




10-1979

United States v. Sioux Nation of Indians

Lewis F. Powell Jr.

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PRELIMINARY MEMORANDUM

December 7, 1979 Conference
List 1, Sheet 4
No. 79-639

UNITED STATES

v.

Cert. to U.S. Ct of Claims
(Friedman, Cowen, Davis; Nichols,
concur; Bennett, Kunzig, dissent)

SIOUX NATIONS

Federal/Civil

Timely

SUMMARY: The SG puts the question this way: Whether
legislation which divests an Indian tribe of a portion of its
land in consideration of an undertaking to provide material
assistance and food rations as long as needed amounts to a
"taking" under the Fifth Amendment so as to entitle the tribe
to interest on a later award for the value of the lands.

*The decision below is defensible and aids the Indians;
it is unlikely to recur; the reading of Lone Wolf
seems acceptable. I would deny -*

DOJ

FACTS: In 1868 the United States and the Sioux Indians signed a treaty establishing "for the absolute and undisturbed use and occupation of the Indians" certain land in South Dakota, including 7 million acres in the Black Hills. That treaty provided that no cession of the reservations lands "shall be of an validity or force" unless executed and signed by at least three-fourths of the adult male Indians occupying the lands.

In 1874, an expedition led by then Lt. Col Custer discovered gold in the Black Hills. Thereafter, a large number of prospectors and settlers entered the reservation area without the consent of the Sioux. After a period of hostilities, including Custer's loss at Little Big Horn, President Grant appointed a commission to negotiate with the Sioux for the cession of the Black Hills land. In 1876 the Commission negotiated an agreement with the Sioux chiefs pursuant to which the Sioux ceded the Black Hills portion of the reservation and the United States, in return, agreed to provide the Sioux with specified rations "until the Indians are able to support themselves." Less than 10% of the adult male Sioux approved that agreement. In 1877, Congress resolved the impasse by enacting into law the unratified agreement. 19 Stat. 254. The United States reports that it has spent approximately \$43 million on rations for the Sioux under the 1877 Act.

1 In 1942, the Sioux brought suit contending that the removal of the Black Hills from the Sioux Reservation constituted a Fifth Amendment "taking." The Court of Claims rejected that

contention holding that under the doctrine of Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), no taking had occurred. Sioux Tribe v. United States, 97 Ct. Cl. 613 (1942) cert. denied 318 U.S. 789 (1943).

In 1946, following the enactment of the Indian Claims Commission Act of 1956, a second round of litigation commenced. (That Act distinguishes between claims grounded on a taking of Indian reservation land, for which a Tribe can recover compensation with interest, and claims grounded on transactions marked by fraud, duress, mistake or "unconscionable consideration," for which compensation without interest will be paid.) See 25 U.S.C. § 70(a). In 1974, the Indians Claims Commission determined that the "1877 Act did amount to a taking and awarded the Sioux \$17 million with interest at 5% per annum since 1877. 33 Ind. Cl. Comm. 151. (The interest now totals about \$105 million.)" On appeal, the Court of Claims reversed in part. It found that the taking claim was barred by principles of res judicata; but it concluded that inadequate consideration had been paid for the Black Hills land and that the Sioux were therefore entitled to recover the principal amount of the award, but without interest. United States v. Sioux, 518 F. 2d 1298 (Ct. Cl.) cert. denied 423 U.S. 1016 (1975).

The litigation would have ended there, except that in 1978 Congress amended the Indian Claims Commission Act to direct the Court of Claims to reach the merits of the 1974 Commission decision without regard to the res judicata defense. The Court

of Claims did as directed and held that the 1877 Act had effected a taking. The SG asks this Court to review that decision.

HOLDING BELOW: Chief Judge Friedman's plurality opinion opined that the test for determining whether the 1877 Act effected a taking was whether Congress had made "a good faith effort to give the Indians the full value of the land." Three Affiliated Tribes of Fort Berthold Reservation v. United States, 390 F. 2d 686, 691 (1968). In adopting this test, he rejected the Government's reliance on Lone Wolf, supra, where this Court wrote that whenever the operative statute "purports to give an adequate consideration" for the lands appropriated, "the courts must presume that Congress acted in perfect good faith *** exercising its best judgment" in effecting "a mere change in the form of investment of Indian tribal property." 187 U.S. at 568. Judge Friedman noted that Lone Wolf was an action for injunctive relief and not for damages, and read the case as holding merely that the judiciary should not enjoin the Congress from appropriating Indian land. He cited United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938), as a post-Lone Wolf case which teaches that the amount given in consideration can be considered in determining whether just compensation has been paid. Judge Friedman then reviewed the legislative history and applied his "good faith" test"

The terms upon which Congress acquired the Black Hills were not the product of any meaningful arms-length bargaining, and did not reflect or show any considered

judgment by Congress that it was paying a fair price. In the "negotiations" the United States gave the Indians the Hobson's choice of ceding the Black Hills or starving. Not surprisingly, the Sioux Chiefs chose the former rather than the latter.

There is no indication that Congress believed that or even considered whether the obligation it assumed to furnish the Sioux with rations until they could support themselves constituted the fair equivalent of the value of the lands the United States was acquiring from them.

There is no reason to believe that Congress anticipated (1) that it would be required to continue to supply rations for more than a half-century or (2) that its fulfillment of the obligation to feed the Sioux would entail the large expenditures it ultimately made.

He concluded that Congress had not acted in good faith and that the 1877 Act therefore was a taking.

Judge Nichols concurred, but disagreed with the majority on the reading of Lone Wolf. For him that case was "a precedent fully applicable in a suit for just compensation as in injunction suit." However, he read Lone Wolf as establishing a "good faith" test identical to that adopted in Fort Berthold.

Judge Bennett, joined by Judge Nichols, dissented on the ground that Lone Wolf gives Congress the power to dispose of tribal property without regard to good faith or the amount of compensation: "once Congress has ... disposed of [Indian] property, and has given value to the Indians for it, that is the end of the matter" under the Fifth Amendment.

CONTENTIONS: The SG, challenging only the award of interest, puts forward four reasons for granting certiorari:

1. The Court below has giving the precedent of Lone Wolf an

artificially narrow reading.*

2. Even if Lone Wolf is inapplicable, the decision below is wrong. The SG characterizes the decision as "attributing bad faith to Congress simply because it failed to expressly say that it was giving fair value for the lands appropriated -- albeit it never suggested that it was not so doing, and, as it turned out, was in fact overgenerous." He asserts that this Court has concluded that there has been a Fifth Amendment taking of Indian lands only in instances in which no payment or derisory payment has been made. E.g. United States v. Creek Nation, 295 U.S. 103 (1935); Shoshone Tribe v. United States, 299 U.S. 476 (1937); Klamath & Moadoc Tribes, supra.

3. The decision below undermines the Indian Claims Commission Act which, according to the SG, "presumably contemplated" that most claims would fall into the category of cases involving inadequate consideration as to which value but

* Lone Wolf was an action to enjoin the Secretary of Interior from allotting and selling tribal land under a 1900 statute on the ground that the law was unconstitutional. The Indians there contended that Congress was without right to divest them of title to reservation land without complying with a treaty provision which required approval of three-quarters of the male tribe members for any changes. This Court held that Congress had power to break the treaty unilaterally. As Judge Friedman noted the United States was not a party in Lone Wolf and had not consented to suit; no court in 1903 had jurisdiction to hear and determine Indian tribal claims, including taking claims. He therefore concluded that Lone Wolf turned upon Congressional power to act, and not upon what ultimately might flow from the disputed action in the way of monetary relief. The SG contends that since the Indians had no remedy at law the Lone Wolf court had to hold that the challenged statute worked no taking, otherwise under settled equitable principles an injunction would have issued.

not interest would be paid. It denies prior claimants equal treatment because to date successful claims based on inadequate consideration have been awarded without interest.

4. The sum involved is substantial, and the mode of analysis employed by the court below will affect "at least a dozen cases still pending in the Court of Claims."

RESPONDENTS' BRIEF: The respondents champion Judge Friedman's narrow reading of Lone Wolf. They would go further than the Court of Claims and hold that Indians, like all other persons, are entitled to just compensation whenever property is taken for any amount less than market value. However, they are satisfied with the "good faith test" in this case and argue that if it is the proper test, the question is fact-bound and does not merit review here. Respondents also contend that the SG's claim that the decision below will impact upon pending cases is without foundation; they assert that there are no such pending cases or at least none that they are aware of. Finally, respondents contend that application of the Lone Wolf test would deny them equal protection of the law.

DISCUSSION: The SG seems correct in his assertion that the decisions of this Court finding a taking involve instances in which no payment was made or inadequate payment after the fact was made. This Court simply has not had occasion to determine whether acquisition of Indian land for present but inadequate compensation constitutes a taking. Nor has the Court had occasion to chose between the competing readings of the Lone

Wolf decision. Thus, the case seems certworthy. If the Court, however, is prepared to adopt a standard similar to that employed by the majority below, the prospect of wading through a voluminous record to determine good faith might counsel a denial.

There is a response.

11/27/79

Shechtman

opn. in petn.

UNITED STATES

vs.

SIoux NATION OF IN

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to Home Wall

Grant

[illegible]

Review 3/20

DOS

David thinks there was a "taking" of the Black Hills portion of the Sioux Tribe Reservation when Congress approved, in 1877, a treaty negotiated with the Tribal Chiefs. Ct/Claims so held. This case, as I understand it,

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: March 19, 1980

RE: No. 79-639, United States v. Sioux Nation of Indians

completion. (I'm not clear about this. Check Briefs)

Question Presented:

Ct/Claims gave judgment of \$17,553,000 to Sioux, plus interest.

Whether legislation which divests an Indian tribe of a portion of its lands in return for an undertaking to provide material assistance and food rations as long as needed amounts to a 'taking' of \$17 million. He argues there was no "taking" & thus no interest is required to be paid. The \$17.5 million later award for the value of the lands.

Background

is viewed as in effect a fair price for the purchase & already has been more than paid by providing rations plus 900,000 acres of grazing land.

The actual background of this case is simply too long and convoluted to run through in this memo. The salient points to me are:

David David thinks there was a "taking" under our case, & that interest is due.

1) In 1868 the United States and the Sioux Nation signed a treaty. Under the treaty, the Sioux received complete control over a large territory, including the more than 7 million acres of the Black Hills at issue in this case. The 1868 agreement also required the

Government to provide rations for the Indians for four years. Finally, no additional cession of Sioux lands was to be accomplished unless executed and signed by three-fourths of the adult male Indians in the tribe.

2) After gold was discovered in the Black Hills, the pressures to occupy the land with whites became irresistible. The Government came to a thoroughly rational decision to acquire the land from the Sioux. Since no one could keep the prospectors out of the vast expanse of the Black Hills, that decision made sense both for Washington and for the Sioux. The Government commissioned a survey of the land to determine its worth, and the official statements of this period -- about 1875 -- are full of intent to provide full value for the lands.

3) The Allison Commission in 1875 attempted to negotiate the purchase of the lands. The Commission offered \$6 million. The Indians asked for \$70 million. The negotiations collapsed. (From here on, my narrative may seem a bit partisan, but it reflects my understanding and interpretation of the facts.)

4) Washington seems to have changed its policies to attempt to coerce the Sioux into reaching a settlement. It directed the Army to stop trying to keep white prospectors out of the Black Hills, and Congress in 1876 directed that all subsistence rations to the Sioux be cut off within a year. Those rations kept the tribe alive, or at least kept alive the 30,000 who lived peacefully on the reservations (another 3,000 or so, including Sitting Bull and Crazy Horse, lived off the reservation and fed themselves). These subsistence rations were not mandated by 1868 treaty, since that only covered four years.

Yet it should be remembered that the Sioux were Plains Indians who lived off the buffalo herds. The disappearance of the herds and the restriction of the Sioux to their reservations eliminated their traditional means of self-support.

5) War broke out in 1876, and Custer made his last stand. All Sioux who wanted to live on the reservations were disarmed and their horses were taken away. This entirely deprived them of any ability to support themselves.

6) In the fall of 1876, a treaty was negotiated with the chiefs of the tribe. In return for the 7 million acres, the Government: (a) agreed to provide the Sioux with "all necessary aid to assist the said Indians in the work of civilization"; (b) agreed to furnish them with schools; and (c) agreed to supply specified rations to all working adult Sioux and children in schools "until the Indians are able to support themselves." As the Court of Claims pointed out, the first two items had already been granted to the Sioux under the 1868 treaty. ?

7) Less than 10 per cent of the adult male Sioux signed the treaty. Nevertheless, Congress enacted its provisions into law in 1877.

8) Through labyrinthine wrangling in Congress and the courts, this case after 45 years has now been reduced to a dispute over interest. Both sides agree that the Government owed the Sioux \$17 million for the Black Hills. Although the Government claims to have spent \$43 million for support of the Sioux over the years, Congress has directed that those funds should not be set off against any award due to the Sioux. The question in this case is whether the

Government "took" the Black Hills within the meaning of the Fifth Amendment, and thus must be held to provide just compensation. If there was such a taking, the Government also owes the Indians over \$100 million in interest (at current interest rates, that's not too bad!).

Discussion:

The legal questions in this case are peculiar to Indian law. First, there is the problem of the impact of Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), where this Court suggested that it lacked jurisdiction to review a congressional determination of what is a fair deal with Indians. The Lone Wolf holding was that such determinations are in the nature of political questions. It has been repudiated by this Court in Delaware Tribal Business Comm'n v. Weeks, 430 U.S. 73, 84 (1977), and should not be applied to this case.

Second, there is the question of what ^vstandard of review should be applied to the bargain struck by Congress with the Sioux. In Three Affiliated Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968), the Court of Claims adopted a good faith effort standard. Under this criterion, so long as Congress made a good faith effort to strike a fair deal with the Indians, the courts should not review the equity of the transaction. This standard has never been reviewed by this Court. I think it a highly dubious test. It retains much of Lone Wolf's deference to congressional conduct of Indian affairs, while also demonstrating little concern for the rights of Indians. In no other context may

Congress unilaterally set the price for condemned land. In all other circumstances, the courts value the property. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

I see no compelling reason to adopt a different posture in this case, especially in light of the unusual relationship between the Indians and the Government. Indeed, I would view Fort Berthold as a departure from this Court's traditional position in Shoshone Tribe v. United States, 299 U.S. 476 (1937), and in Chief Justice Marshall's opinion in Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

In both of those decisions, this Court ruled that the Government must pay just compensation under the Fifth Amendment for any property taken from Indian tribes. The SG suggests that because Congress is trustee for the Indians this Court should utilize a lesser standard of review for congressional actions that must be taken in the interests of the Indians. But here the Congress clearly sought to protect interests other than the Indians'. In most cases, Congress must guard both the public interest and the Indians' interest. This conflict of loyalties suggests that the need for judicial review of compensation is even sharper in takings of Indian land.

