ORIGINAL

In the

Supreme Court of the United States

UNITED STATES,

PETITIONER,

V.

SIOUX NATION OF INDIANS, ET AL.

No. 79-639

Washington, D. C.
March 25, 1980

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UNITED STATES, Petitioner,	:	
v.	:	No. 79-639
SIOUX NATION OF INDIANS, ET AL.	:	

Washington, D. C.

Monday, March 25, 1980

The above-entitled matter came on for oral argument at 11:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Judge

APPEARANCES:

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner

ARTHUR LAZARUS, JR., ESQ., Fried, Frank, Harris, Shriver & Kampelman, 600 New Hampshire Avenue, N.W., Washington, D.C. 20037; on behalf of Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Claiborne, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court:

The case is here on our petition for certiorari to the Court of Claims which court directed the entry of an award of more than some $105 million to the Sioux Nation in respect of the action of Congress a century ago, to be exact in February of 1877, in severing some 7 million acres, the Black Hills area, from what was then the Great Sioux Reservation.

Some 88 million of that sum of $105 million of this award is attributable to interest calculated at 5 percent over 103 years on the principal sum of $17.1 million which was found by the Commission, affirmed by the Court of Claims, to have been the value of these 7 million acres in 1877.

QUESTION: The only issue is the issue of interest?

MR. CLAIBORNE: That is exactly so, Mr. Justice Stewart, and that in turn, the issue of interest --

QUESTION: Depends upon whether or not there was a "taking".

MR. CLAIBORNE: Depends entirely whether or not

this amounts to a "taking" in the Fifth Amendment sense.

QUESTION: May I ask just in passing, then, what was the $17.1 million?

MR. CLAIBORNE: The $17.1 million is the value of the Black Hills area as found by the Indian Claims Commission, as affirmed by the Court of Claims and not disputed by the United States.

QUESTION: Well, then doesn't imply that there was a taking?

MR. CLAIBORNE: Not so. It is simply that that was the value of the land in question before the Commission; left open by the Commission in 1974 was whether there had been, in effect, payment to that extent or to a greater extent the consideration which was given an undertaking to provide provisions so long as the Sioux Nation might need them.

QUESTION: Now it has been decided that there wasn't payment and therefore the Government owes the Sioux Nation $17.1 million for the value of the Black Hills in 1877 or whatever the date was.

But if you don't quarrel with that, why doesn't that imply that there was a taking?

MR. CLAIBORNE: For this principal reason, Mr. Justice Stewart: We are by special Act of Congress passed in 1974 forbidden to offset any payments made with

respect to this transaction that take the form of provisions for subsistence. But that does not prevent us from taking into account that payment in order to determine whether or not there was a taking.

Moreover, the Court of Claims approached the question of taking as determined by whether or not the payment was or was not sufficient as it turned out but rather on whether or not the Congress in 1877 was acting in good faith in attempting to provide a fair equivalent for the value of the Black Hills by making these undertakings, very substantial undertakings to provide provisions which, as we say, ultimately cost the United States amounts in excess of $40 million.

QUESTION: But so what was the $17.1 million for?

MR. CLAIBORNE: The $17.1 million is simply the evaluation of the land that was severed from the reservation in 1877.

QUESTION: That the Government now owes the Sioux?

MR. CLAIBORNE: The Government now owes it only because in the peculiar circumstances of a special Act of Congress passed in 1974 the Government hence forward is forbidden to consider for the purposes of the award an offset which takes the form of a provision for food rations.

QUESTION: I understand that but I have difficulty

understanding is if it wasn't a taking, why the $17.1 million? Now, I can understand your argument if you can say it was taken but paid for; but I don't understand why you could say it wasn't taken at all if you don't quarrel with the $17 million.

MR. CLAIBORNE: Mr. Justice Stewart, we say that it was an exercise of the power of Congress to deal with Indian affairs for the benefit of the tribes. We say that such cases --

QUESTION: That what was an exercise?

MR. CLAIBORNE: The Act of Congress of 1877.

QUESTION: Yes.

MR. CLAIBORNE: Just as it was in Lone Wolf.

QUESTION: Right. Then they wouldn't owe the Indians anything.

MR. CLAIBORNE: Except for the Indian Claims Commission Act which provided that notwithstanding that Congress was exercising its Indian power, if it turns out that the consideration paid was inadequate or that some duress was involved in the case of an agreement, as a matter of a moral claim the court shall allow whatever the deficiency be.

What is more, as I have said before, Congress in 1974 provided with special reference to this case the exception of the offset, the payment -- largely it was --

paid in food rations shall simply not be allowed as an alternate.

And for those reasons we are left unable to say for the purposes of the award we paid for all that and accordingly must admit our liability unless we dispute the evaluation, which we cannot.

QUESTION: Mr. Claiborne, perhaps this is just the same question that my Brother Stewart has asked.

What is the source of the Government's obligation to pay $17.1 million?

MR. CLAIBORNE: Well, in our view, Mr. Justice Stevens, it is the Indian Claims Commission Act and the '74 Act, 1974 Act.

QUESTION: Well, what do you mean by the Indian Claims Commission Act, do you mean --

MR. CLAIBORNE: The Indian Claims Commission Act provides that whenever there is a finding that the United States in its dealings with a tribe paid either an unconscional consideration or was guilty of dealings less than honorable in the transaction --

QUESTION: Say that the source of the obligation is the finding by the Commission pursuant to statute that there was dishonorable dealing by the United States?

MR. CLAIBORNE: Well, it so happens here, Mr. Justice Stevens, that the Commission made no such findings

because instead the Commission found that there had been a "taking" in the Fifth Amendment sense.

