REPORT

of

COMMITTEE TO ADDRESS THE RECOGNITION OF THE TRIBAL GOVERNMENT REPRESENTATIVES OF MAINE'S SOVEREIGN NATIONS IN THE LEGISLATURE

AN UMBRELLA REPORT
Including The Following Specific Reports:

Report A: report of full committee to the Joint Rules Committee
Report B: report of the Senate subcommittee to the President of the Senate
Report C: report of the House subcommittee to the Speaker of the House

Staff:

Jon Clark, Senior Attorney
Office of Policy and Legal Analysis
13 State House Station
Augusta, ME 04333

Members:

Senator Chellie Pingree, Chair
Representative Richard H. Thompson, Chair
Senator Anne M. Rand
Senator Richard A. Bennett
Representative Joseph E. Brooks
Representative William J. Schneider
Penobscot Nation Representative Donna M. Loring
Passamaquoddy Tribal Representative Donald G. Soctomah

TABLE OF CONTENTS

Page

Executive Summary ..... **i**

I. Background And Context **1**
II. Legal Issues **13**
III. Committee Process **14**
IV. Recommendations **16**
Report A: Report to Joint Rules Committee **17**
Report B: Report to President of the Senate **20**
Report C: Report to Speaker of the House **21**

Appendices

- **A. Joint Order Creating Study**
- **B. List of Interested Parties**
- **C. Summaries of 1st 4 Informational Committee Meetings**
- **D. Issues and Options Paper Generated from Committee Discussions**
- **E. Nov. 16, 1999 Opinion of the Attorney General on Questions Propounded by the Committee**
- **F. Letter from Tribes to Department of Interior Seeking Opinions**
  Letter from Committee to Department of Interior Supporting Letter from Tribes
- **G. List of Materials Collected and Reviewed by the Committee Identifying where Materials may be Located**
- **H. "A Brief History of Indian Legislative Representatives in the Maine Legislature" by S. Glenn Starbird, Jr., 1983, updated by Donald Soctomah, 1999**
- **I. 1997 CRS Report to Congress on Territorial Delegates**
- **J. Executive Summary, November 1998 Report of the Standing Committee on Social Issues, Inquiry into Dedicated Seats in the New South Wales Parliament**
- **K. Dedicated Seats: A Comparative Perspective, Chapter 2 of Issues Paper, Aboriginal Representation in Parliament, Standing Committee on Social Issues, Parliament of New South Wales (April 1997)**
- **L. Legislative Record – House, January 21 and 22, 1975, Debate on Reseating the Tribal Representatives**
- **M. Email Summary of Conversation with Congressman Faleomaveaga, Territorial Delegate from American Samoa**

EXECUTIVE SUMMARY

Many issues associated with tribal-state relations confront all states and have long and often painful histories. In each state, however, there are also unique histories, unique issues. The history and current status of tribal-state relations in Maine are unique in a number of ways, perhaps most obviously with respect to the settlement of the so-called Indian land claims made in the 1970s. The settlement, in addition to settling the land claims, established the legal relationship between the State and the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians (and later between the State and the Aroostook Band of Micmacs). These relationships (though different with each tribe) includes in all cases unusually broad state authority over the tribes and tribal members (as compared with the authority that other states have vis-à-vis native tribes).

Another aspect of tribal-state relationships unique to Maine, and the subject of this study, is the presence of tribal government representatives in the House of Representatives. This arrangement, though of somewhat obscure origins, has been an institution of tribal-state relations for as long as Maine has been a state. Until 1967, when Indians were granted the right to vote in Maine elections, these nonvoting representatives, elected by the Passamaquoddy Tribe and the Penobscot Nation, were the sole representatives for whom members of these tribes could vote (notwithstanding that between 1941 and 1975 they were barred from sitting in the House). For uncertain reasons, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs have apparently never had tribal representatives in the Legislature.

This study, established by Joint Order (see Appendix A) was created to examine the current participation and responsibilities of these tribal representatives, to examine similar arrangements, if any, in other states and nations and to make recommendations "to address the issue of recognition" of these representatives in the Legislature.

After seven meetings in which the committee heard from a variety of persons with expertise related to the subject of the study, and after reviewing voluminous historical records, information about other countries, information about U.S. Territorial Delegates, and a variety of legal materials including a written opinion issued by the Attorney General in response to questions propounded by the committee (the opinion may be found in Appendix E), the committee makes the following recommendations:

- The **full committee unanimously** recommends that the Tribal Government Representatives be authorized to sponsor legislation on any subject

- A **majority of the full committee** also recommends that the Tribal Government Representatives be

    - appointed to serve as members of the joint standing committees
    - authorized to vote in committee on any matter except gubernatorial nominations

- authorized to make any appropriate motions in committee, except with respect to gubernatorial nominations

- The **Senate members** of the committee, after considering a variety of options but without reaching agreement on any particular proposal, recommend generally that the Senate consider ways of improving communications between Tribal Governments and the Senate, including through possible changes in the Senate Rules or by making other less formal procedural or policy changes.

- The **House members** of the committee recommend that the Tribal Government Representatives be authorized to

    - propose amendments on the floor on any bill
    - speak on the floor on any matter

  The House members also recommend that the House Rules Committee of the 120th Legislature examine, with input from the Tribal Government Representatives, whether Tribal Government Representatives should be allowed to make motions on the floor.

To implement these recommendations a number of changes need to be made to the Joint Rules. Since these recommendations deal with matters that fall within the jurisdiction of several entities, the committee and its House and Senate subcommittees have made the following separate reports (all are included under the cover of this umbrella report since all are interrelated and form a package for which this umbrella report provides background and supporting material):

Report A is a report of the full committee to the Joint Rules Committee
Report B is a report of the Senate subcommittee to the President of the Senate
Report C is a report of the House subcommittee to the Speaker of the House

I. BACKGROUND AND CONTEXT

1. History/General Indian Law Background

A. Indian law principles.

Indians possess a unique status in this country both historically and, consequently, as a matter of law. Indians, as we know, were here first; European settlement, while enormous in its effects, represents a fairly short period of the human history of this continent. While European invasion may be viewed in many respects as conquest, viewed through the lens of the law it was something quite different.

The legal underpinning of the relationship of Indians to the progressively dominating immigrants was largely established by treaty; the fundamental legal relationship underlying treaties -- that of sovereign to sovereign --- remains to this day somewhere at the root of almost all American Indian law.[1]

One of the first attempts to define the legal relationship of Indians to the dominant society and its government may be found in an opinion written by U.S. Supreme Court Justice John Marshall in 1831 in which he described Indian tribes as, among other things "domestic, dependent nations" whose relationship to the U.S. government "resembles that of a ward to his [2] A year later Marshall attempted to define the relationship of the Cherokees to the State of Georgia and, by extension, of Indian tribes in general to the several states in which they reside: "The Cherokee nation then, is a distinct community occupying its own territory...in which the laws of Georgia can have no force....The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States."[3]

The principal constitutional provision to which Marshall refers is the so-called Indian commerce clause of Art 1, §8 which reads: Congress shall have the Power....To regulate Commerce...with the Indian Tribes. The principal federal laws to which he alludes (other than the specific treaties involved) were the Trade and Intercourse Acts which forbid settlement on or survey of Indian land, travel though Indian territory, and conveyance of any land rights from any tribe, except pursuant to treaty or convention entered into by the United States.[4]

Since these early pronouncements there has grown up (and in some cases been chopped down) a substantial body of federal and state laws and judicially established policy and

---

[1] Despite the fact that no treaty with Maine Indians (including one negotiated by an agent for the colonies just prior to the Revolution) was ever approved by Congress, these principles still form a background for Indian law in Maine. While treaties were the typical legal instruments memorializing agreements, the legal relationship necessary for treaty-making -- that of sovereign to sovereign -- clearly existed prior to and thus irrespective of formal treaties.

[2] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

[3] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

[4] The Trade and Intercourse Act provision relating to alienation of land is codified at 25 USC §177 and is referred to as the "Non-Intercourse Act".

interpretation. Federal policy toward the Indian nations has over the years been a mercurial thing, shifting from the early days of treaty-making to, among other things, removal and relocation, assimilation, termination (of tribes and of federal "trust" responsibilities), and land claim settlements. State relationships with the various tribes differed according to local historical interaction, national polices, local political interests and so on (as one might expect, there are clear distinctions between the relationships that developed in the West and those that developed in the Colonial East). It is very difficult today to speak accurately about the legal relationship of Indians with the several States and with the federal government without limiting oneself to a particular tribe, a particular State and a specific issue. It appears, however, fair to say that underlying all of these relationships lurk several basic principles of Indian law which may be discerned generally in the Marshall opinions and which have been more fully developed since in the federal Indian common law. These principles may be summarized as follows:

1. **Sovereignty**. Indian tribes are in some manner "domestic, dependent nations" or "distinct communit(ies) occupying (their) own territor(ies)" who, though subject to the ultimate power of the federal government, are not, without federal consent, subject to state law.[5]
2. **Reserved rights**. Tribal authority over Indian affairs derives originally from tribal status as sovereign ("inherent powers of a limited sovereignty which has never been [6]) and not originally from any grant from the government. (A treaty "was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted.")[7]
3. **Plenary power of Congress**. Congress enjoys plenary (though not absolute) power over tribal affairs.[8]
4. **The trust relationship**. The relationship of Indians to the federal government, i.e., Congress, "resembles that of a ward to his guardian"; Congress has what has been termed a trust responsibility to the Indian tribes.[9]
5. **Canons of construction**. Certain judicial canons of construction guide the interpretation of federal treaties and laws. These cannons arise out of and reflect the trust responsibility of the federal government. The canons essentially require liberal construction, including the resolution of ambiguities, in favor of the Indians.[10]

Indian law as it relates to Maine tribes is of course, as a result of the Maine land claim settlement acts, unique; nevertheless, it was formed against the backdrop of these general principles which, as a consequence, continue to have relevance to an understanding of the legal status of the tribes and the issues that concern the tribes.[11]

---

[5] See Felix C. Cohen, *Handbook of Federal Indian Law*, 1982 Edition, Miche Bobbs-Merrill, 1982, pp. 259-279.
[6] *United States V. Wheeler*, 435 U.S. 313, 322-23 (1978).
[7] *United States v. Winans*, 198 U.S. 371 (1905). Cohen described this concept of "inherent powers of a limited sovereignty which has never been extinguished" articulated in *Wheeler* as "(p)erhaps the most basic principle of all Indian law, supported by a host of decisions". Cohen, p. 231.
[8] See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). See also Cohen, p 217-220.
[9] See Cohen, pp. 220-228.
[10] See Cohen, pp. 221-225.
[11] See, *e.g*., *Atkins v. Penobscot Nation*, 130 F.3d 482, 489 (1997).

B. The tribes of Maine.

Historically there were a number of Indian villages, bands, tribes and nations within the State. In this summary it is not possible or necessary to review the complexities and uncertainties associated with identifying the various tribal units or their aboriginal territories. As a general matter, all Indians living within the area now encompassed by Maine were, at the time of European contact, linguistically Algonquian (not to be confused with "Algonquin" or "Algonkin" which is a name of a specific group of tribes that were located around the Ottawa River). Many very different tribes fall within the Algonquian language group, ranging from the Micmac of Maine to the Blackfeet of Montana. The languages and cultures of these tribes differ much as do the languages and cultures of Europe which are linguistically Indo-European.

The historic tribes of Maine (those evidently here at the time of first European contact) were the Abenaki (which included a number of sub-groups such as the Androscoggin and the Norwidgewock), the Penobscot (included by some within the Abenaki group), the Passamaquoddy, the Maliseet (very closely related to the Passamaquoddy; linguistically essentially identical) and the Micmac.

The arrival of Europeans had a number of effects on the tribes, including decimation of their populations by European diseases, particularly small pox. Over time, as a result of the diseases and bloody conflicts with settlers moving into their territories, the Abenaki largely abandoned the State. In the nineteenth century and into the early years of this century, a group of Abenakis evidently returned to live in the Moosehead region. At present, there is no officially recognized Abenaki tribal presence in this State (there are Abenaki reservations in Canada). The diseases and conflicts took a substantial toll on the other Indian tribes, but these tribes managed to preserve a presence within the State that is today federally recognized. These are the federally recognized tribes in Maine:

Aroostook Band of Micmacs
Houlton Band of Maliseet Indians
Passamaquoddy Tribe
Penobscot Indian Nation

For convenience and without any intent to be disrespectful, we will refer to these different groups as "tribes" since that is the general term often employed in Indian law.

All of these tribes (and the Abenaki) were members of the historical Wabanaki Confederacy which existed from about the mid-18th century to about the mid-19th century. In recent years, the several tribes have renewed their Confederacy and are today often referred to as a group as Wabanaki Indians.

While the peoples of these tribes share history and culture (the Passamaquoddy and the Maliseet share a very close history and culture), each tribe is a separate entity and to an extent unique.

C. Indian law in Maine

From the American Revolution until 1975, the tribes went largely unrecognized by the federal government. The federal government had ratified no treaty with any of the tribes.[12] For 200 years, the tribes were under the de facto jurisdiction of Massachusetts and then of Maine. The states essentially assumed the role Marshall had defined as Congress', that of "guardian" of "domestic, dependent nations." There appears, however, to have been little or no recognition of tribal sovereignty; the Indians appear to have been treated as wards but not as domestic nations.[13]

Over the years, most of the land the Indians considered theirs was transferred by one means or another to the State and to non-Indians. The federal government neither approved nor interceded. In the early 1970s, when the issue of federal recognition of the tribes was placed squarely before the Department of Interior by the Passamaquoddies (who were requesting the support of the federal government in the prosecution of their land claim), the Acting Solicitor of the Interior concluded "there is no trust relationship between the United States and this tribe."[14] At the time, presumably a similar conclusion would have been offered with respect to the other tribes, given the similar lack of actual historic federal recognition of the tribes.

In 1975 things changed. The federal district court and subsequently the 1st Circuit Court of Appeals, found that the federal Non-Intercourse Act, which forbid the conveyance of Indian land without the consent of the United States, created a trust relationship between the United States and Indian tribes. It was stipulated by the federal government and by the State that the Tribe constituted a tribe of Indians "in the racial and cultural sense." The court found that federal recognition of a tribe by treaty, statute or consistent course of conduct was not required to bring a tribe within the protection of the Non-Intercourse Act; the stipulated existence of the Passamaquoddy Tribe "in the racial and cultural sense" was sufficient to bring the tribe within the terms of the Act; consequently, the United States had a trust responsibility to the tribe.

A new era in Maine Indian law had begun.

The stage had been set earlier. Several years earlier, the Passamaquoddy Tribe and the Penobscot Nation had discovered and developed substantial legal claims to a vast area of the State.[15] The basic claims of the tribes were these:

---

[12] Interestingly, representations were made in 1777 by an agent of the Continental Congress promising certain protections and other inducements if the Wabenakis would support the colonies in the Revolution. The tribes evidently agreed and provided valuable support. After the Revolution, the agent encouraged the new Congress to ratify and abide by the agreement; Congress, however, chose not to. See *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649, 667 (Me. 1975).

[13] The economic condition of the Indians prior to federal recognition, and the subsequent influx of federal assistance, appears to have been quite dismal. Maine Indians were the last native Americans in the nation to receive full voting rights (in 1967). For a discussion of the State's treatment of the tribes as viewed from the Indian point of view, see *The Wabenakis of Maine and the Maritimes*, Maine Indian Program, Bath, Maine, 1989.

[14] *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 653 (Me. 1975).

[15] It should be noted that the Maine Indian land claims did not arise in a vacuum. Other tribes in the east were bringing claims forward (e.g., the Narragansetts in Rhode Island, the Mashpee on Cape Cod, the Oneidas, the

1. That the tribes possessed aboriginal land rights, running back before European settlement, to some 2/3 of the State (essentially everything east of the Penobscot River);
2. That the tribes had been and still were Indian tribes within the meaning of the Non-Intercourse Act;
3. That the aboriginal lands had been conveyed or taken by state "treaty", sale or otherwise without the consent of the United States required under the Non-Intercourse Act and so the conveyances and takings were legally invalid; and
4. That the tribes were therefore entitled to possession of the aboriginal lands and to damages for about 200 years of trespass.

The tribes approached the federal government for support in prosecuting the claims against the State. Since the federal government believed it had no trust responsibility, the cases were held in abeyance pending the outcome of *Morton* case. With the decision in *Morton*, the government undertook a serious examination of the claims and "reported to the District Court that the tribes had significant claims to five million acres of Maine woodland. However , the Department of Justice also informed the court that it was the position of the Federal Government that such claims are best settled by Congress rather than through years of litigation."[16]

Prior to settlement, several important things occurred. Foremost, the Passamaquoddy Tribe and the Penobscot Nation received federal recognition.[17] With recognition came tribal sovereignty vis-à-vis the State, a sovereignty which had essentially lain dormant because unrecognized for some 200 years. Sovereignty pushed aside State jurisdiction over the tribes and tribal affairs on tribal land. In a couple of important cases, the meaning of tribal sovereignty was driven home: In *Bottomly v. Passamaquoddy Tribe*,[18] the 1st Circuit held that the tribe, as sovereign, was immune from suit. In *State v. Dana*,[19] the State Supreme Court held that the Passamaquoddy reservation was "Indian Country" under the federal Major Crimes Act and thus state criminal law did not apply within the reservation. From these cases it became clear the tribes likely possessed the array of sovereignty rights which other federally recognized tribes possessed: exemption from, *inter alia*, State taxation, environmental and business regulation and State control over tribal government.[20]

Cayuga Indian Nation of New York, the St. Regis Mohawk Tribe of New York, the Catawba Tribe of South Carolina). More generally, there was a resurgence among Indians in reasserting Indian rights (groups such as the American Indian Movement were pressing issues and staging symbolic events such as the Trail of Broken Treaties and the occupations of Wounded Knee and Alcatraz). While the Maine Indian land claims were in many respects legally unique, they arose during a period of significant Indian activity around the nation.

[16] Statement of Cecil D. Andrus, Secretary of the Interior, *Hearings Before the Select Committee on Indian Affairs, United States Senate, 96th Congress, 2nd Sess., on S. 2829*, July 1 and 2, 1980, Vol. 1, p. 131.

[17] This federal recognition arose as a result of *Passamaquoddy Tribe v. Morton.* The recognition of both tribes was formalized January 31, 1979 when the Department of Interior issued its list of tribes to whom "(t)he United States recognizes its trust responsibility": the list included both tribes. See Federal Register, Vol. 44, No 26, Tues. Feb. 6, 1979 at 7235, 7236.

[18] 599 F.2d 1061 (1979).

[19] 404 A.2d 551 (Me. 1979).

[20] This sovereignty was largely conceded by the Attorney General Richard Cohen at the time of the settlement. During the Maine Legislative hearing on the settlement he reviewed the holding in *Dana* and opined: "In my

While the State Attorney General took the position that the State had a better than even chance of "winning" against the Indians' land claims,[21] the results and implications of these cases "caused (the Attorney General) to reevaluate the desirability of settlement."[22]

In 1980, a settlement was reached involving the U.S. Government, the State, the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians.[23] The settlement extinguished all Indian land claims in the State, including any by other tribes.[24] It also effectively ended the State's "wardship" of the tribes, ending state programs designed to benefit the tribes. It attempted definitively to establish the legal relationship between the tribes and the State.

Under the settlement the tribes gave up their legal claims to aboriginal land, to trespass damages and to any claims that might have arisen regarding the handling of tribal money held in trust by the State.[25] They also gave up a certain amount of the tribal sovereignty which they had regained through federal recognition (the Houlton Band of Maliseet Indians acquired formal federal recognition under the settlement, but, with a few exceptions, all criminal and civil jurisdiction was ceded to the State). The Passamaquoddy Tribe, Penobscot Nation and Houlton Band of Maliseet Indians received federal money (as settlement of their land claims) and the opportunity to purchase certain lands that could become Indian "territory" (and thus protected as "trust land" by the federal government). The Houlton Band of Maliseet Indians, through federal recognition, became eligible for federal assistance programs. There were some within the tribes who opposed the settlement, in part due to their perception that the settlement ceded too much tribal sovereignty to the State.[26]

The State was relieved of whatever trust responsibility it had historically assumed and absolved of any liability which might have arisen from the exercise of that trust responsibility.[27] The State was not obligated to pay anything to the tribes under the settlement. The legal cloud over the lands claimed by the tribes and any and all future potential aboriginal land claims in the

---

judgment, it is unlikely that if the matter were litigated, we could enforce other State laws on the reservations." *State of Maine, Joint Select Committee of the Maine Indian Claims Settlement, Public Hearing*, March 28, 1980, testimony of Maine Attorney General Richard Cohen, p. 6

[21] He also stated during the U.S. Senate Hearings, that "there was a serious chance that the State and some of its citizens might have some substantial liability." *Hearings Before the Select Committee on Indian Affairs, United States Senate, 96th Congress, 2nd Sess., on S. 2829*, July 1 and 2, 1980, Vol. 1, p. 159.

[22] *State of Maine, Joint Select Committee of the Maine Indian Claims Settlement, Public Hearing*, March 28, 1980, testimony of Maine Attorney General Richard Cohen, p. 4. There were some who argued that Congress should, by Legislative fiat, simply extinguish the Indian's claims and clear non-Indian title to the lands. See for instance, American Land Title Association, Indian Claims Under the Non-Intercourse Act: The Constitutional Basis and Need for a Legislative Solution (White Paper, March 1978).

[23] The Houlton Band of Maliseet Indians did not reach full agreement with the State; a supplementary settlement Act regarding the Band was passed in 1986.

[24] See 25 USC §1723 and 30 MRSA §6213.

[25] See 25 USC §1730.

[26] See *Hearings Before the Select Committee on Indian Affairs, United States Senate, 96th Congress, Second Session, on S. 2829*, July 1 and 2, 1980, Vol. 1, p 373-422.

[27] See 25 USC §1730 and §1731.

State were extinguished. The State, like the tribes, relinquished its right to argue its case in court with regard to the legal merits of the Indian land claims.[28]

In 1991, the Aroostook Band of Micmacs received federal recognition and federal money for the acquisition of trust territory. Under the law as it currently stands, the State has, with a few exceptions, complete civil and criminal jurisdiction over the Band.

The federal Settlement Act is actually composed of three enactments. The original enactment dealt with the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians.[29] In 1986, Congress passed the Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986 which established federal trust status for lands purchased by the Band.[30] In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act which, among other things, created a fund for federal trust land acquisition by the Band.[31] These acts ratified State legislation: the Maine Indian Claims Settlement Act;[32] two subsequent amendments to that Act regarding the Houlton Band of Maliseet Indians;[33] and the Micmac Settlement Act.[34] For practical purposes, these may be reduced two State Implementing Acts:

- The Maine Land Claims Settlement Act
- The Micmac Settlement Act

The Houlton Band of Maliseet Indians are treated under the former but are treated very differently from the manner the Penobscot Nation and the Passamaquoddy Tribe are treated; the Houlton Band of Maliseet Indians are treated almost identically to the manner in which the Aroostook Band of Micmacs are treated under the latter settlement act.[35]

In section 6204 of the Maine Land Claims Settlement Act provides:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.[36]

---

[28] Attorney General Cohen stated to the U.S. Senate, "In addition to the enormous litigation costs to the State, it was apparent to me that the interim economic damage to the State during the period of time it takes to try the case, even if the State were ultimately prevail on the merits, might make such a success a pyrrhic victory." *Senate Hearings*, Vol. 1, p. 160.
[29] See 25 USC 1721, et seq.
[30] 100 Stat. 3184; 25 USCS §1724, note.
[31] 105 Stat. 1143; 25 USCS §1721, note.
[32] PL 1979, ch. 732.
[33] PL 1981, ch. 675 and PL 1985, ch. 672.
[34] PL 1989, ch. 148.
[35] See Micmac Settlement Act, Sec. 2 (a)(5) which indicates that Congress's intent was to "afford to the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians."
[36] 30 MRSA §6204.

There are of course a number of provisions in the Act that do in fact provide otherwise. What is most interesting and important to note for purposes of this study is that under this provision, the tribes are broadly subject to Maine laws.

It should be noted that, under the Act, the Penobscot Nation and the Passamaquoddy Tribe both retain the following sovereignty:

> (I)nternal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.[37]

The reach of this provision is a matter of some dispute between the State and the tribes and has been tested in the courts.

D. Maine Indian Tribal-State Commission

The Maine Indian Tribal-State Commission (MITSC) was established under the land claim settlement.[38] The commission is made up of 9 members, 4 of whom are appointed by the Governor, subject to legislative confirmation, and 4 of whom are appointed by the tribes (2 from each tribe); the 9th member, the chair, is selected by the 8 appointed members.

The commission has these responsibilities:

- continually review the effectiveness of the Act
- continually review the social, economic and legal relationship between the Passamaquoddy Tribe and the Penobscot Nation and the State and
- make such reports and recommendations to the Legislature, the Passamaquoddy Tribe and the Penobscot Nation as it determines appropriate.

In addition, the commission has exclusive regulatory authority over fishing in certain waters in or along Indian territory.[39]

2. The Tribal Government Representatives: overview and background

A. Maine Tribal Government Representatives

Of the four federally recognized tribes in Maine, two are provided nonvoting seats in the Maine House of Representatives for elected tribal representatives: the Penobscot Nation and the Passamaquoddy Tribe. The Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians are presently not provided such seats.

---

[37] 30 MRSA §6206.
[38] See 30 MRSA §6212.
[39] 30 MRSA §6207(3).

Tribal representation in the Maine Legislature is an arrangement of long standing, though its origins are somewhat obscure. It appears the arrangement was carried over from a similar arrangement in the Massachusetts Legislature before Maine was a state and probably has its origins in the American Revolution.[40] It seems probable that the arrangement was created in the aftermath of the Revolution as a result of the tribes' service in that war. Contemporary accounts indicate that this service was crucial with regard to American possession of lands east of the Penobscot.[41] The historical reasons why tribal representation of the Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians was not provided for in the Legislature are unclear as it appears these tribes also provided service during the war.[42]

There was an effort in 1929 and again in 1939 to expand the rights and privileges of the tribal representatives; the effort failed. In 1941, the tribal representatives were unseated from the House, though their legislative pay was continued; the result was a status which some have referred to as that of state-paid lobbyist.

In 1975 the tribal representatives, after some debate, were re-seated.[43]

The federal and state land claim settlement acts of 1980 and subsequent settlement acts with the Maliseets and the Micmacs did not materially affect the status of the tribal representatives in the Legislature; none of the provisions of the acts address the rights or privileges of the tribal representatives.

In its 1997 report, the Task Force on Tribal-State Relations recommended that the Micmac and the Maliseets be provided nonvoting seats in the House. This recommendation was not adopted by the Legislature.

Currently there are several provisions in statute and in the House Rules and Joint Rules related to the rights, privileges and duties of the tribal representatives. The provisions are these:

3 MRSA §1
3 MRSA §2
Rules of the House, Rule 525
Joint Rules, Rule 206 (3)

---

[40] See, *A Brief History of Indian Legislative Representatives in the Maine Legislature* by S. Glenn Starbird, Jr., 1983, updated by Donald Soctomah, 1999 (Appendix H).

[41] See *Military Operations in Eastern Maine and Nova Scotia During the Revolution*, Frederic Kidder, Albany: Joel Munsell, 1867, Kraus Reprint Co., New York, 1971. "How far these people have complied with their engagements our present possessions, Eastward of Penobscot might be a sufficient proof, as it is acknowledged by all acquainted with that country that their assistance was a principal support in its defense." Letter of Col. John Allan to Sam Adams, 1793. Kidder at 313.

[42] See *The History of Maliseets and Micmacs in Aroostook County, Maine, Preliminary Report Number Two*, June 1979, by James Wherry, reprinted in Hearings Before the Select Committee on Indian Affairs, United States Senate, 96th Congress, Second Sess. on S. 2829, July 1 and 2, 1980, Vol. 2, Appendix, p. 506 et seq.

[43] For the debate on the reseating, see Legislative Record -- House, January 22, 1975, pp. A65-A69 a copy of which is located in Appendix L.

Under these provisions, tribal representatives

- must be granted seats in the House
- must be granted the privilege, by consent of the Speaker, of speaking on pending legislation
- must be appointed to sit as nonvoting members of joint standing committees
- may sponsor legislation specifically relating to Indians and Indian land claims, cosponsor any other legislation and either sponsor or cosponsor expressions of legislative sentiment
- may be granted other rights and privileges as voted by the House
- are entitled to per diem and expenses for each day's attendance during regular sessions and to the same allowances as other members during special sessions

B. Other U.S. states

There are no other states in which tribal governments are provided dedicated legislative seats. Wisconsin is actively examining the possibility of creating a nonvoting delegate from the Wisconsin tribes to the State Legislature; it has examined Maine's approach as a possible model.

C. U. S. Congress

There are no seats dedicated to Native Americans in Congress. In 1975, a congressionally-sponsored committee considered the creation of an Indian Congressional delegate, but went no father than considering it. There is presently only one American Indian serving in either the House of Representatives or the United States Senate: Senator Ben Nighthorse Campbell of Colorado. Senator Campbell is chair of the Senate Select Committee on Indian Affairs.

Puerto Rico, Guam, Virgin Islands, American Samoa and the District of Columbia all elect Territorial Delegates to Congress. These Delegates are provided seats in Congress and by statute and by rule enjoy most of the rights, authority, privileges and responsibilities of other members of Congress, with the exception that they may not vote in the House. From 1993-95 the delegates were granted the right to vote in the Committee of the Whole subject to an automatic revote by the House in any case in which the votes of the delegates were decisive. This provision was challenged and upheld by the U.S. District Court and the D.C. Circuit Court of Appeals. See *Michel v. Anderson*, 817 F.Supp. 126 (D.C. Cir. 1993), aff'd 14 F.3d 623 (D.C. Cir. 1994).

For illustrative purposes, here is a selection from the Rules of the House of Representatives - 106th Congress relating to the Delegates:

> Each Delegate...shall be elected to serve on standing committees in the same manner as Members of the House and shall possess in such committees the same powers and privileges as the other members of the committee. (Rule III, 3. (a).)

A brief history of the Territorial Delegates to Congress may be found in Appendix H.

D. Other Countries

i. Canada

There are presently no seats in the Canadian Parliament or in the parliaments of the several provinces and territories dedicated to aboriginal tribes. Several provinces have considered the creation of such dedicated seats, including New Brunswick, Quebec and Nova Scotia. In a couple of provinces (Quebec and Saskatchewan) certain electoral districts have been redrawn to encompass areas of high native populations.

Northwest Territories was recently divided and a new territory created named Nunavut. The Nunavut territorial government will apparently be in accord with the parliamentary model used by other Canadian territories. However, since the Inuit are a majority of the population, they will enjoy preponderant influence in the government; this will allow a form of self-government for the Inuit (a primary reason for the creation of the new territory).

ii. Norway

There are no dedicated seats for aboriginal people in the Norwegian Parliament (the Storting). However, in 1989 the Storting created the Sami Assembly whose 39 members are elected by the Sami (formerly called Lapps). The Assembly oversees a number of cultural, educational and linguistic programs for the Sami funded by the Norwegian Government. The Assembly is also authorized to make reports to the Storting on matters of concern to the Sami, though the Storting is not required to respond to the reports. The Sami vote in the general elections for members of Parliament in the same manner as other citizens.

iii. New Zealand

Since 1867, a number of seats in the New Zealand House have been dedicated to the Maori. There were 4 such seats until 1996 when the number was increased to 5. The House has a total of 120 members. The Maori can choose to vote for a general electorate member of the House or for a Maori member.

For a more detailed description of the New Zealand model, see Chapter 2, "Dedicated Seats: A Comparative Perspective," in *Issues Paper, Aboriginal Representation in Parliament*, Standing Committee on Social Issues, Parliament of New South Wales, (April 1997), a copy of which may be found in Appendix K.

iv. Australia

New South Wales, Australia has been examining the possibility of establishing dedicated aboriginal seats in its parliament. No action has yet been taken.

