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An Interpretation of the Due Process Clause of the Indian Bill of Rights

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NOTE

AN INTERPRETATION OF THE DUE PROCESS CLAUSE OF THE INDIAN BILL OF RIGHTS

The Indian Bill of Rights was enacted into law on April 11, 1968.[1] The 1968 Indian Bill of Rights[2] guaranteed tribal members certain rights against tribal infringement similar to the rights guaranteed to individuals by the Bill of Rights as protection against encroachment by state and federal governments. The rights granted to each Indian include amendments one and four through eight of the Bill of Rights with the following exceptions: establishment of religion is not prohibited; the right to counsel is guaranteed only at the defendant's own expense; there is no right to indictment by a grand jury; and the petit jury right assures a jury of six members in all cases involving the possibility of imprisonment.[3] In addition to the language from the Bill of

1. Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 1302-03 (1970).
2. *Id.*
3. *Id.* The text is as follows:

   § 1302. *Constitutional rights*

   No Indian tribe in exercising powers of self-government shall

   (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

   (2) violate the rights of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

   (3) subject any person for the same offense to be twice put in jeopardy;

   (4) compel any person in any criminal case to be a witness against himself;

   (5) take any private property for a public use without just compensation;

   (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

   (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any

Rights, two other Constitutional word formulas are included: the requirement that the tribe not "deny to any person within its jurisdiction the equal protection of its laws,"[4] and the prohibition against bills of attainder and ex post facto laws.[5] The writ of habeas corpus is the only remedy mentioned in the Act.[6]

Among the most important rights granted by the new law is the right to due process of law.[7] This right is likely to have far reaching effects on tribal institutions. The question that arises is how to interpret the due process clause of the Indian Bill of Rights. It could be interpreted to mean exactly what it means in the Fifth and Fourteenth Amendments to the United States Constitution, or it could be interpreted to include standards which recognize tribal culture and values. In interpreting the Due Process Clause of the Indian Bill of Rights, courts should realize that a literal reading of the provisions to mean exactly what the standards are as applied to state and federal governments would result in seriously undermining the tribe's cultural autonomy and may even threaten the tribe's capacity for survival in the long run. One writer has posed the question as follows:

> Is it justifiable to impose federal notions of Due Process on tribal courts when these rights are not seen as fundamental by Indians and when countervailing factors, unique to the Indian context, militate against such an imposition?[8]

The purpose of this Note is to show that due process need not mean the same for tribes as for non-Indian America through a discussion of the past and present federal policy in regard to the historical doctrine of tribal sovereignty and by discussion of the legislative history and purpose of the Indian Bill of Rights. A discussion of the recent interpretations of the Due Process Clause of the Indian Bill of Rights by the federal courts follows with suggestions as to how the federal courts should approach Title II.

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penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post factor law;

or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. *Habeas corpus*

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Id.

4. 25 U.S.C. § 1302(8) (1970).
5. 25 U.S.C. § 1302(9) (1970).
6. 25 U.S.C. § 1303 (1970).
7. 25 U.S.C. § 1302(8) (1970).
8. Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. SURVEY HUMAN RIGHTS 49 (1971).

I. THE DOCTRINE OF TRIBAL SOVEREIGNTY

Formal recognition of the relationship between the tribe and the U.S. Government came in 1832 from the Supreme Court in the case of *Worcester v. Georgia*.[9] Chief Justice Marshall pointed out that:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. . . . The very term "nation," so generally applied to them, means "a people distinct from others."[10]

Chief Justice Marshall's opinion announced the theory of tribal sovereignty which has determined the Federal judiciary's basic policy toward Indian tribes for the past 130 years.[11] This theory has been refined. The contemporary meaning of tribal sovereignty is defined in *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*,[12] as follows:

> It would seem clear that the Constitution, as construed by the Supreme Court, acknowledges the paramount authority of the United States with regard to Indian tribes but recognizes the existence of Indian tribes as *quasi* sovereign entities possessing all the inherent rights of sovereignty excepting where restrictions have been placed thereon by the United States, itself.[13]

The courts have repeatedly upheld the quasi sovereign status of the tribe;[14] however, Congress has the prerogative of placing limitations upon tribal autonomy. Congress significantly eroded tri-

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9. Worcester v. Georgia, 31 U.S. 515 (1832). The controversy involved an attempt by the State of Georgia to exercise jurisdiction over the Cherokee Reservation contained geographically within its borders and convict a missionary for violation of a state law prohibiting anyone from residing on the reservation without a license. Chief Justice Marshall reversed the Georgia Supreme Court and stated that the Cherokee nation was "a distinct community . . . in which the laws of Georgia can have no force. . . ." *Id.* at 560.

