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A Seat at the Table: Tribal Representation in American Legislatures

American Indian tribes have been the subject of numerous pieces of legislation at both the federal and state level dating back to the early days of the American republic. Despite this, tribes have largely been excluded from representing their interests in an official capacity at legislatures in the United States. While tribes have often sent representatives to act as ambassadors for their nation's interests, aside from elected officials who are themselves Native Americans who are representing non-Native constituencies there has never been a guarantee that Native Americans will be represented in American legislatures, with one exception in the state of Maine. As sovereign nations, "Indian tribes have the inherent right of self-government" (Pevar, 2012, p. 82) which includes the right for tribes to themselves before other governments. One way that tribes may represent themselves within non-tribal legislatures is through reserved tribal seats. Reserved tribal seats are currently a practice unique to Maine, but in theory these seats could be expanded to the federal Congress because of treaty rights two specific tribes hold.

When taking an international perspective, the practice of reserving seats in a legislature for a particular group of people is not an unheard of practice (Reynolds, 2005). Around the world many legislatures reserve seats so that specific groups such as women or ethnic and religious minorities may be represented in government. Of legislatures that reserve seats for specific groups, the New Zealand Parliament's practice of reserving seats for Māori voters is most similar to tribal representation in American legislatures. The Māori, like Native American tribes, are a sovereign nation whose members have the right to vote in Māori-only districts if they choose. In 1867 the Māori Representation Act created the four original Māori electoral districts, although that number has since increased to seven (Parliamentary Library, 2009). While originally

supposed to last only five years in 1876 reserved seats for Māori legislators became a permanent, though controversial, part of New Zealand's political landscape. Since 1967 non-Māori have been able to stand for election in the Māori electorates, although Māori were also allowed to stand in non-Māori electorates. Today a person of Māori descent can choose whether they wish to vote in the "general" district they live in with all other voters, both Māori and non-Māori, or in their dedicated Māori district. Perhaps the greatest impacts the Māori electorates have had in New Zealand politics is the institutionalization of permanent Indigenous representation in Parliament and the emergence of the Māori Party as a force in policy making. For example in 2008 the Māori Party was able to leverage support for the conservative National Party to form a nearly decade-long government in exchange for greater focus on Indigenous issues (Humpage, 2017).

In the United States there is only one current example of reserved seats for Native American tribes, found in the state of Maine's House of Representatives. While these reserved seats are similar to New Zealand's Māori electorates, there are key differences. Members of Parliament elected from the Māori electorates are full members with the same speaking and voting privileges as other members of Parliament, while Maine tribal representatives are non-voting and have at various times had limited rights to speak on the floor of the House or to introduce legislation (DeHart & Mamet, 2020). Specifically, tribal representatives have only been able to introduce legislation since 1995 and, from 1941 to 1975, were prevented from speaking during House debates. In addition, while the Māori electorates are chosen among Māori as a whole rather than by tribal divisions. In Maine the three non-voting seats for Native American tribes are reserved for specific tribes, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Penobscot Nation.

Beyond these differences the Māori electorates and reserved seats in the Maine House are remarkably similar. They are both highly institutionalized within their respective legislative bodies. In fact, the Maine House of Representatives has a longer history of Indigenous representation in its halls of government than the New Zealand Parliament. The Penobscot have participated in the Maine legislature since 1823, with the Passamaquoddy joining in 1842 and the Maliseet in 2012, meaning there has been tribal representation in Maine's state government for all but the first three years of Maine's statehood. Like the Māori electorates, the existence of reserved seats for tribes have also enabled tribes to become influential in the Maine legislative process. Since tribal representatives gained the ability to introduce legislation in 1995 there has been a significant increase in the introduction of pro-tribal legislation (DeHart & Mamet). However, the Maine legislative arrangement for tribes has not been perfect. For one, Maine has four federally recognized tribes (Pevar, 2012), excluding the Aroostook Band of Micmac Indians from the representation other Maine tribes enjoy.. For another since 2015 the three tribal seats have only been partially filled, as the Passamaquoddy and Penobscot withdrew from the Legislature over unresolved sovereignty disputes (Moretto, 2015). While the Passamaquoddy rejoined the House in 2016, the Maliseet left in 2018 leaving two of the three tribal seats empty (Villeneuve, 2018).