In Appendix J may be found the Executive Summary from the November 1998 report of the Standing Committee on Social Issues Inquiry into Dedicated Seats in the New South Wales Parliament.

v. Other Countries

There appear to be a number of other countries that provide dedicated seats for particular ethnic groups. These include Lebanon, Fiji, Zimbabwe and Singapore. Because the governments of these countries are very different from Maine's, the committee has not attempted to collect specific information about these models.

The committee was unable to locate any country in Central or South America that provides for dedicated seats in its legislature for aboriginal or native peoples.

II. LEGAL ISSUES

The joint order creating this committee requires it to "address the issues of voting rights" related to the tribal government representatives in Maine; it also requires the committee to review "possible constitutional issues" "with input from the office of the Attorney General and tribal attorneys."

The committee sought input from the Attorney General, tribal attorneys and the legal staff of the U.S. Department of the Interior. A written opinion was issued by the Attorney General responding to all of the constitutional issues that the committee identified as potentially raised by the "issues of voting rights." That opinion may be found in Appendix E. Oral comments received from tribal counsel are summarized in meeting summaries that may be found in Appendix C. At time of press, no opinion had been issued by the Department of Interior.

An overview of the various legal issues raised by various options considered by the committee may be found in the Issues and Options paper located in Appendix D.

III. COMMITTEE PROCESS

The committee held 7 meetings. During the first 4 meetings it heard comments from a variety of people about the history and status of Maine's Tribal Government Representatives, Indian-State relations, the history and status of the relationship of native peoples in other states and nations with those states and nations, and the legal issues potentially raised by modifying the status of Maine's tribal government representatives. The committee also reviewed a wide variety of historical documents, legal materials, government studies and other papers related to these matters.

In addition to information provided by members and staff, the following persons provided oral or written comments to the committee:

Chief Brenda Commander, Houlton Band of Maliseet Indians
Chief Billy Phillips, Aroostook Band of Micmacs
Diana Scully, Executive Director, MITSC
Cushman Anthony, Chair, MITSC
William Stokes, Esq., Assistant Attorney General
Gregory Sample, Esq., Counsel for Penobscot Nation and Passamaquoddy Tribe
Timothy Woodcock, Esq., former staff to Senator William Cohen
Kaign Smith, Esq., counsel for Penobscot Nation
Mark Lapping, Provost and V.P. Academic Affairs, USM
John Stevens, Member, Passamaquoddy Tribal Council
Judge Jill Shibles, Chief Judge, Mashantucket Pequot Tribal Court and Appellate Justice, Passamaquoddy Appellate Court
Congressman Eni F. H. Faleomavaega, Territorial Delegate, American Samoa

On August 30 ,1999, the committee wrote to the Attorney General requesting opinions on the range of constitutional issues raised by the study; on November 16, 1999 a written opinion was issued by the Attorney General responding to the questions presented. The opinion may be found in Appendix E.

Similar letters were sent to the counsel for the Penobscot Nation and the Passamaquoddy Tribe. Tribal counsel did not provide written opinions; counsel did provide oral comments to the committee on questions raised during committee meetings. Oral comments received from tribal counsel are summarized in meeting summaries which may be found in Appendix C.

In accordance with the interests of the committee, the Governors of the Passamaquoddy Tribe and the Penobscot Nation sent a letter to the Secretary of the Interior seeking an opinion on the legal effect of granting voting rights to the tribal representatives through an amendment to the Indian Claims Settlement Act. The Committee followed up with its own letter to Interior supporting the request. Copies of both letters may be found in Appendix F.

In Appendix C may be found summaries of the first four information-gathering meetings of the committee.

In Appendix G may be found a table of the materials reviewed by the committee and where those materials may be found. Some of the materials are included in the appendices, some are in the committee file that will be archived in the State Archives under the name of the study committee, and the rest of the materials may be found in the State libraries.

IV. RECOMMENDATIONS

1. Recommendations

The **full committee unanimously** recommends that the Tribal Government Representatives be authorized to sponsor legislation on any subject.

A **majority of the full committee** also recommends that the Tribal Government Representatives be

- appointed to serve as members of the joint standing committees;
- authorized to vote in committee on any matter except gubernatorial nominations; and
- authorized to make any appropriate motions in committee, except with respect to gubernatorial nominations.

The **Senate members** of the committee, after considering a variety of options but without reaching agreement on an particular proposal, recommend generally that the Senate consider ways of improving communications between Tribal Governments and the Senate, including through possible changes in the Senate Rules or by making other less formal procedural or policy changes.

The **House members** of the committee recommend that the Tribal Government Representatives be authorized to

- propose amendments on the floor on any bill; and
- speak on the floor on any matter.

The House members also recommend that the House Rules Committee of the 120th Legislature examine, with input from the Tribal Government Representatives, whether Tribal Government Representatives should be allowed to make motions on the floor.

2. Reports of recommendations to entities of jurisdiction

To implement some of these recommendations changes would need to be made to the Joint Rules and the House Rules. The committee and its House and Senate subcommittees make the following separate reports (all of which are included under cover of this umbrella report):

Report A is a report of the full committee to the Joint Rules Committee proposing changes to the Joint Rules
Report B is a report of the Senate subcommittee to the President of the Senate
Report C is a report of the House subcommittee to the Speaker of the House proposing changes to the House Rules

REPORT A

Report of
Committee to Address the Recognition of the
Tribal Government Representatives of
Maine's Sovereign Nations in the Legislature
to
Joint Select Committee on Joint Rules

Proposed changes to Joint Rules

The committee recommends the following changes to the Joint Rules to

- authorize Tribal Government Representatives to sponsor legislation on any subject (**supported unanimously by the committee**)

- provide that Tribal Government Representatives be appointed to serve as members of the joint standing committees and granted the authority to vote in committee on any matter except gubernatorial nominations and to make any appropriate motions in committee, except with respect to gubernatorial nominations (**supported by a majority of the committee**)

The committee recommends, for purposes of convenience of reference in other rules, a new Joint Rule 108 be added to create a definition of "Tribal Government Representative."

Rule 108. Tribal government representatives.

For purposes of these rules, the term "Tribal Government Representative" refers to the member of the Penobscot Nation elected to represent that Nation at each biennial Legislature or the member of the Passamaquoddy Tribe elected to represent that Tribe at each biennial Legislature.

The committee recommends the following amendment to Joint Rule 206 to authorize Tribal Government Representatives to sponsor legislation on any subject (**supported unanimously by the committee**).

Rule 206. Sponsorship.

1. Number; Governor's Bills. A bill, resolve, order, resolution or memorial may have up to 10 sponsors: one primary sponsor, one lead cosponsor from the other chamber and 8 cosponsors from either chamber. Each bill or resolve requested by the Governor or a department, agency or commission must indicate the requestor below the title.

2. Duplicate Requests; Chamber of Origin. For duplicate or closely related bills or resolves, the Legislative Council may establish a policy for combination of requests and

the number of cosponsors permitted on combined requests. A bill, resolve, order, resolution or memorial having cosponsors must originate in the chamber of the primary sponsor.

3. Tribal Government Representatives. Tribal Government Representatives ~~member of the Penobscot Nation and the member of the Passamaquoddy Tribe elected to represent their people at each biennial Legislature~~ may sponsor or cosponsor legislation ~~specifically relating to Indians and Indian land claims, may cosponsor any other legislation and cosponsor~~ or expressions of legislative sentiment in the same manner and subject to the same rules as other members of the House.

The committee recommends the following amendment to Joint Rule 302 and Joint Rule 305 to authorize Tribal Government Representatives to serve on joint standing committees in the same manner as members of the Legislature except with regard to making motions or voting on gubernatorial nominations (**supported by a majority of the committee**).

Rule 302. Membership.

Each of the joint standing committees consists of 13 members, 3 from the Senate, and 10 from the House of Representatives, one of whom may be a Tribal Government Representative. The first Senate member named is the Senate chair. The first named member from the House ~~member named~~, who may be a Tribal Government Representative, is the House chair. The Senate chair shall preside and in the Senate chair's absence, the House chair shall preside and, thereafter, as the need may arise, the chair shall alternate between the members from each chamber, including Tribal Government Representatives, in the sequence of their appointment to the committee. The sequence of appointment for the biennium is as announced by the presiding officers in each chamber. Every member of the Senate and the House of Representatives and each Tribal Government Representative is entitled to at least one initial committee assignment.

Tribal Government Representatives serve on joint standing committees in the same manner as House or Senate members and possess in such committees the same powers and privileges and are subject to the same rules as the other members of the committee except that Tribal Government Representatives may not vote or make motions on gubernatorial nominations in violation of Article V, Part 1, §8.

Rule 505. Committee Vote.

Within 35 days, or 40 days for judicial officers, from the date of the Governor's notice of the nomination to the President of the Senate and the Speaker of the House, the committee shall recommend confirmation or denial by majority vote of the committee members present and voting except that members who are Tribal Government Representatives may not vote in violation of Article V, Part 1, §8 of the State Constitution. The vote of the committee may be taken only upon an affirmative motion to

recommend confirmation of the nominee, and a tie vote of the committee is considered a recommendation of denial. A vote may not be taken sooner than 15 minutes after the close of the public hearing unless by agreement of all committee members present. The committee vote must be by the yeas and nays. The chairs of the committee shall send written notices of the committee's recommendation to the President of the Senate.

REPORT B

Report of
Senate Subcommittee of the
Committee to Address the Recognition
of the Tribal Government Representatives of
Maine's Sovereign Nations in the Legislature
to
President of the Senate

The Senate members of the committee, after discussing a variety of options but without reaching agreement on any specific proposal, recommend generally that the Senate consider ways of improving communications between Tribal Governments and the Senate, including through possible changes in the Senate Rules or by making other less formal procedural or policy changes.

The options that were considered include the following:[44]

1. Establishing a Tribal Government Representative position in the Senate filled on a rotating basis by representatives of the Penobscot Nation, Passamaquoddy Tribe and the Houlton Band of Maliseet Indians (the Aroostook Bank of Micmacs requested that they not be considered for inclusion in such an arrangement at this time). Tribal Government Representatives would be elected by the members of the respective tribes in accordance with each tribes' own internal procedures. Under the proposal, Tribal Government Representative would have the same sorts of rights and privileges in the Senate as their counter parts had in the House. The proposals regarding the extent of these rights and privileges ranged from granting the maximum rights and privileges that may be granted within the restrictions of the U.S. Constitution (essentially all rights and privileges except the right to vote on the floor) to granting only those currently granted to the Tribal Representatives in the House.
2. Redrawing district lines to provide for majority representation by tribal members in a Senate district (and/or a House district).
3. Establishing a formal mechanism or procedure in the Senate for recognizing and receiving comments from tribal representatives on pending matters.
4. Under existing procedures, establishing a standard process for receiving comments from tribal representatives on pending matters.

[44] See Appendix D, for a copy of "Issues and Options" paper prepared by staff and reviewed by the committee. This paper outlines several options and identifies various issues raised by them.

REPORT C

Report of
House Subcommittee of the
Committee to Address the Recognition
of the Tribal Government Representatives of
Maine's Sovereign Nations in the Legislature
to
Speaker of the House

Proposed changes to House Rules
(recommendation for further examination by House Rules Committee)

The House members of the committee recommend that the Tribal Government Representatives be authorized to

- propose amendments on the floor on any bill
- speak on the floor on any matter

The House members also recommend that the House Rules Committee of the 120th Legislature examine, with input from the Tribal Government Representatives, whether Tribal Government Representatives should be authorized to make motions on the floor.

To implement these recommendations (other than the recommendation that the House Rules Committee examine certain matters further) and those made by a majority of the full committee (see Report A), the subcommittee submits the following proposed amendment to House Rule 525.

Rule 525. Penobscot Nation and Passamaquoddy Tribe. The member of the Penobscot Nation and the member of the Passamaquoddy Tribe elected to represent their people at the biennial session of the Legislature, referred to in these rules as "Tribal Government Representatives," must be granted seats on the floor of the House of Representatives~~; be granted, by consent of the Speaker, the privilege of speaking on pending legislation; must be appointed to sit with~~ on joint ~~standing committees as nonvoting members during the committees' deliberations;~~ and may exercise the following rights and privileges:

1. Speech and debate. The right to speak on pending legislation in the same manner and subject to the same rules as members of the House;

2. Amendments. The right to offer amendments on pending legislation in the same manner and subject to the same rules as members of the House;

3. Committee assignments. The right to be appointed to joint standing committees in the same manner and subject to the same rules as members of the House;

the rights and privileges of Tribal Government Representatives serving on committees is governed by Joint Rules;

4. Other rights and privileges. ~~and be granted such~~ Other rights and privileges as may from time to time be voted by the House of Representatives.

G:\OPLANRG\NRGSTUD\UTE\TRIBERPT-final.DOC(3/31/00 3:43 PM)

Appendix A

Joint Order Creating the Study

R. of S.

HP1524

STATE OF MAINE

In House April 8, 1999

WHEREAS, the Maine Indian Claims Settlement Act of 1980 recognized Maine's Native American Tribes as Sovereign Nations; and

WHEREAS, the Legislature finds that there is a need to address the issue of recognition of the tribal government representatives of Maine's Native Sovereign Nations in the Legislature; and

WHEREAS, the Legislature finds that there is a need to conduct a study to review the involvement of Native American tribes in state legislatures throughout the United States and other countries; now, therefore, be it

ORDERED, the Senate concurring, that the Committee to Address the Recognition of the tribal government representatives of Maine's Native Sovereign Nations in the Legislature is established as follows.

1. Committee established. The Committee to Address the Recognition of the Tribal Government Representatives of Maine's Native Sovereign Nations in the Legislature, referred to in this order as the "committee," is established.

2. Membership. The committee consists of 8 members as follows.

A. The President of the Senate shall appoint 3 members from the Senate, one of whom must be a member of the minority party.

B. The Speaker of the House of Representatives shall appoint 3 members from the House of Representatives, one of whom must be a member of the minority party.

C. The Representative of the Penobscot Nation to the Legislature.

D. The Representative of the Passamaquoddy Tribe to the Legislature.

3. Chairs. The first Senate member named is the Senate chair and the first House member named is the House chair.

4. Appointments; convening committee. All appointments must be made no later than 30 days following the effective date of this order. The appointing authorities shall notify the Executive Director of the Legislative Council upon making their appointments. Within 15 days after all members have been appointed, the chairs shall call and convene the first meeting of the committee. The committee may meet as often as necessary, at the call of the chairs.

5. Duties. The committee shall conduct a study to address the issue of recognition of the tribal government representatives of Maine's Native Sovereign Nations in the Legislature. In conducting the study, the committee shall review:

A. The current participation and responsibilities that Native American representatives have in the legislative process throughout the nation and other countries;

B. The rules concerning such participation contained in the House Rules, Senate Rules and Joint Rules of the 119th Legislature; and

C. With input from the office of the Attorney General and tribal attorneys, the possible constitutional issues arising from such representation as well as the issues that may arise from the Maine Indian Claims Settlement Act of 1980.

The study must address the issues of voting rights and the sponsorship of legislation and may include other relevant issues.

6. Staff assistance. Upon approval of the Legislative Council, the Office of Policy and Legal Analysis shall provide necessary staffing services to the committee.

7. Compensation. Members of the committee are entitled to receive the legislative per diem, as defined in the Maine Revised Statutes, Title 3, section 2, and reimbursement for travel and other necessary expenses for attendance at meetings of the committee.

8. Report. The committee shall submit a report along with any recommended legislation and any recommended changes to the House Rules, Senate Rules and Joint Rules to the Joint Standing Committee on Judiciary and the Legislative Council by December 1, 1999. Following receipt of the report, the Joint Standing

Committee on Judiciary may introduce legislation to the Second Regular Session of the 119th Legislature. If the committee requires an extension of time to make its report, it may apply to the Legislative Council, which may grant the extension.

9. Committee budget. The chairs of the committee, with assistance from the committee staff, shall administer the committee's budget. Within 10 days after its first meeting, the committee shall present a work plan and proposed budget to the Legislative Council for its approval. The committee may not incur expenses that would result in the committee's exceeding its approved budget.

SPONSORED BY: _____
(Representative BROOKS)

TOWN: Winterport

LR2981(01)
SPONSOR: Representative BROOKS of Winterport

R. of S.

Joint Study Order Establishing a Committee to Study the Recognition of Sovereign Nations in the Legislature

Lead Cosponsor: (sign) _____

(print name) CATHCART

Cosponsors pursuant to Joint Rule 206, subsection 1:

1. (sign) _____
   (print name) JOHN W BENOIT
2. (sign) _____
   (print name) Kilkelly
3. (sign) _____
   (print name) James D. Libby
4. (sign) _____
   (print name) Shepley
5. (sign) _____
   (print name) Chellie Pingree
6. (sign) _____
   (print name) MICHAEL V. SAXL
7. (sign) _____
   (print name) THOMAS W. MURPHY JR.
8. (sign) _____
   (print name) Richard Thompson

H. P. 1524

DATE: May 12, 1999 (Filing No. S-271)

Reproduced and distributed under the direction of the Secretary of the Senate.

STATE OF MAINE
SENATE
119TH LEGISLATURE
FIRST REGULAR SESSION

SENATE AMENDMENT " A " to H.P. 1524, "Joint Study Order Establishing a Committee to Study the Recognition of Sovereign Nations in the Legislature"

Amend the joint order in the first **ORDERED** paragraph by inserting after subsection 3 the following:

'**4. House subcommittee.** The House subcommittee consists of the 3 members of the House of Representatives appointed by the Speaker, the Representative of the Penobscot Nation and the Representative of the Passamaquoddy Tribe.

5. Senate subcommittee. The Senate subcommittee consists of the 3 members of the Senate appointed by the President of the Senate, the Representative of the Penobscot Nation and the Representative of the Passamaquoddy Tribe.'

Further amend the joint order in the first **ORDERED** paragraph in subsection 5 in the first line by inserting after the following: "**Duties**" the following: '**of the committee**'

Further amend the joint order in the first **ORDERED** paragraph in subsection 5 in paragraph B in the 2nd line by striking out the following: "House Rules, Senate Rules and"

Further amend the joint order in the first **ORDERED** paragraph by inserting after subsection 5 the following:

'**6. Duties of the subcommittees.** The House subcommittee shall review the House Rules concerning the participation and responsibilities of Native American representatives in the legislative process. The Senate subcommittee shall review the Senate Rules concerning the participation and responsibilities of Native American representatives in the legislative process.'

SENATE AMENDMENT

H #5

SENATE AMENDMENT "A" to H.P. 1524

Further amend the joint order in the first **ORDERED** paragraph by striking out all of subsection 8 and inserting in its place the following:

'**8. Report.** The committee members shall report as follows. The members of the committee who are members of the Senate and the House shall submit their report on the Joint Rules to the Joint Rules Committee. The members of the committee who are members of the House shall submit their report on the House Rules to the Speaker of the House. The members of the committee who are members of the Senate shall submit their report on the Senate Rules to the President of the Senate. The committee may submit its report on any additional matters, along with any recommended legislation, to the appropriate joint standing committee, as determined by the presiding officers, and to the Legislative Council. The Representative of the Penobscot Nation and the Representative of the Passamaquoddy Tribe, together or separately, may submit reports to the Joint Rules Committee, the Speaker of the House, the President of the Senate and the appropriate joint standing committee, as determined by the presiding officers. All reports must be submitted by December 1, 1999. Following receipt of a report, a joint standing committee may report out a bill to the Second Regular Session of the 119th Legislature to implement the recommendations contained in the report. If the Representative of the Penobscot Nation or the Representative of the Passamaquoddy Tribe or if the committee or its subcommittees require an extension of time to make their reports, they may apply to the Legislative Council, which may grant the extension.'

Further amend the joint order by renumbering the subsections to read consecutively.

SUMMARY

This amendment establishes a House subcommittee and a Senate subcommittee. The House subcommittee shall review the House Rules concerning the participation and responsibilities of Native American representatives in the legislative process. The Senate subcommittee shall review the Senate Rules concerning the participation and responsibilities of Native American representatives in the legislative process. It also changes the reporting requirements.

SPONSORED BY: Mark W. Lawrence
(President LAWRENCE)

COUNTY: York

SENATE AMENDMENT

Appendix B

List of Interested Parties

Tribal Government Representatives of Maine's Sovereign Nations
INTERESTED PARTIES

G:\OPLANRG\NRGSTUD\SOVREIGN\TRIBALIN.DOC (08/19/99 7:57

Paul Stern
Assistant Attorney General
6 State House Station

Steve Cartwright
Natural Resources Council of Maine
3 Wade Street
Augusta, ME 04330

Diana Scully
Maine Indian Tribal State Comm.
6 Mayflower Road
Hallowell, ME 04347

Kaighn Smith
Drummond, Woodsum, MacMahon
245 Commercial Street
Portland, ME 04104

Cushman Anthony
Maine Indian Tribal State Comm.
120 Exchange Street, Suite 208
Portland, ME 04101

Tina Farrenkopf
Houlton Band of Maliseet Indians
RR#3, Box 450
Houlton, ME 04730

Linda Pistner
Attorney General's Office
6 State House Station

Greg Sample
Drummond, Woodsum, MacMahon
245 Commercial Street
Portland, ME 04104

Brad Coffey
P. O. Box 738
Bangor, ME 04407-0738

Chief Billy Phillips
Aroostook Band of Micmacs
P. O. Box 772
Presque Isle, ME 04769

John Stevens
Passamaquoddy Tribe
P. O. Box 407
Princeton, ME 04668

Chief Brenda Commander
Houlton Band of Maliseets
R#3, Box 450
Houlton, ME 04730

Bill Stokes
Attorney General's Office
6 State House Station

David Lovell
Wisconsin Legislative Council Staff
P. O. Box 2536
Madison, WI 03701-2536

Appendix C

Summaries of 1st 4 Informational Committee Meetings

State of Maine
One Hundred and Nineteenth Legislature

COMMITTEE TO ADDRESS THE RECOGNITION
OF THE TRIBAL GOVERNMENT REPRESENTATIVES
OF MAINE'S SOVEREIGN NATIONS
IN THE LEGISLATURE

SENATE

Chellie Pingree, *Chair*
Anne M. Rand
Richard A. Bennett

HOUSE

Richard H. Thompson, *Chair*
Joseph E. Brooks
William J. Schneider

STAFF

Jon Clark, Legislative Counsel
Office of Policy and Legal Analysis
State House Station 13
Augusta, ME 04333
tele 207-287-1670
fax 207-287-1275

TRIBAL GOVERNMENT REPRESENTATIVES

Donna M. Loring, Penobscot Nation
Donald G. Soctomah, Passamaquoddy Tribe

22 October, 1999

Summary of 1st Meeting
8/25/99

Members attending: All members present except Senator Rand
Attendees in audience: Diana Scully, Director, MITSC; Oliver Wesson, AG Office; Mark Chavaree, Esq. Penobscot Indian Nation

Staff distributed memo dated 24 August 1999 with several attachments which provides background on issues listed in the Joint Order creating the study committee.

Staff provided brief overview of the directives in the Joint Order and the committee's authority to issue various reports to various entities depending upon the nature of its recommendations

Committee discussed its charge and identified the scope of the issues it intended to explore:

1. Tribal government representatives voting on bills in committee and in the House and Senate;
2. Sponsorship of legislation by tribal representatives.
3. Procedural rights of tribal representatives with respect to the right to propose amendments and to make other motions on the floor;
4. Tribal government representation in the Senate;

5. Tribal government representation of the Houlton Band of Maliseets and the Aroostook Band of Micmacs in the Legislature.

Passamaquoddy Rep. Soctomah provided a brief history of the long history of tribal representatives in the Legislature. He noted that the tribes sent delegates to the colonies and later tribal representatives to the Massachusetts Legislature and then to the Maine Legislature when Maine became a state. He noted that from 1941 - 1975 the tribal representatives were unseated, becoming what some called "paid lobbyists".

Penobscot Rep. Loring provided a brief overview of Passamaquoddy and Penobscot participation in the Revolutionary War on the side of the colonies and noted that she believed it was this historical fact that had led to the provision of seats for tribal representatives in the Legislature. She also noted that the Tribe and the Nation and other native peoples are "not just another minority" but because of their preexistence to the now dominant government are sovereign and separate nations whose relationship to the dominant government is defined by treaty. She also noted that the Representatives and Senators that represent Passamaquoddy and Penobscot people also represent many others and so, in her view, cannot adequately represent the particular and unique interests of the Passamaquoddy and Penobscot people.

There was some discussion of how Tribal Government Representatives are currently elected. In the context of this discussion, the following points were made:

- estimates: total membership of all 4 tribes = about 8,000
  Penobscot on the reservation (Indian Island) = about 600
  Penobscot off the reservation (including out of state) = about 1400
  Penobscot total = about 2000
  Passamaquoddy at Pleasant Point = about 850
  Passamaquoddy at Indian Township = about 850
  Passamaquoddy off the reservations = (no figure given)
  Passamaquoddy out of state = about 800
  Passamaquoddy total = about 3300 - 3400
  Houlton Band of Maliseets total = about 700
  Aroostook Band of Micmacs total = about 700
- Voting for Penobscot Representative, qualifications: tribal member (regardless of residency) 18 years or older. The Representative is elected on even-numbered years every 2 years at an election held on the reservation in September.
- Voting for Passamaquoddy Representative, qualifications: on-reservation tribal members. The Representative is elected to a 4-year term and the election is held in September.
- The election, term, and qualifications of Tribal Government Representatives are not regulated or overseen by the State and are considered internal tribal matters.

Senator Bennett requested relevant background materials regarding the history of the Tribal Government Representatives, the re-seating that occurred in 1975, relevant treaties and the land claim settlement. Staff noted that the amount of material is voluminous and judgments about what may be relevant would be somewhat subjective. Staff agreed to gather information,

distribute information that seemed of particular interest and to create a reference library of all information gathered that would accessible to members and the public.

Diana Scully, Director, MITSC, provided a brief overview of the statutory duties and role of that commission.

Chair Thompson noted that recommendations of MITSC for legislative changes must come through the Legislature and that even though MITSC members may have agreed to a certain proposal, the Legislature has an independent authority and responsibility to review and, as it deems appropriate, to reject or modify MITSC proposals.

For the next meeting, scheduled for September 10, 1999, the committee decided:

- To invite the Governors and Chiefs of the four tribes
- To invite Cushman Anthony, Chair of MITSC
- To invite Tim Woodcock, former staff person who worked with the Senate Select Committee on Indian Affairs during the settlement act negotiations
- To seek a formal written opinion of the AG and tribal counsel on the various constitutional issues that would be raised by expanding the authority of the Tribal Government Representatives
- To review background materials gathered by staff (see description, above)

Adjourned

G:\OPLANRG\COMMTTEE\UTE\99STUDY\1STMEET.DOC(10/15/99 10:24 AM)

State of Maine
One Hundred and Nineteenth Legislature

COMMITTEE TO ADDRESS THE RECOGNITION
OF THE TRIBAL GOVERNMENT REPRESENTATIVES
OF MAINE'S SOVEREIGN NATIONS
IN THE LEGISLATURE

SENATE

Chellie Pingree, *Chair*
Anne M. Rand
Richard A. Bennett

HOUSE

Richard H. Thompson, *Chair*
Joseph E. Brooks
William J. Schneider

STAFF

Jon Clark, Legislative Counsel
Office of Policy and Legal Analysis
State House Station 13
Augusta, ME 04333
tele 207-287-1670
fax 207-287-1275

TRIBAL GOVERNMENT REPRESENTATIVES

Donna M. Loring, Penobscot Nation
Donald G. Soctomah, Passamaquoddy Tribe

22 October, 1999

Summary of 2nd Meeting 9/10/99

Members attending: All members present
Attendees: List attached

The following invitees did not attend: Chief Billy Phillips, Aroostook Band of Micmacs; Chief Richard Hamilton, Penobscot Nation; Governor Richard Stevens, Indian Township, Passamaquoddy Tribe; John Stevens, Member, Passamaquoddy Tribal Council.

Staff distributed an updated list of background materials placed on special reserve in the Law Library. Staff also distributed additional copies of a memo sent earlier to members and dated 2 September 1999 ("package #2) with numerous background materials attached and copies of several emails sent to members containing historical materials gathered by Rep. Soctomah.

Cushman Anthony, Chair, MITSC, reviewed key provisions of the land claims settlement and noted that the role of MITSC is to provide a forum to work out issues related to tribal-state relations. He also noted the different treatment of the Maliseets and the Micmacs under the settlement acts and that neither Band is currently represented on MITSC; MITSC is examining the issue of inclusion of the Bands.

It was noted that a bill filed last year (LD 2178) and carried over by the Judiciary Committee proposes to change the status of the Houlton Band of Maliseets to give them the same municipal status as the Passamaquoddy Tribe and the Penobscot Nation under the settlement act.

Chief Brenda Commander, Houlton Band of Maliseets provided an overview of the history of the Maliseets in Maine, noting that the Maliseets occupied territory in what is now Aroostook long before the arrival of Europeans. In 1980 the band received federal recognition and became eligible for benefits under certain federal programs. She noted that her Band retains sovereignty through its relationship with the federal government. She noted that the Maliseets are excluded from certain portions of the settlement act, including the section granting municipal powers to the Passamaquoddy Tribe and the Penobscot Nation. She noted that her Band lacks police authority but that the police coverage on the Band's land by the state, the county and the towns is inadequate. The Band has a land base of 800 acres in Houlton and Littleton which is mostly agricultural land and includes little timber. The Band has 706 members. It has a formal Tribal Government which includes a housing authority; it also includes a road maintenance division.

Chief Commander indicated support for voting rights for the Passamaquoddy Representative and the Penobscot Representative, noted the close cultural ties which the Maliseets have with the Passamaquoddies and indicated initially that the Maliseets may not yet be prepared to have a tribal government representative in the Legislature (see below for further comments by Chief Commander on this subject).

A brief discussion ensued regarding why the towns were not providing road maintenance on the Band's land. Chief Commander indicated that apparently the towns don't believe they have jurisdiction. The town is not paying for a necessary bridge connecting Maliseet lands. She also mentioned that the school bus does not come on Maliseet land. She noted that under the settlement act the Band does not pay taxes on the land but does make payments in lieu of taxes. She indicated that Maliseets believed that modification and re-negotiation of the settlement was expected and understood at the time of the settlement.

Kaign Smith, Esq., counsel to the Penobscot Nation, provided a brief overview of some of the key cases that occurred prior to and then after the settlement and noted the different status and relationship which different tribes around the county have vis-à-vis state government. He mentioned the example of the Navajo (Diné) who have their own constitution and an extensive code very similar to what a state might have. He noted that under the settlement the Passamaquoddy and the Penobscot have retained a much more limited sovereign authority; the principle provision under the settlement preserving sovereign authority is the provision reserving from State interference "internal tribal matters" (30 MRSA §6206). This provision is subject to interpretation; there has been disagreement between the State and the Tribes on its interpretation, and its interpretation has been litigated in a few specific contexts.

Bill Stokes, AAG, provided a brief overview of his analysis of the questions presented in writing to the AG. He noted the paucity of legal precedent in the area of granting a Tribal Representative a right to vote and suggested that the committee was on "uncharted ground." He discussed *Michel v Anderson* 14 F.3d 623 (D.C. Cir. 1994) and noted that the court upheld the vote by

territorial delegates in the Committee of the Whole in the U.S. House because, under House Rules, their vote was essentially meaningless: if their vote was decisive, the rules required an automatic re-vote in which they were not able to vote. He indicated that in his opinion a fundamental question in the Maine context is whether the powers granted to a Tribal Representative would permit the Representative to "exercise legislative power" and thus cause the Representative to become a constitutional "member" of the body. He noted that the Maine Constitution specifically requires gubernatorial nominations to be voted upon by "an appropriate legislative committee comprised of members of both houses in reasonable proportion to their membership" (Art. V, Pt. First, §8); he reads this as a requirement that only constitutionally qualified members may vote in committee on nominations. He indicated that he would draw a distinction between procedural matters related to Tribal Representatives (e.g., seating and speaking rights) which may be addressed through House Rules and issues that rise to the level of constitutional significance such as voting. He suggested that he could draw no bright line as to where one ended and the other began, though certain matters he indicated clearly lay on one side or the other of the line. He indicated he felt voting on the floor crossed the constitutional line but that he was not sure with regard to voting in committee on matters other than nominations. He indicated that he did not believe that the manner of granting rights (such as through a referendum approval process) should affect the constitutional analysis.

