



10-1976

Delaware Tribal Business Committee v. Weeks

Lewis F. Powell Jr.

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Carl - This is in your record!

Note

(Possibly 3 of four cases)

An inscrutable Indian controversy that I don't understand except vaguely.

But 3d/ct invalidated Act of Congress that made certain awards to one segment of the ~~fractured~~ Delaware Tribe (see p 8)

I re aware views of Indian law experts on Court (white & Rehnquist) but I'll vote to ~~go~~

PRELIMINARY MEMORANDUM

Note or Postpone

June 3, 1976 Conference

List 1, Sheet 1

No. 75-1301

DELAWARE TRIBAL BUSINESS COUNCIL

v.

WEEKS

No. 75-1328

WEEKS

v.

KLEPPE

No. 75-1335

ABSENTEE DELAWARE TRIBE OF OKLA. BUSINESS COMMITTEE

v.

WEEKS

Appeal to WD Okla (3 judge ct) (CJ Holloway, DJ Eubanks; DJ Daugherty - dissenting)

Federal/Civil

Timely some or all of these cases.

Included to Note

Note (or possibly Postpone) Nos. 75-1301, 1335, and 1495. Discuss No. 75-1328.

Carl

No. 75-1495

KLEPPE [Sec'y of Int] et al

v.

WEEKS

These cases are curved-lined. Nos. 75-1301, 75-1335, and 75-1495 are all appeals from a judgment of the three-judge court that 25 U.S.C. §§ 1291-1297 are unconstitutional. No. 75-1328 is a cross appeal from a judgment that §§ 1181-1186 are constitutional. Brace yourself, you're not ready for this case, * the summary of which below is by the court below:

These suits challenge the constitutionality of two federal statutes. The first, Pub. L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186, determines the Indian descendants who may participate in the distribution of an Indian Claims Commission award redressing a wrong by the United States under an 1818 treaty with the Delaware Tribe. 7 Stat. 188.¹ The second statute, Pub. L. 92-456, 86 Stat. 762, 25 USCA §§ 1291-1297, performs the same function for a separate Indians Claims Commission award redressing a breach by the United States of an 1854 treaty with the Delawares. 10 Stat. 1048.²

Three classes of Delaware Indian descendants are represented by the parties in these cases. The plaintiffs represent a group known as the Kansas Delawares. The defendants represent two groups of descendants known as the Cherokee Delawares and the Absentee Delawares. The Sec'y of Interior is also a defendant.

*3 classes
of
Delawares*

* In connection with which, I do not understand what quirk in the universal machinery caused me to draw this preliminary memo, as opposed to Bill Block. But perhaps Bill will have to work on the case next Term.

In 25 USCA §§ 1181-86, ⁽¹⁹⁶⁸⁾ relating to the 1818 wrong, Congress devised distributive classifications that permitted descendants in all three classes to share in the award. Invoking the Fifth Amendment Due Process Clause and equal protection principles incorporated by it, and the Just Compensation Clause, the Kansas Delawares challenge the constitutionality of the statute's inclusion of the Cherokee Delawares in these distribution provisions.

Kansas
✓
Cherokee

In 25 USCA §§ 1291-97, ⁽¹⁹⁷²⁾ relating to the 1854 wrong, Congress provided distributive classifications that permitted only the Cherokee Delawares and the Absentee Delawares to share in the award. With respect to this statute, the Kansas Delawares challenge the constitutionality of (1) their exclusion from the distributive provisions, specifically under the Due Process Clause and equal protection principles incorporated by it, and under the Just Compensation Clause, and (2) the inclusion of the Cherokee Delawares and Absentee Delawares, invoking the same Fifth Amendment principles.

2. Facts: The general historical background of this case is somewhat unclear to me, *and so me!* but the significant facts seem to be as follows:

In 1818 the main Delaware tribe was living in Indiana and Ohio. By an 1818 treaty and an 1829 supplement they agreed to move west of the Mississippi - originally to Missouri and subsequently to Kansas. Somewhere along the line part of the tribe went its own way and ended up in Oklahoma. The latter group are the "Absentee Delawares".

In 1854 the main group of Delawares gave most of their Kansas lands in trust to the United States. And in 1866 they agreed to leave Kansas entirely. The 1866 treaty provided that (1) the United States would help them relocate in Oklahoma but (2) that those not wanting to leave Kansas could sever

their ties with the tribe and become U.S. citizens. These "resignees" were to receive an allotment from the Kansas reservation and their share of the trust funds from the 1854 treaty. Twenty-one adults availed themselves of this option, keeping 49 minors with them. The descendants of these resignees and their minor children are the "Kansas Delawares." } *Kan. Delawares*

Upon removal to Oklahoma the main body of the tribe took up residence on unoccupied land within the Cherokee Nation. By agreement with the Cherokees, these Delawares became Cherokees. They nonetheless retained a separate identity as a Delaware group and are now known as the "Cherokee Delawares." (*main body*)

With the cast of characters set, we can complete the background of the present litigation.

(1) 1818 Treaty. The Cherokee Delawares and the Absentee Delawares filed a claim on behalf of the Delaware people before the Indian Claim Commission, claiming that the 1818 treaty had been unfair. The Commission agreed, finding that the tribe had suffered \$1.6 million in damages when trading its Indiana land for the Kansas land. On the basis of this determination, in 1968 Congress enacted 25 USC §§ 1181-1186 to distribute an award to the Delawares. The distribution provision provided for three classes of claimants: Those whose name, or the name of a lineal ancestor,

(a) appears on the 1906 Delaware per capita payroll (which covers the Cherokee Delawares)

(b) Appears on, or is eligible to be on, the 1940 constructed base census roll of the Absentee Delaware Tribe (which covers the Absentee Delawares)

or

(c) appears on any available census roll or records acceptable to the Secretary, provided the claimant shows himself to be a lineal descendant of Delawares who were members of the Delaware Nation as constituted in 1818 (a "catch all" phrase including the Kansas Delawares).

2. 1854 Treaty. The Cherokee Delawares and Absentee Delawares also instituted proceedings before the Commission on the theory that the U.S. had breached its trustee obligations in connection with the 1854 treaty (by selling land other than at auction). The Commission again agreed, and specified an award of \$9.1 million. In 1972 Congress enacted 25 U.S.C. §§ 1291-1297 to provide for distribution of the award. Ten percent of the award was to go to the Cherokee and Absentee Delaware organizations. The rest was to go to individual distributees. This time, however, the individual distributees were limited to the 1906 and 1940 rolls specified in §§ 1181-1186. By excluding the "catch-all" clause used in the 1968 legislation (or a similar one proposed in connection with this legislation) Congress excluded the Kansas Delawares from participation in the distribution. It appears that this result may not have been an actual desideratum of Congress. Rather a catch-all was eliminated at least primarily because distribution in connection with the 1968 legislation had been slowed by claims on behalf of Munsee Indians, who had split with the Delaware nation before 1818 but nonetheless had tried to claim under the §§ 1181-1186 catch-all.

3. Proceedings below:

(a) Relief Sought. Before turning to the procedural points, it will be useful to understand the relief sought by the plaintiffs below, the Kansas Delawares. (Legal theories will be discussed later, but they are constitutional.)

(1) The 1818 wrong. There is only one objection to §§ 1181-1186, which remedy the 1818 wrong - namely, that the Cherokee Delawares are not entitled to participate. (The premise is that the remedy is designed to make whole the Delaware Nation and that the Cherokee Delawares no longer are Delawares because they became Cherokees when they went to live in Oklahoma).

(2) The 1854 wrong. There are two complaints with respect to §§ 1291-1297, which remedy the 1854 wrong. First, the Kansas Delawares complain about their exclusion from the individual distributions. Second, they complain that the Cherokee Delawares and the Absentee Delawares are allowed to share in the award. (As to the Cherokees Delawares, the premise is again the Cherokee argument. As to the Absentee Delawares, the premise is that they were no longer part of the tribe in 1854, having become "absent.")

(b) The suit. Two actions were filed originally to obtain this relief. Plaintiff Weeks, representing the class of Kansas Delawares, filed in W.D. Okla. Plaintiffs Frazier and

Rattler, also representing the class of Kansas Delawares, filed in N.D. Okla. The cases were consolidated in W.D. Okla before a three-judge court, since declaratory and injunctive relief were sought against an Act of Congress. After the United States was dismissed as a party defendant, the defendants in the case included (1) the Secretary of the Interior and (2) individual members of the respective business committees of the Cherokee Delawares and Absentee Delawares as representatives of the respective classes of Cherokee Delawares and Absentee Delawares. *

* Originally the business committees were sued in their own right. But the court is no longer treating them as defendants, only as class representatives. Compare the remarks of the Dist. Ct. at juris. st. in No. 75-1301, at 4a-5a, 23a, and app. juris. st. in No. 75-1335, at 103-104 with juris. st. in No. 75-1328, at 7-8. It is possible also that the committee members are being sued in their individual capacities.

On the merits, the court upheld the constitutionality of §§ 1181-1186. * From that part of the judgment the plaintiffs below appeal. But the court invalidated §§ 1291-1297 in toto and enjoined the Secretary from distributing funds pursuant to them. From that judgment the defendants below appeal. We turn to the latter appeals first.

4. Nos. 75-1301 (Cherokee Delawares), 75-1335 (Absentee Delawares), and 75-1495 (S.G.).

Invalidation of §§ 1291-97 (1972)

The plaintiffs contended below that their exclusion from the §§ 1291-1297 individual distribution (a) violated "equal protection" principles of the Fifth Amendment and (b) deprived them of vested property rights without just compensation. (They supported these arguments by suggesting that the result had been inadvertent, stemming from concern over the Munsees.) The equal protection argument is that it is irrational not to include the Kansas Delawares in the §§ 1291-1297 distribution because that distribution is intended to remedy a historical wrong committed against a tribal group that included ancestors of the Kansas Delawares. The District

* It consequently dissolved a preliminary injunction against distribution under §§ 1181-1186.

Court accepted this argument, notwithstanding the subsequent resignation of those ancestors from the tribe. * The court held (1) that it was unconstitutional to exclude the Kansas Delawares, and (2) voided the entire statute because there was no separability clause. Juris st in No. 75-1301, at 50a, 63a -64a. The Secretary was enjoined from making any distribution pursuant to §§ 1291-1297.** The court rejected the Just Compensation argument, noting that Congress would not have been required to make any distribution. Juris. st. in No. 75-1301, at 61a.

The SG and the respective private defendants appeal. The primary contention of all three appellants is that the statute is rational in excluding the Kansas Delawares. Principal reliance is put on the fact that the Kansas Delawares have severed all ties with the Delaware Nation, while the Cherokee Delawares and the Absentee Delawares have retained tribal affiliations, citing Mancari, 417 U.S. 535. The appellants also emphasize the plenary control of Congress over Indian matters. Finally, it is argued that the absence of a "catch-all" clause is an aid to efficient administration of the distribution.

The principal response of the Kansas Delawares is

* Reveiw was under minimum scrutiny. See juris st. in No. 75-1301, at 28a-29a.

** Thus, the 10% distribution to the tribal organization also is blocked.

that the distribution statute does not focus on tribal relationship, unlike the Mancari situation. In support of this they note that individuals would be eligible under the Absentee-Delaware-roll test who do not have enough Indian blood to be members of the tribe. See Motion to Dismiss in No. 75-1301, at 3.

