

American Indian Law Review

Volume 5 | Number 2

1-1-1977

Due Process: Tom v. Sutton--Right to Appointed Counsel for an Indigent Indian in a Tribal Court Criminal Proceeding

Noma D. Gurich

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

Noma D. Gurich, *Due Process: Tom v. Sutton--Right to Appointed Counsel for an Indigent Indian in a Tribal Court Criminal Proceeding*, 5 AM. INDIAN L. REV. 381 (1977),
<https://digitalcommons.law.ou.edu/ailr/vol5/iss2/7>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

DUE PROCESS: *Tom v. Sutton*— RIGHT TO APPOINTED COUNSEL FOR AN INDIGENT INDIAN IN A TRIBAL COURT CRIMINAL PROCEEDING

Noma D. Gurich

For nearly two hundred years, the United States Constitution has been the mainstay of individual rights and liberties for the majority of the citizens of this country. Yet, Indians living on on reservations throughout the nation have not always been afforded such protection.¹ This dual standard was allowed to exist in the United States because courts were reluctant to find tribal power restricted by the Constitution.² This reluctance developed as early as 1832, when the United States Supreme Court characterized Indian tribes as being "distinct, independent political communities,"³ and as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the federal government, but by reason of inherent tribal sovereignty. Then, in the early 1960's, spurred by Senator Sam Ervin, Congress began to question whether such immunity from constitutional restraint had resulted in actual deprivations of constitutional rights of Indians by Indian tribes.⁴ In an effort to afford federal protection to Indians in their internal tribal lives, Congress enacted the Indian Civil Rights Act of 1968 (ICRA).⁵ The Act made most of the language of the Bill of Rights of the United States Constitution applicable to Indian tribes, including the right to have the assistance of counsel.⁶ This note will discuss to what extent the right to appointed counsel has been and should be extended to Indians in criminal proceedings in tribal courts.

Constitutional Right to Counsel

The sixth amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This phrase has been construed by the Supreme Court to mean that the power and authority to deprive an accused of his life or liberty is withheld from federal and state courts in all criminal proceedings unless the accused has knowingly and voluntarily waived the assistance of counsel.⁷ The right to counsel is also protected by the due process clause of the fifth and fourteenth amendments.

If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense But passing that, and assuming their inability, even if opportunity has been given, to employ counsel, as the trial court evidently did assume, we are of the opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.⁸

The right to counsel has been divided into two distinct areas, the right to retained counsel and the right to appointed counsel. The right to retained counsel has never been disputed,⁹ while the latter was achieved only after many years of litigation. It is now well settled that a defendant in a federal or state criminal prosecution is entitled to appointment of counsel if he cannot afford one, whether the offense with which he is charged is classified as petty, misdemeanor, felony, or capital.¹⁰

Right to Retained Counsel in a Criminal Proceeding in Tribal Court

There are many cases supporting the conclusion that prior to the ICRA, the Bill of Rights of the United States Constitution was not applicable to Indians living on reservations.¹¹ The leading case in this area is *Talton v. Mayes*,¹² wherein the Supreme Court held that the fifth amendment right to indictment by a Grand Jury was not applicable to acts of tribal government. In view of this body of case law, it is not surprising that a United States District Court sitting in Montana concluded that the federal constitutional guarantee of the right to counsel does not apply to prosecutions in tribal courts.¹³ The federal court considered the petitioner's argument that he was denied his constitutional rights in the tribal court by reason of the failure to make counsel available to him, and concluded:

The right to be represented by counsel is protected by the Sixth and Fourteenth Amendments. These Amendments, however, protect this right only as against action by the United States in the case of the Fifth and Sixth Amendments, and as against action by the states in the case of the Four-

teenth Amendment. Indian tribes are not states within the meaning of the Fourteenth Amendment.¹⁴