10. *Id.* at 559 (1832).

11. SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN 1 (1964).

12. Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89 (1956).

13. *Id.* at 92. For a discussion of three principles involved in the scope of the meaning of tribal sovereignty see F. COHEN, FEDERAL INDIAN LAW 123 (1940 ed.).

14. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896). The Supreme Court refused to apply the fifth amendment to the Constitution to invalidate a tribal law that established a five man grandjury; In Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959), the Court by implication, held that a tribal Indian cannot claim protection from illegal search and seizure protected by the fourth amendment. However, the courts have not consistently upheld the internal sovereignty of the tribes. *See, e.g.*, State v. Forman, 16 Tenn. 256 (1835). *See generally*, M. PRICE, *Law and the American Indian* 46 (1973).

bal sovereignty between 1830 and the early 1900s,[15] a period which may be referred to as the "assimilationist period."[16] "The first attempt by Congress to control the internal affairs of Indians was the establishment of the Bureau of Indian Affairs (BIA) in 1924."[17] Also of great importance was the passage of the Major Crimes Act which gave to the federal courts jurisdiction over certain major crimes committed on reservations.[18] Then in 1934, with the passage of the Wheeler-Howard or Indian Reorganization Act (IRA),[19] Congress changed its policy. The principal effect of the Indian Reorganization Act was to re-establish Indian reservation land and reaffirm the concept of tribal sovereignty.[20] After World War II Congress again turned to its earlier assimilation plan. This act, termed the "Termination Policy," granted jurisdiction to specified states and an option to those states not specified to hear both civil and criminal matters between Indians or arising on Indian land.[21]

The present federal policy emphasizes the earlier philosophy of the Indian Reorganization Act. The concept of tribal sovereignty seems to be the theme of the present U.S. policy.[22] At the same time that Congress enacted the Indian Bill of Rights, it also modified the existing law to require the consent of the tribe as a condition to any assumption of civil or criminal jurisdiction by the

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15. Note, *Indian Bill of Rights*, 5 SW. U.L. REV. 139, 143 (1973).

16. An important legislative measure of this period was the Dawes or General Allotment Act of 1887, 24 Stat. 388 (1887), which divided Indian reservation land into small parcels allotted to individual Indians and excess was to be sold to American settlers. *See also* the Citizenship Act of 1924, 43 Stat. 253 (1924), 8 U.S.C. § 3 (1964).

17. Note, *supra* note 15 at 143. The BIA was established to "manage and superintend the intercourse with the Indians" and "to carry into effect such regulations as may be prescribed by the President." *Id.* at 143.

18. Act of March 3, 1885, ch. 341, 23 Stat. 362 (1885), *as amended*, 18 U.S.C. § 1153 (1970). The original act included murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary and larceny. It was amended to include the offenses of incest and robbery (Act of June 28, 1932, ch. 284, 47 Stat. 336); carnal knowledge and assault with intent to commit rape (Pub. L. No. 89-707, § 1, 80 Stat. 1100 (1966)); and assault resulting in serious bodily injury (Pub. L. No. 90-284, § 501, 82 Stat. 80 (1968)); The Act is codified at 18 U.S.C. § 1153 (1970). *See Ex Parte* Crow Dog, 109 U.S. 556 (1883).

19. Act of June 18, 1934, ch. 576, 48 Stat. 984, *as amended*, 25 U.S.C. §§ 461-79 (1970).

20. Sections 16 and 17 of the Act allowed Indian tribes to incorporate and adopt constitutions of self government. The internal sovereignty exercised by the tribes under the IRA was not seen as granted by the Act, but as residual power, unextinguished in the preceding years. For a discussion of the Act itself and its objectives see Comment, *Tribal Self-Government and the Indian Reorganization Act of* 1934, 70 MICH. L. REV. 955 (1972).

