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INTRODUCTION

The decade of the 1960's saw the United States embroiled in the disorienting throes of social upheaval. Following the lead of blacks, minority groups clamored for the equality and privileges enjoyed by white Americans. Active in this struggle were the American Indians. The first fruits for Indians of the civil rights movement came in 1968 with the passage of Title II of the 1968 Civil Rights Act.[1]

The purposes of this comment are: first, to examine the nature and scope of the power Congress relied upon in imposing Title II on the tribes; second, to compare the provisions of this legislation with corresponding provisions of the Constitution; third, to evaluate this particular act as a means of exercising federal power over Indians, laying special emphasis on those sections of Title II which offer Indians rights not as complete as the similar guarantees other Americans hold; and fourth, to examine the legislative wisdom of Title II.

THE NATURE AND SCOPE OF FEDERAL POWER OVER INDIANS

No provision of the Constitution explicitly vests in Congress the power to control Indians. Indeed, the subject of Indians is mentioned only twice: "Indians not taxed"[2] were to be excluded from determining the number of Representatives a state was to be allowed; and Congress was to have the power "To regulate Commerce . . . with the Indian tribes."[3] A long line of judicial decisions, however, has recognized that the principle source of congressional power over Indians stems from the field of international law and the law of conquest.

Upon the discovery of the New World, the European powers recognize the rights of American Indians to the possession of their lands. The law of discovery as formulated by the European powers simply established which country would have paramount right as among themselves in the exploration and conquest of the new lands. Thus, England, France, Spain, and Russia came to be recognized as the European powers entitled to rights of exploration, exploitation, and conquest within the present borders of the United States superior to all other non-New World powers. By revolution, war, and treaty, the United States succeeded to rights held by these four in the territory over which the United States today exercises sovereignty. Possessory rights, then, had to be exacted from often uncooperative Indian tribes. "Threats,

[1] 82 Stat. 78; 25 U.S.C. § 1301 *et seq.*
[2] U.S. CONST. art. I, § 2.
[3] U.S. CONST. art. I, § 8.

cajolery, bribery, force, persuasion, and gifts"[4] were the usual methods employed.[5]

Implicit in this history is the theory that Indian tribes possess a sovereignty co-extensive with that of all foreign nations. While this important fact may have been often overlooked by the executive department in its endeavors to deal with the "Indian problem," the courts have consistently applied this notion in deciding disputes brought before them involving Indians. Chief Justice Marshall first gave full judicial construction to the doctrine in *Worcester v. Georgia.*[6] In that case, the defendant, a white man, had been imprisoned by Georgia officials for violation of a state law prohibiting whites from living with the Cherokees. In deciding the law was unconstitutional, the court made several important points: Indian nations are to be "considered as distinct, independent political communities. . . . "[7] By subordinating their powers to the United States, the Indian nations have not given up the right to self-government.[8] Furthermore, "The whole intercourse between the United States and [an Indian] nation, is, by our constitution and laws, vested in the government of the United States."[9] Thus, the laws of Georgia did not apply to Cherokees within their alotted boundaries.[10]

The doctrine of tribal sovereignty may have advantages, but it also carries with it disadvantages, as was discovered in *Elk v. Wilkins.*[11] Elk, an Indian who had resided in Nebraska long enough to satisfy the state residency requirements for voting, who had been born in the United States, and who had severed all relations with his tribe, presented himself as qualified to vote in local elections. Wilkins, the voter registrar, disagreed, and the United States Supreme Court backed him up. "Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities. . . ."[12] As a member of an "alien nation,"

[4]WASHBURN, RED MAN'S LAND, WHITE MAN'S LAW 42 (1971).

[5]For more detailed and at times more colorful accounts of this history, *see Worcester v. Georgia,* 31 U.S. 515 (1832); *United States v. Wright,* 53 F.2d 301 (4th Cir. 1931).

[6]Worcester v. Georgia, *supra* note 5; *see also* Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

[7]Worcester v. Georgia, *supra* note 5 at 559.