Rep. Loring noted the unique status of the tribes, the government-to-government relationship with the State and the federal government and the need to think "outside the box."

Bill Stokes responded that the box here was the State and U.S. Constitution. He noted there is some precedent indicating that the establishment of a special district composed of all or a majority of Indians might not violate the Equal Protection prohibition on "racial gerrymandering", provided the population of the district was reasonably equal with other districts.

Tim Woodcock, Esq., former staff to Senator William Cohen and who worked with the Senate Committee on Indian Affairs during the settlement, discussed the unique status of Indians and noted that legal concepts and analysis that apply in other cases may not apply or may apply in a different fashion in the context of matters related to Indians. He noted that Congress has what is termed plenary power over Indians under the Indian Commerce Clause (Art. 1, §8). He noted that historically the instrument of agreement between tribes and the federal government was the treaty; after 1871 no treaties with tribes were ratified; the land claim settlement act, however, is in effect the same as a treaty and should, in his opinion, be construed in the same fashion. He noted that Indians were first granted U.S. citizenship in the 1920 following Indian service in WW I; though not all Indians were interested in receiving such citizenship. Indian tribes, he indicated, are quasi-independent sovereigns. He suggested that if it is constitutionally permissible to invest tribal government representatives with full membership status (he was not offering an opinion on the matter), the reason lies with the unique government-to-government status of the tribes and it would need to be accomplished though amendment to the settlement act "treaty". He indicated that in other contexts constitutional equal protection analysis was unique as it applied to Indian affairs. He acknowledged, however, that in this context there was no precedent, that these were "uncharted waters." He suggested the committee or the tribes might solicit the advice of the

Department of the Interior or the Department of Justice on the federal Equal Protection issue (one person one vote). He recommended Interior over Justice in terms of in-house expertise. He noted that while the federal settlement act authorizes (25 USC §1725 (e-1)) the State and the tribes to amend the Maine settlement act, it limits the authorization to certain subjects; granting voting rights to tribal government representatives may not fall within those limits; such a change may require federal approval. He also indicated that the reason Congress authorized changes to the Maine settlement act was that Congress saw the settlement as a beginning point and not an end point, that it believed the State and the tribes would need to continue to work on jurisdictional issues.

Staff emphasized the "uncharted waters" theme by commenting that there may be an important distinction to be drawn between the unique application of certain constitutional provisions to tribal affairs (e.g., application of the Equal Protection Clause to tribal actions) and the application of the one-person-one-vote standard to the Legislature granting Tribal Government Representatives the right to vote, and that precedent in the former area may not be indicative of the appropriate analysis in the latter "uncharted" area.

Chief Brenda Commander asked to speak again and was recognized. She indicated that after hearing the discussion and giving it further thought, she thought it would be helpful if the Maliseets had a Tribal Government Representative in the Legislature.

For the next meeting, scheduled for October 14, 1999, the committee decided:

- To again invite Chief Phillips (who was unable to attend this meeting and indicated to staff a desire to attend the next meeting);
- To again invite John Stevens (who was unable to attend this meeting but wished to speak at the next meeting);
- To invite Bill Stokes back to discuss the written opinion of the AG expected to be available by the next meeting;
- To invite tribal counsel to discuss counsel's written opinion (if any) or the AG's opinion;
- To ask staff to work with the Passamaquoddy and Penobscot representatives to draft a letter from the tribes to Interior requesting an opinion on the legal theories suggested by Tim Woodcock.

Adjourned

G:\OPLANRG\COMMTTEE\UTE\99STUDY\2NDMEET.DOC(10/15/99 11:50 AM)

Committee to Address the Recognition of the Tribal Government Representatives of Maine's Sovereign Nations in the Legislature

ATTENDEES

2nd meeting 9/10/99

please print clearly

Name	Affiliation	Address	Telephone	Check here if you want to be on our service list
Kaighn Smith	Drummond Woodsum, MacMahon	245 Commercial St. Portland ME 04104	207 772-1941	✓
CUSHMAN ANTHONY	MITSC	120 EXCHANGE ST, SUITE 208, PORTLAND 04101	775-3091	✓
Tina M. Farrenkopf	HBMI	RR#3 Box 450 Houlton ME 04730	532-4273 x 214	—
Brenda Commander	HBMI	RR#3 Box 450 Houlton, ME 04730	532-4273	
Emmet Meara	BDN	State House		
David Bragdon	Speaker's Otc.	State House	7-1306	
Linda Pistner	Dept. AG	6 SHS	626 8800	✓
JC Beth Stokes	" "	"	"	
JC Tim Woodcock	Westbrook, Woodcock			

State of Maine
One Hundred and Nineteenth Legislature

COMMITTEE TO ADDRESS THE RECOGNITION
OF THE TRIBAL GOVERNMENT REPRESENTATIVES
OF MAINE'S SOVEREIGN NATIONS
IN THE LEGISLATURE

SENATE

Chellie Pingree, *Chair*
Anne M. Rand
Richard A. Bennett

HOUSE

Richard H. Thompson, *Chair*
Joseph E. Brooks
William J. Schneider

STAFF

Jon Clark, Legislative Counsel
Office of Policy and Legal Analysis
State House Station 13
Augusta, ME 04333
tele 207-287-1670
fax 207-287-1275

TRIBAL GOVERNMENT REPRESENTATIVES

Donna M. Loring, Penobscot Nation
Donald G. Soctomah, Passamaquoddy Tribe

22 October, 1999

Summary of 3rd Meeting 10/14/99

Members attending: All members present except Rep. Schneider who was absent due to illness
Attendees: List attached

Staff distributed an updated list of background materials placed on special reserve in the Law Library. Staff also distributed memo dated 13 October, 1999 to which was attached a copy of the letter from the Governors of the Passamaquoddy Tribe and the Chief of the Penobscot Tribe to Interior requesting an opinion on certain legal questions.

Mark Lapping, Provost and V.P. of Academic Affairs, USM , speaking at the special invitation of Rep. Loring, spoke briefly of his experience in matters relating to native (or aboriginal or first) peoples in Canada (in particular with the Ojibway and Cree), Alaska, Greenland and Scandinavia (the Sami). He spoke of his own Sami heritage. He indicated that the relationships of native peoples and dominant governments have had long and difficult histories. The issues have tended to revolve around land use and cultural practices. A principle issues has been recognition of the sovereign rights of the native peoples. In Norway, Finland and Sweden, the federal governments have recognized the intrinsic sovereignty of the Sami and created a Sami Assembly. In the case of Greenland, Denmark has chosen to grant the people of the island home rule authority. He also noted the creation of the new province of Nunavut in what was Northwest Territories, Canada.

Rep. Loring asked why it is important to recognize aboriginal rights. Mr. Lapping indicated that people lose their identity if they lose their culture. Aboriginal peoples persist and want to be recognized as who they are.

Mr. Lapping provided a brief overview of the Sami Assembly in Finland: it is composed of 31 members, all Sami, elected by the Sami; it has authority to make recommendations to the federal parliament and to the Minister of Sami Affairs; it also is granted a budget by the federal parliament which is spent on various programs to benefit the Sami people and to preserve their culture. He noted that Sami opposition to Finland and Norway joining the EU resulted in separate clauses in the EU agreement protecting native rights. He noted that there is no special Sami seat in the federal parliament; Samis are occasionally elected to seats in parliament. He noted that being Sami is a matter of self-identification; the federal government does not define who qualifies to be Sami.

Rep. Soctomah asked whether the relationship between the federal government and the Sami had been improved by the creation of the Sami Assembly. Mr. Lapping indicated that the history of the relationship has been long and difficult and that it is still difficult. At least, he suggested, there is now open discussion about the issues and the Sami are "at the table". He suggested that the situation in Greenland seemed to be improved as a result of Denmark's pulling back and granting to Greenland home rule authority.

John Stevens, Member, Passamaquoddy Tribal Council, provided his perspective on State-Tribe relations and the land claims settlements. He indicated that native people are still not equal in this society. He indicated that he is still waiting for the promises of the land claim settlement. He indicated that there have been some improvements, but in his view there is still a long way to go. He indicated that the opportunities for native people are not equal to those available to others. He commented on the history of mistreatment of his people and the natural resources on which they depended. He indicated that he felt it important that the relationship of the Tribe and the State be government to government and that he believed the Tribal Government Representatives needed to be treated equally in the Legislature, i.e., that they should be given the right to vote. This, he indicated, would ensure the Tribe had a voice "here" (in the Legislature).

Chair Thompson questioned whether having a voting member in the House might interfere with a truly government-to-government relationship. Mr. Stevens indicated that the important thing for him was mutual respect; he indicated that it was important that his people were respected in the Legislative process.

Since no written opinions were available from either the AG or tribal counsel, the committee did not hear from Bill Stokes, AAG, or Greg Sample, tribal counsel. The committee had a discussion of options and issues. From these discussions, staff will draft an issues and options paper for review by the committee. Once approved by the committee, the paper will be made available to interested parties and the committee may seek comments from various persons on particular issues.

Next meeting tentatively scheduled for November 17, 1999. For next meeting staff will:

- Invite Bill Stokes to discuss the written opinion of the AG expected to be available by the next meeting
- Invite tribal counsel to discuss counsel's written opinion (if any) or the AG's opinion
- Attempt to arrange for a Territorial Delegate to talk with the committee
- Draft a letter with the chairs for signature by the chairs to Interior, copied to the congressional delegation, supporting the inquiry from the tribes; the chairs may contact members of the congressional delegation directly to seek their help in encouraging a timely response from Interior
- Produce an option paper for committee review

Adjourned

G:\OPLANRG\COMMTTEE\UTE\99STUDY\3RDMEET.DOC(10/15/99 5:06 PM)

Committee to Address the Recognition of the Tribal Government Representatives of Maine's Sovereign Nations in the Legislature

ATTENDEES

Oct 14 meeting

please print clearly

Name	Affiliation	Address please include email address if you wish to be added to service list	Telephone	Check here if you want to be on our service list
Diana Scully	MITSC	P O Box 87 Hallowell, 04347	vantage@mint.net 622-4815	✓
Billy Phillips	Aroostook Band of Micmacs	P.O. BOX 772, Presque Isle, Me 04769	764-1972	✓
Brad Coffey	Houlton Band of Malisets	P.O. Box 738 Bangor, ME 04402-0738 frrlegal@mint.net	990-3314	✓
John Stevens	Passamaquoddy Tribe	PO Box 407 Pleasant Mission 04668	796-5710	✓
Greg Sample	Drummond Woodsum & Macdonald Atty for Passam.	P.O. Box 9781 Portland 04104 gsample@dwmlaw.com	772-1941	✓
Brenda Commandy	Malisett.	R#3, Box 450 Houlton, ME	532-4273	✓

State of Maine
One Hundred and Nineteenth Legislature

COMMITTEE TO ADDRESS THE RECOGNITION
OF THE TRIBAL GOVERNMENT REPRESENTATIVES
OF MAINE'S SOVEREIGN NATIONS
IN THE LEGISLATURE

SENATE

Chellie Pingree, *Chair*
Anne M. Rand
Richard A. Bennett

HOUSE

Richard H. Thompson, *Chair*
Joseph E. Brooks
William J. Schneider

STAFF

Jon Clark, Legislative Counsel
Office of Policy and Legal Analysis
State House Station 13
Augusta, ME 04333
tele 207-287-1670
fax 207-287-1275

TRIBAL GOVERNMENT REPRESENTATIVES

Donna M. Loring, Penobscot Nation
Donald G. Soctomah, Passamaquoddy Tribe

18 November, 1999

Summary of 4th Meeting 11/17/99

Members attending: Senate Chair Pingree, House Chair Thompson, Senator Bennett (at end of meeting), Representative Schneider, Penobscot Nation Representative Loring, Passamaquoddy Tribe Representative Soctomah,
Attendees: List attached

Staff distributed memo dated November 17, 1999 ("Package #4") to which was attached the following:

- Copy of letter from Chief Brenda Commander to Jon Clark dated Nov. 10, 1999
- Staff issues and Options papers
- Summaries of previous 3 meetings
- Copy of email summarizing staff's conversation with Congressman Faleomaveaga, Territorial Delegate to Congress from American Samoa
- Copy of excerpt from House Rules, 106th Congress

Bill Stokes, AAG, distributed an opinion of the Attorney General dated November 16, 1999, which responds to various questions propounded in a letter to the Attorney General dated August 30, 1999.

To move the committee from its information-gathering mode to a decision-making mode, Chair Pingree asked if any member would be willing to propose for discussion a committee recommendation. In response, Penobscot Nation Representative Loring offered the following proposal (a modified version of Option 1-A in staff issues and options paper):

- Two Tribal Representatives in the House and one in the Senate, seats to be occupied by members of the Penobscot Nation, Passamaquoddy Tribe and Houlton Band of Maliseet Indians on rotating basis determined by the tribes. (Chief Billy Phillips, Aroostook Band of Micmacs, told the committee that at this time his tribe not interested in having any representation in the Legislature).
- Tribal Representatives authorized to
    - vote on the floor on amendments, not on final action
    - vote in committee on bills
    - vote in committee on nominations
    - make any appropriate motions in committee
    - sponsor legislation on any subject
    - propose amendments on the floor on any bill
    - make any appropriate motions on the floor
    - speak on the floor on any matter

This proposal was discussed by the committee. The chairs explored with Bill Stokes, AAG, and Greg Sample, counsel for the Penobscot Nation and the Passamaquoddy Tribe, constitutional issues raised by the recommendation, in particular that portion involving voting on the floor on amendments.

Bill Stokes indicated he would be concerned that granting such authority would bestow on tribal representatives the characteristics of membership; if so, this would, in his opinion, result in an Equal Protection problem, i.e., run afoul of the so-called one-person-one-vote principle.

Greg Sample indicated he believed that since the proposal excluded the right to cast final votes on the floor (e.g., voting on final enactment), ultimate legislative authority would not be exercised by the tribal representatives and so the one-person-one-vote principle did not appear to him to be violated. He also suggested if the Legislature adopted the Committee of the Whole process used in Congress, the precedent established in the case of the Territorial Delegates (*Michel v. Anderson*) suggests there would be no constitutional impediment to allowing the tribal representatives to vote in the Committee of the Whole.

Bill Stokes noted that under the Maine Constitution, only members of the bodies may vote in committee on gubernatorial nominations; therefore, in his opinion, without amendment to the State Constitution, it would not be constitutionally permissible to allow tribal representatives the right to vote on nominations. He indicated that he felt the other portions of the proposal probably would not run afoul of any constitutional provisions, though conclusions could not be drawn with certainty.

Chair Thompson recommended that staff develop a draft report based on the proposal and that the committee discuss the report and make its final decisions at a subsequent meeting. The members present agreed. It was also agreed that the committee should seek an extension of its deadline to January 1 to allow sufficient time for staff to draft the report and for members to review and discuss it.

Next meeting scheduled for December 14, 1999. For next meeting staff will:

- Draft letter to the Legislative Council requesting an extension of the committee's deadline from Dec. 1, 1999 to Jan. 1, 2000.
- Draft committee report (for review and discussion by the committee) based on the proposal of Representative Loring.

Adjourned

G:\OPLANRG\COMMTTEE\UTE\99STUDY\4THMEET.DOC(11/19/99 11:11 AM)

Appendix D

Issues and Options Paper Generated from Committee Discussions

OPTION 1-A

Who:

Passamaquoddy Tribe Representative
Penobscot Nation Representative
Senator representing Passamaquoddy, Penobscot, Micmac and Maliseet

Rights:

Full membership rights including:

- vote on the floor
- vote in committee on bills
- vote in committee on nominations
- make any appropriate motions in committee
- sponsor legislation on any subject
- propose amendments on the floor on any bill
- make any appropriate motions on the floor
- speak on the floor on any matter

Election method

Tribal members vote for tribal Representative and Senator (under procedures established by the tribes) and for a district Senator and Representative

Issues

1. U.S. Constitution Equal Protection Clause restrictions: one person one vote.

- Objective of one-person-one-vote principle: "so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." (*Reynolds v. Sims*, 377 U.S. 533, 579 (1963).)
- Principle, as generally applied, would be violated by this option.
- Tribes possess unique legal status; does this unique status materially affect one-person-one-vote analysis? Unprecedented question: apparently no state and tribe have ever attempted any such arrangement.

2. State constitutional provisions that apply to any "member" or "Senator" or "Representative" (is the tribal member a constitutional "member" or "Senator" or "Representative"?) [1]

–

[1] The case of the territorial delegates to the U.S. House of Representatives may be a useful model to examine: The delegates have almost all powers (other than voting on the floor) of a Representative and yet apparently are not considered "Representatives" under any of the provisions of U.S. Constitution relating to "Representatives" or to "members" of the House. See *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), upholding right of delegates under special rules to vote in the Committee of the Whole.

- Requirement that "electors" for a "Representative" or "Senator" be residents (Art. II, § 1)
- Election procedure requirements for "Senators" and "Representatives." (Art. IV, Pt. First, § 5 and Art. IV, Pt. Second, § 3).
- House and Senate authority to determine who is elected a "Representative" or "Senator" (Art. IV, Pt. First, § 5 and Art. IV, Pt. Second, § 5).
- Authority of each House "to judge of the elections and qualifications of its own members" (Art. IV, Pt. Third, § 3)
- Authority of each House to expel a "member" with 2/3 vote and to compel attendance of absent "members" (Art. IV, Pt. Third, § 4).
- House composed of 151 "members" (Art. IV, Pt. First, § 2) and Senate of no more than 35 "Senators" (Art. IV, Pt. Second, § 1).
- Required qualifications to be a "member" of the House (Art IV, Pt. First, § 4) or a "Senator" (Art. IV. Part First, § 6); see also Art. IV, Pt. Third, § § 10, 11).
- Requirement that confirmations be voted upon by a legislative committee "comprised of members of both houses" (Art. V, Pt. First, § 8).[2]

3. Mechanism

- With regard to Tribal Representatives: If change made through amendment to settlement acts, would require approval of the Passamaquoddy Tribe and the Penobscot Nation (25 USC § 1725(e)).[3] May also require approval of Congress (25 USC § 1725(e)).[4]
- With respect to a Senator representing all 4 tribes: If change made through amendment to settlement laws, would require approval of tribes and approval of Congress (the federal settlement laws do not appear to authorize amendment of the settlement acts with respect to the Maliseets and only authorize the State and the Micmacs to amend the State settlement laws with respect to the Micmacs with regard to jurisdiction of the State over trust lands. (25 USC § 1721, note, Micmac Settlement Act, § 6 (d); 25 USC § 1725(e)(2).)
- State constitutional issues would apparently not be addressed by amendment to settlement acts (presumably the State could not agree in a settlement act amendment to something that is inconsistent with the State Constitution); an amendment to the State Constitution requires approval by 2/3 of both Houses and approval in state-wide referendum.

---

[2] To grant authority to vote on nominations would apparently either require an amendment to this provision or result in the tribal Representative or Senator becoming a "member" and so subject to all the preceding provisions.

[3] Any amendment to the settlement act that is approved by the tribes (whether specifically ratified by Congress or not) would presumably be binding on the Legislature (absent constitutional impediment) since to undo the amendment would also require approval of the tribes.

[4] If amendment can be made without further Congressional action, the amendment apparently would not carry whatever significance (if any) that might attach to Congressional approval: the consent of Congress to State-Tribe amendments "does not constitute Congressional 'ratification' of such future agreements nor does it elevate such agreements to the status of Federal law." (*Report of the Select Committee on Indian Affairs on S. 2829*, Report NO. 96-957, U.S. Senate, 96th Congress, 2nd Sess. Sept. 17, 1980.)

- House Rule 525 and Joint Rule 206 (3) would need to be amended; changes may need to be made to other rules and to State laws. Changes to laws and rules in themselves would appear to be insufficient, given the constitutional issues.

4. Space

- One new seat in the Senate

OPTION 1-B

Who:

Same as 1-A

Rights:

Same as 1-A

Election method

Districts are redrawn to provide for majority representation by tribal members and elections are then governed by State constitutional provisions and election laws (tribal members would vote for one Senator and Representative who would represent district or districts composed of a majority of tribal members).

Issues

1. Can district lines be drawn to include a sufficient number of residents to meet the one-person-one vote (equal population districts) requirement and still have a majority population of tribal members?

- The following chart assumes all tribal members could be placed in the appropriate districts.

	Approximate Populations[5]	
	Senate District	House District
Current (Senate 35; House 151)	35,550	8,240
Proposed (Senate 36; House 153)	**34,562**	**8,132**
Passamaquoddy Tribal Representative		
Passamaquoddy Tribe total		3,300
Resultant non-tribal population		4,832
Penobscot Nation Representative		
Penobscot Nation total		2,000
Resultant non-tribal population		6,132
All-tribe Senator		
All-tribe total	8,000	
Resultant non-tribal population	26,562	

[5] Populations based on the following: U.S. Census 1998 state population estimate (1,244,250); tribal population estimates provided to committee on 8/25/99 (total population estimates may include non-residents and others who would not actually be able to be included in the district).

2. State constitutional restriction: each district formed of a "contiguous and compact territory" (Art IV, Pt. First, § 2 and Art. IV., Pt. Second, § 2)

- Difficulty of drawing "contiguous and compact" districts to achieve the desired purpose (particularly for a Senate member whose district would include members of all 4 tribes)

3. U.S. Constitution restriction: racial gerrymandering

- Could such redistricting be done without running afoul of the Equal Protection Clause restrictions on racial gerrymandering?[6]

4. Tribes loss of control over election process.

- Converting what is now treated as an "internal tribal matter" (tribal elections) into a matter governed by the Constitution and the laws of the State. For instance, out-of-state and many off-reservation tribal members would not be included in the tribal district(s): Under Constitution (Art II, § 1) only residents may be "electors" for Senators and Representatives; presumably districts could not practically be drawn to include every member of each tribe wherever residing. Also, a tribal Senator or Representative would be required to be resident in the district which that person represents (Art IV, Pt. First, § 4 & Art. IV. Part First, § 6).

[6] In general, preferences granted by law to tribes are treated as "political rather than racial in nature" (*Morton v Mancari*, 417 U.S. 535, 552 (1974)) and thus involve the application of the so-called "rational basis" test as opposed to the "strict scrutiny" test which applies to racial preferences. For a discussion, see *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, Stuart Minor Benjamin, 106 Yale L. J. 537 (Dec. 1996).

OPTION 1-C

Who:

Passamaquoddy Tribe Representative
Penobscot Nation Representative
Maliseet Band Representative
(Micmac Band Representative)

Rights:

Membership rights include **some but not** all of the following:

- vote on the floor (on some or all bills and motions)
- vote in committee on bills (on some or all bills and motions)
- vote in committee on nominations
- sponsor legislation on any subject
- propose amendments on the floor on any bill
- make any appropriate motions on the floor (to the extent consistent with other rights granted)
- speak on the floor on any matter

Election method

Same as 1-A

Issues

1. Same as Issues 1, 2 & 3 under OPTION 1-A, excepting issues related to the Senate.

2. Space.

- Need 2 new seats in the House

OPTION 2

Modify review process of MITSC recommendations so that Legislature can only vote up or down on them. (Perhaps modify composition of MITSC as well)

Issues

1. Method of accomplishing; binding Legislature

- A change to rules or general laws would not bind the Legislature but could serve as procedural guidance.
- If settlement act is amended (would require approval of tribes), it may bind the Legislature (since subsequent amendment to the settlement act to undo the provision would also require tribal approval). Such an amendment may require Congressional approval.[7] If the amendment were approved by Congress, it would be binding on the State.
- An amendment to the State Constitution would bind the Legislature.

2. Method of accomplishing; changing composition of MITSC

- Would require amendment to settlement acts, approval of Tribes and of Congress.

3. Impact on tribes

- If a proposal were supported by State members and one tribe but the other tribe desired some modification, the tribe that desired the modification may be at a disadvantage if the Legislature can only approve or disapprove proposal.[8]

4. Impact on Process.

- To the extent Legislature can only vote up or down, it may be harder for measures to pass.

5. Within scope of study charge?

- Charge is "conduct a study to address the issue of recognition of the tribal government representatives of Maine's Sovereign Nations in the Legislature"

---

[7] The federal settlement act allows amendments without congressional approval with respect to the Penobscot Nation and Passamaquoddy Tribe that relate to (among other things) "the allocation...of governmental responsibility of the State and the tribe and the nation over specified subject matters..." 25 USC § 1725(e).

[8] MITSC is composed of 9 members: 4 appointed by the Governor, 2 by the Passamaquoddy tribe, 2 by the Penobscot Nation and 1 (the chair) chosen by majority vote of these 8 members. (30 MRSA § 6212(1)).

OPTION 3

Create all-tribe Assembly on the Sami Assembly model

- Assembly made up of tribal members only
- elected by the people of all the tribes (size, election procedures, etc. to be determined)
- authority to make recommendations to Legislature
- appropriated a budget to be spent by the Assembly on cultural programs for the tribes

Issues

1. Relationship to tribal sovereignty.

- Each tribe has a distinct legal existence which is federally recognized. The tribes have different legal relationships with the State (under the settlement acts). Tribes may be able to establish their own inter-tribal assembly for the purposes of developing common goals and recommendations. If the Legislature creates such an entity and gives it authority, this authority might interfere with tribal sovereignty (see in particular, 30 MRSA § 6206: "internal tribal matters...shall not be subject to regulation by the State.")

2. Method of creating.

- If amend settlement acts, will need approval of the tribes and Congress (the federal settlement laws do not appear to authorize amendment of the settlement acts with respect to the Maliseets and only authorize the State and the Micmacs to amend the State settlement laws with respect to the Micmacs with regard to jurisdiction of the State over trust lands. (25 USC § 1721, note, Micmac Settlement Act, § 6 (d) and 25 USC § 1725(e)(2).)
- If establish by enactment outside settlement acts, may conflict with settlement acts (e.g., the "internal tribal matters" clause (30 MRSA § 6206)).

3. Within scope of study charge?

- Charge is "conduct a study to address the issue of recognition of the tribal government representatives of Maine's Sovereign Nations in the Legislature"

OPTION 4

Legislator(s) appointed or elected by Legislature to serve as State Government Representative ("liaison") to each tribal government to observe and to participate at some level.

Issues

1. What authority should liaison have?

- observer?
- speak on behalf of Legislature?
- other rights?

2. Access to tribal governments

- What access to tribal government functions should liaison have?
- Would access involve "internal tribal matters" which settlement act preserves from State interference?

3. Mechanism.

- Amend settlement acts (approval of tribes and perhaps of Congress required).[9]
- By general law (not adequate if authority or access conflicts with provisions in settlement acts, e.g. "internal tribal matters" clause)
- By legislative rule (not adequate if authority or access granted conflicts with provisions in settlement acts, e.g. "internal tribal matters" clause)

4. Within scope of study charge?

- Charge is "conduct a study to address the issue of recognition of the tribal government representatives of Maine's Sovereign Nations in the Legislature"

G:\OPLANRG\COMMTTEE\UTE\99STUDY\OPTIONS.DOC(10/20/99 2:24 PM)

[9] The federal settlement laws do not appear to authorize amendment of the settlement acts with respect to the Maliseets and only authorize the State and the Micmacs to amend the State settlement laws with respect to the Micmacs with regard to jurisdiction of the State over trust lands. (25 USC § 1721, note, Micmac Settlement Act, § 6 (d) and 25 USC § 1725(e)(2).)

Appendix E

Nov. 16, 1999 Opinion of the Attorney General on Questions Propounded by the Committee

ANDREW KETTERER
ATTORNEY GENERAL

Telephone: (207) 626-8800
FAX: (207) 287-3145
TDD: (207) 626-8865

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES:

84 HARLOW ST., 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

44 OAK STREET, 4TH FLOOR
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260
FAX: (207) 822-0259
TDD: (877) 428-8800

OPLA
copy

November 16, 1999

The Honorable Chellie Pingree
Maine State Senate
P.O. Box 243
North Haven, Maine 04853

The Honorable Richard H. Thompson
Maine House of Representatives
Route 11
P.O. Box 711
Naples, Maine 04055

Dear Senator Pingree and Representative Thompson:

This will respond to your letter dated August 30, 1999 in which you have sought the opinion of this Office on several questions pertaining to the work of the Committee to Address the Recognition of the Tribal Government Representatives of Maine's Sovereign Nations in the Legislature, which was created and authorized by a Joint Order of the 119th Maine Legislature. As articulated in the Joint Order, the Committee is to conduct a study addressing the issue of the recognition of Maine's Tribal Government Representatives in the Maine Legislature. The questions raised in your August 30, 1999 letter all relate to what privileges may be granted to the Tribal Government Representatives of the Penobscot Nation and the Passamaquoddy Tribe in the Maine Legislature.

By way of background, we would note that there are only two substantive statutory provisions dealing with the Tribal Government Representatives of the Penobscot Nation and the Passamaquoddy Tribe.[1] Title 3 M.R.S.A. § 1 provides that the tribal clerks of both the Penobscot Indian Nation and the Passamaquoddy Tribe shall furnish to the clerk of the House of Representatives a certification of the name and residence of the Representative-Elect of the Indian Tribal Representative to the Legislature. Title 3 M.R.S.A. § 2 sets the amount of

[1] Prior to the enactment of the Maine Indian Claims Settlement Act, there were statutes relating to tribal elections for the Penobscot Nation and the Passamaquoddy Tribe. 22 M.R.S.A. §§ 4792 and 4831 (1980). These provisions, however, were repealed by the law enacting the Maine Indian Claims Settlement Act. P.L. 1979, c. 732, § 18.

Printed on Recycled Paper

compensation to which the Indian Tribal Representative shall be entitled for attendance at the Legislature. Other than those two provisions, nothing in Maine statutes speaks to the issue of Indian Tribal Representatives, including how they are chosen or what their powers or duties are in the Maine Legislature.[2]

The privileges of the Indian Tribal Representatives in the Maine Legislature are contained exclusively in the rules of the House of Representatives and the Joint Rules of the 119th Maine Legislature. Specifically, Rule 525 of the Rules of the House provides in its entirety:

> The member of the Penobscot Nation and the member of the Passamaquoddy Tribe elected to represent their people at the biennial session of the Legislature must be granted seats on the floor of the House of Representatives; be granted, by consent of the Speaker, the privilege of speaking on pending legislation, must be appointed to sit with joint standing committees as non-voting members during the committees' deliberations; and be granted such other rights and privileges as may from time to time be voted by the House of Representatives.

Rule 206(3) of the Joint Rules provides in its entirety as follows:

> The member of the Penobscot Nation and the member of the Passamaquoddy Tribe elected to represent their people at each biennial Legislature may sponsor legislation specifically relating to Indians and Indian land claims, may co-sponsor any other legislation and may sponsor and co-sponsor expressions of legislative sentiment in the same manner as other members of the House.

Article IV, Part First, § 2 of the Maine Constitution specifies that the House of Representatives shall consist of 151 members. The Constitution directs, beginning in 1983 and every tenth year thereafter, that the Legislature shall cause the State to be divided into districts for the choice of one representative for each district. The Constitution mandates that the number of representatives (151) shall be divided into the number of inhabitants of the State to arrive at a mean population figure for each representative district. The purpose of this provision is to establish "as nearly as practicable equally populated districts."

---

[2] How the Penobscot Nation and the Passamaquoddy Tribe choose their Tribal Government Representatives for the Maine Legislature, and what qualifications are set for selection, are internal tribal matters of the respective tribes, which are not subject to regulation by the State of Maine. 30 M.R.S.A. § 6206(1) (1996).

This state constitutional provision is designed to comply with the requirements of the Equal Protection Clause of the 14th Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S.Ct. 1362, 1385 (1964), which held that, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both Houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." This is the so-called "one person, one vote," principle.

With this background in mind, it is now possible to address your specific questions.

