IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 102-63

(Filed: July 25, 1980)

JESSIE SHORT et al.	)	Political question;
	)	Nonjusticiability;
v.	)	Indian tribal;
	)	Individual rights;
THE UNITED STATES	)	Standards for decision

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OPINION*

SCHWARTZ, Trial Judge: In this case some 3800 Indian plaintiffs, who claim to be Indians of the Hoopa Valley Reservation, are suing for shares of the reservation's timber profits equal to those of all other such Indians. The Government has been held liable, and the case is continuing to determine which of the plaintiffs are Indians of the reservation. Jessie Short v. United States, 202 Ct. Cl. 870, 486 F.2d 561 (1973), cert. denied, 416 U.S. 961-62 (1974).

*The within opinion is submitted pursuant to orders of reference of November 12, 1976 and November 16, 1979.

The defendant-intervenor, the Hoopa Valley Tribe, has now moved to dismiss the case on the ground that the determination of who is an Indian of the reservation requires decision of a nonjusticiable political question, under Baker v. Carr, 369 U.S. 186 (1962). The motion is herein denied.

The Government's position on the motion requires careful statement. While the Government joins with the defendant-intervenor in contending that the case "fails the test" of Baker v. Carr, it asks that the court not dismiss, but rather grant a companion motion by the Government to substitute the Yurok Tribe for the plaintiffs. Failing such substitution, the action would remain nonjusticiable and would be dismissed. The motion for substitution is being denied, and the Government must therefore be taken as contending for a dismissal under the political question doctrine. In any event, the reasons advanced by both defendants for application of the doctrine must be examined for validity.

Since the decision in Baker v. Carr, all discussions of the nonjusticiable political question doctrine, the present one not excepted, begin with the epitome of the law on the subject by Mr. Justice Brennan in his opinion, 369 U.S. at 217. After describing the major categories of the cases under the doctrine, he wrote:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a

> lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

I

The Contentions

Together, the defendants maintain that the case presents all six of the criteria of Baker v. Carr for the identification of a nonjusticiable question. Two only are made the subject of argument in any detail. One contention, on the premise that the assets here in dispute are tribal assets, argues that questions of Indian tribal affairs and assets are committed exclusively to branches of government other than the judiciary. The other is that the determination of the definition of an Indian of the reservation would require the formulation of judicially nondiscoverable, nonmanageable standards. The first of these is urged by the defendant-intervenor, the second is put forward by the Government. The Government does not press the committed elsewhere condition, presumably in the interest of harmony with the Government's motion that the court act to substitute for the individual plaintiffs a Yurok Tribe being organized by the Interior Department, in which it is urged that the Department's decision is conclusive that the Yurok and Hoopa Tribes are the two sole Indians of the reservation.

Four of the Baker v. Carr criteria are not seriously argued:

(1.--"[T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." The initial "policy determination" which would be made by the decision in this case, defendant-intervenor says, is whether the reservation will continue to exist and who is to manage it. These questions will plainly not be decided by this court.

(2.--The impossibility of independent resolution "without expressing lack of the respect due coordinate branches of government." Here the motion refers to Committee hearings in Congress on some matters involving the reservation, and to the Interior Department's efforts to organize a Yurok Tribe. Unfortunately, Congress has made no efforts to solve the problems presented in this case. As for the Interior Department's efforts to create a Yurok Tribe, the Department has stated that its efforts are not intended to affect the continued litigation of this case. 44 Fed. Reg. 24536, 24538 (1979). The Department's program for the organization of a Yurok Tribe is discussed in an opinion of today's date denying the Government's motion to substitute the Yurok Tribe for the plaintiffs.

(3.--"an unusual need for unquestioning adherence to a political decision already made," is not at all mentioned by the Government and is supported by the defendant-intervenor only by reiteration of its basic argument of the exclusively Congressional power over tribal property.

(4.--"the potentiality of embarrassment from multifarious pronouncements by various departments on one question," is supported only by a vague reference to decisions "about to be reached" in "legislation or negotiation."