The private appellees have lots of other contentions in the juris statements in No. 75-1301, and No. 75-1335. To me the most significant seems to be that the court was not even entitled to examine the rationality of the statute because Indian affairs are political questions. See, e.g., Juris. st. in No. 75-1301, at 3. Also possibly significant is the contention that the class action device is a subterfuge allowing suit against Indian tribes that have not been authorized by Congress. See Juris st in No. 75-1335, at 5. * See id for a host of other contentions. For reasons that I don't understand the SG makes no such arguments, nor does he even address them in passing in his own Juris st. in No. 75-1495. ?

* As the three-judge court noted that there were no objections to the class action, see juris. st. in No. 75-1301, at 5a, this question may not be in the case unless it is "jurisdictional."

5. No. 75-1328 (Kansas Delawares). After holding that the exclusion of the Kansas Delawares from the §§ 1291-1297 distribution was unconstitutional, the three-judge court turned to the Kansas Delawares' contention that §§ 1291-1297 should not have included the Cherokee or Absentee Delawares * and that §§ 1181-1186 should ^{not} have included the Cherokee Delawares. As noted previously, supra at 6, the premise of the argument against the Cherokee Delawares is that they have become Cherokees, as opposed to Delawares; the premise of the argument against the Absentee Delawares is that they were "absent" in 1854. The legal theory relied upon in each instance is that it violated the equal protection component of the Fifth Amendment and/or the Just Compensation Clause to allow compensation to the Cherokees/Absentees because the irrational inclusions reduce the distribution to proper claimants - i.e., the Absentee and Kansas Delaware, as to the 1818 wrong and the Kansas Delawares alone as to the 1854 wrong.

The three judge court again refused any reliance on Just Compensation principles. Juris st in No. 75-1301, at 54a. It held that the Absentees were rationally included in the 1854 award despite their absence because the Delaware Nation still considered them part of the Nation then. See id. at 56a-59a. And the Cherokee Delawares were rationally included in both awards because they had retained their Delaware identity, although

* It should be remembered that §§ 1291-1297 were held unconstitutional in toto on the Kansas-Delawares exclusion point. Therefore the discussion of the constitutionality of including the Cherokee/ Absentee Delawares in §§ 1291-1297 was dictum intended to guide Congress in passing a new statute. See juris st in No. 75-1301, at 51a-52a & n. 42.

*Exclusion
of
Kansas
Dela.
in 1972
act held
* invalid.*

they had become Cherokees legally, and because their ancestors had been wronged. Id., at 52a-56a.

The plaintiffs below appeal, arguing the same points.

The SG has not been heard from. The Cherokee ^{and Absentee} Delawares move to affirm the portions of the decree favorable to them. Alternatively, the Absentee Delawares urge dismissal on the theories that (a) there was no subject matter jurisdiction for the court below to consider whether the distribution class was too wide (political question, plenary power of Congress), and (b) that the Absentee Tribe itself, not a defendant, was an indispensable party. (The theory may arise from the Tribe's right to 10% of the distribution.)

6. Discussion: (1) As to the holding that §§ 1291-1297 are unconstitutional, something obviously must be done. I wouldn't think that summary reversal would be desirable, though it might be warranted.

It does appear that the exclusion of the Kansas Delawares was inadvertent, and some of this Court's recent cases on the "rationality" requirement pose a problem to concluding that Congress was acting rationally if the "articulated reasons" manifest a mistake. It may be that principal reliance would have to be put on some other point if the case is to be reversed (e.g., plenary power over Indian affairs).

On the other hand, I am not sure that ^{the} Court needs

to Note ^(or Postpone) all three of these cases. (This is especially so in light of some of the junk in the juris st in No. 75-1335.) It seems to me that it might be best to Note only the SG's juris st, unless someone sees an affirmative reason to Note the others. (One such reason would be if the Court is interested in any question not raised explicitly in the SG's juris st— such as the "political question" notion.) *

(2.) As to the holdings unfavorable to the plaintiffs below, I doubt that the Court will be interested in overturning on the merits. While there may be jurisdictional questions, there is no need to reach them when the answer on the merits is clear. It therefore seems nothing would be gained by Noting ^(or Postponing) But the appellees may be entitled to argue these grounds in support of the judgment in Nos. 75-1301, 75-1335, and 75-1495. That is, they could argue that §§ 1291-1297

* In this general connection, it is not clear to me why the suits below could not have been solely against the Secretary of the Interior. But Weeks sued the private defendants as well, and the private defendants were allowed to intervene in the suit by Frazier and Rattler. Possibly the Secretary is viewed as a "stakeholder" of the awards made by the Commission. See juris st in No. 75-1335, at app. 102.

14.

are unconstitutional both because they exclude the Kansas
Delawares and because they include the Cherokee/Absentee
Delawares. Since the arguments might crop up anyway, it might
be just as well to Note ^{or Postpone} No. 75-1328.

There are motions to Dismiss or Affirm in Nos.
75-1301, 75-1335, 75-1495, and a reply in No. 75-1301.

There is a Motion to Affirm in Part and a Motion
to Dismiss or Affirm in No. 75-1328 from the respective private
parties. *There is no response from the SG.*

May 26, 1976

Schenker

Op in juris sts. in
Nos. 75-1301, 75-1328 and
75-1335.

PRELIMINARY MEMORANDUM

June 3, 1976 Conference

List 1, Sheet 1

No. 75-1328

WEEKS

v.

KLEPPE [Sec'y of Int], et al

Appeal to WD Okla (3 judge ct)
(CJ Holloway, DJ Eubanks;
DJ Daugherty - dissenting)

Federal/Civil

Timely

Please see the memo in No. 75-1301. This is a cross appeal from Nos. 75-1301, 75-1335, 75-1495, at least one of which will probably be Noted.

May 25, 1976

Schenker

PRELIMINARY MEMORANDUM

June 3, 1976 Conference

List 1, Sheet 1

No. 75-1335

ABSENTEE DELAWARE TRIBE OF
OKLA BUSINESS COMM et al

v.

WEEKS

Appeal to WD Okla (3 judge ct)
(CJ Holloway, DJ Eubanks;
DJ Daugherty - dissenting)

Federal/Civil

Timely

Please see the memo in No. 75-1301. The issue is
a likely note.

May 26, 1976

Schenker

PRELIMINARY MEMORANDUM

June 3, 1976 Conference

List 1, Sheet 1

No. 75-1495

KLEPPE [Sec'y. of Int]

v.

WEEKS

Appeal to WD Okla
(3-judge court) (CJ Holloway, DJ
Eubanks; DJ Daugherty -
dissenting)

Federal/Civil

Timely

Please see the memo in No. 75-1301. The issue is
a likely Note.

May 24, 1976

Schenker

Conference 6-3-76

Court ..USDC, W.D. Okla.
 Argued, 19...
 Submitted, 19...

Voted on, 19...
 Assigned, 19...
 Announced, 19...

No. 75-1301
 (Vide 75-1328,
 75-1335) +

75-1495

DELAWARE TRIBAL BUSINESS COMMITTEE, ET AL., Appellants

vs.

WANDA JUNE WEEKS

3/12/76 - Appeal

*Relinquish
 say DC's decision
 is "outrageous"*

*Noted
 (Hold
 for
 Stevens)*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.				✓	✓								
Rehnquist, J.				✓				✓					
Powell, J.				✓									
Blackmun, J.				✓									
Marshall, J.				✓									
White, J.													
Stewart, J.													
Brennan, J.													
Burger, Ch. J.													

*Note 1301
 Note 1301*

Summarily

Conference 6-3-76

Court USDC, W.D. Okla.

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 75-1328

Submitted, 19...

Announced, 19...

(Vide 75-1301, 75-1335)

WANDA JUNE WEEKS, ET AL., Appellants

vs.

THOMAS J. KLEPPE, SECRETARY OF INTERIOR, ET AL.

3/15/76 - Appeal

Hold for 1301 & 1335

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.	✓												
Rehnquist, J.								✓					
Powell, J.	✓												
Blackmun, J.								✓					
Marshall, J.				✓									
White, J.	✓			✓									
Stewart, J.	✓												
Brennan, J.				✓									
Burger, Ch. J.	✓												

for 75-1335

Conference 6-3-76

Court USDC, W.D. Okla.

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 75-1335

Submitted, 19...

Announced, 19...

(Vide 75-1301 & 75-1328)

ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE, ET AL., Appellants

vs.

WANDA JUNE WEEKS, ET AL.

3/16/76 - Appeal

There are lots of chaff in it
Qs 1, 4 & 9 seem most imp. of the eleven Qs.

Noted limited to Qs 1, 4 & 9 Consolidate with 75-1301

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.				✓									
Rehnquist, J.				✓									
Powell, J.				✓									
Blackmun, J.				✓									
Marshall, J.				✓									
White, J.				✓									
Stewart, J.				✓									
Brennan, J.													
Burger, Ch. J.				✓									

limited to Q 1, 4 & 9

across Board

limited to Q 1, 4 & 9

Conference 6-10-76

Court
 Argued, 19...
 Submitted, 19...

Voted on, 19...
 Assigned, 19...
 Announced, 19...

No. 75-1301

Delaware Tribal Business Committee
 vs.
 Weeks

Note
~~Invite~~ Invite
 counsel
 to address
 particularly
 Qs 1, 4 + 9

HOLD FOR	CERT.		JURISDICTIONAL STATEMENT					MERITS		MOTION		ABSENT	NOT VOTING
	G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Stevens, J.													
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Burger, Ch. J.													

Same vote
 on 6/3/76

CONFERENCE 6-10-76

Court
Argued, 19...
Submitted, 19...

Voted on....., 19...
Assigned, 19...
Announced, 19...

No. 75-133

Absentee Delaware Tribe of Okla.
Business - Committee
U.
Weeks

Consolidate
with
75-1301
~~75-1495~~
75-1495

Note
Just
counsel
to address
Qs 1, 4 & 9

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT					MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Stevens, J.														
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Burger, Ch. J.														

Same
vote
on 75-1301

Conference 6-10-76

Court
Argued, 19...
Submitted, 19...

Voted on....., 19...
Assigned, 19...
Announced, 19...

No. 75-1495

J. Leppa
vs.
Weeks

Note

Consolidate
with 1301 and
1335

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....													
Stevens, J.													
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Burger, Ch. J.													

Same
vote

October 21, 1976

No. 75-1301 Delaware Tribal Business
Committee v. Weeks
No. 75-1335 Absentee Delaware Tribe of Okla.
v. Weeks
No. 75-1495 Kleppe v. Weeks

These three Indian cases are here on appeals from a three-judge court in Oklahoma, where they were consolidated and disposed of in a single opinion that is easiest to read in the jurisdictional statement (blue cover) in 75-1301.

The cases are consolidated for argument the second week in November.

The cases involve two federal statutes, 25 U.S.C.A. §§ 1181-1186 (1968) and 25 U.S.C. §§ 1291-1297 (1972). In both statutes, Congress undertook to determine the proper distribution of awards of an Indian Claims Commission - awards purporting to redress wrongs under treaties of 1818 and 1854 with the Delaware Indian tribe.