1. **Would granting Tribal Government Representatives the right to vote on the floor violate the Constitution of the United States or the State of Maine, including the constitutional principle generally referred to as "one person, one vote"?**

In responding to this question, we have not found any decision from any court from any jurisdiction that has considered this issue in the context directly involving Native American representation in federal, state or local government. The most nearly analogous case appears to be *Michel v. Anderson*, 817 F.Supp. 126 (D.C. Cir. 1993), *aff'd* 14 F.3d 623 (D.C. Cir. 1994). In *Michel v. Anderson*, several members of the United States House of Representatives sought to enjoin the enforcement of a House rule which allowed territorial delegates to vote in the Committee of the Whole in the House of Representatives. During the course of its decision, the United States District Court framed the issue as to whether territorial delegates, who were not chosen in accordance with the United States Constitution and therefore were not members of the House, were exercising legislative power by being allowed to vote in the Committee of the Whole. The District Court stated that "what is clear is that the casting of votes on the floor of the House of Representatives does constitute such an exercise." 817 F.Supp. at 140. Accordingly, that Court held that unless the territories were granted statehood, "the Delegates could not, consistently with the Constitution, be given the authority to vote in the full House." *Id.*

On the other hand, the District Court noted that "not all votes cast as part of the Congressional process constitute exercises of legislative power." *Id.* The court observed that, at various times during United States history, territorial delegates had been given the authority to sit on and vote in standing committees of the House, and, indeed, they exercised that authority at the time of the litigation in *Michel v. Anderson*. The issue of whether territorial delegates could cast votes in standing committees of the House of Representatives was not challenged in that litigation and, therefore, the court did not express an opinion on it.

Rather, the Court held that allowing territorial delegates to vote in the Committee of the Whole (which is comprised of the entire House of Representatives) did constitute an exercise of legislative power and would be unconstitutional were it not for the fact that a separate rule of the House provided that, when the votes cast by the territorial delegates were decisive, a *de novo* vote was required to be taken in the full House where the territorial delegates could not vote.

The District Court held that the effect of this "savings clause" was that the vote of the territorial delegates in the Committee of the Whole was only symbolic since those votes could never be decisive on any matter. Accordingly, the court held as follows:

> In sum, it is the conclusion of the Court that, while the new rules of the House of Representatives may have the symbolic effect of granting the delegates a higher status and greater prestige in the House and in the Delegates' home districts, it has no effect, or only at most an unproven, remote, and speculative effect, as far as voting or the exercise of legislative power is concerned. Accordingly, the rule is not unconstitutional as the delegation of an improper exercise of legislative power.

817 F.Supp. at 145.

On appeal to the District of Columbia Circuit Court of Appeals, it was conceded "that it would be unconstitutional to permit anyone but members of the House to vote in the full House under any circumstances," even a "vote in proceedings of the full House subject to a revote." *Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994). Thus, the precise question presented to the Appellate Court for decision was: "May the House authorize territorial delegates to vote in the House's committees, particularly the Committee of the Whole?" *Id.*

Unlike the District Court, the Court of Appeals did not believe the issue was whether the delegates were exercising "legislative power" or "authority." Rather, the issue was whether the House rule permitting the territorial delegates to vote in the Committee of the Whole amounted to "bestowing the characteristics of membership on someone other than those 'chosen every second year by the People of the several states,'" as required by Article I, § 2 of the United States Constitution. *Id.*

Having framed the question and the relevant line of analysis in this way, the Court of Appeals stated:

> But what are the aspects of membership other than the ability to contribute to a quorum of members under Article I, § 5, to vote

> in the full House, and to be recorded as one of the yeas or nays if one-fifth of the members so desire? The Constitution, it must be said, is silent on what other characteristics of membership are reserved to members. Although it seems obvious that the framers contemplated the creation of legislative committees, . . ., the Constitution does not mention such committees.

14 F.3d at 630-31.

The Circuit Court then traced the history of the practice of allowing territorial delegates to serve on, chair and even vote in standing committees of the House of Representatives. According to that court, "the territorial delegates were certainly accorded a unique status by the first Congresses," and were "viewed as occupying a unique middle position between that of a full representative and that of a private citizen who presumably could not serve on or chair House committees." 14 F.3d at 631. In sum, "[t]erritorial delegates, representing those persons in geographical areas not admitted as states, then, always have been perceived as would-be congressmen who could be authorized to take part in the internal affairs of the House without being thought to encroach on the privileges of membership." *Id.*

Finally, the Court of Appeals addressed the specific question before it, involving voting in the Committee of the Whole:

> Suffice it to say that we think that insofar as the rule change bestowed additional authority on the delegates, that additional authority is largely symbolic and is not significantly greater than that which they enjoyed serving and voting on the standing committees. Since we do not believe that the ancient practice of delegates serving on standing committees of the House can be successfully challenged as bestowing "membership" on the delegates, we do not think this minor addition to the office of delegates has constitutional significance.

14 F.2d 623, 632.

Returning to your inquiry as to whether granting Tribal Government Representatives the right to vote on the floor of the House of Representatives would violate the constitutional principle of "one person, one vote," we would note that neither the District Court nor the Court of Appeals in *Michel v. Anderson* analyzed the issue in terms of "one person, one vote," for the simple reason that the question of permitting territorial delegates to vote on the floor of the House was not before either court. Nevertheless, both courts indicated that allowing

non-members to vote on the floor of the House would violate the Constitution, either because it constituted the exercise of legislative power or because it bestowed on a non-member of Congress the characteristics of membership. Under either line of reasoning, it is our Opinion that granting Tribal Government Representatives the right to vote on the floor of the House of Representatives would violate both the Maine and United States Constitutions, including the requirement of the Equal Protection Clause that seats in the house of a state legislature be apportioned on the basis of population.[3]

Stated simply, the power to pass legislation is the essence of legislative power. Me. Const., Art. IV, Pt. 3, § 1. Only members of the Legislature can vote on legislation. To allow a non-member to vote on the floor of the House of Representatives would have the real and practical effect of diluting the votes of those individuals who have been duly elected as members in accordance with the Maine Constitution. As a result, it would violate the constitutional principle of "one person, one vote" as articulated by the United States Supreme Court in *Reynolds v. Sims*.[4]

During the Committee's meeting on September 10, 1999, the issue was raised as to whether the equal protection principle of "one person, one vote" could be applied less strictly in view of the unique jurisdictional relationship that exists between the Penobscot Nation, the Passamaquoddy Tribe, the State of Maine and Congress, and particularly in light of the fact that the United States Supreme Court has upheld Indian employment preference laws against equal protection challenges.

It is, of course, true that the United States Supreme Court has recognized the plenary power of Congress to legislate on behalf of federally recognized Indian tribes, which power is derived directly from the Constitution itself. U.S. Const., Art. I, § 8, cl. 3. For example, the Court has recognized that it does not violate equal protection for Congress to adopt a law giving employment preference to Indians within the Bureau of Indian Affairs. *See Morton v. Mancari*, 417 U.S. 535, 553-554, 94 S.Ct. 2474 (1974). The Court indicated that such an employment preference was not racially motivated, but was given to members of quasi-sovereign tribal entities whose lives and activities were governed by the Bureau of Indian Affairs in a unique way. Given the unique relationship between federally recognized Indian

---

[3] Based upon the 1990 U.S. Census, the population of the Penobscot Nation Reservation is approximately 485 and the population of the two Passamaquoddy Tribal Reservations is approximately 1,189. Not all members of the Tribes reside on the Reservations. The ideal or mean House legislative district, based on the same census figures, is 8,132.

[4] In *Michel v. Anderson*, both the District Court and the Court of Appeals held that it was not unconstitutional to allow the territorial delegates to vote in the Committee of the Whole, subject to a vote in the full House where the territorial delegates could not vote. Neither Court ruled on the constitutionality of a procedure allowing the territorial delegates to vote on the floor of the House subject to a revote in the event the vote of the delegates was decisive. Based on the concessions of the litigants, however, the Court of Appeals assumed that such a procedure would be unconstitutional. *See* 14 F.3d at 630.

tribes and the Bureau of Indian Affairs, the Court found the employment preference law reasonable and non-discriminatory. The Court was careful to point out that the preference only applied within the BIA and, therefore, did not present "the obviously more difficult question" that would be involved with "a blanket exemption for Indians for all civil service examinations." 417 U.S. at 554, 94 S.Ct. at 2484. Of course, *Morton v. Mancari* did not involve application of the principle of "one person, one vote", and therefore provides no guidance on application of that principle to the questions considered here.

The United States Supreme Court has also recognized a very narrow exception to the strict application of the "one person, one vote" demands of *Reynolds v. Sims*, in the situation of special limited purpose water districts, whose members were elected by voters whose eligibility to vote was based on landownership. *See Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811 (1981); *Salger Land Co. v. Tulare Water District*, 410 U.S. 719, 93 S.Ct. 1224 (1973). The Supreme Court, however, emphasized that the special districts involved in those cases did not "exercise the sort of governmental powers that invoked the strict demands of *Reynolds*." Specifically, they could not "enact any laws governing the conduct of citizens." 451 U.S. at 366, 101 S.Ct. at 1818. *Accord Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998), *cert. granted*, 119 S.Ct. 1248 (1999).[5] Such special purpose districts are substantially different from a state legislature with the power to enact laws governing the conduct of all citizens.

Thus, it is our Opinion that allowing a Tribal Government Representative to cast a vote that counts on the floor of the House of Representatives, as if he or she were a member of the House of Representatives, would in fact violate both the Constitution of the United States and the Constitution of Maine. Whether the House could constitutionally authorize a Tribal Government Representative to cast even a symbolic vote on the floor of the House is not entirely clear.

2. Would granting Tribal Government Representatives the right to vote on the floor constitute making the Tribal Representatives "members" of the House and require an amendment to the State Constitution?

---

[5] In *Rice v. Cayetano*, a Caucasian born and raised in Hawaii challenged the constitutionality of special elections for trustees of the Office of Hawaiian Affairs who "must be Hawaiian and who administer public trust funds for the betterment of 'native Hawaiians.'" Only those who meet the blood quantum requirement for "native Hawaiians" are permitted to vote in such special elections. The Court of Appeals for the Ninth Circuit rejected the claim that the special elections violated the principle of "one person, one vote" on the ground that the Office of Hawaiian Affairs performed a special purpose for those eligible voters disproportionately affected by it and did not perform fundamentally governmental functions. 146 F.2d at 1080. The United States Supreme Court has agreed to review this case and heard oral argument on October 6, 1999. 119 S.Ct. 1248 (1999), 68 USLW 3135 (1999).

Our analysis under Question 1 above applies here as well. The Legislature cannot make someone a member of the House of Representatives who has not qualified to be a member of the House of Representatives as required by the Constitution. Granting a Tribal Government Representative the right to vote on the floor of the House of Representatives would not make the Tribal Government Representatives "members." Granting such a right would purport to bestow on a Tribal Government Representative the characteristics of a member. *See Michel v. Anderson*, 14 F.3d at 631. An amendment to the State Constitution would be required to make Tribal Government Representatives "members." Nevertheless, even such an amendment to the State Constitution would not avoid or overcome the federal equal protection violation if a Tribal Government Representative was allowed to be a member of the House of Representatives without having been chosen on the basis of population.

3. Would granting Tribal Government Representatives the right to vote in committee violate the Constitution of the United States or the State of Maine, including the principle generally referred to as "one person, one vote?"

In responding to this question, you have also asked whether our answer depends on what matters the Tribal Government Representative would be voting on. For example, you have asked whether there is a distinction between voting on gubernatorial nominees and voting on bills. Moreover, you have asked us to consider the relevance, if any, of the opinions of the District Court and the Court of Appeals in *Michel v. Anderson*, 817 F.Supp. 126 (D.D.C. 1993), *aff'd* 14 F.3d 623 (D.C. Cir. 1994), which we have done in responding to Question 1.

In our view, whether an Tribal Government Representative, not elected as a member of the House of Representatives in accordance with the Maine Constitution, may vote in a legislative committee – as opposed to voting on the floor of the House of Representatives – is a somewhat more difficult question to answer, for the simple reason that, with one exception that we are aware of, the Constitution does not require the Legislature to actually function by means of a legislative committee system. In other words, the Legislature could chose to conduct its business in a fashion other than by means of committees.

In a letter dated February 19, 1999, this Office expressed the view that allowing the Tribal Government Representatives to vote in legislative committees could be unconstitutional. We recognized that "committee votes are not without import," and gave as an example the possibility that a Tribal Government Representative could cast a tie-breaking vote in favor or against confirmation of a gubernatorial nominee. In such an example, that vote would result in a dramatically different situation in view of the two-thirds requirement to override. *See* Me. Const., Art. V, Pt. I, § 8; 3 M.R.S.A. § 151. The letter of February 19, 1999 concluded with the following statement:

> To the extent any vote, whether in committee or on the floor, affects the outcome of a legislative process, only duly elected legislators may vote thereon.

This conclusion appears to be consistent with a prior Opinion of this Office dated January 3, 1975, which stated:

> . . . there would appear to be no prohibition to naming the Indian Representatives at the Legislature to serve on such House committees as the Speaker deems appropriate, or such joint committees as the Speaker of the House and the President of the Senate deem appropriate, in some non-member capacity without the right to vote. In the absence of any rule to the contrary and if the Speaker of the House and the President of the Senate deem it appropriate, such service might possibly include the ability to participate fully in all committee activities, such as participating in discussions and asking questions of witnesses appearing before the Committee, *as if* the Indian Representative was a member, except with no right to vote.

(Emphasis in original.)

Neither the letter of February 19, 1999 nor the 1975 Opinion made any reference to the decisions in *Michel v. Anderson*. Those decisions, of course, dealt specifically with the question of territorial delegates voting in the Committee of the Whole. Since the Committee of the Whole consisted of the entire House of Representatives, action in the Committee of the Whole was, for all practical purposes, action in the entire House. Thus, allowing the territorial delegates to vote in the Committee of the Whole could be viewed as being tantamount to allowing them to vote in the House of Representatives. Because of this, the House created the "savings clause" which mandated a *de novo* vote whenever the votes of the territorial delegates in the Committee of the Whole were decisive.

A standing committee of the Legislature does not include all members of either body and action by a legislative committee certainly cannot be equated with action by the entire House of Representatives. The Circuit Court of Appeals in *Michel v. Anderson* appeared to suggest, in dicta, that allowing the territorial delegates to vote in standing committees (a practice resumed in the 1970's after a hiatus of a century) could be constitutionally permissible because voting in such committees did not constitute "bestowing membership on the delegates." 14 F.3d at 632. There are, however, several important factors which distinguish the issue before the Courts in *Michel v. Anderson* involving the territorial delegates and the question you have raised concerning the Tribal Government Representatives.

First, the territorial delegates have no other representation in Congress. In Maine, on the other hand, "[e]very Indian, residing on tribal reservations and otherwise qualified, shall be an elector in all county, state and national elections." Me. Const., Art. II, § 1. The Indian Reservations are part of House and Senate Districts, and Senators and Representatives are duly elected from those districts every two years.

Second, there has been no history in the State of Maine of allowing Tribal Government Representatives to cast votes in committees. In fact, the tradition has been just the opposite.

Finally, *Michel v. Anderson* was decided in the context of the specific provision in the United States Constitution which vests Congress with plenary power to regulate and manage the political representation of the territories. U.S. Const., Art. IV, § 3. *See also Murphy v. Ramsey*, 114 U.S. 15, 44, 5 S.Ct. 747, 763 (1885).

Thus, it is possible that a court in Maine could find that allowing the Tribal Government Representatives to cast votes in a legislative committee amounts to bestowing the characteristics of membership upon a person not duly qualified as a member of the Legislature. Nevertheless, there is judicial authority, namely, *Michel v. Anderson*, supporting the proposition that allowing the Tribal Government Representatives to cast votes in a legislative committee on bills might be constitutionally defensible.

It is our Opinion, however, that allowing Tribal Government Representatives to vote on gubernatorial nominees would violate Article V, Part First, § 8 of the Maine Constitution, which sets forth the procedure for the confirmation of judicial officers and other civil officers nominated by the Governor. Paragraph 2 of section 8 provides that the procedure for confirmation shall include the recommendation for confirmation or denial by the majority vote of "an appropriate legislative committee comprised of members of both houses in reasonable proportion to their membership."

This specific constitutional provision requires the involvement of a legislative committee comprised of "members of both houses." Since Tribal Government Representatives are not members, they could not under any circumstances cast a vote on gubernatorial nominees pursuant to the procedure set forth in the Constitution.

4. Would granting Tribal Government Representatives the right to vote on matters in committee result in the representatives becoming "members" of the House and require amendment of the State Constitution?

We believe our analysis under Questions 1-3 above responds to this question. Tribal Government Representatives can only become "members" through an amendment to Maine's

Constitution. Even if such an amendment attempted to give Tribal Representatives the power to vote, it would not resolve any federal equal protection issue arising by virtue of the principle of "one person, one vote."

5. Does your analysis of any of the preceding questions change if the voting right is granted through amendment to the Maine Indian Claims Settlement Act (or with respect to the Aroostook Band of Micmacs, the Micmac Settlement Act)? If so, how does your analysis change and how does this effect your opinion?

Our analysis does not change. Amending the Maine Indian Claims Settlement Act or the Micmac Settlement Act would not resolve the constitutional issues discussed in this Opinion. It would provide a statutory basis for allowing the Tribal Government Representatives to enjoy some further participation in the Legislature, but it could not make them "members" of the Legislature as described in the State Constitution, nor could it override the constitutional principle of "one person, one vote."[6]

6. Are there constitutional limits that would prohibit the House, Senate or the Legislature from granting other powers or authority (other than voting rights) to Tribal Representatives, such as sponsoring legislation, offering floor amendments, or making motions during House or Senate sessions? In particular, would the granting of rights other than voting effectively result in the Tribal Representatives becoming "members" of the body and requiring an amendment to the State Constitution?

We believe the answer to this question is found in the earlier Opinion of this Office dated January 3, 1975, a copy of which is enclosed. We do not believe that granting privileges to the Tribal Government Representatives other than voting would convert them into "members" of the House of Representatives. As we have said before, no rule of the House or statutory enactment can make the Tribal Government Representatives "members." Although not entirely free from doubt, a court could find that allowing Indian representatives to sponsor legislation, offer floor amendments, be allowed to debate, or make motions, could all be done in the capacity of non-members who occupy the special status of being "Tribal Government Representatives."

---

[6] At the Committee's meeting on September 10, 1999, a member of the Committee asked whether our analysis would change if the legislation were enacted by way of a referendum. Our analysis would not change since the method of a statute's enactment does not insulate it from complying with applicable constitutional principles. *See Buckley v. American Constitutional Law Foundation*, __ U.S. __, 119 S.Ct. 636, 643 (1999).

I hope this Opinion is helpful to you and to the other committee members.

Sincerely,

ANDREW KETTERER
Attorney General

AK:mhs
Enclosure
cc: Jon Clark

Joseph E. Brennan
Attorney General

John W. Benoit, Jr.
Richard S Cohen
Martin L. Wilk
Deputy Attorneys General

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04330

January 3, 1975

Honorable Gerald E. Talbot
House of Representatives
State House
Augusta, Maine

Dear Representative Talbot:

This will respond to your letter dated January 2, 1975, requesting my opinion whether under the Rules of the House, the Speaker may appoint the two Indian Representatives at the Legislature to joint committees as members. For the reasons which follow, it is my opinion that the Speaker does not have such authority.

This office has, on three different occasions, expressed the view that Indian Representatives at the Legislature are not constitutional representatives, i.e., they do not have powers and authority as members of the Legislature, and have no vote. See Opinions of the Attorney General dated August 31, 1972, December 3, 1970, and May 20, 1969, copies of which are enclosed for convenient reference.

The House Rule pertaining to naming persons to serve on committees reads as follows:

> "It shall be the duty of the Speaker...to appoint the members who are to serve on committees,..." (Emphasis added.)

Since the Rule applies only to members of the Legislature, it does not provide any authority to the Speaker to appoint Indian Representatives at the Legislature to committees as members.

Notwithstanding the foregoing, there would appear to be no prohibition to naming the Indian Representatives at the Legislature to serve on such House committees as the Speaker deems appropriate, or such joint committees as the Speaker of the House and President of the Senate deem appropriate, in some non-member capacity without the right to vote. In the absence of any rule to the contrary and if the Speaker of the House and President of the Senate deem it appropriate, such service might possibly include the ability to participate fully in all committee activities, such as participating in discussions and asking questions of witnesses appearing before the Committee, as if the Indian Representative was a member, except with no right to vote.

Very truly yours,

Joseph E. Brennan
Attorney General

JEB/ec

Appendix F

Letter from Tribes to Department of Interior Seeking Opinions Letter from Committee to Department of Interior Supporting Letter from Tribes

Passamaquoddy Tribe
Indian Township Reservation
P.O. Box 301
Princeton, ME 04668

Penobscot Nation
6 River Road
Indian Island
Old Town, ME 04468

Passamaquoddy Tribe
Pleasant Point Reservation
P.O. Box 343
Perry, ME 04667

September 22, 1999

The Honorable Bruce Babbitt
Secretary of the Interior
U. S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Babbitt:

We are writing to request guidance on two matters relating to the Passamaquoddy Tribe and the Penobscot Nation that have arisen in the context of a Maine legislative study.

As you know, Maine is unique in the nation in that the Passamaquoddy Tribe and the Penobscot Nation have nonvoting representatives who are seated in the Maine House. This year the Legislature established the Committee to Address the Recognition of the Tribal Government Representatives of Maine's Sovereign Nations in the Legislature to examine the roles of these Tribal Government Representatives. Our Tribal Government Representatives are members of this committee. The committee has identified at least the following issues for consideration:

1. Providing Tribal Government Representatives the right to vote on bills in committee and in the House and Senate;

2. Authorizing Tribal Government Representatives to sponsor legislation;

3. Clarifying or broadening the procedural rights of Tribal Government Representatives with respect to the right to propose amendments and to make other motions on the floor;

4. Establishing Tribal government representation in the Senate; and

5. Establishing Tribal government representation of the Houlton Band of Maliseets and the Aroostook Band of Micmacs in the Legislature.

Item 1 has raised certain legal issues. Among these is whether giving Tribal Government Representatives the right to vote would violate the Equal Protection principle generally referred to as "one person, one vote."

It has been suggested to the committee that because of the unique legal status of Native Americans, and in particular of the Passamaquoddy Tribe and the Penobscot Nation, it may be possible through amendment to the Maine Indian Claims Settlement Act to provide voting rights to the Tribal Government Representatives without running afoul the "one person, one vote" principle.

Congress provided in the federal settlement law approving the Maine Indian Claims Settlement Act (25 USC §1725(e)(1)) authorization for the State and the Tribes to amend the Maine act. It is not clear, however, whether that authorization extends to matters pertaining to the role of Tribal Government Representatives in the Legislature.

Though the committee has heard from various legal counsel, it has expressed keen interest in hearing from the Department of the Interior on these matters. We too are very interested in Interior's views. For our own interest and on behalf of the committee, we would your consideration of these questions:

1. Would granting, through an amendment to the Maine Indian Claims Settlement Act (30 MRSA §6201, et seq.), Tribal Government Representatives full membership rights in the Maine House violate the Constitution of the United States, in particular the constitutional principle generally referred to as "one person, one vote"? Please discuss how the unique status of the Passamaquoddy Tribe and the Penobscot Nation and the use of Maine Indian Claims Settlement Act as a vehicle for defining the role of the Tribal Government Representatives affects the interpretation of the application of the one-person-one-vote principle.

2. Could the Maine Legislature, with the agreement of the Tribe and the Nation (but without further federal approval) amend the Maine Indian Claims Settlement Act ("Maine Implementing Act") pursuant to 25 USC §1725(e)(1) to grant the Tribal Government Representatives the right to vote?

Before issuing a written opinion, we would ask that you consult with our legal counsel, Gregory Sample or Kaighn Smith, at (207) 772-1941.

The committee has scheduled its next meeting for October 14. If an opinion can be formulated and issued by that date, it would be most helpful to us and to the committee.

Thank you for your attention to this matter.

Sincerely,

Governor Richard Stevens Indian Township Reservation	Chief Richard Hamilton Penobscot Nation	Governor Richard M. Doyle Pleasant Point Reservation

cc: Kevin Gover, Esq.
Hon. Donna Loring
Hon. Donald Soctomah

8834

bcc: Gregory W. Sample, Esq.
Jon Clark, Legislative Counsel

State of Maine
One Hundred and Nineteenth Legislature

COMMITTEE TO ADDRESS THE RECOGNITION
OF THE TRIBAL GOVERNMENT REPRESENTATIVES
OF MAINE'S SOVEREIGN NATIONS
IN THE LEGISLATURE

SENATE

Chellie Pingree, *Chair*
Anne M. Rand
Richard A. Bennett

HOUSE

Richard H. Thompson, *Chair*
Joseph E. Brooks
William J. Schneider

STAFF

Jon Clark, Legislative Counsel
Office of Policy and Legal Analysis
State House Station 13
Augusta, ME 04333
tele 207-287-1670
fax 207-287-1275

TRIBAL GOVERNMENT REPRESENTATIVES

Donna M. Loring, Penobscot Nation
Donald G. Soctomah, Passamaquoddy Tribe

November 17, 1999

The Honorable Bruce Babbitt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Babbitt:

We are writing on behalf of our committee in reference to an inquiry, dated September 22, 1999, which you received from the Governors of the Passamaquoddy Tribe and the Chief of the Penobscot Nation.

Their inquiry was occasioned by the work of this committee which supports the inquiry. We are very interested in Interior's opinions on the questions presented in that letter.

As you know, two of Maine's four federally recognized Indian tribes have nonvoting representatives seated on the floor of the Maine House. This arrangement is of long standing, is unique in the nation (as far we are aware, it is unique in the world), and has been the subject of interest and study by other states and other nations around the globe.

Our committee has been charged with studying whether changes in Maine's arrangement may be appropriate. Among other issues, we are examining issues that would be raised by the granting of voting rights to the tribal government representatives. The questions presented in the letter you received from the Passamaquoddy Tribe and the Penobscot Nation arise from this examination.

Again, we support their inquiry and, given the tight schedule under which we are operating (our final report is due by the 1st of December) would encourage as prompt a response to their inquiry as is possible. For your reference, we repeat here the questions presented in their letter:

1. Would granting, through an amendment to the Maine Indian Claims Settlement Act (30 MRSA §6201, et seq.), Tribal Government Representatives full membership rights in the Maine House violate the Constitution of the United States, in particular the constitutional principle generally referred to as "one person, one vote"? Please discuss how the unique status of the Passamaquoddy Tribe and the Penobscot Nation and the use of Maine Indian Claims Settlement Act as a vehicle for defining the role of the Tribal Government Representatives affects the interpretation of the application of the one-person-one-vote principle.

2. Could the Maine Legislature, with the agreement of the Tribe and the Nation (but without further federal approval) amend the Maine Indian Claims Settlement Act ("Maine Implementing Act") pursuant to 25 USC §1725(e)(1) to grant the Tribal Government Representatives the right to vote?

Thank you for your attention to this important matter.

Sincerely,

Chellie Pingree
Senate Chair

Richard H. Thompson
House Chair

cc: Honorable Olympia J. Snowe
Honorable Susan M Collins
Honorable John E. Baldacci
Honorable Thomas H. Allen
Members, Committee to Address the Recognition of the Tribal Gov. Rep.
Interested Parties (list attached)

G:\OPLANRG\COMMTTEE\UTE\99STUDY\INTEROR2.DOC(10/15/99 9:34 AM)

Appendix G

List of Materials Collected and Reviewed by the Committee Identifying where Materials may be Located

(certain of these materials are also included in other appendices of this report)

DOCUMENT	DESCRIPTION	LOCATION
Revolutionary War		
Memoir of Col. John Allan	Agent of Continental Congress to Indians of Northeast during Revolution. Memoir provides some description of his contact with the tribes and the context. (Also in Kidder (1867), below)	Master file (to be archived)
Letters of Col. Allan	Letters to the Massachusetts Council regarding conditions as he saw them in eastern Maine and of the tribes in 1779 and 1780	Master file (to be archived)
Military Operations in Eastern Maine and Nova Scotia During the Revolution, Frederic Kidder (1867)	Notes , journal and letters of Col. Allan; of note: • Ltr to Eastern Indians from Mass. Bay Colony, 1775 • Ltr to "St. Johns Tribe" from Geo. Washington, 1776 • Page from Ltr of Jon. Eddy, 1777 • Return of Indians Present at Attack on Ft. Cumberland • Editor's narrative re: Col. Allan's 1st rpt. to Mass. Council • Ltr from British to St. John River Indians, 1780 • Ltr. to "Mersheete Tribe" and Passamaquoddy from Col. Allan, 1784 • Return of Indians in the service of U.S., 1780 • Ltr. to Passamaquoddy Tribe from Geo. Washington, 1776 • Col. Allan Report on Indian Tribes, 1793	State Library
Speech of Louis Mitchell to 63rd Maine Legislature (1887) (IN PACKAGE TO MEMBERS DATED 9/2/99	Overview, from Passamaquoddy representative, of tribal contact with American people with discussion of tribe's service during Revolution Provided courtesy of Rep. Soctomah	Master file (to be archived)
Pledge of Loyalty and request for support, conference at Machias, November 1779	Speech by unidentified person (Pierre Tomma, Chief of the St. Johns?) regarding loyalty to and dependence on America Provided courtesy of Rep. Soctomah	Master file (to be archived)
Article in Eastport, Maine, Sentinel, 1897, *Maine Indians in the Revolution*	An article providing a history of Indian involvement in the Revolution and aftermath Provided courtesy of Rep. Soctomah	Master file (to be archived)

DOCUMENT	DESCRIPTION	LOCATION
Excerpts, Journals of the Continental Congress, 1775	Resolutions regarding Alliance with the Indian Nations against the British Provided courtesy of Rep. Soctomah	Master file (to be archived)
Letter from Eastern Indian Dept. of U.S. to Tribes settled at Passamaquoddy and vicinity, 1874 (1784?)	Assurances regarding U.S. - tribal relations and references to boundary dispute between U.S. and Nova Scotia Provided courtesy of Rep. Soctomah	Master file (to be archived)
Treaties		
(See Proctor Report under General Background, below)		
Excerpt from *Jt. Tribal Counsel v. Morton* (IN PACKAGE TO MEMBERS DATED 9/2/99)	Overview of contacts between Federal Government, the States of Massachusetts and Maine, and the Passamaquoddy Tribe since 1776	Master file (to be archived)
Summary of Indian treaties negotiated and ratified by the various governments and the eastern tribes of Maine, from 1713, (1969 report of Maine Department of Indian Affairs) (IN PACKAGE TO MEMBERS DATED 9/2/99)	Brief summary of treaties and agreements running back to 1713 Provided courtesy of Rep. Loring	Master file (to be archived)
1794 Treaty with Passamaquoddy Tribe	In which Passamaquoddy Tribe relinquishes rights to land and land is "assigned and set off" to the Tribe	Master file (to be archived)
1818 Treaty with Penobscot Nation	Treaty conveying land from Penobscot Nation to Massachusetts in consideration of covenants of Mass. to provide certain supplies to the Nation	Master file (to be archived)
1820 Treaty (Penobscot)	Actually 2 treaties in which terms of 1818 treaty are assumed by Maine	Master file (to be archived)
Art. X, § 5 and § 7, Maine Constitution	Original Maine Constitution, Art X, §5 (still in effect but not printed pursuant to §7) which reiterates ME's assumption of MA's duties and obligations towards the Indians	Master file (to be archived)
1822 Agreement between Massachusetts and Maine		Master file (to be archived)
1833 Obligation to Indians (Penobscot)	Purchase of Penobscot Nation land and obligations to create a trust to administer payment	Master file (to be archived)

