

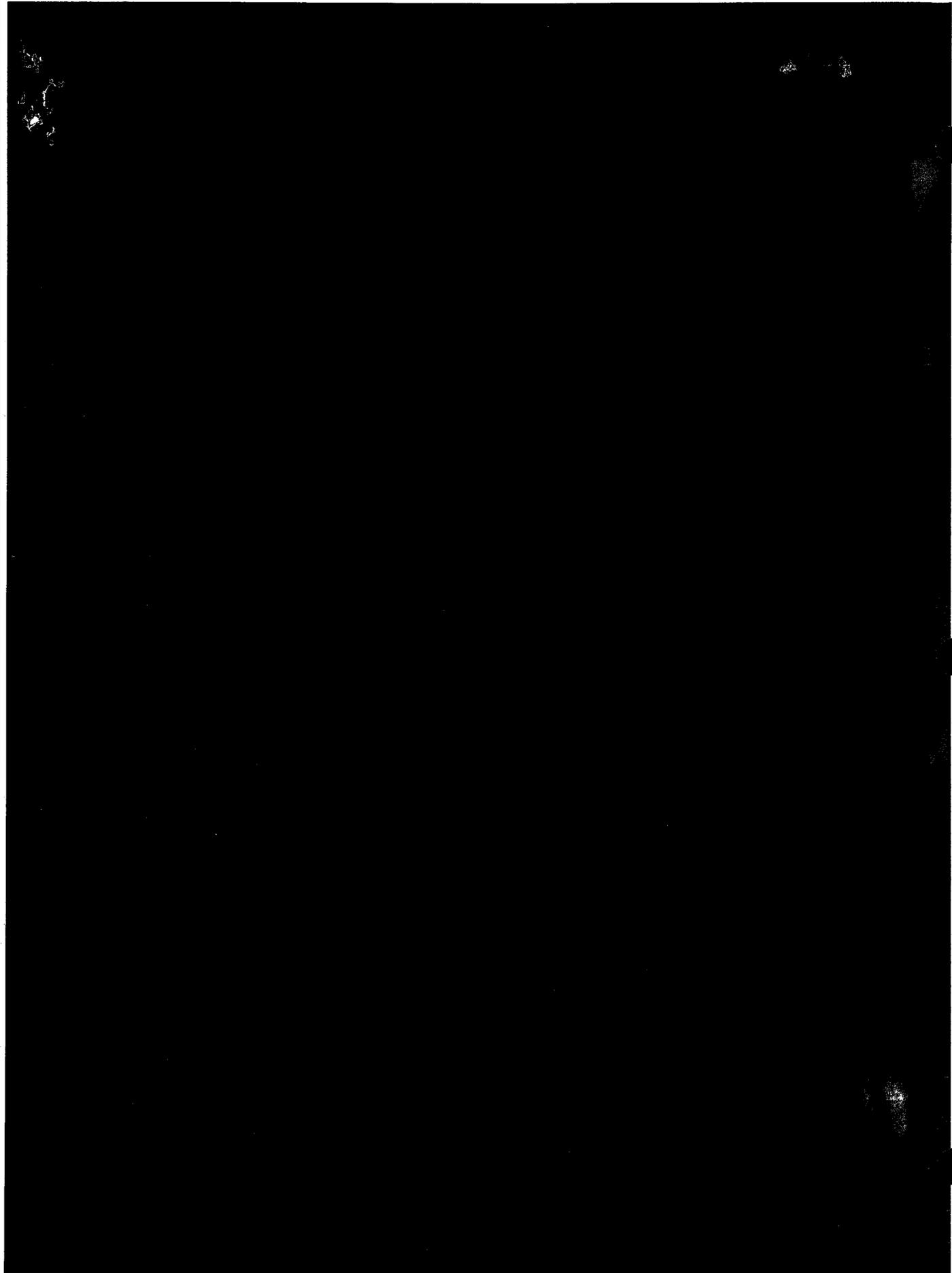
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THEIR DAY IN COURT

A History of the Indian Claims Commission

H.D. Rosenthal

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TABLE OF CONTENTS

PREFACE	vii
INTRODUCTION	ix
Chapter	
I INDIAN RIGHTS AND THE COURT OF CLAIMS, 1831-1946	3
II THE EVOLUTION OF THE INDIAN CLAIMS COMMISSION, 1928-1946	47
III THE INDIAN CLAIMS COMMISSION: THE FORMATIVE DECADE, 1947-1957	111
IV LAW AND PRECEDENT: 1947-1957	135
V INTERLUDE: THE COMMISSION AND THE POLICY OF TERMINATION, 1946-1960	165
VI THE SECOND DECADE: ARTHUR WATKINS AND REFORM, 1957-1967	175
VII EXPANSION, REORGANIZATION, AND "FINAL" RENEWAL: 1967-1978	207

CONCLUSION 245

APPENDIX A 263

APPENDIX B 265

BIBLIOGRAPHY 269

BIBLIOGRAPHICAL ESSAY 303

PREFACE

At the core of much of the friction and many of the policy defeats in Indian affairs is the problem of Indian claims. The great majority of these claims stem from the Federal Government's conduct in the writing and implementing of the 370 tribal treaties that sanctioned the cession of America. The Indian tribes allege that the land was ceded at either "unconscionably" low prices, or that after cession the articles of the treaty were not adhered to by the government. Some of the claims date back as far as 1795 and have been ignored or unsatisfactorily contested in the Congress and the Courts for over a century. A portion of these claims gained relief in the court of claims from 1881 to 1946, but most of those that managed to reach the litigation stage through the complex process of a special congressional jurisdictional act were dismissed on legal "technicalities." These claims symbolized for the Indians a denial of their rights and represented to the whites a stumbling block in the path of Indian assimilation. Either way, they persisted as did the tribes. The demand for their final resolution led to the creation of a more adequate, specialized agency to handle the task.

In 1946 Congress passed legislation establishing the Indian Claims Commission. This study is a history of that Commission and its attempt to deal decisively with the many and hoary claims of the tribes of America. To properly recount this history, the background of the claims themselves is explored and the earlier attempts to resolve

them. Then, the twenty year legislative battle for the Commission is detailed, both in the Congress and within the context of American-Indian history. Lastly, I examine the struggle of the commission from 1956 to 1978 to protract its own life in order to dispose of the 610 dockets it found itself confronting at the end of the claims-filing period in 1951. The successes and failures of this Commission are those of the long history of federal agencies trying to grapple with inter-cultural problems from a non-cultural bias.

The study of this Commission was suggested to me by Dr. Robert P. Swierenga, of Kent State University whose diligent guidance and advice encouraged me throughout.

I am also indebted to Kent State University for four years of support as a teaching fellow and a travel grant that facilitated my research in Washington, D.C. My thanks also to Indian Claims Commissioner John T. Vance for the loan of his personal copy of collected legislative material that greatly aided my work. I wish to acknowledge the hard work of my wife, Theresa, who spent many hours reviewing with me my several drafts. Finally, thank you Kathy James for your intrepid typing of a most difficult work.

INTRODUCTION

The subject of Indian claims is as old as the Nation. The tangle of legal issues that surrounds those claims is as complex as any facet of American jurisprudence. Analysis of that complexity will follow but, simply, the Indian's tribal claims are the result of two basic factors--the Indian's tribal and cultural persistence, and the European's law and respect for private property. The Indians occupied the land of America and soon after contact, the Europeans determined on a policy of dispossession. With their technological superiority, rapid numerical growth, and racial consciousness, the whites ever more easily satisfied their territorial desires. The year 1890 marked the close of the frontier and the book on all substantial Indian armed resistance. This story of power politics is familiar to most people in varying degrees: the series of Indian wars, the signing of treaties, and the eventual shutting away of the natives in desolate reservations. It is a tale that every school boy knows. But it is incomplete. Behind the facade of romance stands the structure of law. What every school boy does *not* know is that the treaties that sanctioned the "taking" of America are still the law of the land. It is within these documents and the related events that the substance for Indian claims is mined. And it is upon them that the legal case for their enforcement is based.

