen as required by Article 2 of the Treaty of 1866.

## I. History of Creek Freedmen's Citizenship

In 1979, MCN adopted a new constitution that excludes the descendants of Creek Freedmen from eligibility to enroll as tribal citizens solely because they are Black, contrary to the Treaty of 1866.[6] This marked a substantial change from the MCN's 1867 Constitution, which recognized the right of the Creek Freedmen to MCN citizenship.[7] In the process leading to the adoption of the 1979 Constitution, considering those constitutional changes, MCN excluded all enrolled Creek Freedmen from the vote.[8] Following the adoption of the 1979 Constitution, MCN began summarily denying enrollment applications from Creek Freedmen and their descendants because their "ancestors were enrolled on the 'Creek Freedmen Rolls'" rather than the Blood Rolls.[9] As a result, Creek Freedmen descendants have been stripped of their rights guaranteed under the Treaty of 1866.

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[4] Press Release, U.S. Dep't of the Interior, Secretary Haaland Approves New Constitution for Cherokee Nation, Guaranteeing Full Citizenship Rights for Cherokee Freedmen (May 12, 2021), http://perma.cc/N485-3SRR.

[5] *Hearing on Select Provisions of the 1866 Reconstruction Treaties Between the United States and Oklahoma Tribes: Before the S. Comm. On Indian Affs.*, 117th Cong. 8 (2022) (statement of Bryan Newland, Asst. Sec'y for Indian Affairs, U.S. Dep't of the Interior.

[6] MUSCOGEE CONSTITUTION (Aug. 20, 1979) [hereinafter 1979 Constitution].

[7] *Compare id.* art. III, § 1, *with* CONSTITUTION AND LAWS OF THE MUSKOGEE NATION (Mar. 1, 1867), art. II, § 1.

[8] *See* 1979 Constitution, art. III, § 1.; *see also* Compl. ¶ 59, *Muscogee Creek Indian Freedmen Band, Inc. v. Zinke*, No. 18-cv-1705 (D.D.C. Aug. 17, 2018), ECF No. 12; Compl. ¶ 49, *Graham v. Haaland*, No. 22-cv-404 (N.D. Okla. Sept. 16, 2022), ECF No. 2; Muscogee (Creek) Nation District Court Case No. CV-2020-34, *Petition* ¶ 53 (Mar. 11, 2020).

[9] The Dawes Act of 1887, which authorized the transfer of most land owned corporately by the Five Tribes, created the Dawes Commission in 1893, which was tasked with identifying all MCN citizens eligible for land allotment and placing these individuals on the "Dawes Roll." In 1898, Congress changed the mandate of the Dawes Commission by passing the Curtis Act, which directed the Commission to create segregated lists of citizens of the Creek Nation—the first, the "Creek Nation Creek Roll," also known as the "Blood Roll," which allegedly listed only Creek citizens with Creek blood; and the second, the "Creek Nation Freedmen Roll," which allegedly included only Creek citizens who were formerly enslaved and were not of biological Creek lineage. FELIX S. COHEN, U.S. DEP'T OF INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 431–33 (3d ed. 1942). In practice, however, any Creek citizen with "one drop" of "Black blood" was relegated to the Creek Nation Freedmen Roll, including Creek citizens with Creek blood. *See, e.g.*, KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES 1893–1914 89–99 (1999).

## II. Legal Basis for MCN Citizenship of Creek Freedmen

Creek Freedmen and their descendants—a group that includes descendants with Creek ancestry, descendants of Black people enslaved by the MCN, and descendants of free Black people who lived as MCN citizens and were survivors of the infamous and violent Trail of Tears had certain rights and protections under the Treaty of 1866.[10]