[8]Worcester v. Georgia, *supra* note 5 at 561: "A weak state, in order to provide for its safety, may place itself under the protection of a more powerful one, without stripping itself of the right of government, and ceasing to be a state."

[9]Worcester v. Georgia, *supra* note 5 at 561.

[10]"It was of the decision in *Worcester v. Georgia* that President Jackson is reported to have said, 'John Marshall has made his decision; now let him enforce it.'" As a matter of history, the State of Georgia, unsuccessful defendant in the case, never did carry out the Supreme Court's decision, and the 'successful' plaintiff, a guest of the Cherokee Nation, continued to languish in a Georgia prison, under a Georgia law which, according to the Supreme Court decision, was unconstitutional." COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942), quoting GREELEY, 1 AMERICAN CONFLICT 106 (1864).

[11]Elk v. Wilkins, 112 U.S. 94 (1884).

[12]*Id.* at 99.

Elk was not a citizen of the United States and thereby could not be a citizen of Nebraska. Furthermore, Indians were not citizens of the United States by way of the Fourteenth Amendment because they were not subject to the jurisdiction and control of the United States. Like any other alien, an Indian could become a citizen of the United States only by complying with its naturalization laws.[13] Recent decisions based on the doctrine of tribal sovereignty are to the same effect.[14]

These decisions, and many others, recognize: (1) Indian tribes are "distinct, independent, political communities,"[15] possessing all the rights, powers, and privileges of any sovereign state; (2) their sovereignty is limited in that tribes have only internal powers (e.g., they cannot make treaties with other powers); and (3) by treaty or legislation, Congress may at any time qualify the sovereignty of the tribes.

The significance of the doctrine of tribal sovereignty cannot be overstated. In a tribal court before the passage of Title II an Indian had no federally protected rights. His only protection flowed from whatever laws the tribe had passed and Indian notions of fair play. Often this resulted in convictions of Indians before tribal courts which never could have been affirmed in the federal or state courts. For example, in *Talton v. Mayes*[16] a Cherokee Indian was indicted by a grand jury of the Cherokee nation authorized by Cherokee law to consist of only five persons. He was convicted and sentenced to be hanged. Upon petition for writ of habeas corpus, the defendant asserted a Fifth Amendment right had been violated by the Cherokee law authorizing a grand jury of only five persons. The Court held ". . . the Fifth Amendment must be understood as restraining the power of the General Government, . . ."[17] and that

> . . . the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.[18]

The rationale of this decision imports that even had the Court employed the notion of incorporating the Bill of Rights into the Due Process Clause,[19] there would still be no grounds for extending Fourteenth

[13]On June 2, 1924, "all non-citizen Indians born within the territorial limits of the United States" became U.S. citizens. 8 U.S.C. §3.

[14]*Cf. Williams v. Lee*, 358 U.S. 217 (1959), where a white man brought suit in state court to collect on a debt owed by an Indian who lived on a reservation, the Supreme Court held the state court had no jurisdiction to try the case.

[15]Worcester v. Georgia, *supra* note 5 at 559.

[16]Talton v. Mayes, 163 U.S. 376 (1896).

[17]*Id.* at 382.

[18]*Id.* at 384.

[19]First espoused by Mr. Justice Black in a dissenting opinion in *Adamson v. California*, 332 U.S. 46 (1947).

Amendment protective qualifications to tribal actions. Indeed, many decisions have borne out this observation.[20]

TITLE II AND THE CONSTITUTION

While in many respects preservative of valuable tribal customs and conducive to the continued existence of the tribe as a viable, governing entity, the judicial doctrine of tribal sovereignty does not guarantee the individual Indian before his tribal government the very rights Americans generally consider fundamental. It was to correct this situation that Title II was passed:

> The proposed Indian legislation, . . . , is an effort on the part of those who believe in constitutional rights for all Americans to give "the forgotten Americans" basic rights which all other Americans enjoy. These measures will not cure all the ills suffered by the American Indians, but they will be important steps in alleviating many inequities and injustices with which they are faced. These rights, fundamental to our system of constitutional freedoms, are not now secured by laws respecting the American Indian.[21]

In effect, Title II was intended to have a similar influence on the tribes as the Fourteenth Amendment has had on the states. Of primary importance to the theme of this article is Subchapter I of Title II.[22] A comparison of Subchapter I to familiar constitutional guarantees is, at this point, necessary.

