No. 880

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE CHICKASAW NATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Treaty and statutes involved	2
Statement	2
Argument:	
I. The Supplementary Agreement of 1902 does not forbid the use of tribal funds for the education of unenrolled Indians	6
II. Section 10 of the Act of 1906 and appropriation Acts from 1912 to 1932 authorized the expenditure of tribal funds for the education of unenrolled children	7
Conclusion	15

CITATIONS

Cases:	
Cherokee Nation v. *Hitchcock*, 187 U. S. 294	8
Chippewa Indians v. *United States*, decided April 17, 1939, No. 666	8
Choctaw and Chickasaw Nations v. *United States*, 81 C. Cls. 63, certiorari denied, 296 U. S. 644	8
Gritts v. *Fisher*, 224 U. S. 640	8
Lone Wolf v. *Hitchcock*, 187 U. S. 553	8
McCaughn v. *Hershey Chocolate Co.*, 283 U. S. 488	14
McFeely v. *Commissioner*, 296 U. S. 102	14
Sizemore v. *Brady*, 235 U. S. 441	8
United States v. *Hermanos y Compania*, 209 U. S. 337	14
United States v. *Jackson*, 280 U. S. 183	14
United States v. *Seminole Nation*, 299 U. S. 417	15
Treaty and Statutes:	
Act of March 3, 1893, c. 209, sec. 16, 27 Stat. 612	3
Act of June 28, 1898, c. 517, 30 Stat. 495 (Atoka Agreement, Curtis Act)	3, 9
Act of July 1, 1902, c. 1362, secs. 14, 28, 35, 32 Stat. 641 (Choctaw-Chickasaw Supplementary Agreement)	2, 3, 4, 6
Act of April 26, 1906, c. 1876, secs. 2, 10, 17, 19, 34 Stat. 137	2, 4, 8, 12
Act of June 16, 1906, c. 3335, sec. 7, 34 Stat. 267 (Oklahoma Enabling Act)	11
Act of March 3, 1909, c. 263, 35 Stat. 781	11

151307—39

Treaty and Statutes—Continued.	Page
Act of April 4, 1910, c. 140, 36 Stat. 269	11
Act of August 24, 1912, c. 388, 37 Stat. 518	12, 14
Act of June 30, 1913, c. 4, 38 Stat. 77	14
Act of August 1, 1914, c. 222, 38 Stat. 582	14
Joint Res. of March 4, 1915, 38 Stat. 1228	14
Act of May 18, 1916, c. 125, 39 Stat. 123	13
Act of March 2, 1917, c. 146, 39 Stat. 969	13
Act of May 25, 1918, c. 86, 40 Stat. 561	13
Act of June 30, 1919, c. 4, 41 Stat. 3	13
Act of February 14, 1920, c. 75, 41 Stat. 408	13
Act of March 3, 1921, c. 119, 41 Stat. 1225	13
Act of May 24, 1922, c. 199, 42 Stat. 552	13
Act of January 24, 1923, c. 42, 42 Stat. 1174	13
Act of June 5, 1924, c. 264, 43 Stat. 390	13
Act of June 7, 1924, c. 300, 43 Stat. 537	2
Act of May 3, 1925, c. 462, 43 Stat. 1141	13
Act of May 10, 1926, c. 277, 44 Stat. 453	13
Act of May 19, 1926, c. 341, 44 Stat. 568	2
Act of January 12, 1927, c. 27, 44 Stat. 934	14
Act of March 7, 1928, c. 137, 45 Stat. 200	14
Act of February 19, 1929, c. 268, 45 Stat. 1229	2
Act of March 4, 1929, c. 705, 45 Stat. 1562	14
Act of May 14, 1930, c. 273, 46 Stat. 279	14
Act of February 14, 1931, c. 187, 46 Stat. 1115	14
Act of April 22, 1932, c. 125, 47 Stat. 91	14
Miscellaneous:	
Black's Law Dictionary (3rd ed. 1933)	7
Funk & Wagnalls' Standard Dictionary (1937)	7
Annual Report of the Secretary of the Interior, 1904, Part I, p. 92	10
Annual Report of the Secretary of the Interior, 1909, Vol. II, pp. 21–22	11
Annual Report of the Department of the Interior, 1913, Vol. II, p. 25	10

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 880

THE CHICKASAW NATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 11–14) is reported in 87 C. Cls. 91.