The Delawares have fractionated, and three separate classes or groups are involved in this litigation (i) The Cherokee Delawares, composed of the main body that moved from Kansas and relocated in Oklahoma under the 1866 treaty; (ii) the Kansas Delawares, a small group of individuals who elected - as they had a right to do under the 1866 treaty - to sever their ties with the tribe, ^{to} remain in Kansas and become U.S. citizens; and (iii) the absentee Delawares,

a fragment of the tribe that parted company with it prior to 1866 and apparently lives somewhere in Oklahoma.

The three-judge court held §§ 1291-1297 unconstitutional, but sustained §§1181-1186. There are appeals and cross appeals.

These cases are too complex for a brief memorandum. Nor have I studied them sufficiently even to have a tentative view, beyond the usual presumption of validity of Congressional action with respect to Indians.

Carl Schenker's cert memo is a good starting point. I can use it as a brief summary of the relevant facts.

I would like for my clerk to give me a summary memorandum that, with respect to each of the three Delaware groups, identifies their claims, the disposition thereof by the three-judge court, and - quite briefly - the principal arguments for and against that Court's disposition of these cases.

Then pray they are not assigned to us to write!


L.F.P., Jr.

TO: JUSTICE POWELL
FROM: Gene Comey
RE: The Delaware Indians Case

BOBTAIL BENCH MEMO

Your aid-to-memory memorandum in this case asks for a summary bench memo that identifies the claims of the various tribal groups, the disposition of the claims by the DC, and the principal arguments for and against the DC's disposition of the case. Before turning to that task, however, it is necessary to set forth the historical background of this issue. And rather than repeating the SG's precise statement of the facts, I suggest that you reread ^(pages) 3 through 6 of the SG's brief ^(xeroxed and attached to this memo) before reading this bench memo. Moreover, since the ^{fragmentation} number of tribal groups and their ^{movement} transfers from state to state gets a bit complicated, I have prepared what Judge Leventhal would no doubt call a "road map" of the facts; it is my hope that after reading the SG's statement of the case and examining the attached ⁱⁿ "road map", the facts will appear crystal clear. If they do not, at least I'll know that I don't have a career in the "chart" business. !

I. ^RBACKGROUND OF THE STATUTE AT ISSUE

The various treaties between the United States and the Delaware Indians have produced a number of lawsuits ^{propm} prompting Congress to Congress to appropriate money to remedy wrongs committed by the federal government. Although only the most recent Congressional enactment is at issue in this case case, you will find it helpful to be aware of two prior monetary distributions based on Indian claims against the United States.

Two
million
dollar
distribution
↓

(A) The 1904 Distribution: On April 21, 1904, Congress appropriated \$150,000 to settle various claims against the United States by the "Delaware Tribe of Indians," including the so-called "outlet lands" that had been ceded to the United States in under the 1854 treaty. The appropriations act directed the Treasury Secretary to pay the settlement fund to the Delaware Tribe, "as said tribe shall in council direct." As the attached road map indicates, at the time of the "wrong"--the 1854 treaty--the ancestors of the "Kansas Delawares" were still members of the Delaware tribe; but at the time of the distribution--the 1904 appropriations act--the Kansas^a Delawares had severed their tribal relations and become citizens of the United States. The Kansas Delawares nevertheless sought to participate in the \$150,000 settlement, but they were excluded. The Comptroller of the Secretary noted that the appropriation was to the tribe, and that the tribe was to direct its distribution. Since the Kansas Delawares had ~~ss~~ severed their relations with the tribe, they could not insist on participation.

(B) The 1968 Distribution: In 1951, members of the Absentee Delaware Tribe filed suit in the Indian Claims Commission on behalf of the Indian Delaware Nation to challenge as inadequate the compensation received under the 1818 Treaty [see attached road map]. In 1963 the Commission found that the value of the Indiana lands ceded to the government in 1818 was greatly in excess of the value of the Kansas lands received by the Delawares in return in 1829, and awarded over one and a half million ~~dola~~ dollars to the Delaware Nation. In 1968 Congress order^{ed} the Secretary of the Interior to distribute funds (previously appropriated) to satisfy the judgment entered by the Indian Claims Commission. The statutory distribution ~~scj~~ scheme is

(also xeroxed and attached)

set forth in 25 U.S.C. 1181, which is reprinted at page 7 of the SG's brief. Rather than repeat the technical terms here, suffice it to say that the Cherokee Delawares were able to participate through one provision, the Absentee Delawares were able to participate through a second provision, and the Kansas Delawares were able to participate through a third provision (referred to in the SG's brief as the "catchall" provision). The major difference between this distribution statute and the distribution scheme under the 1904 appropriations act is that in 1968 Congress directed payment to individuals who could meet certain qualifications, whereas the 1904 settlement was paid to the tribe and in the manner in which "said tribe shall in council direct." The Kansas Delawares did not participate in the 1904 distribution based on the 1854 wrong; the Kansas Delawares did participate in the 1968 distribution based on the 1829 wrong.

All three participated under § 1181 (1968)

(C) The 1972 Distribution:

In 1950 and 1951, the Absentee Delawares and the Cherokee Delawares brought separate but identical suits in the Indian Claims Commission for an accounting under the 1854 treaty relating to the sale of "trust lands" in 1856 and 1857. The Commission concluded that the trust lands had been sold privately rather than at a public auction, as required by the treaty, and awarded the Delawares over nine million dollars, which included interest from 1857 to 1969. Three years later, in 1972, Congress adopted a distribution plan for payment of that judgment; this 1972 distribution plan differed from the distribution plan (25 U.S.C. 1181, supra) set forth for the 1968 appropriation. Under this 1972 plan, ten percent of the award was to be paid directly to the Cherokee and Delaware Tribes for uses approved by the Secretary of the

These are presently involved

Interior, and the remaining ninety percent was to be distributed according to the first two provisions described above for the 1968 distribution plan--i.e., the ~~prob~~ provisions directing payment of money to the [↑]descendants of the Cherokee Delawares and the Absentee Delawares. Congress did not include the "catchall" provision in this 1972 distribution plan, and thus the Kansas ~~Delawares~~ Delawares were not permitted to participate in this second award.

II. THE LITIGATION BELOW

In 1973, Wanda June Weeks, on behalf of herself and the Kansas Delawares, instituted an action in USDC against the Secretary of the Interior and the Cherokee and Absentee Delawares challenging the constitutionality of both the 1968 distribution plan (25 U.S.C. 1181) and the 1972 distribution plan (25 U.S.C. 1292). Approximately one month after Weeks instuted her action, Dorothy Frazier and Ruth Rattler brought a similar action against the Secretary of the ~~INTerior~~ Interior in another DC on behalf of ~~the~~ ~~in~~ ~~members~~ ~~of~~ ~~the~~ ~~Delaware~~ ~~Tribe~~ ~~the~~ descendants of certain members of the Delaware Tribe of 19 1854 who were not eligible under the 1972 distribution plan. The Cherokee and Absentee Delawares intervened in this action as defendants. The two actions were eventually consolidated in the USDC for the WD of Oklahoma.

Holding 4/30/74

The three-judge DC ruled that the 1972 ~~distributi~~ ^{voided} ~~distributi~~ distribution scheme (25 U.S.C. 1291-1297) violated due process by arbitrarily deleting the Kansas Delawares, whose ancestors were among the Indians injured by the government's breach of the 1854 treaty. The Court rejected the plaintiffs' attack on the constitutionality of the 1968 distribution scheme (25 U.S.C. 1181-1186). — *sustained*

75-1328 (suit by Kansas
Delawares is not consolidated)

The Kansas Delawares have sought review of the decision of the DC upholding the constitutionality of the 1968 distribution scheme. That case, No. 75-1328, has not been consolidated with the instant cases for consideration at the November sitting. Thus, the constitutionality of the 1968 distribution scheme is not at issue in these cases.

The Secretary of the Interior (No. 75-1495), the Cherokee Delawares (No. 75-1301), and the Absentee Delawares (No. 75-1335) all seek review of the decision of the DC holding the 1972 distribution scheme unconstitutional due to its failure to include the Kansas Kansas Delawares.

III. THE "CLAIMS" OF THE THREE DELAWARE GROUPS

The issue in this case is simply who is to share in the funds appropriated by Congress for the breach of the 1854 treaty. The 1972 statutory distribution scheme will result in monies being paid to the Delaware Tribe (10%), and to individuals (90%) in the Cherokee Delaware Tribe and the Absentee Delaware Tribe. The Kansas Delawares claim that they too are must be permitted to share in the award since their ancestors were among the Indians injured in 1854; the Cherokee and Absentee Delawares, recognizing that an increase in the number of individuals participating in the award will decrease the pro rata share of each individual, contend that Congress did not act arbitrarily in excluding the Kansas Delawares.



IV. ARGUMENTS FOR AND AGAINST THE DC'S DISPOSITION OF THE CASE

On the merits, the case presents two issues: first, ^{does} the 1972 statutory distribution scheme violate the due process clause of the Fifth Amendment because it arbitrarily excludes the Kansas Delawares; and second, does the 1972 statutory distribution scheme constitute an uncompensated taking in violation of the just compensation clause of the Fifth Amendment in that the interest of the Kansas Delawares in the tribal trust fund became an individualized property interest in 1866 when they resigned from the tribe. There are a number of other issues in the case, and the major ones are discussed below. My own view is that there is absolutely nothing to the just compensation claim, as I explain below, and that the only important "real" issue in the case is the "eqi" "equal protection" claim. For that reason, most of my discussion will center on that latter issue.

(A) The Political Question Issue: Both the

The claim by the Kansas Delawares that their omission from the 1972 distribution was discriminatory & violative of E/P



SG
thinks
claims
are
justiciable

Absentee Delawares and the Cherokee Delawares contend that the instant controversy is nonjusticiable, and that as a result this Court should vacate the judgment entered by the DC. It is worth noting that the SG does not make the "political question" argument, and he suggests instead that claims such as those here presented are justiciable.

See Brief for the SG at 19 n.19. I think the SG is quite right.

This Court has on prior occasions entertained suits alleging that governmental action against Indians constituted a taking of property without just compensation, which is one of the claims pressed in the instant case. See, e.g., United States v. Jim, 409 U.S. 80. The power of Congress to control and manage Indian property is not absolute, and is subject to pertinent constitutional restrictions. United States v. Creek Nation, 295 U.S. at 109-110. Indians are the beneficiaries of the Due Process Clause of the Fifth Amendment, just as they are beneficiaries of the Just Compensation Clause of that amendment. And although some action taken by the government with respect to Indians--for example, whether or not to recognize a tribe--may involve a "political question," the instant case presents a justiciable controversy.

(B) The Tribal Immunity Issue: The Absentee Delawares also contend that the the Absentee Delaware Tribe and its governing body are immune from suit and that the case should therefore have been dismissed by the District Court. *But* the Absentee Delawares recognize that the normal approach to tribal immunity may have no bearing on the ~~suit~~ instant case since both the Absentee Delaware Tribal ~~C~~ Business Committee and the Business Committee for the Cherokee Delawares intervened ~~in~~ as defendants in the ~~Frazier~~ ^{Frazier} action below. The SG contends, in my view correctly, that the ~~intervention of~~ ^{intervention of} voluntary intervention of the both the Absentee and Cherokee Delawares in the Frazier action ~~removes~~ ^{renews} the tribal immunity issue from this case. The tribes consented to suit by voluntarily intervening as defendants, and the Court should not now entertain their claim of tribal immunity.