Thus, I would apply the Fifth Amendment taking clause directly to this transaction. This result would require the payment of interest in this case. It would be possible to reach the same outcome by the circuitous route followed by the Court of Claims -- the Court would have to find that Congress' actions did not constitute a good faith effort to strike a fair deal. But I think that is an unnecessarily tortured approach. It seems at least superficially incorrect because the SG continues to chant that the

CA/claims decided on a "good faith" analysis

Government spent \$43 million supporting the Sioux, even though respondent argues persuasively (to me) that the eventual cost of the subsistence payments should not be taken as dispositive of the equity of the original deal. Moreover, I think the "good faith effort" approach is simply not justified under the Fifth Amendment. Because the treaty was never accepted by the Sioux, the Government took the land by statute. The Government should pay a fair price for the land.

d

DS

SUPPLEMENTAL MEMORANDUM

TO: Mr. Justice Powell
FROM: David
DATE: March 21, 1980
RE: No. 79-639, United States v. Sioux Nation

The SG's reply brief opposes any abandonment of this Court's previously deferential approach to congressional arrangements with Indian tribes. The SG suggests briefly that such a course would convert "every valid exercise" of Congress' "plenary power to manage tribal lands for the benefit of the tribe" into a "taking" under the Fifth Amendment. Although the SG does not really press the point, the claim does focus on what I see as the major danger in the course I recommended in the main bench memo: That unforeseen and substantial liability will be imposed on the Government in future cases. One way to limit that prospect would be to restrict the decision in this case to its facts -- a statutory taking of land. After all, the SG's argument concerns the management of Indian assets, an issue that arises more frequently than simply the seizure of land. In addition, I suspect that if the prospect of crushing future liability were real, the SG would be screaming a bit louder about it. The muted tones of his reply brief suggests to me that the

course I initially recommended is not likely to involve unacceptable costs to the Government.

79-639 U.S. v. SIOUX NATION

Argued 3/24/80

Claiborne (SG)

Only issue is "interest" +
then turn on whether ~~or whether~~
there was a "taking".

The \$17,000,000 is value
of land determined by Commission.
(P.S. asked why this was not a
taking\$. Claiborne answered
that this was a purchase -
the Act of Congress ~~of 1975~~ ^{of 1975} was
an exercise of power of Congress
to act in best interest of Indians.)

JPS asked: What is source
of Gov's obligation to pay
\$17,000,000?

In 1978 Congress instructed
Secretary to ignore res judicata.

Ct claim decision rests primarily
on 1978 Act of Congress; also 1974
Act is relevant.

Claiborne (cont.)

Argues that Congress exercised the "Indian" power rather than the taking power.

Congress left it entirely to Courts to determine whether there was a "taking" - not at time Commission ~~was~~ acted - but back in the 1880s,

~~When negotiations~~

Act of 1877 ratified the agreement negotiated with chiefs. Congress assumed a substantial obligation to pay rations ~~and~~ - expending \$42 million.

There would be no "taking" argument if there had been an "agreement". Under law at time 75% of Indians would have had to approved unless chiefs had authority to agree. Neither of these conditions existed here

CT Claims erred in two respects:

(1) It should have applied presumption that Congress acted in good faith

(2) It too narrowly focused on concept of fair equivalent.

The Black Hills land is largely useless today

1978 statute overruled earlier decision of CT Claims. SB doesn't question this

\$42 million figure was "found" by CT Claims. No basis for saying now it is ~~was~~ not realistic.

Logan (Resk)

The 1877 statute - not any agreement - effected the taking.

In 1978, Congress waived ~~res judicata~~ to give the Sioux "their day in Court." (Byron said it gave them a "second day" in court)

The 1978 Act wiped out - "washed clean" - the Ct. claimer decision of 1944.

If Congress had in fact ~~had~~ set up a "fund" in 1877 from which rations were to be paid, there would be no taking. But no fund was created.

? Govt conceded there would have been a taking if white people had been involved (owned the prop).

Govt had promised to keep whites out of Reservation. After gold was discovered, this promise was not fulfilled.

If \$17 million had been pd in 1877, there would have ended it. But Govt didn't pay. ~~And~~ If Sioux had "agreed" to anything, there would have been no taking.

Layman (cont.)

If "just compensation" had ~~been~~ been pd, ~~no~~ no taking even though no agreement.

Courts - not Congress - determine "just compensation" (absent agreement)

There are 60,000 Sioux now & are depressed.

SG's statement as to what Gov't has pd for rations is inaccurate. No ev. that the \$40,000 (or whatever) was properly delivered. It also included rations said to have been pd in '75 & '76

But even if Gov't had pd over \$40,000, it would make no difference. All that Gov't did by Act of 1877 was to make a conditional promise to do certain things. This is not just compensation.

Congress could have taken the Black Hills (Lone Wolf) - but would have had to pay just comp.

Recognized "treaty prop" is protected by 5th Amend.

"Legal title" of the Black Hills was in Fed. Gov't - tho all incidents of ownership belonged to Sioux ~~Tribe~~ Tribe. This entitled Sioux to just compensation ~~up~~ upon a taking

Need not
restate
national

Leggner (Book)

The 1871 statute - not any
agreement - affected the holding.

In 1871, Congress enacted
the statute to give the State
"their day in Court" (Bryant
said it gave them a "second day"
in Court)

The 1878 Act wiped out - "washed
clean" - the Civilian Service of 1871

of Congress that in fact had
not yet been formed in 1871 from
which workers were to be hired,
which would be no holding. But
the fund was created.

Wall
Lime

Port cancelled there would have been
a holding of white people had been
cancelled (formed the profit).
Port had promised to bank which
out of legislation - after gold was
discovered, the promise was not fulfilled.
If 17 million had been paid in 1871,
there would have been a. But Port
didn't pay. ~~Only~~ 200,000 was "paid"
to anything, there would have been no
holding.

DS

SUPPLEMENTAL MEMORANDUM

TO: Mr. Justice Powell
FROM: David
DATE: March 25, 1980
RE: No. 79-639, United States v. Sioux Nation

The \$17 million base figure for the Black Hills was set by the Indian Claims Commission in 1974. Sioux Nation v. United States, 33 Ind. Cl. Comm. 151, 362-363 (1974). The Court of Claims affirmed that award. United States v. Sioux Nation, 518 F.2d 1298 (Ct. Cl. 1975), cert. denied, 423 U.S. 1016. Thus, the valuation of the land is no longer a live issue in this litigation.

Affirm 8-1

79-639 U.S. v. Sioux Nation

Conf. 3/26/80

The Chief Justice Would prefer to Reverse, but is close & won't dissent.
Ct. Claims in 1974 held no taking. But
lobbier persuaded Congress to "overrule" Ct Claims.
Can be sure Congress was unaware of the
facts. They pay little attention to Indian claims
unless from Indian states. Indian lawyers effective.
Congress is presumed to have acted in good faith.
But the Commission found to contrary.
There is a 100 year problem. Answer as matter
of law is wholly unclear. Will join 4.

Mr. Justice Brennan Affirm

Troubled by Clairborne's position that Govt
made good faith effort to pay Sioux full & fair
equivalent. Ct Claims held otherwise.
no legal reasons stated.

Mr. Justice Stewart Affirm

Quest. is whether there was a taking. Govt
argued there was no taking. Lower Courts hold that
Congress may abrogate a Treaty unilaterally. This is
irrelevant.

On the record, can't find a sound
basis for holding there was no taking.

Mr. Justice White Appar

Govt's position is that it could
condemn prop or, as Trustee for Indians,
could provide terms & conditions for
taking prop. ~~But~~ But Govt didn't
promise to do anything specific.

Danny Friedman & Oscar Davis probably
are right. If ~~to~~ Danny is right as to
Reed, there was a "taking".

Mr. Justice Marshall Appar

Mr. Justice Blackmun Appar

Harry stated reasons - but mostly
~~to~~ agreement with B.R.W.

Mr. Justice Powell Agrees

Govt argues this was ~~action~~ ^{act} as trustee of Indians rather than a taking.

But I agree with Byron that record - as I understand it - doesn't support ~~any~~ Govt's position. There was no specific act. - no clear obligation to do anything.

The 5th amend ~~doesn't~~ ^{applies} to taking of Indian prop. Regretfully, I'm ~~inclined~~ inclined to think there was a taking.

We have been told not to view ration as an off-set

Mr. Justice Rehnquist Reverse

Congress has no right to overrule decision of Ct/Clavin. It could pay Sioux \$100 million. But can't direct an Art III Court what to do.

Cited Mustang (I don't know this case)

Separation of Powers requires reversal.

(I have not considered this issue)

Mr. Justice Stevens Agrees

Congress was not in any mind to be nice to Indians.

But need not analyze record as Ct/Clavin did. Would hold this is simply a plain & simple taking

Congress wiped out res Indians & other defenses

U.S. v Kluit
13 Wall 128
make look other way

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 7, 1980

MEMORANDUM TO THE CONFERENCE

Re: Sioux Tribe of Indians v. United States
79-639

Because my mention of the possibility that some of our earlier cases would strongly indicate that the congressional directive to re-hear this case in the Court of Claims without regard to the defense of res judicata could run afoul of the limitations placed on Article III courts, I have done some further looking into the matter. I must confess that one of the closest cases in point I found was one which Harry suggested to me, United States v. Klein, 13 Wall. 128 (1872). As with so many other areas of the law, there are cases going both ways, but I am tentatively convinced that the Klein rationale is persuasive. Since this would represent a dissenting view, requiring vacation of the decision of the Court of Claims, and since the Chief has already assigned the case for preparation of a majority opinion affirming the Court of Claims, in the interest of orderly procedure I shall simply circulate a dissent along the above mentioned lines after the draft majority opinion circulates.

Sincerely,



April 10, 1980

79-639 U. S. v. Sioux Nation

MEMORANDUM TO THE CONFERENCE:

Bill Rehnquist's memorandum of April 7 prompts me to say that although my vote at Conference - and now - is to affirm the judgment of the Court of Claims, I have never considered carefully the suggestion that Congress exceeded its lawful authority in directing the Court of Claims to disregard the defense of res judicata.

I must say, however, that in light of the case Harry brought to our attention (United States v. Klein, 13 Wall. 128), the point is not frivolous. I therefore have some uneasiness about our decision. Quite apart from the large sum of money involved in this particular case, I have wondered whether our decision will establish a precedent that will give rise to similar claims from Indian tribes that - over the past century or more - may have been persuaded or coerced to surrender lands under circumstances that now would be viewed as a "taking".

In sum, if Bill Rehnquist's further study indicates that there is indeed a substantial constitutional question as to congressional power, I could vote for a reargument on this issue. I appreciate that the possibility of reargument was suggested at Conference, and there appeared to be insufficient interest in reargument to delay the assignment of the writing of an opinion on the merits. I write now merely to express the above qualification to my otherwise positive vote to affirm.

L.F.P., Jr.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 11, 1980

Re: No. 79-639 United States v. Sioux Nation

Dear Harry:

Since a number of us seem to be bombarding one another with memoranda in this case, I take the liberty of responding to your memorandum of April 11, to make just a few preliminary points in response. United States v. Klein is unquestionably distinguishable from the congressional action taken in this case on several grounds, two of which you mention in your memorandum. Nevertheless, one of the underlying principles of the Klein decision was that finality is an essential component of Art. III decisions and that Congress may not interfere with the exercise of judicial power by stripping a judgment of its finality. I believe that this premise of Klein has survived and may have applicability to this case.

This Court in Pope v. United States, 323 U.S. 1 (1944), another case which you cite, found that the decision in Klein "rested upon the ground that . . . Congress was without constitutional authority to control the exercise of . . . judicial power . . . by requiring this Court to set aside the judgment of the Court of Claims." Id. at 8. The Court in Pope found that the congressional act in issue there did not conflict with Klein because properly construed, it did not "set aside [a prior] judgment or . . . require a new trial of the issues . . . which the court had resolved against petitioner." The Court specifically found that because Congress had not set aside a final judgment of an Art. III court, the Act did not "encroach upon the judicial function which the Court of Claims had previously exercised." The Court was careful to reserve the question of whether there would be unconstitutional encroachment upon that function if Congress had set aside the prior judgment of the Court of

Claims and ordered a new trial (as opposed to forming a new statutory obligation). The Court stated:

"We do not consider just what application the principles announced in the Klein case could rightly be given to a case in which Congress sought, pendente lite, to set aside a judgment of the Court of Claims in favor of the government and to require relitigation of this suit. For we do not construe the [Act] as requiring the Court of Claims to set aside the judgment in the case already decided or as changing the rules of decision for the determination of a pending case." (Emphasis added.)

Thus Pope reserves the very question which you state was decided by Cherokee Nation v. United States, 270 U.S. 476 almost twenty years earlier. While I was aware of the Cherokee Nation case, I am not satisfied that it should be found controlling in this situation. In Cherokee, the Court found that Congress passed a statute permitting relitigation so that the Cherokees could present a theory that they were entitled to interest on a compounded basis, rather than merely the simple interest which they were awarded in a prior Court of Claims decision. The Court in the Cherokee case states that the theory of computing interest which the Cherokees were asserting in the second action was not "presented either to the Court of Claims or to this Court. It is a new argument not before considered." 270 U.S. at 486. Thus Cherokee did not present the precise issue of whether Congress can require an Art. III Court to adjudicate the identical issue more than one time.