This holding was reaffirmed some years later in the case of *Settler v. Lameer*.¹⁵ In that case, the court considered the constitutional challenge of an Indian who had been convicted of several misdemeanors in the tribal court in 1967. Although by the time this decision was handed down, the ICRA was in effect, the court refused to apply it retroactively and stated: "Here the proceedings in Tribal Court occurred prior to the enactment of the Indian Civil Rights Act of 1968. Accordingly we find no merit in the contention that the Tribal Court deprived petitioner of his constitutional rights by denying him representation by professional counsel."¹⁶

The right to the assistance of counsel was first extended to Indians living under the authority of tribal courts¹⁷ by the ICRA.¹⁸ The right to be represented by retained counsel is set forth in clear language: "No Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding . . . at his own expense to have the assistance of counsel for his defense."¹⁹ Prior to the ICRA, many tribes prohibited the appearance of lawyers, particularly non-Indians, in tribal courts.²⁰ Such prohibitions are now of questionable validity, and would not survive a challenge if an accused were inclined to do so. The trend appears to be that the appearance of professional counsel in tribal courts has increased since the passage of the ICRA.²¹

Denial of the Right to Appointed Counsel in a Tribal Court Criminal Proceeding

The limited right to counsel provided by Section 1302(6) of the ICRA is concurrent with the constitutional right of retained counsel in federal and state proceedings.²² The inclusion of this statutory right has led several commentators to question whether this provision should be construed to include the constitutional requirements of appointed counsel as a wealthy defendant is now accorded a special advantage in tribal court. Section 1302(8) of the ICRA gives further support to the argument in favor of extending the right to counsel because of the inclusion of the guarantees of equal protection and due process: "No Indian tribe in exercising powers of self-government shall . . . 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."²³ Those provisions in the Constitution have been construed to include the right to appointed counsel.²⁴ The issue of the right to appointed counsel

in tribal court has been raised in two recent cases. *Cliff v. Hawley*²⁵ involved an indigent Indian who was charged with assault and battery in Tribal Court on the Fort Belknap Reservation in Montana. Defendant Cliff filed a petition for a writ of habeas corpus and for appointment of an attorney in the federal district court. Three grounds for the appointment of counsel were alleged: (1) the Indian Civil Rights Act,²⁶ (2) *Argersinger v. Hamlin*,²⁷ and (3) Section 3006A of Title 18 of the United States Code.²⁸ The federal district court issued the following order:

Petitioner has filed a petition for a writ of habeas corpus. It is clear that the petitioner, an indigent defendant, is entitled to the assistance of counsel. (Citations omitted.) But this Court, which has limited authority to furnish representation does not have the authority to appoint counsel for an indigent defendant before a Tribal Court. (Citation omitted.) THEREFORE, IT IS ORDERED that the Judge of the Tribal Court must appoint counsel.²⁹

This order was later stayed pending the outcome of the Ninth Circuit case involving the same issue.³⁰

On March 10, 1976, the Ninth Circuit Court of Appeals issued an opinion in the case of *Tom v. Sutton*.³¹ This case was an appeal from an order of a federal district court in Washington dismissing defendant's petition for a writ of habeas corpus. Appellant Tom, an enrolled member of the Lummi Tribe, had pled guilty to driving a motor vehicle without a valid operator's license within the boundaries of the Lummi Reservation and was sentenced to serve 10 days in jail. The sole issue raised by appellant was whether he had the right to the assistance of appointed counsel in the criminal proceedings before Tribal Court. The lower court denied appellant the right to appointed counsel.