21. Act of August 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. § 1162 (1970). 25 U.S.C. § 1323(a) (1970) authorizes the U.S. to accept retrocession of jurisdiction granted under the Act. 25 U.S.C. § 1322 (1970) now requires the consent of the tribe before a state can assume civil jurisdiction over it.

22. President Johnson in his message to Congress in support of the Indian Civil Rights Act endorsed Indian Tribal Sovereignty and self-government:

> I propose a new goal for our Indian programs: a goal that ends the old debate about "termination" of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership and self-help . . . I propose in short, a policy of maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, and self-determination.

President's Address to Congress, March 6, 1968, 114 CONG. REC. 5394, 5395 (1968). This policy was adopted by the Nixon Administration. *Supra* note 8 at 139, 146 n.41 (1973), *citing* W. WASHBURN, RED MAN'S LAND, WHITE MAN'S LAW 90, 97 (1971).

states.[23] As a result, the tribe has the option of remaining a distinct community. This means the continued existence of substantial political power in the tribal governments.

The significance of the doctrine of tribal sovereignty cannot be overstated. Although federal Indian policy has fluctuated over the years, in fact the courts have consistently applied this concept and now Congress has come to recognize it as something permanent. Tribal sovereignty was a primary catalyst in the adoption of the Indian Bill of Rights.[24] Before its passage the Indian had no federally protected rights against the tribe. His only protection was the tribal code and constitution.[25] But most important, if the Indian Bill of Rights is to reflect the present federal policy of "self-help, self-development, and self-determination"[26] for Indians, then these concepts must be recognized in establishing standards under the Due Process Clause of the Indian Bill of Rights. In construing the statute courts should remember that the courts and Congress have strongly supported the policy of allowing Indian tribes to maintain their governmental and cultural identity.

II. THE INDIAN BILL OF RIGHTS

A. LEGISLATIVE HISTORY

In 1961, the subcommittee of the Senate Judiciary Committee began a series of hearings on the legal status of the Indian in America and the problems Indians encounter when asserting constitutional rights in the relations with state, federal, and tribal governments.[27] This congressional attention to the problems of the Indians concerning their constitutional rights spanned seven years.[28] Hearings were commenced in Washington and moved to California, Arizona, New Mexico, Colorado, North and South Dakota and finally

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23. 28 U.S.C. § 1360 (1970).

24. Note, *supra* note 15 at 146.

25. Several tribal constitutions contain provisions purporting to protect the Indian against tribal action which is contrary to the Federal Constitution. Such a provision is found in the constitution of the Oglala Sioux Tribe, act IV, sec. 1, p. 2. SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2d. SESS., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN, 5 (1964).

26. President's Address to Congress, March 6, 1968, 114 Cong. Rec. 5394, 5395 (1968); *see also* Note, *supra* note 17 at 146 (1973).

27. H.R. No. 15419 and Related Bills, 90th Cong., 2d Sess. 13 (1968).

28. *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1 (1962), 87th Cong., 1st Sess., pt. 2 (1963), 87th Cong., 2d Sess., pt. 3 (1963), and 88th Cong., 1st Sess., pt. 4 (1964) [Hereinafter cited as 1961-63 *Senate Hearings*]. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN (Comm. Print 1964); *Hearings on Constitutional Rights of the American Indian, S.* 961-68 & *S. J. Res.* 40, *Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN (Comm. Print 1966); *Hearings on Rights of Members of Indian Tribes Before the Subcomm. on Indian Affairs of the House Comm. on Internal and Insular Affairs*, 90th Cong., 2d Sess. (1968).

were concluded in Washington.[29] These hearings were held in areas where the subcommittee could receive the views of the largest number of Indian tribes.[30] Additional committee hearings were held in 1965,[31] and another investigative report followed in 1966.[32] The committee reported the bill, as later passed, to the Senate;[33] it passed after only perfunctory discussion.[34] Hearings on the bill were then held in the House.[35] As the House was not moving fast enough on the bill to please Senator Ervin, he amended S. 1843 onto the House Civil Rights Bill under consideration in the Senate in order to force consideration of the Indian Bill of Rights in the full House.[36] The House accepted the amendment, with some discussion on the floor concerning the lack of substantive consideration in the House.[37]