I am not convinced that Congress has done no more than assert a litigant's waiver in this case. Congress in fact has required the Court of Claims to adjudicate an issue which it has already adjudicated. While other litigants

may also be able to waive res judicata, I do not think that a court would feel obligated to exercise its jurisdiction under such circumstances. Thus I think the congressional action in this case is more appropriately characterized as a congressional grant of a new trial on an issue which has been finally decided. I am not ready to conclude that simply on the authority of Cherokee Nation there is no invasion of judicial powers when Congress declines to respect the finality of this Court's decisions, sets aside a valid judgment, and orders a new trial on an issue previously decided in an Article III Court. If we were to enter a judgment in favor of the United States in this case, could Congress order the Court of Claims to hear the issue once again? Under your reading of Cherokee Nation, I think the answer to that question would have to be yes.

I had not intended to articulate my position in this case as of yet, since it is still in the formative stages, but I did want to express my view that the question should be viewed as quite substantial despite the decision in Cherokee Nation. If the Court in Klein was right that Congress does not have the power to set aside a final judgment of an Art. III Court, then I think this case may well be governed by Klein. I think the Court in Pope wisely reserved the question presented in this case and I think we should give it the consideration it deserves.

Sincerely,

WHR/mm

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

✓
April 11, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 - United States v. Sioux Nation

Bill Rehnquist's memorandum of April 7, and Lewis' memorandum of April 10, prompt me to set forth my present views on the question whether Congress had the constitutional power to enact legislation requiring the Court of Claims to reach the merits of the Sioux' taking claim.

As I indicated at Conference, I believe that United States v. Klein, a case I brought up, is properly distinguishable from this case, principally on two grounds. First, the case traditionally has been read as a limitation on Congress' power to dictate how evidence in a particular case is to be judged, when that power also interferes with the constitutional authority committed to a co-equal branch -- in Klein, Congress attempted to render the President's pardon power a nullity. No such problem is presented in this case. See Hart & Wechsler, The Federal Courts and the Federal System 315-316 (2d ed. 1973). Second, in Klein, the legislation which Congress enacted had the effect of retroactively closing the doors of the Court of Claims to a party who already had been adjudged to have a legitimate claim against the United States. Here, of course, Congress' legislative action had the effect of giving a claimant against the Government a second chance to establish its claim. Arguably, legislative action by which Congress waives its right to a judgment in its favor does not present the same kind of equitable concerns that were presented in Klein.

Moreover, since Conference I have had the occasion to look into this issue a bit more closely. For the present, I am convinced that the later case of Cherokee Nation v. United States, 270 U.S. 476 (1926), is controlling on the question. The facts of that case reveal that the Cherokee had obtained a judgment against the U.S., affirmed by this Court in April, 1906, which judgment included a large amount of interest. Thereafter, in 1919, Congress passed a special act that gave

jurisdiction to the Court of Claims to hear and determine the claim of the Cherokee against the U.S. for additional interest arising out of the same substantive claim. This Court observed that "but for the special act of 1919 . . . the question here mooted would have been foreclosed as res judicata." Id., at 486. "The Court construed the special act as a waiver of the res judicata effect of the prior judgment, and concluded: "The power of Congress to waive such an adjudication is clear." Ibid. See also Pope v. United States, 323 U.S. 1, 8-10 (discussing, inter alia, Klein and Cherokee Nation).

I, of course, shall be interested in what Bill Rehnquist may come up with. For now, however, I am fairly persuaded that there is no need for reargument since our prior cases establish the authority of Congress to waive the res judicata effects of a prior judgment in the Government's favor.

In response to Lewis' concern that this case may establish a precedent that will enable Indian tribes to raise similar claims based on "takings" of a century ago, I have only a brief observation. Does not the five year statute of limitations for claims existing before August 13, 1946, established in 25 U.S.C. § 70k, obviate that concern to a significant extent?

Has.

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

CHAMBERS OF
THE CHIEF JUSTICE

April 11, 1980

✓

Re: 79-639 - United States v. Sioux Nation

MEMORANDUM TO THE CONFERENCE:

Tentatively, I lean to Harry's reading of Klein. It is one thing for Congress to try to nullify a favorable judgment and not quite the same to "revive" a "dead" claim. It can always do the latter by private bills but historically it has used the Court of Claims as its "agent" to analyze the evidence relating to damages and even broader questions which a committee of Congress is not equipped to deal with.

For the moment, I am content to wait for the opinion and perhaps that will resolve doubt\$

Regards,

LOBB

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

✓

April 14, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 - United States v. Sioux Nation

I fully agree with Harry's most recent memorandum in this case dated April 14th, and especially with his observation that the case should not be set for reargument. After all, the Solicitor General is obligated to defend an Act of Congress, and setting it for reargument would place the government in the very awkward position of asserting the Act's unconstitutionality, or of giving us no adversary presentation.

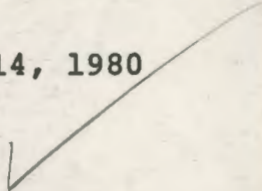
Sincerely,

WHR

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 14, 1980



MEMORANDUM TO THE CONFERENCE

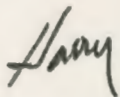
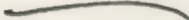
Re: No. 79-639 - United States v. Sioux Nation

The recent correspondence prompts me to circulate this memorandum. The case has been assigned to me for an opinion. I have no desire to undertake that substantial task (I trust you all will agree it is rather substantial if the merits are to be reached), if there is a fair likelihood that a majority ultimately will conclude that Congress exceeded its authority.

I think it desirable, therefore, that we focus on that issue and count the votes. If a majority feel the way Bill Rehnquist does, the case should be reassigned. If a majority feel otherwise, at least tentatively, I shall be willing to go ahead.

As of now, I would reach the merits. The recent correspondence indicates that the Chief feels that way; that Bill Rehnquist is of the other view; and that Lewis is perhaps inclined in the other direction. I shall do nothing until the dust settles.

I might add as a postscript, that I am not very enthusiastic about setting the case for reargument. Although I think it unnecessary, I would not be opposed to requesting prompt briefing on this added issue if a majority is so inclined. There then would be a chance of getting the case down before the Summer.

April 18, 1980

79-639 United States v. Sioux Nation

Dear Harry:

This is a reply to your memorandum of April 14.

I suppose that reargument would, as Bill Rehnquist noted, place the government in an awkward position. But I do not think Bill's point is frivolous, and certainly you are entirely right that we should make a decision on the rebriefing or reargument without further delay. I would join four for a request for briefing on this single issue. Absent such a vote, you can count on my remaining with my Conference vote.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

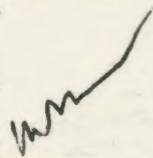
April 21, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 - United States v. Sioux Nation

I think I appreciate the points both Harry and Lewis have made in their recent correspondence on this subject. Given the convoluted nature of the proceedings, I think the awkwardness of the position of the government to which Lewis refers in his letter to Harry of April 18th is apparent; I would, with Lewis, join for re-argument with the stipulation that an amicus be appointed to brief and argue the Article III issue.

Sincerely,



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

CHAMBERS OF
JUSTICE POTTER STEWART

April 21, 1980

Re: No. 79-639, United States v.
Sioux Nation

Dear Harry,

I am more than a little concerned about the impact of a decision that there was a "taking" in this case, but I remain of the view that there was. Although the issue that interests Bill Rehnquist is not a frivolous one, it was not made an issue in this case, and I agree that no purpose would be served by setting the case for reargument on this issue. In short, I adhere to my Conference vote.

Sincerely yours,

? S.
1.
/

Mr. Justice Blackmun

Copies to the Conference

June 11, 1980

79-639 United States v. Sioux Nation

Dear Harry:

I will await Bill Rehnquist's writing on the Article III issue before making a final decision.

Your opinion is most interesting.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 11, 1980

RE: No. 79-639 United States v. Sioux Nation

Dear Harry:

I agree.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Dear Harry,

*I will await WTR's
~~data~~ writing on the Ant III
issue before making a
final decision.*

*Your opinion is
most interesting.*

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

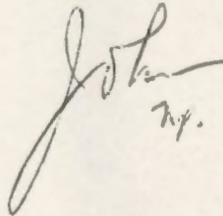
June 11, 1980

Re: 79-639 - United States v. Sioux Nation
of Indians

Dear Harry:

Please join me.

Respectfully,

A handwritten signature in dark ink, appearing to read "John P. Stevens". The signature is stylized with a large, sweeping "J" and "S".

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 11, 1980

Re: 79-639 - United States v. Sioux Nation

Dear Harry:

I am glad to join your opinion for the
Court.

Sincerely yours,

P.S.
11

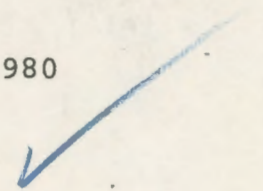
Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1980

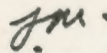


Re: No. 79-639 - United States v. Sioux Nation

Dear Harry:

Please join me.

Sincerely,



T.M.

Mr. Justice Blackmun

cc: The Conference

DOS

MEMORANDUM

TO: Mr. Justice Powell
FROM: David
DATE: June 11, 1980
RE: No. 79-639, United States v. Sioux Nation

I have plowed through this endless tome with particular attention to the Article III arguments raised at Conference by Justice Rehnquist. Although HAB has produced a document only slightly shorter than the D.C. phone book, I do think his treatment of the Article III question was persuasive. Assuming that this Court does not go looking for confrontations with Congress over such matters, HAB presents good reasons to accept jurisdiction: 1) Congress acted under its powers to pay debts and, as sovereign, waived res judicata defenses that it might interpose; 2) the Klein case involved congressional usurpation of the constitutional power of the Executive to make pardons and of the judiciary insofar as Congress attempted to reverse the Court's construction of the constitutional effect of a pardon in Padleford; 3) Justice Cardozo's Cherokee Nation opinion appears to be squarely on point, holding that in an Indian treaty case Congress may waive its res judicata defense.

I spoke to Justice Rehnquist's clerk, who said that they still expect to dissent on the Article III issue. (Reportedly

Justice Rehnquist suggested that the dissent be different from HAB's opinion "in every respect -- especially length.") I think it would be prudent to see what the dissent says.

Pages: 1, 4, 14, 16, 19, 31, 32, 37, 39, 40

To: The Chief Justice *LJP*
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 13 1980

Printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-639

United States, Petitioner,
v.
Sioux Nation of Indians et al. } On Writ of Certiorari to the
United States Court of
Claims.

[June —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West. Although the litigation comes down to a claim of interest since 1877 on an award of over \$17 million, it is necessary, in order to understand the controversy, to review at some length the chronology of the case and its factual setting.

I

For over a century now the Sioux Nation has claimed that the United States unlawfully abrogated the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, in Art. II of which the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named." *Id.*, at 636. The Fort Laramie Treaty was concluded at the culmination of the Powder River War of 1866-1867, a series of military engagements in which the Sioux tribes, led by their great chief, Red Cloud, fought to protect the integrity of earlier-recognized treaty lands from the incursion of white settlers.¹

¹ The Sioux territory recognized under the Treaty of September 17, 1851, see 11 Stat. 749, included all of the present State of South Dakota, and parts of what is now Nebraska, Wyoming, North Dakota, and Montana.

Reviewed

LJP

6/13

I'll await

WAR's dissent

- the HAB's

answer to

*the Separation
of Power issue
is persuasive.*

*I don't like
the repetition
of various
statements
of alleged*

*fraud &
over-reaching
by U.S. Govt.*

2 UNITED STATES *v.* SIOUX NATION OF INDIANS

The Fort Laramie Treaty included several agreements central to the issues presented in this case. First, it established the Great Sioux Reservation, a tract of land bounded on the east by the Missouri River, on the south by the northern border of the State of Nebraska, on the north by the forty-sixth parallel of north latitude, and on the west by the one hundred and fourth meridian of west longitude,² in addition to certain reservations already existing east of the Missouri. The United States "solemnly agree[d]" that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in [this] territory." *Ibid.*

Second, the United States permitted members of the Sioux tribes to select lands within the reservation for cultivation. *Id.*, at 637. In order to assist the Sioux in becoming civilized farmers, the Government promised to provide them with the necessary services and materials, and with subsistence rations for four years. *Id.*, at 639.³

The Powder River War is described in some detail in D. Robinson, A History of the Dakota or Sioux Indians, 356-381 (1904), reprinted in 2 South Dakota Historical Collections (1904). Red Cloud's career as a warrior and statesman of the Sioux is recounted in 2 G. Hebard & E. Brininstool, The Bozeman Trail, 175-204 (1922).

² The boundaries of the reservation included approximately half the area of what is now the State of South Dakota, including all of that State west of the Missouri River save for a narrow strip in the far western portion. The reservation also included a narrow strip of land west of the Missouri and north of the border between North and South Dakota.

³ The treaty called for the construction of schools and the provision of teachers for the education of Indian children, the provision of seeds and agricultural instruments to be used in the first four years of planting, and the provision of blacksmiths, carpenters, millers, and engineers to perform work on the reservation. See 15 Stat. 637-638, 640. In addition, the United States agreed to deliver certain articles of clothing to each Indian residing on the reservation, "on or before the first day of August of each year, for thirty years." *Id.*, at 638. An annual stipend of \$10 per person was to be appropriated for all those members of the Sioux Nation who continued to engage in hunting; those who settled on the reservation to engage in farming would receive \$20. *Ibid.* Subsistence

Third, in exchange for the benefits conferred by the treaty, the Sioux agreed to relinquish their rights under the Treaty of September 17, 1851, to occupy territories outside the reservation, while reserving their "right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase." *Ibid.* The Indians also expressly agreed to withdraw all opposition to the building of railroads that did not pass over their reservation lands, not to engage in attacks on settlers, and to withdraw their opposition to the military posts and roads that had been established south of the North Platte River. *Ibid.*

Fourth, Art. XII of the treaty provided:

"No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same." *Ibid.*⁴

The years following the treaty brought relative peace to the Dakotas, an era of tranquility that was disturbed, however, by renewed speculation that the Black Hills, which were included in the Great Sioux Reservation, contained vast quantities of gold and silver.⁵ In 1874 the Army planned and

rations of meat and flour (one pound of each per day) were to be provided for a period of four years to those Indians upon the reservation who could not provide for their own needs. *Id.*, at 639.

⁴ The Fort Laramie Treaty was considered by some commentators to have been a complete victory for Red Cloud and the Sioux. In 1904 it was described as "the only instance in the history of the United States where the government has gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return." Robinson, *supra*, n. 1, at 387.

⁵ The history of speculation concerning the presence of gold in the Black Hills, which dated from early explorations by prospectors in the 1830's, is capsulized in D. Jackson, *Custer's Gold* 3-7 (1966).