II

The Facts and Posture of the Case

The first step in an examination for a nonjusticiable political question, according to Baker v. Carr, is a "discriminating inquiry into the precise facts and posture of the particular case," lest "semantic cataloguing" lead a court to reject decision of a bona fide controversy over the legality of some action denominated "political." 369 U.S. at 217. The nature of the case is described in the opinion in Jessie Short, 202 Ct. Cl. 870 (opinion and findings), 486 F.2d 561 (1973) (opinion only), cert. denied, 416 U.S. 961 (1974). Only a brief statement is here needed.

The action is a suit by individual Yurok Indians for money which has been wrongfully withheld from them by the Department of the Interior, and paid to the Hoopa Indians per capita, in the legally erroneous belief that the Hoopas are the exclusive owners. By statute the Hoopa Valley Reservation was one of four reservations in California to which the President was authorized to remove Indians. When the reservation was created in 1876, both Hoopas and Yuroks were living in the designated area, a 12-mile square on the Trinity and Klamath Rivers in Northern California, and other Indians moved or were by the Government moved to the reservation from time to time. In 1891

an area adjoining the reservation, down river on the Klamath River, was added to the reservation by executive order. This area was inhabited by Yuroks. "Yurok" means down river. At least since the influx of white settlers into United States territory, the California Indians were not, as were Indians elsewhere, organized into tribal entities, but were gathered together in units no larger than village or similar groups. See Thompson v. United States, 122 Ct. Cl. 348, 356 (1952), cert. denied, 344 U.S. 856 (1952). There were no organized tribes on the original reservation, and there remained none until the imminence of distribution of timber proceeds led the Government in 1950 to sponsor establishment of a Hoopa Valley Tribe, in order to establish a list of eligibles to receive per capita distributions of the burgeoning timber profits.

The enlarged reservation was in Jessie Short held to be a single reservation, no part of which is the exclusive property of any Indians, and all of whose Indians have equal rights to aliquot shares in the timber profits of the reservation. In that decision, 22 of 26 representative plaintiffs were found to be Indians of the reservation and were awarded summary judgment, their shares to be computed when the total number of Indians of the reservation was determined.

The present posture of the case is that there are pending cross-motions for summary judgment as to the status, as Indians of the reservation, of slightly more than 3200 plaintiffs. Summary judgment has been given in favor of some 120 of the

plaintiffs; proceedings to determine the status of the others are pending; and the claims of some 600 intervenors are in an earlier stage.

This, then is the nature and posture of the case. The property involved has been held to be the individual property of the Indians of the Hoopa Valley Reservation, and the remaining proceedings will determine which of the individual plaintiffs are Indians of the reservation.

The question for decision is whether those proceedings will entail decision of a nonjusticiable political question.

III

The History of the Present Contentions

From 1963 to 1974 in this court and in the Supreme Court the Government argued that the assets involved were tribal and thus that the issues were those of tribal rights, exclusively committed to Congress, and beyond the power of the courts to settle. The repetitions of the contention, and its repeated rejection, are recounted in today's decision on the Government's motion for substitution of plaintiffs.

The very cases now cited by the defendant-intervenor to show that the property rights are tribal and therefore their decision involves a political question, Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902), and Lone Wolf v. Hitchcock, 187 U.S. 552 (1903), were cited to the court in 1963 by the Government, to show that the property rights involved were

tribal and their determination beyond the court's jurisdiction. The claim of political question by reason of the tribal character of the rights involved is thus no more than a re-dressing of an old, rejected argument.

If on the other hand, the motion is not treated as simply a long-delayed motion for a rehearing but as raising an issue for the first time, it is all the more remarkable, for it has been put off for 17 years. This case was instituted on March 27, 1963. The Government moved to dismiss on July 8, 1963. Baker v. Carr, with all the attention it focused on the political question doctrine, was more than a year old. Yet from 1963 through this court's decisions in 1964 and again in 1973 that the action could be maintained as an action for the shares of the individual plaintiffs in reservation timber profits, no mention was made of the political question doctrine.

