ABORIGINAL SELF-GOVERNMENT IN THE UNITED STATES

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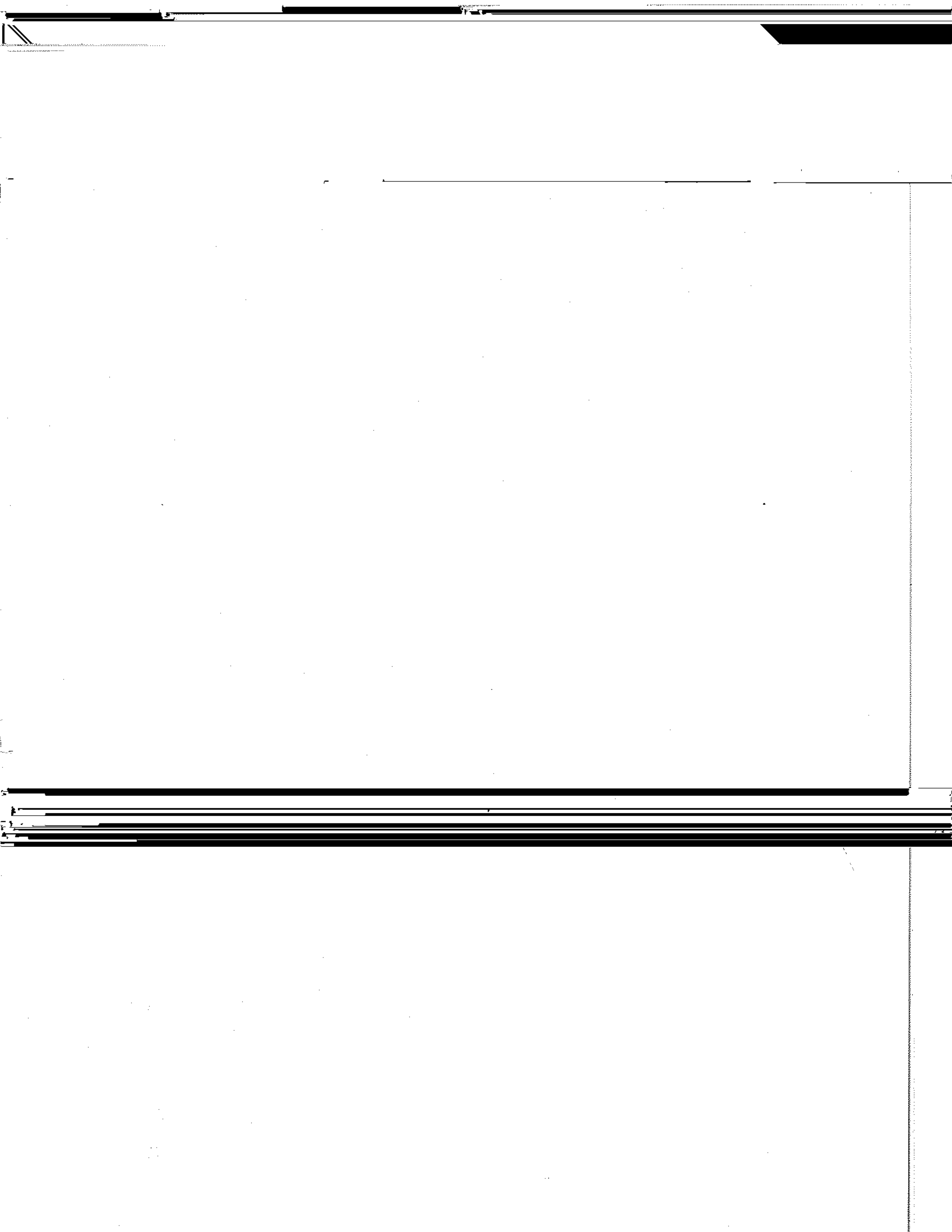

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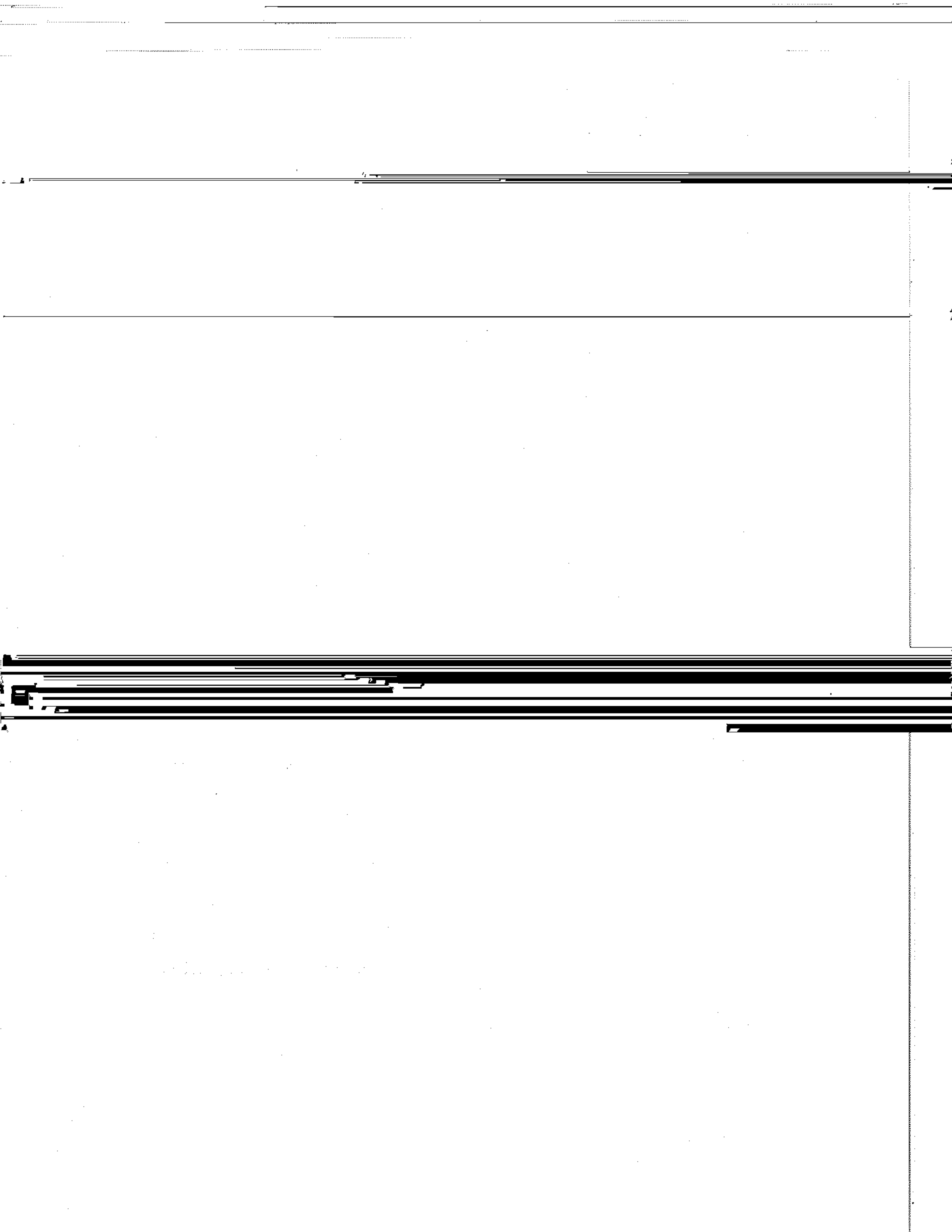