While at the federal level there is no representation for tribes as there is in Maine, there are two tribes who have the potential to send a delegate to Congress, these tribes being the Choctaw and the Cherokee. In Article 22 of the 1830 Treaty of Dancing Rabbit Creek the Choctaw are granted the right to send a delegate to the House of Representatives. The language of the Article makes it clear that the two negotiating parties did not see eye-to-eye when it came to a Choctaw delegate in Congress. On the one hand, the leaders of the Choctaw argued that

because “their people are in a state of rapid advancement in education and refinement” (Kappler, 1904, p. 315), they ought to be able to send a delegate to the House. On the other hand, the representatives of the United States were unsure “that they can under a treaty stipulation” (Kappler) agree to this suggestion. In a sort of compromise, the request for a Congressional delegate was left in the treaty with the stipulation “that Congress may consider of, and decide” (Kappler) whether or not Congress will seat the delegate the Choctaw are entitled to.

By leaving the final decision of whether to seat a Choctaw delegate, the ability of the Choctaw to exercise their treaty right to send a delegate to Washington has been significantly limited. The Choctaw have named representatives of their tribe to represent their interests in Washington since the Treaty of Dancing Rabbit Creek akin to that of an ambassador, but have yet to apply to have a delegate seated in the House. It is difficult to know why this has not occurred, but the fact that this decision would be made by a body that has often been historically unfriendly to tribal rights may be a primary factor in this matter. The Choctaw were not strangers to the idea of sending an ambassador to Washington, as for decades the Choctaw named tribal members who acted as ambassadors in Washington outside of Congress. The most notable example of an extra-congressional Choctaw delegate is that of Peter Pitchlynn, who actively represented the interests of the Choctaw Nation in Congress at various times between the 1850s and 1880s (Ware, 1996).

The tribe that has made the biggest strides to represent themselves within the halls of Congress is the Cherokee Nation. Like the Choctaw, the Cherokee have the right to send a delegate to Washington written into treaties with the United States. Unlike the Choctaw, whose treaty right to a Congressional delegate can be found only in the Treaty of Dancing Rabbit Creek, the Cherokee have three treaties that affirm their right to a delegate. The 1785 Treaty of

Hopewell was the first treaty where the Cherokee were extended the right to send a delegate to Congress. While the language in the Treaty of Dancing Rabbit Creek explicitly places the restriction of Congressional approval on the ability of the Choctaw's right to a delegate, there is no such restriction on the Cherokee. Instead, Article 12 of the Treaty of Hopewell simply states that the Cherokee have the right to choose a delegate and send them "whenever they think fit, to Congress" (Kappler, p. 10).

The Cherokee Nation's right to a delegate was modified by the Treaty of New Echota, ratified in 1835. While the Treaty of New Echota reaffirmed the Cherokee right to a Congressional delegate, new restrictions were placed on the Cherokee that their delegate would be seated only "whenever Congress shall make provision" (Kappler, p. 443) for a Cherokee delegate to be seated. Given the fact that the Treaty of New Echota is both more recent and has different language regarding the same topic than the Treaty of Hopewell, the Treaty of New Echota would likely, and has been proven, to be the treaty the Cherokee Nation would rely on if they were to send a delegate to Congress.

The final treaty between the United States and the Cherokee that relates to a Cherokee delegate was ratified in 1866. While most of the treaty deals with the reconstruction of the relations between the two nations following the Cherokee siding with the Confederacy during the Civil War, Article 31 of the treaty contains a key provision that links the Treaty of New Echota to modern Cherokee efforts to seat a Congressional delegate. Article 31 states that any article of a prior treaty between the United States and Cherokee Nation "inconsistent with the provisions" (Kappler, p. 950) of the 1866 treaty are null and void. Given that no provision of the 1866 treaty relates to a Cherokee delegate, then the treaty rights the Cherokee nation has to a Congressional delegate under the Treaty of New Echota still stand. The 1866 treaty is relevant to a potential

Cherokee Congressional delegate because of the 2017 ruling by the United States District Court for the District of Columbia in *Cherokee Nation v. Nash*. This ruling confirmed that the obligations the 1866 treaty places on both the Cherokee Nation and the United States are still in effect. While the issue at hand in the *Nash* ruling was the citizenship of Cherokee Freedmen in the Cherokee Nation, by explicitly stating that the 1866 treaty is still in effect, the District Court by extension confirmed that the treaty rights the Cherokee have to a Congressional delegate are still in effect.

