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Permalink
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Journal
The Indigenous Peoples' Journal of Law, Culture & Resistance, 7(1)

ISSN
2575-4270

Author
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Publication Date
2022

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OF RESERVATION BOUNDARY LINES AND JUDICIAL BATTLE LINES, PART 1—RESERVATION DIMINISHMENT/DISESTABLISHMENT CASES FROM 1962 TO 1975:

The Indian Law Justice Files, Episode 1

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I would like to thank Sergio Pareja, Dean of the University of New Mexico School of Law, for conferring research grant support for this Article; UNM Professor of Law Librarianship Ernesto A. Longa, UNM Law Library Public Services Coordinator Alexandra Siek, and the UNM Law Library staff for assisting me with research; and Mitzi Vigil (Jicarilla Apache Nation/Okhay Owingeh), administrator of the UNM Law and Indigenous Peoples Program, for general support and encouragement. I also thank John Isch, professor emeritus of Martin Luther College at New Ulm, Minnesota, for generously sharing his remarkable research and publications regarding the U.S.-Dakota War of 1862 and the trials of Dakota Indians, including two ancestors of mine, after the war's conclusion. Thanks, too, to Carolyn R. Anderson, associate professor emerita of St. Olaf College at Northfield, Minnesota, and my Santee Dakota cousin Jimmy Sweet, assistant professor of American Studies at Rutgers University, New Brunswick, for sharing historical background information as well as their own respective research into matters touching on my Dakota ancestors' experiences during and after the U.S.-Dakota War. Shout-out to the UCLA law student editors and staff of the Indigenous Peoples' Journal of Law, Culture & Resistance for their excellent work in preparing this Article for publication. Finally, I'm grateful to my husband Monte Deer Carden (Muscogee Creek Nation), who traveled with me to the various institutions and spent many hours and days scanning documents from the Indian law case files within the archived papers of Supreme Court Justices.

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Abstract

This Article is the first of a two-part investigation into the Indian law doctrine of reservation diminishment/disestablishment, examining Supreme Court decisions in this area in light of insights gathered from the collected papers of individual Justices archived at the Library of Congress and various university libraries. The Article first addresses *Seymour v. Superintendent* (1962) and *Mattz v. Arnett* (1973), observing that these first two diminishment/disestablishment cases are modern applications of basic, longstanding principles of Indian law which are highly protective of Indigenous people's rights and tribal sovereignty. The Article then examines in detail *DeCoteau v. District County Court*, the anomalous 1975 decision in which the Supreme Court held that an 1889 land-sale agreement between the United States and the Sisseton-Wahpeton Dakota Indians, which Congress ratified in 1891, had abolished the boundaries of the Lake Traverse Reservation in South Dakota and North Dakota, a reservation that had been established as the Indians' "permanent reservation" home in an 1867 treaty. The Article critiques *DeCoteau* in view of the historical context of the 1862 U.S.-Dakota War, an explosive conflict that resulted in the forced removal of the Dakota people from their reservation and aboriginal homelands in Minnesota and the abrogation of all U.S.-Dakota treaties, including treaty rights that guaranteed annual payments essential for the Indians' subsistence and survival. The Article brings into view the full scope of the negotiations between the Sisseton-Wahpeton people and U.S. commissioners in 1889, demonstrating that the Dakota people never consented to any reduction or elimination of reservation boundaries when they agreed, under desperate circumstances, to sell to the United States the unallotted lands within the reservation. The Article further surveys additional evidence, unaddressed by the Supreme Court, regarding the 1891 Act's legislative history, including numerous congressional debates and provisions of reports of the Senate and House of Representatives, as well as evidence from Executive Branch sources, which collectively show that the 1891 Act did not shrink or terminate the reservation. The Article posits that *DeCoteau*, which scholars recognize as having initiated a "magic language" mode of analysis in the reservation diminishment/disestablishment area, cannot be reconciled with fundamental principles of Indian law. Finally, the Article inspects and discusses documents from the archived papers of the Justices who took part in *DeCoteau*, unraveling clues that may help account for the Supreme Court's aberrant decision.

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I. Introduction

For the past several years the doctrine of reservation diminishment/disestablishment has figured prominently as a hot-button topic in the Indian law world. In spring 2020, two cases implicating the same legal question—whether the Muskogee (Creek) Indian Reservation in Oklahoma has been "terminated" by Congress—were pending in the Supreme Court;[1] and on July 9, 2020 the high court issued its decision, concluding in *McGirt v. Oklahoma* that the reservation has *not* been extinguished but continues to exist.[2] Arriving on the heels of the unanimously-decided *Nebraska v. Parker*, which affirmed the continuing undiminished reservation status of the Omaha Indian Reservation,[3] *McGirt* offers hope that the Court might continue to provide clarifying guidance regarding the reservation diminishment/disestablishment inquiry generally, and perhaps will even rectify some of the bewildering and troubling features of previous decisions in this special doctrinal area.[4]

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[1] The then-pending cases were *McGirt v. Oklahoma*, PC-2018-1057 (Okla. Crim. App. Feb. 25, 2019), *cert. granted*, 140 S. Ct. 659 (2019), and *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert granted*, 138 S. Ct. 2026 (2018), *argued sub. nom.* Carpenter v. Murphy (subsequently renamed *Sharp v. Murphy*), No. 17-1107 (U.S. Nov. 27, 2018). *See* Rebecca Nagle, *Oklahoma's Suspect Argument in Front of the Supreme Court*, The Atlantic, May 8, 2020, https://www.theatlantic.com/ideas/archive/2020/05/oklahomas-suspect-argument-front-supreme-court/611284/. By granting certiorari in *McGirt*, the Court managed to ensure that all nine Justices were able to participate. *See* Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at "The Far End of the Trail of Tears"?,* 37 Ga. St. U. L. Rev. 739, 741 (2021) (footnotes omitted) ("In a highly unusual turn of events, a predecessor case, *Sharp v. Murphy*, from which Justice Gorsuch recused himself, was argued in November 2018. After additional briefing was ordered, the case was held over for reargument in the following term. The order for additional briefing and the subsequent holding over of the case spurred speculation that the Justices were split 4-4 in *Sharp*."); *see also* Adam Liptak, *Supreme Court Will Rule on Whether Much of Oklahoma is an Indian Reservation*, N.Y. Times, Dec. 14, 2019, https://www.nytimes.com/2019/12/13/us/supreme-court-oklahoma-indian-reservation.html.

[2] McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[3] Nebraska v. Parker, 577 U.S. 481 (2016).

[4] *See* Tweedy, *supra* note 1, at 743 (footnote omitted) ("[T]he *McGirt* decision is unusual in contemporary federal Indian law because it is a Supreme Court decision that hews closely to both traditional federal Indian law principles and general statutory

In this environment of heightened interest, the time is ripe for examining precedents in this particular arena of Indian law jurisprudence through the lens of a unique set of documentary resources, namely, the Indian law case files within the collected papers of individual Supreme Court Justices archived at the Library of Congress and various universities across the country.[5] These files afford a fascinating, behind-the-scenes glimpse into the cloistered debates, machinations, supplications, and alliances—involving the Justices as well as their law clerks—that have precipitated, for better or for worse, the high court's Indian law decisions. The present focus on the reservation diminishment/disestablishment doctrine offers an initial tapping into this rich reservoir of judicial insight and intrigue, an investigation that can only enhance the field's collective knowledge base while we continue predicting and anticipating the trajectory of Supreme Court decision-making in this area going forward.

This Article is the first of a two-part deep-dive investigation into what the "Indian Law Justice Files" have to teach us concerning the development and unfolding of the doctrine of reservation diminishment/disestablishment. The precise focus is the Supreme Court's initial forays into this thicket, manifested in the cases *Seymour v. Superintendent* (1962),[6] *Mattz v. Arnett* (1973),[7] and *DeCoteau v. District County Court* (1975).[8] The Article examines *DeCoteau* in considerable depth, both because it is the launching pad for some of the most disturbing changes in the law of reservation diminishment/disestablishment and because the Supreme Court failed to adequately investigate what the Court itself identified as the dispositive question in the case, namely, whether the U.S. government's 1889 Agreement to purchase unallotted lands from the Sisseton-Wahpeton bands of Dakota Indians entailed tribal understanding of, and consent to, the purported intent of Congress to abolish the Indians' homeland, the Lake Traverse Reservation.[9] A follow-up article will examine the other three diminishment/disestablishment cases for which illuminating documents from the Justices' archived papers

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interpretation principles, eschewing the approach that many Supreme Court cases have taken from the Rehnquist Court onwards of trying to shut down the exercise of tribal sovereignty wherever possible, no matter how flimsy or novel the proffered justification for doing so."). *See generally* Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. Rev. 300 (2021).

[5] For a discussion of the Supreme Court Justices' papers and "questions of access, the public's interest in understanding the Court and its decisions, and the effect of the Justices' papers on scholarship and popular research," see Susan David deMaine, *Access to the Justices' Papers: A Better Balance*, 110 L. Libr. J. 185, 185 (2018). Professor deMaine's article includes a useful appendix listing "Donations and Access Restrictions on Most Significant Collection[s] of Papers for Justices Serving on the Court During and Since 1900." *See id.* at 213-20.

[6] Seymour v. Superintendent, 368 U.S. 351 (1962).

[7] Mattz v. Arnett, 412 U.S. 481 (1973).

[8] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425 (1975).

[9] *See infra* notes 100-705 and accompanying text.

are available—*Rosebud Sioux Tribe v. Kneip* (1977),[10] *Solem v. Bartlett* (1984),[11] and *Hagen v. Utah* (1994).[12] Together, these two articles are envisioned as comprising the first in a series of "episodes" examining various lines of doctrine and jurisprudence from the eye-opening vantage point of the "Indian Law Justice Files."

II. The Supreme Court's Reservation Diminishment/ Disestablishment Cases

A. *Seymour v. Superintendent* (1962)

The Indian reservation diminishment/disestablishment doctrine originated with *Seymour v. Superintendent of Washington State Penitentiary*,[13] decided by the Supreme Court in 1962.[14] The case arose when Paul Seymour, a member of the Colville Indian Tribe, filed a petition for writ of habeas corpus in the Supreme Court of Washington after having been convicted of attempted burglary and sentenced to prison.[15] Seymour argued that because the crime for which he had been convicted occurred on the Colville Indian Reservation, and thus within "Indian country" as defined by 18 U.S.C. § 1151,[16] it was "an offense 'within the

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[10] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

[11] Solem v. Bartlett, 465 U.S. 463 (1984).

[12] Hagen v. Utah, 510 U.S. 399 (1994).

[13] Seymour v. Superintendent, 368 U.S. 351 (1962).

[14] For an excellent summary of *Seymour* and other reservation diminishment/ disestablishment cases, see Matthew L.M. Fletcher, Federal Indian Law § 7.2, at 294-308 (2016).

[15] *Seymour,* 368 U.S. at 352.

[16] The 1948 "Indian country" definition, codified at 18 U.S.C. § 1151, represents a recasting of the term relative to its meaning in the nineteenth century. Very early in the nation's history the term "meant everything west of the original 13 states," Fletcher § 7.1, *supra* note 14, at 291; and in 1834 Congress defined "Indian country" as consisting of (1) "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana or the territory of Arkansas," and (2) "that part of the United States east of the Mississippi river not within any state, to which the Indian title has not been extinguished." Act of June 8, 1834, 4 Stat. 729. By the time the General Allotment Act of 1887 was enacted, however, "Indian country" had become a largely obsolete notion, having been effectively displaced by reliance on, and implementation of, the more recently emerging concept "reservation" in federal Indian policy. *See* S. Lyman Tyler, A History of Indian Policy 73 (1973) ("In the mid-1850s . . . reservations were successfully established . . . . As the westward movement eventually carried whites into all regions of the United States, whites and Indians . . . became intermixed . . . , and the reservation system became the accepted policy to satisfactorily meet the immediate problem."); *see also* Donnelly v. United States, 228 U.S. 243, 268-69 (1913) (citations omitted) (noting that "the Indian Intercourse Act of June 30, 1834 . . . defined the 'Indian country' for the purposes of that act," but that "this section was not reenacted in the Revised Statutes [of 1874], and it was therefore repealed"); *Ex parte* Crow Dog, 109 U.S. 556, 561 (1883) (observing that "the section of the act of 1834 containing the [Indian country] definition of that date has been repealed"); Marc Slonim, *Indian Country, Indian Reservations, and the Importance of History in Indian Law*, 45 Gonz. L. Rev. 517, 524 (2009/2010) (explaining that Congress's passing the Major Crimes Act of 1885,

Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385, represented "a departure from prior Indian legislation" as it "may have been the first time Congress enacted Indian legislation applicable within the limits of any Indian reservation, as opposed to within Indian country"); *cf.* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (emphasis added) (subjecting to federal jurisdiction Indians committing certain listed crimes "within the boundaries of any State of the United States, and *within the limits of any Indian reservation*"); United States v. Kagama, 118 U.S. 375, 377-78 (1886) (emphasis added) (observing that the provision of the Major Crimes Act "which applies solely to offenses by Indians which are committed within the limits of a state *and the limits of a reservation*" "is a still further advance" beyond earlier provisions of federal legislation that "ha[d] heretofore only undertaken to punish an Indian who sustains the usual relation to his tribe, and the offense [was] committed in the Indian country, or on an Indian reservation, in exceptional cases").

In a groundbreaking essay, attorney Marc Slonim explains the rise of the concept "reservation" in mid-to-late nineteenth-century Indian policy and the implications of the Supreme Court's "historical error" in "us[ing] the terms Indian country, Indian reservations, and Indian lands interchangeably," *id.* at 527, in modern reservation diminishment/disestablishment cases:

> By extending the 1885 Major Crimes Act . . . to crimes within the limits of any Indian reservation, Congress covered all crimes within the limits of the reservations, not just those that happened to occur on lands to which the Indians still retained title.
>
> . . . .
>
> The [Supreme] Court has . . . said that this issue is complicated by the fact that, in opening Indian lands to non-Indian settlement in the late 19th and early 20th centuries, Congress "seldom detail[ed] whether opened lands retained reservation status or were divested of all Indian interests." According to the Court—and this is where we come to the historical error—the primary reason for this was the "notion that reservation status of Indian lands might not be coextensive with the tribal ownership was unfamiliar at the turn of the century."
>
> . . . The Court went on to say that it was not until 1948 that Congress statutorily defined "Indian country" to include lands held in fee by non-Indians within reservation boundaries, thereby "uncoupl[ing] reservation status from Indian ownership."
>
> . . . I don't believe this historical account is quite right. . . .
>
> . . . .
>
> . . . Congress and federal officials understood that reservations could include non-Indian lands during the allotment era. . . . [W]hile Indian country status was tied to tribal ownership of the land in question, reservation status was not.
>
> . . . The failure to appreciate the historic distinctions between Indian country and Indian reservations has affected the outcome of particular cases and threatens to undermine the basic framework for ongoing and future reservation boundary litigation. . . .
>
> . . . .
>
> [T]he assertion that reservation status was believed to be coextensive with Indian ownership during the allotment era, so that any transfer of lands out of Indian hands would have been understood to terminate reservation status, threatens to undermine the basic framework in which reservation boundary cases are decided.

Slonim, *supra*, at 527, 528, 529 (footnotes omitted) (quoting Solem v. Bartlett, 465 U.S. 463, 468 (1984)); *see also* Cohen's Handbook of Federal Indian Law § 3.04[3], at 202 (Nell Jessup Newton et al. eds., 2012) (footnotes omitted) [hereinafter "Cohen's Handbook"] ("[S]everal statutes from the allotment era employed the term 'reservation' rather than 'Indian country,' and those statutes were understood

exclusive jurisdiction of the United States.'"[17] The Washington Supreme Court initially referred the matter to a state trial court, which held that, although Seymour was a member of the Colville Tribe, the offense had *not* occurred within Indian country. The state supreme court subsequently affirmed the trial court's ruling, quoting from a previous Washington Supreme Court decision in "holding . . . that 'What is still known as the south half of the diminished Colville Indian reservation is no longer an Indian reservation.'"[18]

The U.S. Supreme Court reversed. "Since the burglary with which the petitioner was charged occurred on property plainly located within the limits of [the Colville] reservation," Justice Hugo Black concluded for a unanimous Court, "the courts of Washington had no jurisdiction to try him for that offense."[19] As a matter of statutory construction the Court's reasoning was straightforward. First, the Court noted that although the Colville Reservation had been expressly diminished by an 1892 Act of Congress which provided that an area "commonly referred to as the 'North Half' should be 'vacated and restored to the public domain,'" the same statute "expressly reaffirmed that this South Half"—i.e., the place where the crime had occurred—"was 'still reserved by the Government for their [the Colville Indians'] use and occupancy.'"[20] The Court then addressed the argument of the superintendent of the Washington State Penitentiary that a 1906 Act of Congress, as implemented by a 1916 Presidential Proclamation, had "completely wip[ed] out the South Half of the Colville Reservation in precisely the same manner as the 1892 Act had 'vacated and restored' the North Half of the reservation 'to the public domain.'"[21]

Turning to the text of the 1906 Act, the Supreme Court observed that the statute "repeatedly refers to the Colville Reservation in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such."[22] Further evincing this intent was the statute's specifying "that the proceeds from the disposition of lands affected by its provisions shall be 'deposited in the Treasury of the United States to the credit of the Colville and confederated tribes

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and interpreted to include fee lands owned by non-Indians. Thus, the idea that a reservation might incorporate non-Indian lands was salient to the federal government at the time that laws providing for allotment and sale of 'surplus' lands were passed."). *See generally* Fletcher § 7.1, *supra* note 14, at 291-94 (discussing "'Indian Country' Before the 1948 Codification").

[17] *Seymour,* 368 U.S. at 352 (quoting 18 U.S.C. § 1151).

[18] *Id.* at 353 (quoting State *ex rel.* Best v. Super. Ct. for Okanogan Cty., 181 P. 688, 689 (Wash. 1919)).

[19] *Id.* at 359.

[20] *Id.* at 354 (quoting 27 Stat. 62, 63, 64 (1892)).

[21] *Id.* at 355.

[22] *Id.* (citing §§ 2, 3, 6, 12, 34 Stat. 80-82 (1906)). In each of the four sections cited by the Court, the 1906 Act refers to the "surplus or unallotted lands" that are thereby subjected to "sale and disposition" as existing within "the diminished Colville Indian Reservation." *See* §§ 2, 3, 6, 12, 34 Stat. 80-82 (1906).

of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington.'"[23] In light of these textual signposts, the Court wrote,

> it seems clear that the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on the reservation. The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.[24]

Supplementing its analysis of the statutory text, the *Seymour* Court next addressed "subsequent congressional treatment of the reservation" as "support" for its conclusion "[t]hat this is the proper construction of the 1906 Act."[25] The Court pointed to intervening statutes in which "Congress has explicitly recognized the continued existence as a federal Indian reservation of this South Half of the diminished Colville Indian Reservation."[26] Adding that "[t]his same construction . . . has been adopted by the Department of Interior, the agency of government having primary responsibility for Indian affairs," the Court concluded "that the Washington courts erred in holding that the 1906 Act dissolved the Colville Indian Reservation because it seems clear that this reservation is still in existence."[27]

While *Seymour*'s construction of the 1906 Act seems conventional in its primary consideration of statutory text and its secondary consideration of supportive language in subsequent federal statutes referencing the same subject (i.e., the status of the Colville Reservation), the case tacitly adheres to the special interpretive canons that the Supreme Court has developed and employed historically for construing congressional acts and provisions of treaties and agreements affecting Indian rights and U.S.-tribal relations. For instance, the Court's observation that the case "raises issues of importance pertaining to this country's relationship to its Indian wards"[28] and the Court's recognition of unique "federal responsibilities for and jurisdiction over the Indians having tribal rights

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[23] *Seymour*, 368 U.S. at 355 (quoting § 6, 34 Stat. 80, 81 (1906)).

[24] *Id.* at 356.

[25] *Id.*

[26] *Id.* (citing 39 Stat. 123, 154-55; 39 Stat. 672; 40 Stat. 449; 41 Stat. 535; 43 Stat. 21; 54 Stat. 703; 69 Stat. 141, 143; 70 Stat. 626-27). Six of these eight intervening statutory provisions refer to "the diminished Colville Indian Reservation," "the Colville Indian Reservation," or "the existing reservation"; the remaining two provisions, as the Court noted, refer to "the '*former* Colville Indian Reservation, Washington,'" a countervailing designation that "illustrate[s] that there may have been some congressional confusion on this issue during that short period of time," i.e., between 1918 and 1920. *Id.* at 356 n.12 (emphasis added) (quoting 41 Stat. 535; 43 Stat. 21).

[27] *Id.* at 357 (citing 54 I. D. 559; 59 I. D. 247; 60 I. D. 318).

[28] *Id.* at 353-54.

on [the Colville] reservation"[29] manifest an interpretive posture that embraces the principle that "tribal property rights and sovereignty are to be preserved unless Congress's intent to the contrary is clear and unambiguous."[30] Moreover, the Court's resolution of contrasting references in subsequent statutes which discuss the status of the Colville Reservation signifies acceptance of the "basic Indian law canons of construction [that] require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor."[31] It is thus apparent that at its inception, the doctrine of reservation diminishment/disestablishment was a special instance of the Supreme Court's historical solicitude for protecting Indian rights and tribal sovereignty, as effectuated through use of the Indian law canons, in the absence of clear and unambiguous indicators of intentional deleterious action by Congress.

The archived papers of Justice William J. Brennan, Jr., who took part in the 1962 *Seymour* ruling, reflect discourse and activity among the Justices that are consonant with this historical solicitude. Justice Brennan's copy of a vote table in the *Seymour* case shows that, in conference, eight Justices voted initially to reverse the Washington Supreme Court's decision denying the reservation status of the South Half of the Colville Reservation, with only Justice Charles E. Whittaker voting to affirm.[32] Justice Brennan's handwritten comment on a conference note-taking sheet summarizes the position of Chief Justice Earl Warren as follows: "No dispute this fellow is an Indian. Thinks Fed Govt retained lower ½ as an Indian reservation."[33] Ultimately, of course, the author of the Supreme Court opinion in *Seymour*, Justice Black, succeeded in obtaining the agreement of all nine Justices, including Justice Whittaker, that the state supreme court's decision ought to be reversed.[34]

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[29] *Id.* at 356.

[30] Cohen's Handbook § 2.02[1], *supra* note 16, at 114.

[31] *Id.* at 113; *see also* Hedden-Nicely & Leeds, *supra* note 4, at 348 ("First and foremost, Indian law canons of construction require federal courts to limit their inquiry to the plain language of the documents at issue. If an ambiguity exists in the plain language of a treaty or statute, that ambiguity is to be resolved in favor of the tribe. Indian law canons were established, in part, to address the balance of power already significantly skewed toward non-Indian rule of small Indian populations that never consented to be governed by a colonial power.").

[32] William J. Brennan Papers, Manuscript/Mixed Material, Box I:69, Folder 61-62 (*Seymour v. Superintendent of Wash. State Penitentiary*), retrieved from the Library of Congress.

[33] *Id.*

[34] Justice Whittaker sent his "join memo" to Justice Black on January 9, 1962, stating simply "I agree." *See* Hugo LaFayette Black Papers, Manuscript/Mixed Material, Box 366 (Seymour v. Superintendent), retrieved from the Library of Congress. In a memo dated January 11 Justice John Marshall Harlan II suggested two changes, including that the name of the case be updated from its original "*Seymour v. Schneckloth*": "Since Schneckloth is no longer in office, might it not be better to substitute in the title, 'Superintendent of Washington State Penitentiary,' the caption which the parties have used in their briefs to describe the respondent pursuant to

B. *Mattz v. Arnett* (1973)

The high court's next reservation diminishment/disestablishment case likewise produced a unanimous decision rejecting the argument that an act of Congress facilitating the sale and purchase of so-called "surplus lands"[35] had eliminated the boundaries of an Indian reservation. *Mattz v. Arnett* arose when a California game warden confiscated five gill nets used by Raymond Mattz, a Yurok Indian, to fish on the Klamath River in northern California.[36] Mattz was accused of violating provisions of state law that prohibited the use of gill nets.[37] He challenged the state-court forfeiture proceedings initiated by G. Raymond Arnett, director of the California Department of Fish and Game, arguing that the state-law provisions did not apply to him because the place where he had been fishing was on the Klamath Indian Reservation, which was beyond the reach of state law by virtue of being within federally defined Indian country.[38] The state trial court held that "the area where the nets were

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amended Rule 48." *See id.* In curious phrasing Black penciled instructions to his own law clerk in the left margin of the memo from Harlan: "George—There is no reason for failing to follow these suggestions in fact the first seems necessary HLB." *See id.*

[35] Mattz v. Arnett, 412 U.S. 481, 496 (1973) (stating that the congressional act at issue "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands"); Seymour v. Superintendent, 368 U.S. 351, 354-55 (1962) (stating that the congressional act at issue "provided . . . for the settlement and entry under the homestead laws of . . . surplus lands").

[36] *Mattz*, 412 U.S. at 484.

[37] *Id.*

[38] *Id.*; *see also* Jessica Cejnar, *Raymond Mattz, Whose U.S. Supreme Court Win Reaffirmed Yurok Rights to the Klamath River, Dies At 79*, Wild Rivers Outpost, Sept. 10, 2021, https://wildrivers.lostcoastoutpost.com/2021/sep/10/raymond-mattz-whose-us-supreme-court-win-reaffirme/ ("In 1969, Mattz was fishing at Brooks Riffle when a California game warden confiscated his gill nets and gave him a citation . . . . Mattz went to state court and demanded his nets back, telling the judge 'these are my Indian rights, you can't keep me from fishing' . . . . According to [Mattz's niece Amy] Cordalis, [general counsel for the Yurok Tribe,] the judge told Mattz to pay him $1, said he'd return his nets and would drop the charges. That wasn't good enough . . . . 'Uncle Ray said, "No. I am pushing this legal issue through the courts because this is my right,"' Cordalis said. 'He pushed the case. And the issue of whether the Yurok Reservation was still Indian Country such that Indian people, Yuroks, still had the right to fish under federal law and under aboriginal rights—their Indian rights—went all the way to the Supreme Court.'"); Anna V. Smith, *How the Yurok Tribe is reclaiming the Klamath River*, High Country News, June 11, 2018, https://www.hcn.org/issues/50.10/tribal-affairs-how-the-yurok-tribe-is-reclaiming-the-klamath-river ("[I]n September 1969, [Mattz] was fishing the fall run of chinook salmon at the family's fishing hole, called Brooks Riffle—named for his great-great-great grandfather. When a state game warden caught Mattz and a group of friends with five gill nets, Mattz claimed all five nets were his and was arrested. He then sued the state of California to return the nets, but the state refused to return them, claiming that Mattz could not legally gillnet in the state of California. . . . At its core, *Mattz vs. Arnett* was a challenge to tribal sovereignty, the ability of tribes to govern themselves. . . . The [Supreme Court] affirmed, in 1973, the Yurok Tribe's treaty rights to fish by traditional means, including gillnetting, and declared that the Yurok Reservation was indeed a part of Indian Country . . . . Mattz's stand on Brooks Riffle is not only part of Cordalis'

seized was not Indian country" and a state appellate court affirmed this ruling, opining that "inasmuch as the area in question had been opened for unrestricted homestead entry in 1892, the earlier reservation status of the land had terminated."[39]

The U.S. Supreme Court reversed the California courts, holding "that the Klamath River Reservation was not terminated by the Act of June 17, 1892, and that the land within the boundaries of the reservation is still Indian country."[40] The Court noted that "the current status of the Klamath River Reservation turns primarily upon the effect of [the] 1892 Act of Congress which opened the reservation land for settlement."[41] The Court then focused on provisions of the 1892 Act—titled "An Act to provide for the disposition and sale of lands known as the Klamath River Indian Reservation"—specifying (1) "That all of the lands embraced within what was the Klamath River Reservation . . . are hereby declared to be subject to settlement, entry, and purchase" by non-Indian homesteaders; (2) "That any Indian now located upon said reservation may . . . apply to the Secretary of the Interior for an allotment . . . ."; and (3) "That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children."[42] Summarizing the structure and sequencing of its ensuing reservation diminishment/disestablishment analysis, the Court stated: "It is our task, in light of the language and purpose of the Act, as well as of the [Act's] historical background, . . . to determine the proper meaning of the Act and, consequently, the current status of the reservation."[43]

In assessing "language and purpose," the Court contextualized the 1892 Act as "but one example of" special legislation enacted by Congress in the wake of the 1887 General Allotment Act—which had given the President *discretion* "to open reservation land for allotment"—in order to "*assure* that [the] particular reservation was in fact opened to allotment."[44] By corralling the 1887 *General* Allotment Act into its analysis in this way,[45] the *Mattz* Court in effect subjected the 1892 *special* Klamath allotment statute to a limiting construction comparable to the one

family lore but is also recorded in federal Indian law.").

[39] *Mattz*, 412 U.S. at 484-85; *see also id*. at 485 (citation omitted) (noting that "[t]he Supreme Court of California, one judge dissenting, denied a petition for hearing").

[40] *Id.* at 506.

[41] *Id.* at 485.

[42] Act of June 17, 1892, 27 Stat. 52, *quoted in Mattz*, 412 U.S. at 495.

[43] *Mattz*, 412 U.S. at 495.

[44] *Id.* at 497 (emphasis added).

[45] *See also id.* (observing that the allotment provisions of the 1892 Act at issue in *Mattz* "do not differ materially from those of the General Allotment Act of 1887, and . . . in fact refer to the earlier Act"); *cf.* FLETCHER § 7.2, *supra* note 14, at 297 (footnote omitted) ("The [*Mattz*] Court held that the 1892 Act was merely a local implementation of the 1887 General Allotment Act, which authorized the President to allot Indian reservations to individual Indians, but left the sale of surplus lands to the President's discretion.").

intimated in *United States v. Celestine*, a 1909 case repeatedly cited in *Mattz*, in which the Court opined that the General Allotment Act "clearly does not . . . abolish the reservations" for which allotment had been prescribed as a general policy.[46] By the same token, the *Mattz* Court thus was able to align its interpretation of the 1892 Act with its similar construction of the special allotment legislation at issue in *Seymour v. Superintendent*: "This Court unanimously observed, in an analogous setting, 'The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.'"[47] Accordingly, the *Mattz* Court rejected the state fish and game department director's insistence that the text of the 1892 Act "militates against a continuation of . . . reservation status" by force of the statute's express provision that "the lands were to be opened up for settlement and sale by homesteaders."[48]

In like manner, the Court rejected the director's additional argument that the Act's textual reference to "what *was* [the] Klamath River Reservation" compelled "the conclusion that Congress intended to terminate the reservation in 1892."[49] The Court explained that this past-tense reference "is not to be read as a clear indication of congressional purpose to terminate" in light of the legislative history of the Act, which disclosed the need to distinguish the particular lands subjected to allotment by the 1892 Act from *other* lands that likewise had been incorporated into an extension of the Hoopa Valley Reservation by an 1891 executive order.[50] The past-tense reference thus could *not* be read as signaling that the reservation had been terminated; rather, it "seems . . . merely to have been a natural, convenient, and short-hand way of identifying the land subject to allotment under the 1892 Act."[51]

Bolstering its construction of the Act's language, the *Mattz* Court rejected the state fish and game department director's further efforts to portray "numerous statements in the legislative history" as "indicat[ing] that the reservation was to be terminated."[52] The director's references to

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[46] United States v. Celestine, 215 U.S. 278, 287 (1909) (quoting with approval Eells v. Ross, 64 F. 417, 420 (9th Cir. 1894)); *see Mattz*, 412 U.S. at 497, 504-05 (citing and quoting *Celestine*, 215 U.S. at 285).

[47] *Mattz*, 412 U.S. at 497 (alteration in original) (quoting Seymour v. Superintendent, 368 U.S. 351, 356 (1962)).

[48] *Id.* at 496 (quoting Brief for Respondent at 3, Arnett v. 5 Gill Nets [Mattz v. Arnett], 412 U.S. 481 (1973) (No. 71-1182), 1973 WL 172526, at *3).

[49] *Id.* at 497-98 (alteration in original) (emphasis added) (internal quotation marks omitted).

[50] *Id.* at 498; *see also id.* at 493-94 (explaining that through the 1891 Executive Order "[t]he Klamath River Reservation . . . was made part of the Hoopa Valley Reservation, as extended" and that President Benjamin Harrison thus "enlarged the Hoopa Valley Reservation to include what had been the Klamath River Reservation as well as an intervening riparian strip connecting the two tracts").

[51] *Id.* at 498.

[52] *Id.* at 499.

language in precursor House bills that were "generally hostile to continued reservation status of the land in question" were unavailing, the Court reasoned, because the Senate succeeded in substituting its own, contrary version of the proposed legislation instead.[53] This final version, which was ultimately enacted in 1892, "compels the conclusion that efforts [reflected in the superseded House bills] to terminate the reservation by denying allotments to the Indians failed completely."[54]

The reservation diminishment/disestablishment analysis as actually implemented in *Mattz* reflected and reinforced the Court's similar approach in the 1962 *Seymour* case.[55] In both cases, the Court appeared to adhere, implicitly, to traditional Indian law canons by requiring clear, unambiguous textual language before concluding Congress had intended to denigrate Indian rights by diminishing or abolishing a tribe's reservation.[56] Likewise, in both cases, the Court regarded with due skepticism arguments adverse to the preservation of Indian rights that litigation opponents attempted to extract from legislative history, explaining why these efforts failed to persuade the Justices to alter their reading of statutory language properly viewed through the lens of historical Indian law principles.[57]

However, dicta arising at the end of the 1973 *Mattz* opinion may be viewed in retrospect as giving subtle warning of potentially detrimental future changes to the reservation diminishment/disestablishment doctrine. Thus, in summarizing its decision the *Mattz* Court properly noted

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[53] *Id.* at 499-503; *cf.* Fletcher § 7.2, *supra* note 14, at 297-98 (footnote omitted) ("The 1892 Act came about when Congress selected the Senate version [of the proposed legislation], providing for the allotment of the reservation, over the House version, which would have expressly disestablished the reservation.").

[54] *Mattz*, 412 U.S. at 504.

[55] *See* Allison M. Dussias, *Heeding the Demands of Justice: Justice Blackmun's Indian Law Opinions*, 71 N.D. L. Rev. 41, 58 (1995) ("*Mattz* was important to the continued existence of reservations and tribal governments because it reaffirmed the principle that opening a reservation to settlement does not itself terminate the reservation. The reservation remains Indian country, in which state authority has historically been limited.").

[56] *See* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 30 (1995) ("The early reservation disestablishment cases appeared to establish a relatively workable test based largely on the language and intent of the particular surplus lands act."). During oral argument in *Mattz*, the petitioner's attorney summed up his advocating for the application of Indian law principles as follows: "In conclusion, . . . to say that the 1892 Act terminated this reservation would go contrary to the requirement . . . that there be a clear intent to terminate, it would be contrary to the decisions of this Court . . . that laws that are ambiguous are to be construed in the Indians' favor. . . . And it would work a great injustice on the Yurok Indians whose life is centered here and who received a very small reservation to begin with." Transcript of Oral Argument at 12, Mattz v. Arnett, 412 U.S. 481 (1973) (No. 71-1182).

[57] *Cf.* Richard W. Hughes, *Indian Law*, 18 N.M. L. Rev. 403, 456-57 (1988) (footnotes omitted) (quoting *Mattz*, 412 U.S. at 505) (reasoning that the no-disestablishment outcomes of both *Seymour* and *Mattz*, and in particular *Mattz*'s statement that "a determination to terminate 'must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history,'" are "consistent with the general rule of construction that Indian legislation must be interpreted, where possible, favorably to the preservation of Indian rights, including tribal governmental power").

that "clear termination language was not employed in the 1892 Act," but inexplicably added: "This being so, we are *not inclined to infer* an intent to terminate the reservation."[58] Compounding this apparent tension with Indian law principles, the Court further opined: "A congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act *or be clear from the surrounding circumstances and legislative history*."[59] These statements could be read as intimating that, absent any basis in the language of a statute, the Supreme Court nevertheless could effectuate *its own* "inclin[ation] to infer" diminishment/disestablishment based *exclusively* on "surrounding circumstances and legislative history." To some extent, this implication is tempered by the accompanying footnotes and citations to authority.[60] For instance, the Court properly noted that "Congress has used clear language of express termination when that result is desired"—providing as examples statutes stating "the . . . reservation is hereby discontinued" and "the reservation lines . . . are hereby abolished"—and elaborated that, with respect to the 1892 Act at issue in *Mattz*, "Congress was fully aware of the means by which termination could be effected."[61] Likewise, in support of its assertion that diminishment or disestablishment could result from "[a] congressional determination to terminate" that *either* is "expressed on the face of [an] Act *or* [is] clear from the surrounding circumstances and legislative history," the only Supreme Court authorities cited are *Seymour v. Superintendent*[62] and *United States v. Nice*,[63] each of which intimated that express congressional action would be required before a court could conclude that Congress had diminished or invaded preexisting Indian rights.[64] Still, the *Mattz* dicta were

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[58] *Mattz*, 412 U.S. at 504 (emphasis added).

[59] *Id.* at 505 (emphasis added).

[60] *Cf.* A.J. Taylor, *A Lack of Trust:* South Dakota v. Yankton Sioux Tribe *and the Abandonment of the Trust Doctrine in Reservation Diminishment Cases*, 73 Wash. L. Rev. 1163, 1171 (1998) (noting that in *Mattz* "the Court expanded its approach to include legislative history as an indicator of congressional intent" but that "in deference to *Seymour*, the Court based its decision on the absence of express statutory language").

[61] *Mattz,* 412 U.S. at 504 & n.22 (citations and internal quotation marks omitted).

[62] Seymour v. Superintendent, 368 U.S. 351 (1962).

[63] United States v. Nice, 241 U.S. 591 (1916).

[64] *See supra* text accompanying notes 19-24 (discussing *Seymour*, 368 U.S. 351 (1962)); *see also Nice*, 241 U.S. at 599, 601 (declining to infer from the General Allotment Act's provisions which authorize "the making of the allotments and the issue of the trust patents" congressional intent to simultaneously extinguish the "national guardianship" of Indian allottees, and instead applying the "familiar rule" that "legislation affecting the Indians is to be construed in their interest, and a purpose to make a radical departure is not lightly to be inferred"). In a footnote the *Mattz* Court also cited an appellate court decision, *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1973), as "a case presenting issues not unlike those before us," *Mattz*, 412 U.S. at 505 n.23, and quoted *Condon*'s statement that "a holding favoring federal jurisdiction is required unless Congress has *expressly or by clear implication* diminished the boundaries of the reservation opened to settlement," *Condon*, 478 F.2d at 689 (emphasis in original), *quoted in Mattz*, 412 U.S. at 505 n.23. *See also infra* notes 690-692 and accompanying text. In *Condon*, however, the Eighth Circuit did not suggest that congressional intent

somewhat foreboding; and, as discussed below, subsequent case-law developments have validated these concerns, as well as further, related ones, about the direction in which the Court's reservation diminishment/disestablishment methodology might be heading.[65]

The available papers of the individual Justices who took part in the *Mattz* decision contain a number of illuminating documents. Among the papers of William H. Rehnquist, who had been sworn in as an Associate Justice of the Supreme Court the year before *Mattz* was decided,[66] is a vote table and notes sheet with handwritten comments indicating that in the initial conference vote, six of the Justices (Chief Justice Warren Burger and Justices Lewis Powell, Harry Blackmun, Thurgood Marshall, William Brennan, and William Douglas) were inclined to reverse the state courts' decision that the Klamath River Reservation had been terminated, while two Justices (Potter Stewart and Byron White) were inclined to affirm. Justice Rehnquist's own position was that he "would DIG [dismiss certiorari as improvidently granted] or affirm." A note by Rehnquist regarding the position of Justice Blackmun—the author of the unanimous *Mattz* opinion—states: "*Seymour* requires reversal." And in the "Memo" section at the bottom of the notes sheet is a significant handwritten note by Rehnquist: "Can't vacate Ind Res by implication."[67]

The papers of Justice Blackmun, archived at the Library of Congress, also contain a conference notes sheet for the *Mattz* case. Justice Blackmun wrote "Cd DIG" in the notation boxes for each of five members of the Court—Chief Justice Burger and Justices Stewart, White, Powell, and Rehnquist—suggesting that the Court might have come close

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to diminish an Indian reservation could be ascertained through "clear implication" arising from surrounding circumstances and legislative history despite the lack of textual language supporting such an implication. Indeed, the *Condon* court's conclusion that a 1908 Act of Congress did not diminish the Cheyenne River Indian Reservation followed from the court's reliance on traditional Indian law interpretive principles. *See, e.g., Condon*, 478 F.2d at 689 (quoting Rice v. Olson, 324 U.S. 786, 789 (1945), and citing, inter alia, Worcester v. Georgia, 31 U.S. 515 (1832)) (alteration in original) (incorporating into the court's analysis "the long standing 'policy of leaving Indians free from state jurisdiction and control [which] is deeply rooted in the Nation's history'").

[65] *See infra* notes 100-705 and accompanying text (discussing DeCoteau v. Dist. Cty. Ct., 420 U.S. 425 (1975)); *cf.* Lauren King, *The Indian Treaty Canon and* McGirt v. Oklahoma: *Righting the Ship*, 56 Tulsa L. Rev. 401, 406 (2021) (footnote omitted) (quoting *Mattz*, 412 U.S. at 505 (emphasis added)) ("The [*Mattz*] Court reiterated that clear congressional intent is required to effect disestablishment, but introduced unfortunate language that would serve to distort the focus of the disestablishment inquiry in subsequent cases: 'congressional determination to terminate must be expressed on the face of the Act *or be clear from the surrounding circumstances and legislative history*.'").

[66] *See* John A. Jenkins, The Partisan: The Life of William Rehnquist 272 (2012) (noting that Rehnquist took the oath of office as Associate Justice of the Supreme Court on January 7, 1972).

[67] William H. Rehnquist Papers, Manuscript/Mixed Material, Box/Docket No. 38: 71-1182 (*Mattz v. Arnett, Director, Department of Fish and Game*), retrieved from the Hoover Institution, Stanford University; *see* App. Exhibit 1, *infra* p. 345.

to dismissing certiorari as improvidently granted in *Mattz*.[68] On a separate sheet of tablet paper, dated "3-24-73," Justice Blackmun wrote: "It seems to me th[at] a reversal & remand is indic[ated] here for sev[eral] reasons." On Blackmun's list appear the following enumerated reasons:

- "*Seymour* . . . I feel is controlling"
- "The U.S. as T[rust]ee aspect smells o[f] reservation"
- "Do n[ot] like term[ination] of Ind rts by implication & inference. Cong knows how to terminate"
- "Cong[ression]al acti[on] since 1892 seems to favor Inds."

Illuminating too is what appears to be a one-page memorandum, dated "3/23/73," written by Justice Blackmun's law clerk:

> I think reversal is pretty clearly required. While the legislative history is not entirely free from doubt, I would even conclude, from that history alone, that the reservation was not terminated. However, the teaching of *Seymour*—and wise it was—was that one ought not get too involved in such legislative history. Many Senators and Congressmen had strong feelings each way; the motives which supported the passage of the 1892 Act were, I imagine, as varied as the persons who voted for it. The legislative history clearly provides no clear cut answer in this case. *Seymour* wisely, I think, counseled against difficult ventures into this history, and opted for a rather fixed rule which can be stated about as follows: Unless legislative intent is very clear and not subject to dispute, the burden is on Congress to terminate a reservation by the use of clear language to that effect in the Act itself—such as "terminate", "discontinue", "restore to the public domain", and the like. Applying this test, which I would not alter, reversal is clearly required.[69]

Ultimately, of course, Justice Blackmun succeeded in persuading all of his fellow Justices to join what became his opinion for a unanimous Court. In a one-page memorandum dated May 31, 1973, Justice William Brennan typed "I agree" in the main body of the document and included the following handwritten note in the bottom margin: "Harry: I found the history fascinating & a splendid support for the result you reach. I'm grateful that you took the time to research it."[70] Among the other Justices who supported reversal of the state courts' decision from the outset, Justice Douglas wrote in a June 5 memorandum to Justice Blackmun: "You have written a fine opinion for the Court in 71-1182, *Mattz v. Arnett*. Please join me."[71] And on the same day, Justice Powell wrote to Blackmun: "Please join me in your fine opinion."[72]

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[68] For evidence of Chief Justice Burger's pressuring Justice Blackmun during oral argument in *Mattz* to vote to dismiss certiorari as improvidently granted, see *infra* note 98.

[69] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 160, Folder 71-1182 (*Mattz v. Arnett*), retrieved from the Library of Congress.

[70] *Id.*

[71] Potter Stewart Papers, Manuscript/Mixed Material, MS 1367, Box No. 272, Folder No. 3249 (*Mattz v. Arnett, Director, Department of Fish and Game,* No. 71-1182), retrieved from Yale University Library.

[72] Byron R. White Papers, Manuscript/Mixed Material, Box I:247, Folder 71-1182 (*Mattz v. Arnett*), retrieved from the Library of Congress.

As for the Justices who originally had indicated that they were leaning toward affirming the state courts' decision, Justice Stewart wrote to Justice Blackmun on June 1: "Your opinion for the Court is a very thorough and convincing one. I expressed a contrary view at the Conference, but I do not propose to write a dissent. Unless, therefore, someone else writes a dissenting opinion, I shall cheerfully acquiesce in your opinion."[73] Similarly, Justice White wrote to Blackmun on June 7: "Although my tentative vote was the other way at conference, I join your present circulation."[74] And, striking a whimsical note, Justice Rehnquist wrote to Blackmun on June 1: "Your quotation in the opinion from Martin Luther has persuaded me to change the view I expressed at Conference, and join your excellent opinion."[75]

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[73] Potter Stewart Papers, Manuscript/Mixed Material, MS 1367, Box No. 272, Folder No. 3249 (*Mattz v. Arnett, Director, Department of Fish and Game,* No. 71-1182), retrieved from Yale University Library. Summarizing Justice Stewart's position as stated in conference, Justice Rehnquist wrote: "only q[uestion] now before us is whether this is 'Indian country'[.] Calif has worked it out satisfactorily, giving Yuroks rts to fish for subsistence—accepts Calif det[ermination] that this is not [Indian country.]" William H. Rehnquist Papers, Manuscript/Mixed Material, Box/Docket No. 38: 71-1182 (Mattz v. Arnett, Director, Department of Fish and Game), retrieved from the Hoover Institution, Stanford University; *see* App. Exhibit 1, *infra* p. 345; *see also infra* notes 84-92 and accompanying text (showing questions about Indian fishing rights that were posed during oral argument in *Mattz*).

[74] Byron R. White Papers, Manuscript/Mixed Material, Box I:247, Folder 71-1182 (*Mattz v. Arnett*), retrieved from the Library of Congress.

[75] William H. Rehnquist Papers, Manuscript/Mixed Material, Box/Docket No. 38: 71-1182 (*Mattz v. Arnett, Director, Department of Fish and Game*), retrieved from the Hoover Institution, Stanford University. The reference is to a long footnote in *Mattz*, in which Justice Blackmun elaborated on a U.S. Department of the Interior official's questioning of anthropologist Stephen Powers' estimates of the population of Yurok Indians on the Klamath River Reservation in the 1860s. In a retort to the official's request "that he modify his estimates," Mattz v. Arnett, 412 U.S. 481, 488 n.7 (1973), Powers responded:

> "If any critic, sitting in his comfortable parlor in New York, and reading about the sparse aboriginal populations of the cold forests of the Atlantic States, can overthrow any of my conclusions with a dash of his pen, what is the use of the book at all? As Luther said, at the Diet of Worms, 'Here I stand; I cannot do otherwise.'"

3 Contributions to N. Am. Ethnology 2-3 (J.W. Powell ed., 1877) (letter of transmittal from editor John Wesley Powell to Secretary of the Interior) (quoting "private letter" from anthropologist Stephen Powers to editor J.W. Powell), *quoted in Mattz*, 412 U.S. at 488 n.7. In Powers' preface, dated August 25, 1874, to his comprehensive study of the diverse cultures of California Indians, the anthropologist adverted to the reason for his indignation at the federal official's request for a "modification of his statements" "concerning the former Indian population," notwithstanding the official's own "opinion" conceding "that more Indians were destroyed in this part of the country than in the remaining portion of the United States," *id*. at 1 (letter of transmittal from editor John Wesley Powell to Secretary of the Interior). Powers wrote:

> Perhaps it is too much to ask any one to believe that there are regions of California which supported more Indians than they ever will of white men. But if those who honor this book with a perusal shall lay it aside with the conviction that the cause of his extinction does *not* "lie within the savage himself," and that the white man does *not* come to "take the place which the savage has practically

> vacated," I shall be content. Civilization is a great deal better than savagery; but in order to demonstrate that fact it is not necessary to assert, as Wood does in his work, that savagery was accommodatingly destroying itself while yet the white man was afar off. Ranker heresy never was uttered, at least so far as the California Indians are concerned. It is not well to seek to shift upon the shoulders of the Almighty (through the savages whom He made) the burden of the responsibility which attaches to the vices of our own race.

Stephen Powers, *Preface* to 3 Contributions to N. Am. Ethnology, *supra*, at 5-6. The language quoted by Powers is from the concluding paragraph of a chapter titled "Australia" in the 1870 book *The Natural History of Man* by English writer John George Wood:

> The means were offered to [the aborigines] of infinitely bettering their social condition, and the opportunity given them, by substituting peaceful labour for perpetual feuds, and of turning professional murderers into food-producers, of replenishing the land which their everlasting quarrels, irregular mode of existence, and carelessness of human life had well-nigh depopulated. These means they could not appreciate, and, as a natural consequence, had to make way for those who could. The inferior must always make way for the superior, and such has ever been the case with the savage. I am persuaded that the coming of the white man is not the sole, nor even the chief, cause of the decadence of savage tribes. I have already shown that we can introduce no vice in which the savage is not profoundly versed, and feel sure that the cause of extinction lies within the savage himself, and ought not to be attributed to the white man, who comes to take the place which the savage has practically vacated.

J.G. Wood, The Natural History of Man: Being an Account of the Manners and Customs of the Uncivilized Races of Men 105 (1870). On the depopulation of California Indians during the nineteenth century, see generally Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873 (2016); The Destruction of California Indians: A Collection of Documents From the Period 1847 to 1865 in Which are Described Some of the Things That Happened to Some of the Indians of California (Robert F. Heizer ed., Bison Books 1993) (1974); Erin Blakemore, *California's Little-Known Genocide*, Hist., Nov. 16, 2017 (updated Dec. 4, 2019), https://history.com/news/californias-little-known-genocide; Chris Clarke, *Untold History: The Survival of California's Indians*, KCET, Sept. 26, 2016, https://www.kcet.org/shows/tending-the-wild/untold-history-the-survival-of-californias-indians.

Powers' apparent resistance to concealing evidence of the scope of the population decimation suffered by California Indians at the time of the California Gold Rush is noteworthy in view of the contemporaneous policy positions and practices of U.S. military officers and other government leaders advocating or countenancing the extermination of Indigenous peoples. *See*, *e.g.*, S. Exec. Doc. No. 13, 40th Cong., 1st Sess., at 27 (1867) (letter dated Dec. 28, 1866 from Lt. Gen. William T. Sherman to Ulysses S. Grant, Commanding Gen. of the U.S. Army) ("We must act with vindictive earnestness against the Sioux, even to their extermination, men, women, and children. Nothing less will reach the root of this case."); *id*. at 46 (letter dated Jan. 24, 1867 from Col. Ely S. Parker to Ulysses S. Grant, Commanding Gen. of the U.S. Army) ("[I]t has of late years become somewhat common, not only for the press, but in the speeches of men of intelligence, and some occupying high and responsible positions, to advocate the policy of [the Indians'] immediate and absolute extermination."); George W. Manypenny, Our Indian Wards 187 (1880) (alterations in original) (emphases omitted) (quoting Brig. Gen. E.O.C. Ord, Commander of the Dep't of Texas, U.S. Sec'y of War Ann. Rep. 121-22 (1869)) ("I have encouraged the troops to capture and root out the Apaches by every means in my power, and to hunt them as they would wild animals. This they have done with unrelenting vigor. Since my last report over two

The papers of Justice Blackmun disclose, however, that coaxing Justice Byron White to join Blackmun's *Mattz* opinion had been no easy task. At oral argument, which was split across two consecutive days, Justice White broadsided the attorneys for both sides with a series of questions pertaining to an issue that was not in dispute and upon which no one had briefed the Court, namely, whether the river where the

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hundred have been killed, generally by parties who have trailed them, for days and weeks, into the mountain recesses, over snows, among gorges and precipices; laying in wait for them by day and following them by night. Many villages have been burned, large quantities of supplies, and arms and ammunition, clothing, and provisions have been destroyed, a large number of horses and mules have been captured, and two men, twenty-eight women, and thirty-four children taken prisoners. . . . Many of the border men, especially those who have been hunted, or lost friends or relations by them, regard all Indians as vermin, to be killed wherever met. . . . The Apaches have but few friends, and, I believe, no agent. Even the officers, when applied to by them for information, can not tell them what to do. There seems to be no settled policy, but a general idea to kill them wherever found. I am a believer in that, if we go for extermination."); Robert Winston Mardock, The Reformers and the American Indian 94 (1971) (footnote omitted) (final alteration in original) ("[In 1870 Montana Territory] Governor [James] Ashley wrote . . . : 'The Indian race on this continent has never been anything but an unmitigated curse to civilization, while the intercourse between the Indian and the white man has been only evil, and that continually, to both races, and must so remain until the last savage is translated to that celestial hunting ground for which they all believe themselves so well fitted, and to which every settler on our frontier wishes them individually and collectively a safe and speedy transit. . . . In Montana, we want no more Chinamen or Indians or barbarians of any race;—we already have enough and to spare.'"); Exec. Order No. B 2021 002, Office of Colorado Governor Jared Polis (Aug. 17, 2021), https://www.colorado.gov/governor/sites/default/files/inline-files/B%202021%20002%20Rescind%201984%20Proc.pdf (rescinding 1864 proclamations issued by Colorado Territory Governor John Evans that, inter alia, "ordered citizens to 'kill and destroy . . . hostile Indians' and urged the citizens to 'take captive, and hold to their own private use and benefit, all property of said hostile Indians that they may capture, and receive all stolen property recovered from said Indians such reward as may be deemed proper and just therefor'"); *see also* Cong. Globe, 32d Cong., 1st Sess. 2175 (1852) (remarks of U.S. Sen. John B. Weller of California) ("The *fate* of the Indian is irrevocably sealed. He must soon be crushed by the encroaching tide of emigration. The *hand of destiny has marked him, and soon* he must fade away. The reflection to every humane heart is a melancholy one, but it is unavoidable. *In the providence of God they must soon* disappear before the onward march of our countrymen. Humanity may forbid, but the *interest* of the white man demands their extinction."); Peter Burnett, *State of the State Address*, The Governors' Gallery, California State Library (reprinting 1851 address by California Governor Peter Burnett to the California Senate and Assembly), https://governors.library.ca.gov/addresses/s_01-Burnett2.html ("That a war of extermination will continue to be waged between the races until the Indian race becomes extinct must be expected. While we cannot anticipate this result but with painful regret, the inevitable destiny of the race is beyond the power or wisdom of man to avert."); *cf.* Madley, *supra*, at 186 (endnote omitted) ("By invoking the inevitable extinction myth, on one hand, while supporting Indian killing, on the other, Burnett leveraged his authority as California's first civilian US governor to endorse further ranger militia operations against California Indians. In this way, he pushed his successor, lieutenant governor and fellow Democrat John McDougal, as well as state legislators, to institutionalize the state-sponsored hunting and killing of California Indians.").

Yurok Indian petitioner, Raymond Mattz, had been fishing with his traditional gill nets was navigable or not and, relatedly, whether the State of California owned the riverbed. In a colloquy with U.S. Solicitor General Harry R. Sachse, who argued in an amicus curiae capacity in support of petitioner Mattz, Justice White began by posing a hypothetical question, asking what the status of the area would be if it no longer contained any living Indians nor encompassed any Indians lands:

> QUESTION: Would you take the same position even if some [land] was allotted, some was homesteaded and the people and all the restrictions on the allotments had expired and the allotted lands had been sold to whites?
>
> MR. SACHSE: Unless Congress had in some—we don't reach that issue here because there still is allotted restricted land in this reservation.
>
> QUESTION: Well, let me ask you. In an Indian reservation that's along a river who owns the bed of the river?[76]

The solicitor general explained that in a previous case the Supreme Court had "already held that the Indians own the bed of the river. It has never been taken from them."[77] Justice White then probed further, intimating the true impetus for his line of questioning:

> QUESTION: Whether the reservation exists or whether it doesn't and regardless who owns the river bed, is there some treaty or some law defining Indian fishing rights? Or is it just ancestral fishing rights that have been—
>
> MR. SACHSE: It's somewhere between the two. There were ancestral fishing rights, but this Court in *Donnelly* held specifically that the 1891 [Hoopa Valley] Extension that ran snaking 40 miles down the river was done specifically to preserve the fishing rights that the Indians had.
>
> QUESTION: Which were what?
>
> MR. SACHSE: I think the exclusive right to fish in that river.
>
> QUESTION: The exclusive right to fish there?
>
> MR. SACHSE: Since it was made an Indian reservation, the purpose of which is that this area is to be reserved for the Indians, and since surplus lands were sold but nothing was done—
>
> QUESTION: You would say, then, I suppose, that since the Indians owned then and still own the bed of the river, that even if all of the riparian land was in other ownership, the Indians would have the exclusive right to fish in that river?
>
> MR. SACHSE: I would say—yes, I would say that. But I don't think this case requires us—
>
> QUESTION: Don't you have to hold that? Because there is some riparian land that is not owned by the Indians.[78]

Solicitor General Sachse endeavored to explain how reservation status entailed the right of the Yurok Indians to fish within their own

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[76] Transcript of Oral Argument, *supra* note 56, at 16 (No. 71-1182).

[77] *Id.* (citing Donnelly v. United States, 228 U.S. 243 (1913)).

[78] *Id.* at 16-17.

reservation, pointing out that in *Donnelly v. United States*[79] the Supreme Court "held that one of the primary purposes of establishing that reservation was to secure to the Indians fishing rights of that river. That reservation has never been abolished. The 1892 Act which let other people than Indians settle in this area while preserving also Indian settlement, simply did not abolish the reservation."[80] Justice White pressed further:

> QUESTION: That still leaves the question of what—you said "exclusive."
>
> MR. SACHSE: No. Let me say this. The issue was not argued below as to exactly the consequences of this being held to be an Indian reservation. The court went up on the question it was not a reservation.
>
> QUESTION: The scope of the Indian rights and whether or not the kind of fishing the Indians now want to do is the kind of fishing that was historically exercised[81] has not been settled[?]
>
> MR. SACHSE: That is correct. And we have only asked this Court to determine the question of whether this remains Indian country, whether this remains an Indian reservation, with a remand after that has been determined to the California courts.
>
> QUESTION: You think it may be irrelevant whether the reservation exists or not if it's true that the Indians still own the bed of the river?
>
> MR. SACHSE: I don't think it would be irrelevant. I think it would matter from the standpoint of criminal and civil jurisdiction. . . .
>
> I would like to get back to the specific point that the Court is faced with, and that is has this allotment process terminated the reservation.[82]

When oral argument resumed the next morning, Justice White continued with his intensive questioning about navigability, riverbed ownership, and Indian fishing rights. This time the target of his interrogation was Roderick Walston, deputy attorney general of California, who argued for respondent G. Raymond Arnett, director of the California Department of Fish and Game:

> QUESTION: Do you concede that the tribe owns the bed of this river in the area that's at issue here?
>
> MR. WALSTON: We haven't raised that question, Mr. Justice White. . . .
>
> . . . .
>
> QUESTION: Is it a navigable river?
>
> MR. WALSTON: I believe that the river is navigable.
>
> QUESTION: So normally the State at admission would have taken title to the river bed.
>
> MR. WALSTON: That's correct, your Honor. In fact, I was prepared to submit an argument to that effect to the Court, but I didn't because I felt there were sufficient other grounds to dispose of

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[79] Donnelly v. United States, 228 U.S. 243 (1913).

[80] Transcript of Oral Argument, *supra* note 56, at 18 (No. 71-1182).

[81] *See infra* note 86.

[82] Transcript of Oral Argument, *supra* note 56, at 18-19 (No. 71-1182).

> the case. I didn't want to raise what I considered to be a technical argument. Based on your question yesterday, I—
>
> QUESTION: Would it make any difference to the resolution of this case?
>
> MR. WALSTON: Yes, it might. If the reservation includes all of the area—
>
> QUESTION: Whatever it is we are supposed to set aside here might not decide the case at all?
>
> MR. WALSTON: That's possible. If the Court concludes that the river that runs through the old reservation is not part of the reservation itself and that title to the river is vested in the State of California, the previous question is not before the Court.[83]

Apparently encouraged by the possibility of disposing of the *Mattz* case on riverbed ownership grounds, Justice White shifted the focus of his questioning to the matter of Indian fishing rights:

> QUESTION: If there is a reservation here, do you concede that the Indians have a right that the State of California may not regulate or interfere with?
>
> MR. WALSTON: Yes. That's correct. We concede that, your Honor.
>
> . . . .
>
> QUESTION: Why do you concede that?
>
> MR. WALSTON: Pardon me?
>
> QUESTION: Why do you concede that?
>
> MR. WALSTON: That if there is an Indian reservation, we are not allowed to—
>
> QUESTION: Yes.
>
> MR. WALSTON: Well, I frankly don't recall, your Honor.[84]

Justice White then asked several pointed questions about gill net fishing by the Indians, zeroing in on whether a gill net "can . . . be used as a commercial fishing device." The deputy attorney general responded "Yes, it commonly is," but conceded that he didn't know whether that was what it was being used for in the *Mattz* litigation.[85] The interrogation continued:

> QUESTION: Well, don't you think that makes some difference in terms of whether or not the Indians have a fishing right that you can't interfere with, or not?
>
> MR. WALSTON: I'm not sure, your Honor. I think that if the Indians have a right to fish on the reservation for their own purposes, they would also have the right to fish on the reservation for commercial purposes.
>
> QUESTION: You mean by that that even though perhaps in ancient times all they could use was a little hand net to catch a fish at a time, now they could use something that stretches across the whole river under new technology and take every fish in the river?
>
> MR. WALSTON: That's my understanding now.
>
> QUESTION: And California could do nothing about it?

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[83] *Id.* at 26-28.
[84] *Id.* at 37-38.
[85] *Id.* at 38-39.

> MR. WALSTON: California can't do a thing about it. Now, the BIA, if we—
>
> QUESTION: Where is the law—where are you finding a law like that?
>
> MR. WALSTON: You've got me on that question, your Honor. I can probably research the question and submit an answer. I just don't recall, frankly, the source of that proposition.[86]

Justice White then inquired whether *Worcester v. Georgia*,[87] the foundational Indian law case, might be considered the source of such Indian fishing rights exclusive of state law, since that case held "that the State has no jurisdiction, regulatory jurisdiction inside a reservation."[88] The exchange continued:

> MR. WALSTON: I think that's right, your Honor. I think that's the source of the authority. I looked into this some time ago, Mr. Justice White, and I just frankly don't recall the source of—
>
> QUESTION: Even if the State owns the bed of the river?
>
> MR. WALSTON: But the Indians can't fish without restriction on the river and California can regulate—
>
> QUESTION: Again I ask you, do you know whether this river is navigable or not?
>
> MR. WALSTON: It's my understanding this river is navigable. . . . I'm not sure.[89]

Justice White pressed the California deputy attorney general to explain why, "[i]f this was a reservation," he would "concede that the State has no jurisdiction," since "the only question we have here is the preliminary question of whether or not this is or is not Indian country."[90] The conversation continued:

> QUESTION: . . . [I]f we find that it is Indian country, then at least the [U.S.] Government says the respective right of the State to enforce its fish and game laws and its conservation laws in this Indian country is an unresolved issue and the case should be remanded to the state court for resolution of that issue.
>
> MR. WALSTON: That's correct, your Honor.

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[86] *Id.* at 39. Justice White's interrogation concerning the nature of Raymond Mattz's gill net fishing activity suggests a related but somewhat different answer to the question "Of what necessity is it to the [*Mattz*] opinion that the petitioner had fished the river 'as his grandfather did before him,' a fact completely irrelevant to the disposition of the case, if not to portray this as a part of the Court's protection of the traditional Indian way of life?" Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 Vt. L. Rev. 623, 663 (2011) (quoting Mattz v. Arnett, 412 U.S. 481, 484 (1973)). While the Court could be seen as endeavoring "to preserve the reservation and 'Indianness' by refusing to abrogate Indian fishing rights," *id.*, the thrust of this questioning implies an insistence that any Indian exemption from state fishing regulations in Indian country must be harnessed to a narrow, judicially policed definition of what qualifies as "traditional [Indian] fishing activities," *id.*

[87] Worcester v. Georgia, 31 U.S. 515 (1832).

[88] Transcript of Oral Argument, *supra* note 56, at 39-40 (No. 71-1182).

[89] *Id.* at 40.

[90] *Id.* at 40-41.

> QUESTION: Am I incorrect about that?
>
> MR. WALSTON: No, you are absolutely correct. In other words, if the area is a reservation, there is a basis for California still regulating the Indian fishing on the area if there was no Federal treaty agreement or statute.
>
> QUESTION: And that's a question that the State court did not reach, that is not here. All we have here is the threshold question of whether or not this is Indian country.
>
> MR. WALSTON: Uh-huh. That's correct, your Honor. That's absolutely correct.[91]

When it came time for the petitioner's rebuttal, Raymond Mattz's lawyer, Lee J. Sclar of California Indian Legal Services, had only a few minutes left to respond to the dizzying array of tangential issues and concerns that Justice White had put into play through his questioning of the other two attorneys. While Sclar was in the process of accomplishing that daunting task, a different Justice interrupted Sclar:

> QUESTION: . . . Here before us isn't the only question this is Indian country? Isn't that all that the Court—
>
> MR. SCLAR: Yes, your Honor. I was answering Justice White's question merely because he inquired. It is not before the Court.
>
> QUESTION: Those questions are simply not before us.
>
> MR. SCLAR: That is correct, your Honor.[92]

It is clear from documents found among the Justices' archived papers that Justice White's intensive questioning during oral argument about matters that were not in controversy in the litigation had an

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[91] *Id*. at 41-42.

[92] *Id.* at 49. *Mattz v. Arnett* is not the only Supreme Court Indian law case in which Justice White conducted intensive, even harsh, questioning during oral argument with regard to the exercise of Indian fishing rights and the regulation of fishing within reservation boundaries. In *Montana v. United States*, 450 U.S. 544 (1981), where the Crow Tribe's regulatory authority over fishing by nonmembers on the Crow Reservation was at issue, Justice White similarly grilled the attorneys who supported the tribe's position, with much of White's ire aimed at the lawyers' assertion that the United States retained ownership of the bed of the Big Horn River, holding it in trust for the tribe's exclusive beneficial use. *See*, *e.g.*, Transcript of Oral Argument 38-40, Montana v. United States, 450 U.S. 544 (1981) (No. 79-1128) (colloquy with United States Deputy Solicitor General Louis F. Claiborne). Further investigation has disclosed that Justice White, "an avid fly-fisherman whose love for the sport was legendary among his friends and associates," was accustomed to embarking on fishing excursions as a favorite pastime, including on the Big Horn River within the Crow Reservation around the time *Montana* was decided. John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of* Montana v. United States, *in* Indian Law Stories 535, 569-72 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011). Justice White's host and companion for these excursions was Jack D. Shanstrom, who later served as judge for the U.S. District Court for the District of Montana and "hosted other Supreme Court Justices for fly-fishing ventures on the Big Horn River," including Justice Antonin Scalia and Justice Sandra Day O'Connor, *id*. at 569-70 & nn.141-43, each of whom, as a non-Indian, would have been exempted from the Crow Tribe's fishing regulations because of the *Montana* ruling.

arresting impact on discussions in chambers. A letter from the California attorney general's office, dated March 28, 1973, the very day oral argument had ended, co-authored by Attorney General Evelle J. Younger and Deputy Attorney General Roderick Walston, laid out the state's views on the navigability question, with Walston stating that he "was unable to respond [to inquiries during oral argument] on the basis of my existing knowledge."[93] Justice Blackmun's law clerk in turn drafted a three-page memorandum, dated "5/28/73" and titled "Re: Post-argument memo from the state," summarizing and commenting on the California attorney general office's letter. The law clerk's memo begins:

> Whether the Klamath River is, or was at the time of Cal's statehood, navigable in fact, was raised in oral argument, and is addressed in the [State's] memo. Your opinion does not reach the question, leaving its resolution, perhaps, for the courts on remand. In my view this is proper . . . .[94]

After providing analysis of the navigability issue, the law clerk concluded the memo with the following advice:

> [T]he issues are difficult, even if the State is correct in asserting that the river is navigable and the State owns it. It would be asking too much, in my view, for this Court, without benefit of briefing and argument, to resolve the issue, an issue which has not yet been raised by either party. . . .
>
> My conclusion from this is that you are quite correct in not reaching the navigability question. I suggest, as I did at lunch today, that you might explain in a letter attached to the *Mattz* draft why the issue was not reached in the opinion. I doubt if you would find any opposition.[95]

In accordance with the law clerk's advice, Justice Blackmun wrote the following "Memorandum to the Conference," dated May 31, 1973:

> Herewith is a draft of a proposed opinion for this case. At the oral argument one of us, I think it was Byron, asked a number of questions directed to the navigability of the Klamath River. Counsel were rather indefinite in their answers. After argument the Deputy California Attorney General sent in a letter dated March 28 commenting upon the issue of navigability.
>
> . . . .
>
> I have concluded that the resolution of navigability of the Klamath River is not necessary for purposes of the present review and that the issue, if it is pertinent at all, may be taken up on the remand. The determination of navigability should not be difficult, but the consequences of the determination may well entail some work. Certainly, it seems to me, this is not anything for us to undertake without the benefit of briefing and argument.[96]

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[93] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 160, Folder 71-1182 (*Mattz v. Arnett*), retrieved from the Library of Congress.

[94] *Id.*

[95] *Id.*

[96] William J. Brennan Papers, Manuscript/Mixed Material, Box I:295, Folder 71-1182

In the papers of Justice William Brennan[97] there appears a typewritten note added at the bottom margin of Brennan's copy of this May 31 memorandum from Justice Blackmun:

> (To Mr. Justice Brennan only)
> P.S. Dear Bill:
> Forgive me for being somewhat expansive in this opinion. It seems to be my annual Indian case,[98] and this one proved historically fascinating. As a consequence, I inserted some material that normally would have been omitted. I rationalize by saying that I have to have a little fun in at least one case a year.[99]

(*Mattz v. Arnett*), retrieved from the Library of Congress. Justice White may have been further mollified by the *Mattz* Court's remand order. *See* Dussias, *supra* note 55, at 49 n.37 (citing Mattz v. Arnett, 412 U.S. 481, 485 (1973); Arnett v. Five Gill Nets, 48 Cal. App. 3d 454, 463-64 (1975), *cert. denied*, 425 U.S. 907 (1976)) ("The Court remanded the case for determination of issues relating to the existence of Mattz's fishing rights and the applicability of state law despite reservation status. On remand, the California Court of Appeals expressed doubt that California could regulate on-reservation fishing, but did not decide the issue because the Indians' fishing was determined not to be a sufficient threat to state conservation efforts to justify state regulation.").

[97] Justice Blackmun retained a copy of his personalized memorandum to Justice Brennan in his own *Mattz* folder. *See* Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 160, Folder 71-1182 (*Mattz v. Arnett*), retrieved from the Library of Congress.

[98] The disdain of some Supreme Court Justices for being assigned the task of writing majority opinions in Indian law cases has been notoriously reported. *See*, *e.g.*, Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 382-83 & nn.9 & 10 (1993) (citing Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 62, 425 (1979)) (noting investigative journalists' accounts purporting to quote the use of demeaning and offensive epithets by Justice John Marshall Harlan II and Justice William J. Brennan, Jr. disparaging Indian law cases); Woodward & Armstrong, *supra*, at 490 ("Rehnquist had nothing but contempt for Indian cases."). A note found among the Blackmun Papers further confirms this disdain. Bearing the date "3-27, 1973"—the first day of oral argument in *Mattz*—the note appears to be in Chief Justice Warren Burger's handwriting. Scrawled vertically in the left margin is a play on words, equating "Dismiss as Improvidently Granted" with "Difficulty Inherent in Grant of Cert," while the rest of the note reads: "Harry If you don't vote to DIG I'll assign all Indian cases to you along with the FPC case!! Schwarze-poste B." Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 116 ("Notes exchanged between justices during court proceedings, 1970-1993"), retrieved from the Library of Congress; *see* App. Exhibit 2, *infra* p. 346; *see also supra* note 68 and accompanying text.

[99] William J. Brennan Papers, Manuscript/Mixed Material, Box I:295, Folder 71-1182 (*Mattz v. Arnett*), retrieved from the Library of Congress; *cf.* Dussias, *supra* note 55, at 49 (footnote omitted) ("The fact that much of the . . . material included by Justice Blackmun [in *Mattz*] was largely irrelevant to resolving the legal issue seems to indicate Justice Blackmun's own interest in the Yurok Indians and their history—apparently he found the material to be very interesting, and felt compelled to include it in his opinion.").

In a memorandum dated "5/8/73" Justice Blackmun's law clerk wrote:

> Here is the draft of Mattz v. Arnett (5 Gill Nets). I have had a great deal of fun researching and writing this opinion, and I am sure you will enjoy looking through some of the very old and interesting books which I have used and cited,

C. *DeCoteau v. District County Court* (1975)

1. Advent of "Magic Language" for Terminating Reservations

As discussed previously, *Seymour v. Superintendent*[100] and *Mattz v. Arnett*[101] are unanimous Supreme Court decisions that employ interpretive approaches which conform to fundamental and longstanding principles of Indian law and reject, accordingly, the arguments of state officials that federal statutes authorizing the sale of unallotted lands had terminated or diminished Indian reservations.[102] However, starting with the next reservation diminishment/disestablishment case, *DeCoteau v. District County Court for the Tenth Judicial District Court*,[103] the high court began crafting and deploying a different, controversial interpretive approach, one that is at war with Indian law principles and that had the immediate effect of fracturing the previous unanimity of the Justices' decision-making in this doctrinal area.

DeCoteau was actually a consolidation of two cases that "raise[d] the single question whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty between the United States and the Sisseton and Wahpeton bands of the Sioux Indians, was terminated and returned to the public domain by the Act of March 3, 1891."[104] In one of the cases, which implicated a question of the civil jurisdiction of state courts over

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particularly Powers and the Annual Reports of the Comm/r of Indian Affairs. Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 160, Folder 71-1182 (*Mattz v. Arnett*), retrieved from the Library of Congress.

[100] Seymour v. Superintendent, 368 U.S. 351 (1962).

[101] Mattz v. Arnett, 412 U.S. 481 (1973).

[102] *See supra* notes 28-31 and accompanying text; *supra* notes 55-57 and accompanying text.

[103] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425 (1975).

[104] *Id.* at 426-27 (citing Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035). Professor Angelique EagleWoman, an enrolled member of the Sisseton-Wahpeton Oyate (the Dakota word "Oyate" translates as "Nation" in the English language), provides a concise breakdown of the traditional cultural/political divisions and bands of the Dakota, Lakota, and Nakota (i.e., Sioux) peoples:

> The Sisseton and Wahpeton are part of the *Oceti Sakowin*, or Seven Council Fires. The Seven Council Fires are composed of the Dakota-, Lakota-, and Nakota-speaking peoples. The Council Fires are formed from four that are Dakota—*Sissetonwan* [Sisseton], *Wahpetonwan* [Wahpeton], *Wahpekute*, and *Mdewakantonwan* [Mdewakanton]; two that are Nakota—*Ihanktonwan* (Yankton) and *Ihanktowana* (Little Yankton); and one that is Lakota—*Tetonwan* [Teton]. . . . Collectively, the Dakota peoples are known as the *Isanyati*, or dwellers at Knife Lake, which was further shortened to simply Santee in most historical records. The Sisseton-Wahpeton Oyate is the joining of two Dakota council fires into one government, eventually located on the Lake Traverse Reservation in present-day northeastern South Dakota and extending partially into present-day North Dakota.

Angelique Townsend EagleWoman (Wamdi A. WasteWin), *U.S.-Dakota War of 1862: Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms*, 39 Wm. Mitchell L. Rev. 486, 488-89 (2013) (citations omitted).

a family-law matter involving tribal-member parties,[105] the South Dakota

[105] Although "in the [*DeCoteau*] decision" the Supreme Court asserted that petitioner Cheryl Spider DeCoteau "voluntarily gave up one of her sons for adoption," Patrice H. Kunesh, *Borders Beyond Borders—Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 New Eng. L. Rev. 15, 31 n.79 (2007) (citing *DeCoteau*, 420 U.S. at 428); *see DeCoteau*, 420 U.S. at 428 ("The petitioner gave Robert up for adoption in March of 1971 . . . ."), at a 1974 Senate subcommittee hearing "DeCoteau testified that she . . . did not knowingly or intentionally relinquish her child," Kunesh, *supra*. The report on the hearing—at which Senator James Abourezk, chairman of the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, elicited testimony from DeCoteau and her attorney, Bertram Hirsch of the Association on American Indian Affairs—vividly recounts South Dakota's mistreatment of the petitioner:

Senator Abourezk. . . .

. . . .

First, it might be good to give your name, your age, and exactly where you live, and so on.

Mrs. DeCoteau. Cheryl Spider DeCoteau. I'm 23.

Senator Abourezk. From where?

Mrs. DeCoteau. I'm not originally from Sisseton, but from Minnesota.

Senator Abourezk. You are in Minnesota now?

Mrs. DeCoteau. Yes.

Herbert John Spider is 5, and Robert Lee is 3, and Joseph there, is 10 months.

. . . I'll start with my oldest boy, John. I had a babysitter watching him and I went to get him, and they wouldn't give him back to me. So I went to my social worker and I asked him if he would come with me up there.

. . . .

That was in December 1970, and I asked him—

Senator Abourezk. You asked the social worker?

Mrs. DeCoteau. Yes. Asked him to meet me at the store. He didn't come. So, I left, and I called from that store, and I said that they already went and they took John, and they took him to a foster home and that I couldn't get him back.

Senator Abourezk. They had taken John without your permission or without your knowledge?

Mrs. DeCoteau. Yes.

They took him, and I went back up there, and I tried to get him back, and they said "No", that they couldn't. I don't know if they had a court hearing or something. I didn't get any papers or nothing.

Senator Abourezk. Did you go to the court hearing?

Mrs. DeCoteau. No, I didn't. I didn't know they had a court hearing.

Senator Abourezk. They had a court hearing without your knowledge?

Mrs. DeCoteau. They had a petition or something.

