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The Indian Claims Commission

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ABSTRACT: In 1946, when the Indian Claims Commission Act was passed, it was expected that the Commission would complete its work in ten years. The volume of dockets, about 650, and the time consuming methods of litigation required repeated extensions of the Commission's tenure, with the present cut-off date set for 1978. The Commission's work has been expedited somewhat by procedural reforms introduced in the 1960s, including expansion of the number of Commissioners from three to five. Generally, the Commission has been a disappointment to Indian claimants. Despite exceptionally broad grounds for suit stated in the 1946 Act, the Commission has favored narrow construals and parsimonious settlements. Tribes must obtain congressional approval of plans for the use of their awards. The Indians' usual preference has been for per capita distributions rather than for programmed use which the government prefers, such as investment in securities or tribal enterprises. Since 1974, except for unusual circumstances warranting otherwise, tribes must program 20 percent of their awards.

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HP017991

RETROSPECT[1]

THE INDIAN Claims Commission Act of August 13, 1946 (P.L. 79–726) was intended to overcome procedural and financial obstacles in the way of Indian tribes seeking restitution for grievances against the United States. Heretofore, a tribe had to obtain a special jurisdictional act from Congress to bring suit in the U.S. Court of Claims, where the grounds for suit tended to be construed so narrowly that more than two out of three claims were disallowed, and it was not unusual for several decades to elapse from the time attorneys were retained until a decision was rendered.

During the 1930s and 1940s, Congress repeatedly considered the creation of a special tribunal to deal fairly and expeditiously with Indian claims and assure that even poor tribes could have their day in court. The legislation of 1946, in effect a general jurisdictional act, permitted tribes five years to register claims with the Commission, which was expected to hear and adjudicate all cases by 1957. The act also eased the way financially for tribal claimants. Attorneys could enter into total contingency contracts with Indian clients and attorneys' fees were limited to no more than 10 percent of a judgment besides the costs of preparing cases. The Bureau of Indian Affairs had the responsibility of informing tribes of their right to bring suit.[2]

Claims could be brought by any "tribe, band or identifiable group" of American Indians through their governing councils or, if lacking a formal organization, by any member acting in behalf of the tribe, band, or group. The Attorney General was designated to defend the government and a special Indian claims staff was set up in the Justice Department to handle the increase in Indian cases. Hearings were to be conducted according to ordinary federal court procedures with either party having the right of appeal, first to the Court of Claims and then to the Supreme Court.

While operating much like a court, a commission, in theory, has more flexibility to deal with unusual and unprecedented circumstances. In practice, commissions frequently are reluctant to break new ground. The Indian Claims Commission was no startling exception in this regard. In some respects, the procedural provisions of the act itself encouraged conservativism. However, the act also incorporated two features which could have given the Commission the necessary latitude to develop new approaches to old problems. These were the grounds for suit (section 2) and the Commission's power to create an Investigation Division (section 12). In the actual promulgation of suits, neither of these provisions figured importantly.

A remarkable range of complaints was anticipated in the grounds for

1. Unless otherwise cited, material in this section is from Nancy Oestreich Lurie, "The Indian Claims Commission Act," *The Annals of the American Academy of Political and Social Science*, vol. 311 (May 1957) pp. 56–70.

2. The Bureau contacted only federally recognized tribes. Thus, many groups on the eastern seaboard were overlooked. Long unresolved claims are now being presented through the courts by Indian groups such as the Penobscot and Passamaquoddy of Maine. For a discussion of wider legal issues regarding Indian affairs up to 1957, see the article by Theodore H. Haas, "The Legal Aspects of Indian Affairs from 1887 to 1957," *The Annals of the American Academy of Political and Social Science*, vol. 311 (May 1957) pp. 12–22. On litigation, see Vine Deloria's article in this issue of THE ANNALS.

HP017992

suit, including elaborately specified claims in law or equity arising in regard to the Constitution, treaties and Executive Orders of the President, as well as claims sounding in tort or involving fraud, duress, mutual or unilateral mistake, and, finally, "claims based on fair and honorable dealings not recognized by any existing rule of law or equity." The door appeared to be open to almost anything, but once cases began to be heard it was shut, quickly and firmly, against any claims which did not deal with a limited number of highly quantifiable issues. In the vast majority of cases this has meant proving that the claimants had been paid less for their land than its fair market price at the time of taking. Awards consist of the difference between these figures minus offsets. Exceptions to this pattern are accounting claims, about 50 out of more than 600 dockets, and concern allegations of mismanagement of tribal funds, lands, and resources. Many of these cases have been transferred to the Court of Claims and are still in litigation. The emphasis in this article will be on land cases.