Section 202(1) provides that no Indian tribe[23] 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 is word for word with the First Amendment—except that no mention is made of legislating respecting an establishment of religion, a concession to theism in some tribal governments.

Section 202(2), pertaining to searches and seizures, is identical to the Fourth Amendment in all but minor grammatical aspects.

Sections 202(3)-(5) refer to the double jeopardy, self-incrimination, and taking of private property for public use without just compensation provisions of the Fifth Amendment. A noted absence is the Fifth Amendment right for presentment or indictment by a grand jury be-

[20] *Cf. Glover v. U.S.*, 219 F. Supp. 19 (D. Mont. 1963), where the petitioner requested the privilege of writ of habeas corpus, alleging he had been convicted of drunken driving by a tribal court, was imprisoned, had no recourse to appeal, and was denied proper legal counsel at his trial, the privilege was denied. The court recognized the sovereignty of the tribe in the area under which the petitioner was convicted: it held "the provisions of the Federal constitution guaranteeing due process and the right to counsel do not apply in prosecutions in tribal courts."

[21] SEN. REP. No. 721, 90th Cong., 2d Sess. (1968); 1968 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 1837, 1867.

[22] 25 U.S.C. §1301-§1303.

[23] 25 U.S.C. § 1301 states: " 'Indian tribe' means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government."

for a person may be held to answer for a capital or otherwise infamous crime.

Section 202(6) quotes substantially the Sixth Amendment. It makes, however, an important deviation. Instead of the guarantee of "Assistance of Counsel for his defense," the Indian defendant before a tribal court has a right to counsel but only "at his own expense."

Section 202(7) qualifies the power of an Indian tribe in that it may not "require excessive bail, impose excessive fines, inflict cruel and unusual punishment, . . ."; these phrases are identical in substance to the Eighth Amendment. The section continues, adding a further limitation on the power of the Indian tribal courts: they may not impose for one offense a penalty of imprisonment for more than six months, a fine of more than $500, or both.

Section 202(8) forbids any Indian tribe to "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." These are the familiar Fourteenth Amendment guarantees.

Section 202(9) commands a tribal council not to "pass any bill of attainder or ex post facto law." This restraint on Indian legislative bodies is identical to the constitutional mandate for Congress in Article I, Sec. 9, clause iii.

Section 202(10) guarantees the right to trial by a jury of not less than six persons for anyone accused of an offense punishable by imprisonment, as does the Sixth Amendment.[24]

As a further protection, Section 203 provides:

> **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.**

THE IMPORT OF TITLE II

That Congress has the power to enact legislation regulating tribal government is unquestionable.[25] This power has been exercised before. Prior to 1885, all criminal offenses committed by Indians against Indians in Indian Country were under the jurisdiction of the tribal courts. In that year Congress passed legislation removing from the tribe's jurisdiction seven major crimes,[26] which was later amended to twelve major crimes.[27] In as much as Title II limits the power of the tribal

[24]In *Williams v. Florida*, 399 U.S. 78 (1970), the Court sustained a conviction by a six-man jury, noting "the 12-man panel is not a necessary ingredient of 'trial by jury.'"

[25]COHEN, *supra* note 10 at 123.

[26]Act of March 3, 1885; 23 Stat. 362, 385. The seven major crimes listed were murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.

[27]18 U.S.C. § 3242 added the following to the seven major crimes: carnal knowledge of any female, not one's wife, who has not attained the age of sixteen years; assault with intent to commit rape; incest; assault with a dangerous weapon; and robbery.

courts and councils, it is similar to the twelve major crimes act. The constitutionality of the major crimes acts has never been questioned. May one infer Title II is also constitutional?

