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# Title II of the 1968 Civil Rights Act: An Indian Bill of Rights

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# TITLE II OF THE 1968 CIVIL RIGHTS ACT: AN INDIAN BILL OF RIGHTS

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One hundred years after adoption of the fourteenth amendment, forty-four years after all native-born American Indians were declared to be citizens of the United States,[1] and eleven years after the Constitution followed the flag overseas,[2] the Bill of Rights finally came to Indian reservations.

Title II of the 1968 Civil Rights Act[3] provides, in substance, that no Indian tribe in exercising its powers of local self-government[4] may engage in action, with certain important exceptions, which the federal or state governments are prohibited from undertaking by the first ten and fourteenth amendments to the Constitution. Significantly, the legislative forerunner of Title II, as originally drafted, would have required that "any Indian tribe in exercising its powers of local self-government shall be subject to [exactly] the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution."[5] In response to testimony that such general language could cause a host of legal and practical problems in the administration of justice on Indian reservations,[6] and at the suggestion

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1. Act of June 2, 1924, 43 Stat. 253, now codified in 8 U.S.C. § 1401(a)(2) (1964). Prior to the Citizenship Act of 1924, approximately two-thirds of the Indians of the United States already had acquired citizenship by treaty or statute. U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 517-520 (1958), derived from F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (G.P.O. 4th ed., 1945).

2. Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

3. Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 1301-1303.

4. In section 201(2) of the 1968 Act, "powers of self-government" are defined to mean and include "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; * * *."

5. S. 961 of the 89th Congress, reprinted in *Hearings on S. 961 etc. Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 5 (1965) [hereinafter cited as *Hearings*].

6. *Hearings* at 16, 64-65, 130-131, and elsewhere. As summarized in STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 89th Cong., 2nd Sess., SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS ON THE CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN 9 (Comm. Print 1966) [hereinafter cited as SUMMARY REPORT]:

> The most serious objections to S. 961 took the form neither of objection to the purposes of the bill nor quarrel with the sundry allegations of the practice of [*sic*] possibility of denial of rights by tribal governments. Instead, as numerous witnesses pointed out, the peculiarities of the Indian's economic

of the Department of the Interior,[7] the proposed legislation was rewritten in order to select and specify the constitutional protections American Indians were to possess in their relations with tribal governments.[8]

The idea that Congress in 1968 had to bring the Bill of Rights to Indian reservations by statute, and that Congress could pick and choose which constitutional safeguards to extend, is alien to popular concepts of American jurisprudence. Before examining the historical and legal precedents which led to this anomaly, a brief review of how Title II compares with the first ten amendments would seem in order.

Section 202(1) of the 1968 Civil Rights Act provides that no Indian tribe[9] shall "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." This language, of course, is taken virtually word for word from the first amendment, with the omission of the clause prohibiting "establishment of religion." Deletion of the establishment clause was deliberate, in recognition of the theocratic nature of many tribal governments.[10]

Section 202(2) paraphrases the fourth amendment by requiring that Indian tribes shall not "violate the right of the people to be

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and social condition, his customs, his beliefs, and his attitudes, raised serious questions about the desirability of imposing upon Indian cultures the legal forms and procedures to which other Americans had become long accustomed.

7. *Hearings* at 317-319.

8. SUMMARY REPORT at 25. The revised bill was introduced as S. 1843 of the 90th Congress on May 23, 1967. 113 CONG. REC. S 7214 (daily ed. May 23, 1967). S. 1843 subsequently was combined with other bills affecting Indians under consideration by the Subcommittee on Constitutional Rights, and, as so amended, was favorably reported on December 6, 1967, by the Senate Committee on the Judiciary. S. REP. No. 841, PROTECTING THE RIGHTS OF THE AMERICAN INDIAN, 90th Cong., 1st Sess. (1967) [hereinafter cited as SENATE REPORT]. The Senate passed the bill by unanimous vote on December 7, 1967 (113 CONG. REC. S 18156 (daily ed. Dec. 7, 1967), but the House Committee on Interior and Insular Affairs, to which S. 1843 was referred, took no action to move the legislation.

On March 8, 1968, Senator Sam J. Irvin, Jr., (D., N.C.), Chairman of the Senate Subcommittee on Constitutional Rights, offered the complete final text of S. 1843 as an amendment to H.R. 2516, the House-passed civil rights bill, and, after some procedural debate as to whether the proposal was germane under the cloture rule then in force, the Senate approved the amendment by a vote of 81-0. 114 CONG. REC. S 2459 *et seq.* (daily ed. March 8, 1968). A few days later, the Senate passed H.R. 2516, which was referred for consideration back to the House of Representatives and ultimately was approved without further amendment. 114 CONG. REC. H 2825-2826 (daily ed. April 10, 1968).

The story of how the Indian Bill of Rights, apparently blocked from passage on its own merits in the House of Representatives, became law as part of the 1968 Civil Rights Act is a subject worthy of the political scientist—a fascinating tale in the fine art of legislative strategy.

9. An Indian tribe is defined in section 201(1) to mean "any tribe, band or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government."