In *Cherokee Nation v. Nash*, a federal district court rejected the Cherokee Nation's argument that it had the power to strip the Cherokee Freedmen of their right to citizenship guaranteed under the 1866 Cherokee Treaty. The court held that the Treaty granted "qualifying freedmen" "a coextensive right to the same citizenship" granted to "native Cherokees" that could not be abrogated by a 2007 vote by the Cherokee Nation to "limit citizenship in the Nation to only those persons who were Cherokee, Shawnee, or Delaware by blood."[11] The court held that because the guarantee to the Cherokee Freedmen of "all the rights of native Cherokees" was contained in the 1866 Cherokee Treaty, it could not be modified or revoked except by amending the 1866 Cherokee Treaty. The court specifically held that the Freedmen's treaty rights could not be affected by amending the Cherokee Nation's constitution. Accordingly, the treaty language permits the Cherokee Nation to define the rights enjoyed by its members, but requires that it do so "equally and evenhandedly with respect to native Cherokees and the descendants of Cherokee freedmen" and to ensure that "neither has rights either superior or, importantly, inferior to the other."[12] The Supreme Court of the Cherokee Nation subsequently accepted the holding of the *Nash* decision, authorizing its application to all departments and agencies of the Nation including the Cherokee Nation Registrar.[13]

The citizenship rights of the Creek Freedmen arise under substantially identical treaty language. And like the rights guaranteed to Cherokee Freedmen by the 1866 Cherokee treaty, the rights of the Creek Freedman are defined in terms of parity with the rights enjoyed by native Creeks.[14]Accordingly, so long as MCN continues to extend citizenship rights to native Creeks, the 1866 Treaty requires that it do so on the same terms to Creek Freedmen and their descendants.

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[10] Treaty of 1866, art. 2 (providing that "persons of African descent . . . lawfully residing in . . . Creek country . . . and their descendants and such others of the same race as may be permitted by the laws of [the Creek] Nation to settle within the limits of the jurisdiction of the Creek Nation as citizens, shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds.")

[11] 267 F.Supp.3d 86, 90, 111, 127 (2017).

[12] *Nash*, 267 F.Supp.3d at 140.

[13] *In re Effect of Cherokee Nation v. Nash*, 15 AM. TRIBAL LAW at 102-03.

[14] While the 1866 Treaty uses the term "native Creeks" in a way that distinguishes and excludes the Creek Freedmen, many Creek Freedmen have native Creek heritage or consider themselves to be native Creeks.

## III. Material Impact of MCN's Exclusion of Creek Freedmen

Enrolled MCN citizens have the right to vote in tribal elections, to hold MCN office, and to receive benefits and funds from the MCN treasury.[15] Other benefits include, but are not limited to, housing, free healthcare, monetary stipends, certain business loans and grants, employment preferences, opportunities for government contracting, scholarships, and admission to colleges operated by the Bureau of Indian Education. MCN's exclusion of the Creek Freedmen from the ability to seek tribal enrollment denies them these critical rights and privileges of MCN citizenship.

It is paramount that the MCN realize, in the words of Secretary Haaland, its "moral and legal obligations to the Freedmen" and ensure they have access to the rights and privileges available to all other MCN citizens.

## IV. Conclusion

The undersigned call upon the Assistant Secretary to urge Principal Chief Hill and the MCN to honor their legal and moral duties to the Creek Freedmen and adhere to the Treaty of 1866. The longer this injustice is permitted to continue, the greater the harm Creek Freedmen will be forced to endure.

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[15] CONSTITUTION AND LAWS OF THE MUSKOGEE NATION (Mar. 1, 1890), art. II, §§ 1–2; Def. Mot. to Dismiss at 2, *Graham v. Haaland*, No. 22-cv-404 (N.D. Okla. Jan. 31, 2023), ECF No. 10 (conceding that MCN treasury funds are "used for the benefit of [MCN] Citizens").

Please contact Dariely Rodriguez at drodriguez@lawyerscommittee.org or Stuart Naifeh at snaifeh@naacpldf.org to discuss this matter prior to October 4, 2023. Thank you for your time and consideration.

Sincerely,

Damon T. Hewitt
President and Executive Director
Lawyers' Committee for Civil Rights Under Law

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is one of the nation's leading racial justice organizations. Formed in 1963 at the request of President John F. Kennedy, the Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. In pursuing our mission, the Lawyers' Committee has represented and partnered with Native American and Alaska Native tribes in litigation and advocacy efforts. Most recently, we represented the Arctic Village Council Tribe in a 2020 legal challenge to witness requirements for absentee ballots.