DOCUMENT	DESCRIPTION	LOCATION
1852 Treaty (Passamaquoddy)	Treaty which mentions election of Tribal Government Representative	Master file (to be archived)
1975 Re-seating of Tribal Government Representatives		
Legislative Record, Maine House of Representatives (IN PACKAGE TO MEMBERS DATED 9/2/99)	The debate on re-seating the Passamaquoddy Tribe and Penobscot Nation Representatives	Master file (to be archived)
1980 Land Claims Settlement		
Maine settlement laws (IN PACKAGE TO MEMBERS DATED 9/20/99)	• Passamaquoddy, Penobscot and Maliseet: 30 MRSA §§6201-6214 • Micmac: 30 MRSA §§7201-7207	Master file (to be archived)
Federal settlement laws (IN PACKAGE TO MEMBERS DATED 9/20/99)	• Passamaquoddy and Penobscot: 25 USCS §§ 1721-1735 • Maliseet: 25 USCS §1724, in the note titled History: Ancillary Laws and Directives • Micmac: 25 USCS §1721, in the note titled History: Ancillary Laws and Directives	Master file (to be archived)
Excerpt from Legislative Record, Maine, 1980	The debate on passage of the Maine Settlement Act	Master file (to be archived)
Legislative Record, Maine, 1980	Of note: Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 (the Maine Implementing Act)	State Law Library
Report of the House Committee on Interior and Insular Affairs, 96th Congress, 1980	U.S. House Committee report on Federal Settlement Act, includes discussion of issues raised about the settlement; of note: • Discussion of tribal sovereignty	State Law Library
Hearing before House Committee on Interior and Insular Affairs, 96th Congress, 1980	Transcript of hearing and written submissions on Federal Settlement Act	State Law Library
Hearings before Select Committee on Indian Affairs, U.S. Senate, 1980 (Vol. 1 and 2)	Voluminous (1344 p.) transcript of testimony, correspondence received for the record and background material. Of note: VOL. I • Opinion, Dept. of Interior, on extinguishment of land claims • testimony, Richard Cohen (review of settlement history) • testimony, Lt. Gov. Cleve Dorr, Passamaquoddy	State Law Library

DOCUMENT	DESCRIPTION	LOCATION
	• Testimony, Robert Coulter, Indian Law Resource Center, and several tribal members opposed to settlement VOL. II • Paper, Settlement implications for Houlton Band of Maliseets, Robert Cleaves • Report, History of Maliseets and Micmacs in Aroostook County (*see pp. 524-542 re: role of tribes in Revolutionary War*) • Draft Paper, Leadership in Maliseet Society, James Wherry • Summary of Massachusetts and Penobscot Relations, (apparently by office of AG; attachment to ltr. of James Wiggins to Sen. Cohen) • Memo, Report on Maine Indians, 1937 (summary report of history and conditions of Passamaquoddy and Penobscot peoples)	*pp. 524-542 in package mailed to members dated 9/2/99 Master file (to be archived)*
The Maine Indian Land Claims Case: Pro and Con, (1978)	Material complied by Dr. Joseph Pecorarar from *The Church World* Provided courtesy of Rep. Loring	Master file (to be archived
"Behind the Scenes of the Maine Indian Land Claims Settlement" and history of Passamaquoddy & Federal/State Government relations (IN PACKAGE TO MEMBERS DATED 9/3/99)	Perspectives from members of Passamaquoddy tribe and a history (unattributed) of Passamaquoddy & Federal/State Government relations Provided courtesy of Rep. Soctomah	Master file (to be archived
Maine Indian Claims Settlement: Concepts, Context and Perspectives, 1995	A paper by Diana Scully, Exec. Dir. MITSC, that provides information about key concepts, historical context, views of settlement and actions and debates since the settlement	Master file (to be archived)
Short paper from MITSC files (unattributed): Maine Indian Claims Settlement Act of 1980 (IN PACKAGE TO MEMBERS DATED 9/2/99)	Provides brief historical background, brief history of settlement discussions and brief summary of major provisions	Master file (to be archived)

DOCUMENT	DESCRIPTION	LOCATION
General Background		
Impact of Maine Civil Laws on the Wabanaki, Report to the 118th Legislature by the MITSC, 1997	Snapshot of Wabanaki issues associated with ME civil laws Provided courtesy of Rep. Loring	Master file (to be archived
At Loggerheads--The State of Maine and the Wabanaki, Final Report of the Task Force on Tribal-State Relations, 1997	Report on ways to improve tribal-state relations and effectiveness of MITSC	Master file (to be archived
Proctor Report, Maine Legislative Research Committee, Report on Maine Indians (1942)	Substantial overview of trends and practices of Maine in its relation to the tribes (treaties, legislation and handling of funds) Provided courtesy of Rep. Loring	Master file (to be archived
A Brief History of Indian Legislative Representatives in the Maine Legislature, (1983, updated 1999)	Provided courtesy of Rep. Soctomah	Master file (to be archived
Excerpt from a report (unattributed) discussing tribal sovereignty (date?)	Overview of concept and history of tribal sovereignty Provided courtesy of Rep. Soctomah	Master file (to be archived
Excerpt from *The Wabanakis of Maine and the Maritimes* (1989)	Historical Overview of the Wabanakis (includes some discussion of Revolutionary War (prepared by the American Friends Service Committee)	Master file (to be archived
Silent Indian Onlookers May Get Voice in House, 1971, Telegram News Service (IN PACKAGE TO MEMBERS DATED 9/8/99)	News article Provided courtesy of Rep. Soctomah	Master file (to be archived
Council Reports, No 139, 1843 (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	Petition of Penobscot Indians that Indian Agent be authorized to pay Tribal Representative Provided courtesy of Rep. Soctomah	Master file (to be archived
The Indian and the Legislature (late 1940s) (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	Article providing snapshot of perspective of one Martha Meserve Gould on tribes and tribal representatives in the 1940s Provided courtesy of Rep. Soctomah	Master file (to be archived)
Non-voting Indian Representatives Play Unique Role in Maine Legislature (1991?) (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	News article on tribal representatives Provided courtesy of Rep. Soctomah	Master file (to be archived)
Indian Envoys Getting More Respect In Augusta (late 1980s?) (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	News article on tribal representatives Provided courtesy of Rep. Soctomah	Master file (to be archived)

DOCUMENT	DESCRIPTION	LOCATION
Maine Indian Representatives 'Viable Force' at State House (1980s?) (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	News article on tribal representatives Provided courtesy of Rep. Soctomah	Master file (to be archived)
Starbird Named to State Post, 1971 (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	News article Provided courtesy of Rep. Soctomah	Master file (to be archived)
American Indian Report, Non-voting Reps in the Maine Legislature Deliver the Goods for Tribes, 1998 (IN EMAIL PACKAGE TO MEMBERS DATED 9/16/99)	News article Provided courtesy of Rep. Soctomah	Master file (to be archived)
The Historical Development of Official Indian Policy in Maine: A Unique Case, by Dean Snow (date?) (IN EMAIL PACKAGE TO MEMBERS DATED 9/23/99)	Paper providing overview of development of Indian policy in Maine with special reference to the treaties (pre-settlement) Provided courtesy of Rep. Soctomah	Master file (to be archived)
Indian Rights and Privileges, 1929 (IN EMAIL PACKAGE TO MEMBERS DATED 12/10/99)	News article describig effort to grant voting rights to Tribal Representatives in 1929 Provided courtesy of Rep. Soctomah	Master file (to be archived)
Legal materials		
Letter from Linda Pistner, Deputy AG, to Rep. Brooks and Pieh (1999) (IN PACKAGE TO MEMBERS DATED 9/2/99)	A letter providing Ms. Pistner's opinion that allowing tribal representatives to vote in committee would be unconstitutional	Master file (to be archived)
Excerpts from Maine House Rules, Joint Rules and Statutes (1999) (IN PACKAGE TO MEMBERS DATED 8/24/99)	Provisions related to the power, authority and rights of Tribal Representatives	Master file (to be archived)
Excerpts from State Constitution (IN PACKAGE TO MEMBERS DATED 8/24/99)	Provisions related to election and qualification of Representatives and Senators	Master file (to be archived)
Territorial Delegates to the U.S. Congress, A Brief History, CRS Report for Congress (1997) (IN PACKAGE TO MEMBERS DATED 8/24/99)	Overview the history, status and certain legal issues related to the delegates	Master file (to be archived)
Memo, Jerome Matus, AAG, 1967 (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	Brief opinion of Assistant AG on seating Tribal Representatives and voting privileges Provided courtesy of Rep. Soctomah	Master file (to be archived)

DOCUMENT	DESCRIPTION	LOCATION
AG opinion, James Erwin, 1971 (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	Brief AG opinion on several issues related to a bill proposing to provide Tribal Representatives a seat on the floor, the right to speak and other privileges as House might establish Provided courtesy of Rep. Soctomah	Master file (to be archived)
Letter from George West, Deputy AG, 1969 (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	Brief opinion of Deputy AG on question of conflict of interest for tribal representative Provided courtesy of Rep. Soctomah	Master file (to be archived)
Memo, John Paterson, AAG, 1970 (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	Brief of Assistant AG on how vacancy in tribal representative seat to be filled Provided courtesy of Rep. Soctomah	Master file (to be archived)
AG opinion, Joseph Brennan, 1975 (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	Brief AG opinion on whether Rules of House allow Speaker to appoint tribal representatives to jt. committees as members Provided courtesy of Rep. Soctomah	Master file (to be archived)
Memo, Martin Wilk, AAG, 1972 (IN EMAIL PACKAGE TO MEMBERS DATED 9/8/99)	Brief opinion of Assistant AG on possible conflict of interest for tribal representative Provided courtesy of Rep. Soctomah	Master file (to be archived)
Opinion of the Attorney General on questions propounded by this committee (IN PACKAGE TO MEMBERS DATED 11/17/99)	Opinion responds to letter from committee requesting opinion on the constitutional issues raised by the study	Master file (to be archived)
Powerpoint presentation, Judge Jill Shibles, Chief Judge Machantucket Pequot Tribal Court and Appellate Justice, Passamaquoddy Appellate Court (IN PACKAGE TO MEMBERS DATED 10/25/99)	Presentation on legal status of the Maine tribes	Master file (to be archived)
CRS Report to Congress: Committee of the Whole: Stages of Action on Measures, 1998 (IN PACKAGE TO MEMBERS DATED 1/30/00)	Description of the Committee of the Whole process in Congress	Master file (to be archived)

DOCUMENT	DESCRIPTION	LOCATION
Other States/Countries		
Wisconsin, Memos, American Indian Study Committee (1999)	Memos providing summary of Maine's model and U.S. territorial delegates model and proposal for tribal representation in Wisconsin	Master file (to be archived)
Nunavut, Canada, descriptions (IN PACKAGE TO MEMBERS DATED 8/24/99)	From the Nunavut web page; background and overview	Master file (to be archived)
Australia, New South Wales, Standing Committee on Social Issues, *Report, Enhancing Aboriginal Political Representation* (1998)	Material provided courtesy of Rep. Loring	Master file (to be archived)
Australia, New South Wales, Standing Committee on Social Issues, *Issues Report* (1997)	Detailed background report including discussion of: • recent political developments for Aboriginal people in N.S.W. • The New Zealand model • U.S. experience (including discussion of Maine) • Canadian experience • aboriginal parliaments in Norway, New Zealand, Canada (NWT)	Master file (to be archived)
Mi'kmaq & Maliseet Response to the Royal Commission on Aboriginal Peoples Final Report, 1998	Material provided courtesy of Rep. Soctomah	Master file (to be archived)
New Brunswick, *Report of the Task Force on Aboriginal Issues*, 1999	Material provided courtesy of Rep. Soctomah	Master file (to be archived)
Two articles from New Brunswick Telegraph Journal, 1998-99 (IN EMAIL PACKAGE TO MEMBERS DATED 9/21/99)	Articles regarding proposals in New Brunswick to designate legislative seats for native Canadians Provided courtesy of Rep. Soctomah	Master file (to be archived)
Memo, Jon Clark to Committee, 1999 (IN PACKAGE TO MEMBERS DATED 9/24/99)	Summary of tribal representatives in other US States and Congress, and in Canada, Norway, New Zealand, Australia and brief mention of Lebanon, Fiji, Zimbabwe and Singapore	Master file (to be archived)
Conversation with U.S. Territorial Delegate, American Samoa	Email from Jon Clark describing conversation with Congressman Faleomaveaga, Delegate from American Samoa	Master file (to be archived)

G:\OPLANRG\COMMTTEE\UTE\99STUDY\MATERAL2.DOC(12/02/99 2:12 PM)

Appendix H

"A Brief History of Indian Legislative Representatives in the Maine Legislature" by S. Glenn Starbird, Jr., 1983, updated by Donald Soctomah, 1999

A BRIEF HISTORY OF INDIAN LEGISLATIVE REPRESENTATIVES IN THE MAINE LEGISLATURE

By
S. Glenn Starbird, Jr., 1983
Updated by
Donald Soctomah, 1999

Of all the fifty states in the Union, Maine is the only one that has Representatives in its legislature for its Indian Tribes. This unique practice has an interesting history.

The earliest record of Representatives being sent from the Penobscots is in 1823 and of the Passamaquoddies in 1842. At that time there was no State law regarding election of Indian Delegates or Representatives to the Legislature and the choice of this person or persons was determined by tribal law or custom only. Massachusetts records show that the practice of the two tribes sending Representatives to the State Legislature was not new with the formation of the new State of Maine in 1820 but probably had been going on since before the Revolutionary War.

The differences between the Old and New Parties in the Penobscot Tribe in the 1830's and 1840's caused such confusion that these two parties signed and agreement in 1850 which provided, among other things, that "an election should be held every year to choose one member of the Tribe to represent the Tribe before the Legislature and the Governor and the Council." This agreement governed the choice of Representative until the Legislature passed the so-called "Special Law" of 1866 which, with the Tribe's agreement, finally settled the procedure of election for not only its Representative but the Governor and Lieutenant Governor, as well.

A similar agreement setting forth the form of their Tribal Government was made between the two Passamaquoddy Reservations in what is known as the "Treaty of Peace of 1852." The system of government established by this document has remained unchanged in its essential provisions ever since, although it was not enacted into State Law until the Passamaquoddy Tribe petitioned the Legislature to do so in 1927. Among the Passamaquoddies, the Representative was to be elected alternately from each of the two Reservations.

A great deal more research must be done in regard to Indian Representation in the Maine Legislature, but our present meager knowledge of the subject shows that over the last half of the nineteenth century there was a gradual growth and development of the Indian Representative's status in the Legislative Halls.

Only from the middle 1890's was there a verbatim Legislative Record made, and not until 1907 is it provided with an index, but from that year on we can read clearly the record in session after session where the Indian Representatives were seated, sometimes spoke, and were accorded other privileges.

This gradual improvement in the status of Indian Representatives resulted in an effort during the 1939 Legislature to place Indian Representatives on a nearly equal footing with the others. This effort failed, however, and the 1941 session passed legislation that ousted the Indians entirely from the Hall of the House, their status being reduced to little better than state paid lobbyists. Since 1965, a gradual change for the better has occurred. Salaries and allowances have increased, and seating and speaking privileges were restored in 1975, after a lapse of thirty-four years.

The closest analogy to Indian representation in the Maine Legislature now existing are probably the Federal Laws that allow the territories and the District of Columbia to seat Delegates in the Federal House of Representatives. Under Federal Law and House Rule a delegate can do anything a regular House Member can do except vote on pending legislation. He can sit on a Committee and vote in Committee, he receives the same salary and allowances, and for all practical purposes, except the House vote, does what any member of Congress can do.

Opinions by the Office of the Maine Attorney General over the years would seem to indicate that Indian Representatives to the Maine House could have a position in the Maine Legislature very similar to delegates of the territories in Congress, under the law and House Rules as they now stand. At any rate, it is to be hoped that improvements in status will continue, for with the settlement of the Maine Indian Land

Claims in 1980, establishing an entirely new relationship with the State, the need for competent representation of the Indian Tribes in the Legislature is more vital than ever before.

In 1996, the Tribal Representatives sponsored a Native Bill for the first time ever, and in 1999 a rule change allowed the Passamaquoddy and Penobscot Representatives to Co-sponsor any Bill, statewide.

Currently, the Wisconsin, New Brunswick, and New Zealand Legistatures are reviewing Passamaquoddy and Penobscot Representative status. Now is the time for Native Representatives to be given the vote.

NOTE: *The above narrative of Indian Representation in the Legislature, is based on information derived from the Legislative Record, Federal and State House Rules, State Department Reports, Maine Public Laws, Resolves, Private and Special Laws, Federal Laws, Newspaper Articles, and other published accounts.*

Appendix I

1997 CRS Report to Congress on Territorial Delegates

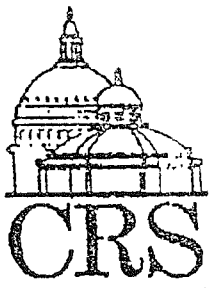
ATTACHMENT 2

CRS Report for Congress

Territorial Delegates to the U.S. Congress: A Brief History

January 23, 1997

Andorra Bruno
Analyst in American National Government
Government Division



Congressional Research Service • The Library of Congress

Territorial Delegates to the U.S. Congress: A Brief History

SUMMARY

The U.S. insular areas of American Samoa, Guam, Puerto Rico, and the Virgin Islands and the federal municipality of the District of Columbia are each represented in Congress by a Delegate to the House of Representatives. These Delegates are the successors of Delegates from statehood-bound territories, who first took seats in the House in the late 1700s.

Early laws providing for territorial Delegates to Congress did not specify the duties, privileges, and obligations of these representatives. It was left to the House and the Delegates themselves to define their role. On January 13, 1795, the House took an important step toward establishing the functions of Delegates when it appointed James White, the first territorial representative, to membership on a select committee. In subsequent years, Delegates continued to serve on select committees as well as on conference committees. The first regular assignment of a Delegate to standing committee duty occurred under a House rule of 1871, which gave Delegates places as additional members on two standing committees. In these committees, the Delegates exercised the same powers and privileges as in the House; that is, they could debate but not vote.

In the 1970s, Congress again began to expand the rights of Delegates. The Delegates gained the right to be elected to standing committees and to exercise in those committees the same powers and privileges as Members of the House, including the right to vote.

Today, Delegates enjoy powers, rights, and responsibilities identical, in most respects, to those of House Members from the states. Like these Members, Delegates can speak and introduce bills and resolutions on the House floor; and they can speak and vote in House committees. The Delegates are not full-fledged Members of Congress, however. Most significantly, they cannot vote on the House floor.

CONTENTS

Northwest Ordinance 1

First Delegate 2

Delegates and Committee Service 4

Unincorporated Territories 6

Committee Voting 7

Additional Territorial Delegates 8

Delegates' Powers and Privileges 9

Committee of the Whole Voting Rights 9

Territorial Delegates to the U.S. Congress: A Brief History

The U.S. insular areas of American Samoa, Guam, Puerto Rico, and the Virgin Islands and the federal municipality of the District of Columbia are each represented in Congress by a Delegate to the House of Representatives.[1] The Delegates enjoy many, but not all, of the powers and privileges of House Members from the states.

Northwest Ordinance

The office of Delegate—sometimes called, nonvoting Delegate—dates to the late 1700s, when territories bound for statehood were granted congressional representation. The Northwest Ordinance of 1787, which was enacted under the Articles of Confederation in order to establish a government for the territory northwest of the Ohio River, provided for a territorial Delegate.[2] The earlier Ordinance of 1784 had also made provision for territorial representation in Congress, but it had never been put into effect.[3]

Following ratification of the U.S. Constitution, the federal Congress reenacted the Northwest Ordinance.[4] The Ordinance specified that the government of the Northwest Territory would initially consist of a governor and other officials appointed by Congress. According to Section 9, once the free adult male population in the district[5] reached 5,000, qualified voters would be able to elect representatives from their counties or townships to a house of

---

[1]In the case of Puerto Rico, the congressional representative is called a Resident Commissioner. Today, the offices of Resident Commissioner and Delegate are essentially the same. The term "Delegates," as used in this report, includes the Puerto Rican Resident Commissioner, unless otherwise indicated.

[2]"The Northwest Ordinance: An Annotated Text." In Taylor, Robert M., Jr., ed. *The Northwest Ordinance, 1787.* Indianapolis, Indiana Historical Society, 1987. p. 51-53.

[3]Boyd, Julian P., ed. *The Papers of Thomas Jefferson*, v. 6. Princeton, Princeton University Press, 1952. p. 615. Still earlier references to territorial representation in Congress can be found in a 1776 letter from Silas Deane to the Select Committee of Congress and in Thomas Paine's "Public Good" (1780). See Hulbert, Archer Butler, ed. *Ohio in the Time of the Confederation*. Marietta, Ohio, Marietta Historical Commission, 1918. p. 1, 3 (Deane); p. 6, 12 (Paine).

[4]Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. The act made some modifications to the Ordinance in order to adapt it to the Constitution.

[5]The Ordinance established the territory as one district but allowed for subdivision in the future, as expedient. "The Northwest Ordinance: An Annotated Text," p. 31.

representatives.[6] This elected house together with an appointed legislative council would elect a Delegate to Congress, as stated in Section 12 of the Northwest Ordinance:

> As soon as a legislature shall be formed in the district, the Council and house assembled in one room, shall have authority by joint ballot to elect a Delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary Government.[7]

The Delegate's duties, privileges, and obligations, however, were left unspecified.

First Delegate

In 1790, Congress extended all the privileges authorized in the Northwest Ordinance to the inhabitants of the territory south of the Ohio River and provided that "the government of the said territory south of the Ohio, shall be similar to that which is now exercised in the territory northwest of the Ohio."[8] Four years later, the Territory South of the River Ohio sent the first territorial Delegate to Congress. On November 11, 1794, James White presented his application to the House of Representatives for seating in the Third Congress.[9] A House committee reported favorably on Mr. White's application and submitted a resolution to admit him, touching off a wide-ranging discussion about the Delegate's proper role.[10]

An immediate question arose: Should the Delegate serve in the House or in the Senate? The Northwest Ordinance, which had been enacted by the unicameral Congress under the Articles of Confederation, had only specified a "seat in Congress." Some Members of Congress argued that the proper place for Delegate White was the Senate since his method of election, by the territorial legislature, was similar to that of Senators. Others suggested that perhaps Mr. White should sit in both chambers. Proposals for seeking Senate concurrence in the matter of admitting Delegate White and for confining his right of debate to territorial matters were dismissed. On November 18, 1794, the House approved the resolution to admit Delegate White to a nonvoting seat in that body.[11] At least one Delegate has served in every Congress since, with the single exception of the Fifth Congress.

Debate surrounding Delegate White's taking the oath further revealed House Members' various perceptions of his status. Some Members believed that

---

[6]"The Northwest Ordinance: An Annotated Text," p. 36-51.

[7]Ibid., p. 51.

[8]Act of May 26, 1790, ch. 14, 1 Stat. 123.

[9]*Annals of Congress*, v. 4, 3rd Cong., 2nd Sess., Nov. 1794. p. 573.

[10]Brown, Everett S. "The Territorial Delegate to Congress." In Brown, Everett S. *The Territorial Delegate to Congress and Other Essays*. Ann Arbor, Mich., George Wahr Publishing Company, 1950. p. 4-5.

[11]*Annals of Congress*, v. 4, 3rd Cong., 2nd Sess., Nov. 1794. p. 884-889.

Mr. White should be required to take the oath. Representative James Madison disagreed. He argued:

> The proper definition of Mr. White is to be found in the Laws and Rules of the Constitution. He is not a member of Congress, therefore, and so cannot be directed to take an oath, unless he chooses to do it voluntarily.[13]

Describing Delegate White as "no more than an Envoy to Congress," Representative William Smith maintained that it would be "very improper to call on this gentlemen to take such an oath." He characterized Mr. White as "not a Representative from, but an Officer deputed by the people of the Western Territory." In making the case that it "would be wrong to accept his oath," Representative Jonathan Dayton emphasized Mr. White's lack of voting power: "He is not a member. He cannot vote, which is the essential part." Representative Dayton compared Delegate White's influence in the House to that of a printer who "may be said to argue and influence, when he comes to this House, takes notes, and prints them in the newspapers."[18]

Ultimately, the House decided that since Mr. White was not a Member, he was not required to take the oath.[14] At the same time, the House, by public law, granted Mr. White the same franking privileges and compensation as Members of the House.[15]

The White case established several precedents for the treatment of future Delegates. In 1802, Congress passed legislation that extended the franking privilege to, and provided for the compensation of, "any person admitted, or who may hereafter be admitted to take a seat in Congress, as a delegate."[16] Like Mr. White, all future Delegates would sit in the House. This practice was written into law in 1817. The law stated, in part:

> ... such delegate shall be elected every second year, for the same term of two years for which members of the house of representatives of the United States are elected; and in that house each of the said delegates shall have a seat with a right of debating, but not of voting.[17]

Subsequent statutes authorizing Delegates specified service in the House. The decision not to administer the oath to Delegate White, however, was not precedential. All future Delegates, beginning with the second, would take the oath.

---

[12]Ibid., p. 889.

[13]Ibid., p. 889-890.

[14]Ibid., p. 890.

[15]Act of Dec. 8, 1794, ch. 2, 1 Stat. 403-404.

[16]Act of Feb. 18, 1802, ch. 5, 2 Stat. 130-131.

[17]Act of March 3, 1817, ch. 42, 3 Stat. 368.

Delegates and Committee Service

The House took an important step toward defining the functions of Delegates when, on January 13, 1795, it appointed Mr. White a member of a select committee to investigate better means of promulgating the laws of the United States.[18] Future Delegates continued the practice of committee service. The second Delegate, William Henry Harrison of the Northwest Territory, served on a number of select committees, some of which he had moved to create, to address issues such as public land laws and the judiciary in the territories.[19] According to historians, in December 1799 Mr. Harrison became the first Delegate to chair a select committee.[20] An active participant in House debates, Delegate Harrison likewise served as a House conferee in disputes with the Senate.[21]

Thus, early territorial Delegates were members of select committees and conference committees. And some evidence suggests that they were allowed to vote in committee in and around 1841. According to a September 3, 1841, report of the Committee of Elections:

> With the single exception of voting, the Delegate enjoys every other privilege and exercises every other right of a Representative. He can act as a member of a standing or special committee and vote on the business before said committees, and he may thus exercise an important influence on those initiatory proceedings by which business is prepared for the action of the House. He is also required to take an oath to support the Constitution of the United States.[22]

---

[18] *Annals of Congress*, v. 4, 3rd Cong., 2nd Sess., Jan. 1795. p. 1082.

[19] See, for example, *Annals of Congress*, v. 10, 6th Cong., 1st Sess., Dec. 1799-April 1800. p. 193, 197-198, 209-210, 477, 510, 513, 660.

[20] There is disagreement, however, over which select committee Delegate Harrison was first appointed to chair. See Goebel, Dorothy Burne. *William Henry Harrison*. Philadelphia, Porcupine Press, 1974 (Reprint of the 1926 edition). p. 44, 49; and Bloom, Jo Tice. "Early Delegates in the House of Representatives." In Bloom, John Porter, ed. *The American Territorial System*. Athens, Ohio, Ohio University Press, 1973. p. 67.

[21] U.S. Congress. House. *The Journal of the House of Representatives*, v. 4, 6th Cong., 1st Sess. Wilmington, Del., Michael Glazier, Inc., 1977. p. 187, 372.

[22] House Report No. 10, 27th Cong., 1st Sess. Quoted in Hinds, Asher C. *Hinds' Precedents of the House of Representatives of the United States*, v. 2, Sec. 1301. Washington, U.S. Govt. Print. Off., 1907. p. 865. (Hereinafter cited as *Hinds' Precedents*) This report excerpt raises the question of whether Delegates served on standing committees around, or prior to, 1841. According to Abraham Holtzman, they did not: "As standing committees began to emerge in the late eighteenth and early nineteenth centuries, however, the House adopted a practice of excluding territorial representatives from these important centers of decision making." Holtzman, Abraham. "Empire and Representation: The U.S. Congress." *Legislative Studies Quarterly*, v. 11, May 1986. p. 257. Similarly, Jo Tice Bloom writes: "During the early period [1794-1820], delegates were never barred from serving on standing committees by any action

(continued...)

By the 1880s, Delegates had apparently lost committee voting privileges. On February 23, 1884, a proposition was made that Delegates be allowed to vote in committee. The proposition was referred to the Committee on Rules, but no action was taken.[23]

Committee voting represented one issue in the larger congressional debate over the office of the territorial Delegate that took place during the second half of the nineteenth century. Delegates asking for admission to seats in the House during this period presented a variety of legal and parliamentary problems. In the course of addressing these issues, House Members expounded various theories of representation, questioned the rights of Delegates, and elaborated on the power of Congress over the territories.[24]

The final decades of the nineteenth century saw the Delegates becoming more integrated into the congressional system. The first regular assignment of Delegates to standing committee duty occurred under a House rule adopted in December 1871. The rule directed the Speaker of the House to appoint a Delegate as an additional member of the Committee on the Territories and to appoint the D.C. Delegate as an additional member of the Committee for the District of Columbia.[25] Additional committee assignments were authorized in 1876, 1880, and 1887.[26] Describing the concurrent development of the Delegates' non-legislative role, Earl Pomeroy wrote:

> The territorial delegate increased in stature appreciably between 1861 and 1890. Without the formal powers of a congressman, he acquired more of a congressman's influence and general functions. He was disseminator of information, lobbyist, agent of territorial officers, of the territorial legislature, and of his constituency, self-constituted dispenser of patronage. He interceded at times in almost every process of control over the territories, and generally no one challenged his right to intercede.[27]

---

[22](...continued)
of the House. They probably did not serve on these committees for the simple reason that a delegate was never appointed and therefore the tradition never began." Bloom, "Forty Delegates in the House of Representatives," p. 67.

[23]*Hinds' Precedents*, v. 2, Sec. 1300, p. 895.

[24]See Brown, "The Territorial Delegate to Congress," p. 19-31.

[25]*Congressional Globe*, v. 102, 42nd Cong., 2nd Sess., Dec. 13, 1871. p. 117-118.

[26]*Hinds' Precedents*, v. 2, Sec. 1297, p. 864. In committee, the Delegates had the same powers and privileges as on the floor of the House (and thus, could not vote), and could make any motion except to reconsider (which presumes that the mover had previously voted).

[27]Pomeroy, Earl S. *The Territories and the United States, 1861-1890*. Philadelphia, University of Pennsylvania Press, 1947. p. 80.

Unincorporated Territories

After the U.S. acquisition of overseas territories following the Spanish-American War, a new concept of territorial status was put forth by the Supreme Court. In a series of cases known as the Insular Cases (1901-1922), the Court distinguished between "incorporated" and "unincorporated" territories. Incorporated territories were considered integral parts of the United States, to which all relevant provisions of the U.S. Constitution applied. They were understood to be bound for eventual statehood. The newly acquired territories were considered unincorporated, however, and, as such, only the "fundamental" parts of the Constitution applied of their own force. The political status of unincorporated territories, the Court said, was a matter for Congress to determine by legislation.[28]

Congress did grant representation to two of the territories acquired from Spain--Puerto Rico and the Philippines. It did so, however, in a way that distinguished their situation from that of statehood-bound territories. Rather than authorizing Delegates, Congress provided for Resident Commissioners to the United States from Puerto Rico[29] and the Philippines,[30] who were to be entitled to "official recognition as such by all departments." According to Abraham Holtzman:

> [N]o reference to Congress or the House of Representatives was made in the authorizing statutes. Apparently, it was Congress's intent that the mandate of these representatives be broader than service in the U.S. legislature.... This suggests a role for resident commissioners more akin to that of a foreign diplomat than that of a legislator. Nevertheless, the representatives from these two territories did serve in the House ....[31]

The Resident Commissioners from Puerto Rico and the Philippines did not enjoy the same privileges as the nonvoting Delegates; initially, they were not even allowed on the House floor. In 1902 and 1908, respectively, the House of Representatives granted them the right to the floor.[32] In 1904, the Puerto Rican Resident Commissioner was given the "same powers and privileges as to committee service and in the House as are possessed by Delegates" and was deemed "competent to serve on the Committee on Insular Affairs as an

---

[28]Coudert, Frederic R. "The Evolution of the Doctrine of Territorial Incorporation." *Columbia Law Review*, v. 26, Nov. 1926. p. 823-850.

[29]Act of April 12, 1900, ch. 191, 31 Stat. 77, 86.

[30]Act of July 1, 1902, ch. 1369, 32 Stat. 691, 694. This act provided for *two* Philippine Resident Commissioners. That number was later reduced to one. Holtzman, "Empire and Representation," p. 253.

[31]Holtzman, "Empire and Representation," p. 253.

[32]*Congressional Record*, v. 35, June 28, 1902. p. 7608; *Congressional Record*, v. 42, Feb. 4, 1908. p. 1540.

additional member."[33] Similar steps were not taken with respect to the Resident Commissioners from the Philippines and those commissioners never served on standing committees.