10. Report of the Department of Justice on S. 1843, dated March 29, 1968, printed in *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., 2nd Sess. 26 (1968). [hereinafter cited as *House Hearings*], *see* Statement on H.R. 2516 by Congressman Ben Reifel (R., S.D.)—the only member of Congress also enrolled as a member of an Indian tribe—before the House Committee on Rules, published as an Extension of Remarks of Congressman Ray J. Madden (D., Ind.) [hereinafter cited as Reifel Statement], 114 CONG. REC. E 2741-2742 (daily ed. April 4, 1968).

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." Perhaps mindful of the nineteenth century Sioux and Apache campaigns, Congress in Title II did not restate the second amendment right of the Indian people to keep and bear arms.

Sections 202(3) - (5), inclusive, make applicable to Indian tribes the restraints upon double jeopardy, self-incrimination and the taking of private property without payment of just compensation respectively, imposed upon the federal and state governments by the fifth and fourteenth amendments. The fifth amendment right to indictment by a grand jury in capital cases, on the other hand, is omitted in view of the limited criminal jurisdiction of tribal courts.

Section 202(6) provides that no Indian tribe shall "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." This language is taken virtually word for word from the sixth amendment, with the omission of the right to trial "by an impartial jury," which is covered under section 202(10), and the addition of the qualification that an Indian criminal defendant in tribal court has a right to counsel only "at his own expense." In commenting upon the latter limitation on a civil right of growing prominence,[11] the Justice Department explained:[12]

> The fact that this is a departure from recent United States case law requiring free counsel for indigents does not necessarily mean it is repugnant to modern judicial standards when viewed in the context of Indian court practices. In most Indian tribes there is no organized bar association. Thus, attorneys are not generally available to repre-

11. Gideon v. Wainwright, 372 U.S. 335 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966).

12. *House Hearings* at 26-27; *see* Remarks of Interior Department Solicitor Edward Weinberg before the Indian Law Committee, Federal Bar Association 2-3 (Sept. 13, 1968) (unpublished):

> [I]f the right to professional counsel without charge were construed as applicable to criminal proceedings in tribal courts, such courts would practically have to cease functioning because they have no bars of professional lawyers associated with them from which they could appoint counsel to represent indigent defendants. Hence, the right to professional counsel guaranteed by the Indian Bill of Rights is conditional upon the defendant's providing such counsel for himself.

As a general rule, professional attorneys have not heretofore been permitted to practice in tribal courts. JUSTICE, U.S. COMM. ON CIVIL RIGHTS REPORT No. 5 145 (1961) [hereinafter cited as CIVIL RIGHTS REPORT]. The regulation preventing attorneys from appearing in Courts of Indian Offenses under the control of the Secretary of the Interior, however, was revoked on May 16, 1961. 25 C.F.R. § 11.9.

> sent defendants. In addition, the prosecution in tribal courts is often informal and may be presented without the assistance of professional attorneys. Finally, the tribal cases generally deal with traditional and customary law where the expertise of trained counsel is not essential.

Section 202(7) ordains that Indian tribes shall not "require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both." The first part of this text obviously is taken from the eighth amendment, while the latter part essentially codifies existing practice under the various tribal law and order codes. Section 202(9) carries over to Indian tribes the prohibition in article I, section 10, against passage by Congress of any bill of attainder or ex post facto law.

Section 202(10) provides that no Indian tribe shall "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." This modification of the sixth amendment right to trial by a twelve-man jury in criminal cases was deemed appropriate in light of the relatively informal nature of tribal court proceedings, while the omission of the seventh amendment right to a trial by jury in civil cases at common law where the value in controversy exceeds $20 also permits continued flexibility in the tribal court systems.[13]

Secton 202(8), reflecting the fourteenth amendment, directs that no Indian tribe shall "deny to any person within its jurisdiction the equal protection of its laws," and, reflecting the fifth amendment, further directs that Indian tribes shall not "deprive any person of liberty or property without due process of law." Section 203, reflecting article I, section 9, provides that 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." As the following discussion will show, sections 202(8) and 203 undoubtedly will have a greater impact upon the operations of tribal governments, and are more likely to be the subject or basis of future litigation, than any of the other provisions of Title II.

## TRIBAL SOVEREIGNTY AND THE BILL OF RIGHTS BEFORE TITLE II

From the earliest days of our Nation, Indian tribes have been recognized, in the words of Chief Justice Marshall, as "distinct,

13. *House Hearings* at 27.

independent, political communities,"[14] and, as such, authorized to exercise powers of local self-government. In a more recent restatement of the controlling rule of law, the Supreme Court of Arizona observed:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles; (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[15]

A striking affirmation of the foregoing principles in particular relation to the Bill of Rights is found in the case of *Talton v. Mayes*, 163 U.S. 376 (1896). The question there presented was whether a law of the Cherokee Nation authorizing a jury of five persons to institute criminal proceedings violated the fifth amendment requirement of indictment by a grand jury. The Supreme Court held that the fifth amendment applies only to the acts of the federal government, that the sovereign powers of the Cherokee Nation, although recognized by the United States, were not created by the United States, and that the judicial authority of the Cherokees was, therefore, not subject to the limitations imposed by the fifth amendment.