The most recent but the last time, the Court of Claims dealt with this case it said, no, the finding of a constitutional taking is barred by res adjudicada but we, the court, will substitute a finding that the dealings were less than honorable. And on that basis we will make an award without interest for $17.1 million. And, indeed, the United States acquiesced in that determination and normal course judgment would have been entered and the matter would have been at en end.

However, the Sioux Nation once again persuaded Congress to make an exceptional rule and in 1978 the Congress passed an Act which directed the Court of Claims to ignore the objection of res adjudicada or collateral estoppel and to review on the merits the earlier Commission determination that there had, indeed, been a Fifth Amendment taking.

On this third round, the Court of Claims acquiesced and defined the Commission's earlier finding that there had been a taking.

QUESTION: I suppose that would have been one form of dealing with an Indian tribe --

MR. CLAIBORNE: Indeed. The only cases in this Court or in the Court of Claims before this one in which that court has found a taking in the constitutional sense are

cases in which this Court has found it appropriate to say that an act of confiscation is not an act of guardianship, all cases in which the Government gave no undertaking, made no payment whatever, are very different from this case in which the Court of Claims assumed, but did not find, that the Government had, indeed, undertaken an obligation which in the fulness of time not only equaled the value of the Black Hills but perhaps exceeded it. They found that however to be irrelevant, irrelevant because they put themselves at the time of 1877 and said, in effect, Congress didn't know it was going to cost the United States that much.

QUESTION: In the Indian Claims Commission Act is the language "dishonorable dealing" and that sort of thing the type of language that would apply between trustee and ward or trustee and settee, or whatever you want to call it?

MR. CLAIBORNE: No doubt there is some thought of that relationship of guardian and ward in the terms of the Indian Claims Commission Act. But at least one of those provisions, the one that deals with dishonorable dealings, which is subsection (5) of 25 U.S.C. 78, expressly allows recovery for claims that would not be recognized at law or in equity but which as a matter of moral obligation ought to be paid and the Commission is directed to make an award if it finds that it is a moral matter, not a legal matter, the

dealings were less than honorable.

QUESTION: This proceeding commences -- the Court of Claims case commences with the 1974 Act and rests on that, does it not?

MR. CLAIBORNE: The Court of Claims decision rests on the '74 Act and the '78 Act, more recently the '78 Act because --

QUESTION: Could either of those Acts have said this shall be treated under the terms of the Fifth Amendment taking?

MR. CLAIBORNE: Mr. Chief Justice, I think Congress could have of course simply awarded the Sioux Nation $100 million or whatever sum in the discretion of Congress it was thought to be fair.

I don't think the Congress could direct a court to bend the rules of the just compensation clause and hint that they were acquiescing in an award under the Fifth Amendment.

QUESTION: Do you think Congress could not have declared against the whole background that this was a taking and should be now evaluated on the basis of just compensation? That wouldn't be tinkering with the Fifth Amendment taking clause, would it?

MR. CLAIBORNE: Well, I --

QUESTION: Declaring it was a taking --

MR. CLAIBORNE: Mr. Chief Justice, that may have been possible. I have difficulties.

I think the Chief Justice is suggesting that the Court still had a role to play and whether the Court of Claims could be simply required to make evaluation determination, excepting as a legal matter directed by Congress that the Fifth Amendment had been violated, I am not sure whether there would be separation of powers.

QUESTION: If the Indian Claims Commission and the Court of Claims, each of which is a creature of the Congress, couldn't declare this was a taking, why couldn't Congress have resolved that question in the '74 and '78 Acts?

MR. CLAIBORNE: Mr. Chief Justice, perhaps they could have. Clearly they did not.

QUESTION: Well, is that important, that they did not?

MR. CLAIBORNE: It is important that they purported to leave it entirely to the Court to determine under the usual rule whether or not this amounted to a taking in the Fifth Amendment sense. And any side hints thrown out were properly disregarded.

QUESTION: In that process it would not be a contemporary taking, it would be a determination of whether there had been a taking back in 1863 or '77 or approximately a hundred years ago.

MR. CLAIBORNE: Indeed, Mr. Chief Justice.

I find that my time has run to the point where I must be very brief about the background facts of the case.

The difficulty in the case arises because in 1868 when the Sioux Nation relinquished a large part of its territory it was provided, among other things, that no further cession should be accomplished, should be valid except with the concurrence of three-fourths of the adult male members.

That treat in 1868 had made a number of provisions which were designed to encourage, furnish incentives by way of money and material aid to the Sioux to become farmers. However, it had wholly failed in that respect and shortly after the 1868 treaty the background situation against which this transaction must be judged included these elements.

First, gold reports had come, that the Black Hills were rich in gold. Now, those reports had begun as early as 1868 and, indeed, some miners had intruded that early. Gradually the invasion multiplied. There were, concededly, serious governmental efforts to prevent the miners from intruding and, indeed, to remove them from that area. Those efforts continued between the date of the treaty in 1868 and the end of 1875. They were however largely unsuccessful. No doubt the greed for gold exceeded the fear of the soldiers and the invasion of the miners became, in effect,

unstoppable, at least without dedicating the entire Army resources for that single purpose.

QUESTION: The exchange of letters between General Sheridan and General Sherman were of profound interest as to how serious the Government attempt to prevent the miners influx was.

MR. CLAIBORNE: There was that exchange which suggests that in the view of one general the President might wink at some invasions.

On the other hand, there are concededly instances in which the Army did arrest, did remove, did incarcerate miners who had penetrated into the Black Hills. It was a matter of timing.

Toward the end of 1875, the President had determined that this was an impossible policy and he eventually abandoned it by withdrawing his orders to the troops, though he did not publish them, in November of 1875.