Committee Voting

The right of Delegates to vote in committee resurfaced as an issue in the 1930s. After a lengthy investigation, a House committee reported that neither the Constitution nor any statutes supported such a committee vote. Although a House rule provided for the appointment of territorial Delegates as additional members on certain committees, the report noted, "the House could not elect to one of its standing committees a person not a Member of the House." According to the report:

> The designation "additional member" applied to a Delegate clearly indicates the character of the assignment. Expressly the Delegate shall exercise in the committee . . . . the same powers and privileges as in the House, to wit, the "right of debating, but not the right of voting."[34]

In the 1970s, the system of territorial representation in Congress underwent significant change as more territories were granted Delegates and as Delegates were given increased powers. For eleven years following the admission of Hawaii to the Union in 1959, the Resident Commissioner from Puerto Rico had been the only territorial representative in Congress. Then, in 1970, the District of Columbia was authorized to elect a Delegate.[35] That same year, Congress enacted the Legislative Reorganization Act, which contained a provision to amend the House rule on Delegates (rule XII) to read:

> The Resident Commissioner to the United States from Puerto Rico shall be elected to serve on standing committees in the same manner as Members of the House and shall possess in such committees the same powers and privileges as the other Members.[36]

The "powers and privileges" included the long-debated right to vote in committee.

---

[33] *Congressional Record*, v. 38, Feb. 2, 1904. p. 1528, 1529. Until 1921, the Puerto Rican Resident Commissioner, like the other Delegates, served a two-year term. Effective that year, however, the Resident Commissioner's term was extended to four years. Act of March 2, 1917, ch. 145, 39 Stat. 951, 963.

[34] *Congressional Record*, v. 75, Jan. 18, 1932. p. 2162-2164.

[35] P.L. 91-405, Sept. 22, 1970, 84 Stat. 845, 848. Congress had previously authorized a D.C. Delegate (Act of Feb. 21, 1871, ch. 62, 16 Stat. 419, 426), but soon afterward revoked that provision (Act of June 20, 1874, ch. 337, 18 Stat. 116).

[36] P.L. 91-510, Oct. 26, 1970, 84 Stat. 1140, 1161.

In 1971, the House rewrote rule XII, according the rights in committee set forth in the Legislative Reorganization Act to the Resident Commissioner from Puerto Rico as well as to the newly authorized D.C. Delegate.[37]

Additional Territorial Delegates

The Delegates' ranks continued to grow with the authorization of congressional representation for the territories of Guam and the Virgin Islands in 1972.[38] And through further amendment of House rule XII, "each Delegate to the House" was given the same committee assignment rights and committee powers and privileges as Members of the House.[39] In 1978, the territory of American Samoa likewise gained the right to send a Delegate to the House. According to the authorizing statute:

> Until the Rules of the House of Representatives are amended to provide otherwise, the Delegate from American Samoa . . . shall be entitled to whatever privileges and immunities that are, or hereinafter may be, granted to the nonvoting Delegate from the Territory of Guam.[40]

Presently, the Commonwealth of the Northern Mariana Islands (CNMI) is the only U.S. territory that is not represented in Congress by a Delegate. Since 1978, the CNMI has had an elected Representative to the United States in Washington, D.C. Over the years, various U.S. and CNMI officials have advocated upgrading the status of the Washington Representative to that of a nonvoting Delegate to the House. Opinion in the CNMI has been divided on this issue, however, with some leaders opposing the creation of a CNMI Delegate seat on the grounds that it would affect the "Covenant," the agreement between the Northern Mariana Islands and the United States that established the Northern Marianas as a U.S. commonwealth.[41] Some opponents have argued that if granted a Delegate, the Commonwealth might lose the ability to negotiate directly with the White House on key issues. In the 104th Congress, legislation to provide for a CNMI Delegate to the House of Representatives (H.R. 4067) was

---

[37] *Congressional Record*, v. 117, Jan. 21-22, 1971. p. 14, 143-144. Rule XII, as amended, also stipulated that the D.C. Delegate serve on the Committee on the District of Columbia.

[38] P.L. 92-271, April 10, 1972, 86 Stat. 118. For information about the political relationship between the United States and its territories, see U.S. Library of Congress. Congressional Research Service. *U.S. Insular Areas and Their Political Development*. CRS Report 96-579, by Ambrra Bruno.

[39] *Congressional Record*, v. 119, Jan. 3, 1973. p. 17, 27.

[40] P.L. 95-556, Oct. 31, 1978, 92 Stat. 2078-2079.

[41] The "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" was approved by the U.S. government by P.L. 94-241, March 24, 1976, 90 Stat. 263, 48 U.S.C. 1801 et seq.

approved by the House Resources Committee.[42] No further action occurred, however, and the bill died at the end of the Congress.

Delegates' Powers and Privileges

Today, Delegates enjoy powers, rights, and responsibilities identical, in most respects, to those of House Members from the states. Like these Members, Delegates can speak and introduce bills and resolutions on the floor of the House; and they can speak and vote in House committees. The Delegates are not full-fledged Members of Congress, however. They cannot vote on the House floor, whether the House is operating as the House or as the Committee of the Whole House on the State of the Union. The Committee of the Whole is a parliamentary device used by the House to expedite the consideration of legislation. In addition, the Delegates cannot offer a motion to reconsider a vote and are not counted for quorum purposes.

Committee of the Whole Voting Rights

During the 103rd Congress, Delegates were allowed to vote in the Committee of the Whole, a development that became the focus of intense partisan controversy. In January 1993, the Democrat-led House amended rule XII to permit such Delegate voting. In the event that a matter before the Committee of the Whole was decided by the margin of the Delegates' votes, however, another amendment (to House rule XXIII) provided for an automatic re-vote in the full House, where Delegates could not participate.[43] Supporters of the rule XII change portrayed it as a logical extension of the Delegates' right to vote in committee.

A group of Republican House Members filed a lawsuit challenging the amendment to rule XII. They argued that the rule change violated Article I of the Constitution by granting legislative power to Delegates who were not "Members [of the House of Representatives] chosen every second Year by the People of the several States."[44] They took issue with the characterization of the Committee of the Whole as a committee and maintained, instead, that it was tantamount to the full House. In their complaint, the plaintiffs stated:

> [N]on-member voting in the Committee of the Whole impairs and dilutes the constitutional rights of the plaintiff-Representatives, both as Members of the

---

[42] See U.S. Congress. House. Committee on Resources. *Northern Mariana Islands Delegate Act.* Report to Accompany H.R. 4067. House Report No. 104-856, 104th Cong., 2nd Sess.

[43] *Congressional Record*, Daily Edition, v. 139, Jan. 5, 1993. p. H5, H6, H52-H54.

[44] U.S. Constitution. Art. I, Sec. 2.

> House and as voters who enjoy the right to full, fair and proportionate representation in the House of Representatives.[45]

They further alleged that the House did not have the authority to unilaterally expand the powers of the Delegates.

The House defendants[46] countered that the House of Representatives was constitutionally empowered to "determine the Rules of its Proceedings."[47] They argued that the Committee of the Whole, like other congressional committees, was an advisory body and was not subject to Article I requirements. They rejected the plaintiffs' contention that the Committee of the Whole effectively controlled action in the House, citing both the preliminary nature of its proceedings and the provision for an automatic re-vote in cases in which Delegate votes were decisive.[48]

In March 1993, Judge Harold H. Greene of the U.S. District Court for the District of Columbia upheld the changes to the House rules. As his opinion made clear, however, he did so only because of the automatic re-vote provision. "If the only action of the House of Representatives had been to grant to the Delegates from the District of Columbia, Guam, Virgin Islands, and American Samoa, and the Resident Commissioner from Puerto Rico the authority to vote in the Committee of the Whole," he wrote, "its action would have been plainly unconstitutional."[49] His opinion further stated:

> [W]hile the action the House took on January 5, 1993 undoubtedly gave the Delegates greater stature and prestige both in Congress and in their home districts, it did not enhance their right to vote on legislation. . . . [B]y virtue of Rule XXIII they [the votes of the Delegates] are meaningless. It follows that the House action had no effect on legislative power, and that it did not violate Article I or any other provision of the Constitution.[50]

In January 1994, the U.S. Court of Appeals for the District of Columbia Circuit upheld the constitutionality of the House rule changes.[51]

---

[45]*Michel v. Anderson*, No. 93-0039 (HHG), Complaint for Declaratory and Injunctive Relief, at 4 (D.D.C. Jan. 7, 1993).

[46]The House defendants were the Clerk of the House and the five Delegates.

[47]U.S. Constitution. Art. I, Sec. 5.

[48]*Michel v. Anderson*, No. 93-0039 (HHG), House Defendants' Memorandum in Support of Motion to Dismiss and in Opposition to Preliminary Injunction (D.D.C. Feb. 2, 1993).

[49]*Michel v. Anderson*, 817 F.Supp. 126, 147 (D.D.C. 1993).

[50]*Michel*, 817 F.Supp. at 147-148.

[51]*Michel v. Anderson*, 14 F.3d 623 (D.C.Cir. 1994).

In January 1995, at the start of the 104th Congress, the Republican-led House amended rule XII to prohibit Delegate voting in the Committee of the Whole.[62]

[62] *Congressional Record*, Daily Edition, v. 141, Jan. 4, 1995. p. H28, H29, H90.

Appendix J

Executive Summary, November 1998 Report of the Standing Committee on Social Issues, Inquiry into Dedicated Seats in the New South Wales Parliament

No. 484

PARLIAMENT OF NEW SOUTH WALES

LEGISLATIVE COUNCIL

STANDING COMMITTEE ON SOCIAL ISSUES

ENHANCING ABORIGINAL POLITICAL REPRESENTATION

INQUIRY INTO
DEDICATED SEATS IN THE NEW SOUTH WALES PARLIAMENT

Ordered to be printed 23 November 1998

Report Number 18

November 1998

EXECUTIVE SUMMARY

There has never been an Aboriginal person elected to the NSW Parliament.

The Committee asserts that a just and equitable society requires the involvement and active participation of all sectors in the decision-making processes which affect their individual lives and communities. The Committee also recognises the special status that Aboriginal people hold in our society as the descendants of the original inhabitants and that special measures are warranted to ensure that they are able to fulfil their democratic expectations and exercise their rights without inhibition.

The Legislative Council directed the Standing Committee on Social Issues to investigate the desirability of enacting legislation to introduce dedicated Aboriginal seats to the NSW Parliament.

In the first phase of the Inquiry, the Committee investigated how certain other jurisdictions provide parliamentary representation for indigenous or ethnic groups. During 1996, two Members of the Committee and a representative of the Secretariat conducted a study tour of Norway, Canada, the United States and New Zealand. In April 1997, the Committee published an Issues Paper which summarised the information gathered during the study tour.

This final Report, *Enhancing Aboriginal Political Representation,* is the result of the Committee's full Inquiry and it includes information from the study tour, submissions, oral evidence, and the community consultations. The Report has two parts: Part One (Chapters 1-3) includes background material relevant to the Committee's Inquiry; Part Two (Chapters 4-10) distills and discusses the feedback received by the Committee about aspects of Aboriginal representation.

During the course of the Inquiry, the Committee took evidence from 19 witnesses on the legal, constitutional and political implications of dedicated Aboriginal seats. Evidence was taken from the key indigenous organisations including representatives from the Aboriginal and Torres Strait Islander Commission (ATSIC) and the NSW Aboriginal Land Council. In addition, Committee Members heard from authorities on the law and the NSW Constitution, a political scientist, an Aboriginal member of local government, the Australian Electoral Commission and representatives from five NSW political parties.

In all, the Committee received 40 submissions. Eight were from representative Aboriginal organisations and other relevant agencies or groups interested in Aboriginal affairs. The majority of the other submissions came from individuals.

In an attempt to facilitate public participation in the Inquiry, the Committee conducted a series of consultation meetings across the State. Approximately 415 people attended these meetings which were held in Redfern, Parramatta, Armidale, Moree, Wagga Wagga, Lismore, Batemans Bay, Coffs Harbour and Dubbo. At each meeting participants were asked to consider the arguments for and against dedicated seats, how dedicated seats could work in practice and other options to improve Aboriginal representation.

This is the first time the Standing Committee on Social Issues has conducted such a consultation process. The consultations enabled Committee Members to hear directly from members of Aboriginal and non-Aboriginal communities and provided an opportunity for indigenous and non-indigenous people to debate the issues of Aboriginal political participation and reconciliation. Many Aboriginal participants expressed a strong desire to play a more active role in the political process in this State.

The Committee found significant support and enthusiasm for the concept of dedicated seats among the Aboriginal and non-Aboriginal people who attended the consultation meetings and from the key representative Aboriginal organisations in NSW. However, there was little agreement on the mechanics of dedicated seats, such as the appropriate number of seats, how candidates should be elected and in which House they should be located. The lack of a clearly defined proposal for dedicated seats made it difficult for some people who participated to declare their support for the concept.

The details of implementing dedicated seats for Aboriginal people are not widely appreciated and the processes for election together with the political implications involve complex issues. Sufficient time could not be made available to fully explain and discuss these issues during the consultative meetings and the Committee recognises that consensus was unlikely to be reached in these circumstances. On many occasions Aboriginal people suggested that they should have been involved in formulating the proposals before consultations were undertaken.

The evidence presented to this Inquiry clearly demonstrates that Aboriginal people are under-represented at all levels of government, notwithstanding the election of several NSW Aboriginal people to local government in recent years and the election of a NSW Aboriginal person to the federal Senate in 1998. The conclusions to this Inquiry seek to provide ways to enhance Aboriginal participation in the political process, both as political representatives and as voters. The Committee believes that a just and equitable society requires the representation of indigenous people in the NSW Parliament.

Appendix K

Dedicated Seats: A Comparative Perspective
Chapter 2 of Issues Paper, Aboriginal Representation in Parliament
Standing Committee on Social Issues,
Parliament of New South Wales (April 1997)

Chapter Two

Dedicated Seats: A Comparative Perspective

2.1 INTRODUCTION

A number of parliamentary systems around the world include some form of dedicated representation for particular cultural groups. In some cases, this occurs in nations where the population is made up of several ethnic groups of considerable size, including:

- Lebanon, where each religious community is allocated a proportion of the 99 seats of the Chamber of Deputies in accord with the proportion of the population that group comprised in the 1932 census. Most of the 26 electoral districts are multi-member, and many have mixed religious populations and representation, with all voters in a voting district voting for all the seats (Crow, 1980:46).

- Fiji, where Fijian Indians slightly outnumber indigenous Fijians, both the 1970 and 1990 Fijian constitutions contained provisions for communal electoral rolls. The 1990 constitution allocates seats in a manner ensuring indigenous Fijian domination of the Parliament (Lawson, 1993).

In other nations, electoral arrangements are designed to ensure minority groups are represented in parliaments. These nations include:

- India, where the constitution provides for Scheduled Castes and Tribes to have proportional representation through reserved seats in the national and state legislatures. The President specifies scheduled castes and tribes for particular states by Presidential Order. However, members of other ethnic groups participate in the elections of these representatives in the reserved constituencies (Vanhanen, 1991:184). There are currently 79 seats in the House of People (Lok Sabha) reserved for scheduled castes and 41 seats reserved for scheduled tribes. If the President is of the opinion that the Anglo-Indian community is not adequately represented, the constitution empowers

the President to appoint up to two members of that community to the House of the People.

- Zimbabwe, where the 1980 constitution established a system whereby 20 reserved seats from a 100 seat House were allocated for whites, who represent only 0.5% of the voting population (Fleras, 1991:84)

- Singapore, which has a unicameral Parliament of 81 members, of whom 60 are elected from 15 Group Representation Constituencies (GRCs). Candidates in a GRC contest the election on a four-member group ticket, and each ticket is required to have at least one candidate belonging to a minority race. The successful ticket wins all four seats in a GRC. Nine GRCs have at least one member from the Malay community, and six have at least one member from the Indian or other minority communities.

It is the arrangements applying to Maori in New Zealand and Indian tribes in the U.S. state of Maine which are the most relevant in considering dedicated seats for Aborigines in New South Wales, since they provide seats for minority indigenous groups in legislatures which have electoral arrangements similar to those in New South Wales. These arrangements are discussed at length in this Chapter. In addition, it is also appropriate to discuss developments in Canada, since the issue has been considered at a both a federal and provincial level.

2.2 THE NEW ZEALAND MODEL

2.2.1 The Maori in New Zealand

Maori constitute between 12% and 13% of the New Zealand population. The Treaty of Waitangi was signed by the Governor and 41 Maori chiefs at Waitangi in 1840, and subsequently by a total of 540 chiefs. The English translation of the Treaty was for some time interpreted as the Maori handing over absolute sovereignty to the British Crown. More recently, the Treaty has been re-interpreted through a combination of statute, the findings and recommendations of the Waitangi Tribunal, and the courts, and the Maori right to *tino rangatiratanga*, or full chiefly authority over lands and possessions, has gained increased recognition (Sharp, 1992).

Unlike the situation in New South Wales, a number of Maori MPs have been elected to general electorates, with many having been successful in constituencies where Maori do not form a large proportion of the population (Royal Commission, 1986:99).

In addition to the representation they have achieved through the traditional political processes, a number of dedicated seats have existed for Maori in the House of Representatives for over 125 years. The first-past-the-post system in New Zealand provided for Maori representation by reserving four seats for those Maori who registered on a separate Maori electoral roll. These seats covered the entire country, overlapping non-Maori constituencies, and were known as Eastern Maori, Northern Maori, Southern Maori and Western Maori. With the introduction of the Mixed Member Proportional (MMP) electoral system in 1996, a fifth seat, known as Central Maori, has been created.

At present, there are a total of 15 Maori members of the New Zealand parliament in a 120 seat House. Two votes are now cast by electors - the first for a local member in a General or Maori constituency seat, and the second for the party of the voters' choice for the party-list seats. The total number of seats a party has in parliament is proportional to the percentage of votes the party wins in this second vote.

2.2.2 History of Maori Seats

In 1852, legislation was passed granting the franchise to all males over the age of twenty-one years who owned or leased land of a specified minimum value. While this included Maori males, most were effectively excluded from the franchise since most Maori land was communally owned and unregistered.

It was believed the individualisation of land titles through the Native Land Court would effectively franchise Maori (O'Connor, 1991:175). It later became apparent that this process was not proceeding at a rate sufficient to satisfy the political aspirations of Maori. Separate representation already existed for special interest groups who did not meet the property qualifications in the form of Goldfields and Pensioner Settlements electorates. In 1867, the Maori Representation Act was passed. The preamble recognised that Maori had been unable to be registered to vote, and that temporary provisions should be made to protect their interests.

Four Maori seats were created, with an intended life span of only five years. These arrangements were extended for a further period in 1872, and made permanent in 1876. In 1871, the Member for Eastern Maori successfully passed a motion proposing Maori representation in the Legislative Council, and thereafter there were usually two appointed Maori representatives in the Council until its abolition in 1950 (Sorrenson, 1986:B23-24).

When the seats were introduced, those with half or more Maori ancestry were required to register on the Maori roll (unless they were property owners), and those with less than half on the "European" roll. From 1896 (after female suffrage had been introduced and the property qualification abolished), those with half-Maori and half-European ancestry could choose to register on either roll. In 1975, references to fractions of descent were removed. The Electoral Act now provides that a Maori, or a descendant of a Maori, is able to register as an elector of either a Maori electoral district or a general electoral district. Self-identification, rather than degree of descent, is therefore the main criterion of Maori identity.

The number of Maori seats had been fixed at four since 1867, regardless of the size of the Maori population, or, since enrolment on the Maori electoral roll was made optional, regardless of the number of Maori opting for the Maori roll. Later bills and petitions supporting increases in Maori representation were unsuccessful (Sorrenson, 1986:B-24).

In 1986, the recommendations of the Royal Commission on Electoral Reform included the abolition of the four Maori seats. It was expected that the Mixed Member Proportional (MMP) electoral system would provide an adequate means for representing minorities, especially Maori voters.

Of the submissions received by the parliamentary Committee examining the draft electoral law bill, an overwhelming majority supported the retention of Maori seats until Maori themselves decided whether they should be abolished or changed.

A further process of consultation was instituted, and Maori were successful in arguing against the loss of the guaranteed Maori seats. The report of the Electoral Law Committee noted the significant amount of concern regarding Maori representation and more fundamental constitutional issues concerning the status of Maori and the implications of the Treaty of Waitangi expressed in submissions (Electoral Law Committee, 1993:6).

It was also recommended that the number of Maori seats should be based on the electoral population. With the introduction of MMP, the number of Maori seats is adjusted in proportion to the same quota as general seats.

From the 1930's until the election in 1993, the four Maori seats had been safe for Labour, in alliance with the political-religious Ratana movement. All five Maori seats are now held by New Zealand First.

2.2.3 Administration of the Maori Seats

- Voter Registration

The choice between enrolling on the Maori roll or General roll is exercised at the time of registering to vote. The enrolment form questions all enrollers as to whether they have Maori ancestry. Those with such ancestry are then asked to nominate the roll on which they wish to be placed (see Appendix I). No information on the benefits or disadvantages of each option is provided.

While registering to vote has been mandatory since 1956, legal sanctions for non-registration are not pursued. There is evidence that eligible Maoris are over-represented among those not enrolled to vote, and may number over 35% of the total (Waitangi Tribunal, 1994:25).

In a survey of 1,411 respondents not registered on any electoral roll, 44% indicated they couldn't see the point of enrolling, and, of that group, 52% indicated they had not enrolled because enrolling made no difference for Maori, or that Pakeha controlled the system.

Cultural differences may also be a factor discouraging registration, as Maori prefer to deal with issues in a face-to-face or hands-up manner. During consultations by the Electoral Reform Project Steering Committee in 1993, there were also suggestions that Maori had difficulty filling out electoral forms, that advertising campaigns were misguided and face-to-face consultation and assistance was needed (Electoral Reform Project Steering Committee, 1993:29).

Voting at elections in New Zealand is not compulsory. Traditionally, non-voting has been particularly high among Maori and Pacific Islanders, with lower voter turn-out consistently recorded in the Maori seats when compared to the general seats. Voter

turn-out has also been low for those Maori who choose to register on the general roll instead of the Maori roll. This may largely be accounted for by the disproportionate number of Maori among the socially marginalised groups, such as low income earners and home renters (Mulgan, 1994:252).

The Maori Electoral Option

A Maori voter is only able to transfer from one type of electoral district to another during a two-month period shortly after each five-yearly population census, known as the Maori Electoral Option. A Maori option card gets sent to every person who indicated they were of Maori descent when they registered to vote, allowing them to elect to change from one roll to the other. If the card is not returned, the voter remains on the roll on which they were last registered.

A special Maori Option was held in conjunction with the reform of the electoral system (Appendix II). Maori electors had two months from 15 February 1994 to choose whether to register on the Maori electoral roll or the general roll for the first MMP election. At the conclusion of that Electoral Option, the number enrolled on the Maori roll had increased from 104,414 to 136,708. This increase resulted in the creation of a fifth Maori seat. However, 127,826 people who said they were of Maori descent remain enrolled on the general roll.

A number of Maori groups disputed the outcome of the 1994 Maori Electoral Option. The Waitangi Tribunal found that government funding to inform Maori of their democratic entitlements and responsibilities was inadequate. However, the Court of Appeal held that reasonable (if imperfect) steps had been taken to publicise and explain the Electoral Option. Parliament's Electoral Law Committee (1996) has since recommended that the Option period be extended to four months; that a publicity campaign be conducted concurrently with the Option; and that funding be sufficient, with the Committee consulted in that regard for future exercises of the Option.

Maori voters choosing to register on the general roll may support the Maori seats, but believe their vote counts more in what may be a marginal general seat, or that they can be better served by the local M.P. who may have more time to devote to local issues. Since the Maori seats can no longer be regarded as safe for any party given the outcome of the 1996 election, this may encourage voters to move back to the Maori roll.

Electorates and Boundaries

With the introduction of MMP, the number of South Island general constituencies has been set at 16, allowing for the calculation of an electoral quota based on that island's population. There are currently 44 North Island general constituency seats, five Maori seats, and 55 list seats.

The Government Statistician determines the number of Maori seats by:

- calculating the ratio of the number of people registered on all the Maori electoral rolls compared to the total number of people on all the electoral rolls, General and Maori, who said they were of Maori descent when they last enrolled; and

- applying that proportion to the total number of people (adults and children) who said they were of Maori descent at the most recent population census.

The resulting figure is the Maori electoral population, which is then divided by the South Island electoral quota to give the number of Maori electorates.

Many Maori argue that the number of Maori seats should simply be based on data on the Maori population obtained from each five-yearly census, in the same way that electoral populations in general electorates are calculated. Some also believe enrolment should occur at the time of the census.

After the number of Maori seats is established, a Maori Electoral Quota is then calculated to determine the electoral population which should be in each electorate. The Representation Commission is then responsible for dividing New Zealand into the ascertained number of electoral districts. When the Commission is determining Maori electoral districts, the seven member Commission is supplemented by three further members: the Chief Executive of Te Puni Kokiri (the Ministry of Maori Development), and two Maoris appointed by the Governor-General on the nomination of the House, one to represent the Government and one to represent the Opposition. The Representation Commission is required to take into account community of interest among members of Maori tribes in setting electorate boundaries.

- Polling Day Arrangements

In New Zealand, not all polling places are able to issue Ordinary Maori votes to people enrolled on the Maori roll. At those polling booths that do have provisions for Maori voters, tables and ballot boxes for this purpose are set aside from ordinary voting tables. If a voter is voting at a polling place within their electorate that does not have Maori Ordinary voting facilities, a "Tangata Whenua" vote is made, with polling officials completing relevant details on a declaration before issuing voting papers. If voters are outside their electorate, a "special" vote must be made, in which case the declaration form to be completed by the voter is the same as that applying to voters on the general roll voting outside their electorate.

2.2.4 An Evaluation of the Maori seats

Some commentators question the extent to which Maori interests have been protected by the provision of dedicated seats within the electoral system. Historically, the four seats did not provide equal representation on a population basis (O'Connor, 1991:176). Some commentators therefore conclude the origins of the Maori seats are "less than reputable", preventing anything more than a marginal effect on the composition of the House of Representatives (Mulgan, 1989a:137).

The Maori voice was often ineffective in matters of vital importance to them, such as Native Land Acts which facilitated settler purchase and the loss of Maori land (Sorrenson, 1986, B-26).

While there have been a number of notable achievements by Maori Ministers (see Sorrenson, 1986:B-xx-36), the report of the Royal Commission on the Electoral System concluded that

> *even in the few brief periods when one of their number has held the portfolio of Maori Affairs, the policies and legislative measures which have been adopted by successive Parliaments have rarely given full effect to Maori concerns* (Royal Commission, 1986:91).

The Royal Commission also spoke of separate representation reinforcing

> *the political dependency of the Maori people and their exposure to non-Maori control over their destiny and future* (Royal Commission, 1986:90-91).

Would Maori interests have been better served without separate representation? It is clear that the Maori seats have ensured a Maori voice is heard. Maori members representing general electorates have to be sensitive to the interests of the Pakeha majority and have not been able to devote themselves wholeheartedly to specifically Maori interests in the same way as Members of Parliament for the Maori seats can. Pakeha Members representing general seats have no formal links with Maori voters living in their electorates, since many Maori voters are on a separate electoral roll (Mulgan, 1989a:137).

Many Maori believe this is changing, and no Member can now afford to ignore Maori interests. The current interpretation of the Treaty of Waitangi has resulted in significant inroads in policy terms, and is increasingly being accepted by all political parties.

The Royal Commission found it difficult to arrive at a precise assessment of the extent of the Maori MPs' influence on policy. The Commission did, however, note that almost all candidates for election in Maori constituencies understand the problems of their people in ways that non-Maori may not, and are sympathetic advocates in the political arena and in representing Maori in dealings with Government departments and other official organisations affecting their interests (Royal Commission, 1986:89).

There are, however, a number of weaknesses often identified in the current arrangements applying to the Maori seats, including:

- the small number of Maori M.P.s, making it difficult to scrutinise all legislation, and resulting in issues and policies disadvantageous to Maori being passed through Parliament (Dibley, 1993:77);

- difficulties for members in Maori seats in servicing their constituents due to the large size of their electorates. For example, there are 41 general electorates within the boundaries of the seat of Southern Maori. While Members in Maori electorates receive a slightly higher Electorate Allowance, they do not regard this as sufficient to compensate for the extra travelling involved;

- the constraints of party allegiance, making it difficult to speak out strongly on Maori issues for fear of alienating the Pakeha supporters of their party; and

- the administration of the Maori Electoral Option and the Maori Roll, which pose substantial difficulties.

Despite these difficulties, the final submission from the Electoral Reform Project Steering Committee to the Select Committee on Electoral Reform concluded:

> *There is virtual unanimity in Maoridom regarding the need to retain the present four Maori seats* (Electoral Reform Project Steering Committee, 1993:22).

The Electoral Reform Project Steering Committee, comprising representatives of Maori organisations, concluded that guaranteed Maori representation was seen as linked to Maori rights, identity, and status (Electoral Reform Project Steering Committee, 1993:38). The Maori M.Ps have also come to be regarded as people of importance, and bring authority or "mana" to a Maori occasion (Dibley, 1993:64). The Royal Commission found Maori had made separate representation something of their own: "It had been indigenised" (Sorrenson, 1986:B-57).

However, neglect of Treaty of Waitangi guarantees has meant that the Maori Members have been burdened with the responsibility of protecting constitutional rights, with few resources and "the weight of the system against them" (Royal Commission, 1986:86). The report of the Royal Commission listed a number of ways in which Maori rights could be better addressed, including the devolution of some of the Parliament's own functions and finance to local, regional or national Maori organisations; and greater legal recognition of the Treaty of Waitangi.

2.3 UNITED STATES

2.3.1 Native Americans in the United States

In the United States, the self-identified Aboriginal population is close to 2 million people, who comprise less than 1% of the total population. There are 516 federally recognised Indian tribes. There are 287 reservations encompassing 22.68 million hectares of land held in trust, and almost all land settlements have been concluded.

From 1777 to 1871, United States relations with individual Indian nations were conducted through treaty negotiations, in contrast to the experience of the Aboriginal people of Australia. These "contracts among nations" created unique sets of rights

benefiting each of the treaty-making tribes. Those rights, like any other treaty obligation, represent "the supreme law of the land", and protection of those rights is a critical part of the federal Indian trust relationship.

2.3.2 Representation in U.S. Legislatures

- The Insular Territories and Congress

In the United States, the dependencies of Guam, Puerto Rico, Virgin Islands and American Samoa are guaranteed a representative to Congress. These elected delegates, like the delegate from the District of Columbia, have floor privileges and votes on committees, but not votes on the floor of the House.

These delegates were entitled to vote in the Committee of the Whole in the last Congress, but this arrangement was discontinued by the Republicans. There are difficulties in formalising voting power for these delegates as there are concerns regarding the skewing of the current political balance, as most are Democrat strongholds.

- Native American Representation in Congress

In 1975, the American Indian Policy Review Commission, a congressionally sponsored research project, considered the election of an Indian Congressional delegate, but made no recommendation on the issue (National Indian Policy Centre, 1993:23).

During the last Congress, the delegate from American Samoa introduced a bill to establish a dedicated Congressional seat for a Native American delegate, but the bill was never debated.

There are currently two Native American Senators. While there have been representatives in the past, and there has been an Indian Vice-President, there are currently no Native American members of the House of Representatives.

Navajo comprise more than 50% of constituents in some electoral districts in Arizona yet they have no representative at a federal level. Electoral boundaries transect reservations, making it more difficult to elect representatives. All eight tribes in one

Congressional district in Arizona have met to discuss how they can have a greater impact in elections. Some tribal elections coincide with national elections, which encourages participation. Voter turn-out for general elections in other tribes is low.

The lack of Congressional representation is identified as a crucial issue by some American Indians. While the Committee system has provided a means of input, the current power brokers are seen as hostile to Indian interests. Non-native members of Congress must appeal to the bulk of their constituents and Indian lobbyists are vulnerable to being "sold out" in negotiations.