Though it is not the purpose of this Note to discuss the merits of this legislation, it should be pointed out that it is easy to conclude from the foregoing that legislation passed after such long and careful deliberation is of necessity sound. However, how do the Indians view their "Bill of Rights?" According to one source, Indians view it as a further weakening of Indian self-government in the name of protecting Indians from their own people.[38] That critic states: "They see the Indian Bill of Rights as another imposition by a white government of white standards, values and governmental theory upon once sovereign tribes."[39] It is difficult to assess the extent of opposition, but its very existence makes it even more imperative that the courts in applying the Due Process Clause of the Indian Bill of Rights recognize the historical concept of tribal sovereignty and the distinct features of tribal culture.

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29. *H.R.* 15419 *and Related Bills*, 90th Cong., 2d Sess. 14 (1968).
30. *Id.*
31. *Hearings on Constitutional Rights of the American Indian S.* 961-68 & *S.J. Res.* 40 *Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).
32. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS. CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN (Comm. Print 1966)
33. S. REP. NO. 841, 90th Cong., 1st Sess. (1967).
34. 113 CONG. REC. 35, 471-77 (1967).
35. *Hearings on Rights of Members of Indian Tribes Before The Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. (1968).
36. 114 CONG. REC. 2459-62 (1968). *See* Rieblich, *Indian Rights Under the Civil Rights Act of* 1968, 10 ARIZ. L. REV. 617, 619 (1968).
37. 114 CONG. REC. 9552-53 (1968). On the day of the statute's passage, Wayne N. Aspinall, Representative from Colorado, and Chairman of the House Committee on Interior and Insular Affairs, opposed passage of the proposed legislation on the ground that the House committee had not had time to fully consider the merits of the proposal relating to Indians. *See* Rieblich, *Indian Rights Under the Civil Rights Act of* 1968, 10 ARIZ. L. REV. 617, 618 (1968).
38. Coulter, *supra* note 8 at 50.
39. *Id. See also* Kerr, *Constitutional Rights, Tribal Justice and the American Indian*, 18 J. PUB. L. 311, 333 (1969) which states that the Indians general response to the Indian Bill of Rights was one of apathy and in some cases opposition. For a critical analysis of the Indian Bill of Rights see, Warren, *An Analysis of the Indian Bill of Rights*, 33 MONT. L. REV. 255 (1972). In addition, it is important to note that though Indian country has been described as a civil rights "no man's land," tribal members are more likely to find meaningful protection on the reservation rather than off it. It is claimed that there is pervasive discrimination against Indians off the reservation. Senate Hearings on Constitutional Rights, 89th Cong., 1st Sess. 817-71 (1964); F. COHEN, FEDERAL INDIAN LAW 400 (1940 ed.).

1. *An Interpretation of the Legislative Intent*

The purpose of the subcommittee's investigation was "to seek to ascertain whether our Indians understand their basic rights under the Federal Constitution and whether these rights are adequately protected."[40] Most of the hearings focused on the question of whether or not those charged with offenses were receiving any procedural rights.[41] The hearings revealed that judges seldom have any legal training, and there are no professional prosecutors.[42] Furthermore, the tribes have allowed defendants to have only non-attorney representatives as counsel,[43] and this privilege is seldom exercised.[44] One provision of Title II specifies that in a tribal court a criminal defendant shall be entitled to the assistance of counsel.[45] This provision engendered much discussion and some Indian tribes expressed the fear that a defense lawyer in a tribal court would so confuse the lay judges with formalistic demands that the system might collapse.[46] Considerable doubt as to whether a right to retained counsel is either necessary or desirable for the informal Indian trial has been expressed by several commentators[47] and there has been considerable litigation in this area.[48] The legislative hearings also developed additional information concerning the criminal justice systems of the tribes.[49]

The hearings produced little information about the substantive practices of tribal courts and governments.[50] However, discussion of the Indian Bill of Rights showed no intent to use the statute as a means for modifying tribal cultural attitudes in order to facilitate assimilation of Indians into the non-Indian community.[51] In fact, the committee exhibited a positive desire to avoid any injury

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40. *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 2, 285 (1963).