Tribal delegations first took their claims to the Congress for at least reasonable payment for the lands they were forced to barter away. But the federal government that had imposed upon them the hated treaties was not to be

the white man offered only money. During the treaty-making period, when the Tribes lost most of their land and the base of their existence, \$800 million had been paid to the tribe. The Commission allowed another \$800 million in compensatory awards.

Indian painter George Catlin wrote in the mid-nineteenth century that: "For the nation, there is an unrequited account of sin and injustice that sooner or later will call for national retribution." Somewhere in the mid-twentieth century America seemingly realized this fact and made an effort to respond with the Indian Claims Commission. It was a very limited response, excluding many types of claims and making only monetary awards, but it was something. The life of the Commission, though designed for a terminal purpose, may be, in the long run, only the opening payment on that "unrequited account."

Strangely, though the public record is replete with material concerning the Indian claims and the Commission, little of their existence has been exposed to the public at large. The secondary sources make scant reference to this aspect of Indian affairs. Works like Vine Deloria's *Behind the Trail of Broken Treaties* and Wilcomb Washburn's *Red Man's Land/White Man's Law* deal at some length with the subject of claims but they are the exceptions. The best sources of information on this issue, outside of the government, are the various law journals and the series on Indian affairs by the Clearwater and Garland Presses.

The objective of this book is to relate the life of this little-known Commission. To do this properly, the context of the claims, and the precedents for their adjudication, are explored. Next, the legislative struggle that led to the Commission's establishment is recounted in detail to explain the evolution of a unique federal agency, and vital segment of Indian-American history. The remainder of the work deals primarily with the function of the Commission as it

strove to accomplish the enormous task assigned it. The history of the Indian Claims Commission is laden with all the elements of melodrama: ignorance, arrogance, racism, greed, corruption, and hypocrisy. But it also reveals flashes of morality, honesty, perseverance, and justice. It is hoped that a survey of this material will not only inform the reader of a neglected aspect of recent Indian affairs, but also more fully acquaint him with the key role of the Indian in American history.

the agent of redress. The decisions of the Marshall court gave them rights but no relief. Driven back to the Congress and the bureaucracy, their petitions were either lost in the maze of a government they only vaguely understood or rejected as pathetic gestures of a race that did not know it was dying.

The United States Court of Claims was established in 1855 and offered a ray of hope only to shut it off in 1863 by expressly banning the tribes from its proceedings. But the Indians and the attorneys who aided them for pecuniary or moral rewards kept the claims alive. These claims became symbols to the Indians of their right to exist. In 1881 they succeeded in gaining access to the new Court, but only through the torturous procedure of a special jurisdictional act from Congress opening the Court to individual cases. This process, which should have discouraged them, brought forth 200 such acts by 1946. It was Congress that first buckled under the labor involved in what had become a labyrinthine process. Under the pressure of claims, claims sympathizers, and calls for remedial legislation, Congress finally passed a general act to allow all the demands to be heard by a special Indian tribunal. This was the Indian Claims Commission Act of August 13, 1946.

This Commission, which actually served as the Indian's court of claims, was established to hear an unprecedented variety of claims accrued to 1946. It encompassed all the Indians of America. Its goal was to end *finally* the Indian's tribal claims that had so long been pressed on the courts, the Congress, and the Executive Branch and had been such a source of frustration to all parties involved in Indian affairs. Their final resolution, proclaimed the optimistic, would allow Congress more time for other matters, save the government money, ease the burden on the Justice Department, give America a source of pride in its system of justice, and, of course, greatly benefit

the Indians. Ten years was allotted to accomplish these goals.

But a decennium, as many had suspected, was far too short a span to accomplish such a task. The 852 claims that inundated the Commission were far more than anyone expected. Failing completion of its task in the prescribed decade, the Commission, to give all the claimants their promised "day in court," was renewed in 1957, 1961, 1972, and finally in 1976 to September 30, 1978. It faced an immense challenge from a technical and legal standpoint. The records were old and voluminous. The case presentation involved the expertise of anthropologists, ethnologists, historians, land appraisers, and specialized attorneys. The great majority of these cases involved inadequate compensation for the area ceded as defined in the treaties. The experts had to establish which tribe lived where and when. This done, they were called upon to value the land at the "time of taking." Then the amount paid to the Indians had to be determined, compared to the value, and the difference, if "very gross," paid by the government. This often took years. Issues to be established and documented were those of fact, of law, and of morality, each more difficult than the one before. The commissioners set their rules, defined their interpretation of the scope of the Act, and began the work. Progress was slow at first but picked up momentum with a change of personnel, growing experience, a revision of the Act, and constant pressure from Congress to finish "this interminable task." The Commission in the thirty-two years of its life heard and disposed of 550 of the 617 dockets it formulated from the original 852 claims, one-fifth of the time it took to create them. The Remainder were transferred to the Court of Claims for final resolution.

Indian claims are unique. They involve ancient debts between disparate cultures. The Indian really wanted land,

THEIR DAY IN COURT

A History of the
Indian Claims Commission

CHAPTER I

INDIAN RIGHTS AND THE COURT OF CLAIMS,
1831-1946

The bases of the Indian claims against the American Government are rooted in what has been referred to as the "largest real estate transaction in history." This turnover of land was the concomitant of the inexorable westward drive of the white man and involved the parallel retreat of the Indian from his homeland. As the Indian's possessions receded, his claims surfaced in what Felix Cohen, expert in Indian/American law, called "the backwash of a great national experiment in dictatorship and racial extermination." This episode in American history flowered in the period from the end of the Civil War to the First World War and the "wrongs committed," continues Cohen, "or at least initiated by our public servants in that period give rise to most of the claims that we are trying to redress today."¹ Historical precedent and national policy called for the United States to acquire this land by the legal forum of treaty-making and legislation rather than the simpler method of conquest and confiscation. The separate Indian tribes were considered as foreign nations during the treaty-making period and in 370 treaties they negotiated away nearly two billion acres of North America, leaving themselves 140 million acres at the end of that period in

4 Their Day in Court

1868. (The last treaty was made and ratified in 1868, but the process was not formally ended until 1871.) They survived thereafter tenuously on some 200 reservations, mostly west of the Mississippi River. But much of their remaining land was still greatly coveted by an insatiable and aggressive people. When military pressure was no longer condoned as a means of removal, the General Allotment Act of 1887 proved quite effective. Before it was terminated in 1933 another ninety million "surplus" acres were alienated from Indian ownership.

Despoliation of the land and its former possessors was inherent in this mad, largely undisciplined, rush to the Pacific. The United States acquired about 443 million acres from 1789 to 1840 for some \$31.3 million in cash and 53.8 million acres for Indian settlement further west. This cost to the government of about ten cents per acre compared very favorably to the value of \$1.25 per acre that was the minimum purchase price for lands of the public domain. Sale at this price would have brought the Indian \$554 million. The United States drove hard bargains with the Indians and "practically every treaty left the Indians weaker and poorer; the United States accordingly, became wealthier and stronger."²

Politically, morally, culturally, legally, and philosophically, America had all the tools and rationalizations it needed to remove the human blocks to its progress. In his first annual message to Congress in 1817, President James Monroe said: "The earth was given to mankind to support the greatest numbers of which it is capable, and no tribe or people have a right to withhold from the wants of others more than is necessary for their own support and comfort." The frontiersmen had sounded this theme for two centuries, and Monroe, in the tradition of Jefferson, was not remiss in sounding it again for the nineteenth century. In the period of greatest westward

Indian Rights and the Court of Claims 5

expansion, 1815 to 1860, 260 treaties were signed. Two hundred and thirty of all the treaties between 1789 and 1868 involved Indian lands, seventy-six called for removal and resettlement, and nearly 100 dealt primarily with boundaries between Indian and white lands.³ These treaties and other government agreements embodied 720 land cessions from 1784 to 1894.