On appeal, appellant contended that he had a right to appointed counsel for two reasons: (1) The due process language of the Indian Civil Rights Act necessarily required the tribal courts to appoint professional defense counsel for indigent criminal defendants appearing before the Lummi Tribal Court,³² and (2) irrespective of the Indian Bill of Rights enacted by Congress, Article VIII of the Lummi Tribal Constitution guarantees him the right to appointed counsel.³³

The court of appeals dismissed appellant's first argument by relying upon a rule of construction which states that an enactment is to be construed so as to give it the effect that Congress intended.³⁴ The court then related some of the legislative history surrounding the composition of the ICRA, including the fact that

representatives of various Indian tribes appeared in opposition to the adoption of the Federal Constitution *in toto*.³⁵ The court also stated that as a result of the opposition, the Department of the Interior submitted a substitute bill which guaranteed only specific enumerated rights to the Indians.³⁶ The court concluded with the legal maxim of statutory construction, *expressio unius est exclusio alterius*.³⁷

In refuting appellant's second proposition, the court of appeals used three arguments: (1) Because the Lummi constitution was adopted two years before *Argersinger v. Hamlin*³⁹ was decided, the Lummi Tribe could not have intended to provide counsel for indigents charged with petty offenses;³⁹ (2) every provision of the constitution must be interpreted in light of the entire document, and because the Lummi constitution adopted the civil rights of citizens off the reservation as well as the ICRA, the general language of the former must be limited by the specific language of the ICRA regarding the right to counsel;⁴⁰ and (3) federal courts should accept the interpretation of state courts in giving effect to a state constitution unless a federal constitutional question is involved. In the same manner, deference should be given to the interpretation of the Lummi constitution by the Lummi Tribal Court, which permitted a person to have counsel only at his own expense.⁴¹ Thus, the Ninth Circuit Court of Appeals affirmed the lower court's decision and denied appellant the right to appointed counsel.

Toward the Right to Appointed Counsel in a Tribal Court Criminal Proceeding

A federal district court sitting in Montana and one sitting in Washington considered the same issue—the right to appointed counsel in a criminal proceeding in tribal court for an Indian who could not afford counsel—at about the same time, using similar resources, and arrived at opposite conclusions. The reason for the different outcomes is based on the fact that the individuals involved in the drafting of the ICRA were motivated by different considerations, which in turn created some ambiguity in the ICRA, leaving room for considerable litigation. As the Supreme Court has not yet considered the issue of appointed counsel on Indian reservations, the litigation will undoubtedly continue.⁴²

Because of the ambiguity in the ICRA, the Ninth Circuit Court of Appeals exaggerated the importance of the "legislative intent" in construing the due process clause of it. While some commentators portray the ICRA as being an attempt at maintaining Indian

sovereignty,⁴³ others describe the Act as a compromise among interest groups.⁴⁴ One author suggested that it was 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,”⁴⁵ while another described the goal of Senator Ervin (the moving force behind the ICRA) as trying to “duplicate the North Carolina assimilation experience on a national level.”⁴⁶ In light of these apparent contradictions, it is difficult to conclude absolutely that due process means something different for Indians on reservations.⁴⁷ If the intent of Congress were to assimilate tribal courts into the federal system, then a different standard would not accomplish the goal.⁴⁸ If the ICRA were merely a compromise among special interests, then the standard which is best suited to the Indians on reservations may not even have been considered.⁴⁹ Congress was certainly aware of the state of the constitutional law regarding the right to appointed counsel in 1968. Because the Supreme Court had not included petty crimes and misdemeanors within the requirement for appointed counsel, Congress had no reason to extend appointed counsel to Indians in Tribal Court because of the limited jurisdiction of those courts.⁵⁰ Congress could not have known that the constitutional requirement for appointed counsel would change four years later; therefore, without language indicating otherwise, it is erroneous to assume that Congress did not intend the ICRA to be adapted to changing interpretations of constitutional standards.