I didn't know anything about it, and when I did go they had to appoint me a lawyer. The welfare appointed me a lawyer so I went to see him. The judge appointed me a lawyer.

I went to see him, and he didn't try to help me or anything. All he did was just ask me my age, name and address, and the name of my first boy and my other one. Then he asked me how old they were, and that was all. Then he said he was going to go talk to the judge and the welfare workers. He didn't do anything because I didn't know anything that happened until July of 1971.

Senator Abourezk. Did they keep John all that time?

Mrs. DeCoteau. Yes. They had John all that time in a foster home.

Senator Abourezk. Did you know where he was?

Mrs. DeCoteau. No; I didn't know where he was. I kept asking, but they

wouldn't tell me where he was or anything.

Senator ABOUREZK. I'd like to ask you to back up just a minute. Did this happen in South Dakota or Minnesota?

Mrs. DECOTEAU. It was in Sisseton.

Senator ABOUREZK. Did the welfare department ever, to your knowledge, prove that you weren't being the best mother for that child at all, and perhaps your lawyer, Mr. Hirsch, can answer if you're unable to?

Mrs. DECOTEAU. The man said that I wasn't a very good mother and everything, and that my children were better off being in a white home where they were adopted out, or in this home, wherever they were. They could buy all this stuff that I couldn't give them and give them all the love that I couldn't give them.

Senator ABOUREZK. They said that, but did they really prove that in court, or did they give any specific examples of why you weren't a good mother?

Mr. HIRSCH. The answer to that is "No."

. . . .

Senator ABOUREZK. Is it true that you found out about the original hearing accidentally and that she was given no notice of the hearing?

Mr. HIRSCH. The original hearing was one of the grossest violations of due process that I have ever encountered. Unfortunately, I find it is quite commonplace when you're dealing with Indian parents and Indian children.

Senator ABOUREZK. Did you get notice?

Mr. HIRSCH. She did not get notice of either the first hearing or the second hearing.

The first hearing was a hearing on the petition of the social worker stating that there was a need for emergency custody in the department of welfare over Mrs. DeCoteau's children.

The judge issued an order placing that child in the custody of the department of public welfare without informing Mrs. DeCoteau that such a hearing was taking place, and without allowing her an opportunity to come before the court and submit testimony that such an order should not be issued.

So, the child was placed in a foster home and the judge appointed an attorney for Mrs. DeCoteau and set a hearing date on the issue of dependency and neglect. Pending the hearing the child was to remain in a foster home.

In other words, you were talking about the burden of proof. They already took the child away from her prior to having any hearing on unfitness and the burden of proof was very clearly shifted on Mrs. DeCoteau to prove that she was fit, rather than the state proving that she was unfit.

Then the hearing was scheduled for about 7 months after the child was originally taken from her.

Then the hearing was scheduled. They notified Mrs. DeCoteau by publication in the local Sisseton paper, despite the fact that her social worker knew exactly where to find her. This is another problem where the State quite frequently uses publication notice when, in fact, they know very clearly where the person can be found and how to serve that person directly. They use publication notices instead.

Needless to say, these people don't usually make a habit of reading the local paper. She found out entirely by accident that there was a hearing on the merits because another tribal member happened to pick up the paper the day before the hearing and noticed that the hearing was scheduled for the next day.

Senator ABOUREZK. All right.

Cheryl, then, did you have a subsequent experience with the welfare people with regard to your second son, Bobby?

Mrs. DECOTEAU. Yes.

Senator Abourezk. I wonder if you could tell us what happened there?

Mrs. DeCoteau. I was pregnant with Bobby and the welfare came there and asked me if I would give him up for adoption.

Senator Abourezk. While you were pregnant with him?

Mrs. DeCoteau. Yes.

Senator Abourezk. Before he was even born?

Mrs. DeCoteau. Yes.

They just kept coming over to the house. They came every week. On a certain day they come and they kept talking to me and asking if I would give him up for adoption and said that it would be better.

They kept coming and coming and finally when I did have him, he came to the hospital. After I came home with the baby, he would come over to the house. He asked me if I would give him up for adoption and I said no.

He let me alone for a while until I moved into Sisseton and moved in town.

He kept coming over and asking if I would give him up for adoption. Then he called me one afternoon and said if I wanted to give him up and I said no; and the next morning, real early he came pounding on the door and I let him in and he asked me if I'd come up to the office. He had something to talk to me about.

So, I went up to the office and there were a whole bunch of papers there. I was kind of sick then too and I didn't know what I was signing. He asked me if I would sign my name on this top paper, and I signed it and he sealed it or something. I signed it and he signed it, and sealed it or something.

Senator Abourezk. Do you know what that paper was?

Mrs. DeCoteau. No; I didn't know what that paper was. But, then they took the baby and I asked him what he was doing, and he said it was too late now, that I gave him up for adoption. I signed the papers.

Then, they took him. They told me to wait a week. Before all this happened, when I did sign the paper, he told me to come back and see him in a week and he would tell me if I could have him back or not. When I did go back in 1 week, that's when he told me it was too late, that I had signed the papers for adoption and I couldn't get him back.

Senator Abourezk. How old was the baby when they took him?

Mrs. DeCoteau. He was 4 months.

Senator Abourezk. Can you describe how they came and took him, or how that happened?

Mrs. DeCoteau. When they came to the house there, I just had the baby with me. My grandmother took John home the day before. I had the baby with me and then I took him with me when I went up there. Before I signed the paper, one of the social workers came there and took him to the next room. When they did that, I signed the papers and stuff and they wouldn't give him back to me. They wouldn't let me take him home and all that. They told me that they'd give me 1 week and to come back and see him in 1 week.

Senator Abourezk. You mean you took the baby with you when you signed the papers and they kept the baby right there?

Mrs. DeCoteau. When they took me in the office there, the social worker went and called another lady in to watch the baby in the next room until I got done. When he got through talking with me, when they took the baby and I signed the papers, they just took him right out the doors and they took him right to the foster home the same day.

Afterwards, I went to see an attorney and he said that he would help me, and that was in March 1970. . . . [T]his all happened in March 1970.

I went to this lawyer and he said that he would help me and I filled out all kinds of papers and answered all the questions he wanted to know and then he

Supreme Court held that "since some of the incidents [alleged in the lawsuit] . . . occurred on nontrust [i.e., non-Indian] land within the [Lake Traverse] reservation, they happened on land in 'non-Indian country'" where state jurisdiction existed.[106] The other case involved habeas corpus

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said he'd let me know. I didn't hear nothing from him for awhile and I think it was in August he called me and I went to see him. He said that a date was set in September 1970, to have a court hearing.

We went to that, but I lost that. This was before John was taken away, because they took Robert and then John was taken away. My grandfather notified me and said that I had to go to court for both kids. They were going to give them up for adoption and that's when Bert here, he was my lawyer.

Senator Abourezk. Did you eventually get Bobby back?

Mrs. DeCoteau. I got him back last April.

Senator Abourezk. How long did you and your lawyer have to fight that in court before you got him back?

Mrs. DeCoteau. About 10 months, 7 months for Johnny and 10 for Robert.

Senator Abourezk. It was almost a year and a half for both kids?

Mrs. DeCoteau. Yes.

Senator Abourezk. Do you have custody now of all three of the children?

Mrs. DeCoteau. Yes.

Mr. Hirsch. That was 10 months, Senator, after I became involved in the case. She had been trying for quite some time before that to get the kids back.

Senator Abourezk. Yes.

Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs on Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction, 93d Cong. 65-69 (1974); *see also* Kunesh, *supra*, at 46 (quoting H.R. Rep. No. 95-1386, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530) (noting that a 1978 report of the House of Representatives "recited Cheryl DeCoteau's story as the rationale for including specific procedural due process requirements in the bill [that Congress subsequently enacted as the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923]: 'In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights. It is an unfortunate fact of life for many Indian parents that the primary service agency to which they must turn for financial help also exercises police powers over their family life and is, most frequently, the agency that initiates custody proceedings.'"); *cf.* Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 Yale L. & Pol'y Rev. 292, 301 (2020) (footnote omitted) ("In a series of historic congressional hearings, Native people shared the devastating impact of forced child removals. Cheryl DeCoteau, a member of the Sisseton-Wahpeton Sioux Tribe, testified that a South Dakota child welfare worker had removed her children to foster care without any process."); Fletcher § 7.2, *supra* note 14, at 298 (footnotes omitted) ("Importantly, [*DeCoteau v. District County Court*] involved the termination of parental rights by the state of a tribal member. South Dakota tribes cited the state as a terrible offender in terminating Indian parental rights without due process, with South Dakota's example helping to persuade Congress to pass the Indian Child Welfare Act in 1978, largely stripping state courts of jurisdiction over these matters.").

[106] *DeCoteau*, 420 U.S. at 460 (Douglas, J., dissenting) (quoting DeCoteau v. Dist. Cty. Ct. for Tenth Jud. Dist., 211 N.W. 2d 843, 846 (S.D. Sup. Ct. 1973) (decision below)); *cf.* Robert L. Pirtle, To Right the Unrightable Wrong: An Autobiography of Robert L. Pirtle, Tribal Lawyer 445 (2007) ("Throughout the [*DeCoteau*] court

petitions brought by tribal-member inmates of a South Dakota penitentiary, asserting that their detention was illegal because the state-law crimes for which they had been convicted occurred on non-Indian lands within the boundaries of the Lake Traverse Reservation, where the state had no jurisdiction over them.[107] The Eighth Circuit Court of Appeals agreed with the Indian petitioners, holding that the "scene of the alleged crimes" was "within Indian country" and that, consequently, "South Dakota had no jurisdiction to try [them]."[108] In so ruling, the Eighth Circuit overruled one of its own precedents from a decade earlier which held that the Lake Traverse Reservation had been "terminated" by Congress.[109]

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proceedings, South Dakota was represented by Tom Tobin, a lawyer from Winner, South Dakota, who seemed to hate Indians, and had done a great deal of legal research in an effort to find ways of destroying reservations. Tobin succeeded in convincing the State Supreme Court, not surprisingly, that Article I [of the Agreement of 1889, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1036,] terminated the Reservation and that all nontrust land inside the boundaries of the *former* Reservation was subject to state law."); Lance Morgan, *The Politics of Fear and Racism*, Indian Country Today, Mar. 31, 2004 (updated Sept. 12, 2018), https://indiancountrytoday.com/archive/the-politics-of-fear-and-racism (discussing Tobin's highly paid involvement in other racially charged legal controversies regarding Indian country in Nebraska and Minnesota); Michael Wickline, *Controversy swirls around attorney representing Kamiah School District*, Lewiston Tribune, Nov. 26, 1996, https://lmtribune.com/education/controversy-swirls-around-attorney-representing-kamiah-school-district-tom-tobin-has-a-bad-record-and/article_f7814512-143a-5227-9641-97669509fece.html (reporting on Indian Education Parents Committee's protests against the retaining of Tobin to represent the school board of Kamiah, Idaho, on the Nez Perce Indian Reservation, at a time when he "was suspended from practicing law in his home state" and in view of Tobin's role as "an outspoken activist in the Interstate Congress [for] Equal Rights and Responsibilities, a group . . . dedicated to eliminating Indian treaty rights"). Tobin apparently founded the anti-Indian organization called the Interstate Congress for Equal Rights and Responsibilities the year *DeCoteau* was decided:

> The recent spate of Indian assertiveness has triggered substantial opposition in white communities. In 1975 a group called the Interstate Congress for Equal Rights and Responsibilities was set up in Winner, S.D., near the Rosebud Sioux reservation, to coordinate opposition to Indian legal victories. Today ICERR claims to have 10,000 members in 17 states who say they are victims of reverse discrimination. They complain that Indians vote and have a voice in local affairs but are not required to pay taxes. Moreover, they say that treaties setting out hunting and fishing rights give Indians a disproportionate share of the fish and game in their areas. The organization is supporting countersuits in 20 states contesting Indian claims to land, water and fishing rights, and its members are lobbying for passage of so-called "backlash" bills in Congress. The most extreme of these—H.R. 9054, introduced by Rep. John E. Cunningham (R Wash.)—would "abrogate all treaties entered into by the United States with Indian tribes."

Sandra Stencel, *The Rights Revolution*, CQ Researcher, June 23, 1978, at 441-60, http://library.cqpress.com/cqresearcher/cqresrre1978062300; *see also infra* note 699 (noting Tobin's participation as co-counsel for South Dakota in litigation that diminished the Rosebud Sioux Reservation).

[107] *See DeCoteau*, 420 U.S. at 430 (majority opinion of Stewart, J.).

[108] *Id.* (quoting United States *ex rel.* Feather v. Erickson, 489 F.2d 99, 103 (8th Cir. 1973) (decision below), *rev'd*, *DeCoteau*, 420 U.S. 425 (1975)).

[109] *Id.* (citing DeMarrias v. South Dakota, 319 F.2d 845 (8th Cir. 1963)). The Eighth

Ruling on the consolidated cases, in *DeCoteau* a six-Justice majority of the U.S. Supreme Court concluded that the Lake Traverse Reservation was "terminated,"[110] while three Justices vigorously dissented.[111] As summarized in Justice William Douglas's dissenting opinion, in 1867 the United States ratified a treaty that "granted [the Sisseton and Wahpeton Sioux] Indians a permanent reservation with defined boundaries and the right to make their own laws and be governed by them subject to federal supervision."[112] Two decades later, the Sisseton and Wahpeton bands were induced by federal Indian commissioners to open some of their reservation lands to settlement by non-Indians; the resulting Agreement of 1889 was then passed into law by the Act of 1891, which specified that the Indians agreed "to sell all their claim 'to all the unallotted lands within the limits of the reservation.'"[113] Despite the fact that the face of the 1891 Act contains "not a word to suggest that the boundaries of the reservation

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Circuit Court of Appeals' termination-era *DeMarrias* decision consisted primarily of the appellate court's simply praising what it called the trial court's "carefully considered" and "well reasoned opinion," an opinion that, in the Eighth Circuit's view, "clearly demonstrated that the effect of the [1889 Agreement with the Sisseton-Wahpeton Dakota and the 1891 Act ratifying the Agreement] was to restore the unallotted lands which the Indians ceded to the public domain and to remove such unallotted lands from the category of Indian country." *DeMarrias*, 319 F.2d at 846-47. The trial court, however, had issued a similarly perfunctory decision, relying primarily on *Bates v. Clark*, 95 U.S. 204 (1877). The trial court wrote:

> Equally well manifested by those Acts [i.e., the 1889 Agreement and the 1891 Act], though only implicitedly [sic] inscribed, is a congressional intent to diminish the original area limits of the reservation, to separate jurisdiction and in the process and as an overall product of the entire arrangement to end "Indian country" and the reservation status. . . . As to Indian country, it is said in *Bates v. Clark*:
>
> "The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

DeMarrias v. South Dakota, 206 F. Supp. 549, 551-52 (D.S.D. 1962) (citation omitted) (quoting *Bates*, 95 U.S. at 208). *But see*, *e.g.*, United States *ex rel.* Condon v. Erickson, 478 F.2d 684, 688 (8th Cir. 1973) (citations omitted) (citing, inter alia, *Bates*, 95 U.S. 204 (1877); Seymour v. Superintendent, 368 U.S. 351, 357-58 (1962)) ("It was originally held that Indian Country ceased to be such whenever Indians lost title to the land. This view has been laid to rest by the present definition of 'Indian Country' which includes all land within an Indian reservation *notwithstanding the issuance of any patent*."), *cited with approval in* Mattz v. Arnett, 412 U.S. 481, 505 n.23 (1973); *see also supra* note 16.

[110] *See DeCoteau*, 420 U.S. at 426-49 (majority opinion of Stewart, J., joined by Burger, C.J., and Blackmun, Powell, Rehnquist, and White, JJ.).

[111] *See id.* at 460-68 (Douglas, J., dissenting, joined by Brennan and Marshall, JJ.).

[112] *Id.* at 461 (Douglas, J., dissenting) (citing Treaty of Feb. 19, 1867, 15 Stat. 505, as amended, 15 Stat. 509, *reprinted in DeCoteau*, 420 U.S. at 449-55).

[113] *Id.* (Douglas, J., dissenting) (citing Agreement of 1889, art. I, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1036).

were altered,"[114] the majority of Justices in *DeCoteau* ruled that the Act "terminated" the Lake Traverse Indian Reservation.[115]

The departure from Indian law principles in *DeCoteau* is marked by the emergence of what scholars have called "magic language" judicially deemed to signal Congress's intent to shrink or "terminate" the boundaries of an Indian reservation.[116] The textual language that is said to denote such intent in *DeCoteau* consists of (1) the provision that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"[117] and (2) the provision that "[i]n consideration . . . the United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of two dollars and fifty cents per acre for each and every acre . . . ."[118] Thus, from the *DeCoteau* decision onward, the Supreme Court began treating such language of "cession" and "sum-certain" payment as a kind of talisman for resolving the question whether the use of particular land-sale language in allotment legislation constitutes congressional action that intentionally "wiped out"[119] an Indian reservation.[120]

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[114] *Id.* (Douglas, J., dissenting).

[115] *Id.* at 427-28 (majority opinion of Stewart, J.) ("We hold . . . that the 1891 Act terminated the Lake Traverse Reservation, and that consequently the state courts have jurisdiction over conduct on non-Indian lands within the 1867 reservation borders.").

[116] *See*, *e.g.*, Robert T. Anderson, Sarah A. Krakoff & Bethany Berger, American Indian Law: Cases and Commentary 286 (4th ed. 2020) (noting that in the reservation diminishment case *Hagen v. Utah*, 510 U.S. 399 (1994), "the Court has arguably expanded the list of 'magic language' so that returning land to the public domain also counts as an 'intent' to diminish"); *cf.* Tweedy, *supra* note 1, at 749 (footnote omitted) (noting that in reservation diminishment/disestablishment cases the Supreme Court "sometimes appears to expand the universe of qualifying magic language in an outcome-determinative manner").

[117] Agreement of 1889, art I, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1036, *quoted in DeCoteau*, 420 U.S. at 439 n.22; *see* Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177, 1212 & n.261 (2001) (citation omitted) (observing that in *DeCoteau* "the Court incorporated into its diminishment approach the search for 'magic language' in the statute" and that "[t]he 'magic language' . . . was that the tribe agreed to 'cede, sell, relinquish, and convey to the United States all . . . claim, right, title and interest'").

[118] Agreement of 1889, art. II, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 35, 36, *reprinted in DeCoteau*, 420 U.S. at 456; *see DeCoteau*, 420 U.S. at 448 ("The 1891 Act . . . appropriates and vests in the tribe a sum certain—$2.50 per acre—in payment for the express cession and relinquishment of 'all' of the tribe's 'claim, right, title, and interest' in the unallotted lands.").

[119] Transcript of Oral Argument at 27, DeCoteau v. Dist. Cty. Ct., 420 U.S. 425 (1975) (No. 73-1148) (statement of William F. Day, Jr., Esq., on behalf of Respondents) (arguing that the 1891 Act "wiped out the boundaries of [the Lake Traverse] reservation"); *cf.* Seymour v. Superintendent, 368 U.S. 351, 355 (1962) (addressing the Washington courts' interpretation of an Act of Congress and a Presidential proclamation "as completely wiping out the South Half of the Colville Reservation").

[120] *See DeCoteau*, 420 U.S. at 446 (citation omitted) (opining that the land-sale language at issue in *DeCoteau* "is virtually indistinguishable from that used

2. Tribal Understanding of the 1889 U.S. Agreement with the Sisseton-Wahpeton Dakota in *DeCoteau*—A Long-Overdue Examination

a. May 21, 1889—Meeting with Dakota Territory Citizens at Big Coulee, as Reported in the *Minneapolis Tribune*

Perhaps most disturbing is the fact that this "'magic language' approach to statutory interpretation"[121] originated in a context that demanded judicial ascertainment of the Indians' own understanding of the "agreement" they signed and that Congress then enacted into law. As the *DeCoteau* majority observed, the 1891 Act that the Supreme Court construed as having "terminated the Lake Traverse Reservation"[122] was passed pursuant to the policy of the 1887 General Allotment Act, which "empowered the President to allot portions of reservation land to tribal members and, *with tribal consent*, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit."[123] Tellingly, as its leading evidence of tribal consent, the *DeCoteau* Court pointed to a newspaper story, published in the *Minneapolis Tribune* in May of 1889, which purported to quote statements by "[s]pokesmen for the tribe" in response to the efforts of "a South Dakota banker, D.W. Diggs, . . . on behalf of the local white community," to acquire the lands "for commerce, farming, and railroad development."[124] According to the newspaper story, Diggs was part of a "committee appointed by the convention at Watertown[, Dakota Territory] to go to Washington to urge the completion of the arrangements for opening the Sisseton reservation."[125] Diggs himself served "as

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in the other sum-certain, cession agreements ratified by Congress in the same 1891 Act"); *infra* note 651 (noting the threat to other Indian nations posed by *DeCoteau*'s weaponizing of land-sale terms commonly found in U.S. agreements with tribes); *see also*, *e.g.*, Solem v. Bartlett, 465 U.S. 463, 470-71 (1984) (citing *DeCoteau*, 420 U.S. at 447-48) ("When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."); *cf.* Judith V. Royster, *Of Surplus Lands and Landfills: The Case of the Yankton Sioux*, 43 S.D. L. Rev. 283, 305 n.169 (1998) ("Prior to *DeCoteau*, . . . the Court required explicit language of termination before it would find the surplus land disestablished from the reservation."); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, 18 (1999) ("[S]urely even a modest application of the [Indian law] canon would treat 'cede, sell, relinquish, and convey' for a specified amount as ambiguous concerning whether the tribe had simply agreed to convey land title or had also taken the extraordinary act of ceding away whatever sovereignty it had then or might be recognized as having in the future.").

[121] Frickey, *supra* note 120, at 19.

[122] *DeCoteau*, 420 U.S. at 428.

[123] *Id.* at 432 (emphasis added) (citing Mattz v. Arnett, 412 U.S. 481, 496-97 (1973)); *see also infra* notes 644-645 and accompanying text.

[124] *DeCoteau*, 420 U.S. at 433 (footnote omitted).

[125] *A Large Pow-Wow: A Council at Big Brule to Urge the Opening of the Sisseton*

stenographer to report proceedings" when the "committee" of white Dakota Territory citizens "held a council with Chief Gabriel Renville and nine of his head men at the Big Coulee" on May 21, 1889 "to ascertain [the Indians'] views in regard to opening the reservation."[126] As truncated by the *DeCoteau* Court, Diggs ascribed the following words to the Sisseton-Wahpeton representatives:

> "We never thought to keep this reservation for our lifetime.
>
> . . . .
>
> ". . . Now that South Dakota has come in as a state we have some one to go to, to right our wrongs. The Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. We want to get the benefit of the sale. If the government will pay what they owe, we will be pleased with the opening. There will be left over allotments 880,000 acres. If the government pays what they owe, and pay what they agree per acre, we will be pleased with the opening. When the government asks me to do anything, I am always willing to do it. I hope you will try to get the government to do what is right.
>
> "If the government will do this, it will benefit both the Indians and the whites [and illustrates by holding up half a dozen keys [in a] perpendicular position, separately], we all stand this way [and then, pressing them against each other], we will be as one key. When the reservation is open[127] we meet as one body. We be as one.
>
> . . . .
>
> ". . . If we get the money we will open up. Your committee needn't be discouraged, we will open up.
>
> ". . . We are anxious to become citizens and vote. We have laid before you all we have to say from our hearts. . . ."[128]

Reservation, Minneapolis Tribune, May 22, 1889 [hereinafter "*A Large Pow-Wow*"], https://newspapers.mnhs.org/jsp/viewer.jsp?doc_id=mnhi0005/1DFC5F58/89052201&page_name=1.

[126] *Id.*; *see* Angelique EagleWoman, *Permanent Homelands Through Treaties with the United States: Restoring Faith in the Tribal Nation-U.S. Relationship in Light of the* McGirt *Decision*, 47 Mitchell Hamline L. Rev. 640, 666 (2021) (observing that in *DeCoteau* "the Court drew on local officials' accounts" which "included accounts from those who pressured tribal leadership to open the reservation, and a heavily excerpted, unattributed newspaper article"); *cf.* Fletcher § 7.2, *supra* note 14, at 299 (noting commentators' observation that "the [*DeCoteau*] Court's reliance on likely self-interested contemporaries is shoddy history at best").

[127] In the newspaper story the word that is actually used here is not "open" but "opened." *See infra* note 136 and accompanying text.

[128] *DeCoteau*, 420 U.S. at 433-34 (bracketed alterations in original newspaper story, except "[in a]", which is an alteration added by the *DeCoteau* Court) (footnote omitted) (all other omissions added by the *DeCoteau* Court) (quoting *A Large Pow-Wow*, *supra* note 125). The comma in the middle of the phrase "to go to, to right our wrongs" does not appear in the newspaper story, but was silently added by the *DeCoteau* Court. *Cf. infra* note 136 and accompanying text; *infra* note 148.

While the *DeCoteau* Court opined that these excerpts from the 1889 *Minneapolis Tribune* newspaper story show that Chief Gabriel Renville and the other Sisseton-Wahpeton representatives "spoke clearly" in favor of terminating their reservation,[129] a fuller examination of the story in the context of the U.S. government's relations with the Sisseton-Wahpeton Dakota people demonstrates the falsity of that conclusion.[130]

First, *DeCoteau*'s excerpts from the newspaper story are a classic example of "cherry-picked statements"[131] that create an illusion of intent to terminate or shrink reservation boundaries.[132] An examination of the entire newspaper story reveals that all of the Sisseton-Wahpeton representatives[133] who met with the group of white citizens of Dakota Territory

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[129] *DeCoteau*, 420 U.S. at 449.

[130] As for *DeCoteau*'s prefacing its excerpts from the newspaper story with the misleading statement that "[i]n May [1889], Diggs met with a council of tribal leaders, who told him that the tribe would consider selling the reserved lands if the Government would first pay a 'loyal scout claim' which the tribe believed was owing as part of the 1867 Treaty," *id*. at 433, see *infra* note 178 and accompanying text; *infra* note 403 and accompanying text.

[131] *Cf.* Nebraska v. Parker, 577 U.S. 481, 490-91 (2016) (rejecting reliance on "cherry-picked statements by individual legislators" as credible "evidence of diminishment").

[132] The respondent's brief in the *DeCoteau* case, submitted to the Supreme Court by the attorney general of South Dakota, likewise deploys decontextualized "cherry-picked statements" from the 1889 newspaper story, at the beginning of the brief's argument, to establish at the outset an illusion of tribal consent to the Lake Traverse Reservation's termination. The state attorney general wrote: "In early 1889 certain members of the tribe were approached and indicated they would sell their reservation: 'We never thought to keep this reservation for our lifetime. . . . We don't expect to keep reservation. We want to get the benefit of the sale . . . .'" Brief for Respondent at 6-7, DeCoteau v. Dist. Cty. Ct. for Tenth Jud. Dist., 420 U.S. 425 (1975) (No. 73-1148), 1974 WL 187535, at *10 (citation omitted). In their reply brief, attorneys for the Sisseton-Wahpeton petitioner, Cheryl Spider DeCoteau, called attention to this misleading use of the 1889 newspaper story:

> Respondent cites these materials as dispositive of Congressional intent to disestablish the Reservation two years later in 1891. The materials have nothing to do with Congressional intent. The [*Minneapolis*] *Tribune* story excerpts are completely out of context; patching parts of statements of several people in a misleading way. The negotiation proceedings read in their entirety do not at all support Respondent's disestablishment conclusion. Both documents were prepared by non-Indians and the reliability of the translations from Sioux must also be questioned.

Reply Brief for Petitioner at 14 n.15, DeCoteau v. Dist. Cty. Ct. for Tenth Jud. Dist., 420 U.S. 425 (1975) (No. 73-1148), 1974 WL 186005, at *9 n.15 (citations omitted).

[133] *DeCoteau* amalgamates the views of the five Sisseton-Wahpeton representatives quoted in the newspaper story—Chief Gabriel Renville, Michael Renville, John B. Renville, Major Amos, and Solomon Two Stars—into a single column of edited, rearranged, and strung-together excerpts without individual attribution, *see DeCoteau*, 420 U.S. at 433-34, compounding the "cherry-picked statements" problem by creating the false appearance of a univocal tribal narrative allegedly conveying "clear expressions of tribal . . . intent," *id.* at 447, to accept the reservation's termination. The Supreme Court thus appears to have emulated the technique used by the attorney general of South Dakota and flagged as "misleading" in the reply brief of petitioner Cheryl Spider DeCoteau. *See supra* note 132.

were focused on a single overarching imperative: requiring the U.S. government to fulfill its *existing* obligations before the tribe would agree to terms regarding potential *future* sales of land within the Lake Traverse Reservation. Thus, the newspaper story contains extensive comments by Chief Gabriel Renville:

> ["]I don't feel that I made friends with the white man today. At the time of the massacre in 1862 our people made friends with the whites and protected them from the hostiles with all heart. We stand between the hostiles. We suffered a great deal. After that the government took our annuities and we have suffered from it. Many years we had worked hard to get what belonged to us, and when the bill was made out the government had taken out two years. That is not right. We never thought to keep this reservation for our lifetime. If your customer owe[s] you and ask[s] for more credit, you won[']t trust him till he pays up what he owes. If the government pay[s] back annuity and ask[s] us to sell our land, the question will be what price you shall pay for it.["]
>
> In answer to the question, "what do you think the government ought to pay for the land?" he replied:
>
> "I can't say. When commission and Indians get together they talk it over."
>
> Being asked what the Indians claimed, he formulated it as follows:
>
> First, they want their patents issued, securing to them their land in severalty.
>
> Second, they claim that under the treaty of 1851 there is due them in annuities cut off in 1862 the amount as adjusted and admitted by the interior department of $305,987.37 and for the two years left out of the account of $36,800, making a total of $342,787.37.
>
> Third—According to the treaty of 1851 the survey of their land is wrong. The amount of land taken from them by this is about 48,000 acres.[134]

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[134] *See* Valerie Sherer Mathes, *Charles C. Painter's "How We Punish Our Allies": Advocating for Gabriel Renville and the Sisseton and Wahpeton Dakota Scouts*, S.D. Hist., Summer 2021, at 139, 143 (footnote omitted) ("Although the loyal scouts had finally gained a permanent home, they continued to face corruption . . . . During his investigation in 1888, [Indian Rights Association agent Charles C.] Painter learned that the surveyors who set the reservation boundaries had deliberately taken '46,000 acres off from the border' and charged the Indians '$45,000 for running the lines.'"). For a thorough discussion of the Indian Rights Association's prominent role in "championing a policy of dispossession and assimilation in the 1880s" while contending with strong and determined resistance from a reform organization called the National Indian Defense Association and its founder Thomas A. Bland, see C. Joseph Genetin-Pilawa, Crooked Paths to Allotment: The Fight over Federal Indian Policy after the Civil War 112-55 (2012) (book chapters titled "Thomas Bland's Moment, 1875-1886" and "The Allotment Controversy, 1882-1889"). Professor Genetin-Pilawa explains that the Indian Rights Association adopted the "institutional innovation" of "employing a lobbyist at the capital" and "tapped Charles C. Painter, an experienced activist for African American rights, . . . for this position," a full-time advocacy appointment Painter held until his death in 1895. *Id.* at 137-38 (endnote omitted).

> These are the specific demands they make of the government. They also claim that there is due from the government as pay for Chief Renville and 12 of his scouts for five month's service and the same chief and 23 scouts for 14 month's service performed by directions of Gen. Sibley in 1863 and 1864. Gabriel also modestly suggested that he thought that all the Indians who are 21 when the final settlement is made should receive 160 acres of land. The bill gives this amount to all 21 or over at the date of the bill's passage, with 80 acres to those between 18 and 21, and 40 acres to all under 18. He added, in conclusion, that when the claim is settled they want the money paid in cash and not in shoe pegs and overalls.
>
> . . . .
>
> ["]If the government don't settle up there is no use to send a commission here.
>
> . . . .
>
> ["]If you can't get what we want, and the government don't give back what they owe, then what. The money we ask for we worked for by protecting the frontier—at the massacre of 1862. We didn't run off, but guarded 500 prisoners with Gen. Sibley. We are tired of asking for what is due us for many years. If this money is not paid us, and we are citizens and have to pay taxes, what will we pay taxes with? You will take our ponies. We are anxious to become citizens and vote. We have laid before you all we have to say from our hearts. We believe what you say. We hope in South Dakota we will be one and help each other. We thank you and depend on you to help us.["][135]

The newspaper story also conveys statements by another Sisseton-Wahpeton representative, Michael Renville:

> ["]You have heard about the mistake of the survey. I will not speak further of the survey. When you come here and make friends with us we are pleased. The Indian suffers from mistakes; he don't know how to correct them. Now that South Dakota has come in as a state we have some one to go to to right our wrongs. The Indians have taken their land in severalty. They are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. We want to get the benefit of the sale. If the government will pay what they owe, we will be pleased with the opening. There will be left over allotments 880,000 acres. If the government pays what they owe, and pay what they agree per acre, we will be pleased with the opening. When the government asks me to do anything, I am always willing to do it. I hope you will try to get the government to do what is right.
>
> ["]If the government will do this, it will benefit both the Indians and the whites [and illustrates by holding up half a dozen keys a in [sic] perpendicular position, separately,], we all stand this way [and then, pressing them against each other,], we will be as one key. When the reservation is opened we meet as one body. We be as one.["]
>
> . . . .

[135] *A Large Pow-Wow*, *supra* note 125 (conveying statements of Sisseton-Wahpeton Chief Gabriel Renville).

> ["]I forgot to say when we went to see the great father at Washington, the whites said: 'If you get the money it won't last long.' But we want money as well as white men. He say if you get money won[']t open reservation. If we get the money we will open up. Your committee needn't be discouraged, we will open up.["][136]

The words of two additional tribal representatives, Major Amos[137] and John B. Renville,[138] are reported briefly in the newspaper story. John B. Renville said: "I think the most important thing is that we own patents. Other things will come afterwards. We want you to push that so that the old people will get the benefit. Some are old and need the money from the annuities."[139] And Major Amos said: "All the points have been mentioned. We depend on you to help us all you can."[140]

Finally, the 1889 newspaper story purports to impart the views of Solomon Two Stars, another Sisseton-Wahpeton representative, in the following terms:

> ["]Other speakers, you have heard what they say. I will mention, if you are going to help us, some things they have not spoken of. After severalty law passed man came to make allotments. The babies got no land. It is not right. Sixteen and seventeen year old they got 40 acres. Not right. When babies grow up they have nothing. It is not right. You speak friendly to us. We are friends to you. We lost two years. Don't got any crops. We are suffering, no telling about this season. We may all starve if Cook don't take in wood.["] (Cook is the Wilmot[, Dakota Territory] merchant who buys their wood, which is their most reliable source of revenue.) ["]We have heard good words. My heart is happy. We are friends to you. We show it in time of massacre.["][141]

Far from exhibiting any wish to facilitate or accept the Lake Traverse Reservation's termination, the unedited statements of the five Sisseton-Wahpeton representatives in the 1889 *Minneapolis Tribune* newspaper story show that those leaders were united in insisting the United States

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[136] *Id.* (conveying statements of Sisseton-Wahpeton representative Michael Renville).

[137] In the Executive Branch report on U.S. negotiations with the Sisseton-Wahpeton Dakota at Sisseton Agency in November and December, 1889, Major Amos is referred to as "Big Amos." *See* S. Exec. Doc. No. 66, *infra* note 157, at 18 (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs) (mentioning "Big Amos" as one of the Indians who met earlier in 1889 with Diggs and others "at Big Cooley to hold council"); *see also* Elijah Black Thunder et al., Ehanna Woyakapi: History and Culture of the Sisseton-Wahpeton Sioux Tribe of South Dakota 45 (photo. reprt. 2017) (1975) (identifying "Big Amos" as one of the "men serving as head scouts or scouts," with Gabriel Renville serving "as Chief of Scouts," during the period immediately following the U.S.-Dakota War).

[138] The newspaper story describes John B. Renville as "a preacher in the Presbyterian Church, under the shadow of which the party was sitting, a man of 56, in whose veins a large proportion of white blood flows, and who has a white wife." *A Large Pow-Wow*, *supra* note 125.

[139] *Id.* (conveying statement of Sisseton-Wahpeton representative John B. Renville).

[140] *Id.* (conveying statement of Sisseton-Wahpeton representative Major Amos).

[141] *Id.* (conveying statement of Sisseton-Wahpeton representative Solomon Two Stars).

redress *past* transgressions and broken promises before the tribe would agree to any *future* land sales. In particular, the five Sisseton-Wahpeton leaders demanded that the U.S. government satisfy the following articulated grievances:

- The government's failure to complete the process of securing allotments to tribal members as prescribed by the 1867 Sisseton-Wahpeton Treaty,[142] a process that the leaders now insisted be modified to guarantee equalized land assignments in severalty to women and minors, in addition to adult male heads of families.
- The government's wrongful withholding of "back annuities," which the tribal leaders insisted be "paid in cash" rather than be doled out piecemeal in the form of future purchases of farming provisions and supplies (derided as "shoe pegs[143] and overalls" by Chief Gabriel Renville).
- The government's erroneous surveying of the Lake Traverse Reservation's boundaries, which resulted in 48,000 acres being wrongfully excluded from the eastern portion of the reservation.
- The government's failure to pay salaries and expenses for the service of a number of Sisseton-Wahpeton scouts, including Chief Renville himself, who accompanied and assisted Brigadier General Henry Hastings Sibley of the U.S. Military District of Minnesota[144] in retaliatory/punitive military expeditions in 1863 and 1864 against Dakota people who had fled from Minnesota after the conclusion of the U.S.-Dakota War.[145]

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[142] *See* Treaty of Feb. 19, 1867, art. V, 15 Stat. 505, 506, as amended, 15 Stat. 509, *reprinted in* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 452-53 (1975).

[143] It is unclear whether the intended words were "shoe pegs" or "shoe pacs." *Compare supra* note 135 and accompanying text ("shoe pegs"), *with infra* note 227 and accompanying text ("shoe pacs"), *and infra* note 393 and accompanying text ("shoe pacs").

[144] *See* Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 Stan. L. Rev. 13, 19 (1990) (noting that during the U.S.-Dakota War of 1862 "[t]he American forces were led by Colonel Henry H. Sibley, appointed on August 19 by Minnesota Governor [Alexander] Ramsey to be commander of the volunteer forces and named on September 29 by President Lincoln to be Brigadier General of United States Volunteers in charge of the U.S. Military District of Minnesota").

[145] Chief Renville's grievance regarding the U.S. government's failure to compensate the Dakota scouts, *see supra* text accompanying note 135 (showing newspaper story's statement that the Indians "also claim that there is due from the government as pay for Chief Renville and 12 of his scouts for five month's service and the same chief and 23 scouts for 14 month's service performed by directions of Gen. Sibley in 1863 and 1864"), appears to have been a projection of his disappointment over the Senate's having stricken certain articles of the 1867 Treaty, as originally drafted and agreed-to by Renville and other Sisseton-Wahpeton signatories, prior to final ratification. The omitted articles would have provided such compensation. *See infra* note 488 and accompanying text. The topic of the unpaid scouts likely had been instigated, moreover, by D.W. Diggs, who had maneuvered the Indians into attending the May 1889 meeting with white citizens of Dakota Territory and who seemed intent on ingratiating himself with Chief Renville, the former leader of the scouts, in the course of Diggs's lobbying the federal government to open the Lake Traverse Reservation for

In the context of their airing these core grievances in the 1889 newspaper story, the statements of the Sisseton-Wahpeton representatives, as conveyed by the Dakota Territory citizen/banker/stenographer D.W. Diggs, do *not* evince tribal consent to any alteration of the boundaries of the Lake Traverse reservation, nor to the elimination of the reservation altogether. Rather, in context, the statement attributed to Chief Gabriel Renville that "We never thought to keep this reservation for our lifetime"[146] signifies only that the Sisseton-Wahpeton Indians remained willing to sell *land within* their reservation notwithstanding their insistence that "the government pay [the] back annuity"[147] it owed the tribe first. Likewise, in context, the statement ascribed to Michael Renville that "We don't expect to keep reservation" means only that the tribal representatives remained "willing the surplus land" *within* their reservation "should be sold," provided that past "mistakes" were first redressed, and that Diggs's "committee needn't be discouraged" about this.[148] In addition, Michael Renville's use of the words "open," "opened," and "opening" with regard to the reservation's potential future[149] signifies nothing more than a willingness to allow "white settlers onto the reservation whose habits of work and leanings toward education would invigorate life on the reservation."[150] None of these statements nor any others from the 1889 newspaper story[151] reasonably could be construed

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railway development. *See infra* note 153 and accompanying text; *infra* note 401 and accompanying text; *infra* note 488.

[146] *Supra* text accompanying note 135.

[147] *Supra* text accompanying note 135.

[148] *Supra* text accompanying note 136.

[149] *Supra* text accompanying note 136.

[150] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 462 (1975) (Douglas, J., dissenting) (footnote omitted).

[151] Thus, the statement "Now that South Dakota has come in as a state we have some one to go to, to right our wrongs," and the metaphor of the "half a dozen keys . . . press[ed] . . . against each other" to make "one key," *id.* at 433-34 (citation omitted) (quoting in silently altered form *A Large Pow-Wow*, *supra* note 125 (conveying statements of Michael Renville)), extracted and decontextualized by the *DeCoteau* Court, likewise do *not* intimate tribal consent to abolishing the reservation. Rather, those quotes, attributed to Sisseton-Wahpeton representative Michael Renville, appear in the midst of his referring to "the mistake of the [reservation] survey" and his hope that, with South Dakota's imminent entry into the Union, a new forum or mechanism might arise that could help "correct" such "mistakes," *see supra* note 136 and accompanying text, by reconciling the survey with the reservation's actual boundaries as established by the 1867 Treaty. In other words, those quoted passages, in their original context, were uttered in the spirit of welcoming the prospect of support from the incoming government of South Dakota, as well as from the white citizens/neighbors who would be purchasing the surplus lands, in *rectifying and validating*, not eliminating, the Lake Traverse Reservation's boundaries.

It also must be noted that when *DeCoteau* was decided the Supreme Court was fully aware that state court systems, like the one that would develop once South Dakota became a state on November 2, 1889, *see infra* note 161, were important forums for allowing Indians as plaintiffs to seek relief against wrongdoing by non-Indian defendants, *including wrongdoing that occurred on reservations*. *See*, *e.g.*,

as telegraphing tribal consent to the U.S. government's annihilation of the Sisseton-Wahpeton Dakota people's "permanent" treaty-guaranteed homeland, the Lake Traverse Reservation.[152]

b. November 30, 1889—U.S.-Dakota Negotiations at Sisseton Agency

A newspaper story, moreover, is not a legally operative document; and the Supreme Court's primary reliance in *DeCoteau* on statements that white settlers, motivated by prospects of self-enrichment through Indian land acquisitions,[153] purported to be the translated words of non-English

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Williams v. Lee, 358 U.S. 217, 219-20 (1959) (citing, inter alia, Felix v. Patrick, 145 U.S. 317, 332 (1892)) (observing that on-reservation state-court "suits by Indians against outsiders have been sanctioned"); *see also* Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, 467 U.S. 138, 148 (1984) (citations omitted) ("This Court . . . repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country."). Accordingly, the fact that a Sisseton-Wahpeton leader purportedly was quoted in an 1889 newspaper story as having expressed the hope that South Dakota's courts might become a place "to go to, to right our wrongs" does *not* imply that the Indians expected, or consented to, the elimination of the Lake Traverse Reservation.

[152] Treaty of Feb. 19, 1867, art. III, 15 Stat. 505, 506, as amended, 15 Stat. 509 (setting apart "a permanent reservation" for the Sisseton-Wahpeton bands of the Santee Sioux Indians), *reprinted in DeCoteau*, 420 U.S. at 451-52.

[153] *See DeCoteau*, 420 U.S. at 431 n.8 (alteration in original) (citation omitted) ("On April 22, 1889, a banker from Milbank, S. Dak., D.W. Diggs, wrote to the Secretary of the Interior: '[The Lake Traverse Reservation] is a great detriment to our interests, as it blocks the progress of two or three lines of railroad that we are anxious to see completed. We need these roads badly, and the opening of the reservation would give new impetus to immigration which has been attracted by government lands further west. Any information that will enable the citizens of this section to render any service that may be needed in hastening the opening will be appreciated.'"); *see also* Brief for Petitioner at 18, DeCoteau v. Dist. Cty. Ct. for Tenth Jud. Dist., 420 U.S. 425 (1975) (No. 73-1148), 1974 WL 186007, at *15 (citations omitted) ("One of the most insistent supporters of the reservation opening was D.W. Diggs, Banker, Bank of Milbank, South Dakota, who ultimately became one of the commissioners sent to negotiate the opening with the Sisseton and Wahpeton bands. Diggs' main concern was the barrier that the reservation was posing to the development of local resources, in particular the completion of two or three railroad lines. Diggs' local interests suggest the possibility of an allegiance extraneous to the mandated goals of the commission.").

In his April 22, 1889 letter—typewritten under the masthead "Sargent & Diggs, Bankers" for "The Bank of Milbank" in "Milbank, Dakota"—Diggs promoted himself as a potential member of the commission for negotiating with the Sisseton-Wahpeton Indians: "If any need should exist for a special agent here, in the opening, or a commission to be appointed, I trust you will remember Yours truly." Nat'l Archives Recs. of the Bureau of Indian Aff. Rec. Grp. 75, Spec. Case 147 (Sisseton), Letter No. 26163-1889, encl. 5 (Apr. 2, 1889 letter from banker D.W. Diggs to John W. Noble, Secretary of the Interior) (on file with author), *cited in DeCoteau*, 420 U.S. at 431-32 n.8. Diggs pressured the Secretary further less than a month later, writing: "My Dear Gen'l I presume you are annoyed by my frequent communications, but the matter of opening the Sisseton Reservation is one of sufficient importance to all our people to warrant the utmost effort to secure it. Hoping to hear from you soon. I am Yours Sincerely D.W. Diggs." *Id.*, encl. 2 (May. 13, 1889 handwritten note from banker D.W. Diggs to John W. Noble, Secretary of the Interior) (on file with author), *cited in*

speaking Sisseton-Wahpeton representatives in that 1889 newspaper story is a telltale sign of the actual *lack* of evidence of tribal consent to the Lake Traverse Reservation's termination via legally operative federal sources, i.e., the 1891 Act of Congress and its associated legislative history.[154] In this regard, the 1891 Act contains "not a word to suggest that the boundaries of the reservation were altered."[155] Likewise, the legislative history is devoid of any indication that Congress intended to destroy the reservation when it passed legislation enacting the tribe's agreement to the sale of unallotted lands within the reservation's boundaries.[156]

Indeed, the most significant document comprising the 1891 Act's legislative history—an 1890 Executive Branch report transmitted by President Benjamin Harrison to the Senate and House of Representatives—contains several pages of detailed, painstakingly transcribed negotiations with leaders of the Sisseton and Wahpeton bands of the Dakota Indians, including the translated words of Chief Gabriel Renville; yet, nothing in the 29-page report evidences tribal consent to shrinking or abolishing the Lake Traverse Reservation.[157] The document is titled "A report relative to the purchase and release of the surplus lands *in the Lake Traverse Indian Reservation*,"[158] and throughout the report statements of U.S. officials refer

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DeCoteau, 420 U.S. at 431-32 n.8.

[154] In his engaging autobiography, tribal attorney Robert Pirtle writes:

> [A]s if to add insult to injury, the Supreme Court stooped to including in its 1975 *DeCoteau* decision a newspaper article from May 1889, in which a tribal spokesman was quoted as having stated that the Tribe never hoped to keep the Reservation, that it was grateful to the federal government for paying its "loyal scout claim" payments for not joining in the Great Sioux Uprising of 1862 but acting as scouts for federal troops instead, that tribal members were anxious to get payments for the unallotted lands and would be glad to open up the Reservation for settlement by non-Indians. Such a newspaper article has no business being included in a Supreme Court opinion as it is not evidence, nor is it legislative history either of the 1889 agreement or the Congressional Act ratifying it. And we all know how newspaper reporters change our statements and twist stories all around to fit their predisposed beliefs. How do you think a white newspaper reporter in South Dakota in 1889 regarded Indians? Besides, the tribal spokesman spoke no English, had no idea what tribal sovereignty meant as a legal matter or how it fit in the complex matrix with state and federal law, and most certainly did not intend to represent that the Tribe wished to give up its sovereignty in the 1891 Act.

Pirtle, *supra* note 106, at 446.

[155] *DeCoteau*, 420 U.S. at 461 (Douglas, J., dissenting); *cf.* King, *supra* note 65, at 406 (footnote omitted) ("In dissent [in *DeCoteau*], Justices Douglas, Brennan, and Marshall accused the majority of manufacturing congressional intent.").

[156] *See infra* notes 157-620 and accompanying text (thoroughly examining *DeCoteau*'s legislative history).

[157] *See* S. Exec. Doc. No. 66, 51st Cong., 1st Sess. (1890) (report of councils with Sisseton and Wahpeton Indians). The *DeCoteau* Court relegated discussion of selected excerpts from this crucial document to a single footnote, *see DeCoteau*, 420 U.S. at 435-37 n.16, subordinating this official government report to the Court's primary focus on the 1889 *Minneapolis Tribune* newspaper story. *See also infra* notes 373-451 and accompanying text.

[158] S. Exec. Doc. No. 66, *supra* note 157, at 1 (emphasis added). The phrase "purchase and release of the surplus lands" in the title of the Executive Branch report, as well as in the

to the developing agreement as entailing the Indians' potential consent to the sale of lands *within the reservation's boundaries*.[159] This federal objective, to elicit tribal consent to the sale of lands *within the reservation*, was explained by General Eliphalet Whittlesey, chairman of the U.S. commission, when he and the other appointed negotiators[160] first met with an

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opening sentence of the House of Representatives' report on the 1889 Agreement and the bill for ratifying it, *see infra* text accompanying note 467, evidences the Agreement's alignment with, and amplification of, the policy of the General Allotment Act, Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 389 (authorizing the Secretary of the Interior to negotiate with Indian tribes "for the purchase and release" of surplus lands within reservations), a policy that "clearly does not . . . abolish the reservations," United States v. Celestine, 215 U.S. 278, 287 (1909) (citation and internal quotation marks omitted). *See also* S. Exec. Doc. No. 66, *supra* note 157, at 1 (letter from President Benjamin Harrison to the Senate and House of Representatives) (referring to the 1889 negotiations with the Sisseton and Wahpeton bands "for the purchase and release of the surplus lands in the Lake Traverse Indian Reservation" as "having been conducted under the authority contained in the fifth section of the general allotment act of February 8, 1887"); *supra* notes 46-47 and accompanying text; *infra* note 378; *infra* notes 644-647 and accompanying text.

[159] *See* S. Exec. Doc. No. 66, *supra* note 157, at 1 (letter from President Benjamin Harrison to the Senate and House of Representatives) ("surplus lands in the Lake Traverse Indian Reservation"); *id.* at 2 (letter from Interior Secretary John W. Noble to President Harrison) ("unallotted lands within the Lake Traverse Reservation"); *id.* at 3 (letter from Indian Affairs Commissioner T.J. Morgan to Interior Secretary John W. Noble) ("surplus lands within the Lake Traverse Reservation," "unallotted land within the reservation"); *id.* at 5 (letter from appointed negotiators Eliphalet Whittlesey, D.W. Diggs, and Charles A. Maxwell to Indian Affairs Commissioner T.J. Morgan) ("surplus lands within their (the Lake Traverse) reservation").

[160] Just prior to General Whittlesey's opening remarks on November 30, 1889, William McKusick, the U.S. Indian agent at Sisseton Agency, introduced all three members of the commission:

> Members of the Sisseton and Wahpeton tribe and now fellow-citizens, I have called you together to meet a Commission sent here by the United States Government. That Commission is now before you. On my left is General Whittlesey. He has been for many years secretary of the Board of Indian Commissioners. His duties have been to inspect all goods bought for your schools; he inspects all goods before they are sent. If there is a man in the world entitled to your confidence, it is General Whittlesey.
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> Next on the Commission is Mr. Maxwell. He knows all about the lands at the agencies and knows about your lands here, and is particularly fitted for the place. Next on the Commission is Mr. Diggs, of Milbank. We all agree that he is a far-seeing man and will work for your interests. I congratulate you on meeting a Board of Commissioners so competent and favorably disposed in your behalf. General Whittlesey will now explain to you their business with you, and for what purpose you are called together.

Id. at 15-16 (report of councils with Sisseton and Wahpeton Indians) (statement of U.S. Indian Agent William McKusick); *see also* Gary Clayton Anderson, Gabriel Renville: From the Dakota War to the Creation of the Sisseton-Wahpeton Reservation, 1825-1892, at 143 (2018) (noting that "[D.W.] Diggs joined Eliphalet Whittlesey, former secretary of the Board of Indian Commissioners, and Charles W. Maxwell from the Government Land Office in opening negotiations with Renville at Sisseton Agency"); *cf. infra* note 513 (noting Whittlesey's service on the Board of Indian Commissioners from 1875 to 1899).

assembled portion of Sisseton and Wahpeton tribal members at Sisseton Agency, South Dakota,[161] on November 30, 1889:

> You have a tract of land which is unoccupied and of no use to you, and you have been reported in Washington as wishing to dispose of some of those lands; they are yours and no one wishes to take them from you. There is this difference between you and other landowners, you can sell only to the Government of the United States. . . .
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> . . . .
>
> [Y]ou see we are not sent here to force anything on you. We do not intend to say one word to deceive you or to do one thing that is to wrong you. We want to do, and have you do, what is best for you and your children. We want to know what your proposition is. We wish you to say if you wish to sell any of this land, and if any, how much, and then we would like to have you agree on a price. . . . Now, if any of you are willing to talk in regard to this matter, we will listen, or if you do not care to talk now we will wait patiently to hear you when you are ready. There is a map of your reservation; the red marks show the allotted lands. This is from Washington, and is correct. We are ready to hear you if you are ready to talk.[162]

To this, Chief Gabriel Renville responded: "There are not one-half of our people here, for that reason we would like to take the matter into consideration and set a day to talk with you."[163] Referring to Whittlesey's having read aloud detailed "instructions and letters" from the Secretary of the Interior,[164] Chief Renville said: "We would like a translation of the letter

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[161] South Dakota was proclaimed a state, along with North Dakota, on November 2, 1889, thereby displacing the former Dakota Territory. *See Presidents Cleveland and Harrison contribute to North and South Dakota statehood*, Rapid City J., Oct. 13, 2014, https://rapidcityjournal.com/presidents-cleveland-and-harrison-contribute-to-north-and-south-dakota-statehood/article_64dd45cb-a559-5aba-be90-f5f86d73a645.html ("At 3:40 p.m. EST on Nov. 2, 1889, President Benjamin Harrison signed almost identical statehood proclamations that created North Dakota and South Dakota. No one will ever know which state was the 39th or the 40th to enter the Union because Harrison covered and shuffled the documents before and after signing them. He proudly declared, 'They were born together—they are one and I will make them twins.'").

[162] S. Exec. Doc. No. 66, *supra* note 157, at 16 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[163] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[164] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey). The Commissioner of Indian Affairs had obtained approval from the Secretary of the Interior after having transmitted to the Secretary, on August 13, 1889, a proposed "draught of instructions . . . for the guidance of a Commission (to be appointed) to negotiate with the Sisseton and Wahpeton Indians for the sale of their surplus lands under provision of the Act of February 8, 1887," i.e., the General Allotment Act. Nat'l Archives Recs. of the Bureau of Indian Aff. Rec. Grp. 75, Land Div., Letters Received: Spec. Case 147 (Sisseton), Entry 96, Letter Book 188, at 198 (citation omitted) (on file with author) (Aug. 13, 1889 letter from T.J. Morgan, Commissioner of Indian Affairs, to John W. Noble, Secretary of the Interior), *cited in* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 434 n.13 (1975). In its entirety, the Secretary's letter of instructions states as follows:

Gentlemen:

Upon receipt hereof, you will proceed to the Sisseton Agency, Dakota, for the purpose of negotiating with the Sisseton and Wahpeton Indians for the relinquishment of such portions of the Lake Traverse Reservation, not allotted, as said Indians may consent to release.

Such negotiations are authorized by the 5th Section of the Act of February 7 [sic], 1887, which provides: "That any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable, between the United States and said tribe, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress."

The Lake Traverse Reservation was created by the 3rd Article of the treaty between the United States and the Sisseton and Warpeton [sic] Bands of Dakota or Sioux Indians, concluded February 19, 1867 (15 Stats., 506).

It contains 918,780 acres, of which some 127,887 acres have been allotted in severalty, and 1,417 acres reserved for church and other purposes, leaving a surplus of some 789,476 acres.

The allotments have virtually been completed, although it is possible that some few individuals who were not on the reservation when allotments were made in 1887, are entitled to allotments.

The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.

It is understood that the Indians desire to sell a portion at least, of their surplus lands.

You will call a full council of the bands and submit the subject for their consideration. If a majority of such council determine to sell any portion of the reservation, you will then agree upon the quantity of land to be sold, and its location, which should be described by sections, or other legal subdivisions of townships.

It is not considered advisable that the cession at this time should embrace all these surplus lands. A sufficient quantity should be reserved for future contingencies.

The terms and conditions of the sale should then be agreed upon, which should be just and equitable to the Indians, as well as to the United States.

You will explain to the Indians that under the Act of February 8, 1887, the sums agreed to be paid as purchase money will be held in the Treasury of the United States for their sole use, the same with interest thereon at 3 per cent per annum, to be at all times subject to appropriation by Congress for the education and civilization of said Indians.

The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement, which should be signed by at least a majority of the male adults of the bands.

All such adults should be given the opportunity to sign.

When freely and properly signed, your certificates and the certificate of the Official Interpreter, should be attached to the instrument.

The proceedings of the Council should be reduced to writing and attested by your signatures and that of the Official Interpreter.

The Indians should be informed that the negotiations will not be valid or binding until ratified by Congress.

read, as it is long and we do not remember it all. We are now men and we want to talk to you as men and understand each other."[165]

c. December 3, 1889—U.S.-Dakota Negotiations at Sisseton Agency

Negotiations resumed three days later, on December 3, 1889. At the outset the commission's chairman, General Whittlesey, said to the assembled Sisseton and Wahpeton Indians: "We hope you will speak freely and state your wishes, and remember that you are all equal, and no one has supremacy over you in any way."[166] A tribal member, Magaiyahe, then informed the negotiators that the Indians' "wishes will be presented by Gabriel Renville, who has been chosen as spokesman for the Sisseton and Wahpeton Indians."[167] Other Indians echoed this choice; one stated: "We have been with him since the happenings of 1862. . . . [H]e has led us in everything since then, and we are satisfied with him. We know that through his efforts we have made a home here, have an agency and schools."[168]

With his tribe's endorsement thus declared, Chief Gabriel Renville informed the U.S. negotiators that the Sisseton-Wahpeton people were "not ready to speak of the surplus lands at present" because "[t]here were three things in the way." He continued:

> The first is that the Government owes us. We have tried to get it, but can not. The second is that an error was made in the survey of this reservation, and we claim a piece which we ask be connected in with the surplus lands. We have received our patents since the meeting at Big Cooley,[169] which at that time was the third thing. . . . The feeling among the people is not that they do not intend to sell at all, but what we want is that our claim be allowed first. After that, if a commission comes, we will sell to them if we can agree on terms. We claim that our back annuities should be allowed from 1862 and not from 1864 as suggested by Indian Office. The error in the survey is shown by this map.[170]

General Whittlesey then proceeded to dispute the matter of the survey, saying, "If the survey left off a little on one side, it took in more on the

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Id. at 199-201 (letter from T.J. Morgan, Commissioner of Indian Affairs, as approved by John W. Noble, Secretary of the Interior, to members of commission tasked with conducting U.S. negotiations with the Sisseton and Wahpeton Indians) (on file with author) [hereinafter "Letter of Instructions"], *cited in* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 434 n.13 (1975).

[165] S. Exec. Doc. No. 66, *supra* note 157, at 16 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[166] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[167] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Magaiyahe, or Star).

[168] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Wicaurpinoupa [Wicanhpinonpa], or [Solomon] Two Stars).

[169] *See supra* notes 126-152 and accompanying text.

[170] S. Exec. Doc. No. 66, *supra* note 157, at 17 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

other side."[171] After further debate, Chief Renville firmly asserted: "This error is one reason why we will not dispose of our surplus lands."[172]

The chief continued: "The other [reason] is our claim for back annuities. If you will first see that we get these and then come for our surplus lands we will let you have them."[173] On this crucial issue—whether "back annuities" would have to be paid before the Indians would agree to the sale of unallotted lands within the Lake Traverse Reservation—intensive argumentation transpired for the remainder of the December 3 meeting and over the course of several additional days of the negotiations, until the final, culminating day of December 13.[174] In his message to the Senate and House of Representatives, President Benjamin Harrison summarized the protracted discussions regarding this aspect of the negotiations:

> Perhaps the question of the payment by the United States of the annuities which were forfeited by the act of February 16, 1863, should not have been considered in connection with this negotiation for the cession of these lands. But it appears that a refusal to consider this claim would have terminated the negotiation, and if the claim is just its allowance has already been too long delayed. The forfeiture declared by the act of 1863 unjustly included the annuities of certain Indians of these bands who were not only guilty of no fault, but who rendered meritorious services in the armies of the United States in suppression of the Sioux outbreak, and in the war of rebellion.
>
> The agreement submitted, I understand, provides for the payment of the annuities justly due to these friendly Indians to all the members of the two bands per capita. This is said to be the unanimous wish of the Indians, and a distribution to the friendly Indians and their descendants only, would now be very difficult if not impossible.[175]

President Harrison's letter and the extensive negotiations with the Sisseton-Wahpeton representatives, memorialized in the 1890 Executive Branch report, make clear that the "back annuities" the Indians insisted be paid before terms could be finalized regarding land sales within the Lake Traverse Reservation were treaty entitlements[176] wrongly confis-

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[171] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[172] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville); *see also* Anderson, *supra* note 160 at 143 ("The original boundary line for the eastern edge of the reservation, [Chief Renville] complained, had been moved too far west, leaving lands that had become Roberts County, Dakota Territory, in the east, in the hands of the whites. Whittlesey countered by saying that the government had compensated the Indians for this by adding lands in the west. More importantly, Whittlesey believed such an issue could only be rectified in the courts and was irrelevant to the discussion of this proposal."); *supra* note 134 and accompanying text.

[173] S. Exec. Doc. No. 66, *supra* note 157, at 17 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[174] *See id.* at 18-29 (report of councils with Sisseton and Wahpeton Indians).

[175] *Id.* at 1-2 (letter from President Benjamin Harrison to the Senate and House of Representatives).

[176] *See* Gustav Niebuhr, Lincoln's Bishop: A President, A Priest, and the Fate of 300 Dakota Sioux Warriors 17 (2014) ("The federal government promised in

cated and cut off by Congress in February 1863 in retaliation against the Dakota Indians after the conclusion of the U.S.-Dakota War of 1862.[177] Thus, essential to ascertaining the Indians' understanding of the 1889 Agreement, ratified and enacted by Congress in 1891, is careful consideration of this postwar retaliatory backdrop and its implications. By largely disregarding this crucial context for the 1889 Sisseton-Wahpeton negotiations—and by dismissively and misleadingly labeling the Indians' demand for back annuities as a "loyal scout claim"[178]—the Supreme Court posited

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an 1851 treaty to pay the Dakotas a sum of money—in gold—each June. With the annuity, Dakota families were to buy food and clothing, and receive whatever else—such as schools and farming implements—they might need to wean themselves from a traditional hunting economy."); *see also infra* note 439 and accompanying text (discussing 1851 Treaty of Traverse des Sioux). *See generally* Jonathon C. Horn, *Indian Annuities*, Colo. Encyclopedia, https://coloradoencyclopedia.org/article/indian-annuities ("Annuities were a fixed sum of money or goods that the U.S. government paid to Indigenous people on a regular basis for the sale of their lands. Treaties with Indigenous nations typically specified payments in dollar amounts over a period of years in return for land cessions."); Cohen's Handbook § 1.03[1], *supra* note 16, at 27 (footnote omitted) ("Treaties frequently called for the United States to deliver goods and services to the tribes as part of an exchange for vast amounts of Indian land. . . . Many treaties contained clauses calling for the payment of annuities or other monies.").

[177] Act of Feb. 16, 1863, 12 Stat. 652 ("*Be it enacted* . . . That all treaties heretofore made and entered into by the Sisseton, Wahpaton [Wahpeton], Medawakanton [Mdewakanton], and Wahpakoota [Wahpekute] bands of Sioux or Dakota Indians, or any of them, with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States."); *see also* H.R. Rep. No. 1953, 50th Cong., 1st Sess., at 5 (1888) ("Indians Who Served in the Army of the United States") (letter from J.D.C. Atkins, Commissioner of Indian Affairs, to William F. Vilas, Secretary of the Interior) ("By act of Congress, February 16, 1863, in which the outraged feelings of the country, as well as its indiscriminating wrath, found expression, all treaties with the four bands [of Dakota Indians] were abrogated, their lands in Minnesota and their funds were confiscated, although part of the Sisseton and Wahpeton band remained loyal and enlisted in the Army."). *See generally* Howard J. Vogel, *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland*, 39 Wm. Mitchell L. Rev. 538 (2013) (discussing the question of the legality of Congress's 1863 retaliatory actions against the Santee Dakota).

[178] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 433 (1975) ("In May [1889], Diggs met with a council of tribal leaders, who told him that the tribe would consider selling the reserved lands if the Government would first pay a 'loyal scout claim' which the tribe believed was owing as part of the 1867 Treaty."); *see also id.* at 435 (footnote omitted) (stating that the negotiations with the Sisseton-Wahpeton Indians in late 1889 "show that the Indians wished to sell outright all of their unallotted lands, on three conditions," including "that Congress appropriate moneys to make good on the tribe's outstanding 'loyal scout claim'"). The term "loyal scout claim," although placed in quotation marks by the Supreme Court in *DeCoteau*, appears nowhere in the 1889 *Minneapolis Tribune* newspaper story, *A Large Pow-Wow*, *supra* note 125, to which the Court adverted in its first use of that term on page 433 of the *DeCoteau* majority opinion, *see DeCoteau*, 420 U.S. at 433, nor anywhere in the 1890 Executive Branch

a false historical narrative concerning "expressions of tribal . . . intent,"[179] expressions that are crucial for analyzing the reservation disestablishment issue in *DeCoteau*.[180]

3. Interlude and Reflection—Ancestral Connections to the U.S. Government's Betrayal of the Sisseton-Wahpeton Dakota People in *DeCoteau*

For me, as an enrolled member of the Santee Sioux Nation and a descendant of grandparents and other ancestors who personally suffered the trauma of the 1862 U.S.-Dakota War and its aftermath, the *DeCoteau* Court's disregard of this historical backdrop is especially galling. The war itself was an explosive uprising of the Santee Dakota Indians of Minnesota who rebelled against conditions of starvation, destitution, and despair brought about by decades of corruption, deceit, aggression, and betrayal by U.S. negotiators, federal Indian agents, territorial and state officials, local traders and storekeepers, and frontier settlers whose common aim was to enrich themselves by dispossessing the Indians of their lands and resources.[181] Two of my great-great-grandfathers, Ehnamani

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report containing, inter alia, the transcribed 1889 negotiations with the Sisseton-Wahpeton Indians, cited multiple times in connection with the Court's second use of that term on page 435 of the *DeCoteau* majority opinion, *see id.* at 435 & n.16 (citing S. Exec. Doc. No. 66, *supra* note 157, at 1, 4-5, 7, 19-20, 21, 22, 25). Nor does the term appear in § 27 of the 1891 Act, the third and final purported authority cited by the Court when invoking the term on page 441 of the majority opinion. *See id.* at 441 (citing Act of Mar. 3, 1891, ch. 543, § 27, 26 Stat. 1035, 1038) ("As passed by the Congress, the 1891 Act recited and ratified the 1889 Agreement with the tribe and appropriated $2,203,000 to pay the tribe for the ceded land and to make good the tribe's 'loyal scout' claim."). Rather, the *DeCoteau* Court apparently invented that label, using it to deflect from the true significance of the Sisseton-Wahpeton leaders' demand for back annuities when negotiating over the potential sale of unallotted lands within the Lake Traverse Reservation. *See also infra* notes 368-372 and accompanying text; *infra* notes 398-406 and accompanying text; *infra* notes 473-499 and accompanying text.

[179] *DeCoteau*, 420 U.S. at 447.

[180] *See id.* at 448 (observing that the "the 1891 Act before us" is "not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented"); *cf.* Hughes, *supra* note 57, at 457 ("On the strength of the agreement with the Tribe, the [*DeCoteau*] Court held that Congress had intended to disestablish totally the Lake Traverse Reservation in South Dakota.").

[181] Many historians' accounts provide valuable summaries of the causes of the U.S.-Dakota War—or "Great Sioux Uprising"—of 1862. *See*, *e.g.*, Roy W. Meyer, History of the Santee Sioux: United States Indian Policy on Trial 115 (1967) ("Most of [the Sioux Indians'] grievances have already been mentioned: bitterness over the treaties of 1851; the non-fulfillment or tardy fulfillment by the government of obligations incurred under the terms of those treaties; the treaty of 1858 and the deception (as the Indians saw it) practiced upon them in turning over the proceeds from the ceded lands to the traders; . . . the advantage which the Indians believed, with reason, was being taken of them by the traders; the increasing pressure of white settlement near and even on the reservation, which, coupled with the uncertainty of the Indians' tenure, seemed to foreshadow a time when they would again be bullied into signing a treaty and be forced to move once more."); *see also*, *e.g.*, Gary Clayton Anderson, Massacre in Minnesota: The Dakota War of 1862, the Most Violent

Ethnic Conflict in American History 77-79 (2019) (footnote omitted) ("[T]rouble erupted on August 4 [at the Upper Agency], as several desperate warriors broke into the warehouse. They took twenty sacks of flour. . . . [Days later, after a standoff between the Indians and American soldiers,] Agent [Thomas J.] Galbraith agreed to come out and council [with the Indians] . . . . As the council came together, Sissetons Standing Buffalo and Red Iron immediately demanded that food be distributed. The agent had little to offer and finally turned to the traders. They then huddled with their spokesman, Andrew Myrick. Once back at the council, Galbraith demanded an answer. Myrick rose slowly, as if to exit, and then turned and said, 'as far as I am concerned let them eat grass.' [Mdewakanton Dakota Chief] Little Crow sat stunned, as young [Presbyterian missionary] John Williamson translated the message. A general cry came up from the group as they left in a huff."); Linda M. Clemmons, Conflicted Missions: Faith, Disputes, and Deception on the Dakota Frontier 182 (2014) (endnote omitted) ("Although the distribution [of treaty annuities] traditionally occurred in June, the money had not arrived by early August. The tension was compounded by the fact that the Sissetons' crops had been destroyed by draught and cutworms, which meant that no reserve was available to feed the large group as they waited for their annuities."); David A. Nichols, Lincoln and the Indians: Civil War Policy and Politics 76-77 (1978) ("The Indian System in Minnesota had always been extraordinarily corrupt, and it was making life more difficult for the Indians every year. More immediate factors entered into the situation that resulted in war. . . . [T]he Sioux were virtually starving due to a crop failure and a delay in the arrival of [treaty] annuities made matters worse. The hungry Sioux waited at their agencies for nearly two months. The money arrived the day after the war began."); Kenneth Carley, The Dakota War of 1862: Minnesota's Other Civil War 6 (2d ed. 1976) ("At the Lower Agency, . . . the [Mdewakanton and Wahpekute] Sioux had received some supplies early in June [1862] and had returned to their villages to await the annuity payment. Early in August [Chief] Little Crow obtained the agent's pledge that more provisions would be issued to his people. The promise was not kept, and the chief then demanded that the traders extend further credit. This they refused to do . . . ."); Ralph K. Andrist, The Long Death: The Last Days of the Plains Indians 27-29 (1964) ("In 1862, the Sioux in Minnesota had two things to show for a little more than a half century of treaty-making with the United States: a reservation 10 miles wide and 150 miles long on the Minnesota River, and a deep and smoldering resentment over years of having been swindled. . . . In all land cession dealings, the white men were able to avoid any temptation to be honest and honorable, and carefully arranged that the Sioux came out the small end of the funnel each time with nothing left but resentment."); Winifred W. Barton, John P. Williamson: A Brother to the Sioux 55-56 (1919) ("[According to the Rev. John P. Williamson, Presbyterian missionary among the Dakota Indians in Minnesota in 1862,] [i]t was . . . the desperation of hunger and impending starvation which drove [the Indians'] leaders to seize the only available supplies, and to put the storekeepers out of the way as a means of accomplishing their purpose. After blood had been shed, one thing followed another."); Doane Robinson, A History of the Dakota or Sioux Indians 256 (Ross & Haines, Inc. 1956) (1904) ("[I]n a large measure [the causes which made this massacre possible] may be attributed to dissatisfaction growing out of sale of the lands of the Santees under the treaties of Mendota and Traverse des Sioux and the application of the moneys due the Indians under those treaties; but there were many other contributing causes."); Helen Jackson, A Century of Dishonor: A Sketch of the United States Government's Dealings with Some of the Indian Tribes 163 (1880) ("Early in August [1862] some bands of the Upper Sioux [i.e., Sisseton and Wahpeton bands of Dakota Indians], who had been waiting at their agency nearly two months for their annuity payments, and had been suffering greatly for food during that time—so much so that 'they dug up roots to appease their hunger, and when corn was turned out to them they devoured

("Walks Among") and Iyasamani ("Yelling Walker"),[182] were among the 303 Dakota Indians convicted and sentenced to death by a U.S. military commission for allegedly participating in the war.[183] Both escaped

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it uncooked, like wild animals'—became desperate, and broke into the Government warehouse, and took some of the provisions stored there. This was the real beginning of the outbreak . . . .").

[182] An indispensable resource for researching genealogical information—including U.S. census rolls, probate records, marriage licenses, birth and death certificates, and church registries—for Santee Dakota people is a Facebook community website, "Santee Sioux Genealogy," administered by genealogist Vicky Valenta. *See Santee Sioux Genealogy,* Facebook, https://www.facebook.com/Santee.Sioux.Genealogy. Facsimiles of documents available at this website have been especially helpful in enabling me to trace and confirm my own Dakota ancestry farther back than my grandparents' and great-grandparents' generations.

[183] *See* Chomsky, *supra* note 144, at 28 ("Of the 392 men tried, the Commission convicted 323. Of those convicted, the Commission sentenced 303 to be hanged; only 20 were sentenced to terms of imprisonment. The Commission acquitted the remaining 69 prisoners."); *see also* John Isch, The Dakota Trials: The 1862-1864 Military Commission Trials 134-35 (2013) (trial record of "E-a-sha-mane [Iyasamani]," Case #99); *id.* at 301-02 (trial record of "Chan-o-mane [Ehnamani]," Case #293). Professor Isch's book is an invaluable, meticulously documented and annotated compilation of the unedited transcripts of the 1862-1864 trials of Dakota and Winnebago Indians in Minnesota; and in the book's "Introductory Notes to the Transcriptions," *id.* at 21-27, the author elaborates on the intrinsic difficulties encountered by researchers, past and present, in attempting to accurately determine the names of many of the Indian defendants who were prosecuted at the trials, including "legibility issues and variant spellings" as well as the fact that "it was not unusual for a Dakota to have several names or even to change his or her name over time," *id.* at 24. Fortunately, information in a table titled "Dakota Prisoners Pardoned in 1866 at Davenport," *id.* at 581, is crucial in establishing the true identity of "Chan-o-mane," Case #293, as Ehnamani. *See id.* at 583, 585 (citing a 1908 Court of Claims document as showing "Chnamane" to be a variant spelling, or erroneous transcription, of "Ehnamane" ["Ehnamani"], the name of pardoned prisoner no. 117); *see also* Nat'l Archives Microfilm Publications, Microcopy No. 234, Letters Received by the Off. of Indian Aff., St. Peter's Agency, 1866-1867, Roll 765 ("Copy–List of Indian Prisoners confined at Camp Kearney, Davenport[,] Iowa, January 20th, 1866") (on file with author) (list attested by Assistant Adjutant General William Atwood accompanying Mar. 15, 1866 letter from Assistant Adjutant General Edward D. Townsend to James Harlan, Secretary of the Interior, showing "Ehnamani," age 40, as prisoner no. 117, with "To be hung" stated to be the "Term of imprisonment"). Accordingly, the speculation that Case #99 ("E-a-sha-mane") may refer to Artemas Ehnamani, *see* Isch, *supra*, at 135, is mistaken, since Case #293 ("Chan-o-mane"), *see id.* at 301-02, is Ehnamani's trial record instead. Moreover, while the biographical details regarding Ehnamani, *see id.* at 135, are mostly accurate (albeit associated with a different defendant and trial record), it was not Ehnamani ("Walks Among") but a different convicted and incarcerated Dakota Indian, Iyasamani ("Yelling Walker"), who "was pardoned by Lincoln in April 1864," *id.*; *see also id.* at 449 (showing "Iyasamani" as one of the names listed in President Lincoln's pardon order of April 30, 1864); *infra* note 192 and accompanying text. The irony of this inadvertent conflating of the identities of Ehnamani and Iyasamani is that each of them is a great-great-grandfather of mine—Ehnamani being the maternal grandfather, and Iyasamani the paternal grandfather, of my own maternal grandmother Cora Mitchell Trudell, who is properly mentioned as being one of the grandchildren of Artemas Ehnamani and his wife Rebecca Frazier (Winyanhiyayewin, or "Passing-By Woman"), my great-great-grandmother, *see* Isch,

execution by virtue of their names not being included on the list of 39 Dakota Indians whose death sentences were confirmed by President Abraham Lincoln.[184] One of the 39 received a last-minute reprieve,[185] but on December 26, 1862, the remaining 38 condemned Dakota prisoners on Lincoln's list were hanged simultaneously on a massive scaffold in Mankato, Minnesota, the largest mass execution in U.S. history.[186]

My two ancestors, then, were among the 265 condemned-but-not-executed men who were sent to be incarcerated indefinitely[187] in April

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supra, at 135.

For a provocative and persuasive argument that the military commission that tried and convicted the accused Dakota Indians was "not intend[ed] . . . as a replacement for a court of law, but rather, as a proxy for the battlefield," see Maeve Herbert [Glass], *Explaining the Sioux Military Commission of 1862*, 40 Colum. Hum. Rts. L. Rev. 743, 746 (2009). Professor Glass elaborates:

> [Colonel Henry Hastings] Sibley convened the commission only after the traditional means of military reprisals were found to be unavailable. In Sibley's view, had he simply had more cavalry when the Sioux attacked him in late September, he could have lawfully killed two-thirds of the hostile Indians without any process whatsoever. . . . By deploying a military commission, Sibley estimated that he could kill roughly the same number of Sioux. And, indeed, by November 5, 1862, a little over a month after he determined that continued pursuit was impossible, the commission accomplished a feat that would have been impossible on the battlefield: it had sentenced 303 prisoners to death.
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> . . . .
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> . . . [President Lincoln's] handling of the review process suggests that he, like the commanders in the field, did not view the commission as an adjudicatory forum intended to replicate a court-martial or a criminal tribunal.

