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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 These provisions, however, were repealed by the law enacting the Maine Indian Claims Settlement Act.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.

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."

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[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

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[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?

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[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."

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[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

ANDREW KETTERER
Attorney General

AK:mhs
Enclosure
cc: Jon Clark