If employed at all, "fair and honorable dealings" has been mainly "color" in arguments based on unconscionable payments for land or uncompensated takings.[3] Attorneys for the Indians and the Justice Department assessed the sentiment of the Commission as expressed in the earliest cases, 26 dismissals and only two awards by 1951, and settled for legal theories based on acreage and cold cash. Even the grounds of fraud and duress, traditional sources of Indian grievance, seemed to strike many attorneys as more rhetorical than substantive issues. In fairness, it should be noted that the hazards of contingency contracts and 10 percent fees designed to benefit the Indians also tended to discourage lawyers from striking out in innovative directions.

Presentation of land cases soon followed a routine format. First, there is the need to prove the petitioners' identity as the rightful descendants of those who used and occupied the land in question. The concepts of use and occupancy frequently became matters at issue until a kind of formula evolved out of the Commission's decisions. The Commission chose to honor tribal claims where any kind of aboriginal title to exclusive use and occupancy was shown, if only ritualistic or seasonal, but to disallow compensation for intertribally shared lands although an important portion of several tribes' sustenance might have come from such areas. Where the government moved several tribes into an area and then moved them on, the Commission has recognized such shared interests as a form of legal title to given lands.[4]

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If it is decided that a petitioner has a proper claim, a second round of hearings considers the petitioners'

3. "Fair and honorable dealings" cannot be used in accounting claims transferred to the Court of Claims, but it has figured in the Commission's decisions in not allowing offsets where administrative procedures worked hardships on tribes. The difficulties of bringing suit on grounds of fair and honorable dealings per se are discussed by James Michael Kelly in a review of *Gila River Pima-Maricopa Community* v. *United States*. His discussion appears in "Recent Developments", *Saint Louis University Law Journal*, vol. 15, no. 3 (1971) pp. 491–507. Kelly concludes, "The holdings . . . did serve to solidify an historical American tradition and belief: Indians never win."

4. Imre Sutton, *Indian Land Tenure* (New York: Clearwater Publishing Co., 1975), provides valuable analyses of Indian land holding, both aboriginal and under federal trust, and extensive discussion of Indian Claims Commission cases.

and government's evaluations of the fair market price of the land at the time it was relinquished. Finally, if the government is proved liable, the question of offsets must be argued. Hearings require extensive testimony by various kinds of expert witnesses, the introduction of hundreds of pages of documentation, and all the customary legal paper generated by opposing attorneys. By 1976, the Commission's records comprised 39 volumes, each averaging well over 500 pages.[5]

In effect, the Commission required the litigants to undertake and pay for much of the work intended for the Investigation Division and sought no major appropriation from Congress to make it an effective source of knowledge to illuminate their deliberations.

TWENTY YEARS LATER

When the Indian Claims Commission was first reviewed in THE ANNALS in 1957, it was observed that it had already become necessary for Congress to extend its tenure for five years and that the claims would "simply not be settled when the Commission expires in 1962." The life of the Commission has had to be extended four more times, most recently to September 30, 1978, when any remaining litigation will be completed in the Court of Claims.

The extended tenure of the Commission is due in part to the volume of cases greatly exceeding congressional expectations in 1946. By the 1951 deadline, 370 petitions were filed but because many included more than one cause of action, by September 1976, the Commission had gradually separated them into 615 dockets. Dockets are sometimes further subdivided into several issues so that the number of actual claims has been estimated in the neighborhood of 850.[6] The Commission could not possibly have wrapped up its work by 1957. The situation would have been even worse if some procedural changes had not been instituted.

Initially, for example, both the land area and its evaluation had to be decided by the Commission before either party could appeal to the Court of Claims. In 1960, an amendment to the original act allowed for interlocutory appeal when the extent of title alone had been ruled on, with evaluation argued only once, after acreage was determined.[7] With the slow settlement of claims, Indians' attorneys with a number of pending suits were often hard put to finance the preparation of their cases. In 1963, a revolving loan fund administered through the Indian Bureau helped attorneys pay for expert assistance of a nonlegal nature.

The most sweeping efforts to expedite the Commission's work occurred in 1967. The number of Commissioners (appointed by the President with the advice and consent of

5. Indian Claims Commission, *Annual Report* (Washington, D.C., 1976) p. 1.

6. Thomas Le Duc, "The Work of the Indian Claims Commission under the Act of 1946," *Pacific Historical Review*, vol. 26, no. 1 (1957) pp. 1–16.

