CONGRESSIONAL No. 17641.

IN THE

Court of Claims of the United States

THE CHOCTAW AND CHICKASAW NATIONS OF INDIANS,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

REPLY BRIEF

ON BEHALF OF

THE CHOCTAW AND CHICKASAW NATIONS OF INDIANS.

In replying to the contentions of the defendant that the court is without jurisdiction, "for the investigation and determination of facts", and to report to the Senate, "the facts in the case and the amount where the same can be liquidated", we do so largely as a matter of customary practice.

We feel that the brief of plaintiffs filed in December, 1931, is quite sufficient upon that phase of the case in both the matter of argument and cited cases.

It will be noted that the motion of the defendant filed on November 18, 1931, raises the identical questions as to jurisdiction, in practically the same order that they are now raised, in its answer brief.

We, therefore, deem it inadvisable, and in poor taste, to burden the Court with a repetition of the arguments and citations therein set out. We deem it sufficient to respectfully refer the Court to plaintiffs' brief then filed as being a complete answer to every question of jurisdiction now raised.

The only material case now cited that was not then urged, is the case of *Creek Nation* v. *United States,* Congressional No. 17640 (74 Ct. Claims, 663).

Counsel for defendant lays great stress upon this opinion, and earnestly urges that it is controlling herein, and quotes extensive excerpts therefrom as supporting their views.

The Creek case was pending before the Court at the time of the filing of the motion of the defendant to dismiss for want of jurisdiction. That case had been argued on that motion some time before a like motion was argued in this case and was still under consideration at the time the Court overruled defendant's motion and took jurisdiction in the instant case.

These proceedings were had in the following order: The Creek case was argued and submitted on December 8, 1931; this case was argued and submitted on January 25, 1932; the motion of the defendant was overruled and jurisdiction herein was sustained on February 8, 1932. The motion of the defendant was sustained in the Creek case on May 2, 1932, and jurisdiction denied.

The Court was, therefore, in possession of every fact and circumstance that could be argued, for *exactly*

sixty days prior to its overruling defendant's motion in this case, before jurisdiction was denied in the Creek case.

So, if there was anything in the Creek case that had an adverse bearing upon this case, the Court was in full possession of the facts and the law long before its ruling was made sustaining jurisdiction herein. Certainly nothing has since happened in the Creek case that would shed further light, or afford additional information, that would bring about a different holding.

The opinion of the Court, in the Creek case, classifies that case and draws the distinction that exists between it and this case in the plainest language.

In its opinion in the Creek case the Court said:

> "Does the bill then provide for the payment of a grant, gift or bounty? We may at once eliminate the question of a gift or bounty. No argument is advanced from any source that such is the case."

By further reference to our brief in opposition to defendant's motion to dismiss, we respectfully submit that the whole brief fairly bristles with the contention that the only thing submitted to this Court is a request for a *"grant, gift, or bounty"*, within the meaning of Section 151 of the Judicial Code, as distinguished from a *claim, "legal or equitable."*

We quote the last paragraph, on page 35 of that brief, wherein we say:

> "The claim herein involved is one that appeals to, and is addressed to, the sound morals and good conscience of the Legislative branch of the United States Government—that and nothing more. The Senate of the United States has, by referring this claim to this court for investigation and report,

made forced litigants of the plaintiffs herein. That is the jurisdiction that is sought by this reference —none other."

Again, on page 39, we say:

"In keeping with the rule of procedure as outlined by the Supreme Court in this case, the plaintiff Tribes have appealed to the Congress for consideration of this claim, as a political matter, and *not as a justiciable issue.*"

Further, on page 40, after citing the Syllabus in the case of *Widmayer* v. *United States,* (42 Ct. Claims, 519), we quote from the opinion of this Court, as follows:

"'* * * where a claim referred under the Bowman or Tucker Acts is neither a legal nor equitable demand in its character, the court will find the facts but cannot assess the damages. The relief to be given, if any, will be a gratuity; and the amount of a gratuity must be a matter of legislative discretion.'"