Unlike the major crimes acts, which were concerned only with federal jurisdiction over certain specified crimes, Title II is an extension of constitutional rights that Congress in some cases modified, and in others neglected to extend. As legislation intending to extend the Bill of Rights to Indians, it can be evaluated by its four methodological divisions:

(1) those sections where the rights extended to Indians are identical with the rights an American enjoys under the Constitution (*e.g.*, speech, press, assemblage; right against unreasonable searches and seizures; double jeopardy, self-incrimination, public taking without just compensation; speedy and public trial; no excessive bail, fine, nor infliction of cruel and unusual punishment; equal protection and due process; no bills of attainder or ex post facto laws; and review by habeas corpus proceedings);

(2) those sections from which are omitted other constitutional guarantees (*e.g.*, from 202(1) is omitted "no law shall be made respecting the establishment of religion;"[28] and from 202(3)-(5) the right to an indictment by a grand jury for a capital or infamous crime; generally omitted is the right to keep and bear arms);

(3) those sections where Congress imposed restraints more extensive than those of the Constitution (*e.g.*, 202(7) limits tribal judicial action to the imposition of penalties no greater than six months in jail, a fine of $500, or both);

(4) those sections which extend less than the constitutionally protected rights enjoyed by other American citizen (*e.g.*, section 202(6)—the right to counsel at one's own expense; and section 202(10) grants the right to a jury trial for those accused of crimes punishable by imprisonment as opposed to the "in all criminal prosecutions" of the Sixth Amendment). In light of the doctrine of tribal sovereignty, these categories require separate evaluations of their constitutionality.

It is of little value to question the extension to Indians of rights identical with those of the Constitution. Because Congress has the power, and because the manner of its exeercise is identical to the Constitution, no possibility of invalidation for want of constitutionality arises.

Similarly, where Congress neglected to make any mention of restraints which are otherwise imposed on the national and state governments, it cannot be said this omission is unconstitutional. Indeed, Indians

[28] U.S. Const. amend. I.

and Indian tribes can only derive federally protected rights through federal legislation. In as much as the rights were not enjoyed in the past and would not be today were it not for Title II, this portion of the legislation cannot fail for not extending to Indians rights commensurate with those of non-Indians.

A similar conclusion is reached upon examination of those sections which impose restraints more extensive than the guarantees enumerated in the Constitution. The restrictions Congress may believe wise to impose on tribal actions are not limited to the Bill of Rights. The power Congress possesses over tribes allows it to enact any legislation so long as it is within constitutional parameters.

The section where Congress imposed a restraint on tribal actions less substantial than the Sixth and Fourteenth Amendments impose on state and federal actions deserves stricter scrutiny. Title II allows a tribal court to deny an accused the assistance of counsel where the accused cannot provide a lawyer "at his own expense". The Constitution clearly imposes a more comprehensive restraint on federal and state court actions: *Gideon v. Wainwright*[29] held a person accused of a felony and unable to afford a lawyer could not receive a fair trial unless represented by counsel. Later Court of Appeal decisions have expanded the *Gideon* ruling to include some situations where the defendant is charged with a misdemeanor.[30] Conceptually, these are obviously two different rights to the assistance of counsel.

Clearly, Congress is not constitutionally empowered to impose a Title II right to counsel on lower federal courts. If Congress does not constitutionally have the power to impose the Title II right to counsel in that instance, does it have the power to impose such a restraint on Indian tribes? Two areas of our jurisprudence shed light on the regulatory powers of Congress where another sovereign is involved: The first is the body of law known collectively as the Insular Cases.[31] The second involves the power of Congress to govern the land and naval forces.[32] The doctrine of tribal sovereignty makes these two comparisons apposite.

The Insular Cases made plain that when governing territorial acquisitions not incorporated into the Union ". . . Congress is not subject to

[29]Gideon v. Wainwright, 372 U.S. 335 (1963).

[30]*See* Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); James v. Headley, 410 F.2d 325 (5th Cir. 1969); and Alvis v. Kimbrough, 446 F.2d 548 (5th Cir. 1971). However, it must be noted the Supreme Court has denied certiorari where the defendant was convicted of a misdemeanor without the benefit of counsel. *See* Winters v. Beck, 239 Ark. 1093, 397 S.W.2d 364 (1965), cert. denied, 385 U.S. 907 (1966); and Connecticut v. Heller, 154 Conn. 743, 226 A.2d 521 (1967), cert. denied, 389 U.S. 902 (1967).

