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INTEREST ON INDIAN CLAIMS: JUDICIAL PROTECTION OF THE FISC

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INTRODUCTION

The Indian policy of the United States has been a highly political matter throughout the nation's history. Allocating the limited land, mineral and water resources of the country between Indian and non-Indian claimants has rarely been a simple or welcome task for the federal government.[1] Decades of battle, both military and political, have reduced both the quantity and quality of land held by American Indians. Out of the conflict hundreds of claims for redress, at least in monetary form, have arisen.

Originally, Congress conducted all negotiations with the Indian tribes. In 1946 it attempted to avoid the political problems involved in legislating upon Indian claims[2] by creating the Indian Claims Commission.[3] Originally conceived as an advisory body to the Congress,[4] the Commission became the basic component of a system which attempted to judicialize the awarding of compensation to Indian tribes.[5] While the Commission had broad jurisdiction over claims arising from past injustices, it was given little substantive guidance in defining com-

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1. The long debate over claims of Alaskan natives demonstrates this fact. *See* Wyant, *Sharing the Wealth of Alaska, The Oil Rush,* THE NEW REPUBLIC, Feb. 14, 1970, at 19.

2. In his veto message to Congress regarding the Turtle Mountain Indians Jurisdictional Act, which would have referred certain tribal claims to the Court of Claims, President Franklin D. Roosevelt declared that

> [t]his would require the Court of Claims and Supreme Court to pass upon questions of governmental policy in dealing with the Indians, and upon the propriety or impropriety of the Government's action in specific cases. These are questions of a political nature which, heretofore, Congress has consistently refused to remit to the courts for review.

S. Doc. No. 179, 73d Cong., 2d Sess. (May 10, 1934).

3. Indian Claims Commission Act of 1946 § 1, 25 U.S.C. § 70 (1964). In 1863 claims "growing out of or dependent on any treaty stipulation entered into . . . with the Indian tribes" had been excluded from the jurisdiction of the Court of Claims. Act of March 3, 1863, ch. 92, § 9, 12 Stat. 767.

4. *See* S. 1902, 75th Cong., 2d Sess. (1937); H.R. 5817, 75th Cong., 2d Sess. (1937). *See generally* 81 CONG. REC. 6238-67 (1937).

5. For a discussion of the judicialization of the Commission's fact-finding procedures, see Vance, *The Congressional Mandate and the Indian Claims Commission,* 45 N.D.L. REV. 325 (1969).

pensable wrongs[6] or determining appropriate measures of compensation.[7] The task of developing these concepts fell upon the Commission and, through appellate review, the Court of Claims and Supreme Court. The only guidelines available to the Commission and the Court of Claims were earlier doctrines developed by the courts under various jurisdictional acts.[8] Most of these jurisdictional acts, however, had limited tribal claims much more narrowly[9] than did the provisions of the new Indian Claims Commission Act.[10]

The creation of the Commission enabled Congress to rid itself of one of its most vexing problems concerning Indian claims—whether interest should be paid on awards to tribal claimants. Since many of the claims arose more than one hundred years before the passage of the Act, the question had immense fiscal importance. Of all the complex issues involved in formulating measures of compensation, the question of interest loomed largest. In starkest terms, the question was whether the federal treasury should assume the burden of interest which by

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6. *See* Gila River Prima-Maricopa Indian Community v. United States, 190 Ct. Cl. 791 (1970), *petition for cert. filed,* 39 U.S.L.W. 3025 (U.S. May 21, 1970) (No. 174).

7. *See* Washington Post, Jan. 29, 1970, at 3, col. 1.

8. Such acts were passed as early as 1881 when the Court of Claims was given jurisdiction over claims of the Choctaw Nation. Act of March 3, 1881, ch. 139, 21 Stat. 504. For details of claims under many of these acts, see *Hearing on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs,* 79th Cong., 1st Sess. (1945).

9. *See* Klamath & Moadoc Tribes v. United States, 296 U.S. 244 (1935); Osage Tribe of Indians v. United States, 66 Ct. Cl. 64 (1928), *appeal dismissed & cert. denied,* 279 U.S. 811 (1929); Creek Nation v. United States, 63 Ct. Cl. 270, *cert. denied,* 274 U.S. 751 (1927); Otoe & Missouria Indians v. United States, 52 Ct. Cl. 424 (1917).

10. The act defines the jurisdiction of the Commission as follows:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribes, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other grounds cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

Indian Claims Commission Act of 1946 § 2, 25 U.S.C. § 70a (1964). This section has been interpreted as not only waiving sovereign immunity but also creating broad new causes of action. *See* Otoe & Missouria Tribe v. United States, 131 F. Supp. 265 (Ct. Cl.), *cert. denied,* 350 U.S. 848 (1955).

this time totaled 500 percent or more.

Congress attempted to face the interest issue in 1940, subsequent to two awards of interest by the courts.[11] It was proposed that no more than six years of interest be paid on any one tribal claim.[12] The Department of Interior and other Indian spokesmen opposed the bill asserting that the denial of interest would be constitutionally impermissible when a fifth amendment taking of private property had occurred.[13] The bill was never reported out of committee,[14] and future proposals which led to the creation of the Indian Claims Commission largely ignored the problem of interest. It was left to the Commission and the courts to determine, as a matter of legal principle, whether the treasury should be protected from the interest claims. This article seeks to explore how the issue has been resolved.