Janai S. Nelson

Janai Nelson
President and Director-Counsel
NAACP Legal Defense and Educational Fund

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. Using the power of law, narrative, research, and people, LDF defends and advances the full dignity and citizenship of Black people in America.

Cc: Principal Chief David Hill, The Muscogee Creek Nation, dhill@mcn-nsn.gov

# EXHIBIT B

# Congressional Black Caucus

2264 RAYBURN HOB • WASHINGTON, D.C. 20515 •
TEL (202) 225-9776 • FAX (202) 225-9750
www.thecongressionalblackcaucus.com



**Change Course, Confront Crises, Continue the Legacy**

March 13, 2008

Senator Harry Reid
Majority Leader
S-221, Capitol
Washington, DC 20510

Dear Senator Reid:

When H.R. 2786, the Native American Housing Assistance and Self-Determination Reauthorization Act of 2007, was considered and passed the House members of the Congressional Black Caucus and others insisted that the bill include a provision that would prevent the Cherokee Nation of Oklahoma from receiving any benefits or funding under the bill until the Cherokee Nation of Oklahoma is in full compliance with the Treaty of 1866 and recognizes all Cherokee Freedmen and their descendants as tribal citizens.

We understand that the Senate may be considering a version of this bill that does not include these critically important requirements. We are writing to advise you that the members of the CBC will not support, and will actively oppose, passage of a NAHASDA bill that does not include this limitation. We must send the unequivocal message to the Cherokee Nation of Oklahoma that failure to provide full citizenship rights to the Cherokee Freedmen will have severe consequences.

We appreciate your work on this matter and look forward to continuing to work with you on this and other important issues.