(C) The Just Compensation Issue: The Kansas Delawares ^{renew} their contention, raised below, that the statutory distribution scheme constitutes an uncompensated taking of property in violation of the Fifth Amendment. There is simply nothing to this argument. It is well-settled that tribal property does not vest in an individual until final distribution. Upon leaving the tribe in 1866, the Kansas Delawares had no "vested property" rights which could be the subject of a just compensation claim. See, e.g., United States v. Jim, 409 U.S. 80; Cherokee Nation v. Hitchcock, 187 U.S. 294, 307.

(D) The Equal Protection Issue: As I mentioned above, this is really the heart of the case. The question is whether Congress acted arbitrarily in distributing funds to the Cherokee and Absentee Delawares

Tribal immunity issue out of case

while excluding the Kansas Delawares. I proceed to deal with that issue as follows. First, I will summarize the various contentions offered by the appellants (including the SG) in favor of the statute's rationality; second, I will summarize the arguments offered by the appellees as to why the statute is irrational and arbitrary; and finally, I will offer my own view of the relative merits of the parties.

(1) REASONS ADVANCED IN FAVOR OF THE STATUTE'S CONSTITUTIONALITY

-----The test to be applied to this equal protection challenge involves determining whether the statute is "patently arbitrary" and "utterly lacking in rational justification."

-----There is a "rational" justification for Congress's failure to include the Kansas Delawares. The funds at issue were appropriated to satisfy a judgment in favor of the Delaware Tribe, and the Kansas ~~Delawares~~ are no longer members of the tribe. It is rational to exclude from the distribution those whose ancestors relinquished any interest in tribal property.

-----There is precedent for excluding the Kansas Delawares from distributions made to remedy prior wrongs. For example, the 1904 distribution, discussed supra, awarded \$150,000 to the Delaware Tribe, and the Kansas Delawares were not permitted to participate in the Tribe's distribution of that fund.

-----Even aside from the fact that their ancestors left the tribe in 1866, there is a rational justification for the exclusion of the Kansas Delawares. Congress rationally acted "to further the legitimate legislative objective of mitigating the hardship to Indians who belong to federally-recognized tribes." Congress has repeatedly favored tribal members in ways that might not be appropriate with

respect to other groups. See, e.g. Morton v. Mancari, 417 U.S. at 552. The distribution reflects this rational distinction between Indians who are presently members of federally-recognized tribes and those whose only connection with the tribe is historical.

-----The fact that the tribes have no formal reservation is not important. The question is whether the federal government has recognized a responsibility toward these people as a group through recognition of their tribe.

-----The statute is not irrational simply because those eligible for distribution receipt of funds of the under the 1972 distribution scheme do not correspond precisely to the membership of the Absentee and Cherokee Delaware Tribes. Absentee Delaware Tribe membership is limited to those with one-eighth Delaware blood, whereas the statute contains no similar limitation on one's eligibility for receipt of funds. And Indians whose name, or name of whose lineal ancestors, is on (or, in the case of the Absentee Delawares, is eligible to be on) certain designated tribal rolls are entitled to share in the distribution even though they may have withdrawn from the tribe. This is not irrational, since Congress has authority to specify which classes of individuals bearing a reasonable relationship to the tribe may be treated as tribal members for purposes of the allocation of tribal property. Sizemore v. Brady, 235 U.S. at 447. Classifications need not be drawn with mathematical precision. And it would be costly to require case-by-case inquiry rather than reliance on the tribal rolls.

-----Even recognizing that Congress was primarily concerned with excluding a group known as the "Munsees" from participation, and even assuming that Congress did not know the identity of every group of individuals (such as the Kansas Delawares) who would be excluded from participation in the fund) ^{through deletion of the catch-all provision,} Congress nevertheless decided to distribute the judgment based SOLELY on the basis of an applicant's ability to trace his descendancy to a member of the Delaware Tribe as it existed on a certain date.

-----Moreover, Congress was concerned with the delay that had resulted from the prior distribution scheme in 1968, and an intent to avoid this delay was undoubtedly a factor that contributed to the congressional decision to allocate the funds with respect to two existing federally-recognized tribes.

-----Relief from what the DC considered to be mere legislative oversight must come from Congress and not the courts.

(2) REASONS ADVANCED AGAINST THE STATUTE'S CONSTITUTIONALITY

you -----Classifications resulting in differential treatment to similarly situated groups must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation.

-----Since the ancestors of the Kansas Delawares were members of the tribe at the time of the wrong, the question is whether subsequent events offer a rationale to support the discriminatory treatment.

-----One asserted subsequent event is that the ancestors of the Kansas Delawares resigned from the tribe in 1866. When the ancestors left the tribe, a condition of their resignation was a

pro rata share of the tribal assets. It is irrational to offer as a ground from their ground for ec excluding the Kansas Delawares from a pro rata share of the judgment the fact that their ancestors resigned from the tribe on the condition that they receive such a pro rata share.

-----The fact that the Kansas Delawares were not included in the 1904 distribution is not controlling here. That distribution went to the tribe under the terms of the appropriation act. Here, Congress seeks to compensate individuals for a wrong which was suffered when their ancestors were members of the tribe, and the fact that the intervening ancestors of the Kansas Delawares subsequently left the tribe does not warrant differential treatment in light of that purpose.

-----There will be no administrative difficulty in including the Kansas Delawares. The names of the lineal ancestors of the Kansas Delawares are on an official role filed with the Commissioner of Indian Affairs pursuant to the 1866 treaty by which the ancestors left the tribe. Moreover, the roll for payment of the 1968 distribution, which included the Kansas Delawares, is readily available and need only be reopened and updated. And to the extent that there is some administrative burden, it is too slight to justify this differential treatment.

-----There is no truth to the contention that the result would have been the same if the Congress had distributed the funds to the tribes and the tribes in turn distributed the funds to their members members. The Kansas Delawares were recognized as and were participating as members of the Delaware Tribe of Indians and would have received received a pro rata share under such a shc scheme. [I can't tell

for sure whether this allegation is accurate, nor can I understand how it can be. It is definitely worth a question at oral argument.]
-----The challenged distribution scheme does not have any statutory requirement that the individuals to be included on the payment roll have any connection with the modern day tribes.



DISCUSSION

With respect to the merits of the equal protection claim, I think the arguments pressed by the SG and the tribal committees are very thin. The purpose of this statute was to remedy a wrong that the government had committed some 100 or so years ago, and the purpose was to be achieved by compensating individuals who could prove that their lineal ancestors were members of the tribe at the time the wrong was committed. Compensation will go to such eligible individuals even if they have withdrawn from the tribe, and even if they are ineligible to be tribe members. But compensation will not be available for the descendants of the Kansas Delawares, and the only real justification I can find for that distinction in treatment is that the ancestors of the Kansas Delawares left the tribe after the wrong had been committed. But why should that matter in terms of the rational basis test when individuals can qualify simply by showing descendency from Cherokee or Absentee Delawares, even though such individuals themselves have no connection with the tribe? Moreover, four years prior to this ^{distribution} distribution scheme Congress passed another distribution scheme that included the Kansas Delawares under the "catchall" provision.

And I don't see much of an administrative convenience argument here either. A roll of "Kansas Delawares (69 in number) was prepared when they left the tribe in 19 1866, and that roll is currently available. And a roll was prepared for purpose purposes of the "catchall" provision of the 1968 distribution statute, and the latter roll need only be reopened and updated.

But even though I don't see much of a rational basis in this scheme, I would be surprised if the Court were willing to find the statute unconstitutional. The reason for this is historical: the Court seems to have always given great deference to congressional judgments in the Indian area. You will note that the SG has an entire section of his brief entitled: "Congress has plenary power under the Constitution to Manage and Distribute the property and funds of Indian tribes". And it is the SG's contention that once a court finds that the legislation "can be tied rationally to the fulfillment of Congress' unique obligation to the ful toward the Indians," [citing Morton v. Mancari, 417 U.S. 551-552], the judicial inquiry is at an end. He makes this argument separate and independent from the usual rational basis inquiry with respect to equal protection claims.

True

I find the SG's plenary power argument unsatisfactory on an intellectual basis. Is Congress's plenary power with respect to Indians any more "plenary" than Congress's power with respect to interstate commerce? Isn't the SG really suggesting that there is a special rule for Indian matters: if it looks even vaguely rational, don't upset the congressional judgment.

Although I would reject the SG's presentation if I were writing on a clean slate, I think he knows full well that historically the Court has been willing to give great deference to Congress in these Indian matters, and when you have a hard case to win on normal equal protection analysis, it doesn't hurt to remind the Court of this historical tradition.

9 agree

As a concluding note, it is worth realizing that the judgment constitutes approximately nine million dollars. If the fund is distributed solely among the Cherokee and Absentee Delawares, who total some 9000 individuals, the per capita distribution will be about \$1000. And there are approximately 700 Kansas ~~Delawares~~ Delawares who seek to participate in the award. As a ~~rs~~ result, even if the Court affirms the judgment of the DC and requires in effect Congress to include the Kansas Delawares, the per capita distribution will not change by much.* Given the relatively modest sums involved, and the absence of any novel questions of constitutional importance or statutory construction, what is this case doing here?*

* From \$1000 to \$930.

* I'm afraid
none of us
understood

Fifth Amendment:

No person shall be * * * deprived of * * *
property, without due process of law * * *.

The Act of October 3, 1972, 86 Stat. 762 *et seq.*,
25 U.S.C. (Supp. IV) 1291-1297, is set forth at J.S.
App. 94a-97a.

STATEMENT

1. The Delaware Indians originally lived on the east coast of what is now the United States but, by the second decade of the 19th century, they were geographically scattered.² Although the main branch of the tribe lived in Indiana and Ohio, some members (the Munsee Indians) resided in New York and Canada, while others lived on a tract of land in Missouri that had been granted by Spain in 1793, and still others were located in Texas, Arkansas, and Oklahoma. In the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana to the United States in return for a promise of land west of the Mississippi River. The Delawares then moved to the Missouri tract, where they remained until 1829 (J.S. App. 6a-7a).

Treaty
1818

In September 1829, the Delawares signed another treaty with the United States, supplementing the 1818 Treaty, in which they agreed to give up their tem-

Treaty
1829

² A more extensive discussion of the historical facts outlined in this statement may be found in S. Rep. No. 1518, 90th Cong., 2d Sess. 7-11 (1968), and the opinion of the Court of Claims in *Delaware Tribe of Indians v. United States*, 128 F. Supp. 391 (Ct. Cl.).