The Historical Background

During the years of the exploration and conquest of the New World, European nations devised legal principles among themselves to govern the ownership of newly-found territory. Discovery and possession gave title to the government by whose subjects or under whose authority the discovery and possession took place. Aboriginal occupants were not ignored; the title of the discoverer was *subject* to the rights of the natives to possess and use their aboriginal lands according to their own discretion. This was, however, only an usufructory right. Aboriginal occupiers had no authority to dispose of the land at their own will. Furthermore, exclusive power to extinguish aboriginal use and occupancy rights was vested in the government holding title to the land.[15]

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11. United States v. Klamath & Moadoc Tribes of Indians, 304 U.S. 119 (1938); United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938). The Commissioner of Indian Affairs stated that the bill was "provoked" by the sizeable judgments in these two cases, and that "it seeks to avoid a repetition of such judgments in the case of other Indian tribes." *Hearings on S. 3083 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 19 (1940).

12. *Hearings on S. 3083 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. (1940). The proposed bill also dealt with the question of offsets against tribal judgments. The offset provisions became a reality in the Indian Claims Commission Act, but the Act remained silent on the interest question. Indian Claims Commission Act of 1946 § 2, 25 U.S.C. § 70a (1964).

13. *Hearings on S. 3083, supra* note 12, at 21, 28, 65-66, 124, 137-38, 144, 210.

14. *See* 86 Cong. Rec., pt. 19, at 670 (1940). There are suggestions in the hearings that the proposals were channeled to the Judiciary Committee because it was doubtful whether the Indian Affairs Committee would act favorably upon the bill. *Hearings on S. 3083 supra* note 12, at 58.

15. These doctrines were first developed by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). *See also* U.S. Dept. of Interior, Federal Indian Law 593-601 (1958); F. Cohen, *The Legal Conscience*, in Selected Papers of Felix S. Cohen 273-304 (L. Cohen ed. 1960).

The incidents of this aboriginal Indian title were refined largely in the twentieth century. Recent court decisions have indicated that these incidents included the concept that "aboriginal title" belonged to those tribes which maintained exclusive[16] possession of a particular area "for a long time."[17] The United States owned the fee in land subject to aboriginal title and, therefore, could not become a trespasser on aboriginally held lands.[18] Furthermore, the boundaries of the land to which a particular tribe might claim title were not frozen at the date of United States sovereignty over the land area involved.[19]

As the population of the United States grew, white settlers found Indian lands attractive. Therefore, the federal government often negotiated treaties with Indian tribes, taking a cession of tribal lands in exchange for small payments and a reservation of other lands which the United States did not consider desirable. Tribal rights to a new reservation were often guaranteed by Congress.[20] When Congress by treaty or statute granted permanent occupancy rights in a sufficiently defined territory, the Indians obtained "recognized title" to such lands.[21] The policy of dealing with Indian tribes by treaty[22] was ended in 1871.[23] Agreements made with tribes thereafter required approval of both houses of Congress, but legislation without previous agreement also was used in

16. Joint and amicable possession by two or more tribes, however, could not defeat aboriginal Indian title. Sac & Fox Tribe v. United States, 315 F.2d 896, 903 n.11 (Ct. Cl.), *cert. denied,* 375 U.S. 921 (1963); Confederated Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 194 n.6 (1966).

17. *See* Sac & Fox Tribe v. United States, 315 F.2d 896, 903 (Ct. Cl.), *cert. denied,* 375 U.S. 921 (1963); Quapaw Tribe v. United States, 120 F. Supp. 283, 285 (Ct. Cl. 1954); Snake or Paiute Indians v. United States, 112 F. Supp. 543 (Ct. Cl. 1953).

18. Kwash-Ke-Quon Indians v. United States, 137 Ct. Cl. 372 (1953).

19. Sac & Fox Tribe v. United States, 383 F.2d 991, 998-99 (Ct. Cl.), *cert. denied,* 389 U.S. 900 (1967).

20. As to the nature of such rights, compare the following:

> Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy.

Northwestern Shoshone Indians v. United States, 342 U.S. 335, 337 (1944).

> Those additional rights may be sufficient to spell out fee simple title in the Indians if that is what Congress wished, or they may result in something less than fee simple title.

Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926, 940 (Ct. Cl. 1959).

21. *See* Sac & Fox Tribe v. United States, 315 F.2d 896, 897 (Ct. Cl.), *cert. denied,* 375 U.S. 921 (1963); Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926, 936, 939-40 (Ct. Cl. 1959).

22. For a history of United States treaty making with Indian tribes, see U.S. DEPT. OF INTERIOR, FEDERAL INDIAN LAW, 164-214 (1958). The definitive compilation of tribal land cessions is C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES, 18TH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY, pt. 2 (1899).

23. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566.

dealing with Indian lands.[24]

Treaty Takings of Recognized Title Lands and the Fifth Amendment

If Indian treaties ceding recognized title lands were considered to be voluntary, consensual agreements, they might not be subject to the fifth amendment requirement of just compensation.[25] It is questionable, however, whether these treaties were indeed voluntary. The Indian Claims Commission Act appeared to destroy the mythology of consent by treating recognized title land cessions for unreasonably low compensation in the same manner as agreements arising from fraud, mistake or duress, actions which more clearly vitiate any element of formal consent.[26] If these cessions were in fact involuntary because of unconscionable treaty terms, it would seem to follow that the fifth amendment concept of just compensation, including interest from the date of taking, would become the basis for determining the value of the tribal claims. Such a result would not be precluded even if the treaties manifested some elements of formal consent, since there still may be a fifth amendment taking if the cessions were in substance involuntary.[27]

The suggestion that treaty takings for unconscionable consideration violate the fifth amendment was reinforced by judicial interpretation of the Indian Claims Commission Act. To maintain a claim based upon unconscionable consideration, the claimant was required to show either actual fraud or a disparity of price[28] so great as to amount to "fraudulent conduct or gross negligence."[29] Consideration was unconscionable when "no reasonable seller in a willing transaction under any circumstances"[30] would sell for the price paid. Thus, the courts began to view treaty takings of recognized title lands as nonconsensual takings if the compensation was inadequate.