The Ninth Circuit also gave considerable weight to the fact that representatives of various Indian tribes appeared in opposition to the adoption of the entire Federal Constitution. However, a close look at the proceedings reveals that of approximately 250 tribes, only about 36 tribes participated in the hearings.⁵¹ The court also indicated that the revisions by the Department of the Interior were due to opposition from the tribes. Another view indicates that:

Throughout the debate sparked by Senator Ervin’s proposals, the attitude of the Department of the Interior and the BIA remained consistent. When vital organizational interests, such as reputation and control, were not involved, and when a commitment of resources was not required, they proved to be cooperative. But when confronted with the limitation of their responsibilities or influence or when pressed for a commitment to additional tasks, they resisted, even if the interests of the Indian people were compromised.⁵²

Finally, the court relied on the specific language of Section 1302(6) to exclude the right to appointed counsel. As discussed

previously,⁵³ the right to appointed counsel and the right to retained counsel are distinct, yet are both protected in the same constitutional language, even though not specifically spelled out. If the term "due process" has a constant meaning, then the right to appointed counsel should receive the same protection in the ICRA as it does in the Federal Constitution.

Turning to the discussion of appellant's second contention involving the Lummi Tribal Constitution, the court of appeals ignored the consequences of the *Argersinger v. Hamlin* opinion⁵⁴ on the right to appointed counsel for Indians. The court stated that the Lummi Tribe did not intend to include appointment of counsel in their constitution when it was adopted in 1970 because the controlling constitutional opinion at that time⁵⁵ only required the appointment of counsel in serious crimes. This argument takes into account the fact that Congress had removed most felonies from the jurisdiction of Tribal Courts⁵⁶ and had limited the punishment that could be imposed by tribal courts to a maximum of six months imprisonment, or a fine of \$500, or both.⁵⁷ This argument overlooks the fact that the Tribal Court's jurisdiction was not limited only to misdemeanors. Conceivably, one could commit a felony other than those specifically excluded from the Tribal Court's jurisdiction, and receive a penalty no more serious than six months in jail and/or a \$500 fine.⁵⁸ Thus, the Lummi constitution, by incorporating the rights enjoyed by non-Indians under the Federal Constitution, did not exclude the possibility of the appointment of counsel in felony cases. The Lummi constitution did not include language limiting its tribesmen to constitutional rights for non-Indians existing in 1970, and exclude any rights which might be acquired later. Therefore, when the constitutional requirement for appointed counsel changed in 1972, the Lummi constitution, which included the right to appointed counsel in felony cases, was extended to include misdemeanors.

The second argument offered by the court of appeals to disprove the right to appointed counsel in the Lummi Tribal Constitution involved another rule of construction. The court concluded that the specific language of the ICRA takes precedence over the general language in the Lummi constitution which guaranteed Indians all rights guaranteed to non-Indians. This rule of construction is applicable only when there is a conflict in statutory language that cannot be resolved by merely reading the statute.⁵⁹ In this case, there is no conflicting language. The Federal Constitution and the ICRA guarantee the right to counsel, and both use the language "due process." Because there is no language in the Lummi constitution defining due process, the phrase must

be considered to have a consistent meaning each time it is used. Moreover, a statute is always subject to the test of constitutionality. Because a statute is presumed constitutional, there is no conflict in the Lummi constitution, and the court erred in concluding that the right to appointed counsel in the Federal Constitution is limited by the ICRA.

Finally, the Ninth Circuit Court of Appeals concluded that deference should be given the interpretation of the Lummi Tribal Court. The important qualification in the rule of construction followed by the court is that deference is given a state court's interpretation unless a federal question is involved. The court completely overlooked the fact that there was a federal question involved in this case—the right to appointed counsel. Moreover, a question involving an Indian tribe is in itself a federal question. Because the federal court had the authority to make the interpretation, the court's reasoning was clearly defective.

Other criticisms have been made concerning extending the right to appointed counsel to Indians in tribal court. One major criticism is the lack of resources of Indian tribes to fund such a program. The income level of reservation Indians falls well below the poverty line. Average annual family income of \$1,500,⁶⁰ land held in trust by the BIA, and meager royalties received for white development of reservation resources provide inadequate bases for tribal revenue.⁶¹ Alternative sources of funding appointed counsel may come from federal government agencies such as the BIA, OEO,⁶² or the Law Enforcement Assistance Administration.⁶³ Funding from government sources is not out of the question because the possibility of such funding was discussed during the hearings preceding the passage of the ICRA.