4 UNITED STATES v. SIOUX NATION OF INDIANS

undertook an exploratory expedition into the Hills, both for the purpose of establishing a military outpost from which to ^{those} control ~~rebel~~ Sioux who had not accepted the terms of the Fort Laramie Treaty, and for the purpose of investigating "the country about which dreamy stories have been told." D. Jackson, *Custer's Gold* 14 (1966) (quoting the 1873 annual report of Lieutenant General Philip H. Sheridan, as Commander of the Military Division of the Missouri, to the Secretary of War). Lieutenant Colonel George Armstrong Custer led the expedition of close to 1,000 soldiers and teamsters, and a substantial number of military and civilian aides. Custer's journey began at Fort Abraham Lincoln on the Missouri River on July 2, 1874. By the end of that month, they had reached the Black Hills, and by mid-August had confirmed the presence of gold fields in that region. The discovery of gold was widely reported in newspapers across the country.⁶ Custer's florid descriptions of the mineral and timber resources of the Black Hills, and the land's suitability for grazing and cultivation, also received wide circulation, and had the effect of creating an intense popular demand for the "opening" of the Hills for settlement.⁷ The only obstacle to

⁶ In 1974, the Center for Western Studies completed a project compiling contemporary newspaper accounts of Custer's expedition. See H. Krause & G. Olson, *Prelude to Glory* (1974). Several correspondents traveled with Custer on the expedition and their dispatches were published by newspapers both in the Midwest and the East. *Id.*, at 6.

⁷ See Robinson, *supra* n. 1, at 408-410; A. Tallent, *The Black Hills* 130 (1975 reprint of 1899 ed.); J. Vaughn, *The Reynolds Campaign on Powder River* 3-4 (1961).

The Sioux regarded Custer's expedition in itself to be a violation of the Fort Laramie Treaty. In later negotiations for cession of the Black Hills, Custer's trail through the Hills was referred to by a chief known as Fast Bear as "that thieves' road." Jackson, *supra* n. 5, at 24. Chroniclers of the expedition, at least to an extent, have agreed. See *id.*, at 120; G. Manypenny, *Our Indian Wars* xxix, 296-297 (1972 reprint of 1889 ed.).

"progress" was the Fort Laramie Treaty that reserved occupancy of the Hills to the Sioux.

Having promised the Sioux that the Black Hills were reserved to them, the United States Army was placed in the position of having to threaten military force, and occasionally to use it, to prevent prospectors and settlers from trespassing on lands reserved to the Indians. For example, in September 1874, General Sheridan sent instructions to Brigadier General Alfred H. Terry, Commander of the Department of Dakota, at Saint Paul, directing him to use force to prevent companies of prospectors from trespassing on the Sioux reservation. At the same time, Sheridan let it be known that he would "give a cordial support to the settlement of the Black Hills," should Congress decide to "open up the country for settlement, by extinguishing the treaty rights of the Indians." App. 62-63. Sheridan's instructions were published in local newspapers. See *id.*, at 63.⁸

Eventually, however, the Executive Branch of the Government decided to abandon the Nation's treaty obligation to preserve the integrity of the Sioux territory. In a letter dated November 9, 1875, to Terry, Sheridan reported that he had met with President Grant, the Secretary of the Interior,

⁸ General William Tecumseh Sherman, Commanding General of the Army, as quoted in the Saint Louis Globe in 1875, described the military's task in keeping prospectors out of the Black Hills as "the same old story, the story of Adam and Eve and the forbidden fruit." Jackson, *supra* n. 5, at 112. In an interview with a correspondent from the Bismarck Tribune, published September 2, 1874, Custer recognized the military's obligation to keep all trespassers off the reservation lands, but stated that he would recommend to Congress "the extinguishment of the Indian title at the earliest moment practicable for military reasons." Krause & Olson, *supra* n. 6, at 233. Given the ambivalence of feeling among the commanding officers of the Army about the practicality and desirability of its treaty obligations, it is perhaps not surprising that one chronicler of Sioux history would describe the Government's efforts to dislodge invading settlers from the Black Hills as "feeble." F. Hans, *The Great Sioux Nation* 522 (1964 reprint).

and the Secretary of War, and that the President had decided that the military should make no further resistance to the occupation of the Black Hills by miners, "it being his belief that such resistance only increased their desire and complicated the troubles." *Id.*, at 59. These orders were to be enforced "quietly," *ibid.*, and the President's decision was to remain "confidential." *Id.*, at 59-60 (letter from Sheridan to Sherman).

With the Army's withdrawal from its role as enforcer of the Fort Laramie Treaty, the influx of settlers into the Black Hills increased. The Government concluded that the only practical course was to secure to the citizens of the United States the right to mine the Black Hills for gold. Toward that end, the Secretary of the Interior, in the spring of 1875, appointed a commission to negotiate with the Sioux. The commission was headed by William B. Allison. The tribal leaders of the Sioux were aware of the mineral value of the Black Hills and refused to sell the land for a price less than \$70 million. The commission offered the Indians an annual rental of \$400,000, or payment of \$6 million for absolute relinquishment of the Black Hills. The negotiations broke down.⁹

In the winter of 1875-1876, many of the Sioux were hunting in the unceded territory north of the North Platte River, reserved to them for that purpose in the Fort Laramie Treaty. On December 6, 1875, for reasons that are not entirely clear, the Commissioner of Indian Affairs sent instructions to the Indian agents on the reservation to notify those hunters that if they did not return to the reservation agencies by January 31, 1876, they would be treated as "hostiles." Given the

⁹ The Report of the Allison Commission to the Secretary of the Interior is contained in the Annual Report of the Commissioner of Indian Affairs (1875), App. 146, 158-195. The unsuccessful negotiations are described in some detail in Jackson, *supra* n. 5, at 116-118, and in Robinson, *supra* n. 1, at 416-421.

severity of the winter, compliance with these instructions was impossible. On February 1, the Secretary of the Interior nonetheless relinquished jurisdiction over all hostile Sioux, including those Indians exercising their treaty-protected hunting rights, to the War Department. The Army's campaign against the "hostiles" led to Sitting Bull's notable victory over Custer's forces at the battle of the Little Big Horn on June 25. That victory, of course, was short-lived, and those Indians who surrendered to the Army were returned to the reservation, and deprived of their weapons and horses, leaving them completely dependent for survival on rations provided them by the Government.¹⁰

In the meantime, Congress was becoming increasingly dissatisfied with the failure of the Sioux living on the reservation to become self-sufficient.¹¹ The Sioux' entitlement to sub-

¹⁰ These events are described by Manypenny, *supra* n. 7, at 294-321, and Robinson, *supra*, n. 1, at 422-438.

¹¹ In *Dakota Twilight* (1976), a history of the Standing Rock Sioux, Edward A. Milligan states:

"Nearly seven years had elapsed since the signing of the Fort Laramie treaty and still the Sioux were no closer to a condition of self-support than when the treaty was signed. In the meantime the government had expended nearly thirteen million dollars for their support. The future treatment of the Sioux became a matter of serious moment, even if viewed from no higher standard than that of economics." *Id.*, at 52.

One historian has described the ration provisions of the Fort Laramie Treaty as part of a broader reservation system designed by Congress to convert nomadic tribesmen into farmers. Hagan, *The Reservation Policy: Too Little and Too Late*, in *Indian-White Relations: A Persistent Paradox* 157-169 (J. Smith & R. Kvasnicka eds., 1976). In words applicable to conditions on the Sioux reservation during the years in question, Professor Hagan stated:

"The idea had been to supplement the food the Indians obtained by hunting until they could subsist completely by farming. Clauses in the treaties permitted hunting outside the strict boundaries of the reservations, but the inevitable clashes between off-reservation hunting parties and whites led this privilege to be first restricted and then eliminated. The Indians

sistence rations under the terms of the Fort Laramie Treaty had expired in 1872. Nonetheless, in each of the two following years, over \$1 million was appropriated for feeding the Sioux. In August 1876, Congress enacted an appropriations bill providing that "hereafter there shall be no appropriation made for the subsistence" of the Sioux, unless they first relinquished their rights to the hunting grounds outside the reservation, ceded the Black Hills to the United States, and reached some accommodation with the Government that would be calculated to enable them to become self-supporting. Act of August 15, 1876, 19 Stat. 176, 192.¹² Toward this end, Congress requested the President to appoint another commission to negotiate with the Sioux for the cession of the Black Hills.

This commission, headed by George Manypenny, arrived in the Sioux country in early September and commenced meetings with the head men of the various tribes. The members of the commission impressed upon the Indians that the

became dependent upon government rations more quickly than had been anticipated, while their conversion to agriculture lagged behind schedule.

"The quantity of food supplied by the government was never sufficient for a full ration, and the quality was frequently poor. But in view of the fact that most treaties carried no provision for rations at all, and for others they were limited to four years, the members of Congress tended to look upon rations as a gratuity that should be terminated as quickly as possible. The Indian Service and military personnel generally agreed that it was better to feed than to fight, but to the typical late nineteenth-century member of Congress, not yet exposed to doctrines of social welfare, there was something obscene about grown men and women drawing free rations. Appropriations for subsistence consequently fell below the levels requested by the secretary of the interior.

"That starvation and near-starvation conditions were present on some of the sixty-odd reservations every year for the quarter century after the Civil War is manifest." *Id.*, at 161 (footnotes omitted).

¹² The chronology of the enactment of this bill does not necessarily support the view that it was passed in reaction to Custer's defeat at the Battle of the Little Big Horn on June 25, 1876, although some historians have taken a contrary view. See Jackson, *supra* n. 5, at 119.

United States no longer had any obligation to provide them with subsistence rations. The commissioners brought with them the text of a treaty that had been prepared in advance. The principal provisions of this treaty were that the Sioux would relinquish their rights to the Black Hills and other lands west of the one hundred and third meridian, and their rights to hunt in the unceded territories to the north, in exchange for subsistence rations for as long as they would be needed to ensure the Sioux' survival. In setting out to obtain the tribes' agreement to this treaty, the commission ignored the stipulation of the Fort Laramie Treaty that any cession of the lands contained within the Great Sioux Reservation would have to be joined in by three-fourths of the adult males. Instead, the treaty was presented just to Sioux chiefs and their leading men. It was signed by only 10% of the adult male Sioux population.¹³

Treaty

¹³ The commission's negotiations with the chiefs and head men is described by Robinson, *supra* n. 1, at 439-442. He states:

"As will be readily understood, the making of a treaty was a forced put, so far as the Indians were concerned. Defeated, disarmed, dismounted, they were at the mercy of a superior power and there was no alternative but to accept the conditions imposed upon them. This they did with as good grace as possible under all of the conditions existing." *Id.*, at 442.

Another early chronicler of the Black Hills region wrote of the treaty's provisions in the following chauvinistic terms:

"It will be seen by studying the provisions of this treaty, that by its terms the Indians from a material standpoint lost much, and gained but little. By the first article they lose all rights to the unceded territory in Wyoming from which white settlers had then before been altogether excluded; by the second they relinquish all right to the Black Hills, and the fertile valley of the Belle Fourche in Dakota, without additional material compensation; by the third conceding the right of way over the unceded portions of their reservation; by the fourth they receive such supplies only, as were provided by the treaty of 1868, restricted as to the points for receiving them. The only real gain to the Indians seems to be embodied in the fifth article of the treaty [Government's obligation to provide subsistence rations]. The Indians, doubtless, realized that the Black Hills was destined soon to slip out of their grasp, regardless of their

Congress resolved the impasse by enacting the 1876 "agreement" into law as the Act of Feb. 28, 1877 (1877 Act). 19 Stat. 254. The Act had the effect of abrogating the earlier Fort Laramie Treaty, and of implementing the terms of the Manypenny Commission's "agreement" with the Sioux leaders.¹⁴

claims, and therefore thought it best to yield to the inevitable, and accept whatever was offered them.

"They were assured of a continuance of their regular daily rations, and certain annuities in clothing each year, guaranteed by the treaty of 1868, and what more could they ask or desire, than that a living be provided for themselves, their wives, their children, and all their relations, including squaw men, indirectly, thus leaving them free to live their wild, careless, unrestrained life, exempt from all the burdens and responsibilities of civilized existence? In view of the fact that there are thousands who are obliged to earn their bread and butter by the sweat of their brows, and that have hard work to keep the wolf from the door, they should be satisfied." Tallent, *supra* n. 7, at 133-134.

¹⁴ The 1877 Act "ratified and confirmed" the agreement reached by the Manypenny Commission with the Sioux tribes. 19 Stat. 254. It altered the boundaries of the Great Sioux Reservation by adding some 900,000 acres of land to the north, while carving out virtually all that portion of the reservation between the one hundred and third and one hundred and fourth meridians, including the Black Hills, an area of well over 7 million acres. The Indians also relinquished their rights to hunt in the unceded lands recognized by the Fort Laramie Treaty, and agreed that three wagon roads could be cut through their reservation. *Id.*, at 255.

In exchange, the Government reaffirmed its obligation to provide all annuities called for by the Fort Laramie Treaty, and "to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868." *Id.*, at 256. In addition, every individual was to receive fixed quantities of beef or bacon and flour, and other foodstuffs, in the discretion of the Commissioner of Indian Affairs, which "shall be continued until the Indians are able to support themselves." *Ibid.* The provision of rations was to be conditioned, however, on the attendance at school by Indian children, and on the labor of those who resided on lands suitable for farming. The Government also promised to assist the Sioux in finding markets for their crops and in ob-

The passage of the 1877 Act legitimized the settlers' invasion of the Black Hills, but throughout the years it has been regarded by the Sioux as a breach of this Nation's solemn obligation to reserve the Hills in perpetuity for occupation by the Indians. One historian of the Sioux Nation commented on Indian reaction to the Act in the following words:

"The Sioux thus affected have not gotten over talking about that treaty yet, and during the last few years they have maintained an organization called the Black Hills Treaty Association, which holds meetings each year at the various agencies for the purpose of studying the treaty with the intention of presenting a claim against the government for additional reimbursement for the territory ceded under it. Some think that Uncle Sam owes them about \$9,000,000 on the deal, but it will probably be a hard matter to prove it." F. Fiske, *The Taming of the Sioux*, 132 (1917).