Absentee Indians
(Okla) remain a
recognized Tribe

porary residence in Missouri and to move to a permanent residence in Kansas. 7 Stat. 327. These Kansas lands purported to satisfy the federal government's obligation under the 1818 Treaty to provide the Delawares with a home west of the Mississippi. Although most of the Delawares moved to the land assigned them in Kansas, a substantial group (the Absentee Delawares) settled in Oklahoma, where they have maintained their tribal identity, with chiefs and a tribal council, to the present day (J.S. App. 7a-8a). The Absentee Delawares constitute a federally-recognized tribe.*

In 1854, the nucleus of the Delaware Tribe, then living in Kansas, entered into a treaty with the United States in which it ceded most of its lands to the federal government (10 Stat. 1048; J.S. App. 98a-106a). Part of this territory was reserved for the Delawares as a permanent home (the "diminished reserve"), while the bulk of the remainder (the "trust lands") was to be sold by the government at public auction with the proceeds going to the Delaware general tribal fund. In 1856 and 1857, however, the United States violated the terms of the treaty by selling the trust lands, not by public auction, but by private sales at appraised prices. As a result, the Delawares received \$1,057,898.19, which was far less than they would have obtained had a public auction been held (J.S. App. 8a; 21 Ind. Cl. Comm. 344, 366).

Treaty
1854

U.S.
violated
the Treaty

Delawares
was
cheated

* The Absentee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1335, which has been consolidated with this appeal.

In 1866, the Delawares entered into another treaty with the United States in which they agreed to move to Indian Country in Oklahoma (14 Stat. 793; J.S. App. 107a-118a). Under this treaty, the diminished reserve was to be sold and the proceeds used to buy 160-acre tracts of land in Oklahoma for each tribal member. In addition, all adult Delawares were to be given the opportunity either to remove to Oklahoma with the tribe or, instead, to dissolve all tribal relations and to become citizens of the United States. Each Delaware who chose to leave the tribe was to receive fee simple title to an 80-acre plot in the reserved Kansas lands and a *pro rata* portion of the tribal assets "then held in trust by the United States" (J.S. App. 9a, 76a). Article IX of the treaty further provided that Indians electing to become citizens of the United States "shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities" (14 Stat. 796; J.S. App. 77a).

Appellees, who sued as representatives of the so-called "Kansas 'Delawares,'" are the descendants of those Indians who severed all relations with the Delaware Tribe in 1866, ~~to~~ receive their proportionate share of the tribal assets, and ~~to~~ remain in Kansas as American citizens (J.S. App. 9a-10a).⁴

⁴ A total of 21 adults and 49 minors remained in Kansas. Under Article IX of the 1866 Treaty, the minor children of the Kansas "Delawares" were to be considered temporarily severed from the tribe until they became 21 years' old, at which point they could elect either to become citizens of the United States or to rejoin the tribe in Oklahoma. By Act of

Treaty
1866

Reserve
Delawares

Descendants
of Delawares
who severed
relations
with tribe
in 1866

By 1867 most of the Delawares had moved to Oklahoma. Pursuant to an agreement with the Cherokee Tribe, each Delaware who enrolled upon a certain register received a life estate of 160 acres of land on the Cherokee reservation. See generally *Delaware Indians v. Cherokee Nation*, 193 U.S. 127. Although these Indians became members and citizens of the Cherokee Nation, they retained a group identity as Delawares (J.S. App. 10a-11a & n. 12). Their descendants are the Cherokee Delawares, a federally-recognized tribe.⁵

2. In 1951 members of the Absentee Delaware Tribe filed suit in the Indian Claims Commission on behalf of the Delaware Nation to challenge as inadequate the compensation received under the 1818 Treaty. In 1963, the Commission found that the value of the Indiana lands ceded to the United States in 1818 was greatly in excess of the value of the Kansas lands received by the Delawares in return in 1829, and awarded \$1,627,244.64 to the Delaware Nation (J.S. App. 12a). 12 Ind. Cl. Comm. 404. Five years later, in the Act of September 21, 1968, 82 Stat. 861

June 22, 1874, 18 Stat. 146, 175, however, Congress declared the minors to be citizens of the United States, appropriated funds to pay them a proportionate share of the assets of the Delaware Tribe, and directed the Secretary of the Interior to issue fee simple title to lands allotted to them in the 1866 Treaty (J.S. App. 11a-12a).

⁵ The Cherokee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1301, which has been consolidated with this appeal. The formal name of this tribe is the "Delaware Tribe of Indians."

~~et seq., 25 U.S.C. 1181-1186, Congress ordered the Secretary of the Interior to distribute funds previously appropriated to satisfy the judgment to the following (25 U.S.C. 1181; J.S. App. 92a):~~

(a) Indians whose "name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906";⁶

(b) Indians whose "name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior";⁷ or

(c) Indians who "are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary."

~~Thus, the Cherokee Delawares (through the first provision), the Absentee Delawares (through the second provision), and the Kansas "Delawares" (through~~

⁶ The 1906 payroll was compiled for the purpose of distributing \$150,000 appropriated by Congress in settlement of a number of lawsuits brought by the Cherokee Delawares against the United States. See Act of April 21, 1904, 33 Stat. 189, 222. (J.S. App. 14a, n. 15.)

⁷ The 1940 census roll is used by the Absentee Delawares as the basis for determining tribal membership pursuant to a 1956 resolution of the Absentee Delaware Tribe (J.S. App. 14a, n. 15).

DELAWARE INDIANS
(Prior to 1818)

(Others)

Missouri

Texas

Arkansas

Oklahoma

(Munsee Indians)

New York

Canada

(Main Branch)

OHIO

INDIANA

MISSOURI

(nucleus of tribe)

KANSAS

Gov't sells out

1818 TREATY of St Mary's Delaware cede land in Indiana for promise of land west of Mississippi. Delaware moved to Missouri as temporary residence.

1829 Supplemental Treaty. Delaware give up temporary residence in Missouri, and move to a permanent home in KANSAS in satisfaction of gov't's promise of 1818. The nucleus of the tribe moved to KANSAS.

But a substantial portion moved to Oklahoma and retained their tribal identity. These are the Absentee Delawares.

1854 The nucleus of the tribe living in KANSAS cedes most of its lands to the fed.

1854 The nucleus of the tribe living in KANSAS cedes most of its lands to the fed. gov't. Part of the land was to be reserved as a permanent home for the Delawares (the diminished reserve). Part was to be sold at public auction with proceeds going to Delaware general tribal trust fund.

Gov't sells bulk of the Kansas Indian lands with proceeds to Delaware tribal trust funds

1866 Delawares enter into another treaty with U.S. Delawares agree to move to Indian country in Oklahoma; the diminished reserve is to be sold, and proceeds used to buy land (160 acres) in Oklahoma for each tribal member. All adult Delawares given OPTION: ① Move to Oklahoma with tribe, or ② dissolve all relations with tribe, become U.S. citizens, receive 80 acre plot in Kansas from the diminished reserve, and a pro rata portion of tribal assets "then held in trust by the U.S."

The Indians who remained in Kansas are referred to as the "Kansas Delawares" even though they severed all relations with the tribe. Appellees here, plaintiffs below, sued as representatives of the "Kansas Delawares".

The Indians who moved to Oklahoma became members and citizens of the Cherokee nation, but retained a group identity as Delawares. They are referred to as the Cherokee Delawares.

KANSAS
The "Kansas Delawares"

Oklahoma

15

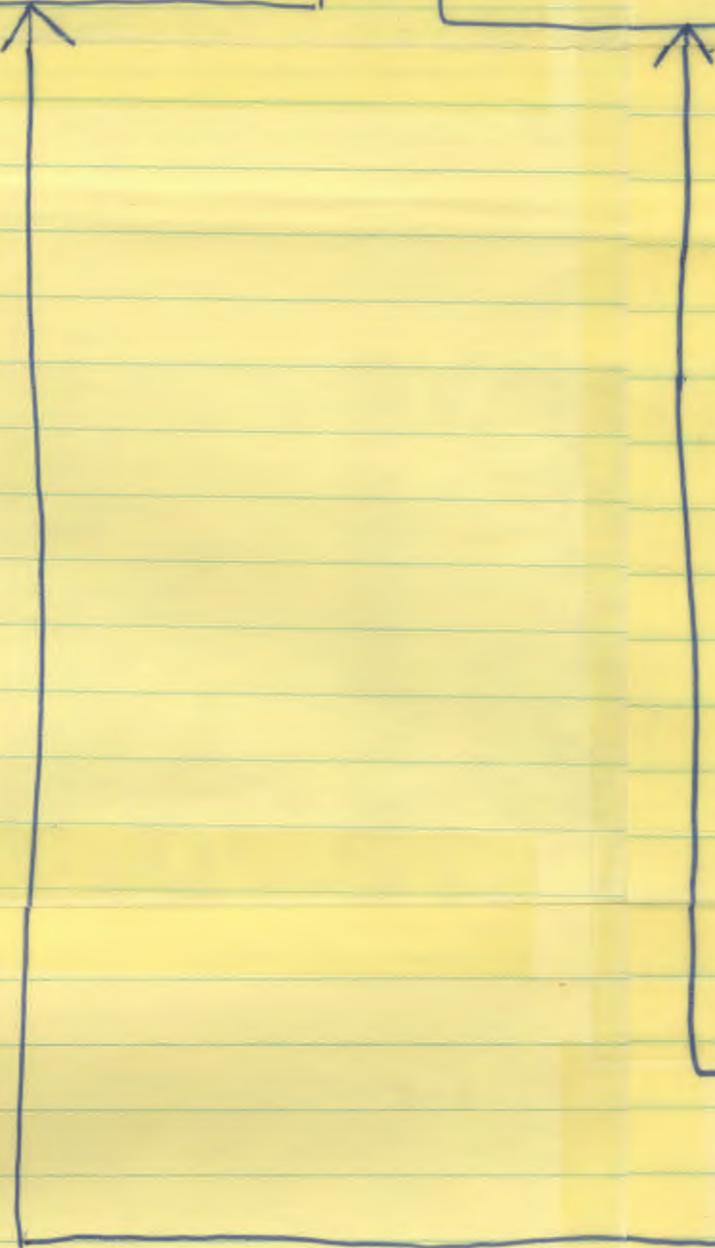
The "Absconding
Debtors" *

(Munsee Indians)
New York
Canada

OKlahoma a
*
"The Cherokee Delaware"

KANSAS
The "Kansas Delaware"

Gov. + sells 60K
of the Kansas
Indian lands with
proceeds to Delaware
tribal trust funds



* = a Federally recognized tribe.

OKlahoma a
*
"The Cherokee Delaware"

KAWSAS
The "Kansas Delaware"

Indian lands with
proceeds to Delaware
tribal trust funds

75-1301 DELAWARE TRIBAL v. WEEKS

Argued 11/10/76

Christensen (for Cherokee Delaware)
1866 Treaty - giving option to
become Am. citizens - is critical
to this case. 19 adults exercised
this option & renounced their
Indian Tribal status. (Karas
Delawares)

As contrasted with the
Karas Delaware, the Cherokee
Delaware & the Absentee Delaware
* have remained Indians and
retained their Tribal identity.

(There is a fourth ^{Delaware} group - the
Munseys)

There never has been a group
of Indians - any organized
or political entity - known as
Karas Delaware. (But, as
I Stevens noted, the ancestors
of these people were wronged)

Randolph (SG) If I write, must refer to his argument.

The award of Commission to Tribal Indians. Basis of award was wrong done to Tribal property.

The award is "of Tribal property." ~~Congress~~

The Kansas Delaware, at time they opted "out," were entitled under terms of Treaty to their share of Tribal assets at the time. (J. Stewart thinks these assets included an intangible or contingent interest in ~~the~~ claims whatever claims the Tribe then had. J. Stewart commented that the claims were not ~~existent~~ extant; even tho wrong had occurred previously, there was no cause of action because until Congress acted there was no fund available & no one to sue.