7. In discussing the legislative history of the Claims Commission Act since 1946, I have relied heavily on "The Indian Claims Commission Act as Amended," a pamphlet edited and printed by the firm of Wilkinson, Cragun and Barker, Washington, D.C., May 1972. I am grateful to Frances Horn, a partner in this firm, for bringing this publication to my attention and for her patient kindness in answering, in personal correspondence and phone calls, my many questions regarding various developments in the work of the Commission incorporated in this article.

HP017994

the Senate) was increased from three to five. By this time, Chief Commissioner Edgar Witt and Commissioner Louis J. O'Marr had retired and had been replaced respectively by Arthur V. Watkins (1960)[8] and T. Harold Scott (1959). The 1967 legislation called for new presidential appointments. Neither William M. Holt, the last original Commissioner, nor Scott was reappointed, and Watkins chose to retire. Thus, a completely new panel took office with the life title of Chief Commissioner abolished in favor of a changing chairmanship.

Since 1967, procedural streamlining has included prehearing conferences to get technical matters cleared away and regularizing a practice, employed occasionally after 1960, of farming hearings out to smaller panels rather than having the entire Commission hear each case. The most significant saving of time concerned expert testimony. Customarily, both sets of witnesses had presented extensive oral testimony. Since 1967, both parties to the suits have been required to present their experts' direct testimony in written form 30 days before trial so that hearings can begin immediately with cross examination based on the reports.

Appendix 1 of the Commission's 1976 *Annual Report* reveals that in the 18 years from 1949 to 1967, the Commission disposed of 232 dockets, 132 by dismissals and 100 by awards. In the next eight years, 68 dockets were dismissed and 180 resulted in awards, a total of 248 dockets. Despite an enormously accelerated pace of work, the first Chairman, John T. Vance, noted in 1969 that it was unrealistic to expect the Commission to complete, in the three years then remaining to it, more work than had been accomplished in the preceding two decades.[9] Vance called for activation of the Investigation Division to employ experts, assemble evidence and present proposed findings of fact to the Commission which would then hear further arguments from the interested parties to arrive at final opinions. Apparently, the enormous shifting of bureaucratic and legal gears and the necessary appropriation to institute a real Investigation Division met with less enthusiasm than the, by now, familiar technique of extending the life of the Commission to complete its work.

Size of awards

Although complete statistics are not yet available, it is possible to make some general observations as the work of the Commission finally draws to a close. By June 3, 1977, there had been certified to Indian claimants in 285 dockets a total of $657,151,090.33 before deduction of attorneys' fees. This amount must have been equalled, if not greatly exceeded, by the cumulative costs

8. The original Commissioners' lack of prior experience in Indian affairs was deemed an asset of open mindedness. However, when Watkins was appointed, arguments in his favor were that he was already an expert in Indian matters, having been the foremost proponent of the termination policy while he was a Senator (R. Utah)—hardly a qualification to inspire Indian confidence in the Commission. Greater sensitivity has characterized appointments since 1967, including Margaret Hunter Pierce, experienced in Indian claims in her previous positions as Clerk, Chief Clerk and Reporter for the Court of Claims, and Brantley Blue, a Lumbee Indian and formerly a judge.

9. John T. Vance, "The Congressional Mandate and the Indian Claims Commission," *North Dakota Law Review*, vol. 45, no. 3 (Spring 1969) pp. 325–36.

HP017995

since 1946 for personnel and related expenses of the Commission itself, the Indian Claims Section of the Justice Department, the Court of Claims in appeals from Commission decisions, and the Congress and Bureau of Indian Affairs in regard to various continuing concerns with the course of Indian Claims.

Awards, to date, range from less than $2,500 (Ponca, Doc. 324) to over $29,000,000 in the eight combined dockets of the Indians of California (Docs. 31, 37, 176, 215, 333, 80, 80-D, 347). Some tribes' claims are presented in several dockets and in some cases several tribal groups share in a single docket. The average amount per docket which resulted in an award is under $3,000,000. On a per capita basis Indian people for the most part will realize only a few thousand dollars each from their tribes' awards. From their point of view, it must appear that the federal mountain labored long and mightily to bring forth a pretty paltry mouse, if any mouse was forthcoming at all. With few exceptions, interest is not allowed.[10] Land evaluations are low, offsets cut down the size of claims awards, and the costs of preparing Indians' cases are deducted from their awards.