By the 1890's, the contest for America was over and its possession signed, sealed, and delivered. But, though the white man was contented with his record in these dealings, the Indian was not. One western historian has noted that "it would be difficult, indeed, to find a land cession made by the Indians entirely of their own volition."⁴ The American right to buy always superseded the Indian right not to sell. Removal was forced removal. The white man's superior power allowed this policy, and *pro forma* use of the *de facto* treaty assuaged his Anglo-Saxon tradition and concern for the legalistic niceties.

In America there was a generation eager to crack open a continent and ransack its riches. The Civil War had been won, righteousness had triumphed, and the time had come...to make money. Once the destiny of America was in the hands of Washington, Jefferson, Adams, Hamilton and Madison. More recently it was in the hands of Fisk and Gould, Morgan and Carnegie and Rockefeller. These men studied not at the school of Montesquieu but at the school of Mammon. But [they needed] that protective cloak of righteousness which is the inevitable garment of the Anglo-Philistine.⁵

6 Their Day in Court

For the Indian the opposite reality of dispossession was more difficult to accept and the legality of it all was little comfort to men who once had freely roamed forests and plains and now were forcibly confined to bleak reserves.

It was this precise legalistic tradition that necessitated the treaty process, but at the same time harbored the seeds of future retaliation for the inequities of the procedure. "The fact is," said a premier authority on Indian law, "that through most of North America and particularly throughout the continental United States, the validity of aboriginal titles has been pretty consistently recognized since 1532."⁶ In that year Francisco de Vitoria formulated for the Spanish crown the legal framework of European rights in the New World and stressed respect for Indian life and property. This concept was carried on in northern Europe as reflected in the classic works of jurists Hugo Grotius (1583-1645) and Emerich Vattel (1714-67) and the earliest English dealings with the Indian nations. For the Americans also, the keynote of land policy was recognition of Indian property rights based on this precedent. In his report of 1872, the Commissioner of Indian Affairs so observed:

Confiscation, of course, would afford a very easy solution for all difficulties of title, but it may fairly be assumed that the United States Government will scarcely be disposed to proceed so summarily in the face of the unbroken practice of eighty-five years, witnessed in nearly 400 treaties solemnly ratified by the Senate, not to speak of the two centuries and a half which the principal nations of Europe, through all their wars and conquests, gave sanction to the rights of the aborigines.

Indian Rights and the Court of Claims 7

The consequences of this powerful European respect for property are still with us. Thus, the United States, through formal treaty or agreement with the Indian tribes, purchased 95 percent of its public domain for nearly \$800 million.⁸ This figure and the treaties mitigate the myth of rude conquest and dispossession. Jefferson observed two centuries ago that the lands of this country were not taken from the Indians by conquest as is so generally supposed. "I find in our historians and records, repeated proofs of purchase, which cover a considerable part of the lower country; and many more would doubtless be found on further search. The upper country, we know, has been acquired altogether by purchase made in the most unexceptional form."⁹ Further west, to protect the Indian in his land-holding rights, this concept prevailed again. The Louisiana Purchase conveyed simply the power to govern and to tax, not title to the land which was not Napoleon's to sell, and was safeguarded by the terms of the treaty.

These facts present us with a division of opinion. The legalists take comfort in the documentary record of treaties signed and moneys paid. They do not deny the many wrongful acts incorporated in the statutory record but stress that at the same time they were committed the United States "recognized and affirmed a higher standard of dealings than were [sic] followed...and the body of Indian rights written into our basic law survived to serve as a rallying ground for a great rebirth of Indian life in our own days."¹⁰ The moralists see no "higher standard of dealings" for the Indian. The higher standard existed only in treaty rhetoric and was for the white's mythology, if anything, for the treaties almost always involved unconscionably low payments and were *ex post facto* to the loss of the land. The process was to invade their lands, confiscate their resources, engage in a "defensive" war, propose a treaty to a then

8 Their Day in Court

destitute people, order them to move west, and offer to pay for the ceded property but withhold promised funds on one pretext or another.¹¹

As is often the case, there is truth in both of these positions. Certainly the Indian lost his heritage and suffered grievously for it. But, a treaty was made and obligations incurred by the United States Government. The fact that these obligations were often not met did not negate the law of the land, but perverted it. What the white man chose to forget, the Indian chose to remember, and bided his time. When the fever of conquest subsided, that same legal-conscience that necessitated the treaties was used to enforce them.

The first important attempt of the Indian to test the theory of American law in the courts rather than the practice of American arms on the battlefield came in 1831. The Cherokee Nation had adopted the white man's culture a generation earlier and had made impressive advances along the road to civilization by 1829. The argument that the hunter must naturally give way to the farmer could no longer be applied to these Indians. The State of Georgia, failing that old pretense, proceeded then to simply confiscate their land and void their treaty. The Indians sought redress in the Supreme Court but lost on a jurisdictional ruling. With old nemesis Andrew Jackson in the White House and the congressional passage of the Removal Bill of 1830, their dreams were shattered. Their victory in the *Worcester* case (6 Pet. 515, 1832) the next year temporarily buoyed their spirit but lack of federal enforcement and the clouding of their case by the larger controversy over nullification again dashed their hopes and confirmed for them that white justice was for white men, a fact they long knew, but dared for a moment to challenge. The Cherokee were declared neither sovereign nations nor states of the Union within the meaning of Article III,

Indian Rights and the Court of Claims 9

Section 2 of the Constitution and they could not sue, be sued, or intervene in any case where the original jurisdiction of the Supreme Court was involved. They were thus in judicial limbo in any attempt to defend their rights or press their claims and remained there for fifty years until the Court of Claims was authorized to hear their case.¹²

The decade of the 1830's saw the Cherokee Nation and consequently the five Civilized Tribes defeated legally and uprooted physically. But, though often in despair, they showed a perseverance in the protection of their rights and property that spanned generations. With the courts closed to them and the Executive Branch hostile (whatever the administration) they appealed to the Congress for legislative protection. Some whites and all of the Choctaws were aware of the fraud of the treaty of 1830. Beginning in 1834, Congress was bombarded by claims from the Choctaws defining the errors and malfeasance of the executors of their treaty.¹³ The tribe persisted throughout the 1840's and into the 1850's and became all the more annoying to Congress by employing white legal assistance. Congress and the Executive reacted negatively to this, feeling that such claims were of a political-legislative-administrative nature and remedy, and necessitated no external counsel. Thus the treaties in the early 1850's contained provisions to wipe out old claims and to prohibit contracts for, and payments to, tribal attorneys.¹⁴

At the same time that the right to redress claims was being circumscribed for the Indian it was expanded for the white man *against* the red man. The claims of the whites for "depredations" committed against them by Indians under treaty were first recognized in an act of 1796. This act and ones following it in 1834 and 1859 provided for indemnification of losses from Indian depredations to be paid out of Indian treaty annuities or "out of any money in

10 Their Day in Court

the Treasury not otherwise appropriated." Thus, though the Indian could not sue the government, he could be "sued" by it (and be denied counsel) in the name of its citizens and be subject to forced payment of the claims by administrative deductions from his treaty funds. By 1872 (the depredation legislation was extended in 1870, 1872, 1885, 1886 and 1891) close to 300 claims were settled against the Indians for over \$434,000. This amount was 55 percent of what was claimed, a rather better collection rate than the 7 percent the Choctaws had received in a land claim they pressed in Congress in the 1830's.¹⁵

Also at the time the Indian was being squeezed out of the judicial system in regard to his legitimate claims against the government, the American citizen was in the process of broadening his own path into it. Before 1855, no general statute allowed citizens to bring suit against the United States Government on claims for a money judgement. The only recourse was to petition Congress to redress any grievance by a private act. By the 1850's, though, this process had become a burden on Congress and was rife with delays and inequities. It is the constitutional function of Congress to examine and determine claims against the United States, but Congress can delegate this power, with limitations. It did so in 1855 when it created the Federal Court of Claims to "hear and determine all claims founded upon any law of Congress, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also claims which may be referred to said court by either house of Congress."¹⁶

Throughout the decade of the 1850's treaties rather than legislation were the focus of Indian law and little of a permanent or general nature was enacted. During the period from 1853 to 1857, fifty-two treaties provided for the cession of fifty-seven million acres. Claims were dealt

Indian Rights and the Court of Claims. 11

with within the treaties themselves. The treaty of 1855 with the Choctaws and the Chickasaws incorporated an agreement to "submit for adjudication" to the United States Senate land claims not allowed in the treaty of 1830.¹⁷ The hopelessness, in regards to the use of the federal court system still persisted in the minds of most Indians and discouraged their litigation.