PREFACE

The constitutional reform process, as it relates to aboriginal peoples

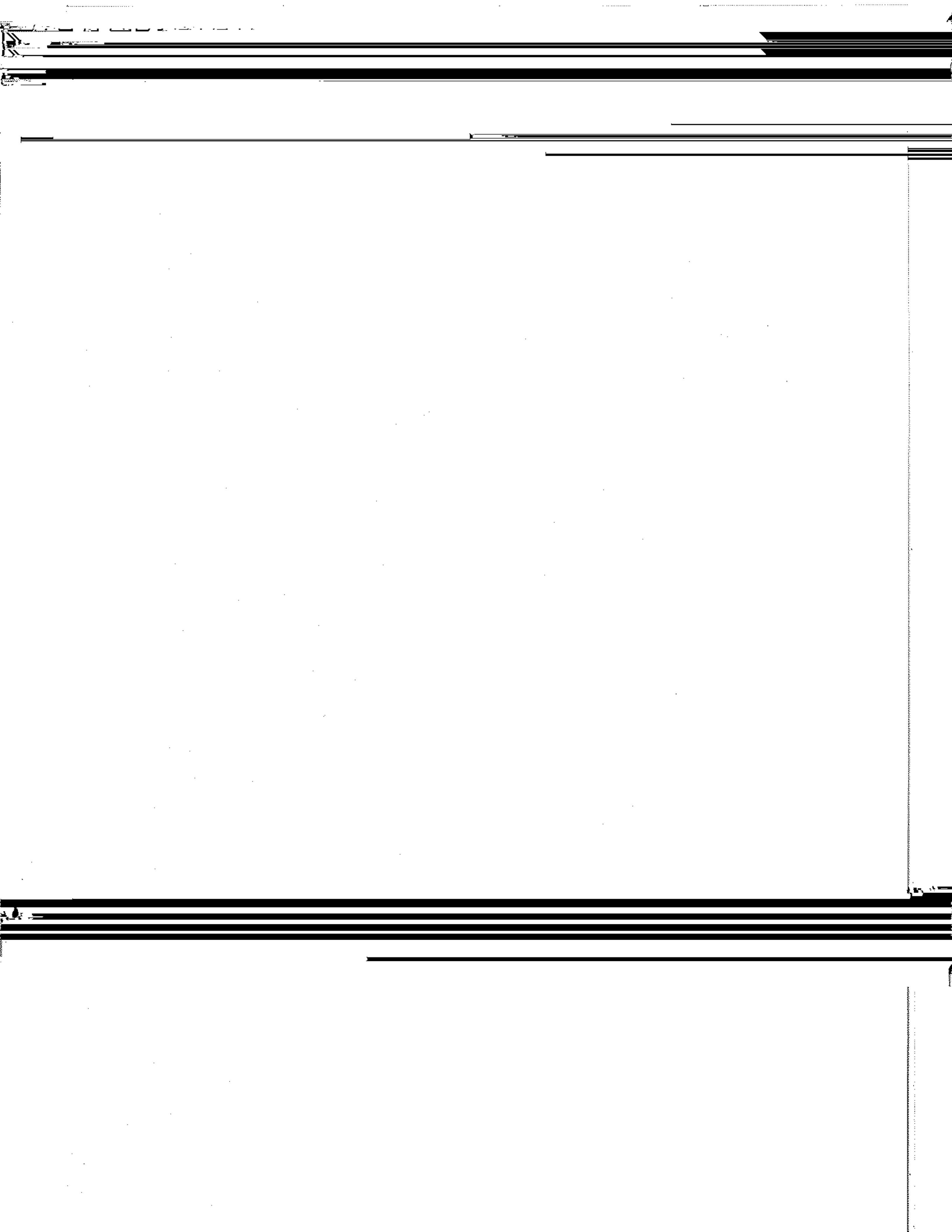
has come to focus on one major agenda item -- aboriginal self-government. At the First Ministers' Conference in March 1984, aboriginal peoples' leaders were calling for self-government, while many federal and provincial ministers were openly questioning "What does it mean?" The aim of Phase One of the Institute's project on Aboriginal Peoples and Constitutional Reform, which is subtitled

from those models proposed to date, that any formula will have to be flexible enough to accommodate diverse structures and allocations of policy responsibility. The wide variety of views as to what aboriginal self-government means -- ranging from "nationhood" to local school boards -- have yet to be clearly articulated and fully elaborated.

This situation has led some observers to express alarm at the yawning gap between the expectations of aboriginal peoples, and the political wills of federal and provincial governments.