The *Talton* holding actually stands only for the proposition that a tribal government, absent any federal action, is not required to grant Indians a *remedial* right — a right concerning the form and manner in which the power of government is exercised — conferred by the Constitution.[16] Left open by the holding, and never decided by the Supreme Court, was whether a tribal government, again absent any federal action, may deny its members a *fundamental* right — an inviolable and personal liberty — under the Constitution, such as freedom of religion.[17] The lower federal

14. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
15. Begay v. Miller, 70 Ariz. 380, 222 P.2d 624, 627 (1950), quoting from F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1 at 123; *see* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 92-93 (8th Cir. 1956).
16. The Talton decision is correctly cited in The Edgewood, 279 F. 348 (3rd Cir. 1922), in support of the principle that presentment by a grand jury is not a fundamental constitutional right. *See* Hawaii v. Mankichi, 190 U.S. 197 (1903), and Soto v. United States, 273 F. 628, 633 (3rd Cir. 1921).
17. The flat prohibition against slavery in the thirteenth amendment has been held applicable to Indian tribes. *In re* Sah Quah, 31 F. 327 (D. Alas. 1886).

courts, though, in a series of decisions withholding basic Bill of Rights protections, eventually filled that gap.

In *Martinez v. Southern Ute Tribe of Southern Ute Res.*, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958), for example, the court ruled that the due process clause did not apply to the acts of an Indian tribe in denying an individual Indian the benefits of tribal membership. In *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), the court ruled that neither the due process clause of the fifth amendment nor the equal protection clause of the fourteenth amendment applied to the act of an Indian tribe in imposing a tax only on non-members for the use of Indian trust lands. In *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), the court ruled in rejecting a first amendment attack upon a criminal conviction under tribal law for the ritual use of peyote.[18]

> The First Amendment applies only to Congress. It limits the powers of Congress to interfere with religious freedom or religious worship. It is made applicable to the States only by the Fourteenth Amendment. Thus construed, the First Amendment places limitations upon the action of Congress and of the States. But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States. Under the philosophy of the decisions, it, as any other law, is binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress. No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so.[19]

The doctrine that Indian tribes are not federal instrumentalities for purposes of invoking the Bill of Rights or states within the meaning of the fourteenth amendment also has found expression in the district courts. Thus in *United States v. Seneca Nation of*

18. Forty years ago, the validity of a State anti-peyote ordinance was upheld. State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926). More recently, State prosecutions of members of the Native American Church for the use or possession of peyote outside a reservation uniformly have been dismissed on first amendment grounds. People v. Woody, 61 Cal.2d 889, 394 P.2d 813, 40 Cal. Rptr. 69, (1964); Arizona v. Attakai, Criminal Cause No. 4098, Coconino Cty. (1960); Colorado v. Pardeahtan, Criminal Action No. 9454, Denver Cty. (1967); Texas v. Clark, Criminal Action No. 12, 879, Webb Cty. (1968).

19. 272 F.2d at 134-135. As stated by the court (272 F.2d at 132), the Native American Church case also involved a claim of illegal search and seizure under the fourth amendment, but this argument is not discussed in the opinion.

*New York Indians*, 274 F. 946 (W.D. N.Y. 1921), the court dismissed for lack of jurisdiction a claim based upon the alleged unlawful taking of private property by a tribal government. *Glover v. United States*, 219 F. Supp. 19 (D. Mont. 1963), held that a criminal defendant in tribal court has no right to counsel under the sixth amendment. A non-Indian doing business on, but evicted from, an Indian reservation was denied protection under the fourteenth amendment. *United States v. Blackfeet Tribal Court*, 244 F. Supp. 474 (D. Mont. 1965). And, in a frequently noted case, *Toledo v. Pueblo de Jemez*,[20] a suit under the old Civil Rights Act, 8 U.S.C. §43, by a Protestant minority, refused the right to build a church or use a tribal cemetery, was dismissed on the ground that the conduct of an Indian tribe is not State action.

Notwithstanding its firm foundation in legal and historical precedents, however, the continuing vitality of the *Talton* rule was by no means assured in this era of changing constitutional interpretation.[21] The more often claimed violations of fundamental rights were litigated, the more likely some court would find a rationale for holding Indian tribes subject to the Bill of Rights — and finally one did. In *Colliflower v. Garland*, 342 F.2d 369 (1965), the Court of Appeals for the Ninth Circuit, on the newly stated premise that tribal courts "function in part as a federal agency," held that the District Court had jurisdiction "in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court."[22]

The *Colliflower* decision required fancy judicial footwork.[23] Although the ruling expressly was confined "to the courts of the Fort Belknap reservation,"[24] no meaningful difference really exists between the Fort Belknap Tribal Court and, as one example, the Oglala Sioux Tribal Court which the Court of Appeals for the Eighth Circuit found not to be a federal instrumentality in *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89, 94-98

20. 119 F. Supp. 429 (D. N.M. 1954); *see*: 7 STAN. L. REV. 285 (1955); *The Constitutional Rights of the American Tribal Indian*, 51 VA. L. REV. 121, 132 (1956); 51 IOWA L. REV. 654, 665 n. 79 (1966).