With the question of the applicability of the fifth amendment

24. *See* U.S. Dept. of Interior, Federal Indian Law 210-12 (1958).

25. *See* Albrecht v. United States, 329 U.S. 599 (1947); National Bd. of YMCA v. United States, 396 F.2d 467 (Ct. Cl. 1968).

26. Indian Claims Commission Act of 1946 § 2, 25 U.S.C. § 70a (1964). This provision was to give the Commission authority "to go behind defenses frowned upon in equity." H.R. Rep. No. 1466, 79th Cong., 1st Sess. 11 (1945).

27. *See* United States v. Certain Parcels of Land in the Country of Fairfax, 345 U. S. 344 (1953).

28. Osage Nation v. United States, 97 F. Supp. 381, 421 (Ct. Cl.), *cert. denied,* 342 U.S. 896 (1951).

29. Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 694 (Ct. Cl. 1968).

30. Nez Perce Tribe v. United States, 176 Ct. Cl. 815, 829 (1966), *cert. denied,* 386 U.S. 984 (1967).

unanswered by Congress, the Indian Claims Commission and the courts faced the task of developing neutral principles by which the amendment, originally designed for occasional takings of comparatively small amounts of property, could be applied to the taking of vast areas of the continent.

Origin of the No-Interest Rule

Loyal Creek Indians v. United States[31] marked the origin of the rules on interest. During the Civil War, the Creek tribal government allied itself with the Confederacy and ostracized those tribal members who supported the Union. These Loyal Creeks took refuge behind Union lines in Kansas.

A 1901 agreement with the Creek Nation[32] provided that the claims of the Loyal Creeks for loss of their property in Oklahoma would be submitted to the Senate. The Senate subsequently determined damages of $1,200,000. The House of Representatives, however, objected to this amount, and in conference the award was reduced to $600,000, which was ultimately turned over to the claimants. The Loyal Creeks brought suit under the Indian Claims Commission Act for the difference between the Senate award and the $600,000. On appeal, the Court of Claims ruled that the treaty provided that the Senate act as arbitrator and, having determined the amount of the award in that capacity, Congress could not reduce that amount. The court added, however, that the claimants were not entitled to interest on the award.[33]

Strong and relevant precedent supported the denial of interest.[34] Because the case involved the failure of the United States to pay a judgment, the court denied interest, albeit in a hesitating manner:

> If it were not for these emphatic expressions of the Supreme Court, we would be inclined to think that such a departure from fair and honorable dealing as is shown by the Government's failure, for some forty-seven years, to pay a definite sum which it had agreed to pay, would require it to compensate the plaintiffs by paying interest. In deference to the views of the Supreme Court, we do not so decide.[35]

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31. 97 F. Supp. 426 (Ct. Cl.), *cert. denied*, 342 U.S. 813 (1951).
32. Act of March 1, 1901, ch. 676, § 26, 31 Stat. 861, 869.
33. 97 F. Supp. at 431.
34. *See* Albrecht v. United States, 329 U.S. 599 (1947); United States v. Goltra, 312 U.S. 203 (1941). *See generally* D. SCHWARTZ & J. JACOBY, GOVERNMENT LITIGATION 163-64 (1963).
35. 97 F. Supp. at 431.

Application of the Creek Decision to Recognized Title Land Takings

In *Osage Nation v. United States,*[36] the Court of Claims, citing the *Creek* case, held that no interest is payable upon unconscionable consideration claims under the Indian Claims Commission Act. The case, an appeal from the Indian Claims Commission, presented two alternative theories of recovery for the net proceeds in excess of the $300,000 cession consideration paid by the government for tribal lands. The petitioners objected to the use of these net proceeds for a "Civilization Fund" to benefit all American Indians. One theory merely alleged that the "Civilization Fund" amounted to a wrongful or unfair diversion of funds by the government and that the treaty should be revised to make these amounts payable to the Osage Nation. Under traditional theories, however, a judgment under the wrongful diversion theory would not bear interest because interest does not accrue on such government claims.[37] The Osage Nation also asked for the difference between the price it received for its lands and the fair market value of those lands when they were eventually sold. Unlike delay in payment or diversion of a liquidated sum, under this theory the Nation claimed that the price did not constitute just compensation. The petitioners maintained that the consideration they had received was unconscionable in the sense that it represented neither the fair, the reasonable nor the freely agreed upon value of the land. The court, however, failed to distinguish between payment of funds wrongfully diverted or withheld and payment for recognized title lands taken for unconscionable consideration. Relying solely upon the *Creek* case, the court held that no "taking" of the Osage's property in the constitutional sense occurred.[38] The court, however, did not harbor misconceptions as to the true nature of the Osage Nation's consent to the treaty terms, for it candidly noted:

> If these Indians had been more versed in the ways of "civilization" or had been represented, as were some other tribes, by astute white attorneys, it would have been impossible to seriously suggest that 34 cents an acre was a fair price for this land.[39]

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36. 97 F. Supp. 381 (Ct. Cl.), *cert. denied,* 342 U.S. 896 (1951).

37. United States *ex rel.* Angarcia v. Bayard, 127 U.S. 251 (1888); Confederated Salish & Kootenai Tribes v. United States, 175 Ct. Cl. 451, *cert. denied,* 385 U.S. 921 (1966). *See* SCHWARTZ & JACOBY, *supra* note 34, at 163-64. *See also* United States v. Southern Ute Tribe or Band of Indians, 423 F.2d 346, 359-61 (Ct. Cl. 1970), suggesting that interest might be payable and 31 U.S.C. § 547a (1964) relating to the investments of trust funds by the United States.