Fair market value

While it would appear a simple matter to deduct the sum paid for land from the fair market value at the time of taking, historic land values are subject to many interpretive alternatives. Where cessions were small and surrounded by private land for which there was an active market, comparative appraisal is relatively easy. However, many cases involve large aboriginal holdings more or less remote from white settlement. Even appraisals based on contemporary sales of similar, unimproved lands raise technically, if not ethically, uncomfortable issues. As pointed out by historian Thomas Le Duc:

> . . . the United States, by virtue of its vast operations in the land market in the nineteenth century, held a monopolistic power over land prices throughout the country . . . the price of private land was substantially a function of public policy. After 1840, certainly, federal policy affected adversely the value of private land in the United States. . . . The appraiser must, therefore, calculate values as they prevailed within the orbit of prices determined by government dumping of land at low prices.[11]

A number of ingenious formulas were brought forth by the Justice Department in the early hearings to arrive at land values, such as the attempt to set an average dollar amount per acre according to the price the government eventually got from sale of the land. However, included in this "average" were huge sections conveyed under other forms of entry than cash sales, veterans' land paper, and agricultural college scrip, for example. While such flagrant financial fudging was disallowed, demolishing such arguments entailed time and expense for Indian claimants.[12] The inexactitude of restrospective appraisal has

10. The Commissioners note a current state of uncertainty about accounting claims and ". . . the Government's duty or lack of duty to pay interest on tribal moneys it withholds from Indians." (*Annual Report*, 1976). In claims arising out of the Fifth Amendment of the Constitution (due process), interest is automatically included from the time of taking. Sale of "surplus" Indian land has figured in a number of Fifth Amendment claims.

11. Le Duc, "The Work of the Indian Claims Commission," p. 12.

12. Ibid., pp. 10–11.

HP017996

been resolved increasingly over the last decade by stipulations in which both parties to the suits agree to a compromise between their respective experts' appraisals.[13]

Offsets

Offsets also have helped to reduce the size of awards, a few to the point of nullifying them. The following discussion of offsets draws heavily on a detailed study of the subject by John R. White.[14] The Act of 1946 probably would not have been passed without the inclusion of the offset provision. Figures as high as $3,000,000,000 were bruited about as the bill the government might have to pay on Indian claims. Although this sum was patently inflated, apparently it served to frighten legislators into allowing offsets. As White observes of the final form of the Indian Claims Commission Act, "It's as if the government was expressing a willingness to correct the error of its ways—providing the effort wasn't too costly."

Neither the Commission nor Court of Claims has been entirely consistent in determining what constitutes a proper offset. Generally, "money or property given to or funds expended gratuitously for the benefit of the claimant," is understood to mean expenses for group rather than individual welfare. Special considerations to chiefs have been disallowed as offsets but, as White shows, it is then difficult to understand why the government was allowed to offset the cost of funerals for indigent Indians in the Quapaw judgment of 1954.

The major justification for offsets is that if Indians had received proper compensation for their lands initially they would not have needed subsequent gratuities. Offsets are therefore part of the price paid for the land. However, offsets often turn out to be the price of things that Indian people neither wanted nor would have purchased if given a choice. Also, had tribes not been forced to relinquish the lands and resources which had supported them, they would not have required government gratuities to survive.[15]

As a general point of law, a defendant may not plead against a judgment a gratuity given a plaintiff. Monroe Price notes the questionable legality of Indian claims offsets in observing that "a person defending against a tort claim of rape cannot offset the award by the value of the incidental pleasure his victim enjoyed as a result of the attack."[16]

The Investigation Division

When the Commissioners decided to give the task of generating information to the litigants, they made the hearings unnecessarily time consuming and costly for all concerned, including the tax paying public. The expense of the cases would have been no greater if the Investigation Division had been properly

13. Indians' attorneys tend to feel that stimulations generally work to the tribes' benefit. At least, they hasten proceedings in cutting down the number of appeals by either side.

14. John R. White, "Barmecide Revisited: The Gratuitous Offset in Indian Claims Cases," *Ethnohistory*, in press.

15. The "Sioux Amendment" to the original Act, approved October 27, 1974 (88 Stat. 1499) states that "expenditures for food, rations, or provisions shall not be deemed payments on the claim" which, in effect, recognized that otherwise the Sioux Black Hills claim would have been virtually wiped out.