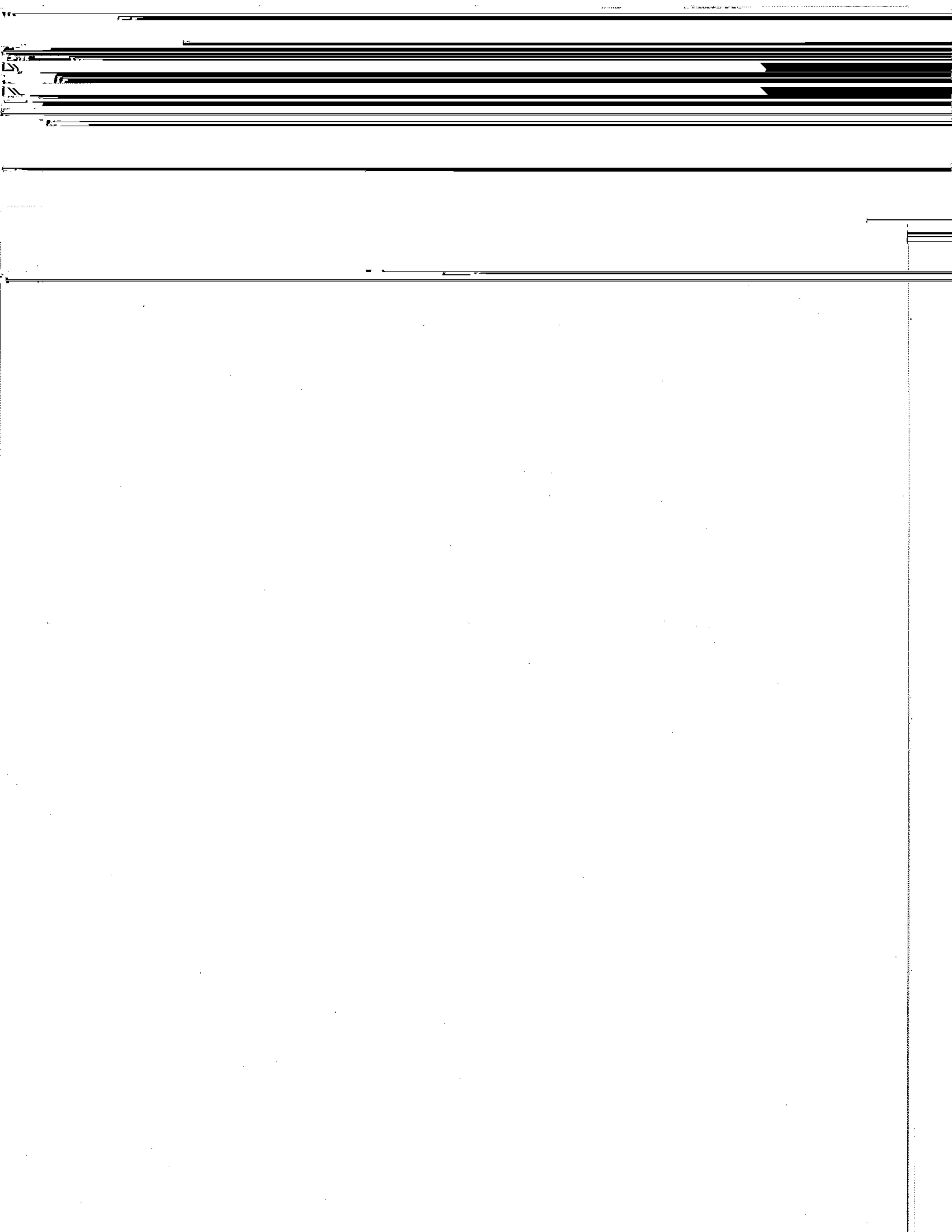
Diverse and conceivably conflicting views cannot be accommodated without a clear understanding and shared perceptions of what is at issue. Phase One of the project, including this series of

The principal objective is to identify and operationalize alternative models of self-government, drawing upon international experience, and relating that experience to the Canadian context. Douglas Sanders, in his paper on "Aboriginal Self-Government in the United States", explores the experience of Indian tribal government and its relevance to the Canadian context. He exposes the "major myth" of



ABSTRACT

United States Indian law recognizes an inherent Indian right to self-government, deriving from the original sovereignty of the tribes before colonization. This recognition is found in the treaties, the



INTRODUCTION

Indian law and policy has been more dramatic in the United States than in Canada. United States law has been more conceptual, talking of sovereignty and inherent rights. It has been more volatile

attorneys...Prior to 1960 only a handful of attorneys knew much about the unique principles and doctrines of the Indian law field...In response to Indian demand for better legal representation during the self-determination era many lawyers now have become expert in this specialized field. The

A recent study commissioned by the Bureau of Indian Affairs stated:

of the myth parts of the [illegible]

The treaty policy took on an orthodoxy, both before and after the revolution:

> When the United States won its independence from Great Britain, it became heir to an established procedure in Indian relations and in the acquiring of Indian lands. The theory and practice it strengthened by its own actions. It made
>
> treaties with the Indian tribes as independent nations at the

The Articles of Confederation of 1777 provided for central control over Indian affairs:

> The United States in Congress assembled shall also have the sole and exclusive right and power of...regulating the trade

administration established by Britain in 1755. But in the United

War, to enforce the trade and intercourse acts. Beginning in 1796, the acts authorized the military to remove illegal settlers from Indian lands. The concern with the integrity of Indian reserve lands is the major initial reason for Indian legislation in Upper and Lower Canada

the basis that the constitution did not expressly give the national government a sweeping mandate over Indian affairs.

The assumptions and practices of the national government were endorsed in the Marshall judgments of 1823, 1831 and 1832.[8] The major case, Worcester v Georgia, has been cited more frequently in United States case law than any other decision, with the single exception of Marbury v. Madison. The case is widely known for the

confrontation involved between the judicial and executive branches of government. President Andrew Jackson was supposed to have said of the judgment: "John Marshall has made his decision, now let him enforce

with the United States) upheld by the Supreme Court. Chief Justice Marshall described the tribes as "domestic dependent nations" whose relationship to the United States resembled that of a "ward to his guardian."[10] The tribe could not, therefore, invoke the original jurisdiction of the Supreme Court. It was, nevertheless,

> ...a distinct political society separated from others, capable of managing its own affairs and governing itself...[11]

Two other judges belittled the political and property rights of the Cherokee, but two dissenting judges held they represented a foreign state and had established certain valid claims.

The substantive issues were reheard in 1832 in Worcester v

> which their authority is exclusive, and having a right to all the lands within those boundaries...[14]

