

# The Burger Court Opinion Writing Database

## *Tooahnippah v. Hickel*

397 U.S. 598 (1970)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

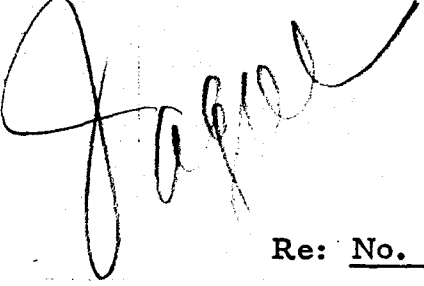
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 6, 1970

  
Re: No. 300 - Tate v. Hickel

MEMORANDUM TO THE CONFERENCE:

Subject to further revision I transmit herewith  
a proposed opinion in this case.

W. E. B.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
~~Mr. Justice Fortas~~  
~~Mr. Justice Marshall~~

MR. CHIEF JUSTICE BURGER delivered the ~~opinion of the~~ <sup>Majority</sup> Court.  
From: The Chief Justice

We granted the writ to review the action of the ~~Circuit Court of Appeals~~ <sup>3/6/70</sup> holding that the decision of the Regional Solicitor ~~acting for the Secretary of the Interior~~, disapproving the will of a Comanche Indian constitutes final and unreviewable agency action. We conclude that such decision is subject to judicial review. <sup>1/</sup>

(1)

George Chahsenah, a Comanche Indian, died on October 11, 1963, unmarried and without a surviving father, mother, brother or sister. His estate consisted of interests in three Comanche allotments situated in Oklahoma under the jurisdiction of the Bureau of Indian Affairs, Department of the Interior. <sup>2/</sup> Shortly after Chahsenah's death, the appraised valuation

<sup>1/</sup> The Court of Appeals decision, which held that the United States District Court for the Western District of Oklahoma had erred in reviewing the Regional Solicitor's action, is reported as Hickel v. Tate, 407 F.2d 394 (10th Cir. 1969).

<sup>2/</sup> The General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by Act of February 28, 1891, 26 Stat. 794, as amended by Act of June 25, 1910, 36 Stat. 855, 25 U.S.C. § 331 et seq., provides, inter alia, for the allotment to individual Indians of parcels of land. The title to the lands is held by the United States in trust for the allottee, or his heirs, during the trust period, or any extension thereof. Chahsenah had no heirs at his death.

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Supreme Court of the United States  
Washington, D. C. 20543

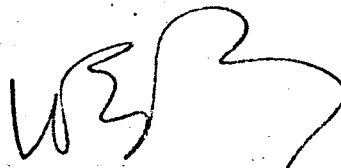
CHAMBERS OF  
THE CHIEF JUSTICE

March 27, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 300 - Tate v. Hickel

Enclosed is a revised draft with altered  
areas marked.



W.E.B.

TO: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
~~Mr. Justice Fortas~~  
Mr. Justice Marshall

From: The Chief Justice

No. 300 - Tate v. Hickel

Circulated: \_\_\_\_\_

Recirculated: 3/27/70

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ to review the action of the Court of Appeals holding that the decision of the Regional Solicitor, acting for the Secretary of the Interior, disapproving the will of a Commanche Indian constitutes final and unreviewable agency action. - We conclude that such 1/ decision is subject to judicial review.

George Chahsenah, a Commanche Indian, died on October 11, 1963, unmarried and without a surviving father, mother, brother or sister. His estate consisted of interests in three Commanche allotments situated in Oklahoma under the jurisdiction of the Bureau of Indian Affairs, Department of the Interior. 2/ Shortly after Chahsenah's death, the appraised valuation

1/ The Court of Appeals decision, which held that the United States District Court for the Western District of Oklahoma had erred in reviewing the Regional Solicitor's action, is reported as Hickel v. Tate, 407 F.2d 394 (10th Cir. 1969).

2/ The General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by Act of February 28, 1891, 26 Stat. 794, as amended by Act of June 25, 1910, 36 Stat. 855, 25 U.S.C. § 331 et seq., provides, inter alia, for the allotment to individual Indians of parcels of land. The title to these lands is held by the United States in trust for the allottee, or his heirs, during the trust period, or any extension thereof. Chahsenah had inherited the interests he held at his death.