Following this, we further asserted:

"That case is analogous to the case at bar: We seek the same jurisdiction; we seek the same consideration; we seek, through the Court, the same relief that was granted to those claimants by the Congress."

Moreover, on page 42, we say:

"As stated above, our rights under the Treaty were determined by the opinion of the Supreme Court of the United States in 179 U. S. 494. We do not ask for a rehearing of that adjudication. We are appealing to the Congress for the relief which the Supreme Court in that opinion suggested that we should seek. Nor are we seeking the revision of any treaty in the light of any subsequent event that has caused lands conveyed by the Treaty to become enhanced in value. We appeal to the conscience of the Congress of the United States, in accordance with the rights guaranteed us under the first amendment to the Constitution of the United States, for redress of our just grievance. This is all we seek."

In oral argument we insisted upon nothing as a *claim, "legal or equitable"* or otherwise, as against the government. We urged, with all the force of language, that the relief sought is strictly for a *"grant, gift or bounty"*, within the meaning of Section 151 of the Judicial Code; one that is addressed to sound conscience and good morals.

In the report of the Committee on Indian Affairs of the United States Senate (Senate Report 652, 71st Congress, 2nd Session) made upon the bill now referred, a copy of which is attached to the Petition of the Plaintiffs as Exhibit "A" thereof, it will be seen that the claim of the plaintiffs was considered to be clearly in the nature of a *"grant, gift or bounty."*

We call the attention of the Court to pages 4 and 5 of the Report, as follows:

"It should be remembered that the parties to the Treaty were the Government and the Choctaw and Chickasaw Indians, the former the guardian, and the latter its wards. It is apparent that the Government overreached its wards."

Further, on page 11, the Committee said:

"* * * since the language of cession in the several treaties is practically the same, equity and fair dealing require that the Government give to

> the word 'cede', in the Third Article of the 1866 Treaty with the Choctaws and Chickasaws, the same construction that it gave to the words 'cede and convey', in the third Article of the Seminole and Creek Treaties, and pay the Choctaws and Chickasaws for the residue of their Western lands. The obligation to accord the Choctaws and Chickasaws the same treatment that it gave the other three Tribes is incumbent upon the Government, since the relation existing between it and these two Tribes is that of guardian and ward."

Not only is this the case, but at the time the Creek case was argued and submitted, and at the time the question of jurisdiction was argued and submitted in this case, there was a third case pending that was argued and submitted upon the same general proposition. We refer to the case of the *Wales Island Packing Company* v. *United States,* Congressional No. 17340.

In that case, the defendant urged this case in support of its contention that jurisdiction should be denied in its motion for a new trial, saying:

> "* * * and rather than repeat that discussion here, the court is respectfully referred to those motions, with the request that they be considered in the determination of this motion."

The Court, no doubt, did consider the argument advanced in the *Wales Island* case when it overruled defendant's motion to dismiss and sustained jurisdiction. That is precisely what was done in the *Wales Island* case.

So, if the defendant can gain any consolation by quoting the decision of the Court in the Creek case we can, with like confidence, point out the decision of the

court in the *Wales Island* case, as being equally persuasive on the question of jurisdiction.

But, as having more force than all, in support of our contentions as to jurisdiction, we respectfully and earnestly submit the holding of this Court, not in a *similar case,* nor in one that bears a *general resemblance* to this case, but in *this identical case.*

As above pointed out, all questions of jurisdiction in this case were presented at the same time, in the same manner, and with all the solemnity that could attach to either the Creek or the Wales Island case, and the Court, at that time—more than four years ago—sustained our contentions and took jurisdiction.

Since that time these plaintiffs have spent thousands of dollars, and four years of time, in assembling facts, circumstances and historical events, showing that they are entitled to the relief prayed for; all of which has been in conformity to the manifest intent of the Senate of the United States, as expressed in the Resolution of reference. They now stand ready, willing and anxious to submit the result of their labors to the Court.