In summation:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original

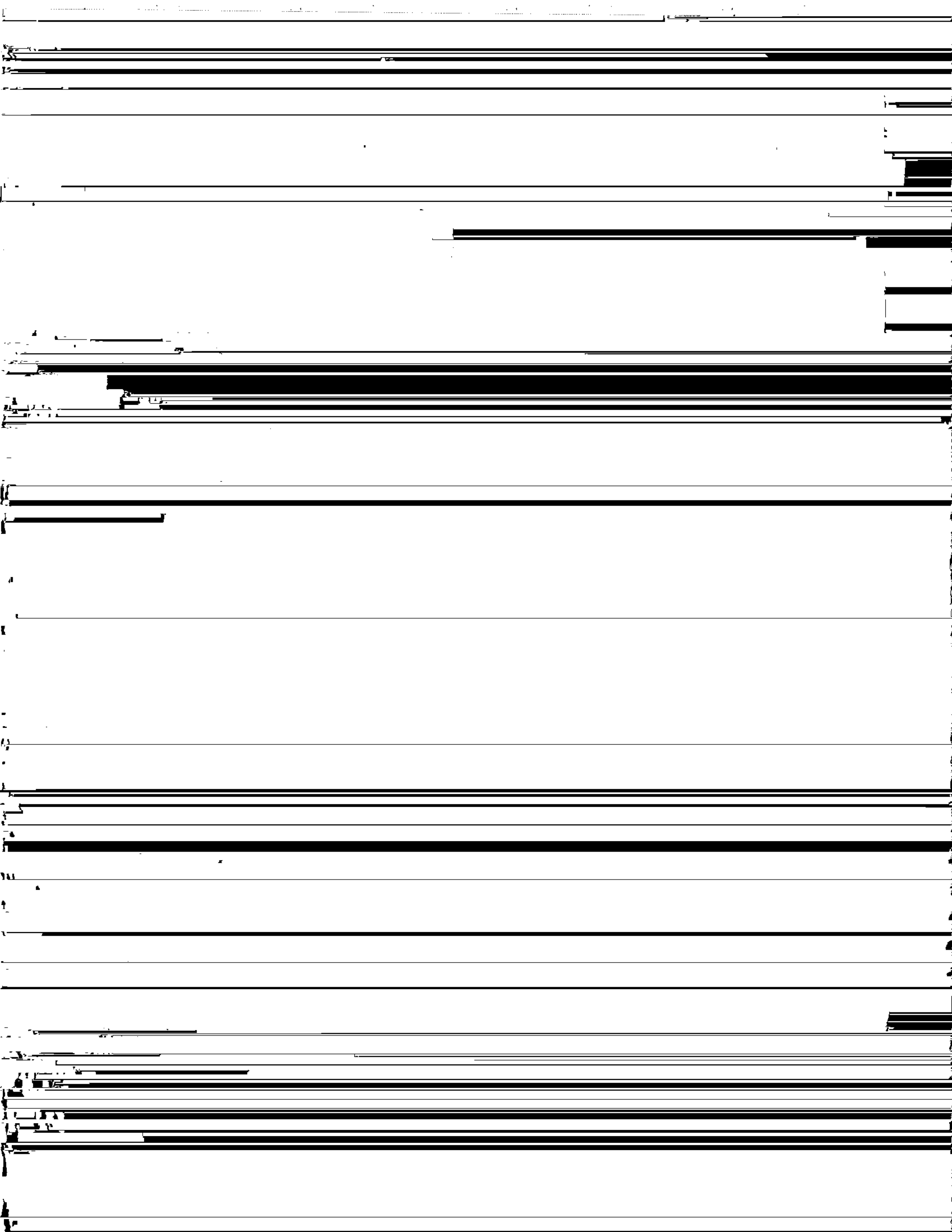
effect, the judgment upheld one federal policy, embodied in the treaty, against a competing federal policy of removal of the tribes west of the Mississippi, something the federal government had promised Georgia in 1802.[17]

For our purposes, the significance of the Marshall judgments is the extent to which they formalized one particular element of the

existing federal treaty policy - that of dealing with the tribes as distinct political entities, whose internal self-government continued unaffected by the treaties or the trade and intercourse acts.

REMOVAL AND ALLOTMENT

The proposal to move the Indians to a permanent reservation



process, "surplus" reservation lands would become available to non-Indians. As with the removal policy, allotment first took form in treaties negotiated with the Indian tribes. A series of treaties, beginning in 1854, contained allotment provisions. In the same period

[illegible]

the policy of promising permanent annuities on the surrender of Indian

[illegible]

land was discontinued:

> A policy of rapid distribution of tribal funds was substituted; it paralleled the rapid distribution of tribal [illegible]

provision is that agreements with tribes must now be implemented by

through treaties (which need only be ratified by the Senate to come

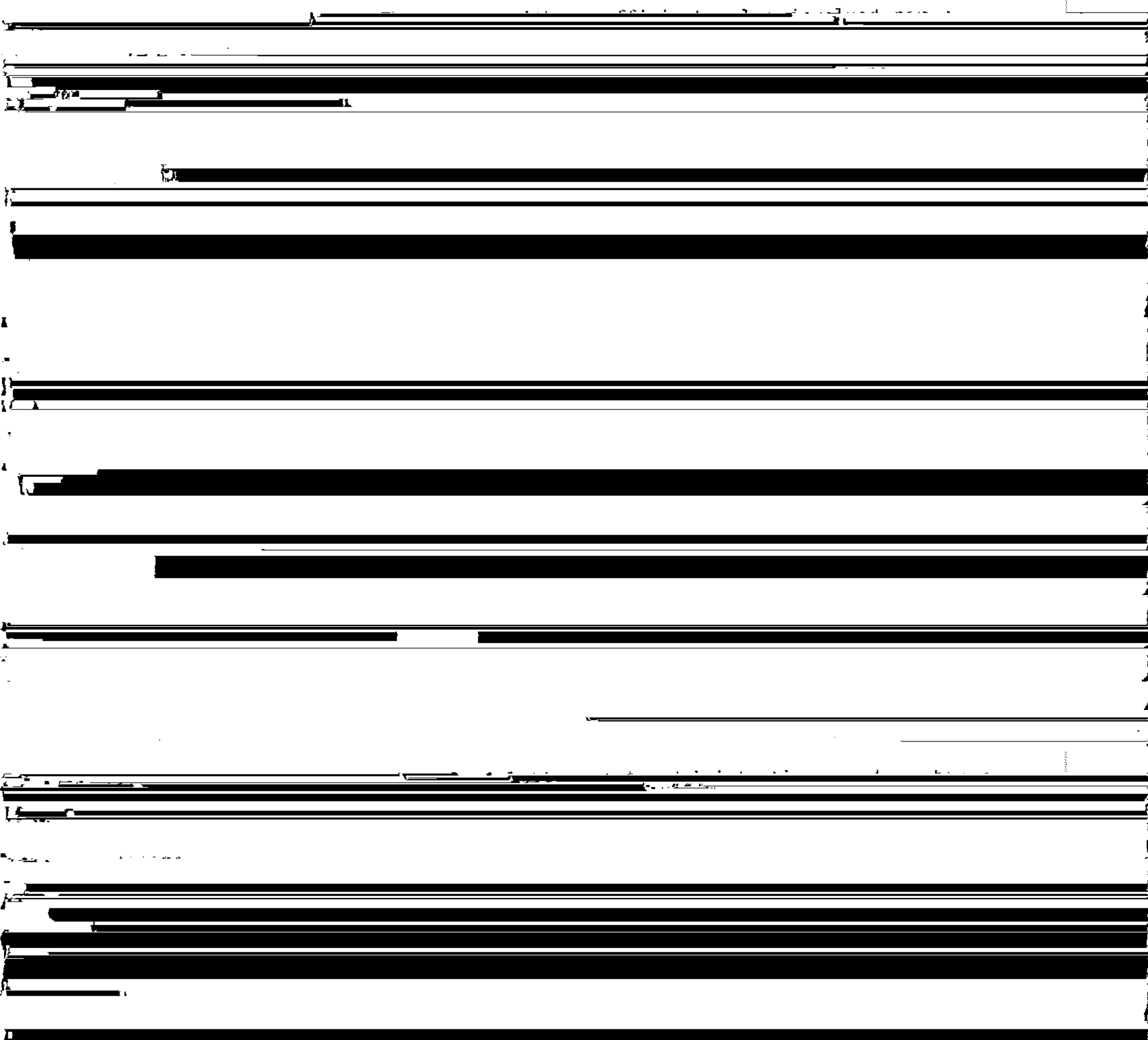
Act of 1887 to impose an allotment policy in Indian country, in violation of the provisions of many treaties.[28]

The General Allotment Act, commonly called the Dawes Act, was

The allotment policy was not applied in a manner consistent with its own assumptions:

The basic aim of the Dawes Act was to transform the Indian into a homesteader.