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Fortas  
Mr. Justice Marshall

1

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

No. 300.—OCTOBER TERM, 1969

Recirculated: 4/21/70

James Tooahimpah Tate  
et al., Petitioners,  
v.  
Walter J. Hickel,  
Secretary of the  
Interior, et al.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Tenth Circuit.

[April —, 1970]

MR. CHIEF JUSTICE BURGER delivered the opinion of  
the Court.

We granted the writ to review the action of the Court  
of Appeals' holding that the decision of the Regional  
Solicitor, acting for the Secretary of the Interior, dis-  
approving the will of a Comanche Indian constitutes  
final and unreviewable agency action. We conclude that  
such decision is subject to judicial review.<sup>1</sup>

George Chahsenah, a Comanche Indian, died on  
October 11, 1963, unmarried and without a surviving  
father, mother, brother, or sister. His estate consisted  
of interests in three Comanche allotments situated in  
Oklahoma under the jurisdiction of the Bureau of Indian  
Affairs, Department of the Interior.<sup>2</sup> Shortly after

<sup>1</sup>The Court of Appeals decision, which held that the United  
States District Court for the Western District of Oklahoma had  
erred in reviewing the Regional Solicitor's action, is reported as  
*Hickel v. Tate*, 407 F. 2d 394 (10th Cir. 1969).

<sup>2</sup>The General Allotment Act of February 8, 1887, 24 Stat. 388,  
as amended by Act of February 28, 1891, 26 Stat. 794, as amended  
by Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. § 331 *et seq.*,  
provides, *inter alia*, for the allotment to individual Indians of parcels  
of land. The title to these lands is held by the United States in

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

April 24, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 300 - Tate v. Hickel

Minor stylistic changes as marked

in red.

W.E.B.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Fortas  
Mr. Justice Marshall

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

No. 300.—OCTOBER TERM, 1969

Recirculated: 4/24/70

James Tooahimpah Tate  
et al., Petitioners,  
v.  
Walter J. Hickel,  
Secretary of the  
Interior, et al.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Tenth Circuit.

[April 27, 1970]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ to review the action of the Court of Appeals holding that the decision of the Regional Solicitor, acting for the Secretary of the Interior, disapproving the will of a Comanche Indian constitutes final and unreviewable agency action. We conclude that such decision is subject to judicial review.<sup>1</sup>

George Chahsenah, a Comanche Indian, died on October 11, 1963, unmarried and without a surviving father, mother, brother, or sister. His estate consisted of interests in three Comanche allotments situated in Oklahoma under the jurisdiction of the Bureau of Indian Affairs, Department of the Interior.<sup>2</sup> Shortly after

<sup>1</sup>The Court of Appeals decision, which held that the United States District Court for the Western District of Oklahoma had erred in reviewing the Regional Solicitor's action, is reported as *High Horse v. Tate*, 407 F. 2d 394.

<sup>2</sup>The General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by Act of February 28, 1891, 26 Stat. 794, as amended by Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. § 331 *et seq.*, provides, *inter alia*, for the allotment to individual Indians of parcels of land. The title to these lands is held by the United States in



March seventh  
1970

Dear Chief:

In No. 300 - Tate v. HICKEL,

I join your opinion.

William O. Douglas

The Chief Justice

4

April 21, 1970

Dear Chief:

In No. 300 -- Tate v.

Hickel, I am happy to join your re-  
circulation of April twenty-first.

William O. Douglas

The Chief Justice

March 24, 1970

Re: No. 300 - Tate v. Hickel

Dear Chief:

I am glad to join your opinion, but, on the basis of my research so far, I have in mind writing a concurring opinion taking the view that the question of the Secretary's power in the premises should also be reached and that it should be held that no such power exists. If I decide to go forward with such a piece, I hope to have it ready for circulation at least by the beginning of next week.

Sincerely,

J. M. H.

The Chief Justice

CC: The Conference

*[Faint handwritten notes and signatures at the bottom of the page]*

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 300.—OCTOBER TERM, 1969

James Tooahimpah Tate  
et al., Petitioners,  
v.  
Walter J. Hickel,  
Secretary of the  
Interior, et al.