Fiske's words were to prove prophetic.

II

Prior to 1946, Congress had not enacted any mechanism of general applicability by which Indian tribes could litigate treaty claims against the United States.¹⁵ The Sioux, however, after years of lobbying, succeeded in obtaining from Congress the passage of a special jurisdictional act which provided them a forum for adjudication of all claims against the United States "under any treaties, agreements, or laws of Congress or for the misappropriation of any of the funds or

taining employment in the performance of government work on the reservation. *Ibid.*

Later congressional actions having the effect of further reducing the domain of the Great Sioux Reservation are described in *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 589 (1977).

¹⁵ See § 9 of the Act of March 3, 1863, ch. 92, 12 Stat. 767; § 1 of the Tucker Act of March 3, 1887, ch. 359, 24 Stat. 505.

lands of said tribe or band or bands thereof." Act of June 3, 1920, 41 Stat. 738. Pursuant to this statute, the Sioux, in 1923, filed a petition with the Court of Claims alleging that the Government had taken the Black Hills without just compensation, in violation of the Fifth Amendment. This claim was dismissed by that court in 1942. In a lengthy and unanimous opinion, the court concluded that it was not authorized by the Act of June 3, 1920, to question whether the compensation afforded the Sioux by Congress in 1877 was an adequate price for the Black Hills, and that the Sioux' claim in this regard was a moral claim not protected by the Just Compensation Clause. *Sioux Tribe v. United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U. S. 789 (1943).

In 1946, Congress passed the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. § 70 *et seq.*, creating a new forum to hear and determine all tribal grievances that had arisen previously. In 1950, counsel for the Sioux resubmitted the Black Hills claim to the Indian Claims Commission. The Commission initially ruled that the Sioux had failed to prove their case. *Sioux Tribe v. United States*, 2 Ind. Cl. Comm'n 646 (1954), aff'd, 146 F. Supp. 229 (Ct. Cl. 1956). The Sioux filed a motion with the Court of Claims to vacate its judgment of affirmance, alleging that the Commission's decision had been based on a record that was inadequate, due to the failings of the Sioux' former counsel. This motion was granted and the Court of Claims directed the Commission to consider whether the case should be reopened for the presentation of additional evidence. On November 19, 1958, the Commission entered an order reopening the case and announcing that it would reconsider its prior judgment on the merits of the Sioux claim. App. 265-266; see *Sioux Tribe v. United States*, 182 Ct. Cl. 912 (1968) (summary of proceedings).

Following the Sioux' filing of an amended petition, claiming again that the 1877 Act constituted a taking of the Black

Hills for which just compensation had not been paid, there ensued a lengthy period of procedural sparring between the Indians and the Government. Finally, in October 1968, the Commission set down three questions for briefing and determination: (1) What land and rights did the United States acquire from the Sioux by the 1877 Act? (2) What, if any, consideration was given for that land and those rights? and (3) If there was no consideration for the Government's acquisition of the land and rights under the 1877 Act, was there any payment for such acquisition? App. 266.

Six years later, by a 4-1 vote, the Commission reached a preliminary decision on these questions. *Sioux Nation v. United States*, 33 Ind. Cl. Comm'n 151 (1974). The Commission first held that the 1942 Court of Claims decision did not bar the Sioux' Fifth Amendment taking claim through application of the doctrine of res judicata. The Commission concluded that the Court of Claims had dismissed the earlier suit for lack of jurisdiction, and that it had not determined the merits of the Black Hills claim. The Commission then went on to find that Congress, in 1877, had made no effort to give the Sioux full value for the ceded reservation lands. The only new obligation assumed by the Government in exchange for the Black Hills was its promise to provide the Sioux with subsistence rations, an obligation that was subject to several limiting conditions. See n. 14, *supra*. Under these circumstances, the Commission concluded that the consideration given the Indians in the 1877 Act had no relationship to the value of the property acquired. Moreover, there was no indication in the record that Congress ever attempted to relate the value of the rations to the value of the Black Hills. Applying the principles announced by the Court of Claims in *Three Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968), the Commission concluded that Congress had acted pursuant to its power of eminent domain when it passed the 1877 Act,

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rather than as a trustee for the Sioux, and that the Government must pay the Indians just compensation for the taking of the Black Hills.¹⁶

The Government filed an appeal with the Court of Claims from the Commission's interlocutory order, arguing alternatively that the Sioux' Fifth Amendment claim should have been barred by principles of *res judicata* and collateral estoppel, or that the 1877 Act did not effect a taking of the Black Hills for which just compensation was due. Without reaching the merits, the Court of Claims held that the Black Hills claim was barred by the *res judicata* effect of its 1942 decision. *United States v. Sioux Nation*, 207 Ct. Cl. 234, 518 F. 2d 1298 (1975). The court's majority recognized that the practical impact of the question presented was limited to a determination of whether or not an award of interest would be available to the Indians. This followed from the Government's failure to appeal the Commission's holding that it had acquired the Black Hills through a course of unfair and dishonorable dealing for which the Sioux were entitled to damages, without interest, under § 2 of the Indian Claims Commission Act, 60 Stat. 1050, 25 U. S. C. § 70a (5). Only if the acquisition of the Black Hills amounted to an uncon-

¹⁶ The Commission determined that the fair market value of the Black Hills as of February 28, 1977, was \$17.1 million. In addition, the United States was held liable for gold removed by trespassing prospectors prior to that date, with a fair market value in the ground of \$450,000. The Commission determined that the Government should receive a credit for all amounts it had paid to the Indians over the years in compliance with its obligations under the 1877 Act. These amounts were to be credited against the fair market value of the lands and gold taken, and interest as it accrued. The Commission decided that further proceedings would be necessary to compute the amounts to be credited and the value of the rights of way across the reservation that the Government also had acquired through the 1877 Act.

Chairman Kuykendall dissented in part from the Commission's judgment, arguing that the Sioux' taking claim was barred by the *res judicata* effect of the 1942 Court of Claims decision.

stitutional taking would the Sioux be entitled to interest, *Id.*, at 237, 518 F. 2d, at 1299.¹⁷

The court affirmed the Commission's holding that a want of fair and honorable dealings in this case was evidenced, and held that the Sioux thus would be entitled to an award of at least \$17.5 million for the lands surrendered and for the gold taken by trespassing prospectors prior to passage of the 1877 Act. See n. 16, *supra*. The Court also remarked upon President Grant's duplicity in breaching the Government's treaty obligation to keep trespassers out of the Black Hills, and the pattern of duress practiced by the Government on the starving Sioux to get them to agree to the sale of the Black Hills. The court concluded: "A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe." *Id.*, at 241, 518 F. 2d, at 1302.

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¹⁷ See *United States v. Tillamooks*, 341 U. S. 48, 49 (1951) (recognizing that the "traditional rule" is that interest is not to be awarded on claims against the United States absent an express statutory provision to the contrary and that the "only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment"). In *United States v. Klamath Indians*, 304 U. S. 119, 121 (1938), the Court stated: "The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, *i. e.*, value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

The Court of Claims also noted that subsequent to the Indian Claims Commission's judgment, Congress had enacted an amendment to 25 U. S. C. § 70a, providing generally that expenditures made by the Government "for food, rations, or provisions shall not be deemed payments on the claim." Act of October 27, 1974, § 2, 88 Stat. 1499. Thus, the Government would no longer be entitled to an offset from any judgment eventually awarded the Sioux based on its appropriations for subsistence rations in the years following the passage of the 1877 Act. 207 Ct. Cl., at 240, 518 F. 2d, at 1301. See n. 16, *supra*.

Nonetheless, the court held that the merits of the Sioux' taking claim had been reached in 1942, and whether resolved "rightly or wrongly," *id.*, at 249, 518 F. 2d, at 1306, the claim was now barred by res judicata. The court observed that interest could not be awarded the Sioux on judgments obtained pursuant to the Indian Claims Commission Act, and that while Congress could correct this situation, the court could not. *Ibid.*¹⁸ The Sioux petitioned this Court for a writ of certiorari, but that petition was denied. 423 U. S. 1016 (1975).

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The case returned to the Indian Claims Commission, where the value of the rights of way obtained by the Government through the 1877 Act was determined to be \$3,484, and where it was decided that the Government had made no payments to the Sioux that could be considered as offsets. App. 316. The Government then moved the Commission to enter a final award in favor of the Sioux in the amount of \$17.5 million, see n. 16, *supra*, but the Commission deferred entry of final judgment in view of legislation then pending in Congress that dealt with this case.

On March 13, 1978, Congress passed a statute providing for Court of Claims review of the merits of the Indian Claims Commission's judgment that the 1877 Act effected a taking of the Black Hills, without regard to the defenses of *res judicata* and collateral estoppel. The statute authorized the Court of Claims to take new evidence in the case, and to conduct its review of the merits *de novo*. Pub. L. 95-243, 92 Stat. 153, amending § 20 (b) of the Indian Claims Commission Act. See 25 U. S. C. § 70 (b) (1976 ed., Supp. II).

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Acting pursuant to that statute, a majority of the Court of Claims, sitting en banc, in an opinion by Chief Judge Fried-

¹⁸ Judge Davis dissented with respect to the court's holding on *res judicata*, arguing that the Sioux had not had the opportunity to present their claim fully in 1942. 207 Ct. Cl., at 249, 518 F. 2d, at 1306.

man, affirmed the Commission's holding that the 1877 Act effected a taking of the Black Hills and of rights of way across the reservation. *Sioux Nation v. United States*, 220 Ct. Cl. —, 601 F. 2d 1157 (1979).¹⁹ In doing so, the court applied the test it had earlier articulated in *Fort Berthold*, 182 Ct. Cl., at 553, 390 F. 2d, at 691, asking whether Congress had made "a good faith effort to give the Indians the full value of the land," 220 Ct. Cl., at —, 601 F. 2d, at 1162, in order to decide whether the 1877 Act had effected a taking or whether it had been a noncompensable act of congressional guardianship over tribal property. The court characterized the Act as a taking, an exercise of Congress' power of eminent domain over Indian property. It distinguished broad statements seemingly leading to a contrary result in *Lone Wolf v. Hitchcock*, 187 U. S. 553 (1903), as inapplicable to a case involving a claim for just compensation. *Id.*, at —, 601 F. 2d, at 1170.²⁰

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The court thus held that the Sioux were entitled to an award of interest, at the annual rate of 5%, on the principal sum of \$17.1 million, dating from 1877.²¹

¹⁹ While affirming the Indian Claims Commission's determination that the acquisition of the Black Hills and the rights-of-way across the reservation constituted takings, the court reversed the Commission's determination that the mining of gold from the Black Hills by prospectors prior to 1877 also constituted a taking. The value of the gold, therefore, could not be considered as part of the principal on which interest would be paid to the Sioux. 220 Ct. Cl., at —, 601 F. 2d, at 1171-1172.

²⁰ The *Lone Wolf* decision itself involved an action by tribal leaders to enjoin the enforcement of a statute that had the effect of abrogating the provisions of an earlier-enacted treaty with an Indian tribe. See Part IV-B, *infra*.

²¹ Judge Nichols concurred in the result, and all of the court's opinion except that portion distinguishing *Lone Wolf*. He would have held *Lone Wolf*'s principles inapplicable to this case because Congress had not created a record showing that it had considered the compensation afforded the Sioux under the 1877 Act to be adequate consideration for the Black Hills. He did not believe that *Lone Wolf* could be distinguished on the

We granted the Government's petition for a writ of certiorari, — U. S. — (1979), in order to review the important constitutional questions presented by this case, questions not only of long-standing concern to the Sioux, but also of significant economic import to the Government.

III

Having twice denied petitions for certiorari in this litigation, see 318 U. S. 789 (1943); 423 U. S. 1016 (1975), we are confronted with it for a third time as a result of the amendment, above noted, to the Indian Claims Commission Act of 1946, 25 U. S. C. § 70s (b) (1976 ed., Supp. II), which directed the Court of Claims to review the merits of the Black Hills takings claim without regard to the defense of res judicata. The amendment, approved March 13, 1978, provides:

"Notwithstanding any other provision of law, upon application by the claimants within thirty days from the date of the enactment of this sentence, the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter

ground that it involved an action for injunctive relief rather than a claim for just compensation. 220 Ct. Cl., at —, 601 F. 2d, at 1175-1176.

Judge Bennett, joined by Judge Kunzig, dissented. The dissenters would have read *Lone Wolf* broadly to hold that it was within Congress' constitutional power to dispose of tribal property without regard to good faith or the amount of compensation given. "The law we should apply is that once Congress has, through negotiation or statute, recognized the Indian tribes' rights in the property, has disposed of it, and has given value to the Indians for it, that is the end of the matter." *Id.*, at —, 601 F. 2d, at 1182.

Congress

judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo." 92 Stat. 153.

Before turning to the merits of the Court of Claims' conclusion that the Act of February 28, 1877, effected a taking of the Black Hills, we must consider the question whether Congress, in enacting this 1978 amendment, "has inadvertently passed the limit which separates the legislative from the judicial power." *United States v. Klein*, 13 Wall. 128, 147 (1872).

A

There are two objections that might be raised to the constitutionality of this amendment, each framed in terms of the doctrine of separation of powers. The first would be that Congress impermissibly has disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments in this case mere advisory opinions. See *Hayburn's Case*, 2 Dall. 409, 410-414 (1792) (setting forth the views of three Circuit Courts, including among their complements Chief Justice Jay, and Justices Cushing, Wilson, Blair, and Iredell, that the Act of March 23, 1792, 1 Stat. 243, was unconstitutional because it subjected the decisions of the Circuit Courts concerning eligibility for pension benefits to review by the Secretary of War and the Congress). The objection would take the form that Congress, in directing the Court of Claims to reach the merits of the Black Hills claim, effectively reviewed and reversed that court's 1975 judgment that the claim was barred by res judicata, or its 1948 judgment that the claim was not cognizable under the Fifth Amendment. Such legislative review of a judicial decision would interfere with the independent functions of the Judiciary.