16. Monroe Price, *Law and the American Indian: Readings, Notes and Cases* (New York: Bobbs Merrill, 1973), pp. 497–98.

staffed and funded; it might have been considerably less. The number of researchers and experts hired by the Justice Department are paid for with public moneys which could have been shunted just as easily through the Commission itself, thereby also saving much duplicating of effort by opposing experts.

Not only are Indian claimants' awards reduced by the cost of experts, but there is the incalculable cost of the lack of experts. Indians' attorneys were not equally able to assume what turned out to be extremely long-term risks. There is the nagging possibility that when final analyses are made some of the early dismissals and very small awards will be shown to be the result of differential access to experts, especially before the revolving loan fund was established.

re: Sengopori

Disposition of awards

Until Indian groups present plans for the distribution of their judgments, their awards draw 4 percent interest in the federal treasury or, with tribal approval, the Indian Bureau invests their money at the highest rates obtainable. Until recently, Congress spent a great deal of time detailing exactly how the money was to be used in the disposition of each award. A general disposition act for Indian claims judgments, passed October 19, 1973, now delegates primary responsibility for review and approval of plans to the Secretary of the Interior. The lengthy rules governing the Secretary's work include the directive that "not less than twenty (20) per centum of judgment funds, including investment income thereon, is to be used for tribal programs unless the Secretary determines that particular circumstances of the affected tribe clearly warrant otherwise."[17]

The fact is that the majority of tribes have argued for complete and immediate distribution of their awards on a per capita basis despite urging by Congress, the Indian Bureau and some of their own members to husband their awards with investment programs or programs to serve the general interest.[18] If ill-advised, as some believe, the widespread clamor for per capitas is understandable.

In the first place, the implementation of the Indian Claims Commission Act coincided with the period of gathering congressional sentiment for termination of federal responsibility to protect Indian land and resources. As Indian people saw it, termination was likely to be the penalty for attempting to program their money. The Menominee tribe, the first to be terminated, was singled out largely because of its apparent "wealth." In 1951, after 17 years of litigation, the Menominee had won a net judgment of $7,600,000 in the Court of Claims. Added to working capital from their tribal

17. "Use or Distribution of Indian Judgment Funds," *Federal Register*, vol. 39, no. 10 (15 January 1974) pp. 1835–36.

18. A Bureau of Indian Affairs statement taken from a memo from the division of Tribal Government Services, Aug. 26, 1974, lists 109 judgment dispositions by special acts prior to the act of 1973. Of 100 plans with complete data, 49 (involving 36 tribes) are total per capita distributions and two more tribes have modified, "family plan" per capita distributions; 11 plans (involving 10 tribes) divide awards between per capita distribution and programming with the largest share in most cases going into per capitas; the remaining 38 plans are totally programmed awards, but 11 of these are accounted for by three tribes each with several awards. In one case a tribe with two programmed awards distributed a third and by far the largest in per capitas.

HP017998

lumbering industry, they had some $10,000,000 in cash assets besides their substantial, tribally held estate in timbered land. The tribe voted $1,500 per capita payments from their judgment (since individual income had suffered over the years because of government mismanagement of their lumbering, the basis of their suit), setting the rest aside for community purposes, including the actual expenditure of about $250,000 for improving the hospital they maintained with tribal enterprise earnings.

By 1961 when termination became final, with the Menominee still protesting against it, the remainder of their judgment and money they had accumulated previously had gone down the drain in the process of getting them terminated. Virtually bankrupt, they even had to close their hospital and lost a sizeable piece of their land before they succeeded in getting their termination repealed in 1973. While the per capitas made no appreciable difference in individuals' lives, it was the only satisfaction the Menominee got out of their judgment. Had it not been distributed, it would have gone with the rest of their funds.[19]

Besides widespread Indian awareness of the Menominee story, practically every tribe has had its own historical experiences of money managed for their benefit, and when it was gone they were no better off than before. Problems with federal administration and tribal governments have created schisms in Indian communities and, for many tribes, arguments about disposition of claims awards have added to internal political dissent. Although delays of several years between certification of awards and approval of plans have increased judgments through accumulated interest, this fact fails to convince many Indian people of the advantages of investment programs. Explanations of how the equivalent of immediate per capita amounts could accrue from interest over a period of a few years, while leaving the award intact and still producing income, are not enough to overcome an abiding Indian suspicion that the two birds will fly out of the bush before they hatch any eggs.