Randolph (cont)

Karson Delaware are a "class" only because of Rule 23 (Class Action)

1969? Congress has plenary authority as to disposition of Tribal property, & it obviously focused on the Tribes in the 1972 act. Congress felt no obligation to individuals Indians who had renounced right to Tribal assets 100 yrs ago.

Steve asked about exclusion of Munsee Delaware. Congress left Munsees out because of difficulty of identifying the Munsees. For same reason, Karson Delaware were left out. altho they benefited from a former award - but only under a "catch-all" clause that did not identify Karson Delaware.

*
Stagner (for Resp Wanda Wecker
in all three cases)

1866 Treaty treated children of
Kauon Delaware differently from
adults - see Art 9 of Treaty. The
minors were given right to resign
from Tribe after attaining age 21. *

Last Chief of Delaware died in
1890s. Since then there has been
a ^{Business} Committee whose sole function
is to assert claims vs U.S.

A cause of action existed in 1964

Cherokee Delaware have been
before this Court twice before - claiming
not as Delaware but as Cherokee.
Since 1867 (when the Delaware
affiliated with the Cherokee) there
has been no Delaware Tribe anywhere.
They are an identifiable "group" &
their claims arise only because
of Tribal ancestral rights.

* * *

Responding to Potter's quest, Stagner
said none of the children of the
1866 adults ever joined the Cherokee
Delaware Tribe.

* Stagner did not tell us whole story. See } A12a
@p 39/ct

But
by act of
1974
treated
the minors
same as
adults
- see
12a
of 39/ct
op.

R
Rothbaum (Rebuttal for Appellants)

This same issue arose in 1804 (1804), & the Chief Justice & AG — by opinion (see Brief of Appellants) — ruled vs. ~~the~~ the Kanawha Delaware.

There is a "catchall clause" in 337 — but there was a mistake.

Muncie Tribe separated from Delaware in 1818 (?)

As to the awards in this case, 10% goes to Tribe & 90% goes to individuals on the ¹⁹⁴⁰ rolls (prepared by ^{Bureau of Indian} Dept. of Affairs) ~~Interior~~ of tribal members.

Delaware Indian Cases

11/10/76

Kansas Delawares

Remained in Kansas in 1866, severing relations with Del. Tribe; receiving their share of Tribal assets & becoming American citizens

Absentee Delawares

When the Delawares, then in Mo., agreed by Treaty of 1829 to move to Kansas, a substantial number settled in Okla. They have maintained Tribal identity, recognized by U.S. as a Tribe.

Cherokee Delawares

In 1866, pursuant to another Treaty, the largest body of Delawares moved from Kansas to Indian Territory in Okla, & by agreement with Cherokee Tribe became members of the Cherokee Nation - but retained a group identity as Delawares.

Present Litigation

As result of litigation before Indian Claim Comm. for an accounting under 1854 Treaty, the Comm. awarded the Delaware some \$9 million.

25 U.S.C. }
1291-1297 } In 1972 Congress adopted a Plan
of Distribution of this award:

Payments were to be made to descendants (not Tribes) of Cherokee & Absentee Delaware - but nothing to Kansas Delaware.

25 USC 1181 } A prior, 1968 Distribution approved by Congress, provided for participation by all three groups. Payments went to individuals - not Tribes,

Various suits filed, ~~with~~ consolidated & tried by 3 J/CT (Okla). We noted these:

75-1301 Delaware Tribal Committee v. Wanda Weeks

75-1335 Absentee Delawares v Weeks

75-1495 Kleppe v Weeks

Decision of 3 J/CT:

1972 Distribution Plan under 5/1291-97 ~~with~~

Review of § 1101:

1972 Desegregation Plan under § 1291-97 ~~is~~
held discriminatory (E/P component of 5th Amend.)
by virtue of deleting Kaiser Delaware.

1968 Plan (§ 1181-1186) sustained, but
I don't think it is before us. It is 75-1328
that we are holding.

Principal Issues

The 1972 Plan awards 10% to the Delaware Tribe (whichever that is!) & 90% to individuals in the Cherokee & Absentee Delaware Tribes. (about 9000)

Nothing was provided for the some 700 surviving Kansas Delawareans.

Kansas Delawareans assert two grounds:

- (i) "taking" of their inherited interest in tribal trust funds w/out compensation, and
- (ii) discriminatory distribution in violation of E/P & D/P (5th amend).

No basis for "just compensation" claim.

But 3rd Ct sustained, not w/out good deal of rationality, the E/P claim.

Reverse 8-1

The Chief Justice Revere

No need for finding a rational basis for what Congress does to or for Indians.

quest. is almost non-justiciable.

Agrees with dissent.

Douglas, J. Stewart - Affirm

Congress made mistake by appropriating 100% of award to 95% of those entitled to it.

This violates W/P clause

Brennan, J. Revere

Whether Congress intended only to exclude Munsee or omitted Kanaw by ~~mistake~~ inadvertence, it is clear from total leg. history that we can't construe statute ~~as to~~ to include Kanaw.

Stewart, J. Revere

No Q of statutory construction. ~~The~~ The statute clearly left the Kanaw Delaware out. This issue is whether ~~the~~ this exclusion is lawful. It is.

In dispensing money to Indians Congress can do as it pleases.

White, J.

Reverse

Const. issue is before
us but Congress has
broad latitude
that was not ~~abused~~.

Marshall, J.

Reverse

Blackmun, J. Reverse

The issue is justiciable.
All Indians here are
getting windfall.

Powell, J. Reverse

I agree with Petten
& Byron.

Rehnquist, J. Reverse

Apply same standard
as dissenting judge
- altho ~~the~~ issue is
justiciable

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 1/4/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75-1301, 75-1335, AND 75-1495

Delaware Tribal Business Committee
et al., Appellants,

75-1301 v.

Wanda June Weeks et al.

Absentee Delaware Tribe of Oklahoma
Business Committee et al.,
Appellants,

75-1335 v.

Wanda June Weeks et al.

Thomas S. Kleppe, Secretary of the
Interior, et al., Appellants,

75-1495 v.

Wanda June Weeks et al.

On Appeals from the
United States Dis-
trict Court for the
Western District
of Oklahoma.

[January —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

An Act of Congress providing for distribution of funds to certain Delaware Indians, pursuant to an award by the Indian Claims Commission to redress a breach by the United States of an 1854 treaty, is challenged in this action by a group of Delawares excluded from the distribution. The question presented by this case is whether their exclusion denies them equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment.¹

¹Fifth Amendment equal protection claims are cognizable under the Amendment's Due Process Clause. *Schneider v. Rusk*, 377 U. S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954). "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U. S. 1, 93 (1976).

Renewed
1/4/77
W.F.P.
Join

I

A brief history of the migrations of the Delaware Indians will serve as a helpful backdrop to the case.² The Delawares originally resided in the northeastern United States, in what are now southern New York, New Jersey, part of Pennsylvania, and part of Delaware. The Munsee Indians, related to the Delawares, resided in the northern part of that area. Under pressure from new settlers, both the Delawares and the Munsees were gradually forced to move westward, and by 1820 they were geographically scattered. During the trek westward the main branch of the Delawares stopped for varying lengths of time in what are now Ohio, Indiana, and Missouri, while others went to Arkansas, Oklahoma, and Texas. In 1818, the Delawares in Indiana ceded their lands in that State to the United States in return for a promise of land west of the Mississippi River.³ The Delawares then moved to Missouri for a short time, but under an 1829 "supplementary article" to the 1818 treaty, were again moved to what they were told would be their permanent residence on a reservation in Kansas.⁴ The establishment of this reservation was purportedly the fulfillment of the promise made in the 1818 treaty to provide western land in return for their agreement to leave their Indiana lands.

Some Delawares, however, never joined the main body of the Delawares on the Kansas reservation. Among these was a small group that migrated to Oklahoma and settled

² A more detailed narrative of the Delawares' history and westward migrations may be found in *Delaware Tribe of Indians v. United States*, 2 Ind. Cl. Comm. 253, 255-261 (1952), and in the opinion of the District Court below, 406 F. Supp. 1309 (WD Okla. 1975). See also Senate Rept. to accompany H. R. 16402, S. Rep. No. 1518, 90th Cong., 2d Sess., 7-12; C. Weslager, *The Delaware Indians* (1972); M. Wright, *A Guide to the Indian Tribes of Oklahoma* 145-155 (19—).

³ Treaty of 1818, 7 Stat. 188.

⁴ Treaty of 1829, 7 Stat. 327.

with the Wichita and Caddo Indians. For a time during the 1850's and 1860's, the Delawares in Kansas expected this group to rejoin the main body of the tribe there, but these Indians, called the "Absentee Delawares" in this suit, stayed with the Wichitas and Caddos.⁵ Their descendants have remained in Oklahoma through the present day, and are a federally recognized Indian tribe.⁶

By the 1850's, the main body of the Delaware Nation, together with a small number of Munsees, had assembled on the "permanent" reservation in Kansas at the confluence of the Kansas and Missouri Rivers. But the hope that the Kansas reservation would be the Delawares' last stopping place was short-lived. In 1866, the Delawares living on the reservation signed a treaty, under which they were to move to "Indian Country" in Oklahoma to live with the Cherokees.⁷ Each Delaware moving to Indian Country and enrolling on the proper register was to receive a life estate of 160 acres of Cherokee land and the right to become a member of the Cherokee Nation. Most of the Delawares on the Kansas reservation accepted these conditions and moved to Oklahoma, where they were gradually assimilated for most purposes into the Cherokee Nation, and were permitted to share equally with the Cherokees in the general funds of that tribe. See, *e. g.*, *Delaware Indians v. Cherokee Nation*, 193 U. S. 127 (1904); *Cherokee Nation v. Journeycake*, 155 U. S.

⁵ The Treaty of 1860, between the United States and the main body of the Delawares, 12 Stat. 1129, Art. IV, provided:

"Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each shall be set apart for them, to be allotted to them as they return . . ."

⁶ The formal name of the Absentee Delawares is the Absentee Delaware Tribe of Western Oklahoma. Appellees concede that the Absentee Delawares are a federally recognized tribe. No. 75-1328, J. S. 20.

⁷ Treaty of 1866, 14 Stat. 793.

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196 (1894). Despite their association with the Cherokees, these Indians, called "Cherokee Delawares" in this suit, have over the years maintained a distinct group identity, and they are today a federally recognized tribe.⁸

The 1866 Treaty did not require all Delawares on the Kansas reservation to move to Oklahoma. Rather, the Treaty provided that any Delawares who agreed to "dissolve their relations with their tribe" and become citizens of the United States might elect to remain in Kansas. Such Delawares would receive 80 acres of land in Kansas in fee simple and a "just proportion" of the tribe's credits "then held in trust by the United States," but thereafter could not "further participate in their [tribal] councils nor share in their property or annuities."⁹ Twenty-one adult Delawares chose to accept these conditions and remain in Kansas.¹⁰ Their descendants, called "Kansas Delawares" in this suit, are not a federally recognized tribe.¹¹

⁸ The formal name of the Cherokee Delawares is the Delaware Tribe of Indians. Appellees contend that the Cherokee Delawares were not a federally recognized tribe until after the commencement of this lawsuit. Tr. of Oral Arg., 58-59. The District Court made no finding as to the Cherokee Delawares' status as a recognized tribe, but it is clear that Congress had prior to the enactment of the statute dealt with the Cherokee Delawares as a distinct entity. See, *e. g.*, Act of 1904, 33 Stat. 189, 222, providing for payments to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct. . . ."; 43 Stat. 812; 44 Stat. 1358; and 49 Stat. 1459, amending 43 Stat. 812.