The issue of parliamentary representation has not been seriously considered by the peak representative group, the National Congress of American Indians. Many consider that any proposal for introducing parliamentary representation would give governments an excuse for not dealing with tribal leaders, and be contrary to tribal sovereignty. At a federal level, it would be difficult to select a token number of Congressional representatives to speak for all tribes and Alaskan villages.

- State Legislatures

Representation in state legislatures is also contentious because of the history of Indian-state relations. While there is debate regarding participation in state governments, many recognise tribal members are citizens of both states and tribal nations, and need to have their voices heard. In Arizona, for example, Navajo have elected two state House of Representative members and one Senator. Indian nations actively approach these state representatives for support.

In the state of Washington, a bill was introduced in 1991 to provide for Indian delegates, in recognition of the "unique government-to-government relationship" between tribes and the state and the "important historical and cultural perspective" they would bring to the legislature. The bill provided for two non-voting delegates in the House of Representatives, and two in the Senate. The means of election were to be left to the tribes, and the bill provided that such elections could, for example, be limited to election by the chairs of the tribal councils. The bill was never enacted.

However, in one state, Maine, dedicated seats are provided for representatives of two Indian nations.

2.3.3 Representation in Maine

The state of Maine provides legislative representation by way of a representative from the two largest tribes, the Penobscot and the Passamaquoddy, but the representatives have no voting rights. Maine also has Mi'kmaq and Maliseet tribes, who do not have parliamentary representation. A majority of members of the recent Task Force on Tribal-State Relations (1997:6) recommended that the Maine Legislature also offer and fund the opportunity for these tribes to have a tribal representative.

While Indian tribes in Maine have been sending representatives to the state legislature since early last century (1823 for the Penobscot and 1842 for the Passamaquoddy), legislation formalizing the election of Indian representatives was enacted for the Penobscot tribe in 1866, and for the Passamaquoddy in 1927. This arrangement was discontinued in 1941, when legislation ousted the elected representatives from the chamber, and they became little more than paid lobbyists. Seats in the House and speaking privileges were re-established in 1975.

The state constitution provides for 151 members, so Indian members are regarded as "non-constitutional" members. They are seated by House Rules, rather than by statute. These Indian delegates may not vote on legislation, but enjoy all other privileges of a member of the state legislature. However, they do not receive the same salary as other members, but are paid at a daily rate for attending the House. They also receive the same allowances for meals, housing, constituent services and travel expenses as other members of both houses.

The Joint Rules of the Maine Legislature have recently been amended to allow Indian representatives to sponsor bills of concern to their tribes and for land claims. The rule limits sponsorship to Indian-specific legislation, so other sponsors will continue to be sought if there is any doubt in this regard. In addition, Members may now serve on Committees as non-voting members. The Passamaquoddy member serves on the Judiciary Committee, and the Penobscot representative on the Natural Resources Committee.

There is no restriction on the issues the tribal representatives can speak about. Obtaining a vote on the floor of the House is the goal of the tribal members, and would require constitutional amendment.

The tribal representatives are currently non-partisan. The incumbent Passamaquoddy representative has an open invitation to attend the caucus of both parties, which was not the case in the past.

Other Indian tribes and nations in the U.S. feel that such participation in state legislatures may compromise their sovereignty. Since parliamentary representation is not new to the tribes in Maine, and they have played a considerable role in the development of the area since European settlement, many view such participation as an expression of their sovereignty.

▪ Administration of the Tribal Seats

Tribal elections have been imposed by the state since 1852. The Passamaquoddy parliamentary representative is elected during elections for the reserves' tribal Council, Governor and Lieutenant Governor. Representation alternates between the two Passamaquoddy reservations, and members are elected to serve for two parliamentary terms (four years). However, a referendum is proposed to allow representatives to run as incumbent members for a second term. The Penobscot have one reserve, and the parliamentary representative can stand for a number of terms.

Ballot booths are provided on reserve, and off-reserve absentee voting facilities are available. The tribes manage their own electoral rolls and check qualifications for registration as a tribal member.

▪ An Evaluation of the Tribal Seats

Even before the recent change to the House Rules allowing Indian members to sponsor legislation, the members had been successful in lobbying other members to sponsor their bills, and have proven powerful on the floor of the House. While the Indian members are not fully empowered due to their lack of voting rights, their ability to be on Committees enables them to have a prominent role in public hearings and in making public statements. The members have had a "moral authority" guaranteeing them a seat in decision-making forums, and encouraging government accountability. They are able to use their positions as an entree to other decision-makers of the state, depending on the skills of the individuals concerned.

Recent achievements have included ensuring the Indian Tribal State Commission is reviewed. However, a bill providing for special provisions in the review of projects by the Board of Environmental Protection if they affected reservations was defeated.

The Penobscot representative considers it very difficult to sit in the House and contribute to debates and not be able to vote, and believes non-voting is a way of keeping the tribal representatives "in their place", making representation a half-way measure. While tribal representatives may dominate discussion in Committees before Members' votes are cast, they are unable to "horse-trade" on issues due to the lack of a vote. The two tribal representatives collaborate on issues affecting both tribes, and assist in lobbying for votes on issues affecting one tribe.

There are mixed feelings about representation, with some tribal members not wanting to be seen as part of the state system, and others taking a pragmatic approach, recognising federal and state assistance is required to maintain their community. Without parliamentary representation, more unfavourable legislation may pass, and the tribes would be forced to operate in a more litigious mode, with associated costs to the community.

Since all state members are part-time, the House sits for only part of the year, and members have no staff or offices, the main role for the tribal representatives is one of leadership. However, they are becoming increasingly effective and are learning to use their positions in a more assertive and activist way.

The tribal representatives are regarded by the people as more important than their other elected representatives, whom they are reluctant to approach. While the Penobscot number approximately 2,000, they are widely spread. The non-native local member represents approximately 7,000 people, of whom 600-700 would be Penobscot. When decisions between Indian and non-Indian interests must be made (for example, on environmental vs industry issues), they will support the majority of their (non-Indian) constituents.

There have been many discussions on incorporating tribal culture into the parliamentary process, such as through flags or the morning prayer, which has been delivered by tribal spiritual people. It is widely acknowledged that the presence of tribal representatives provides an opportunity to educate other members and the community on Indian issues.

2.4 CANADA

2.4.1 Aboriginal Peoples in Canada

In Canada, 1993 figures suggest the self-identified aboriginal population was 1,201,216 representing 4% of the total population and including status Indians as defined by the Indian Act, non-status Indians, Inuit and Metis (mixed Indian/European people tracing their ancestry to the Red River area of Manitoba). There are 605 federally-recognised Indian bands.

2.4.2 Representation in Canadian Legislatures

- **Federal Parliament**

There have been a number of aboriginal representatives in the Canadian Parliament, including three representatives from constituencies with a non-aboriginal majority. There are currently three aboriginal members of the House. However, to achieve representation in proportion to their population, approximately 12 aboriginal members are required.

Several political parties have attempted to encourage aboriginal political participation, The Liberal Party, for example, has an Aboriginal Peoples' Commission, which supports mechanisms ensuring greater representation in the parliament.

The issue of increasing aboriginal representation has received considerable attention at the federal level in Canada. The Congress of Aboriginal Peoples was one of the first organisations to propose dedicated seats for aboriginal peoples in the early 1980s. The Congress represents non-status Indians and Metis, and following the re-instatement of 110,000 as status Indians, is also representing off-reserve Indians.

In 1990, Senator Len Marchand (1990), a member of the Okanagan Indian Band and former Minister in the Trudeau government, produced a paper entitled *Aboriginal Electoral Reform - A Discussion Paper*. During subsequent hearings of the Royal Commission on Electoral Reform and Party Financing, it became apparent that the issue of aboriginal representation required further study. The Royal Commission then established a working group known as the Committee for Aboriginal Electoral Reform, comprising current and former indigenous members of Parliament, and chaired by Senator Marchand. The Committee was asked to consult with the

aboriginal community concerning Aboriginal Electoral Districts to determine whether the Royal Commission should make a recommendation on the subject. After consultations, the Committee issued a report, *The Path to Electoral Equality* (Committee for Aboriginal Electoral Reform, 1991) to the Commission.

This report recommended a guaranteed process for aboriginal representation in the House of Commons, rather than guaranteeing seats. The number of Aboriginal Electoral Districts in each province was to depend on the number of people registering on a separate roll, divided by the province's electoral quotient. This arrangement could be achieved with the consent of both Houses, and therefore was in line with the decision not to make recommendations that would require constitutional change.

The Royal Commission on Electoral Reform and Party Financing (1992) subsequently recommended that up to eight Aboriginal Electoral Districts be created in the House of Commons. The House Committee on Electoral Reform implemented a number of the Royal Commission's initiatives, but ignored others, including aboriginal representation.

Also in 1992, the Charlottetown Accord proposed guaranteed representation in the Senate, with aboriginal seats in addition to provincial and territorial seats. The possibility of a double majority in relation to matters materially affecting Aboriginal people was also raised, with details to be discussed further by governments and representatives of aboriginal peoples. The provisions for constitutional reform in the Charlottetown Accord were rejected in the referendum of that year (Russell, 1993).

The Royal Commission on Aboriginal Peoples, established in 1991, also considered dedicated seats. During consultations, the issue of parliamentary representation was raised by some national organisations, but not at the community level. The Commission's final report, released in 1996, does not support special representation. It was suggested that special representation creates a small, marginalised group with little real clout. While they can speak on issues, there were concerns regarding the image of, and effective, tokenism in the House.

The Royal Commission instead recommended the creation of an Aboriginal Parliament, discussed further in Chapter Three.

The Assembly of First Nations, the peak national representative body for status Indians, does not support aboriginal representation, particularly at the provincial level, as they believe First Nations should deal directly with the Crown as equal partners.

Provincial Representation

The level of aboriginal representation in governments has generally been lower at the provincial level, with the exception of northern constituencies in Saskatchewan, and more recently in Manitoba and Alberta. Quebec has created a new electoral district for an area with a considerable Inuit population. In Saskatchewan, one northern town is to be removed from a riding to create a gerrymander for the aboriginal population.

Dedicated seats have been considered in a number of provinces. In 1991, the Premier of New Brunswick requested the Representation and Electoral Boundaries Commission to inquire into aboriginal representation. The Commission's 1992 report, Towards a New Electoral Map for New Brunswick, was referred to the Select Committee on Representation and Electoral Boundaries, who recommended the Commission undertake no further consultation until requested by the aboriginal community. No such request has been made and interest in the issue appears to have waned (Niemezak, 1994:17-18).

In early 1994, the Native Affairs Minister of Quebec indicated support for amendments to the electoral act to provide up to two designated aboriginal seats (Niemezak, 1994:18). This proposal has not been further developed.

Nova Scotia

Proposals for dedicated seats have advanced somewhat further in the province of Nova Scotia. There are 13 bands of Mi'kmaq Indians in Nova Scotia. Traditionally, treaties in the eastern provinces were for peace and friendship rather than lands, but some lands have been set aside by the federal government.

In 1991, the then Premier of Nova Scotia instituted a Select Committee on Establishing an Electoral Boundaries Commission. During the Committee deliberations, the Supreme Court of Canada, in ruling on a case regarding an electoral

redistribution in Saskatchewan, rejected a strict population equality requirement for representation. The Court found that provincial legislatures were bound to ensure "effective representation" through relative, rather than absolute, parity of voting power. While this rejects the US conception of absolute equality of voting power, the court left the concept of relative parity largely undefined.

The Select Committee recommended the establishment of a Commission, and indicated the current 52 seats should be retained, but minority representation for the black and Acadian communities should be considered, together with the option of adding an additional Mi'kmaq seat.

The Commission reported in 1992, and developed an entitlement system for justifying the move to effective representation based on relative parity of voting power. Five smaller "protective constituencies" were devised to encourage minority representation, one for the black community, three for Acadian communities and one for isolated northern communities. While this did not guarantee seats for the minority groups, as they only constituted 30-35% of the population after redistribution, it did make it easier for representatives to be elected.

In considering an additional Mi'kmaq seat, the Commission consulted widely. Two days of talks were held with representatives of the bands and Mi'kmaq organisations. The majority of those attending the conference were in favour of some form of Mi'kmaq representation in the legislature. Those opposing representation believed involvement with the government may compromise the sovereignty of the Mi'kmaq, and the primary relationship should be with the federal government. Self-determination and treaty recognition were seen as the first priorities, with exchange of representatives between the two governments a subsequent goal. Others were critical of the ability of the party system to meet the needs of the Mi'kmaq people, citing the experience of Indian members in provincial and Canadian legislatures, and some believed one representative would be inadequate. Many supported the concept of a treaty delegate, with non-voting rights, in the legislature. The conference agreed that further discussion at the community level was required, with the Grand Council given an opportunity to consider the matter.

The Commission recommended a guaranteed aboriginal seat not be created at that time, at the request of the Mi'kmaq community, but that the House of Assembly adopt a procedure for further consultation.

The original bill dealing with the recommendations of the Commission did not include any such reference, but as a result of subsequent representations and hearings, the bill was amended at the third reading stage and the final legislation did contain a recognition of the goal of an aboriginal seat. Section 6 of the House of Assembly Act states:

> (1) The House hereby declares its intention to include as an additional member a person who represents the Mi'kmaq people, such member to be chosen and to sit in a manner and upon terms agreed to and approved by representatives of the Mi'kmaq people.
>
> (2) Until the additional member referred to in subsection (1) is included, the Premier, the Leader of the Official Opposition and the leader of a recognised party shall meet at least annually with representatives of the Mi'kmaq people concerning the nature of the Mi'kmaq representation in accordance with the wishes of the Mi'kmaq people, and the Premier shall report annually to the House on the status of the consultations.

Formal meetings have not been held every year. Following the meetings that have been held, the Premier's reports have simply stated a meeting occurred, various views were expressed and no consensus was reached. While organisations representing band chiefs have not pursued the issue, the Native Council (representing off-reserve Indians) has indicated its ongoing support. It appears the issue is not moving ahead because of commitment to, and rapid progress in, areas of self-government.

2.5 CONCLUSION

This Chapter has outlined a number of international jurisdictions where dedicated seats exist or have been considered for indigenous peoples. In New Zealand, the existence of voting Maori members is widely accepted as a means of ensuring Maori interests are represented in the parliament. In the United States, non-voting tribal delegates in the Maine legislature are also considered to offer some opportunity to protect tribal interests. In other jurisdictions, however, guaranteed parliamentary representation, particularly in state jurisdictions, is seen as contrary to tribal sovereignty. In other nations, such as Canada, the focus appears to have moved away from debate over dedicated seats to the promotion of and struggle for self-government initiatives, discussed further in the next Chapter.

The Committee recognises that direct comparisons cannot be made between indigenous peoples, or governmental systems, of various nations. What is appropriate for one group in one nation may prove inappropriate elsewhere. However, the Committee welcomes submissions which consider whether elements of the electoral arrangements discussed in this Chapter would be appropriate in a New South Wales context, and what benefits may flow to the Aboriginal community in this state if they were implemented.

Appendix L

Legislative Record -- House, January 21 and 22, 1975
Debate on Reseating the Tribal Representatives

HOUSE

Tuesday January 21, 975

The House met according to adjournment and was called to order by the Speaker.

Prayer by the Rev. D. J. and Irving Stevens of Bangor.

The members stood at attention during the playing of the National Anthem by Mark Fenderson of Augusta.

The journal of the previous session was read and approved.

Papers from the Senate

Bills from the Senate requiring reference were disposed of in concurrence.

Petitions, Bills and Resolves Requiring Reference

The following Bills, Resolve and Resolution were received and, upon recommendation of the Committee on Reference of Bills, were referred to the following Committees:

Business Legislation

Bill "An Act to Clarify the Exemption of Hairdressers Holding Booth Licenses from Eligibility for Unemployment Compensation" (H. P. 202) (Presented by Mrs. Boudreau of Portland)

Bill "An Act Relating to Action or Claim of Insured Against Insurer under a Policy of Insurance" (H. P. 207) (Presented by Mr. Smith of Dover-Foxcroft)

(Ordered Printed)

Sent up for concurrence.

Tabled and Assigned

Bill "An Act to Repeal Milk Control Prices at the Retail Level" (H. P. 208) (Presented by Mr. LaPointe of Portland) (Cosponsors: Mr. Berry of Buxton, Mr. Hewes of Cape Elizabeth and Mr. Kelleher of Bangor)

The Committee on Reference of Bills suggested the Committee on Business Legislation.

The SPEAKER: The Chair recognizes the gentleman from Easton, Mr. Mahany.

Mr. MAHANY: Mr. Speaker, I now move that this bill be referred to the Committee on Agriculture, ordered printed and sent up for concurrence.

Thereupon, on motion of Mrs. Clark of Freeport, tabled pending the motion of Mr. Mahany of Easton that the Bill be referred to the Committee on Agriculture and tomorrow assigned.

Education

Bill "An Act to Incorporate the Town of Benedicta School District" (H. P. 200) (Presented by Mr. Walker of Island Falls)

(Ordered Printed)

Sent up for concurrence.

Judiciary

Bill "An Act Relating to Subsidized Adoptions" (H. P. 203) (Presented by Mrs. Boudreau of Portland)

(Ordered Printed)

Sent up for concurrence.

Legal Affairs

Resolve, to Reimburse Virginia A. Brann of Windsor for Motor Vehicle Damage Due to State Construction (H. P. 196) (Presented by Mr. Hewes of Cape Elizabeth)

Bill "An Act Relating to Vehicle Operators Wearing a Radio Headset" (H. P. 204) (Presented by Mr. Farnham of Hampden)

(Ordered Printed)

Sent up for concurrence.

Local and County Government

Bill "An Act to Increase Salary of Clerk of Courts of Washington County" (H. P. 199) (Presented by Mrs. Kelley of Machias)

Bill "An Act to Set Off Burying Island in Taunton Bay to the Town of Franklin" (H. P. 209) (Presented by Mr. Conners of Franklin)

(Ordered Printed)

Sent up for concurrence.

State Government

Resolution, Proposing an Amendment to the Constitution to Provide for Annual Sessions of the Legislature. (H. P. 197) (Presented by Mr. Birt of East Millinocket)

Bill "An Act to Authorize the Board of Cosmetology to Employ a Part-time Executive Secretary" (H. P. 201) (Presented by Mrs. Boudreau of Portland)

(Ordered Printed)

Sent up for concurrence.

Taxation

Bill "An Act Relating to Property Tax Exemption of Institutions and Organizations" (H. P. 198) (Presented by Mrs. Berry of Madison)

Bill "An Act Exempting Trucks Purchased by Nonresidents from Sales Tax" (H. P. 205) (Presented by Mr. Finemore of Bridgewater)

(Ordered Printed)

Sent up for concurrence.

Veterans and Retirement

Bill "An Act Relating to Retirement Benefits for Spouses of Deceased State Wardens" (H. P. 206) (Presented by Mr. Hobbins of Saco)

(Ordered Printed)

Sent up for concurrence.

Orders

Mrs. Kany of Waterville presented the following Order and moved its passage:

ORDERED, that the House Rules be amended by adding a new House Rule No. 55 to read:

55. The member of the Penobscot Indian Tribe and the member of the Passamaquoddy Indian Tribe elected to represent their tribes at the biennial session of the Legislature shall be granted seats on the floor of the House of Representatives; be granted, by consent of the Speaker, the privilege of speaking on pending legislation; and be granted such other rights and privileges as may from time to time be voted by the House of Representatives.

The Order was read.

On motion of Mrs. Kany of Waterville, pursuant to House Rule No. 54, tabled one legislative day pending passage.

Mr. Talbot of Portland was granted unanimous consent to address the House.

Mr. TALBOT: Mr. Speaker, Ladies and Gentlemen of the House: As Chairman of the Committee on Human Resources, I am very concerned and very disturbed with what I have been reading and hearing in the news media, and the actions which have been taking place here in Augusta over the past several days concerning the hiring and firing of women, the entire area of positive and affirmative action concerned with minorities, and especially the frame in which the Governor wants equal representation in state government for all by the year 2000.

Mr. Speaker, I don't want to get into personalities and I don't want to criticize the Governor for his actions for which he has a right and for which I am sure he has a reason to back up that right. But, Mr. Speaker, it would seem from my point of view that someone is talking from both sides of their mouth. From one side we hear that the Governor wants good, qualified women to serve in state government. From the other side, we hear he is firing, or let escape from his grasp, two highly qualified women, Mrs. Roberta Weil and Mrs. Shirley Elias Ezzy, and now the entire Committee on the Status of Women.

Mr. Speaker, I am concerned about employment everywhere in Maine from Fort Kent to Kittery, men as well as women, but I, like many of you, stood and fought on this floor for passage of the Equal Rights Amendment and hopefully to bring women into the mainstream of American life. I have always been an advocate of minority rights and bringing them into the mainstream of American life also.

But, Mr. Speaker, the year 2000 is totally unrealistic, not in keeping with the progressiveness with which we as natives and as a state should be and must be going, and above all, it can only set us further back in our cycle of progress.

The Governor asked us to wait another 25 years — 25 years on top of the 10 years which we are behind already. My children and yours will have grown up and be out into the working world with children of their own, but still a situation in life which we find ourselves in today — outside the mainstream.

The people of this State look to us to lead, and lead we must, and now, with the expertise with which both women and minorities possess here in our State, expertise in which to help and assist Governor Longley in any way he sees possible, and who are willing to give of that expertise in order to get the job done but who haven't been asked yet.

I am concerned and I am disturbed, along with myself, about the people. Women and minorities of this State deserve an affirmative action plan and a positive approach to this delicate but very vital situation.

Consent Calendar First Day

(H. P. 29) (L. D. 37) Resolve to Reimburse Mrs. Betty Mills of Portland for Damage to Property caused by Escapees from the Boys Training Center. Committee on Legal Affairs reporting "Ought to Pass" as amended by Committee Amendment "A" (H-4)

(H. P. 65) (L. D. 77) Resolve to Reimburse William Rich of Buckfield for loss of Bee Hives by Bear. Committee on Legal Affairs reporting "Ought to Pass" as amended by Committee Amendment "A" (H-5).

Consent Calendar Second Day

(H. P. 12) (L. D. 17) Bill "An Act Relating to the Taking of Alewives in the Town of Whiting, Washington County."

No objection having been noted, was passed to be engrossed and sent to the Senate.

Orders of the Day

The Chair laid before the House the first tabled and today assigned matter:

Bill "An Act Relating to Issuance of Motor Vehicle Registrations by Municipal Tax Officers" (H. P. 152)

Order that our congratulations and acknowledgement be extended; and further

Order and direct, while duly assembled in session at the Capitol in Augusta, under the Constitution and Laws of the State of Maine, that this official expression of pride be sent forthwith on behalf of the Legislature and the people of the State of Maine. (H. P. 272)

The Joint Order was read and passed and sent up for concurrence.

House Reports of Committees
Ought to Pass in New Draft
New Draft Printed

Mr. Pelosi of Portland from Committee on State Government on Bill "An Act Designating a Legal State Holiday in Remembrance of Martin Luther King, Jr." (H. P. 17) (L. D. 25) reporting "Ought to pass" in New Draft (H. P. 271) (L. D. 242) under new title Bill "An Act Designating a Commemorative Day in Remembrance of Martin Luther King, Jr."

Report was read and accepted, the New Draft read once and assigned for second reading tomorrow.

Consent Calendar
Second Day

(H. P. 29) (L. D. 37) Resolve, To Reimburse Mrs. Betty Mills of Portland for Damage to Property caused by Escapees from the Boys Training Center.

(H. P. 65) (L. D. 77) Resolve, To Reimburse William Rich of Buckfield for Loss of Beehives by Bear.

No objection having been noted at the end of the second legislative day, House Papers were passed to be engrossed and sent to the Senate.

Passed to Be Engrossed

Bill "An Act to Repeal Requirement for an Atlantic Salmon Stamp under the Fish and Game Law" (H. P. 11) (L. D. 16)

Was reported by the Committee on Bills in the Second Reading, read the second time, passed to be engrossed and sent to the Senate.

Orders of the Day

The Chair laid before the House the first tabled and today assigned matter:

Bill "An Act Amending the Elderly Householders Tax and Rent Refund Act to Expand Eligibility to Recipients of Supplemental Security Income" (H. P. 104) (L. D. 101)

Tabled — January 16 by Mr. Smith of Dover-Foxcroft

Pending — Further Consideration

On motion of Mr. Smith of Dover-Foxcroft, retabled pending further consideration and tomorrow assigned.

The Chair laid before the House the second tabled and today assigned matter:

Bill "An Act to Exempt Fuel Adjustment Charges from the Sales Tax" (H. P. 189)

Tabled — January 16 by Mr. Dam of Skowhegan

Pending — Reference

On motion of Mr. Dam of Skowhegan, referred to the Committee on Taxation, ordered printed and sent up for concurrence.

The Chair laid before the House the third tabled and today assigned matter:

Bill "An Act to Repeal Milk Control Prices at the Retail Level" (H. P. 208)

Tabled — January 21 by Mrs. Clark of Freeport

Pending — Motion of Mr. Mahany of Easton to refer to Committee on Agriculture

The SPEAKER: The Chair recognizes the gentlewoman from Freeport, Ms. Clark.

Ms. CLARK: Mr. Speaker, Men and Women of the House: "An Act to Repeal Milk Control Prices at the Retail Level," was originally referred to the Committee on Business Legislation, for it does, in fact, deal with the control of business practices and was appropriately referred to that committee.

This bill is consumer oriented as well as being business oriented. And while it has traditionally in the past been referred to the Committee on Agriculture, I would ask that a division be ordered and that you would consider rereferring this to the Committee on Business Legislation.

The SPEAKER: The Chair recognizes the gentleman from Bangor, Mr. Kelleher.

Mr. KELLEHER: Mr. Speaker, Ladies and Gentlemen of the House: As one of the cosponsors of this L. D., I feel that it should go to Agriculture, and maybe tradition is not a bad thing for this House to consider.

I would remind the gentlewoman from Freeport that there was a bill heard yesterday dealing with prescription drugs, and it dealt with business regulation of the industry, and that was heard, I believe appropriately, in Health and Institutions.

I do hope that the House supports the motion of Mr. Mahany and sends this bill to the Committee on Agriculture.

The SPEAKER: The Chair recognizes the gentleman from Easton, Mr. Mahany.

Mr. MAHANY: Mr. Speaker, Ladies and Gentlemen of the House: This bill concerns an agricultural commodity. We had a similar bill last year, and it was handled by the Committee on Agriculture. I think the proper place for this bill is to be sent up to Agriculture.

The SPEAKER: The Chair recognizes the gentlewoman from Freeport, Ms. Clark.

Ms. CLARK: Mr. Speaker, Men and Women of the House: I would be less than a responsible chairwoman of the Committee on Business Legislation if I did not respond to the gentleman from Bangor, Mr. Kelleher, and say that the bill dealing with prescription drug advertising could have been appropriately drafted to fit into Title 32, Chapter 41, which regulates pharmacists. Title 32 contains the provisions regulating the various businesses and professions, amendments to which have customarily been referred to the Committee on Business Legislation. Obviously, the Committee on Business Legislation will defer to the majority will of this House.

The SPEAKER: A vote has been requested. The pending question is on the motion of the gentleman from Easton, Mr. Mahany, that this Bill be referred to the Committee on Agriculture. All in favor of that motion will vote yes; those opposed will vote no.

A vote of the House was taken.

107 having voted in the affirmative and 28 having voted in the negative, the motion did prevail.

Thereupon, the Bill was referred to the Committee on Agriculture, ordered printed and sent up for concurrence.

The Chair laid before the House the fourth tabled and today assigned matter:

HOUSE ORDER, Amending the Hou Rules

Tabled — January 21 by Mrs. Kany Waterville

Pending — Passage

The SPEAKER: The Chair recogniz the gentlewoman from Waterville, Mr Kany.

Mrs. KANY: Mr. Speaker, Ladies and Gentlemen of the House: Like mo freshmen, I had high hopes of bringi innovative problem solving to the floor this House. So here I am with my first presentation merely trying to establish something which had been tradition in th chamber for over a hundred years.

The order before you calls for a chan in the House Rules to allow a seat and speaking privileges, by consent of the Speaker of the House, for the two tribal elected Indian Representatives. It does n call for voting privileges, so there would l no violation of the one-man, one-vote rule or any possible charges of conflict of interest.

The Indian representatives had flo privileges until 1941 when a change in single word in our statutory law made them representatives at the Legislature instead of representatives to th Legislature, relegating them to me onlookers from the balcony or lobbyists the halls.

Why was the change made? The 1939 Legislative Record shows the stor brewing in debate over a pay raise for th Indian Representatives, centering c should the Indians, without the responsibility of voting, have the same pay as other legislators? We still pay the $2,000, plus 30 days' expenses, pe biennium, but don't receive the benefit their voice. Many attempts have since been made to reinstate those floor privileges, and it is important to look some of the very legitimate questio which have been raised. Why should th Indians have a seat and speaking privileges and not other minorities?

And haven't the Indians been adequatel represented in the past? The answer that Maine's approximately 3,000 India are so scattered throughout northeast Maine that they do not have a real impact in the election of a regular House membe It is only recently that the two tribes we even allowed to vote for actual members this chamber, in 1968 — 6 years ago only with the help of Representative Mills when he threatened court action. If this doesn' show Maine historically treatin Maine-born Indians like citizens of separate nation, I don't know what would. Even so, the State of Maine has never acknowledged any inherent sovereig powers in the tribes, even though treati between Maine and the two tribes includ such wording as: "so long as they shall remain a Nation, and reside within the State of Maine." Nor have the Passamaquoddy and Penobscot Indian been officially recognized by the federa government as Indians, primarily because the originally treaties were made with Massachusetts. Maine assumed the treaty obligations and also made separat treaties. The legal questions ar extremely complicated. Clarification o the Indians' legal status has simply not been made.

Perhaps the biggest question is, do th Indians really want a seat and speakin privileges? I can assure you they do. In fact, these are all letters and telegrams

from members of the two tribes saying that they do.

What prompted me to introduce this order was being a member of two separate platform subcommittees on Indian affairs and listening to public hearing after public hearing in which the Indians asked for speaking privileges for their tribally elected representatives.

I believe that if we totally ignore reasonable requests such as this at such public hearings, we make a sham of those hearings.

I could give you some second-hand information about the Indians, about their governance and their acute problems like the reliable estimate that 65 percent of Maine Indians were unemployed in 1973. But I feel like a parasite relaying second-hand information. Let us give this House the benefit of the Indians' first-hand knowledge and at the same time allow them at least a voice in the state's policymaking process which affects their lives.

We, in our statutory law, even dictate how they can choose their tribal leaders. The precedent is there for what this order asks. Let us finally restore the privileges and the dignity of the Indian Representatives.

The SPEAKER: The Chair recognizes the gentleman from Bangor, Mr. Kelleher.

Mr. KELLEHER: Mr. Speaker, Ladies and Gentlemen of the House: First I would like to compliment the gentlewoman from Waterville on her fine presentation on the floor of the House this morning. Some of her remarks I do agree with and there are others that I don't.

I have opposed this order in previous legislatures because I feel that we as members of the House, all 151 of us, come here to represent all the people of Maine. I feel that we represent not only our own constituents from where we come from, but we try to represent, with distinction and pleasure to the Indians, the type of representation that they want.

There are some very capable legislators here that are elected by the Indians. My seatmate across the aisle, Mr. Mills, is a very capable man who has presented their problems with eloquence on the floor of this House, and I think the success of the legislation that was passed in this House is due to representation like Mr. Mills, Mr. Binnette, the gentleman from Aroostook County, Mr. Haskell, when he was here, and Mr. Bither, because of Indians that reside fairly heavily in their districts.

I don't think that we in this House should be singling ourselves out to support an order for any particular group or persons in this State. We are here to represent, and I hope we represent all the people of Maine.

The Indian Representatives appear before the appropriate committees where the bills are being heard as other people do in this State, as other special interest groups do. But unfortunately, the other special interests groups are not as well provided for as the legislature provides for the Indians. I might say that they are allowed 30 trips here to the legislature to speak in behalf of their bills. They are allowed telephone privileges. They are allowed a small compensation for themselves to be here. I think it is $2,000.