21. Actually, spadework for the burial of Talton already had started. In Elk v. Wilkins, 112 U.S. 94 (1884), a relatively contemporaneous case, the Supreme Court declared that: "[G]eneral acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." 112 U.S. at 100. The Supreme Court, though, repudiated this statement from Elk in Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) at 116, and, as the Court of Appeals for the District of Columbia Circuit observed, Elk v. Wilkins, "whatever its present day significance, certainly does not operate to remove 'Indians and their property interests' from the coverage of a general statute." Navajo Tribe v. NLRB, 288 F.2d 162, 165 n. 4 (D.D.C. 1961), *cert. denied*, 366 U.S. 928 (1961). The death of Elk clearly signaled the ultimate demise of Tatlon.

22. Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965).

23. The opinion was both criticized (79 HARV. L. REV. 436 (1965)), and praised (26 MONT. L. REV. 235 (1965)).

24. *Supra* note 22, at 379.

(1956).[25] Moreover, although passing reference was made to a possible distinction between fundamental and remedial rights under the Constitution,[26] the Ninth Circuit established no standards for determining which constitutional restrictions should apply to tribal courts and, indeed, affirmatively indicated that the fourteenth amendment might not apply at all.[27] What emerges from a close reading of *Colliflower*, therefore, is not a cohesive new theory of constitutional law, but rather the distinct impression that the Court of Appeals found a gross injustice to have been perpetrated[28] and simply decided to stop it.[29]

In addition to judicial concern, Congress and the executive agencies, and that fourth branch of government, the private foundation, devoted ever-increasing attention through the 1960's to controlling possible violations of constitutional rights in the operations of Indian tribes. Whereas a Special Task Force on Indian Affairs in 1961 recommended to the Secretary of the Interior only that tribes be encouraged to protect civil liberties by their own ordinances,[30] President Lyndon Johnson urged Congress in 1968 to enact a statutory Indian Bill of Rights.[31] A Commission on the Rights, Liberties, and Responsibilities of the American Indian, established by the Fund for the Republic, in 1961 declared that the immunity of Indian governments from Bill of Rights restraints jeopardizes "the very assumptions on which our free society was established."[32] Most important, beginning in 1961 the Senate Subcommittee on Constitutional Rights began the public hearings[33] which ultimately led to the inclusion of Title II in the 1968 Civil Rights Act.

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25. To the same general effect with respect to the Navajo Tribal Court is Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908 (1963).

26. 342 F.2d at 379, referring to the so-called "Insular Cases": Hawaii v. Mankichi, *supra* note 16; Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); and Talton v. Mayes. Whether the fundamental-remedial right distinction established in the Insular Cases would be extended to cases involving tribal sovereignty is questionable in view of the Supreme Court's statement with respect to the former that "it is our judgment that neither the cases nor their reasoning should be given any further expansion." Reid v. Covert, *supra* note 2, at 14.

27. *Supra* note 22, at 379.

28. As stated by the court (342 F.2d at 370-371), the record seems clearly to support Mrs. Colliflower's claim that she was not afforded the right to counsel, was not confronted by any witnesses against her and, for all practical purposes, was not afforded any trial.

29. The district court, on remand, took the hint. Citing only the court of appeals decision as authority, and after a brief statement of the facts, Judge Jameson concluded "that there was a lack of due process under the fifth amendment," granted petitioner's motion for summary judgment, and discharged Mrs. Colliflower from custody. Colliflower v. Garland, Civil No. 2414 (D. Mont., Aug. 19, 1965).

30. *Report to the Secretary of the Interior by the Task Force on Indian Affairs* 31-32 (July 10, 1961).

31. *House Hearings* at 24.

32. COMM. ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN, A PROGRAM FOR INDIAN CITIZENS 24 (1961), expanded and restated in W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 44 (1966).

33. The complete history of these hearings is summarized in the SENATE REPORT, *supra* note 8, at 5, as follows:

> In 1961, the subcommittee began its preliminary investigation of the legal status of the Indian in America and the problems Indians encounter when as-

## TRIBAL SOVEREIGNTY AND THE BILL OF RIGHTS— AN ATTEMPTED RECONCILIATION

In their relations with the federal and state governments, Indians are entitled to the same rights, privileges and immunities as any other citizens.[34] As the cases previously cited would indicate, however, the Senate Subcommittee on Constitutional Rights confirmed during the course of its hearings that Indians in their relations with tribal governments are not always accorded those same rights, privileges and immunities[35]—a situation the Subcommittee members found intolerable. Congress, unlike the courts, had clear-cut authority to make constitutional protections applicable to Indian tribes,[36] and the ultimate question presented to the Subcommittee, therefore, was not whether to act, but rather how far and how fast to proceed. Consistent with the long history of dealings between the United States and Indian tribes, any extension of the Bill of Rights to Indian reservations, in order to become practically as well as legally effective, would require agreement from the Indians, and such consent in turn required respect for tribal sovereignty.