Id. at 776-77, 778 (footnotes omitted); *see also* Michael S. Green, Lincoln and Native Americans 86 (2021) (endnote omitted) ("Sibley . . . may have seen [the military commission trials] as another step in defeating the Dakota because further attacks on them were difficult, given such factors as manpower and weather.").

[184] *See* Carley, *supra* note 181, at 73 ("The names of the thirty-nine Sioux to be executed at Mankato were carefully written by President Lincoln himself on executive mansion stationery."); *see also* Lincoln's Execution List, The U.S.-Dakota War of 1862, Minn. Hist. Soc'y, https://www.usdakotawar.org/history/multimedia/lincolns-execution-list (facsimile of list of condemned Dakota prisoners). For a discussion of President Lincoln's handling of the question whether to allow the execution of all 303 of the condemned Santee Dakota Indians, see generally Paul Finkelman, *"I Could Not Afford to Hang Men for Votes": Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, 39 Wm. Mitchell L. Rev. 405 (2013).

[185] *See* Niebuhr, *supra* note 176, at 163-64 (endnote omitted) ("Thirty-eight men would hang—after issuing his original order, Lincoln had lowered the number by one, commuting a death sentence on the testimony of the missionary Thomas Williamson, who personally investigated the man's case and argued for his innocence of war crimes.").

[186] *See* Anderson, *supra* note 181, at 258-62 (describing execution by hanging of 38 Santee Dakota prisoners and legal developments during the week preceding the mass execution); Chomsky, *supra* note 144, at 33-37 (same).

[187] *See* Mary Lethert Wingerd, North Country: The Making of Minnesota 332 (2010) (noting that President Lincoln "ordered the convicted men to indefinite prison terms at Camp McClellan near Davenport, Iowa"); Nichols, *supra* note 181, at 127 ("[Lincoln] ordered the permanent incarceration of the pardoned in conditions that led to more deaths than the hangings."); *see also* Niebuhr, *supra* note 176, at 174 ("In April

1863 at Camp Kearney, the Dakota war prisoners' stockade adjacent to Camp McClellan, the larger prison at Davenport, Iowa for captured Confederate soldiers, a facility that also served as a Union Army hospital and training camp.[188] While confined at Camp Kearney—located on the west bank of the Mississippi River across from Rock Island (known today as Arsenal Island), Illinois, and called *Wi'tawakaŋ*, or "Sacred Island," by the Indians[189]—more than one hundred of the Dakota war prisoners perished between 1863 and 1866.[190] My great-great-grandfather

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[1863], the Indians reprieved by Lincoln were removed from Mankato, shackled, and put aboard a steamboat bound down the Minnesota River to Saint Paul. From there, they were shipped down the Mississippi to a military camp in Davenport, Iowa."). The Indians who had been condemned to be executed but who had not been hanged at Mankato remained "under the sentence of death" for the duration of their imprisonment at Davenport. *See infra* note 192 (quoting from an annotation in volume 7 of the *Collected Works of Abraham Lincoln*); *see also* Linda M. Clemmons, Dakota in Exile: The Untold Stories of Captives in the Aftermath of the U.S.-Dakota War 65 (2019) ("Although these prisoners had been spared from hanging in December, they remained worried that they would eventually suffer the same fate. General Sibley stoked their fears, emphatically stating that the majority of prisoners should be hanged.").

[188] *See* Isch, *supra* note 183, at 444 ("New buildings were constructed [in an area divided apart from Camp McClellan, a military base in Davenport, Iowa] and a fence built around what became Camp Kearney. The name 'Camp Kearney' was used infrequently in the press; most people continued to call it Camp McClellan. But after [Major General John] Pope divided them, they were indeed two different camps."). For an extended discussion of Dakota people's experience of incarceration at the Davenport prison, see Clemmons, *supra* note 187, at 63-90.

[189] *See An Experiment of Faith: The Journey of the Mdewakanton Dakota Who Settled on the Bend in the River—A Brief History of the Organization and Construction of the First Presbyterian Church, Flandreau, South Dakota* (2003) (section titled "Exile, Reflection and Change"), https://fsst-nsn.gov/wp-content/uploads/2015/08/fsst_experiment_of_faith_2015.pdf ("The four-day journey [in April 1863] down the Mississippi, with periodic stops to take on wood, would take them to the location known by the Dakota as *Witawakan* 'sacred island or Rock Island.'"); *cf.* John P. Williamson, An English-Dakota School Dictionary: Waṡicun ka Dakota Ieska Wowapi 183 (1902) (translating "Rock Island" as "*Wi'tawakaŋ*").

[190] *See* Stephen Return Riggs, Dakota Grammar, Texts, and Ethnography 217 (James Owen Dorsey ed., 1893), *reprinted in* 9 Contributions to N. Am. Ethnology 217 (J.W. Powell ed., 1893) [hereinafter "Riggs, Dakota Grammar, Texts, and Ethnography"] ("More than one hundred [Dakota prisoners at Davenport by October 1865] had died since their first imprisonment. And the white doctor, who was appointed to treat their sick, cared not whether they died or lived. Indeed, they thought he would rather have them die. When a good many of them were sick and dying with smallpox, he had been heard to say that his Dakota patients were doing very well!"). Notably, this description of the neglect and abuse suffered by the Dakota prisoners at Davenport appears in a chapter of the Presbyterian missionary Riggs's 1893 book that is dedicated primarily to summarizing the life and Dakota ministry of my great-great-grandfather, the Reverend Artemas Ehnamani, who had been one of the prisoners. *See id.* at 214-18 (chapter titled "The Superhuman"); *see also infra* note 191 and accompanying text. In his 1880 autobiography Riggs further described conditions at the Davenport prison, where he twice visited the Dakota prisoners:

> [W]ithin the stockade, where the prisoners were kept, the houses were of the most temporary kind, through the innumerable crevices of which blew the winter winds and storms. Only a limited amount of wood was furnished them,

> which, in the cold windy weather, was often consumed by noon. Then the Indians were under the necessity of keeping warm, if they could, in the straw and under their worn blankets.
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> In these circumstances, many would naturally fall sick, go into decline,—pulmonary consumption, for which their scrofulous bodies had a liking,—and die. The hospital was generally well filled with such cases. The death rate was very large—more than ten per cent, each year, making about 120 deaths while they were confined at that place.

Stephen R. Riggs, Mary and I: Forty Years with the Sioux 221-22 (1880) [hereinafter "Riggs, Mary and I"]; *see also* Michael Simon, *Translator's Preface*, *in* Clifford Canku & Michael Simon, The Dakota Prisoner of War Letters: Dakota Kaŝkapi Okicize Wowapi xiii (2013) (noting that Riggs's estimate of 120 deaths "may have included the deaths of others who were captured after the war and brought to camp"); 31 Cong. Rec. 1663 (1898) (reprinting Jan. 3, 1896 affidavit testimony of Santee Sioux Indian Joseph Kitto, Sr.) ("Affiant further states that he is one of the men who was sentenced to be imprisoned at Davenport, Iowa, for a term of four years, and while there there were over 100 deaths [that] occurred among the prisoners on account of hard usage and improper diet."). Another Presbyterian missionary among the Indians, Thomas Williamson, "stayed with the Dakota" during the early months of their imprisonment at Camp Kearney and

> was allowed to view the prisoners from above the enclosure. He noticed that they "looked very badly. . . . The confinement and hot weather was very detrimental to their health, which pleases [the commander] who wishes them to die of sickness seeing he cannot hang them." . . . The sick received little assistance from the camp doctor, who, according to Williamson, also wished their deaths.
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> [In] autumn of 1864 . . . the soldiers played a cruel trick on the prisoners. The soldiers told the prisoners that new stoves would soon arrive, so they ought to remove the old ones. But as the cold settled on Davenport, the prisoners were still without the new stoves. Upon realizing that the soldiers had duped them into a scheme that presaged their freezing to death, the prisoners sought and recovered their old stoves. The incident was a cruel reminder that many would soon die or fall sick from the cold.

Sarah-Eva E. Carlson, *They Tell Their Story: The Dakota Internment at Camp McClellan in Davenport, 1862-1866*, 63 Annals of Iowa 251, 262-63, 269 (2004) (footnotes omitted), https://doi.org/10.17077/0003-4827.10819; *see also* Canku & Simon, *supra,* at 72-73 (Dakota-to-English translation of letter from Dakota prisoner Robert Hopkins, Oct. 24, 1864) ("Then this winter some of us will probably freeze to death, we are thinking. Throw those iron stoves outside, they said. And the Dakotas said, 'Probably they will give us different ones,' and they threw out all the stoves, but it got cold and once again they took the stoves back inside."). Professor Isch offers yet another perspective on the hardship imposed on the Dakota prisoners at Davenport, a "picture . . . given by a former soldier who described how the camp was cleaned and supplied with firewood." Isch, *supra* note 183, at 445. According to the soldier, the U.S. government

> "compelled [the Indian prisoners] under strong guard to perform all the drudgery that could be invented in and about Camp McClellan where our drafted men had their barracks. It was the duty of the redskins to sweep the camp of the boys in blue with brooms made out of hazelbrush or twigs, or whatever would make a clumsy broom, and the order of sweeping must be done in military style. The redskins were placed with their rude brooms in a straight line, and then in regular order, compelled to sweep till the whole camp was gone over, and the sweepings carried to a dump outside the camp. This was not all that was required of them. The camp must be supplied with wood for cooking purposes. Back of the camp on the river bank was a woodyard about 80 rods [440

Ehnamani—the maternal grandfather of my grandmother Cora Mitchell Trudell—remained imprisoned there until April 1866, when all of the surviving Dakota prisoners were granted remission of their death sentences and released by order of President Andrew Johnson.[191]

My grandmother's paternal grandfather Iyasamani—my other great-great-grandfather—was released from prison earlier, when President Lincoln issued an order on April 30, 1864, listing 25 Dakota "Indian prisoners

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> yards] distant. A steep hill was between camp and woodyard, and up the hill the Indians were compelled to carry the wood to supply the entire camp which at this time was occupied by several thousand of the boys in blue. This pack train reminded this writer of the pack trains that we read of in ancient Asia, the only difference is in the latter being carried by mules and camels while the former named carried the wood under the supposed name of men."

Id. (quoting Levi Wagoner, *Camp McClellan and the Redskins*, 5 Annals of Jackson Cty. Iowa 19, 20 (1907-1908)); *see also* Linda M. Clemmons, "*The young folks [want] to go in and see the Indians": Davenport Citizens, Protestant Missionaries, and Dakota Prisoners of War, 1863-1866*, 77 Annals of Iowa 121, 133 (2018) (footnotes omitted), https://pubs.lib.uiowa.edu/annals-of-iowa/article/id/8539/ ("The trauma and indignities associated with the 'Indian prison' continued even after death. Soldiers buried the deceased men in unmarked graves just outside the Indian prison. . . . [M]embers of the public—including a prominent dentist—dug up the Dakota graves looking for 'relics,' just as their relatives' bodies had been exhumed following the hangings at Mankato. The grave robbers, however, were disappointed to find that most of the Dakota prisoners 'had been buried without anything,' so they 'found nothing but bones.'").

[191] *See* Chomsky, *supra* note 144, at 40 (citation omitted) ("Finally, on March 22, 1866, President Johnson ordered remission of the sentences of death and release of the 177 remaining prisoners."). My great-great-grandfather's name is included in the list of "Indians Pardoned at Davenport, Iowa," in Marion P. Satterlee, A Detailed Account of the Massacre by the Dakota Indians of Minnesota in 1862, at 97, 101 (1923) (listing "Ehna-mani" or "Walks amongst," age 40, as pardoned Dakota prisoner no. 117). *See also* Isch, *supra* note 183, at 581, 583 (listing "Ehnamani" in table of "Dakota Prisoners Pardoned in 1866 at Davenport"). While incarcerated at Mankato in the winter of 1862-1863, awaiting his fate, Ehnamani underwent a Christian religious conversion that he "explained . . . in terms of a vision experience," an event that he "concluded . . . was a supernatural visitation." Bonnie Sue Lewis, Creating Christian Indians: Native Clergy in the Presbyterian Church 34 (2003); *cf.* Anderson, *supra* note 181, at 270 ("[T]he revival at the Mankato prison swelled to include three quarters of the Dakota men who were incarcerated. The population included 326 men, 257 of whom were still condemned to death."). Professor Bonnie Sue Lewis writes: "When the [Davenport] prisoners were released in 1866 to rejoin their families on the Santee Reservation on the Niobrara River in Nebraska, Ehnamani and Titus Ichaduze, another Dakota who had been imprisoned with Ehnamani, were licensed to preach." Lewis, *supra,* at 44. As the founding pastor of Santee's "Pilgrim [Presbyterian] Church, made up of nearly 300 former prisoners and their families," the Reverend Artemas Ehnamani "found that Christianity offered a means of transforming his life. He accepted the challenge and remained pastor . . . [for 35 years] until his death in [1902]." *Id.*; *see also* Stephen R. Riggs, Tah′-koo Wah-kan′: The Gospel Among the Dakotas 424-25 (1869) (describing the election of Ehnamani in the summer of 1867 to serve as Pilgrim Church's pastor and spiritual guide); *Pardoned by Lincoln: Life Work of an Indian—How a Sioux Fighting Man Condemned to Death by the Whites, Became a Powerful Teacher Among His People—Extraordinary Career of Artemas Ehnamani in Minnesota, South Dakota and Nebraska*, Minneapolis J., Sept. 19, 1903, https://newspapers.mnhs.org/jsp/PsImageViewer.jsp?doc_id=4b0d4236-188b-40ad-be89-7fd727b9dc91%2Fmnhi0031%2F1DFY7Q5A%2F03091901.

now in confinement at Camp McClellan near Davenport" and directing, in Lincoln's handwriting and above his signature: "The persons named on this list are pardoned and ordered to be sent to their families or relatives."[192] Iyasamani, who was of the Wahpeton band of Santee Dakota Indians, eventually settled with his second wife among other Sisseton-Wahpeton people in Dakota Territory, joining in the work of the Dakota scouts and serving as a presbyter in the Dakota Indian ministry of the Mayasan

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[192] *See* Order for Pardon of Sioux Indians, Apr. 30, 1864 ("List of Indian prisoners now in confinement at Camp McClellan near Davenport Iowa pardoned and to be liberated and sent to their families"), *reprinted in* 7 Collected Works of Abraham Lincoln 325-26 (Roy P. Basler ed., 1953), https://quod.lib.umich.edu/l/lincoln/lincoln7/1:722?rgn=div1;view=fulltext; *see also* List of Sioux Indians pardoned by Lincoln; endorsed by Abraham Lincoln, Apr. 30, 1864 (facsimile), *Abraham Lincoln papers: Series 1, General Correspondence, 1833 to 1916*, https://www.loc.gov/item/mal3271200 (manuscript/mixed material). An annotation in the *Collected Works of Abraham Lincoln* recounts the instrumental role of Presbyterian missionary Thomas Williamson in facilitating the presidential pardons:

> Reverend Thomas S. Williamson, missionary to the Sioux, had written to Lincoln on April 27, assigning reasons for pardoning the Sioux imprisoned at Davenport, Iowa, since November, 1862, under sentence of death. Lincoln submitted the letter to [Commissioner of Indian Affairs] William P. Dole, who answered on April 28: "I have read the letter of the Rev. Mr Williamson to you asking the pardon of certain Indians now under the sentence of death at Davenport and wish to say . . . that I do not believe any injury will accrue to the white people if you should exercise the pardoning power in favour of a portion of these people and I have so much confidence in . . . Mr. Williamson that I have no hesitancy in uniting in his recommendation in favor of the particular persons named by him. . . ."

7 Collected Works of Abraham Lincoln, *supra*, at 326 n.1 (omissions in original), https://quod.lib.umich.edu/l/lincoln/lincoln7/1:722?rgn=div1;view=fulltext.

Professor Carol Chomsky notes the continuing hardship suffered by the pardoned prisoners after their release from incarceration:

> Despite the official pardons, these and other pardoned Dakota had difficulty returning to their families. Once released, the men apparently were not eligible to receive further supplies from the Army and had no way to support themselves locally or to travel to reunite with their families. If they could somehow provision themselves for that journey, they were then in danger of being killed on the trip. Three prisoners were held as long as eight months after being pardoned because no provision was made for them once released.

Chomsky, *supra* note 144, at 40 n.158 (citations omitted). For a news story about my research regarding Iyasamani's imprisonment at Camp Kearney and President Lincoln's pardon order, see Alma Gaul, *Sioux descendant visits area of Davenport prison*, Quad City Times, July 23, 2017, https://qctimes.com/news/opinion/editorial/columnists/alma-gaul/sioux-descendant-visits-area-of-davenport-prison/article_6192abf4-7959-500d-9495-dee627512cbe.html.

Presbyterian Church at Sisseton[193] until his death in August 1889.[194] Thus, my great-great-grandfather Iyasamani, whom President Lincoln expressly pardoned, was among the original recipients of Indian land allotments from within the Lake Traverse Reservation, established by treaty in 1867 as the permanent homeland for the Sisseton-Wahpeton people.[195]

An additional ancestral connection that deepens my appreciation of the true historical events crucial to the *DeCoteau* case is the parental guardianship role, in my family's history, undertaken by a Mdewakanton Dakota Indian scout named Mahpiyawakonze ("Influences the Clouds")[196] who helped raise my great-grandfather Vines Mitchell in

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[193] In his 1880 autobiography the missionary Stephen R. Riggs noted the relationship between communities of Indian scouts and the Christian churches that began flourishing among the Sisseton-Wahpeton Dakota following the U.S.-Dakota War:

> The families of these Sioux scouts were sent out to the frontier, and maintained by the government, not only during that summer [of 1863], but for several years. This was known as the "Scout's Camp," and the church among them was called by the same name, until 1869, when several churches were formed out of this one, as they began to scatter and settle down on the new Sisseton Reservation.

Riggs, Mary and I, *supra* note 190, at 198; *see also* Black Thunder et al., *supra* note 137, at 25 (noting that during the summers of 1866 through 1868 missionaries Stephen R. Riggs and Thomas S. Williamson "visited new Indian churches, known as the Scout Camps, located throughout the territory that would soon become the Sisseton Reservation").

[194] Details regarding my ancestors' involvement in events of the U.S.-Dakota War are derived from documents available at the Santee Sioux Genealogy website, *see supra* note 182, as well as probate records, depositions, and trial testimony, on file with the author, in early-twentieth-century litigation pursued by my great-grandfather Vines Pisyedan Mitchell in the matter of the estate of his father, Iyasamani, my great-great-grandfather. The name transcribed as "Pisyedan" in litigation documents referring to Vines P. Mitchell appears to be a contracted form of "piś-pi′-źe-daŋ," a Dakota word meaning "wrinkled." *See* Stephen Return Riggs, A Dakota-English Dictionary 423 (James Owen Dorsey ed., 1890), *reprinted in* 7 Contributions to N. Am. Ethnology 423 (J.W. Powell ed., 1890) (translating and defining "piś-pi′-źe-daŋ" as "*adj. wrinkled* or *shrivelled*, as one's hands from being long in water").

[195] *See supra* note 194; *see also* H.R. Exec. Doc. No. 42, 44th Cong., 1st Sess., at 22 (1875) (schedule of allotments of land in severalty assigned to members of the Sisseton and Wahpeton bands of Sioux Indians residing on the Lake Traverse Indian reservation) (showing "I-ya-xa-ma-ni [Iyasamani]" as name of allottee for allotment no. 185); 1867 Census of Lake Traverse Indians (Sisseton), Taken by Charles Crawford and Samuel J. Brown, Oct. 3, 1867, Joseph and Samuel Brown Papers, Minn. Hist. Soc'y, Microfilm Roll 5 (on file with author) [hereinafter "1867 Lake Traverse Census"] (showing "Iyasamani" on 4th unnumbered page of handwritten census list of Lake Traverse Indians); *see also* Black Thunder et al., *supra* note 137, at 63 (showing "Iyaza Mani [Iyasamani]" on list of people U.S. Indian Agent Charles Crissey "reported in 1882 . . . had purchased farm implements within the past five years with money they had earned").

[196] The life of Mahpiyawakonze is discussed in Carolyn Ruth Anderson, *Dakota Identity in Minnesota, 1820-1995*, ProQuest Dissertations Publishing, UMI No. 9727903, https://www.proquest.com/docview/304367268/63CF3147D8E6485EPQ/1?accountid=14613 (Ph.D. dissertation, Indiana University, 1997). Professor Anderson writes:

> A Dakota named Mahpiyawakonze, known to the whites as "Indian John" (a common name attributed to Indian men), John Wakonze, or John Police was one of the scouts enlisted to guard the frontier following the [U.S.-Dakota] Conflict. . . . During the Conflict Mahpiyawakonze rescued a mother and her four

> children, whom he protected for four weeks. The woman was the quarter-blood daughter of the former Dakota agent at Fort Snelling, Lawrence Taliaferro. He was seriously wounded by the butt of a rifle to his chest, damaging a lung, in the process of rescuing a family. After the Conflict he was employed along with his brother as a scout. On a scouting expedition sometime during 1862-1864 they were caught in a snowstorm on the prairie, and Mahpiyawakonze suffered permanently damaging frostbite to his arms and legs. He never recovered completely from the chest injury or the freezing, becoming nearly incapacitated at the end of his life.
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> . . . Just before his death, through the efforts of white supporters in the community, he was awarded a military pension of fifteen dollars per month, which was then transferred to his widow, Lucy (Tateiyayewin). They had no children who survived them.

Id. at 223-24 (citations omitted); *see also* Jane Lamm Carroll, *"Who Was Jane Lamont?": Anglo-Dakota Daughters in Early Minnesota*, Minn. Hist., Spring 2005, at 184, 191 (endnote omitted), http://collections.mnhs.org/mnhistorymagazine/articles/59/v59i05p184-196.pdf ("In an 1888 affidavit, Mary [Taliaferro] . . . credited a Mdewakanton Dakota man, Mahpiyawakonze (Indian John), with rescuing and protecting her family, which now numbered four children. Mary, who apparently was a skilled healer, had treated Mahpiyawakonze for serious injuries sustained in the struggle and nursed him later that year after he almost froze to death on a scouting expedition for General Sibley.").

In 1885, Mahpiyawakonze testified for the U.S. government in litigation implicating the corruption and greed of the traders among the Santee Dakota at the start of the 1862 U.S.-Dakota War, and he included testimony about the infamous provocation uttered by trader Andrew J. Myrick. *See* In the Matter of the Claims of Nathan Myrick et al. vs. The United States, for Goods and Supplies Furnished the Sioux Indians at Upper and Lower Agencies in Minnesota, between the First Day of June, 1861, and the Outbreak of Said Indians, in August, 1862, at 1, 50-52, Images 393, 444-46 (testimony for the United States of "Marpiy-Wakunza [Mahpiyawakonze]," Aug. 1, 1885), Nat'l Archives Recs. of the Bureau of Indian Aff. Microfilm Publication M574, Microfilm Roll 75, Spec. File 274, *available in digitized form at* https://www.familysearch.org/search/catalog/362686?availability=Family%20History%20Library). In a sworn statement, Mahpiyawakonze said that the traders "didn't want to give credit to the Indians from that time after the spring hunt" in 1862. *Id.* at 50, Image 444. He added:

> Those lower Indians, they were starving, and a party went up to Fort Ridgely to see an officer. Before they went to see the officer they went up to some store and the store trader told the Indians to eat grass, and they went to Fort Ridgely to make this complaint. They asked the officer if they could help those poor Indians and they said there was an agent out there, and they could get some help there[.] Several of those were sick.

Id. at 51, Image 445.

An intriguing observation is that Mahpiyawakonze's name appears as one of the names on the list of "two hundred and nine Indians," S. Exec. Doc. No. 66, *supra* note 157, at 8 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan), who allegedly signed the 1889 Agreement, ratified by Congress in 1891, which permitted "the purchase and release of the surplus lands in the Lake Traverse Indian Reservation," *id.* at 1, and which is the subject of the Supreme Court's reservation disestablishment decision in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). *See* S. Exec. Doc. No. 66, *supra* note 157, at 14 (listing "Marpingawakonze [Mahpiyawakonze] (his x mark)" as one of the male adult Dakota Indians who "consent[ed] and agree[d] to all the stipulations, conditions, and provisions . . . contained" in the 1889 Agreement). The difficulty with the list's inclusion of this name and "x mark" is that the Dakota signatories began

Minnesota from age four to eighteen, between the years 1862 and 1876.[197] Vines was born at Redwood Village (Lower Sioux Agency) in 1858—the year Minnesota became a state—the son of Iyasamani and his first wife Wasteyadan ("Little Good One"), my great-great-grandmother.[198] After the Indians were defeated in the U.S.-Dakota War, Wasteyadan, who was in her mid-twenties, and her four-year-old son (known only as Hepi, the Dakota name given to a third-born child, if male)[199] were among the approximately 1700 Indians forced into confinement at Fort Snelling,[200] a

signing the agreement on December 13, 1889, *see id.* at 29 (report of councils with Sisseton and Wahpeton Indians) (noting that "[a]t 12:25 [p.m.] signing the agreement began by Simons [Simon Anawangmani, or "Walks Galloping On"] signing first"), whereas Mahpiyawakonze had died the previous year, on September 20, 1888. *See "Indian John" Dead*, St. Paul Daily Globe, Sept. 21, 1888, https://www.newspapers.com/clip/20700750/native-american-hastings-mn/ ("'Indian John,' whose real name is Mah-pe-ah-wa-ko-sia [Mahpiyawakonze], the Sioux brave who aided in saving the lives of many people during the Indian outbreak and war in this state in 1862, and who afterward served the United States as a scout, died last night of lockjaw attributed to a nail running into his foot several days ago. His age was over seventy years.").

[197] *See supra* note 194.

[198] *See supra* note 194. Wasteyadan was the daughter of my great-great-great-grandfather Sakehota ("Grey Claws") and Wakaninajinwin ("Stands Sacred" or "Stands Like a Spirit"), my great-great-great-grandmother, who was one of the daughters of the renowned Mdewakanton Dakota chief Mahpiyawicasta ("Cloud Man," born between 1785 and 1795), my great-great-great-great-grandfather. *See* Mark Diedrich, *A "Good Man" in a Changing World: Cloud Man, the Dakota Leader, and His Life and Times,* 36 Ramsey Cty. Hist. 4, 5, 7 (2001); *see also id.* at 21 (" . . . Cloud Man and most of his relatives surrendered to General Henry Sibley at Camp Release [at the end of the U.S.-Dakota War of 1862] . . . . About 1,300 of the surrendered Dakota were brought down to Fort Snelling. . . . Living conditions were deplorable and diseases spread quickly in the crowded lodges. During the winter [of 1862-1863], about 130 people died, particularly of measles, and Cloud Man was among them.").

[199] *See* Riggs, Dakota Grammar, Texts, and Ethnography, *supra* note 190, at 208 ("[I]f the first born is a boy, his inherited name is 'Ćaske,' and the second child, if a boy, will be called 'He-paŋ;' and the third, 'He-pi;' and the fourth, Ća-taŋ;' and the fifth, 'Ha-ke.' Some children have no other names given them, and wear these alone when they are grown up.").

[200] *See* Niebuhr, *supra* note 176, at 172 (noting that "seventeen hundred Dakotas—mainly women and children—were confined in Fort Snelling, outside Saint Paul"). Among the confined Indians were some of the "friendly" Dakota who had collaborated with U.S. forces to help end the U.S.-Dakota War, including those who later represented the Sisseton-Wahpeton Dakota during the 1889 negotiations at Sisseton Agency. *See* Corinne L. Monjeau-Marz, The Dakota Indian Internment at Fort Snelling 1862-1864, at 138-39 (rev'd ed. 2006) (reprinting Rep. of the Comm'r of Indian Aff. for the Year 1863, at 313, 316) (showing "Michael Renville," "Gabriel Renville," and "Charles Crawford" as heads of families of six, eight, and one, respectively, in "the census of the Indian camp" at Fort Snelling, Dec. 2, 1862, as reported by Lieutenant William McKusick, "Superintendent of Indian Camp"); *see also Fort Snelling Concentration Camp Dakota Prisoners*, 28 Am. Indian Q. 170, 174 (2004) (showing "Michael Renville," "Gabriel Renville," and "Charles Crawford" as heads of families of six, eight, and one, respectively, in list of heads of families at Fort Snelling, as compiled by U.S. Army on Dec. 2, 1862); Anderson, *supra* note 160, at 41 (endnote omitted) ("[J]ust before the steamboats left for Crow Creek in May 1863, [Gabriel] Renville recruited a number of 'friendly' Dakotas to join him

U.S. military fort near St. Paul, Minnesota,[201] where almost the entire population of Santee Dakota women, children, and elderly men in the state endured rampant disease, exposure, mental distress, and hunger, and suffered many fatalities, in one of America's earliest concentration camps.[202]

Fearing that Hepi, who had fallen ill, would die in the Fort Snelling internment camp, Wasteyadan asked a Catholic priest, Father Augustin Ravoux, to baptize him;[203] the priest did so, giving the boy the name Vines.[204]

[in the corps of Indian scouts organized by General Henry H. Sibley] . . . . A list was quickly established that exempted some twenty-three men and their dependents from deportation to Crow Creek."); *cf.* Robinson, *supra* note 181, at 348 ("Most, if not all of the Sissetons and Wahpetons who remained in Minnesota after the battle of Wood Lake [at the conclusion of the U.S.-Dakota War] volunteered under General Sibley as scouts during the ensuing war.").

[201] *See* Monjeau-Marz, *supra* note 200, at 136 (reprinting Rep. of the Comm'r of Indian Aff. for the Year 1863, *supra* note 200, at 315) (showing "Wastuiaduw [Wasteyadan]" as head of family of seven in list of heads of families in census of the Indian camp at Fort Snelling, Dec. 2, 1862); *see also Fort Snelling Concentration Camp Dakota Prisoners*, *supra* note 200, at 173 (showing "Wasteiado [Wasteyadan]" as head of family of seven in list of heads of families at Fort Snelling, as compiled by U.S. Army on Dec. 2, 1862). *See generally* Peter DeCarlo, Fort Snelling at Bdote: A Brief History (2d ed. 2020).

[202] *See* Mark Diedrich, Dakota Oratory: Great Moments in the Recorded Speech of the Eastern Sioux, 1695-1874, at 81 (1989) ("[O]n November 7[, 1862] Lt. Col. William R. Marshall [started marching those surrendered Dakota men who were considered innocent, including the elderly, and the women and children from Redwood Agency] to Fort Snelling. A large 'pen' was erected below the fort on the Minnesota River to enclose the Dakota camp, which was guarded by soldiers on the perimeter. Even embittered white visitors were appalled by the terrible conditions in the camp, finding among other things that the paths between the lodges were 'the receptacles of all the offal.'"); Wingerd, *supra* note 187, at 331 (endnote omitted) ("The biting wind blew off the river, chilling the internees to the bone. Crowded together on the cold, damp bottomland, without adequate food or fuel to warm their tipis, the 1,600 Dakotas confined there had no resistance to outbreaks of mumps, measles, or pneumonia that infected the camp. The elderly and the young were especially vulnerable. More than 200 Dakotas died over the winter, mainly children and old people."); *cf.* John Upton Terrell, Sioux Trail 177 (1974) ("The remaining Santee [after the mass execution] . . . were held in concentration camps. Their reservation was taken from them and opened to white settlement."). For a detailed study of the Santee Dakota people's confinement at Fort Snelling, see generally Monjeau-Marz, *supra* note 200.

[203] *See* 2 William W. Folwell, A History of Minnesota 254 (1924) (footnote omitted) ("Little is known of the ministrations of Father Augustin Ravoux in the Indian camp at Fort Snelling. His own brief statement is that he visited it often and baptized 184 persons, almost all young children."). Ravoux also had baptized at least 24 of the condemned Dakota prisoners during the weeks leading to their mass execution at Mankato on December 26, 1862. *See id.* at 210-11 & n.37; *cf.* Clemmons, *supra* note 181, at 198 (endnote omitted) ("Thomas Williamson, Father Augustin Ravoux, and Stephen Riggs were given the opportunity to baptize the condemned prisoners. By the time of the hangings, twenty-five men had accepted baptism from Father Ravoux, fifteen from Williamson, and none from Riggs. . . . It is not surprising that the Dakotas did not choose to entrust their salvation to Riggs. His close association with the government and the trials clearly lost him what little trust he had gained over the years.").

[204] *See supra* note 194; *see also* Monjeau-Marz, *supra* note 200, at 149, 152 (abstraction of baptismal registry, 1862-1865 Dakota & Metis Ministry, Church of St. Peter, Mendota, Minnesota, registry page 103, rec. no. 714, #111) (listing baptism of 4-year-old boy by Father

When the government then arranged for all of the surviving Santee Dakota people who were confined at Fort Snelling[205] to be permanently removed from Minnesota in early 1863,[206] Wasteyadan took further action to protect

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Augustin Ravoux, Jan. 24, 1863, whose parents are stated to be "Iyoxamani [Iyasamani]" and "Waxteyahdi marpi win [Wasteyadan]"). The Dakota words "marpi win" after Wasteyadan's name are approximations of "mahpiya win" ("cloud woman"), and probably were included in the baptismal registry to signify her being part of the family group of her maternal grandfather Chief Cloudman (Mahpiyawicasta), who was confined along with Wasteyadan and her son Hepi/Vines at Fort Snelling. *See supra* note 198; *cf.* Williamson, *supra* note 189, at vii, 34, 262 (translating "cloud" as "Mahṗiya" and "woman" as "wiŋ′yaŋ," and explaining that "[f]emale proper names very often take the termination *win* (contraction of *wiŋyaŋ*) . . . .").

[205] *See* Niebuhr, *supra* note 176, at 174 ("The legislation . . . called for the Dakotas at Fort Snelling to be deported. Scores had died during a harsh and hungry winter, but a population of more than 1,450 remained.").

[206] *See* Meyer, *supra* note 181, at 140-41 (discussing federal legislation that facilitated the removal of Santee Dakota people from Minnesota). As Meyer explains, the legislation desired by "most white Minnesotans" for "the expulsion of the Sioux"

> was finally obtained, in the form of two acts, the first approved February 16 and the second March 3, 1863. The first of these was titled "An Act for the Relief of Persons for Damages sustained by Reason of Depredations and Injuries by certain Bands of Sioux Indians" and concerned chiefly the mechanics of paying the victims of depredations. The first section, however, specifically abrogated all treaties entered into by the government with the four bands of Santee Sioux and denied them any further benefits under the terms of these treaties, including all rights to occupancy of land in the state of Minnesota. The second piece of legislation, titled "An Act for the Removal of the Sisseton, Wahpeton, Medwakanton [Mdewakanton], and Wahpakoota [Wahpekute] Bands of Sioux or Dakota Indians, and for the disposition of their Lands in Minnesota and Dakota" was the necessary sequel to the first, which had left the dispossessed bands without a place to live. The act of March 3 did not specifically designate a future home for them, but it did call upon the President to assign to them a tract of land, outside the limits of any state, large enough to provide each member of the tribe willing to farm with "eighty acres of good agricultural land, the same to be well adapted to agricultural purposes." It further provided that the proceeds from the sale of their former reservation should be invested for their benefit. None of the money was to be paid directly to the Indians, as under the old system, but it was to be used to advance them in farming so that they would become self-sustaining. On the same date, Congress approved an appropriation of $50,016.66 for the removal of the Sioux and their establishment in their new homes.

Id. (footnotes omitted). A separate congressional bill, enacted into law on February 21, 1863, "call[ed] for the 'peaceful' removal of the Winnebagos, who had not, as a tribe, taken any part in the [1862] uprising." *Id.* at 141 (footnote omitted). *See generally* William E. Lass, *The Removal from Minnesota of the Sioux and Winnebago Indians*, Minn. Hist., Dec. 1963, at 353, http://collections.mnhs.org/MNHistoryMagazine/articles/38/v38i08p353-364.pdf; Jackson, *supra* note 181, at 218-56 (book chapter titled "The Winnebagoes").

In his 1880 book *Our Indian Wards*, George W. Manypenny, who chaired the 1876 U.S. commission for obtaining the Indians' relinquishment of the Black Hills region of the Great Sioux Reservation, described the government's removal of the Santee Dakota Indians "from Minnesota to the Crow Creek agency, on the Missouri river, about one hundred and fifty miles above Yankton, in the Territory of Dakota." Manypenny, *supra* note 75, at 135. He wrote:

> The Sioux were transported from Fort Snelling to Hannibal, Missouri, on

> two steamboats; one of the boats stopped there, and the Indians on it crossed over to St. Joseph, on the Missouri river, by rail. The other boat continued to the junction of the Mississippi and Missouri rivers, and thence up the latter to St. Joseph; and here the Indians that crossed over by rail were put upon the boat, and from thence to Crow Creek all of them were on one boat. They were very much crowded from St. Joseph to Crow Creek. Sixteen died on the way, being without attention or medical supplies. All the Indians were excluded from the cabin of the boat, and confined to the lower and upper decks. It was in May, and to go among them on the lower deck was suffocating. They were fed on hard bread and mess pork, much of it not cooked, there being no opportunity to cook it, only at night, when the boat laid up. They had no sugar, coffee, or vegetables. Confinement on the boat, in such a mass, and want of proper food, created much sickness, such as diarrhea and fevers. For weeks after they arrived at Crow Creek, the Indians died at the rate of from three to four per day. In a few weeks, one hundred and fifty had died, mainly on account of the treatment they received after leaving Fort Snelling.

Id. at 135-36; *see also* Meyer, *supra* note 181, at 146 (footnote omitted) ("[Presbyterian missionary John P. Williamson] described conditions on board the [steamboat] *Florence*, saying that 'when 1300 Indians were crowded like slaves on the boiler and hurricane decks of a single boat, and fed on musty hardtack and briny pork, which they had not half a chance to cook, diseases were bred which made fearful havoc during the hot months, and the 1300 souls that were landed at Crow Creek June 1, 1863, decreased to one thousand. . . . So were the hills soon covered with graves. The very memory of Crow Creek became horrible to the Santees, who still hush their voices at the mention of the name.'"). The subsequent removal of the Indians from Crow Creek to what became the Santee Sioux Reservation in Nebraska is explained in a letter that was submitted to the Congressional Record by the Commissioner of Indian Affairs in 1898, in support of a bill for restoring the treaty annuities that Congress had confiscated and cut off in 1863:

> After three years' trial the lands upon which these Indians were located were found not to be "well adapted to agricultural purposes," and steps were therefore taken to relocate them upon lands better adapted to the use of the Indians. As a result of the Executive order dated February 27, 1866, four townships in the then Territory of Nebraska were set apart and reserved for the Santee Sioux Indians, then residing upon the said Crow Creek Reservation.

31 Cong. Rec. 1664 (1898) (reprinting letter from D.M. Browning, Commissioner of Indian Affairs, as transmitted by M. Hoke Smith, Secretary of the Interior, to the Chairman of the Committee on Indian Affairs). The Commissioner delineated three classes of "the Indians now occupying the Santee Reservation in Nebraska," as follows:

> From office report, dated June 4, 1866, it appears that the Indians occupying said lands consisted:
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> (1) Of the Indians who had been located at the Crow Creek Reservation, consisting of old men, women, and children who surrendered to or were captured by General Sibley in 1863, together with some 75 others who were pardoned by President Lincoln and sent there about one and one-half years before that time.
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> (2) Of Sioux Indian prisoners, some 200 in all, who had been confined at Davenport, Iowa.
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> (3) Of Sioux Indians from Minnesota who were friendly to the United States during the outbreak in 1862, and who were then in a destitute condition in that State.

Id. at 1664-65.

For further discussion of Santee Dakota people's struggle to survive during their years at Crow Creek, see Clemmons, *supra* note 187, at 41-61; Doreen Chaky, Terrible Justice: Sioux Chiefs and U.S. Soldiers on the Upper Missouri, 1854-1868, at 183-97 (2012) (book chapter titled "A Reservation of Desolation"); Colette A. Hyman,

Survival at Crow Creek, 1863-1866, Minn. Hist., Winter 2008-2009, at 148, http://collections.mnhs.org/mnhistorymagazine/articles/61/v61i04p148-161.pdf; *see also* Anderson, *supra* note 181, at 279. Historian Gary Clayton Anderson writes:

> Death rates at Crow Creek climbed appreciably by late summer [1863], mainly from illness and malnutrition. By spring 1864, roughly two hundred had died, many of them children. While the camp consisted originally of roughly 600 women, 600 children, and 116 men, literally two-thirds of the remaining people left Crow Creek by spring 1864. By this time, even Dakota Indians knew that crops could not easily be grown in the rocky soil, which dominated the landscape around Crow Creek. Worse, the early years of the 1860s had been dry on the Great Plains, leading to dust storms. . . .
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> Large numbers of these Mdewakanton Dakota people fled east to join the scout camp established by Gabriel Renville near Coteau des Prairies, while others migrated south to Fort Randall, where younger Dakota women prostituted themselves to the officers and men for food. Crow Creek had become a death camp with a mere five hundred occupants remaining from the original group of just over thirteen hundred that had been dropped at the location the year before. Thus, it took little prompting to convince the Dakota Indians, then spread out along the Missouri River, to move once again in spring 1866 to new lands at Santee, Nebraska. Here the Mdewakanton band was finally reunited, as their men, released from Davenport, arrived first, with their dependents following.

Id.; *see also* Anderson, *supra* note 160, at 65-66 (footnote omitted) ("With six hundred women at Crow Creek and virtually no eligible men, Dakota women and their children often went to live with officers or common soldiers at the fort or joined polygamous arrangements in order to receive rations. The Mdewakanton refugees who reached the scout camps in 1864 and 1865 were usually led by women. The army had agreed to give rations—usually half-day rations—to all dependents of scouts, but the amount consistently fell short. Thus, Gabriel Renville and his scouts had to make one of two choices—they could turn destitute women away to starve to death or list them on the rolls as wives, in which case the government would provide some food. The list of more than a hundred active scouts from 13 September 1864 shows that about half of their households included more than one woman.").

Harrowing congressional testimony from 1865 by Santee Dakota victims of confinement at Crow Creek Agency, as well as contemporaneous first-hand accounts by U.S. soldiers and agency personnel familiar with conditions there, are appended to a U.S. Senate report published in 1867. *See* Condition of the Indian Tribes: Rep. of the J. Spec. Comm. Appointed Under J. Resol. of Mar. 3, 1865, app. at 401-19 (1867) [hereinafter "Condition of the Indian Tribes"], https://babel.hathitrust.org/cgi/pt?id=hvd.32044051726057&view=1up&seq=5&skin=2021. Mdewakanton Dakota chief Passing Hail stated:

> When the provisions were brought here the agent told us the food was to be divided between us and the Winnebagoes, and only five sacks of flour were given us per week through the winter; they were issued to us each Saturday. They brought beef and piled it up here; they built a box and put the beef in it and steamed it and made soup; . . . and that is the reason these hills about here are filled with children's graves; it seemed as though they wanted to kill us. We have grown up among white folks, and we know the ways of white folks. White folks do not eat animals that have died themselves; but the animals that died here were piled up with the beef here and were fed out to us; and when the women and children, on account of their great hunger, tried to get the heads, blood, and entrails, when the butchering was being done, they were whipped and put in the guard-house. . . . We heard that the agent traded some of our goods away, and we suppose he traded them for robes and furs. We think if he had not have traded them away there would have been plenty to go around, and

> the women would not have been crying with cold.

Id., app. at 407 (testimony of Chief Passing Hail). Another Santee Dakota witness testified:

> [The Indians at this agency] have suffered much for both clothing and provisions. . . . At times they have been two days without anything to eat, especially the women who had no men to provide for them; and most of them were in that condition at first, as less than a hundred men came here with them. In the fall or winter of the same year I came a half-breed woman by the name of Moore starved to death.
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> . . . .
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> . . . They had no guns nor horses [to go and hunt], and but few men, and they were unacquainted with the country. When they got guns along in that winter [of 1863-1864], . . . they started on a [buffalo] hunt to James river. They were compelled to pack their wood on their backs as far as the James river, about 60 miles. The reason they went on this hunt is that they were so near starved. One aged woman became exhausted, and they had to leave her about forty miles out. They had no provisions to leave with her, and she has never been seen since.

Id., app. at 405 (testimony of David Faribault). A military surgeon testified further about the noxious food the U.S. government provided for the Indians at Crow Creek Agency:

> Some time about the middle of the winter a large vat was constructed, of cottonwood lumber, about six feet square and six feet deep, in connexion with the steam saw-mill, with a pipe leading from the boiler into the vat. Into the vat was thrown beef, beef heads, entrails of the beeves, some beans, flour, and pork. I think there was put into the vat two barrels of flour each time, which was not oftener than once in twenty-four hours. This mass was then cooked by the steam from the boiler passing through the pipe into the vat. When that was done, all the Indians were ordered to come there with their pails and get it. . . . The Indians would pour off the thinner portion and eat that which settled at the bottom. As it was dipped out of the vat some of the Indians would get the thinner portions and some would get some meat. I passed there frequently when it was cooking, and was often there when it was being issued, and it had a very offensive odor; it had the odor of the contents of the entrails of the beeves. I have seen the settlings of the vat after they were through issuing it to the Indians, when they were cleaning it out, and the settlings smelt like carrion—like decomposed meat. . . . [T]he quantity of food issued to them per day did not exceed eight ounces per head for man, woman, and child. . . . The entrails of the beeves thrown into the vat the Indians said were not washed, and I should think by the smell that they were not.
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> . . . .
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> . . . [The Indians] would pick up the corn left by the horses when fed; they would eat wolves poisoned by the soldiers; they would skin the wolf for the sake of the carcass to eat; they also ate the horses that died through the winter. I mean the horses belonging to the soldiers.
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> . . . .
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> . . . No other rations were issued during that time [when rations of soup were issued from the vat]. Soup from the vat was all they had, and I think it was only issued every other day.

Id., app. at 401-02 (testimony of Samuel C. Hynes, assistant surgeon, 6th Iowa Cavalry); *see also*, *e.g.*, *id.*, app. at 407, 409-10 (testimony of Edward R. Pond, mission teacher of the Santee Indians at Crow Creek Agency) ("They had but little clothing, not enough to protect them from the cold. There had been no clothing issued to them for more than a year. They suffered severely from exposure and want of clothing. . . . One year

her young son. She entrusted Vines to the care of her aunt Tateiyayewin ("Gone Wind Woman") and her aunt's husband Mahpiyawakonze,[207]

ago last winter several women and a boy, being very hungry, killed one of the cattle to eat, and Major [Saint Andre Durand] Balcombe[, U.S. Indian agent for the Winnebagos at Crow Creek,] put them in a very cold house in very cold weather and kept them there nearly a week without fire, and day times he took them and had them work round and fed them on bread and water. On another occasion, while they were slaughtering the cattle, Balcombe ordered them not to let the women come near where they were butchering, but some disobeyed and went near to get the blood, when he seized them there in numbers and put them in a cold house and kept them over night without fire. One of the women had a baby one week old, which she had left at her house, and some woman brought it up to be nursed, but Balcombe refused to let it be nursed, but finally relented and let it go in, and the woman that brought it up gave her one of her blankets."); *id.*, app. at 415 (testimony of Rev. John P. Williamson, missionary among the Santee Indians at Crow Creek Agency) ("For a short time the Winnebago physician supplied the Santees with medicines, but for a year past no provision has been made for medicine or medical attention. They very much need and are very desirous to have a physician; it would be an act of mercy on the part of the government to furnish them with one."); *see also* Clemmons, *supra* note 187, at 49-50 (endnotes omitted) ("As winter [1863-1864] approached, . . . Balcombe . . . took official charge of the Dakota side of Crow Creek . . . . 'Agent Balcombe,' John Williamson bluntly stated, 'hates the Sioux and has said that they all deserved to starve to death.' Balcombe's animosity toward the Dakota was palpable. He refused to hire an interpreter because 'he likes it better—they can't trouble him too much.' He also allotted the poorest cattle to the Dakota, reserving the better animals for his family. This meant that Dakota families often received 'nothing but heads, and sometimes nothing but entrails and feet.' After Balcombe distributed a few sickly cattle to the Dakota, he ordered agency employees to slaughter the rest and spread out the carcasses to freeze over the winter. Agency workers stacked the dead animals inside and outside the agency warehouse and covered them with sawdust. According to Edward Pond, . . . by spring the meat was 'spoiled and tainted and produced an offensive odor' and was swarming with maggots. Balcombe, however, issued the spoiled meat to the families until the following June. . . . When . . . Balcombe finally issued clothing and blankets, he did so in a way that humiliated and dehumanized the women. He allegedly stood at the top window of the warehouse and threw out a dress and a blanket for each family. He had the women stand below to catch the supplies. Unfortunately, strong winds blew many of the dresses and blankets away, forcing the women to chase them across the prairies. Later, the women found out that much of the clothing had not been distributed and was being used by the reservation staff. Wicahpewastewin (Good Star Woman) recalled that 'the Indians were almost naked. They wound burlap around their legs to keep warm. Many of the women had to wear burlap gotten from the soldiers, and nobody had any sleeves in their garments.'").

Among the hundreds of Santee Dakota Indians who perished at Crow Creek was my great-great-great-grandfather Tunkanwasicunna ("Stone Little White Man")—the Wahpeton Dakota father of my great-great-grandfather Iyasamani ("Yelling Walker")—who died while confined there in 1864. *See supra* note 194; *cf.* Clemmons, *supra* note 187, at 49 (endnotes omitted) ("For six weeks after they arrived at Crow Creek, Dakota men, women, and especially children died at the average rate of two, three, or more a day. By July, just over a month after arriving at Crow Creek, 70 had died from illness and starvation. By September, [John] Williamson reported that about 150 had died, noting that 'there are hardly any babies and small children left.' By 1864, [Episcopal missionary] Samuel Hinman reported that more than six hundred children had died from starvation and illness.").

[207] *See supra* note 194; *see also* Monjeau-Marz, *supra* note 200, at 136 (reprinting Rep. of the Comm'r of Indian Aff. for the Year 1863, *supra* note 200, at 315) (showing

enabling the boy to remain in Minnesota to be raised within a small community of Indian scouts and their families, who were permitted to continue residing in the state.[208] Thus, like my great-great-grandfather Iyasamani,

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"Mahpiyawakinze [Mahpiyawakonze]" as head of family of four in list of heads of families in census of the Indian camp at Fort Snelling, Dec. 2, 1862); *Fort Snelling Concentration Camp Dakota Prisoners*, *supra* note 200, at 173 (showing "Mahpiyawakanzi [Mahpiyawakonze]" as head of family of four in list of heads of families at Fort Snelling, as compiled by U.S. Army on Dec. 2, 1862). Mahpiyawakonze's name is included among the Santee Dakota signatories to a "Petition of chiefs and headmen of Medawakanton [Mdewakanton] and Wahpakoota [Wahpekute] Sioux Indians" confined at Fort Snelling, dated December 18, 1862, pleading "to our Great Grand Father, the President of the United States," for fair and merciful treatment; this petition is reprinted in the Congressional Record for the date February 11, 1898, in support of a bill for restoring "the annuities . . . arising under the treaties . . . of . . . 1837, and . . . 1851, which annuities [were] declared forfeited by the act of Congress approved February 16, 1863." 31 Cong. Rec. 1651, 1656 (1898) (providing text of annuities restoration bill and including "Marpeyawakonze [Mahpiyawakonze] (his x mark)" in list of 1862 petition's signatories). The petition states that "our young men all broke out" and "went to war," but that the signatories "felt bad for this and opposed it," stating further:

> We did not go to war. We killed nobody. We helped to save the captives, and we succeeded in saving nearly 300 white women and children . . . .
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> . . . We did no harm and tried to do good. We know our young men and many of our old men have broken the treaty, and we feel bad. We are farmers, and want that our Great Father would allow us to farm again whenever he pleases, only we never want to go away with the wild blanket Indians again, for what we have done for the whites they would kill us. We of the Upper Sioux would like to go to live on the Couteau des Prairie, 15 miles west of Big Stone Lake, in Dakota Territory, and we of the Lower Sioux would like to go back to our farms and there live as white men, or we would like to live among the white men and farm as they do if they would let us. We think we ought to be dealt with as our Great Father does with his white children.
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> . . . [W]e who did not do bad hope to live, and we ask our Great Father to let us live and to aid us. We think we have not forfeited our annuities or other funds, because we have done no wrong; and we ask that our Great Father will use so much as belongs to us in such a way as to him seems best for our good to help us to live, and as much as belongs to the bad Indian we would like to have our Great Father pay our just debts out of, and it is in right that the white people who have lost all their property should be paid out of the money which was the Sioux'.
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> We humbly and respectfully ask that our Great Father take pity on us and do as he thinks best for our good. We must have food and clothing and in the spring somewhere to live. . . . We are here at Fort Snelling, 41 Lower Sioux Indians, 20 Upper Sioux Indians, and about 1,500 women and children and 20 half breed men. We know not what to do and we submit ourselves into the hands of our Great Father.

Id. at 1656 (reprinting text of 1862 petition).

[208] *See supra* note 194; *see also* Clemmons, *supra* note 187, at 133, 143 ("[E]ach of the approximately 280 men who eventually worked as scouts had varied reasons for joining . . . . In addition to sending money to their relatives, scouting also allowed some of the men . . . to feed and even remain with their families. . . . Approximately thirty to forty families were allowed to remain in Minnesota during their husbands' service as scouts."); *cf.* Colette Routel, *Minnesota Bounties on Dakota Men During the U.S.-Dakota War*, 40 Wm. Mitchell L. Rev. 1, 3 & n.7 (2013) ("Not all of the Dakota were removed from Minnesota, however. The United States allowed certain

Mahpiyawakonze—the Mdewakanton Dakota scout who raised and protected my great-grandfather Vines Mitchell (Iyasamani and Wasteyadan's son) in Minnesota after the 1862 U.S.-Dakota War, serving as Vines's adoptive father[209]—settled among the Sisseton-Wahpeton people, received his assigned allotment on the Lake Traverse Reservation,[210] and even took part, as an Indian scout, in punitive expeditions under the leadership of Gabriel Renville, chief of the scouts, against other Dakota Indians targeted as "hostiles" by the U.S. military.[211]

'friendly' or 'loyal' Dakota, who had helped whites during the War to remain within the state."); Lass, *supra* note 206, at 357 ("One hundred thirty-seven Sioux and half-breeds . . . were to be retained at the fort. These included the scouts who were to accompany the proposed Sibley expedition of 1863, and their families, as well as other individuals who had remained friendly to the whites during the uprising.").

[209] *See* List of Sioux scouts and soldiers prepared by S.H. Elrod and approved Feb. 16, 1892 by Acting Interior Secretary George Chandler, at 14-15, U.S. Off. of Indian Aff., Manuscripts Collection, Minn. Hist. Soc'y, location M201 (microform reel) (on file with author) [hereinafter "List of Sioux scouts and soldiers"], http://www2.mnhs.org/library/findaids/00334.xml (showing "John Mar-piya-wa-kanza [Mahpiyawakonze]" as no. 28 on roll of "Scouts or Soldiers" and listing, under the heading "Descendants of Scouts or Soldiers Deceased," "Ta-ta-eya ya win" [Tateiyayewin]" as Mahpiyawakonze's "Widow" and "V.P. Mitchell" as his "Adopted Son").

[210] *See* H.R. Exec. Doc. No. 42, *supra* note 195, at 28 (schedule of allotments of land in severalty assigned to members of the Sisseton and Wahpeton bands of Sioux Indians residing on the Lake Traverse Indian reservation) (showing "Ma-rpi-ya-wa-kon-ze [Mahpiyawakonze]" as name of allottee for allotment no. 261); 1867 Lake Traverse Census, *supra* note 195 (showing "Morpiyawakenze [Mahpiyawakonze]" on 5th unnumbered page of handwritten census list of Lake Traverse Indians).

[211] *See* Gabriel Renville, *A Sioux Narrative of the Outbreak in 1862 and Sibley's Expedition in 1863*, *in* 10 Minn. Hist. Soc'y Collections 612, 613 (1905) (showing "Mah-pe-yah-wah-koon-zay [Mahpiyawakonze]" on list of seven "Medawakantons [Mdewakantons]" who were among the "scouts who with their families had come from Fort Snelling" "to go on General Sibley's [1863] expedition" against "the hostile Sioux"; and showing the same Dakota Indian scout's name on a second list of "the names of those who were not to go [on this expedition], but to remain and scout with their headquarters at Fort Ridgely"). Portions of Gabriel Renville's narrative, including the second list of Dakota scouts, are reprinted in Through Dakota Eyes: Narrative Accounts of the Minnesota Indian War of 1862, at 100-05, 186-92, 230-34, 273-75 (Gary Clayton Anderson & Alan R. Woolworth eds., 1988). *See also* Laura L. Anderson, *Introduction* to Amos E. Oneroad & Alanson B. Skinner, Being Dakota: Tales & Traditions of the Sisseton & Wahpeton 3, 8-9, 20-21 (Laura L. Anderson ed., 2003) (footnotes omitted) ("Some of the Dakota men enlisted as scouts with Gabriel Renville (Tiwakaŋ ["Sacred Lodge"]). The scouts were a U.S. Army auxiliary group used to control the Dakota camps, to bring in fugitives, to identify the active participants in the war, and to be trackers for the 1863-66 military expeditions. The members of the scouts' extended families were in Davenport, Crow Creek, or with the roving bands, while their immediate families were often at the scout station. The military provided specific orders for the scouts to carry out, regardless of the obligations the scouts felt toward their families. They understood that any redemption of the Dakota people, any benevolence on the part of the government, and any hope of return to their homeland depended on their performance for the army. . . . Early in 1865 Solomon [Two Stars] and four [other] scouts . . . took the lives of three men from a group that had entered Minnesota, killed the Jewett family in Blue Earth County, and were on their way to the Missouri River when the scouts intercepted them. Jack Campbell, the

4. Tribal Understanding of the 1889 U.S. Agreement with the Sisseton-Wahpeton Dakota (*continued*)

a. December 3-5, 1889—U.S.-Dakota Negotiations at Sisseton Agency

It would be unrealistic, of course, to expect the Justices of the United States Supreme Court, when deciding an Indian case, to acquire as intimate an understanding of the impact of U.S. Indian policy on Native communities as those of us whose family histories and tribal destinies have been so directly and profoundly affected.[212] In the *DeCoteau* case, however, the Justices needed only have faithfully applied traditional principles of Indian law to have avoided the erroneous, unjust, and indeed preposterous conclusion that the 1889 Agreement with the Sisseton-Wahpeton bands of Dakota Indians, ratified by Congress in 1891, imparted "clear expressions of tribal and congressional intent" to abolish the Lake Traverse Reservation.[213] Crucial among those Indian law principles is the rule that any agreement with an Indian tribe must be judicially construed as the Indians would have understood the provisions when they negotiated and signed the agreement.[214] In *DeCoteau*, not only is it certain that

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favorite nephew of Solomon, was among the perpetrators. Under strict orders to take no prisoners, Solomon Two Stars expediently and dutifully executed his sister's son, 'before my tears should blind me,' in what he lamented as 'the awfullest moment' of his life. Performing a soldier's duty exacted a new loyalty . . . . Every scout . . . no doubt felt ambivalent about his new duties.").

[212] In his watershed *History of the Santee Sioux*, published in 1967, the late Professor Roy W. Meyer wrote:

> Whatever the end of the Sioux Uprising may have meant to the white man—a chance to speculate in land or acquire a farm in lands previously unavailable, a demonstration of the Lord's saving power over men about to be executed, or something else—for the Sioux it meant just one thing: catastrophe. It meant their expulsion from the land where they and their ancestors had lived since the immemorial past, and, more than that, it meant the shattering of whatever unity the Santee bands had possessed. Never again were the Mdewakantons, Wahpekutes, Sissetons, and Waheptons one people, occupying a single fairly well defined area. Henceforth they were scattered over states and provinces, with hundreds of miles separating their dispersed settlements and the lands between rapidly filling up with white men, who learned eventually to tolerate the Indian, if only to exploit him, but never to accept him as an equal.

Meyer, *supra* note 181, at 132.

[213] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 447 (1975).

[214] *See* Cohen's Handbook § 2.02[1], *supra* note 16, at 113-14 (footnote omitted) ("[T]reaties and agreements are to be construed as the Indians would have understood them."). Professor Richard Collins explains the crucial function of this interpretive rule in the context of nineteenth-century federal-tribal policy negotiations:

> The [treaty] canon is a core part of the trust relationship that is firmly established as federal policy. Moreover, it is often difficult to prove the particular circumstances of a treaty's negotiation over a century after its making. The effect of the canon is to place the burden on opponents of Indian claims to prove uncoerced Indian consent to yield the asset at issue. This is an appropriate rule in light of the language barrier and the prevalence of at least some degree of duress. The canon also forces courts to try to understand the unfa-

the Sisseton-Wahpeton representatives would *not* have understood an agreement that contained "not a word to suggest that the boundaries of the reservation were altered"[215] as nevertheless effectuating that devastating result; but they in fact left an eloquent and forceful record of their position, concerns, and demands in the 1890 report of councils between the Indians and the U.S. negotiators,[216] a report that likewise contains nothing to suggest that by merely agreeing to sell their unallotted lands for a set price per acre, the Sisseton-Wahpeton leaders consented to the destruction of their people's "permanent reservation" home.[217]

As indicated previously,[218] toward the beginning of those negotiations, on December 3, 1889, the Sisseton-Wahpeton representatives' chosen spokesman, Chief Gabriel Renville, was adamant: the tribe would not agree to sell any of its unallotted land unless and until the federal government first satisfied the leaders' demand for payment of "back annuities" that were a major source of the Indians' longstanding grievances.[219] The U.S. negotiators balked at this, making a series of long speeches aimed at getting the Indians to back down from their stated position and instead "put the two things together" by agreeing to have

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> miliar, Indian side of a case, and it stiffens the spines of uncertain judges when prevailing politics run against Indian interests.

Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. Colo. L. Rev. 1, 9 (2013) (footnote omitted); *see also id.* at 21 (footnotes omitted) ("Congress ended new Indian treaties in 1871, but the government continued to make formal agreements with Indian nations that were ratified by the full Congress rather than by two-thirds of the Senate. These statutes are essentially treaty equivalents that should be subject to the treaty canon."); *cf.* Matthew L.M. Fletcher, *Textualism's Gaze*, 25 Mich. J. Race & L. 111, 116 (2020) ("As with treaty interpretation, the way Indians and tribes understand texts is crucial to the interpretation of all relevant texts—and should usually be dispositive. Federal Indian affairs statutes are usually more than mere federal statutes; they are negotiated agreements between sovereign entities: the United States and the Indian tribes. To treat a federal Indian affairs statute as merely a creature of Congress is wrong.").

[215] *DeCoteau*, 420 U.S. at 461 (Douglas, J., dissenting).

[216] *See* S. Exec. Doc. No. 66, *supra* note 157, at 15-29 (report of councils with Sisseton and Wahpeton Indians).

[217] *See DeCoteau*, 420 U.S. at 461 (Douglas, J., dissenting) (citation omitted) (noting that the 1867 Treaty "granted these Indians a permanent reservation with defined boundaries and the right to make their own laws and be governed by them subject to federal supervision"); *cf.* Robert N. Clinton, *The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation*, 28 Ariz. L. Rev. 29, 41-42 (1986) (footnote omitted) ("In *DeCoteau* . . . Justice Stewart relied on late nineteenth century statements by tribal leaders, federal negotiators, and members of Congress that were addressed to the then salient question of land ownership to resolve a quite different concern over jurisdiction defined in terms of reservation diminishment. Stewart's inquiry was at best misguided and at worst an outright misuse of Native American legal history.").

[218] *See supra* notes 167-177 and accompanying text.

[219] *See* S. Exec. Doc. No. 66, *supra* note 157, at 6 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan) ("[U]ntil those back annuities were paid [the Indians] positively declined to enter into negotiations for the sale of any portion of their surplus lands . . . .").

"the [back annuities] claim and the sale of land on one agreement."[220] The commissioners used both carrot and stick in their efforts to get what they wanted. Referring to a lapsed congressional bill from the previous year that, if passed, would have partially satisfied the Indians' "back annuity" claims,[221] the chairman of the commission, General Eliphalet Whittlesey, said: "I will keep trying to get the bill through, I am so friendly to this people; but if we could put these two things together now, we should hope to succeed."[222] However, the commissioners also warned the Dakota leaders that they and their people would suffer if they failed to comply with the U.S. negotiators' demand that the Indians "be willing to sell this land" and state "how much [they] would . . . ask per acre."[223] Thus, Whittlesey said: "You are very much in need of money for spring, and if you should put off doing anything until this claim is settled you may not get anything for several years. As you are intelligent men, we hope you will come to some agreement and have both put together."[224]

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[220] *Id.* at 18 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[221] *See* H.R. Rep. No. 1953, *supra* note 177. The 1888 House Report specified that the proposed legislation would have benefited "certain Sisseton and Wahpeton Sioux Indians who served in the armies of the United States against their own people" by, inter alia, appropriating money "for the payments of 1862 and 1863 [that] were never made to them" because of "the confiscation of their [treaty] annuities" following the U.S.-Dakota War. *Id.* at 1, 4 (report of William H. Perry, Chairman of the House Committee on Indian Affairs; letter from J.D.C. Atkins, Commissioner of Indian Affairs, to William F. Vilas, Secretary of the Interior); *see also supra* notes 177-178 and accompanying text.

[222] S. Exec. Doc. No. 66, *supra* note 157, at 18 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[223] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[224] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey). This technique of pressuring the Indians by stating or insinuating that they lacked intelligence if they refused to comply with U.S. demands and that such refusal would endanger the Indians' survival and the lives of their children had become a routine component of federal negotiations with Indian tribes in the late nineteenth century. *See*, *e.g.*, S. Exec. Doc. No. 9, 44th Cong., at 31-32 (2d Sess. 1876) (journal of proceedings of the George Manypenny Commission tasked with securing tribal consent to relinquishing ownership of the Black Hills area of the Great Sioux Reservation in 1876) (remarks of commissioner Henry B. Whipple, Episcopal bishop of Minnesota, to the Oglala Lakota) ("[T]he Great Father . . . selected this commission of friends of the Indians that they might devise a plan, as he directed them, in order that the Indian nations might be saved, and that, instead of growing smaller and smaller until the last Indian looks upon his own grave, they might become, as the white man has become, a great and powerful people. . . . [Y]ou cannot find an instance on the earth where a people without government, without education, without labor, have ever failed to go down into the grave and become extinct."); *id.* at 42-43 (remarks of commissioner Whipple to the Sicangu Lakota) ("You say these are very hard words; but they are very kind words. They are kind words that will tell any people the way to life instead of death. . . . I believe there are two ways open to you: one leads to peace, happiness, and life; and I believe the other way is the path of sorrow. As I know the Indian loves his children as I love my children, I ask them to act as wise men."); *id.* at 56 (remark of commissioner H.C. Bulis to the Cheyenne River Sioux)

The pressure continued as commissioner D.W. Diggs, the South Dakota banker, took up the refrain:

> I have been your friend since I knew you ten years ago. I have watched with great interest the progress your children are making, because it is education that elevates man. Many of you are too old to get the benefits of these schools, but you ought to do for your children what you were unable to do for yourselves. . . .
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> [T]he Secretary . . . appointed me because he knew that I was your friend and would see that justice was done. I think your claim ought to be paid. . . . Our instructions are to ask you if you want to sell your surplus lands. You see these gentlemen coming a long way do not care to have their mission fail, nor do I, as you need the money, and while we will not attempt to force you, we shall use all fair argument to have you see the matter as we see it. The chief has shown us just what is between us. The error in survey of east line and the payment of the claim of back annuities. . . . The Secretary wrote to Congress saying that your claim was a just one and ought to have been adjusted long ago. Every man who can read that treaty must admit that your claim is a just one, and that you ought to have the money. We are here to-day to help you to get that money; there is a way we can help, and a way that may fail.
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> Our proposition is this: After setting aside lands for schools, churches, and any who may not have received allotments, to buy the balance. When we have agreed on a price per acre, we recommend that the back annuities be paid first, from 1862 to date; second, that the surplus lands be paid for at a price agreed upon; these are the two points. . . . I know you think about the deceit of agents and others in the past, but there is none of that now. . . . You need money now to buy seed, oxen, wagons, and farming implements. If you fix the bill now, you get the money in time for your crops. Why should you men be denied this money any longer. It may be five years before another commission comes out here. We want you to have it, and are willing to wait. If you say the bars are up, we will go to our tepees; but if you think the bars can be gotten over, we will wait and talk with you.
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> . . . .

("If you refuse to accept [this agreement], death and starvation stare you in the face."), *all quoted in* John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 Great Plains Nat. Resources J. 40, 53 n.42 (2001); *see also* Ann Laquer Estin, Lone Wolf v. Hitchcock: *The Long Shadow*, *in* The Aggressions of Civilization: Federal Indian Policy Since the 1880s, at 218 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984) (citation omitted) (quoting remarks of David H. Jerome, chair of the U.S. commission tasked with securing tribal consent to the allotment of the Kiowa, Comanche, and Kiowa-Apache Reservation in 1892) ("If the Indians will do what the Great Father wants them to do, and do their part well, it will result in your having plenty of food and clothing; and instead of having, as you sometimes do, only one meal a day, you will have three meals a day and have plenty of clothing and things that will make you comfortable through the winter. . . . Now, if you follow the plan that we have told you about you will not have your babies die from the cold, but you will have them grow up good, strong, healthy men and women, instead of putting them in the ground.").

> . . . We can go to Congress this winter and have your claim allowed, but now that the committee is here we would like to do both at once and guaranty that both will pass together.[225]

Despite the pressure, Sisseton-Wahpeton Chief Gabriel Renville remained steadfast. Perhaps recalling his long experience with congressional promises and procedural traps,[226] he explained why it was important that the matter of "back annuities" be resolved before the tribe would hear any talk of the sale of "surplus land" within the Lake Traverse Reservation:

> It seems to us if Congress should fail to ratify this proposed agreement we would have to wait years before we could get anything from Congress. If we should fail in getting our claim through we will raise the price of our land.
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> . . . .
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> We are very poor just now, as our crops have failed. In 1867 Congress said, by treaty, that it would help us when we were in need. There has been several years we have received nothing, although we relied upon it. If they were reminded of this they might help us this winter.
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> . . . .
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> . . . We know that the Government is rich and intends to do right. Why does it not first settle what it owes us and then come to us for our lands, which we will not refuse. . . . We are friends; first settle our claim, and then we will listen to and talk with you about our surplus land. We are poor and our crops have failed, but you have our money, holding it, and do not help us as promised in the sixth article of the treaty of 1867, and now we are like a drowning man grabbing at straws to save himself. We all want to do what is right. Why should the Government refuse to pay us our claim before they wish to take away our land.
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> . . . .
>
> I have spoken for all the people, and it is their wish that I should say these things. In the past there has been lots of land sold, but we have not benefited by the sales. In 1867 they promised us they would help us, but they have not helped us very much for many years. Let them first settle our claim and then we will talk about our surplus lands. We are now citizens and can talk with you as such, and do not care to talk about shoe pacs, etc., but cash. We can buy for ourselves what we need if payment is made in cash, and then we do not care to have an agency here after the surplus lands have been sold. The people have asked me to say this as their wish.[227]

As this first full day of negotiations wore on, and seeing that the chief of the Sisseton-Wahpeton people would not budge from his strongly

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[225] S. Exec. Doc. No. 66, *supra* note 157, at 18-20 (report of councils with Sisseton and Wahpeton Indians) (statements of D.W. Diggs).

[226] *Cf.* Anderson, *supra* note 160, at x (noting that in the course of his lifetime of leadership Renville "frequently walked the halls of Congress, lobbying and often getting support for his people").

[227] S. Exec. Doc. No. 66, *supra* note 157, at 18-20 (report of councils with Sisseton and Wahpeton Indians) (statements of Gabriel Renville).

stated position, the U.S. commission resorted to a different coercive tactic: divide and conquer.[228] First, General Whittlesey attempted to humor Gabriel Renville with a rejoinder following the chief's metaphor about a drowning man grabbing at straws:

> The Government does not want to take anything from you. If a man was drowning and grabbed a straw he would drown, but if a plank was handed him he would be saved. Now you have a chance of getting on a plank. We would be glad for your sake if you would put the two things together and get something for your lands and your claim.[229]

Next, stating that the commission would "put down on paper just what we think to be right and give it to you for your consideration" and "give everyone a chance to sign it,"[230] Whittlesey announced a work-around with regard to the position of the tribe's spokesman, which Chief Renville reiterated once again, saying, "It is understood that nothing more will be said by the people, as we first want our claim paid."[231] Whittlesey turned to the assembled Sisseton-Wahpeton people: "Is it the wish of all that we do not meet tomorrow?"[232] "No" was the people's answer.[233] A tribal member then asked the assembly, "Would any of you change your minds in the next ten days?"[234] "No" was the answer once again.[235]

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[228] Similar methods and tactics were used by other U.S. commissions during the allotment era to dispossess Indians of their collectively owned tribal lands. In writing about the United States' 1892 negotiations with the Kiowa, Comanche, and Apache nations, Muscogee (Creek) historian Blue Clark reflects on the general strategy:

> To persuade the Indians to cede further lands, the federal government often used specially appointed commissioners as negotiators. Commissioners in many earlier negotiations established their strategy when dealing with Indians. They began mildly by explaining that they had come to befriend the Indians and offer the best terms possible. Commissioners knew that Indians in council acted unanimously, so the federal representatives tried to separate the groups into more manageable smaller blocs. They attempted to find interested individual Indians and work with them toward agreement. As deliberations continued and Indians showed reluctance to part with their homelands, commissioners hardened in their stance. . . . Finally, the commissioners dictated terms to their wards and gained consenting signatures through intimidation, coercion, and bribery.

BLUE CLARK, *LONE WOLF V. HITCHCOCK*: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 38-39 (1994); *see also infra* note 290.

[229] S. EXEC. DOC. NO. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[230] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[231] *Id.* at 20 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[232] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[233] *Id.* (report of councils with Sisseton and Wahpeton Indians).

[234] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Wicauspinonpa, or Two Stars).

[235] *Id.* (report of councils with Sisseton and Wahpeton Indians).

The tribal member rejoined, "Shall Gabriel tell them so?"[236] "Yes," the Sisseton-Wahpeton people responded.[237]

Disregarding this demonstration of univocal support for the position stated repeatedly by Chief Gabriel Renville, General Whittlesey said, "We propose to make and submit a fair agreement and put it before you to-morrow for any to sign who wish, as it may be very many years before you have another chance."[238] To this, the chief expressed affront: "You are now treating us like children."[239] "No, not at all," Whittlesey said. "It is just as we would treat one another. If I was to make Mr. Diggs a proposition I would submit it in writing, and if he agreed he would sign; if not, he returns without signing."[240] Concluding the now-tense meeting with an attempt at amicability, Whittlesey said:

> We are friends of yours and will remain so, no matter how this matter comes out. We will be here to-morrow, and do most earnestly desire that you have something with which to start in the spring. If nothing is done now you will remain just as you are. We will do what we can to help you to get your claim through, although you are putting a load on us in asking us to help get your bill through Congress before the reservation is opened.[241]

To this, a tribal member responded: "Gabriel Renville has expressed the feeling of the people, and they have so decided and will not change. We will now close, as we have our ponies to care for."[242]

Many tribal attendees left the December 3 gathering offended by the U.S. negotiators' show of disrespect, and it took the commissioners a full week—until December 10—to reassemble a critical mass.[243] In the interim, however, the commissioners moved ahead with a strategy of overcoming resistance by meeting separately with individuals and small groups of the Dakota people.[244] Thus, on the evening of December 3,

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[236] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Wicauspinonpa, or Two Stars).

[237] *Id.* (report of councils with Sisseton and Wahpeton Indians).

[238] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[239] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[240] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[241] *Id.* at 20-21 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[242] *Id.* at 21 (report of councils with Sisseton and Wahpeton Indians) (statement of Star).

[243] *Id.* at 6 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan) (noting that the "large number of Indians" who arrived on December 9, 1889 "convened in council" on the morning of December 10).

[244] In their report to the Commissioner of Indian Affairs, the U.S. negotiators explained how their series of meetings with small factions of the Dakota proved crucial to their efforts:

> We found two nearly equally divided elements upon the reservation, one

after the close of the larger meeting, the commissioners had "a lengthy consultation . . . with Chief Renville" at which the chief reiterated that "the great fear of the Indians was that, should they consent to the sale of a portion of their reservation, with a proviso or condition that their back annuities should be paid, that portion of the agreement providing for the sale of land would be ratified by Congress and the back annuity clause be rejected."[245] The commissioners explained: "To meet this objection we promised to insert a clause in the agreement providing that the sale of the lands should not take effect and be in force until the back annuities shall have been paid."[246] And on December 4, with "many of [the Indians] . . . having gone to their homes on remote parts of the reservation," the commission had a meeting with a small faction at which "the terms [the commissioners] proposed to submit, which had been reduced to writing, except as to the price to be paid for the land, were fully and carefully explained to the Indians."[247] The commissioners reported that "[t]he result of this [December 4 meeting] and the bearing and attitude of those Indians present gave us some encouragement and led us to believe that the obstacles in the way might be removed and success yet crown our efforts."[248] On the following day, December 5, "the Indians present held a lengthy council among themselves, which resulted in a request from them that messengers be dispatched to summon every absent Indian to

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> opposed to selling any portion of their lands until the back annuities were paid, the other, the younger and more progressive element, in favor of an agreement providing for the sale of the surplus land and payment of the back annuities at the same time, and it was from this class that we received the most encouragement and assistance, and to which we are largely indebted for our success.

Id. at 7 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan); *see also infra* note 290.

[245] S. Exec. Doc. No. 66, *supra* note 157, at 6 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan). While the U.S. government's "report relative to the purchase and release of the surplus lands in the Lake Traverse Indian Reservation," *id.*, contains transcripts for some days of the negotiations (i.e., November 30, 1889, as well as from 2 to 5:20 p.m. on December 3 and on December 6, 11, 12, and 13, *see id.* at 15-29), discussions with the Indians that occurred on the evening of December 3 as well as on December 4, 5, 9, and 10 do not appear in transcript form but instead are cursorily summarized in a letter from the U.S. negotiators transmitted to the Commissioner of Indian Affairs, *see id.* at 5-8. The report provides no explanation for this discrepancy. *But see infra* note 290.