But some Indians were undaunted, and filed their claims with the new Court of Claims. None had come to judgment by 1863 when Congress passed an amendatory law to the act of 1855 which included the exclusion of the Indians from the new court. This act resulted from a fundamental deficiency in the law of 1855. Though the Court could "hear and determine" claims and make findings of fact and conclusions of law, its decision was not embodied in a judgment but in a report to Congress if adverse, or in a draft of a private bill if favorable. The Court did not relieve Congress of a burden as intended and, since the congressional committees were willing to re-examine the claims *de novo* and receive fresh evidence from either side, the Court became another hurdle for the claimant. This weakness and the rapid increase in cases resulting from the Civil War led to the Act of 1863.¹⁸ Section 9 of this statute declared that jurisdiction of the Court of Claims "shall not extend to or include any claim against the government not pending in said court on December 1, 1862, growing out of or dependent on, any treaty stipulation entered into with foreign nations or with the Indian tribes."¹⁹ Thus, as the claims procedure was simplified for Americans, the oversight that did not exclude the Indians in 1855 was corrected.

Of course, the exigencies of war can excuse many evils. Some 10,000 Indians fought on the Confederate side, but the fact that most of those tribes had been horribly treated by the United States Government prior to the war

12 Their Day in Court

was forgotten or ignored. "Treason" was treason. Also, most of the Indians of the Southeast, the Five Civilized Tribes' remnants, and those on the western border were trapped by the secession and cut off from Union financial and military support which ceased anyway. In spite of this, many remained loyal and some 11,000 fought for the Union and aided in its border war in nonmilitary ways. The Act of 1863, as so many others, spoke of Indians in an all-inclusive manner, and friends and allies alike were treated as "traitors" and enemies.²⁰ The wartime action of the "Confederate-Indians" may have been simply a blind for the baser motive to exclude the Indian's claims from the Court of Claims, for it is certain that Congress recognized the danger of allowing Indian claimants access to the Court. The claims had become numerous and many officials were aware of their value and validity. The judicial conscience was often more receptive to truth than that of the legislative branch, as the Marshall Court had shown. A similar show of character in the Congress of 1863 would have resulted in a very long and costly procedure.²¹

From 1863 to 1881 the Court of Claims remained closed to the Indians. This might have been the final blow to Indian persistence in seeking redress for the many wrongs perpetrated on them. For those in closest and longest contact with white society it was no surprise, and for those farthest from it, yet a future concern. The Indian was always aware of his defensive situation as the long line of patriot chiefs: Philip, Pope, Pontiac, Tecumseh, Osceola, Blackhawk, Crazy Horse, and Chief Joseph testify.²² His inappropriate or slow reaction was usually seen by the whites as the incivility of the savage rather than the inability of the overmatched. In his Report to the Secretary of the Northwestern Treaty Commission, the Chairman, Newton Edmunds, wrote in 1866:

Indian Rights and the Court of Claims 13

Indians are suspicious and comprehend frauds better than whites suppose, but they have been so remote from remedies and so ignorant of the means of redress, fraud has been perpetrated with such impunity as to be an established system of trade. Such things are not only pernicious as they defraud either the government or the Indians, but they disgust the Indian who comprehends and condemns them.²³

The Indian knew he had lost his lands by force, that his meager payment was the best of a bad bargain, and that even the agreements he secured were not honored. He was the one acted upon, the victim; he knew. America's destiny was all too manifest to him. The American looked West to the Pacific and great nationhood, the Indian looked East to the trail of the graves of his fathers. Still, he persisted.

With the new Court closed, the Indian persevered in Congress. He wrote his claims and provisions to investigate them into treaties and secured separate acts to redress them. No single tribe was more tenacious in its relentless drive for satisfaction than the Choctaws. From the mid-1830's into the 1880's no Congress was without a bill, a memorial, an internal report, or an executive recommendation whose intent was to meet and resolve a tribal claim rooted in their many treaty infractions.²⁴ But to run a claim through the gauntlet of Congress and the bureaucracy was a tortuous, frustrating task and the results were meager. In 1871, the treaty-making process was formally ended and the fiction of the tribes "independent nation" status was terminated, but with the proviso that nothing in that act "shall be construed to invalidate or impair the obligations of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."²⁵ This provision kept the past alive

14 Their Day in Court

for the Indian claimant and enabled him to persist in his quest for judicial recognition for the decade longer that it took.

Some few white voices helped to state the Indian side. The Nez Perce Indian agent, J.B. Monteith, lamented in 1871, that "forced removal from lands that have been secured them by treaty, and with which their longest and tenderest recollections have been associated, is fatal to all efforts to improve and elevate the Indians." He saw the simple truth that white duplicity and selective application of the law had engendered general despair among Indians and urged that they "must be made to feel that the tenure by which they hold their lands is as sacred as that of the white people."²⁶ *Worcester v. Georgia* and a series of other decisions had already stressed this, and it was again confirmed in 1872 in *Holden v. Joy*.²⁷ Nonetheless, though the high court recognized their title, the nation still continued voraciously to consume their land. The voice of General Francis A. Walker, Commissioner of Indian Affairs in 1871, prevailed over that of a lowly agent: "There is no question of national dignity be it remembered, involved in the treatment of the savages by a civilized power. With wild men as with wild beasts the question whether in a given situation one shall fight, coax, or run is a question merely of what is easiest and safest."²⁸ The need to believe this was still prevalent and remained so until the closing of the frontier.

The Fourteenth Amendment (1868) might have been a shield for the Indians, declaring as it does that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside, but they were denied inclusion under it. Much in American law dictated against this denial and a good argument has been made that "all the coercive policies adopted by the federal government [toward

Indian Rights and the Court of Claims 15

the Indian] from 1870 to 1928 were strictly illegal."²⁹ But the Indian rarely hoped for protection from the federal government, seeing it as his principal foe, as well it was. The latter 1870's saw the peak of the Plains warfare and the 250 that fell with Custer shocked and shamed Americans "and soldiers would come again and again until they had made the natives pay for what had happened on the Little Big Horn."³⁰ It was in the court system and with the aid of sympathetic white allies that the Indian made his small advances. In the famous *Standing Bear v. Crook* trial of 1879, the United States District Court for Nebraska, for the first time, established Indians as persons under the terms of the Fourteenth Amendment. Out of this case also came an investigation of the South Dakota Poncas' claims and a Congressional recognition of their obvious justice. In January of 1881 a presidential commission of investigation expressed its conviction, from the Poncas case, that "it is of the utmost importance to white and red men alike that all Indians should have the opportunity of appealing to the courts for the protection and vindication of their rights of person and property."³¹ A door was opened.

The year 1881 was a turning point in the long history of Indian claims frustration. By a special act in March of that year the tenacious Choctaws were granted access to the Court of Claims for resolution of their fifty-year-old grievances.³² In the years of Indian exclusion from this Court the Indians of the West had followed those of the East into military defeat and confinement. As the last of the hostilities and resistance faded the legal forum was allowed to take the place of the military necessity, and the Choctaw precedent broadened this format. It was in this year that a prominent New York attorney, Charles O'Connor, publicly lauded the Court of Claims as the "first-born of a new judicial era." He saw the court as a new principle and as a "practical negative upon that vicious

16 Their Day in Court

maxim" that the sovereign can do no wrong. "Henceforth our government repudiates that arrogant assumption, and consents to meet at the bar of enlightened justice every rightful claimant, how lowly soever his condition may be."³³ After 1881 this would include even the "lowly Indians," but only by the process of a special jurisdictional act.