Tribal business ventures or community improvements are considered at least as risky as investments. Furthermore, while "home" remains the reservation, many people spend much time away at jobs in urban areas and do not see locally-based programs as serving the general interest. Finally, Indian people are inclined to consider community development a federal financial responsibility, part of the promise they relate to treaties, which has never been fulfilled to their satisfaction.

It is less easy to understand why some tribes have chosen to program all or a large portion of their judgments. There is no discernible pattern of tribal programming of judgment funds in terms of geographical location, cultural similarities, or a particular period when Indian people might have felt more confident about programming. As far as my limited observations suggest, one of the persuasive arguments for programming is that future generations of the tribe have an equity in the

19. For more information on Menominee, see Debbie Shames, ed., *Freedom with Reservation* (Madison, Wisconsin: National Committee to Save the Menominee People and Forests, 1972); Nancy Oestreich Lurie, "Menominee Termination: From Reservation to Colony," *Human Organization*, vol. 31, no. 3 (Fall 1972) pp. 257–69.

HP017999

award. The people deciding on disposition plans just happen to be alive now to collect on debts owed since their ancestors' time. There is also an element of respect for the memory of recently deceased elders, who initiated tribal claims proceedings in the 1940s knowing they might not live long enough to benefit personally, but worked for the on-going interests of the tribe.

The philosophical beauty of all this will be readily admitted by those who insist on per capitas, but they are convinced that inevitably Indian people will be bilked out of their money. Their reasoning is that if the present generation does not cash in, no one will. Moreover, philosophical considerations often are not very meaningful because the source of awards is not clearly understood. Few tribal representatives were able to attend their claims hearings; fewer still were called upon to testify to promote a sense of direct tribal effort in forwarding their claims; and often lawyers and ethnohistorians uncovered causes for suit of which the tribes had been unaware. Not only are many of the Indian people dead whose names appear on the original petitions, but many original attorneys of record have died or retired, their practices passed on to others who may not have maintained their predecessors' close contacts and frequent communications with their clients. There are now simply a lot of Indian people who, as long as they can remember, have heard about money the government owes them and who tend to perceive the awards as a kind of token compensation for personal hardships and grievances they identify generally with the fact of being Indian. Even where there is understanding that awards are based on lost lands, there is bitterness because often it is not understood that compensation is based on the appraised value of land at the time it was ceded and not on the wealth the land generated for the white man since then.

When per capita distributions have been approved, payments still can be held up for several years by the enormous amount of work entailed in arriving at a complete and accurate enrollment of everyone eligible to share in an award. Tribal membership usually is based on quantum of Indian "blood," a quarter for most tribes. Among the many complications to be dealt with are locating highly mobile Indian people who have lived away from their communities for many years and Indian children who have been adopted by white families. There are people who may be as much as "4/4" Indian but of such mixed tribal descent that they may have trouble proving that a full quarter of their ancestry derives from the tribe with which they may have a life-long sense of identification. Then there are individuals everyone in the tribe recognizes as members, but whose ancestors, through some historical oversight, did not get listed on an early roll used as a basis for checking genealogical credentials of present claimants.

It is too soon to tell whether tribes which programmed all or a large part of their awards will fare better in the future than those which disposed of all or most of their money in per capita distributions. However awards are disposed of, the fact of mounting inflation over the long period of time required to settle most of the claims has made the judgments less significant to the Indian interest than they would have

HP018000

been ten or twenty years ago. If justice delayed has not been justice denied, it has been materially diminished through time.

INDIAN GRIEVANCES

Justice also may have been diminished because, prior to taking office, none of the original Commissioners whose work set the course for all the cases had any significant acquaintance with Indian affairs. Their early decisions limited severely the kind of information subsequently considered. The very first decision certainly had wide reaching effects. This concerned the Fort Sill Apache (Doc. 137) who alleged unfair imprisonment. All of them had been held in federal custody for many years because of depredations committed by the relatively small group led by Geronimo. The Commission dismissed the claim (1949) not for lack of possible merit but on jurisdictional grounds that it concerned a mere aggregate of individual grievances, albeit all derived from the same source, and not a collective grievance of a "tribe, band or identifiable group" specified in the Indian Claims Commission Act. It is possible that faced with hundreds of claims, the Commission simply panicked at the prospect of trying to put a price on mental anguish and similar intangibles and beat an expeditious retreat to high, legalistic ground to avoid the quagmire of moral questions.