[246] S. Exec. Doc. No. 66, *supra* note 157, at 6 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan). Whereas "about 250 Indians" attended the larger meeting on the afternoon of December 3, "about seventy-five of the Indians" were present for the December 4 meeting. *Id.*

[247] *Id.* (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan). The commissioners reported that the Indians "requested that a copy of our proposition be furnished them in their own language . . . and this we agreed to do, and the council then adjourned." *Id.*

[248] *Id.* (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan).

meet in a general council to be held on Monday, December 9, previous to meeting [the commissioners again] on Tuesday[, December 10]."[249]

b. December 6, 1889—U.S.-Dakota Negotiations at Sisseton Agency

Prior to the arrival of the Indians "in large numbers" on December 9,[250] however, the commissioners continued to meet with small groups of Sisseton-Wahpeton individuals. One of these meetings, with an undisclosed number of Indians in attendance, occurred on December 6; this is one of only two of the smaller meetings for which a transcript of the day's negotiations appears in the government's published report.[251] According to the transcript only two individuals spoke at this meeting, General Whittlesey on behalf of the commission, and Michael Renville of the Sisseton-Wahpeton Dakota. Whittlesey did most of the talking:

> My friends, we have been thinking of you almost all night. There is no people that I have more interest in than the Sissetons. . . . [T]he Government is dealing kindly and generously with you, and in this matter before us the Government wishes to deal kindly with you. I think you and I agree in what you want and what we want, the only difference is in the way we want it. I think what we want will sooner enable you to get what you want. We were sent here to ask you what land you wished to sell and to make such arrangements and conditions as we could agree upon. We agree that the money due you ought to be paid. We propose that that money be a part of any agreement we make, and until that money is paid all of the agreement will be nothing. Now, if we could get together and talk the matter over, we might agree on what ought to be done. (Here the figures on back annuities were given in detail.)[252]

After thus imploring his audience's cooperation with what the commission wanted (a land-sale agreement) in order for the Indians to get what they wanted (payment of back annuities), Whittlesey sweetened the pot by explaining that the government's proposal would ensure that the back annuities would be distributed per capita and "give every man, woman, and child $240 each."[253] He then showed the Indians the prepared text of the agreement, saying, "We have written out here all about the sale of the surplus lands and the payment of the money. It is a long paper and would take me a long time to read it."[254]

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[249] *Id.* (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan).

[250] *Id.* (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan).

[251] *See id.* at 21 (report of councils with Sisseton and Wahpeton Indians).

[252] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[253] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[254] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

After "a synopsis of the agreement or proposition was read," Whittlesey continued:

> The commission will recommend that all receive equal allotments of land. In order to do this you need some land reserved. The money paid for lands will be placed to your credit in the United States Treasury at 3 per cent. interest. The money will be yours, and the interest paid every year. If at any time you need a part of the principal you can petition Congress and it will have the right to give it to you. The back annuities are included in the same paper, and unless this payment is made the rest will come to nothing. . . . Now what can we do and what do you want more than that?[255]

Knowing that he was addressing only a small fraction of the Sisseton-Wahpeton people, and that the previous day the Indians still present had agreed that messengers should be sent to summon to council a greater number of their people,[256] Whittlesey said:

> In order to make this paper binding we want a majority of the adults to sign it. We are sorry that so many have gone home, but a great many have, and we do not know when they can be brought together again. If you who are here think that we can get them here again you will let us know, or if you think there is no use we will say good-by and go home.[257]

Having listened patiently to General Whittlesey's long speech, Sisseton-Wahpeton leader Michael Renville responded:

> We have always said that when the sale of surplus lands was considered we would ask that 160 acres be given to each member of the tribe. You spoke of money due us; some of us think it ought to come to all who belong here, while others think that none but scouts should receive it. We said in council that we would not sell surplus lands until back annuities were paid, but you say that if the lands are now sold the back annuities would be paid at the same time. This pleases us. We want a translation of the agreement so that we can take it and consider it.[258]

Sensing (or perhaps knowing) which side of the intratribal debate regarding back annuities his audience was on, Whittlesey concluded the December 6 meeting by saying, "In this agreement we do not say anything about scout money, but call it the back annuities due the Sisseton and Wahpeton Indians, parties to this agreement."[259]

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[255] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[256] *See supra* text accompanying note 249.

[257] S. Exec. Doc. No. 66, *supra* note 157, at 21 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[258] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Michael Renville).

[259] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

c. December 9-11, 1889—U.S.-Dakota Negotiations at Sisseton Agency

With the arrival of the larger body of the Sisseton-Wahpeton Dakota people at Sisseton Agency on December 9, the Indians and the commissioners made their final respective preparations for the continuation of negotiations. As stated in the U.S. negotiators' letter to the Commissioner of Indian Affairs, on December 9 the Indians "held a protracted council among themselves" out of which arose "many inquiries . . . respecting the proposed agreement, and in some cases [the Indians] came in groups for information."[260] The following day, on December 10, the commissioners "proceeded to the council room" where "each article of the proposed agreement was taken up and carefully explained in detail, except as to the price proposed to be paid for the land." This was in response to the fact that "information [had] reached [the commissioners] that many of [the Indians] did not understand our proposition, especially the article relating to their back annuities."[261] After meeting with the commissioners, the Indians used the rest of that day, December 10, "to further counsel among themselves"; out of this meeting grew the Sisseton-Wahpeton people's newly arrived-at position in response to the multifaceted pressure to immediately sell all of the Indians' unallotted lands within the Lake Traverse Reservation:

> [T]he Indians agreed among themselves that they would sell all the lands remaining after the allotments and additional allotments provided for in article four of the agreement had been made,[262] at $5 per acre, the fund arising therefrom to draw interest at 5 per cent. per annum. They also at this council appointed a committee of ten to confer with [the commission] in regard to the matter.[263]

By December 11, 1889, many of the Sisseton-Wahpeton people had returned to Sisseton Agency, although it appears that a "full council" was not present until the following day.[264] Nevertheless, on December 11 the chairman of the U.S. negotiating commission, General Whittlesey,

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[260] *Id.* at 6 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan).

[261] *Id.* (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan).

[262] Article IV of the 1889 Agreement standardizes allotments within the Lake Traverse Reservation "to equalize the allotments . . . so that each individual [tribal member], including married women, shall have one hundred and sixty acres of land" and provides that "patents shall issue for the lands allotted . . . upon the same terms and conditions and limitation as is provided in" the General Allotment Act (or Dawes Act) of 1887. Agreement of 1889, art. IV, ratified by Act of Mar. 3, 1891, ch 543, § 26, 26 Stat. 1035, 1037-38, *reprinted in* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 458-59 (1975).

[263] S. Exec. Doc. No. 66, *supra* note 157, at 6 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan).

[264] *See id.* at 7 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan) (noting that "on that morning [Thursday, December 12] there was a full council").

proceeded with the important business of explaining the six articles of the commission's proposed agreement. But first he chastised the Indians for having taken several days to reassemble, saying, "My friends, I am glad to see so many of you here today. There were many of you here on Tuesday, but many of you ran away like scared rabbits."[265] As with the smaller meeting on December 6, the government's report provides a transcript of the December 11 proceedings; and, again, like at that earlier meeting, the transcript shows that besides Whittlesey only one other person—Charles Crawford of the Sisseton-Wahpeton Dakota, this time—spoke.[266]

In explaining the six articles of the government's proposed agreement, Whittlesey first highlighted that the agreement would accommodate those who desired to have the back annuities paid per capita. Referring to the back annuities as "[t]he money you have tried for so long to get, but have failed,"[267] Whittlesey explained that the agreement "will give each [of you] $240."[268] He then reiterated that the bill from the previous year which would have provided a partial remedy for the U.S. government's unjust confiscation of the Sisseton Wahpeton people's previous treaty annuities[269] "died with the last Congress," and that "[t]his agreement, if Congress ratifies it, will be just the same as a new bill."[270] Whittlesey concluded his summary of that part of the proposed agreement addressing "back annuities" as follows: "I think now you understand what the agreement says about the back annuity money."[271]

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[265] *Id.* at 22 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[266] *See id.* at 22-23 (report of councils with Sisseton and Wahpeton Indians); *see also supra* notes 250-259 and accompanying text.

[267] S. Exec. Doc. No. 66, *supra* note 157, at 22 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey). Whittlesey's blaming the Indians on December 11 for nonpassage of the prior remedial bill contrasts with his statement on December 3 that "[t]he Secretary did all he could to get the bill through Congress last winter, and we helped him, but there were so many things before Congress that we failed." *Id.* at 18 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey). Historian Valerie Sherer Mathes explains the real reason for the bill's defeat:

> [A]lthough [the] scouts' bill had passed the Senate, Joseph G. Cannon, chairman of the House Appropriations Committee, had prevented its consideration. Cannon did not believe that the annuities should be restored, despite both the secretary of the interior and the commissioner of Indian affairs supporting it. They argued that the Sisseton-Wahpetons were "in a starving condition" and that they deserved the appropriation because it had been "unjustly and wrongfully withheld." At one point in the hearings, Cannon crossly responded, "Let them starve!"

Mathes, *supra* note 134, at 153-54 (footnotes omitted).

[268] S. Exec. Doc. No. 66, *supra* note 157, at 22 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[269] *See supra* note 221 and accompanying text.

[270] S. Exec. Doc. No. 66, *supra* note 157, at 22 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[271] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

Whittlesey then summarized other provisions of the government's proposed agreement with the Sisseton-Wahpeton Dakota:

> Second. . . . [W]e have put in this agreement an equal division of land so that each will receive 160 acres. That will include the children born since the allotment of land. These were the two conditions made by you in regard to the sale of the surplus lands.
>
> Third point. After you have received your back annuities, each receive 160 acres of land; you will sell all that is left. . . . In this agreement the United States Government agrees to pay for the land so sold under the allotment act, and draw interest at 3 per cent. The principal is to be placed in the United States Treasury. This interest money and, if at any time you wish it, a part of the principal can be appropriated by Congress to be used for your benefit and educational purposes. I want you to understand one thing: The money to be paid for your lands will not be paid to you at once, as the law forbids; but if by failure of crops or any thing you wish to draw a part of the principal you can do so.[272]

Having thus explained that the agreement provided for (1) payment of back annuities; (2) equalized sizes of allotments for all tribal members, including children; and (3) sale of all unallotted lands within the reservation at an annual interest rate of three percent, General Whittlesey addressed the one matter that remained and that had not yet been incorporated into the government's proposed agreement, namely, "how much will you ask per acre for the lands you wish to sell?"[273] But before allowing the Indians to answer that fundamental question, Whittlesey cautioned them as follows:

> There are two ways of making a bargain: If a man has a horse to sell he says he will sell it for so much. Sometimes he says, how much will you give for it? Now, you have not told us how much you will ask for your surplus land, but we know about how much the Government will give. I am going to tell you just how much we think the Government will give for it.[274]

At this point, Sisseton-Wahpeton representative Charles Crawford "asked for two minutes time to speak," a request that was "granted."[275] Crawford said:

> Yesterday there was an effort to have the scout bill pushed without signing the agreement, and then there are some who think they can get their back annuities by having it included in this agreement. Some have an idea that the scout bill is still before Congress; for that reason I have asked that you be called here to explain. You have said

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[272] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).
[273] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).
[274] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).
[275] *Id.* (report of councils with Sisseton and Wahpeton Indians).

> that the scout bill is dead. I am glad it is as it is. We all want that this annuity will go to each member of this people.[276]

General Whittlesey responded to Charles Crawford's request for an explanation regarding the status of the "scout bill," saying:

> What Mr. Crawford has said is good. You are all men and capable of judging each for himself. He has asked us to explain again if annuity money will be paid to all alike. We have said, yes. . . . Mr. Crawford asked if the old scout bill was still before Congress. As I have said before that bill of yours is dead. It died with the last Congress, March 4, 1889.[277] There is no such bill now before Congress, but if we can get this paper signed we shall hope to get it ratified and that will secure to you your annuity money, and all the other things spoken of.[278]

The chairman of the commission of U.S. negotiators ended the December 11 meeting with a small group of Sisseton-Wahpeton Dakota people with remarks strongly hinting that the government was inclined to approve only a small price per acre for the unallotted lands within the Lake Traverse Reservation:

> Now, as you want to be by yourselves for a little while before we name the price the Government will pay for your lands, we are willing to wait for you to consider that important question, but can not wait very long. I will say this, your neighbors over west have agreed to sell a tract of land at $1.25 and 75 and 50 cents per acre, and the Creeks and Seminoles sold for $1.25 per acre. We want you to know these things while you are thinking about the price.[279]

d. December 12, 1889—U.S.-Dakota Negotiations at Sisseton Agency

Having carried on intensive discussions with both large and small groups of the Sisseton-Wahpeton Dakota for eight of twelve days since initiating the talks on November 30, the U.S. negotiating commission managed to assemble a "full council" of the Indians for the crucial concluding two days, December 12 and 13, 1889.[280] Unlike on some of the preceding days, Chief Gabriel Renville, the Indians' own chosen spokesman, was present for both of these final two days of the negotiations.[281] On December 12, General Whittlesey called on one of the Sisseton-Wahpeton representatives, the Reverend John B. Renville, to "lead us in

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[276] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Charles Crawford).

[277] *See supra* note 221 and accompanying text.

[278] S. Exec. Doc. No. 66, *supra* note 157, at 22-23 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[279] *Id.* at 23 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[280] *See supra* note 264 and accompanying text.

[281] *See* S. Exec. Doc. No. 66, *supra* note 157, at 23-29 (report of councils with Sisseton and Wahpeton Indians) (showing Chief Gabriel Renville's participation in transcribed negotiations on Dec. 12 and 13, 1889).

prayer," having avowed to the assembly that "we all want to do just what is right."[282]

When the prayer was finished, Whittlesey stated that with respect to the draft agreement he had discussed with some of the Indians the previous day, "we have not taken a word out nor put in a word," that "[w]e have yielded to your wishes in the agreement," and that "[t]here is but one thing more; that is, the price of the land."[283] Whittlesey then turned the meeting over to one of his fellow commissioners, the banker D.W. Diggs, for the purpose of providing an explanation "[a]s to the price of the land," asserting that Diggs "knows all about the land in this country."[284] In the ensuing long speech—the longest, by far, of any in the transcript of the proceedings—Diggs increased the pressure on the Indians to accept the U.S. negotiators' assignment of a particular price per acre. The following are highlights from Diggs's speech:[285]

- ". . . I was appointed [to the negotiation commission] as I was your friend. I can say from my heart that I am your friend, and whether you accept this agreement or not, I am still your friend. Before I met these gentlemen here I had never seen them, and thought that I would find myself in antagonism in many respects, but I had resolved to be firm and do what I thought to be right; but after meeting these gentlemen I was agreeably surprised to find that they were as liberal in their views as the law and treaty would permit."
- "There are some points on which there are no disagreement [sic], and others on which there are. The first was in regard to back annuities. We believed that it would be best to give it to you year by year, but when we heard that you wanted it in a lump we yielded. We know that some of you will spend it foolishly, as would so many educated white people. We now have in the agreement that the entire amount be paid you at once in cash, with an annual income of $18,400 for twelve years."
- "My colleagues are a long way from home, and have been restive at times and wish to get away. I think you will bear testimony that the commissioners have been patient up to this point, but now we have come to that point when we must come to a decision. The point left is the price of the land to be sold. If there is any other point it has not been brought to our notice."
- "The price agreed upon by the Commission is $2.50 per acre, you having failed to make a proposition. . . . $1.25 is the price fixed by the Government for wild lands. We know that you ask more than that. We admit it is worth more, as you are surrounded by white settlers. You have taken the best of the land and when allotments are

[282] *Id.* at 23 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).
[283] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).
[284] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).
[285] For all the bulleted excerpts from commissioner Diggs's long speech to the Sisseton-Wahpeton Indians, see *id.* at 23-24 (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs).

completed you will take as much more of the best, so that it leaves the proportion of poor land much greater."

- "The Government sells its good lands for $1.25 per acre. Now you say, 'If the Government sells for $1.25 why should you offer $2.50?' I will tell you. It is nearer good markets and we have taken this view of it. We can take it to Congress and get it through at double minimum; but no man can show that the Government will buy this land at more than double minimum price.[286] It would make no difference to this Commission if the Government paid you $10 per acre, but what did we come for? To make an agreement that would be ratified by Congress."
- "Now we do not feel confident that this bill will pass Congress with these liberal arrangements made. There are men in Congress who know nothing of you and care nothing for you. I have no doubt that someone will bring up this point: That this reservation was given you in place of all back annuities . . . . Now, I tell you what a lawyer would say; he would say that you were not entitled to back annuities because you received this land for it. You would say it was yours already; then the lawyer would say that if one was void all was void and you have no land. How are we to overcome that? Our Congressmen are your lawyers and we shall put in their mouths this argument: 'These people have been wrongfully kept out this annuity and it is but justice to them that you should admit it and that they be permitted to sell it for their benefit as in part for injustice done them.'"[287]

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[286] Diggs's assertion that $2.50 per acre was a "double minimum price" with respect to the actual value of the Indians' lands is rebutted in a speech by U.S. Representative Darwin Hall of Minnesota, reprinted in a volume of the Congressional Record that contains a significant portion of the legislative debates over the 1891 Act that ratified the 1889 Agreement with the Sisseton-Wahpeton Dakota:

> 1. To the stipulation that the price stipulated for the purchase [i.e., $2.50 per acre] is too high—
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> The answer is: That these lands are exceptionally fertile; that they are surrounded on all sides by populous and prosperous farming communities; they are well watered and timbered; the average price of unimproved land in the vicinity of the reservation is not less than $5 per acre; that $2.50 is the price fixed for the alternate sections of land lying within the railroad grants of Minnesota and Dakota known as "double-minimum lands." The price was fixed before there was any settlement of the country.

22 Cong. Rec. app. at 105 (1891) (speech of Cong. Hall).

[287] The scare tactic used by Diggs here—i.e., the threat that Congress might decline to approve "these liberal arrangements" since "a lawyer would say" that the establishment of the Lake Traverse Reservation in 1867 was itself compensation for Congress's 1863 confiscation of the Indians' annuities—is a form of bluffing. As Diggs certainly knew, that argument had been dispelled in the House Report accompanying the 1888 bill "for the relief of certain Sisseton and Wahpeton Sioux Indians who served in the armies of the United States," H.R. Rep. No. 1953, *supra* note 177, at 1. In a letter reprinted in the House Report, the Commissioner of Indian Affairs derided that argument after paraphrasing it as maintaining that the establishment of the Lake Traverse and Devil's Lake reservations under the 1867 Treaty

> has been held to be in full satisfaction for the wrong done these Indians, and is cited as an estoppel, and admission on their part that full compensation has been received by them. But what did we give them by this treaty as a reward for their faithful services in which they had imperiled their lives; and in compensation

- "Now I appeal to you men who have families to act in this matter like men, look at the present condition of your families without sufficient clothes and food or stock to cultivate your lands. Accept this agreement as the best this Commission can make and hope to get it through Congress, and if you accept this you will have a friend in every white man in the surrounding country. But suppose you refuse this proposition, what have you to hope for in the passage of your annuity bill? . . . You hitch the two together and the white man and the Indian will pull together."
- "Now I tell you as a friend that if this agreement is not just as you would like to have it, it is much better than your present condition. . . . It is nothing to me personally, but as your friend, honestly I would advise you to accept this agreement as the best that can pass Congress. This Commission is hedged about by laws and treaties. In trying to follow your views we have run against laws on all sides, and we have tried to steer so as to get between these laws."
- "When I went home I wrote to these gentlemen to have patience, but they say to me now that this day will decide whether they remain another night. I believe that the first man that signs this paper will be putting himself down as doing the very best for the people. Now we are going to give every man an opportunity to sign this paper right here. I hope every one of you will show this Commission courtesy enough to come before it to say whether you will sign or not. Not a word will be used on the part of the Commission to induce you to sign. The Commission will now sign the agreement in your presence. My last word to you is that you sign this agreement and get all you can."

At the conclusion of this long speech by commissioner Diggs, and without having solicited or obtained any indication of acceptance by Chief Gabriel Renville, the Sisseton-Wahpeton Dakota people's chosen spokesman, all three of the U.S. negotiators came forward and signed the "agreement" that they themselves had drafted.[288] After signing the document, the commission chairman, General Whittlesey, spoke scornfully to the assembled Indians: "We have been explaining over and over again every day and have been two weeks explaining it, but if you do

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> for their annuities, which were confiscated; and for their crops, which our troops consumed, valued at $120,000; and for their valuable lands in Minnesota, from which they were driven; and for the right of way for roads through their lands in Dakota, which they ceded to us? What was the valuable consideration given to which we refer as compensation for all their loss and wrong? Simply the reservations in Dakota on which they live, which were theirs already.

Id. at 6 (letter from J.D.C. Atkins, Commissioner of Indian Affairs, to William F. Vilas, Secretary of the Interior).

[288] *See* S. Exec. Doc. No. 66, *supra* note 157, at 24 (report of councils with Sisseton and Wahpeton Indians); *see also id.* at 6-7 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan) ("[W]e . . . advised [the Indians] that we proposed to give $2.50 per acre for each and every acre of the lands which they desired to dispose of, the funds arising therefrom to be placed in the United States Treasury upon the terms and conditions named in the general allotment act, and having affixed our signatures to the agreement in their presence, that we were ready to receive their signatures.").

not understand it we will explain it again."[289] In response to this condescending remark, Chief Renville voiced discontent at the commission's presumptuousness and haste:

> It took two summers on the Big Sioux Reservation and at White Earth Agency. We do not care to do this in a hurry. We first decided not to sell until after scout bill was paid, but we reconsidered yesterday and have made up our minds to do something, but you would not hear us—
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> . . . .
>
> [Y]esterday about half of our people were not here. The people chose ten men as a committee to consult with you in regard to what was to be done. You would not consult with the committee.[290]

Chief Renville then made clear that the "agreement" the commissioners had just presumed to openly sign did not accord with the position of the Sisseton-Wahpeton Dakota people with respect to (1) the price per acre at which they were willing to sell the unallotted lands within their reservation, or (2) the interest rate for proceeds from the land sales to be deposited in the U.S. Treasury for the Indians' benefit:

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[289] *Id.* at 24 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[290] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville). In their report to the Commissioner of Indian Affairs, the U.S. negotiators made reference to their refusal to meet with a ten-member committee of the Sisseton-Wahpeton Dakota Indians to negotiate terms, stating that the commissioners "informed [the Indians] . . . that we had no power to confer with a committee, as we were sent to counsel and talk with the whole people." *Id.* at 6-7 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan). This explanation is belied by the fact that the U.S. negotiators met numerous times with individual Indians and small groups of the Dakota people during the two weeks of the negotiations, without a "full council" being present. *See supra* notes 160-174, 243-279 and accompanying text (recounting the U.S. commission's 1889 negotiations with individuals and small groups of Dakota Indians on November 30 and on December 3, 4, 5, 6, 9, 10, and 11). Moreover, the fact that even the smaller meetings are transcribed or summarized in the government's report of councils renders duplicitous commissioner Diggs's palliative to the Indians on December 12:

> By what we have said about meeting that committee we mean no disrespect to the committee nor to the people who made them, but we wish to follow our instructions. The instructions further require us to make a report of each day's work, and if we should meet a committee we would have to show it.

S. Exec. Doc. No. 66, *supra* note 157, at 26 (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs); *see also supra* note 244. For the full text of the Interior Secretary's letter of instructions to the U.S. commissioners, see *supra* note 164. The more obvious explanation for their refusing to meet with the ten-member committee of representatives of the entire Sisseton-Wahpeton people is that doing so would undermine the strategy of meeting separately with small factions and individuals *of the commissioners' own choosing and at their own option and discretion*, a routine divide-and-conquer tactic U.S. negotiators deployed in the nineteenth and early twentieth centuries to dispossess Indians of their tribally owned reservation lands. *See supra* note 228 and accompanying text.

> We understand that paper; some things we like; some things we do not like. The price of the land was just put in. The people have decided not to take less than $5 per acre. We want it in cash, or the interest in cash. The people decided that 5 per cent. was what would be accepted, and now you have come here before this committee [of ten tribal members] could talk with you. Now, if you can make these changes we will do as we agreed. If not, there is nothing more to do.[291]

Despite what seemed, at the outset, a unified front by the Indians regarding the land-sale terms specified by Chief Renville, Whittlesey and the other U.S. commissioners insisted that the sale price remain $2.50 per acre. "[W]e can not go back with $5," General Whittlesey said, "as Congress would throw the agreement on the floor. We have gone as far as we can go. We have asked Congress to pay you twice as much as any other Indians get. Therefore we mean just what we say when we put it down at $2.50."[292]

With regard to the other remaining term in contention, Whittlesey said: "Now, about the other point, I will say we can not make a new law. Congress makes the laws, and does not ask us what law to make, and this is the law."[293] He then had a portion of the 1887 General Allotment Act read aloud to the Indians, "in which is stated that 3 per cent. is to be the interest on money paid for lands under that act."[294] In response to this, Chief Renville stated: "That law was for all Indians, but when those out West refused the 3 per cent., they were granted 5 per cent. interest."[295] Commissioner Diggs then interrupted the chief by reading aloud the lengthy "letter of instructions" from the Secretary of the Interior that provided guidance for the commission's negotiations with the Indians.[296] Chief Renville expressed his displeasure with Diggs's long-windedness:

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[291] S. Exec. Doc. No. 66, *supra* note 157, at 24 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[292] *Id.* at 24-25 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[293] *Id.* at 25 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[294] *Id.* (report of councils with Sisseton and Wahpeton Indians); *see also* Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 390 (General Allotment Act) ("And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation [allotted pursuant to the Act] shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof."). The three percent rate was the result of a last-minute amendment, demanded by the House of Representatives, to the Senate bill Congress ultimately enacted as the General Allotment Act; the Senate bill (S. 54) initially specified five percent as the interest rate on proceeds flowing from the Act's authorizing "the Secretary of the Interior to negotiate with [an] Indian tribe for the purchase and release . . . of such portions of its reservation not allotted as such tribe shall . . . consent to sell," *id*. *See infra* note 647 and accompanying text.

[295] S. Exec. Doc. No. 66, *supra* note 157, at 25 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[296] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of

> We ought to make shorter speeches. Mr. Diggs made a long speech, and we do not remember half. We know these extracts of laws. We know that a change was made in the taking of land out West, and also on the 3 per cent. interest. If they can change the law in regard to the taking of land they can do so in regard to the 3 per cent. We have decided to sell all of the surplus after each has received 160 acres. We know that the money due us on the treaty of 1851 is ours, and it has pleased us to have that in. In regard to the people out West selling for $1.25 per acre, we know that one acre of our land is worth ten of theirs. In 1872 a commission came here and took all we had outside of this reservation for 5 cents per acre, and in 1851 the very best lands were sold at less than 1 cent per acre. This little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell for $5 an acre. Now let us hear what can be done. You seem to want to treat us like children, put us back where we were twenty years ago. Let us do what is right and just.[297]

General Whittlesey countered Chief Renville's clear explanation for insisting on a higher price per acre and a higher interest rate on proceeds from on-reservation land sales with false mockery and shaming:

> My friend Gabriel made a pretty long speech, and I do not know whether I can remember it all. We came here with feelings of friendship for this people. We have done what we think the very best Congress will do. In regard to payment of money, after you get established as citizens you will probably get cash; as regards the price per acre and the 5 per cent. interest, it will defeat the agreement and you will be left as you are. Now I do not think we ought to explain this again, but think you ought to show your manliness by coming forward and signing it.[298]

Attempting to correct a misrepresentation, posited by Diggs in his long speech,[299] of the Sisseton-Wahpeton Dakota people's position regarding terms of the agreement, Chief Renville responded: "We decided yesterday what we can do. My friend seems to misunderstand us. We do not want the pay for lands in a lump, but want the 5 per cent. interest to be

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D.W. Diggs); *see also id.* at 26 (statement of Gen. Whittlesey) ("[O]n the rate of interest and manner of payment we have our instructions, and we can not go contrary to the instructions of the Secretary of the Interior, who sent us here."). For the full text of the letter of instructions, see *supra* note 164.

[297] S. Exec. Doc. No. 66, *supra* note 157, at 25 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[298] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey). Whittlesey's disingenuousness in mocking Chief Renville for having criticized Diggs's lengthy statements, by Whittlesey's pretending that he could "not remember . . . all" of the chief's "pretty long speech," *id.*, is apparent by simply comparing the length of Renville's speech as printed in the government's report of councils, *see supra* note 297 and accompanying text (15 lines of text), with the length of Digg's speech, *see supra* note 288 and accompanying text (81 lines of text).

[299] *See supra* note 285 and accompanying text.

paid in cash. We understand that some of the money will be used for schools."[300]

Seemingly irritated with the chief's rebuttals and clarifications, Whittlesey attempted to push past him: "Perhaps there are some others who wish to speak."[301] Sisseton-Wahpeton representative Charles Crawford spoke up with added support for Chief Gabriel Renville's position: "Our chief says that the agreement in some things is not good. There is one thing I do not like, and that is the payments of interest to be made in goods. I would like to know if it is possible to have payments made in cash?"[302] Whittlesey responded:

> I would be willing to recommend it, but not put it in the agreement. Congress has in this law reserved the right to appropriate as it thinks right for the people. When Congress finds out that you can use the money better than goods it will give it to you. I think you can all trust Congress to do that for you, but we can not put it in the agreement.[303]

Another tribal member elaborated on why the Sisseton-Wahpeton Dakota people insisted on cash payments: "In the past we have received cattle wagons and implements for money due us and have found these things to be very poor, but if we had the money we can buy what we want, and for this reason we think we ought to receive the cash annually."[304] Whittlesey then offered an accommodation: "I think you can handle the cash as well as any one can handle it for you, and will do all I can to see that you get the payments of interest annually in cash."[305]

This offer appears to have softened the bargaining position of some of the Sisseton-Wahpeton people at the December 12 meeting. Charles Crawford, who had met with the U.S. commissioners in one of the small meetings, held the previous day,[306] said:

> This is business. I believe what the Commission has said. I do not think they wish to deceive us. They represent the Government. It is their duty to work for that Government and our duty to work for ourselves. Some of us only got 40 and 80 acres of land and have understood that 160 acres is put in agreement, as the Commissioner of Indian Affairs recommended that all Indians should receive that amount of land, but you say you can not change the rate of interest

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[300] S. Exec. Doc. No. 66, *supra* note 157, at 25 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[301] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[302] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Charles Crawford).

[303] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[304] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Titus Jug).

[305] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[306] *See supra* notes 264-279 and accompanying text.

> nor the manner of payments. Now, if the 160-acre clause can be put in why can not the others? Congress has the right to amend all laws. When the Government asked for the lands out West the people asked for a 5 per cent. interest, and it was granted and put in their agreement, although you say it has not become a law. Now, if Congress ratifies their agreement and allows them 5 per cent. it will do so with us. Now I ask that the interest at 5 per cent. be paid us annually in cash.[307]

General Whittlesey's response to Crawford's forceful argument was that the agreement could contain a provision equalizing the acreage of the Indians' allotments because "the Commissioner of Indian Affairs so recommended," but that "on the rate of interest and manner of payment we have our instructions, and we can not go contrary to the instructions of the Secretary of the Interior, who sent us here."[308] Tribal representative Michael Renville—who, like Charles Crawford, had met previously with the U.S. commissioners in a smaller meeting[309]—then offered additional conciliatory words while remaining in solidarity with his fellow tribesmen regarding the acceptable terms of the agreement:

> I do not blame you for not doing all we ask. You are only following instructions of superior officers. . . .
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> . . . .
>
> Among a people who do not fully understand a thing, they talk about it until they understand it. You were told to talk to us together. One of your questions was, "What price do you put on your land?" We decided that $5 was our price.[310]

Notwithstanding the accuracy of Michael Renville's recollection, the chairman of the commission dismissed it: "I think we have nothing more to say. Our patience has not been worn out. If any wish to speak we will listen."[311] Another Sisseton-Wahpeton speaker then joined his voice in support of the position urged by the other tribal leaders: "It has been decided by the people to sell all surplus lands after each get 160 acres at $5 per acre, the interest to be paid annually in cash at 5 per cent."[312] Apparently fearing an impasse, General Whittlesey exclaimed:

> We are dealing with you as we would with an assembly of whites. If they had a piece of property and we offered to buy it we would make a proposition, and each would consider the proposition, and if more than one-half agreed to sell, that property would be sold. That

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[307] S. Exec. Doc. No. 66, *supra* note 157, at 25-26 (report of councils with Sisseton and Wahpeton Indians) (statement of Charles Crawford).

[308] *Id.* at 26 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[309] *See supra* notes 250-259 and accompanying text.

[310] S. Exec. Doc. No. 66, *supra* note 157, at 26 (report of councils with Sisseton and Wahpeton Indians) (statement of Michael Renville).

[311] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[312] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Daniel Robertson).

> is what we want to do here. Everyone who signs says "yes," everyone who does not sign says "no." That is the way white men do and that is the way we want you to do.[313]

It was at this moment that a tribal member made a comment that proved to be a wedge into the Indians' position regarding land-sale terms:

> I am an Indian and the Great Spirit made me to live on this land; but as an Indian have never done anything for myself. I now speak for the Indian. If you will put the price at $2.50 per acre and 5 per cent. interest paid annually in cash I have no doubt it will please all.[314]

Commissioner Diggs responded immediately to this suggested compromise:

> Now, my friends, we are coming a little nearer, but you have seen that it is impossible to do as you wish. We will write a letter recommending what you ask and read it to you, and I will say that I will urge our Congressmen to get it in the bill. I should be very sorry if all our negotiations should fail on these two points, which is asking too much of us under our instructions.[315]

Perhaps sensing that this was an opportune moment to temporarily adjourn the negotiations, Diggs added: "We know that all of you want to go home, and if we could go now and eat and write that letter we will meet you in an hour. If you would rather wait until morning we will wait until then. We leave it to you to decide."[316] A tribal member responded:

> You gentlemen have come here among us and are to us like gods. We can do nothing. It is for the people to do for themselves. You are hurrying us too much. If you will give us something to eat we will feel better. We will adjourn our meeting until to-morrow morning.[317]

Reminiscent of strategic threats by the United States to withhold food from Indian people in previous negotiations with tribes in the nineteenth

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[313] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[314] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Motoduzahan [Mahtoduzadan, or "Swift Bear"]).

[315] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs).

[316] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs).

[317] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Star).

century,[318] Diggs said: "We think that you all have been furnished provisions by the agent. Council adjourned till next morning at 10 o'clock."[319]

e. December 13, 1889—U.S.-Dakota Negotiations at Sisseton Agency

As negotiations thus approached what became the final, culminating day, the U.S. commissioners had reason to be optimistic. Through a variety of tactics, they had leveraged the Sisseton-Wahpeton Dakota people from the Indians' initial "no land sales until back annuities are paid" position[320] to potential acceptance of terms incorporating, into a single agreement, (1) payment of back annuities and (2) the government's offer to pay a low amount of only $2.50 per acre for all unallotted lands within the Lake Traverse Reservation.[321] What remained, as negotiations resumed on Friday, December 13, 1889, was the question whether the interest rate for proceeds from the land sales deposited in the U.S. Treasury would be (1) three percent, with the amount of interest expended at the discretion of the Secretary of the Interior for the Indians' benefit, or (2) five percent, to be distributed annually to the Indians in cash.[322]

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[318] *See*, *e.g.*, LaVelle, *supra* note 224, at 53 n.43 (citing S. Exec. Doc. No. 9, *supra* note 224, at 31-32, *as quoted in* Virginia Irving Armstrong, I Have Spoken: American History Through the Voices of the Indians 106 (1971)) ("The duress to which the Sioux tribes were subjected is evident in a response by Standing Elk of the Sicangu Lakota to the Commission's negotiation tactics. In a meeting at Spotted Tail Agency in September 1876 to coerce signatures for the cession of the Black Hills, commissioner A.S. Gaylord announced that 'the Great Council [U.S. Congress] has made a law stating the things which must be done by you in order that more food shall be given you.' To this, Standing Elk replied: '[I]t seems that hard words are placed upon us and bend down our backs. Whatever the white people say to us, wherever I go, we all say "Yes" to them—"Yes," "Yes," "Yes." Whenever we don't agree to anything that is said in council, they give the same reply—"You won't get any food;" "You won't get any food."'"); *cf.* Genetin-Pilawa, *supra* note 134, at 138 (endnote omitted) ("[Indian Rights Association] members were thankful that some agencies 'diminished' or 'ceased' their distribution of treaty-stipulated rations. This practice, they argued (despite the fact that the United States was obligated to uphold treaty agreements), inhibited assimilation. Withdrawing rations would force Native people to assimilate and participate in a market economy—or starve."); *supra* note 181 and accompanying text (noting how conditions of starvation triggered the U.S.-Dakota War of 1862 and citing authorities elaborating on this causative factor).

[319] S. Exec. Doc. No. 66, *supra* note 157, at 26 (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs).

[320] *See supra* notes 173-177 and accompanying text; notes 218-219 and accompanying text; notes 226-227 and accompanying text; note 231 and accompanying text; note 245 and accompanying text.

[321] *See supra* notes 175-177 and accompanying text; notes 220-225 and accompanying text; note 229 and accompanying text; note 246 and accompanying text; notes 252-259 and accompanying text; notes 267-272 and accompanying text; notes 275-278 and accompanying text; note 285 and accompanying text; note 292 and accompanying text; notes 314-315 and accompanying text.

[322] *See supra* notes 254-255 and accompanying text; note 263 and accompanying text; note 272 and accompanying text; note 279 and accompanying text; note 291 and accompanying text; notes 293-308 and accompanying text; notes 312-315 and accompanying text.

Accordingly, at the beginning of the December 13 meeting, the chairman of the U.S. commission, General Whittlesey, framed the remaining issues succinctly:

> When we closed yesterday there was one thing that seemed to be in the way; that was the interest on amount to be paid for land and how it should be paid. As we told you, we were compelled to put it in the agreement, the interest to be at 3 per cent., and that Congress would retain the right to appropriate money as they thought best. You want the money and the interest at 5 per cent. in cash. We said that we could not put it in the agreement but would write a letter to the honorable Secretary of the Interior.[323]

Whittlesey then ordered that the letter be read aloud and interpreted for the Indians; the text of the letter later was published in the government's report:

> SIR: In our negotiations with the Sisseton and Wahpeton bands of Dakota or Sioux Indians at this agency we find them very persistent in demanding 5 per cent. interest on the proceeds of the lands which they propose to sell, and that the interest be paid to them in cash, except so much thereof as may be necessary to support the agency boarding school now here. They claim that they are citizens of the United States and are sufficiently intelligent and competent to manage their own affairs, and that that they have the right to be dealt with as men like other citizens. We are inclined to concede these demands, but are restricted by the act of Congress of February 8, 1887, section five (24 Stat. 388) [i.e., the General Allotment Act], and by our instructions. These Indians are aware that the prevailing interest allowed by the Government on the funds of Indians is five per cent. per annum, and they are at a loss to understand why an exception should be made in their case.
>
> We understand that heretofore the proceeds of the sale of Indian lands have been placed in the Treasury of the United States and bear interest at the rate of 5 per cent. per annum in lieu of investment, and we therefore recommend that Congress be requested to allow interest at the rate of 5 per cent. per annum on the amount agreed to be paid for the lands of these Indians, and to direct that the said interest be paid per capita to them in cash, after deducting the amount annually necessary for the support of the agency boarding school.[324]

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[323] S. Exec. Doc. No. 66, *supra* note 157, at 27 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[324] *Id.* at 12 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to John W. Noble, Secretary of the Interior). The U.S. negotiators also wrote to their immediate supervisor, the Commissioner of Indian Affairs, summarizing their advocacy with respect to interest payments to the Indians:

> After much talk, the Indians strongly contending that they should have 5 per cent. interest, to be paid per capita in cash, we agreed to write a letter to the Secretary of the Interior, recommending that Congress be urged to allow that rate per cent., and that after deducting enough to support the Government schools the balance to be paid to them in cash, and that we would make every effort in our power to bring about the desired result.
>
> We deemed it proper to make this promise for the reason that 5 per cent. is

After the letter was read, Whittlesey said:

> You have heard what we have written. I hope you understand it. We promise, all three of us, to do all that we can to get what you ask for. That the 5 per cent. interest will be paid in cash, except what is needed to support Government schools. We believe that you are all men and can manage your own affairs better than others can manage them for you. I have said enough and think that you are all satisfied that we are trying to do what is right. If any one wishes to speak before signing we will listen.[325]

Exhibiting familiarity with the tactics used by U.S. negotiators in the nineteenth century when pushing for the dispossession of lands held collectively by Indian nations, Chief Gabriel Renville opened his remarks on a note of sarcasm: "We have often heard from you that you want all to understand this matter and all do what is right."[326] He then reiterated the point of clarification that he had made the previous day[327] to disabuse the negotiators of the erroneous notion that the Indians were seeking a lump-sum payment from the government for all of their unallotted lands: "There has never been money paid to Indians in a lump in payment for the lands. The Government always owes for the land and pays the interest on the amount the same as when one of you borrow[s] money from another."[328] Chief Renville also made a final effort to get Whittlesey and the other commissioners to accept the Sisseton-Wahpeton people's position regarding the price per acre for the sale of their unallotted lands:

> Since you have been here we have twice decided as a people what to do. First, to get back annuities before selling, second, we reconsidered that answer and decided to ask $5 per acre for all surplus lands, the amount to draw 5 per cent. interest in cash, and then all would willingly sign. . . . The last council of the people decided on asking $5 per acre and 5 per cent. interest, to be paid in cash, and will sign no other. I do not say this to make anybody angry, but talk plain because

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> the usual rate allowed by the Government on Indian funds. In all the special acts of the last Congress authorizing the purchase of Indian lands, provision is made that the money paid therefor shall be placed in the Treasury and bear 5 per cent. per annum . . . . We can see no reason why an exception should be made in the case of these Indians, and they are at a loss to understand why they are not treated as well as other Indians, some of whom are their relations and neighbors.

Id. at 7 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan).

[325] *Id.* at 27 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[326] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[327] *See supra* text accompanying note 300 (emphasis added) (quoting the following clarification from Chief Renville: "My friend seems to misunderstand us. *We do not want the pay for the lands in a lump*, but want the 5 per cent. interest to be paid in cash.").

[328] S. Exec. Doc. No. 66, *supra* note 157, at 27 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

> I know it is right. . . . You were told to do what is right and for that reason I have been among the people begging them to do right.[329]

Despite this final push by Chief Renville "to get the best deal for his people"[330] regarding particular land-sale terms, after two weeks of intensive discussions the U.S. negotiators' efforts to chip away at the Sisseton-Wahpeton people's resistance at last achieved its object. A decisive "collapse of the [Indians'] united front"[331] occurred when one of the most respected and influential elders, 82-year-old Simon Anawangmani, stated his desire to have the negotiations come to a close:

> The headmen have said they want to do right, and do what is right for the people and I want to be protected by the laws of the Great Father, and now that I can reach that I am glad because I and my people like to have money. I have tried to hold on to what we have left, but what more than what is offered us do we want? If I should ask for all the money the Great Father has we could not get it. I am getting weary and will sign, then I will have nothing more to trouble myself about.[332]

Following this declaration, other Sisseton-Wahpeton representatives voiced their intention to follow Simon Anawangmani's lead.[333] Apparently sensing that signing was now inevitable, the Dakota Indians present raised a series of questions in rapid succession. Michael Renville asked, "[I]f we sell surplus lands how long will interest run on that?"[334] "Forever" was the commission's answer, "unless Congress appropriates the principal."[335] Michael Renville also asked whether any of the proceeds from the land sales would be used to pay for the past services of an attorney who had failed to get Congress to pass legislation that would have redressed some of the Sisseton-Wahpetons' grievances regarding back annuities.[336] The commission responded: "That contract expired last year. . . . If you get it [i.e., the new agreement] through this way you will not pay any one 10 per cent. or even 1 per cent."[337]

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[329] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[330] Anderson, *supra* note 160, at 145.

[331] *Id.*

[332] S. Exec. Doc. No. 66, *supra* note 157, at 27 (report of councils with Sisseton and Wahpeton Indians) (statement of Simons Ananwangrnam [Simon Anawangmani, or "Walks Galloping On"]).

[333] *See id.* at 27-28 (report of councils with Sisseton and Wahpeton Indians) (statements of Michael Renville) ("I believe in the words of Simons. . . . If you people have picked Simons out as one to sign he will do so."); *see also id.* at 28 (statement of Motoduzahan [Mahtoduzadan, or "Swift Bear"]) ("This man (Simons) says he will sign, and so will I.").

[334] *Id.* at 27 (report of councils with Sisseton and Wahpeton Indians) (statement of Michael Renville).

[335] *Id.* (report of councils with Sisseton and Wahpeton Indians) (answer by commission).

[336] *See id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Michael Renville) ("We gave papers to a certain man. . . . Now, can that man draw his pay?").

[337] *Id.* (report of councils with Sisseton and Wahpeton Indians) (answer by

It certainly must have been clear to Chief Gabriel Renville, too, that momentum was now building toward the negotiations' conclusion. Accordingly, he seized the opportunity to bring up an issue especially important to him as past leader of the Dakota scouts in whose honor the Lake Traverse Reservation was established in 1867.[338] Referring to the lapsed congressional bill of the previous year titled "Indians Who Served in the Army of the United States,"[339] Chief Renville asked, "A year ago last winter who was it that got the bill along so far as it is?"[340] General Whittlesey replied that both he and another commissioner, Charles A. Maxwell, had been involved in the effort, and that "the House Committee on Indian Affairs helped. The Commissioner of Indian Affairs and Secretary of the Interior both recommended it. All of these did from friendship what they could for you."[341] Chief Renville reminded the commission that he himself had been entitled to a share of the anticipated benefits pursuant to the lapsed bill,[342] an astute maneuver that may have helped pave the way for Congress's subsequent inclusion of a separate provision of the 1891 Act appropriating additional funds especially for all of the still-living former Dakota scouts as well as the families and descendants of deceased scouts.[343]

Another Sisseton-Wahpeton leader and tribal elder, Solomon Two Stars, who also had served under Gabriel Renville as a Dakota scout,[344] spoke immediately after the chief during these winding-down moments of the negotiations. Demonstrating both remarkable prescience and extraordinary political skill in trying to prevent any further rift among the tribal leaders, Two Stars delivered the following oration:

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commission); *see also id.* at 7 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan) ("[T]he Indians raised a question as to whether a certain attorney would be entitled to and receive a per cent. of the back annuity money under contracts made with some of them. We explained to them that as the time limited in the contracts had expired last July, there were now no such contracts in existence and that therefore they were under no obligation to pay any attorney's fees.").

[338] *See* Treaty of Feb. 19, 1867, art. III, 15 Stat. 505, 506, as amended, 15 Stat. 509 (setting apart reservation "in consideration of the faithful and important services said to have been rendered by friendly bands of the Sissitons [sic] and Warpetons [sic] Sioux here represented"), *reprinted in* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 451 (1975); *see also* H.R. Rep. No. 1953, *supra* note 177, at 6 (letter from J.D.C. Atkins, Commissioner of Indian Affairs, to William F. Vilas, Secretary of the Interior) (noting that "the third article [of the 1867 Treaty] . . . sets apart for the scouts and their families the Traverse Lake Reservation").

[339] H.R. Rep. No. 1953, *supra* note 177; *see also supra* note 221 and accompanying text.

[340] S. Exec. Doc. No. 66, *supra* note 157, at 28 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[341] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[342] *See id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[343] *See infra* notes 473-476 and accompanying text.

[344] *See supra* note 211 and accompanying text.

> I will say a few words. This man Simons [i.e., Simon Anawangmani] at the time of the outbreak saved a white woman and took her to her people. He did a good act. After that there were over two hundred prisoners in the camp and others of us got together and delivered them to the whites. We took them to General Sibley. Some of those who saved the prisoners are dead, but some are here. This man (Gabriel Renville) is one. We afterward got a great many of the hostile Indians who came to our camp at night and gave them up to General Sibley. In February, 1863, Gabriel Renville and some others were sent out as scouts. We guarded this country from the James River to the settlements. I think we did a great deal towards making the frontier safe. For eighteen months we did this work without pay. We know that by these acts we got this reservation. I think we ought to be allowed to judge for ourselves and do what is right. I do not accuse you gentlemen at all, but in the past we have signed papers that we were afterwards blamed for and each would regret having done so. What I want is that all understand this paper, and none sign until we understand the agreement. Let the committee we selected look it over, and if they consent to sign we will sign, but we want 5 per cent. interest.
>
> . . . .
>
> If this paper is signed as it is it will make trouble. If you have written to the Secretary we want to wait until the answer comes, and if all is agreeable we want to sign. Everything we do in our councils seems to be overruled by you. We have heard remarks made about commissions in the past, and if this is signed as it is it will make talk about you.[345]

General Whittlesey's only response to this impassioned speech was with regard to Two Stars' last-ditch effort to get the commission to yield to the Indians' desire to have the agreement itself specify an interest rate of five percent on proceeds from the sale of the unallotted lands. "We told you yesterday why we could not do that," Whittlesey said.[346] Mahtoduzadan (Swift Bear) then interjected, saying,

> I do not understand much, but will speak on what I think I understand. I think you have in this agreement all we have asked. You have told us that all our [back annuity] money will be returned, and what we get from sale of land will be in cash. That paper says that it will be in cash, and that the rate of interest will be 5 per cent. We think all Sisseton and Wahpetons who have lived here have a right here.[347]

Perceiving a misunderstanding in Mahtoduzadan's remarks, Whittlesey said:

> I do not want any mistake to go out. I want you to understand this agreement. It says that the interest is 3 per cent. In this letter we say

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[345] S. Exec. Doc. No. 66, *supra* note 157, at 28 (report of councils with Sisseton and Wahpeton Indians) (statement of Two Stars).

[346] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[347] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Motoduzahan [Mahtoduzadan, or "Swift Bear"]).

> that it ought to be 5 per cent., and we ask the honorable Secretary to ask Congress to say it will be 5 per cent., and I think you will have the help of the Representatives from Dakota. Now I believe that all understand this.[348]

Apparently detecting the Indians' growing inclination toward signing, Whittlesey added:

> We have talked a long time. If we should stay to hear more my hair could not get much whiter, but I would become too old to act. This is just as we explained it yesterday. We give you an opportunity to sign, but if all of you decide not to sign you have that right, but if you sign you put a great deal of work on us.[349]

The last attempt to stop or delay the proceedings was made by Chief Renville. "Why is it that it takes three-fourths at other agencies to rule," he asked, "while with us you say it takes only a majority. Our treaty does not provide for the sale of this land at any time."[350] Whittlesey replied, "My friend Gabriel knows that among white people a majority rules."[351] Following this final rebuff from the chairman of the federal government's negotiating commission, the tribal elder Simon Anawangmani initiated the process of the Sisseton-Wahpeton Indians' signing the 1889 Agreement, saying, "This paper is presented for signatures and I have said that I will sign. I am playing no game. I am doing what is right. I have already said that I will sign and will do so now."[352]

5. *DeCoteau*'s False Narrative of Tribal Consent, Distortion of Legislative History, and Expedient Disregard of Indian Law Principles

a. Misrepresenting the Testimony of the Sisseton-Wahpeton Dakota

As this Article demonstrates, the U.S. government's 1889 negotiations with the Sisseton-Wahpeton Dakota did not entail any discussion regarding a potential diminishment or termination of the Lake Traverse Reservation. This observation is crucial for discerning the fallacy and injustice of the Supreme Court's 1975 *DeCoteau v. District County Court* decision, holding that the reservation was disestablished; for, as the Court's opinion implicitly concedes,[353] during the nineteenth century

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[348] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[349] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[350] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[351] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey).

[352] *Id.* at 29 (report of councils with Sisseton and Wahpeton Indians) (statement of Simons Ananwangrnam [Simon Anawangmani, or "Walks Galloping On"]).

[353] *See* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 448 (1975) (asserting that the 1891 Act "is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented"); *see also id.* at 438 (observing that

the federal government's understanding was that Congress could not alter a treaty reservation's boundaries without the Indians' consent.[354] Accordingly, to conclude that Congress in the nineteenth century had altered or terminated a reservation, a court would have to overcome formidable barriers. These include (1) the requirement, pursuant to Indian law canons, that any agreement with the tribe exhibit clear evidence that the Indians actually understood and consented to the alleged diminishment or disestablishment;[355] (2) the Indian law canons-compelled requirement that any ambiguities in the congressional act that is alleged to have shrunk or extinguished a reservation, together with any doubtful expressions found in the act's legislative history, be resolved in favor of concluding that the reservation remained intact;[356] and (3) satisfaction of the Supreme Court's treaty abrogation standard whenever the reservation in question had been set apart by treaty as the Indians' federally protected homeland.[357]

With respect to the Indians' understanding, this Article's thorough examination[358] dispels the fiction that the Sisseton-Wahpeton Dakota consented to the termination of the Lake Traverse Reservation during their 1889 negotiations with the U.S. government[359] and exposes *DeCoteau* as resting on the deployment of a false narrative about U.S.-Dakota relations and the documented history and circumstances of the negotiations.[360] As explained previously, this misrepresentation consists

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during the ratification debates "Congress recognized that the [1889] Agreement could not be altered . . . .").

[354] *See*, *e.g.*, Maricopa & Phoenix Ry. Co. v. Territory of Arizona, 156 U.S. 347, 351 (1895) (noting that because "there was no treaty with the Indians for whose benefit the reservation was established, limiting the power of [C]ongress to grant the railroad the rights conveyed," Congress's "consent . . . to the railroad's entering on the land and using it . . . was . . . a valid exercise of power"); *see also* Tassie Hanna & Robert Laurence, *Justice Thurgood Marshall and the Problem of Indian Treaty Abrogation*, 40 Ark. L. Rev. 797, 814 (1987) (observing that not until the Supreme Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), was it "made . . . clear that [the Indians'] agreement was not a constitutional requirement before a treaty could be abrogated"). In an 1899 report reviewing the history of Sisseton-Wahpeton annuities in light of a pending amendment to an Indian appropriations bill, the Senate Committee on Indian Affairs wrote: "Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political." S. Rep. No. 1441, 55th Cong., 3d Sess., at 17 (1899) ("Annuities of Certain Sioux Indians").

[355] *See supra* note 214 and accompanying text; Collins, *supra* note 214, at 21 (noting that statutes ratifying "formal agreements with Indian nations" like the 1889 Agreement in *DeCoteau* "are essentially treaty equivalents that should be subject to the treaty canon").

[356] *See supra* note 102 and accompanying text.

[357] *See infra* notes 624-636 and accompanying text.

[358] *Cf.* Collins, *supra* note 214, at 47 n.296 ("The [*DeCoteau*] Court quoted statements by Indian parties to the agreement from which one might have determined their understanding that the reservation would be abolished, but the question is uncertain in the absence of a systematic effort to examine it.").

[359] *See supra* notes 121-352 and accompanying text.

[360] *See supra* note 180 and accompanying text.

partially of *DeCoteau*'s use of "cherry-picked statements" taken out of context from a May 1889 *Minneapolis Tribune* newspaper story that purported to quote from interviews with several Sisseton-Wahpeton leaders.[361] But, more centrally, *DeCoteau*'s misleading portrayal of the Sisseton-Wahpeton people's alleged consent to the termination of their reservation stems from the Court's misrepresentations regarding the official negotiations conducted at Sisseton Agency in November and December of 1889.[362]

For instance, the transcribed proceedings[363] clearly show that from the start the Indians had no intention of selling *any* of the unallotted land within their reservation, insisting that the government first fulfill its outstanding preexisting obligations to the Dakota people.[364] The *DeCoteau* majority opinion, however, states that prior to the negotiations "the Commissioner of Indian Affairs had apparently been won over" by the Indians' desire to sell their lands and that "[w]hile [the Commissioner's] proposed instructions [to the U.S. negotiators] suggested that sale of all the surplus lands might be 'inadvisable,' the negotiations in fact proceeded toward such a total sale."[365] Nowhere does the opinion disclose or even mention the Indians' resistance to the coercive tactics used by the commissioners to pressure the Sisseton-Wahpeton people into signing the prepared text of an "agreement" to sell all of the unallotted lands within the Lake Traverse Reservation,[366] a document replete with

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[361] *See supra* notes 124-152 and accompanying text.

[362] *See* S. Exec. Doc. No. 66, *supra* note 157, at 15-29 (report of councils with Sisseton and Wahpeton Indians).

[363] *See* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 434-35 (1975) (footnote omitted) (noting that the "proceedings at these meetings were transcribed").

[364] *See* S. Exec. Doc. No. 66, *supra* note 157, at 6 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan) ("[U]ntil those back annuities were paid [the Indians] positively declined to enter into negotiations for the sale of any portion of their surplus lands . . . ."); H.R. Rep. No. 1356, 51st Cong., 1st Sess., at 1 (1890) (citation omitted) (noting that "the Indians absolutely refused to enter into any negotiations for the sale of their surplus lands, or any portion of them, unless the commissioners would agree to incorporate in the agreement a stipulation for the payment of certain annuities claimed to be due them under an act of Congress approved February 16, 1863"); *see also supra* notes 218-242 and accompanying text.

[365] *DeCoteau*, 420 U.S. at 434. Although *DeCoteau* places the word "inadvisable" in quotation marks, *see id.,* that word does not appear in the "draught of instructions," *see* Letter of Instructions, *supra* note 164, at 198 (Aug. 13, 1889 letter from T.J. Morgan, Commissioner of Indian Affairs, to John W. Noble, Secretary of the Interior), approved by the Secretary of the Interior and transmitted to the U.S. commission tasked with eliciting a land-sale agreement from the Sisseton-Wahpeton Dakota. Rather, the letter of instructions states: "It is not considered advisable that the cession at this time should embrace all these surplus lands. A sufficient quantity should be reserved for future contingencies." *Id.* at 200.

[366] *See supra* notes 157-352 and accompanying text; *see also* Reply Brief for Petitioner, *supra* note 132, at 14, 1974 WL 186005, at *9 (citing S. Exec. Doc. No. 66, *supra* note 157, at 23-29 (report of councils with Sisseton and Wahpeton Indians)) ("A close reading of the transcripts of the last two of the five council sessions that the

boilerplate terminology in a language foreign to the Indians, and land-sale terms selected and dictated by the commissioners themselves.[367]

The false light that *DeCoteau* casts on the U.S. government's negotiations with the Sisseton-Wahpeton Dakota is further displayed in this sentence:

> [T]he records show that the Indians wished to sell outright all of their unallotted lands, on three conditions: that each tribal member, regardless of age or sex, receive an allotment of 160 acres; that Congress appropriate moneys to make good on the tribe's outstanding "loyal scout claim"; and that an adequate sales price per acre be arrived at for all of the unallotted land.[368]

In this sentence use of the term "loyal scout claim"—a term *invented*, not quoted, by the Court[369]—is misleading in two fundamental ways. First, it positively misrepresents the record of negotiations that the sentence purports to summarize; for the transcribed proceedings show that the U.S. negotiators repeatedly clarified that the agreement the commissioners were urging the Indians to sign would *not* single out the Dakota scouts for privileged benefits, but instead would provide per capita distribution of "back annuity" payments to *all* the Sisseton-Wahpeton people.[370] Second, and relatedly, the term "loyal scout claim" in the sentence from *DeCoteau* is a red herring, diverting from acknowledging the crucial condition that the Indians *did* impose—adamantly and repeatedly—during the negotiations, namely, that the United States at long last pay restitution for having wrongfully confiscated and cut off treaty

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commissioners held with the Sisseton and Wahpeton Sioux reveals that the Tribe was probably strong-armed into opening the Lake Traverse Reservation."); Kunesh, *supra* note 105, at 33 n.91 ("The Tribe did not so much willingly sell and cede its land, as it acted out of desperation, sacrificing the land to ensure the community's survival, since the federal government at that time was under intense pressure to open the Reservation for farming and railroad development."); *see also supra* note 228 and accompanying text.

[367] *See supra* text accompanying note 288. The U.S. negotiators thus disregarded their instructions when they confronted the Sisseton-Wahpeton Dakota with a unilaterally preformulated "agreement"—a document the negotiators themselves defiantly and dramatically signed in the Indians' presence, *see supra* text accompanying note 288—that (1) contained terms that were contrary to the terms demanded by the Indians, *see supra* text accompanying note 291, and (2) dictated the sale of all of the unallotted lands on the Lake Traverse Reservation despite the Indian Affairs Commissioner's warning, endorsed by the Secretary of the Interior, that a cession that "embrace[d] all these surplus lands" would "not [be] considered advisable," *see supra* note 365.

[368] *DeCoteau*, 420 U.S. at 435 (footnote omitted).

[369] *See supra* note 178 and accompanying text.

[370] *See*, *e.g.*, S. Exec. Doc. No. 66, *supra* note 157, at 21 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey) ("In this agreement we do not say anything about scout money, but call it the back annuities due the Sisseton and Wahpeton Indians, parties to this agreement."); *see also supra* text accompanying notes 258-259 *supra* text accompanying notes 276-278; *infra* notes 478-500 and accompanying text.

annuities after the U.S.-Dakota War,[371] a "monstrous injustice to the Sisseton and Wahpeton bands."[372]

Evasion, omission, and diversion thus characterize *DeCoteau*'s treatment of the Indians' understanding of the agreement that they signed at the closing of the 1889 negotiations. Most astonishing is *DeCoteau*'s restricting to a single footnote its primary consideration of the most compelling evidence of "tribal and congressional intent,"[373] i.e., the meticulously transcribed negotiations contained in the 29-page Executive Branch report on the U.S. commission's proceedings.[374] *DeCoteau* utilizes that footnote, moreover, as a conduit for misrepresenting testimony from the report and for promoting erroneous and misleading implications drawn from dubious and only partially disclosed sources. For example, the footnote begins by quoting only the *first part* of a sentence in a letter from the U.S. negotiators to the Commissioner of Indian Affairs that appears in the government's report, in which the negotiators state "that they had 'advised them [the tribe] that we proposed to give $2.50 per acre for each and every acre of the lands which they desired to dispose of . . . .'"[375] But in the report itself, that sentence continues as follows: ". . . the funds arising therefrom to be placed in the United States Treasury upon the terms and conditions named in the general allotment act."[376] By this omission the Supreme Court evaded having to reconcile its interpretation of the surplus land act in *DeCoteau* as legislation that implied Congress's intent to alter the reservation, with the Court's *contrary* interpretation of an allotment-era congressional act in *Mattz v. Arnett*, where the Court reiterated that the legislation at issue, which mirrored provisions of the General Allotment Act, "did no more . . . than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."[377] By omitting crucial contextualizing words from the negotiators' letter, the *DeCoteau* Court avoided having to genuinely confront or explain this contradiction.[378]

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[371] *See supra* note 177 and accompanying text.

[372] H.R. Rep. No. 1356, *supra* note 364, at 2.

[373] *DeCoteau*, 420 U.S. at 447.

[374] S. Exec. Doc. No. 66, *supra* note 157.

[375] *DeCoteau*, 420 U.S. at 435 n.16 (alterations in original) (quoting S. Exec. Doc. No. 66, *supra* note 157, at 7 (letter from appointed negotiators Eliphalet Whittlesey, D.W. Diggs, and Charles A. Maxwell to Indian Affairs Commissioner T.J. Morgan)).

[376] S. Exec. Doc. No. 66, *supra* note 157, at 7 (letter from appointed negotiators Eliphalet Whittlesey, D.W. Diggs, and Charles A. Maxwell to Indian Affairs Commissioner T.J. Morgan); *see supra* note 288.

[377] Mattz v. Arnett, 412 U.S. 481, 497 (1973) (alteration omitted) (quoting Seymour v. Superintendent, 368 U.S. 351, 357-58 (1962)); *see supra* text accompanying notes 44-48.

[378] The Supreme Court purported to reconcile *DeCoteau* with *Mattz v. Arnett* by opining that in *Mattz* the surplus land act brought about a "mere opening of [reservation] lands to settlement" which was not inconsistent with "continued reservation status," whereas

Next, the footnote in *DeCoteau* exhibits a long excerpt from that same letter in the government's report, spotlighting the negotiators' assertion that "upon informal inquiry among the Indians it was learned that [the negotiators'] plan" to "reserve a large quantity of land for educational and Government purposes" "would not meet with [the Indians'] approval."[379] The letter goes on to state that the negotiators "did not press the matter, believing it better that the Government should own the lands upon which the agency and school building are located."[380] At least two erroneous implications spring from *DeCoteau*'s strategic emplacement of this language from the negotiators' letter. First, the language might be misconstrued to suggest that, by purportedly refusing to approve the commissioners' "plan" to "*reserve* a large quantity of land for educational and Government purposes,"[381] the Indians *were objecting to the continuation of reservation status* beyond the sale of the unallotted land. Second, the selected language from the negotiators' letter might be misconstrued as implying that the Sisseton-Wahpeton people *wished to retain little or no presence of the federal government in the Indians' vicinity* after the sale of their unallotted lands, a presence that would endure if the agreement were to "reserve a large quantity of land for educational and Government purposes."[382] Both implications are without merit.

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the 1891 Act in *DeCoteau* "is a very different instrument" because "[i]t is not a unilateral action by Congress but the ratification of a previously negotiated agreement, *to which a tribal majority consented*." *DeCoteau*, 420 U.S. at 447-48 (emphasis added) (citation omitted); *see also id.* at 447 (opining that "the gross differences between the facts of those cases [i.e., *Mattz* and *Seymour v. Superintendent*, 368 U.S. 351 (1962)] and the facts here cannot be ignored"). But the distinction is illusory because the *appearance* in *DeCoteau* of tribal consent to the termination of the Lake Traverse Reservation rests on the advancement of a false historical narrative that is contradicted and dispelled by the record of actual negotiations with the Sisseton-Wahpeton Dakota in 1889. *See supra* & *infra* notes 353-563 and accompanying text. Moreover, the fact that "[t]he Lake Traverse reservation . . . has the distinction of being the first reservation partitioned under the General Allotment Act," Michael L. Lawson, *Indian Heirship Lands: The Lake Traverse Experience*, S.D. Hist., Winter 1982, at 213, 217-18 (footnote omitted), and that Congress followed the 1887 Act's general prescription for acquiring "such portions of its reservation . . . as [a] tribe shall . . . consent to sell," Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 389, evinces a perfect alignment between the "purchase and release," *id.*, of Sisseton-Wahpeton surplus lands, on the one hand, and the policy of the General Allotment Act, on the other, a policy that "clearly does not . . . abolish the reservations," United States v. Celestine, 215 U.S. 278, 287 (1909) (citation and internal quotation marks omitted). To the contrary, the General Allotment Act's "policy was to continue the reservation system and the trust status of Indian lands . . . ." Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 478 (1976) (quoting *Mattz*, 412 U.S. at 496); *see also supra* notes 46-47 and accompanying text; *supra* note 158 and accompanying text; *infra* notes 644-647 and accompanying text.

[379] S. Exec. Doc. No. 66, *supra* note 157, at 7 (letter from appointed negotiators Eliphalet Whittlesey, D.W. Diggs, and Charles A. Maxwell to Indian Affairs Commissioner T.J. Morgan), *quoted in DeCoteau*, 420 U.S. at 435 n.16.

[380] *Id.*

[381] *Id.*

[382] *Id.*

The first implication conflicts with *additional* language from the government's report that is *left out* of the *DeCoteau* footnote. That footnote concludes with an excerpt from a letter to the Secretary of the Interior in which the Commissioner of Indian Affairs "explain[s] the final agreement."[383] The Commissioner's letter breaks down the proposed allocation of acreage, stating that the "Indians entitled to allotments" "number between 1,500 and 1,600 souls, . . . leaving 662,780 acres to which the Indian title is extinguished by the terms of the agreement."[384] While the *DeCoteau* footnote stops there, the Commissioner's letter continues as follows: "Included in this are the lands upon which the agency and school buildings are located . . . ."[385] This additional language from the Commissioner's letter is crucial for ascertaining the true meaning of the U.S. negotiators' phrase "*reserve* a large quantity of land for educational and Government purposes."[386] It demonstrates that the issue was whether or not the "lands upon which the agency and school buildings [were] located"[387] would be included in the total acreage to be purchased from the Indians, lands to which "the Indian title"—a *possessory* term, not a *jurisdictional* one—would thus be "extinguished."[388] In other words, the question whether the Indians wished to "*reserve* a large quantity of land for educational and Government purposes"[389] equates only to whether they wanted to *withhold such land from sale*. It does *not* equate to whether they intended to *retain such land in reservation status*.[390]

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[383] *DeCoteau*, 420 U.S. at 437 n.16.

[384] S. Exec. Doc. No. 66, *supra* note 157, at 4-5 (letter from Indian Affairs Commissioner T.J. Morgan to Interior Secretary John W. Noble), *quoted in DeCoteau*, 420 U.S. at 437 n.16.

[385] *Id.* (letter from Indian Affairs Commissioner T.J. Morgan to Interior Secretary John W. Noble).

[386] *Id.* at 7 (emphasis added) (letter from appointed negotiators Eliphalet Whittlesey, D.W. Diggs, and Charles A. Maxwell to Indian Affairs Commissioner T.J. Morgan), *quoted in DeCoteau*, 420 U.S. at 435 n.16.

[387] *Id.* at 5 (letter from Indian Affairs Commissioner T.J. Morgan to Interior Secretary John W. Noble).

[388] *Id.* at 4-5 (letter from Indian Affairs Commissioner T.J. Morgan to Interior Secretary John W. Noble), *quoted in DeCoteau*, 420 U.S. at 437 n.16.

[389] *Id.* at 7 (emphasis added) (letter from appointed negotiators Eliphalet Whittlesey, D.W. Diggs, and Charles A. Maxwell to Indian Affairs Commissioner T.J. Morgan), *quoted in DeCoteau*, 420 U.S. at 435 n.16.

[390] The word "reserved" appears elsewhere in the transcribed proceedings as denoting "withheld from sale" rather than "retained in reservation status." *See id.* at 21 (emphasis added) (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey) ("The commission will recommend that all receive equal allotments of land. In order to do this you need some land *reserved*."); *supra* text accompanying note 255; *cf. supra* note 164 (emphasis added) (reprinting letter of instructions from Commissioner of Indian Affairs to the U.S. negotiators stating that "[a] sufficient quantity [of surplus lands] should be *reserved* for future contingencies"). *DeCoteau*, however, deploys the word "reserved" to forge an association with reservation status, *see DeCoteau*, 420 U.S. at 433 (emphasis added) ("In May [1889], Diggs met with a council of tribal leaders, who told him that the tribe would consider selling the *reserved* lands . . . ."), thereby promoting the fallacious implication discussed

The second potential implication arising from the *DeCoteau* footnote is that the *reason* the Indians disapproved of a "plan" that would "reserve a large quantity of land for educational and Government purposes" *was because they wished to be rid of the federal government's presence*.[391] But this implication, too, is dispelled by the recorded testimony, if fairly and fully considered. *DeCoteau*, however, promotes the erroneous implication by misrepresenting the views of Sisseton-Wahpeton Chief Gabriel Renville, juxtaposing two strategically placed extracts from the chief's many speeches over the two weeks of negotiations. Thus, the Supreme Court wrote:

> During the negotiations, the intent of all parties to effect a clear conveyance of all unallotted lands was evident. For instance, on December 3, 1889, Gabriel Renville, a tribal spokesman, stated:
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> "I have spoken for all the people, and it is their wish that I should say these things. In the past there has been lots of land sold, but we have not benefited by the sales. In 1867 they promised us they would help us, but they have not helped us very much for many years. Let them first settle our claim [loyal scout claim][392] and then we will talk about our surplus lands. We are now citizens and can talk with you as such, and do not care to talk about shoe pacs, etc., but cash. We can buy for ourselves what we need if payment is made in cash, and then we do not care to have an agency here after the surplus lands have been sold. The people have asked me to say this as their wish."
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> . . . .
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> The Indians were aware that they were taking a not insignificant step in selling the reservation lands. Gabriel Renville stated:
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> "This little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell . . . ."[393]

DeCoteau's showcasing of selected and altered quotations in footnote 16 projects a distorted and misleading depiction of the Sisseton-Wahpeton people's negotiations with the U.S. government in late 1889.

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supra at text accompanying note 381 and at text accompanying notes 383-390. In this regard, it should be noted further that the term "reserved lands" does not appear in the May 1889 *Minneapolis Tribune* newspaper story which *DeCoteau* references in stating, misleadingly, that "[i]n May [1889], Diggs met with a council of tribal leaders, who told him that the tribe would consider selling the *reserved lands* . . . ," *DeCoteau*, 420 U.S. at 433 (emphasis added). Instead, the newspaper story states that "the general object" of the May 1889 meeting was merely "to ascertain [the Indians'] views in regard to *opening* the reservation," not abolishing it. *See A Large Pow-Wow*, *supra* note 125 (emphasis added); *supra* text accompanying note 126.

[391] S. Exec. Doc. No. 66, *supra* note 157, at 7 (letter from appointed negotiators Eliphalet Whittlesey, D.W. Diggs, and Charles A. Maxwell to Indian Affairs Commissioner T.J. Morgan), *quoted in DeCoteau*, 420 U.S. at 435 n.16; *see supra* text accompanying note 382.

[392] *DeCoteau*'s altering of Chief Renville's speech by inserting, in brackets, the term "loyal scout claim"—a term invented by the Supreme Court itself, *see supra* note 369 and accompanying text—functions as a diversion. *See infra* notes 398-406 and accompanying text.

[393] *DeCoteau*, 420 U.S. at 436-37 n.16 (citations omitted).

As an initial observation, there is bitter irony in the Supreme Court's quoting from Chief Renville's testimony on December 3 as "eviden[ce]" of the Indians' "intent . . . to effect a clear conveyance of all unallotted lands";[394] for, as this Article's examination shows, Chief Renville strenuously and vocally opposed the sale of *any* of the unallotted lands during the tense negotiations that took place on December 3.[395] Indeed, the chief's opposition is manifest in the concluding sentences of a speech of his that immediately precedes the extract from his December 3 testimony that *DeCoteau* isolates. Just prior to his follow-up remark "I have spoken for all the people, and it is their wish that I should say these things,"[396] Chief Renville said:

> We are friends; first settle our claim, and then we will listen to and talk with you about our surplus land. . . . We all want to do what is right. Why should the Government refuse to pay us our claim before they wish to take away our land.[397]

The Supreme Court's misleading, out-of-context portrayal of Chief Renville's remarks on December 3 *alone* casts considerable doubt on *DeCoteau*'s purporting to draw from the testimony of Sisseton-Wahpeton leaders *any* implication of tribal consent to the termination of the Lake Traverse Reservation.

One of the ways *DeCoteau* misrepresents Chief Renville's testimony is by adding an alteration to a quotation while keeping the actual

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[394] *Id.* at 436 n.16.

[395] *See supra* notes 166-174 and accompanying text (examining U.S. negotiations with the Sisseton-Wahpeton Dakota on December 3, 1889, and showing Chief Gabriel Renville's opposition to the government's proposal that the Indians immediately agree to sell their unallotted lands on the Lake Traverse Reservation); *supra* notes 219-242 and accompanying text (same).

[396] S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville), *quoted in DeCoteau*, 420 U.S. at 436 n.16 (citation omitted); *see supra* note 393 and accompanying text. In the context of the transcribed December 3 negotiations Chief Renville's statement "I have spoken for all the people, and it is their wish that I should say these things" functions both as (1) a follow-up remark underscoring his insistence that the government must "first settle our [back annuities] claim" before "we will listen to and talk with you about our surplus land," *infra* text accompanying note 397, and (2) a defiant rebuttal to the chairman's stated intention to disregard and bypass the chief's spokesman role altogether, i.e., Whittlesey's divisive threat to "to put down on paper just what we think to be right" and "give every one a chance to sign it." S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey); *see also supra* text accompanying notes 230-231.

[397] S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville); *see supra* notes 226-227 and accompanying text. The chairman of the U.S. negotiating commission grudgingly acknowledged Chief Renville's refusal to discuss land-sale terms at the December 3 meeting, saying, just prior to the close of the meeting: "We will do what we can to help you to get your claim through, although you are putting a load on us in asking us to help get your bill through Congress before the reservation is opened." S. Exec. Doc. No. 66, *supra* note 157, at 21 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey); *see supra* note 241 and accompanying text.

context undisclosed, thereby inviting an erroneous association between the chief's words and a different, inapposite concept. Thus, *DeCoteau* displays the following altered quotation from Chief Renville: "In 1867 they promised us they would help us, but they have not helped us very much for many years. Let them first settle our claim [loyal scout claim] and then we will talk about our surplus lands."[398] Insertion of the bracketed term "loyal scout claim"—a term devised by the Supreme Court itself[399]—leads the reader to assume (wrongly) that "[i]n 1867" the United States promised to "help" the Sisseton-Wahpeton Dakota through a treaty promise that had something to do with satisfying a "loyal scout claim." Indeed, the Supreme Court promoted this association in express terms a few pages previous to the Court's distortion of Chief Renville's words in footnote 16;[400] for, on page 433 *DeCoteau* states that during the May 1889 *Minneapolis Tribune* interview "a council of tribal leaders . . . told [D.W. Diggs] that the tribe would consider selling the reserved lands if the Government would first pay a 'loyal scout claim' which the tribe believed was owing as part of the 1867 Treaty."[401]

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[398] *DeCoteau*, 420 U.S. at 436 n.16 (alteration in original) (citation omitted) (quoting S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville)); *see supra* text accompanying note 393.

[399] *See supra* note 369 and accompanying text.

[400] *See supra* note 393 and accompanying text.

[401] *DeCoteau*, 420 U.S. at 433; *see also supra* note 178 and accompanying text. *DeCoteau* adds a further layer of misdirection regarding the May 1889 *Minneapolis Tribune* interview by asserting, in a footnote, that one month earlier banker D.W. Diggs and "other local, non-Indian citizens from the counties adjacent to the reservation" had written to the Secretary of the Interior and "promised to use their influence to secure to the tribe *further congressional appropriations, mentioned in the 1867 Treaty, Art. VI, as compensation for the tribe's loyalty during the 1862 Sioux uprising*." *DeCoteau*, 420 U.S. at 432 n.8 (emphasis added). In actuality, the "resolution" Diggs sent to the Secretary of the Interior, to which *DeCoteau* refers, *see id.*, mentions neither the 1867 Treaty in general nor Article VI of that treaty in particular. Rather, in relevant part Diggs's "resolution" provided as follows:

> WHEREAS the Indians on this reservation have certain grievances which they urge as a reason for withholding their consent to final action necessary to opening the Reservation to settlement.
>
> RESOLVED: That it is the sense of this convention composed of all the counties contiguous to the said Reservation that the government of the United States owes a debt of gratitude to all Indians who were loyal and rendered service or befriended the white man in the terrible scenes of the massacre of 1862, and that Chief Gabriel Renville having been conspicuous as a friend of the government and the white man, the government should recognize such loyalty and service in some substantial form.
>
> RESOLVED, That as citizens we will use our influence to secure to Chief Renville and all other Indians who were loyal to the government, who are now members of this band, that justice that has been denied them. Confident that the government will promptly accord to them such compensation as in its judgment they are under the law entitled, and will see to it that the provisions of treaties heretofore made are scrupulously carried out to the end, that any wrong to them resulting from neglect shall be speedily redressed.