38. 97 F. Supp. at 424.

39. *Id.* at 422.

The opinion can only represent a political decision stating that the sham formalities of treaty negotiation justify relieving the treasury of the United States from fiscally unacceptable judgments.

Pawnee Indian Tribe v. United States[40] served to clarify the *Osage* ruling. The plaintiff claimed interest only on the award for a small portion of land excluded from the Pawnee reservation by an error in the original survey. Upon discovery of the error, Congress appropriated an amount to compensate the Pawnees. The Indian Claims Commission found the award grossly inadequate when compared with the fair value of the land excluded. The Commission, however, did not allow interest on the judgment for the difference between the amount paid by Congress and the fair market value. The Commission's rationale was that an implied agreement existed between the United States and the Pawnees that the land was taken in exchange for the payment made. Again, sham formalities justified a denial of interest; the so-called agreement resulted from the request by the government's own agent, the Indian superintendent at Omaha, that the Pawnees be compensated for their land rather than receiving back the land itself in order to avoid interference with white settlement in the area.

Not only did the Commission find the facts of the *Pawnee* case sufficient to justify the denial of interest, but it went on to hold that no interest is allowable on any judgments under section 2, clause 3 of the Indian Claims Commission Act[41] which provides for jurisdiction over

> claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity . . . .[42]

Thus, claims based upon fraud, duress and mistake, as well as upon unconscionable consideration, were subject to the rule denying interest. The Court of Claims affirmed the Commission's holding on this issue with a cryptic analysis:

> The United States thus acquired this acreage by purchase and not by condemnation, and hence, plaintiff is not entitled to interest.[43]

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40. 8 Ind. Cl. Comm. 648 (1960), *aff'd*, 301 F.2d 667 (Ct. Cl.), *cert. denied*, 370 U. S. 918 (1962).

41. 8 Ind. Cl. Comm. 648, 757 (1960).

42. Indian Claims Commission Act of 1946 § 2, 25 U.S.C. § 70a (1964).

43. Pawnee Indian Tribes of Oklahoma v. United States, 301 F.2d 667, 670 (Ct. Cl.), *cert. denied*, 370 U.S. 918 (1962). Two more recent cases shed additional light on the is-

The theory of tribal consent, however illusory, would appear more difficult to maintain in claims arising after the federal government abandoned treaty making in favor of legislation in its dealing with Indian tribes.[44] Perhaps realizing this, the government consistently maintained that no fifth amendment taking occurred so long as some consideration, however inadequate, existed or, conversely, that only a taking without the payment of *any* consideration constituted the exercise of eminent domain powers.[45] This contention, however, was rejected by the Court of Claims in *Three Tribes of Fort Berthold Reservation v. United States.*[46]

Fifth Amendment Takings of Recognized Title Lands and "Good Faith"

The *Fort Berthold* claim arose out of two provisions of a 1910 statute[47] providing for the disposal of certain Fort Berthold Reservation lands for the benefit of the Fort Berthold Indians. The statute provided that prior to sale, a presidential commission would classify and appraise the land in 160-acre tracts which were to be sold to homesteaders for the appraised value. Of the 327,000 acre tract, 29,000 acres were granted to the state of North Dakota at an appraised value of $2.50 per acre.

The court recognized in *Fort Berthold* that no semblance of tribal consent could be found.[48] Instead, the court substituted a test of "good faith" for the previous test of consent and thereby avoided the issue of a fifth amendment taking.

> In short, it is concluded that it is the good faith effort on the part of Congress to give the Indians the full value of their land that identifies the exercise by Congress of its plenary

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sue. In *United States v. Delaware Tribes of Indians,* 427 F.2d 1218 (Ct. Cl. 1970), the court stated:

> It is well established that the United States is not liable for interest in the absence of a contractual or statutory requirement to pay interest. [United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); Pawnee Indian Tribe of Oklahoma v. United States, 301 F.2d 667 (Ct. Cl.), *cert. denied,* 370 U.S. 918 (1962).] In line with this rule are the decisions that awards based on unconscionable consideration do not draw interest under the Indian Claims Commission Act.

Id. at 1222. In *United States v. Creek Nation,* 427 F.2d 743 (Ct. Cl. 1970), the court reversed the Commission's award of interest on the basis of res judicata but affirmed an award of the principal amount on the ground of mutual mistake of fact. *See* the Commission's opinion at 18 Ind. Cl. Comm. 434 (1967) and 21 Ind. Cl. Comm. 278 (1969).

44. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566. *See also* U.S. DEPT. OF INTERIOR, FEDERAL INDIAN LAW 210-12 (1958).

45. *See* Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 695 (Ct. Cl. 1968).

46. 390 F.2d 686 (Ct. Cl. 1968).

47. Act of June 1, 1910, ch. 264, § 1, 36 Stat. 455.

48. 390 F.2d at 689.

> authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its power of eminent domain by giving or selling Indian land to others, by dealing with it as its own, or by any other act constituting a taking.[49]

In this manner, the court introduced at least three revolutionary concepts into the jurisprudence surrounding the fifth amendment. The first relates to the power of Congress. According to the court's reasoning, Congress cannot exercise the power of eminent domain unless at the same time it exceeds the power granted to the federal government.

