

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

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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 through 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 policies, 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 been⁶) 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 canons 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 farther 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 to Joint Rules Committee

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

Report to Joint Rules Committee

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

Report to Joint Rules Committee

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 to 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 Band 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;

Report to Speaker 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.

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