On the trial in 1969 both defendant and the Hoopa Valley Tribe, then an amicus and now a co-defendant, participated with all energy in the examination of the 26 representative plaintiffs. Of the 26, 22 were held to be Indians of the reservation. Thereafter both the Government and the Tribe, now admitted as a party, filed briefs in trial court, appellate division and on petition to the Supreme Court for a writ of certiorari. No

mention was made of any nonjusticiable question involved in the decisions on individual entitlement.[1/]

Following the denial of certiorari by the Supreme Court in 1974, between 2 and 3 years were spent by the parties on personal questionnaires designed to document the qualifications of the individual plaintiffs to be Indians of the reservation. These questionnaires were painfully filled out by over 3200 Indian plaintiffs, checked for accuracy by the Bureau of Indian Affairs and rechecked by plaintiffs' counsel. The facts were compiled and computerized, and in 1976 became the basis for cross-motions for summary judgment for and against 3200 of the 3800 plaintiffs.[2/] An additional 600 plaintiffs, the late intervenors in the action, meantime continued to fill out their questionnaires.

During all this time, it did not occur to either the Government or the defendant-intervenor to speak out either that the issue was one of tribal rights and thus not for

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1/ The defendant-intervenor cannot disavow responsibility for what was settled before it was admitted as a party in 1974. Its earlier absence from the case was its own doing. At the outset of the case it successfully resisted a motion to make it a third party defendant. Then it sought to intervene as a defendant, in 1969, on the eve of the trial. Admitted as an amicus, it examined and cross-examined the witnesses and otherwise exercised the privileges of a party. Its admission as a party in 1974 added to its status only the privilege of seeking certiorari as a party from the decision of the court in Jessie Short.

2/ The proceedings on these motions have been suspended for unsuccessful efforts at mediation, for the proceedings by the Government to organize a Yurok Tribe, and for the present motion and the companion motion to substitute a Yurok Tribe for the individual plaintiffs.

decision by the judiciary or, if the issue were recognized to be the definition of an Indian of the reservation, that that issue is incapable of decision by the judiciary for lack of discoverable standards. Now, after an enormous investment in time and money by the 3800 Indian claimants and their many counsel, the Government and the defendant-intervenor come forward with a contention of political question which could have been made 17 years ago.[3/]

If the invocation of Baker v. Carr is regarded as no more than a re-dressing of the old arguments of a lack of jurisdiction over tribal affairs, it is to be denied summarily. If it is a motion on the new ground of the political question doctrine, the long delay in its making bars it on the grounds of laches and estoppel. The motion comes after years of litigation on the premise of justiciability--years of reliance by plaintiffs, induced by the co-defendants, on the justiciability of the issue of the definition of an Indian of the reservation.

3/ A crowning touch to the long delay in raising the political question doctrine is the occasion on which the doctrine's applicability is said first to have been revealed to the movant: it came as a suggestion from the trial judge early in 1978.

The context of the revelation is not described. It was part of an exhortation delivered to counsel on the merits of settlement and the risks of litigation. One of the paraded horribles was that after decades of litigation the Supreme Court might dismiss the case under the political question doctrine. Upon which the parties proceeded to formal mediation, which was unfortunately a failure.

Rhetoric in a good cause needs but little excuse. The many arguments in favor of settlement cannot be of equal quality.

Alternatively, the same reasons--the long delay in the making of the motion and the long and active participation by the movants in the litigation to determine individual entitlement--are strong evidence of the lack of merit of the motion now made.

IV

The Claim of "A Textually Demonstrable Commitment to a Coordinate Political Department"

The defendant-intervenor urges, as its primary ground for dismissal under the political question doctrine, that the case is one of those Indian cases held in Baker v. Carr to have been textually by the Constitution committed to Congress for decision. The Government's variation on this contention is that the issue has been committed not to Congress but to the executive branch, and that the court is concluded by the Interior Department's recognition of the Yurok Tribe as the owner, with the Hoopa Tribe, of the timber profits involved. Only a brief word is necessary on this variation of the committed elsewhere argument. The Interior Department can no more conclude the court, nor prescribe a rule of decision for a pending case, than it concluded the court in Jessie Short with its 1958 decision that the Hoopas were the sole owners of the timber profits.

Mr. Justice Brennan's exact words were, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." 369 U.S. at 217. Neither the Hoopa

Tribe nor the Government dwells on a textual demonstration; indeed, a constitutional text is not mentioned. And neither recognizes the point made by Mr. Justice Brennan that the political question doctrine does not avoid an antecedent question as to the power of the particular branch to conclude a court by its decision. Mr. Justice Brennan, dissenting in Goldwater v. Carter, 444 U.S. 996, ____, 100 S. Ct. 533, 539 (1979).