JURISDICTION

The judgment of the Court of Claims was entered on April 4, 1938 (R. 14). On June 2, 1938, petitioner filed a motion for a new trial (R. 15), which was denied on November 14, 1938 (R. 15). On December 30, 1938, petitioner filed a motion for leave to file a second motion for a new trial (R. 15), which was granted on January 19, 1939 (R. 15).

Petitioner's second motion for a new trial was filed and denied on January 19, 1939 (R. 15). The petition for a writ of certiorari was filed April 17, 1939 (R. 16). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Supplementary Agreement of 1902, the Act of April 26, 1906, and later appropriation Acts authorized the Secretary of the Interior to expend tribal funds of the Chickasaw Nation for the education of Indian children who were not on the final roll of members of the Chickasaw Nation, but who were children of enrolled members.

TREATY AND STATUTES INVOLVED

Relevant portions of the Choctaw-Chickasaw Supplementary Agreement, ratified by the Act of July 1, 1902 (c. 1362, 32 Stat. 641), and Section 10 of the Act of April 26, 1906 (c. 1876, 34 Stat. 137, 140–141), are printed in the Statement below. The material portion of the special jurisdictional Act of June 7, 1924 (c. 300, 43 Stat. 537), as amended by the Acts of May 19, 1926 (c. 341, 44 Stat. 568), and February 19, 1929 (c. 268, 45 Stat. 1229), is set forth in the amended petition in the Court of Claims (R. 1–2).

STATEMENT

Petitioner, the Chickasaw Nation, brought this suit under the special jurisdictional Act of June 7,

1924 (R. 1–2), alleging that the United States, contrary to the provisions of treaties and laws limiting the right to share in the tribal funds to enrolled members of the tribe, had illegally spent tribal funds in the education of unenrolled Indians (R. 7–8). The basic statutory background and the pertinent facts are as follows:

Under Section 16 of the Act of March 3, 1893 (c. 209, 27 Stat. 612, 645), a commission was appointed to treat with the Five Civilized Tribes (which include the Chickasaw Tribe) for the allotment of their lands in severalty, with a view to the ultimate creation of a state out of the Indian Territory. An agreement, known as the Atoka Agreement, was made with the Choctaw and Chickasaw Tribes and was ratified by the Curtis Act of June 28, 1898 (c. 517, 30 Stat. 495). Subsequently another agreement, the Choctaw-Chickasaw Supplementary Agreement, was made and was ratified by the Act of July 1, 1902 (c. 1362, 32 Stat. 641). These agreements provide generally for the preparation of final rolls of members of the tribes, for the allotment of lands to such members, and for the sale of the balance of the tribal property, with certain exceptions, and the distribution of the proceeds among the members. Section 28 of the Supplementary Agreement provides for the enrollment of Choctaw and Chickasaw citizens and freedmen living on September 25, 1902, but that no child born thereafter

shall be entitled to enrollment. Section 35 of this agreement provides:

> No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, * * *.

Subsequently, by Section 2 of the Act of April 26, 1906 (c. 1876, 34 Stat. 137), children born between September 25, 1902, and March 4, 1906, became entitled to enrollment.

Prior to the Act of April 26, 1906, the Chickasaw Tribe had managed and controlled its tribal schools (R. 10). Section 10 of that Act provided:

> SEC. 10. That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the present system so far as practicable, until such time as a public-school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, * * * and any of the tribal funds so set aside remaining unexpended when a public-school system under a future State or Territorial government has been established, shall be distributed per capita among the citizens of the nations, in the same manner as other funds.

Pursuant to this Act and later appropriation Acts authorizing the use of tribal funds for school purposes, the Secretary of Interior during the years 1913 to 1932, inclusive, expended $788,421.07 out of tribal funds for the education of children who were not on the final roll of members of the Chickasaw Nation, but who were children of enrolled members (R. 10).

Upon these facts and statutes the Court of Claims concluded that the expenditures were legal. It held (1) that Congress intended by the Act of April 26, 1906, that the Chickasaw schools to be carried on with tribal funds were to be attended by all Chickasaw children, whether or not enrolled, (2) that Congress had power to authorize this use of tribal funds as being in the interest of the tribe, (3) that the "distribution" spoken of in the Act of 1902 referred only to the distribution of the Chickasaw property specified in that Act, and, if that were

not so, (4) that Congress did not intend, and the Indians did not understand, that absolute control of the tribal funds was to be so vested in the Indians that none of these funds could be used for the benefit of the tribe as a whole (R. 12–14).[1]

This conclusion made it unnecessary for the court to make any finding as to the amount of offsets which the United States might have against the Chickasaw Nation (R. 14). The petition of the Nation was held to be without merit and was ordered dismissed (R. 14).