But in truth, during the late 1889 negotiations, including the discussions that took place on December 3, the "claim" Chief Renville and the other Sisseton-Wahpeton leaders repeatedly invoked was, as summarized by President Benjamin Harrison, a claim for "payment by the United States of the annuities which were forfeited [by Congress] by the act of February 16, 1863," a payment that was "justly due to these friendly Indians" and whose "allowance ha[d] already been too long delayed."[402] Notwithstanding *DeCoteau*'s staging of inapposite and mis-

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> RESOLVED, That we recommend to congress, that all men in this band who acted as scouts under Genl. Sibley be suitably rewarded for their loyalty and valuable services.
>
> RESOLVED, that we urge upon the Secretary of the Interior the importance of immediately adjusting all just claims in order that the Sisseton Reservation may be speedily opened[.]

Nat'l Archives Recs. of the Bureau of Indian Aff. Rec. Grp. 75, Spec. Case 147 (Sisseton), Letter No. 26163-1889, encl. 3 ("Resolutions of the Convention" signed by D.W. Diggs and six others, dated May 13, 1889, and stated to be "a true copy of the resolutions passed by the Convention held at Watertown[, Dakota Territory,] for the purpose of securing the Early opening of the Sisseton Indian Reservation") (on file with author) [hereinafter "Diggs Resolution"], *cited in DeCoteau*, 425 U.S. at 431-32 n.8. As the Sisseton-Wahpeton representatives made clear at the May 1889 *Minneapolis Tribune* interview and during their two weeks of negotiations with the U.S. commission in November and December of that year, the "certain grievances" that the Indians "urge[d] as a reason for withholding their consent to final action necessary to opening the Reservation to settlement," *id.*, stemmed *not* from concerns about the federal government's failure to compensate the unpaid scouts nor from unfulfilled promises contained in Article VI of the 1867 Treaty, but from Congress's acts of retaliatory aggression in having confiscated and foreclosed annuity payments guaranteed by treaties with the Santee Dakota Indians that predated the 1862 U.S.-Dakota War. *See supra* notes 146-147 and accompanying text; *supra* notes 173-180 and accompanying text; *infra* notes 483-490 and accompanying text; *cf.* 31 Cong. Rec. 1651 (1898) (exhibiting text of a bill for restoring "the annuities . . . arising under the [Santee Dakota] treaties . . . of . . . 1837, and . . . 1851, which annuities [were] declared forfeited by the act of Congress approved February 16, 1863"); Wolfchild v. Redwood Cty., 91 F. Supp. 3d 1093, 1096-97 (D. Minn. 2015) (citation omitted) (discussing annuities established and extended under 1837, 1851, and 1858 treaties with the various bands of the Santee Dakota Indians and explaining that "as a result [of the 1862 U.S.-Dakota War], Congress [by the Act of Feb. 16, 1863, 12 Stat. 652,] abrogated and annulled all treaties between [the United States and the Minnesota Sioux], and declared all lands and rights of occupancy within the State of Minnesota and annuities and claims to the United States forfeited"). The "recommend[ation]" that the scouts "be suitably rewarded for their loyalty and valuable services," Diggs Resolution, *supra*, likely was added to the resolution in an attempt to appease Gabriel Renville, who had served as leader of the Dakota scouts, in advance of the meeting Diggs had arranged to take place a month later for the purpose of luring Renville and other tribal representatives into accepting the white Dakota citizens' schemes for obtaining congressional "action necessary to opening the Reservation to settlement," *id*. *See infra* note 488.

[402] S. Exec. Doc. No. 66, *supra* note 157, at 1-2 (letter from President Benjamin Harrison to the Senate and House of Representatives); *supra* note 175 and accompanying text; *cf.* S. Exec. Doc. No. 66, *supra* note 157, at 18-19 (emphasis added) (report of councils with Sisseton and Wahpeton Indians) (statements of D.W. Diggs) ("The chief has shown us just what is between us. The error in survey of east line and *the payment of the claim of back annuities*. . . . We are here to-day to help you to get that money . . . .");

leading associations,[403] Chief Renville's statement that "[i]n 1867 [the U.S. government] promised us they would help us" clearly was *not* in reference to any "loyal scout claim."[404] Rather, that statement alluded to Article VI of the 1867 Treaty, which promised that "in consideration of the destitution . . . resulting from the confiscation of their annuities and improvements, . . . Congress will, in its own discretion, from time to time make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life . . . ."[405] Indeed, Chief Renville made this exact reference explicit in the very exchange on December 3 from which *DeCoteau* strategically extracts, saying, "We are poor and our crops have failed; but you have our money, holding it, and do not help us *as promised in the sixth article of the treaty of 1867* . . . ."[406]

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supra text accompanying note 225.

[403] Remarkably, three false and misleading associations are implanted in a single pivotal sentence in *DeCoteau*. Thus, the Supreme Court wrote: "In May, Diggs met with a council of tribal leaders, who told him that the tribe would consider selling the reserved lands if the Government would first pay a 'loyal scout claim' which the tribe believed was owing as part of the 1867 Treaty." *DeCoteau*, 420 U.S. at 433. But in the May 1889 *Minneapolis Tribune* newspaper story to which *DeCoteau* refers, there is no mention—by the Sisseton-Wahpeton Dakota leaders or anyone else—of (1) the term "reserved lands," (2) the judicially invented label "loyal scout claim," or (3) the 1867 Treaty that established the Lake Traverse Reservation. *See A Large Pow-Wow*, *supra* note 125. All three of the illusory associations in this misleading sentence from *DeCoteau* are instrumental in the case's construction of a false narrative of tribal consent to the reservation's extinguishment. *See*, *e.g.*, *supra* notes 379-390 and accompanying text (discussing *DeCoteau*'s treatment of the phrase "reserve a large quantity of land for educational and Government purposes"); *supra & infra* notes 398-406 and accompanying text (discussing *DeCoteau*'s inapposite references to the 1867 Treaty); *infra* notes 473-500 and accompanying text (discussing *DeCoteau*'s use of the label "loyal scout claim").

[404] Consistent with President Benjamin Harrison's summary of the matter, *see supra* note 402 and accompanying text, the original context of Renville's speech shows that in saying "our claim," *see supra* text accompanying note 398, the chief meant the Sisseton-Wahpeton Dakota people's demand for restitution of annuity payments that were guaranteed by the 1851 Treaty of Traverse des Sioux but that had been confiscated and cut off by Congress in 1863, in retaliation after the U.S.-Dakota War of 1862. Thus, Renville's reference to "our claim" is extracted from remarks of his on December 3, 1889, which in turn responded to a long speech by commissioner D.W. Diggs in which Diggs stated that the commission "recommend[ed] that the back annuities be paid first, from 1862 to date," S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs); *see also id.* at 17 (report of councils with Sisseton and Wahpeton Indians) (Dec. 3, 1889 statement of Gabriel Renville) ("The feeling among the people is not that they do not intend to sell at all, but what we want is that our claim be allowed first. After that, if a commission comes, we will sell to them if we can agree on terms. We claim that our back annuities should be allowed from 1862 and not from 1864 as suggested by Indian Office."); *supra* text accompanying note 170. For further discussion of this, see *infra* notes 478-500 and accompanying text.

[405] Treaty of Feb. 19, 1867, art. VI, 15 Stat. 505, 507, as amended, 15 Stat. 509, *reprinted in DeCoteau*, 420 U.S. at 453; *see also infra* note 418 and accompanying text.

[406] S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville); *supra* text accompanying note 227.

With regard to this second erroneous implication stemming from *DeCoteau*'s selective quoting of words from the U.S. negotiators' letter, the crucial point is as follows. The notion that the letter's language as invoked in *DeCoteau*[407] implies *the Indians wished to be rid of the federal government's presence*[408] is contradicted by abundant testimony in the record. Assuming that the U.S. commissioners were not simply fabricating what they claimed had been "learned" "upon informal inquiry among the Indians,"[409] the letter's language, and Chief Renville's remark disparaging the agency (i.e., "we do not care to have an agency here . . . ."),[410] are most reasonably construed as reflecting the Sisseton-Wahpeton people's grievances over the federal government's corruption, incompetence, and overall failures in the administration of Indian affairs on the Lake Traverse Reservation, as well as their need to maximize revenue from the sale of unallotted lands on account of the Indians' impoverished and desperate condition.[411] The language quoted from the negotiators' letter and

A short time earlier during the same exchange with the U.S. commissioners on the afternoon of December 3, 1889, Chief Renville made another remark that makes clear he was *not* referring to any "loyal scout claim" when he invoked the 1867 Treaty. Thus, the chief said: "In 1867 Congress said, by treaty, that it would help us *when we were in need*." S. Exec. Doc. No. 66, *supra* note 157, at 18 (emphasis added) (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville); *supra* text accompanying note 227; *see also supra* note 404.

[407] I.e., the negotiators' purporting to report that "upon informal inquiry . . . it was learned" that the Indians disapproved of the "plan" to "reserve a large quantity of land for educational and Government purposes," S. Exec. Doc. No. 66, *supra* note 157, at 7 (letter from appointed negotiators Eliphalet Whittlesey, D.W. Diggs, and Charles A. Maxwell to Indian Affairs Commissioner T.J. Morgan), *quoted in DeCoteau*, 420 U.S. at 435 n.16; *see supra* text accompanying note 379

[408] *See supra* text accompanying notes 379-382.

[409] *See supra* note 407 and accompanying text. Feigning consultation with the Indians was a ploy that had been used in defrauding the Dakota previously, during the scandal involving the 1851 Treaty of Traverse des Sioux and the so-called "traders' paper," *see infra* note 439 and accompanying text. *See also* Meyer, *supra* note 181, at 80-81 ("Each Indian, after he stepped away from the treaty table, was pulled to a barrel nearby and made to sign a document prepared by the traders. . . . The Indians later claimed that they had thought they were signing a third copy of the treaty . . . . The traders and some others insisted, however, that the whole matter had been discussed privately beforehand and that the Indians knew perfectly well what they were signing.").

[410] S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville), *quoted in DeCoteau*, 420 U.S. at 436 n.16 (citations omitted); *see also supra* note 393 and accompanying text.

[411] *See*, *e.g.*, S. Exec. Doc. No. 66, *supra* note 157, at 18 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville) ("We are very poor just now, as our crops have failed. . . . There has been several years we have received nothing, although we relied upon it. If [Congress] were reminded of this they might help us this winter."); *supra* note 227 and accompanying text; *see also A Large Pow-Wow*, *supra* note 125 (conveying statement of Sisseton-Wahpeton representative Solomon Two Stars) ("Don't got any crops. We are suffering, no telling about this season. We may all starve . . . ."); *supra* note 141 and accompanying text; 22 Cong. Rec. 611 (1890) ("Executive and Other Communications") (noting transmittal of "a communication from the Commissioner of Indian Affairs [to the House Committee on Indian Affairs], calling attention to the distressed and suffering condition of the Sisseton and Wahpeton

Indians and the necessity for passage of" the bill ratifying the 1889 Agreement). In the communication referenced in the Congressional Record, the Commissioner of Indian Affairs wrote:

> I am in receipt of the following telegram from Hon. Herbert Welsh, dated Philadelphia, December 15, 1890: "John Robinson, Episcopal missionary, Sisseton Reservation, has just wired me, 'Get day for considering Sisseton bill before holiday adjournment. Immediate action should be taken for the sake of human life. Urge and insist on this. Sickness increasing on account of hunger and cold. Do not delay a day.'"

H.R. Exec. Doc. No. 100, 51st Cong., 2d Sess., at 1 (1890) (letter from George Chandler, Acting Secretary of the Interior, to the Speaker of the House of Representatives, transmitting communication from T.J. Morgan, Commissioner of Indian Affairs); *see also* Nat'l Archives Recs. of the Bureau of Indian Aff. Rec. Grp. 75, Letters Received: Spec. Case 147 (Sisseton), Letter No. 39462-1890 & encl. (on file with author) (letter from South Dakota Governor Arthur C. Mellette to John W. Noble, Secretary of the Interior, with enclosed Nov. 27, 1890 petition signed by Chief Gabriel Renville and 67 other "delegates representing the Sisseton and Wahpeton Indians" conveying "the absolute need and destitution existing at [Sisseton] Agency as the result of crop failures," "call[ing] upon the proper authorities at Washington for aid during the coming winter," and stating that "[u]nless we are helped in some way, great suffering will be the result"), *cited in DeCoteau*, 420 U.S. at 432 n.8. In a letter from the previous summer, dated July 14, 1890, the U.S. Indian agent for Sisseton Agency wrote:

> My annual report, together with all other reports and references, show that this section of country suffered severely by drought during the summer of 1889, and that nearly all of the crops on the Lake Traverse Reservation were blasted and dried up. The Indians of this reservation having taken allotments in 1887 began to make quite an effort at farming in 1888 and 1889, and used up all the means they had in opening up land, building, etc., and became almost entirely dependent upon their crops for a living.
>
> I found these Indians so poor and destitute in the fall of 1889, after the drought of that season, that I immediately reported their condition, and the honorable Secretary of the Interior at once authorized me to expend a sum not exceeding $2,000 in the purchase of flour, pork, and beans for the relief of the destitute. Said provisions were purchased in November last, and have been carefully issued as directed, and there are no further provisions for these destitute people. These Indians are in want of provisions. Their destitution presses them so hard that the few trees that should be left to grow are being cut and hauled away to purchase something to live on. They are digging the wild turnips, and I often hear of ponies and oxen being sold for their value to obtain provisions for their families. The agency physician, after visiting the sick, often reports the destitution and poverty of the families. These Indians have but few resources for obtaining the necessaries of life. They obtain a limited amount of fish from the lakes, and this is all the wild game on this reservation. There is but little timber, which is located around the lakes and in the ravines, and this is wrongfully being cut from necessity, as before stated.
>
> A very few Indian men can get employment among the whites, as they are not that far advanced in civilization to command much pay as laborers. The old Chief Renville and many of the leading men of the tribe have visited me of late, and called my attention to the destitution of the people. They say that if the tribe has anything coming to it from the Government from any source whatever, that it is the earnest desire of all that sufficient supplies and provisions be purchased and issued to the tribe to relieve them from their destitution and poverty. These leading Indians apply for food for the tribe and insist that such

from Chief Renville's testimony does *not* imply that the Indians wanted their reservation abolished.

Thus, the transcribed proceedings exhibit the Indians' resentment over the corruption and meddling of U.S. agents assigned to superintend the reservation. In one strikingly tense moment, Chief Renville demanded that the commissioners remove one such former agent from the gathering at Sisseton Agency, saying, "There is one here who the people do not want here any longer. They do not like him as agent, and do not think he ought to be allowed to remain here, as he is not agent now."[412] In fact, it is in the context of precisely this exchange with the commissioners—recorded on the same page of the transcribed proceedings—that Chief Renville exclaimed: "We can buy for ourselves what we need if payment is made in cash, and then we do not care to have an agency here after the surplus lands have been sold."[413] The context clearly shows that Chief Renville was expressing disgust and exasperation at the presence of a former U.S. agent whom the Sisseton-Wahpeton people loathed.[414] His

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> destitution and poverty should not be allowed to continue. They say that a small payment now will do more good than a large one after many of them have died from destitution and want. They despair of the relief from the bill now before Congress for the payment of back annuities, and earnestly apply for the earliest assistance that can be obtained.

H.R. Exec. Doc. No. 443, 51st Cong., 1st Sess., at 2 (1890) (letter from U.S. Indian Agent William McKusick to T.J. Morgan, Commissioner of Indian Affairs, transmitted to the Speaker of the House of Representatives by John W. Noble, Secretary of the Interior); *see also* Brief for Petitioner, *supra* note 153, at 17, 1974 WL 186007, at *14 (footnote omitted) (noting that the 1889 negotiations took place "at a time when the [Sisseton-Wahpeton] Bands were very poor and hungry, due to three successive crop failures, and faced with a winter of severe cold and high winds" and that "[i]n order to survive, the Bands were forced to enter into an agreement opening some of their lands for settlement").

[412] S. Exec. Doc. No. 66, *supra* note 157, at 20 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[413] *Id.* (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville). Because of the similarity in the Dakota words for "agent" (*Ateyapi*) and "agency" (*Ateyapi ti*), and in view of the context of Chief Renville's anger over the presence of an intensely disliked former Indian agent during the 1889 negotiations, *see supra* text accompanying note 412, the accuracy of the transcript's selecting the word "agency" rather than "agent" in the Dakota-to-English translation of Renville's December 3 remark is questionable. *See* Williamson, *supra* note 189, at 5 (specifying Dakota-language translations for "agency" and "agent").

[414] Gabriel Renville's contentious relationship with Moses N. Adams, U.S. Indian agent at Sisseton Agency from 1872 to 1875, was notorious. *See*, *e.g.*, *Champions of Excellence: Gabriel Renville, Hall of Fame Inductee*, https://sdexcellence.org/Chief_Gabriel_Renville_1978 (last visited Dec. 6, 2021) (website for South Dakota Hall of Fame) ("Even though Chief Renville was an ally of the whites, after he settled on the reservation the government agent, Moses N. Adams, considered him hostile. . . . The Sisseton agent favored the 'church' Indians and Renville and other leaders of the traditional Indians accused the agent of discriminating against them in the disposition of supplies and equipment. Renville said Adams favored the idle church-goers instead of encouraging them to work. Agent Adams considered Renville a detriment and removed the chief from the reservation executive board which the

remark was *not* a plea for the annihilation of his people's reservation, as *DeCoteau* falsely insinuates through a decontextualized misappropriation of Chief Renville's testimony.[415]

Other testimony further substantiates the Indians' complaints about corruption and mismanagement at Sisseton Agency, as well as their grievances regarding the government's defective administration of Indian education on the reservation. Commissioner D.W. Diggs, for instance, broached the subject of the Dakota people's anger over corrupt agents in one of his long speeches earlier on December 3, saying, "I know you think about the deceit of agents and others in the past, but there is none of that now. In early days, when Indians were on the frontier, the agent or men sent out could do just as they pleased."[416] In the same speech, Diggs also urged continuation of schools among the Indians, saying, "I have watched with great interest the progress your children are making, because it is education that elevates man. Many of you are too old to get the benefits of these schools, but you ought to do for your children what you were unable to do for yourselves."[417] To this, Chief Renville responded:

> You spoke of education. We all know that we are not educated; for that reason the sixth article of the treaty[418] was made. Since then our schools have been full, and why is it that none of our children have been educated so that we can use them. Perhaps it is because the teachers do not care. . . . The whites around us have taught us to be religious and we know what Christians are, but they have never treated us as they have been told to in the tenth commandment.[419]

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agent had organized to carry out his policies. This action was considered unnecessarily violent. In 1874 Renville was finally successful in securing a government investigation of the agent's activities which resulted in an official censure of Adams."). *See generally* Anderson, *supra* note 160, at 90-107 (discussing Gabriel Renville's interactions and altercations with Moses N. Adams in book chapter titled "Agent Adams Takes the Helm").

[415] *See supra* note 393 and accompanying text.

[416] S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs).

[417] *Id.* at 18 (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs); *see also supra* note 225 and accompanying text.

[418] *See* Treaty of Feb. 19, 1867, art. VI, 15 Stat. 505, 507, as amended, 15 Stat. 509 ("[I]n consideration of the destitution of said bands of Sisset[o]n and Wa[h]peton Sioux . . . , resulting from the confiscation of their annuities and improvements, it is agreed that Congress will, in its own discretion, from time to time make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life, under the system in operation on the Sioux reservation in 1862; including, if thought advisable, the establishment and support of local and manual labor schools; the employment of agricultural, mechanical, and other teachers; the opening and improvement of individual farms; and generally such objects as Congress in its wisdom shall deem necessary to promote the agricultural improvement and civilization of said bands."), *reprinted in* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 453 (1975).

[419] S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville). In the King James version of the Bible, the tenth commandment states: "Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor

Once again, the context makes clear that Chief Renville was giving powerful, morally commanding voice to the indignities that his people were suffering because of the apathy, arrogance, and neglect of personnel involved in educational efforts among the Sisseton-Wahpeton Dakota. He was *not* suggesting or implying that governmental support for educating the Indians should come to an end,[420] nor that the reservation itself should be extinguished.

Chief Renville was hardly alone, moreover, in condemning wrongdoing by U.S. agents on the Lake Traverse Reservation and pleading with the commissioners not to allow any agent to serve as middleman with respect to the Dakota people's government funds. Other Sisseton-Wahpeton leaders likewise insisted that proceeds from the sale of the unallotted lands be provided in the form of cash payments, rather than farming provisions, in view of notorious past and continuing instances of U.S. agents' misappropriating those provisions for the agents' own enrichment.[421] During the December 12 negotiations, for instance,

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his ox, nor his ass, nor any thing that is thy neighbor's." *Exodus* 20:17 (KJV).

[420] The record *does* provide some evidence that the commissioners themselves were trying to manipulate the negotiations to ensure that maximum acreage on the reservation, including land on which government schools were located, would be available for purchase by white settlers. Thus, commissioner Diggs included the following comment in his extraordinarily long speech on December 12, toward the end of the 1889 negotiations: "This reservation will be quickly settled by whites, bringing the arts of civilization, establishing schools in every township, so that you can send your children to school without sending them miles away, and I have no doubt you will have entire control of all money coming to you, *there being no use for Government schools*." S. Exec. Doc. No. 66, *supra* note 157, at 24 (emphasis added) (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs). In addition to expressing frustration because of Diggs's "long speech" about which "we do not remember half," *see supra* text accompanying note 297, Chief Renville countered Diggs's apparent interest in seeing an end to "Government schools" on the Lake Traverse Reservation, saying, "We understand that some of the money [from the sale of unallotted land] will be used for [Government] schools." S. Exec. Doc. No. 66, *supra* note 157, at 25 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[421] In his biographical study of Henry Benjamin Whipple, Episcopal bishop of Minnesota, focusing on Whipple's determined efforts to bring about reform in the notoriously corrupt national administration of Indian affairs around the time of the U.S.-Dakota War, Professor Gustav Niebuhr writes that even before the start of the conflict Whipple

> made it clear he believed from what he had seen that Native Americans—and not just in Minnesota—had been treated with appalling dishonesty, essentially robbed, plied with liquor, and left to fend for themselves. He laid the blame on a highly politicized Indian Affairs office that in all practicality served the interests of its officials rather than the Indians. It was the spoils system, run rampant, thieves appointed to supervise thieves. Whipple offered blunt, critical analysis that he would use often to make his point: "The Indian agents who are placed in trust of the honor and faith of the government are generally selected without any reference to their fitness for the place. The congressional delegation desire to reward John Doe for party work, and John Doe desires the place because there is a tradition on the border that an Indian agent with Fifteen hundred dollars a year can retire on an ample fortune in four years." In Whipple's view, work that should

Charles Crawford spoke in support of Renville's concerns, declaring, "Our chief says that the agreement in some things is not good. There is one thing I do not like, and that is the payments of interest to be made in goods. I would like to know if it is possible to have payments made in cash?"[422] A fellow tribesman, Titus Jug, pressed harder on this demand: "In the past we have received cattle wagons and implements for money due us and have found these things to be very poor, but if we had the money we can buy what we want, and for this reason we think we ought to receive the cash annually."[423] The Sisseton-Wahpeton leaders doubtless also were aware of corruption-induced hardship suffered by their Dakota and Lakota relatives farther west in 1875, 1876, and 1877, a time of U.S. military subjugation of the Great Sioux Nation and the forced dispossession of the sacred Black Hills;[424] and of course the role of cor-

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> have meant service to Native American tribes amounted to avaricious scheming by men who wanted nothing more than to get rich very quickly.

Niebuhr, *supra* note 176, at 33 (endnote omitted).

[422] S. Exec. Doc. No. 66, *supra* note 157, at 25 (report of councils with Sisseton and Wahpeton Indians) (statement of Charles Crawford); *see supra* note 302 and accompanying text.

[423] S. Exec. Doc. No. 66, *supra* note 157, at 25 (report of councils with Sisseton and Wahpeton Indians) (statement of Titus Jug); *see supra* note 304 and accompanying text.

[424] *See generally* LaVelle, *supra* note 224, at 43-62. After the Indians defeated Lieutenant Colonel George Armstrong Custer and his troops at the Battle of the Little Bighorn on June 25, 1876, Congress authorized a commission to coerce the Sioux tribes' "agreement" to the relinquishment of the gold-laden Black Hills region of the Great Sioux Reservation. *See id.* at 52-60 (describing the origins of the Manypenny Commission and detailing the commission's coercive methods and tactics). The transcribed proceedings of the commission's negotiations catalog many complaints by the Indians about the pervasive corruption among U.S. Indian agents. For instance, White Bear of the Crow Creek Sioux addressed the commissioners as follows:

> My people have been told that any of them who would go to farming, plowing the ground and fencing it in, would be assisted by the Great Father. They have done it, wearing the skin from their hands in doing so, but they have received nothing and are poorer than they were before. . . . They were also told that they would receive mowing-machines and scythes to cut hay, but they have not received them. If they had mowing-machines, such as they could ride upon, to ride around their country and cut hay, they would be able to earn something; but the agent considers that the country belongs to him personally and cuts all the hay. My friends, I would like to have our agent, before the sun goes down, climb up into the second story of the warehouse and take down all the teepee cloths and blankets that he has there and divide them among the people. Then, in regard to the harnesses for horses that were sent here by the Great Father to be given to the chiefs, they are obliged to work for them and buy them. I do not know whether the Great Father is ashamed of this, but my people are ashamed of it.

S. Exec. Doc. No. 9, *supra* note 224, at 75 (journal of proceedings of the Manypenny Commission) (speech of White Bear of the Crow Creek Sioux). Mad Bear of the Standing Rock Sioux gave testimony describing in detail the organized ring of corruption operating at Standing Rock Agency:

> If we had had the implements of all descriptions that the Great Father has to work with we probably could have supported ourselves. . . . A great many of these things have not been given to us. The white men living on the agency now

rupt and incompetent agents in instigating the U.S.-Dakota War of 1862 remained painfully present in memory for *all* the Santee Dakota survivors of that cataclysmic conflict.[425] In view of this traumatic postwar

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> know what has become of these things. . . . Men, civilians, that we have had for agents would steal our food, steal things that were sent to us, and when they were likely to be caught in the act and be brought to justice for their misdeeds they used the money that they had accumulated by these thefts to clear themselves. . . . Of the cattle that have been purchased for the Indians by the Government and sent out here, they were counted by a man on horseback riding at a gallop, and he made two hundred out of one hundred, and then they grabbed for the money. . . . It is the fault of the white men that this is done. They select men that belong to the ring, that have been used as clerks at agencies, &c. When one agent is removed they select his friend to succeed him, and so the stealing still goes on.

Id. at 50-51 (journal of proceedings of the Manypenny Commission) (speech of Mad Bear of the Standing Rock Sioux); *see also id.* at 70-71 (journal of proceedings of the Manypenny Commission) (speech of White Ghost of the Crow Creek Sioux) ("My people think that the flour that is sent here is for them to eat, and they are not pleased that it is fed to the pigs about the agency. . . . I have for a long time known the ways of your people in dealing with us and taking away our country, and I know that they have been such as to make us miserable."). For these and other examples of Sioux Indians' testimony, as transcribed in the 1876 report of the Manypenny Commission, regarding corruption in the administration of the U.S. agencies on the Great Sioux Reservation, see LaVelle, *supra* note 224, at 51-52 n.38; *cf.* Mardock, *supra* note 75, at 43 ("References to the existence of a shadowy but sinister 'Indian Ring' were frequently expressed by critics of Indian policy in 1868. This 'ring' was supposedly a clandestine group of unprincipled contractors, Indian agents, and politicians who made illegal profits from handling government transactions with the tribes.").

Systemic corruption by U.S. agents among the Sioux Indians had been reported in a congressional investigation a decade before the taking of the Black Hills. *See*, *e.g.*, Condition of the Indian Tribes, *supra* note 206, app. at 367-68 (1865 testimony of Yankton Nakota chief Struck by the Ree) ("If they bring any goods for the Indians to eat and put them in the warehouse, the agents live out of them, and the mess-house where travellers stop has been supplied from the Indians' goods, and pay has been taken by the agents, and they have put the money in their pockets and taken it away with them. I have seen them take the goods from the storehouse of the Indians and take them to the mess-house, and I have had to pay for a meal for myself at the mess-house, and so have others of our Indians had to pay for meals at the mess-house, prepared from their own goods. . . . If I had understood from what my grandfather [i.e., the President] had told me, that I was to be treated as I have been, I would never have done as I have done; I never would have signed the treaty. Mr. [Alexander H.] Redfield said to me, 'when I am gone, you will meet with a great many agents; but you will never meet one like me.' I think I never want to see one like him. . . . When agent [Walter A.] Burleigh came he made fine promises of what he would do. I asked for my invoice, but he would not let me have it . . . . I think the agents are all alike. The agent puts his foot on me as though I were a skunk. And the agents are all getting rich and we are getting poor.").

[425] *See*, *e.g.*, Meyer, *supra* note 181, at 110 ("[W]hen [Santee Dakota Chief] Little Crow began to negotiate with Colonel [Henry H.] Sibley in the dying days of the uprising, he started his letter with these words: 'Dear Sirs: For what reason we have commenced this war I will tell you, it is on account of Maj. Galbrait[h]. . . .' The causes of the Sioux Uprising are manifold and complex, but it is no exaggeration to say that Thomas J. Galbraith had more to do with bringing on the war than any other single individual. If the picture of him that emerges from contemporaneous and later testimony and from his own correspondence is substantially correct, his appointment as Sioux agent was

historical context—a context almost entirely ignored in *DeCoteau*[426]—

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a political blunder of major proportions."). Galbraith's predecessor was U.S. Indian Agent Joseph R. Brown, who had played a key role in the "traders' paper" corruption scandal that had defrauded and dispossessed the Dakota Indians through their signing of the Treaty of Traverse des Sioux in 1851. *See infra* note 439; *see also* Anderson, *supra* note 181, at 72-75 (discussing widespread, systemic corruption in the administration of Indian affairs among the Santee Dakota Indians by agents Brown and Galbraith). Historian Gary Clayton Anderson writes:

> The "Indian business," as it was often called, had been good to Brown. While clearly siphoning funds from contracts, debts, and annuity payments, Brown had also employed his wife Susan, son Samuel, and daughter Ellen, at the cost of $1,200 a year. Samuel was just fifteen years old at the time.
>
> Thomas Galbraith replaced Brown as agent in May 1861. He had the backing from Minnesota Congressman Cyrus Aldrich, who sat on the House Committee on Indian Affairs. Aldrich obviously picked Galbraith so that he might join in the pillaging of Dakota and Anishinaabe funds. . . .
>
> Galbraith inherited the same system for distributing annuities and cash as former agents, systematically taking a share. The corruption had become institutionalized, the superintendent of Indian affairs only competing with the various Indian agents at Anishinaabe, Dakota, and the recently moved Winnebago agencies.

Id. at 73. When Henry B. Whipple, Episcopal bishop of Minnesota, was granted an audience to meet with Abraham Lincoln in September 1862, at the end of the U.S.-Dakota War, he drew the President's attention to the widespread corruption in the administration of Indian affairs:

> Whipple sought a total reform in the Office of Indian Affairs. . . . He had seen up close the effects of alcohol sales, fraudulent dealing, and even violence by the men entrusted to keep the Indians' welfare in mind, rather than to enrich themselves.
>
> At one point, Lincoln needed to pause and absorb the urgency of the message and register his own grasp of Whipple's information. It was characteristic of the president. He told Whipple a homespun story, providing an opportunity for them both to sit back a bit—and to show Whipple that he had heard him. "Bishop," he said, "a man thought that monkeys could pick cotton better than negroes could because they were quicker and their fingers smaller. He turned a lot of them into his cotton field, but he found that it took two overseers to watch one monkey. It needs more than one honest man to watch one Indian Agent." The story pleased Whipple; he felt he had gotten through at last. Ten weeks later Lincoln would casually speak with a friend from Illinois whose brother-in-law Luther Dearborn had recently visited Minnesota. "When you see Lute," Lincoln told the friend, "ask him if he knows Bishop Whipple. He came here the other day and talked with me about the rascality of this Indian business until I felt it down to my boots."
>
> Lincoln made a promise after that meeting—poignantly, when viewed in retrospect—to address America's other racial sin after first dealing with slavery and secession. "If we get through this war," he said, "and I live, this Indian system shall be reformed!"

Niebuhr, *supra* note 176, at 132 (endnotes omitted); *see also* Mardock, *supra* note 75, at 14 (footnote omitted) ("In his second annual message to Congress, on December 1, 1862, Lincoln asked that Congress give special consideration to . . . a reorganization [of the Indian system] and added, 'Many wise and good men have impressed me with the belief that this can be profitably done.'").

[426] *DeCoteau*'s only allusions to the context of the U.S.-Dakota War are (1) its perfunctory and unelaborated statement that "[w]hen the Sioux Nation rebelled

Chief Renville's remarks denigrating the agency-as-corrupt-middleman during the 1889 negotiations[427] *cannot* be construed as implying consent to the U.S. government's destruction of the very reservation Renville had worked heroically to establish as his people's desperately needed refuge[428] and "permanent" homeland.[429]

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against the United States in 1862, the Sisseton and Wahpeton bands of the Nation remained loyal to the Federal Government, many members serving as 'scouts' for federal troops," DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 431 (1975); and (2) its trivializing and diversionary mislabeling of the Indians' demand for "back annuity" payments during the 1889 negotiations as a "loyal scout claim." *See supra* note 178 and accompanying text; *supra* notes 368-372 and accompanying text; *supra* notes 398-405 and accompanying text; *infra* notes 473-500 and accompanying text.

[427] *See supra* note 413 and accompanying text.

[428] *See* Treaty of Feb. 19, 1867, 15 Stat. 505, 505, as amended, 15 Stat. 509 (final alteration in original) (acknowledging that "Congress, in confiscating the Sioux annuities and reservations, made no provision for the support of these, the friendly portion of the Siss[e]ton and Wa[h]peton bands, and it is believed [that] they have been suffered to remain homeless wanderers, frequently subject to intense suffering from want of subsistence and clothing to protect them from the rigors of a high northern latitude"), *reprinted in DeCoteau*, 420 U.S. at 450; *see also* Mathes, *supra* note 134, at 141 (footnote omitted) ("[Congress] . . . denied annuity payments for past land sales to all Dakotas, including the army scouts. Instead, Congress paid out these funds to Minnesota families who had suffered 'damage by the depredations' of the Dakotas and the army. Despite their roles assisting the army, Renville and his people were left homeless and penniless."); Meyer, *supra* note 181, at 201 ("The plight of the upper Sioux [i.e., the Sisseton and Wahpeton bands of Dakota Indians] was extremely serious at this time [i.e., before the establishment of the Lake Traverse Reservation in 1867]. Since one of the objects of making a treaty was to keep them from indiscriminate roving, they were expected to remain on the reservation at all times and ran the risk of being treated as hostile if they strayed outside its boundaries."); Folwell, *supra* note 203, at 418 ("By confiscating their annuities and reservations [in Minnesota] Congress had left these friendly and innocent [Sisseton-Wahpeton] people homeless, to wander and suffer for lack of food and clothing in a high latitude. The purposes of the [1867] treaty were to secure a recognition of their friendship to the government and the people of the United States, relief from their precarious life by the chase, and their settlement on the soil.").

In his own published narrative, Chief Renville himself invoked the hopelessness and desperation of the Dakota people over the loss of their Minnesota homelands in the aftermath of the U.S.-Dakota War. Reflecting on his confinement at Fort Snelling with the large mass of Santee Dakota Indians during the winter of 1862-1863, Renville stated:

> [A] fence was built on the south side of the fort and close to it. We all moved into this enclosure, but were so crowded and confined that an epidemic broke out among us and children were dying day and night, among them [Solomon] Two Stars' oldest child, a little girl.
>
> The news then came of the hanging at Mankato. Amid all this sickness and these great tribulations, it seemed doubtful at night whether a person would be alive in the morning. We had no land, no homes, no means of support, and the outlook was most dreary and discouraging. How can we get lands and have homes again, were the questions which troubled many thinking minds, and were hard questions to answer.

Renville, *supra* note 211, at 610-11, *reprinted in* Through Dakota Eyes, *supra* note 211, at 234; *see also supra* note 200.

[429] Treaty of Feb. 19, 1867, art. III, 15 Stat. 505, 506, as amended, 15 Stat. 509 ("[T]here shall be set apart for the members of said bands . . . the following described lands as a permanent reservation . . . ."), *reprinted in DeCoteau*, 420 U.S. at 451-52; *see*, *e.g.*,

In this regard, *DeCoteau*'s purporting to quote from Chief Renville as having averred that the Lake Traverse Reservation "was given us as a permanent home, but now we have decided to sell . . . "[430] amounts to an egregious misrepresentation. Once again, the *DeCoteau* footnote extracts only *the first part* of a crucial sentence, leaving the remainder undisclosed.[431] In the full context of his recorded testimony, Renville was responding, angrily, to the commission chairman's false and misleading argument that changing the proposed interest rate on proceeds from land sales—from the three percent in the draft foisted on the assembled Sisseton-Wahpeton Dakota people by the U.S. negotiators[432] to the five percent demanded by the Indians—was a request that was impossible to accommodate.[433] Expressing disgust for yet another long-winded speech by Diggs, and calling the chairman's bluff (a bluff which included the chairman's pointing to a three percent interest-rate figure in the text of the General Allotment Act),[434] Chief Renville said:

Patrick Springer, *"It's home": The saga of two Dakota Sioux reservations, born of injustice, but enduring cultural homelands*, Bemidji Pioneer, Sept. 23, 2020, https://www.bemidjipioneer.com/indigenous-impacts/6627292-Its-home-The-saga-of-two-Dakota-Sioux-reservations-born-of-injustice-but-enduring-cultural-homelands ("The contributions of the Dakota scouts like Renville and the loyalty of Sisseton-Wahpeton Dakotas during the [1862] outbreak were instrumental in founding the Lake Traverse Reservation . . . . Renville played a major part in the creation of Lake Traverse Reservation . . . ."). *See generally* Anderson, *supra* note 160, at 58-89 (discussing Gabriel Renville's leadership among the Sisseton-Wahpeton Dakota in book chapters on "Creation of a New Homeland" and "Building a Reservation"). Historian Valerie Sherer Mathes describes a tragic incident—emblematic of the widespread animosity and violence against Dakota Indians in the decades following the U.S.- Dakota War—that befell Renville and other Sisseton-Wahpeton representatives when they traveled to Washington, D.C. to negotiate the 1867 treaty:

> . . . Congress . . . brought a delegation representing these bands to Washington to negotiate a new treaty in the winter of 1867 . . . . The delegates had a horrific experience. They were cooped up for four months and one member, Scarlet Night, also known as Scarlet Crow, was kidnapped on the evening of 24 February 1867. Only after government officials offered a one-hundred-dollar reward was his lifeless body found near today's Key Bridge on the Virginia side of the Potomac River two weeks later.

Mathes, *supra* note 134, at 150 (footnote omitted). Professor Mathes notes further:

> Although it was made to look like Scarlet Night had hanged himself, Indian affairs agent Joseph R. Brown noted the knots used to tie the blanket strips were not the kind that Indians used. Furthermore, the branch would never have held his weight. Officials paid the reward despite Brown's misgivings that the people who reported the body probably killed him. The government gave Scarlet Night's family five hundred dollars in trade goods as compensation. His grave in the Congressional Cemetery in Washington, D.C., remained unmarked until 1916.

Id. at 150-51 n.37 (citations omitted).

[430] *DeCoteau*, 420 U.S. at 436-37 n.16 (alteration in original) (citation omitted); *see supra* note 391 and accompanying text.

[431] *See supra* note 375 and accompanying text.

[432] *See supra* note 288 and accompanying text.

[433] *See supra* notes 293-296 and accompanying text.

[434] *See supra* note 294 and accompanying text.

> We ought to make shorter speeches. Mr. Diggs made a long speech, and we do not remember half.[435] We know these extracts of laws. We know that a change was made in the taking of land out West, and also on the 3 per cent. interest. If they can change the law in regard to the taking of land they can do so in regard to the 3 per cent.[436] We have decided to sell all of the surplus after each has received 160 acres. We know that the money due us on the treaty of

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[435] *See supra* notes 284-288 and accompanying text.

[436] *See* S. Exec. Doc. No. 66, *supra* note 157, at 2-3 (letter from John W. Noble, Secretary of the Interior, to President Benjamin Harrison) ("The rate of interest stipulated to be paid by the agreement is 3 per cent., as provided in said act [i.e., the General Allotment Act], but upon the recommendation of the Commissioners who negotiated the agreement, based upon their promise to the Indians to that effect, the Commissioner of Indian Affairs has in his draught of the bill fixed the rate of interest at 5 per cent. per annum."); *id.* at 7 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to Indian Affairs Commissioner T.J. Morgan) ("We deemed it proper to make this promise for the reason that 5 per cent. is the usual rate allowed by the Government on Indian funds. In all the special acts of the last Congress authorizing the purchase of Indian lands, provision is made that the money paid therefor shall be placed in the Treasury and bear 5 per cent. per annum . . . . We can see no reason why an exception should be made in the case of these Indians, and they are at a loss to understand why they are not treated as well as other Indians, some of whom are their relations and neighbors."); *see also supra* note 294 and accompanying text; *supra* note 324 and accompanying text.

Ultimately, Congress approved the five percent interest rate demanded by Chief Renville and the other Sisseton-Wahpeton leaders. *See infra* note 446. However, the Congressional Record shows that the Senate may have come close to keeping the rate at three percent on the argument that the signed agreement itself so provided, notwithstanding the commissioners' reassurances to the Indians:

> Mr. PETTIGREW: The agreement was 5 per cent., and we have paid 5 per cent. on the present funds of all other Indians. There is no reason why the Sissetons and Wahpetons, who were friendly to the Government in 1862 and have always since been friendly, should be discriminated against.
>
> The PRESIDING OFFICER. The question is on the amendment to the amendment of the committee.
>
> The amendment to the amendment was agreed to.
>
> Mr. CASEY. In the amendment of the committee, on page 196, line 2, before the words "per cent.," I move to strike out "three" and insert "five."
>
> Mr. COCKRELL. That raises a question about modifying the agreement. This is a provision carrying the agreement into effect.
>
> . . . .
>
> Mr. DAWES. If [3 per cent interest] is a part of the agreement, of course it can not be altered.
>
> Mr. COCKRELL. It is unquestionably a part of the agreement.
>
> Mr. DAWES. I have not the text before me. The motion of the Senator from South Dakota [Mr. PETTIGREW], I supposed, applied to a section of the bill providing what should be done.
>
> Mr. PETTIGREW. It did.
>
> Mr. DAWES. But we can not alter the agreement. If the Indians have agreed with us that their funds shall draw but 3 per cent. interest, it must so stand.
>
> Mr. CASEY. I withdraw the amendment.
>
> The PRESIDING OFFICER. The amendment is withdrawn.

22 Cong. Rec. 3457 (1891).

> 1851 is ours, and it has pleased us to have that in.[437] In regard to the people out West selling for $1.25 per acre,[438] we know that one acre of our land is worth ten of theirs. In 1872 a commission came here and took all we had outside of this reservation for 5 cents per acre, and in 1851 the very best lands were sold at less than 1 cent per acre.[439] This

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[437] Chief Renville's reference was to General Whittlesey's having stated the previous day, on December 11, 1889, that the redrafted agreement would "secure to you your annuity money," a promise he reiterated at the start of this December 12 meeting, saying: "We have yielded to your wishes in the agreement." S. Exec. Doc. No. 66, *supra* note 157, at 22-23 (report of councils with Sisseton and Wahpeton Indians) (statements of Gen. Whittlesey); *see also supra* note 278 and accompanying text; *supra* note 283 and accompanying text. The agreement's inclusion of "the money due us on the treaty of 1851," S. Exec. Doc. No. 66, *supra* note 157, at 25 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville), was the accomplishment of an objective Chief Renville had been pursuing all along, as reflected in the interview he gave for the May 1889 newspaper story that was published in the *Minneapolis Tribune*. *See A Large Pow-Wow*, *supra* note 125 (summarizing interview with Chief Gabriel Renville) (noting that the Indians "claim that under the treaty of 1851 there is due them in annuities cut off in 1862" certain stated back annuity amounts and quoting Chief Renville's complaint that after the U.S.-Dakota War "the government took our annuities and we have suffered from it"); *see also supra* note 135 and accompanying text.

[438] *See* S. Exec. Doc. No. 66, *supra* note 157, at 23 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey) ("I will say this, your neighbors over west have agreed to sell a tract of land at $1.25 and 75 and 50 cents per acre . . . ."); *see also supra* note 279 and accompanying text.

[439] Resentment, like Chief Renville's, over the 1851 Treaty of Traverse des Sioux was longstanding, as "[t]he Sissetons and Wahpetons . . . believed they had been duped and cheated at Traverse des Sioux," Wingerd, *supra* note 187, at 199. Historian Mary Lethert Wingerd elaborates on the circumstances surrounding the advent of the 1851 treaty, including the role of trader/entrepreneur Henry H. Sibley—who later became the first governor of the state of Minnesota, and later still led the state and federal forces (and oversaw the trials of Dakota prisoners) during the U.S.-Dakota War of 1862—in masterminding a plot to trick the Indians into signing a "traders' paper" that funneled most of the money due the Indians under the treaty to Sibley and other traders:

> Sibley also took pains to win support from the missionaries, who wielded considerable influence among some Dakotas who were beginning to adapt themselves to euro-American ways. Though the missionaries tended to blame the traders for all the Indians' ills, they made an exception for the gentlemanly Sibley, who seemed to share their cultural values more than the rest of the rough-hewn backwoods fraternity. Moreover, Sibley was known as a critic of the way previous treaties had "betrayed and deceived" the Indians. Even as he paved the way for an unprecedented land grab, he spoke out in Congress against the policy of "utter extermination" that his government had practiced. "Minnesota," he vowed, "shall at least be freed from any responsibility on that score." [Missionaries] Stephen Riggs and Thomas Williamson thus regarded Sibley approvingly as a kindred spirit who shared their Christian concerns and were easily enlisted as treaty advocates. The treaty also neatly supported their plan for "saving" the Indians. Only recently, they had jointly published an "Outline of a Plan for Civilizing the Dakota." The agenda it set out called for the abolishment of the "community property system" and the need to "restrict" and "confine" the Indians to "persuade" them to give up hunting and gathering for a more "worthwhile" agricultural lifestyle. In other words, since proselytizing and

little reservation is ours, and all we have left. There is nothing in our

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persuasion had failed, they hoped to force the Indians into farming by limiting their access to land, which would make it impossible to sustain themselves by hunting. Once civilized and under the close supervision of the missionaries, the former savages would more readily embrace Christian principles. The proposed massive land cession would clearly advance the plan they had conceived.

. . . In the west, the Sissetons and Wahpetons were in dire straits. A succession of bad winters had repeatedly brought the bands to the brink of starvation, forcing them to eat their "horses, dogs, and even the skins covering their tepees." In 1850, massive autumn prairie fires had raged from the Minnesota River valley to the James River in present-day South Dakota, driving the buffalo west to the Missouri. Trader Martin McLeod, writing from his post on the Minnesota River, reported that the desperate Sissetons and Wahpetons were anxious for a treaty and would sell "a large portion of their country if liberally dealt with." . . .

. . . .

[T]he treaty strategizers determined to hold two councils, first with the Sissetons and Wahpetons at Traverse des Sioux, followed by a second council with the Mdewakantons and Wahpekutes at Mendota. Sibley was confident that he had prepared the ground for a smooth operation. He could assure his creditor, Pierre Chouteau in St. Louis, that his debts would soon be cleared, confidently boasting, "The Indians are all prepared to make a treaty when we tell them to do so, and such a one as I may dictate. . . . I think I may safely promise you that no treaty can be made without our claims being first secured."

. . . .

The Indians spent the night in heated discussion. Though most of those present had desired a treaty, they had not expected to be asked for their entire homeland. Some wanted to reject the treaty; others, with an educated understanding of land values, wanted to set a price of $6 million. But tribal elders sorrowfully knew that they had little negotiating room. As historian Rhoda Gilman writes, "Scarcely anyone was too naïve to see that the elaborate drama at the treaty table was a mask for naked conquest. If no treaty were signed, white men would swarm into the land anyway, and should the Dakota try to drive them out, some pretext would be found to send in troops."

. . . .

[Minnesota Territory Governor and treaty commissioner Alexander Ramsey] ordered no further rations be issued and notified the Indians that unless they agreed to treat by evening, the commissioners would strike their tents and depart the next day. Faced with the naked reality of their need and the limits of their options, within hours the chiefs capitulated. . . . The next day negotiations commenced in earnest, with Sibley and his traders and Stephen Riggs constantly shuttling among the bands to urge their acceptance of the terms. Two days later, on July 23, the chiefs put their hand to the pen and signed away their lands. It was not a happy occasion. Though Commissioner [of Indian Affairs Luke] Lea pronounced that "nothing but our kind feelings to the Sioux people would have induced us to make a treaty so favorable to them," the Indians were not deceived. [Sisseton chief] Sleepy eyes, before signing, stated that the commissioners had taken advantage of their "difficult circumstances" to offer less than the land was worth. He wanted a copy of the treaty to be kept with the Indians "that we may be looking at it and know whether you are telling us the truth or not." . . . Wahpeton chief Big Curly Head perhaps said it best: "You think it a great deal of money to give for this land, but you must well understand that the money will all go back to the whites again, and the country will also remain theirs."

> Even as the chief was speaking, treaty payments were transferring into the hands of the traders, thanks to a clever provision designed to take care of traders' claims. Though the treaty did not specifically compensate them, a special cash sum of $305,000, called "hand money," was allotted to assist the bands in establishing their new homes on the reservation, provide for their mixed-blood relations, and allow the chiefs in open council to "settle their affairs"—which, of course, meant pay their debts to the traders. Sibley and his friends had prepared a paper that pledged the chiefs to repay their bands' debts and provide gift money to mixed-blood relatives. At the treaty-signing ceremony, each signator, after making his mark, was directed, either by a trader or mixed blood or by missionary Stephen Riggs, to a nearby upended barrel, where [fur trader and later U.S. Indian Agent Joseph R.] Brown waited with another pen. The prepared "traders' paper" that the Indians were then handed to sign was not explained. Some understood the nature of the document but many thought it was another copy of the treaty, though in later testimony the traders swore it had been previously agreed upon. Indian subagent Nathaniel McLean, suspecting that the Indians did not understand what they were signing, requested that the paper be read and explained in open council. The commissioners, indebted to the traders and anxious to end the tiresome proceedings, brushed him off. The result was a masterful coup for the debt-ridden traders, clearing accounts that stretched back to 1819. Henry Sibley, true to form, stayed aloof during the signing ceremony. Though he was the architect of the plan, he could rely on his friends and associates to see it through. Nearly every veteran of the Dakota trade appeared on the list of creditors for substantial sums, which in large part would go to pay off their own debts to Sibley—who made direct claims of $144,984. His efforts on behalf of the treaty had been well worthwhile. When the claims were tallied and adjusted, $210,000 went to the traders and $40,000 to mixed-blood payments, leaving a mere $60,000 for the more than 15,000 Wahpetons and Sissetons to establish and sustain themselves for a year on the narrow strip of land that was to be their home.

Id. at 187-93 (endnotes omitted); *see also* Clemmons, *supra* note 181, at 131-33 (endnotes omitted) (discussing the respective roles of missionaries Thomas Williamson and Stephen Riggs in the "traders' paper" controversy and noting that during a Senate inquiry into the matter Williamson "offered incendiary testimony against the government agents" and "claimed that he . . . believed, like the Dakotas, that they were signing multiple copies of the same document, not a traders' paper" while Riggs testified that "[a]lthough he admitted that he had never interpreted the traders' paper to the Dakotas . . . he was sure that they understood it."); Satterlee, *supra* note 191, at 4 ("When the Indians signed the [1851] treaty they were subjected to a gross fraud right in presence of the Agent, Treaty Officials and supposed friends including the Missionaries. . . . It was an evasion of law and a dishonest collection of unproven claims."); Isaac V.D. Heard, History of the Sioux War and Massacres of 1862 and 1863, at 37 (1863) (recounting and quoting speech of Wahpeton Dakota Chief Red Iron, or Mazaduta, in council with Minnesota Territory Governor Alexander Ramsey in December 1852, after the signing of the 1851 Treaty of Traverse des Sioux) ("When you first sent for us there were two or three chiefs here, and we wanted to wait till the rest would come, that we might all be in council together, and know what was done, and so that we might all understand the papers, and know what we were signing. When we signed the treaty the traders threw a blanket over our faces, and darkened our eyes, and made us sign papers which we did not understand, and which were not explained or read to us. We want our Great Father at Washington to know what has been done."), *quoted in* Jackson, *supra* note 181, at 390. For a thorough discussion and critique of the two 1851 U.S.-Dakota treaties—i.e., the Treaty of Traverse des Sioux with the Sisseton and Wahpeton bands and the Treaty of Mendota with the Mdewakanton and

> treaty that says that we must sell.[440] It was given us as a permanent home, but now we have decided to sell *for $5 an acre*. Now let us hear what can be done. You seem to want to treat us like children, put us back where we were twenty years ago. Let us do what is right and just.[441]

By omitting the words "*for $5 an acre*"[442] and thus altering the sentence from Chief Renville's speech to make it say that the reservation "was given us as a permanent home, but now we have decided to sell . . . ,"[443] *DeCoteau* facilitates the false implication that the Indians intended to divest themselves of *the reservation itself*—their "permanent home."[444] But with the concealed words restored—and in light of the *actual context* of Renville's speech[445]—it is clear that the chief was simply communicating a readiness to sell lands *within* the reservation, provided that the U.S. negotiators would accept the terms demanded by the Indians regarding (1) the price per acre (five dollars) and (2) the interest rate (five percent) on proceeds from the sale that would generate funds for the Sisseton-Wahpeton people's benefit.[446] In context, Chief Renville

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Wahpekute bands—see Gwen Westerman & Bruce White, Mni Sota Makoce: The Land of the Dakota 163-90 (2012).

[440] Chief Renville made essentially the same point—that "nothing in our treaty . . . says that we must sell," *supra* text accompanying note 440; *see also supra* note 393 and accompanying text—at the end of the negotiations, when he made a final attempt to forestall the signing ceremony, saying: "Our treaty does not provide for the sale of this land at any time." S. Exec. Doc. No. 66, *supra* note 157, at 28 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville); *see supra* note 350 and accompanying text. In that later instance, too, Renville's objective was strictly to leverage the negotiations to ensure that the agreement's final land-sale terms were optimally beneficial to the Sisseton-Wahpeton people. *See* S. Exec. Doc. No. 66, *supra* note 157, at 27 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville) ("The last council of the people decided on asking $5 per acre and 5 per cent. interest, to be paid in cash, and will sign no other. I do not say this to make anybody angry, but talk plain because I know it is right. . . . I have been among the people begging them to do right."); *see also supra* notes 329-330 and accompanying text.

[441] S. Exec. Doc. No. 66, *supra* note 157, at 25 (emphasis added) (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville).

[442] *See supra* text accompanying note 441.

[443] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 436-37 n.16 (1975) (alteration in original) (citation omitted); *see supra* note 391 and accompanying text.

[444] *Supra* text accompanying note 441; *see also supra* note 217 and accompanying text.

[445] *See supra* notes 433-441 and accompanying text.

[446] *See supra* note 263 and accompanying text; *see also* Act of Mar. 3, 1891, ch. 543, § 27, 26 Stat. 1035, 1039 (specifying that proceeds from the sale of the unallotted land within the Lake Traverse Reservation "shall be placed in the Treasury of the United States, to the credit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians . . . , and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by the President for the education and civilization of said bands of Indians or members thereof"); *DeCoteau*, 420 U.S. at 441 (quoting language from Act of Mar. 3, 1891, ch. 543, § 27, 26 Stat. 1035, 1039, adopting the five percent interest rate). The 1891 Act's specification that proceeds from the sale of the unallotted lands would be used "for the education

clearly was *not* announcing or implying his people's agreement to having "[t]his little reservation"[447] of theirs "completely wip[ed] out"[448] by the United States government.

In addition to misrepresenting quotations from Chief Renville to foster an illusion of tribal consent to the destruction of the Lake Traverse Reservation, *DeCoteau* disregards testimony that gives witness to a *contrary* understanding of the Sisseton-Wahpeton people. For instance, during the December 3, 1889 negotiations, a highly respected tribal elder, Solomon Two Stars, extended high praise to Chief Renville for his long-standing and continuing leadership, saying to the commissioners:

> You have already heard that we have selected one man to do the talking. We all desire that he should speak for us. We have been with him since the happenings of 1862. We know how he has brought us on since then, and hence we select him; he has led us in everything since then, and we are satisfied with him. *We know that through his efforts we have each made a home here, have an agency and schools.* We know him to be worthy of the confidence placed in him, and have given him the power to answer all questions for us. We are not alone in knowing these things, but the whites about here know them to be facts. I have been selected to say these things, and have said them.[449]

Later, in his oration on the last day of the negotiations, December 13, Two Stars spoke movingly once again of Chief Renville's leadership, and he included these significant remarks:

> In February, 1863, Gabriel Renville and some others were sent out as scouts. We guarded this country from the James River to the settlements. I think we did a great deal towards making the frontier safe. For eighteen months we did this work without pay. *We know that by these acts we got this reservation.*[450]

Clearly, testimony made on-the-record by a revered tribal elder, speaking for all the Sisseton-Wahpeton people in praising Chief Renville for "acts" through which "we got this reservation" and for "efforts" that led to the Indians having "an agency and schools" on their Lake Traverse

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and civilization of" the Sisseton-Wahpeton Indians, Act of Mar. 3, 1891, ch. 543, § 27, 26 Stat. 1035, 1039, triggers application of the rule that "[i]n construing provisions designed for their education and civilization as fully if not more than in construing provisions for their material wants, is it a duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress." Minnesota v. Hitchcock, 185 U.S. 373, 402 (1902).

[447] S. Exec. Doc. No. 66, *supra* note 157, at 27 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville); *see supra* note 441 and accompanying text.

[448] Seymour v. Superintendent, 368 U.S. 351, 355 (1962); *see supra* note 21 and accompanying text; *see also supra* note 119.

[449] S. Exec. Doc. No. 66, *supra* note 157, at 16 (emphasis added) (report of councils with Sisseton and Wahpeton Indians) (statement of Wicaurpinoupa [Wicanhpinonpa], or [Solomon] Two Stars); *see also supra* note 168 and accompanying text.

[450] S. Exec. Doc. No. 66, *supra* note 157, at 28 (emphasis added) (report of councils with Sisseton and Wahpeton Indians) (statement of Wicaurpinoupa [Wicanhpinonpa], or [Solomon] Two Stars); *see also supra* note 345 and accompanying text.

Reservation "home," constitutes additional compelling evidence *against DeCoteau*'s conclusion that "the tribe spoke clearly"[451] in favor of abolishing the reservation.[452]

b. Cherry-Picking the Legislative Reports

In the final analysis, there is nothing in the extensive record of the 1889 negotiations between the United States and the Sisseton-Wahpeton Dakota from which one could fairly infer or reasonably conclude that the Indians consented to the termination of their permanent home, the Lake Traverse Reservation. The record of negotiations—like the text of the 1891 Act that ratified the 1889 Agreement[453]—is devoid of anything "to suggest that the boundaries of the reservation were altered."[454] Indeed, the possibility that the government might alter or abolish the reservation *was never raised* during the negotiations and, hence, the issue appears nowhere in the transcribed proceedings.[455] It is unsurprising, then, that the issue likewise is nowhere to be found in other documents that comprise the 1891 Act's legislative history—neither in the respective reports of the House of Representatives and Senate[456] nor in the legislative debates in the Congressional Record.[457]

The absence of any reference to altering or terminating the reservation boundaries is thus readily apparent in *DeCoteau*'s excerpt from the 1890 Senate Report on the bill "to ratify and confirm an agreement with the Sisseton and Wahpeton bands of Dakotas or Sioux Indians."[458] The three-paragraph excerpt—which, as *DeCoteau* notes, "summarized

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[451] *DeCoteau*, 420 U.S. at 449.

[452] It should also be noted that U.S. Indian agents continued to be appointed to superintend the Sisseton Agency even after the 1891 Act ratifying the 1889 Agreement with the Sisseton-Wahpeton Dakota was enacted. *See*, *e.g.*, 23 Cong. Rec. 115 (1892) ("Daniel T. Hindman, of Britton, S. Dak., to be agent for the Indians of the Sisseton Agency in South Dakota, vice William McKusick, resigned."); *see also* 60th Ann. Rep. of the Comm'r of Indian Aff. 418, 421-22 (1891) (Report of Sisseton Agency submitted by U.S. Indian Agent William McKusick to Commissioner of Indian Affairs, Sept. 30, 1891) ("I retire from the Indian service knowing much more than I did, and shall always hereafter have much charity for the man who has United States Indian agent affixed to his name . . . .").

[453] Act of Mar. 3, 1891, ch. 543, 26 Stat. 1035, *cited in DeCoteau*, 420 U.S. at 427.

[454] *DeCoteau*, 420 U.S. at 461 (Douglas, J., dissenting).

[455] *See* S. Exec. Doc. No. 66, *supra* note 157, at 15-29 (report of councils with Sisseton and Wahpeton Indians). In fact, the U.S. commissioners were never instructed or authorized by the Secretary of the Interior to negotiate with the Sisseton-Wahpeton Dakota for an alteration or abolishment of the Lake Traverse Reservation's boundaries. *See infra* note 645.

[456] *See* Brief for Petitioner, *supra* note 153, at 20, 1974 WL 186007, at *16 (citation and footnotes omitted) ("The committee reports do not express any intent to dissolve the Reservation. These reports . . . manifest a primary concern to alleviate the destitution and suffering of the Sisseton and Wahpeton Bands by relief owed them 'as a matter of right.'").

[457] *See infra* notes 501-553 and accompanying text; *infra* notes 574-586 and accompanying text.

[458] S. Rep. No. 661, 51st Cong., 1st Sess., at 1 (1890).

the Agreement"[459]—speaks of the Indians' "agree[ing] to cede, sell, relinquish, and convey . . . unallotted lands within the Lake Traverse Reservation" and recites the obvious fact that "the Indian title . . . will be extinguished" as to the acreage thus sold.[460] The excerpt does *not* mention, allude to, or hint at any alteration of the reservation's boundaries.[461] The Supreme Court may have selected this excerpt because it uses the word "*reserved*," with the Senate Report's noting "the fact that the additional [i.e., equalized] allotments are in lieu of any residue which, under their title, these Indians could have *reserved* for the future benefit of their families."[462] But, similar to the other instances wherein *DeCoteau* appears to promote misleading implications concerning the word "*reserved*,"[463] the context in the Senate Report makes clear that, in observing the "Indians could have reserved [a residue of Indian-title land] for the future benefit of their families,"[464] the Senate meant the Indians might have *withheld such land from sale*, not that they might have *retained such land in reservation status*.

Although *DeCoteau* states that "[a]lmost identical language appears in" the House Report on the bill for ratifying the 1889 Agreement,[465] the House Report in fact is more than twice as long as the Senate Report and contains additional language and material absent from the Senate Report which cast further doubt on *DeCoteau*'s conclusion that the Sisseton-Wahpeton Indians consented to the elimination of their reservation.

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[459] *DeCoteau*, 420 U.S. at 438 n.19.

[460] S. Rep. No. 661, *supra* note 458, at 1, 3, *quoted in DeCoteau*, 420 U.S. at 438 n.19. Significantly, in purporting to quote from the Senate Report *DeCoteau* declines to provide an ellipsis marking the Supreme Court's having omitted crucial additional language. *Compare DeCoteau*, 420 U.S. at 438 n.19 (purporting to quote S. Rep. No. 661, *supra* note 458, at 1) ("'By the terms of this Agreement the said bands of Indians agreed [sic] to cede, sell, relinquish, and convey to the United States the unallotted lands within the Lake Traverse Reservation.'"), *with* S. Rep. No. 661, *supra* note 458, at 1 (emphasis added) ("By the terms of this Agreement the said bands of Indians agree to cede, sell, relinquish, and convey to the United States the unallotted lands within the Lake Traverse Reservation *on the following conditions, to wit: That certain annuities claimed by them to have been unjustly withheld or forfeited under the act of February 16, 1863 (12 Stats., 652), be restored and paid . . . .*"). By silently omitting this additional language *DeCoteau* suppresses the Senate Report's explicit recognition of the fact that the Sisseton-Wahpeton bands had conditioned their consent to selling unallotted lands within the Lake Traverse Reservation on the U.S. government's promise to restore the Dakota people's wrongly confiscated past treaty annuities, *see supra* notes 176-177 and accompanying text, *not* on the government's payment of a "loyal scout claim." *See infra* notes 473-500 and accompanying text (discussing "The 'Loyal Scout Claim' Stratagem").

[461] *See infra* note 674.

[462] S. Rep. No. 661, *supra* note 458, at 3 (emphases added), *quoted in DeCoteau*, 420 U.S. at 438 n.19.

[463] *See supra* notes 379-390 and accompanying text; *supra* note 403 and accompanying text.

[464] S. Rep. No. 661, *supra* note 458, at 3 (emphases added), *quoted in DeCoteau*, 420 U.S. at 438 n.19.

[465] *DeCoteau*, 420 U.S. at 438 n.19 (citing H.R. Rep. No. 1356, *supra* note 364, at 8-9).

Unlike the Senate Report, the House Report describes the Agreement as one "for the purchase and release of the surplus lands *in* the Lake Traverse Reservation,"[466] clearly indicating that what the Indians consented to was merely the sale of acreage in the continuously existing reservation,[467] and *not* the dissolution of the reservation itself. Perhaps most significantly, the House Report eschews the word "*reserved*" when explaining the Agreement's provision for "the equalization of allotments on the basis of 160 acres."[468] In contrast to the verbiage in the Senate Report, discussed above,[469] the House Report adverts to "the . . . fact that the additional allotments are in lieu of any residue which, under their title, they [i.e., the Indians] might have *retained for the minor children of their respective families*."[470] This clarifying language—which dispels the false implication *DeCoteau* appears to promote regarding the word "*reserved*," discussed previously[471]—is hardly "[a]lmost identical"[472] to the *different*, potentially confusing and misleading language that *DeCoteau* selects from the Senate Report instead.

c. The "Loyal Scout Claim" Stratagem

Another important difference between the two legislative reports is that the House Report, unlike the Senate Report, contains letters from Interior Department officials addressing the need for enacting an *additional* provision of legislation to provide a remedy specifically for former Dakota scouts (not just Sisseton and Wahpeton scouts but Mdewakanton and Wahpekute scouts too), and the descendants of deceased scouts, who resided *outside* the Lake Traverse Reservation.[473] This proposed provision eventually was enacted as part of § 27 of the 1891 Act of Congress that *also* ratified and enacted (as § 26) the 1889 Agreement.[474] The special provision's enactment appears to have been a culminating, hard-won achievement of the former leader of the Dakota scouts, Chief Gabriel

[466] H.R. Rep. No. 1356, *supra* note 364, at 1 (emphasis added). Regarding the probative significance of the House Report's use of the phrase "for the purchase and release of the surplus lands"—which mirrors language in the General Allotment Act, Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 389—see *supra* note 158 and accompanying text; *infra* note 645.

[467] *See also* H.R. Rep. No. 1356, *supra* note 364, at 1 (emphasis added) (referring to the "unallotted lands *within* the reservation"); *id.* at 8 (emphases added) (referring to "unimproved lands in the vicinity of *this reservation*" and to a railway company's being "entitled to a confirmation of their title" on the basis of the company's having purchased from the Indians a "right of way *through this reservation*").

[468] *Id.* at 8.

[469] *See supra* notes 458-462 and accompanying text.

[470] H.R. Rep. No. 1356, *supra* note 364, at 8 (emphasis added).

[471] *See supra* notes 379-390 and accompanying text.

[472] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 438 n.19 (1975) (citing H.R. Rep. No. 1356, *supra* note 364, at 8-9); *see also supra* note 465 and accompanying text.

[473] *See* H.R. Rep. No. 1356, *supra* note 364, at 2-7 (reprinting letter from John W. Noble, Secretary of the Interior, to T.J. Morgan, Commissioner of Indian Affairs, and letter from T.J. Morgan, Commissioner of Indian Affairs, to John W. Noble, Secretary of the Interior).

[474] *See* Act of Mar. 3, 1891, ch. 543, §§ 26-27, 26 Stat. 1035, 1035-38.

Renville, after many years of lobbying,[475] including advocacy Renville advanced by making certain leveraging comments to the U.S. commission on the last day of the 1889 negotiations at Sisseton Agency.[476] The Interior Department letters in the House Report thus provide crucial contextual information for clearing up the unnecessary—but expedient—confusion *DeCoteau* creates regarding the relationship between what *DeCoteau* repeatedly labels as a "loyal scout claim," on the one hand, and the 1889 Agreement's provision of "back annuities," on the other.[477]

As enacted in 1891, the *new* provision regarding the former Dakota scouts appropriated $126,620, to be paid

> [t]o the scouts and soldiers of the Sisseton, Wahpeton, Medawakanton [Mdewakanton], and Wapakoota [Wahpekute] bands of Sioux Indians, who were enrolled and entered into the military service of the United States and served in suppressing what is known as the "Sioux outbreak of [1862];" or those who were enrolled and served in the armies of the United States in the war of the rebellion, and to the members of their families and descendants, now living, of such

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[475] *See*, *e.g.*, 20 Cong. Rec. 1497 (1889) (remarks of Cong. Nelson) ("[T]he object of this bill is to restore to that portion of the Sioux Indians who were in our Army either as scouts aiding us against their own people, or in the Army of the Union during the war down South—to restore to them the share of the annuities to which they were properly entitled. . . . Two of the leading men of these bands, Chief Renville and Sam Johnson, came here during the last session of Congress and went before the Indian Office, and there is a voluminous report from the Department, embodied in the report of the committee, setting forth in detail their just dues and making a computation which the committee adopted in framing this bill as the amount belonging to these Indians."); Mathes, *supra* note 134, at 148 (footnote omitted) ("In 1888, Renville had come to Washington, D.C., to solicit [Indian Rights Association agent Charles C.] Painter's help in restoring the annuities of tribal members who had served as scouts during the Dakota War. Because he did not speak English, Renville brought his interpreter Samuel Jerome Brown, who was part Dakota."); *see also supra* note 226.

[476] *See supra* notes 338-343 and accompanying text. Shortly after the conclusion of the 1889 negotiations at Sisseton Agency, bills were introduced in both the House of Representatives and the Senate calling for enactment of special relief for the Dakota scouts. *See* 21 Cong. Rec. 243 (1889) (introduction of bill on Dec. 18, 1889 by Cong. Comstock "to relieve certain Sioux Indians, their families and descendants, who remained loyal to the United States during the Indian war following the outbreak of the Sioux Indians of August, 1862, and the male members of the families of which served either as scouts on the frontier against their own people, or as soldiers in the armies of the United States during the civil war of 1861, and who in the Indian outbreak in August, 1862, were annuitants as members of the Sisseton, Wahpeton, Medawakanton [sic], or Waupakoota [sic] bands of Sioux Indians, from the operation of certain acts of Congress passed to punish the hostile Indians"); 21 Cong. Rec. 581-82 (1890) (introduction of bill on Jan. 15, 1890 by Sen. Pettigrew "for the relief of certain Sisseton and Wahpeton Sioux Indians who served in the armies of the United States against their own people when at war with the United States, and of their families, descendants, and legal representatives, and of certain other Indians of said bands who served as soldiers in the armies of the United States during the civil war, from the operation of certain acts of Congress passed to punish the hostile Indians").

[477] *See supra* note 178 and accompanying text.

> scouts and soldiers that are dead, *who are not included in the foregoing class, as parties to said agreement . . . .*[478]

The italicized words highlight the fact that this was a *special* statutory appropriation *in addition to* the money appropriated under Article III of the 1889 Agreement that paid restitution to *all* the Sisseton-Wahpeton people of the Lake Traverse Reservation, "parties hereto, per capita," who had been "wrongfully and unjustly deprived [of annuity payments] by the operation of the provisions of [the Act of February 16, 1863] . . . entitled 'An act for the relief of persons for damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians.'"[479] The House Report provides further clarification regarding this crucial distinction between (1) the *general* "back annuity" payments authorized by Article III of the 1889 Agreement and (2) the *special*, separate appropriation earmarked for off-reservation former Dakota scouts and the descendants of deceased scouts which Congress was persuaded to add, ultimately, to the 1891 Act.[480] In particular, the House Report incorporates an explanatory letter from the Secretary of the Interior, introduced in the following way by the Committee on Indian Affairs:

> We submit the following letter . . . addressed to this committee in response to our inquiries respecting the claims of the scouts, soldiers, and others of the Sisseton, Wahpeton, Medawakanton [sic], and Waupakoota [sic] bands of Sioux Indians named in the bill. This letter contains . . . a detailed statement of their accounts with the United States, showing [(1)] the sum of $376,578.37 now due the Sisseton and Wahpeton Indians, parties to the [1889] agreement,[481] *and [(2) an additional] $126,200 due the members of these bands who were enrolled in the military service and who served as scouts and soldiers during the civil war, and who are now living outside the*

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[478] Act of Mar. 3, 1891, ch. 543, § 27, 26 Stat. 1035, 1038 (emphasis added).

[479] Agreement of 1889, art. III, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1037, *reprinted in* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 457-58 (1975); *see also* 31 Cong. Rec. 1664 (1898) (reprinting letter from D.M. Browning, Commissioner of Indian Affairs, as transmitted by M. Hoke Smith, Secretary of the Interior, to the Chairman of the Committee on Indian Affairs) ("Article 3 of said agreement [of 1889] provided for the appropriation of $342,778.37. Besides this the annuities for the years remaining unpaid, twelve in all, were also restored by said article."). For a description of the Act of February 16, 1863, see *supra* note 206.

[480] *See supra* note 478 and accompanying text.

[481] Significantly, years after passage of the 1891 Act the federal government continued to administer and account for the proceeds of the 1889 agreement, and in so doing adverted to the Lake Traverse Reservation's *continuing existence*. *See*, *e.g.*, S. Doc. No. 68, 55th Cong., 2d Sess., at 19 (1898) (emphasis added) ("A Report Concerning the Sisseton and Wahpeton Bands of Dakota or Sioux Indians, in Conformity with the Requirements of the Indian Appropriation Act of June 7, 1897") (exhibiting, among statements of financial transactions, "Statement No. 8.—Payments for land ceded, Lake Traverse Reservation, agreement of December 12, 1889," and stating that "[b]y Executive order of January 19, 1895, under the provision of section 27 of the act of March 3, 1891, authority was granted for a per capita payment of $199,800 out of the . . . principal to the Sissetons and Wahpetons *of the Lake Traverse Reservation . . . .*").

> *reservation, including also certain loyal Medawakanton [sic] and Waupakoota [sic] Indians living in Minnesota . . . .*[482]

DeCoteau imposes the made-up label "loyal scout claim" to conflate these two separate appropriations authorized by the 1891 Act[483] and to falsely assert that in 1889 the Sisseton-Wahpeton Dakota had agreed to sell their unallotted lands on the "condition[] . . . that Congress appropriate moneys to make good on the tribe's outstanding 'loyal scout claim,'"[484] a "claim" *DeCoteau* further posits was one that "the tribe believed was owing as part of the 1867 Treaty."[485] But in truth the Indians' demand for "back annuities," which the U.S. negotiators

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[482] H.R. Rep. No. 1356, *supra* note 364, at 2 (emphasis added). The Secretary of the Interior had transmitted the recommendation of the Commissioner of Indian Affairs "that provision be made for the 250 Medawakanton [sic] and Waupakoota [sic] scouts, and also for 50 families, numbering 250 persons, of the loyal scouts of the Sisseton and Wahpeton bands, who reside outside of the Sisseton Reservation, and that they should receive the same per capita allowance as that to be paid to the Sisseton and Wahpeton scouts who reside on the reservation, under the [1889] agreement made with the Sisseton and Wahpeton Indians." *Id.* (letter from Interior Secretary John W. Noble to Committee on Indian Affairs); *see also* S. Exec. Doc. No. 143, 52d Cong., 1st Sess., at 2 (1892) (letter from Indian Affairs Commissioner T.J. Morgan to John W. Noble, Secretary of the Interior) ("The amount appropriated by the [1891] act . . . was $126,620. From this amount there was set apart, by order of the Department, $2,250 for the payment of the necessary expenses incident to the preparation of the roll and payment of funds, leaving the sum of $124,370 to be paid to those entitled thereto. The roll approved by this office and by the Department embraced the names of 138 scouts and soldiers. Dividing the above-named amount of $124,370 among the 138 scouts and soldiers would give a per capita of $901.23, and this latter amount is that which Special Agent [Samuel H.] Elrod is presumed to have paid to each scout or soldier who was living at the time of payment, or, in the event of the death of any scout or soldier, said amount, under direction of the Department, was to be paid to the family and descendants of such scout or soldier."). Two of the 138 names on the "roll of Sioux scouts and soldiers" were stricken as duplicative prior to Acting Interior Secretary George Chandler's final approval of the roll on February 16, 1892. *See* List of Sioux scouts and soldiers, *supra* note 209, at 32, 44, 51 (striking nos. 97 & 129).

The name of the Mdewakanton Dakota scout Mahpiyawakonze ("Influences the Clouds") is included on the roll as no. 28, and the name of my great-grandfather Vines P. Mitchell (my maternal grandmother Cora Mitchell Trudell's father) is included as Mahpiyawakonze's "Adopted Son" under the heading "Descendants of Scouts and Soldiers Deceased." *See id.* at 14-15; *see also supra* note 209. Two collateral ancestors of mine also are included on the 1882 roll of former and deceased scouts and soldiers: "Jack Frazer," i.e., Joseph "Jack" Frazer (Ite Maza, or "Iron Face"), elder brother of my great-great-great-grandmother Margaret Frazier (Waktehinhedwin, or "Woman Who Comes Suddenly in Triumph," my maternal grandmother Cora Mitchell Trudell's great-grandmother); and "Frances Trudel [Francis Hepi Trudell]," elder brother of my great-grandfather Antoine Trudell (Oyatetawa, or "His Nation," my maternal grandfather Martin Trudell's father). *See* List of Sioux scouts and soldiers, *supra* note 209, at 38 (listing "Jack Frazer," no 115); *id.* at 18 (listing "Frances Trudel," no. 44); *see also id.* (listing "Trudel, Francis" in alphabetically arranged index on 28th unnumbered page preceding enumerated roll of "Scouts or Soldiers").

[483] *See supra* note 178 and accompanying text.

[484] *DeCoteau*, 420 U.S. at 435; *see supra* note 368 and accompanying text.