The crack in the wall that the Choctaws had forced remained only that. Three years after they had filed their claim and two years before its settlement the Supreme Court ruled against Indian citizenship. Justice John M. Harlan, in his minority opinion, decried the failure of the Fourteenth Amendment in the case of the Indian and declared that:

There is still in this country a despised and rejected class of persons, with no nationality whatever; who born in our territory, owing no allegiance to any foreign power and subject as residents of the States to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.³⁴

In 1892 the Court of Claims noted that the United States courts had never been open to Indians or civil liberties been given to them.³⁵ But, in that same year a challenge to the Indian's right to sue in State and Federal Courts was defeated.³⁶ Thus the gains the Indians had achieved in the 1880's, though meager, were secured. From 1881 to 1890 the tribes filed eleven claims and secured awards on two, but seventy-three contracts, representing sixty-one more claims, were approved or pending with the Secretary of Interior. In the years following, to World War I, twenty more claims

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were filed with the Court totaling \$13 million.³⁷

Little momentum came to recognize the claims nineteenth century and Government policy in the Allotment Act of 1887, destroying his tribal social place in American society millions to tribal entities was viewed as inconsistent the context of the era this based on white assumptions decisions on Indian matters though, (1881-1914) the land appropriated for Indian whites. Money went for which in fact gave land to employees of the Indian hand was too impermanent on the other hand, too perishable. So, by 1914 the maintain the tribal life of the policy of the government entrenched bureaucracy Indian's own desire to secure more than a balance for

The decade following was an unprofitable one. The Court was concerned, but future victories. From 1891 were referred to the Court resulted in awards totaling response to America's interest enthusiastic. Eight thousand

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Little momentum could be generated in government
 to recognize the claims in the declining years of the
 nineteenth century and early years of the twentieth.
 Government policy in this period, especially after the
 Allotment Act of 1887, was to "civilize" the Indian by
 destroying his tribal society and forcing him to take his
 place in American society as an individual. The payment of
 millions to tribal entities on the basis of "ancient" claims
 was viewed as inconsistent at best and foolish at worst. In
 the context of the era this was sensible, but, as usual, it was
 based on white assumptions and goals as were all policy
 decisions on Indian matters. In this same time period,
 though, (1881-1914) the huge sum of over \$263 million was
 appropriated for Indian affairs; this meant, in reality, for
 whites. Money went for white educators; for allotment,
 which in fact gave land to whites; and to maintain the 6,000
 employees of the Indian Service. The Indian, thus, on one
 hand was too impermanent to some to be paid his due, and,
 on the other hand, too profitable to others to be allowed to
 vanish. So, by 1914 there existed a system that was to
 maintain the tribal life of the American Indian. Officially
 the policy of the government was assimilationist, but the
 entrenched bureaucracy that fed on the Indian and the
 Indian's own desire to survive as a separate people, were
 more than a balance for that policy.

The decade following the beginning of the Great War
 was an unprofitable one as far as Indian success in the
 Court was concerned, but in those years lay the promise of
 future victories. From 1914 to 1923 only eight claims cases
 were referred to the Court of Claims, three of which
 resulted in awards totaling over \$1.5 million. But the Indian
 response to America's involvement in the War had been
 enthusiastic. Eight thousand joined the service, though not

18 Their Day in Court

subject to the draft. This motivated a strong movement in Congress and the Executive for a general law to reward them with American citizenship which was finally passed in 1924. The removal of this cloud over the Indian's legal status, combined with congressional goodwill, resulted in an explosion of claims to redress the old injustices. In the next three years almost as many cases were filed in the Court of Claims (37) as were presented in the forty-two years before citizenship (39). But it was not the legal enactment of citizenship alone that led to the increase in Indian claims agitation for it did not change the Indian's relationship to the Court. It was the increase in public awareness of Indian patriotism brought on by the government and the press during and after World War I that increased the pressure on and the willingness in Congress to pass the jurisdictional acts opening the Court to the Indians. Still, the new post-war mood and the grant of citizenship were only palliatives for an inadequate system.³⁸

But, 1924 was the swing-year that initiated the torrent of Indian claims presentation and litigation. Just as pressure on Congress of increased numbers of white's claims led to the creation of a new court in 1855 it would do so again for Indians in 1946 in the form of a quasi-judicial Indian Claims Commission. The events of the twenty-two years from 1924 to 1946 built that pressure in the Government. The increased filings of Indian claims after 1924 had its immediate effect the following year when the Comptroller General was first given special funds to handle Indian cases. With these funds a force of about fifty accountants and clerks was assembled. Before 1924 the press of Indian cases was so light (politically as well as numerically) that the government could and did handle them at its leisure. Until then only one year (1891) saw more than one award, and in only four years were as many as four cases filed. Then came the rush: 1924 saw 5 claims

Indian Rights and the Court of Claims 19

filed, 1925 had 7, 1926 reached 10, and in 1927 they rose to 15. In 1926 an Indian Tribal Claims Section of the General Accounting Office was organized, comprising eighty-two people, to work exclusively on compiling data for Indian claims cases.³⁹ A bad situation was to be made worse.

As is often the case, many were aware of the inadequacy of the situation and offered remedies but the machinery of the government ground on regardless. Since the turn of the century, important officials in and out of government had called for a general jurisdictional act by Congress to open the Court of Claims to the Indians, but to no effect. In 1928, Senator Linn Frazier of North Dakota, a member of the Committee on Indian Affairs called the system interminable and calculated that 172 years would be necessary to end the case load of the eighty-six cases then pending.⁴⁰ In that same year the *Meriam Report* was issued and it adjudged the Indian claims process to be "burdensome and unjust." Though the *Report* recognized that delay was inherent in the nature of these complex claims it denounced the process of securing jurisdictional acts that brought them to the Court. The *Report* continued that congressional action introduced politics into the law, personalities were too much a factor and claims often were stifled in the Executive Branch for purely financial reasons.⁴¹ A perfect example of this problem was the *California Indians* case. From 1922 to 1928 their bill received two favorable and two unfavorable reports from the Secretary of the Interior. In 1928 Congress authorized the State of California to sue on behalf of the Indians for claims on unratified treaties of 1852. It was another sixteen years before they received an award. In several other cases a bill had come before Congress ten or twelve times and received alternating reports.⁴²

One of the most objectionable facets of the claims process was that of delay. A study in 1930 found that an average of ten years was required between the time the

jurisdictional act was passed until the trial in the Court of Claims. A later report added to this period an average of just under five years to final disposition.⁴³ For the Indian this involved not merely exasperation but great effort and expense. The Wichita of Oklahoma first gained the right to sue in an act of 1895 but were stalled until a jurisdictional act of 1924 led to a final dismissal in 1939. The Klamath of Oregon gained their act in 1920, stemming from an 1864 treaty, and were dismissed in 1938. The Shoshone of Wyoming began to protest their 1868 treaty in 1891, secured an act in 1927 and a decision in 1938. The Northwestern Band of Shoshone of Utah and Idaho had a treaty of 1863, further lands taken in 1878, protested until they received their act in 1926, and saw dismissal in 1942. The Osage of Oklahoma began their complaints about their 1865 treaty in 1873, gained a jurisdictional act in 1921, and were dismissed in 1928.⁴⁴ Clearly this system needed change but delay in itself was not the agent of change for its negative effects mostly fell upon the Indian and his counsel and not Congress or the federal departments.