The second objection would be that Congress overstepped its bounds by granting the Court of Claims jurisdiction to

decide the merits of the Black Hills claim, while prescribing a rule for decision that left the Court no adjudicatory function to perform. See *United States v. Klein*, 13 Wall., at 146; *Yakus v. United States*, 321 U. S. 414, 467-468 (1944) (Rutledge, J., dissenting). Of course, in the context of this amendment, that objection would have to be framed in terms of Congress' removal of a single issue from the Court of Claims' purview, the question whether res judicata or collateral estoppel barred the Sioux' claim. For in passing the amendment, Congress left no doubt that the Court of Claims was free to decide the merits of the takings claim in accordance with the evidence it found and applicable rules of law. See n. 23, *infra*.

These objections to the constitutionality of the amendment were not raised by the Government before the Court of Claims. At oral argument in this Court, counsel for the United States, upon explicit questioning advanced the position that the amendment was not beyond the limits of legislative power.²² The question whether the amendment impermissibly interfered with judicial power was debated, however, in the House of Representatives, and that body concluded that the Government's waiver of a "technical legal defense" in order to permit the Court of Claims to reconsider the merits of the Black Hills claim was within Congress' power to enact.²³

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²² In response to a question from the bench, government counsel stated: "I think Congress is entitled to say, 'You may have another opportunity to litigate your lawsuit.'" Tr. of Oral Arg. 20.

²³ Representative Gudger of North Carolina persistently argued the view that the amendment unconstitutionally interfered with the powers of the Judiciary. He dissented from the Committee Report in support of the amendment's enactment, stating:

"I do not feel that when the Federal Judiciary has adjudicated a matter through appellate review and no error has been found by the Supreme Court of the United States in the application by the lower court (in this instance the Court of Claims) of the doctrine of res judicata or collateral estoppel that the Congress of the United States should enact legislation

The question debated on the floor of the House is one the answer to which is not immediately apparent. It requires us to examine the proper role of Congress and the courts in

which has the effect of reversing the decision of the Judiciary." H. R. Rep. No. 95-529, p. 17 (1977).

Representative Gudger stated that he could support a bill to grant a special appropriation to the Sioux Nation, acknowledging that it was for the purpose of extinguishing Congress' moral obligation arising from the Black Hills claim, "but I cannot justify in my own mind this exercise of congressional review of a judicial decision which I consider contravenes our exclusively legislative responsibility under the separation of powers doctrine." *Id.*, at 18.

The Congressman, in the House debates, elaborated upon his views on the constitutionality of the amendment. He stated that the amendment would create "a real and serious departure from the separation-of-powers doctrine, which I think should continue to govern us and has governed us in the past." 124 Cong. Rec. H897 (Feb. 9, 1978). He continued:

"I submit that this bill has the precise and exact effect of reversing a decision of the Court of Claims which has heretofore been sustained by the Supreme Court of the United States. Thus, it places the Congress of the United States in the position of reviewing and reversing a judicial decision in direct violation of the separation-of-powers doctrine so basic to our tripartite form of government.

"I call to your attention that, in this instance, we are not asked to change the law, applicable uniformly to all cases of like nature throughout the land, but that this bill proposes to change the application of the law with respect to one case only. In doing this, we are not legislating, we are adjudicating. Moreover, we are performing the adjudicatory function with respect to a case on which the Supreme Court of the United States has acted. Thus, in this instance, we propose to reverse the decision of the Supreme Court of our land." *Ibid.*

Representative Gudger's views on the effect of the amendment vis-à-vis the independent powers of the Judiciary were not shared by his colleagues. Representative Roncalio stated:

"I want to emphasize that the bill does not make a congressional determination of whether or not the United States violated the Fifth Amendment. It does not say that the Sioux are entitled to the interest on the \$17,500,000 award. It says that the court will review the facts and law in the case and determine that question." *Id.*, at H898.

Representative Roncalio also informed the House that Congress in the past had enacted legislation waiving the defense of *res judicata* in private

recognizing and determining claims against the United States, in light of more general principles concerning the legislative

claims cases, and had done so twice with respect to Indian claims. *Ibid.* He mentioned the Act of March 3, 1881, ch. 139, 21 Stat. 504 (which actually waived the effect of a prior award made to the Choctaw Nation by the Senate), and the Act of February 7, 1925, ch. 148, 43 Stat. 812 (authorizing the Court of Claims and the Supreme Court to consider claims of the Dealware Tribe "de novo, upon a legal and equitable basis, and without regard to any decision, finding, or settlement heretofore had in respect of any such claims"). Both those enactments were also brought to the attention of a Senate subcommittee in hearings on this amendment conducted during the previous legislative session. See Hearings on S. 2780 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess., 16-17 (1976) (letter from Morris Thompson, Commissioner of Indian Affairs). The enactments referred to by Representative Roncalio were construed, respectively, in *Choctaw Nation v. United States*, 119 U. S. 1, 29-32 (1886), and *Delaware Tribe v. United States*, 74 Ct. Cl. 368 (1932).

Representative Pressler also responded to Representative Gudger's interpretation of the proposed amendment, arguing that "[w]e are, indeed, here asking for a review and providing the groundwork for a review. I do not believe that we would be reviewing a decision; indeed, the same decision might be reached." 124 Cong. Rec. H899 (Feb. 9, 1978). Earlier, Representative Meeds clearly had articulated the prevailing congressional view on the effect of the proposed amendment. After summarizing the history of the Black Hills litigation, he stated:

"I go through that rather complicated history for the purpose of pointing out to the Members that the purpose of this legislation is not to decide the matter on the merits. That is still for the court to do. The purpose of this legislation is only to waive the defense of res judicata and to waive this technical defense, as we have done in a number of other instances in this body, so this most important claim can get before the courts again and can be decided without a technical defense and on the merits." *Id.*, at H668 (Feb. 6, 1978).

See also S. Rep. No. 95-112, p. 6 (1977) ("The enactment of [the amendment] is needed to waive certain legal prohibitions so that the Sioux tribal claim may be considered on its merits before an appropriate judicial forum."); H. R. Rep. No. 95-529, p. 6 (1977) ("The enactment of [the amendment] is needed to waive certain technical legal defenses so that the Sioux tribal claim may be considered on its merits before an appropriate judicial forum.").

and judicial roles in our tripartite system of government. Our examination of the amendment's effect, and this Court's precedents, leads us to conclude that neither of the two separation of powers objections described above is presented by this legislation.

B

Our starting point is *Cherokee Nation v. United States*, 270 U. S. 476 (1926). That decision concerned the Special Act of Congress, dated March 3, 1919, 40 Stat. 1316, conferring jurisdiction upon the Court of Claims "to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five." In the judgment referred to by the Act, the Court of Claims had allowed 5% simple interest on four Cherokee claims, to accrue from the date of liability. *Cherokee Nation v. United States*, 40 Ct. Cl. 252 (1905). This Court had affirmed that judgment, including the interest award. *United States v. Cherokee Nation*, 202 U. S. 101, 123-126 (1906). Thereafter, and following payment of the judgment, the Cherokee presented to Congress a new claim that they were entitled to compound interest on the lump sum of principal and interest that had accrued up to 1895. It was this claim that prompted Congress, in 1919, to reconfer jurisdiction on the Court of Claims to consider the Cherokee's entitlement to that additional interest.

Ultimately, this Court held that the Cherokee were not entitled to the payment of compound interest on the original judgment awarded by the Court of Claims. 270 U. S., at 487-496. Before turning to the merits of the interest claim, however, the Court considered "the effect of the Act of 1919 in referring the issue in this case to the Court of Claims."

270 U. S., at 485-486. The Court's conclusion concerning that question bears close examination:

"The judgment of this Court in the suit by the Cherokee Nation against the United States, in April, 1906 (202 U. S. 101), already referred to, awarded a large amount of interest. The question of interest was considered and decided, and it is quite clear that but for the special Act of 1919, above quoted, the question here mooted would have been foreclosed as *res judicata*. In passing the Act, Congress must have been well advised of this, and the only possible construction therefore to be put upon it is that Congress has therein expressed its desire, so far as the question of interest is concerned, to waive the effect of the judgment as *res judicata*, and to direct the Court of Claims to re-examine it and determine whether the interest therein allowed was all that should have been allowed, or whether it should be found to be as now claimed by the Cherokee Nation. The Solicitor General, representing the Government, properly concedes this to be the correct view. *The power of Congress to waive such an adjudication of course is clear.*" 270 U. S., at 486 (last emphasis supplied).

The holding in *Cherokee Nation* that Congress has the power to waive the *res judicata* effect of a prior judgment entered in the Government's favor on a claim against the United States is dispositive of the question considered here. Moreover, that holding is consistent with a substantial body of precedent affirming the broad constitutional power of Congress to define and "to pay the Debts . . . of the United States." U. S. Const., Art. I, § 8, cl. 1. That precedent speaks directly to the separation of powers objections discussed above.

The scope of Congress' power to pay the Nation's debts seems first to have been construed by this Court in *United*

States v. Realty Company, 163 U. S. 427 (1896). There, the Court stated:

"The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded." *Id.*, at 440.

Other decisions clearly establish that Congress may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States, as Congress did in this case and in *Cherokee Nation*. Although, the Court in *Cherokee Nation* did not expressly tie its conclusion that Congress had the power to waive the res judicata effect of a judgment in favor of the United States to Congress' constitutional power to pay the Nation's debts, the *Cherokee Nation* opinion did rely on the decision in *Nock v. United States*, 2 Ct. Cl. 451 (1867). See 270 U. S., at 486.

In *Nock*, the Court of Claims was confronted with the precise question whether Congress invaded judicial power when it enacted a joint resolution, 14 Stat. 608, directing that court to decide a damage claim against the United States "in accordance with the principles of equity and justice," even though the merits of the claim previously had been resolved in the Government's favor. The court rejected the Government's argument that the joint resolution was unconstitutional as an exercise of "judicial powers" because it had the

effect of setting aside the court's prior judgment. Rather, the court concluded:

"It is unquestionable that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress. But here Congress do not attempt to award judgment, nor to grant a new trial *judicially*; neither have they *reversed* a decree of this court; nor attempted in any way to interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before." 2 Ct. Cl., at 457-458 (emphasis in original).

The *Nock* court thus expressly rejected the applicability of separation of powers objections to a congressional decision to waive the res judicata effect of a judgment in the Government's favor.²⁴

²⁴ The joint resolution at issue in *Nock* also limited the amount of the judgment that the Court of Claims could award *Nock* to a sum that had been established in a report of the Solicitor of the Treasury to the Senate. See 14 Stat. 608. The court rejected the Government's argument that the Constitution had not vested in Congress "such discretion to fetter or circumscribe the course of justice." See 2 Ct. Cl., at 455. The court reasoned that this limitation on the amount of the claimant's recovery was a valid exercise of Congress' power to condition waivers of the sovereign immunity of the United States. "[I]t would be enough to say that the defendants cannot be sued except with their own consent; and Congress have the same power to give this consent to a second action as they had to give it to a first." *Id.*, at 458.

Just because we have addressed our attention to the ancient Court of Claims' decision in *Nock*, it should not be inferred that legislative action of the type at issue here is a remnant of the far-distant past. Special jurisdictional acts waiving affirmative defenses of the United States to legal claims, and directing the Court of Claims to resolve the merits of

The principles set forth in *Cherokee Nation* and *Nock* were substantially reaffirmed by this Court in *Pope v. United States*, 323 U. S. 1 (1944). There Congress had enacted special legislation conferring jurisdiction upon the Court of Claims, "notwithstanding any prior determination, any stat-

those claims, are legion. See *Mizokami v. United States*, 188 Ct. Cl. 736, 740-741, and nn. 1 and 2, 414 F. 2d 1375, 1377, and nn. 1 and 2 (1969) (collecting cases). A list of cases, in addition to those discussed in the text, that have recognized or acted upon Congress' power to waive the defense of res judicata to claims against the United States follows (the list is not intended to be exhaustive): *United States v. Grant*, 110 U. S. 225 (1884); *Lamborn & Co. v. United States*, 106 Ct. Cl. 703, 724-728, 65 F. Supp. 569, 576-578 (1946); *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 19 (1944); *Richardson v. United States*, 81 Ct. Cl. 948, 956-957 (1935); *Delaware Tribe v. United States*, 74 Ct. Cl. 368 (1932); *Garrett v. United States*, 70 Ct. Cl. 304, 310-312 (1930).

In *Richardson*, the Court of Claims observed:

"The power of Congress by special act to waive any defense, either legal or equitable, which the Government may have to a suit in this court, as it did in the *Nock* and *Cherokee Nation* cases, has never been questioned. The reports of the court are replete with cases where Congress, impressed with the equitable justice of claims which have been rejected by the court on legal grounds, has, any special act, waived defenses of the Government which prevented recovery and conferred jurisdiction on the court to again adjudicate the case. In such instances the court proceeded in conformity with the provisions of the act of reference and in cases, too numerous for citation here, awarded judgments to claimants whose claims had previously been rejected." 81 Ct. Cl., at 957.

Two similar decisions by the United States Court of Appeals for the Eighth Circuit are of interest. Both involved the constitutionality of a joint resolution that set aside dismissals of actions brought under the World War Veterans' Act, 1924, 38 U. S. C. § 445 (1952 ed.), and authorized the reinstatement of those war risk insurance disability claims. The Court of Appeals found no constitutional prohibition against a congressional waiver of an adjudication in the Government's favor, or against conferring upon claimants against the United States the right to have their cases heard again on the merits. See *James v. United States*, 87 F. 2d 897, 898 (CA8 1937); *United States v. Hossmann*, 84 F. 2d 808, 810 (CA8 1936). The court relied, in part, on the holding in *Cherokee Nation*, and the sovereign immunity rationale applied in *Nock*.

ute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon" certain claims against the United States arising out of a construction contract. Special Act of February 27, 1942, § 1, 56 Stat. 1122. The court was also directed to determine Pope's claims and render judgment upon them according to a particular formula for measuring the value of the work that he had performed. The Court of Claims construed the Special Act as deciding the questions of law presented by the case, and leaving it the role merely of computing the amount of the judgment for the claimant according to a mathematical formula. *Pope v. United States*, 100 Ct. Cl. 375, 379-380, 53 F. Supp. 570, 571-572 (1944). Based upon that reading of the Act, and this Court's decision in *United States v. Klein*, 13 Wall. 128 (1872) (see discussion *infra*, at —), the Court of Claims held that the Act unconstitutionally interfered with judicial independence. 100 Ct. Cl., at 380-382, 53 F. Supp., at 572-573. It distinguished *Cherokee Nation* as a case in which Congress granted a claimant a new trial, without directing the courts how to decide the case. *Id.*, at 387, and n. 5, 53 F. Supp., at 575, and n. 5.