> It is obvious that Congress cannot simultaneously (1) act as a trustee for the benefit of the Indians, exercizing its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.[50]

The principle that the constitutional delegation of certain powers to the federal government immunizes the government from the restraints of the fifth amendment in the exercise of those powers is quite anomalous. While the proposition may be "obvious" to the court, it is no more obvious to others than the assertion that a taking of land in order to build a highway is not subject to the fifth amendment because the federal government is exercising, in utmost good faith, its power to establish post-roads.[51]

The second concept introduced by the *Fort Berthold* decision is the novel principle that just compensation is solely a matter of legislative motive rather than judicial determination:

> [T]he [Indian Claims] Commission was of the opinion that

49. *Id.* at 693.
50. *Id.* at 691.
51. The court may have had in mind the distinction made in older legal writings between the power of eminent domain and the police power. This distincion was generally used in reference to state rather than federal actions. The distinction has been thoroughly discredited as "almost useless, as it fails to suggest what acts will be regarded as coming under the police power and what acts as coming under the power of eminent domain." L. ORGEL, VALUATION UNDER EMINENT DOMAIN 9 (2d ed. 1953).

> the lands sold to homesteaders were not taken from appellant under the Fifth Amendment. We agree. The facts of this case establish that Congress was not taking Indian land and giving it to the settlers, but was making a good faith effort to transmute Indian property from land to money by giving the Indians the full money value of the land. . . . There is no evidence or suggestion that the [presidential] commission did not act in perfect good faith and do its best to find reasonable prices.[52]

Thus, the court was concerned with whether Congress *intended* to give the Indians the fair market value rather than with whether the Indians *in fact* received the fair market value. In effect, the court denied the power of the judiciary to review condemnation awards absent a showing of fraud or bad faith. In so doing, the decision questioned the traditionally exclusive power of the courts to make a de novo determination of the amount which constitutes just compensation.[53]

The *Fort Berthold* decision appears to stand the fifth amendment principle on its head by making the fact of taking depend upon the compensation paid. Normally, a court decides first whether a taking occurred and then whether the compensation was adequate. *Fort Berthold* determined first whether the government made a good faith effort to pay full value before questioning whether or not a taking under the fifth amendment occurred. Finding a good faith effort, the court derived therefrom a negative answer to its second issue.[54]

Beyond the constitutional implications, the court threw into disarray the relationship between unconscionable consideration claims under the Indian Claims Commission Act and the awarding of interest for fifth amendment takings. In determining that the government exercised good faith in compensating the Indians for the Fort Berthold lands, the court concluded that no fifth amendment taking occurred and that the only claim was one based upon the unconscionable consideration clause of the Indian Claims Commission Act. In order to sustain this claim, it must be shown "that monies received from the sale of lands were so far below the fair market value as to amount to fraudulent conduct or gross negligence."[55] It is difficult to imagine, however, how "fraud-

52. 390 F.2d at 693-94.
53. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); United States v. Bowman, 56 F. Supp. 109, 119 (D. Ore. 1943); United States v. 9.94 Acres of Land in the City of Charleston, 51 F. Supp. 478, 481 (E.D.S.C. 1943).
54. 390 F.2d at 693-95.
55. *Id.* at 694.

ulent conduct or gross negligence" can be established if the determination has already been made that the government exercised good faith. It appears that the court thought that many unconscionable consideration claims exist which do not involve fifth amendment takings. Yet the court's tests are such that a finding on the issue of fraud *vel non* determines both unconscionability and the existence of a fifth amendment taking.

TAKINGS OF ABORIGINAL TITLE LANDS

Judicial Fiscal Considerations

The development of the doctrine that the interest is not payable upon the taking of aboriginal title lands openly demonstrates the influence of fiscal considerations upon the development of Indian law. In *United States v. Alcea Band of Tillamook Indians,*[56] the Tillamooks brought suit under an act which, unlike most of the earlier acts,[57] gave the Court of Claims jurisdiction over claims growing out of aboriginal title.[58] The United States claimed that the Indians were not entitled to any compensation for the loss of their lands as they never possessed *recognized title* granted by treaty from the government. The Court of Claims, however, ruled in favor of the Tillamooks stating that "Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original [aboriginal] title."[59] The Supreme Court upheld the court's decision stating that the fact of recognition of title is immaterial if the claim of aboriginal Indian title and an involuntary taking thereof is satisfactorily proved.[60] The case was then remanded on the issue of damages, and the Court of Claims entered judgment for the value of the lands as of 1885 plus interest from that date.[61] The United States again appealed and the Supreme Court granted certiorari. In a per curiam decision the Court reversed, finding that no interest was payable upon the award because none of the former opinions had indicated that the taking was pursuant to the fifth amendment.[62]

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56. 329 U.S. 40 (1946).
57. The Court noted that
> [i]n only one act prior to 1935 had Congress authorized judicial determination of the right to recover for a taking of nothing more than original Indian title; and no case under that act, passed in 1929, reached this Court.

Id. at 44-45.
58. Act of August 26, 1935, ch. 686, 49 Stat. 801.
59. 59 F. Supp. 934 (Ct. Cl. 1945).
60. 329 U.S. 40, 52 (1946).
61. 87 F. Supp. 938 (Ct. Cl. 1950).
62. 341 U.S. 48 (1951).