A third consequence of the allotment process was the "heirship" problem. Allotments of marginal lands often passed on intestacy to multiple heirs. Within a few decades, the title to various allotments was fractionalized among numerous first or second



"certain old heathen and barbarous customs". Engaging in specified dances and ceremonials was made punishable in 1921:[41]

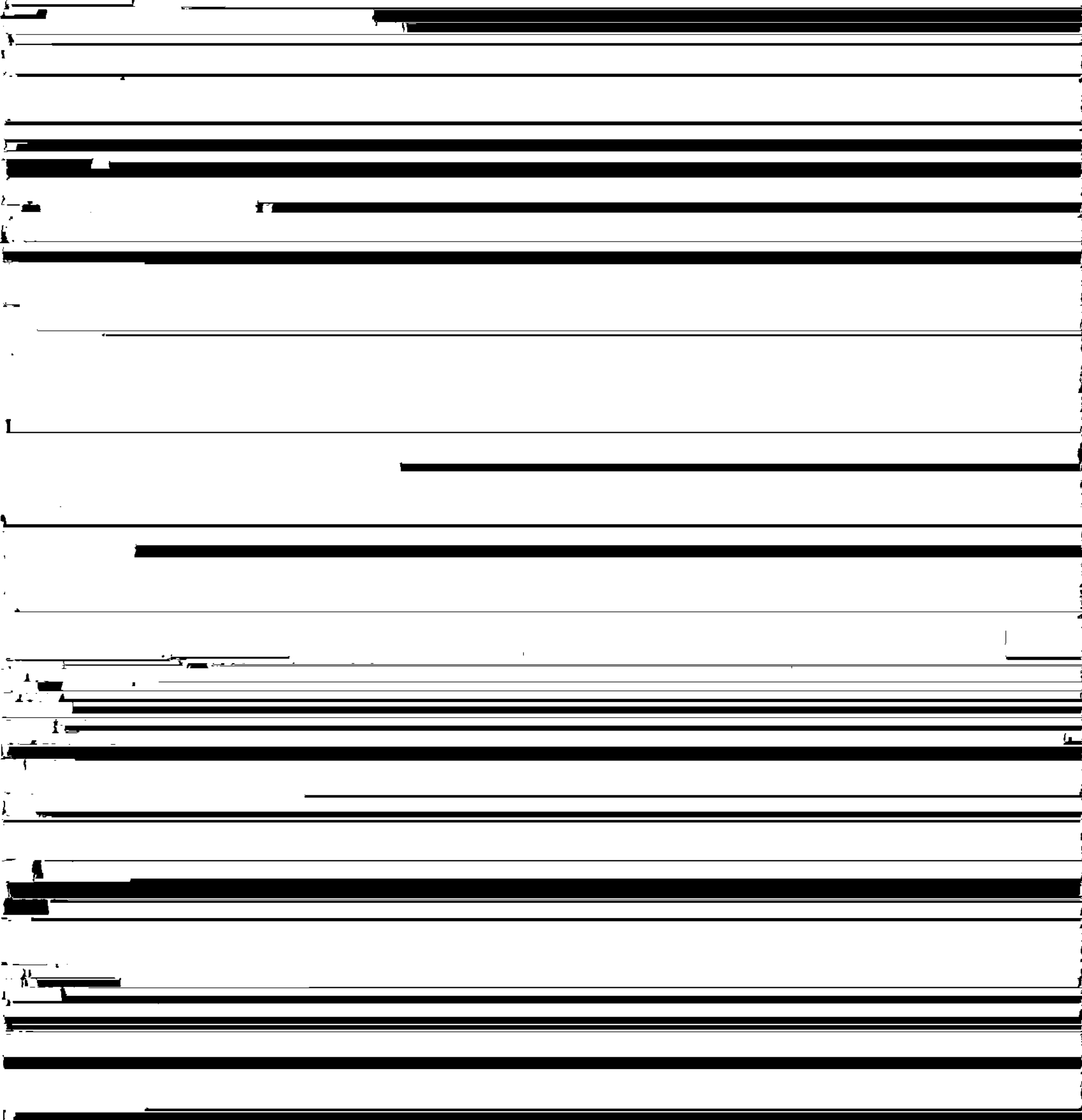
> During the allotment era extensive government supervisory power over the everyday life of Indians was essentially unchecked. For example, in 1872 Congress prohibited most

> contracts between non-Indians and tribes or Indians who were not citizens unless approved by the Secretary of the Interior and the Commissioner of Indian Affairs. Contracts between individual Indians or between a tribe and its attorney were

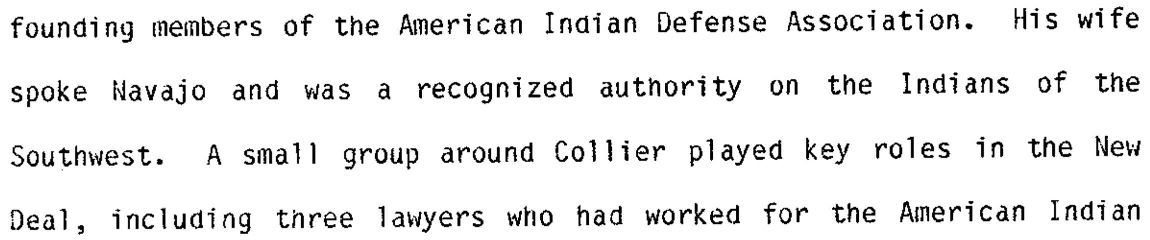
> subject to departmental approval. In effect, the Indian Office controlled litigation by approving or disapproving attorney contracts and fees.
>
> The allotment policy touched most aspects of Indian life. It was a systematic attempt to eradicate Indian heritage and tribalism. President Roosevelt described the allotment process in his message to Congress in 1906 as "a mighty pulverizing engine to break up the tribal mass."[42]

Administration", was completed in 1928 and is commonly referred to as

the Meriam report after its . . . 44



founding members of the American Indian Defense Association. His wife spoke Navajo and was a recognized authority on the Indians of the Southwest. A small group around Collier played key roles in the New Deal, including three lawyers who had worked for the American Indian



law became the undisputed authority in the field.

Indian Reorganization Act

The centrepiece of the Indian New Deal was the **Indian Reorganization Act** of 1934, commonly called the **IRA.** The **IRA** was designed to strengthen Indian reservation communities by expanding

of Indian acculturation or assimilation. But Collier saw adaptation as a two-way street. He believed there were fundamental social and economic problems in non-Indian society. The genius of Indian society

non-Indians needed to learn.

"heirship" lands problem or an ending of the "checkerboard" patterns by purchases and land exchanges. Much of the limited land added to reserves in the period was of marginal productivity.