41. For a discussion of the hearings, see Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1355-60 (1969).

42. *Id.* at 1357.

43. 1961-63 *Senate Hearings*, *supra* note 28 at 13, 54, 73, 427, 608, 825; 1965 Senate Hearings, *supra* note 31 at 138.

44. 1961-63 *Senate Hearings*, *supra* note 28 at 247-50.

45. 25 U.S.C. § 1302(6) (1970).

46. 114 CONG. REC. 9540, 9614 (1968).

47. Coulter, *Fed. Law and Indian Tribal Law: The Right to Civil Counsel and the* 1968 *Indian Bill of Rights*, 3 COLUM. SURVEY HUMAN RIGHTS L. 49 (1972); Reiblich, *Indian Rights Under the Civil Rights Act of* 1968, 10 ARIZ. L. REV. 617, 628-32 (1968).

48. Reagan v. Blackfeet Tribal Court, Civil No. 001254, 001255, (D. Mont. 1969) (action arising from expulsion and suspension by tribe of two lawyers from tribal court practice); Claw v. Armstrong, Civil No. 001085 (D. Colo. 1970) (action to compel tribal court to provide counsel and establish procedure for granting jury trials); Wasson v. Gray, Civil No. 001015, (D.N.M. 1971) (action to restrain federal and tribal officials from excluding attorneys from tribal administrative building); Towersap v. Fort Hall Indian Tribal Council, Civil No. 001103 (D. Idaho 1971) (action to compel tribal court to allow Indian plaintiffs professional legal counsel).

49. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments* 82 HARV. L. REV. 1343, 1356-59 (1969).

50. *Id.* at 1358-59.

51. *Id.* at 1359.

to the tribes' capacity to function as autonomous governmental units. In addition to continually asking witnesses in the hearings whether the imposition of criminal procedural standards would be too heavy a burden on the tribal courts,[52] Senator Sam Ervin stated: "We have no desire to interfere with or to cut into tribal authority. We seek only to strengthen that and at the same time strengthen the rights of the American Indians, both under tribal authority and under the Constitution."[53] During the hearings on the proposed legislation numerous witnesses pointed out the peculiarities of the Indians' economic and social conditions, his customs, beliefs and attitudes that would raise serious questions about the desirability of imposing upon them forms and procedures to which they were unaccustomed.[54] Therefore, the focus of the legislative committee was upon establishing new individual rights for Indians balanced by a recognition of the importance of tribal sovereignty.

Little attention was given by the subcommittee to determining and evaluating standards of review. The committee's adoption of constitutional language was not the result of serious consideration of the problem of standards, but an easy way to avoid its difficulties. Furthermore, it is important to note that though some of the language is taken virtually word for word, the Indian Bill of Rights is not an exact reproduction of the language of the Federal Bill of Rights. There are several important differences. In the guarantee of freedom of religion,[55] the clause prohibiting the "establishment of religion" was purposely deleted in consideration of the theocratic nature of some tribal governments.[56] The Fifth Amendment right to a grand jury indictment was also omitted in view of the limited criminal jurisdiction of tribal courts.[57] There is a guarantee of the right to trial by jury, but it is limited to criminal cases, and then by a six-man jury.[58] These modifications appear to be a recognition of the informal nature of proceedings in the tribal courts.

The Indian Bill of Rights also guarantees the right to be represented by counsel, but only at the defendant's expense.[59] This modification was made in view of the fact that most Indian tribes have no organized bar association so attorneys are not generally available, and prosecution in tribal courts is often informal and

52. 1961-63 *Senate Hearings*, *supra* note 28, at 99, 147, 873-75.
53. *Id.* at 287 (Senator Ervin quoted by Senator Carroll).
54. Rieblich, *Indian Rights Under the Civil Rights Act of* 1968, 10 ARIZ. L. REV. 617, 622 (1968).
55. 25 U.S.C. § 1302(1) (1970).
56. *Hearing on H.R.* 15419 *and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess., ser. 23 at 26 (1968) [Hereinafter *House Hearings*].
57. Lazarus, *Title II of the* 1968 *Civil Rights Act*: *An Indian Bill of Rights*, 45 N.D. L. REV. 337, 339 (1969).
58. 25 U.S.C. § 1302(10) (1970).
59. 25 U.S.C. § 1302(6) (1970).