For Indians, tribal sovereignty is not an abstract concept, a cultural relic, or even a vanishing institution. On their reservations,

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serting constitutional rights in their relations with State, Federal, and tribal governments. Approximately 2,000 questionnaires, addressed to a broadly representative group of persons familiar with Indian Affairs, comprised an important segment of this investigation. The preliminary research, the first such study ever undertaken by Congress, demonstrated a clear need for further congressional inquiry. Accordingly, hearings were commenced in Washington in August 1961, and moved to California, Arizona, and New Mexico in November. The following June, hearings were held in Colorado and North and South Dakota and finally concluded in Washington during March of 1963. These hearings and staff conferences were held in areas where the sub-committee could receive the views of the largest number of Indian tribes. During this period, representatives from 85 tribes appeared before the subcommittee.

S. 961 through S. 968 and Joint Resolution 40 of the 89th Congress were introduced in response to the findings of the subcommittee based on these hearings and investigations.

On June 22, 23, 24, and 29, 1965, the subcommittee, meeting in Washington, received testimony relative to these measures. Additional statements were filed with the subcommittee before and following the public hearings. In all, some 79 persons either appeared before the subcommittee or presented statements for its consideration. These persons included representatives from 36 separate tribes, bands or other groups of Indians located in 14 States. Four national associations representing Indians, as well as three regional, federated Indian organizations, presented their views. Members of Congress, State officials, and representatives from the Department of the Interior also submitted opinions on this legislation.

The 1965 hearings revealed the necessity of revising some of the orginal measures, combining two of them into title I, and deleting two proposals from the legislative package. The six titles of S. 1843, as amended, are products of the recommendations of the Subcommittee on Constitutional Rights as reported in its 'Summary Report of Hearings and Investigations on the Constitutional Rights of the American Indian, 1966'.

34. U.S. CONST. amend. XIV, § 1; Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962); Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); SENATE REPORT at 7; CIVIL RIGHTS REPORT, *supra* note 12, at 131-132, 160.

35. SENATE REPORT at 6-9; SUMMARY REPORT, *supra* note 6, at 3.

36. United States v. Kagama, 118 U.S. 375 (1886); U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 24-33 (1958); *see* cases cited *supra* note 15.

the tribe represents to its members not only the local government,[37] but also a dominant force in their economic and social lives. Indeed, in 1934, after pursuing a contrary policy for generations, Congress itself recognized that strong, independent tribal organizations are fundamental to reservation development (for humans as well as natural resources), and granted to the tribes new powers in the management of their political and business affairs.[38] Moreover, through the years, tribal institutions, including the tribal courts, though handicapped by lack of funds and experience,[39] have worked unusually well in protecting the rights and promoting the interests of the Indian people. Small wonder, therefore, that Indians could be expected to resist any change in the law, no matter how attractive otherwise, which threatened the underlying powers or independence of tribal governments.

The legislative history of Title II makes clear that Congress viewed extension of the Bill of Rights to Indian reservations as a tool for strengthening tribal institutions and organizations, not as a weapon for their destruction.[40] The omission of the first amend-

37. Congress has shifted jurisdiction over major crimes, such as murder, manslaughter, rape, arson, burglary, etc., from the tribal courts to the federal district courts by statute (18 U.S.C. §1153), but the tribal courts retain jurisdiction over lesser offenses and, generally, in civil actions between Indians. The scope of tribal self-government is summarized in U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 395 (1958) as including the powers

> . . . to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.

38. Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §461-79 (1964).

39. SUMMARY REPORT, at 24: "These denials [of constitutional rights] occur, it is also apparent, not from malice or ill will, or from a desire to do injustice, but from the tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system." CIVIL RIGHTS REPORT, at 146: "Indian courts are said to render a good brand of justice except, perhaps, where offenders require treatment rather than punishment, as in the case of many juvenile delinquents and some adults. Most Indian courts have neither the personnel nor the resources to cope with offenders of this sort." *Report to the Secretary of the Interior by the Task Force on Indian Affairs* 28 (July 10, 1961):

> The size and effectiveness of local forces of law and order are highly variable. Thus, the Navajos have a tribal court with seven judges, spend more than $1 million in tribal funds annually for law and order activities, equip their Indian police force with squad cars and two-way radios, and have built modern and well-equipped jails which would be the envy of many county sheriffs. But, at the other end of the scale, there are tribal courts established in Indian country where, due to inadequate tribal funds, there is only one judge, untrained, no police force, and an outworn building for detention purposes.