Self-government

Indian scholar Vine Deloria, Jr. has pointed out the

self-government reforms in the **IRA** obscured any understanding of [illegible] of tribal government before 1934. Collier, it seems

understood that he was substituting "indirect rule" along the British

national legislation. One had to look to tribal tradition, treaty

Bureau created a Court of Indian Offences with three Navajo judges.[50] The first Navajo Tribal Council was established in 1923 at the instigation of the BIA in order to validate leases of Navajo resources. These judicial and legislative institutions, while [illegible]

powers of the Navajo tribe. The tribe rejected the **IRA,** to a large [illegible]

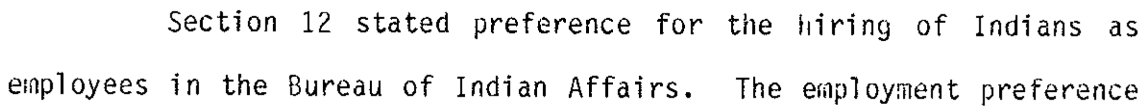
government and modified the relationship with the Interior Department.[52]

Economic Development

Section 17 of the IRA allowed the establishment of a tribal business corporation and Section 10 authorized a revolving loan fund of $10 million.

Bureau of Indian Affairs

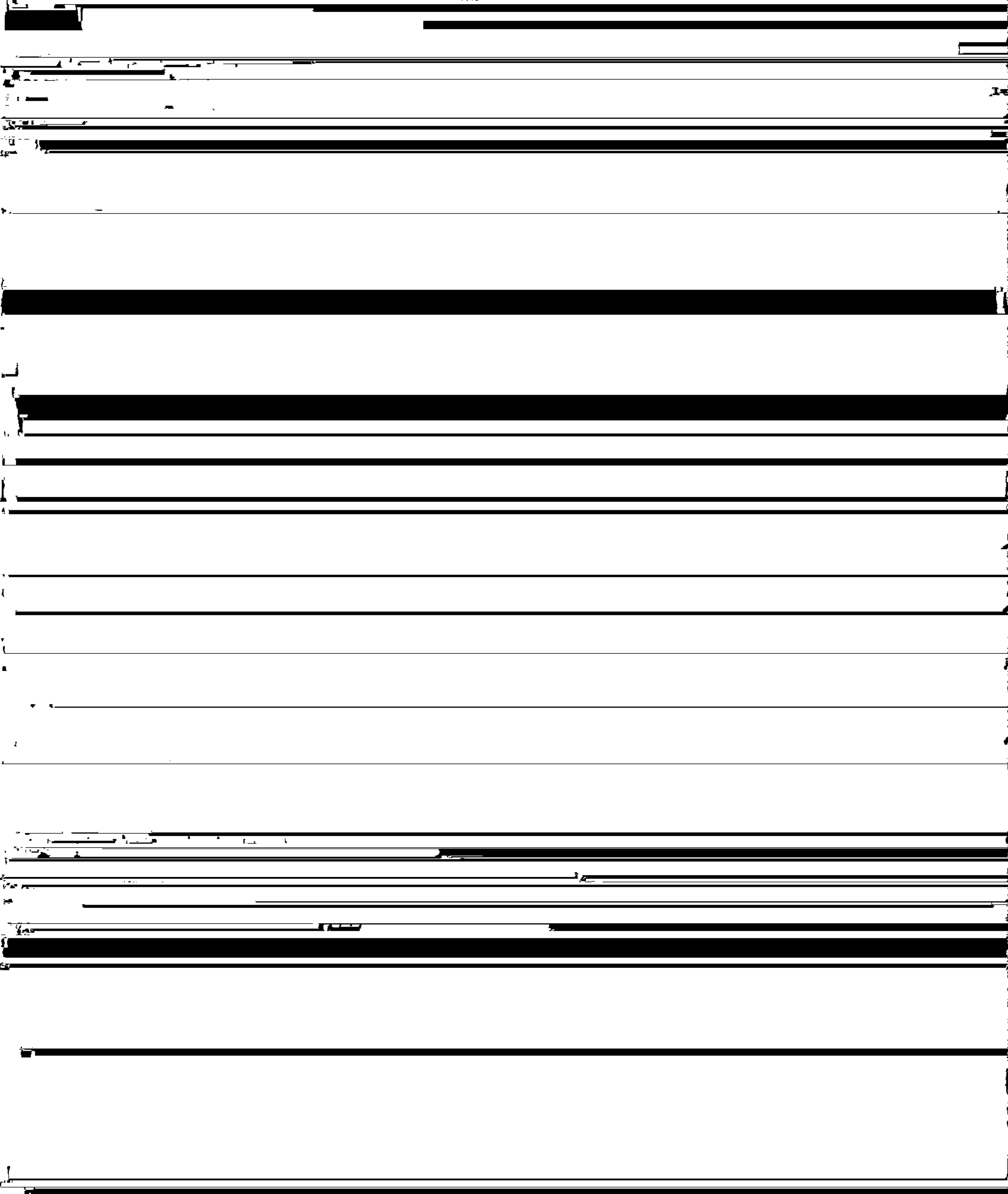
Section 12 stated preference for the hiring of Indians as employees in the Bureau of Indian Affairs. The employment preference



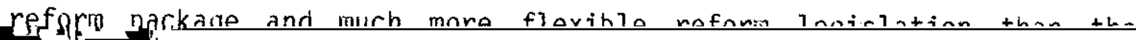
Morton v Mancari.[53] The tribal constitutions under section 16,

Indian New Deal as seriously flawed. The problems with the Indian New Deal can perhaps be summarized in relation to Indian involvement.

package was decided at a closed conference in Washington. The regional consultations with Indians only occurred after hostility to the



less "Indian". After all, how could others match the splendid isolation of the Pueblo pristine existence. As Berkhofer has observed: "In this sense, all Indians became Pueblos in his vision regardless of Collier's belief that his program allowed for the multiplicity of tribal cultures and conditions." Hence, Collier's efforts were seen as condescendingly rehabilitational to those who could not match his Pueblo ideal.[58]



through Congress and Collier's initial draft was massively altered in

the process.[62]

TERMINATION

The Indian New Deal never fully took hold in national political life. It was attacked in Congress and underfunded. Indian Affairs appropriations reached a peak in 1939, decreasing markedly in subsequent years:

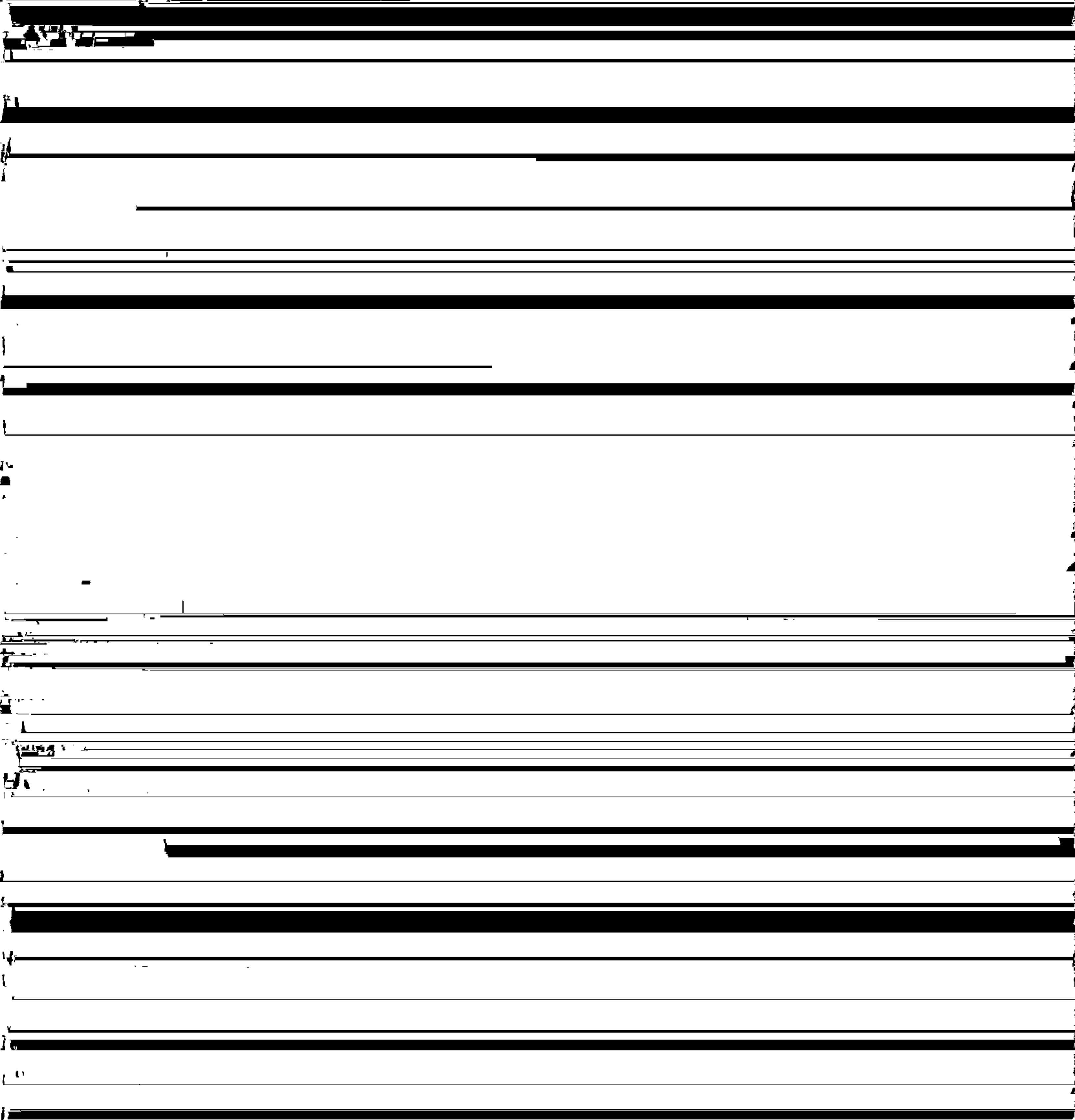
> Ideological attacks increased, further budget cuts were made, and large numbers of Bureau personnel were lost in the war effort. The federal government focussed on the international situation, and BIA operations were moved to Chicago. Indian interests were no longer a political issue significant enough to command the attention of the President or the Secretary of the Interior.

Some 109 tribes and bands were terminated, involving about 1,362,155 acres of land, and 11,500 individual Indians. The total amount of Indian trust land was diminished by about 3.2%. Two tribes with large landholdings were disestablished, the Menominee in Wisconsin and the Klamath in Oregon.[73]

did not involve comprehensive legislation for reform of major

road, but it put a halt to a possible judicial trend to make the

legislation establishing special relationships between the United States Government and the State of Alaska...



It was necessary "to strengthen the Indian's sense of autonomy" without any threat of ending "Federal concern and Federal support." Nixon asked Congress to repeal House Concurrent Resolution 108, which had stated the termination policy. His other specific recommendations [illegible]

Congressional Findings

Sec. 2 (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that -

(1) the prolonged Federal domination of Indian service

programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self government, and has denied

adequately protected, or the contract proposed is not adequate to complete or perform the program. The Secretary is required to give

Indian Affairs to convert, in part at least, from a delivery agency to

independent source of revenue, it will not be able to reimburse the program for the unallowable costs, blocking the continuation of the contract relationship. The problem reflects the limited discretion given the tribes to make financial decisions under the contracting arrangements.

- federal law provides that no money can be paid under a contract unless there is a budgetary allocation covering the sum. There have been instances of contractual obligations of the federal government not being paid for this reason.

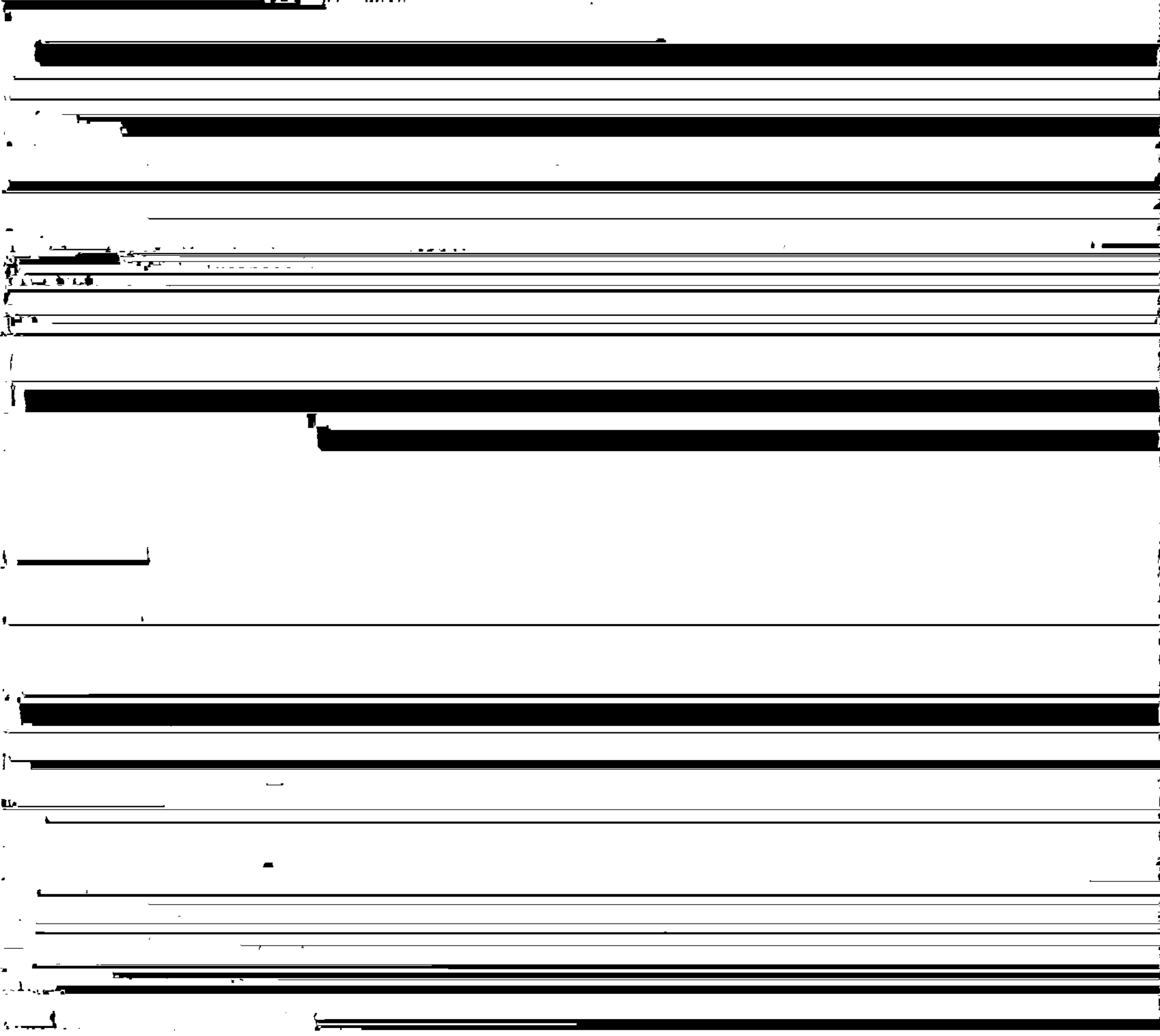
use of the grants. and the proposals would have to be