From: Harlan, J.  
On Writ of Certiorari to the  
United States Court of Appeals  
peals for the Tenth Circuit.  
APR 7 1970  
Recirculated: \_\_\_\_\_

[April —, 1970]

MR. JUSTICE HARLAN, concurring.

The Court's opinion has two aspects: *First*, that the Secretary of Interior's approval or disapproval of a will disposing of restricted Indian property is subject to judicial review in a federal court. *Second*, that the Secretary's action disapproving the decedent's will in the circumstances of this case was not a valid exercise of the authority vested in him by 25 U. S. C. § 373.<sup>1</sup> I join the Court's opinion in both respects; but I deem it appropriate to state the reason for my agreement with the second of these holdings, which the Court's opinion deals with only summarily.

I

I will briefly restate only those facts essential for putting the issue of the propriety of the Secretary's action into focus. First, it is perfectly clear that the decedent's will met all the traditional requirements for a valid testamentary instrument, and was in compliance

<sup>1</sup> While the Court of Appeals has not yet passed on the merits of this case, forbearance by us would be an unnecessary amenity in the circumstances here. We have before us the full record developed in the District Court which—as this Court's opinion notes—did reach the merits. Moreover, the parties have briefed in this Court not only the issue of whether the Secretary's disapproval was reviewable, but also whether it was valid.

1, 2, 5

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall

**SUPREME COURT OF THE UNITED STATES**

No. 300.—OCTOBER TERM, 1969

From: Harlan, J.

James Tooahimpah Tate  
et al., Petitioners,  
v.  
Walter J. Hickel,  
Secretary of the  
Interior, et al.

Circulated: \_\_\_\_\_  
On Writ of Certiorari to the  
United States Court of Appeals  
peals for the Tenth Circuit. **APR 23 1970**

[April —, 1970]

MR. JUSTICE HARLAN, concurring.

The Court's opinion has two aspects: *First*, that the Secretary of Interior's approval or disapproval of a will disposing of restricted Indian property is subject to judicial review in a federal court. *Second*, that the Secretary's action disapproving the decedent's will in the circumstances of this case was not a valid exercise of the authority vested in him by the first proviso of 25 U. S. C. § 373.<sup>1</sup> I join the Court's opinion in both respects; but I deem it appropriate to amplify the reasons given by the Court for its second conclusion.

From the facts stated in the Court's opinion, I think the issue presented by the merits of this case can fairly be characterized as follows: When there is no evidence of fraud, duress or undue influence, when the decedent is of sound and disposing mind, when there is a rational basis for the decedent's disposition, and when the will meets all the technical requirements of the Secretary's regulations, does the proviso of 25 U. S. C. § 373 authorize the Secretary of the Interior or his delegate to withhold approval of an Indian will simply because he concludes, in the

omission

<sup>1</sup> The text of 25 U. S. C. § 373 is quoted in relevant part in n. 3, *ante*, of the Court's opinion.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

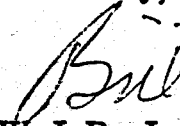
March 9, 1970

RE: No. 300 - Tate v. Hickel

Dear Chief:

I agree with your opinion in the  
above case.

Sincerely,

  
W.J.B. Jr.

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 9, 1970

No. 300 - Tate v. Hickel

Dear Chief,

I am glad to join your opinion for the  
Court in this case.

Sincerely yours,

*P.S.*  
*1.*

The Chief Justice

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 21, 1970

No. 300 - Tate v. Hickel

Dear Chief,

I continue to be with you in your  
opinion for the Court as recirculated today.

Sincerely yours,

P.S.)

The Chief Justice

Copies to the Conference



March 16, 1970

Dear Chief:

RE: No. 300 - Tate v. Hickel

Please join me,

Sincerely,

A.W.

The Chief Justice

U.S. Supreme Court

April 22, 1970

Re: No. 300 - Tate v. Hickel

Dear Chief:

I am still with you.

Sincerely,

B.R.W.

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 10, 1970

Re: No. 300 - Tate v. Hickel

Dear Chief:

Please join me.

Sincerely,



T.M.

The Chief Justice

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 23, 1970

Re: No. 300 - Tate v. Hickel

Dear Chief:

Please join me in your opinion  
as recirculated on April 21.

Sincerely,

  
T.M.

The Chief Justice

cc: The Conference

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