But constitutional text and constitutional power aside, the contention of commitment of the issue elsewhere either misreads Baker v. Carr or misstates the nature of this case. This case is a dispute over individual rights, not a case of tribal rights. Mr. Justice Brennan made it plain in Baker v. Carr that the Indian matters which are committed to Congress, to the extent they are committed, are cases involving the status or recognition of Indian tribes, not Indian individuals.

His now famous passage on the doctrine, quoted above, was the conclusion from his detailed review of the cases in four categories--foreign relations, duration of hostilities, the validity of enactments and "[t]he status of Indian tribes." Under that last heading he wrote that "[t]his Court's deference to the political departments in determining whether Indians are recognized as a tribe * * * reflects familiar attributes of political questions" as well as the "unique element" that the relation of Indians to the United States "resembles that of a ward to his guardian." 369 U.S. at 215-16 (quoting from Cherokee Nation v. Georgia, 5 Pet. 1, 16,17 (1831)). Yet,

he pointed out, the doctrine has limits; "there is no blanket rule." While it is for Congress and not the courts to determine when the Indian is to be released from the condition of tutelage, Congress may not "'bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe * * * * Able to discern what is 'distinctly Indian' (United States v. Sandoval, 231 U.S. 28, 46 (1913)), the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." 369 U.S. at 215-17.

In a lengthy footnote, Mr. Justice Brennan explored the limits of the doctrine in Indian cases with a close analysis of Cherokee Nation v. Georgia, supra, the historically leading case: "This case, so frequently cited for the broad proposition that the status of an Indian tribe is a matter for the political departments, is in fact a noteworthy example of the limited and precise impact of a political question." It held no more than that original jurisdiction was lacking, "for the Cherokees could in no view be considered either a State of this Union or a 'foreign state.'" Continuing, Mr. Justice Brennan wrote that Chief Justice Marshall made clear that if the issue of the Cherokee's rights arose in a customary legal context--"a proper case with proper parties"--it would be justiciable.

Relevant for the present case is Mr. Justice Brennan's further comment that when in Worcester v. Georgia, 6 Pet. 515 (1832) "the same dispute produced a case properly brought,"

in which the right asserted was one of protection under federal treaties and laws from conflicting state law, and the relief sought was the voiding of a conviction under that state law, the Court did void the conviction, "despite the consequences in a heated federal-state controversy and the opposition of the other branches of the National Government." 369 U.S. at 215-16, n.43. The political question in Indian cases, so understood, has to do with the status and recognition of Indian tribes, not with the private or property rights of Indian individuals. The rights of individual Indians when controverted, are customarily ruled on by the courts.

This distinction, seen by Mr. Justice Brennan in Cherokee Nation v. Georgia and Worcester v. Georgia, may be seen again in the recent cases of Gilligan v. Morgan, 413 U.S. 1, 11-12 (1973) and Scheuer v. Rhodes, 416 U.S. 232, 249 (1974). In the former, the Supreme Court held that the commitment of military functions to Congress and the Executive, and the complexity and subtlety and expertise required to manage these functions, rendered nonjusticiable a suit by the students at Kent State University for an injunction against the Ohio National Guard to restrain its conduct likely to lead to the unconstitutional use of force. Nevertheless, not long afterwards the Court in Scheuer v. Rhodes held Gilligan v. Morgan no bar to an action against the Governor of the State and others for damages on behalf of the estates of the students killed at the Kent State demonstration. The political question doctrine will not serve

to prevent the determination of private rights. Scheuer v. Rhodes, supra, 416 U.S. at 249-50. See Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 Yale L.J. 517, 585-86 (1966).

The courts recognize a "textually demonstrable constitutional commitment" to other political branches of a decision on Indian tribal affairs, but at the same time see to it that the political question doctrine of nonjusticiability should not leave Indians, a weak and dependent people, without protection against ill feeling and oppression. See Baker v. Carr, supra, 369 U.S. at 215-16; Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Kagama, 118 U.S. 375, 383-85 (1886). This has been the pattern of the cases.