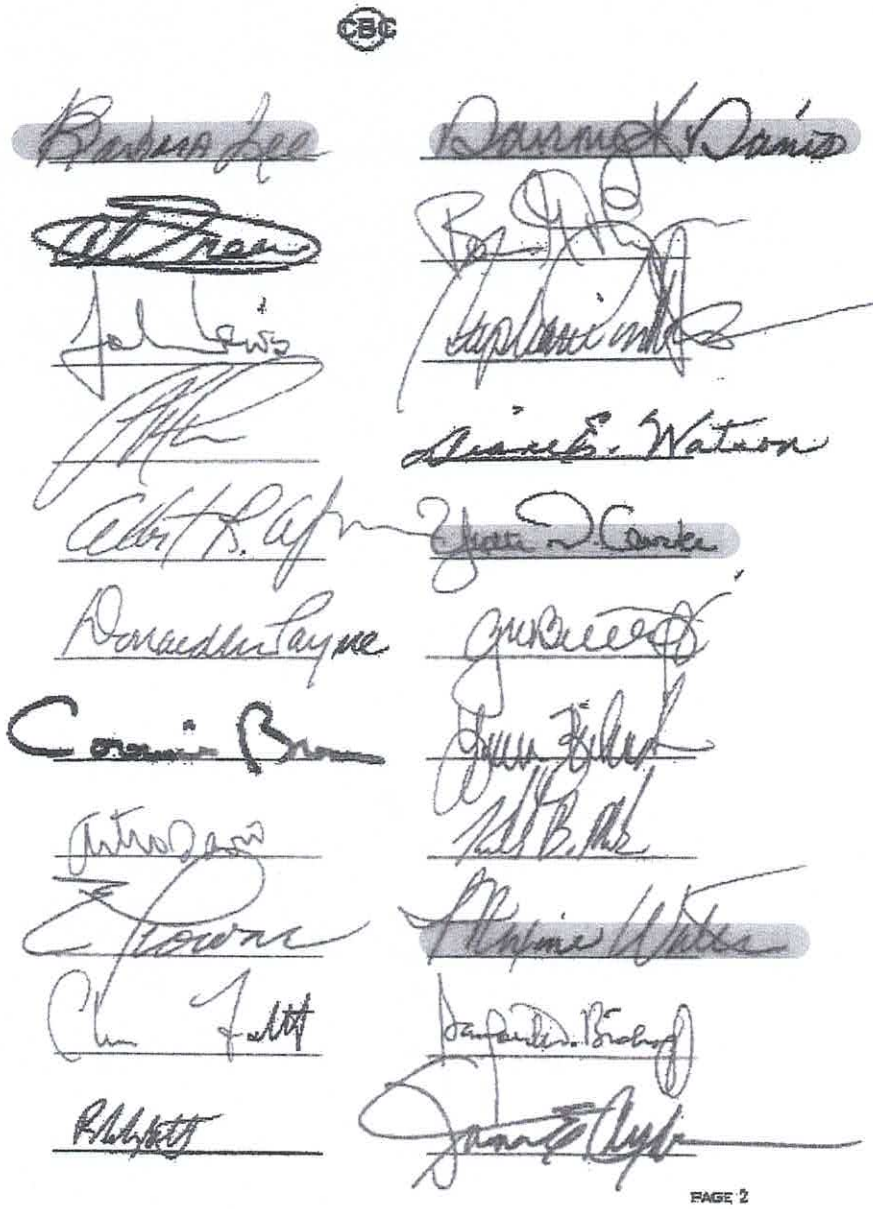
Sincerely,

Carolyn C. Kilpatrick
Chairwoman, CBC

Mel Watt
Chair, CBC Cherokee Indian Taskforce

## Signatures Page 2

EXHIBIT 5



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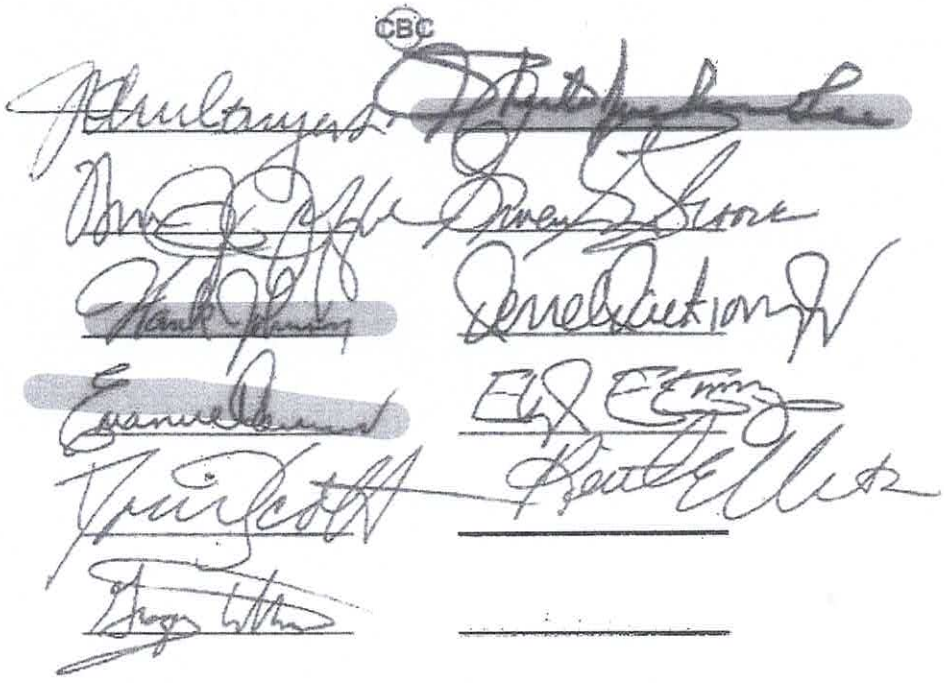


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# EXHIBIT C

# Congress of the United States
## House of Representatives

April 30, 2009

The Honorable Eric Holder
Attorney General
Department of Justice Building
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Dear Mr. Attorney General:

Over forty years after enactment of the landmark Civil Rights and Voting Rights Acts, there is a place in the United States that African Americans cannot vote or receive federal benefits as a matter of law. The victims of this racial oppression are known as freedmen, who are descendants of African slaves owned by Indians. They are called freedmen, but they are anything but free.