We submit, in all frankness, and candor, that if any holding of this Court is controlling upon jurisdiction, it is the ruling heretofore solemnly made in this particular case.

May not this be urged, not only upon the grounds of fairness and justice, but upon the grounds of regular and orderly procedure?

What right has anyone to assume that the Court has not given the subject of jurisdiction due consideration and mature deliberation before it entered its order on February 8, 1932?

Why may it not be taken for granted that the Court has good and sufficient reasons for drawing a distinc-

tion between this case and the Creek case, when it sustained jurisdiction in the one, and denied it in the other? And especially so, when it was made plain then, as it is being made plain now, that this claim is for a *"grant, gift or bounty"*, whereas the Creek case was not.

Although counsel for the defendant in oral argument made in support of the motion to dismiss, abandoned the contentions raised in their brief as to the sufficiency of the referred bill because no direct appropriation is made, that contention is, apparently, again raised in their answer brief. It is argued at some length that the pending bill is insufficient, for that reason. Supporting which, its language is quoted:

> "* * * and there is hereby authorized to be appropriated * * *";

and that there is no way of determining who is to appropriate the money, for what purpose or from what source.

This contention is even more novel than the original complaint that the President had, at one time, vetoed a bill referring this claim to this Court.

The reason for the employment of the language contained in the pending bill is, of course, quite obvious. No one having a knowledge of the rules of legislation, as employed by Congress, could possibly raise this objection seriously. However, since it has been raised, may we not respectfully call the attention of the Court to Rule XVI of the Senate of the United States, wherein it is specifically provided that no appropriation can be made except "to carry out the provisions of some existing law."

By this rule the Senate is simply saying that any bill seeking to make a direct appropriation, unless some

statute authorizing the same has theretofore been passed, is subject to a point of order. The pending bill is the authorizing statute, making it possible for an appropriation to be made, should the Congress conclude that, under the facts and circumstances, the same would be warranted. It is that kind of a report, for the information and guidance of Congress, that the Code contemplates, and which the Senate, in the passage of its Resolution, has requested.

The defendant contends that the requests for findings, and the language of the referring Resolution go beyond the permissive language contained in the Code.

May we say this, once and for all? We do not seek, either in requested findings, or in the Senate Resolution, any enlargement of the Court's jurisdiction, as limited and defined by Section 151 of the Judicial Code.

If any language has been used, either in requested findings, or in the Senate Resolution, that would seem to go beyond what is permitted by the Code, we ask that the same be disregarded by the Court.

We know of nothing that we could do that would enlarge the broad jurisdiction of the court, under the Code. We know of nothing that the Senate of the United States could, alone, do to that end. But surely, if language has been inadvertently employed, in either briefs or the Senate Resolution that might seem to request the Court to do more than, under the Code, it has the power to do, then such language should be treated as mere surplusage; no more, and no less. Certainly, it would not be seriously contended that any inadvertent language, either in the briefs or in the Resolution, would utterly destroy the jurisdiction of the Court under the Code.

We submit that Section 151 of the Code is as broad as could be written and, boiled down, simply provides

that when any bill is pending in either House of Congress, providing for the payment of a grant, gift or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims. This is a fair reading of the provisions of the Judicial Code that are applicable to the reference herein presented. Before defendant can urge a lack of jurisdiction and before this Court can find an absence of it, it must be specifically and definitely pointed out that the reference herein sought to be made is outside the language employed in the statute; otherwise, the Court must, under the Code, take jurisdiction and hear the reference.

In other words, the burden is not upon the plaintiffs to show that we come within the provisions of this Section but is rather upon the defendant to point to some specific language of the statute that precludes the Court from taking jurisdiction. From a fair reading of the Section, we challenge defendant's ability to do so.

The matter of jurisdiction being disposed of, we stand now before this Court with a vast store of facts, circumstances and historial incidents concerning which the Congress of the United States has, through the Senate, indicated its wish to be advised. No single fact, circumstance, incident or event is in anywise contravened or denied by the defendant.

We, therefore, respectfully submit that they should be heard and reported to the Congress.

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