It should be noted that the second *Tillamook* decision need not stand for the proposition that aboriginal title is not subject to a fifth amendment taking. Indeed, it was not initially so read by the Indian Claims Commission. In *Assiniboine Indian Tribe v. United States,*[63] Commissioner O'Marr found a more conventional explanation for the decision:

> The land involved in that case [*Tillamook*] was taken by an Executive order . . . and the Supreme Court held . . . that the recovery for the taking of the land was not grounded upon the Fifth Amendment and disallowed interest. It has been suggested that the ruling applies only to cases where Indian lands held by original Indian title are taken through executive or administrative action, and does not apply to such appropriations of land held by the Indians under title recognized by the Government. It seems obvious that whether the Indian title is "recognized" or "unrecognized" it is only the right of occupancy that the Indians were deprived of by the official action. There would seem to be no logical reason for denying the Indians the protection of the Fifth Amendment for the taking of lands held under original Indian title by executive action and giving such protection where lands so taken are held under "recognized" title. As we understand the decision of the Supreme Court it is the manner of taking that determines whether the Fifth Amendment applies and not the tenure of occupancy, that is, not on whether right of occupancy is based upon aboriginal possession.[64]

The explanation that a taking without legislative sanction might not constitute an exercise of the eminent domain power has solid foundation in precedent,[65] although a closer examination of the authority might reveal congressional ratification of a taking.[66]

The Supreme Court, however, arrived at a different interpretation of its second *Tillamook* decision. In *Tee-Hit-Ton Indians v. United States,*[67] the Court declared that the fifth amendment does not protect

63. 2 Ind. Cl. Comm. 272 (1952), *aff'd,* 121 F. Supp. 906 (Ct. Cl.), *cert. denied,* 348 U.S. 863 (1954).

64. *Id.* at 298-99.

65. United States v. Goltra, 312 U.S. 203 (1941); Hooe v. United States, 218 U.S. 322 (1910).

66. U.S. DEPT. OF INTERIOR, FEDERAL INDIAN LAW 613-22 (1958). *See also* Confederated Salish & Kootenai Tribes v. United States, 401 F.2d 785 (Ct. Cl. 1968), *cert. denied,* 393 U.S. 1055 (1969).

67. 348 U.S. 272 (1955).

against the taking of *aboriginal title* lands without just compensation. After pointing out that the second *Tillamook* case discarded any suggestion to the contrary in its first *Tillamook* decision, the Court said:

> This leaves unimpaired the rule derived from *Johnson v. McIntosh* that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment. This is true not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.[68]

While the Court purports to have found its rule in *Johnson v. M'Intosh*,[69] little in that early case supports such a conclusion. The Court in *Johnson* merely held that enforceable ownership rights to Indian title land cannot be conveyed by tribes to third persons.

An unusually candid footnote in the *Tee-Hit-Ton* opinion, however, may present a more realistic picture of the Court's reasoning:

> Three million dollars was involved in the *Tillamook* Case as the value of the land, and the interest granted by the Court of Claims was $14,000,000. The Government pointed out that if aboriginal Indian title was compensable without specific legislation to that effect, there were claims with estimated interest already pending under the Indian jurisdictional act aggregating $9,000,000,000.[70]

Faced with the prospect of billions of dollars in judgments, the Court may have felt compelled to overrule, sub silentio, its statement of a few years earlier that "Congress, not this Court or other federal courts, is the custodian of the national purse."[71]

The Search for Historical Justification of the No-Interest Rule

The question remains whether there are other grounds for denying application of the fifth amendment to the taking of aboriginally held lands. Courts have ruled that certain rights to use land owned in fee by

68. *Id.* at 284-85.
69. 21 U.S. (8 Wheat.) 543 (1823).
70. 348 U.S. 272, 283 n.17 (1955).
71. United States v. Standard Oil Co., 322 U.S. 301, 314 (1947).

the government do not constitute "property" as that term is used in the fifth amendment. Examples of such usufructory interests are grazing permits[72] and prospecting permits.[73] Aboriginal occupancy rights, as originally conceived, however, were more substantial in nature.

Chief Justice Marshall, in carefully tracing the British view of such rights, noted that Great Britain claimed only "the exclusive right of purchasing such lands as the natives were willing to sell."[74] The King did not grant the right to take aboriginal lands by conquest in colonial charters.

> These grants [of charters] asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defense, not for conquest.[75]

This concept, however, was subjected to drastic change over the years. As Chief Justice Marshall declared:

> [P]ower, war, conquest, give rights, which after possession, are conceded by the world, and which can never be controverted by those on whom they descend.[76]

Thus, in little more than a century Indian title became "permission from the whites to occupy" traditionally held lands.[77]

> After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[78]

It was thus apparent that Chief Justice Marshall's negative answer to the following question was no longer accepted:

> Did these [European] adventurers, by sailing along the

72. United States v. Cox, 190 F.2d 896 (10th Cir.), *cert. denied*, 342 U.S. 867 (1951).
73. Acton v. United States, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969).
74. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544-45 (1832).
75. *Id.* at 546.
76. *Id.* at 543.
77. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).
78. *Id.*

> coast and occasionally landing on it, acquire . . . rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, or agriculturists and manufacturers?[79]

In the eyes of a twentieth century court these Europeans had, indeed, acquired dominion over the lands of aboriginal occupants.

Justice Reed's Tour de Force and the Concept of Aboriginal Title

The *Tee-Hit-Ton* decision establishes the doctrine that no fifth amendment taking is involved when the land taken is held by arboriginal title.[80] Fifth amendment principles are applied, however, to takings of *recognized* title lands.[81] Yet, until well into the twentieth century, the courts made little distinction between the two types of land tenure.[82] The question remains whether there is any historical justification for this distinction which exempts from the protection of the fifth amendment all lands for which the Indians have not obtained "recognized" title.[83]

In 1896 the Supreme Court described the incidents of aboriginal title as follows:

> It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupacy of the land with the privilege of using it in such mode as they saw fit, until such right of occupation had been surrendered to the government. *When Indian reser-*

79. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543 (1832).

80. *See* notes 67-70 *supra* and accompanying text.

81. Shoshone Tribe v. United States, 299 U.S. 476 (1937); Unitah & White River Band of Ute Indians v. United States, 152 F. Supp. 953 (Ct. Cl. 1957); Assiniboine Tribe v. United States, 121 F. Supp. 906 (Ct. Cl.), *cert. denied,* 348 U.S. 863 (1954); Blackfeet & Gros Ventre Tribe v. United States, 119 F. Supp. 161 (Ct. Cl.), *cert. denied,* 348 U.S. 835 (1954).