[485] *DeCoteau*, 420 U.S. at 433; *see also supra* text accompanying note 401.

ultimately agreed to accommodate[486] and which is addressed in Article III of the 1889 Agreement,[487] was *not*, as *DeCoteau* wrongly intimates, merely a claim for compensation because of the government's failure to pay the scouts for their service at the time of the U.S.-Dakota War; nor was it a claim arising from the 1867 Treaty that established the Lake Traverse Reservation.[488] Rather, the "back annuities" claim was for something far

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[486] *See supra* note 246 and accompanying text.

[487] Agreement of 1889, art. III, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1037, *reprinted in DeCoteau*, 420 U.S. at 457-58.

[488] *DeCoteau*'s only allusion to authority for describing what it brands a "loyal scout claim" as a claim that "the tribe believed was owing as part of the 1867 Treaty" is this assertion: "In May, [D.W.] Diggs met with a council of tribal leaders, who told him that the tribe would consider selling the reserved lands if the Government would first pay a 'loyal scout claim' which the tribe believed was owing as part of the 1867 Treaty." *DeCoteau*, 420 U.S. at 433. *DeCoteau* then merely displays its own excerpts from the *Minneapolis Tribune* newspaper story that purported to convey the statements of Sisseton-Wahpeton leaders as interviewed in May of 1889, six months prior to the start of the official U.S. negotiations with the Sisseton-Wahpeton Dakota in November and December of that year. *See supra* notes 124-132 and accompanying text. Although none of the "cherry-picked" quotations, *see supra* note 131 and accompanying text, nor anything else in the newspaper story, mentions or refers to any "loyal scout claim," *see supra* note 178 and accompanying text, one of the quotations—a fragment from a longer statement attributed to Michael Renville, *see supra* text accompanying note 136—begins as follows: "'. . . If we get the money we will open up.'" *DeCoteau*, 420 U.S. at 434 (alteration in original) (quoting *A Large Pow-Wow*, *supra* note 125). *DeCoteau* thus creates the appearance that Michael Renville was referring to what *DeCoteau* calls a "loyal scout claim" when he said "If we get the money we will open up"; but in truth, the reference was to the Indians' demand that "the government . . . pay what they owe," *A Large Pow-Wow*, *supra* note 125 (quoting Michael Renville), an assertion that in turn referenced Chief Gabriel Renville's immediately preceding statement insisting that the government fulfill a "claim" described by the newspaper as a "claim that under the [Traverse des Sioux] treaty of 1851 there is due [the Indians] in annuities cut off in 1862" certain amounts of money, including treaty annuity allocations for "the two years [i.e., 1862 and 1863] left out" of a previous insufficient accounting by the Department of the Interior. *Id.* (quoting Gabriel Renville); *see also infra* notes 491-497 and accompanying text (discussing Michael Renville's opposition to any privileged payments for scouts during the U.S. negotiations at Sisseton Agency in late 1889).

It is true, of course, that the newspaper story refers to Chief Renville's *also* having spoken of the U.S. government's failure to pay for the work of the Dakota scouts during 1863 and 1864, *see supra* text accompanying note 135; *supra* note 145 and accompanying text, a topic D.W. Diggs, the meeting's "stenographer," *see supra* text accompanying note 126, likely instigated to ingratiate himself with the chief after the lapse earlier that spring of a congressional bill Renville favored that would have appropriated "back annuity" monies exclusively for the scouts and the families and descendants of deceased scouts. *See supra* notes 338-343 and accompanying text. That particular issue, however, was not pursued during the U.S. negotiations at Sisseton Agency, apparently because the majority of the Indians wanted the 1889 Agreement to provide "back annuity" payments to *all* Sisseton-Wahpeton people instead, payments that the Indians therefore demanded (successfully) be distributed per capita. *See* S. Exec. Doc. No. 66, *supra* note 157, at 2 (letter from President Benjamin Harrison to the Senate and House of Representatives) (reporting to Congress that per capita

"payment of the [back] annuities justly due to these friendly Indians" was "said to be the unanimous wish of the Indians"); *supra* text accompanying note 175; *see also supra* notes 368-370 and accompanying text. Chief Renville's continuing efforts, post-1889, to secure benefits for the Dakota scouts appear to have contributed substantially to Congress's decision to add a special appropriation inclusive of *all* the scouts to the 1891 Act. *See supra* notes 473-482 and accompanying text. But regardless of Chief Renville's separate and independent advocacy, satisfying a "loyal scout claim" was *not* a "condition[]," *DeCoteau*, 420 U.S. at 435, demanded by the Sisseton-Wahpeton Dakota during their 1889 negotiations with U.S. commissioners.

The confusion *DeCoteau* creates by representing that the asserted "loyal scout claim" was one that "the tribe believed was owing as part of the 1867 Treaty," *supra* text accompanying note 485, would appear to exploit the historical fact that, as originally agreed-to by the Indians, the 1867 Treaty would indeed have provided ample benefits for the Dakota scouts. Historian Gary Clayton Anderson explains:

> . . . Articles 11 and 12 [of the original draft of the treaty] set up a massive troop of Indian scouts, 250 in number, who would be paid $60 a month and given rations. The chief of scouts—[Gabriel] Renville being the logical choice—would receive $75 a month. Renville proudly signed his name to the agreement in cursive.
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> . . . .
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> At the same time, Congress was embroiled in debate over much headier issues. . . . These postwar reforms cost money, and expensive Indian treaties simply did not fit into this agenda. . . . [Indian Affairs Committee Chairman James Harlan] struck out Articles 6 through 14 and sent the treaty to the Senate floor. In place of the articles funding the reservation, the new Article 6 simply stated that Congress would make appropriations "at its own discretion" for the new reservation. . . . [T]here would be no large distribution of funds, no massive organization of well-paid scouts, only the creation of two large Indian reservations. With these changes, the Senate ratified the agreement on 15 April 1867.

Anderson, *supra* note 160, at 70-71 (endnotes omitted); *see also* Treaty of Feb. 19, 1867, 15 Stat. 505, 507-09 (showing articles VI through XIV of original, subsequently amended version of treaty, together with "his x mark" signatures of "the delegates representing the Sissiton [sic] and Warpeton [sic] bands of Sioux Indians"); Treaty with Sissiton [sic] and Warpeton [sic] Sioux, Exec. Doc., 39th Cong., 2d Sess., at 9-11 (1867) ("Confidential") (same); S. Rep. No. 9, 55th Cong., 1st Sess., at 3 (1897) ("Sections 6 to 14 [of the original version of the 1867 Treaty], inclusive, made valuable concessions to said Indians, but these sections were all stricken out by the Senate and no compensation whatever given for the cessions made by these Indians in this treaty. Other sections were inserted imposing hard conditions upon these people, in violation of the treaty, and as thus amended the treaty was sent back for their approval. These Indians were broken in spirit, destitute, and starving. By their friendship for the whites during the outbreak they had incurred the hatred of the other tribes of Sioux Indians, and therefore dared not go west into Dakota, where game was plenty, and hunt for food and clothing, but were obliged to accept whatever was offered, and so accepted the amendments imposed by the Senate.").

In view of this historical backdrop—a backdrop *DeCoteau*, again, does not provide, examine, or explain—Chief Gabriel Renville's impassioned, lifelong advocacy on behalf of the Dakota scouts is understandable. But the crucial point is that whatever subsequent course Chief Renville's advocacy may have taken, the U.S. government's 1889 negotiations with the Sisseton-Wahpeton people simply did not entail the parties' agreeing on any special "condition[]," *DeCoteau*, 420 U.S. at 435, accommodating the Dakota scouts, *DeCoteau*'s obfuscating use of the invented label "loyal scout claim" notwithstanding. *See also supra* note 403.

more serious: the "monstrous injustice"[489] inflicted on *all* Dakota people by the U.S. government in 1863, i.e., Congress's retaliatory abrogation of all Dakota treaties, forced expulsion and removal of Dakota people from Minnesota, and confiscation and forfeiture of all annuity payments essential for the Dakota people's subsistence and survival.[490]

As discussed previously, *DeCoteau* deploys the term "loyal scout claim" in misrepresenting the transcribed remarks of Sisseton-Wahpeton Chief Gabriel Renville.[491] The case treats the speech of another tribal representative, Michael Renville, in similar fashion, displaying that testimony as follows:

> Michael Renville, another tribal spokesman, stated:
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> "We have always said that when the sale of surplus lands was considered we would ask that 160 acres be given to each member of the tribe . . . . We said in council that we would not sell surplus lands until back annuities [for the loyal scout claim] were paid, but you say that if the lands are now sold the back annuities would be paid at the same time. This pleases us." *Id.*, at 21.[492]

What *DeCoteau* omits from Michael Renville's testimony, replacing it with an ellipsis, is the following sentence: "You spoke of money due us; some of us think it ought to come to all who belong here, while others think that none but scouts should receive it."[493] Also left out, as context, is the response from the chairman of the U.S. commission, a response that immediately follows Michael Renville's December 6, 1889 speech, quoted in altered form in *DeCoteau*;[494] Chairman Whittlesey said: "In this agreement we do not say anything about scout money, but call it the back annuities due the Sisseton and Wahpeton Indians, parties to this agreement."[495] The omitted material makes clear that the "money due us" to which Michael Renville was referring was *not* past wages for the unpaid Dakota scouts but "back annuities" that the government owed to *all* the "Sisseton and Wahpeton Indians, parties to [the 1889] agreement."[496] It is ironic, to say the least, that *DeCoteau* should make it look

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[489] *See supra* note 372 and accompanying text.

[490] *See supra* note 177 and accompanying text; *supra* note 206 and accompanying text.

[491] *See supra* notes 393-452 and accompanying text.

[492] *DeCoteau*, 420 U.S. at 436 n.16 (alterations in original).

[493] S. Exec. Doc. No. 66, *supra* note 157, at 21 (report of councils with Sisseton and Wahpeton Indians) (statement of Michael Renville); *see supra* note 258 and accompanying text.

[494] *See supra* note 492 and accompanying text.

[495] S. Exec. Doc. No. 66, *supra* note 157, at 21 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey); *see supra* note 259 and accompanying text.

[496] *See supra* note 495 and accompanying text. It is thus equally clear that Michael Renville was referring to the same "money due us" as was Gabriel Renville when the chief invoked that same phrase during the negotiations, saying, "We know that the money due us on the treaty of 1851 is ours, and it has pleased us to have that in." S. Exec. Doc. No. 66, *supra* note 157, at 25 (report of councils with Sisseton and Wahpeton Indians) (statement of Gabriel Renville); *supra* text accompanying note 297; *supra* note 437; *see also* Charles C. Painter, *Some Dangers Which Now*

like Michael Renville was thanking the Commission for satisfying a "loyal scout claim" in a speech in which he was stating his approval of the fact that the Agreement would *not* single out the scouts for privileged and exclusive payments but would distribute "back annuities" to *all* the Sisseton-Wahpeton people.[497]

Threaten the Interests of the Indians, *in* Proceedings of the 10th Ann. Meeting of the Lake Mohonk Conf. of Friends of the Indian 76-77 (Martha D. Adams ed., 1892) ("[A] commission was appointed to negotiate with the Indians on the Sisseton reservation for the sale of their surplus land. . . . The Indians insisted on the payment of their confiscated annuities as a condition precedent to a sale of their land, and the commissioners were compelled to put this into the agreement.").

[497] The fact that Michael Renville and Chairman Whittlesey, in their December 6, 1889 exchange, were referring to the "back annuities" that the U.S. government wrongly confiscated from the Dakota people in 1863 and *not* any "loyal scout claim" is confirmed by additional testimony from the transcribed proceedings. Thus, in saying "You spoke of money due us," *see supra* note 493 and accompanying text, Michael Renville was referring to Chairman Whittlesey's having just said, "We agree the money due you ought to be paid." S. Exec. Doc. No. 66, *supra* note 157, at 21 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey); *see also supra* note 258 and accompanying text. Whittlesey's statement in turn was in reference to extensive discussion from the preceding date on which negotiations took place, December 3, 1889, a day on which D.W. Diggs, speaking for the commission, said: "When we have agreed on a price per acre, we recommend that the back annuities be paid first, from 1862 to date . . . ." S. Exec. Doc. No. 66, *supra* note 157, at 19 (report of councils with Sisseton and Wahpeton Indians) (statement of D.W. Diggs); *see supra* note 225 and accompanying text. This negotiated arrangement for satisfying the demands of Michael Renville, Chief Gabriel Renville, and the other Sisseton-Wahpeton leaders for payment of "back annuities" was codified in the 1889 Agreement, as ratified by Congress in 1891:

> The United States stipulates and agrees to pay the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of [$342,778.37], being the amount found to be due . . . under the provisions of the fourth article of the treaty of [July 23, 1851, i.e., the Treaty of Traverse des Sioux], and of which they have been wrongfully and unjustly deprived by the operation of the provisions of an act of Congress approved [February 16, 1863] . . . .

Agreement of 1889, art. III, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1037, *reprinted in DeCoteau*, 420 U.S. at 457-58; *see also supra* note 479 and accompanying text. The Senate Report on the bill to ratify and confirm the 1889 Agreement sheds light on Diggs's statement that the back annuities should be paid "from 1862 to date":

> By the terms of their treaties they were to be paid an annuity of $150,050 for fifty years, beginning July 1, 1851, and terminating on July 1, 1901, except $15,000 of which was to continue forever. . . . The two unpaid appropriations [for 1862 and 1863] were covered back into the Treasury . . . . Of their annuities twelve installments had been appropriated, two of which [i.e., for 1862 and 1863] had been unpaid when the confiscation act [of 1863] went into effect, leaving twenty-nine installments from 1862 to 1890, inclusive, or $2,134,400 still unpaid.

S. Rep. No. 661, *supra* note 458, at 2.

Also illuminating is a chronicle provided by Eliphalet Whittlesey, chairman of the U.S. commission at Sisseton Agency, and published as part of the October 7 proceedings of the 1891 meeting of the Lake Mohonk Conference of Friends of the Indian, a meeting of Indian policy reformers that took place immediately *after* Congress passed the 1891 Act that ratified the 1889 Agreement with the Sisseton-Wahpeton Dakota:

By interjecting the label "loyal scout claim" to deflect from the Dakota people's demand for restitution of their "back annuities," the *DeCoteau* Court sidestepped its obligation to consider the oppressive historical circumstances of the 1889 negotiations—i.e., the dire hardship and widespread suffering caused by Congress's postwar retaliation and acts of genocidal aggression against the Dakota people[498]—when under-

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> The Indian Appropriation Bill passed last winter makes appropriation for the fiscal year 1892, which began the first day of July, 1891. It contains ratifications of agreements with Indians, some of which have been lying unacted upon for several years. The agreement with the Pottawattomies [sic] of Oklahoma, with the absentee Shawnees, with the Sac and Fox, the Cheyennes and Arrapahoes [sic], the Coeur d'Alène of Idaho, the Fort Berthold Indians of North Dakota, the Sissetons of South Dakota, and the Crows in Montana,—all these have been ratified by Congress, and appropriations made for carrying them out involving several millions of dollars, a small part of which only is paid in cash. Where cash payments have been provided, it has been to carry out old, previously made treaties with the United States. Certainly, that was the case with the Sissetons. There was a treaty made with them in 1851, just forty years ago, by which the United States bound itself to pay to these Indians certain money per capita. That was suspended on account of the outbreak in Minnesota in 1862,—the whole of it,—the innocent suffering with the guilty. The agreement with the Sissetons provided that those annuities should be restored to the Sissetons, on the ground that they had remained loyal and firm friends of the whites during that terrible time. By these ratifications all the agreements are completed that have been made, and which were remaining unratified until the last Congress, excepting one with the southern Utes, which many of us hope will remain pigeon-holed for a good many years to come.

General E. Whittlesey, *Survey of the Year's Work*, *in* Proceedings of the 9th Ann. Meeting of the Lake Mohonk Conf. of Friends of the Indian 13 (Israel C. Barrows ed., 1891). For descriptions and brief histories of the Lake Mohonk Conference meetings of Indian policy reform advocates, see Mathes, *supra* note 134, at 147; Patricia Nelson Limerick, The Legacy of Conquest: The Unbroken Past of the American West 196-200 (1987); Francis Paul Prucha, 2 The Great Father: The United States Government and the American Indians 617-23 (1984); Mardock, *supra* note 75, at 200-01; William T. Hagan, American Indians 123-24 (1961); *see also* Richard B. Collins & Karla D. Miller, *A People Without Law*, 5 Indigenous L.J. 83, 93-104 (2006) (discussing the role and legacy of the "Friends of the Indian" with regard to misplaced doubts, historically, about "whether Native American tribes had legal capacity to sue").

[498] *See supra* note 490 and accompanying text; *cf.* Herbert [Glass], *supra* note 183, at 753-57 (discussing the initial plans of government and military officials for "a war of extermination as the preferred response" to the Indian attacks at the start of the U.S.-Dakota War); Routel, *supra* note 208, at 4, 77 (footnote omitted) ("Like the bounty system in Minnesota, these programs [that placed a bounty on Indian inhabitants elsewhere in the United States] were creatures of state and territorial law, but they were implicitly and explicitly approved by the federal government. In fact, they could be viewed as part of a much broader extermination program that was at the heart of federal Indian policy during this time period. . . . Federal, state, and local governments all had a hand in creating the bounty system that provided monetary rewards for the killing of Dakota men beginning in 1863."); Meyer, *supra* note 181, at 124-25 ("[I]n view of the remarks made in 1857 by Special Agent [Kintzing] Prichette about the desire of the whites to use an Indian war as a pretext for seizing lands, one is justified in wondering how much that motive figured in the hysterical utterances of the newspapers and of public men in the weeks following the [1862] outbreak."); *id.* at 101-02 (footnote omitted) ("The attitude . . . toward the Indians was suggested by an item in a Red Wing

newspaper noted by Prichette [in his 1857 report]: 'We have plenty of young men who would like no better fun than a good Indian hunt.' In Minnesota he found that 'but one sentiment appeared to inspire almost the entire population, and this was, the total annihilation of the Indian race within their borders.' Thus the objectives of the Indian Bureau and the missionaries were impossible of attainment in the face of a populace who found no room in their world for live Indians."); Anderson, *supra* note 181, at 234 (footnote omitted) ("Minnesota newspaper editors soon joined the chorus of angry politicians who wanted revenge. 'Nothing short of extermination' was acceptable, read a banner headline in the *St. Paul Press*. And as for the women and children, the paper recommended a 'penal colony' be created on Isle Royale in Lake Superior. . . . The Indians' 'refusal to be civilized, forces upon us the hard alternative of exterminating him.' Never had an American frontier community been more closely aligned in supporting a policy approaching genocide than in Minnesota in the late fall of 1862."); Extra Sess. Message of Gov. Ramsey to the Leg. of Minn. 12 (Sept. 9, 1862) ("Our course then is plain. The Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders of the State. . . . They have themselves made their annihilation an imperative social necessity."); Chomsky, *supra* note 144, at 23 & n.60 (footnote omitted) (quoting Sept. 28, 1862 letter from Maj. Gen. John Pope, commander of the U.S. Army Dep't of the Northwest, to Brigadier Gen. Henry H. Sibley of the U.S. Military District of Minnesota) ("It is my purpose utterly to exterminate the Sioux if I have the power to do so and even if it requires a campaign lasting the whole of next year. Destroy everything belonging to them and force them out to the plains, unless, as I suggest, you can capture them. They are to be treated as maniacs or wild beasts, and by no means as people with whom treaties or compromises can be made."); Green, *supra* note 183, at 74 & n.17 (endnote omitted) (quoting Aug. 17, 1862 letter from President Lincoln's private secretary John G. Nicolay to U.S. Secretary of War Edwin M. Stanton) ("As against the Sioux, it must be a war of extermination."). In his annual report, dated January 27, 1863, as "agent for the Sioux of the Mississippi," Rep. of the Comm'r of Indian Aff. for the Year 1863, *supra* note 200, at 266 (letter from Clark W. Thompson, Superintendent of Indian Affairs, St. Paul, Minnesota, to William P. Dole, Commissioner of Indian Affairs, transmitting report of Thomas J. Galbraith, U.S. Indian agent for the Sioux of the Mississippi), Thomas J. Galbraith echoed the sentiments of the white citizens of Minnesota in the months following the U.S.-Dakota War:

> I shall now proceed to consider the question, What shall be done with the Sioux Indians, and what policy shall be adopted toward them? . . .
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> . . . .
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> Since the outbreak countless theories have been advanced on this subject. Extermination, massacre, banishment, torture, huddling together, killing with small-pox, poison, and kindness, have all been proposed. . . . When we look this subject in the face, I take it few will contend seriously that the Sioux and all the other Indians can be "*exterminated*" just now. Exterminate is a severe, a terrible word—much easier written than put into practical operation. . . .
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> . . . .
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> The power of the government must be brought to bear upon them; *they must be whipped, coerced* into obedience. After this is accomplished, few will be left to put up on a reservation; many will be killed; more must perish from famine and exposure, and the more desperate will flee and seek refuge on the plains or in the mountains. Few except women and children can be captured, and if they should be, they never should be allowed to cause trouble again. A very small reservation should suffice for them.
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> . . . .
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> One of two things must, in my opinion, happen: either the entire race must become extinct, or they must assimilate with the whites, and become part of the people, or, if not part of the people, at least friends of the people. Unless

taking the crucial and indispensable judicial task of ascertaining what the Indians understood they were agreeing to (and demanding) in signing the 1889 Agreement. This evasion is integral to *DeCoteau*'s false narrative of tribal consent. Without it, the fiction that the Dakota people consented to *further* aggression—that is, federal annihilation of the Indians' "permanent home," the Lake Traverse Reservation[499]—would be readily seen as preposterous and quickly dispelled. In piercing *DeCoteau*'s fictitious and absurd historical narrative, it is the Supreme Court's 1975 decision, not Congress's 1891 Act, that is laid bare as the *real* source of this

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> Indian nationality is abolished, the Indian race must, ere long, be known only in history. Before the approach of the aggressive civilization of the age, unless they become a part of it, they must disappear.

Id. at 294, 296, 297 (report of U.S. Indian Agent Thomas J. Galbraith to Clark W. Thompson, Superintendent of Indian Affairs, St. Paul, Minnesota). *See generally* NIEBUHR, *supra* note 176, at 87-106 (book chapter titled "A 'War of Extermination,'" addressing the immediate aftermath of the 1862 U.S.-Dakota War in Minnesota).

For a compelling, cautionary critique addressing the propriety and limitations of using the term "genocide" to characterize "patterns of colonial dispossession" that Indigenous peoples have endured historically, see Joseph P. Gone, *Colonial Genocide and Historical Trauma in Native North America: Complicating Contemporary Attributions*, *in* COLONIAL GENOCIDE IN NATIVE NORTH AMERICA 273, 275 (Andrew Woolford, Jeff Benvenuto & Alexander Laban Hinton eds., 2014). Professor Gone, a clinical and community psychologist, anthropologist, and member of the Gros Ventre (*Aaniiih*) Nation of the Fort Belknap Indian Community in Montana, writes:

> [A]dvocates [who promote the concept of historical trauma] must attend more closely to the concrete and specific historical events that have shaped the emergence of any contemporary Indigenous community . . . . [T]he rhetorical and political efficacy of overgeneralized attribution of this term [i.e., genocide] remains in serious question . . . . [B]eyond those actual instances of group-based mass murder that intermittently occurred during the colonization of Native North America, it may be that understatement will best serve Indigenous interests more effectively than hyperbole. Moreover the terms *colonization* and *colonial subjugation* would appear to serve readily enough for general characterizations of the postcontact historical experiences of Indigenous North Americans *without* sacrificing either historical accuracy or scholarly integrity. Most important, neither risks trivializing the intermittent occurrences of murderous settler campaigns undertaken for outright extermination of Indigenous peoples that even today threaten to rend the very fabric of human communality in the United States and Canada.

Id. at 287; *cf.* PIERRE CLASTRES, *Of Ethnocide*, *in* ARCHEOLOGY OF VIOLENCE 43, 43-46 (Jeanine Herman trans., Semiotext(e) 1994) (1980) (discussing the emergence of the word "ethnocide" in the twentieth century as a response to the need for naming a "phenomenon" that is distinct "from the reality that 'genocide' represents" in that "ethnocide signals not the physical destruction" of human beings "but the destruction of their culture," and observing that, vis-à-vis the Indian tribes of North and South America and "[f]rom its agents' perspective, . . . ethnocide would not be an undertaking of destruction: it is, on the contrary, a necessary task demanded by the humanism inscribed at the heart of western culture").

[499] *See supra* note 441 and accompanying text.

unconscionable destruction of the Sisseton-Wahpeton people's reservation by the United States government.[500]

d. Distorting the Congressional Record

With regard to *DeCoteau*'s use of the Congressional Record to bolster its decision, the problem of "cherry-picked statements"[501] crops up once more. The opinion stacks and splices together in a single column[502] different quoted fragments of paragraphs from "the sponsors of the comprehensive legislation"[503] (i.e., the 1891 Act) that "also ratified several other agreements providing the outright cession of surplus reservation lands to the Government."[504] But none of those chosen paragraph fragments makes any reference to altering or terminating reservation boundaries. Thus, *DeCoteau* extracts from the recorded remarks of Congressman George D. Perkins and Senator John Tyler Morgan the following respective comments:

> "All the pending agreements or treaties for the purchase of Indian lands are ratified and confirmed by the provisions of this bill. . . .
>
> "The bill carries the largest appropriation ever carried by an Indian appropriation bill, but it extinguishes the Indian title to a great domain and opens it to settlement by the hardy and progressive pioneers . . . ."
>
> "We do not pretend to make any modification or amendment of the agreements themselves. We merely ratify those, and then we take the

[500] *Cf.* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Calif. L. Rev. 1137, 1148-49 (1990) (observing that in *DeCoteau* and other reservation diminishment/disestablishment cases it is clear "that the holdings, although couched in legislative intent terms, are based on other factors").

[501] *See supra* note 131 and accompanying text.

[502] *See DeCoteau*, 420 U.S. at 440-41.

[503] *Id.* at 440.

[504] *Id.* at 439. As for *DeCoteau*'s apparent intimation (without explanation) of a legally significant distinction among otherwise virtually indistinguishable Indian land-sale agreements because of the Sisseton-Wahpeton cession's being an "outright" one, the case contradicts the *contrary* position of the overturned appellate decision below, in which the Eighth Circuit Court of Appeals held that the Lake Traverse Reservation was *not* disestablished:

> The case before us is not unlike *Seymour*, *Mattz* and *Condon*. The overall climate of legislative activity concerning Indian reservations during the period from 1887 through 1910 received its primary impetus from the General Allotment Act. The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, *the reservation here was not sold to the government outright* but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation.

United States *ex rel.* Feather v. Erickson, 489 F.2d 99, 101 (8th Cir. 1973) (decision below) (emphasis added) (citations omitted) (adverting to Seymour v. Superintendent, 368 U.S. 351 (1962); Matz v. Arnett, 412 U.S. 481 (1973); United States *ex rel.* Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973)), *rev'd*, *DeCoteau*, 420 U.S. 425 (1975); *see also* Reply Brief for Petitioner, *supra* note 132, at 15, 1974 WL 186005, at *9 (citations omitted) ("The General Allotment Act contemplated the extinguishment of Indian titles or right to occupation of surplus lands within reservations and not the disestablishment of any part of the reservation.").

> estate we have acquired in this way, and after providing for the payment of the money, or whatever it is we have agreed to pay these Indians, we take these landed estates and parcel and divide them out among the people in a fashion that we think is the most conducive to the occupancy of that country by an honest, laborious, earnest, and faithful set of people."[505]

Apart from exuding the white-settler supremacism that was prevalent in nineteenth-century America,[506] there is nothing particularly noteworthy

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[505] *DeCoteau*, 420 U.S. at 440-41 (alteration in original) (footnotes omitted) (quoting 22 Cong. Rec. 3784 (1891) (remarks of Cong. Perkins); 22 Cong. Rec. 3455 (1891) (remarks of Sen. Morgan)).

[506] *See generally* Stephen Kantrowitz, *White Supremacy, Settler Colonialism, and the Two Citizenships of the Fourteenth Amendment*, 10 J. Civ. War Era 29 (2020), https://muse.jhu.edu/article/750248. Discussing mid-nineteenth-century federal Indian policy, Professor Kantrowitz writes:

> Land cessions often followed Native military defeats, and military removals of Native populations formed part of the violent conquest of Indian Country. . . . In various forms over successive national administrations, this policy sought to transform Native people into American-style farmers; to reshape their lifeways and customs so thoroughly that they became acceptable neighbors for white settlers; to transform them so totally, that is, that they ceased to be alien at all and were absorbed into the American body politic. In particular, this policy required that Native people surrender their collective ownership of land, accept "allotments" of small tracts of this land to individuals and households, and allow the rest to be sold to American settlers.
>
> . . . .
>
> . . . The pressure of white settlement was inexorable [according to the "mainstream" thinking of policymakers]. Native peoples would be absorbed by the white settler societies around them, or they would fail to assimilate and would "perish from the face of the earth." Either way, the march of settlement would continue.

Id. at 37, 44-46 (endnote and citation omitted).

The careers of both U.S. Representative George D. Perkins of Iowa and U.S. Senator John Tyler Morgan of Alabama involved advocating white supremacist policy positions. *See* Jane Conard, *Charles Collins: The Sioux City Promotion of the Black Hills*, S.D. Hist., Spring 1972, at 131, 160 (footnote omitted), https://www.sdhspress.com/journal/south-dakota-history-2-2/charles-collins-the-sioux-city-promotion-of-the-black-hills (noting Perkins's role, as editor of the *Sioux City Journal*, in "criticizing governmental policy" in 1875 guarding against the invasion of the treaty-protected Black Hills by miners, and indicating Perkins's alignment with Charles Collins, editor of the Sioux City, Iowa rival newspaper *Weekly Times*, in the belief, as stated by Collins, that "[t]he government had reached the point where it 'must declare that [Black Hills] country open to white men, or decree that white men have no rights that the government is bound to respect'"); *see also* David Holthouse, *Activists Confront Hate in Selma, Ala.*, Intelligence Rep., Nov. 30, 2008, https://www.splcenter.org/fighting-hate/intelligence-report/2008/activists-confront-hate-selma-ala ("Lynching blacks was just fine with John Tyler Morgan. In fact, when Morgan represented Alabama in Washington, D.C., following the Civil War, the former Confederate general-turned-grand dragon of the Ku Klux Klan and six-term U.S. senator introduced and championed several bills to legalize the practice of racist vigilante murder as a means of preserving white power in the Deep South. A lawyer from Selma, Morgan was one of the fiercest segregationists and white supremacists of the early Jim Crow era. During Reconstruction, he advocated the forced removal of the South's entire black

or significant, vis-à-vis the reservation diminishment/disestablishment inquiry, about these legislators' remarks. The references to "extinguish[ing] the Indian title," "settlement" of "these landed estates," and "occupancy of that country" previously occupied solely by the Indians advert only to the proposed *alienation of land-title*, that is, the *transfer of property rights* in the ceded "estates";[507] those references do *not* signify or imply *loss of reservation status or the destruction of federal and tribal jurisdiction*, as the pre-*DeCoteau* Supreme Court precedents make clear.[508] Both of these legislators, moreover, made *additional* statements that appear elsewhere in the Congressional Record that imply their shared understanding that the Lake Traverse Reservation would continue to exist after the 1889 Agreement's ratification.[509]

Potentially more foreboding, however, if only in retrospect, is *DeCoteau*'s singling out the following portion of a paragraph from the recorded remarks of Senator Henry L. Dawes:

> "The remainder of the bill is made up of the other appropriations necessary to carry out the *agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement *as part of the public domain* upon the payment by the settlers of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians *for the surrender* $2.50 an acre."[510]

With regard to Senator Dawes's use of the term "public domain," it should be noted at the outset that in *DeCoteau* (1) "the 'public domain' language was found not in the act itself" and (2) "[t]here was no evidence of similar language in the negotiations leading to the [1889] agreement, and consequently no evidence that the tribe understood that the ceded lands would be deleted from the reservation."[511] Although it could not have been known

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population to Cuba, Hawaii and the Philippines. He once said, 'The snows will fall from heaven in sooty blackness,' before whites would accept blacks as their equals.").

[507] Likewise, *DeCoteau*'s citations to the Congressional Record in support of the statement "it was decided that these lands should be sold to settlers at $2.50 per acre under the homestead laws," *DeCoteau*, 420 U.S. at 438-39 & n.20 (citing 22 Cong. Rec. 2809-10, 3784 (1891) (remarks of Congs. Holmann and Perkins); 22 Cong. Rec. 3453, 3457-58 (1891) (remarks of Sens. Pettigrew and Dawes)), implicate only an ineluctable land-sale issue, not a question of altering or eliminating reservation boundaries.

[508] *See supra* notes 47-48 and accompanying text (discussing Mattz v. Arnett, 412 U.S. 481 (1973)); *supra* notes 22-24 and accompanying text (discussing Seymour v. Superintendent, 368 U.S. 351 (1962)).

[509] Regarding the implications of Senator Morgan's additional remarks, see *infra* note 517. Regarding Congressman Perkins's further remarks, see *infra* notes 526-538 and accompanying text.

[510] *DeCoteau*, 420 U.S. at 441 (emphases added) (quoting 22 Cong. Rec. 3879 (1891) (remarks of Sen. Dawes)).

[511] Royster, *supra* note 56, at 33 n.162 (citation omitted). *DeCoteau*'s assertion that "[t]he

in 1975 when the case was decided, *DeCoteau*'s pinpointing a senator's use of the term "public domain" in the case's legislative history was a strategic move in advance of the Supreme Court's 1994 decision to add "public domain" to the list of words with "magic" reservation-boundary-altering properties.[512] But in the context of *DeCoteau*, the notion that Senator Dawes's mention of "public domain" might imply Congress's extinguishment of the Lake Traverse Reservation is exceedingly implausible.[513]

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sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded land to the 'public domain,'" *DeCoteau*, 420 U.S. at 446 (emphasis added) (citations omitted), is misleading. As direct support *DeCoteau* cites only its own three stacked and strung-together excerpts from the Congressional Record, *see id.* (citing *id.* at 440-41). But among those excerpts—quotes extracted from three different legislators—the term "public domain" is used by only one individual, Senator Dawes, *see id.* at 440-41 & nn.23-25 (excerpting quotes from Cong. Perkins, 22 Cong. Rec. 3784 (1891), Sen. Morgan, 22 Cong. Rec. 3455 (1891), and Sen. Dawes, 22 Cong. Rec. 3879 (1891)); *see also supra* notes 502-505 and accompanying text; *supra* note 510 and accompanying text. Moreover, an online legal database search for the term "public domain" in the Congressional Record for 1890 and 1891 yielded no other instance where that term was used by Senator Dawes or anyone else in connection with the 1889 Agreement or the land-disposition provision associated with the agreement. *See* 21 Cong. Rec. 381-10800 (1890); 22 Cong. Rec. 1-3921 (1891); 23 Cong. Rec. 1-104 (1892). In other words, notwithstanding *DeCoteau*'s misleading assertion, there was only one legislator—not multiple "sponsors"—who mentioned "public domain" in connection with the disposal of the Sisseton-Wahpeton lands, and that one legislator, Senator Dawes, used the term in this way only in the single instance quoted in *DeCoteau* and *nowhere else* in the two years (1890 and 1891) of legislative proceedings, transcribed in volumes 21, 22, and 23 of the Congressional Record, during which the Indian appropriations bill that became the 1891 Act was addressed numerous times by the Senate and the House of Representatives. For further analysis regarding Senator Dawes's mention of the term "public domain," as quoted in *DeCoteau*, see *infra* notes 574-586 and accompanying text.

[512] *See* Tweedy, *supra* note 1, at 751 (footnote omitted) (observing that after *DeCoteau* "[t]he Court . . . expanded this universe of so-called magic language to include run-of-the-mill language that 'restor[ed] land to the public domain'"); *see also supra* note 116 and accompanying text.

[513] *See*, *e.g.*, Susan D. Campbell, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 Am. Indian L. Rev. 57, 73-74 (1984) (footnote omitted) ("[A] body of case law gives strong support to the argument . . . that the public domain language in surplus lands acts carried little meaning. This case law indicates that when the phrase 'public domain' was used in federal public lands legislation, it merely referred to land available for sale or disposition under the general land laws. 'Public domain' was used interchangeably with 'public lands.'"); *cf.* Leavenworth, Lawrence & Galveston R.R. Co. v. United States, 92 U.S. 733, 741 (1876) (emphasis added) (holding that an act of Congress that granted lands to a state for railroad development cannot be construed to encompass lands that were within Indian reservations at the time the statute was enacted and observing that "these grants have always been recognized as attaching *only to so much of the public domain as was subject to sale or other disposal, although the roads of many subsidized companies pass through Indian reservations*"). That the term "public domain" had varying, conflicting meanings during the allotment era is illustrated by an 1879 report of the Board of Indian Commissioners, "a group of Eastern philanthropists who advised the Interior Department regarding its administration of Indian affairs." Loring Benson Priest, Uncle Sam's Stepchildren: The Reformation of United States Indian Policy, 1865-1887, at 12 (Octagon Books, 1969) (1942); *see also* Mathes, *supra* note 134, at 146 n.22 ("The Board of Indian

Most significant in this regard is the fact that nothing in the 1889 Agreement provides for the *disposition* of the lands sold by the Indians and purchased by the U.S. government. Rather, Congress added a provision for disposing of those lands as a *separate section* (§ 30)[514] of the "comprehensive legislation" of 1891, legislation that included (as § 26) the entire 1889 Agreement.[515] Because Congress understood that it could not change or abolish the boundaries of the Lake Traverse Reservation, established by treaty in 1867, without tribal consent,[516] the provision for the post-sale disposition of the Sisseton-Wahpeton lands—a provision that was never presented to the Indians for their consideration or approval—could have had no effect at all on the reservation's existence *regardless of whether Congress unilaterally relegated the ceded lands to "public domain" status.*[517]

Commissioners consisted of unpaid philanthropists and humanitarians nominated by major Protestant denominations. It also had authorization to exercise joint control with the Bureau of Indian Affairs to purchase and inspect food, disburse funds, negotiate treaties, and make inspection tours."). In a caustic passage, the 1879 report exhibits the Board members' understanding of "public domain" as encompassing lands occupied by Indians within a reservation's boundaries:

> "We may moralize over the natural rights of the Indian as much as we please, but after all they have their limit. . . . [I]t is evident that no 12,000,000 acres of the public domain, whose hills are full of ores, and whose valleys are waiting for the diligent hand to 'dress and keep them,' in obedience to the divine command, can long be kept simply as a park, in which wild beasts are hunted by wilder men. This Anglo-Saxon race will not allow the car of civilization to stop long at any line of latitude or longitude on our broad domain. If the Indian in his wildness plants himself on the track, he must inevitably be crushed by it."

Priest, *supra*, at 219-20 (endnote omitted) (quoting 11th Ann. Rep. of the Bd. of Indian Comm'rs 12 (1879)). General Eliphalet Whittlesey, who chaired the U.S. negotiating commission at Sisseton Agency in November and December, 1889, served as assistant secretary, and then as secretary, of the Board of Indian Commissioners for a quarter century, from 1875 to 1899. *See* 41st Ann. Rep. of the Bd. of Indian Comm'rs 25 (1909) (notice regarding "Death of Gen. Eliphalet Whittlesey"); *see also supra* note 160.

[514] Act of Mar. 3, 1891, ch. 543, § 30, 26 Stat. 1035, 1039 (providing that the ceded lands "shall . . . be subject only to entry and settlement under the homestead and township laws of the United States" and "[t]hat patents shall not issue until the settler or entryman shall have paid to the United States the sum of [$2.50] per acre for the land taken up by such homesteader").

[515] *See* Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1035-38, *reprinted in DeCoteau*, 420 U.S. at 455-60.

[516] *See supra* notes 353-354 and accompanying text.

[517] This crucial point is borne out further by remarks from the Congressional Record that are left out of *DeCoteau*. In the Senate debate that took place from February 27 to March 3, 1891, from which *DeCoteau* extracts two senators' comments, Senator Dawes opened his remarks, on February 27, by stating that the amended Indian appropriations bill under consideration contained "agreements made by these Indians by which they have agreed to *surrender* to the United States *about 10,000,000 acres of land*." 22 Cong. Rec. 3453 (1891) (emphases added) (remarks of Sen. Dawes). This statement establishes a contextualizing reference point for Dawes's later elaboration, on March 3—i.e., that "the United States gave the Indians *for the surrender* $2.50 an acre," *see supra* note 510 and accompanying text—showing that what the Sisseton-Wahpeton Dakota agreed to "*surrender*" was "*acres of land*," not their reservation. *See also infra* note 647 (further discussing the significance of Senator Dawes's use

DeCoteau's dubious use of the Congressional Record implicates other problems as well. The case disregards, for instance, crucial

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of the word "surrender" in debates leading to enactment of the bill that became the 1891 Act). In addition, Senator Dawes made clear that although in its proposed amendments to the appropriations bill the Senate Committee on Indian Affairs "ha[d] modified the disposition of the land" with respect to some of the agreements, *no change could be made to the agreements themselves*: "Of course, it is *beyond our power* to modify the agreements. The agreements are *in haec verba* [i.e., verbatim] as made [with the Indians] by the commissioners . . . ." 22 Cong. Rec. 3453 (1891) (emphasis added) (remarks of Sen. Dawes).

The same basic point—that Congress had discretion to select the methods for disposing of lands purchased from Indian tribes *but could not change the agreements themselves*—is the true import of Senator Morgan's remark, a key opening sentence from which is omitted in *DeCoteau*, *see supra* note 505 and accompanying text. Morgan had risen in support of Dawes's urging the Senate to pass the comprehensive Indian appropriations bill, saying: "Mr. President, this Congress ought not to adjourn without disposing of these treaties, not so much on account of the Indians out there as on account of the people who are occupying and intend to occupy that country." 22 Cong. Rec. 3455 (1891) (remarks of Sen. Morgan). He further stated that the agreements were essentially "contracts by which two-thirds or three-fourths of the male adults of any tribe may dispose of what is, or is supposed to be, their interest in *the land included within* their reservations." *Id.* (emphasis added). After bluntly criticizing how U.S. officials had been carrying out negotiations with the Indians ("Now, while we have been dickering with these people in this way . . ."), Senator Morgan added:

> *When we adopt this bill the statute will not change all these agreements*. We do not pretend to make any modification or amendment of the agreements themselves. We merely ratify those, and then we take the estate we have acquired in this way, and after providing for the payment of the money, or whatever it is we have agreed to pay these Indians, we take these landed estates and parcel and divide them out among the people in a fashion that we think is the most conducive to the occupancy of that country by an honest, laborious, earnest, and faithful set of people.

Id. (emphasis added). Clearly, Senator Morgan was *not* positing that "[t]he intended effect of all these ratification agreements," DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 439-40 (1975), was to shrink or abolish reservations by paying the Indians "outright," *see id.* at 439 (referring to "outright cession of surplus reservation lands"); *see also supra* note 504, for lands that Congress, at its discretion, would then make available for purchase by homesteaders. Rather, Morgan was rallying votes by reassuring his colleagues that the proposed amendment to the Indian appropriations bill was not an unconstitutional power-grab by Congress, modifying negotiated agreements with Indian tribes, but instead was—to borrow a phrase from a different senator—a perfectly legal "provision [for] carrying the agreement[s] into effect," 22 Cong. Rec. 3457 (1891) (remarks of Sen. Cockrell).

It is also important to observe that *DeCoteau concedes* that "Congress recognized that the [1889] Agreement could not be altered" and that "debate [therefore] centered largely on the disposition to be made by the United States of the lands it had acquired under the Agreement." *DeCoteau*, 420 U.S. at 438 (footnote omitted); *see also supra* notes 353-354 and accompanying text. But *DeCoteau* fails to *further* concede that this fact negates any implication that legislators' use of the term "public domain," when debating how Congress should dispose of the Sisseton-Wahpeton lands, is relevant (given the requirement of tribal consent) to the question of the Lake Traverse Reservation's alleged termination. For further discussion of *DeCoteau*'s problematic treatment of the ambiguous term "public domain," see *infra* notes 574-586 and accompanying text.

remarks made by a key "sponsor[] of the comprehensive legislation"[518] regarding the bill's Sisseton-Wahpeton-specific sections and provisions,[519] Congressman Oscar S. Gifford, one of the first two elected legislators to represent the state of South Dakota in the U.S. House of Representatives.[520] Thus, the following transcribed remarks appear in the Congressional Record for the date September 29, 1890, under the heading "Sisseton and Wahpeton Bands, Sioux Indians":

> Mr. PERKINS. I yield to the gentleman from South Dakota [Mr. GIFFORD].
>
> Mr. GIFFORD. Mr. Speaker, I desire to present the following Senate bill which I send to the Clerk's desk.
>
> The Clerk read the title of the bill, as follows:
>
> A bill (S. 3216) to ratify and confirm an agreement with the Sisseton and Wahpeton band of Dakota or Sioux Indians, and for other purposes.
>
> Mr. GIFFORD. Mr. Speaker, with the permission of the House, I will make a brief statement with regard to this bill.
>
> Mr. KILGORE. Let the bill be read.
>
> Mr. GIFFORD. It is a long bill, and I will make a brief statement as to its provisions if there is no objection.
>
> The SPEAKER pro tempore. Without unanimous consent is given [sic] the bill will have to be read at length.
>
> Mr. GIFFORD. I want to make a brief statement before the bill is read, if I may have unanimous consent to do so. This bill ratifies an agreement made with Indians in South Dakota, something like one thousand Indians, for the *cession or opening to settlement of a portion of their reservation. The portion opened to settlement amounts to about 700,000 acres of land—678,000 acres. There are something like 900,000 acres in the total reservation.* These Indians have all taken their allotments. They are civilized Indians, not blanket Indians. There remain unallotted for their use and benefit 112,000 acres in

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[518] *DeCoteau*, 420 U.S. at 440; *see supra* text accompanying note 503.

[519] *See* Brief for Petitioner, *supra* note 153, at 19 n.12, 1974 WL 186007, at *15 n.12 ("Although the bill that became the 1891 Act was not introduced by Congressman Gifford, the sections pertaining to the Lake Traverse Reservation were incorporations of earlier bills introduced by him."); 21 Cong. Rec. 380 (1890) (noting that on Dec. 21, 1889, Congressman Gifford introduced "[a] bill (H. R. 3732) to accept and ratify an agreement made by the Sisseton and Wahpeton bands of Sioux Indians, and to grant a right of way for the Chicago, Milwaukee and St. Paul Railway through the Lake Traverse reservation, in South Dakota," and that the bill was sent "to the Committee on Indian Affairs"); 22 Cong. Rec. 3875, 3877 (1891) (identifying Congressman Gifford as one of three "Managers on the part of the House" for the "committee of conference on the disagreeing votes of the two Houses" who met with their Senate counterparts regarding the comprehensive Indian appropriations bill and "after full and free conference . . . agreed to recommend and [did] recommend to their respective Houses" final, successful passage of the bill which became the 1891 Act).

[520] *See Hon. O.S. Gifford Passed Away*, Dakota Farmers' Leader, Jan. 24, 1913, https://www.newspapers.com/image/167025978/ (noting that Gifford "was a member of the constitutional convention when Dakota Territory was divided into North and South Dakota" and "was a delegate to Congress three terms and honorably served on important committees").

> round numbers. By the terms of the agreement it is proposed to pay to these Indians the sum of $2.50 per acre. The agreement is perfectly satisfactory to the Indians and to all the parties concerned. The $2.50 per acre will be paid back by the settlers, or, in other words, the Government is reimbursed for the value of the land paid to these Indians for the land. It will all be paid back into the Treasury of the United States by the settlers whenever the land is taken and occupied for settlement, which will be at once.[521]

As the italicized selection indicates, Representative Gifford clearly understood that (1) the term "cession," as used in the 1889 Agreement with the Sisseton-Wahpeton Dakota,[522] meant only the "opening to settlement of a portion of [the Indians'] reservation" and (2) the "portion" thus "opened to settlement" amounted to "678,000 acres" of the approximately "900,000 acres in the total [Lake Traverse] reservation."[523] Gifford's explanation of the 1889 Agreement—soon to be ratified by the 1891 Act[524]—coming, as it was, from the primary sponsor/proponent of the agreement's ratification in the House of Representatives, is both weighty and highly probative, vividly pointing toward the conclusion that Congress's ratification of the Indians' "cession . . . of a portion" of their "total reservation"[525] did *not* eliminate the reservation's boundaries.

DeCoteau also ignores additional remarks by legislators in debates over bills closely tied to the 1889 Agreement and the 1891 Act, remarks that likewise clearly evince the Lake Traverse Reservation's continuing existence. One such bill was H.R. 3732, a bill "to accept and ratify an agreement made by the Sisseton and Wahpeton bands of Sioux Indians, and to grant a right of way for the Chicago, Milwaukee and St. Paul Railway through the Lake Traverse reservation, in South Dakota."[526] The bill, which was debated in the House of Representatives on March 12, 1890, referenced "a certain memorandum of agreement" dated December 8, 1884, "signed by Gabriel Renville, principal chief," and other Sisseton-Wahpeton representatives, including "Michael Renville, president of council."[527] In fact, the contents of that memorandum already had been incorporated into the body of the 1889 Agreement itself, comprising its fifth article.[528] Accordingly, the March 12, 1890 debate was, in essence,

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[521] 21 Cong. Rec. 10699 (1890) (emphasis added).

[522] *See* Agreement of 1889, art. II, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1037 (referring to "the cession, sale, relinquishment, and conveyance of the lands described in article one of this agreement"), *reprinted in DeCoteau*, 420 U.S. at 457.

[523] *See* 21 Cong. Rec. 10699 (1890) (remarks of Cong. Gifford); *supra* text accompanying note 521.

[524] *See* Agreement of 1889, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1035-38, *reprinted in DeCoteau*, 420 U.S. at 455-60.

[525] 21 Cong. Rec. 10699 (1890) (remarks of Cong. Gifford); *supra* text accompanying note 521.

[526] 21 Cong. Rec. 2162-63 (1890) (remarks of Cong. Perkins).

[527] 21 Cong. Rec. 2163 (1890) (reading of H.R. 3702).

[528] Agreement of 1889, art. V, ratified by Act of Mar. 3, 1891, ch. 543, § 26,

Congress's initial consideration of a portion of the agreement that the Sisseton-Wahpeton Dakota Indians had signed three months earlier, at Sisseton Agency in December 1889.[529]

Crucial, then, are the legislators' contemporaneous—and consistent—references to the Lake Traverse Reservation's existence when they began debating the 1889 Agreement's provisions in March of 1890:

> Mr. PERKINS. . . . [T]his [railway] road has been already built and is now in operation. It secured, after negotiation with these Indians, by treaty the right to *enter the reservation*. The money has been on deposit in the Treasury Department, but the Indians can not get it because there has been no ratification of the agreement. . . .
>
> Mr. GIFFORD. I will state, Mr. Speaker, there are two short lines of road provided in this bill, one of which extends 40 miles *in the reservation*.
>
> Mr. ANDERSON, of Kansas. How much is *the reservation*?
>
> Mr. GIFFORD. It contains somewhere in the neighborhood of a million acres.
>
> And one line extends *across the reservation*, the other a short distance *into it*. . . .
>
> . . . .
>
> Mr. COBB. Let me ask the gentleman how *do these Indians hold that reservation*?
>
> Mr. GIFFORD. As a *permanent reservation*.
>
> Mr. COBB. By act of Congress?
>
> Mr. GIFFORD. No sir: under a treaty: and the language is that they shall hold it as a *permanent reservation*. That is the exact language, I believe, of the treaty.
>
> . . . .
>
> Mr. ANDERSON, of Kansas. . . . Has this company ever received from the United States, by an act of Congress, permission to *enter that reservation*?
>
> Mr. PERKINS. The object of this legislation is to ratify the agreement they made with the Indians, including the right of way *across the reservation*. There has never been any legislative action ratifying it. The Indians themselves gave the company this permission. Hence the necessity for the passage of this bill.
>
> Mr. ANDERSON, of Kansas. In other words, the railroad company, as I understand it, assume that they are the United States Government and enter into a treaty with the Indians for the purpose of constructing a railway *through that reservation*. They construct the road, and now come to us under the guise of confirming a treaty to justify them in their unmitigated impertinence in the attempt to exercise the authority which is only vested in Congress. Am I correct?

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26 Stat. 1035, 1038 ("The agreement, concluded with the said Sisseton and Wahpeton bands of Dakota or Sioux Indians, on the eighth day of December, eighteen hundred and eighty-four, granting a right of way through their reservation for the Chicago, Milwaukee and St. Paul Railway, is hereby accepted, ratified and confirmed."), *reprinted in DeCoteau*, 420 U.S. at 459.

[529] *See* S. Exec. Doc. No. 66, *supra* note 157, at 14-15 (listing Sisseton-Wahpeton Dakota signatories to 1889 Agreement).

> Mr. GIFFORD. No: I do not think you are at all. [Laughter.]
>
> Mr. ANDERSON, of Kansas. That is the position as it appears to me from the statements I have heard.
>
> Mr. GIFFORD. I have no doubt that is the gentleman's view, but it is not correct.[530]

While the Sisseton-Wahpeton leaders had first consented to the railway right-of-way across the Lake Traverse Reservation in 1884,[531] the spring 1890 debate took place after the contents of that yet-to-be-ratified memorandum had been formally incorporated into the 1889 Agreement.[532] By confirming, without modification, the entire 1884 railway memorandum,[533] the 1889 Agreement incorporated by reference the Indians'

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[530] 21 Cong. Rec. 2163-64 (1890) (emphases added).

[531] *See* S. Exec. Doc. No. 22, 49th Cong., 1st Sess., at 2-5 (1885) (letter from J.D.C. Atkins, Commissioner of Indian Affairs, to L.Q.C. Lamar, Secretary of the Interior) (transmitting "the agreement [made by the Sisseton and Wahpeton bands of Sioux Indians to grant a right of way for the Chicago, Milwaukee and Saint Paul Railway through the Lake Traverse Reservation], modified and amended . . . , and signed by a large majority of the Indians interested," executed at Sisseton Agency, Dakota Territory, Dec. 8, 1884). As was typical of the era, *see supra* note 228, U.S. officials used strong-arm methods to coerce the Indians' "consent" to the railway right-of-way. *See*, *e.g.*, S. Exec. Doc. No. 22, *supra*, at 8 (letter from U.S. Indian Agent Benjamin W. Thompson to Hiram Price, Commissioner of Indian Affairs) ("The chief and some of his headmen have fought me most persistently about this matter, and did not yield finally until after an all-day and all-night session at the beginning of the issue. I have used to combat them a party of young men, who, with the more progressive element, completely outvoted Chief Renville and party."); *see also* H.R. Exec. Doc. No. 71, 48th Cong., 1st Sess., at 39-40 (1884) (letter from U.S. Indian Agent Benjamin W. Thompson to Hiram Price, Commissioner of Indian Affairs) ("[A] council of chiefs and headmen was held on the 24th instant [i.e., Nov. 24, 1883], Col. W.R. Barr, inspector, being present. At that council the headmen complained of the short crops, especially the short corn crop, which was cut off by the frost in September. They asked for a grant from the old Sioux Reservation fund to help them through the winter. . . . At Colonel Barr's suggestion we told them that I would ask the honorable Commissioner to place the money to my credit to be paid out pro rata to the members of the tribe upon their signing the railroad agreement. This was strenuously opposed by Chief Gabriel Renville, who, for some reason, seems determined to prevent the agreement being signed, and in the council he was able to prevent any action favoring the signing. However, there was some argument on the subject, and I believe that if the suggestion of Colonel Barr is carried out, and I am enabled to offer the money to the individual Indians upon their signature being affixed to the contract, that the agreement will be rapidly and readily signed."); *id.* at 41 (letter from Hiram Price, Commissioner of Indian Affairs, to Henry M. Teller, Secretary of the Interior) ("Whilst I do not favor the proposition to distribute the money on hand as an inducement *per se* to the Indians to now sign the agreement, or upon the basis of a *per capita* payment, I see no objection, considering the wants and necessities of the tribe on account of short crops, as detailed by Agent Thompson in his letter, to an immediate application of the fund as heretofore authorized by the Department, viz: for the equal benefit of the Indians as, in the judgment of this office, their best interests may require; they (the Indians) being given to understand the source from which the money is derived, and that they are in all good faith bound to carry out the proceedings of their council, and execute the agreement without delay. Of course, if they still decline, the money can be returned and redeposited to my official credit to await further action in the premises.").

[532] *See supra* note 528 and accompanying text.

[533] Agreement of 1889, art. V, ratified by Act of Mar. 3, 1891, ch. 543, § 26,

insistence "that when the land is no longer used for railroad purposes it [must] revert back to the Sissetonewan [Sisseton] and Wahpetonewan [Wahpeton] Nation,"[534] a demand the United States accommodated via section 2 of the 1884 railway agreement.[535] Thus, the numerous references to "the reservation" in the 1890 congressional debate over this right-of-way provision[536] and the 1889 Agreement's wholesale incorporation of the 1884 railway memorandum,[537] in conjunction with the absence of any mention in the Congressional Record of the notion that the reservation would cease to exist once the agreement was ratified, point to only one rational conclusion: that Congress, like the Sisseton-Wahpeton Indians, did *not* believe, assume, or intend that the agreement's enactment would extinguish the reservation's boundaries but instead understood that tribal sovereignty and jurisdiction would persist, post-ratification, throughout the entire, unaltered reservation.[538]

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26 Stat. 1035, 1038 (ratifying and confirming "agreement concluded with the said Sisseton and Wahpeton bands of Dakota or Sioux Indians, on the eighth day of December, [1884], granting a right of way through their reservation for the Chicago, Milwaukee and Saint Paul Railway"), *reprinted in DeCoteau*, 420 U.S. at 459; *see supra* note 528 and accompanying text.

[534] S. Exec. Doc. No. 22, *supra* note 531, at 5 (May 15, 1884 letter from Principal Chief Gabriel Renville and other Sisseton-Wahpeton Dakota leaders to U.S. Indian Agent Benjamin W. Thompson) ("[W]e, the chief and council of the Sissetonewan and Wahpetonewan Nation . . . respectfully request that said agreement be amended as follows, viz: . . . that when the land is no longer used for railroad purposes it revert back to the Sissetonewan and Wahpetonewan Nation."); *see also id.* at 6 (letter from Hiram Price, Commissioner of Indian Affairs, to L.Q.C. Lamar, Secretary of the Interior) (acknowledging receipt of letter "transmitting the action of the council of the Sisseton and Wahpeton bands of Indians" requesting that the proposed railway agreement be amended to provide "that when the land is no longer used for railroad purposes it shall revert back to the Indians").

[535] *Id.* at 5 (letter from J.D.C. Atkins, Commissioner of Indian Affairs, to L.Q.C. Lamar, Secretary of the Interior) (showing § 2 of 1884 railway agreement as stating "[t]hat whenever the right of way and lands, the use and occupancy whereof are hereby granted, shall cease to be used for Indian purposes the same shall revert to the United States."). Because § 2 was added to satisfy the Indians' demand that the agreement be modified to require reversion of the right-of-way (while reservation status persisted) "back to the [Sisseton] and [Wahpeton] Nation" should the land "no longer [be] used for railroad purposes," *id.* (May 16, 1884 letter from Principal Chief Gabriel Renville and other Sisseton-Wahpeton Dakota leaders to U.S. Indian Agent Benjamin W. Thompson), the provision *must* be so interpreted. *Cf.* Worcester v. Georgia, 31 U.S. 515, 553 (1832) (instructing that if a term in an agreement with the Indians otherwise "would admit of no other signification" but one, when that term's "being mis[un]derstood" by the Indians nevertheless "is so apparent" and "results so necessarily from the whole transaction," the term "must . . . be taken in the sense in which it was most obviously used"—that is, the text must be construed according to how the Indians understood *or misunderstood* it).

[536] *See supra* text accompanying note 530.

[537] *See supra* note 533 and accompanying text.

[538] Authority for the 1884 railway right-of-way agreement derived from a provision of the 1867 Treaty which stated that the Sisseton-Wahpeton Dakota "hereby *cede* to the United States the right to construct . . . railroads . . . over and across the lands claimed by said bands (including their reservation as herein designated)." Treaty of Feb. 19, 1867, art. II, 15 Stat. 505, 506, as amended, 15 Stat. 509 (emphasis added), *reprinted in*

This conclusion is further cemented by examining ensuing debates regarding the comprehensive Indian appropriations bill, which ultimately became the 1891 Act, that took place in the House of Representatives in the summer of 1890.[539] As in the March 1890 debate over the railway right-of-way through the Lake Traverse Reservation,[540] a prominent and authoritative voice in the debate on June 17, 1890 was that of Congressman Gifford of South Dakota, the primary House sponsor/proponent of congressional ratification of the 1889 Agreement with the Sisseton-Wahpeton Dakota.[541] In one colloquy that exhibits extensive remarks by Congressman Gifford, the legislators debated how Indian education moneys should be appropriated:[542]

DeCoteau, 420 U.S. at 451; *see* S. Exec. Doc. No. 22, *supra* note 531, at 3 (letter from J.D.C. Atkins, Commissioner of Indian Affairs, to L.Q.C. Lamar, Secretary of the Interior) (transmitting 1884 agreement and indicating authorization for it in article II of the 1867 Treaty). Thus, the Sisseton-Wahpeton Dakota and the U.S. government were familiar with use of the word "cede" in a context that ensured that when the Indians agreed to "cede" rights to the United States the boundaries of their "permanent reservation," Treaty of Feb. 19, 1867, art. III, 15 Stat. 505, 506, as amended, 15 Stat. 509, *reprinted in DeCoteau*, 420 U.S. at 452, were not affected at all and remained intact.

[539] *See* 21 Cong. Rec. 6192-6205 (1890).

[540] *See supra* text accompanying note 530.

[541] *See supra* notes 518-519 and accompanying text.

[542] Criticism, as reflected in this colloquy, of the policy of transporting Indians from remote reservations to "Eastern schools," to be educated apart from the cultural influences of their own tribal communities, was delivered in scathing terms by Senator Preston B. Plumb of Kansas during the congressional debates over the Indian appropriations bill that became the 1891 Act:

> Mr. President, I want to say, and I say it with the full understanding of the effect of my words, that I do not believe the system of education upon which we spend millions of dollars has advanced the Indian one single iota in the scale of civilization. It has pacified him; it has to some extent given him as a hostage against war and things of that sort. It is in response to that sentiment which says it is cheaper to feed than it is to fight, and so on; and it is especially to the delectation of a few ladies and gentlemen who are worth some millions of dollars and who have got so high above those by whom they are surrounded that they do not care about the poor, and the weak, and the feeble, and the down-trodden in the cities from which they come, and who disport themselves annually at Mohonk and Newport and at other places where there is plenty of good living and plenty of good wines and things of that kind in delivering diatribes about the unwillingness of Congress to do the proper thing, about the unchristianlike conduct which we exhibit toward the Indian, and drink a few more bottles of champagne, stroke their bowels complacently, and adjourn.
>
> Mr. President, it is out of conditions of that kind and in response to sentiments uttered by men of that kind that we have evolved, in my judgment, the most pernicious thing that could possibly be applied to the Indian system of education, which does not take him at the bottom, which does not begin with him where we began and where all people who have advanced began, but takes him, so to speak, by the nape of the neck and yanks him upon a plane of civilization where, like the seed that was sown on the unfruitful ground, when the sun comes out he is parched and disappears.
>
> Mr. President, there is not one single living evidence of the usefulness, that is, the permanent usefulness, of this system of education. . . .

Mr. GIFFORD. Mr. Chairman, I should very much dislike to have the House or the country misled in regard to the course of life that the students in these Indian schools lead after they leave the schools. My experience, of course, is confined to the twenty or twenty-five thousand Indians within the State of South Dakota and to some in Wisconsin and in Minnesota. . . .

. . . .

This Indian problem is by no means solved as yet. The question is not settled. The Indian is not yet a civilized being, but he is becoming civilized rapidly. All of these tribes of Indians that to-day feel the influences of the settlements in their vicinity are becoming civilized and self-supporting rapidly. We are brought into immediate and close contact with this question in South Dakota. We know these Indians in our State can be made self-supporting. . . .

The Indians, let me say as an evidence of this, in Dakota, in Michigan, in Minnesota, and, I apprehend, largely in Montana, will be self-supporting after awhile; but the Government must maintain and carry on the industrial schools and they must be conducted somewhere *near these reservations*. Eastern schools are beneficial, and, as the chairman of the committee says, some of the most beneficial results we have seen have grown out of the establishment of these Eastern schools and their influences. But, I repeat, the Government must maintain its influence over the Indians; it must retain its guardianship over them and must conduct industrial schools itself *on or near the reservations*. . . .

This process of improving the condition of the Indians by educational industrial facilities must be continued in the East as well as in the West; but should be carried on largely *in the vicinity of the reservations*. . . .

I now yield the time back to the chairman of the committee.

Mr. PICKLER. Before the gentleman takes his seat, will he permit a question?

Mr. GIFFORD. Certainly.

Mr. PICKLER. That is as to whether or not it is the desire of the parents of these Indians that these schools should be had at their homes or in their immediate vicinity rather than away from them.

Mr. GIFFORD. That is the desire largely among the Indians in our State. They so expressed themselves while here. But at the same

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. . . .

. . . I have had plenty of opportunities to see that the Indians we have kept on the reservations, whom we have put under the stress of the necessity to do something in order that they might have that whereby they were clothed and whereby their stomachs were filled, and who have had no education at all, have done better and are better worth citizenship to-day than the people upon whom we spend thousands of dollars in education, and who the more we educate them the less they become self-supporting and the less fitted practically for citizenship, if citizenship means anything except refined loaferism.

. . . We have got into the way of yielding everything in the sacred name of education to such an extent that if anyone proposes to limit any expenditure of the public money for that purpose, no matter how derived nor for whom expended, he of course is esteemed a heretic from thenceforth.

22 Cong. Rec. 3445-46 (1891) (remarks of Sen. Plumb).

> time there is no difficulty in securing some of these Indian children for the Eastern schools. The parents prefer to have them educated near their homes. There is no question about that. The Indians will receive much more benefit from the influence of the schools if they are located *near the reservation*. I am not in favor of discontinuing the Eastern schools; let the Eastern schools continue their work, but let us have some industrial schools *near their reservation*. It will be much more satisfactory to the Indians.[543]

Once again, this colloquy in the House of Representatives strongly implies that the legislators understood that the Lake Traverse Reservation would continue to exist after enactment of the provisions of the Indian appropriations bill.[544] The Supreme Court's disregard of these crucial House debates in the 1891 Act's legislative history adds to the many egregious errors in *DeCoteau*'s reasoning and conclusion.

The Court also ignored an illuminating Senate debate regarding an 1898 amendment to an Indian appropriations bill that altered provisions for disposing of the acreage the United States had purchased, pursuant to the 1891 Act, from the Sisseton-Wahpeton Dakota and other Indian nations. The amendment was proposed by Richard F. Pettigrew of South Dakota, the state's first full-term U.S. senator,[545] who had been centrally involved in the debates that led to passage of the 1891 Act.[546] In relevant part, the 1898 amendment provided:

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[543] 21 Cong. Rec. 6195 (1890) (emphases added).

[544] *See also supra* notes 524-525 and accompanying text; *supra* text accompanying note 537.

[545] *See* John Andrews, *Pettigrew's Redemption: Might a Sculptor Vindicate Sioux Falls' Forgotten Father?*, S.D. Mag., Sept./Oct. 2010, https://www.southdakotamagazine.com/pettigrews-redemption (subsequently revised for online publication).

[546] *See* 22 Cong. Rec. 3434-60 (1891) (showing Sen. Pettigrew's participation in Feb. 27, 1891 debate on Indian appropriations bill). Senator Pettigrew was—to borrow a label the Supreme Court applied to *other* legislators, *see* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 440 (1975)—one of the de facto "sponsors of the comprehensive legislation." He had proposed, for instance, language amending the bill with regard to school-section lands on the Sisseton-Wahpeton reservation, language that became part of § 30 of the 1891 Act. *See infra* notes 611-619 and accompanying text. The importance of Senator Pettigrew's participation in debates on the bill that became the 1891 Act is illustrated in an excerpt from the February 17, 1891 Senate proceedings, a colloquy that also exhibits Congress's understanding that to alter the boundaries of an Indian reservation, prior tribal consent was needed. The focus of the colloquy was Senator Pettigrew's proposed amendment for, among other purposes, securing "an agreement with the Indians residing upon the Pine Ridge and Rosebud agencies for a readjustment of the boundary line between said reservations," 22 Cong. Rec. 3436-37 (1891) (reprinting text of proposed amendment). In Senator Pettigrew's absence, his colleagues proceeded with the following discussion:

> Mr. DAWES. The Senator from South Dakota [Mr. PETTIGREW] desires to amend the phraseology of that in some particular. He is not in the Senate Chamber. I ask unanimous consent for him, if he comes in before the bill is finished, to go back and offer such amendment as he chooses to this amendment.
>
> Mr. McPHERSON. I should like to hear the Senator from Massachusetts state, as this seems to be some radical change, the object and purpose of this amendment.

That all settlers under the homestead laws of the United States upon the public lands acquired prior to the passage of this act by

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Mr. DAWES. I will state it to the Senate briefly. The Senator will call to mind the efforts which have been made to open a large portion of the Sioux reservation. Two propositions were made by Congress to the Sioux Nation to open about 11,000,000 acres. The first proposition failed. A commission was sent out there. They refused to accept the proposition. When that proposition was made, the line between the Pine Ridge and the Rosebud ran along a certain river. That was objected to, and is one of the reasons on the part of the Indians for not accepting the proposition.

It was suggested by the agent at Pine Ridge and by the commission when they came back that the line be changed over to another river, but in the mean time, while that was going on the Indians from the Rosebud agency moved out to that land supposing that it was coming within their reservation. The line was moved over to another river and included those Indians in the Pine Ridge reservation. That was accepted. Then the Department found it necessary to remove all those Indians back to the Rosebud agency; and that was one of the grievous complaints they made as a justification for the late war.

General [Nelson A.] Miles told them he would try and get some new arrangement of that line, and he has represented here that he assured them he would do what he could to make a new arrangement. It is a pretty difficult thing because the amount of annuities of the Indians there depends upon the number of Indians taking rations at the particular agency, and the fund here is to be divided into six separate funds in the same way. It is necessary, therefore, for two or three careful men to go on the ground and try to adjust that difficulty with them. That is the purpose of the amendment. I think it was a mistake to change the line, and I take this occasion to say that I made it myself, but I made it on the representation of these Indians.

Mr. McPHERSON. Then do I understand the Senator from Massachusetts to profess that he individually has been the cause of the last Indian war?

Mr. DAWES. No, not exactly that, because I simply was the humble scribe who wrote that change; that is all. I was not a Pharisee; I was nothing but a scribe.

The PRESIDING OFFICER. In view of the intention to go back to this amendment at a subsequent hour the Chair understands that it is not to be put on at the present time.

Mr. DAWES. I ask that the amendment be adopted, reserving the privilege to the Senator from South Dakota to come back to it to modify it if he desires.

Mr. SANDERS. The Senator from South Dakota is in the cloak room.

The PRESIDING OFFICER. The amendment will be agreed to, with the understanding that it may be regarded as open hereafter, if it is desired.

Mr. DAWES. The Senator from South Dakota [Mr. PETTIGREW] made a suggestion of a modification of phraseology, and I told him that I would give him an opportunity to offer it. He is absent, and I should like if he comes in and wants to modify it that his amendment to it shall be in order. It would not be in order after we had agreed to insert it unless by unanimous consent.

The PRESIDING OFFICER. That is the understanding.

Mr. DAWES. The Senator from South Dakota [Mr. PETTIGREW] is now here. I call his attention to changes in the phraseology which he suggested in the Pine Ridge commission amendment, on pages 52 and 53. I do not know that it is important. Perhaps the Senator will not care to offer an amendment. That amendment is pending now. If the Clerk will proceed with the reading of the bill the Senator can look it over and offer the amendment.

Id. at 3437.

> treaty or agreement from the various Indian tribes who have [resided] or who shall hereafter reside upon the tract entered in good faith for the period hereby required by existing law, shall be entitled to a patent for the land so entered, upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry . . . .[547]

In the debate over this proposed legislation—labeled by a skeptical senator as "the free-homes bill"[548]—Senator Pettigrew was challenged for not having included any parallel provision allowing homesteaders to obtain free parcels of land within abandoned *military* reservations.[549] In the ensuing extensive discussion, Pettigrew and all the other senators who participated in the debate—i.e., Pettigrew's supporters as well as his challengers—repeatedly adverted to the Lake Traverse Reservation's existence *in the present tense*. Because of the importance of this highly probative material from the Congressional Record evincing the Lake Traverse Reservation's post-1891 continuing existence—evidence *DeCoteau* does not disclose[550]—this Article displays it fully:

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[547] 31 Cong. Rec. 1647 (1898) (introduction of Sen. Pettigrew's proposed modification to amendment).

[548] *Id.* at 1648 (remarks of Sen. Pasco).

[549] *See infra* text accompanying note 553.

[550] In a footnote *DeCoteau* opines that "[n]o consistent pattern emerges" from the Supreme Court's avowed consideration of "numerous Interior Department memoranda and letters issued over the past 80-odd years, which refer to the area as either the 'reservation' or a 'former reservation,'" and that "[t]he authors of these documents appear to have put no particular significance on their choice of a label." *DeCoteau*, 420 U.S. at 442 n.27. This footnote appears to be a deflection from the obligation, in a reservation diminishment/disestablishment case, to judicially evaluate any ambiguities in the record of post-enactment governmental references to "the area" at issue in accordance with Indian law canons of construction, *see infra* notes 565-567 and accompanying text. Be that as it may, the four instances this Article examines, of debates and procedural activity from the Congressional Record conveying remarks that evince the Lake Traverse Reservation's continuing existence, are *not* examples of merely casual references with respect to matters unrelated, or only tangentially related, to Congress's 1891 Act ratifying the 1889 Agreement with the Sisseton-Wahpeton Dakota. Rather, all four instances—i.e., (1) the March 1890 debate in the House of Representatives over whether to ratify the provision comprising Article V of the 1889 Agreement, *see supra* notes 526-537 and accompanying text, (2) the June 1890 House debate over the 1891 Act's appropriations for Indian education, *see supra* notes 540-544 and accompanying text, (3) Congressman Gifford's September 1890 introduction of S. 3216, the bill ratifying the 1889 Agreement, into the House of Representatives, *see supra* notes 518-525 and accompanying text, and (4) the 1898 Senate debate over a proposed amendment to the 1891 Act's land-disposition provisions, *see supra & infra* notes 545-553 and accompanying text—are debates and legislative actions pertaining to matters that are *inextricable parts of the 1891 statute itself*. By not addressing or even mentioning the congressional debates and other activity regarding these *intrinsic components of the 1891 Act*, *DeCoteau* refrains from disclosing relevant and crucial evidence from the legislative history showing Congress's contemporaneous understanding and intent with respect to the 1889 Agreement and the 1891 Act, evidence that weighs heavily *against DeCoteau*'s holding.

Mr. ALLISON. . . . I still believe that it [i.e., the amendment as now modified by the Senator from South Dakota] ought not to be a part of this bill. In substance, this measure has passed this body during the present Congress, and in substance it passed this body during last Congress as applied *to Indian reservations*. . . .

I have not objected to the general policy suggested in the amendment of allowing homesteads *upon Indian reservations*, because that has been the policy of our Government for many years. . . .

The amendment as it stands will do injustice in some respects *upon several of the reservations*, because the lands which have been open to settlement have cost the Government a considerable sum of money per acre, and some of those lands, at least, are now worth from thirty to forty dollars an acre; yet this amendment makes no distinction as between the more valuable and less valuable lands.

. . . .

[B]y placing amendments upon this appropriation bill in a few instances—I do not know how many, because I have not been able to investigate the question—the men who have taken valuable lands *upon these Indian reservations* will now be entitled to receive them practically without paying anything for them.

Regarding *the great reservations*, I know as well as the Senator from Montana or the Senator from South Dakota that the Government will never realize any considerable sum out of the lands. That is eminently true in the State of South Dakota. Lands have been opened there to homestead settlement since 1889, I believe. Many of them have not been taken up, and for those that have been taken up I have no doubt the settlers have not been able to pay in many instances, because they can not raise crops upon those lands and compete with the rich lands in the Middle States.

. . . .

Mr. PASCO. I ask the Senator from South Dakota if the same provision with reference to abandoned military reservations is contained in this amendment which is contained in the free-homes bill?

Mr. PETTIGREW. The amendment does not include military reservations; otherwise it is just the same as before.

Mr. PASCO. Then I will ask the Senator from South Dakota to make it harmonious with the action of the Senate hitherto upon this subject and include the same amendment with reference to military reservations that is contained in the free-homes bill.

. . . .

Mr. PETTIGREW. I will say in reply to the Senator that the chief objection to this measure has been the fear that we would open up to settlement military reservations, which are often near large cities, and which are of great value. It is claimed that the rule ought not to apply to those. For that reason that portion of the amendment was stricken out.

The *great reservations* that we propose to reach contain lands that are not of great value. One reservation which was made in South Dakota was opened up to settlement in 1889. There were 9,000,000 acres of land in it, and there are 8,000,000 acres untaken and unoccupied. From that reservation only $87,000 has been

received.[551] As to the *other two reservations* in South Dakota, one of which was opened in 1890 and the other in 1894, at least one-third of the area is still untaken and open to settlement.[552] The reason it was not taken and has not been settled is that the people who did take land there found they were unable to pay for it, and therefore others would not come.

The total receipts of the Government since 1889 up to 1896 from the sale of *these reservations* was but $87,000, according to the official report, and since 1896 the total receipts have been $132,000, showing that the Government can not dispose of these lands under the provisions of existing law.

. . . .

Mr. PASCO. This is a very large question which is brought up by the Senator from South Dakota. It has hitherto been acted upon by the Senate. It relieves the actual settlers from their obligations to pay for the lands which have been purchased from the Indians and entered as homesteads with the full understanding that the purchase price was to be paid by the entrymen. The proposition is made to change this policy and to give to the settlers their homes free. If this policy is to be changed, I urged when the subject was before the Senate that the same privilege should be extended to actual settlers upon abandoned and opened military reservations. The appeal was so just that the Senator from South Dakota made no objection to the amendment when I offered it and it was adopted by the Senate. It has been discussed elsewhere and the proposition was regarded as fair and just. There is no reason why the settlers upon the abandoned military reservations in my own State and in other States should not be treated as liberally as settlers *upon the Indian reservation lands* which have been opened.

. . . .

Mr. ALLISON. The original amendment offered by the Senator from South Dakota included military reservations; but it is manifestly improper to deal with military reservations on an Indian appropriation bill, because it would be confessedly general legislation.

. . . .

Mr. PASCO. . . .

. . . .