[31]*E.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Door v. U.S., 195 U.S. 138 (1904); Balzac v Puerto Rico, 258 U.S. 298 (1922).

[32]U.S. CONST. art I, § 8.

the same constitutional limitations, as when it is legislating for the United States."[33] This interpretation allowed Ohio to tax fibers shipped from the Phillipines to Ohio even though at the time the Phillipine Islands were a territory of the United States. From the Insular decisions one can infer Congress is not limited by constitutional restraints when legislating for areas where another sovereign, not part of the federal system, is involved. Given this inference it would seem Congress can impose restraints on tribal actions which would be unconstitutional in the state-federal context. However, as relevant as this argument seems, it may be obsolete, for the United States Supreme Court has stated ". . . it is our judgment that neither the (Insular Cases) nor their reasoning should be given any further expansion . . . ."[34]

In legislating for the regulation of our land and naval forces Congress was again faced with the problem of passing laws for an area beyond the borders of the United States. Before 1957 a military tribunal could assert jurisdiction under Article 2(11) of the Uniform Code of Military Justice over "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States." Under this authority, Mrs. Covert was convicted by a court-martial of the murder of her husband, an Air Force sergeant stationed in England. In an opinion announced by Mr. Justice Black, the Court reversed the conviction, holding the defendant "could not constitutionally be tried by military authorities."[35] The Court further stated:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. When the Government reaches out to punish a citizen who is abroad, the shield of the Bill of Rights and other parts of the Constitution provided to protect his life and liberty should not be stripped away just because he happens to be in another land.[36]

The unequivocal language of *Covert*, applied to the Insular Cases and to Congress' power to govern the land and naval forces, indicates the Supreme Court would not approve of congressional legislation which purported to impose an unconstitutional limitation upon tribal action. Indeed, one can infer from this decision Congress does not have the power to impose an extra-constitutional restraint on tribal governments.

While the right to counsel of Title II is conceptually different from the right to counsel of the Constitution, practically speaking the difference may not be so great. Because Congress limited the severity of punishments which a tribal court may impose,[37] it can be argued it was contemplated tribal courts would be reserved for handling misdemeanors

[33]Hooven & Allison Co. v. Evatt, 324 U.S. 652, 674 (1945).
[34]Reid v. Covert, 354 U.S. 1, 14 (1957).
[35]*Id.* at 5.
[36]*Id.* at 5-6.
[37]25 U.S.C. § 1302(7).

of the petty offense class.[38] Following this line of reasoning, the Title II right to counsel is not unconstitutional. Presently, it cannot be said one is constitutionally entitled to the assistance of counsel when accused of a misdemeanor.

This argument has two weak points: First, Title II does not specifically limit tribal court jurisdiction to only misdemeanors. Tribal court criminal jurisdiction is limited only by the twelve major crimes act or other specific federal legislation. Therefore, today it is conceptually possible for a tribal court to convict a person of a felony, although it may not impose a penalty more severe than six months in jail and a $500 fine. For example, an overt conspiracy to commit murder, a crime usually considered a felony, is within a tribal court's jurisdiction, but no more harsh a punishment than six months imprisonment and a $500 fine may be imposed. Second, given the trend of judicial decisions, one might forecast the United States Supreme Court may require the assistance of counsel when a possible penalty is less than six months imprisonment. The political philosophies of recent appointees, however, suggest this prediction is remote.

An additional observation, pertinent to all of Title II and particularly section 202(6), the right to counsel section, is necessary. Section 202(8) restricts tribal action in that no person may be deprived of liberty or property without due process of law. Constitutional due process includes the right to counsel.[39] Only by interpreting the due process language of Title II as a special kind of "Indian due process" unrelated to constitutional due process can this apparent contradiction be assuaged. Under this argument, the Due Process and Equal Protection restraints imposed on the tribes are not the same as those of the Fourteenth Amendment. This would allow tribal courts to perhaps "absorb" tribal customs into the due process clause of Title II, a result not wholly undesirable. However, if one looks to the interpretations given that guarantee over the years by the Supreme Court,[40] and the plain import of the words as a literal constructionist might, those sections where Congress extended less than the constitutionally protected rights and those sections where other guarantees were omitted would be eclipsed and rendered of limited effectiveness. In view of the obvious parallel of Title II with the Bill of Rights, their many similar phrases, and the general congressional intent,[41] interpreting the due process guarantee of Title II to be different from that of the Fourteenth Amendment would be tenuous at best.