82. The legislative history of the Indian Claims Commission Act may be interpreted as calling for identical treatment of aboriginal and recognized title claims. In a case in which it denied interest on an aboriginal title claim, the Indian Claims Commission said in regard to another issue:

> Thus the Commission was to act as did courts of equity in granting just remedies which were otherwise precluded by technical legal rules. The unequal treatment of Indians possessing land under Indian title and those holding recognized title is the consequence of one of those technical legal rules.

Washoe Tribe v. United States, 21 Ind. Cl. Comm. 447, 457 (1969).

83. For the definitions of aboriginal and recognized title, see notes 15-24 *supra* and accompanying text.

> *vations were created, either by treaty or executive order, the Indians held the land by the same character of title,* to wit, the right to possess and occupy the lands for the uses and purposes designated.[84]

Even as late as 1941 the Court of Claims declared:

> This treaty gave the Sioux Nation a permanent reservation to the lands described thereunder. The Indian Nation possessed the use and occupancy of this reservation and, as has been repeatedly held, *this was equivalent to an Indian title* and therefore was in the nature of a cession by the United States of this territory to the Indian Nation. It is unquestioned that the United States retained the fee simple in all Indian lands.[85]

Thus, it is not surprising that in his classic opinion granting interest for the taking of certain reservation lands, Justice Cardozo made no distinction between recognized and aboriginal title lands:

> Confusion is likely to result from speaking of the wrong to the Shoshones as a destruction of their title. Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. . . . The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land *pro tanto,* in substance if not in form.
>
> . . . .
>
> . . . The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is "as sacred as that of the United States to the fee."[86]

While Justice Cardozo traced his quotation regarding the sacredness of occupancy rights back to 1874,[87] the Supreme Court had, as early as 1835, applied the same language to aboriginal title lands.

> [I]t is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee simple of the whites.[88]

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84. Spalding v. Chandler, 160 U.S. 394, 402-03 (1896) (emphasis added).
85. Sioux Tribe v. United States, 94 Ct. Cl. 150, 166 (1941).
86. Shoshone Tribe v. United States, 299 U.S. 476, 496-98 (1937).
87. Justice Cardozo quotes and cites *United States v. Cook,* 86 U.S. (19 Wall.) 593 (1874).
88. Mitchell v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

In the light of these decisions, Chief Justice Vinson's reasoning in the first *Tillamook* case was hardly revolutionary:

> The older cases explaining and giving substance to the Indian right of occupancy contain no suggestion that only "recognized" Indian title was being considered. Indeed, the inference is quite otherwise.[89]

Justice Reed, however, joined by Justices Rutledge and Burton in his dissenting opinion, disagreed arguing that

> [w]hile Indians were permitted to occupy these lands under their Indian title, the conquering nations asserted the right to extinguish that Indian title without responsibility to compensate for his loss.[90]

In support of his statement Justice Reed cited the 1783 Treaty of Paris[91] which, he said, "confirmed the sovereignty of the United States without reservation of Indian rights."[92] While Chief Justice Marshall had stated that after the American Revolution, Indians "assumed the relation with the United States which had before subsisted with Great Britain,"[93] Justice Reed suggested that the United States had made an abrupt departure from that policy[94] and adopted the view held by colonial France.[95]

In 1671, the Intendent of New France called together the representatives of fourteen Indian tribes at Sault Ste. Marie, and in their presence

> erected there a post to which he affixed the King's arms, and declared to all those people that he had convoked them in order to receive them into the King's protection, and in his name to take possession of all their lands, so that henceforth ours and theirs should be but one.[96]

By this ceremony, the French considered that tribal occupancy rights

89. 329 U.S. 40, 52 n.30 (1946).
90. *Id.* at 58.
91. 8 Stat. 80 (1783).
92. 329 U.S. at 58 n.6.
93. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832).
94. This opinion had been foreshadowed by Justice Reed's opinion in *Northwestern Shoshone Indians v. United States*, 324 U.S. 335, 337 39 (1945).
95. *See* Thomas, *Introduction* to C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES, 18TH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY, pt. 2, 545-59 (1899) [hereinafter designated as THOMAS INTRODUCTION TO ROYCE].
96. Denonville, *Memoir on the French Limits in North America*, IX NEW YORK COLONIAL DOCUMENTS 383, as reprinted in THOMAS INTRODUCTION TO ROYCE at 546-47.

passed absolutely to the Crown.[97]

Justice Reed apparently considered that British relinquishment of claims to property rights in the United States in the Treaty of Paris[98] similarly passed tribal occupancy rights absolutely to the United States. Thereafter, in his view, Indians were permitted to remain on the land as an act of grace. Apparently, it was Justice Reed's contention that since the Treaty of Paris did not mention the status of Indian rights in America, the United States' ratification of the treaty was a rejection of the view of aboriginal ownership held by England, Spain and the Netherlands[99] in favor of France's position.

Historical evidence is exactly to the contrary. In August, 1789, President Washington forwarded to Congress a report from Secretary of War Knox, which stated in part:

> By having recourse to the several Indian treaties, made by the authority of Congress, since the conclusion of the war with Great Britain, excepting those made January 1789, at Fort Harmar, it would appear, that Congress were of opinion, that the Treaty of Peace, of 1783, absolutely invested them with the fee of all the Indian lands within the limits of the United States; that they had the right to assign, or retain such portions as they should judge proper.

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97. THOMAS INTRODUCTION TO ROYCE at 547.