This Court reversed the Court of Claims' judgment. In doing so, the Court differed with the Court of Claims' interpretation of the effect of the Special Act. First, the Court held that the Act did not disturb the earlier judgment denying Pope's claim for damages. "While inartistically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before." 323 U. S., at 9. Second, the Court held that Congress' recognition of Pope's claim was within its power to pay the Nation's debts, and that its use of the Court of Claims as an instrument for exercising that power did not impermissibly invade the judicial function:

"We perceive no constitutional obstacle to Congress' imposing on the Government a new obligation where

there had been none before, for work performed by petitioner which was beneficial to the Government and for which Congress thought he had not been adequately compensated. The power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary. . . . *United States v. Realty Co.*, 163 U. S. 427. . . . Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal. [Footnote citing *Nock* and other cases omitted.] Nor do we think it did so by directing that court to pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act and to give judgment accordingly . . . see *Cherokee Nation v. United States*, 270 U. S. 476, 486." 323 U. S., at 9-10.

In explaining its holding that the Special Act did not invade the judicial province of the Court of Claims by directing it to reach its judgment with reference to a specified formula, the Court stressed that Pope was required to pursue his claim in the usual manner, that the earlier factual findings made by the Court of Claims were not necessarily rendered conclusive by the Act, and that, even if Congress had stipulated to the facts, it was still a judicial function for the Court of Claims to render judgment on consent. *Id.*, at 10-12.

To be sure, the Court in *Pope* specifically declined to consider "just what application the principles announced in the *Klein* case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside the judgment of the Court of Claims in favor of the Government and to require reliti-

gation of the suit." *Id.*, at 8-9. The case before us might be viewed as presenting that question. We conclude, however, that the separation of powers question presented in this case has already been answered in *Cherokee Nation*, and that that answer is completely consistent with the principles articulated in *Klein*.

The decision in *United States v. Klein*, 13 Wall. 128 (1872), arose from the following facts: Klein was the administrator of the estate of V. F. Wilson, the deceased owner of property that had been sold by agents of the Government during the War Between the States. Klein sued the United States in the Court of Claims for the proceeds of that sale. His lawsuit was based on the Abandoned and Captured Property Act of March 12, 1863, 12 Stat. 820, which afforded such a cause of action to noncombatant property owners upon proof that they had "never given any aid or comfort to the present rebellion." Following the enactment of this legislation, President Lincoln has issued a proclamation granting "a full pardon" to certain persons engaged "in the existing rebellion" who desired to resume their allegiance to the Government, upon the condition that they take and maintain a prescribed oath. This pardon was to have the effect of restoring those persons' property rights. See 13 Stat. 737. The Court of Claims held that Wilson's taking of the amnesty oath had cured his participation in "the . . . rebellion," and that his administrator, Klein, was thus entitled to the proceeds of the sale. *Wilson v. United States*, 4 Ct. Cl. 559 (1869).

The Court of Claims' decision in Klein's case was consistent with this Court's later decision in a similar case, *United States v. Padelford*, 9 Wall. 531 (1870), holding that the presidential pardon purged a participant "of whatever offence against the laws of the United States he had committed . . . and relieved [him] from any penalty which he might have incurred." *Id.*, at 543. Following the Court's announcement of the judgment in *Padelford*, however, Congress enacted a proviso

to the appropriations bill for the Court of Claims. The proviso had three effects: First, no presidential pardon or amnesty was to be admissible in evidence on behalf of a claimant in the Court of Claims as the proof of loyalty required by the Abandoned and Captured Property Act. Second, the Supreme Court was to dismiss, for want of jurisdiction, any appeal from a judgment of the Court of Claims in favor of a claimant who had established his loyalty through a pardon. Third, the Court of Claims henceforth was to treat a claimant's receipt of a presidential pardon, without protest, as conclusive evidence that he had given aid and comfort to the rebellion, and to dismiss any lawsuit on his behalf for want of jurisdiction. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

The Government's appeal from the judgment in Klein's case was decided by this Court following the enactment of the appropriations proviso. This Court held the proviso unconstitutional notwithstanding Congress' recognized power "to make 'such exceptions from the appellate jurisdiction' [of the Supreme Court] as should seem to it expedient." 13 Wall., at 145. See U. S. Const., Art. III, § 2, cl. 2. This holding followed from the Court's interpretation of the proviso's effect:

"[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." 13 Wall., at 145.

Thus, construed, the proviso was unconstitutional in two respects: First, it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor.

"The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdic-

tion on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the interstate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

“ . . .
 “. . . Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.” *Id.*, at 146-147.

Second, the rule prescribed by the proviso “is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.” *Id.*, at 147. The Court held that it would not serve as an instrument toward the legislative end of changing the effect of a presidential pardon. *Id.*, at 148.

It was, of course, the former constitutional objection held applicable to the legislative proviso in *Klein* that the Court was concerned about in *Pope*. But that objection is not applicable to the case before us for two reasons. First, of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government’s own favor. Thus, Congress’ action could not be grounded upon its broad power to recognize and pay the Nation’s debts. Second, and even more important, the proviso at issue in *Klein* had attempted “to prescribe a

rule for the decision of a cause in a particular way[.]” 13 Wall., at 146. The amendment at issue in the present case, however, like the Special Act at issue in *Cherokee Nation*, waived the defense of *res judicata* so that a legal claim could be resolved on the merits. Congress made no effort in either instance to control the Court of Claims’ ultimate decision of that claim. See n. 23, *supra*.²⁵

²⁵ Before completing our analysis of this Court’s precedents in this area, we turn to the question whether the holdings in *Cherokee Nation*, *Nock*, and *Pope*, might have been based on views, once held by this Court, that the Court of Claims was not, in all respects, an Art. III court, and that claims against the United States were not within Art. III’s extension of “judicial Power” “to Controversies to which the United States shall be a Party.” U. S. Const., Art. III, § 2, cl. 1. See *Williams v. United States*, 289 U. S. 553 (1933).

Pope itself would seem to dispel any such conclusion. See 323 U. S., at 12–14. Moreover, Mr. Justice Harlan’s plurality opinion announcing the judgment of the Court in *Glidden Co. v. Zdanok*, 370 U. S. 530 (1962), lays that question to rest. In *Glidden*, the plurality observed that “it is probably true that Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court.” *Id.*, at 566. But they concluded that that circumstance did not render the decisions of the Court of Claims legislative in character, nor, impliedly, did those instances of “lively attention” constitute impermissible interference with the Court of Claims’ judicial functions.

“Throughout its history the Court of Claims has frequently been given jurisdiction by special act to award recovery for breach of what would have been, on the part of an individual, at most a moral obligation. . . . Congress has waived the benefit of *res judicata*, *Cherokee Nation v. United States*, 270 U. S. 476, 486, and of defenses based on the passage of time. . . .

“In doing so, as this Court has uniformly held, Congress has enlisted the aid of judicial power whose exercise is amenable to appellate review here. . . . Indeed the Court has held that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted constitutional court. *United States v. Realty Co.*, 163 U. S. 427.

“The issue was settled beyond peradventure in *Pope v. United States*,

C

When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that Court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were there in pursuit of judicial enforcement of a new legal right. Congress had not "reversed" the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux' claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments.

323 U. S. 1. There the Court held that for Congress to direct the Court of Claims to entertain a claim theretofore barred for any legal reason from recovery—as, for instance, by the statute of limitations, or because the contract had been drafted to exclude such claims—was to invoke the use of judicial power, notwithstanding that the task might involve no more than computation of the sum due. . . . After this decision it cannot be doubted that when Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function." 370 U. S., at 566-567 (citations omitted).

The Court in *Glidden* held that, at least since 1953, the Court of Claims has been an Art. III court. See *id.*, at 585-589 (concurring opinion). In his opinion concurring in the result, Mr. Justice Clark did not take issue with the plurality's view that suits against the United States are "Controversies to which the United States shall be a Party," within the meaning of Art. III. Compare 370 U. S., at 562-565 (plurality opinion) with *id.*, at 586-587 (concurring opinion).

Moreover, Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits. That court was left completely free to reaffirm its 1942 judgment that the Black Hills claim was not cognizable under the Fifth Amendment, if upon its review of the facts and law, such a decision was warranted. In this respect, the amendment before us is a far cry from the legislatively enacted "consent judgment" called into question in *Pope*, yet found constitutional as a valid exercise of Congress' broad power to pay the Nation's debts. And, for the same reasons, this amendment clearly is distinguishable from the proviso to this Court's appellate jurisdiction held unconstitutional in *Klein*.

In sum, as this Court implicitly held in *Cherokee Nation*, Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

IV

A

In reaching its conclusion that the 1877 Act effected a taking of the Black Hills for which just compensation was due the Sioux under the Fifth Amendment, the Court of Claims relied upon the "good faith effort" test developed in its earlier decision in *Three Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968). The *Fort Berthold* test had been designed to reconcile two lines of cases decided by this Court that seemingly were in conflict. The first line, exemplified by *Lone Wolf v. Hitchcock*, 187 U. S. 553 (1903), recognizes "that Congress possesse[s] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians." *Id.*, at 565. The second line, exemplified by the more recent decision in *Shoshone Tribe v. United States*, 299 U. S. 476 (1937), con-

cedes Congress' paramount power over Indian property, but holds, nonetheless, that "[t]he power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.'" *Id.*, at 497 (quoting *United States v. Creek Nation*, 295 U. S. 103, 110 (1935)). In *Shoshone Tribe*, Mr. Justice Cardozo, in speaking for the Court, expressed the distinction between the conflicting principles in a characteristically pithy phrase: "Spoliation is not management." 299 U. S., at 498.

The *Fort Berthold* test distinguishes between cases in which one or the other principle is applicable:

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

"Some guideline must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action: Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee." 182 Ct. Cl., at 553, 390 F. 2d, at 691.

Applying the *Fort Berthold* test to the facts of this case, the Court of Claims concluded that, in passing the 1877 Act,

Congress had not made a good-faith effort to give the Sioux the full value of the Black Hills. The principal issue presented by this case is whether the legal standard applied by the Court of Claims was erroneous.²⁸

*Principal
issue*

B

The Government contends that the Court of Claims erred insofar as its holding that the 1877 Act effected a taking of the Black Hills was based on Congress' failure to indicate affirmatively that the consideration given the Sioux was of equivalent value to the property rights ceded to the Government. It argues that "the true rule is that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." Brief for United States 52. The Government derives support for this rule principally from this Court's decision in *Lone Wolf v. Hitchcock*.

In *Lone Wolf*, representatives of the Kiowa, Comanche, and Apache tribes brought an equitable action against the Secretary of the Interior and other governmental officials to enjoin them from enforcing the terms of an act of Congress

²⁸ It should be recognized at the outset that the inquiry presented by this case is different from that confronted in the more typical of our recent "taking" decisions. *E. g.*, *Kaiser Aetna v. United States*, — U. S. — (1979); *Penn Central Transp. Co. v. New York*, 438 U. S. 104 (1978). In those cases the Court has sought to "determin[e] when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U. S., at 124. Here, there is no doubt that the Black Hills were "taken" from the Sioux in a way that wholly deprived them of their property rights to that land. The question presented is whether Congress was acting under circumstances in which that "taking" implied an obligation to pay just compensation, or whether it was acting pursuant to its unique powers to manage and control tribal property as the guardian of Indian welfare, in which event the Just Compensation Clause would not apply.

that called for the sale of lands held by the Indians pursuant to the Medicine Lodge Treaty of 1867, 15 Stat. 581. That treaty, like the Fort Laramie Treaty of 1868, included a provision that any future cession of reservation lands would be without validity or force "unless executed and signed by at least three fourths of all the adult male Indians occupying the same." *Id.*, at 585. The legislation at issue, Act of June 6, 1900, 31 Stat. 672, was based on an agreement with the Indians that had not been signed by the requisite number of adult males residing on the reservation.

This Court's principal holding in *Lone Wolf* was that "the legislative power might pass laws in conflict with treaties made with the Indians." 187 U. S., at 566. The Court stated:

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians." *Ibid.* (Emphasis in original.)²⁷

The Court, therefore, was not required to consider the contentions of the Indians that the agreement ceding their lands

²⁷ This aspect of the *Lone Wolf* holding, often reaffirmed, see, *e. g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 594 (1977), is not at issue in this case. The Sioux do not claim that Congress was without power to take the Black Hills from them in contravention of the Fort Laramie Treaty of 1868. They claim only that Congress could not do so inconsistently with the command of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."

had been obtained by fraud, and had not been signed by the requisite number of adult males. "[A]ll these matters, in any event, were solely within the domain of the legislative authority and its action is conclusive upon the courts." *Id.*, at 568.

In the penultimate paragraph of the opinion, however, the Court *Lone Wolf* went on to make some observations seemingly directed to the question whether the act at issue might constitute a taking of Indian property without just compensation. The Court there stated:

"The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation v. Hitchcock*, 187 U. S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. *We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.* In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be under-

stood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional." *Ibid.* (Emphasis supplied.)

The Government relies on the italicized sentence in the quotation above to support its view "that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." Several adjoining passages in the paragraph, however, lead us to doubt whether the *Lone Wolf* Court meant to state a general rule applicable to cases such as the one before us.

First, *Lone Wolf* presented a situation in which Congress "purported to give an adequate consideration" for the treaty lands taken from the Indians. In fact, the ~~act~~ ^{fact} at issue set aside for the Indians a sum certain of \$2 million for surplus reservation lands surrendered to the United States. 31 Stat. 678; see 187 U. S., at 555. In contrast, the background of the 1877 Act "reveals a situation where Congress did not 'purport' to provide 'adequate consideration,' nor was there any meaningful negotiation or arm's-length bargaining, nor did Congress consider it was paying a fair price." 220 Ct. Cl., at —, 601 F. 2d, at 1176 (concurring opinion).