40. *House Hearings, supra* note 10, at 26; Reifel Statement, *supra* note 10; Remarks of Edward Weinberg, *supra* note 12, at 2, 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." *See* W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 44 (1966), and recommendations in the *Report to the Secretary of the Interior by the Task Force on Indian Affairs* 31 (July 10, 1961):

> The Task Force is guided in thinking by the conviction that the protection of life and property, the preservation of civil rights, and the development of clearly defined civil and criminal codes is essential to rapid economic growth in the Indian country, and this, in turn, is fundamental to the

ment establishment clause, in deference to the theocratic nature of some Indian tribal governments, and the limitations placed upon a criminal defendant's right to counsel, in deference to the unmanageable administrative burdens an absolute right to counsel would place upon tribal court systems, already have been mentioned. In addition, although the Subcommittee staff urgently recommended in 1966 that individual Indians be granted a right of appeal from an adverse decision in a tribal court and a trial *de novo* in the federal district court in criminal cases where a denial of constitutional rights may have occurred,[41] and although the bill which ultimately became Title II contained such language when originally introduced in 1967,[42] the appellate provisions of the legislation were completely eliminated before S. 1843 was reported by the Senate Committee on the Judiciary.[43] Again, the Subcommittee agreed to delete a proposed new legal safeguard — even one strongly endorsed by its Chairman[44]—on the ground that an appeal and trial *de novo* in federal court would cause too serious a disruption of tribal self-government.

A Congressional intent to preserve tribal sovereignty under the 1968 Civil Rights Act is vividly illustrated by the provisions of Title IV. In 1953, when the most serious effort in modern times to terminate the special relationship between the federal government and Indian tribes was reaching its peak, Congress passed an act[45] which authorized a number of western states, not previously possessed of that right, unilaterally to amend their constitutions or statutes in order to extend state civil or criminal jurisdiction over Indian reservations and, in effect, to wipe out tribal jurisdiction. In response to fifteen years of Indian protests against this ever-present threat to their powers of local self-government, Title IV amends the 1953 Act to require "the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption" before any extension of state jurisdiction would become operative.

The legal background, legislative history and actual text of the 1968 Civil Rights Act thus show that Congress there intended affirmatively and sensitively to reconcile application of the Bill of Rights on Indian reservations with continued control by Indians over

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rapid rise of the standard of living on the reservations which is necessary to Indian well-being.

For the view that Title II weakened tribal sovereignty, on the other hand, *see The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1822 (1968).

41. SUMMARY REPORT at 25-26.
42. S. 1843 of the 90th Congress, reprinted at 113 CONG. REC. S 7214 (daily ed. May 23, 1967).
43. SENATE REPORT at 1-2, 14.
44. SUMMARY REPORT at 13-14; *Hearings, supra* note 5, at 91.
45. Act of Aug. 15, 1953, 67 Stat. 588, 18 U.S.C. § 1162 (1964), 28 U.S.C. § 1360 (1964).

their own affairs.[46] In attempting this reconciliation, Congress undertook to solve a legal problem which, realistically, the courts appeared ill-equipped to handle. Specifically, given current trends of judicial decision, the exclusion of reservation Indians from the enjoyment of many rights conferred by the Constitution was not likely much longer to endure. At the same time, however, applying every limitation in the Bill of Rights to the acts of Indian tribes could destroy tribal self-government, while the economic and social advancement of reservation Indians clearly is tied to the maintenance of strong tribal institutions. In a way which the courts might not have found possible, Congress in the 1968 Civil Rights Act sought to balance these interests — freedom for the individual, yet respect for tribal sovereignty. The measure of its initial success is evident in the almost unanimous support which Indians gave Title II, notwithstanding the trepidation with which they had viewed earlier versions of the same legislation.[47]

## FUTURE ENFORCEMENT OF TITLE II

Title II has not yet been judicially construed.[48] As in the case of constitutional rights generally, the Indian Bill of Rights presents a limitless potential for litigation. Even in the absence of guiding precedents, however, some conclusions reasonably may be reached in answer to the two key questions: how far do the rights created by the statute extend,[49] and in what court can those rights be enforced?

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46. CIVIL RIGHTS REPORT, *supra* note 12, at 133: "Whether and to what extent such limitations [Bill of Rights restraints] are desirable involves (as in so many Indian affairs) a delicate balancing of values—between civil rights and liberties on the one hand, and the benefits of tribal autonomy on the other." *Compare* 51 VA. L. REV. 121 at 135 (1965).

47. Endorsements of S. 1843 by numerous Indian tribes and Indian-interest organizations appear at 113 CONG. REC. S 18157 *et seq.* (daily ed. Dec. 7, 1967). In the final stages of the legislative process, only the more traditional Pueblo groups in New Mexico actually objected to Title II. *House Hearings* at 37 *et seq.;* Reifel Statement, *supra* note 10, at E 2742. By contrast, representatives of many tribes opposed predecessor bills during the 1965 hearings of the Senate Subcommittee on Constitutional Rights. *Hearings, supra* note 5, *passim.*

48. At least two cases have been instituted under the 1968 Act, one in the federal district court in Arizona to upset the eviction of the head of the OEO-supported Navajo legal service from the Navajo Reservation, and the second in the federal district court in Montana to change practices in the Blackfeet Tribal Court, but neither had progressed to final decision as of the date of this writing; in the former case, Judge Walter E. Craig on December 16, 1968 did deny defendant's motion to dismiss for lack of jurisdiction in part on the basis of Title II, Dodge v. Nakai, Civ. No. 1209 Pet.