Freedmen are guaranteed full and equal citizenship in a small number of Indian Tribes pursuant to treaties signed with the United States Government following the Civil War. Despite over 100 years of litigation and federal laws reaffirming and protecting the rights of freedmen, today's tribal leaders of the Cherokee, Seminole, Choctaw, Chickasaw, and Creek Nations of Oklahoma (The Five Civilized Tribes) have chosen to ignore their longstanding treaty obligations by removing freedmen from tribal citizenship rolls or relegating them to second-class status within the tribe.

We the undersigned members of Congress request that the Department of Justice Civil Rights Division commence a full-scale investigation into what we believe are the Five Tribes' systematic expulsion of its freedmen citizens in violation of their treaty, voting, and civil rights. The illegal actions of the leadership of the Five Tribes, some of which are the wealthiest tribes in Indian Country, have resulted in the freedmen's inability to access federal benefits and programs, totaling in the hundred of millions of dollars annually, in the areas of housing, education, health, and public works. In many instances, the illegal expulsions of the freedmen occurred decades ago.

### Treaties and Case Law

Tribal leaders justify their right to expel the freedmen on the grounds of tribal sovereignty. But a number of laws and treaties that require the United States Government's involvement on behalf of the freedmen uniquely distinguish their citizenship status:



EXHIBIT 6

1. **The Five Civilized Tribes' Treaties of 1866** provide equal rights of tribal citizenship to descendants of former slaves and guarantee their right to run for office.

   The Cherokee treaty provides that "...all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees (Article 9); and "should any such law, either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly or injuriously in said district, he is hereby authorized and empowered to correct such evil..." (Article 6)

   The Creek treaty provides that its former slaves and their descendants "...shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds..." (Article 2)

   The Seminole treaty provides that its former slaves "shall have and enjoy all the rights of native citizens, and laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe. (Article 2)

1. **The 13th Amendment** prohibits slavery and badges and incidents of slavery. The D.C. Court of Appeals has upheld in *Vann v. Kempthorne*, that recent efforts by the Cherokee Nation of Oklahoma to disenfranchise its freedmen represent "a badge or incident of slavery," a clear violation of the 13th Amendment.

3. **The 1970 Principal Chiefs Act** requires the Secretary of Interior to approve the voting procedures of the Five Civilized Tribes. In 2002, the United States Government severed its relations with the Seminole Nation after it refused to allow the Freedmen to vote in tribal elections in violation of the Principal Chiefs Act. The Cherokee Nation voted in March 2007 to remove its freedmen. That election has never been approved by the Department of Interior.

The United States Government's refusal to uphold its fiduciary responsibility to protect the Cherokee Freedmen, whose citizenship rights were removed in a March 2006 vote, contradicts actions taken in 2000 by the Bureau of Indian Affairs (BIA) in response to the Seminole Nation's expulsion of its freedmen citizens. The Clinton administration's Assistant Secretary of the BIA, Kevin Gover, responded by suspending the United States

Government's relations with the Seminole Nation, including withholding all federal funds and shuttering the Nation's gaming operations, until all freedmen had been reinstated in the tribe.

The BIA's action led to two lawsuits, *Seminole Nation v. Norton I an II*, that were won by the United States Government.

*Norton I* held that the Treaty of 1866 is in full force and effect and had not been abrogated by acts of Congress, dispelling the Seminole Nation's argument that it was not bound by the treaty to guarantee the freedmen's rights to citizenship and the vote.

*Norton II* affirmed the Department of Interior's decision to disallow recognition of the election of the Seminole Nation's Principal Chief in which freedmen were not allowed to vote. The decision held that the tribe had a duty to protect the rights of the freedmen and, if they did not, that the United States Government was obligated to uphold their rights.

In the same year as *Norton II* (2002), the Cherokee Nation petitioned the Bureau of Indian Affairs (BIA) to remove U.S. oversight of its electoral process through a constitutional amendment. The BIA responded that it would suspend oversight on three conditions: (1) the freedmen must be able to vote; (2) the freedmen cannot be terminated; and (3) the 1970 Principal Chiefs Act that requires United States Government approval of tribal voting procedures remains in effect. In 2007, the Cherokee Nation removed its freedmen from the tribe in violation of the BIA's previously issued guidelines.