However, I suspect the background of the case is the conceded dependence of the Sioux on governmental food rations. As I have said, the treaty of 1868 which had sought to make the Sioux self-sufficient farmers had entirely failed. The Sioux in 1875, '76 and '77 were still wholly dependent on the Government for rations, the Government expending something over $1 million a year for that purpose. The Sioux treaty of 1868 had provided that rations should

continue for four years but gratuitously without any legal obligations the Congress continued those appropriations for 2-3 years more. And Congress was unhappy with the prospect that that situation might continue indefinitely. After all, guardian though it was, the guardian is not normally expected to put his hand in his own pocket for the sake of his ward.

Another consideration that is an important background of the case is the value of the Black Hills to the Sioux themselves. They knew there was gold there but they had no intention of removing it. There was no large game in the reservation, this was not the hunting ground. There was valuable grazing and agricultural land but it appears that it had been put at this period to very little use by the Sioux.

And finally, because of the miners coming in, there had been clashes between the miners and the Indians and there was a prospect that that armed conflict between those two forces would escalate.

In these circumstances Congress determined after much patient consideration that the only practical realistic solution was to persuade the Sioux to cede the hills and that determine in the mind of the Executive and Legislative branches of the United States had occurred by the beginning of 1875. The President had the area surveyed with the view

of determining its value so that a fair equivalent could be paid. He invited the Sioux leaders to Washington, he appointed a Commission and that Commission, the Allison Commission failed. This was all in 1875.

Upon the failure of any agreement, Congress considered the matter and while it is not really relevant to determine precisely what threats were made about cutting off rations, since this is not a case based upon duress, it is nevertheless important to note that Congress at no time ever cut off the rations. And, indeed, never threatened to cut off the rations except a year hence.

A new Commission was formed. That Commission ultimately reached an agreement with the Sioux leaders, albeit the requisite number of members did not sign. That agreement, later ratified by Congress in the 1877 Act, provided relevantly in section 5, that in consideration -- and those are the words of the agreement in the Act -- in consideration of the cession of the Hills several undertakings were made by the United States, the important one which was a promise to provide rations for so long as the Sioux might need them.

Congress was well aware that it had just appropriated in the preceding years over $1 million. It had deleted a provision that rations should continue for only ten years more; this was entirely open ended. Congress was

obviously aware that it was undertaking a very substantial burden.

QUESTION: What did it amount to over the period of years; was $50 million the figure you have in the briefs?

MR. CLAIBORNE: There is a figure of $57 million which is based on General Accounting Office reports once upon a time conceded by former counsel for the Sioux, which we cannot say is any longer conceded. There was a finding by the Court of Claims itself in 1942 when this case first reached that court that as of 1942 the total amount had been some $43 million.

Even allowing for discount, considering that the payments in the first 20 years exceeded or averaged something over $1 million a year, it is evident the United States not only paid interest but repaid the principal long before 1942 or the present.

There is one irony about this case, which is that the question of taking would not be here at all if either the '68 Act had not provided that the signature of the Sioux leaders was not sufficient and this had therefore become a proper treaty or if three-quarters of the members had been persuaded to sign. No matter what duress, no matter how unconscionable the consideration, no matter how dishonorable the dealings, no court has ever found a "taking" when there was an agreement. Compensation may be due because advantage

was taken of the Indians and they are entitled to an award for the difference but not for the interest.

Had Congress been as high-handed and as callous as is suggested here, that result no doubt could have been accomplished. After all, the dependence of the Sioux on their rations might have informed a calloused Executive and a calloused Congress to simply wait until such time as the Sioux having been cut off, which they never were, were so desperate that they would indeed sign, there would then have been an agreement.

Indeed the irony here is that the Sioux in a companion case involving the 1868 treaty have recovered, subject to offsets, something over $40 million on the ground that they were grossly underpaid, much more grossly than here, will not receive interest on that award.

QUESTION: Mr. Claiborne, this $40 million and $20 million and all, how much of that was administration costs?

MR. CLAIBORNE: Mr. Justice Marshall, --

QUESTION: You know we know what happened back in those days.

MR. CLAIBORNE: The accounting reports are exhibits before the Court. But those figures were calculated as the amount attributable to the subsistence obligation undertaken in 1877 and quite independently of the obligations which

continued under the 1868 treaty.

QUESTION: Was that the money that the Indians received or was some of that administrative costs?

MR. CLAIBORNE: We know that the procedure with respect to the rations was to bring cattle onto the reservation and there be held until such time as they were slaughtered and distributed 1-1/2 pounds per person per day of beef was the -- gross of course -- was the requirement in the treaty.

The treaty was not vague with respect to these provisions. It specified exactly a pound of floor, a pound and a half of beef, and so forth, per day per person.

To what extent some of those supplies may have gone astray, I cannot testify.

Now, we believe that the Court of Claims went astray in two respects, and I must be prompt.

First, we think the Court of Claims,plying its own good faith test,presumed the wrong way. It should have accorded to Congress the presumption of good faith as the Lone Wolf case teaches us rebuttable presumption if the evidence is overwhelming to the contrary, of course. But instead the Court of Claims relied on the failure of Congress expressly to say we are hereby granting a fair equivalent. They did say this is in consideration of. We must assume they meant a fair consideration.

Now, secondly, it seems to us that the Court of Claims too narrowly focused on the question of monetary equivalence. The United States as guardian is not merely a land manager, it has broader duties, and in the special exigent circumstances with which it was faced here it may have been in the interest of the Sioux to acquire even for less than full value this land relatively useless to them in order to avoid all the dangers, including the danger that that land would be lost to the miners, including the danger that if they did not sell it, if it was not acquired they would be without rations, including the danger that hostilities between them and the miners would endanger the future of the Sioux Nation.

I may reserve the balance of my time for rebuttal.