⁹ 14 Stat. 793, Art. III, IX.

¹⁰ These 21 adults had 49 children who, under the terms of the 1866 Treaty, were permitted to elect for themselves upon attaining majority whether to join the Delawares who had moved to the Cherokee Nation. Under an 1874 Treaty, however, the minor children were all granted citizenship in the United States, and were granted land on the same terms as to their parents. 18 Stat. 146, 175. The District Court found that the 1874 Treaty eliminated the necessity for an election by the children. 406 F. Supp., at 1320.

¹¹ Appellees stated at oral argument in this Court that a Kansas Delaware, Mr. Joe Bartles, was prominently involved in prosecuting the Delawares' claims before the Indian Claims Commission, that two Kansas

In 1854, while they still lived on the Kansas reservation, the main body of the Delawares signed a treaty with the United States under which the United States was to sell certain reservation tribal "trust" lands at public auction. In 1856 and 1857, the United States breached the treaty by selling the lands privately and not at public auction. Approximately one hundred years later, the Cherokee and Absentee Delawares brought separate but identical claims before the Indian Claims Commission arising out of this breach of the 1854 treaty. The Commission found that the two groups were "entitled jointly to represent the entire Delaware Tribe," 21 Ind. Cl. Comm. 344, 345 (1969), citing *Delaware Tribe v. United States*, 2 Ind. Cl. Comm. 253 (1952), *aff'd* as to parties, 128 F. Supp. 391 (Ct. Cl. 1953), and determined that the private sales of the trust lands had realized \$1,385,617.81 less than would have been realized for the tribe at public auction. The Commission awarded the tribe that sum plus interest, or a total of \$9,168,171.13.¹² 21 Ind. Cl. Comm., at 369-370. Congress appropriated funds to pay the award and later enacted Pub. L. 92-456, 25 U. S. C. §§ 1291-1297, providing for its distribution.¹³ The

Delawares had served as members of the (Cherokee) Delaware Tribal Business Committee, and that the Business Committee in 1952 adopted a resolution recognizing a number of Kansas Delawares as entitled to share in Delaware lands. Tr. of Oral Arg., 59-61. There were apparently no Kansas Delawares on the Business Committee during Congress' deliberations on the statute to distribute the award to redress the breach of the 1854 Treaty.

¹² It is not disputed that the credits "then held in trust by the United States" which were distributed proportionately to the Kansas Delawares under the 1866 Treaty included the amount received by the United States when it sold the trust lands privately rather than at public auction. We may assume that compliance by the United States with its promise to sell the lands at public auction would have meant that the sum paid to each Kansas Delaware who bought out of the tribe would have been larger.

¹³ Pub. L. 92-456 (1972), 86 Stat. 762 *et seq.* appears as 25 U. S. C. §§ 1291-1297 (1970 ed., Supp. IV) as follows:

statute limited distribution to the Cherokee and Absentee Delawares, with amounts payable determined under a formula provided in 25 U. S. C. § 1294. Ten percent of the

“25 U. S. C. 1291:

“The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298, and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be necessary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections.

“25 U. S. C. 1292:

“The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:

“(a) they were born on or prior to and were living on October 3, 1972; and

“(b) they are citizens of the United States; and

“(c)(1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

“(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary.

“25 U. S. C. 1293:

“All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before the last day of the fourth full month following October 3, 1972, and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determination on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the commit-

DELAWARE TRIBAL BUSINESS COMM. v. WEEKS 7

total sum was to be set aside for the two tribal bodies, and was to be retained by the United States to the credit of the tribes, to be used in ways approved by the Secretary

tee shall advise the Area Director in writing of its judgment regarding the eligibility of the applicant.

"25 U. S. C. 1294:

"(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292 (c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292 (c) (2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior.

"(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292 (c) (1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body: *Provided*, That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

"25 U. S. C. 1295:

"Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the estab-

of the Interior. The remaining 90% was to be divided among Cherokee Delawares whose names appeared on a "per capita payroll" described in § 1292 (c)(1), and among Absentee Delawares whose names appeared on a "constructed base census roll" described in § 1292 (c)(2).¹⁴

Appellee Weeks, on behalf of all the Kansas Delawares, instituted this action against the United States, the Cherokee Delawares, the Absentee Delawares, and the Secretary of the Interior in the District Court for the Western District of Oklahoma, alleging that the exclusion of the Kansas Delawares from the distribution of the award constituted a denial of the equal protection of the laws guaranteed by the Due Process Clause of the Fifth Amendment. A three-judge court was convened.¹⁵ The court declared, one judge dissenting, that Congress' failure to include the Kansas Delawares among those entitled to share in the award under Pub. L. 456 violated the Due Process Clause. The court also enjoined the Secretary of the Interior from distributing

ishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

"25 U. S. C. 1296:

"None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes.

"25 U. S. C. 1297:

"The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title."

¹⁴ So defined, Cherokee Delawares eligible to share in the distribution must necessarily be members of the tribal entity as presently constituted. Absentee Delawares eligible to share in the award, on the other hand, are defined somewhat more broadly, so that some nonmembers of the tribe are eligible under the statute.

¹⁵ A similar action in the District Court for the Northern District of Oklahoma was consolidated with appellee Weeks' suit in the District Court below, and the appeals to this Court are from the decision in the consolidated cases.

any of the appropriated funds pending amendment of the distribution provisions of the statute, or enactment of further legislation providing for distribution of the funds. 406 F. Supp. 1309, 1346-1347 (1975). Each defendant separately appealed to this Court, the Secretary of the Interior in No. 75-1495, the Cherokee Delawares in No. 75-1301, and the Absentee Delawares in No. 75-1335. We noted probable jurisdiction of the three appeals, — U. S. — (1976). We reverse.¹⁶

II

Appellants differ on the issue of whether this suit presents a nonjusticiable political question because of Congress' pervasive authority, rooted in the Constitution, to control tribal property. Stated in other words, they differ on the issue of whether congressional exercise of control over tribal property is final and not subject to judicial scrutiny, since the power over distribution of tribal property has "been committed by the Constitution to" the Congress, *Baker v. Carr*, 369 U. S. 186, 211 (1962), and since "[t]he nonjusticiability of a political question is primarily a function of separation of powers,"

¹⁶ The United States, also joined as a party defendant, was dismissed from the suit on the ground that it had not consented to the action. No appeal was taken to this Court from that dismissal.

Appellees also filed an appeal from the District Court judgment which is pending as No. 75-1328. Their complaint asserted that 25 U. S. C. §§ 1181-1186 (relating to the 1818 treaty) and §§ 1291-1297 (relating to the 1854 treaty) violated the Fifth Amendment's Due Process and Just Compensation Clauses, §§ 1181-1186 because the Cherokee Delaware class was wrongfully included in the proposed distribution under that statute, and §§ 1291-1297 because the Kansas Delaware class was wrongfully excluded and the Cherokee and Absentee Delaware classes wrongfully included in that statute's distribution. The District Court held that neither statute was unconstitutional by reason of the inclusion of the Cherokee Delaware and the Absentee Delaware classes. It is from this aspect of the District Court's decision that the appeal in No. 75-1328 is taken. In light of today's decision, the judgment of the District Court in that respect is affirmed.

id., at 210. Appellants Cherokee and Absentee Delawares, citing *Lone Wolf v. Hitchcock*, 187 U. S. 553 (1903), argue that Congress' distribution plan reflects a congressional determination not subject to scrutiny by the Judicial Branch, and that the District Court therefore erred in reaching the merits of this action. Appellant Secretary of the Interior, on the other hand, submits that the plenary power of Congress in matters of Indian affairs "does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny or that claims, such as those presented by [appellees], are not justiciable." Brief of Secretary, p. 19 n. 19. We agree with the Secretary of the Interior.

The statement in *Lone Wolf*, at 565, that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties, see generally *Antoine v. Washington*, 420 U. S. 194, 201-204 (1975), has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. See, e. g., *Morton v. Mancari*, 417 U. S. 535 (1974). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States v. Alcea Band of Tillamooks*, 329 U. S. 40, 54 (1946) (plurality opinion); see also *United States v. Creek Nation*, 295 U. S. 103, 109-110 (1935); cf. *United States v. Jim*, 409 U. S. 80, 82 n. 3.

The question is therefore what judicial review of Pub. L. 92-456 is appropriate in light of the broad congressional power to prescribe the distribution of property of Indian tribes. The general rule emerging from our decisions ordinarily requires the judiciary to defer to congressional determination of what is the best or most efficient use for which tribal funds should be employed. *Sizemore v. Brady*, 235

U. S. 441, 449 (1974). Thus, Congress may choose to differentiate among groups of Indians in the same tribe in making a distribution, *Simmons v. Seelatsee*, 384 U. S. 209 (1966), aff'g 244 F. Supp. 808 (ED Wash. 1965), or on the other hand to expand a class of tribal beneficiaries entitled to share in royalties from tribal lands, *United States v. Jim, supra*, or to devote to tribal use mineral rights under allotments that otherwise would have gone to individual allottees, *Northern Cheyenne Tribe v. Hollowbreast*, 425 U. S. 649 (1976). The standard of review most recently expressed is that the legislative judgment should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians" *Morton v. Mancari, supra*, at 555.

III

We are persuaded on the record before us that Congress' omission of the appellee Kansas Delawares from the distribution under Pub. L. 92-456 was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

First, the Kansas Delawares are not a recognized tribal entity, but are simply individual Indians with no vested rights in any tribal property. Pub. L. 92-456 distributes tribal rather than individually owned property, for the funds were appropriated to pay an award redressing the breach of a treaty with a tribal entity, the Delaware Nation. It was that tribal entity, represented jointly in the suit before the Indian Claims Commission by the appellants Cherokee Delawares and Absentee Delawares, that suffered from the United States' breach, and both the Commission award and the appropriation by Congress were the means of compensating that tribal entity for the wrong done to it. Indeed, the Indian Claims Commission is not empowered to hear individuals' claims, but may only adjudicate claims held by an "Indian tribe, band, or other identifiable group." 25 U. S. C. §§ 70a, 70i; see *Minnesota Chippewa Tribe v. United*

States, 315 F. 2d 906, 913-914 (Ct. Cl. 1963). As tribal property, the appropriated funds were subject to the exercise by Congress of its traditional broad authority over the management and distribution of lands and property held by recognized tribes, an authority "drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, *supra*, at 551-552. This authority of Congress to control tribal assets has been termed "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs . . ." Cohen, *Handbook of Federal Indian Law* 94, 97 (1942).