Second, given the provisions of the act at issue in *Lone Wolf*, the Court reasonably was able to conclude that "the action of Congress now complained of was but . . . a mere change in the form of investment of Indian tribal property." Under the Act of June 6, 1900, each head of a family was to be allotted a tract of land within the reservation of not less than 320 acres, an additional 480,000 acres of grazing land were set aside for the use of the tribes in common, and \$2 million was paid to the Indians for the remaining surplus. 31 Stat. 677-678. In contrast, the historical background to the opening of the Black Hills for settlement, and the terms

of the 1877 Act itself, see Part I, *supra*, would not lead one to conclude that the Act effected "a mere change in the form of investment of Indian tribal property."

Third, it seems significant that the views of the Court in *Lone Wolf* were based, in part, on a holding that "Congress possessed full power in the matter." Earlier in the opinion the Court stated: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." 187 U. S., at 565. Thus, it seems that the Court's conclusive presumption of congressional good faith was based in large measure on the idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review. That view, of course, has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm. v. Weeks*, 430 U. S. 73, 84 (1977).²⁸

²⁸ For this reason, the Government does not here press *Lone Wolf* to its logical limits, arguing instead that its "strict rule" that the management and disposal of tribal lands is a political question, "has been relaxed in recent years to allow review under the Fifth Amendment rational-basis test." Brief for United States 55, n. 46. The Government relies on *Delaware Tribal Business Comm. v. Weeks*, 430 U. S. 73, 84-85 (1977), and *Morton v. Mancari*, 417 U. S. 535, 555 (1974), as establishing a rational-basis test for determining whether Congress, in a given instance, confiscated Indian property or engaged merely in its power to manage and dispose of tribal lands in the Indians' best interests. But those cases, which establish a standard of review for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment, do not provide an apt analogy for resolution of the issue presented here—whether Congress' disposition of tribal property was an exercise of its power of eminent domain or its power of guardianship. As noted earlier, *supra*, at n. 27, the Sioux concede the constitutionality of Congress' unilateral abrogation of the Fort Laramie Treaty. They seek only a holding that the Black Hills "were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe." *United States v. Creek Nation*, 295 U. S. 103,

to the objective facts as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition. . . .

"The 'good faith effort' and 'transmutation of property' concepts referred to in *Fort Berthold* are opposite sides of the same coin. They reflect the traditional rule that a trustee may change the form of trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence. On the other hand, if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property of the ward. In other words, an essential element of the inquiry under the *Fort Berthold* guideline is determining the adequacy of the consideration the government gave for the Indian lands it acquired. That inquiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians." 220 Ct. Cl., at —, 601 F. 2d, at 1162.³⁰

³⁰ An examination of this standard reveals that, contrary to the Government's assertion, the Court of Claims in this case did not base its finding of a taking solely on Congress' failure in 1877 to state affirmatively that the "assets" given the Sioux in exchange for the Black Hills were equivalent in value to the land surrendered. Rather, the court left open the possibility that, in an appropriate case, a mere assertion of congressional good faith in setting the terms of a forced surrender of treaty-protected lands could be overcome by objective indicia to the contrary. And, in like fashion, there may be instances in which the consideration provided the Indians for surrendered treaty lands was so patently adequate and fair that Congress' failure to state the obvious would not result in the finding of a compensable taking.

To the extent that the Court of Claims' standard, in this respect,

D

We next examine the factual findings made by the Court of Claims, which led it to the conclusion that the 1877 Act effected a taking. First, the Court found that "[t]he only item of 'consideration' that possibly could be viewed as showing an attempt by Congress to give the Sioux the 'full value' of the land the government took from them was the requirement to furnish them with rations until they became self-sufficient." 220 Ct. Cl., at —, 601 F. 2d, at 1166. This finding is fully supported by the record, and the Government does not seriously contend otherwise.³¹

departed from the original formulation of the *Fort Berthold* test, see 220 Ct. Cl., at —, 601 F. 2d, at 1182-1183 (dissenting opinion), such a departure was warranted. The Court of Claims' present formulation of the test, which takes into account the adequacy of the consideration given, does little more than reaffirm the ancient principle that the determination of the measure of just compensation for a taking of private property "is a judicial and not a legislative question." *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327 (1893).

³¹ The 1877 Act, see *supra*, at —, and n. 14, purported to provide the Sioux with "all necessary aid to assist the said Indians in the work of civilization," and "to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868." 19 Stat. 256. The Court of Claims correctly concluded that the first item "was so vague that it cannot be considered as constituting a meaningful or significant element of payment by the United States." 220 Ct. Cl., at —, 601 F. 2d, at 1166. As for the second, it "gave the Sioux nothing to which they were not already entitled [under the 1868 treaty]." *Id.*, at —, 601 F. 2d, at 1166.

The Government has placed some reliance in this Court on the fact that the 1877 Act extended the northern boundaries of the reservation by adding some 900,000 acres of grazing lands. See n. 14, *supra*. In the Court of Claims, however, the Government did "not contend . . . that the transfer of this additional land was a significant element of the consideration the United States gave for the Black Hills." 220 Ct. Cl., at —, n. 3, 601 F. 2d, at 1163, n. 3. And Congress obviously did not intend the extension of the reservation's northern border to constitute consideration for the property rights surrendered by the Sioux. The extension was effected in that article of the Act redefining the reservation's borders; it was not men-

Second, the court found, after engaging in an exhaustive review of the historical record, that neither the Manypenny Commission, nor the congressional committees that approved the 1877 Act, nor the individual legislators who spoke on its behalf on the floor of Congress, ever indicated a belief that the Government's obligation to provide the Sioux with rations constituted a fair equivalent for the value of the Black Hills and the additional property rights the Indians were forced to surrender. See *id.*, at ———, 601 F. 2d, at 1166-1168. This finding is unchallenged by the Government.

A third finding lending some weight to the Court's legal conclusion was that the conditions placed by the Government on the Sioux' entitlement to rations, see n. 14, *supra*, "further show that the government's undertaking to furnish rations to the Indians until they could support themselves did not reflect a congressional decision that the value of the rations was the equivalent of the land the Indians were giving up, but instead was an attempt to coerce the Sioux into capitulating to congressional demands." *Id.*, at —, 601 F. 2d, at 1168. We might add only that this finding is fully consistent with similar observations made by this Court nearly a century ago in an analogous case.

In *Choctaw Nation v. United States*, 119 U. S. 1, 35 (1886),

tioned in the article which stated the consideration given for the Sioux' "cession of territory and rights." See 19 Stat. 255-256. Moreover, our characterizing the 900,000 acres as assets given the Sioux in consideration for the property rights they ceded would not lead us to conclude that the terms of the exchange were "so patently adequate and fair" that a compensable taking should not have been found. See n. 30, *supra*.

Finally, we note that the Government does not claim that the Indian Claims Commission and the Court of Claims incorrectly valued the property rights taken by the 1877 Act by failing to consider the extension of the northern border. Rather, the Government argues only that the 900,000 acres should be considered, along with the obligation to provide rations, in determining whether the Act, viewed in its entirety, constituted a good-faith effort on the part of Congress to promote the Sioux' welfare. See Brief for United States 73, and n. 58.

the Court held, over objections by the Government, that an award made by the Senate on an Indian tribe's treaty claim "was fair, just, and equitable." The treaty at issue had called for the removal of the Choctaw Nation from treaty-protected lands in exchange for payments for the tribe's subsistence for one year, payments for cattle and improvements on the new reservation, an annuity of \$20,000 for 20 years commencing upon removal, and the provision of educational and agricultural services. *Id.*, at 38. This Court stated:

"It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure had to be brought to bear upon the Indians to effect their removal, and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal. The most noticeable thing, upon a careful consideration of the terms of this treaty, is, that no money consideration is promised or paid for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over ten millions of acres." *Id.*, at 37-38.

As for the payments that had been made to the Indians in order to induce them to remove themselves from their treaty lands, the Court, in words we find applicable to the 1877 Act, concluded:

"It is nowhere expressed in the treaty that these payments are to be made as the price of the lands ceded; and they are all only such expenditures as the government of the United States could well afford to incur for the mere purpose of executing its policy in reference to the removal of the Indians to their new homes. *As a consideration for the value of the lands ceded by the treaty, they must be regarded as a meagre pittance.*" *Id.*, at 38 (emphasis supplied).

These conclusions, in light of the historical background to the opening of the Black Hills for settlement, see Part I, *supra*, seem fully applicable to Congress' decision to remove the Sioux from that valuable tract of land, and to extinguish their off-reservation hunting rights.

Finally, the Court of Claims rejected the Government's contention that the fact that it subsequently had spent at least \$43 million on rations for the Sioux (over the course of three quarters of a century) established that the 1877 Act was an act of guardianship taken in the Sioux' best interest. The court concluded: "The critical inquiry is what Congress did—and how it viewed the obligation it was assuming—at the time it acquired the land, and not how much it ultimately cost the United States to fulfill the obligation." 220 Ct. Cl., at —, 601 F. 2d, at 1168. It found no basis for believing that Congress, in 1877, anticipated that it would take the Sioux such a lengthy period of time to become self-sufficient, or that the fulfillment of the Government's obligation to feed the Sioux would entail the large expenditures ultimately made on their behalf. *Ibid.* We find no basis on which to question the legal standard applied by the Court of Claims, or the findings it reached, concerning Congress' decision to provide the Sioux with rations.

E

The aforementioned findings fully support the Court of Claims' conclusion that the 1877 Act appropriated the Black Hills "in circumstances which involved an implied undertaking by [the United States] to make just compensation to the tribe." *United States v. Creek Nation*, 295 U. S., at 111. We make only two additional observations about this case. First, dating at least from the decision in *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, 657 (1890), this Court has recognized that Indian lands, to which a tribe holds recognized title, "are held subject to the authority of the general

government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner." In the same decision the Court emphasized that the owner of such lands "is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Id.*, at 659. The Court of Claims gave effect to this principle when it held that the Government's uncertain and indefinite obligation to provide the Sioux with rations until they become self-sufficient did not constitute adequate consideration for the Black Hills.

Second, it seems readily apparent to us that the obligation to provide rations to the Sioux was undertaken in order to ensure them a means of surviving their transition from the nomadic life of the hunt to the agrarian lifestyle Congress had chosen for them. Those who have studied the Government's reservation policy during this period of our Nation's history agree. See n. 11, *supra*. It is important to recognize that the 1877 Act, in addition to removing the Black Hills from the Great Sioux Reservation, also ceded the Sioux' hunting rights in a vast tract of land extending beyond the boundaries of that reservation. See n. 14, *supra*. Under such circumstances, it is reasonable to conclude that Congress' undertaking of an obligation to provide rations for the Sioux was a *quid pro quo* for depriving them of their chosen way of life, and was not intended to compensate them for the taking of the Black Hills.³²

³² We find further support for this conclusion in Congress' 1974 amendment to § 2 of the Indian Claims Commission Act, 25 U. S. C. § 70a. See n. 17, *supra*. That amendment provided that in determining offsets, "expenditures for food, rations, or provisions shall not be deemed payments on the claim." The report of the Senate Committee on Interior and Insular Affairs, which accompanied this amendment, made two points that are pertinent here. First, it noted that "[a]lthough couched in general terms, this amendment is directed to one basic objective—expediting the Indian Claims Commission's disposition of the famous Black Hills case."

V

In sum, we conclude that the legal analysis and factual findings of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not effect "a mere change in the form of investment of Indian tribal property." *Lone Wolf v. Hitchcock*, 187 U. S., at 568. Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.

The judgment of the Court of Claims is affirmed.

It is so ordered.

S. Rep. No. 93-863, p. 2 (1974) (incorporating memorandum prepared by the Sioux Tribes). Second, the Committee observed:

"The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs; first, it deprived the Sioux of their livelihood; secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs." *Id.*, at 4-5.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1980

Re: 79-639 - United States v. Sioux Nation of Indians

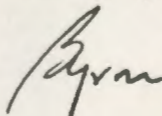
Dear Harry,

Regretfully, for the reasons I shall state, I am reluctant to join all of your opinion. In the first place, I have found the case a much closer one on the merits than your opinion makes it out to be. Also, the validity of the Indian Claims Commission finding that the government acted unfairly and dishonorably is not before us, and I do not entirely share the atmosphere of your draft that often casts the conduct of the government in such an unfavorable light. I would also prefer in stating the historical facts to stand on the record rather than to rely on accounts by historians and other writers whose accuracy and objectivity have not been put to the test.

I agree with your Part III and with the general conclusion stated in Part V that when judged by currently prevailing Fifth Amendment standards, the Court of Claims was correct in concluding that the government actions at issue here effected a taking for which compensation was and is due.

I shall file a statement to this effect.

Sincerely yours,



Mr. Justice Blackman

Copies to the Conference

cmc

June 20, 1980

79-639 U.S. v. Sioux Nation

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

File

DOS

BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: David
DATE: June 20, 1980
RE: No. 79-639, United States v. Sioux Nation

Mr. Justice Rehnquist's opinion strikes several appealing notes, but I believe in the end it is unpersuasive. The argument on the merits seems to me plainly to favor the Indians. The Article III question, however, is closer. Justice Rehnquist does not acknowledge the full force of the opinion in Cherokee Nation v. United States, which held:

"The question of interest [on a prior award] was considered and decided, and it is quite clear that but for the special Act of 1919, above quoted, the question here mooted would have been foreclosed as res judicata. In passing the Act, Congress must have been well advised of this, and the only possible construction therefore to be put upon it is that Congress has therein expressed its desire, so far as the question of interest is concerned, to waive the effect of the judgment as res judicata. . . . The power of Congress to waive such an adjudication is clear." 270 U.S., at 486.

This
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WHR.

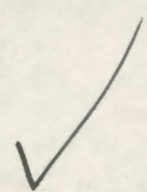
I believe that this passage squarely controls the issue in this case, unless you are of a mind to repudiate it. Justice Rehnquist's attempted distinction of the precedent, pp. 9-10, seems somewhat lame.

As we discussed, the historical argument-rending indulged in

by the Court opinion is not necessary to the case. Justice Rehnquist forcefully makes this point in his final section. Rather than join Justice Rehnquist's equally subjective retort on this, the best course might be to join with Justice White in joining only the substantive holdings in the case (Parts III and V), and by implication reject the historical passages.

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

CHAMBERS OF
THE CHIEF JUSTICE



June 23, 1980

RE: 79-639. - United States v. Sioux Nation
of Indians

Dear Harry:

I join.

Regards,

Mr. Justice Blackmun

Copies to the Conference

[illegible]