QUESTION: Mr. Claiborne, can I ask you one question focusing on the 1978 statute where the Congress enacted legislation, as I read it effectively overruled the Court of Claims prior holding that the taking claim on the part of the Sioux was barred by res adjudicata.

Does that bother you at all? You don't make the argument, is that conceivably a violation of the separation of powers doctrine?

MR. CLAIBORNE: I would have thought not, Mr. Justice Blackmun. I hesitated to answer the Chief Justice's

question as to a congressional finding of taking but I think Congress is entitled to say, "You may have another opportunity to litigate your lawsuit."

MR. CHIEF JUSTICE BURGER: Mr. Lazarus.

ORAL ARGUMENT OF ARTHUR LAZARUS, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. LAZARUS: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the Act of February 28, 1877 effected a taking of the Sioux Black Hills country in violation of the Fifth Amendment for which just compensation must be paid under the Constitution. It is the Act of 1877 that effected the taking.

Government counsel has alluded to the possibility of an agreement. Well, maybe the United States could have gotten an agreement or it could have forced an agreement. But it didn't, it enacted the 1877 statute and it is the statute, not any agreement that took the Sioux land.

QUESTION: Was it the 1974 or '78 Act that said there would be no setoff for the $50 million, more or less, that was paid; which of those Acts?

MR. LAZARUS: It was the 1974 Act which said that food rations and provisions may not be deemed payments on the claim. But the Government gives less to the '74 Act than the Act really encompasses. Because the Indian Claims

Commission had determined that whatever the Government spent on rations was a payment on the claim and therefore it was wiped out by the '74 statute. Congress has taken that whole claimed amount of money out of this case.

QUESTION: Now, having done that, could Congress also have declared that the Court of Claims should proceed as though there had been a Fifth Amendment taking back there 100 years ago?

MR. LAZARUS: Congress could have done so, Your Honor, but when I testified before the committee I said the taking was so clear that Congress did not have to go that far. All they had to do was waive res adjudicada and the Sioux were going to win this case.

QUESTION: Well, a couple of lines in that statute and none of you would be here today.

MR. LAZARUS: I think that is true and I think if weren't talking about $105 million none of us would be here today either, because this is a clear-cut case of a taking.

QUESTION: Then what was your objection to having the Act declare that?

MR. LAZARUS: Oh, I am not sure I could have gotten the committee to go that far, Your Honor.

What they did was waive res adjudicada and give us our day in court. And we told them if we got our day in court --

QUESTION: Your second day in court on the question.

MR. LAZARUS: Well, the first day in court was on food rations and provisions where Congress made a different kind of finding. Congress said that --

QUESTION: The first day though on the taking issue was some time ago.

MR. LAZARUS: In 1942 the case was litigated under a special jurisdictional act and the case was then dismissed and the basis for the dismissal was a matter of dispute. When we were before the Court of Claims in 1975 we said it was dismissed because it was not within the scope of the jurisdictional act and the majority of the court said otherwise.

But in any event, even that majority described the 1942 decision as whether rightly or wrongly decided, it was res adjudicada. They had their doubts even then about the correctness of the 1942 case. And of course Congress in 1978 told us that 1942 case is washed clean, we consider this case now on the merits.

QUESTION: I take it if Congress took this land, as you say it did, instead of promising to provide rations and subsistence it had established a trust fund of X million dollars and said out of the income from this we will use to pay rations.

Would the case be different? I suppose it would.

MR. LAZARUS: Oh, yes, it would, Your Honor. If Congress had made a payment in 1877 --

QUESTION: Or established a fund.

MR. LAZARUS: The fund could be the equivalent of -- if -- of course that is the way Indian money was treated --

QUESTION: Yes.

MR. LAZARUS: -- it was never given directly to the Indians. It was put in the Treasury to their credit.

QUESTION: And if they had promised to set up the fund and use that to buy rations and distribute them, you wouldn't be here, I take it?

MR. LAZARUS: If Congress had in fact set up that fund I would not be here. If Congress had made an indefinite promise to say, "We give you $17-1/2 million at some indeterminate time in the future to some indeterminate number of Sioux," that would not be just compensation. Just compensation is payment.

QUESTION: But you say that would not have avoided being a taking, then?

MR. LAZARUS: That is correct. That would mean the 1977 Act was a taking --

QUESTION: Was a taking rather than an exercise of some other kind of congressional power.

MR. LAZARUS: That is exactly what happened in

1877.

QUESTION: Mr. Lazarus, is the taking issue an open one in this present litigation?

MR. LAZARUS: Well, it is --

QUESTION: I don't mean how you feel about it but I mean whether it is barred by some previous decision or barred by the jurisdictional Acts of Congress?

MR. LAZARUS: Oh, no, the taking issue is the critical issue. That is the one the 1877 -- the 1978 statute opened to the court. That is the only issue before the Court.

But when you say is it an open issue, it is not open in this sense. The Government will concede that under the circumstances of the 1877 Act there would be a taking if that property were owned by a white man. All they are saying is it is not a taking because it was owned by an Indian tribe.

QUESTION: And that would be the same thing, I suppose, in my example, that Congress couldn't do that a white man.

MR. LAZARUS: Congress could not do it to a white man.

QUESTION: It would have been a taking.

MR. LAZARUS: It would have been a taking and it is a taking for an Indian.

QUESTION: The only reason it is a taking for an Indian here though is because they didn't put put up the fund; they must made an indefinite promise rather than put up the fund. So it was a taking.

MR. LAZARUS: That is correct.

QUESTION: But that isn't the reason why it would have been a taking for a white man.

MR. LAZARUS: Yes, if it had been a taking -- if that property were owned by a white man and Congress took it --

QUESTION: They would have had to pay him.