The Congress, in the exercise of its plenary power over Indian affairs, may restrict the powers of a tribe (United States v. Wheeler, 435 U.S. 313, 323 (1978)), and the expressed Congressional standard for membership in a tribe will not be disturbed by the courts (see Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 813 (E.D. Wash. 1965), aff'd, 384 U.S. 209 (1966)). And the Congressional power over Indian tribal affairs is held to be exclusive of any attempt on the part of the States to regulate the conduct of Indian tribes. See United States v. Sandoval, supra, 231 U.S. at 45-49; Lone Wolf v. Hitchock, supra, 187 U.S. at 553; United States v. Holliday, 3 Wall. 407, 419 (1865). Such decisions, it may be noted, speak as much for the protection of private Indian rights from repression by State law, in the spirit of Worcester v. Georgia, supra, as for the exclusivity

of Congressional power over tribal affairs. It has been well said that "it appears that the Court was persuaded of the hostility of the states against the Indians and therefore sought to maximize the scope of federal protection." (footnotes omitted) Scharpf, supra, 75 Yale L.J. at 586.

Whatever the matters committed to Congress, the claims of individual Indian rights to land or money wrongfully withheld will not be held nonjusticiable, despite the implication of political matters. Even actions affecting the status of Indian tribes or claimed Indian tribal rights are justiciable, where the objective of the suit is the vindication of the tribe's rights. Thus the courts will pass on the status as a tribe of an Indian group laying claim to allegedly tribal lands. See Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D.Mass. 1977), aff'd, 592 F.2d 575 (1979), cert. denied, 100 S. Ct. 138 (1979); Narragansett Tribe v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798 (D.R.I. 1976). And there is no reluctance to pass on tribal matters where the claim is that the Secretary of the Interior has arbitrarily interferred with the tribe's controls of its own monetary affairs. See Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976), aff'd sub nom. Harjo v. Andrus, 581 F.2d 949 (D.C.Cir. 1978).

What appears from the foregoing is that the application to Indian cases of the committed elsewhere aspect of the political question doctrine is limited at most to cases of tribal status or affairs, and has no application to individual Indian rights, or to actions to vindicate Indian rights, or to challenge the

legality of government action. Since this is a case in which claimants are seeking the vindication of individual Indian rights, denied by the Executive Branch, it is doubly not subject to the doctrine.

V

The Claim of "A Lack of Judicially Discoverable and Manageable Standards" for Decision

The second invocation of the political question doctrine addresses the issue actually before the court--the determination which of the plaintiffs are Indians of the Hoopa Valley Reservation. The Government argues that there are no "judicially discoverable and manageable standards"--the words of Baker v. Carr--for resolving "what is it that makes an Indian of the Reservation"; the case thus "fails the test" of Baker v. Carr for justiciability.

The nature of the question, the Government contends, makes it impossible to fashion standards for individual qualification as an entitled Indian of the reservation:

> Despite his best efforts, the Trial Judge has been unable to fashion standards for individual qualifications as an 'entitled Indian of the Reservation' in reference to the legal arguments of counsel. We submit that this impasse derives from the nature of the question rather than the deficiencies in the legal arguments espoused. In the context of this case, for example, what are the legal criteria for choosing between a 1/4 blood minimum and a 1/8 blood minimum or any blood requirement at all? To borrow a concept from administrative law,'there is no law to apply.' Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). (Government brief, Feb. 7, 1980, 2-3).

It is of course premature now to say that the trial judge is unable to determine which of the plaintiffs are Indians of

the reservation. This is especially so since the Government and the Hoopa Valley Tribe found it easy, in the summary judgment proceedings, to fashion a standard and propose it for adoption, on the strength of large numbers of cited authorities. Their standard makes no fine distinctions between 1/4 and 1/8 blood, but disqualifies all of less than 1/2 blood, as well as most of those with 1/2 blood.[4/]

The issue is, however, both difficult and novel. It is novel because there is no counterpart outside California of the system of nontribal reservations there obtaining, and because the California Indians themselves are unique in their nontribal character, that is, in the absence of organized tribes. It is difficult to decide--especially with little help from the parties--how much Indian blood, or the blood of tribal groups found on the reservation, shall distinguish Indians of the reservation. What years, if any, of residence, on, or off, the reservation shall be required? What other associations--or disassociations--with the reservation shall weigh in the decision: birthplace, residence in formative or in the aging years,

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4/ The Government and the Hoopa Valley Tribe propose a standard composed of eight separate grounds for disqualification, whose cumulative result would disqualify all but some 120 of the 3200 plaintiffs who are the subjects of the motion for summary judgment. The plaintiffs, in turn, proposed a standard which qualified all but a handful of their members.

