



# Due Process and the Indian Civil Rights Act

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The relationship between tribal sovereignty and individual civil rights were debated and controversial during the whole 19<sup>th</sup> century. The United States government dealt with tribes as sovereign nations through treaties and through the Departments of War and State, and citizenship rights as US citizens were denied them. At the end of the century, the United States Supreme Court ruled that the United States Bill of Rights did not apply to the actions of tribal governments in a case called *Talton v Mayes* (1896). The issue of civil rights for persons subject to the jurisdiction of tribal governments was not addressed by the federal government for the next 60 some years.

The 1960s were years filled with civil rights movements on many fronts. Civil rights were at the forefront of national issues and Lyndon Johnson was president. The black civil-rights movement, women's movement, gay rights, and protests against the Vietnam War were all brewing. The Indian front was no exception. The nationalistic activism that developed among the aboriginal nations in the 60s was called 'Red Power.' It was composed of various groups with competing aspirations, strategies, and goals.

In 1968 the Indian Civil Rights Act (ICRA) was passed by Congress. Although the U.S. Bill of Rights applies to all U.S. citizens in terms of their relationship to the state and federal governments, the U.S. Bill of Rights does not apply to the conduct of tribal governments because of their inherent sovereign status. Congress believed that a special bill of rights was needed in the Indian community, and given its plenary power, Congress simply made it so. Some Native factions supported the ICRA and viewed it as a safety net for tribal members and others subject to the jurisdiction of a tribe, while others viewed it as an intrusion on tribal government.

The purpose and scope of the Indian Civil Rights Act is to provide certain rights to all persons who are subject to the jurisdiction of a tribal government. At the heart of the Indian Civil Rights Act is the obligation of tribes to provide *due process* and *equal protection* in tribal operations. The Act contains almost all of the fundamental rights in the U.S. Constitution with the exception of four. Those four are: 1) Tribal governments do not have to separate church and state; 2) Tribal governments do not have to provide free legal counsel to those who cannot afford it; 3) Tribal governments do not have to provide a trial by jury in civil cases; and 4) Tribal governments do not have to provide grand jury indictments in criminal cases. Additionally, the ICRA sets the limits on fines and jail time that a tribal court may impose, which are a maximum of 1 year in jail and/or up to \$5,000 in fines.

The Indian Civil Rights Act affects tribal procedures in the area of criminal jurisdiction very significantly. It mandates that tribal courts advise criminal defendants of their right to a trial by jury, requires tribes to write their criminal laws in clear and certain language, honors a criminal defendant's right against self-incrimination, prohibits the trial judge from also being the prosecutor, and requires tribes to maintain complete records of judicial proceedings. If a tribal court has sentenced someone to jail, that person has a right to appeal their case to the federal court system through a writ of *habeas corpus*.

The Indian Civil Rights Act also applies to tribes exercising civil jurisdiction, but the procedural requirements are not quite as stringent as for criminal jurisdiction. Tribes exercising civil jurisdiction still must follow procedures that provide due process and equal protection. Basically, tribal court civil procedures must be fundamentally fair.

There is no set definition of 'due process,' but it generally means that tribes must be fair in their governmental activities, procedures, and tribal court hearings. Due process requires that tribal governments give notice of an action that is planned, and an opportunity to be heard in front of a fair tribunal. The opportunity to be heard means the chance to present your side of the story, and to find out the position of the other side.

Due process also means that no law or governmental procedure should be arbitrary or unfair. People must be given equal protection under tribal law. Tribal governments must apply the law equally to persons in similar situations. The rights of individuals are balanced against the governmental interest, but the action of the government must be reasonable and fundamentally fair.