MR. LAZARUS: They would have to pay him.

QUESTION: It wouldn't be enough to set up a fund.

MR. LAZARUS: That is correct. That is correct.

QUESTION: Well, what if Congress had simply said instead of trying to take back the 800 square miles consisting of the Black Hills, "We have a lot of demands on our resources and our Army can't protect you Sioux tribes but we concede it is your property and you fight off the individual white citizens that come in looking for gold as best you can."?

MR. LAZARUS: Well, that would have been -- that would have been an allowable self-help except under the 1868 treaty the Sioux had promised to maintain peace and the Sioux did maintain peace and it was the United States that

broke the peace. It was the United States that sent Custer on the reservation to publicize that there was gold. As soon as the gold was publicized the whites invaded the reservation. That was a violation of Article 2 of the --

QUESTION: But now what if the invasion had been simply by white citizens having no connection with the Government?

MR. LAZARUS: The Government had a treaty commitment to keep them out. Under the 1868 treaty the United States promised to keep whites out of the Great Sioux Reservation and it had a military obligation to do so.

Now, it turned out that -- Government counsel says that we have conceded that the United States made serious efforts to keep the whites out. We have conceded no such thing, because the finding of the Indian Claims Commission was that the military forces, whether because of inability or unwillingness to keep the whites out allowed them in.

QUESTION: You stated that the construction of the treaty made it an absolute obligation to keep the whites out no matter what the demands on the Federal Treasury and no matter what Congress would have appropriated?

MR. LAZARUS: Yes, until the United States changed that treaty, that was its obligation. And I would point out to Your Honor that the United States always found enough troops to round up Indians. Its only trouble was finding

enough troops to round up white people.

QUESTION: Well, take the situation of say something completely divorced from Indians, a local county or city government. And if it were to devote 90 percent of its tax dollars to increasing the police force it could prevent any burglaries. It instead has any number of demands on those resources and so it only appropriates 20 percent. Therefore there are burglaries in the area which depreciate the value of the property and put pressure on people to sell, perhaps.

Now, does that amount to a "taking"?

MR. LAZARUS: Your Honor, let us assume your hypothetical.

First, the United States created this crisis; it wasn't the Indians who created it, it was the United States who created it. The United States took the bulk of the Sioux land under the 1868 treaty and, as Government counsel has already pointed out, paid them $40 million less than the land was worth. As a result of that they started impoverish, that was the fault of the United States. And the United States kept them from their hunting grounds, so they became dependent on the United States for food.

Then the United States first encouraged the miners to come in and then withdrew the troops. Then the United States rounded up the Sioux and put them on the reservation

and took their guns and horses so they couldn't hunt. And there we had this crisis that the United States created.

Now, let us assume the United States didn't have enough money to handle that crisis other than to take the Black Hills away from the Sioux, which is exactly what it did. All we say is, "O.K., pay us." And that is what the United States did not do.

All the United States had to do was to pay us the $17-1/2 million that the land was worth and it made absolutely no effort to do so and it hasn't done it yet. And I think, Mr. Justice Stewart, you put your finger on it right at the beginning, because the Government concedes it hasn't paid us. And it concedes that it owes us under some theory under the Indian Claims Commission Act. That can either be for a breach of trust, for failure to pay a conscionable consideration or for a violation of fair and honorable dealings.

The gravamen of each one of those causes of action is it didn't pay us. And if you didn't pay us for those causes of action, you didn't pay us for a taking, either.

QUESTION: Well, suppose the Government had at the time the Black Hills were taken, as you say, the Government had said, "Well, let's agree on a value and we will pay it to you over a period of years." And they had agreed on a value say of $20 million payable over 50 years.

Would that have been a taking?

MR. LAZARUS: No, sir, that would have been an agreement. If the Sioux had agreed to it, even if the amount of money was not fair value, that would not have been a taking.

QUESTION: Or if the Government had said, "We think the value of the land is $20 million and we will pay it to you over 50 years."?

MR. LAZARUS: If the Sioux had agreed to --

QUESTION: No, the Sioux didn't agree.

MR. LAZARUS: The rule in just compensation cases as I understand the --

QUESTION: Well, what about the rule in fair compensation cases where the Government is arguing this is not a taking. We are taking the land under with our other hat on but we are paying you fair compensation?

MR. LAZARUS: This Court has already disposed of that argument in the Creek Nation case where the United States made the argument that we were not dealing within our sovereign capacity, we were dealing with them as a trustee. And this Court made very short shrift of that argument. It said, "You are responsible as a trustee and you are responsible under the Constitution and your activity as a trustee must conform to constitutional standards." And the Court there found, even though the Government

argued that it was acting as a trustee that it was a taking because --

QUESTION: I thought you said a while ago that if th United States had set up a trust fund of $20 million here and paid the income of it to the Sioux, it would have been all right.

MR. LAZARUS: Well --

QUESTION: It would not have been a taking.

MR. LAZARUS: It would not have been a taking in the fund if that $20 million fund had been equal to the value of the land.

QUESTION: Well, assume --

MR. LAZARUS: I thought you were assuming that. And what I am saying is that that is the exact same situation as if the United States had paid the $20 million directly to --

QUESTION: And then it wouldn't have been a taking even though the Sioux had not agreed to it.

MR. LAZARUS: That is correct, because just compensation would have been paid.

QUESTION: Well, all right --

MR. LAZARUS: But in this case just compensation was not paid.

QUESTION: And if the United States had said, "Well, we were thinking of setting up the $20 million and

paying the interest to you but instead of doing that we are going to pay you what undoubtedly will be more than that in the form of food and shelter."

Then it is a taking?