Such loyalty to clients is understandable from counsel for the Yuroks and Hoopas, but more might have been expected from counsel for the United States.

education "on" or "off," descent from residents listed on early censuses, the ownership of allotments?

The motions for summary judgment are still pending. Among the pending matters are such sources of assistance to the court as the employment of a court-appointed expert and invitations to appropriate organizations to appear as amici curiae on the issue of the appropriate qualifications for an Indian of the reservation. It is not at all beyond the realm of possibility that the trial judge--and if not the trial judge, another judge or panel of judges--will find a formula which weighs and balances various indicia, to a just result. Perhaps the elements of reservation Indian status need not be so rigorously absolute as the Government implies. For instance, claimants with lesser degrees of Indian blood may perhaps be qualified by the number of their years of residence, or by other indicia of attachment.

The "standard" or definition of an Indian of the reservation will of course be important only for the close cases. Of the 26 representative plaintiffs whose cases were tried, 22 were found to be qualified as Indians of the reservation, and four were set down for rehearing. Of the over 3,000 individual Indians now under consideration, the greatest number would doubtless be readily disposed of, even by a standard which relegated obvious cases to the far sides of the dividing line, and left cases in the middle for special treatment. It is of course desirable that a single, precise formula be found to decide every case, but it may be questioned whether an all-purpose, mathematical definition is an absolute. Thus a residue of close

or doubtful cases could be heard specially, in the interest of avoiding injustice. The Hoopa Tribe, when it decided who should be its members and thereby become eligible for per capita distributions of timber profits, went as far as it could with category definitions, and then added named individuals. The issue is, after all, the determination of the status of individuals. If no predetermined standard will do the job, case by case decisions, even on 3,000 claimants, are in this court not impossible.[5/]

Difficulty in formulation of the required definition could not justify a refusal to decide. It is the business of the federal courts to decide difficult and novel questions. A long list could be made of difficult questions, with political implications, decided by federal judges. Near the top might be the power of the House of Representatives over its members (Powell v. McCormack, 395 U.S. 486 (1969)), the fairness of a legislative apportionment plan (Baker v. Carr, supra), and whether inflation is an unconstitutional diminution of judicial compensation (Atkins v. United States, 214 Ct. Cl. 186, 556 F.2d 1028 (1977), cert. denied, 434 U.S. 1009 (1978)).

Indian cases are no more difficult than many decided by the courts. The federal courts are "able to discern what is

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5/ The archives of the court contain the decision by Commissioner Guion Miller on the 45,857 separate applications to share in a judgment in the case of the Eastern Cherokees v. United States, 45 Ct. Cl. 104 and 229 (1910), aff'd 225 U.S. 572 (1912). The Commissioner examined 4500 witnesses in 17 states and in his ten volume report on May 28, 1909, approved 30,254 claims.

'distinctly Indian.'" Baker v. Carr, 369 U.S. at 216. Who is an Indian is routinely decided under the Indian Crimes Act, 18 U.S.C. § 1153 (1976) without a fixed definition. See, e.g., United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1979); United States v. Dodge, 538 F.2d 770 (8th Cir. 1976); cf. Montoya v. United States, 180 U.S. 261 (1901) (Indian "tribe" or "band" construed). A boundary dispute between two Indian tribes, not settled by the text of the governing statute, will not be turned away from court for lack of standards for the decision. Sekaquaptewa v. MacDonald, 9th Cir., Nos. 78-3504, 78-3505, May 23, 1980. While the question is apparently novel in the courts, the concept of an "Indian of the reservation" is not new in the statutes. For 50 years the phrase appeared in a statute concerning distribution of timber profits.[6/]

Lastly, the decision of who are the Indians of the Hoopa Valley Reservation is fundamentally a further construction of the statute and executive order held in Jessie Short to have created a reservation, all of whose Indians have equal rights to such reservation fruits as timber profits. In the