I don't believe that this legislature is unrealistic in its approach and care for the Indians. They have a special bureau, and they should have. That bureau is well manned and it is well financed. They present their arguments to the various committees in the legislature that deal with Indian bills.

I ask this House to not support the order. It isn't that we are not in tune to like or dislike the Indians — that's not true at all. You are here to represent them as you are here to represent everybody else in this State. I hope that this House will not support the order, and I move for its indefinite postponement.

The SPEAKER: The gentleman from Bangor, Mr. Kelleher, moves for the indefinite postponement of this House Order.

The Chair recognizes the gentleman from Enfield, Mr. Dudley.

Mr. DUDLEY: Mr. Speaker and Members of the House: I rise to support the motion for indefinite postponement for many reasons. I think I can speak authentically about Indian people. I represent the Town of Milford here, which has almost as many Indians as there are on the Reservation. I have represented them for ten years. I find them very nice people to represent, and I have had no problems with them. I didn't think they were unreasonable. I think we are the people that sometimes get unreasonable when we say there are a thousand Indians — this was the figure given here this morning — there are a thousand that claim to be Indians. They are the Indians by legislation of this House or the Indian Council puts them on the Council on this registry. But there are not a thousand Indians by birth in this State, I am sure.

Another figure was given here — 65 percent of them are unemployed, and 65 percent of them will always be unemployed, because in my opinion they don't want to work. I have hired them on many occasions in the past. One or two days is about the limit on my payroll. They wouldn't show up after that. There are a few that want to work, and they are working. Those are not the ones we deal with. We send a delegation, we'll say, up to Old Town to meet the Indians and we get up there about ten o'clock in the forenoon and the legitimate ones are the ones that want to work and they're working. They get home at five o'clock, so we see the ones that are not working, and in some cases, not all cases, quite a few don't want to work.

I can take you back into a little history in the House because I have been here a long while. It is true, they did at one time sit in the House, but at that time they didn't vote for a representative. Now they vote for a representative. They elect Mr. Binnette from Old Town, Mr. Mills, and they are two of the most able legislators, in my opinion, in the House. They have got a lot of seniority here, they know their way around, and they have done well for these people. What I am trying to tell you, in the old days, they didn't vote for a legislator, but they do vote for a legislator now.

I would like to bring you up to date a little further. We had a Democrat candidate, an Indian fellow, Cliff Francis. He ran twice for the legislature and he is one with more Indian blood than the average. Perhaps that's the reason he didn't get elected. But let me tell you, he lost the election by some eight or nine votes. I came down to the recount with him, and we found that he didn't carry Old Town Island. We also found that his own people, 34 of them didn't vote for either him or his opponent and that he didn't carry the Island. Now, this was in a general election, and he lost by a very small margin. So my thought in that vein was that they if they had really wanted an Indian Representative in the House in the place of one of us, they had a chance to do it, because they either didn't vote for him at all or they voted against him and perhaps its because he is a real Indian. There were quite a lot of them that voted that were obviously Indian by legislation.

My second thought on this is, if we seat minority groups, I would like to see the House smaller not bigger, and if we do that I represent a lot of minority groups and I would like to think that I am doing the very best I can for all of them. I can think and you can, if you stop and think a minute, of quite a few minority groups that you must represent, and if we let one group in, then I am going to feel obligated to let the others have a seat also, because they would have a legitimate right to be seated in the House.

The Indian people that we pay compensation to lobby, they are the only lobbyists, if we stop and think about it, that we actually pay the State of Maine pays. The other lobbyists are paid by somebody, not by State funds like us. I feel very strongly that this order should not pass and so I support the motion.

, I am not going to take any more of your time, but I live pretty close to these people and I have some very good Indian friends, and if you really want to know something right down to earth about them, come see me and I can tell you a lot more.

The SPEAKER: The Chair recognizes the gentleman from Bangor, Mr. Ingegneri.

Mr. INGEGNERI: Mr. Speaker, Ladies and Gentlemen of the House: I am perhaps a little presumptous and go against two or three veterans. I must confess that I did not go into this issue deeply with Mrs. Kany, and my popping up is strictly spontaneous. When the gentleman from Enfield, I believe it is, spoke, two phrases came to my mind, phrases that any legislature or any congress ought to be ashamed of. One is, benign neglect. We all hear how Mr. Nixon's top administrator used that expression with reference to the blacks. He used it in an intellectual sense and, yet, it displayed something that was very deep — would show that we all know what you are fearing but we feel that if we kindly leave you alone, you will build yourselves up, you will pull yourselves up by the bootstraps and get to where we are.

In that very thought there is a feeling of superiority. When the gentleman from Enfield spoke, he used the expression, "there are 65 percent unemployed, but they always want to be unemployed." I just can't understand how somebody could assume that somebody wants to be unemployed or wants to live at about 25 percent of the living allowance that all of us or the average person has.

Then the expression that we represent everybody, and why should this minority be singled out among all others? Very simply, I think there is not a minority; it is a nation. It is a nation that was here before we were here. How best can we express the gratitude of the hospitality which they showed us hundreds of years ago when they welcomed the explorers to these shores than by us showing them the hospitality of this chamber?

The SPEAKER: The Chair recognizes the gentleman from Cape Elizabeth, Mr. Hewes.

Mr. HEWES: Mr. Speaker, Ladies and Gentlemen of the House: Speaking as an individual representative from Cape Elizabeth, I support the motion of the

gentleman from Bangor, Mr. Kelleher, to indefinitely postpone this order.

The founding fathers of this country had a battle cry: "Taxation without representation." I submit that this order would provide double representation with less than adequate taxation, because there is a representative representing everybody in the State of Maine presently. The State was divided into 151 Districts by the court just a year or so ago.

I was here in 1967 when the change was made that allowed the residents of the Indian Reservation to vote back in 1967, and that is the case now. I don't think it is right to discriminate in favor of any group or against any group, I believe in equality of all people irrespective of their color, race, creed, national origin or background.

I would like to point out further that in England they have a House of Lords. There are certain people who do inherit a right to sit in a certain parliamentary body, but that is not the case here. In the legislature we all run on our own merits and are elected or defeated accordingly. If, in fact, we were going to let anyone sit, it would seem to me that former governors-we have two ex-governors in the state who served fifteen years as governor of this state, and neither one of them has been around here since January 2 as far as I know. If you are going to seat anyone, perhaps you ought to seat ex-governors or someone like that.

What need is there for this legislation? I submit there is no need. I submit further that there has been no violation of any treaty. The gentlewoman from Waterville, Mrs. Kany, very graciously gave me a copy of the Indian Tribal Treaties this morning, and I don't see of any treaty violations. If we owe anything because of a breach of contract, a breach of treaty, I don't think it is here. There is no treaty that I know of that says that any Indians will be entitled to two seats in the Maine House of Representatives, speaking or otherwise.

I am not criticizing individuals who might be seated; I am sure they are very cultured, intelligent and dedicated and very fine people, but I just feel that to discriminate in favor of any group right now is also discriminating against all our constituents. I am opposed to discrimination and I hope that you will vote in favor of the indefinite postponement motion made by the gentleman from Bangor, Mr. Kelleher.

The SPEAKER: The Chair recognizes the gentleman from York, Mr. Rolde.

Mr. ROLDE: Mr. Speaker, Ladies and Gentlemen of the House: I rise today to support the order of the gentlewoman from Waterville and to oppose the motion for indefinite postponement of the gentleman from Bangor. I do so in several capacities. First, there are my own personal feelings as to the justice of this particular action in seating the Indian representatives to the legislature. Secondly, it was quite clear in our Democratic caucus the other day that a strong majority of the Democrats in the House favor Mrs. Kany's order. So in my role as majority leader, no matter what my personal feelings might have been, I would have, in any case, supported the position that the Indian Representatives should be seated. Our Democratic platform has called for this on several occasions.

Primarily, however, my feelings are that this question is not a political one nor even a great emotional issue although there are strong emotions involved. To me, it is simply a practical matter.

I would like to quote verbatim from the statute that establishes the Indian Representatives. It reads, "The member of the Penobscot Indian Tribe and a member of the Passamaquoddy Indian Tribe elected to represent his tribe at the biennial assembly of the legislature shall receive a compensation of $1,500 for such attendance and travel at each legislative session for 20 trips to and from his place of abode at the same rate the state employees receive, an allowance for meals and housing expenses as any other member of the Senate and House of Representatives for 20-days attendance at each legislative session." So there we have written into the laws of the State of Maine the fact that the Maine Legislature has accorded a special significance to the two Indian tribes of Maine, accorded to no other group in the state to the extent that these two tribes are allowed under the law two special representatives at the legislature and a state expenditure in excess of $3,000 is provided for them, and then it is left at that. What a complete half measure this is.

We spend more than $3,000 of the taxpayers' money paying for special Indian Representatives to the legislature and then we really don't let them accomplish their jobs. We don't let them sit in this body and speak on matters of importance to them. We don't let them serve on appropriate committees and put in needed effort on bills that affect them. We don't, in fact, require anything of them for this expenditure but, rather, we treat these Indian representatives in a unique fashion as sort of state subsidized lobbyists who are kept behind the glass partition in a limbo that isn't even fair to them nor to us.

Opponents of this order agree that the Indians should not be seated, because to do so would be discriminatory against all other minority groups in Maine. Yet those who argue in this fashion should have the courage to carry their logic to an even farther conclusion, which is that if it is discriminatory to seat Indian Representatives then it is also discriminatory to have Indian Representatives and they should be working to repeal the law that establishes Indian Representatives.

For my part, I believe that as long as we have Indian Representatives established by law and funded by the taxpayers' money, they should be seated and given all of the appropriate opportunities to contribute to our proceedings.

So I ask you to consider this question, not on the basis of emotion, but whether in your own minds you find any logic in establishing Indian representatives by statute as a unique legislative entity and then not allowing them to function to the fullest extent possible?

Mr. Speaker, I ask to have the vote taken by the yeas and nays.

The SPEAKER: The gentleman from York, Mr. Rolde, has requested a roll call vote.

The Chair recognizes the gentleman from Eastport, Mr. Mills.

Mr. MILLS: Mr. Speaker, Ladies and Gentlemen of the House: For over ten years, I have represented two Indian Reservations in the old district that I formerly represented. I now have one Indian Reservation left, but that is not the important point. The important point here is that we deal with our Indian Reservation as a nation of people who are peculiar unto themselves for their own culture. It would be very difficult for any of us here to understand their type of culture, but it is very clear, it is traditional, it is historical, and it reaches back into time.

There is no question that under the American Revolutionary War and such that the Indians were a great asset to the new country developing. It is in their history; it is in their graveyards down there on the reservation. If any of us were down there and were to go through one of those Indian cemeteries and see the creditation on those headstones of the services these people have performed they have been one of the strongest allies this country ever had.

Not to have progress up to ten years back and the conditions that I found when I became a member of the legislature. When I went on these reservations I found shacks that you wouldn't keep a pig in. There was no water, no sewerage, no nothing. Everything was dumped out into the middle of the street. Their clothes were doled out to them by an Indian agent from the State of Maine who, incidentally, retired a very rich man from that job.

To move it along into what we started to accomplish in the 102nd and the succeeding legislative sessions, there was a great deal of thinking done here in Augusta. There was a great deal of action taken on the petal level, not anything that was flamboyant, but what do you do to help these human beings?

The first bill I introduced went in for $5,000. It was to establish water on the Indian reservations. There was one pipe to serve the whole reservation with a faucet to it that had to be thawed out in the winter time. I was instrumental in introducing a bill here that went through to establish water and sewerage on the Indian Reservation. There was quite an argument, a lot of debate. It was a long-winded deal, and when it was accomplished here and the legislature had approved it — and this was a known fact and accomplished and constructed on the Indian Reservations in the State of Maine — then I did get the surprise that I had never expected, the letters that came to me from doctors all over the United States some from Canada, praising what had been accomplished by the Maine Legislature. The fact of it was that the Indians in their poverty and their pitiful conditions were known carriers of virus diseases.

To let you know exactly how this thing worked, if a disease broke out on an Indian Reservation in all the filth that was accumulated there, — to the Indian way of thinking, one person dying, that is nothing, two persons dying, that is nothing, but when three or four or seven more get sick, they start packing up and they leave between two and five in the morning to all parts of the United States and over into Canada. According to the American Medical Association, this was the thing that had been plaguing the physicians for a long time, these people being carriers of violent diseases. These were the type of letters that I received from the doctors.

As you move along on this thing over a ten-year period of time — I could stand here and talk all day if my voice would hold out, but I don't think it would - but where we stand here today is not whether represent the Indians or who represents them or anything else. You are dealing with humanity. What has been going on the past ten years with the Indians in Maine is the fact that they have their own tribal laws. Some of the clearer thinking Indians

who have recently been educated have found that their tribal laws can be corrupted by a gang that violently take control on the reservation. These things I hear and nobody in this House probably hears them, but to bring this along up to date, what we have been doing in the past ten years through the Department of Education, Health and Welfare, various agencies and everything else, is to establish each Indian reservation as a separate community in village form unto itself. This has come a long ways. We now have good schools. We have school committees. We have people there that are now trained and people are capable of making their own decisions.

Personally, I can see no harm in this legislature, in a moment of humanity towards the Indian tribes, so called, but they are in treaty with the State of Massachusetts back before 1820 when the State of Maine became a state unto itself and accepted the responsibilities that were incumbent on the State of Massachusetts. It is down in our Law Library downstairs. Glen Starbird, Associate Commissioner of Indian Affairs, he knows where these records are and he knows more about Indians than they know about themselves.

I am not going to bore you with any more of these things I have been through, but I am going to say this — I see no reason why we shouldn't seat these Indians and let them speak on their own Indian affairs when there are bills here for them to consider or us to consider, as they are doing it without a vote. This cannot be done because it violates the United States Supreme Court Rule.

The SPEAKER: The Chair recognizes the gentlewoman from Owls Head, Mrs. Post.

Mrs. POST: Mr. Speaker, Ladies and Gentlemen of the House: I was not planning to speak to this order today but feel that I would like to mention or point out that the debate that has gone on so far in this House is maybe a perfect example of the reasons why Mrs. Kany's order should indeed be passed.

Earlier in the debate, we heard charges that Indians don't work or don't want to work.

We heard charges that most likely the Indian people don't care if they have representatives in this House or don't want representatives, and although the Indian representatives, which the State of Maine are paying for, are standing here today behind the glass, they themselves are not able to refute these charges. I think it is this kind of situation that needs to be changed and I ask you to vote against Mr. Kelleher's indefinite postponement.

The SPEAKER: The Chair recognizes the gentlewoman from Auburn, Mrs. Lewis.

Mrs. LEWIS: Mr. Speaker, Ladies and Gentlemen of the House: I am not speaking for or against this order, but I merely call your attention to the Constitution of the State of Maine, Section Two, it would be on page 8 in the Register and also Section 4, and I wonder if this shouldn't be a constitutional amendment to increase our numbers to 153 inasmuch it very specifically says, "151 members."

I also would mention for the benefit of some of the new members that we have had an Indian. He wasn't a representative of the Indians, he himself, was an Indian, Ross Dyer, who was here in the last session, a representative from Strong.

The SPEAKER: The Chair would advise the members of the House that the Attorney General, James Erwin, ruled two years ago that it would not be a violation of the Constitution if our rules were amended to add Indian representation.

The Chair recognizes the gentleman from Lewiston, Mr. Jalbert.

Mr. JALBERT: Mr. Speaker, Ladies and Gentlemen of the House: I dislike intensely this type of debate on the floor of this House. I particularly dislike getting up this morning because of my own personal feelings for the gentleman from Bangor, Mr. Kelleher, and the gentleman from Enfield, Mr. Dudley. I might say in passing that as far as Mr. Dudley is concerned, when he talks about people that don't work, he certainly doesn't mean himself because he is a three-shift man. He will be the first one to admit. And I am not out of order, Mr. Speaker.

When I was a member of the minority back in 1945 — and I am not speaking now as a member of the majority party in the House, I am talking about my own background, an American of Canadian ancestry. In 1945 I was in the minority. A very short while ago in a discussion with my very lovely lady from Pemaquid, a good solid "Worp," I informed her that if you would tie up all the Americans of Italian ancestry, the Americans who call themselves Anglo-Saxons who are our so-called Worps, and I love them, the Americans of Greek ancestry and Americans of Polish or Lithuanian ancestry and so on, if you tie it all up and then us old Americans of Canadian ancestry group ourselves together, we are in the majority.

I don't consider myself any better than anybody else. I have never been maligned since I have been here in 1945. Nobody has ever been maligned since I have been here in 1945. Nobody has ever thrown anything at me as far as my background and my ancestry is concerned. If they did, they would hear from me and find out that I was in pretty good voice. We are not giving anything here to them that they didn't have before.

I can recall working for a governor back in the thirties and three was an Indian sitting right in that corner seat. As a matter of fact, if my memory serves me right, there were two of them, and I think it stopped in 1939.

I might state to my good friend from Cape Elizabeth, Mr. Hewes, that things have changed since 1974. I am going with my leader.

The SPEAKER: The Chair recognizes the gentleman from Old Town, Mr. Binnette.

Mr. BINNETTE: Mr. Speaker, Ladies and Gentlemen of the House: I would be remiss in my duties if I didn't get up here as the representative of the Indians of the Penobscot Tribe and if I didn't try to express my thoughts on this matter.

I have a great deal of respect for my Indian brothers and sisters, as I have lived across the river from their Reservation for over 70 years. I have had many occasions they have been to my place and they are most welcome. As a matter of fact, I would rather have some of those Indians sit in my home than some of the Democrats in my town.

I think we try to represent these people to the best of our abilities. My friend Senator Sewall, who lives across the river also, he has been highly in accord with me on a lot of measures which pertain to the Indians. We try to do what is right for them, and whenever they need help we are right there to help them. We will do anything we can. I am speaking for Senator Sewall. He has assured me that anything that they need, he will do everything in his power to see that they get it. I don't know what is going to be gained if they sit up here. There is no question about it; they have no vote. They do have a right to come to us as their representatives and we will listen to their ideas. As a matter of fact, I have a lot of bills that are going to be presented before this body and I hope you will give me support on it because it is something that pertains to their laws which they would like to have corrected.

I also believe that they should be entitled to sit on the committees in regard to Natural Resources so they could ask the questions that pertain to their tribes, whatever it is. So those are the thoughts that I have in there but I don't believe in this order. I think we can accomplish as much without the order.

I think our majority leader said it was in the platform, I agree. There are a lot of things in the platform that I am not going to go onto, I will tell you that right now. I really believe that it is entirely up to every member's mind or thoughts as to how they feel in this regard. If it is of a benefit for these people, well and good but as far as I can see, I will repeat it again, I don't see as it is going to be anything to their benefit to be allowed to sit down there. I think they could gain far more by contacting various legislators in regard to some of their measures and I certainly hopd that this debate has not created a difference for these people.

I have been reading about these drumbeats and all that sort of stuff. I haven't had a drumbeat from any of those people over there in regard to having a seat, but I have heard on many occasions, many an evening, the beating of drums on some other things.

The SPEAKER: The Chair recognizes the gentleman from Bangor, Mr. Henderson.

Mr. HENDERSON: Mr. Speaker, Ladies and Gentlemen of the House: I rise to oppose my good friend, the gentleman from Bangor, Mr. Kelleher's motion of indefinite postponement.

I would like to call the attention of the House to a recent report of the Maine Advisory Committee to the U.S. Commission on Civil Rights which had to do with the condition of Indians in the State of Maine, and that report was not a very happy one. I suppose if we consider ourselves the representatives of all the people of Maine, including the Indian people, I think we have to feel to the extent that we could have done anything about it, we haven't done a very good job. I don't have the report but only news reports of it. It says it points to a long and tiresome struggle against the insensitivity of agencies and the carelessness of men in power. It should have said "and women" — to the needs of the Indian people.

In addition, it went on to describe the problems of housing and others that we are well aware of, but one of the things it did point out was that many programs that are developed for the Indians are those in which they are not consulted. There was a recent program set up by the Community Action Program in the Penobscot and Piscataquis area requesting funds for children and other youth services for individuals in the area including Indians. It was only after they got the funds that someone asked them if they had consulted the Indians as far as the way these funds are going to be used and they said no. But

they hadn't even got any input from that community.

I hope that we can be a little bit broader in that kind of decision that we have to make and get that needed input.

The SPEAKER: The Chair recognizes the gentleman from Brewer, Mr. Cox.

Mr. COX: Mr. Speaker, Ladies and Gentlemen of the House: I have been listening to this debate, which seems to me to have gone on too long. I have just written a little summary of the differences of this group from the other minority groups which exist in our State, and the point has been raised that this is just another minority group. This is not just another minority group. This group has territory assigned by law to this group as a group. They have their own laws; they have their own culture. How can a member of the Anglo-Saxon majority effectively speak for this minority with any deep knowledge of their problems?

The SPEAKER: The Chair recognizes the gentleman from Enfield, Mr. Dudley.

Mr. DUDLEY: Mr. Speaker, Ladies and Gentlemen of the House: I will be very brief. I don't think I was understood very clearly when I was before you before when I tried to point out that prior to 1946 or a certain date — I think it was about then — when they did sit in the House, at that time they were not in the legislative district. They didn't vote for a legislator. Today they do. I think there is some discrepancy when you say one man, one vote. The federal court — we didn't say that, the Maine court didn't say that, the federal court said one man, one vote. From that point on we tried to divide these districts equally. These Indian people do now vote for a legislator. Prior to that they didn't; they didn't have a man in the house. That is the difference between then and now. They do vote for a legislator. I assume for a minute that they elect Mr. Binnette and they elect the man from Eastport, Mr. Mills, then if we seat two more men and there are only a thousand Indians, this doesn't prescribe to the federal court order of one man, one vote. Then there will be one thousand Indians who have four legislators in the House.

The SPEAKER: The Chair recognizes the gentlewoman from Waterville, Mrs. Kany.

Mrs. KANY: Mr. Speaker, Ladies and Gentlemen of the House: Once again, we are in no way talking about granting voting privileges, as the representative from Enfield just implied we do. We don't have treaties with any of the other minorities and with their heirs forever, as stated in the treaties. I was wondering if the gentleman from Enfield really believes that only 35 per cent of the Maine Indians are interested in working? I have a different understanding of that.

Also, the gentleman from Cape Elizabeth was wondering about the treaty violation and, of course, there is litigation in the courts at this time because of treaty violations.

Just one more comment and that is, does the representative from Old Town really believe the Indian Representatives can be as effective without speaking on legislation affecting them while standing at the back of this house? I think this is a question of dignity.

The SPEAKER: The Chair recognizes the gentleman from Old Town, Mr. Binnette.

Mr. BINNETTE: Mr. Speaker, Ladies and Gentlemen of the House: In answer to the gentlewoman from Waterville, she makes reference in regard to what I said about the Indians being able to contact other people. I can tell you from my past experience, and I have been here many years, many a legislator haven't gotten up and spoken on some measure, but he has had advice from out in back of the hall and it has been very good and valuable advice.

he SPEAKER: The gentleman from York, Mr. Rolde, has requested a roll call vote. For the Chair to order a roll call, it must have the expressed desire of one fifth of the members present and voting. All those desiring a roll call vote will vote yes; those opposed will vote no.

A vote of the House was taken, and more than one fifth of the members present having expressed a desire for a roll call, a roll call was ordered.

The SPEAKER: The pending question is on the motion of the gentleman from Bangor, Mr. Kelleher, that House Order relative to amending House Rules to Seat Indian Representatives be indefinitely postponed. All in favor of that motion will vote yes; those opposed will vote no.

ROLL CALL

YEA: Ault, Berry, G. W.; Berube, Binnette, Birt, Bowie, Byers, Carter, Conners, Curran, R.; Dudley, Durgin, Dyer, Farley, Farnham, Finemore, Fraser, Garsoe, Gould, Gray, Hewes, Hinds, Hunter, Hutchings, Immonen, Jackson, Jacques, Kauffman, Kelleher, Littlefield, Lizotte, Lovell, Lunt, Mackel, MacLeod, Maxwell, McMahon, Morton, Perkins, T.; Peterson, P.; Pierce, Rideout, Shute, Strout, Stubbs, Susi, Tarr, Teague, Torrey, Twitchell, Walker, Webber.

NAY: Albert, Bachrach, Bagley, Bennett, Berry, P. P.; Blodgett, Boudreau, Burns, Bustin, Call, Carpenter, Carroll, Chonko, Churchill, Clark, Connolly, Cooney, Cote, Cox, Curran, P.; Dam, Davies, DeVane, Doak, Dow, Drigotas, Faucher, Fenlason, Flanagan, Goodwin, H.; Goodwin, K.; Greenlaw, Hall, Henderson, Hennessey, Higgins, Hobbins, Hughes, Ingegneri, Jalbert, Jensen, Joyce, Kany, Kennedy, Laffin, LaPointe, Laverty, LeBlanc, Leonard, Lewin, Lewis, Lynch, MacEachern, Mahany, Martin, A.; Martin, R.; McBreairty, McKernan, Mills, Miskavage, Mitchell, Morin, Mulkern, Nadeau, Najarian, Norris, Palmer, Peakes, Pelosi, Perkins, S.; Peterson, T.; Post, Powell, Quinn, Raymond, Rolde, Rollins, Saunders, Silverman, Smith, Snow, Snowe, Spencer, Sprowl, Talbot, Theriault, Tierney, Tozier, Truman, Tyndale, Usher, Wagner, Wilfong, Winship, The Speaker.

ABSENT: Carey, Curtis, Gauthier, Kelley.

Yes, 52; No, 95, Absent 4.

The SPEAKER: Fifty-two having voted in the affirmative and ninety-five in the negative, with four being absent, the motion does not prevail.

The pending now before the House is, shall this House Order receive passage?

Mr. Finemore of Bridgewater requested a roll call vote.

The SPEAKER: The gentleman from Bridgewater, Mr. Finemore has requested the yeas and nays. For the Chair to order a roll call, it must have the expressed desire of one fifth of the members present and voting. All those desiring a roll call vote will vote yes; those opposed will vote no.

A vote of the House was taken, and more than one fifth of the members present having expressed a desire for a roll call, a roll call was ordered.

The SPEAKER: The pending question on House Order to Amending House Rul relative to Indian Representatives. All in favor of this House Order receiving passage will vote yes; those opposed w vote no.

ROLL CALL

YEA — Albert, Bachrach, Bagley, Bennett, Berry, P. P.; Berube, Binnette, Blodgett, Boudreau, Bowie, Burns, Busti Call, Carpenter, Carroll, Chonk Churchill, Clark, Connolly, Cooney, Cot Cox, Curran, P.; Dam, Davies, DeVane, Doak, Dow, Drigotas, Durgin, Farley, Faucher, Fenlason, Flanagan, Frase Goodwin, H.; Goodwin, K.; Greenla Hall, Henderson, Hennessey, Hobbin Hughes, Hutchings, Ingegneri, Jacques, Jalbert, Jensen, Joyce, Kany, Kennedy, Laffin, LaPointe, Laverty, LeBlan Leonard, Lewin, Lewis, Lunt, Lync MacEachern, Mahany, Martin, A Martin, R.; McBreairty, McKernan, Mills, Miskavage, Mitchell, Morin, Mulkern, Nadeau, Najarian, Norris, Palme Peakes, Pelosi, Perkins, S.; Peterson, P Peterson, T.; Post, Powell, Quin Raymond, Rolde, Rollins, Saunders, Silverman, Smith, Snow, Snowe, Spencer, Sprowl, Talbot, Theriault, Tierney, Tozie Truman, Twitchell, Tyndale, Ushe Wagner, Walker, Webber, Wilfon Winship, The Speaker.

NAY — Ault, Berry, G. W.; Birt, Byers, Carter, Conners, Curran, R.; Dudle Dyer, Farnham, Finemore, Garso Gould, Gray, Hewes, Higgins, Hind Hunter, Immonen, Jackson, Kauffman, Kelleher, Littlefield, Lizotte, Lovell, Mackel, MacLeod, Maxwell, McMahor Morton, Perkins, T.; Pierce, Rideou Shute, Strout, Stubbs, Susi, Tarr, Teagu Torrey.

ABSENT — Carey, Curtis, Gauthier, Kelley.

Yes, 107; No, 40; Absent, 4.

The SPEAKER: One hundred and seve having voted in the affirmative and forty in the negative, with four being absent, the motion does prevail.

The SPEAKER: The Chair at this time would recognize in the back the Representative of the Penobscot Tribe Ernest Gosselin and would assign him t seat No. 152.

The Chair recognizes the Representative from the Passamaquoddy Tribe, Joseph Nicholas, and would assign him to seat No 61.

Thereupon, the Sergeant-at-Arms an Assistant Sergeant-at-Arms escorted Indian Representatives Ernest Gosselin and Joseph Nicholas to their respective seats on the floor, amid the applause of th House.

Mr. Dam of Skowhegan was granted unanimous consent to address the House.

Mr. DAM: Mr. Speaker, Ladies an Gentlemen of the House: I did hav prepared what I refer to as a ripper in the speech, but I did receive a note a little while ago saying that there might have been a misunderstanding between mysel and the man on the second floor, namely the Governor.

Last November, the people elected a man that called himself an Independent. Since I am not using my ripper, I have go to rely sort of on what comes into my head because I have said I would tone it down.

Appendix M

Email Summary of Conversation with Congressman Faleomaveaga, Territorial Delegate from American Samoa

11/15/99

Clark, Jon

To: Indian Committee
Cc: IndianServiceList
Subject: Congressman Faleomaveaga

Members, Tribal Gov. Rep. Study Comm.:

Reminder: next meeting scheduled for
Wed., Nov. 17, 9:00 -2:00
Judiciary Comm. Room.

I had a long and very interesting telephone conversation this morning with Congressman Faleomaveaga, the territorial delegate from American Samoa. Here is a summary of the information he provided me.

Each territory has its own unique history and legal status; this history and legal status affects how people within the territories view the non-voting status of their delegates. In every case, the territorial delegate is the only representative which the territory has in Congress.

Because the 3.8 million citizens of Puerto Rico are U.S. citizens and pay federal taxes, there is some discontent in Puerto Rico that the territorial delegate does not have full voting rights. The situation is similar in D.C. which has a population of about 600,000; interestingly, this population is about that of a congressional district. The delegate from D.C. has been fighting for some time, so far unsuccessfully, to provide D.C. citizens with a vote in Congress.

Residents of American Samoa are considered U.S. nationals: they are not U.S. citizens but are deemed to have pledged their allegiance to the U.S. They do not pay federal taxes. The population of American Samoa is about 60,000; in addition, there are another 140,000 Samoans scattered over the contiguous states which Congressman Faleomaveaga includes among his constituency (some of these vote by absentee ballot in the Samoan election for Congressional Delegate).

He indicated he is very grateful to have a vote in committee (he serves on International Relations). He noted that a delegate, if so appointed, could serve as chair of a committee. He feels Congress has "come a long way" from the days when delegates were not allowed a seat at the table (the right to serve on and vote in committee was granted in the 70s). When I asked specifically how he felt about not having the vote in the House, he indicated that because Samoans don't pay federal taxes, this arrangement is perhaps "fair enough." He also noted that since most of the important work is done in committee, he is able to accomplish much with his committee vote.

He noted that when the U.S. Senate converted what used to be the Select Committee on Indian Affairs into a standing committee, it provided a better, more permanent forum for consideration of Indian affairs. He noted that the chair of that committee is Senator Ben Nighthorse Campbell of Colorado (the only American Indian presently serving in either the House of Representatives or the United States Senate). He noted that there is no standing committee on Indian Affairs in the House.

Congressman Faleomaveaga is very pleasant and responsive, and I'm sure he would be happy to try to answer any follow-up questions members might have.

He mentioned that if the committee wished to have more information on the territorial delegates and their history, the committee might ask one of the members of Maine's congressional delegation to submit the request to the Congressional Research Service. A request for expedited research would probably result in a report issued in a couple of weeks. (Reminder: In the first package I distributed to the committee -- back in August -- there is a copy of a 1997 CRS "Report for Congress" which provides a history of territorial delegates. You may want to take another look at that report before deciding whether you would like further information.)

I hope this is helpful. If you have any questions, please don't hesitate to contact me.

Jon

cc: Interested parties