[38] 18 U.S.C. § 1 defines a petty offense as a misdemeanor, the maximum punishment for which does not exceed six months imprisonment nor a fine greater than $500; a misdemeanor is any crime not a felony; and a felony is an offense punishable by death or imprisonment for more than one year.

[39] Gideon v. Wainwright, *supra* note 29.

[40] *Duncan v. Louisiana*, 391 U.S. 145 (1968), includes a summary of fundamental rights absorbed into the Due Process Clause by judicial interpretation.

[41] SEN. REP. NO. 721, *supra* note 21.

ITS WISDOM EXAMINED

The congressional intent in enacting Title II is adequately described in the committee reports. In passage of this act Congress presumed the ills suffered and the inequities faced by American Indians could be, at least partially, cured by federal legislation and that those ills and inequities flowed from tribal action. The history of congressional and executive control over the "Indian problem" suggests otherwise. From the advent of the white man and his interference with the Indian way of life, the social and cultural positions of the Indian and his tribe have deteriorated. During the past one hundred years this deterioration stemmed almost exclusively from the simple assumption by the white man that he was better qualified to govern Indians and Indian tribes than were the Indians themselves. In other words, the principle of self-government was not considered appropriate for Indians. Fortunately for the Indian and the white, the trend appears to have changed: the executive branch has officially abandoned the belief that Indians are incapable of governing themselves.[42]

The practical effect of Title II is to restrict tribal sovereignty just as did the seven major crimes act.[43] In this respect, it is in keeping with the philosophy of the last century. It is a blatant imposition of white values on a different culture. Even if it is assumed the Indian culture has been reduced through interaction with the white culture to one of only distantly related fragments lacking in cohesion, this imposition still violates the right of self-government derived from the concept of tribal sovereignty enunciated so long ago by Chief Justice Marshall.[44] Assuming elements of Indian culture still exist in a form capable of supporting a self-governing entity, as many advocates of "red power" declare, Title II may in the long run do more harm than good. While the ills this legislation sought to cure do indeed exist, federal legislation is no panacea: the remedy must be discovered and applied by the individual Indian tribes. Success will follow only if the tribes are allowed by the federal government to develop what in many instances will be their traditional forms of self-government.

CONCLUSION

While not specifically mentioned in the Constitution, it cannot be doubted Congress has the power to legislate regarding Indians and Indian tribes. Any examination of the constitutionality of Title II must necessarily, then, be an evaluation of the means by which Congress elected to use that power. But for Section 202(6), guaranteeing an Indian before an Indian court a right to counsel at his own expense, Congress legislated well within constitutional parameters.

Given the arguments surrounding the Title II right to counsel and

[42]Message to Congress on Indian Affairs from President Richard M. Nixon, July 8, 1970.
[43]Act of March 3, 1885, *supra* note 26.
[44]Worcester v. Georgia, *supra* note 5.

the judicial preference for construing congressional legislation so as to avoid the constitutional question, it may be predicted that Section 202(6) will withstand attacks on its constitutionality. This conclusion is based, however, on the presumption the Supreme Court does not redefine the right to counsel to include those instances where an accused is charged with a crime, the maximum punishment for which is less than six months imprisonment.

No matter what the outcome of the Title II right to counsel issue, there remains the interpretational problems of its due process clause. Until the Supreme Court grapples with this issue, an accurate assessment of the import of Title II cannot be made. It is clear, however, the legislative philosophy behind Title II disregards the doctrine of tribal sovereignty and self-government. For those who believe the best government for Indians is government by Indians, Title II may well prove more bane than boon.