In 2019 the Cherokee Nation initiated the process of getting their delegate sent to Congress. In August of that year Principal Chief of the Cherokee Nation Chuck Hoskin Jr. appointed Kimberly Teehee to fill the role of the Cherokee delegate to Congress. (Katz, 2020). Teehee was later confirmed by the Council in accordance with the Cherokee Constitution, however Congress has yet to act regarding Teehee's nomination. Teehee previously served in the Obama administration as a senior White House policy advisor for Native American affairs. If Teehee were to be seated in Congress she would likely serve in a manner similar to the six non-voting members of the House of Representatives. In 1787 the Northwest Ordinance created territorial delegates, and since then territories of the United States have been sending delegates to Congress (Davis, 2015). Given that the Constitution of the United States makes no reference to Congressional representation for non-states, Congress has largely dealt with this issue through legislation. Although Puerto Rico's resident commissioner has been seated in the House since 1901, the 1970s saw the most recent expansion of Congress' ranks to include delegates from the District of Columbia, Guam, American Samoa, and the U.S. Virgin Islands (Davis). More recently in 2008 Congress passed legislation to allow the Northern Mariana Islands to send a delegate to Congress. Throughout this time the rights of non-voting members in Congress have

shifted, but currently non-voting members may not vote on legislation, but may serve and vote in committees, participate in House debates, and introduce legislation.

As a non-voting member of the House of Representatives, Teehee and future Cherokee delegates would serve in a similar fashion to the tribal representatives of the Maine House of Representatives. While similar in this respect, the primary difference between the tribes in Maine and the Cherokee and Choctaw is where their respective rights to a delegate are derived. In Maine the three tribes with representation in the state House have the right to send a delegate because of state law, while the Cherokee and Choctaw have the right to representation in the federal House because of treaty rights. Should Teehee be seated in the House, the most immediate effect would likely be a movement within the Choctaw to send their own delegate to Washington. It is unknown how a tribal delegate in Congress would affect the over five hundred tribes that do not have a right to send a delegate, though. While Teehee stated that if she were seated she would “aid in advancing Indian Country generally” (Katz), tribal delegates would not be bound to represent Indians as a whole outside of the tribe that sent them to Congress.

It is difficult to determine whether a Cherokee delegate to Congress will be seated in the near future in spite of the treaty rights the Cherokee Nation has. During debates over criminal justice legislation that would have further empowered tribal nations’ court systems to prosecute certain offenses during the 2010s, many lawmakers expressed concerns over whether tribal courts could be fair to non-Native defendants (Deer, 2015). It is likely that some lawmakers will repeat these concerns over the fairness of additional tribal empowerment, or that Cherokee or Choctaw citizens are “double dipping” and getting extra representation, despite the fact that their delegates would be non-voting. Another barrier to the seating of a tribal delegate is determining which tribe is able to send a delegate. There are three federally recognized Cherokee tribes, and

of the three thus far only the Cherokee Nation of Oklahoma has sought to place a delegate.

Likewise, there are also three federally recognized Choctaw tribes, complicating the issue of how a determination would be made of which tribe can send a delegate (Rosser, 2005).

As sovereign nations, Native American tribes have the right to have their voices heard in the halls of their neighboring governments be it at the federal or state level. While throughout history this has most often taken the form of delegates and representatives sent on behalf of tribes to advocate for their interests outside of Congress, some tribes also have the right to represent themselves within legislatures through reserved seats. In Maine three tribes are guaranteed the right to send delegations to the state House of Representatives, while at the federal level the Cherokee and Choctaw have treaty rights to send Congressional delegates. While a rarity within American legislatures when tribes have been reserved seats, as in the case of Maine, it has been shown that tribes are better able to advocate for their interests. Given the potential for the Cherokee and Choctaw to gain representation at the federal level, this recognition of sovereignty would likely lead to similar gains for these tribes.

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