ARGUMENT

I

THE SUPPLEMENTARY AGREEMENT OF 1902 DOES NOT FORBID THE USE OF TRIBAL FUNDS FOR THE EDUCATION OF UNENROLLED INDIANS

Petitioner contends that Section 35 of the Supplementary Agreements of July 1, 1902, *supra,* p. 4, forbids the use of tribal funds for the education of unenrolled Indians by providing that no person not enrolled shall be "entitled to in any manner participate in the distribution of the common property" of the tribe. But this clause does not bar

[1] The petitioner seems now to concede that Congress had the *power* to use the tribal funds for the education of unenrolled children (Pet. Br. 13, 21–22). This would remove the second and fourth bases of the Court of Claims' opinion from controversy. The burden of the petitioner's present brief is that the Supplementary Agreement, the Act of 1906, and later Acts, properly construed, do not authorize the Secretary of the Interior to expend tribal money on unenrolled children (Pet. Br. 26).

such a use, for the word "distribution" normally refers to an "apportionment" rather than a "disbursement" or "expenditure" (See Funk & Wagnalls, Standard Dictionary (1937); Black's Law Dictionary (3rd ed. 1933), and the use of funds for education falls in the latter category. Further, as other sections of the statute indicate, the "distribution" referred to is a per capita or equal division of the tribal funds among the enrolled members on a final or intermediate winding up of the tribal affairs. (See Secs. 14, 59, 64, 72.) If use of tribal funds for education were a "distribution," the use of such funds for the education of enrolled members would have violated the rights of other members, not being educated, to an equal distribution. Petitioner, however, impliedly recognizes the validity of expenditures of tribal funds for the education of enrolled members (Pet. Br. 40). Petitioner cannot consistently do this and assert that the statute provides for an "equal" distribution (Pet. Br. 8), and then say that "distribution" covers the use of funds for education.

II

SECTION 10 OF THE ACT OF 1906 AND APPROPRIATION ACTS FROM 1912 TO 1932 AUTHORIZED THE EXPENDITURE OF TRIBAL FUNDS FOR THE EDUCATION OF UNENROLLED CHILDREN

Even if the Supplementary Agreement of 1902 had provided that tribal funds could be used only for enrolled members and not for the education of unen-

151307—39——2

rolled children, it is well settled, and petitioner now seems to concede (Pet. Br. 13, 21–22), that Congress, by virtue of its plenary control over tribal property, had power thereafter to authorize the use of tribal funds for the education of children of enrolled members. *Gritts* v. *Fisher,* 224 U. S. 640, 648; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565, 568; *Sizemore* v. *Brady,* 235 U. S. 441, 449; *Chippewa Indians* v. *United States,* No. 666, decided April 17, 1939; *Choctaw and Chickasaw Nations* v. *United States,* 81 C. Cls. 63 (1935), certiorari denied, 296 U. S. 644. Petitioner is therefore driven to contend that neither the Act of 1906 nor later appropriation Acts from 1912 to 1932 authorized the education of unenrolled children out of tribal funds.

A. Section 10 of the Act of April 26, 1906, *supra,* p. 4, directs the Secretary of the Interior to assume control of the schools in the various tribes, retaining the present system so far as practicable, until such time as a public-school system shall have been established and "proper provision" made thereunder for the education of "the Indian children of said tribes." It further directs him to set aside tribal funds to defray the expenses of the schools.

This section makes no distinction between enrolled or unenrolled children, nor is there anything in the section from which it can be inferred that Congress intended to make such a distinction. The

natural inference from this section is that pending the establishment of an adequate school system "the Indian children of said tribes" are to be educated in the tribal schools at tribal expense. The use of the phrase "the Indian children of said tribes" cannot be considered inadvertent in a statute which makes important distinctions between members on approved rolls and others. See, *e. g.,* Section 17. Nor is this necessarily inconsistent with the general scheme of the statute to benefit enrolled members, since they would benefit as the recipients of the education or as parents of recipients. In fact, this construction effectuates more nearly the equal distribution contemplated by the statute than a construction which would allow certain enrolled members an education at tribal expense with consequent benefit to themselves and their parents but without corresponding benefits to enrolled parents of unenrolled children of school age.