The Department of the Interior's response to the issue of the right to defense counsel revealed, however, its insensitive attitude that the Indians had testified about in the earlier hearings. The Solicitor recommended that defendants have the right to counsel but only at their own expense. He claimed that the alternative was to obtain appropriations from Congress to pay lawyers appointed by the tribal courts and, in order to maintain a balance, also to provide prosecutors for the courts. If the problem was [*sic*] one of maintaining a balance, there was no reason to accord the wealthy defendant a special advantage. Rather, it appeared that the BIA was reluctant to assume the initiative to obtain extra appropriations from Congress, as it had similarly failed to request adequate funds to maintain tribal libraries and

facilities. In view of the Bureau's past performance, it is not surprising that it presented the choice essentially as one between the right to counsel at the defendant's expense or no right to counsel at all, instead of being prepared to seek funds for a balanced, professional Tribal Court system.⁶⁴

The lack of personnel is another criticism aimed at the requirement of appointed counsel. Some tribes with the help of legal consultants have set up tribal bar examinations to prepare attorneys to practice before the Tribal Court.⁶⁵ On a few reservations, lawyers from federal legal service programs may be available to individuals.⁶⁶ With increased federal funding such services could be expanded. Another way to combat the lack of legal personnel is to permit lay representatives to represent indigents in Tribal Court.⁶⁷ However, the Department of the Interior has informally notified tribes that "counsel" means what one would normally consider it to mean,⁶⁸ that is, a duly qualified attorney.

Another criticism is that using professional appointed counsel will further erode the cultural autonomy of Indians. While this may be the strongest argument against counsel in general, it has little impact now that the right to retained counsel has been imposed upon the tribal courts by the ICRA. There is no good reason to accord the wealthy Indian an advantage over his poorer brother. The effects of a criminal conviction on an individual call for adequate procedural safeguards for all Indians.⁶⁹ Furthermore, tribal courts will become more sophisticated with the increased presence of attorneys,⁷⁰ and with increased access for appeal to the federal system, the need will increase for adequate representation at the Tribal Court level.

Conclusion

The Indian Civil Rights Act of 1968 extended the right to be represented by counsel to the Indian in Tribal Court for the first time. While in 1968 the need for appointed counsel for indigents in criminal proceedings was not realized, by 1972 the requirement was absolute. Continuing to deprive indigent reservation Indians of the right to counsel renders the promise of individual rights proclaimed in the ICRA hollow at best. To allow the wealthy man procedural protections and not to extend those protections to the poor man places the majority of reservation Indians in a position worse than before the ICRA was enacted. Although tribe-provided counsel for indigent criminal defendants will be among the most onerous of requirements because of its cost, the burden

must be assumed. The absolute need for professional assistance led the Supreme Court long ago to conclude: "The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel."⁷¹

NOTES

1. Approximately 280,000 American Indians live on reservations. COMMISSION ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 218 (1966) (figures based on 1960 Census).

2. The United States Constitution is binding upon tribal governments only where it is expressly applicable or where it is made binding upon them by treaty or Act of Congress. *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 135 (10th Cir. 1959); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957).

3. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

4. For a complete discussion of the history surrounding the enactment of the Indian Civil Rights Act, see Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. LEGIS. 557, 575 (1972) [hereinafter cited as Burnett].

5. Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77, 25 U.S.C. §§ 1301-303 (1970).

6. 25 U.S.C. § 1302. "Constitutional Rights. No Indian tribe in exercising powers of self-government shall . . . (6) deny to any person in a criminal proceeding . . . at his own expense to have the assistance of counsel for his defense . . ."

7. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

8. *Powell v. Alabama*, 287 U.S. 45, 69, 71 (1932).

9. "The distinction is well established in this Court's decisions. [Citations omitted.] Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified." *Chandler v. Fretag*, 348 U.S. 3, 9 (1954).

10. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Betts v. Brady*, 316 U.S. 455 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932).

11. See note 2, *supra*.

12. 163 U.S. 376 (1896).

13. *Glover v. United States*, 219 F. Supp. 19 (D. Mont. 1963).

14. *Id.* at 21.

15. 507 F.2d 231 (9th Cir. 1974).

16. *Id.* at 241-42.

17. "Tribal Courts exist today on some sixty reservations. The vast majority of these and the major ones in area and population are located in the northern plains and Rocky Mountain states . . . Indian people in these parts (East, South, Midwest and Pacific states) even if still living on 'reservations' or otherwise designated Indian land holdings, are, with a few exceptions, subject to state court jurisdiction." Brakel, *American Indian Tribal Courts: Separate? Yes, Equal? Probably Not*, 62 A.B.A.J. 1002 (1976) [hereinafter cited as Brakel].

18. 25 U.S.C. §§ 1301-03 (1970).

19. 25 U.S.C. § 1302 (6) (1970).

20. Brakel, *supra* note 17, at 1003.

21. "A questionnaire to which 16 of the largest tribes responded revealed that while only seven had permitted professional, non-Indian attorneys to represent criminal defendants in tribal courts prior to 1968, eleven tribes now do, while four have expressed no policy. The only tribe which stated that it continued to bar non-Indian attorneys was later compelled to admit them by a federal district court." Burnett, *supra* note 4, at 615-16.

22. See note 9, *supra*.
23. 25 U.S.C. § 1302(8) (1970).
24. See note 10, *supra*; *Griffin v. Illinois*, 351 U.S. 12 (1956), and its progeny establish that equal protection of the laws requires states (and fifth amendment due process requires the federal government) to furnish the poor man all the procedural protections which his wealthier brother is allowed if he pays for them.
25. CV-75-97-HG (D. Mont. 1976), as reported in 3 INDIAN L. REP. n-3 (Feb. 1976).
26. 25 U.S.C. §§ 1301-03 (1970).
27. 407 U.S. 25, 37 (1972), holding "that absent a knowing an intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."
28. 18 U.S.C. § 3006A (Supp. IV, 1974). This statute requires United States district courts to set up a plan for providing counsel to persons appearing in federal district court who are unable to afford representation, and it directs the magistrate or judge to appoint counsel in such cases, unless waived by the defendant
29. 3 INDIAN L. REP. n-3 (Feb. 1976).
30. *Tom v. Sutton*, C.A. No. 75-1551 (W.D. Wash. 1975), reported in 3 INDIAN L. REP. n-4 (Feb. 1976).
31. 533 F.2d 1101 (9th Cir. 1976).
32. *Id.* at 1103.
33. Article VIII provides in part: "All members of the Lummi Indian Tribe shall be accorded equal rights pursuant to tribal law. No member shall be denied any of the rights or guarantees enjoyed by non-Indian citizens under the Constitution of the United States, including, but not limited to . . . due process of law. No member shall be denied any of the rights or guarantees as provided in Title II of Public Law 90-284— the Act of April 11, 1968 (82 Stat. 77 and 78) as follows: No Indian tribe in exercising powers of self-government shall . . . (6) deny to any person in a criminal trial . . . at his own expense to have the assistance of counsel for his defense; . . . (8) . . . or deprive any person of liberty or property without due process of law . . ." See 533 F.2d 1101, 1105.
34. 533 F.2d 1101, 1103 (9th Cir. 1976).
35. *Id.*
36. *Id.*
37. *Id.* "The expression of one thing is the exclusion of another." BLACK'S LAW DICT. 4th ed. A footnote to the court's discussion points out that the terms "due process" and "equal protection" may not always be given the same meaning where Indians are involved as they are when non-Indians protected by the Federal Constitution are involved.
38. 407 U.S. 25 (1972).
39. 533 F.2d 1101, 1105 (9th Cir. 1976).
40. *Id.* at 1106.
41. *Id.*
42. *Tom v. Sutton* is now on appeal to the Supreme Court.
43. *Zointz, In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 5 (1975); *Lazarus, Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337, 346-47 (1969) [hereinafter cited as *Lazarus*]; Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1359 (1969).
44. *Burnett, supra* note 4, at 574-602; *Coulter, Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. SURVEY OF HUMAN RIGHTS L. 49, 74 (1970-71) [hereinafter cited as *Coulter*].
45. *Lazarus, supra* note 43, at 346.
46. *Burnett, supra* note 4, at 576.
47. See *Martinez v. Santa Clara Pueblo*, 540 P.2d 1039 (10th Cir. 1976). This case is fully discussed at Note, *Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo*, 90 HARV. L. REV. 627 (1977); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973). *Contra*, *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976); *McCurdy v. Steele*, 506 F.2d 653 (10th Cir. 1974); *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (9th Cir. 1973); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971).