Another crimp in the system was the inconsistency and inadequacy of the jurisdictional acts themselves. It was said that they varied so fundamentally that "it is impossible to list any common principles applicable to all Indian claims cases and not applicable to other cases."⁴⁵ Of course there were some common features which did occur frequently such as that admonishing the court to construe narrowly the act, to interpret the act as providing a forum only and not as a recognition of liability, and limiting the court from considering the justice or injustice of a law, treaty, or agreement. Narrow and often inaccurate drawing of bills, and their subsequent denial led to repeated calls for new or amended acts. Tribes such as the Oregon Indians, and the Colville and the Okanogan, had presented their redrawn claims nine times and six times respectively from the 69th

Congress to the 74th Congress. Senate testimony in 1935 revealed that about one-half of the special jurisdictional acts were subsequently amended in an effort to make the alleged wrongs justiciable.⁴⁶ The classic example on this procedure is the *Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians v. The United States*. The Klamath had secured a jurisdictional act in 1920 to present their land claims in the Court of Claims. In 1935 the Court dismissed the case and the Supreme Court upheld the decision. The justice of the claim was recognized by all, that is, it was "shocking to the conscience" that \$108,750 was paid by the government for land worth almost three million dollars, but the Court ruled that the "obligation of the United States to make good plaintiff's loss is a moral one calling for action by Congress in accordance with what it shall determine to be right." The original act had limited the judicial scope and this decision was proper so in 1936 an amendatory act broadened the original and allowed the Court to rule on the merits of the case and plaintiff received an award of \$5.3 million the following year.⁴⁷

The *Meriam Report* of 1928 and extensive hearings on Indian claims in 1935 and 1940 failed to alter significantly the procedure of claims resolution. These investigations did, however, sharpen the focus of the interested parties on the critical issues of attorney representation, interest on claims, and gratuities. The Indian attorney had, from the earliest cases, been suspect from all sides. He was portrayed as Indian lover or rascal, rarely as simply a lawyer on a job. The subject of "interest" also raised fierce debate because of the prospect of raising millions of dollars in claims to billions. The consideration of gratuitous government expenditures for Indians as legal offsets or deductions from any claims award, produced a more reasoned and calm discussion but was challenging to all involved because of the questions it posed as to the

22 Their Day in Court

morality of the American Government. These three points are as old as most of the claims, and at various times have, separately or in conjunction, raised as much fuss and feathers as the claims themselves.

From the 1830's, attorneys have been involved closely with Indian rights and claims, notably the *Cherokee Nation v. Georgia* case. Many honest and dedicated men have taken up the defense of the Indian as have a number of less upright self-seekers. The government on occasion attempted to ameliorate the grossest frauds and "revolting waste of the patrimony of the Indians" by the unscrupulous.⁴⁸ Mostly, though, employment by the Indian tribes of legal counsel was discouraged. The government and the agencies concerned with Indian affairs consistently contended that, as the guardian of the Indian, it was *their* responsibility to protect *their* wards in their rights and property. The persistence of Indian claimants over decades and the large accrual of claims rather belie that the government did, in fact, carry through on this responsibility. Ralph H. Case, dean of the Indian lawyers recalled that his youth in South Dakota was full of stories of injustices told to him by Indian friends. He went to Washington, D.C. soon after his bar exams as a representative of the Sioux but was told by an official of the Bureau of Indian Affairs that the Sioux did not need a lawyer, "we'll take care of them."⁴⁹ Another very knowledgeable observer of the situation asserted that it "cannot be shown that the government in a single case sincerely investigated the complaints and protests of the Indians with a view of doing justice to them." He added also that in "no case has the government reimbursed the Indians on account of violations of treaties and claims asserted without the services of counsel; and it rested solely upon the intelligence and industry of such counsel that Indian claim was ever paid by Congress or by a judgement of a court."⁵⁰

Indian Rights and the Court of Claims 23

In the face of the facts that the federal government was an unsympathetic foe and the process of even gaining a confrontation with it was lengthy and difficult, some few attorneys persisted. Only a leaven of idealism could raise them to the effort of maintaining these often frustrating litigations. A limited number of attorneys and firms, largely centered in Washington, D.C., developed a specialized knowledge of Indian law and history, congressional connections, familiarity with the records of the Department of Interior and the General Accounting Office, and experience in the Court of Claims. These men were subject to the supervision and direction of the Commissioner of Indian Affairs and the Secretary of Interior, and could make no contract, compromise, or settlement without the Secretary's approval.⁵¹ Recoveries were contingent on success of the suit and usually determined by the Court or the jurisdictional acts not to exceed 10 percent with a general maximum of \$25,000.⁵² For a few it was a fruitful practice, for all a trying one. Ralph Case handled over fifty claims cases before 1946 and lost them all. One of the fifty appeared to be a \$5 million victory but was nullified by \$8 million allowed the government in offsets. Veteran Indian lawyer Francis A. Goodwin of Washington invested twelve years of his time and \$5,000 of his own funds in a Nez Perce claim and came up empty handed. Noted Indian attorney Ernest L. Wilkinson of Washington, D.C., lost seven years and \$12,000 on the *Shoshone* case. On the other hand, in a suit for the Menominee of Wisconsin, Wilkinson won an award of \$1.78 million. Government testimony at the fee hearing recognized that his services were worth 25 percent of the award rather than the 10 percent allowed. When one considers that his firm worked some 2,200 days over an eleven year period and employed fifteen attorneys and experts, the \$178,000 final fee does appear niggardly. In his famous *Ute* case, Wilkinson employed the services of sixty-

24 Their Day in Court

nine lawyers over a fifteen-year period. They utilized 36,400 sources from the National Archives and presented 10,281 pages of testimony and 1,259 exhibits in sixteen weeks. It was the longest continuous hearing ever in the Court of Claims and only one phase of the trial. In 1950 the Utes accepted a settlement of \$32 million and Wilkinson a fee of \$2.8 million.⁵³ From 1881 to 1946, 219 claims were filed with the Court of Claims. Of these cases only thirty-five won awards which totaled \$77.3 million or an average \$1.2 million per year in net recovery.⁵⁴ Indian lawyer, Paul M. Niebell, summed up the situation well in his statement to the Senate subcommittee of the Judiciary Committee in 1940: "I am one Indian attorney who is sorry he ever became connected with this sort of litigation.... I am in it now and I have to finish it."⁵⁵

In spite of the record many in Congress only saw conspiracy at the root of the Indian claims. This was usually the result of their own ignorance of Indian history in general and the specific claims in particular. Even Senator Burton K. Wheeler of Montana, himself regarded suspiciously by the conservatives as a radical progressive and member of the La Follette bloc, joined this group. No enemy of the Indian, Wheeler said in hearings on the proposed Indian Reorganization Act of 1934 that it was a "well known fact here that in this city it has been somewhat of a racket with some lawyers and people going out there chasing around the country and having solicited such business among various tribes."⁵⁶ Possibly he saw these lawyers as he did the bankers--as enemies of the people.

Congressional debate on Indian legal legislation often raised the specter of the avaricious Indian attorney whose claims business was the biggest "racket in the country," usually with the motive and effect of obscuring merit with myth.⁵⁷ Along with this, old attitudes concerning the "limited capabilities" of the mind of the

Indian Rights and the Court of Claims 25

savage persisted. A good illustration of this, one among many, was an exchange between Representatives and members of the executive department dealing with Indian claims:

Mr. Bacon of New York: Are these claims dug up by lawyers?

Mr. Blair of the Justice Department: Every tribe in the country has traditions, and so forth, of agreements and arrangements entered into, and, of course, every tribe is endeavoring to get its claims presented. In some instances the tribes hunt up attorneys and in other instances the attorneys hunt up the tribes.

The Chairman: I expect the latter class is the principal one, because most of the Indians do not know about the treaties that were made several generations back.

Mr. Stormont of the Justice Department: It is surprising how much they do know about those old treaties. In fact it has been my experience that attorneys for Indian tribes have the greatest difficulty in keeping out of their petitions a multitude of claims that they want the attorney to present. As it is, they have to present in their petitions claims that they know have not the slightest basis in law, equity, or anything else....

26 Their Day in Court

Mr. Taber of New York: The principal occupation of Indians is putting up claims against the government.

Mr. Stormont: It seems so from the record.