98. Article I of the Treaty merely provides:

> His Britannic Majesty acknowledges the said United States . . . to be free, sovereign and independent states; that he treates with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, propriety and territorial rights of the same, and every part thereof.

8 Stat. 80, 81 (1783).

99. *See* THOMAS INTRODUCTION TO ROYCE 538-45, 549-61, 575-78. Of the European nations, Spain most clearly expressed its recognition of the absolute right of Indian inhabitants to lands they occupied. Two provisions of the *Reconiliacion de las Leyes de los Reynos de las Indias* illustrate this. In a law which restored to the Spanish crown lands in "the dominion of the Indians" those lands held "without just and true titles," it was provided that

> after distributing among the Indians whatever they may justly want to cultivate, sow and and raise cattle, confirming to them what they now hold, and granting what they may want besides—all the remaining land may be reserved to us.

Id. at 541. Another provision directed that Europeans desiring to establish a colony should persuade the natives "by mild means" to allow the settlement. If the Indians do not consent

> the settlers, after having notified them . . . shall proceed to make their settlement without taking any thing that may belong to the Indians, and without doing them any greater damage than shall be necessary for the protection of the settlers and to remove obstacles to the settlement.

Id. at 540. *See also* United States v. Northern Paiute Nation, 393 F.2d 786 (Ct. Cl. 1968).

> But it is manifest, from the representations of the confederated Indians at the Huron village, in December, 1786, that they entertained a different opinion, and that they were the only rightful proprietors of the soil; and it appears by the resolve of the 2d July, 1788, that Congress so far conformed to the idea, as to appropriate a sum of money solely to the purpose of extinguishing the Indian claims to lands they had ceded to the United States, and for obtaining regular conveyances of the same. This object was accordingly accomplished at the treaty of Fort Harmar, in January, 1789.
>
> The principle of the Indian right to the lands they possess being thus conceded, the dignity and interest of the nation will be advanced by making it the basis of the future administration of justice towards the Indian tribes.[100]

Moreover, the Treaty of Paris was consistent with prior British practice of ignoring Indian rights in documents between Europeans unless forced by an actual problem to include them.[101]

In a recent decision[102] the Court of Claims faced the issue of whether Texas, while an independent republic, had accorded aboriginal use and occupancy rights to Indians. The court pointed out that

> the law of the prior sovereigns (Spain, Mexico, and to a limited degree France) accepted aboriginal ownership, and that all the colonizing European powers took the same position. . . . Only a convincing demonstration could show that the Republic of Texas uniquely departed from this consensus of the whole western world.[103]

If a similar standard of "convincing demonstration" is applied in order to define the extent to which the United States adopted pre-existing aboriginal title doctrines, it is submitted that the Treaty of Paris will not suffice to show clearly that the United States asserted absolute ownership to Indian lands.

The Supreme Court, however, in *Tee-Hit-Ton Indians v. United States* rejected the contention that the fifth amendment applies to takings

100. Report Relative to the Northwestern Indians, June 15, 1789, IV AMERICAN STATE PAPERS (Class II, 1832) 12, 1st Cong., 1st Sess., Doc. No. 2 (Aug. 7, 1789).
101. *See* THOMAS INTRODUCTION TO ROYCE at 555.
102. Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967).
103. *Id.* at 493.

of aboriginal title lands.[104] Justice Reed, his view of history prevailing,[105] spoke for a majority of five justices. The first *Tillamook*[106] decision was explained as a statutory direction to pay for aboriginal title.[107] Justice Black in *Tillamook* had advanced this theory[108] and was specifically rejected by both the majority and minority.[109] In *Tee-Hit-Ton,* Justice Black joined the majority.[110] This opinion, with its apparent advertence to fiscal consideration,[111] finally divested aboriginal title of its "sacredness."

CONCLUSION

The tortuous history of Indian litigation forces the inevitable conclusion that the courts have been less than candid in explaining their decisions. Where the Indians held recognized title to land taken by white settlers, the courts have either fictionalized the nature of the agreement by injecting a false consent[112] or subjected fifth amendment doctrines to contortive reasoning.[113] Where the takings have been of aboriginal title land, interest and, indeed, the constitutional necessity for any compensation have been avoided by creation of the historically unsound distinction between aboriginal title and recognized title in reference to fifth amendment issues.[114]

The allowance of interest on only small classes of claims eliminated politically unacceptable judgments while paying lip-service to the fifth amendment. While it has become fashionable to attribute such decisions to "result-oriented" jurists who have forsaken "principled decision,"[115] an examination of history indicates that the blame lies with legislators who have abdicated the responsibility of resolving difficult political problems.

By enacting various jurisdictional acts and the Indian Claims Commission Act, Congress decided that economic wealth should not be allocated between Indian tribes and the federal government on the basis

104. *See* notes 67-71 *supra* and accompanying text.
105. *See* notes 90-95, 98-99 *supra* and accompanying text.
106. 329 U.S. 40 (1946).
107. 348 U.S. at 284.
108. 329 U.S. at 54-55.
109. *Id.* at 45, 46.
110. By the time of the *Tee-Hit-Ton* decision, Justices Vinson, Murphy and Rutledge had been succeeded by Justices Warren, Minton and Clark. Justices Warren, Douglas and Frankfurter dissented in *Tee-Hit-Ton.*
111. *See* note 70 *supra* and accompanying text.
112. *See* notes 36-45 *supra* and accompanying text.
113. *See* notes 47-55 *supra* and accompany text.
114. *See* notes 56-111 *supra* and accompanying text.
115. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 81-100 (1970).

of military strength. By failing to establish guiding principles for such redistribution, the legislature created a vacuum making future confusion inevitable.[116]

116. *See* H. HART & A. SACKS, THE LEGAL PROCESS 395-98 (Tent. ed. 1958).