The policy proposed by the Senator from South Dakota, that the people who went upon these lands shall have free homesteads, is a liberal one; but it ought to apply to them all. It ought not to segregate the settlers upon particular lands and grant relief to others, and I hope that if this question is to be pressed in its present shape some action will be taken which will protect them all and not give one set of settlers advantages over others.

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[551] The reference is to the Great Sioux Reservation. *See infra* note 617 and accompanying text.

[552] The references are to the Lake Traverse Reservation and the Yankton Sioux Reservation, respectively. *See* Agreement of 1889, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, *reprinted in DeCoteau*, 420 U.S. at 455-60; Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 314-19.

Mr. MORRILL. Mr. President, it seems to me that this is a question as to which we ought to go rather slowly. It is a little curious that Senators will come here and persuade us to buy Indian lands and pay a high price for them on the sole ground that the Government is to be reimbursed by the sale of the lands, and when the treaty for the purchase of the lands has been consummated, then they come here and urge that we shall abandon the idea of taking any price for such lands, but that they shall be given free as homesteads.

. . . .

Mr. PETTIGREW. Mr. President, I will state, in reference to the amendment offered by the Senator from Florida, that it was offered on the floor during the extra session, and I did not object to it. We now find ourselves in a different situation. It is not germane to the pending bill. It refers to military reservations. This is legislation with regard to Indians and *Indian reservations*, and the question of disposing of a military reservation is of so much importance that it ought to be considered by a committee of this body, properly investigated, and reported upon.

. . . .

Mr. ALLEN. Mr. President, I heartily agree with the Senator from Florida that many of the military reservations ought to be thrown open to settlement. . . .

But I hope the Senator from Florida will not insist on his proposed amendment, and by that means imperil the worthy and meritorious amendment offered by the Senator from South Dakota.

I do not think anything is to be gained by putting an amendment on the bill which would have the effect of defeating itself and defeating that portion of the bill to which it is offered or may be offered as an amendment. I feel confident that if every Senator here understood the situation and the condition of the homestead settlers on the Indian lands as they are understood by those of us who represent States *having Indian reservations in them*, there would be no serious objection to the adoption of the amendment.

. . . .

Mr. KYLE. . . .

. . . .

The committee should understand, with reference to the lands *upon the Sisseton and Yankton reservations*, in South Dakota, lands that will be particularly affected by this bill, that they are on the border of the semiarid region. When *the reservations* were thrown open to settlement, hundreds gathered upon the borders. They were ready with their fast teams to make a general run for the coveted lands. They seized whatever they could put their hands upon, only to find, after they had agreed to pay $2.50 an acre—that is the price *upon the Sisseton Reservation*—that the land was in many instances valueless.

Many of them will have to prove up this year, I believe, and will be forced to pay the $2.50 an acre. To do this, Mr. President, a mortgage will have to be placed upon the land, as with poor crops they have been able to save but little, and this has been expended for necessary improvements. I appeal, therefore, to the Senate to pass this amendment. It is in the line of fair treatment to this noble band of

> self-sacrificing people, who, by subduing the wildness of the frontier, do more for progress and civilization than any other class of citizens.
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> . . . .
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> Mr. PASCO. . . .
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> . . . .
>
> . . . I give notice now that if this amendment is adopted by the House of Representatives and the settlers upon the Indian lands are provided for in this bill, I shall take further steps to see that these other interests of settlers on abandoned military reservations in Florida and elsewhere are protected, and I shall be glad then to have the assistance of the Senators who have this morning assured us that they would assist when the question comes before the Senate as a separate proposition. I feel, however, that injustice is being done in excluding from this beneficent legislation the privilege of free homes for these worthy people who have settled upon abandoned military reservations, who are just as much entitled to consideration as those who have settled upon the Indian lands . . . .
>
> . . . .
>
> The VICE-PRESIDENT. The question is on agreeing to the amendment offered by the Senator from South Dakota [Mr. PETTIGREW].
>
> The amendment was agreed to.[553]

The Supreme Court's nondisclosure of ample evidence from the 1891 Act's legislative history weighing *against* a finding of reservation extinguishment,[554] including remarks by legislators from South Dakota (where the Lake Traverse Reservation was located) who personally shepherded the 1889 Agreement through the ratification process, reveals a pattern in *DeCoteau* of distorting the congressional record.

e. Muting the Presidential Proclamation

For Congress's 1891 ratification of the 1889 Agreement with the Sisseton-Wahpeton Dakota to become law, the President, of course, had to approve and proclaim it. *DeCoteau*'s only reference to President Benjamin Harrison's final approval is a single sentence: "On April 11, 1892, President Harrison declared open for settlement all 'lands embraced in said reservation, saving and excepting the lands reserved for and allotted to said Indians.'"[555] The President's express reference—when approving, in 1892, the ratified agreement—to "lands *embraced in* [the] reservation"[556] obviously is crucial evidence that the legislation, thus proclaimed, did *not* abolish the Lake Traverse Reservation.[557] But there is more, and

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[553] 31 Cong. Rec. 1648-50 (1898).

[554] *Cf.* Fletcher § 7.2, *supra* note 14, at 298-99 (observing that *DeCoteau*'s questionable legal analysis, including the case's "drawing from anecdotal histories" and generally conducting arguably "shoddy history at best," lends the impression that "there was no legislative history directed at the continued existence of the reservation").

[555] *DeCoteau*, 420 U.S. at 442 (footnote omitted) (quoting Proclamation of the President, Apr. 11, 1892, No. 22, 27 Stat. 1017, 1017).

[556] Proclamation of the President, Apr. 11, 1892, No. 22, 27 Stat. 1017, 1017 (emphasis added), *quoted in DeCoteau*, 420 U.S. at 442; *see supra* text accompanying note 555.

[557] *See* Brief for Petitioner, *supra* note 153, at 40, 1974 WL 186007, at *24-*25 (citations

stronger, evidence of the reservation's continuing existence in the 1892 proclamation—evidence *DeCoteau* leaves undisclosed.

The Eighth Circuit Court of Appeals, for instance, in the lower-court decision that the Supreme Court reversed in *DeCoteau*, had stated that "[t]he only direct reference to the boundaries of the reservation subsequent to the 1891 Act came from President Harrison in his proclamation opening the lands '*within* the Lake Traverse Reservation' to settlement," a reference that was "by no means conclusive" with respect to the argument that the boundaries had been legislatively extinguished.[558] The full sentence from which the Eighth Circuit borrowed the quoted phrase states as follows: "The lands to be opened for settlement are for greater convenience particularly described in the accompanying schedule, entitled 'Schedule of lands *within the Lake Traverse Reservation* opened to settlement by proclamation of the President dated April 11, 1892,' and which schedule is made a part hereof."[559] But in addition to this *second* reference, noted by the appellate court, to the "opened" lands[560] being "in" or "within" the reservation there is this *third* instance, embedded in one of the proclamation's "Whereas" clauses: "Whereas, by agreement made with said Indians residing on said reservation, dated December 12, 1889, they conveyed, as set forth in article one thereof, to the United States, all their title and interest in and to all the unallotted lands *within the limits of the reservation* . . . ."[561] Neither of these two additional examples of language from the presidential proclamation evincing the reservation's existence is addressed, of course, in *DeCoteau*. Nor is an informative margin note that appears adjacent to the solitary fragment extracted in *DeCoteau*—i.e., a note designating the for-sale acreage as "Lands *on Lake Traverse reservation*, North and South Dakota, open to settlement April 15, 1892."[562]

But the most telling evidence is the proclamation's detailed specifications of the *existing boundaries* of the Lake Traverse Reservation,

omitted) ("That the President, as the chief executive of the United States, the ultimate guardian of the Sisseton and Wahpeton Sioux, contemplated an undiminished reservation is clearly indicated by the terms of the Proclamation. . . . The President also warned that until the official opening no entry was to be made upon the reservation lands except by the Indians. Surely, if the lands had been excluded from the Reservation, the Indians would have no greater right of entry than others.").

[558] United States *ex rel.* Feather v. Erickson, 489 F.2d 99, 102 (8th Cir. 1973) (decision below) (emphasis in original) (quoting Proclamation of the President, Apr. 11, 1892, No. 22, 27 Stat. 1017, 1018), *rev'd*, *DeCoteau*, 420 U.S. 425 (1975).

[559] Proclamation of the President, Apr. 11, 1892, No. 22, 27 Stat. 1017, 1018 (emphasis added).

[560] *See supra* text accompanying note 559.

[561] Proclamation of the President, Apr. 11, 1892, No. 22, 27 Stat. 1017, 1017 (emphasis added).

[562] *Id.* (emphasis added) (margin note). The margin note is particularly significant because it shows that the President understood that the unallotted lands that were proclaimed to be "open to settlement" starting on April 15, 1892—a year *after* the 1891 Act's ratification of the 1889 Agreement with the Sisseton-Wahpeton Dakota—were "[l]ands *on [the] Lake Traverse reservation*." *Id.* (emphasis added).

exact descriptions President Harrison provided for the practical purpose of allowing land-district offices to administer homesteaders' acquisition of the for-sale parcels. Thus, the proclamation includes the following specific geographical guideposts in attaching the acreage to particular land districts:

> All that portion *of the Lake Traverse Reservation*, commencing at the northwest corner *of said reservation*; thence south 12 degrees 2 minutes west, following the west *boundary of the reservation* to the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence east, following the new seventh standard parallel to its intersection with the north *boundary of said Indian reservation*; thence northwesterly with *said boundary* to the place of beginning, is attached to the Fargo land district, the office of which is now located at Fargo, North Dakota.
>
> All that portion *of the Lake Traverse Reservation*, commencing at a point where the new seventh standard parallel intersects the west *boundary of said reservation*; thence southerly along the west *boundary of said reservation* to its extreme southern limit; thence northerly along the east *boundary of said reservation* to Lake Traverse; thence north with said lake to the northeast corner *of the Lake Traverse Indian Reservation*; thence westerly with the north *boundary of said reservation* to its intersection with the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence with the new seventh standard parallel to the place of beginning, is attached to the Watertown land district, the office of which is now located at Watertown, South Dakota.[563]

None of this additional compelling evidence confirming the President's recognition of the Lake Traverse Reservation's continuing, post-1891 existence is mentioned or discussed in *DeCoteau*.[564]

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[563] *Id.* at 1018 (emphases added) (enumeration of paragraphs omitted); *see also* Brief for Petitioner, *supra* note 153, at 39, 1974 WL 186007, at *24 (emphasis in original) (citation omitted) ("On March 22, 1892, the Commissioner of Indian Affairs issued a Circular on 'Sisseton and Wahpeton Lands' in which he discusses the 'proclamation to be hereafter issued by the President, opening to settlement and entry the unallotted lands embraced *within the limits* of the Sisseton and Wahpeton (Lake Traverse) Indian reservation, in the State of North Dakota and South Dakota.' The Commissioner also mentions the 'boundary line between the States of North and South Dakota across the Lake Traverse reservation.'").

[564] Other instances of Executive Branch evidence left undisclosed and unexamined in *DeCoteau* include the body of federal administrative adjudications of the same period that clearly evince the Lake Traverse Reservation's continuing, post-1891 existence. *See*, *e.g.*, *[In re] Edward Parant*, *in* 20 Decisions of the Dep't of the Interior and Gen. Land Off. in Cases Relating to the Public Lands from Jan. 1, 1895, to June 30, 1895, at 53-55 (S.V. Proudfit ed., 1895) (emphases added) (Jan. 21, 1895 final decision of M. Hoke Smith, Secretary of the Interior, reversing a judgment of the Commissioner of the General Land Office, referring to the place of appellant's July 26, 1892 homestead entry as a tract of "ceded land, lying *within the Sisseton-Wahpeton Indian reservation, known as Lake Traverse reservation*," and advising the Commissioner: ". . . I can not agree with you that Parant is disqualified to take a homestead *in the Lake Traverse reservation*"); *see also* Brief for Petitioner, *supra* note 153, at 41, 1974 WL 186007, at *25 (citations omitted) (discussing the *Edward Parant* case as

one of "[t]wo decisions of the Department of the Interior" that "expressly state the contemporaneous understanding that the [1891] Act did not disestablish or diminish the [Lake Traverse] reservation," with the other case being *"[In re] Madella O. Wilson*, decided on August 10, 1893," wherein "the First Assistant Secretary of the Interior refers to the land in question as 'in the Sisseton and Wahpeton Indian reservation'").

Also unaddressed in *DeCoteau* are comprehensive reports of the Commissioner of Indian Affairs for the years 1890, 1891, and 1892 which evince the Interior Department's recognition of the Lake Traverse Reservation's continuing existence. In his "Report of Sisseton Agency" dated September 20, 1890, U.S. Indian Agent William McKusick stated, under the subheading "Reservation," that "*this reservation* is triangular in form, with its southern point near Watertown, S. Dak., and reaching north about 90 miles, covering a small piece of North Dakota. It contains about 918,000 acres of land . . . ." *Reports of Agents* at 65, *in* 59th Ann. Rep. of the Comm'r of Indian Aff. (1890) (emphasis added) ("Report of Sisseton Agency"). The report includes a subsection titled "Sale of Surplus Lands" that refers to the yet-to-be-ratified Agreement of 1889 with the Sisseton-Wahpeton Dakota, but makes no mention of any impact the agreement would have on the reservation's boundaries:

> In November last commissioners of the General Government held a council with these Indians for the purpose of obtaining a proposition to sell their surplus lands. A proposition was obtained, signed by a large majority of the tribe, and the same is now before Congress for ratification. It is earnestly hoped that said agreement will be ratified, in order that these Indians may be relieved from a half-starved, half-clothed condition and placed in more comfortable circumstances.

Id. A year later, in a report dated September 30, 1891, Agent McKusick similarly described the still-existing reservation: "*This reservation*, which is known as the Lake Traverse Reservation of South Dakota, contains about 918,000 acres of land, is triangular in shape, with its point near Watertown, S. Dak., and extending north 90 miles or more, covering a small part of North Dakota." 60th Ann. Rep. of the Comm'r of Indian Aff., *supra* note 452, at 418 (emphasis added) ("Report of Sisseton Agency"). The Commissioner of Indian Affairs likewise invoked the reservation's existence in 1891, stating that "*[o]n the Lake Traverse Reservation*, in South Dakota, [the work of making allotments] will probably be completed early in October." *Id.* at 41 (emphasis added). And in 1892 the Commissioner made a similar reference to the reservation's continuing existence: "All the Sisseton and Wahpeton Indians *located upon the Lake Traverse Reservation* have received their allotments and the surplus lands have been opened to settlement." 61st Ann. Rep. of the Comm'r of Indian Aff. 67 (1892) (emphasis added). Significantly, in the 1892 report the Commissioner adverted to the case of the Sisseton-Wahpeton Dakota as an example of "an entire change of the industrial situation *on the reservations*" that had come about *after the sale of surplus lands*. *Id.* at 98 (emphasis added). The Commissioner wrote:

> Where the lands have been allotted, *the surplus sold*, and a white community has been brought into immediate contact with the Indians, as is the case, for instance, among the . . . Sissetons . . . , it is believed that such an entire change in the situation will be brought about in the course of a comparatively short time that every competent Indian, man or woman who desires employment can have it either at good wages working for white people or in remunerative return when working at their own homes.

Id. (emphasis added); *see also id.* at 108-09 (emphasis added) (listing as "Action Pending Before Congress," under the subheading "Sisseton and Wahpeton Reservation," a "'bill granting right of way to the Watertown, Sioux City and Duluth Railway Company *through the Sisseton and Wahpeton Indian Reservation*'" and stating that "[t]he bill was reported on in office letter of May 21, 1892, to the Secretary of the Interior"). As in the 1890 and 1891 reports, the report of the Commissioner of Indian

f. Loading the Canons with Magic Weapons

This Article has shown that a full and fair examination of (1) the text of the 1891 Act ratifying the 1889 Agreement with the Sisseton-Wahpeton Dakota, (2) the proceedings of U.S. negotiations with tribal representatives, (3) the Act's additional legislative history as manifested in Senate and House reports and in congressional debates, and (4) the President's 1892 proclamation of the ratified agreement demonstrates overwhelmingly that the Act did *not* terminate or alter the boundaries of the Lake Traverse Reservation. This conclusion is reinforced in consideration of the applicable Indian law canons of construction, judicial rules that are crucial for interpreting statutes and treaty provisions involving Indian rights.[565] Only by systematically violating these canons while purporting to validate them[566]—and, in effect, *supplanting* them with a *contrary* and *antithetical* interpretive approach—could the Supreme Court presume to write that "'the face of the act,' and its 'surrounding circumstances'

Affairs of 1892 contains a "Report of Sisseton Agency," dated September 26, 1892, wherein newly appointed agent D.T. Hindman referred repeatedly to the reservation's continuing existence. *See*, *e.g.*, *id.* at 469 ("The Reservation and Indians.—The Sisseton and Wahpetons no longer hold their land in common, having taken allotments in severalty, and on April 15 of the present year *this reservation* was thrown open for settlement . . . ."); *id.* (emphasis added) ("[T]here is with the introduction of whites *on this reservation*, yet a worse enemy to the red man than the dance. It is alcohol.").

For additional examples of language from the reports of, and correspondence with, the Commissioner of Indian Affairs during the period 1892-1906 evidencing the Lake Traverse Reservations' continuing existence—"early interpretations of the 1891 Act [that] should be given great weight in ascertaining Congressional intent"—see Brief for Petitioner, *supra* note 153, at 41-42, 1974 WL 186007, at *25-*26; *cf.* Mattz v. Arnett, 412 U.S. 481, 505 (1973) ("[O]ur conclusion that the 1892 Act did not terminate the Klamath River Reservation is reinforced by repeated recognition of the reservation status of the land after 1892 by the Department of the Interior and by Congress."); Seymour v. Superintendent, 368 U.S. 351, 357 (1962) (footnote omitted) (stating that the Supreme Court's non-disestablishment "construction of the 1906 Act has been adopted by the Department of Interior, the agency of government having primary responsibility for Indian affairs"); *supra* notes 25-27 and accompanying text.

[565] The leading treatise in the field of Indian law concisely summarizes the canons:

> The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.

Cohen's Handbook § 2.02[1], *supra* note 16, at 113-14 (footnotes omitted); *see also* Fletcher §§ 5.4, 5.5, *supra* note 14, at 219-26 (discussing "Canons of Construction of Indian Treaties" and "Canons of Statutory Construction"); William C. Canby, Jr., American Indian Law in a Nutshell 122-30 (6th ed. 2015) (discussing "Sympathetic Construction of Treaties (and Statutes)").

[566] *See* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 444 (1975) (avowing that "[t]his Court does not lightly conclude that an Indian reservation has been terminated" and quoting from several cases that applied Indian law canons). *But see* Royster, *supra* note 120, at 307 n.189 (citing *DeCoteau* as a "diminishment case in which the Court . . . recited the [Indian law] canons and then refused to apply them").

and 'legislative history,' all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891."[567]

Thus, instead of following the rule that "[t]reaties [and agreements] are to be construed as they were understood by the tribal representatives who participated in their negotiation,"[568] *DeCoteau* fashions a false narrative regarding U.S. negotiations with the Sisseton-Wahpeton Dakota, creating an *illusion* of tribal consent to the Lake Traverse Reservation's extinguishment that is utterly contradicted by the historical record.[569] And instead of "constru[ing] federal legislation addressing Indian affairs liberally in favor of the Indians, . . . with ambiguous provisions interpreted to their benefit,"[570] *DeCoteau* assigns the text of the 1891 Act imaginary or "magic" meaning divorced from the shared understanding and intentions of the parties to the 1889 Agreement,[571] and cherry-picks from the Act's legislative history to conceal all evidence of Congress's recognition that the sale of the unallotted land did *not* alter the reservation's boundaries.[572]

It is true, of course, that "there is no doubtful language in the [1889] Agreement or in the 1891 Act" to which the canon requiring that ambiguities be "resolved in favor of the Indians" might be applied in *DeCoteau*; after all, neither the Act nor the Agreement contains "a word to suggest that the boundaries of the reservation were altered."[573] Still, where ambiguities on subsidiary issues arguably appear in the case, *DeCoteau* resolves them *against* the Indians. As discussed previously, *DeCoteau* isolates a remark by Senator Henry L. Dawes concerning the 1891 Act because of Dawes's mentioning the ambiguous term "public domain," thereby judicially promoting the implication that the Act relegated the unallotted acreage of the Lake Traverse Reservation, purchased by the U.S. government, to "public domain" status (whatever "public domain" might have meant for Senator Dawes).[574] But not only was Dawes adverting

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[567] *DeCoteau*, 420 U.S. at 445 (quoting *Mattz*, 412 U.S. at 505).

[568] Canby, *supra* note 565, at 122; *see also* Collins, *supra* note 214, at 21 (noting that "formal agreements with Indian nations that were ratified by the full Congress" are "essentially treaty equivalents that should be subject to the treaty canon").

[569] *See supra* notes 353-451 and accompanying text.

[570] Fletcher § 5.5, *supra* note 14, at 223.

[571] *See supra* notes 116-120 and accompanying text; *see also* Pirtle, *supra* note 106, at 446 (stating that with the *DeCoteau* decision the Supreme Court used "factitious reasoning" and "engaged . . . in intellectual legerdemain").

[572] *See supra* notes 453-499 and accompanying text.

[573] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 461, 463 (1975) (Douglas, J., dissenting); *see also* Pirtle, *supra* note 106, at 446 ("In the [1889] agreement and the [1891] Congressional Act approving it *there is not one single word of an intent to terminate the [Lake Traverse] Reservation*."); *cf.* Brief for Petitioner, *supra* note 153, at 21-22, 1974 WL 186007, at *16 (citation omitted) ("The construction of the 1891 Act probably does not require invocation of 'the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' No language in the 1891 Act expressly disestablishes or diminishes the reservation nor is such a consequence clear from the surrounding circumstances and legislative history.").

[574] *See supra* notes 510-513 and accompanying text. For evidence that Senator Dawes

to a section of the 1891 Act that could not possibly have altered the reservation since the Indians never consented to that unilaterally enacted land-disposal provision;[575] he also was not even purporting to provide a definitive, accurate summary of the land-status effects of the many different agreements with Indian tribes, including the 1889 Agreement with the Sisseton-Wahpeton Dakota as ratified by the 1891 Act. Rather, Dawes was simply responding to a direct question posed by a fellow senator amidst a barrage of complaints by perturbed colleagues about the convoluted and confusing process (then concluding) by which the colossal Indian appropriations bill was being rushed through Congress. An examination of the full context of Dawes's "public domain" comment—a context *DeCoteau* neither exhibits nor explains—reveals the unnerving circumstances in which the senator from Massachusetts found himself:

> Mr. STEWART said: Mr. President, I do not believe that the reading of a conference report which refers to amendments by numbers only furnishes any information to the Senate, and I ask unanimous consent that the report may be adopted without reading.
>
> Mr. GORMAN. No, no.
>
> Mr. STEWART. It will take an hour to read it. We can not know what it means when nothing but the numbers of the amendments are stated.
>
> Mr. COCKRELL. If we can not understand the amendments we shall have them read.
>
> . . . .
>
> The VICE PRESIDENT. The question is on agreeing to the conference report.
>
> Mr. CULLOM. Mr. President—
>
> Mr. DAWES. Has the conference report been adopted?
>
> Mr. CULLOM. Not yet.
>
> I was not present, Mr. President, when this bill was considered in the Senate, and I supposed it was an appropriation bill for the benefit of the Indians. But in looking it over I find less about appropriations than almost any other subject. There are provisions in reference to treaties, in reference to the appointment of commissions, in reference to cessions of land, and all manner of contracts, and, so far as I have been able to observe it within the last few minutes, I can scarcely imagine any subject that is not involved in this bill.
>
> . . . I would like very much, if the Senator from Massachusetts feels disposed to do so, that he should explain somewhat why all these different propositions and provisions in reference to other matters besides appropriations are incorporated in this bill.
>
> Mr. DAWES. When this bill was up for consideration before the Senate its peculiar character was unfolded and discussed at great length. Therefore the Senate is responsible for its peculiar condition, for it was thrashed about as well as the Senators on different sides of

actually understood that the sale of any Indian tribe's surplus lands pursuant to the provisions of the 1887 General Allotment Act would keep reservation boundaries intact, see *infra* note 647.

[575] *See supra* notes 513-517 and accompanying text.

the Senate Chamber were capable of doing. I will say to the Senator that it is the most ill-shaped and ill-gotten-up bill I have ever had any experience with.

Mr. CULLOM. I hope the Senator from Massachusetts is not responsible for it.

Mr. DAWES. I took particular pains to show to the Senate, as well as I was able, who was responsible for it. The bill came to this body in such shape that it was impossible for the Senate to relieve itself of the condition in which it was, for if this body stripped it and left it with nothing but the Indian appropriation bill proper, still the conference committee had to dispose of the matter stripped out of it, and therefore the Senate alone could not strip it and keep it stripped.

All but two of these large agreements with the Indians passed the Senate a long time ago in separate bills. They went to another body and were not acted upon there, but were taken by the Committee on Indian Affairs in the last week of the session and put bodily into this bill. That body, by an overwhelming vote, kept them there, in spite of everything that could be done. Therefore, this Senate, having no power over any other body than itself, was compelled to conform its action to this condition of things.

Mr. CULLOM. Mr. President, I suppose it is entirely too late in the session to think about rejecting this bill containing these appropriations and starting anew. So far as I am concerned, I do not feel disposed to vote for the conference report. I apprehend what the Senator from Massachusetts has stated, that almost every bill which has been before this Senate with reference to the Indians, or Indian reservations, or Indian lands, or Indian contracts, or Indian treaties, has managed somehow or other to get into this bill which is called an appropriation bill. I must insist that that kind of legislation, which we are going into more and more every session of the Congress of the United States, embodying measures of every sort, size, and kind that we can not take care of separately, certainly ought to be abolished before a very much longer time elapses, or else we may as well abolish all attempted legislation by separate acts, and let the Committee on Appropriations embody in the bills called appropriation bills whatever legislation they think necessary in the interest of the country.

. . . .

Mr. PLUMB. . . .

. . . Mr. President, I am glad the Senator from Illinois [i.e., Senator Collum] has brought this matter to the attention of the Senate and shown to some extent how vicious this practice is and how from time to time it breaks out as a sort of eruption, not now so bad as heretofore, and yet I fear worse than it ought to be, indicating dereliction of duty in certain quarters, whereby at the last moment the only resource left for the passage of important legislation is that it shall be incorporated upon an appropriation bill.

Mr. DAWES. Let us have a vote.

Mr. COLLUM. I want to say one word further.

> The PRESIDING OFFICER (Mr. SANDERS in the chair). The question is, Shall the report of the conference committee be agreed to?[576]

After an enforced pause to require the chamber "to proceed to the consideration of an amendment by the House to the Senate joint resolution . . . to provide for the organization of the circuit courts of appeal,"[577] the cacophony of complaints about the still-pending conference report on the Indian appropriations bill continued:

> Mr. CULLOM. I simply desire to say a word or two in addition to what I have already said upon this bill.
>
> I called the attention of the Senate . . . to this tremendous bill or conference report which we are considering, because I have been impressed with the belief that unless something is done by the Congress of the United States to stop the tendency of accumulating legislation upon appropriation bills we shall reach the point after awhile of legislating upon appropriation bills altogether, so that nobody will know where to find a law upon any subject unless he goes all through all the appropriation bills of the Government. And while I am not complaining of anybody in this Senate in connection with this bill I do think that there should be a more determined effort on the part of Senators and committees of the Senate to keep out of appropriation bills the vast amount of legislation that is going into them upon every occasion when we get near the end of a session. I do hope that hereafter committees having charge of appropriations, whoever they may be, will do whatever it is possible for them to do to prevent such an amount of legislation as has been ingrafted upon appropriation bills at this very session up to this time. If we do not, we might as well, as I said awhile ago, abandon almost any effort at legislation outside of appropriation bills and depend upon getting whatever we want ingrafted upon appropriation bills.
>
> Mr. GORMAN. Now, I should like the Senator from Massachusetts to favor us with a statement of how much this bill appropriates or carries on its face.
>
> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is about $16,000,000. The Indian appropriation bill proper contains about $7,200,000. *The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain. In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as part of the public domain upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 per acre.*
>
> Mr. GORMAN. Now, do I understand the Senator from Massachusetts to say that provision is made here for the Government

[576] 22 Cong. Rec. 3877-79 (1891).

[577] *Id.* at 3879.

to charge the settler the same amount per acre that the Government has paid to the Indian for this land?

Mr. DAWES. As nearly as could be calculated. The idea of the several agreements, and the idea of their ratification in this bill, is to reimburse the United States for this land. In other words, the United States purchases for the homesteader and acts as go-between between the Indian and the homesteader. It is not the intention of the United States to make any money out of the homesteader, but it is trying to take pains to secure reimbursement.

Mr. GORMAN. What is the price per acre? Have the conferees agreed upon the amount fixed by the Senate?

Mr. DAWES. The amount originally was $1.25. I am not certain whether the change from $1.25 to $1.50 was effected by the Committee on Indian Affairs or by the committee of conference. My recollection on that point is vague.

Mr. GORMAN. When the Senate considered this bill it fixed the price at $1.50 and $2.50.

Mr. DAWES. Yes. When it came from the other branch it was $1.25 upon every part of it except the Sisseton and Wahpeton reservation.

Mr. GORMAN. Was it not retained at $1.50 and $2.50 in the conference report?

Mr. DAWES. Yes.

Mr. GORMAN. Then there is no loss to the Government in that direction?

Mr. DAWES. It has been complained that the Government has more than reimbursed itself, but I do not think the Government has, because there are a good many indefinite appropriations.

Mr. GORMAN. Mr. President, I agree with the suggestion of the Senator from Illinois [Mr. CULLOM], and I so stated when this bill was under consideration in the Senate, when it came here from elsewhere at so late an hour in this session, freighted with all these treaties that have been pending for years. They are not treaties made in the last three or four months, but treaties made in the last three or four years, that had never been ratified, although this body, engaged as it has been in the discussion of other measures foreign to the ordinary business of the Senate, in committees and the body itself had found time to consider the separate proposition of these treaties in separate bills, as is the right thing to do always to secure fair action.

Mr. DAWES. Will the Senator from Maryland allow me to correct myself?

Mr. GORMAN. Certainly.

Mr. DAWES. I am reminded by the Senator occupying the chair [Mr. SANDERS] that by the agreement with the Crow Indians we purchased land for very much less than $1.50 an acre, I think less than $1 per acre, and we sell that land for $1.50 an acre. The Senator from Montana [Mr. SANDERS] complained that we were making too much money out of that transaction.

Mr. GORMAN. . . .

. . . .

[W]hile attempts have been recently made to legislate here in relation to these treaties, they have never been considered. Yet now,

> in the closing hours of this session, this bill came to us in such a form that it was impossible to ascertain what was contained within its pages. . . .
>
> . . . I do not believe there is another member of the Committee on Appropriations besides the Senator from Massachusetts who can tell whether it is a fair bill, in the interest of this Government, or not; and I do not hold the Senator from Massachusetts responsible for what may result from the provisions contained within this measure.
>
> . . . .
>
> The PRESIDING OFFICER. The question is on concurring in the report of the committee of conference.
>
> The report was concurred in.[578]

In view of the illuminating context occluded by *DeCoteau*'s isolated paragraph fragment, italicized above,[579] Senator Dawes's remark *cannot* be construed as implying Congress's elimination of the Sisseton-Wahpeton people's reservation.[580] At most the comment is ambiguous, in which case application of the Indian law canons requires construing the comment in favor of preserving Indian rights and *against* any implication or inference of disestablishment.[581] But the remark's full context, as transcribed in the Congressional Record, shows that Dawes was merely doing the best he could to field irate comments and questions that were being pressed on him by fellow senators on the very day—and at the very hour—that the massive Indian appropriations bill was completing its arduous journey through the Senate's legislative process. Dawes's reference to the price to be paid per acre ($2.50) by the U.S. government for the Sisseton-Wahpeton lands was in direct response to Senator Gorman's having asked him "how much this bill appropriates or carries on its face." In trying to answer that difficult question (and making mistakes, concededly,

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[578] *Id.* at 3879-81 (emphasis added).

[579] I.e., Senator Dawes's referring to "the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain" and his assertion that "[a]ll this land is opened by this bill to settlement as part of the public domain," including land "which was obtained from the Sisseton and Wahpeton reservation, which is open at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 an acre," 22 Cong. Rec. 3879 (1891) (remarks of Sen. Dawes), *quoted in* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 441 (1975); *see supra* text accompanying note 510; *see also supra* text accompanying note 578.

[580] Further evidence that Senator Dawes was *not* implying that the 1891 Act, by making the Sisseton-Wahpeton unallotted lands available for purchase by settlers, would abolish the Lake Traverse Reservation is found in the 1891 volume of the proceedings of the Lake Mohonk Conference of Friends of the Indian, of which Dawes was an active member. In a discussion of the Conference that took place on October 8, 1891, Senator Dawes said to his fellow assembled participants: "In all of the agreements that were ratified [by the 1891 Act], it was provided that the land purchased should be open to the homestead settlers, who were to pay for it the sum of $1.25 an acre, except *in the Sisseton reservation*, where they were to pay $2.50." Proceedings of the 9th Ann. Meeting of the Lake Mohonk Conf. of Friends of the Indian, *supra* note 497, at 65 (emphasis added).

[581] *See supra* note 31 and accompanying text; *supra* note 56 and accompanying text; *supra* note 570 and accompanying text.

in the process),[582] Senator Dawes was not even trying to accurately delineate or specify the bill's multitudinous effects on the land status of the various reservations and tribes affected by the comprehensive legislation.[583] The legislative context, as shown in the Congressional Record,

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[582] *See supra* text accompanying note 578.

[583] Although Senator Dawes had introduced the bill that became the 1887 General Allotment Act (or Dawes Act) into the Senate and "[h]is name stuck to the . . . act," Prucha, *supra* note 497, at 666, his views regarding the legal effects of allotment were, in fundamental ways, contrary to conventional understanding and disputed by leading Indian policy reform advocates and thinkers of his own time. Illustrating this are the September 27, 1888 transcribed proceedings of the Lake Mohonk Conference of Friends of the Indian, which show the assembly's adoption of a resolution endorsing congressional passage of a comprehensive bill "to establish Indian Police Courts and to define their Jurisdiction, and to regulate Judicial Proceedings within the Indian Reservations, and for other purposes." Proceedings of the 6th Ann. Meeting of the Lake Mohonk Conf. of Friends of the Indian 46, 71 (Isabel C. Barrows ed., 1888). In urging such adoption the proposal's architect, Professor James Bradley Thayer of Harvard Law School, chairman of the Lake Mohonk Conference's law committee, reminded the assembly that it had been the

> opinion of this Conference last year . . . that there *is* need of further legislation to protect the rights of Indians and others on the reservations. . . . I will assume it as the just view, that all persons on the Indian reservations, whether tribal Indians, or citizen Indians, or whites, should have courts and a system of law applicable to the reservations, and administered under the authority of the United States Government.

Id. at 47 (remarks of Prof. J.B. Thayer). Thayer acknowledged the lack of support from Senator Dawes, who was absent from that day's proceedings, explaining that "Dawes holds that when an Indian has taken up land in severalty, that land is taken out of the reservation. It is as if it were taken up bodily and lifted outside the reservation. It appears rather to us that he is still on the reservation . . . ." *Id.* at 69 (remarks of Prof. J.B. Thayer); *see also* Proceedings of the 5th Ann. Meeting of the Lake Mohonk Conf. 65 (1887) (remarks of Sen. Dawes) (opining that when Indians are assigned allotments "[t]hey stand upon the reservation no more" and that "[t]hey stand upon their homesteads as citizens of the United States, and no part of the homestead is a part of the reservation, and all the rest of the land is reservation"), *reprinted in* Henry L. Dawes, *Defense of the Dawes Act*, *in* Americanizing the American Indians: Writings by the "Friends of the Indian" 1880-1900, at 100, 106 (Francis Paul Prucha ed., 1973). Responding to a concern raised at the meeting by General Eliphalet Whittlesey—who a year later would lead the U.S. negotiations with the Sisseton-Wahpeton Dakota—that the proposed bill might "keep [the Indians] from becoming absorbed as a part of our body politic," Proceedings of the 6th Ann. Meeting of the Lake Mohonk Conf. of Friends of the Indian, *supra*, at 68 (remarks of Gen. Whittlesey), Professor Thayer said:

> I do not see that it would have that effect. . . . The bill assumes the continuance of the reservation system . . . . The bill is neutral as touching the length of time the reservation system shall continue; but while it continues it insists on the power of the United States Government to retain the control. It has a duty to these people as its wards so long as it keeps up this system,—the duty of administering as well as providing law, instead of allowing that system to be administered by their worst enemies, or by their neighbors in the States adjoining.

Id. (remarks of Prof. J.B. Thayer) (alluding to United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the states where [the Indians] are found are often their deadliest enemies.")). Following some fretting by the Lake Mohonk Conference's founder over having to disagree with Senator Dawes,

of Dawes's adverting to "the public domain" when answering a fellow senator's question about how much the massive Indian appropriations bill would cost the U.S. government[584] dispels any inference that Dawes's

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see id. at 70 (remarks of Quaker schoolteacher Albert K. Smiley) ("We cannot afford to lose the support of a man who is, by general consent, the best friend of the Indian in this country."), Dawes's own daughter offered words of reassurance:

> I think there is no danger that any difference of opinion here will "offend" Mr. Dawes. He is very sensitive lest there should be any such feeling. Of course, he has very strong opinions on this subject. He feels bound to hold them because he feels bound to do for the Indian the best that he can see to be done for him. Nothing that I remember for many years has grieved him so much as differing from the friends of the Indian on this subject. But he will be the first and strongest to beg you not to qualify your opinions on his account. He hopes the Mohonk Conference will feel no delicacy in supporting its own opinion on his account. The members of this Conference are responsible for their opinions as he is for his, and you may be sure that he will appreciate the delicate consideration that has been exhibited this morning.

Id. (remarks of Anna L. Dawes). The record of proceedings states that "[i]t was then unanimously voted that [the Conference's resolution endorsing passage of the Thayer Bill] should be referred to the Committee on Resolutions." *Id.* at 71.

This vignette from an 1888 meeting of the Lake Mohonk Conference underscores the peril of relying on a single, isolated remark by Senator Dawes when endeavoring to discern the congressionally intended land-status effects of the comprehensive 1891 Indian Appropriations Act which, in one of its numerous sections, ratified the 1889 Agreement with the Sisseton-Wahpeton Dakota. It also evinces a "widely held, contemporaneous understanding," Solem v. Bartlett, 465 U.S. 463, 471 (1984), that congressional acts facilitating allotment generally would *not* shrink or abolish reservation boundaries. *See also* Campbell, *supra* note 513, at 90 ("While the Thayer Bill never passed (largely because of the cost it was expected to involve), its proposal reflected the fact that lawyers saw the Dawes Act as deficient. . . . [A] number of lawyers [including Thayer] believed that the Dawes Act caused only uncertainty as to legal jurisdiction over the reservations and dire need for further legislation. This suggests that the provisions of the Dawes Act, and the surplus lands acts passed to implement it, did not, and were not meant to, accomplish the extension of state law over the reservations. . . . Allotment, paradoxically, did not weaken the reservation system, but necessitated its expansion."); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 478 (1976) (quoting Mattz v. Arnett, 412 U.S. 481, 496 (1973)) (observing that the policy of the General Allotment Act "was to continue the reservation system and the trust status of Indian lands"); *cf.* Cohen's Handbook § 1.04, *supra* note 16, at 75 (footnote omitted) (observing that "[u]nder the federal allotment and assimilation policy," as advocated by "the so-called 'Friends of the Indian,'" "Indians had to be permanently settled on fixed reservations, since only then could tribal lands be assigned to individuals"). For further discussion of the Thayer Bill and its implications, see Mathes, *supra* note 134, at 151; Prucha, *supra* note 497, at 679-81; Collins & Miller, *supra* note 497, at 97-100; H.R. Exec. Doc. No. 1, Pt. 5, 51st Cong., 2d Sess., at 898-900 (1890).

[584] *See supra* text accompanying note 578. Senator Dawes's focus, during the congressional debate, on allaying fears about the total cost of the Indian appropriations bill strongly implies his having used the term "public domain" in the sense of its "merely refer[ing] to land available for sale or disposition under the general land laws." Campbell, *supra* note 513, at 73; *see also* Barker v. Harvey, 181 U.S. 481, 490 (1901) (citation and internal quotation marks omitted) ("'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. The words 'public lands' are habitually used in our legislation to describe

imprecise, off-the-cuff-and-on-the-fly response implied Congress's intent to "destroy the existence of"[585] the Lake Traverse Reservation.[586]

Perhaps the starkest illustration of *DeCoteau*'s refusal to apply the Indian law ambiguities canon is the Supreme Court's rejection of the argument that a provision regarding school lands in the text of the 1891 Act strongly implies that Congress intended the reservation's continuing existence. As Justice William Douglas framed the matter in his *DeCoteau* dissent, "The only provision of the 1891 Act which extends state jurisdiction into the reservation is a clause in § 30 which exempts sections 16 and 36 and reserves them 'for common school purposes,' and makes them 'subject to the laws of the State wherein located.'"[587] In particular, § 30 of the 1891 Act provides:

> That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, *and be subject to the laws of the State wherein located . . . .*[588]

Adherence to Indian law canons is implicit in Justice Douglas's observation that § 30's express provision for the applicability of state law to sections 16 and 36 school lands clearly implies the *absence* of state jurisdiction everywhere else within the ceded acreage *by virtue of the reservation's continuing existence*.[589] This, of course, is the proper resolution, in accordance with Indian law principles,[590] of the debate among counsel

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such as are subject to sale or other disposal under general laws.").

[585] Seymour v. Superintendent, 368 U.S. 351, 356 (1962); *see supra* text accompanying note 24.

[586] In light of the courts' "hav[ing] generally served as the conscience of federal Indian law, protecting tribal powers and rights," David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Calif. L. Rev. 1573, 1573-74 (1996), the corrosive impact of *DeCoteau*'s wielding the term "public domain" cannot be overstated. As Professor Judith Royster bluntly puts it, "Hitching the language of the [1891] Act to the statements of the congressional sponsors, the Court held that the act disestablished the entire Sisseton-Wahpeton Reservation." Royster, *supra* note 56, at 33.

[587] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 464 (1975) (Douglas, J., dissenting).

[588] Act of Mar. 3, 1891, ch. 543, § 30, 26 Stat. 1039 (emphasis added), *quoted in DeCoteau*, 420 U.S. at 445 n.33.

[589] *See supra* text accompanying note 587; *see also* Pirtle, *supra* note 106, at 446 ("This provision is proof positive that Congress *did not* intend to terminate the Reservation and to make state law apply throughout!"); Erin Hogan Fouberg, Tribal Territory, Sovereignty, and Governance: A Study of the Cheyenne River and Lake Traverse Indian Reservations 117 (2000) ("By making sections 16 and 36 school lands, the [1891] act was recognizing the continued existence of the reservation. Otherwise, that clause would have been unnecessary.").

[590] *See supra* note 565 and accompanying text.

in *DeCoteau*[591] about the meaning of the 1891 Act's inclusion (in § 30) of the phrase "*and be subject to the laws of the State wherein located*."[592] In an amicus memorandum submitted to the Supreme Court in *DeCoteau*, the United States summarized the issue and how it should be resolved:

> [Respondent District County Court] argues that the placement of the comma between "purposes" and "and" indicates that all the land, not just the school sections, would be subject to state jurisdiction. We agree that non-Indians on those lands (and their interests) are subject to state law, but submit that the most reasonable reading of this clause, in historical context and in light of the "crazy quilt" pattern, is that the land remains a part of the Reservation and that tribal authority over Indians on these portions of the Reservation remains undiminished. Moreover, . . . the clause does not give a clear indication of congressional intent to terminate or diminish the reservation, and *any doubt should, of course, be resolved in favor of the Indians*. And here, since the 1891 Act ratified the 1889 agreement with the Tribe, *it is to be construed according to the sense understood by the Indians*.[593]

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[591] *See* Brief for Petitioner, *supra* note 153, at 22, 30-32, 1974 WL 186007, at *17, *20-*21; Brief for Respondent, *supra* note 132, at 126-29, 1974 WL 187535, at *76-*77; Reply Brief for Petitioner, *supra* note 132, at 6-9, 1974 WL 186005, at *5-*7.

[592] *See supra* text accompanying note 588.

[593] Memorandum of the United States as Amicus Curiae at 8-9, DeCoteau v. Dist. Cty. Ct. for the Tenth Jud. Dist., 420 U.S. 425 (1975) (No. 73-1148), 1974 WL 187467, at *5 (emphases added) (citations omitted). The United States' position on the school-lands issue was in accord with that of the Eighth Circuit Court of Appeals in one of the two consolidated cases reviewed by the Supreme Court in *DeCoteau*:

> Appellee leans upon a phrase extracted from section 30 of the 1891 Act. The phrase ", and be subject to the laws of the state wherein located" is read by appellee to confer state jurisdiction upon the entire portion of land opened to homesteading. Appellant argues a misplaced comma and contends that only school lands, sections sixteen and thirty-six, are subject to state jurisdiction. Appellant's argument is more plausible in light of the general pattern adopted by Congress in making specific grants of these numbered sections in each township to the states. We do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse reservation.

United States *ex rel.* Feather v. Erickson, 489 F.2d 99, 101-02 (8th Cir. 1973) (decision below) (citations omitted), *rev'd*, *DeCoteau*, 420 U.S. 425 (1975).

In arguing what it called "the 'subject to the laws of the State' comma issue," Brief for Respondent, *supra* note 132, at 134, 1974 WL 187535, at *79, the District County Court stated it had "addressed a letter to the English Department of the University of South Dakota, Vermillion, South Dakota, and requested an interpretation of the meaning and intent of Congress in regard to the aforementioned language contained in Section 30 of the 1891 Act." *Id.* at 128, 1974 WL 187535, at *77. Respondent reported that "[s]even members of the English Department responded in a detailed analysis of parallel structure, word order and punctuation," and that "[t]he *majority*, based upon their observations and analyses, 'supported the conclusion that the writer's intent was to allow the first "shall" to control the final phrase, with the resultant interpretation that all of the lands, not just those sections reserved for school purposes, are to be subject to state law.'" *Id.* at 128, 1974 WL 187535, at *77 (emphasis added) (citation omitted). The fact that the seven South Dakota English professors did not all agree (and respondent District County Court neglected to disclose just how closely divided

The Supreme Court majority in *DeCoteau* avoided applying the Indian law canons and brushed off the school-lands issue in a footnote, siding with the state and against the Indians. The wording of the brush-off, however, is subtly revealing:

> We think the disagreement irrelevant to the jurisdictional issue before us. The "school provision" was not part of the 1889 Agreement, and there is no indication in the legislative history that Congress intended the provision to qualify the terms of the cession of unallotted lands to the Government. . . . Even if we were to assume, with counsel for the tribal members, that the "state law" phrase of § 30 refers only to school lands, the natural inference would be that state law is to govern the manner in which the 16th and 36th sections are to be employed "for common school purposes." This implies nothing about the presence or absence of state civil and criminal jurisdiction over the remainder of the ceded lands.[594]

The *DeCoteau* majority opinion is correct in stating that "[t]he 'school provision' was not part of the 1889 Agreement . . . ."[595]—just as the land-disposal

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the panel's vote was) supports, of course, judicially resolving the arguably ambiguous "comma issue" in favor of the Indians, not the state. But moreover, the entire tedious punctuative enterprise is a textbook illustration of the kind of interpretive approach that longstanding Indian law principles *forbid. See*, *e.g.*, Fletcher § 5.5, *supra* note 14, at 224 ("[C]ourts presume the United States intends its enactments to benefit tribal interests. Standard rules of statutory interpretation do not apply, and courts interpret ambiguous provisions in federal statutes to the benefit of tribal interests.").

Curiously—and undoubtedly to make the final divergent vote of the selected state university academics appear less close than it really was—a solitary member of the University of South Dakota law faculty, Marion R. Smyser, also was tapped to weigh in on the "comma issue," rendering an opinion in alignment with that of the respondent state court and the majority of the English professors who answered the survey. The District County Court stated that Professor Smyser "ha[d] for several years instructed Legislation and similar courses at the School of Law of the University of South Dakota," Brief for Respondent, *supra* note 132, at 128-29, 1974 WL 187535, at *77. An online search-engine search conducted by this author yielded little further information about Professor Smyser—except an anecdote posted in the comments section of the website for the *Madville Times*, a blog billed as "Real liberal media for the great state of South Dakota":

> I recall a story about Professor Marion Smyser, a former railroad lawyer turned long time law school teacher at USD Law School. In the 70's a student in his civil procedure class argued that a particular court decision was "unjust." Smyser did not defend the decision, rather, he told the student to leave the classroom and look at the name engraved at the top of the entrance to the law school, and then come back and report to the class what the engraving said. The student returned and reported the engraving as "School of Law." Smyser then asked if the student saw any language about "justice" anywhere near the engraving, and the answer was no. Smyser had no further comment.

Caheidelberger, *President Obama All Action, Congress All Talk on Immigration Reform*, Madville Times, *subsequently renamed* Dakota Free Press, Nov. 21, 2014, http://madvilletimes.com/2014/11/21/president-obama-all-action-congress-all-talk-on-immigration-reform/ (last visited Dec. 22, 2021) (anonymous comment).

[594] *DeCoteau*, 420 U.S. at 445-46 n.33.

[595] *Supra* text accompanying note 594.

provision likewise was not part of the agreement either.[596] With regard to the latter point, any reference in the Congressional Record, as explained above,[597] to the lands the 1891 Act made available to homesteaders as being "public domain" lands therefore could not have altered reservation boundaries since reducing or abolishing the Lake Traverse Reservation *required the Sisseton-Wahpeton Dakota people's consent*. The same is true with regard to the school-lands issue: whatever the school-lands provision's precise meaning, that provision could not affect the boundaries of the reservation because the Indians never agreed to any change in those boundaries when they negotiated and signed the 1889 Agreement.[598] The unstated predicate implicit in *DeCoteau*'s school-lands footnote,[599] therefore, is the Supreme Court's embrace—*and enforcement*—of the *fiction* that the Sisseton-Wahpeton Indians *had* agreed to their reservation's extinguishment.[600] Having curated and promoted an *appearance* of tribal consent in a previous footnote,[601] the Court could, in this subsequent footnote, proceed on the assumption that state jurisdiction was "a given" because tribal consent to the reservation's dissolution was manifest in "the terms of [the Indians'] cession of unallotted lands to the Government" in 1889.[602] Accordingly, the Court could—and did—assign to the tribal-member parties the burden of proving any departure from this (false) baseline premise of complete "state civil and criminal jurisdiction over . . . the ceded lands"—that is, the burden of persuading the Justices that in § 30 of the 1891 Act, Congress chose "to qualify" such plenary state jurisdiction with regard, specifically, to the sections 16 and 36 school lands.[603] And from this judicially contrived starting point, the Court could—and did—conclude that the Sisseton-Wahpeton parties had failed to prove that Congress had deviated from the (false) premise in enacting the school-lands provision. Hence, "the presence . . . of state civil and criminal jurisdiction over [all of] . . . the ceded lands"[604] remained uniform and unbroken notwithstanding the school-lands provision because—in the Court's flawed analysis—(1) the Indians had consented, in 1889, to the elimination of the Lake Traverse Reservation[605] and (2) "there is no indication in the [1891 Act's] legislative history that Congress intended the [school-lands] provision to qualify" the resulting plenary state jurisdiction over all of the ceded lands.[606]

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596 *See supra* notes 514-517 and accompanying text.
597 *See supra* notes 514-517 and accompanying text.
598 *See supra* notes 358-451 and accompanying text.
599 *See supra* note 594 and accompanying text.
600 *See supra* notes 178-180 and accompanying text.
601 *See supra* notes 373-451 and accompanying text.
602 *See supra* note 594 and accompanying text.
603 *See supra* note 594 and accompanying text.
604 *See supra* note 594 and accompanying text.
605 *See supra* note 180.
606 *See supra* note 594 and accompanying text.

The absence of any mention of the Indian law canons in the Supreme Court's treatment of the school-lands issue in *DeCoteau* thus reflects a *sub silentio* "swapping-in" of a countervailing *states'-rights* premise to obviate the need to apply any otherwise pertinent Indian rights principles.[607] This, in turn, explains why the *DeCoteau* majority did not even bother to rebut Justice Douglas's facially compelling point that the 1891 Act's language regarding school lands "was deemed necessary because the South Dakota Enabling Act did not reserve the 16th and 36th sections in Indian reservations for school purposes; hence this special provision had to be made."[608] Notwithstanding the irrefutable truth of Douglas's observation about the South Dakota Enabling Act,[609] for the *DeCoteau* majority Congress's ratification of the 1889 Agreement meant that the Lake Traverse Reservation no longer existed; accordingly, the Court could simply ignore the negative implication urged by Justice Douglas and instead assign a trivial explanation for the school-lands provision, namely, that Congress wanted "state law . . . to govern the manner in which the 16th and 36th sections are to be employed 'for common school purposes.'"[610] Having founded its analysis on imaginary tribal consent, the *DeCoteau* majority had to—and did—come up with an imaginary congressional purpose for the school-lands provision.

Nevertheless, the only relevant contemporaneous discussion in the Congressional Record strongly supports Justice Douglas's dissenting position on the school-lands provision, not the contorted, falsely premised post hoc rationalizing of the *DeCoteau* majority. Thus, on February 27, 1891, Senator Pettigrew of South Dakota proposed adding the exact language that became the school-lands provision of the 1891 Act.[611] He explained:

> [M]y amendment requires that sections 16 and 36 shall be donated for the purpose of supporting the common schools of the State of South Dakota. If that provision were rejected as to every reservation

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[607] *See* Ennis, *supra* note 86, at 663 (discussing *DeCoteau* as illustrative of cases where "the Court's tendency to view state sovereignty as obviating the application of the [Indian law] canons is manifest").

[608] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 464 (1975) (Douglas, J., dissenting) (footnote omitted).

[609] The relevant language from the Enabling Act states:

> That upon the admission of each of said States [i.e., North Dakota and South Dakota] into the Union sections numbered sixteen and thirty-six in every township of said proposed States . . . are hereby granted to said States for the support of common schools . . . : Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants . . . of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants . . . of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

Act of Feb. 22, 1889, 50th Cong., 2d Sess., ch. 180, § 10, 25 Stat. 676, 679.

[610] *See supra* note 594 and accompanying text.

[611] *See* 22 Cong. Rec. 3457 (1891) (proposed insertion of section of Indian appropriations bill by Sen. Pettigrew).

> in the State of South Dakota when we were admitted in to the Union, we would have lost more than half of all the school lands donated to the State, which would be unjust and unfair . . . .[612]

Senator Pettigrew's remark reflects an understanding regarding the need for the school-lands provision that is parallel to, and supportive of, the point made by Justice Douglas, dissenting in *DeCoteau*—i.e., that the provision "was . . . necessary because the South Dakota Enabling Act did not reserve the 16th and 36th sections in Indian reservations for school purposes."[613] Pettigrew recognized that if the South Dakota Enabling Act had not contained a special provision facilitating the donation of school lands from the corpus of public lands that formerly were part of Indian reservations, South Dakota would have been shut out from real property resources, available to other states, "for the support of common schools."[614] Avoiding a similarly "unfair"[615] outcome vis-à-vis the Lake Traverse Reservation's ceded acreage clearly was on Pettigrew's mind when he proposed adding the school-lands provision to the 1891 Act. Pettigrew's apparent sense of urgency is understandable, moreover, for just one year previously—and only four months after South Dakota became a state[616]—President Benjamin Harrison had issued a proclamation accepting agreements obtained from the Sioux tribes of the former Dakota Territory pursuant to the Act of March 2, 1889, a momentous piece of legislation that broke up the Great Sioux Reservation and made millions of acres available to homesteaders.[617] While the South Dakota

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[612] *Id.* at 3457-58 (remarks of Sen. Pettigrew). Although *DeCoteau* cites these same pages from the Congressional Record, it does so solely to support the point that "it was decided that these lands should be sold to settlers at $2.50 per acre under the homestead laws," *see supra* note 507, without noting or mentioning Senator Pettigrew's explanation therein for proposing that the school-lands provision be added to the bill that became the 1891 Act.

[613] *See supra* note 608 and accompanying text.

[614] Act of Feb. 22, 1889, 50th Cong., 2d Sess., ch. 180, § 10, 25 Stat. 676, 679; *supra* note 609.

[615] *See supra* text accompanying note 612.

[616] *See supra* note 161.

[617] *See* Proclamation of the President, Feb. 10, 1890, No. 9, 51st Cong., 1st Sess., 26 Stat. 1554, 1554 ("Now, therefore, I, Benjamin Harrison, President of the United States, by virtue of the power in me vested, do hereby make known and proclaim the acceptance of said act [of Mar. 2, 1889] by the different bands of the Sioux Nation of Indians, and the consent thereto by them as required by the act is hereby declared to be in full force and effect . . . ."); Act of Mar. 2, 1889, 50th Cong., 2d Sess., ch. 405, § 28, 25 Stat. 888, 899 ("An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes") (providing that "this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians"); *see also* Herbert T. Hoover, *The Sioux Agreement of 1889 and Its Aftermath*, S.D. HIST., Spring 1989, at 56, 58 (footnote omitted) ("The Sioux Agreement of 2 March 1889 [further] reduced [the Great Sioux] reservation by 9,274,668.7 acres, leaving the Teton and Yanktonai tribes only 12,681,911 acres within the boundaries of the Cheyenne River, Crow Creek, Lower Brule, Pine Ridge, Rosebud, and Standing Rock reservations."); *cf.* Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts*

Enabling Act ensured that school lands would be granted to the state automatically once a reservation was "extinguished" and its lands "were restored to, and [became] a part of, the public domain,"[618] a "special provision had to be made"[619] regarding the Sisseton-Wahpeton lands because the 1891 Act would *not* extinguish the Lake Traverse Reservation and thereby trigger the automatic transfer of school land to the state. Senator Pettigrew's concerns were well taken, moreover, because his proposed school-lands provision was indeed added to the Indian appropriations bill and enacted into law as part of § 30 of the 1891 Act.[620]

As *DeCoteau*'s constant disregard of the Indian law canons demonstrates, the central defect in the case is the Supreme Court's rigid adherence to its own false narrative of tribal consent to the abolishment of the Lake Traverse Reservation.[621] This adherence is interwoven through the Gordian knot of *DeCoteau*'s multilayered contrivances and distortions of analysis; and in the course of this aggressive judicial activism[622] *DeCoteau* emplaces a menacing, albeit unspoken, proposition for

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of Allotment-Era Settlers, 36 Seattle U. L. Rev. 129, 150 (2012) (footnotes omitted) ("[E]ventually the required number of adult males signed the [1889] agreement to cede over 9 million acres of land and divide themselves onto several smaller reservations. However, the signatures were coerced: the Sioux were told that, if they did not sign, their land would be taken on less favorable terms. More aggressive tactics included jailing opponents of the cession and forbidding influential leaders, such as Sitting Bull, from speaking out publicly against the proposal.").

[618] *See supra* note 609. As Justice Douglas noted in his dissenting opinion in *DeCoteau*, remarks by legislators in subsequent sessions of Congress reflected this understanding of how the South Dakota enabling act functioned to generate state school lands from public lands that formerly were within Indian reservations. *See* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 462 n.1 (1975) (Douglas, J., dissenting) (quoting 35 Cong. Rec. 3187 (1902) (remarks of Sen. Gamble)) ("This provision [of the enabling act] did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain."); *id.* (quoting 38 Cong. Rec. 1423 (1904) (remarks of Cong. Burke)) ("I would state that under the enabling act under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, and it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain.").

[619] *See supra* note 608 and accompanying text.

[620] Act of Mar. 3, 1891, ch. 543, § 30, 26 Stat. 1039, *quoted in DeCoteau*, 420 U.S. at 445 n.33; *see supra* note 588 and accompanying text.

[621] *Cf.* Campbell, *supra* note 513, at 66-67 (noting that "in *DeCoteau*, the Court seized on the apparent acquiescence of the tribe (however that may have been gained) in the sale of the surplus lands").

[622] *Cf.* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 219 (2002) ("[U]nder the guise of interpreting allotment statutes, these [reservation diminishment and termination] cases accomplish precisely what Congress later sought to avoid by enacting its definition of Indian country—a clear indication that the Court has established and is enforcing its own Indian policy under the guise of judicial Indian plenary power."); Getches, *supra* note 586, at 1654 ("The foundation principles of Indian law demand resistance to the temptation of judicial activism. A return to foundation principles . . . would spare tribes the subjective

undermining the U.S. government's historical commitment to protecting and preserving Indian treaty rights.[623] Thus, without mentioning the word, *DeCoteau* effectuates an *abrogation* of the Sisseton-Wahpeton Dakota people's right to a "permanent reservation" home, expressly guaranteed by the 1867 Treaty that established the Lake Traverse Reservation.[624] Yet, the Supreme Court did not even attempt to reconcile this consequence of its analysis in *DeCoteau* with the Court's own stringent rules for finding Congress has deliberately abrogated an Indian treaty. That treaty abrogation standard itself was the product of judicial decisions that adhered to Indian law canons when addressing whether Congress had unilaterally destroyed the treaty rights of an Indian tribe.[625] In its overturned decision finding that the reservation was *not* disestablished in *DeCoteau*, the Eighth Circuit Court of Appeals included the treaty abrogation rule as

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judgments of courts by requiring congressional action, with the scrutiny of the political process and the tribes' full participation, before modifying their rights as sovereigns."); Frank Pommersheim, Broken Landscapes: Indians, Indian Tribes, and the Constitution 297 (2009) (discussing cases that exemplify the proliferation of "a judicial version of plenary power" in modern Indian law and that "permit[] the [Supreme] Court to make policy-driven decisions about what is 'best' for non-Indians who might potentially be subject to tribal jurisdiction").

[623] *Cf.* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 Calif. L. Rev. 601, 606-07 (1975) (footnote omitted) ("Because of the great importance of the rights guaranteed by Indian treaties, the power of Congress to abrogate should be exercised sparingly. Indian treaties should be abrogated only if 'consistent with perfect good faith toward the Indians.' Plainly, these treaty rights are significant enough that our jurisprudence should carefully guard against their loss."); King, *supra* note 65, at 403 ("The supremacy of Indian treaties, the weight given to treaty promises, and the deference the Indian canons accord the breadth of those promises demand an accordingly high bar for abrogation of treaty rights. Although the Supreme Court has established a relatively high bar for abrogation of treaty usufructuary rights, it has established an inexplicably low bar for abrogation of treaty rights to a homeland, i.e., for reservation disestablishment.").

[624] Treaty of Feb. 19, 1867, art. III, 15 Stat. 505, 506, as amended, 15 Stat. 509 ("[T]here shall be set apart for the members of said bands . . . the following described lands as a permanent reservation . . . ."), *reprinted in DeCoteau*, 420 U.S. at 451-52; *see*, *e.g.*, Wilkinson & Volkman, *supra* note 623, at 629 n.147 (observing that in *DeCoteau* the Supreme Court purported to have "found a strong showing that Congress had intended an abrogation"); *cf.* Frickey, *supra* note 500, at 1148 ("Diminishment or disestablishment would, of course, abrogate the treaty that established the reservation.").

[625] *See* Cohen's Handbook § 2.02[1], *supra* note 16, at 114 & n.5 (collecting, inter alia, treaty abrogation cases supporting the principle that "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous"); *see also* Frickey, *supra* note 98, at 417 ("[T]he Supreme Court has long applied a clear-statement requirement to congressional acts that appear to invade tribal sovereignty. The clearest example is the principle that, absent compelling evidence, a court should not hold that a federal statute has abrogated an Indian treaty. . . . Just as contemporary decisions protect against all but express repeals of values rooted in the Constitution, the Indian treaty abrogation doctrine protects against all but clear repeals of values rooted in the spirit of Indian treaties.").

first on the appellate court's list of Indian law principles that had to be applied to resolve the dispute:

> We must answer this question: Did the 1891 Act either on its face, or alternatively, when considered with the contemporaneous and subsequent legislative history, manifest Congressional intent to diminish the Lake Traverse reservation boundaries?
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> We have these guidelines: (1) *Intent to abrogate treaty rights is not lightly imputed to Congress*; (2) Congress having once established a reservation, all tracts remain a part of that reservation until separated therefrom by Congress. Indeed, Congressional intent to disestablish the reservation must be either expressed on the face of the Act or be clearly discernible from the "surrounding circumstances and legislative history." (3) Opening an Indian reservation for settlement by homesteading is not necessarily inconsistent with its continued existence as a reservation. (4) The well-preserved general rule is that Indians are to be left free from state jurisdiction and control. Federal jurisdiction is preferred.[626]

For its assertion that courts may not "lightly impute[] to Congress" an "[i]ntent to abrogate treaty rights"[627] the Eighth Circuit relied on a 1968 U.S. Supreme Court case, *Menominee Tribe v. United States*,[628] in which the high court manifested the judiciary's historical role in protecting Indian rights to the greatest extent possible by "not interpret[ing] a federal statute to abrogate an Indian treaty right . . . absent a clear statement to that effect."[629] Even after *DeCoteau*, when the Supreme Court in 1986 announced a relatively diluted treaty abrogation standard in *United States v. Dion*,[630] the threshold remained high enough to have prevented the Court from concluding that the 1891 Act abridged the guarantee of a "permanent reservation" under the 1867 Treaty with the Sisseton-Wahpeton Dakota.[631] "What is essential," the Court wrote in *Dion*, "is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve

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[626] United States *ex rel.* Feather v. Erickson, 489 F.2d 99, 101 (8th Cir. 1973) (decision below) (emphasis added), *rev'd*, *DeCoteau*, 420 U.S. 425 (1975).

[627] *Id.*; *see supra* text accompanying note 626.

[628] Menominee Tribe v. United States, 391 U.S. 404, 413 (1968), *cited in* United States *ex rel.* Feather v. Erickson, 489 F.2d at 101; *see* Wilkinson & Volkman, *supra* note 623, at 637 (discussing *Menominee Tribe* as "a particularly strong statement in support of Indian treaty rights").

[629] Fletcher § 5.6, *supra* note 14, at 226.

[630] United States v. Dion, 476 U.S. 734 (1986). *DeCoteau* is the initial building-block toward *Dion*'s weakened treaty abrogation standard. *See id.* at 739 (citing, inter alia, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977)) ("We have enunciated . . . different standards . . . for determining how such clear and plain intent [to abrogate Indian treaty rights] must be demonstrated. . . . In other cases we have looked to the statute's 'legislative history' and 'surrounding circumstances' as well as 'the face of the Act'"); *Rosebud Sioux Tribe*, 430 U.S. at 587 (citing, inter alia, *DeCoteau*, 420 U.S. 425 (1975)) ("But the 'general rule' [regarding ambiguities] does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary.").

[631] *See supra* note 624 and accompanying text.

that conflict by abrogating the treaty."[632] But in *DeCoteau*, there was no "clear evidence"—indeed, no evidence at all—that "Congress actually considered" any such conflict between deliberately "destroy[ing] the existence of"[633] the Sisseton-Wahpeton people's reservation home, on the one hand, and preserving the Indians' 1867 treaty rights, on the other, "and chose to resolve that conflict by abrogating the treaty."[634] All Congress intended, in passing the 1891 Act, was to purchase the unallotted acreage that the Indians had agreed to sell, and to make those parcels available so that homesteaders could buy them from the U.S. government and move onto the Lake Traverse Reservation. The fact that *DeCoteau* defies the Supreme Court's own treaty abrogation standard—and indeed does not even acknowledge the *existence* of a treaty abrogation issue—points, once again, to the pervasive role of the case's core fiction, i.e., the judicially fabricated narrative about the Sisseton-Wahpeton people's consent to the destruction of their own reservation,[635] a device the Court used, successfully, to circumvent the treaty abrogation issue altogether.

Because *DeCoteau*'s disregard of Indian law principles and adherence to a false narrative of tribal consent unfolded in a reservation disestablishment case in which the Supreme Court was purporting to heed "clear expressions of tribal and congressional intent,"[636] the case raised disturbing questions about the framework for interpreting acts of Congress in this area of Indian law going forward. Especially alarming was *DeCoteau*'s projecting an entirely imaginary tribal position regarding the impact reservation disestablishment would have on the Sisseton-Wahpeton Dakota people's ability to continue functioning as a sovereign government,[637]

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[632] *Dion*, 476 U.S. at 739-40; *see also* Clark, *supra* note 228, at 110 (endnote omitted) ("Of the various judicial tests applied to determine whether Congress actually intended to abrogate an Indian treaty, most involve some sort of express legislative reference to the Indian treaty rights under question and a clear showing of legislative intent to modify the treaty terms.").

[633] Seymour v. Superintendent, 368 U.S. 351, 356 (1962); *see supra* text accompanying note 24.

[634] *Dion*, 476 U.S. at 739-40; *see supra* note 632 and accompanying text.

[635] *See supra* notes 353-451 and accompanying text.

[636] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 447 (1975).

[637] Contrary to the Supreme Court's erroneous statement in *DeCoteau* that "[a] tribal constitution did not appear until 1946 . . . ," *id.* at 443 (footnote omitted), the Sisseton-Wahpeton Dakota had adopted a tribal constitution and legal code in 1884, governing conduct by Indians and non-Indians on the Lake Traverse Reservation. *See* Sisseton-Wahpeton Constitution (Sisseton and Wahpeton Peoples, 1884), *in* Documents of Native American Political Development: 1500s to 1933, at 423-51 (David E. Wilkins ed., 2009) [hereinafter "1884 Sisseton-Wahpeton Constitution"]; *see also* Anderson, *supra* note 160, at 124 ("As was typical with such constitutions in this age, the agent had a final say when any important issue came up, including the approval of law enforcement officers selected in the various districts that the new constitution created. After reviewing the various agreements and compromises in the document, the commissioner of Indian affairs signed it in February 1884."). Tribal historian Elijah Black Thunder and colleagues summarize the formation and structure of the Sisseton-Wahpeton constitutional government in the nineteenth century:

A clause of the [1867] treaty allowed the tribe to make their own laws and

with the Court's opining, on the basis of no evidence whatsoever, that

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> to form their own legislative body. A constitution was drafted in 1884. This was adopted by a grand council and submitted to the Indian Department in Washington where some changes were made. The constitution was then resubmitted to the grand council for final approval. The legislative body consisted of two divisions—the upper house composed of those recognized by the Indian Department as chief and headmen, and the lower house, composed of two representatives from each of the ten districts. The executive department consisted of a head chief, assistant chief, attorney general, secretary of state, treasurer and sheriff. There was a supreme court with a chief justice and four associates, and a constable and justice of the peace for each district. The justices of the peace had jurisdiction in cases involving $25 or less with all suits of larger amounts going to the supreme court. The sheriff had power to make arrests in any district and was paid in fees for services performed. . . .
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> . . . .
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> The legislature met every winter. At the first election one representative was chosen from each district to serve one year and one to serve two years. Subsequent elections provided for half the lower house to be elected each year. The executive officers held office for two years.
>
> The law-making bodies' actions were modeled after the state legislature with each house having to pass bills and then these being signed by the head chief and the Indian agent.

Black Thunder et al., *supra* note 137, at 63-64. The 1884 Sisseton-Wahpeton Constitution included several provisions that referred specifically to the reservation itself. The preamble states that

> in the year (1867) in a Treaty made between the United States and the Sisseton and Wahpeton Nations, it is provided in the tenth article that the chiefs and headmen located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the reservations.

1884 Sisseton-Wahpeton Constitution, *supra*, at 424. Article 1, section 1, of the 1884 tribal constitution provides that "[t]he boundary [of the] Sisseton and Wahpeton Reservation is that described in the treaty of 1867 . . . ," and Article 3, which established "[t]he Legislative power," provides that "[t]here shall be ten districts on the Reservation." *Id.* at 425 (second alteration in original). Article 4, section 2, includes the provision that "if any white man shall be found guilty of any of the offenses herein mentioned, he shall be immediately removed from the reservation . . . ." *Id.* at 439. Article 5, section 1, specifies criminal penalties for anyone who "except for medicinal purpose for the physician shall bring any whiskey, wine, beer, or any other intoxicating liquor within the Reservation." *Id.* at 440. In addition, the tribal legislature enacted bills in March of 1884, approved by both Principal Chief Gabriel Renville and U.S. Indian Agent Benjamin W. Thompson, that (1) required "[a]ny person desiring to trade within the bounds of the Reservation" to "apply to the Secretary of the nation for a License" in order to "be permitted to trade," and (2) imposed a tribal tax on "wood and hay sold outside the Reservation" by "[a]ny person." *See id.* at 448-49.

In *DeCoteau*'s implausible reasoning, this elaborate, developing system of nineteenth-century reservation-based tribal constitutional government—a system whose very *existence* the Supreme Court wrongly disavowed, *see DeCoteau*, 420 U.S. at 443 (footnote omitted) ("A tribal constitution did not appear until 1946 . . . .")—was abandoned, discarded, and swept away without a word or thought, and without the convoking of any constitutional amendment process, as a consequence of the Sisseton-Wahpeton Indians' simply having signed an agreement to sell their unallotted lands to the United States.

"the tribe . . . [was] satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs."[638] The obligation to ascertain the Indians' own understanding of treaties and agreements[639] would amount to little or nothing if courts could continue to simply invent a subjective position on a key issue like this, as *DeCoteau* did, and falsely attribute it to the Indians. Also ominous was *DeCoteau*'s referring to land-cession language like that in the 1889 Agreement with the Sisseton-Wahpeton Dakota[640] as being "precisely suited" to finding a reservation extinguished.[641] There is nothing intrinsic in words like "cede, sell, relinquish, and convey"[642] that denotes that parties to an on-reservation land-sale agreement understood the sale *also* would eliminate the reservation itself.[643] Moreover, the policy of the 1887 General Allotment Act—which Congress followed when obtaining and ratifying the 1889 Agreement[644]—specifies a procedure for the federal government's securing nothing more than "the purchase and release" of lands that a tribe might voluntarily "consent to sell";[645] it

[638] *DeCoteau*, 420 U.S. at 446.

[639] *See supra* note 214 and accompanying text.

[640] Agreement of 1889, art. I, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1036 (providing that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"), *quoted in DeCoteau*, 420 U.S. at 445; *see also infra* note 674.

[641] *DeCoteau*, 420 U.S. at 445 (concluding "that the Lake Traverse Reservation was terminated in 1891" and opining that "[t]he Agreement's [land-sale] language, adopted by majority vote of the tribe, was precisely suited to this purpose").

[642] Agreement of 1889, art. I, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1036, *quoted in DeCoteau*, 420 U.S. at 445.

[643] *See* Collins, *supra* note 214, at 47 ("But these words said nothing about abolishing the reservation, and the Court made no effort to ascertain the Indians' understanding of their import.").

[644] *See* S. Exec. Doc. No. 66, *supra* note 157, at 1 (letter from President Benjamin Harrison to the Senate and House of Representatives) (observing that the 1889 negotiations with the Sisseton and Wahpeton bands "for the purchase and release of the surplus lands in the Lake Traverse Indian Reservation" had been "conducted under the authority contained in the fifth section of the general allotment act of February 8, 1887"); *see also supra* note 158 and accompanying text; *supra* note 378; *cf.* United States v. Rickert, 188 U.S. 432, 437 (1903) ("Upon inspection of that agreement [of 1889 with the Sisseton-Wahpeton Dakota] we find nothing that indicates any different relation of the United States to the allotted lands from that created or recognized by the [General Allotment] act of 1887.").

[645] Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 389 (authorizing the Secretary of the Interior to negotiate with an Indian tribe "for the purchase and release" of surplus lands within a reservation "as such tribe shall, from time to time, consent to sell"); *see* Agreement of 1889, art. I, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1036 (quoting and paraphrasing section five of the 1887 General Allotment Act, in the Agreement's opening "Whereas" provision, as authority for the U.S. government's lawfully negotiating with the Sisseton-Wahpeton Dakota "for the purchase and release" of "such portions" of the Lake Traverse Reservation as the Indians might "consent to sell"), *reprinted in DeCoteau*, 420 U.S. at 455; *see also supra* note 158. The Interior Secretary's letter of instructions to the U.S. commissioners who negotiated with the Sisseton-Wahpeton Dakota likewise restricted the commissioners to the task of negotiating land-sale terms based on a determination of "the quantity of land to be

does *not* prescribe, expressly or implicitly,[646] any procedure for abolishing or diminishing a tribe's reservation, as the Supreme Court repeatedly has recognized.[647] By declaring that garden-variety land-sale terms were

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sold" by the Indians. Letter of Instructions, *supra* note 164; *cf.* S. Exec. Doc. No. 66, *supra* note 157, at 12 (letter from E. Whittlesey, D.W. Diggs, and Charles A. Maxwell, commissioners, to John W. Noble, Secretary of the Interior) ("We . . . are restricted by the act of Congress of February 8, 1887, section five (24 Stat. 388) [i.e., the General Allotment Act], and by our instructions."); *supra* text accompanying note 324; S. Exec. Doc. No. 66, *supra* note 157, at 21 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey) ("We were sent here to ask you what land you wished to sell and to make such arrangements and conditions as we could agree upon."); *supra* text accompanying note 252; S. Exec. Doc. No. 66, *supra* note 157, at 22 (report of councils with Sisseton and Wahpeton Indians) (statement of Gen. Whittlesey) ("In this agreement the United States Government agrees to pay for the land so sold under the allotment act . . . ."); *supra* text accompanying note 272. The Secretary's letter contains no authorization for negotiating a reduction or elimination of the Lake Traverse Reservation's boundaries, and the U.S. government's report shows that the commissioners never engaged in any discussion, ultra vires their charge, about a potential abolishment of the reservation during the two weeks of the transcribed negotiations. *See generally* Letter of Instructions, *supra* note 164; S. Exec. Doc. No. 66, *supra* note 157, at 15-29 (report of councils with Sisseton and Wahpeton Indians). During the negotiations, moreover, the U.S. commissioners repeatedly apprised the Indians of the fact that the Secretary had expressly confined the commission to "the purpose of negotiating . . . for the relinquishment of such portions of the Lake Traverse Reservation, not allotted, as said Indians may consent to release" and that the resulting written "form of agreement" must therefore specify the "terms and conditions agreed upon in Council" together with an exact "description of the lands to be relinquished." Letter of Instructions, *supra* note 164; *see supra* notes 164-165 and accompanying text; *supra* note 296 and accompanying text.

[646] Construing section five of the General Allotment Act as *implicitly* prescribing a reservation diminishment/disestablishment procedure would violate the Indian law canons that require, inter alia, "that . . . statutes . . . be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor." Cohen's Handbook § 2.02[1], *supra* note 16, at 113 (footnotes omitted); *see supra* note 565. Thus the Supreme Court has instructed that provisions of the General Allotment Act are to be interpreted "[a]ccording to a familiar rule," i.e., that "legislation affecting the Indians is to be construed in their interest." United States v. Nice, 241 U.S. 591, 599 (1916); *see also supra* note 64 and accompanying text. Inferring an implicit reservation diminishment/disestablishment procedure would defy, moreover, the Supreme Court's acknowledgment that the General Allotment Act's "policy was to continue the reservation system and the trust status of Indian lands . . . ." Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 478 (1976) (quoting Mattz v. Arnett, 412 U.S. 481, 496 (1973)); *see also infra* note 647 and accompanying text.