Whatever their reason, the Commissioners automatically excluded claims from the start which on careful examination might have been both valid and reasonably manageable. Whether the distinction between an aggregate of grievances and a group grievance was inherent in the act or only an artifact of construal which attorneys were willing to live with, the difference apparently accounts for the absence of cases concerning allotment as unjust in effect, whatever its benevolent intent, in having reduced enormously the tribes' capital in land and fragmented what remained beyond use by the communities. It helped to further entrench an already repressive bureaucracy to confound the course of satisfying community life on allotted and unallotted reservations alike, right up to the present day.

Allotment meant that after the government granted land collectively to a group, it then aggrieved the group by imposing a policy without the group's informed consent to divide the land in severalty. This interfered with developing the land in the collective interest. It also conveniently reduced any future tribal grievance about the consequences of allotment to an aggregate of individual grievances outside the jurisdiction of the Commission which was created to settle Indian grievances. The only complaints which can be heard concerning allotment involve accounting cases claiming the government did not get the best price it could have in the sale of "surplus," unallotted land or that allocation of allotments was mismanaged in terms of the regulations concerning those qualified to receive them.[20]

Because there was no Investigation Division, there is no way of knowing whether it would have viewed claims in the broad perspective of the whole fabric of Indian

20. For a discussion of allotment and sale of "surplus" Indian land, see Price, *Law and the American Indian*, pp. 483–87.

policy, or whether the Commission would have heeded the Division in making different construals. The fact that the first Commissioners saw no need for an Investigation Division suggests that they reposed their faith in the workings of the law rather than evidence.

The Commission was further isolated from the full scope and nature of Indian grievances by the lack of meaningful Indian involvement in the cases, a point noted by Commissioner Vance, who suggests that there was nothing to prevent Indians from presenting their own cases. It was the Indian Bureau, according to Vance, which erred in interpreting its charge to inform tribes about the Commission as a directive to get competent counsel under contract.[21] Granted the old saw that anyone who tries to represent himself in court has a fool for a lawyer, there could have been Indian input if, at least as a first step, tribes had drawn up their own complaints. The Investigation Division, had there been one, could have systematized the patterns of complaint which would have emerged, researched tribal histories for further bases of claims, and recommended formal handling by attorneys as needed. Even attorneys have complained that most of their research had to follow upon submission of petitions they could only hope covered all likely issues.

No one really listened very carefully to the Indians. It should be remembered that the Commission was the direct result of recommendations in the Meriam Report of 1928:

> The benevolent desire of the United States government to educate and civilize the Indian cannot be realized with a tribe which has any considerable unsatisfied bona fide claim against the government . . . the conviction in the Indian mind that justice is being denied, renders extremely difficult any cooperation between the government and its Indian wards.[22]

It is my opinion that the Meriam staff, upon encountering a pervasive expression of grievance among Indian people across the land, drew an oversimplified conclusion about the nature of that grievance, a conclusion which continued to dominate the Commission's work more than 40 years later. That is, that Indians were complaining mainly about having been shortchanged in the treaty period. This was far from the only issue about which Indian people were becoming increasingly exercised by the 1920s. Inbued with the idea of educating and civilizing Indian "wards" out of their Indianness, the Meriam staff simply could not comprehend the Indians' meaning that it was this very philosophy underlying federal policy and programs, including allotment, about which Indian people were aggrieved.

In other contexts, the Report showed commendable insight in noting the socially damaging effects of the Indian Bureau's efforts to stamp out entirely all trace of Indian custom. However, the Meriam staff did not grasp the connection Indian people made to their current hardships when they talked about land and treaties. As an ethnologist, I submit that in the course of my field work going back to 1944, and of colleagues I have talked with who worked with a variety of tribes even earlier, and right up to Wounded Knee II and the occupation of the Indian Bureau building in the 1970s,

21. Vance, *The Congressional Mandate.*

22. Lewis Meriam, *The Problem of Indian Administration* (Baltimore, Md.: Johns Hopkins Press, 1928), p. 805.

HP018002

the universal and persisting Indian complaint has not been bad treaties or cheap treaties or even fraudulent treaties. It has been BROKEN treaties. Never mind that it was not a treaty but rather an agreement or Executive Order that set aside land for Indians to occupy. A promise is a promise and governmental "bad faith," another favorite Indian rallying cry, is still bad faith.