Mr. Bacon: It is a regular racket.⁵⁸

These government attorneys were not friends of the Indian to say the least, judging by other testimony, but even they could not conceal the reality of the history of Indian claims. Non-literate people often have a firm grasp of their own history through oral tradition. An analysis of the *Annual Reports* of the Commissioner of Indian Affairs in the latter nineteenth and early twentieth centuries and the reports of the Board of Indian Commissioners contained therein shows ample evidence of Indian awareness of their injuries and their agitation, unaided by attorneys, for redress.⁵⁹

Not all members of Congress were hostile to the Indian claims lawyers. The Indian Affairs Committee members, usually more aware of the facts, acted more out of fiscal concern and a desire to save money for the government *and* the Indians by eliminating the middlemen. In proposing legislation they hoped for compromise and direct settlements on Indian claims instead of litigation. It was often assumed that Congress and the tribes could readily agree on many cases and thus obviate the need of "paying to private attorneys amounts which have aggregated millions, and which before the final settlement is achieved under the now existing arrangement, would total tens of millions."⁶⁰ This, as has been pointed out, was workable in theory only, for the vast majority of claims cases went to trial at the demand of either the government or the claimant.

Indian Rights and the Court of Claims 27

Linked to the Indian's long struggle to prosecute and collect on their claims, with and without legal counsel, was the resulting problem of accrued interest on the eventual cash settlements. The matter of interest was not feared by the government, or even considered much until the shock of the Shoshone and Klamath decisions in 1937 and 1938 which allowed large interest payments. Before these, interest was claimed in fourteen cases but allowed only in two, in 1905 and 1928.⁶¹ The increased caseload of the thirties and the landmark decisions of 1937 and 1938 changed the passive attitude of the government and charged the active role of the claimants. Responding to the oft repeated government reproach that the claims were too old to be pursued, distinguished Indian attorney, Charles J. Kappler, asserted that if they were it was due to government delay.⁶² The Indians were kept "in a state of tutelage and not allowed to sue," stated Indian attorney Ernest L. Wilkinson. In fact, the Departments of Interior or Justice should have pressed the suits long before on behalf of the wards as Mr. Justice Van Devanter pointed out in his opinion in the *U.S. v. Creek Nation* case of 1935. This opinion was in response to the defense's contention that the case be dismissed because the tribe took no legal action at the time the land was taken. Such logic could have neatly boxed the Indians out of most of their claims, but the Supreme Court had none of it. Plainly, remarked Wilkinson, the government, before the 1920's was unwilling to do its job and the "tribes were not civilized or not free enough to properly assert their rights."⁶³

In 1940 the government struck back at the decisions of 1937 and 1938. A bill was introduced into the Senate to limit interest payments, if any, to four percent for six years from the date of injury. In testimony on the bill, Justice Department lawyers argued that without this law the \$750 million in pending cases could balloon to \$3 billion with

300-400 percent interest added over 60-80 years. The case was then put to Congress that any such recovery by the Indians was too large and would grow unless limits were set. Congress had to decide if it wanted to "allow the several Indian tribes to recover large sums of money, including both principal and interest," or to enact a defense against this huge potential expense.⁶⁴

Defenders of the Indian first attacked this ruse by pointing out that it quoted the amount claimed and conveniently neglected to mention the miniscule recovery rate of 1.35 percent. Then they explored for Congress the more fundamental issue of the precedent *Klamath* and *Shoshone* cases which had defined interest as "as element of just compensation." The Indian's friend tried to show that the government wanted to call "just compensation" interest and have the Congress set its limits. In law it was not interest but "just compensation" and only the courts could determine this form of award. The element of "just compensation" arose in these cases from the original wrongful taking of the land, often a breach of treaty; and the failing of fiduciary duty to act as guardian to seek reparations for wrongs against the ward. Wilkinson said that it was poor enough compensation to give the Indians a law suit decades later instead of what should have been paid them at the time of taking. He added: "Do not think, therefore, you are being Santa Claus by giving them a jurisdictional act. That is only a feeble remedy only additional compensation could redress the delay." He then strongly attacked Justice for "misconceiving its mission" and attempting to subvert justice and protect itself by putting up a bill whose sole purpose was to save the government money. He saw a conspiracy, inspired by the two Supreme Court decisions, to circumvent the Indian Committee and the courts by congressional action. The arguments against

the bill were forceful and it was never reported out of committee.⁶⁵ But the issue of interest was also buried.

In the next six years, to 1946, only three awards were allowed in the Court of Claims, none with interest. Of the five cases that claimed interest, all were dismissed. In 1945 the Supreme Court again seemed to have reverted to an old position when it ruled in the *Northwestern Shoshone v. U.S.* case that recovery should be denied because the injuries were ancient ones "committed by our forefathers in the distant past against remote ancestors of the present claimants." The matter of interest stood unresolved until it was taken up by the Indian Claims Commission.⁶⁶

Another of the critical elements of Indian claims that long embittered the participants was the matter of gratuities. Gratuities are defined as the cost of annuity goods beyond the treaty stipulations expended for the benefit of the tribe. This basic definition has been contorted depending on who was determining which expenses were "annuity goods," and what expenses were for "the benefit of the tribe." The debate began in 1920, for in that year a jurisdictional act, that of the *Klamath*, first provided for the allowance of gratuities as offsets by the government. Before that act only one of the sixteen successful recoveries made by the tribes in the Court of Claims had allowed gratuities as an offset. This one exception, in 1910, was different in other ways also and in no way served as a model.⁶⁷ The practice continued after 1920 but varied greatly as to use and definition from case to case. What did not vary was the government's time-consuming practice of referring all claims to the General Accounting Office for a thorough search for possible offsets, mainly to reduce any awards. Provisions of the Indian Reorganization Act of 1934 disallowed as offsets any of its expenditures⁶⁸ and the jurisdictional acts of the Five Civilized Tribes denied the government the use of

30 Their Day in Court

gratuitous offsets, but these were not the rule. From 1929 to 1935, in every case but two, where the act allowed offsets of gratuities and where a recovery had been won, the case was dismissed because the recovery was exceeded by the offsets. A fair example of this process was the case of *Blackfeet v. U.S.* (1935). The Blackfeet won their land claim and an award of over six million dollars but offsets of over five and a half million left them with \$622,000. Gratuities allowed included the payment of Indian agents, Indian police, judges, interpreters, maintenance and repair of agency buildings, teachers, and prorated expenses for education of Indian children at various institutes even though it was never shown that Blackfeet children ever attended the specified schools.⁶⁹

The process of claims accounting was lengthy and expensive. The General Accounting Office estimated, in 1935, that it had spent one million dollars examining some 1.38 million "claim instances" and over 83,000 accounts for reports. The largest report, one of the Sioux petitions, resulted in a document of 4,385 pages in eight volumes derived from the analysis of 7,279 accounts and 600,000 vouchers. This job took seven years and cost over \$177,000. A small case, the Shoshone report, consisted of one volume of 615 pages derived from the analysis of 1,100 accounts at a cost of \$15,000. A large part of this work was in compiling the record of gratuity payments. It was a "gamble," testified a General Accounting Office official, depending on whether the Court allowed them. The gamble paid off. In sixteen cases decided by the Court involving claims totaling \$346 million the Court allowed \$13.6 million. Offsets were allowed amounting to \$11 million leaving a net recovery of about \$2.65 million.⁷⁰

Many of these "gratuities" obviously were more for the benefit of the government than the Indians and the Court seemed more generous in their allowance as the

Indian Rights and the Court of Claims 31

number of cases filed increased. Friends of the Indian regarded the process as "grossly unfair" and a "grave wrong doing on the part of the highest officials of the land." Indian attorneys felt that the term gratuity had been distorted and the Indian himself scornfully referred to the practice as "Indian giving."⁷¹ But the Government Claims Chief, George Stormont, retorted that he regarded gratuities as *quid pro quo* for land compensation to the Indians. "If we had paid them for our violations of the treaty, they would have had the fund in the Treasury, out of which they would have been supported. Not having any fund, we made a direct appropriation. When we came to the settlement of the case, we offset the gratuities."⁷² This attitude was typical of the Justice Department in general and Stormont in particular and largely responsible for twenty-five years of legal frustration for Indians in the Court of Claims.