may be presented without the assistance of professional attorneys.[60] Also the expertise of trained counsel is not necessary where only traditional and customary law is involved.[61] In addition, two provisions in the original bill were deleted in deference to the different nature of some Indian tribal governments. The right of appeal from an adverse decision in a tribal court and a trial *de novo* in the federal district court in criminal cases were omitted[62]—on the ground that the Senate Subcommittee on the Judiciary thought they were too disruptive of tribal self-government.[63] Also the Subcommittee recognized that the tribes, as ethnic units, must restrict voting on tribal matters to the members of their particular tribe and withdrew the Fifteenth Amendment guarantee that voting would not be restricted because of race.[64] Therefore, though originally the same restraints imposed on the federal government were to be imposed on the Indian tribes,[65] the Indian Bill of Rights was tailored to Indian needs in response to the differences of Indian culture and government.[66]

Although the committee stated as one of its recommendations that "[t]he constitutional rights and protections conferred upon American citizens should be made applicable to American Indians in their relationship with their tribal governing bodies,"[67] certainly the differences between the Indian Bill of Rights and the U.S. Bill of Rights make it plain that Congress did not intend to impose the same limitations on the tribes as are imposed on the state and federal governments.

The legislative history indicates a positive concern to balance individual rights with tribal sovereignty. It, therefore, follows that application of Anglo-American standards of due process in tribal systems of justice and government would not be compatible with the concept of tribal sovereignty and would result in the destruction of tribal procedure and culture. The legislative history and resulting bill strongly suggest that the Due Process Clause of the Indian Bill of Rights should be interpreted only with careful reference

60. Lazarus, *supra* note 57 at 339-40 *quoting House Hearings*, *supra* note 56 at 26-27.
61. *Id.* at 340.
62. *Hearings on S. 961 etc. Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 5, 91 (1965); STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS ON THE CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN 9 (Comm. Print 1966).
63. Lazarus, *supra* note 57 at 347.
64. Note, *supra* note 15 at 150.
65. 110 CONG. REC. 17329 (1964).
66. Lazarus, *supra* note 57 at 345-48.
67. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS ON THE CONSTITUTIONAL RIGHT OF THE AMERICAN INDIAN 23 (1964). *See* 114 CONG. REC. 9596 (1968) (remarks of Congressman Mead that, "The provisions of the Bill of Rights are not identical to the Federal Constitution's Bill of Rights, and the differences are largely in order to accommodate tribal customs").

to the context of the particular tribal culture, customs, and form of government.

B. FEDERAL COURT DECISIONS AND THE DUE PROCESS CLAUSE OF THE INDIAN BILL OF RIGHTS

The federal judiciary may have the most important role in administering change in the tribal justice systems.[68] Certainly decisions as to how broadly the 1968 legislation will affect traditional practices will be made by these courts, especially at the district level. The most litigated provision of the Indian Bill of Rights is its assurance that no person within its jurisdiction will be denied the equal protection of its laws or deprived of liberty or property without due process of law.[69] To date the federal courts have been undecided as to what these ambiguous phrases grant to Indians. Though several courts have entertained suits alleging denials of due process, little has been stated to clarify these terms.[70] In this area judicial awareness of tribal institutions and culture and of the legislative history is especially important.[71] The legislative history appears to reflect that the Indian Bill of Rights requires a limited construction which in turn involves an analysis of its development. It does not authorize the court to apply broadly such a concept as due process, but requires a sensitive regard for its impact on tribal structures and values. This point is fully revealed by the foregoing discussion of seven years of legislative history.[72]

In deciding cases involving the due process clause, some courts have not engaged in the sort of historical discussion and analysis that should be essential. In *Johnson v. Tower Elwha Tribal Community*,[73] an action to determine whether a tribe must grant hearings prior to cancellation of an assignment of right to use tribal land, the court concluded that the due process and equal protection clause in the Indian Bill of Rights have the same meaning as those clauses as applied to the United States and the states in the Fifth and Fourteenth Amendments.[74] Another recent example of this interpretation is *Crave v. Eastern Band of Cherokee Indians*[75] where the court stated:

> The terms 'due process of law' and 'equal protection of the laws' are not susceptible of exact or comprehensive defini-

68. Burnett, *An Historical Analysis of the* 1968 *Indian Civil Rights Act*, 9 HARV. J. LEGIS. 557, 617 (1972).
69. 25 U.S.C. § 1302(8) (1970).
70. Courts have had to struggle with a more fundamental problem—whether they had jurisdiction initially to decide such intratribal controversies notwithstanding the guarantees of the Indian Bill of Rights. Note, *supra* note 15 at 150.
71. *See* Burnett, *supra* note 68.
72. See text accompanying footnotes 50 through 67, *supra*.
73. Johnson v. Tower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973).
74. *Id.* at 202-03.

> tion. What is due process of law depends on the circumstances and varies with the subject matter and the necessities of the situation. By due process of law is meant one which, following the forms of law, is appropriate to the case and just to the parties affected. *What is due process may be ascertained in part by an examination of those settled usages and modes of proceedings existing before. . . .*[76]

Applying those principles to the action taken by the Tribal Council of Eastern Band of Cherokees the court found itself compelled to find that the plaintiff's property was taken without notice and hearing and thus without due process of law.[77] These courts and others[78] seem to be rushing to extract and apply standards found and defined in the U.S. Constitution.

However, another approach was taken by the federal district court for northeastern North Dakota in *Lohnes v. Cloud,*[79] The plaintiff in this case brought an action for damages resulting from an auto accident on the Fort Totten Indian Reservation and alleged that the "Tribal Court, as it is instituted, relative to civil proceedings, is unconstitutional in that it violates the due process provisions of the Indian Bill of Rights, 25 U.S.C. § 1302(8)."[80] The district court in *Lohnes,* confronted with a jurisdictional challenge in the form of a motion to dismiss, granted the motion, but on the theory that the civil rights violation complained of—denial of a jury trial in tribal court for a tort action—was in fact tribal action tolerated by the terms of the Indian Bill of Rights.[81]

It is the court's reasoning in *Lohnes* that is of immense significance. The court in *Lohnes* took pains to trace the legislative history of the Indian Bill of Rights and to analyze the doctrine of tribal sovereignty. The court quoting the Eighth Circuit language in *O'Neal* which is instructive as to the restrictive application of § 1302 to tribal courts, as well as the rationale underlying it, stated:

> 'Congress clearly did not intend to detract from the continued vitality of the tribal courts by passage of this legislation. . .' at 1144, n.1.
>
> 'However, it is clear to us that Congress wished to protect and preserve individual rights of the Indian peoples, with the

75. Crave v. Eastern Band of Cherokee Indians, Civil No. 3412 (D.N.C. Feb. 11, 1974) (emphasis added).
76. *Id.*
77. *Id.*
78. *See, e.g.,* U.S. v. Brown, 334 F. Supp. 536 (D. Neb. 1971); Daly v. U.S., 483 F.2d 700 (8th Cir. 1973); Armstrong v. Harvard, Civil No. 6-72-CIU-315 (Jan. 22, 1974).
79. Lohnes v. Cloud, 366 F. Supp. 619 (1973).
80. *Id.* at 620.
81. *Id.* at 623. Implicit in the court's holding, however, was the conclusion that if a jury trial had been denied in a criminal proceeding, this would have been proscribed by the Indian Bill of Rights. The court would then have had jurisdiction to impose an equitable remedy thus limiting this exercise of the tribe's power.

> realization that this goal is best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments.'
>
> 'Prior to the adoption of the Indian Bill of Rights, the courts respected the need of Indians to maintain strong tribal governments.'
>
> 'Since the passage of the Indian Bill of Rights we have recognized the fear that courts may apply broadly such elusive and expanding concepts as due process . . . without sensitive regard for their impact on tribal structures and values.'[82]

These passages clearly indicate the court in *Lohnes* recognized the need for sensitivity to the legislative history and doctrine of tribal sovereignty. The thrust of the court's reasoning is that the lengthy legislative history of the Indian Bill of Rights and a long standing federal policy of respect for tribal self-determination require that a clear distinction be maintained between the requirements imposed on the tribe through the Indian Bill of Rights and the requirements imposed upon federal and state governments through the Bill of Rights and the U.S. Constitution.