49. The proposition that Title II is "selective" in making Indian tribes subject to constitutional restraints seems beyond dispute. SENATE REPORT at 10-11; SUMMARY REPORT at 25; Remarks of Edward Weinberg, *supra* note 12, at 1-3; Vol. VII, No. 5 ALBUQUERQUE L. J. 5-11 (1968); M. Price, *The Civil Rights Act of* 1968: *An Analysis for Discussion,* Vol. 1, No. 4 *Am. Indian L. Newsletter* 4 (May 24, 1968). The issue which the courts must face is what was selected in and what was selected out.

Significantly, Title III of the 1968 Civil Rights Act, under which the Secretary of the Interior is directed to recommend to Congress "a model code to govern the administration of justice by courts of Indian offenses on Indian reservations," provides that such code shall assure that a criminal defendant "shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the

1. *Forum*: With respect to the review of criminal proceedings in tribal courts, section 203 of Title II expressly provides that 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. Although the statute speaks only in terms of "detention," the federal district courts in all likelihood will (and should) extend their habeas corpus review of criminal convictions in tribal courts to include cases where the defendant is released on probation, which still involves restraint upon his person, or where the defendant merely is fined, which usually is an alternative to, or substitute for, actual imprisonment.[50] Furthermore, although the term "legality" is not defined, the only interpretation of that word consistent with the purposes of the statute would be that the federal district courts are authorized to inquire into the question of whether a defendant's rights under section 202 may have been violated, but are not authorized to inquire into whether he may have been denied some other right under either the Constitution or tribal law. Even as so limited, section 203 provides ample opportunity for the federal courts to insure that tribal criminal proceedings are basically fair and that the constitutional rights of Indian criminal defendants, as specified by Congress, are fully protected.

Title II, of course, does not provide for an appeal to the federal courts or other review of decisions by tribal courts in civil cases. More important, the 1968 Act does not designate any court in which the legality of tribal executive or legislative action, which allegedly conflicts with the Bill of Rights, can be tested. In the absence of a statutory direction, the choice of the appropriate forum for an adjudication of these rights is further complicated by the well-settled rule that Indian tribes enjoy sovereign immunity from suit, which may not be waived without the consent of Congress.[51]

Where executive or legislative activities are subject to Secretarial review — as frequently is the case under tribal constitutions, particularly with respect to the management of trust lands and the expenditure of trust funds — the Secretary of the Interior will have the power, which an aggrieved party by appeal may request that he invoke,[52] to determine whether such tribal action is in accordance

United States being tried in a Federal court for any similar offense." Congress intended a difference between the two titles of the 1968 Act. Unlike tribal courts, which are run by the tribes, courts of Indian offenses are controlled by the Secretary. 25 C.F.R. §11.1.

50. *See* W. Canby & W. Cohen, *The Professional Attorney and the Civil Rights Act, Vol.* 1, *No.* 28 *Am. Indian L. Newsletter* 7 (Dec. 16, 1968).

51. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940), and cases therein cited; Maryland Casualty Co. v. Citizens Nat. Bank, 361 F.2d 517, 520 (5th Cir. 1966), *cert. denied*, 385 U.S. 918 (1966); Green v. Wilson, 331 F.2d 769 (9th Cir. 1964); Haile v. Saunooke, 246 F.2d 293 (4th Cir. 1957), *cert. denied sub nom.* Haile v. Eastern Band of Cherokee Indians, 355 U.S. 893 (1957).

52. 25 C.F.R. §2.8.

with Title II, and his determination can be reviewed in the federal courts pursuant to the Administrative Procedure Act.[53] Where tribal executive or legislative activities are not subject to Secretarial review, as generally is the case with respect to political affairs, the logical forum for testing the validity of such tribal action is the tribal court.[54] As noted above, however, no appeal is available to the federal or state courts in the event the tribal court refuses to take jurisdiction over the dispute.

Assuming the formidable sovereign immunity hurdle can be overcome,[55] a suit to enforce rights recognized and protected under Title II probably will lie in the state court of general jurisdiction, where the state possesses jurisdiction on Indian reservations in accordance with Public Law 280 of the 83rd Congress,[56] and in the federal district court, where the amount in controversy exceeds $10,000.[57] The bulk of all civil cases arising on Indian reservations in which a violation of section 202 rights is alleged, though, will not fall within either of these categories.[58] The conclusion necessarily follows that, at least in some classes of cases, Title II may have provided a right without an effective remedy.

2. *Substantive Law*: Passage of the 1968 Civil Rights Act undoubtedly has postponed the day when the Supreme Court must decide whether *Talton v. Mayes, supra*, still is good law.[59] Assuming (as the cases so far hold) that the principles of *Talton* and derivative

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53. 5 U.S.C. §§ 702-06 (Supp. II 1966). If the ordinance under attack has long previously been approved by the Secretary, laches may defeat an administrative or judicial appeal. In such cases, an action for a declaratory judgment would seem more appropriate. 28 U.S.C. §2201 (1964). *But see* Oliver v. Udall, *supra* note 25.

54. *Cf.* Williams v. Lee, 358 U.S. 217 (1969); Kain v. Wilson, —S.D.—, 161 N.W.2d 704 (1968).