Moreover, the statute specifically continued the system theretofore in existence, and that system had provided for the education of all the Indian children. The Atoka Agreement of June 28, 1898, provided (30 Stat. 510):

> The revenues from coal and asphalt, or so much as shall be necessary, shall be used for the education of the children of Indian blood of the members of said tribes.

Another section provided that the royalties from the coal leases were to be used for education until the tribes were required to pay taxes (p. 511). And

by an earlier section lands allotted were made nontaxable in the hands of the original allottee for a period not to exceed twenty-one years. It is a fair construction of these provisions that the children of allottees and those born after the dissolution of the tribal government, which was set for eight years later (p. 512), were to be educated with tribal funds, for the state-to-be could legitimately complain and refuse to educate them if they or their parents were nontaxable.

The same policy was present in the Act of 1906. The Secretary of the Interior was to continue the tribal schools until a public school system was established and "proper provision" made for the education of Indian children. Under this Act and the Atoka Agreement much of the land was nontaxable. It was not to be expected nor could it be fairly asked that Oklahoma make "proper provision" for the education of Indian children, either enrolled or unenrolled, if they or their parents were nontaxable. See Annual Report of the Secretary of the Interior, 1904, Part I, p. 92; Annual Report of the Department of the Interior, 1913, vol. II, p. 25. It is for this reason that enrolled and unenrolled children fall within the scope of the Act of 1906.

Petitioner contends that the tribal schools were to be continued only until a public-school system was established and, if operated longer, they were to be attended only by enrolled children (Pet. Br. 39–40). The statute, however, requires also that

"proper provision" for the education of the Indian children exist, and no attempt has been made to show that such provision existed. Moreover, Congress, recognizing the need for the tribal schools, continued them from year to year in the appropriation Acts from 1912 to 1928 set forth in subdivision B, *infra*. Finally, if the Secretary was required to close the schools on the establishment of a public-school system, he had no authority to keep them open even for enrolled children.

In Point IV of its brief petitioner cites various statutes as showing that Congress intended in the Act of 1906 that only enrolled Indian children should be educated with tribal funds (Pet. Br. 36–40). The statutes cited carry no such implication. By Section 7 of the Enabling Act of June 16, 1906 (c. 3335, 34 Stat. 267, 272), Congress merely donated money to Oklahoma to help set up schools, as it had helped with grants of land to other States having no particular Indian problem. The federal appropriations for the tribal schools from 1904 to 1909, of which the Act of March 3, 1909 (c. 263, 35 Stat. 781, 804), is typical, were made in maintaining these schools for the benefit of both the Indians (at this time only enrolled Indians) and the whites (See Annual Report of the Secretary of the Interior, 1909, vol. II, pp. 21–22), and not merely the whites as the petitioner claims (Pet. Br. 37–38).[2] The federal appropriations in

[2] Further, the petitioner ignored the Act of April 4, 1910 (c. 140, 36 Stat. 269, 282), which appropriated $75,000 for

aid of the common schools in Oklahoma from 1912 to date, of which the Act of August 24, 1912 (c. 388, 37 Stat. 518, 533), is typical, were made to secure the education of Indians in these schools, since their property was generally nontaxable. Annual Report of the Secretary of the Interior, 1913, vol. II, p. 25. Therefore petitioner incorrectly states (Pet. Br. 39) that Congress, recognizing that unenrolled Indians were not entitled to an education in tribal schools, provided these funds for their education in the public schools. Instead Congress meant to pay for all Indians, enrolled or unenrolled, who might be excluded because they or their parents were nontaxable. See Annual Report of the Secretary of the Interior, *supra*. Indeed, these statutes have behind them the same reasoning as the Act of 1906, namely, to secure the education of Indian children whose education might be jeopardized by the nontaxability of Indian land. They affirmatively support the interpretation that the Act of 1906 authorized the education of all the Indians in the tribal schools.

B. Even if there were doubt as to the proper construction of Section 10 of the Act of 1906, the statutes from 1912 to 1932 appropriating tribal funds for school purposes plainly authorize the education of unenrolled Indian children from tribal funds. From 1912 to 1928 appropriation Acts were enacted worded substantially as follows:

the support of the tribal schools under the Act of 1906. There is no doubt that the Act was designed to aid enrolled Indians, since whites were not mentioned.