The ancestors of the Kansas Delawares severed their relations with the tribe when they elected under the 1866 treaty to become United States citizens entitled to participate in tribal assets only to the extent of their "just proportion . . . of the cash value of the credits of said tribe . . . then held in trust by the United States." (Emphasis supplied.) We cannot say that the decision of Congress to exclude the descendants of individual Delaware Indians who ended their tribal membership and took their proportionate share of tribal property as constituted more than a century ago, and to distribute the appropriated funds only to members of or persons closely affiliated with the Cherokee and Absentee Delaware tribes, was not "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

Second, the exclusion of the Kansas Delawares under Pub. L. 92-456 was not their first exclusion from participation in a distribution of tribal assets. In 1904 Congress appropriated \$150,000.00 to settle claims of the Delaware Tribe of Indians, arising out of another injustice done to the Delawares under the 1854 treaty, unrelated to the breach which forms the basis for the distribution under Pub. L. 92-456. See *United States v. Delaware Tribe of Indians*, 427 F. 2d 1218, 1229-1230 (Ct. Cl. 1970). The 1904 Act directed the Secretary of the Treasury to pay the settlement to the tribe

known in this suit as the Cherokee Delawares "as said tribe shall in council direct," thereby excluding both Absentee and Kansas Delawares. 33 Stat. 189, 222. Some Kansas Delawares unsuccessfully sought to participate in the distribution, as noted by the District Court in this case, "on grounds similar to some of those argued in the present case." 406 F. Supp., at 1321 n. 15. The Comptroller of the Treasury concluded that "[m]anifestly [the Kansas Delawares] were not entitled to participate in the distribution of annuities or other funds due or belonging to the Delaware tribe" for

"The provision in the Act of April 21, 1904, *supra*, authorizes and directs payment to the 'Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct' The proviso immediately following the appropriation in the Act emphasizes the clear indication that the appropriation was made for the tribe as distinguished from the Delaware Indians who had severed their tribal relations and become citizens of the United States." 11 Dec. of the Comp. 496, 500 (emphasis in original).

While this precedent of excluding the Kansas Delawares from the 1904 Act does not of itself legitimate their exclusion from the present distribution statute, their earlier exclusion nevertheless indicates that Congress has historically distinguished them from the Cherokee Delawares in distributing tribal awards.

Third, Congress deliberately limited the distribution under Pub. L. 92-456 to the Cherokee and Absentee Delawares because of substantial problems it apprehended might attend a wider distribution. H. R. 5200, the bill originally introduced to distribute the funds, had contained a "catchall" clause authorizing distribution "to include the names of all persons born on or prior to and living on the date of this Act who are lineal descendants of members of the Delaware

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Tribe as it existed in 1854. . . ."¹⁷ This catchall would have been analogous to a clause in a 1968 statute distributing funds to compensate the Delaware Tribe for the United States' inadequate payment to them when they were moved off their Indiana lands in 1818.¹⁸ Under the 1968 catchall clause, all linear descendants of the tribe as it existed in 1818 were permitted to share in the distribution, 25 U. S. C. § 1181 (d), and about three hundred Kansas Delawares were thereby allowed to participate in the distribution of the award redressing the 1818 wrong.

The omission of the catchall provision from Pub. L. 92-456, as finally enacted, followed legislative hearings at which the Cherokee and Absentee Delawares testified. At these hearings they directed Congress' attention to problems that had arisen when Munsee Indians, in addition to the Kansas Delawares, had claimed eligibility under the catchall provision of the 1968 statute.¹⁹ Because of a dispute over the eligibility of the Munsees to participate under the catchall clause, there had been inordinate delays in the distribution of the funds. Indeed, as late as 1972 many of the Munsees' claims were still unresolved, and distribution under the 1968 statute was virtually paralyzed. Hearings on H. R. 5200 *etc.* before

¹⁷ H. R. 5200, 92d Cong., 1st Sess., § 2 (March 1, 1971); S. 1067, 92d Cong., 1st Sess., § 2 (March 2, 1971).

¹⁸ Pub. L. 90-508 (1968), 82 Stat. 861 *et seq.*, 25 U. S. C. §§ 1181-1186 (1970 ed., Supp. IV). The constitutionality of this statute was also challenged by appellees in the District Court. See n. 16, *supra*.

¹⁹ Hearings on H. R. 5200 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. (March 13, 1972); Hearings on H. R. 5200, H. R. 14267 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. (May 8, 1972); Hearings on H. R. 14267, H. R. 5200 before the Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. (May 10, 1972); Hearings on S. 3113, S. 1067, S. 2249 and S. 2298 before the Subcommittee on Indian Affairs of the Senate Committee of Interior and Insular Affairs, 92d Cong., 2d Sess. 60 *et seq.* (July 21, 1972).

the Subcommittee on Indian Affairs, 92d Cong., 2d Sess., 12, 22, 59, 79, 97, 105-106, 113 (March 13, 1972).

We recognize, as did the District Court, that Congress omitted the catchall provision from the present statute in order to avoid a repetition of the problems with the Munsees, and that Congress was not "made aware that the limitation of the distribution to [the Cherokee and Absentee Delawares] would exclude a group which had lived on the Kansas Delaware lands and which could trace their descendancy as the Kansas Delawares do." 406 F. Supp., at 1332.²⁰ But we do not conclude from Congress' ignorance of the effect of the elimination of the catchall on the Kansas Delawares that the statute is therefore irrational. Congress chose to limit distribution of the award to the Cherokee and the Absentee Delawares, in whose names the Delawares' claims had been prosecuted before the Indian Claims Commission, and whom the Commission had found to represent the interests of all the Delawares. Regardless of Congress' knowledge of the effect of this limitation on the Kansas Delawares, we cannot say that the congressional choice, though predicated upon the Munsee experience under the 1968 statute, does not rationally support its decision to avoid undue delay, administrative difficulty, and potentially unmeritorious claims by distributing the award only to the Cherokee and Absentee Delawares.²¹

²⁰ It seems apparent from the Senate and House reports accompanying the bill that was eventually enacted that Congress was not made aware of the Kansas Delawares' existence, for the Reports state that the beneficiaries of the distribution will be the "[l]iving descendants of members of the Delaware Tribe as it existed in 1854." Senate Rept. to accompany H. R. 14267, S. R. 2-1126, 92d Cong., 2d Sess., 6.; House Rept. to accompany H. R. 14267, H. R. 92-1081, 92d Cong., 2d Sess., 6.

²¹ The congressional decision to distribute funds only to individuals who were members of, or clearly identified with, specific tribes has precedent in other similar statutes. See, *e. g.*, 25 U. S. C. §§ 565-565 (g) (Klamaths); 25 U. S. C. §§ 581-590c (1970 ed., Supp. IV) (Shoshone

IV

Our conclusion that the exclusion of the Kansas Delawares from distribution under Pub. L. 92-456 does not offend the Due Process Clause of the Fifth Amendment, of course does not preclude Congress from revising the distribution scheme to include the Kansas Delawares. The distribution authorized by Pub. L. 92-456 has not yet occurred, and Congress has the power to revise its original allocation. *United States v. Jim, supra*, 409 U. S., at 82-83.

Reversed.

and Shoshone-Bannock); 25 U. S. C. §§ 1071-1073 (1970 ed. and Supp. IV) (Confederated Colville); 25 U. S. C. §§ 1161-1167 (1970 ed. and Supp. IV) (Cheyenne-Arapaho); 25 U. S. C. §§ 1191-1195 (Confederated Umatilla); 25 U. S. C. §§ 1261-1265 (1970 ed., Supp. IV) (Blackfeet and Gros Ventre); 25 U. S. C. §§ 1300b-1300b-5 (1970 ed., Supp. IV) (Kickapoo); 25 U. S. C. §§ 1300c-1300c-5 (1970 ed., Supp. IV) (Yankton Sioux); 25 U. S. C. §§ 1300e-1300e-7 (1970 ed., Supp. IV) (Assiniboine).

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1977

Re: Nos. 75-1301, 75-1335 & 75-1495 - Delaware
Tribal Business Committee v.
Weeks

Dear Bill:

Please join me.

Sincerely,

*Byron
JP*

Mr. Justice Brennan

Copies to Conference

January 5, 1977

No. 75-1301 Delaware Tribal Business
Commission v. Weeks
No. 75-1335 Absentee Delaware Tribe
v. Weeks
No. 75-1495 Kleppe v. Weeks

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

Sally - Do join on me

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 5, 1977

Re: Nos. 75-1301, 75-1335, and 75-1495,
Delaware Tribal Business Comm. v. Weeks

Dear Bill,

I am glad to join your opinion for the Court
in these cases.

Sincerely yours,

P.S.
/

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



January 6, 1976

Re: 75-1301, 1335, 1495 - Delaware Tribal
Business Committee v. Weeks et al.

Dear Bill:

Your opinion identifies three possible justifications for a legislative decision to exclude the Kansas Delawares from the distribution of funds to the successors in interest of the persons injured by the breach of the 1854 Treaty. None of those justifications raises any question about appellees' status as successors of members of the injured class; nor do you question the fact that the exclusion is the consequence of a malfunctioning of the legislative process rather than deliberate choice by Congress.

The appellees are members of the class whose claim has been determined to be valid by the Indian Claims Commission. There is nothing in the proceeding before the Claims Commission, or in the legislative history of the statute, to support the conclusion that anyone advocated, or Congress intended, to award compensation for less than all members of the class. At the end of the legislative process Congress adopted an amendment to the bill in order to be sure that the Munsees--who are not members of the class--would not participate in the award. Unfortunately, the amendment had the unintended consequence of also excluding the appellees.

In view of the fact that payment of the appropriated funds to the appellants will represent a distribution of the entire amount of the award, I do not see how the Court can be sanguine about the possibility suggested in Part IV of your opinion, of a legislative solution which will correct what I regard as a manifest injustice.

In any event, I still plan to prepare a dissenting opinion which will set forth the substance of the foregoing together with a discussion of the reasons why I am persuaded that each of the three hypothetical justifications for this discriminatory action is insufficient to save its constitutionality.

Respectfully,

A handwritten signature in cursive script, appearing to be the name "John".

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



January 6, 1976

Re: Nos. 75-1301, 75-1335, and 75-1495 - Delaware
Tribal Business Committee v. Weeks, et al.

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 13, 1977 ✓

Re: Nos. 75-1301, 75-1335, and 75-1495, Delaware Tribal
Business Comm. v. Weeks

Dear Bill:

Please join me.

Sincerely,

JM.

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

January 22, 1977

RE: 75-1301; 1335; 1495 - Delaware Tribal Business
Comm.; Absentee Delaware Tribe of Okla. Business
Comm.; Kleppe v. Weeks

Dear Bill:

I am more nearly with Harry's position at the moment than with an unreserved "join." I will await John's dissent, and you will then hear from me promptly.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

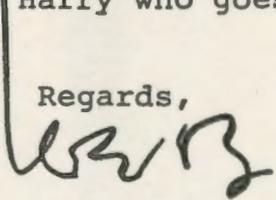
February 17, 1977

Re: 75-1301; 1335; 1495 - Delaware Tribal Business
Comm. et al.; Absentee Delaware Tribe of Oklahoma
Business Comm. et al.; Kleppe, Sec. Interior v. Weeks

Dear Bill:

John has made some persuasive points which tempt me but I conclude we must proceed on the "fiction" that Congress generally must be presumed to know what it is doing. I doubt it did here but the "fiction" is essential to orderly operation of co-equal branches.

I come down joining Harry who goes almost the whole way with you.

Regards,


Mr. Justice Brennan

Copies to the Conference