55. *See* Remarks of Edward Weinberg, *supra* note 12, at 7: "This fact [tribal immunity from suit] would not seem to pose any particular problem to a suitor because he seemingly could proceed against the tribal officers responsible for the challenged action, as individuals, under the familiar doctrine that the cloak of immunity does not cover officers whose acts are beyond their authority." *But see* Green v. Wilson, *supra* note 51.

56. Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. § 1162 (1964), 28 U.S.C. § 1360 (1964).

57. 28 U.S.C. § 1331, (1964) granting jurisdiction to the District Courts where an issue arises under the Constitution, laws, or treaties of the United States. Under the Act of October 10, 1966, 80 Stat. 880, 28 U.S.C. § 1362 (Supp. II 1966), the jurisdictional amount was dropped for suits involving a federal question brought by Indian tribes, but no such waiver exists for suits by individual Indians.

58. Another potential statutory source for the review of tribal action in the light of Title II is 28 U.S.C. § 1343 (1964), which provides in part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . .

The 1968 Civil Rights Act clearly qualifies as a law "for the protection of civil rights," but Title II on its face does not authorize the filing of any civil action and, therefore, the courts more probably than not will dismiss suits based upon 28 U.S.C. § 1343 (1964) alone for lack of jurisdiction.

59. If the Talton rule no longer is valid, and the Bill of Rights limits tribal action under the Constitution absolutely, then enactment of Title II becomes a grand, but empty gesture.

decisions remain controlling, and thus that Congress has the power to select which Bill of Rights protections shall apply to the acts of Indian tribes, the central substantive issue that the courts now will face is whether Title II should be strictly or liberally construed. The historical and legal background of Title II, as well as the manifest Congressional intent in the 1968 Act to preserve, if not enhance, tribal sovereignty, all point to a strict construction of its language.

Section 202(6), for example, provides that a criminal defendant in tribal court shall have the right "at his own expense" to have the assistance of counsel for his defense. This right to counsel logically extends to attorneys who are willing to serve at no cost to the defendant because he is poor. The legislative history of Title II makes clear, on the other hand, that the tribal court has no statutory obligation to appoint counsel for an indigent defendant,[60] and any judicial extension of the right to counsel to impose such a burden upon the tribal court would seem wholly unwarranted.[61] Similarly, under the doctrine of *expressio unius est exclusio alterius*,[62] a party to a civil suit in tribal court apparently is not entitled as a matter of right to the assistance of a professional attorney of his own choice.

The requirements of section 202(8) that an Indian tribe not "deny to any person within its jurisdiction[63] the equal protection of its laws or deprive any person of liberty or property without due process of law" pose more difficult problems of statutory interpretations. Here again, in order to carry out the twin purposes of the 1968 Act—protection for the individual, yet respect for tribal sovereignty—the courts properly should exercise restraint before striking down long-standing tribal practices which reasonably can be justified. Thus, under Title II, a continuing violation of the "one man, one vote" principle[64] in a tribal election code probably could and should be subject to judicial correction. The Iroquois custom that tribal membership and inheritance rights with respect to land descend only through the female line, on the other hand, is not so repugnant to ordinary standards of fair play as to dictate its abolition by the courts.[65] Moreover, to cite other examples in the field of

60. Citations *supra* note 12.

61. *Supra* note 11. The Supreme Court never has ruled that a right to counsel exists in cases of petty offenses, the general area of tribal court criminal jurisdiction.

62. 50 AM. JUR. *Statutes* §§ 244, 429 (1944).

63. Although a serious question exists as to whether non-Indians come within a tribe's jurisdiction as a matter of law, Congress obviously intended to establish "rights for all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians." SUMMARY REPORT at 10. In view of the actual text of section 202(8), a subsidiary question exists as to whether non-Indians are entitled to due process, or only to the equal protection of the law.

64. Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Avery v. Midland County, 36 U.S.L.W. 4257 (April 2, 1968); *but see* Sailors v. Board of Educ., 387 U.S. 105 (1967), and Dusch v. Davis, 387 U.S. 112 (1967).

65. In conferring civil jurisdiction over Indian reservations within that state upon the

economic regulation, ample factual justification exists for sustaining even as against a due process or equal protection attack the right of a tribe to grant its members a preference in the allocation of reservation grazing privileges or to assess a tax only upon nonmembers doing business on the reservation.[66]

In the final analysis, though, how the courts will construe Title II and, in particular, section 202(8) is a story yet to be told. Perhaps the safest conclusion is that, over the years, the 1968 Civil Rights Act will prove another landmark statute both in the protection of individual Indian rights and in the progressive development of tribal resources and institutions.

New York courts, Congress specifically recognized and gave effect to "those tribal laws and customs which they [the Indians] desire to preserve . . . ." Act of September 13, 1950, 64 Stat. 845, 25 U.S.C. § 233 (1964).

66. Morris v. Hitchcock, 194 U.S. 384 (1904); *see* Travelers' Insurance Co. v. Connecticut, 185 U.S. 364 (1902); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); Madden v. Kentucky, 309 U.S. 83 (1940).