## Unfinished Business

Forty-four years after the Selma marches, there is still unfinished business, a fact that you eloquently noted at this year's commemoration of Bloody Sunday with the following words:

"Some take the view that the civil rights movement has been an unbroken march forward. But the men and women of Bloody Sunday know better. Some take the view that when it comes to civil rights, we have already reached the Promised Land. But we know better. And some take the view that justice and equality have been achieved for all Americans. But I know better."

Today freedmen continue to endure a legacy of discrimination that African Americans in the South withstood decades ago and many have now overcome, a life where the tyranny of governance based on the doctrine of states' rights determined their unequal access to quality schooling, health care, housing, jobs, and the vote. They bear witness to Dr. Martin Luther King's words penned in a Birmingham jail cell that "injustice anywhere is a threat to justice everywhere."

Today the Seminole Nation does not permit its freedmen access to federal tribal benefits but, in a cruel ironic twist, allows them to vote and hold office.

Today the Cherokee Nation refuses to process any new freedmen citizenship applications and severely limits freedmen's access to federal tribal benefits and the tribe's gaming proceeds. It seeks to rid the nation of people like Bernice Riggs – a descendant of humorist Will Rogers, a Cherokee citizen, and Clem Vann Rogers, a noted Cherokee leader—who suffers from Alzheimer's in a nursing home unsupported by Indian Health Services medical benefits.

Today Creek freedmen are no longer citizens after the Creek Nation removed them from its citizenship rolls in 1979, even barring freedmen from the polls, when the nation voted to reorganize under the Oklahoma Indian Welfare Act of 1936. Allen Mitchell -- a retired sheriff, minister, and Creek freedmen -- was illegally prohibited from registering to vote in the election. Despite serious voting irregularities, the Department of Interior approved the new Creek constitution.

Today the Choctaw Nation does not recognize its freedmen citizens due to the fact that over two decades ago, in 1983, the Nation denied freedmen the right to vote for a new tribal constitution that included a provision to remove freedmen from the nation. The Department of Interior approved the constitution.

Today we believe the U.S. Government has a moral obligation to investigate whether or not Chickasaw freedmen's rights have been upheld in accordance with the 1866 treaty.

## Action

More than 100,000 persons of African descent, whose ancestors were forced to toil without pay for hundreds of years, marched the Trail of Tears in shackles, and bear a large responsibility for the wealth of the five tribes, languish without full and equal access to educational, housing, and health service benefits and without sharing in the largesse of the tribes' newfound casino wealth.

We can no longer allow those who oppose upholding the freedmen's civil and voting rights to claim that this is a tribal sovereignty issue that rests solely within the domain of the tribal courts and tribal law. As previously noted, there are numerous treaties the Five Civilized Tribes signed with the United States Government following the Civil War that guarantee the civil and voting rights of freedmen. Those rights have been abrogated repeatedly by these tribes and the only recourse for the freedmen at this juncture is the federal courts and the U.S. Government.

The Department of Justice has the legal and moral responsibility to investigate what we believe are violations of the freedmen's civil and voting rights. We can no longer afford to sit back and allow BIA officials, some of whom are major architects of the freedmen's civil and voting rights violations, to set policy that runs counter to the United States Government's legal obligations to the freedmen.

In closing, it is our firm belief that Department of Justice Civil Rights Division must be charged by you to investigate all efforts past and present to disenfranchise the freedmen and that any investigation it undertakes must not be short-circuited by forces that seek to use tribal sovereignty as a justification for inaction. We believe that tribal efforts to disenfranchise the freedmen transcend the scope of tribal courts and law and that incidents of tribal packing of courts to disenfranchise the freedmen and violations of the Principal Chiefs Act warrant federal investigation and possible intervention (see *Colliflower v. Garland*).

We seek your prompt attention to this matter and await your earliest response.

Sincerely,

Diane E. Watson
Member of Congress

John Conyers, Jr.
Member of Congress

Barney Frank
Member of Congress

Barbara Lee
Member of Congress

John Lewis
Member of Congress

Sheila Jackson Lee
Member of Congress