MR. LAZARUS: Then it is a taking, because the cases are quite clear that just compensation is payment, not promises. The Government --

QUESTION: It is quite clear that under a taking case that the -- what compensation is just cannot be unilaterally determined by the taker. And in my Brother White's questions to you, you conceded that had the United States simply unilaterally determined that $20 million is the right price, we will set up a trust fund for that, that would not have been a taking.

MR. LAZARUS: If that is how my remark is being interpreted, it goes too far.

QUESTION: That is what I understood your answer --

MR. LAZARUS: No, my answer is that if that $20 million was determined by a court to be a just compensation --

QUESTION: Well, even --

MR. LAZARUS: -- as the Commission has determined that $17-1/2 million was just compensation, then just compensation would be paid. But if the value of that property were $25 million and Congress said, "We will set up a trust fund of $20 million," that is not just compensation.

And that no matter how much good faith is involved, that is not just compensation.

QUESTION: Well --

MR. LAZARUS: This Court in Monongahela Navigation 90 years ago said it is not up to Congress to say what just compensation is, the courts say what just compensation is.

QUESTION: Well, I agree. I think you said that if the Government set up a fund that itself determined was a fair compensation and paid the interest, that would not be a taking as long as whenever the question came up it was determined that that was fair compensation.

MR. LAZARUS: That is correct.

QUESTION: Although the Sioux might have at the time objected to it violently.

MR. LAZARUS: Now, I --

QUESTION: Mr. Lazarus, how many Sioux are there now?

MR. LAZARUS: Your Honor, there are 60,000 or more Sioux now. They are at the very bottom of the economic ladder even compared to other Indians. The Sioux are among the most depressed in the entire United States and they are so depressed, not in least part, because the United States in 1877 took their most valuable asset, the Black Hills and it hasn't paid for it yet.

Now, that land which the United States acquired

and turned over to its assigns $1.4 billion in gold has been taken out of the Homestake mine alone. That is just one mine among many.

QUESTION: Well, the Sioux never wanted it to mine, did they?

MR. LAZARUS: It was the Sioux's to do with as they wished, Your Honor, under recognized title which they possessed. They had a title as sacred as a fee. They could use it or not use it. They might not have wanted to use it in 1877, they may have wanted to use it in 1910. The standard of value is not the value to the Indians, it is the fair market value and if they wanted to use their property for hunting at that time and for gold at a later time, that was to be their choice, not the Government's choice. The Government had no right to take it away from them just because the Government didn't like the way they were using it.

Now, I would like to point out, Your Honor, because we have talked a great deal today about money, so I would like to address the $47 million or $43 million or $57 million that the Government repeatedly raises in its presentation, both in its brief and on argument here today. I regret to say that what Government counsel has told you about that money, it is just plain inaccurate. He has not accurately described what is before the Court.

What is in the record in the Court is a General Accounting Office report that lumps, as Mr. Justice Marshall recognized, it lumps a whole series of expenditures under a label "1877 Act." And it doesn't tell us whether it was for provisions, and it doesn't tell us whether those provisions were ever delivered and it doesn't tell us if those provisions were delivered did it go to people who weren't entitled to them, because the Act says that children between the age of 6 and 14 don't get rations if they are not in school. And it doesn't tell you whether those rations were delivered to people living on land susceptible of cultivation and their families, because they weren't entitled to rations either.

So none of those things could be counted in the $43 million. The $43 million includes money that was spent in 1875 and 1876 that couldn't possibly be consideration under the '77 Act. There is not, and our brief shows, a bit of credible evidence that the Government spent 5 cents for rations on the Sioux.

But even if it had, even if it could prove that it spent every dime of that $43 million, it would be irrelevan for purposes of this case, because whether there was a taking depends on what the 1877 Act said and it has nothing to do with what may have happened 10, 20 or 50 years later. The 1877 Act makes no payment to the Sioux. All it does

is make them a conditional promise: "We will provide rations for you until you can support yourself, subject to these various conditions about children not getting them and laborers not getting them."

And that kind of indefinite promise is not just compensation and the Government concedes that it is not just compensation.

QUESTION: Under a treaty a reservation is set up for an Indian tribe and at sometime later the Government, the Congress just says, "Well, we think the reservation is too big. We are going to cut it in half and open the rest up." So it just cuts it in half and redraws the reservation.

Now, is that both a breach of the treaty or is it a taking, or both?

MR. LAZARUS: It is a breach of the treaty and the United States has the power to breach the treaty.

QUESTION: That is Lone Wolf.

MR. LAZARUS: That is Lone Wolf.

QUESTION: Right.

MR. LAZARUS: Lone Wolf tells us that Congress -- if Congress determines that that reservation should be cut in half, Congress can come in and do it; it can do it without the consent of the Indians and it can do it in violation of the treaty. It is also a taking and when Congress does it, it has to pay for it. There is no reason --

QUESTION: Now, what case is that?

MR. LAZARUS: That Shoshone case, that is Klamath, that is Creek Nation, that is every case this Court has had where we have dealt with just compensation and recognized --

QUESTION: But those were cases just involving whether interest should be paid, weren't they?

MR. LAZARUS: Well, that is what this case involves, Your Honor.

QUESTION: But I thought this involved a taking, too. Did those expressly involve the question of whether Justice White's hypothesis was or was not a taking?

MR. LAZARUS: Those cases all involved taking. The circumstances were different. In the Shoshone case, the Shoshone had a reservation, the United States settled the Arapahoes on part of the reservation, the Shoshone never agreed to it.

Question: Did the United States have the power to do it? Yes.

Did the United States have to pay for doing it? Yes.

Did it have to pay just compensation? Yes.

That is --

QUESTION: A treaty-created property right is a property right that if it is taken by the United States, they have got to pay for it.