reservation economies. The opening paragraphs of the statement establish its tone:

> This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.
>
> When European colonial powers began to explore and colonize

confirmed aspects of the President's statement, condeming "excessive regulation" and calling for greater private sector involvement. As well there were familiar criticisms of the BIA:

> The commission said the agency's technical assistance and asset management programs were "incompetent". ...In "tne bureau's organizational structure," the report said, "functioning and operational deficiences are such that the cost of doing business on Indian reservations is raised



This was not written into the **IRA** itself, but was a common part of the **IRA** "boilerplate" constitutions which were approved under the legislation. It now appears that tribes which chose to organize

national life has been withdrawn from the Indian tribes by encroaching state legislation, then, surely, it must follow that the Seneca Nation of Indians has retained

thought to be offensive to Non Indians) as well as provide

being determined. In Babbit Ford v Navajo Nation,[96] the 9th circuit ruled that a non-Indian seeking to repossess a car on the Navajo Reservation was subject to tribal laws on the question. In [illegible] Jicarilla Apache Tribe,[97] the Supreme Court ruled that

the tribe had an inherent power to impose a severance tax on non-Indian mining activities on the reservation. The major negative decision on tribal jurisdiction in recent years is the decision of the 10th circuit in Dry Creek Lodge v Arapahoe and Shoshone Tribes.[98] The court held that the tribal government could not block non-Indian development [illegible] the non-Indian in fee within the exterior boundaries of

This test, involving a balancing of Indian and non-Indian interests, has been frequently quoted in recent cases

Reagan for President. Paradoxically, he later blamed Reagan's [illegible]

Indian funding for his defeat as tribal chairman in [illegible]

To the complexity of federal statute law is added the major fact that Indian tribal jurisdiction is in a period of fundamental definition. The expansion of civil jurisdiction for tribal governments and courts has created uncertainties about the substantive civil law to be applied. There is work underway to adapt the Uniform Commercial Code for enactment by the Navajo Tribe. In the meantime, the legal context for on-reserve investment is confusing, a factor which inhibits economic development. An official of the Colville Tribe testified in April, 1984:

> The Colville Tribes have one major barrier to development of their territory. That is the jurisdictional maze that operates on the reservation. Few non-Indian companies, lenders or investors, want to buy uncertainty and lawsuits. Yet, that is exactly what they do when the invest in Colville projects.
>
> The unsettled questions of state, federal, Tribal regulatory, commercial and tax jurisdictions eat up millions of Tribal dollars, exhaust Tribal representatives and staff and defeat Tribal development efforts.[110]

The point about disorderliness can be overstated. In any

[illegible] is the single most glaring failure of

Footnotes

1. Johnson, "Alternative Approaches to Alaska Native Land and Governance," December 1, 1984, unpublished, p. 30.

2. TCI, "Indian Self-Determination Study," May, 1984, p. 29 (copy obtained from the Bureau of Indian Affairs).

3. Jennings, The Invasion of America, University of North Carolina Press, 1975, Chapter 8 and, specifically, pages 133-34 and 137-38.

21. Cohen, p. 81.

22. Cohen, p. 99. The 1907 and 1918 Acts to allot and distribute tribal funds are described at pages 138-39.

23. Cohen, p. 106.

24. 25 U.S.C., s. 71.

25. Pp. 105-107.

26. (1883) 109 U.S., p. 556.

27. U.S. v. Kagama (1886) 118 U.S., p. 375.

28. The Allotment Act was upheld in Lone Wolf v. Hitchcock (1903) 187 U.S., p. 553.

29. Cohen, p. 131.

30. Cohen, p. 135; 25 U.S.C., s. 336.

31. The competency commission apparently proceeded on racist

41. Cohen, p. 141.

42. Cohen, p. 143.

43. Philp, John Collier's Crusade for Indian Reform, University of Arizona Press, 1977, Chapter 2.

55. Philp (1977), p. 158.

56. Haas (1947), p. 1.

57. Cohen, pp. 149-50.

58. Hauptman, p. 29.

59. Hauptman, Chapter 3.

60. Philp (1977), p. 155.

63. Taylor, pp. 33-34.

64. Philp (1977), pp. 170-74.

65. Philp (1977), p. 176.

66. Philp (1977), p. 198.

67. Taylor, p. 93.

68. Cohen, pp. 154-55.

69. Philp (1983), p. 167.

70. Burt, Tribalism in Crisis, University of New Mexico Press, 1982, p. 5.

71. Philp (1983), p. 165.

80. Cohen, p. 185.

81. TCI, "Indian Self-Determination Study," May, 1984, p. 22 (copy obtained from the Bureau of Indian Affairs).

82. Pp. 50 and 61.

83. Comptroller General, "Controls Are Needed Over Indian

99. Cohen, p. 668, n. 52.

100. Montana v. United States, (1981) 450 U.S. 544.

103. The issue has spread to blackjack as well; "Legal Problems Arise in Ute Gambling Plan," Navajo Times Today, Wednesday, November 21, 1984, p. 4.