The point is that whatever chicanery was practiced in the period when most reservations were established and however meager the consideration Indians received for their lands, they were dealt with as tribes, even "nations," as peoples with common interests and destinies. Certainly, tribes have resented and lamented having had to relinquish their territories for a pittance, but their ancestors negotiated as best they could, insisting that permanent homelands be guaranteed to them by the federal government as part of the low price for their vast domains. The deepest grievance has been with the government's unwillingness to uphold even these sorry bargains in failing to protect the remaining Indian estate and keep it intact.[23]

As Imre Sutton has observed, in this country ". . . only the Indians represent a truly 'territorial' minority, and their constant quest for equity in American society stands alone in being founded on a recognized body of treaties and laws . . . in a society that has openly promised to preserve historical guarantees. . . ."[24]

23. Cf. Kirke Kickingbird and Karen Duchenaux, *One Hundred Million Acres* (New York: Macmillan, 1973); also Edgar S. Cahn, ed., *Our Brother's Keeper: The Indian in White America* (Washington, D.C.: New Community Press, 1969), especially part III, pp. 68–112.

24. Sutton, *Indian Land Tenure*, p. ix.

BEYOND THE INDIAN CLAIMS COMMISSION

If Indian people did not benefit as anticipated from the Indian Claims Commission, both they and scholars derived indirect benefits. Anthropological interest was reawakened in documentary research. The Justice Department's arrangements with Indiana University to study midwest claims led to the creation of a large depository of source materials and the journal, *Ethnohistory*. The greatly increased call for data concerning Indian claims prompted major efforts at the National Archives, making available on microfilm whole runs of Indian Bureau records of general scholarly value. Two commerical publishing houses have deemed claims testimony and supporting documentation of sufficient importance to publish much of this information.

The Indian Claims Commission at least provided an unprecedented opportunity for tribes across the country to become acquainted with the potential of the courts and the operation of law in forwarding Indian interests.[25] The Commission, as well as the civil rights ferment of the 1960s, helped to inspire increasing numbers of young Indian people to enter law careers. A special legal program for Indians has been founded at the University of New Mexico, while law schools across the country are adding courses on Indian law. Two national organizations, founded and administered by Indians, have emerged within the last decade to assist tribes

25. Henry F. Dobyns, "Therapeutic Experience of Responsible Democracy," in *The American Indian Today*, eds. Stuart Levine and Nancy Oestreich Lurie (Baltimore, Md.: Penguin Books, 1970), pp. 268–93.

HP018003

in legal matters: the Native American Rights fund in Boulder, Colorado, and the Institute for the Development of Indian Law in Washington, D.C.[26] In this connection, there has been important feedback from the Commission. The new Indian litigation has been able to draw upon both the enormous amount of source material now assembled[27] and a cadre of trained researchers familiar with Indian legal history.

An astounding number of cases are being heard on Indian issues from county courts to the Supreme Court, but since tribes must file in such a variety of jurisdictions, Vine Deloria, Jr., an Indian and a lawyer, sees the need for a Court of Indian Affairs. Recognizing the Commission's shortcomings, he still feels it holds potential as a model, especially with the current panel of commissioners, "because they had to deal with one subject matter—Indian law—[they] have become more knowledgeable than most judges in the federal system about Indian history."[28]

Finally, a justification for going into what went wrong and what might have been. The Commission has stimulated world wide interest. People in Hawaii and the United States trust territories, as well as in Sweden, Canada, Australia, New Zealand and other nations, are in communication with people involved in Indian claims cases. The United States Commission dealing with Indian claims offers a precedent to be studied closely, improved upon and adapted to deal with grievances raised by other "territorial minorities."[29]

26. Cf. Robert McLaughlin, "Who Owns the Land? A Native American Challenge," *Juris Doctor*, vol. 6, no. 8 (September 1976) pp. 17–25; "The Native American Challenge: In Pursuit of Tribal Sovereignty," *Juris Doctor*, vol. 6, no. 9 (October 1976) pp. 51–58.

27. Margaret Hunter Pierce, "The Work of the Indian Claims Commission," *American Bar Association Journal*, vol. 16, no. 2 (February 1977) pp. 227–32.

28. Vine Deloria, Jr., *A Better Day for Indians* (New York: The Field Foundation, 1977), pp. 26–29. Deloria notes that in accepting an award, the claimant Indians sign off forever any residual rights they might have to the land involved, an agreement they may regret.

29. I would like to express my special thanks for reviewing an initial draft of this article and for providing valuable data, comment, and criticism to Stephen E. Feraca, Division of Government Services, Bureau of Indian Affairs, Washington, D.C., Frances Horn (see footnote 7), and John R. White, Anthropology Department, Youngstown State University, Youngstown, Ohio. Any errors and interpretive shortcomings are, of course, my responsibility.

HP018004