> * * * *Provided further,* That during the fiscal year ending June thirtieth, nineteen hundred and seventeen, no moneys shall be expended from tribal funds belonging to the Five Civilized Tribes, without specific appropriation by Congress, except as follows: * * * tribal and other Indian schools for the current fiscal year under existing law, * * * *Provided further,* That the Secretary of the Interior is hereby authorized * * * to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: *And provided further,* That the Secretary of the Interior is hereby empowered, during the fiscal year ending June thirtieth, nineteen hundred and seventeen, to expend funds of the Chickasaw, Choctaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes.[3]

[3] This is the Act of May 18, 1916, c. 125, 39 Stat. 123, 148. The Acts from 1916 to 1926, inclusive, were substantially identical. Act of March 2, 1917, c. 146, 39 Stat. 969, 985; Act of May 25, 1918, c. 86, 40 Stat. 561, 581, 582; Act of June 30, 1919, c. 4, 41 Stat. 3, 23; Act of February 14, 1920, c. 75, 41 Stat. 408, 428; Act of March 3, 1921, c. 119, 41 Stat. 1225, 1242–1243; Act of May 24, 1922, c. 199, 42 Stat. 552, 575; Act of January 24, 1923, c. 42, 42 Stat. 1174, 1196–1197; Act of June 5, 1924, c. 264, 43 Stat. 390, 398; Act of May 3, 1925, c. 462, 43 Stat. 1141, 1148–1149; Act of May 10, 1926, c. 277,

From 1929 to 1932 the appropriation Acts authorized the expenditure of certain sums out of tribal funds for the "support of schools and for tuition" or "for tuition and other educational purposes."[4]

For twenty years the Secretaries of the Interior have been construing these Acts in conjunction with the Act of 1906 as authorizing the use of tribal funds for the education of unenrolled Indian children. This construction is entitled to great weight. *United States* v. *Jackson,* 280 U. S. 183, 193; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492. Moreover, the reenactment of these statutes is deemed to be an adoption by Congress of their administrative construction. *McFeely* v. *Commissioner,* 296 U. S. 102, 108; *United States* v. *Hermanos y Compania,* 209 U. S. 337, 339.

---

44 Stat. 453, 460. The Acts from 1912 to 1914, inclusive, did not authorize "repairs, improvements, or new buildings." The 1914 Act contained the provision for the use of funds of the Five Civilized Tribes for "tribal and other Indian schools" but omitted the provisions authorizing the Secretary to continue such schools during the ensuing fiscal year. Act of August 24, 1912, c. 388, 37 Stat. 518, 531; Act of June 30, 1913, c. 4, 38 Stat. 77, 95; Act of August 1, 1914, c. 222, 38 Stat. 582, 600. The 1927 and 1928 Acts contained the latter provision but not the former. Act of January 12, 1927, c. 27, 44 Stat. 934, 947–948; Act of March 7, 1928, c. 137, 45 Stat. 200, 216. In 1915 a joint resolution provided that the provisions of the 1914 Act continue for another year. Joint Res. of March 4, 1915, 38 Stat. 1228.

[4] Act of March 4, 1929, c. 705, 45 Stat. 1562, 1577; Act of May 14, 1930, c. 273, 46 Stat. 279, 294; Act of February 14, 1931, c. 187, 46 Stat. 1115, 1130; Act of April 22, 1932, c. 125, 47 Stat. 91, 104.

Further, since 1924 there have been no enrolled children to be educated (Pet., Br. 16) and yet Congress has enacted these statutes authorizing the continuance of the tribal schools, and even the construction of new buildings, out of tribal funds. Congress must be deemed to have been aware of the decrease in the number of enrolled children to be educated and their ultimate cessation, since that flowed from its own act in closing the rolls as of 1906. See *United States* v. *Seminole Nation,* 299 U. S. 417, 432. The passage of these later Acts was, therefore, equivalent to an authorization that the tribal funds be expended for the education of the unenrolled children. Since the earlier Acts are similarly worded, it is a fair inference that this has always been the intent of Congress. *United States* v. *Seminole Nation,* 299 U. S. 417, 432.

CONCLUSION

The decision below is clearly correct. No important question of law is presented. It is respectfully submitted therefore that the petition for a writ of certiorari should be denied.

ROBERT H. JACKSON,
Solicitor General.
CHARLES E. COLLETT,
Acting Assistant Attorney General.
CHARLES W. LEAPHART,
Special Assistant to the Attorney General.
THOMAS HARRIS,
ELY MAURER,
Attorneys, Department of Justice.

MAY 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939