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6/ In the Timber Act of June 25, 1910, c. 431, § 7, 36 Stat. 857, codified as 25 U.S.C. § 407 (1940), the Secretary of the Interior was authorized to use timber profits "for the benefit of the Indians of the reservation." In the course of a comprehensive amendment in 1964 these words were rewritten to read "for the benefit of the Indians who are members of the tribe or tribes concerned." Act of April 30, 1964. Pub. L. No. 88-301, 78 Stat. 186-87, 25 U.S.C. § 407 (1964). See H.R. Rep. No. 1292, 88th Cong., 2d Sess. 3 (1964), reprinted in [1964] U.S. Cong. & Ad. News 2162, 2164: "This change provides a better reference to the Indians entitled to share in the financial benefits flowing from such timber sales."

language of the political question doctrine, the "initial policy decision" which is not for the courts to make, was in the present case made by the 1876 statute and the 1891 executive order. Cf. Narragansett Tribe v. Southern Rhode Island Land Development Corp., supra, 418 F. Supp. at 815. The decision on who are the Indians of the reservation will constitute the performance of the traditional function of judicial statutory interpretation. "Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation." Mr. Justice Powell, concurring in Goldwater v. Carter, supra, 444 U.S. at ____, 100 S. Ct. at 535. Accord, Powell v. McCormack, supra, 395 U.S. at 548-49; National Treasury Employees Union v. Nixon, supra, 492 F.2d at 603.

VI

Conclusion

Application of the political question doctrine would require dismissal of the case, the Government's prayer for substitution of plaintiffs notwithstanding. Just as there are "prudential considerations" which counsel dismissal to avoid a decision on political questions, so are there prudential and

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7/ Mr. Justice Powell has reduced the six criteria of Baker v. Carr to three inquiries, the last of which is, "Do prudential considerations counsel against judicial intervention?" Goldwater v. Carter, 444 U.S. 996, ___, 100 S. Ct. 533, 534 (1979). See also, A. M. Bickel, The Least Dangerous Branch (The Supreme Court at the Bar of Politics), 183-98 (1962); Bickel, The Supreme Court, 1960 Term: Foreward, The Passive Virtues, 75 Harv. L. Rev. 40, 42-51 (1961); contra: Mr. Justice Douglas, concurring in Baker v. Carr, 369 U.S. at 246, n.3; Wechsler, Toward Neutral Principles of

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discretionary considerations here which counsel against dismissal. A dismissal could not be explained to the 3800 plaintiff Yuroks who have sued and labored for many years for the "large, personal judgments" (the Government's words) for their money, paid by the Government to the Hoopas. "[D]ismissal of the suits now," the Government says, "would only exacerbate the day-to-day conflict on the reservation and make any peaceful organization of the Yurok Tribe and management of the reservation resources virtually impossible." Government brief, February 7, 1980, 4. The political question doctrine is a tool for the maintenance of order, not for the promotion of disorder.

Finally, the court may not neglect to exercise its jurisdiction, exclusive of all other courts, to hear Indian monetary claims of the kind and magnitude here involved. Cf. Cohens v. Virginia, 6 Wheat. 264, 404 (1821); Navajo Tribe v. United States, Ct. Cl. Nos. 69, 299, 353, May 28, 1980, slip op. Part IV. Only a substantial claim of nonjusticiability may be ground for judicial refusal to decide a controversy within the jurisdiction of an Article III court. Cf. United States v. Nixon, 418 U.S. 683, 697 (1974). Accord, National Treasury Employees Union v. Nixon, 492 F.2d 587, 606 (D.C.Cir. 1974).

7/(cont'd)

Constitutional Law, 73 Harv. L. Rev. 1, 7-10 (1959); cf. Henkin, Is There a "Political Question" Doctrine, 85 Yale L.J. 597, 622-24 (1976). Considerations of prudence are believed to be the source of the application of the political question doctrine to the status of Indian tribes. See C.G. Post, The Supreme Court and Political Questions, 112 et seq., passim (1936).

The nature of the group of plaintiffs and the rights they assert, the posture of the proceedings and the settled law of the case, all confirm that the claim of the presence of a political question is insubstantial. There is no textually demonstrable constitutional commitment of decision elsewhere, no showing that the issues are beyond judicial capability to decide.

Accordingly, it is the court's duty to decide the case, "'to say what what the law is.'" Chief Justice Burger in United States v. Nixon, supra, 418 U.S. at 703 (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)). The motion must therefore be denied.