MR. LAZARUS: That is right. A treaty protected -- we are only talking about recognized treaty title, not ab origine title,but recognized treaty title is Fifth Amendment property under the Constitution. That is what this Court held in Shoshone.

QUESTION: That is a little different -- and you tell me if I am mistaken -- from an Indian reservation in which title remains in the United States Government.

MR. LAZARUS: Well --

QUESTION: And the question such as in the DeCoteau case and others as to whether or not the reservation has been terminated is a question of congressional intent. But here this was not an Indian reservation, this was -- this belonged to the Sioux Nation, didn't it?

MR. LAZARUS: Well, this -- all reservations, the beneficial ownership and all the incidence of ownership are in the Indian tribe. The bare legal title is in the United States.

QUESTION: And that was true here, too?

MR. LAZARUS: Yes.

QUESTION: It was.

QUESTION: But this was more than ab origine title. Even if originally it had ab origine title it was recognized by treaty and it constituted a reservation.

MR. LAZARUS: That is correct, it was recognized

by treaty twice over.

QUESTION: It was Federal land?

MR. LAZARUS: It was a Federal Indian reservation, recognized title and that --

QUESTION: That title was in the Sioux Nation and not in the Federal Government.

MR. LAZARUS: Well, all of the incidence of ownership; if you want to say who has all the incidence of ownership, it is the Sioux Nation. Where does the bare legal title rest, it is in the United States as it is with respect to all Indian lands. That is part of what establishes the trust.

But when the United States takes it -- and Shoshone makes this quite clear -- when the United States takes it, the Indians have a 100-percent interest for purposes of determining just compensation. You value it at full value.

QUESTION: Has there been any question of compensation in the cases before this Court where the question was: Was the reservation terminated?

MR. LAZARUS: No, I don't think -- I don't think we get the just compensation cases in that situation unless you have a statute, what we call the surplus land statute that was in DeCoteau and in Rosebud and Mattz v. Arnett. Where there is a surplus land statute that the Indians have agreed to that terminates part of the reservation,

there is no just compensation claimed. There may be a just compensation claimed if it is a unilateral surplus land statute and the United States takes the surplus lands and disposes of them to settlers, to white settlers for $2.50 an acre when it is really --

QUESTION: But if all the land in a reservation is either allotted land and held in trust by the United States or it has been entered and is in fee ownership of whites, if all the land in the reservation is either allotted land or it is fee-owned by whites, terminating the reservation is not a taking?

MR. LAZARUS: That is correct.

Just changing the jurisdiction is not a taking.

QUESTION: No.

MR. LAZARUS: It is acquiring the land which is what happened in this case that creates the taking.

Now, Your Honors, I see my time is almost up and so all I can say is that if the precedents of this Court are followed, then the decision of the Court of Claims must be affirmed, because the precedents of this Court say that the Sioux had recognized or treaty title, that that title is Fifth Amendment property, that the United States acquired the land under circumstances that constituted taking, and my client has never been paid just compensation.

And I suggest to you, Your Honors, that you should

not think of the amount of money involved. The Constitution is not only color blind, it is dollar blind and we are entitled to just compensation under every single ruling of this Court and the Court of Claims should be affirmed.

QUESTION: Well, if the United States at the time had said: "Look, we are taking the Black Hills, we are going to pay you $100,000 a year for as long as we want to but we won't tell you for how long," and they had paid them $100 million, you would still be making the very argument that you have been?

MR. LAZARUS: Absolutely, Your Honor, because that was not just compensation.

QUESTION: May I ask just this one question, Mr. Lazarus.

Your position, as I understand it, your basic position does not require us to consider the issue that the Court of Claims devoted most of its attention to?

MR. LAZARUS: Your Honor, our basic position is that you do not have to reach the rationale of the Court of Claims, because the good faith test, in our opinion, is not a valid test.

If you applied the good faith --

QUESTION: I understand that.

MR. LAZARUS: -- test as the Court of Claims did, we win anyway, because they said there was no good faith.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, a luncheon recess was taken.)

AFTERNOON SESSION

(1:00 P.M.)

MR. CHIEF JUSTICE BURGER: Mr. Claiborne, you may proceed.

REBUTTAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court:

It ill behooves the Sioux Nation who have at least since 1920 been very much the special favorites of the laws to put themselves in the shoes of a white claimant who would not be here, having been barred by limitations, res adjudicada estoppel by the admission of counsel, setoffs --

QUESTION: I am having difficulty hearing you.

MR. CLAIBORNE: A white person in the same shoes would not be here, having been barred by limitations, by res adjudicada --

QUESTION: Wall, not if he were the beneficiary of this same Act of Congress, yes.

MR. CLAIBORNE: But most important, he would have been able to plead payment as, indeed, we are free to do, though not to defeat the award of $17 million but to determine whether there was a taking.

The Court of Claims in this case was very clear about that, they held that although the provisions supplied

were now allowable as an offset against the award they were to be taken into account in determining whether there was fair dealing or whether Congress acted in good faith.

Now, whether Congress acted in good faith depends on whether at the time the value of the provisions was thought to be somewhat equivalent to the value of the Black Hills. The value of the Black Hills is a matter which a century later gave rise to enormous controversy. Before the Commission experts varied between less than $5 million to more than $25 million.

The Commission, after months of hearings and with years to ponder, came up with a figure of $17.1 million.

But Congress cannot be faulted if in 1877 it did not accurately know that value. It would still have been acting in good faith if it had somewhat under-valued the value of that territory. It certainly cannot be faulted, because in fact its promise was over-generous. And as to that promise and its implementation, my learned friend has suggested that the figure of $43 million is confected. It comes out of the Government Accounting Office reports, it is a finding of the Court of Claims in 1942. It was increased by an admission of former counsel in the 1950's. It is not a figure taken out of the air.