48. "Where once fourteenth amendment procedural due process was only partially a function of the Bill of Rights, the modern approach is toward a uniform standard for both state and federal governments. A similar unifying trend is apparent for military tribunals, administrative agencies, and juvenile courts. The bases of this trend seem to be fuller perceptions of the integrated character of the nation, and disbelief that deviations from procedural due process standards would achieve their purported goals. More fundamentally, this trend reflects a belief that, regardless of the stated goals or exigencies of a particular process, the loss of liberty, the stigma, and collateral consequences attendant upon a criminal conviction are substantially the same regardless of the forum or location in which they are imposed." Note, *Indian Tribal Courts and Procedural Due Process: A Different Standard?* 49 IND. L.J.721, 732-33 (1974).

49. Burnett, *supra* note 4, at 601-602; Coulter, *supra* note 44, at 77-78.

50. In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that the alleged murder of one Sioux by another on the reservation was not within the criminal jurisdiction of any court of the United States and only the tribe could punish the offense. The furor caused by the tribe's refusal to prosecute the accused led to the passage of the Major Crimes Act of 1885, 93 Stat. 385, *as amended*, 18 U.S.C. §§ 1153, 3242 (Supp. 1976).

51. DeRaismes, *The Indian Civil Rights Act of 1968 and Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59, 75 (1975).

52. Burnett, *supra* note 4, at 601-602.

53. See note 9, *supra*.

54. 407 U.S. 25 (1972).

55. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

56. See note 51, *supra*.

57. 25 U.S.C. § 1302(7) (1970).

58. Note, *An Analysis of the Indian Bill of Rights*, 33 MONT. L. REV. 255, 263 (1972).

59. *Busey v. District of Columbia*, 129 F.2d 24 (C.A.D.C. 1942); *Braicks v. Henricksen*, 43 F. Supp. 254 (W.D. Wash. 1942).

60. Comment, *Indian Legal Services Programs: The Key to Red Power*, 12 ARIZ. L. REV. 594, 595 (1970).

61. Burnett, *supra* note 4, at 581.

62. Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, 1969 L. & SOC. ORDER 161, 169-75 (1969).

63. Burnett, *supra* note 44 at 615.

64. *Id.* at 591.

65. Brakel, *supra* note 17, at 1003; Coulter, *supra* note 44, at 67.

66. *Id.* at 1003.

67. Brakel, *id.*, suggests that lay representation is not a satisfactory substitute for professional representation. See also *Settler v. Lameer*, 507 F.2d 231, 242 n.24 (9th Cir. 1974).

68. Price, *supra* note 62, at 172-73.

69. Burnett, *supra* note 4, at 579 n.137. Legal assistance is provided for Indians tried under the Major Crimes Act in federal court.

70. Brakel, *supra* note 17, at 1003. White lawyers are sometimes allowed to sit on tribal courts and tribal judges tend to emulate white judges. *Id.* at 1006.

71. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).