[647] *See*, *e.g.*, *Mattz*, 412 U.S. at 497 (observing that the allotment provisions of an 1892 congressional act "which do not differ materially from those of the General Allotment Act . . . do not, alone, recite or even suggest that Congress intended to terminate" the reservation in question); Seymour v. Superintendent, 368 U.S. 351, 357-58 (1962) (noting that the "contention . . . that, even though the reservation was not dissolved completely by the Act permitting non-Indian settlers to come upon it, its limits would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians" raises an issue that "has . . . been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in [18 U.S.C.] § 1151 to include 'all land within the limits of any Indian reservation under the jurisdiction of the United States

Government, notwithstanding the issuance of any patent'"); *Nice*, 241 U.S. at 599 (". . . Section 5 [of the General Allotment Act] expressly authorizes negotiations with the tribe, either before or after the allotments are completed, for the purchase of so much of the surplus lands 'as such tribe shall, from time to time, consent to sell', directs that the purchase money be held in the Treasury 'for the sole use of the tribe', and requires that the same, with the interest thereon, 'shall be at all times subject to appropriation by Congress for the education and civilization of such tribe . . . or the members thereof.' This provision for holding and using these proceeds . . . makes strongly against the claim that the national guardianship was to be presently terminated. . . . [The provision] relating to the use by Congress of their moneys in their 'education and civilization' implies the retention of a control reaching far beyond their property."); United States v. Celestine, 215 U.S. 278, 287 (1909) (quoting Eells v. Ross, 64 F. 417, 419-20 (9th Cir. 1894) (citation omitted)) ("It is clear that allotment alone could not have this effect [of revoking a reservation] . . . . The [General Allotment] act of 1887 . . . clearly does not . . . abolish the reservations."); Cohen's Handbook § 3.04[3], *supra* note 16, at 199 (footnote omitted) ("The Supreme Court has repeatedly stated that the act of opening a reservation alone does not diminish or terminate the Indian country status of the reservation."); Anderson, Krakoff & Berger, *supra* note 116, at 275 (citation omitted) ("[W]ithout more, the mere opening of a reservation to non-Indians (through the allotment process or otherwise) has not been held to terminate reservation status."); *see also supra* note 16; *supra* note 378; *cf.* Reply Brief for Petitioner, *supra* note 132, at 16, 1974 WL 186005, at *9 (citations omitted) (observing that the *Seymour* and *Mattz* decisions "reaffirm [the Supreme] Court's early holdings which recognized continued reservation existence after allotment and 'cession'").

Significantly, on the eve of Congress's adoption of the bill that became the General Allotment Act, Senator Henry Dawes personally reassured attendees of the Lake Mohonk Conference that the pending legislation would *not* bring about the extinguishment of a reservation by the mere sale of surplus lands as authorized by section five of the bill. Just before the senator's October 13, 1886 speech, titled "The Dawes Bill," Presbyterian mission administrator Frank Field Ellinwood expressed concern about the bill's potential impact on church properties, saying, "I would like to ask Senator Dawes whether this bill contemplates the proper guarantees desired and needed by missionary societies in relation to their investments in building on Indian reservations." Proceedings of the 4th Ann. Meeting of the Lake Mohonk Conf. 30 (1886) (remark of Dr. Ellinwood). At the conclusion of the speech a participant asked, "In view of the present condition of the Indian is twenty-five years enough?" *Id.* at 32 (remark of unnamed attendee). Dawes responded to both matters:

> I propose to let the tribal patents go [i.e., let the trust status of individual allotments expire after 25 years] and to *let the reservation stand as it is*, with this provision [reads "And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided," &c., S. 54, p. 9].
>
> As fast as you allot this land, as fast as you can negotiate with the Indians for the rest of the land, you shall capitalize that land and put the money in the Treasury, and pay 5 per cent. annually for the education of the Indians. I think *any one who is troubled about having these reservations protected will see that this is provided for. They are just as safe if the tribal patent is taken away as before.*

Id. (remarks of Sen. Dawes) (second alteration in original) (emphases added) (quoting language from portion of Senate bill 54 that became § 5 of the Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, 389-90); *see supra* note 164 (showing text of § 5 of the General Allotment Act embedded in Interior Secretary's letter of instructions to U.S. commissioners tasked with negotiating a land-sale agreement with the Sisseton-Wahpeton Dakota at Sisseton Agency in November and December, 1889); *see also* 17 Cong. Rec. 123 (1886) (showing that on Dec. 8, 1885 Senator Dawes "introduced a bill (S. 54) to provide for the allotment of lands in severalty to Indians on the various

reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes; which was read twice by its title, and referred to the Committee on Indian Affairs"); 18 Cong. Rec. 1577 (1887) ("A message from the President of the United States, by Mr. O.L. Pruden, one of his secretaries, announced that the President had on the 8th instant [i.e., Feb. 8, 1887] approved and signed the following act[]: An act (S. 54) to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."); *cf.* Priest, *supra* note 513, at 186-87 (noting the sparse "congressional history of such an important measure as the Dawes Act" and observing that "[d]etailed consideration of the bill at Board [of Indian Commissioners] meetings, by the various Indian associations, and at Mohonk conference meetings took the place of the usual hearings and debates"); Wilcomb E. Washburn, The Assault on Indian Tribalism: The General Allotment Law (Dawes Act) of 1887, at 17 & n.9 (1975) (citing Proceedings of the 3rd Ann. Meeting of the Lake Mohonk Conf. 39 (1885)) (observing that during debates over precursor legislative proposals that preceded enactment of the General Allotment Act "[Senator] Dawes opposed the instant abolition of reservations" and "was particularly outraged at the loose talk about breaking up Indian reservations in violation of existing treaties and title"). Prior to final passage of the General Allotment Act Congress reduced from five to three percent the interest rate on proceeds from the sale of any unallotted lands within a consenting tribe's reservation pursuant to § 5 of the Act. *See* 18 Cong. Rec. 974 (1887) (remarks of Sen. Dawes) ("The other change is the difference between 5 per cent. and 3 per cent. interest. Five per cent. is the uniform rate of interest paid for Indian funds, and the answer to that on the part of the House was that that rate was established at a time when all interest was at that high rate; all interest now is at 3 per cent. and less, and they insisted upon those two amendments, and the Senate yielded.").

Senator Dawes's apparent understanding that land-sale agreements with Indian tribes pursuant to section five of the General Allotment Act would leave reservation boundaries intact sheds essential light on his subsequent paraphrasing that Act as "a statute which authorized the Secretary of the Interior whenever in his judgment—that is the language of it—the interests of the Indians and of the United States are promoted thereby, to enter into negotiations with any tribe of Indians *for a surrender of any portion of their reservations*." 22 Cong. Rec. 3880 (1891) (emphasis added) (remarks of Sen. Dawes); *cf.* Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 389 (providing that "at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe . . . of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians"). As thus illuminated, what Dawes obviously meant when using the phrase "*for a surrender of any portion of their reservations*" was simply a tribe's consent to the transfer of property interests in particular acreage within a reservation, *a transfer that would not change the reservation's boundaries*. In turn, the fact that Dawes so paraphrased the General Allotment Act when debating the bill that became the 1891 Act at issue in *DeCoteau* informs the sense in which Dawes, during that same debate, used the term "*surrender*" when referring to "the agreements that were made with Indians *for the surrender of a large portion of their reservations to the public domain*" and when stating that "the United States gave the [Sisseton-Wahpeton] Indians *for the surrender* $2.50 an acre." 22 Cong. Rec. 3879 (1891) (emphases added) (remarks of Sen. Dawes), *quoted in DeCoteau*, 420 U.S. at 441; *see supra* note 510 and accompanying text; *supra* notes 578-579 and accompanying text; *see also supra* note 517 (discussing the significance of an additional instance of Senator Dawes's use of the word "surrender"

"precisely suited" to abolishing a reservation,[648] *DeCoteau* seemed to have *weaponized* the interpretive enterprise in this area of Indian law, arming judicial construction of surplus land acts with a precedent that created an arsenal of "magic language"[649] precisely suited to the task of "wiping out"[650] *other* reservations as well.[651] It remained to be seen, when *DeCoteau* was decided, whether this aberrant case construing federal Indian legislation to a tribe's *detriment* would be wielded in future litigation also,[652] afflicting *other* Indian nations and eroding even further the historical duty of the U.S. government in general, and the Supreme Court in particular, to protect Indian rights and tribal sovereignty to the maximum extent possible.

Notwithstanding the difficulty of reconciling *DeCoteau* with Indian law principles, it is important to note that the Court gave formal recognition, at least, to several of those principles, including (1) "[the Supreme]

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during senate debates on the bill that became the 1891 Act).

[648] *See supra* note 641 and accompanying text.

[649] *See supra* note 116 and accompanying text; *supra* note 121 and accompanying text.

[650] *See supra* note 119 and accompanying text.

[651] *Cf.* Kunesh, *supra* note 105, at 46 (observing that "the Court's determination in *DeCoteau* radically altered not only the tribe's geographical borders, but also seriously damaged its authority over all manner of issues, civil, criminal, and regulatory, particularly its authority to safeguard the welfare of children and families"); Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Life 25 (1995) ("The social, cultural, and psychological—not to mention the obvious legal—impact of [reservation diminishment/disestablishment] decisions exacerbates the burden of maintaining individual and tribal well-being and integrity.").

DeCoteau's immediate threat to other Indian nations is apparent in footnote 22 of the majority opinion, where the Supreme Court appeared to aim the case's weaponizing of land-sale terms at other reservations as well. *See DeCoteau*, 420 U.S. at 439 & n.22 (quoting Agreement of 1889, art. I, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1036) (asserting that "[t]he language in the other agreements ratified at the same time is comparable" to the "'cede, sell, relinquish, and convey'" terminology in the 1889 Agreement with the Sisseton-Wahpeton Dakota, and insinuating that all such language in "agreements providing for the outright cession of surplus reservation lands to the Government" is sufficient for concluding that the reservation status of the sold lands has terminated). The *DeCoteau* Court's devising to assign reservation-extinguishing meaning to the "outright cession of surplus reservation lands" collides with the fact that the General Allotment Act—which "clearly does not . . . abolish the reservations," *Celestine*, 215 U.S. at 287 (citation and internal quotation marks omitted)—itself requires "that such lands be purchased from the tribes prior to being sold off to non-Indians," Tweedy, *supra* note 617, at 134 (footnote omitted).

[652] An early, approving commentary asserts that *DeCoteau* provides courts "the guidance needed to determine the effect a surplus land statute had on the boundaries of the reservation involved" in any reservation diminishment/disestablishment case, including "that to determine the effect a particular statute had on reservation boundaries, the courts must not rely on general principles of Indian law in ascertaining congressional intent." James M. Bekken, *Indians—Reservations—Jurisdictional Effect of Surplus Land Statute Upon Traditional Boundaries of an Indian Reservation*, 52 N.D. L. Rev. 411, 418-19 (1975). The then-student author of the case note went on to serve for many years as a state-court jurist. *See All District Court Judges*, State of North Dakota Courts, https://www.ndcourts.gov/district-court/all-district-court-judges (noting Bekken's having served as a county court judge for four North Dakota counties and having been "[e]lected Judge of the Southeast Judicial District in 1994, 1998 and 2004").

Court will not lightly conclude that an Indian reservation has been terminated"; (2) when "Congress has once established a reservation all tracts included within it remain part of the reservation until separated therefrom by Congress"; and (3) "congressional intent must be clear, to overcome the general rule that doubtful expressions are to be resolved in favor of" the Indians.[653] In dissent, Justice William Douglas underscored the centrality of the rule that "doubtful clauses in agreements with Indians are resolved in favor of the Indians," but correctly maintained that "there is no doubtful language in the Agreement or in the 1891 Act" since neither of them contained the "'clear language of express termination'" demanded by the controlling Supreme Court precedent.[654] Douglas also castigated the majority for ignoring a crucial warning in *Seymour v. Superintendent* about practical problems stemming from the kind of "'crazy quilt' or 'checkerboard' jurisdiction" inflicted by the Court's decision dissolving the boundaries of the Lake Traverse Reservation.[655] He elaborated that "[j]urisdiction dependent on the 'tract book' promises to be uncertain and hectic" with "the only beneficiaries being those who benefit from confusion and uncertainty."[656] Justice Douglas added, "Checkerboard jurisdiction cripples the United States in fulfilling its fiduciary responsibilities of guardianship and protection of Indians."[657]

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[653] *DeCoteau*, 420 U.S. at 444 (citations and internal quotation marks omitted).

[654] *Id.* at 463 (Douglas, J., dissenting) (quoting Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973)).

[655] *Id.* at 466-67 (Douglas, J., dissenting) (citing Seymour v. Superintendent, 368 U.S. 351, 358 (1962)); *cf.* Transcript of Oral Argument, *supra* note 119, at 25 (No. 73-1148) ("QUESTION: [W]ouldn't you have an extraordinarily difficult problem of administering the laws, civil or criminal, if it would be on a patchwork basis of everything that's white there being under the jurisdiction of South Dakota, and everything that's red being under the jurisdiction of the tribe?"); Kunesh, *supra* note 105, at 76 (observing that in his *DeCoteau* dissent Justice Douglas "chastised his Court's disregard for the Indian law canons of construction and its extraordinarily upending conclusion that the Lake Traverse Reservation had been disestablished," and noting further Douglas's "uncanny trepidation" regarding "the decision's indifference to the preservation of family and community relations, essential to cultural survival").

[656] *DeCoteau*, 420 U.S. at 467 (Douglas, J., dissenting). Justice Douglas's concern about "confusion and uncertainty" being a part of *DeCoteau*'s legacy is reminiscent of Felix Cohen's similar observation that "confusion and ignorance in fields of law are allies of despotism." Felix S. Cohen, *Author's Acknowledgments*, *in* Felix S. Cohen's Handbook of Federal Indian Law xxxii (University of New Mexico Press 1971) (1941).

[657] *DeCoteau*, 420 U.S. at 467 (Douglas, J., dissenting). It is interesting to note that in what appears to be the earliest, type-written draft of Justice Potter Stewart's majority opinion in *DeCoteau* there is a sentence that is crossed out with a pencil and that does not appear in the final published opinion. That sentence reads: "At present, the Indian allotments take up some fifteen percent of the original reservation lands, the allotments being scattered in a checkerboard pattern over the area." *See* Potter Stewart Papers, Manuscript/Mixed Material, MS 1367, Box No. 99, Folder No. 862 (*DeCoteau, Natural Mother and Next Friend of Feather v. District Court*, No. 73-1148), retrieved from Yale University Library. One might reasonably speculate that Justice Stewart thought it inadvisable to keep that sentence in his opinion after reading a circulated draft of Justice Douglas's dissenting opinion.

6. Excavating the Truth About *DeCoteau*—Clues from the Indian Law Justice Files

The files of Supreme Court Justices shed light on the behind-the-scenes deliberations that precipitated the devastating *DeCoteau* decision. A conference notes sheet retained by Justice William Rehnquist shows that Justice Lewis Powell, who ultimately joined Justice Potter Stewart's majority opinion concluding that Congress had "terminated the Lake Traverse Reservation,"[658] initially was against that conclusion, having been "persuaded by SG [Solicitor General]."[659] The tally of the initial conference votes, as recorded in a vote table, thus was 5 to 4, with Powell casting his vote along with the others in the minority, i.e., Justices William Douglas, William Brennan, and Thurgood Marshall, in support of upholding the reservation's continuing existence.[660] Reversing course, in a February 10, 1975 memorandum Powell wrote: "Dear Potter: Although I voted the other way (relying primarily on *Mattz*) your opinion—especially the full exposition of the history—persuades me to your view."[661]

What is most intriguing from the documents in the Justices' papers, however, is evidence showing the apparent force of Justice Harry Blackmun—author of the unanimous *Mattz v. Arnett* decision preserving the Klamath River Reservation[662]—in consolidating support among his fellow Justices for reaching a *contrary* conclusion in the case of the Sisseton and Wahpeton bands' Lake Traverse Reservation. For instance Justice Rehnquist, in a note-taking area of his own copy of the *DeCoteau* conference notes sheet, wrote, in the box labeled "Blackmun, J.":

> *Mattz* correct—here 1889 agreement speaks rather plainly—Indians agreed to convey for a price—CA8 made too much out of *Mattz* in its second case—perhaps civil case dist. [distinguished] from crim . . . if ever any reservation case lose by Indians, this is prime candidate[.][663]

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[658] *DeCoteau*, 420 U.S. at 428.

[659] William H. Rehnquist Papers, Manuscript/Mixed Material, Box 16 (Vote sheets, argued cases 1970-1974), retrieved from the Hoover Institution, Stanford University; *see also* Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress (stating, in note-taking box of conference notes sheet for "Powell, J.": "Persuaded by t[he] SG" and "C/8 [i.e., the Eighth Circuit Court of Appeals] was right 2d ti[me]").

[660] William H. Rehnquist Papers, Manuscript/Mixed Material, Box 16 (Vote sheets, argued cases 1970-1974), retrieved from the Hoover Institution, Stanford University.

[661] Potter Stewart Papers, Manuscript/Mixed Material, MS 1367, Box No. 99, Folder No. 862 (*DeCoteau, Natural Mother and Next Friend of Feather v. District Court,* No. 73-1148), retrieved from Yale University Library.

[662] *See supra* notes 36-64 and accompanying text.

[663] William H. Rehnquist Papers, Manuscript/Mixed Material, Box 16 (Vote sheets, argued cases 1970-1974), retrieved from the Hoover Institution, Stanford University. Conference notes taken by Justice William O. Douglas are consistent: "HB [Harry Blackmun] *Mattz* is right—1889 Act reflect[s] agreement to cede—8th Cir. makes too much out of *Mattz* . . . ." Papers of William O. Douglas, Manuscript/Mixed Material, Box 1691, Nos. 73-1148 and 73-1500 (DeCoteau v. District County Court 10th Judicial Dist.; Erickson v. Feather), retrieved from the Library of Congress.

Rehnquist's handwritten notes also record other Justices' deference to Blackmun's stated position. In the box labeled "White, J.," Rehnquist wrote: "agrees w/HAB [Harry A. Blackmun]"; and in the box for "Stewart, J."—author of the *DeCoteau* majority opinion—Rehnquist wrote: "agrees with HAB—*Mattz* was as far as I would go."[664]

These conference notes are consistent, moreover, with a wealth of documents found among the Harry A. Blackmun Papers at the Library of Congress, elaborating Justice Blackmun's position in *DeCoteau*. Echoing the conference notes taken by Justice Rehnquist, Blackmun ultimately sent Justice Stewart a memorandum, dated February 11, 1975, that reads: "Dear Potter: I feel that your opinion for these cases is a most constructive one. If Indians are ever to lose a case, these, it seems to me, are the ones they will lose."[665] Even more significant is a seven-page typewritten draft, dated "12/4/74," of a memorandum by Justice Blackmun addressed to the other Justices, a document that in turn borrows heavily from a 23-page memorandum submitted to Blackmun by a law clerk. In familiar phrasing, the Blackmun memo states: "David suggests, and I am inclined to agree, that if ever any of these Reservation cases are to be lost by the Indians, this is a prime candidate for that very result." Similarly, the law clerk's memorandum opens with a "Discussion" section that states, "[I]f the Indians are going to lose any of these reservation cases, this would be the one." Tellingly, a small check mark (in Justice Blackmun's characteristically diminutive handwriting)—a recurring device Blackmun employed as a supplement to his use of yellow highlighting—appears next to this comment from the law clerk's memo.[666] Both the Blackmun memorandum and the parallel one produced by the law clerk afford crucial insight into the deliberations that resulted in the *DeCoteau* decision.[667] Accordingly, this Article reproduces substantial portions of both memos, followed by analysis and commentary.

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[664] William H. Rehnquist Papers, Manuscript/Mixed Material, Box 16 (Vote sheets, argued cases 1970-1974), retrieved from the Hoover Institution, Stanford University; *see also* Papers of William O. Douglas, Manuscript/Mixed Material, Box 1691, Nos. 73-1148 and 73-1500 (DeCoteau v. District County Court 10th Judicial Dist.; Erickson v. Feather), retrieved from the Library of Congress (noting the position of "CJ," i.e., Chief Justice Warren E. Burger, in conference as follows: "8th Circ. was right the 1st time & he affirms").

[665] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress; *see* App. Exhibit 3, *infra* p. 347.

[666] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress. It is unclear whether Justice Blackmun's draft memorandum ever was distributed to the other Justices. No copy exists in the files of any of the other Justices who participated in the *DeCoteau* case and whose papers are available for research, i.e., all the Justices except Chief Justice Warren E. Burger. *Cf.* deMaine, *supra* note 5, at 219 (appendix table) (noting, under the heading "Disposition of Judicial Papers," that "William and Mary Law Library holds the Burger Papers," which "are closed until 2026, forty years after his retirement, as instructed in the deed of gift").

[667] *Cf.* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 Ariz. L. Rev. 933, 934-36 (2009) (arguing, based on a

In his own *DeCoteau* memorandum Justice Blackmun wrote the following:

> In these cases the supreme court of South Dakota and the CA 8 have reached opposing conclusions regarding the disestablishment of the Lake Traverse Reservation, originally set up by treaty with the Sioux Indians in 1867. The South Dakota court reached a conclusion of disestablishment. The CA 8 reached a conclusion of nondisestablishment and in so doing in effect overruled an earlier case in 319 F.2d 845 where the panel consisted of Judges Vogel, Van Oosterhout [name underlined by Justice Blackmun] and Ridge.[668]
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> Bearing somewhat on this is *Mattz v. Arnett*, 412 U.S. 481 (1973), an opinion I wrote for a unanimous Court at the end of the Term before last. That concerned the continuance of the Klamath River Reservation. We reached the conclusion that the Reservation had not been disestablished and that land within its boundaries was still Indian country. We held that allotment provisions of the 1892 Act, there under consideration, was [sic] consistent with continued Reservation status; that the Act's legislative history did not support the view that the Reservation was terminated but really compelled the conclusion that efforts to terminate it failed completely; that a Congressional determination to terminate must be expressed on the face of the statute or be clear from the circumstances ~~in~~ ["and" inserted by Blackmun] legislative history; and that the conclusion of nontermination was reinforced by repeated recognition thereafter by the Department of Interior and by the Congress. Thus the *Mattz* opinion gave a great big boost to the continued status of a reservation absent clear opposing indications.
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> . . . .
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> Some dates have perhaps a little significance. The first is 1867 when the Lake Traverse Reservation was established by Treaty. The second is 1889 when the government and the Indians reached an agreement whereby the Indians agreed to "~~seed~~ ["cede" inserted by Blackmun], sell, relinquish and convey" the surplus lands to the United States for $2.50 an acre. The third is the Act of 1891 which reflected the 1889 agreement. It specifically stated that the Act ~~seeded~~ ["ceded" inserted by Blackmun], and conveyed to the United States [sic] should be subject only to entry and settlement under the Homestead

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review of "163 preliminary memoranda written by Supreme Court clerks in the certiorari decision-making process . . . made public in the Digital Archive of the Papers of Justice Harry A. Blackmun," that the "process harshly discriminates against the interests of Indian tribes and individual American Indians" by "undervalu[ing] the merits and importance of petitions filed by tribal interests" while "overvalu[ing] the merits and importance of petitions filed by the traditional opponents of tribal interests").

[668] The citation refers to *DeMarrias v. South Dakota*, 319 F.2d 845 (8th Cir. 1963). *See also supra* note 109 and accompanying text. Judge Martin D. Van Oosterhout was a colleague of Justice Blackmun for the full duration of Blackmun's tenure as a judge on the Eighth Circuit Court of Appeals. *See History of the Federal Judiciary: U.S. Court of Appeals for the Eighth Circuit: Judges*, Federal Judicial Center, https://www.fjc.gov/history/courts/u.s.-court-appeals-eighth-circuit-judges (showing Harry Andrew Blackmun's tenure on the Eighth Circuit as lasting from 1959 to 1970 and Martin Donald Van Oosterhout's as lasting from 1954 to 1979).

Laws, excepting the 16th and 36th sections "which shall be reserved for common school purposes, and be subject to the laws of the State wherein located." Much of the controversy centers in the presence of the comma after the word "purposes." Does the following phrase modify and apply only to the school sections or, in contrast, does it apply to the lands seeded [sic]? Surely the statute can be read either way. If, however, it were to apply only to the school lands, then the comma after "purposes" would have been better omitted.

The CA8 in overruling the earlier CA 8 case gave emphasis to much of what we said in the *Mattz* case. They reasoned that Congress having once established a reservation, must demonstrate its intent to disestablish either by something expressed on the face of the Act or something discernable from the circumstances and legislative history. It stated that opening a reservation for homesteading is not inconsistent with its continued existence as a reservation. The general rule, said the CA 8, is that Indians are to be left free from state jurisdiction. Federal jurisdiction is to be preferred.

In contrast, the South Dakota court stressed the fact that the 1891 Act was a sale ~~in session~~ ["and cession" inserted by Blackmun] and went on to say that there was no occasion for construction. It is manifest that Congress intended to restore to the public domain all unallotted lands. Each side makes what it can out of the *Mattz* opinion.

David Becker[669] points out that neither side here in its briefs makes an investigation of the background of all this. I take it he is

[669] David M. Becker served as a law clerk for Justice Stanley Forman Reed (retired) from 1974 to 1975. *See SEC Says Its Former Top Lawyer Should Be Investigated Over Madoff Work*, Financial Advisor, Sept. 21, 2011, https://www.fa-mag.com/news/sec-says-its-former-top-lawyer-should-be-investigated-over-madoff-work-8395.html?section=43 (noting that Becker "worked as a clerk for former U.S. Supreme Court Justice Stanley Reed"); *see also List of law clerks of the Supreme Court of the United States (Seat 6)*, Wikipedia, https://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States_(Seat_6) (last visited Aug. 25, 2021) (noting Becker's having clerked for Justice Reed from 1974 to 1975). In a 2015 interview, Becker explained that he also provided support for Justice Harry Blackmun: "I was Justice Reed's law clerk, but he was retired and quite elderly, and rarely came into the office. What I did is split my time among four active justices. I spent several months with Chief Justice Burger, and then I spent three or four months each with Justices Blackmun, White, and Stewart." William Thomas, *Securities and Exchange Commission Historical Society Interview with David Becker*, May 21, 2015, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/oral-histories/20150521_Becker_David_T.pdf; *cf.* Randall P. Bezanson, *Good Old Number Three: Harry Blackmun and His Clerks*, *in* In Chambers: Stories of Supreme Court Law Clerks and Their Justices 326, 340 n.2 (Todd C. Peppers & Artemus Ward eds., 2012) ("During October term 1975, Justice Blackmun's clerks were supplemented by the law clerk for retired Justice Stanley Reed.").

Although David Becker's work with both Justice Blackmun and Justice Potter Stewart, the author of the *DeCoteau* majority opinion, suggests Becker's influence in the development of that opinion, notations connected with Justice Stewart's original draft of *DeCoteau* indicate that Stewart's law clerk, Curtis A. Hessler, also may have had a significant role in the production of that draft. *See* Potter Stewart Papers, Manuscript/Mixed Material, MS 1367, Box No. 99, Folder No. 862 (*DeCoteau, Natural Mother and Next Friend of Feather v. District Court*, No. 73-1148), retrieved from Yale University Library (showing the name "C Hessler" handwritten in pencil at top of first page of

suggesting that legislative history needs some investigating before we can be certain as to the result to be reached.

. . . .

The Indian parties, supported by the SG, argue that South Dakota has no jurisdiction in either of these cases and that the tribal counsel [sic] is the pertinent court to which the controversy should be taken. They argue substantially as follows: No intent to disestablish can be found. There is no expressed language of disestablishment in the Act. Congress knew how to use disestablishment language when it wanted to. The comma after the work [sic] "purposes" is surplusage and unintended. The last phrase of the Act refers only to the school sections. The legislative history shows a desire to reward the Sioux for their loyalty. Disestablishment is hardly a reward. There is a continuance of trust responsibilities of the United States, and this is consistent with continued reservation status. Modern maps show the Reservation, and the Department of Interior has made noises consistent with its continued status. If South Dakota has jurisdiction here, we have an inevitable checkerboard effect which is undesirable. Further, to rule in favor of the state is to defeat effective self-government on the part of the Sioux and to place the Indians under the control of South Dakota.

The state's arguments are about as anticipated. It claims that the language of ~~s~~ession [the letter "c" is inserted in place of "s" by Blackmun] and disestablishment could hardly be more unambiguous. The Act under which South Dakota entered the Union prohibited the establishment of schools within Indian land until the surrounding Reservation had been disestablished. Thus, the reference in the Act to school sections clearly shows an intent to disestablish. Senator Dawes is revealed by the legislative history as speaking of the actual return of vast amounts of land to the public domain. The continuation of trust responsibility is not inconsistent with disestablishment. Further, these lands were sold to the United States for a specific sum. The United States did not enter as a trustee but rather as a buyer. Contemporary maps show the immediate removal of the Reservation and their later reinclusion as a former Reservation. Checkerboarding is neither here nor there, for this is inevitable whenever land allotted to Indians is defined as Indian country. Checkerboarding does not argue either for or against a disestablishment conclusion. Finally, the state points out that the Sioux constitute only 10% of the population of the land area in question and occupy only 1.5% of the land.

David suggests, and I am inclined to agree, that if ever any of these Reservation cases are to be lost by the Indians, this is a prime candidate for that very result. The language of the statute stands there as a very definite barrier. There are specific words of ~~s~~ession [the letter

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original typewritten draft of *DeCoteau* majority opinion, and containing a typewritten note with the handwritten signature "Curt" stating "I have corrected the slips at pp. 5 & 21 noted by Mr. Justice Blackmun in our Indian opn."); *see also Nomination of Curtis A. Hessler: Hearing Before the Committee on Finance, United States Senate*, 96th Cong. 1 (1980), https://www.finance.senate.gov/imo/media/doc/HRG96-76.pdf (stating "Law Clerk to Justice Potter Stewart" from "August 1974 to August 1975" as part of Hessler's "biographical data" for Senate hearing on the nomination of Hessler to be an Assistant Secretary of the Treasury for Economic Policy).

> "c" is inserted in place of "s" by Blackmun], relinquishment, sale and conveyance. The *Mattz* opinion clearly contemplated that some language can be used which would disestablish, although the conclusion there was that the language employed did not disestablish. True, there is no specific reference or recital that the land is being returned "to the public domain." Are those very words, however, absolutely necessary? Congress did given [sic] evidence that it was returning this land to the public domain, and the Indians can come up with nothing that is more specific. Thus, definitely on balance, I am inclined to believe that South Dakota has the better argument here.
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> I must confess, however, that the CA 8's difficulty and its overruling of its earlier case causes me a little bit of personal embarrassment. I think the earlier case was correctly decided, and I suspect that the second and contrary decision was arrived at only because of what was held in *Mattz*. I suspect, however, that the CA 8 panel just went too far and failed to see that we had allowed plenty of elbowroom for contrary results on different facts. Roy Stephenson[670] will be upset if this case is reversed.
>
> David points out, of course, that there are some policy matters that the Court might consider. In favor of the State is that the Indian population and the Indian territory actually owned is small. On the other side of that coin is the fact that everyone supposedly is interested in fostering tribal self-government. A decision in favor of the Indians would have symbolic importance, and very recent statutes seem to give some implied recognition by Congress of the continued Reservation status of the Lake Traverse Region.[671] I suspect, however that those very recent statutes come too late.[672]

The law clerk's memorandum, dated "11/26/74," which clearly influenced Justice Blackmun's own, subsequent draft memorandum, contains the following parallel passages:

> I do not have much to add that is not a repetition of an argument of the parties. It seems pretty clear to me that broader questions of policy aside, if the Indians are going to lose any of these reservation cases, this would be the one. Without recapitulating South Dakota's arguments in any great detail, the language of the statute looks pretty hard to get around. Compare the language of the statute in *Mattz*—"That all the lands . . . are hereby declared to be subject to settlement"[673]—with

[670] Roy L. Stephenson served as a judge on the U.S. Court of Appeals for the Eighth Circuit from 1971 until his death in 1982. He had been appointed and confirmed to the seat vacated by Judge Martin D. Van Oosterhout—Justice Blackmun's longtime federal appellate court colleague—when Van Oosterhout assumed senior status. *See History of the Federal Judiciary: Judges—Stephenson, Roy Laverne*, Federal Judicial Center, https://www.fjc.gov/history/judges/stephenson-roy-laverne; *History of the Federal Judiciary: Judges—Van Oosterhout, Martin Donald*, Federal Judicial Center, https://www.fjc.gov/history/judges/van-oosterhout-martin-donald; *see also supra* note 668 and accompanying text.

[671] *See infra* notes 677-678 and accompanying text.

[672] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress; *see* App. Exhibits 4 & 5, *infra* pp. 348-49.

[673] The surplus land act at issue in *Mattz* actually provided, in relevant part: "That all of the lands embraced in what was Klamath River Reservation in the State of

> the operative statutory language here: "The Sisseton and Wahpeton bands . . . hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest."[674] *Mattz* clearly contemplates that some language can be sufficient to effect disestablishment of a reservation. 412 U.S. at 504.[675] The sole argument for the Indians that this language is insufficient is that it does not contain a reference to returning the land to the public domain.[676] Although one might ques-

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California . . . are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands . . . ." Act of June 17, 1892, 27 Stat. 52, *quoted in* Mattz v. Arnett, 412 U.S. 481, 495 (1973).

[674] This sentence from the law clerk's memorandum is misleading in that it cuts short (and thus misrepresents) the relevant "operative statutory language" and does not include an ellipsis in front of the period to alert the memo's recipient/reader, i.e., Justice Blackmun, to the fact that additional words have been deliberately left out. The operative language in the ratified 1889 Agreement actually provides as follows:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest *in and to all the unallotted lands within the limits of the reservation as set apart to said bands of Indians* as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

Agreement of 1889, art. I, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1036 (emphasis added), *quoted in* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 445 (1975). The additional qualifying language that the law clerk's memo silently omits reveals that what the Indians agreed to "cede, sell, relinquish, and convey" was not the reservation itself but only their "claim, right, title, and interest *in and to all the unallotted lands within the limits of* the [Lake Traverse] reservation," a reservation that this very provision exalts as being "*set apart to said bands of Indians*" by treaty. *Id.* (emphases added); *see also* Agreement of 1889, ratified by Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 1035, 1036 (emphasis added) (acknowledging that "the Sisseton and Wahpeton bands of Dakota or Sioux Indians are desirous of disposing of *a portion of the land set apart and reserved for them*" by the 1867 Treaty), *reprinted in DeCoteau*, 420 U.S. at 455.

[675] Far from suggesting merely "that some language can be sufficient to effect disestablishment," Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress (memorandum from law clerk to Justice Blackmun), on page 504 of *Mattz*, the Supreme Court actually stated that "clear termination language" in a statute is the necessary "means by which termination [of a reservation] could be effected." *Mattz*, 412 U.S. at 504. The Court wrote:

> A second conclusion is inescapable. The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. . . . More significantly, throughout the period from 1871-1892 numerous bills were introduced which expressly provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.

Id. (footnote omitted). In an appended footnote, the *Mattz* Court reiterated: "Congress has used clear language of express termination when that result is desired." *Id.* at 504 n.22; *see also supra* notes 40-65 and accompanying text (discussing Supreme Court's reservation diminishment/disestablishment analysis in *Mattz*).

[676] The absence of any statutory "reference to returning the land to the public domain" was *not*, of course, "[t]he sole argument for the Indians," Harry A. Blackmun

> tion whether searching for that particular verbal formula would not result in too formalistic an approach, it is clear from the comments of Congress, particularly Senator Dawes, that Congress did in fact think that it was returning the land to the public domain. The Indian parties have been unable to point to anything in the statutory language that evinces an intent not to disestablish; the best they have been able to do is point to certain things that are not inconsistent with an intent to preserve the reservation. Again, there is no need for me to repeat South Dakota's arguments in detail. Suffice to say, that although several matters do not seem persuasive to me either way—for example, balancing the references subsequent to 1891 to the reservation as the "former reservation" as opposed to "the reservation"—I find the bulk of South Dakota's arguments speak for themselves and are much more convincing.
>
> A somewhat more difficult question is this: given a statute subject to two interpretations that are at least arguable, where do the equities lie? On the one hand, it seems to me that South Dakota's interest in applying its law in an area whose populations is [sic] only 10 per cent Indian is rather substantial. So is the reliance interest of those non-Indians living in the area, who may well be amazed to find that they have chosen to live under tribal law.
>
> On the other side of the ledger is the interest in fostering tribal self-government. In addition, a decision in favor of the Indian parties, I would assume, has symbolic importance that extends beyond the immediate holding. I confess that I have no real opinions on the weight to be accorded these considerations, although it does appear that in Public Laws 93-489 and 491 (appended hereto)[677] Congress has thrown its weight behind recognizing the reservation status of Lake Traverse.[678]

At the end of his memo to Justice Blackmun, in a section labeled "Recommendation," the law clerk wrote:

Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress (memorandum from law clerk to Justice Blackmun), in *DeCoteau*. *See generally*, *e.g.*, Brief for Petitioner, *supra* note 153, 1974 WL 186007; Reply Brief for Petitioner, *supra* note 132, 1974 WL 186005; *see also supra* text accompanying note 672 (showing Justice Blackmun's listing numerous arguments asserted in *DeCoteau* by "[t]he Indian parties, supported by the SG [i.e., Solicitor General]").

[677] *See* Act of Oct. 26, 1974, Pub. L. No. 93-489, 88 Stat. 1465 ("An Act [t]o declare that certain federally owned lands are held by the United States in trust for the Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Indian Reservation in North and South Dakota"); Act of Oct. 26, 1974, Pub. L. No. 93-491, 88 Stat. 1468-69 ("An Act [t]o authorize the Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation to consolidate its landholdings in North Dakota and South Dakota, and for other purposes"). Photocopies of both of these Public Laws are included in Justice Blackmun's *DeCoteau* folder at the Library of Congress. *See* Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress; *see also supra* text accompanying notes 671-672.

[678] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress.

> I do not have strong feelings about this one, other than a hope that you do not get assigned the opinion. Questions of policy, which I do not feel adequately equipped to evaluate, aside, it seems reasonably clear that the language and history of the 1891 statute indicate that it was intended to disestablish the Lake Traverse Reservation. . . .
>
> Probably the most important thing the Court can do in this case is to indicate that each of these reservation cases must be decided with careful reference to the statutory language and legislative history. The opinions of both the Eighth Circuit and the South Dakota Supreme Court are much too cursory for such a complicated question.[679]

These revealing memoranda from the Harry A. Blackmun Papers at the Library of Congress are ironic and disturbing on a number of levels. As discussed previously, it was Justice Blackmun himself, as author of the unanimous *Mattz v. Arnett* opinion,[680] who employed an interpretive methodology in the reservation diminishment/disestablishment inquiry context that is consonant with, and illustrative of, traditional principles of Indian law, principles that demand a high degree of certainty before a court can declare that Congress intended to shrink or eliminate the boundaries of an Indian reservation.[681] Thus, in light of *Mattz*—and of *Seymour v. Superintendent*,[682] the only diminishment/disestablishment case decided by the Supreme Court prior to *Mattz*, upon which *Mattz* itself relied—Blackmun's ridiculing *Mattz* for "[giving] a great big boost to the continued status of a reservation absent clear opposing indications" and his faulting the Eighth Circuit for "[giving] emphasis to much of what we said in *Mattz*"[683] seem inexplicable. Indeed, the Eighth Circuit's faithful deference to *Mattz* could hardly have seemed more unassailable:

> The *Mattz* case makes clear that Congress, during the legislative years surrounding the 1891 Act "was fully aware of the means by which termination could be effected." Clear language such as that discussed in *Mattz* expressing intent to discontinue the Lake Traverse reservation is nowhere to be found in the 1891 Act here involved.
>
> . . . .
>
> Congress established the Lake Traverse reservation as a "permanent" reservation in 1867. Since that time Congress has not through clear expression or by innuendo shown an intention to disestablish.
>
> . . . .
>
> . . . We . . . hold that the body of legislative documents concerning the Lake Traverse Indian reservation does not, against the glare of *Seymour* and the more recent judicial guidance in [inter alia] *Mattz*, . . . demonstrate congressional intention to disestablish the reservation.[684]

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[679] *Id.*

[680] Mattz v. Arnett, 412 U.S. 481 (1973).

[681] *See supra* notes 55-57 and accompanying text.

[682] Seymour v. Superintendent, 368 U.S. 351 (1962).

[683] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress.

[684] United States *ex rel.* Feather v. Erickson, 489 F.2d 99, 102 (8th Cir. 1973), *rev'd*, DeCoteau v. Dist. Cty. Ct., 420 U.S. 425 (1975).

Also alarming is what these memoranda reveal about the willingness of Justice Blackmun, following the advice of a law clerk,[685] to entertain the idea of turning the reservation diminishment/disestablishment inquiry into an exercise in discretionary judicial policymaking.[686] Thus, echoing the law clerk's memo, Blackmun's memo recites "that there are some policy matters that the Court might consider" when deciding whether an Indian reservation continues to exist, such as (1) "the Indian population" and percentage of "Indian territory" within a reservation—factors that in *DeCoteau* are said to weigh "[i]n favor of the State"—as well as (in the law clerk's words) (2) "the reliance interest of those non-Indians living in the area, who may well be amazed to find that they have chosen to live under tribal law." Apparently, as prescribed in the law clerk's memo, contemplation of such "[q]uestions of policy"—a judgment about "where . . . the equities lie"—would take the place of applying Indian law canons and thus of requiring parties hostile to "continued reservation status" to come forward with "clear opposing indications" of congressional intent. Indeed, the advice appears to be that the burden of proof should be thrust upon litigants who maintain that reservation status remains intact, as reflected in the law clerk's grievance that "[t]he Indian parties have been unable to point to anything in the statutory language that evinces an *intent not to* disestablish . . . ."[687]

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[685] *Cf.* Edward Lazarus, Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court 6 (1998) (criticizing, after Lazarus's having served as a law clerk for Justice Blackmun, the Supreme Court as "a Court where Justices yield great and excessive power to immature, ideologically driven clerks, who in turn use that power to manipulate their bosses and the institution they ostensibly serve").

[686] *See* Getches, *supra* note 586, at 1573-74 ("Recently . . . the Court has assumed the job it formerly conceded to Congress, considering and weighing cases to reach results comporting with the Justices' subjective notions of what the Indian jurisdictional situation ought to be. . . . The Supreme Court has . . . begun . . . abandoning entrenched principles of Indian law in favor of an approach that bends tribal sovereignty to fit the Court's perceptions of non-Indian interests."); Hedden-Nicely & Leeds, *supra* note 4, at 330-31 (quoting Getches, *supra* note 586, at 1626) ("This is the hallmark of the subjectivist approach. Ignore the innumerable laws and policies developed by Congress that support tribal rights and sovereignty and instead laser in on its short-lived but destructive policies from the Allotment Era by 'filling gaps in legislation and construing tribal sovereign powers in accordance with allotment-era goals merely because some or all of a reservation has been allotted.' In so doing, the necessary inference is that the allotment policies were correct and Congress' policy of self-determination is wrong.").

[687] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress (emphasis added). Justice Blackmun's misinformed understanding, *see supra* notes 673-676 and accompanying text, of the tribal parties' arguments in *DeCoteau*, as well as his apparent readiness to proceed with deciding reservation diminishment/disestablishment cases in disregard of traditional Indian law principles, is evident in a list of "Questions" found among Blackmun's archived papers that the Justice (and, presumably, his law clerk) prepared for addressing "[t]o the Indian Parties":

> 1. Are you contending that the language of the statute is ambiguous solely because of the failure of the drafters to use the phrase "public domain?" How

The statement "Roy Stephenson will be upset if this case is reversed" may indeed simply be an expression of self-effacing "personal embarrassment" by Justice Blackmun for voting with the *DeCoteau* majority, thereby overturning an appellate court decision that had relied squarely on Supreme Court precedent authored by Blackmun himself.[688] Stephenson, the federal judge who wrote that unanimous appellate decision,[689] had previously authored a similar Eighth Circuit decision upholding the boundaries of an Indian reservation, *United States ex rel. Condon v. Erickson*,[690] an opinion Blackmun himself had cited approvingly in *Mattz*.[691] A one-page memorandum in the *Mattz* folder within Blackmun's archived papers reveals that *Mattz*'s citation to Stephenson's *Condon* opinion had come about through the urging of a law clerk, who wrote, "Judge Stephenson's opinion is really quite on point, as he engages in much the same analysis as we do."[692] However, correspondence with a different federal judge, retrieved from Blackmun's *DeCoteau* folder at the Library of Congress, raises implications beyond mere feelings of embarrassment.

The correspondence consists of two additional documents from Justice Blackmun's *DeCoteau* folder: a letter addressed to the Justice, along with Blackmun's reply. The letter to Blackmun is from Andrew W. Bogue, the then-sitting judge for the U.S. District Court for the District of South Dakota.[693] On March 6, 1975—three days after *DeCoteau* was decided—Judge Bogue wrote:

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could the statutory language have been more unambiguous?

2. What do you make of the fact that the other cession agreements were ratified by the same Congress on the same day, and that the discussion concerning them made no differentiation in terms of the legal effect of the conveyances? Indeed, what can you make of Senator Dawes' statement immediately prior to ratification, referring to all the agreements, that they restored vast amounts of land "to the public domain?"

3. Do you think that all the 30,000 people who settled in the disputed territory had fair notice and understanding that they were subjecting themselves to tribal jurisdiction?

4. What can you point to in the statutory language or the legislative history that is not merely consistent with an intent to retain the reservation, but that evinces a positive intention that the reservation should survive the 1891 Act?

Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress.

[688] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress.

[689] United States *ex rel.* Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), *rev'd*, *DeCoteau*, 420 U.S. 425 (1975).

[690] United States *ex rel.* Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973).

[691] *See* Mattz v. Arnett, 412 U.S. 481, 505 n.23 (1973) (citing United States *ex rel.* Condon v. Erickson, 478 F.2d at 689); *see also supra* note 64.

[692] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 160, Folder 71-1182 (*Mattz v. Arnett*), retrieved from the Library of Congress.

[693] *See South Dakota Hall of Fame: Legacy Andrew Bogue*, https://sdexcellence.org/Andrew_Bogue_2017 (last visited Aug. 25, 2021) (noting that Judge Bogue "sat on the federal court bench from 1970 to 2009").

> Dear Justice Blackmun:
>
> I have this day read the Supreme Court's decision in the case of *DeCoteau v. District County Court,* in which case the Supreme Court held that the Sisseton-Wahpeton Reservation of South Dakota was diminished by the sale of certain unallotted lands.
>
> The purpose of my letter is to commend you and the Supreme Court for the decision made. I recognize that federal judges should not appear to be partisan in the outcome of any case, however, I cannot help but feel that this is an area which has been long neglected and which has caused the Indian and the non-Indian communities of this state to be somewhat frustrated. The very great number of problems which could arise out of white communities being included in the reservation caused me many nightmares. The issues of licensing of liquor stores, attorneys and doctors, as well as issues of taxation would have glutted our calendar here for years to come. I feel that the white communities and a great share of the Indian communities are relieved by your decision.
>
> Please extend my regards to Mrs. Blackmun.
>
> Personal regards,
>
> Andrew W. Bogue[694]

Justice Blackmun replied to Bogue in a letter dated March 12, 1975:

> Dear Andrew:
>
> Thank you for your thoughtfulness in writing as you did on March 6 concerning No. 73-1148, *DeCoteau v. District County Court*. Surely the situation, with the South Dakota court going one way and the Eighth Circuit another, needed to be resolved. I think the decision was the correct one, and I am comforted by the fact that you agree.
>
> I hope all is well in Rapid City and, in fact, throughout the whole State of South Dakota.[695]

The circumstances of Judge Bogue's letter lend credence to the suspicion that his correspondence with Justice Blackmun about *DeCoteau* might "appear to be partisan in the outcome of [a] case."[696] At the time he sent Blackmun his letter praising *DeCoteau*, review of Bogue's own decision diminishing an Indian reservation—the Rosebud Sioux Reservation in South Dakota—was pending in the Eighth Circuit.[697] Two years later, that case would be further reviewed by the Supreme Court itself, culminating in a ruling that devastated the Rosebud Sioux Tribe and went even farther

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[694] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress; *see* App. Exhibit 6, *infra* p. 350.

[695] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress; *see* App. Exhibit 7, *infra* p. 351.

[696] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress; *see* App. Exhibit 6, *infra* p. 350.

[697] Rosebud Sioux Tribe v. Kneip, 375 F. Supp. 1065 (D.S.D. 1974) (decided by Bogue, J.), *aff'd*, 521 F.2d 87 (8th Cir. 1975).

than *DeCoteau* in fundamentally damaging time-honored principles of Indian law.[698] In March of 1975, when Bogue initiated his correspondence, Justice Blackmun could have been expected to participate in reviewing the Rosebud Sioux case—as indeed he ultimately did, joining the majority opinion of Justice William Rehnquist that substantially diminished the size of the Rosebud Sioux Reservation.[699] Evidence that a Supreme

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[698] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

[699] *See id.* at 585-615 (majority opinion of Rehnquist, J., joined by Burger, C.J., and White, Blackmun, Powell, and Stevens, JJ.); *see also* Carole Goldberg, *President Nixon's Indian Law Legacy: A Counterstory*, 63 UCLA L. Rev. 1506, 1523 (2016) (noting that "Justice Blackmun joined the other three Nixon appointees" in *Rosebud Sioux Tribe v. Kneip*, a decision that "was decidedly contrary to tribal interests, subtracting three quarters of the reservation's 3.2 million acres as defined in an 1889 federal statute, and leaving 2,000 tribal members outside of tribal jurisdiction"). That the question of the diminishment of the Rosebud Reservation was on the Justices' minds when Judge Bogue initiated his correspondence with Justice Blackmun is evident from an oral argument colloquy in *DeCoteau*, involving William F. Day, Jr., special assistant attorney general of South Dakota, who argued on behalf of respondent District County Court for the Tenth Judicial District:

> QUESTION: What happens, Mr. Day, in a reservation which is clearly and concededly a reservation—let's take the Rosebud Reservation in your State.
>
> MR. DAY: Okay.
>
> QUESTION: Now, who has jurisdiction there over civil controversy between two non-Indians?
>
> . . . .
>
> MR. DAY: The State of South Dakota, your Honor.
>
> . . . [W]e exercise jurisdiction over non-Indians in Todd County, South Dakota, what we're claiming to be the Rosebud Indian Reservation.
>
> QUESTION: And you recognize it clearly as a reservation?
>
> MR. DAY: Yes, sir.
>
> QUESTION: Everybody does?
>
> MR. DAY: We do.
>
> QUESTION: Unh-hunm.
>
> QUESTION: Well, historically, there hasn't been much claim to the contrary, has there? No one has attempted to cut the States out of that, have they?

Transcript of Oral Argument, *supra* note 119, at 44 (No. 73-1148). The Justices' questioning South Dakota's special assistant attorney general regarding the status of the Rosebud Reservation was no mere coincidence since William F. Day, Jr. had represented the four South Dakota counties that were among the defendants in the *Rosebud Sioux Tribe* lawsuit which precipitated Judge Bogue's federal district court decision on February 6, 1974—ten months before oral argument in *DeCoteau*—reducing the size of the Rosebud Reservation to exclude those counties from its boundaries. *See Rosebud Sioux Tribe*, 375 F. Supp. at 1066 (showing "William F. Day, Jr., Winner, S.D." as one of the attorneys "for defendants"); *id.* at 1084 (diminishing the reservation and asserting "that the State of South Dakota can exercise jurisdiction over Indian people in the counties of Gregory, Tripp, Mellette, and what was Lyman"); *see also supra* notes 693-698 and accompanying text. Both Bogue's *Rosebud Sioux Tribe* opinion and Day's brief for the four counties—coauthored with attorney Tom Tobin, *see supra* note 106—are component parts of an appendix respondent District County Court filed in the Supreme Court in *DeCoteau*. *See* 3 App. for Respondent at 69-141, DeCoteau v. Dist. Cty. Ct., 420 U.S. 425 (1975) (No. 73-1148) (on file with Author) (reprinting Brief for the Four Counties, *Rosebud Sioux Tribe*, 375 F. Supp. 1065 (D.S.D. 1974) (No. CIV 72-4055), and listing William F. Day, Jr. and Tom Tobin as "ON THE BRIEF"); *id.* at 143-95, *DeCoteau*, 420 U.S. 425

Court Justice felt "comforted" by one judge's approval of his judgment in an Indian law case and that he suffered "personal embarrassment" for having to disagree with another judge's decision[700] raises disturbing collateral questions about judicial objectivity, integrity, and ethics in a field of law that is uniquely vulnerable to any weakening of these guardrails.[701] These concerns are magnified by the fact that Justice Blackmun's position in *DeCoteau* clearly was the driving force relative to the votes of the other Justices in the majority. Indeed, with Justice Lewis Powell's having initially voted with the dissenters[702] and with Justice Potter Stewart's having stated that he "agree[d] with HAB,"[703] the decision easily could have come out in favor of acknowledging the Lake Traverse Reservation's continuing existence if only Blackmun had remained as faithful to the application of Indian law principles as he had been when he wrote for a unanimous Court in *Mattz v. Arnett*,[704] just two years before *DeCoteau*.[705]

(No. 73-1148) (reprinting *Rosebud Sioux Tribe*, 375 F. Supp. 1065 (D.S.D. 1974) (opinion of Bogue, J.)). *See generally* EagleWoman, *supra* note 126, at 664-76 (analyzing and criticizing "the unceasing attack of South Dakota to gain approval by the highest federal court in the United States to disrupt and destroy the reservation status of the Sioux Tribal Nations"). Prior to focusing his legal work on diminishing the Rosebud Reservation and terminating the Lake Traverse Reservation, Day had served for seven years as a jurist of the Rosebud Sioux Tribal Court. *See* Obituaries, Argus Leader, Jan. 4, 2018, https://www.legacy.com/obituaries/ArgusLeader/obituary.aspx?n=William-F-Day&pid=187719174 ("On September 14, 1964, President Cato Valandra of the Rosebud Sioux Tribe appointed Bill to the office of Judge of the Sioux Tribal Court of Rosebud, where he served until 1971.").

[700] Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (*DeCoteau v. District County Ct.*), retrieved from the Library of Congress.

[701] *See* Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. Rev. L. & Soc. Change 529, 539 (2021) (footnotes omitted) ("The ABA Model Code of Judicial Conduct . . . recognizes that a fair and impartial judiciary is essential to the United States justice system. Accordingly, judges are obligated to 'strive to maintain and enhance confidence in the legal system.' Judges must apply the law impartially and must avoid even the appearance of impropriety. Any judicial conduct that undermines the impartiality of a court subverts public confidence in the legal system."); Mistretta v. United States, 488 U.S. 361, 407 (1989) (majority opinion of Blackmun, J.) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *cf.* Sissela Bok, Lying: Moral Choice in Public and Private Life 31 n. (2nd Vintage Books ed. 1999) (1978) ("The function of the principle of veracity as a foundation [of relations among human beings] is evident when we think of trust. I can have different kinds of trust: that you will treat me fairly, that you will have my interests at heart, that you will do me no harm. But if I do not trust your word, can I have genuine trust in the first three? If there is no confidence in the truthfulness of others, is there any way to assess their fairness, their intentions to help or to harm? How, then, can they be trusted? *Whatever* matters to human beings, trust is the atmosphere in which it thrives.").

[702] *See supra* text accompanying note 661.

[703] *See supra* text accompanying note 664.

[704] Mattz v. Arnett, 412 U.S. 481 (1973).

[705] *See supra* notes 55-57 and accompanying text. Justice Blackmun's position in *DeCoteau* contrasts sharply with his arguably ordinary alignment (at least during the latter part of his Supreme Court career) with the votes and viewpoints of Justices

III. Conclusion

The doctrine of reservation diminishment/disestablishment originated in 1962 as an application of historical and fundamental Indian law principles in a particular, newly developing context, one that commanded the Supreme Court's attention at a time when Indian tribes were emerging from the tyranny of the so-called "termination" era of federal Indian law[706] and beginning to reassert their autonomy, sovereignty, and right of self-government in the modern era.[707] The Court's essential adherence to those principles in *Seymour v. Superintendent*[708] was carried forward through its 1973 decision in *Mattz v. Arnett*.[709] That case, like *Seymour*, held—unanimously—that legislation dating back to the allotment and assimilation period of U.S. Indian policy, an oppressive and damaging era long since repudiated by federal policymakers,[710] could not be stretched

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William Brennan and Thurgood Marshall—both of whom joined Justice William Douglas's *DeCoteau* dissent, *see* DeCoteau v. Dist. Cty. Ct., 420 U.S. 425, 460-68 (1975) (Douglas, J., dissenting, joined by Brennan and Marshall, JJ.)—in Indian law cases. *Cf.* Dussias, *supra* note 55, at 139 ("The frequency with which Justices Brennan and Marshall joined Justice Blackmun's opinions, or at least agreed with the approach taken in his opinion, suggests that Justices Blackmun, Brennan, and Marshall shared largely similar views of Indian law during their common years on the Court. . . . [T]he overall picture that emerges from examining Justice Blackmun's opinions is that these three Justices were generally in agreement with each other on the Indian law issues addressed in Justice Blackmun's opinions, or at least in agreement on the basic approach which should be taken in dealing with such issues."). *But see* Goldberg, *supra* note 699, at 1523 ("[O]nce he was on the [Supreme] Court, Justice Blackmun displayed far more antagonism toward tribal interests during the era of the four Nixon appointees than afterwards. Justice Blackmun's early decisions have a patently anti-tribal cast. . . . While he was part of the Nixon four, . . . Justice Blackmun largely toed the anti-tribal line.").

[706] For overviews of the termination era, see Cohen's Handbook § 1.06, *supra* note 16, at 84-93; Fletcher § 1.3, *supra* note 14, at 12-13.

[707] *See* Krakoff, *supra* note 117, at 1212 (noting that "only since the era of self-determination have questions arisen concerning whether allotment-era statutes (the policies of which have been entirely abandoned) diminished reservation boundaries"); Royster, *supra* note 56, at 30 n.147 ("It may be significant that *Seymour* was decided as the ravages of the termination era were becoming evident and public policy was beginning to shift again to protecting tribal autonomy. A Court faced with immediate evidence of the failure of an assimilationist policy was unlikely to strain to give effect to a similar policy from an earlier era."); Goldberg, *supra* note 699, at 1521-22 (footnote omitted) ("Since the 1960s, as tribes have asserted greater control over their territories, opposing interests have challenged the reach of reservation boundaries. These opponents have found ammunition for their challenges in federal allotment statutes dating back to the late nineteenth and early twentieth centuries."); *cf.* Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations 86 (2005) ("[A]s the shock waves of termination rolled through Indian country, Indian people realized that something had to be done and that they could count upon nobody save themselves. That realization became a major impetus for the gathering of the modern tribal sovereignty movement.").

[708] Seymour v. Superintendent, 368 U.S. 351 (1962).

[709] Mattz v. Arnett, 412 U.S. 481 (1973); *see, e.g.*, Hanna & Laurence, *supra* note 354, at 807 ("The first two reservation diminishment cases . . . held for the Indian tribes, mostly on the basis of the statutory language and history, but with some consideration of the treatment the reservation received from subsequent Congresses.").

[710] *See Mattz*, 412 U.S. at 496 n.18 ("The policy of allotment and sale of surplus

or otherwise manipulated to read as if Congress had intended to shrink or destroy the boundaries when it merely permitted non-Indians to purchase unallotted lands and reside among the Indians on a reservation.[711]

However, as this Article's investigation into the contents of individual Justices' archived papers has shown, an erosion of those protective Indian law principles was underway in the early 1970s;[712] and in 1975 the Supreme Court issued a devastating decision—*DeCoteau v. District County Court*[713]—that violated those principles while professing to follow them,[714] holding that a congressional act ratifying a tribe's agreement to sell unallotted lands abolished the reservation itself,[715] a reservation that

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reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U.S.C. § 461 *et seq.*").

[711] *Cf.* Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. Rev. 393, 396 (1995) (footnote omitted) (describing the reservation diminishment/disestablishment cases as ones in which the Supreme Court "ponder[s] the question whether an allotment-era statute, opening a reservation for white settlement, worked a diminishment of the reservation down to the lands allotted to the tribe and its members, or, on the other hand, left the reservation boundary intact and merely allowed whites to homestead on the reservation").

[712] *See* Tweedy, *supra* note 1, at 751 ("Starting in the mid-1970s . . . the Court began to conclude that language indicating an intent for a tribe to cede lands unconditionally to the United States for a sum certain was sufficient to support a judicial inference of an intent to diminish or disestablish a reservation."); *see also supra* notes 58-65 and accompanying text.

[713] DeCoteau v. Dist. Cty. Ct., 420 U.S. 425 (1975).

[714] *See* Royster, *supra* note 120, at 307 n.189 (citing *DeCoteau* as a "diminishment case in which the Court . . . recited the [Indian law] canons and then refused to apply them"); *supra* note 566 and accompanying text; *see also* Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?:* Menominee*,* Nebraska v. Parker*,* Bryant*,* Dollar General . . . *and Beyond*, 2017 U. Ill. L. Rev. 1901, 1921 (2017) (footnotes omitted) (citing, inter alia, *DeCoteau*, 420 U.S. at 444) ("Although [the Supreme Court] has insisted that allotment does not diminish a reservation absent 'clear and plain' evidence of congressional intent, it has repeatedly found diminishment even though Congress did not actually say the boundaries would change.").

[715] *See* Frickey, *supra* note 500, at 1150 ("Standing alone, this language [of the 1891 Act of Congress at issue in *DeCoteau*] only implies a transfer of Indian title to the United States. It says nothing about tribal jurisdiction over the lands."); *see also* Memorandum of the United States as Amicus Curiae, *supra* note 593, at 9, 1974 WL 187467, at *5 ("Nothing in that [1889] agreement shows that the Tribe intended to give up anything more than beneficial title to some of its land. The natural understanding by the Tribe would be that it was selling only its property interest in land, not its right of self-government, particularly in view of the pattern in which allotments were being made."); *cf.* Getches, *supra* note 586, at 1621 (footnote omitted) ("When construing legislation opening Indian country to non-Indian occupancy, the Court has generally resisted diminishing reservation boundaries absent clear evidence that Congress intended to divest the tribe not only of parcels of land but the power to govern the area."); Taylor, *supra* note 60, at 1182 (footnote omitted) ("Because every surplus land act had one distinct motivating purpose—to lure white settlers onto the reservation by offering inexpensive parcels—most of the statutes contained some form of cession terminology necessary to effectuate the land transfer. A sale of land, however, does not necessarily concede loss of jurisdictional authority over it.").

had been guaranteed by treaty to be the tribe's "permanent" home.[716] It remained an open question, after the *DeCoteau* decision, whether the doctrine of reservation diminishment/disestablishment could be brought back in line with traditional Indian law principles, or would continue to devolve along a contrary, inimical trajectory.[717]

To find out, please stay tuned for the exciting Part 2 of this first episode of *The Indian Law Justice Files* . . . .

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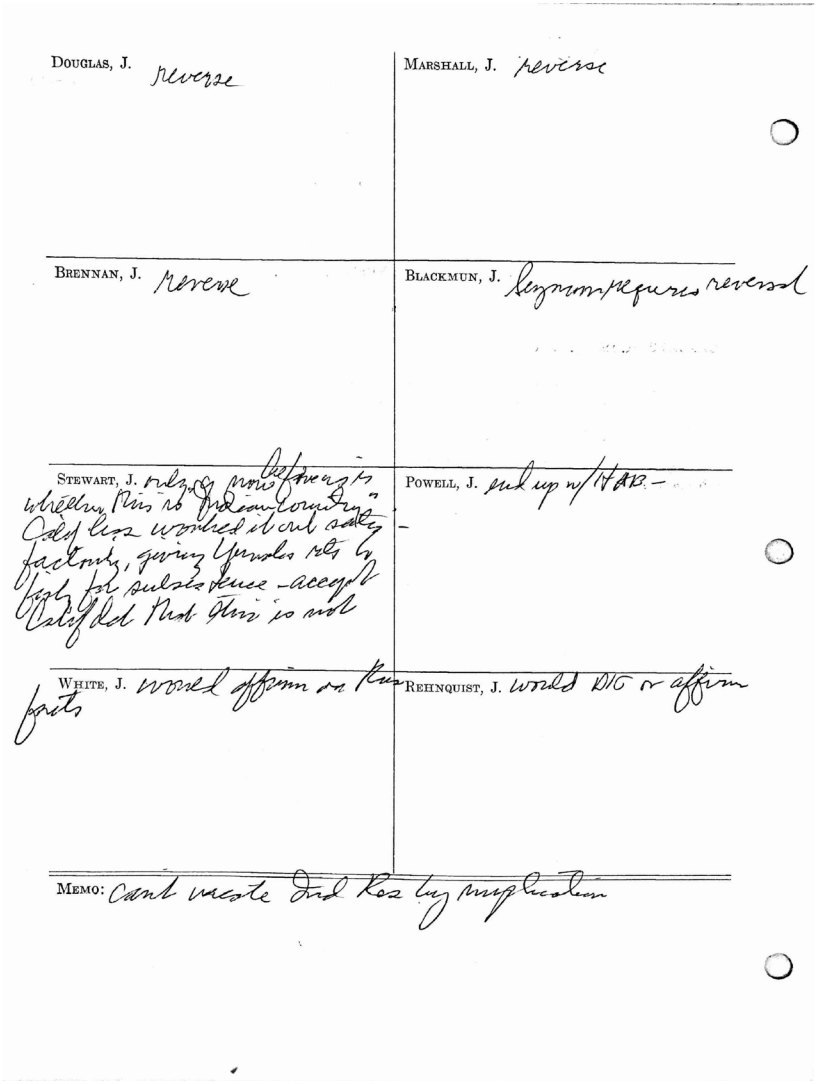
[716] Treaty of Feb. 19, 1867, art. III, 15 Stat. 505, 506, as amended, 15 Stat. 509 ("[T]here shall be set apart for the members of said bands . . . the following described lands as a permanent reservation . . . ."), *reprinted in DeCoteau*, 420 U.S. at 451-52. For discussion of potential remedies for the Sisseton-Wahpeton Dakota people, see EagleWoman, *supra* note 104, at 533-38 (advocating for remedial action "[o]n the international level" in light of the fact that "Indigenous peoples experiencing human rights violations have demanded that nation-states evolve their human rights standards to provide for collective rights"); Angelique A. EagleWoman, *Re-establishing the Sisseton-Wahpeton Oyate's Reservation Boundaries: Building a Legal Rationale from Current International Law*, 29 Am. Indian L. Rev. 239, 252, 266 (2005) (identifying "the need to regain federal recognition of the [Lake Traverse] reservation boundaries to restore full acknowledgement of tribal jurisdiction within those boundaries" and concluding that "[a]fter the *DeCoteau* decision, the [Sisseton-Wahpeton Oyate] has exhausted judicial remedies in the United States and international law is the next logical step to regain its traditional territories as an indigenous nation"); *see also* Angelique EagleWoman, *It's time to rectify the 1975 DeCoteau decision, disestablishing the Sisseton-Wahpeton Reservation*, Indian Country Today, July 15, 2020, https://indiancountrytoday.com/opinion/its-time-to-rectify-the-1975-decoteau-decision-disestablishing-the-sisseton-wahpeton-reservation ("It is time to course correct the negative consequences from the wrongly decided *DeCoteau* case and wipe away the injustice of that ruling which continues to be used as a threat over Indian Country. The Sisseton-Wahpeton Dakota have never relinquished our beautiful Lake Traverse Reservation and we call upon the U.S. Congress to rectify the 1975 *DeCoteau* decision as a judicial error, by passing federal law to re-recognize our reservation boundaries.").

[717] *Cf.* Tweedy, *supra* note 1, at 787 (referencing McGirt v. Oklahoma, 140 S. Ct. 2452 (2020)) ("[I]f *McGirt* is any indication, there is a substantial possibility that the Court may realign itself with the canons of construction in federal Indian law . . . and return to a principled approach rooted in core doctrine, rather than the pell-mell methodologies we have too often seen in recent decades."); Mary Kathryn Nagle, *Special* McGirt *Issue: Introduction*, 56 Tulsa L. Rev. 363, 368 (2021) ("Because of *McGirt*, today's metric of justice will no longer be what white settlers expected, but could not lawfully secure, more than one hundred years ago. Because of *McGirt*, when it comes to treaties and tribal nations, today's measure of justice will be the *law*. Nothing less. Nothing more."). *But see* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2510, 2511, 2521 (2022) (Gorsuch, J., dissenting) (observing that in *McGirt* the Supreme Court was unwilling "to usurp Congress's authority and disestablish [the Muscogee Creek Reservation] by a lawless act of judicial fiat" but decrying the 5 to 4 *Castro-Huerta* majority opinion conferring state jurisdiction over an on-reservation crime committed by a non-Indian against an Indian as an "ahistorical and mistaken statement of Indian law" that "allows Oklahoma to intrude on a feature of tribal sovereignty recognized since the founding" and that "surely marks an embarrassing new entry into the anticanon of Indian law").

Appendix—
Selected Exhibits from the Papers of Supreme Court Justices



Douglas, J. reverse

Marshall, J. reverse

Brennan, J. reverse

Blackmun, J. [illegible] requires reversal

Stewart, J. [illegible]

Powell, J. [illegible]

White, J. would affirm on the facts

Rehnquist, J. would DIG or affirm

Memo: Can't vacate and Res by implication

Exhibit 1: From the William H. Rehnquist Papers, Manuscript/Mixed Material, Box/Docket No. 38: 71-1182 (Mattz v. Arnett, Director, Department of Fish and Game), retrieved from the Hoover Institution, Stanford University.

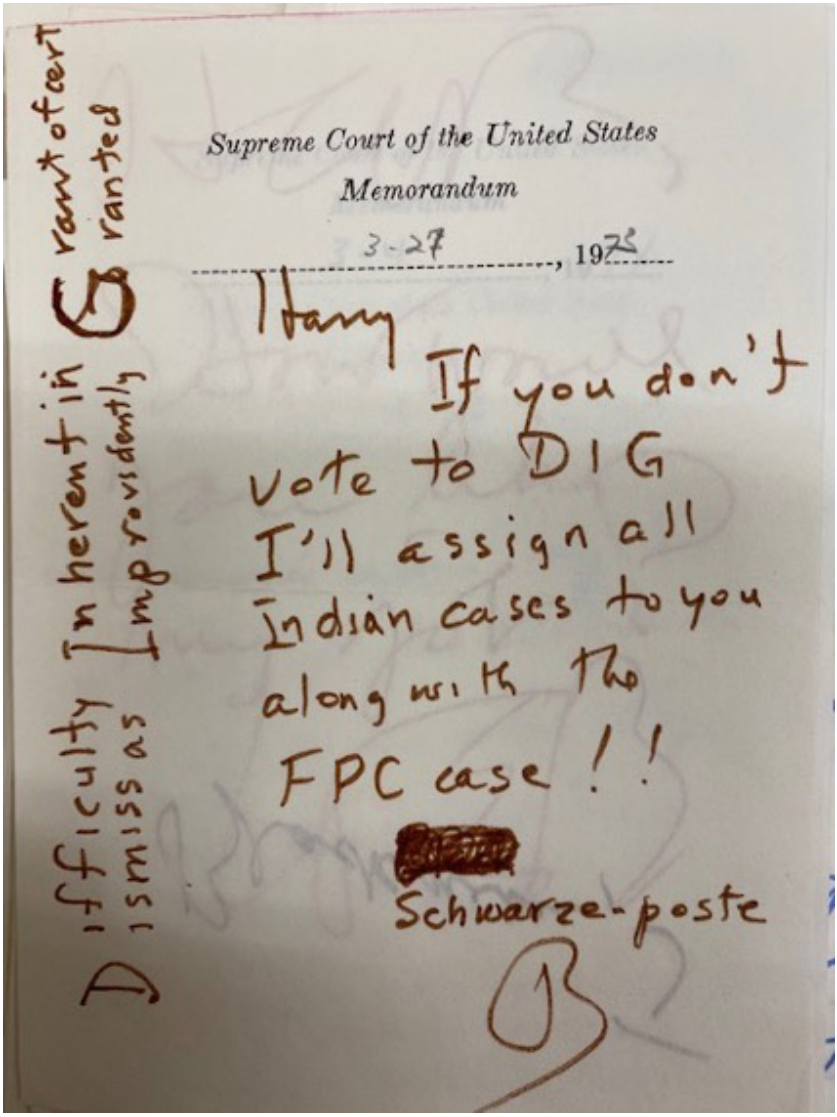


Exhibit 2: From the Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 116 ("Notes exchanged between justices during court proceedings, 1970-1993"), retrieved from the Library of Congress.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 11, 1975

Re: No. 73-1148 - DeCoteau v. District County Court
No. 73-1500 - Erickson v. Feather

Dear Potter:

I feel that your proposed opinion for these cases is a most constructive one. If Indians are ever to lose a case, these, it seems to me, are the ones they will lose.

Near the top of page 5 is a reference to the "Northern District of South Dakota." I haven't been in my Circuit for a few months, but, the last I knew, the entire State is a District. See 28 U.S.C. § 122. Perhaps the confusion is due to the fact that there is a Northern Division of the District, but then that would be of small significance.

I wonder also about the page reference to Mattz at the end of the paragraph on page 21.

Sincerely,

Harry

Mr. Justice Stewart

Yale UNIVERSITY LIBRARY
Manuscripts & Archives

Exhibit 3: From the Potter Stewart Papers, Manuscript/Mixed Material, MS 1367, Box No. 99, Folder No. 862 (DeCoteau, Natural Mother and Next Friend of Feather v. District Court, No. 73-1148), retrieved from Yale University Library.

No. 73-1148 - DeCoteau v. District Court
No. 73-1500 - Erickson v. Feather

In these cases the supreme court of South Dakota and the CA 8 have reached opposing conclusions regarding the disestablishment of the Lake Traverse Reservation, originally set up by treaty with the Sioux Indians in 1867. The South Dakota court reached a conclusion of disestablishment. The CA 8 reached a conclusion of nondisestablishment and in so doing in effect overruled an earlier case in 319 F.2d 845 where the panel consisted of Judges Vogel, Van Oosterhout and Ridge.

Bearing somewhat on this is Mattz v. Arnett, 412 U.S. 481 (1973), an opinion I wrote for a unanimous Court at the end of the Term before last. That concerned the continuance of the Klamath River Reservation. We reached the conclusion that the Reservation had not been disestablished and that land within its boundaries was still Indian country. We held that allotment provisions of the 1892 Act, there under consideration, was consistent with continued Reservation status; that the Act's legislative history did not support the view that the Reservation was terminated but really compelled the conclusion that efforts to terminate it failed completely; that a Congressional determination to terminate must be expressed on the face of the statute or be clear from the circumstances ~~in~~ and legislative history; and that the conclusion of nontermination was reinforced by repeated recognition thereafter by the Department of Interior and by the Congress. Thus, the Mattz opinion gave a great big boost to the continued status of a reservation absent clear opposing indications.

Exhibit 4: From the Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (DeCoteau v. District County Ct.), retrieved from the Library of Congress.

No. 73-1148
No. 73-1500 - 6 -

that very result. The language of the statute stands there as a very definite barrier. There are specific words of session, relinquishment, sale and conveyance. The Mattz opinion clearly contemplated that some language can be used which would disestablish, although the conclusion there was that the language employed did not disestablish. True, there is no specific reference or recital that the land is being returned "to the public domain." Are those very words, however, absolutely necessary? Congress did given evidence that it was returning this land to the public domain, and the Indians can come up with nothing that is more specific. Thus, definitely on balance, I am inclined to believe that South Dakota has the better argument here.

I must confess, however, that the CA 8's difficulty and its overruling of its earlier case causes me a little bit of personal embarrassment. I think the earlier case was correctly decided, and I suspect that the second and contrary decision was arrived at only because of what was held in Mattz. I suspect, however, that the CA 8 panel just went too far and failed to see that we had allowed plenty of elbowroom for contrary results on different facts. Roy Stephenson will be upset if this case is reversed.

David points out, of course, that there are some policy matters that the Court might consider. In favor of the State is the fact that the Indian population and the Indian territory actually owned is small. On the other side of that coin is the fact that everyone supposedly is interested in fostering tribal self-government. A decision in favor of the Indians would have symbolic importance, and very recent statutes seem to give some implied recognition by

Exhibit 5: From the Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (DeCoteau v. District County Ct.), retrieved from the Library of Congress.

United States District Court
District of South Dakota
318 Federal Building
Rapid City, South Dakota
March 6, 1975

Andrew W. Bogue
U. S. District Judge
Rapid City, South Dakota 57701

The Honorable Harry A. Blackmun
United States Supreme Court
Washington, D. C. 20544

Dear Justice Blackmun:

I have this day read the Supreme Court's decision in the case of DeCoteau v. District County Court, in which case the Supreme Court held that the Sisseton-Wahpeton Reservation of South Dakota was diminished by the sale of certain unalloted lands.

The purpose of my letter is to commend you and the Supreme Court for the decision made. I recognize that federal judges should not appear to be partisan in the outcome of any case, however, I cannot help but feel that this is an area which has been long neglected and which has caused the Indian and the non-Indian communities of this state to be somewhat frustrated. The very great number of problems which could arise out of white communities being included in the reservation caused me many nightmares. The issues of licensing of liquor stores, attorneys and doctors, as well as issues of taxation would have glutted our calendar here for years to come. I feel that the white communities and a great share of the Indian communities are relieved by your decision.

Please extend my best regards to Mrs. Blackmun.

Personal regards,

Andrew W. Bogue

AWB/ey

Exhibit 6: From the Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (DeCoteau v. District County Ct.), retrieved from the Library of Congress.

March 12, 1975

The Honorable Andrew W. Bogue
United States District Court
318 Federal Building
Rapid City, South Dakota 57701

Dear Andrew:

Thank you for your thoughtfulness in writing as you did on March 6 concerning No. 73-1148, DeCoteau v. District County Court. Surely the situation, with the South Dakota court going one way and the Eighth Circuit another, needed to be resolved. I think the decision here was the correct one, and I am comforted by the fact that you agree.

I hope all is well in Rapid City and, in fact, throughout the whole State of South Dakota.

Sincerely,

Exhibit 7: From the Harry A. Blackmun Papers, Manuscript/Mixed Material, Box 198, Folder 73-1148 (DeCoteau v. District County Ct.), retrieved from the Library of Congress.