It is well known and was then well known that this obligation would exceed some million dollars a year.

Congress had deleted the limitation of 10 years, obviously anticipating that it might need to be continued longer. AT the very least, Congress undertook a very serious substantial obligation which was fully fulfilled and it ought not now to be said to have been acting in such bad faith as to constitute an unconstitutional taking.

QUESTION: You say that if the Government takes the Black Hills and says: "We promise to pay you $100,000 a year forever for the Black Hills," obviously you say there is no taking.

MR. CLAIBORNE: Exactly so, Mr. Justice White.

QUESTION: And so you don't think the necessary precondition is that at the time the property is taken that a total value be set and paid over?

MR. CLAIBORNE: Not in such a case as this. To delay for valuation would have simply invited the Hills from being stolen for the Sioux --

QUESTION: It would have been a taking vis-a-vis a white?

MR. CLAIBORNE: In the case of a white man, perhaps the amount --

QUESTION: What if a group of white people had owned the Hills and the Government had done this to them. That would have been a taking?

MR. CLAIBORNE: I think not, in light of the

actual payment that was made --

QUESTION: Well, really? The Government can take property and say: "We don't need to pay you over the present value of it, we can just" --

MR. CLAIBORNE: It may have been a taking --

QUESTION: -- "pay $100 a year and sooner or later we will get to the value."?

MR. CLAIBORNE: I should correct myself, Mr. Justice White.

In a case of a white person in which the obligations are different this might have been a taking. But there would have been no recovery, because the payments made in respect of that taking properly discounted would have eliminated the principal and therefore no interest would have been --

QUESTION: But by the time they -- the money they paid out equaled the principal plus the interest up to that date.

MR. CLAIBORNE: Indeed, by my computations, that had occurred at about 1915, certainly by 1926.

QUESTION: I am not entirely clear on this, Mr. Claiborne.

Is there any relationship of sovereign to sovereign between the United States and any group of white people within our boundaries?

MR. CLAIBORNE: I think --

QUESTION: And the United States is not and never has been a trustee for any category of white people, have they?

MR. CLAIBORNE: That is --

QUESTION: Comparable to the Indian relationship?

MR. CLAIBORNE: But that trustee relationship, Mr. Chief Justice, carries both obligations but also unusual powers, the power to dispose against the will and without exercising the power of evident domain --

QUESTION: There is no such power, comparable power over any white category?

MR. CLAIBORNE: That is --

QUESTION: These were all results of treaties in the first instance, were they not, these rights and duties and powers?

MR. CLAIBORNE: Well, this Court has held that independently of treaties the inherent situation of the Indians place them within the protection of the United States.

QUESTION: The Constitution itself recognizes Indian tribes as sovereigns, does it not?

MR. CLAIRBORNE: Yes, but the Constitution perhaps also recognizes the dependence status of Indian tribes, their inability to alienate their land which accordingly,

if it must be done in their interest, may occasionally have to be done against their will by their guardian.

QUESTION: There is one question. Perhaps we have covered it, but I just want to be sure.

Going back to Mr. Justice Stewart's very first line of inquiry when you first started your argument, I am not clear in my own mind why if there is the good faith or its equivalent on which your position ultimately rests, what is the justification for the $17 million principal award? How can the two be consistent?

MR. CLAIBORNE: Well, Mr. Justice Stevens, the Court of Claims has not taken its mandate to find a recovery only when the dealings were less than dishonorable literally. They have found that in every circumstance in which the amount paid was less than a substantial equivalent, even though in good faith the bargain was made, there will be an award under the Indian Claims Commission Act.

In this case the Court of Claims determined on its own, without benefit of any finding from the Commission, that the dealings had been less than honorable. The United States at this point could not in any event make any offsets. Accordingly, perhaps we could have contested that finding but we were content, as we then thought, to pay the $17 million and have done with this protracted litigation.

Had we known that at the end of the day Congress would reopen the matter of interest in 1978, perhaps we would have contested the finding that the dealings had been less than honorable. But it was not seemingly necessary to do so --

QUESTION: But isn't that correct, that the acceptance of your position requires us to adopt a view of the case which would be inconsistent with the $17 million principal award, if that were still open?

MR. CLAIBORNE: I think not, Mr. Justice Stevens. I think the Court can find that the dealings were not wholly honorable and that results in a moral claim which would not bear interest and yet find, because that is judged from hindsight, and yet find that Congress was in good faith seeking to benefit the Sioux tribe at the time and accordingly there was an exercise of the Indian power and not of the eminent domain power. And, accordingly, no taking within the meaning of the Fifth Amendment.

QUESTION: My basic concern which prompted me to ask you that question and those questions at the outset was I had had difficulty in constructing any theory. If one begins with a proposition that the United States owes the Sioux Nation $17 million-plus, I had had difficulty constructing any theory to support the view that the United States didn't also owe interest on that amount. But I

think I now understand your answer, which is that the $17 million resulted from the action of Congress that disallowed any offsets.

MR. CLAIBORNE: Exactly so. Indeed --

QUESTION: And that that is inapplicable to the question of interest.

MR. CLAIBORNE: When the Court of Claims made its decision in 1974 saying the value of the Black Hills is $17.1 million, it then said in Stage 2 the United States may prove its offset, including these provisions.

QUESTION: Right.

MR. CLAIBORNE: At that point the Sioux, realizing that the offsets would wipe out the award, came to Congress and said, "Forbid that," which Congress did --

QUESTION: In 1978.

MR. CLAIBORNE: And that produced this pecuniary situation.

QUESTION: And that produced this $17 million.

MR. CLAIBORNE: That produced the $17 million, which we could no longer contest.

QUESTION: I understand your argument.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

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