Thus, as a federal court is faced with applying the broad language found in the Indian Bill of Rights, two divergent approaches to the question of defining standards are available. The courts in *Johnson*[83] and *Crave*[84] have merely avoided any difficulties by ignoring legislative history as well as the present federal policy concerning Indians by applying already existing standards under the Bill of Rights. But the district court in *Lohnes*[85] properly meets the issue of determining standards by going to the heart of the Indian Bill of Rights and the doctrine of tribal sovereignty.

III. CONCLUSION

As one commentator aptly points out, "[F]or Indians, tribal sovereignty is not an abstract concept, a cultural relic, or even a vanishing institution."[86] To the members, an Indian tribe represents a dominant force in their economic and social lives as well as the local government.[87] The present federal policy emphasizes self-determination concerning the Indian Community.[88] This policy,

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82. *Id.* at 623 *quoting* O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1144-45 (8th Cir. 1973).

83. 484 F.2d 200 (9th Cir., Sept. 4, 1973).

84. Civil No. 3412 (D.N.C., Feb. 11, 1974).

85. 366 F. Supp. 619 (1973).

86. Lazarus, *supra* note 57 at 345 (1969).

87. *Id.* at 346.

88. 117 CONG. REC. 46383 (1971); *See also* Message to Congress on Indian Affairs from President Richard M. Nixon, July 8, 1970.

set forth in Senate Concurrent Resolution 26, as passed on December 11, 1971, stated:

> That it is the sense of Congress that—(3) improving the quality and quantity of social and economic development efforts for the Indian people and maximizing opportunities for Indian control and self-determination shall be a major goal of our national Indian policy; . . .[89]

The historic right of the Indians to self-determination demands a high order of respect for their institutions and culture. Moreover, the legislative history of Title II makes it clear that the enactment of the Indian Bill of Rights was to be a tool for strengthening tribal institutions,and not a weapon for their destruction.[90] The Indian Bill of Rights was tailored to tribal life—for instance, the Senate committee made changes in the Act to protect tribal ethnic identity and theocracy.[91] The Congressional intent was clearly to preserve tribal sovereignty[92] while assuring greater protection of individual rights. Therefore, in interpreting the Due Process Clause of the Indian Bill of Rights and exacting standards, the courts must weigh and balance individual rights *and* tribal values.[93] The courts must make decisions weighing both these interests thought by Congress to be important. To do this, courts will have to receive evidence on the customs and culture of the particular tribe and will have to recognize the historical doctrine of tribal sovereignty and the legislative history of the Indian Bill of Rights. Congress could not include in the Indian Bill of Rights all accommodations to Indian culture; it is the responsibility of the courts to respond to the individual situations. The judicial doctrines developed in cases being brought under the Indian Bill of Rights are of tremendous importance in defining the future direction of tribal sovereignty. It is necessary to realize that the Indian Bill of Rights could dramatically limit the exercise of tribal self-government. The courts

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89. *Id.*

90. *See* Note, *supra* note 49 at 1356-59.

91. Note, *supra* note 15 at 160.

92. *Hearings on H.R.* 15419 *and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 26 (1968). Remarks of Edward Weinberg in describing the Interior Department's "selective" approach, which the Subcommittee adopted: "we were concerned that certain of the limitations placed by the Constitution upon the powers of the Federal Government, if imposed upon tribal governments, would be disruptive of those governments out of all proportion to the protection they would afford individuals."

93. *See* Note, *supra* note 15 at 163; Note, *The Indian Bill of Rights and The Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1369 (1969). One commentator opposes weighing individual rights against tribal self-government stating that, "in a non-Indian tribunal it is all too easy to foresee how the balance is likely to be struck." He suggests that, "the due process clause should be taken to guarantee fundamental fairness in the particular context of tribal culture and self-government." Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the* 1968 *Indian Bill of Rights*, 3 COLUM. SURVEY HUMAN RIGHTS L. 49, 92 (Jan. 1971).

must respect what so aptly was expressed by a Santo Domingo Pueblo to the Senate Subcommittee:

> The things you value, that which makes life meaningful to you are not the same with us in many respects.[94]

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94. *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., 29 (1969).