It was in 1935 that the issue of gratuities was more clearly defined by the government to the chagrin and further embitterment of the claimants. In a hearing before the Committee on Expenditures of the House, Chairman John Cochran declared the hearing's purpose to be the protection of the government and to "stop the Congress from sending more of these cases to the Court of Claims and provide by law all cases heretofore certified be subject to the offsets provision."⁷³ Subsequently an act was passed directing the Court of Claims to "consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band."⁷⁴ The furor that followed this act was occasioned by the fact that it was a product of a subcommittee of the House Committee on Appropriations chaired by James Buchanan in closed executive session with Blair and Stormont of the Lands Division of the Justice Department. No member of the Interior or Indian Departments was present. This act was actually a rider to

the appropriations bill in the House and passed on the Committee report and against the recommendations of the Senate Committee on Appropriations before any interested parties for the Indian side were aware of it. Added to the controversy was the fact that the law was listed under the heading of "unmilitary activities" of the War Department, not under that of the Interior Department where all Indian matters are handled. And, this particular section, unlike any other Public Law 260, had no title to describe its content.⁷⁵ Several interested parties dashed to Washington, D.C. soon after and secured the introduction of a bill in the Senate clarifying gratuities, which passed but was buried in the House.⁷⁶ In later testimony, Stormont responded to insinuations that this act was a sinister Justice Department measure. He recalled his and Blair's appearance before the Committee on Expenditures but forgot the purpose. The subject of offsets "just came up" he said, and the act he had drawn up at Buchanan's and Blair's request had only been for the personal use of Chairman Buchanan.⁷⁷

To the Indian attorneys, Stormont's denial was unconvincing. They refused to accept the logic that gifts could be later deducted from awards as a matter of law when no other cases and no other claimants faced this type of offset. And, they were even more aggrieved when such gifts were allowed as offsets even when specific agreements, treaties, and jurisdictional acts disallowed them.⁷⁸ But the law held, and most effectively for the government. A report by the Attorney General of 1946 showed that the Court of Claims had allowed some \$49.4 million in claims, but the \$29.4 million in offsets left only \$20 million to the Indians.⁷⁹ The government was certainly a tough and clever opponent when defending its treasury against the Indian, as it had been in the previous century when first bargaining for the land. Even Stormont admitted this in testimony when Merlin Hull, the Progressive Representative from

Wisconsin asked: "Have you ever heard of a treaty in which the Indians got the advantage of the government at the time the treaty was signed?" "Well I cannot say that I have," Stormont replied.⁸⁰

One last and crucial act of the Court of Claims closed its central role in Indian claims litigation. In 1946, the year that the Indian Claims Commission was established to supersede the system of jurisdictional acts, a landmark decision of the Court of Claims in 1945 was sustained by the Supreme Court. With the *Alcea Band of Tillamooks* case the Court finally dealt with a principal block to Indian recovery and set a precedent to allow the new Commission to serve the Indian cause more adequately than the Court. This was the first case to award compensation for taking of land held under "Indian title." Previously, compensation was awarded for lands held only under title "officially recognized" by treaty, agreement, or law. Some jurisdictional acts prior to this had authorized the Court of Claims to determine liability based upon aboriginal title but no awards were ever made.⁸¹ In 1945, the Supreme Court again disallowed recovery based on "Indian title" in the *Northwestern Bands of Shoshone Indians v. U.S.* case. But in *U.S. v. Tillamooks*, the next year on review from the Court of Claims, the Court regarded United States recognition as immaterial, for international law as John Marshall had pointed out gave the Indians legal right of occupancy in the lands. The United States could extinguish that right as sovereign but to do so without consent or compensation in the face of much judicial and contractual precedent did not satisfy, for the Court, the "high standards of fair dealings" required of America in administering Indian affairs.⁸²

No doubt, the Court's reversal was influenced by the change in congressional intent evidenced in the proceedings and passage of the Indian Claims Commission Act of 1946. Thus, in the same year, two giant obstacles were removed

34 Their Day in Court

from the path of Indian claims. First, the Indian no longer had to have a title to his lands that was made legitimate by the sovereign through recognition to gain compensation for its taking. Second, the Indian Claims Commission was established to eliminate the need for a special jurisdictional act to allow entrance into the Court of Claims. The *Alcea* case gave the *coup de grace* to the "menagerie" theory of Indian title; the theory that Indians "are less than human and that their relations to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined."⁸³ For 136 years, since the Supreme Court first touched the question of Indian rights in the Yazoo land case of 1810 and held the Indians to be an independent people with absolute proprietorship of the soil, this working myth had obscured the fact of legal recognition.⁸⁴ The Indians Claims Commission of 1946 was a breakthrough long in coming, but could a century and third of practice be negated by a Commission and an attitude little different than before? The Court of Claims, so long involved with Indian cases, was retained as the appellate court under the new law. Veteran Indian lawyer, Ralph Case, had urged that the Court be divorced from the claims process. Cherokee attorney, Robert L. Owen, concurred, because the Court was the "very body whose decisions for years gone by were challenged by the Indian claimants as contrary to equity and law and justice."⁸⁵ But the lawmakers saw it differently and the Court remained a part of the Indian claims procedure.

The Indian's struggle for recognition and adjudication of their claims was long and difficult. As they lost their national sovereignty and the military power to enforce their claims their legal rights also suffered diminution. But these rights, granted to them by the white man's legal system through the treaty-making process, were

Indian Rights and the Court of Claims 35

not extinguished. The treaties were as contracts and also the law of the land and thus held a sanctity that was at the heart of American legal institutions. So the tribes fought to be heard in the Court of Claims, under the dubious distinction as "wards" of the nation, until officially banned from the Court in 1863. They then kept their rights alive before the Congress until, in 1881, they were granted the half-loaf of recognition by the jurisdictional acts. These acts created more frustration than redress, yet it took sixty-five years for the pressure generated by their inadequacies to result in the passage of the Indian Claims Commission.

The following words of Abraham Lincoln are written in foot-high letters in the hallway of the United States Court of Claims: "It is as much the duty of government to render prompt justice against itself, in favor of its citizens, as it is to administer the same, between private individuals." The Indian claimants believed this statement, but they had a difficult time trying to convince the Congress, the bureaucracy, and all the other powers arrayed against them. The Court of Claims was found to be inadequate for the task of claims settlement. In 1946 the primary responsibility for this longstanding problem then fell on the new Commission.

NOTES

1. Felix S. Cohen, *The Legal Conscience* (New Haven: Yale University Press, 1960), 265. Cohen was a legal scholar and author, and in 1938 entered government. He served as counsel to the Secretary of Interior and Associate Solicitor in the Interior Department. Here he became the foremost figure in Indian law and led the team that wrote *Federal Indian Law*. Out of government after 1948 he represented several tribes and was counsel to the Association on American Indian Affairs, Inc.
2. George D. Harmon, *Sixty Years of Indian Affairs, 1789-1850* (Chapel Hill: The University of North Carolina Press, 1941), 319. This figure of \$554 million represents a minimum, for the price of public land from 1796 to 1820 was \$2/acre and it was not reduced to \$1.25 until 1820.
3. *Federal Indian Law* (New York: Association on American Indian Affairs, 1966), 163.
4. Walter Hart Blumenthal, *American Indian Dispossessed: Fraud in Land Cessions forced upon the Tribes* (Philadelphia: G.S. MacManus Co., 1955), 43. See Charles C. Royce, 18th *Annual Report of the Bureau of American Ethnology* 1899. A convenient breakdown of Royce can be found in Sam B.

Hilliard, "Indian Land Cessions West of the Mississippi," *The Journal of the West*, Vol. X, (July 1971), 493-510.

5. William H. Marnell, *Man-Made Morals: Four Philosophies That Shaped America* (New York: Anchor Books, 1968), 238.
6. Cohen, *Legal Conscience*, 68-69.
7. *Ibid.*, quoted at 282.
8. *Ibid.*, 69.
9. Thomas Jefferson, "Notes on the State of Virginia, 1781-85," reprinted in Saul K. Padover, *The Complete Jefferson* (New York: Duell, Sloan, & Pearce, 1943), 623.
10. Cohen, *Legal Conscience*, 266.
11. John Upton Terrell, *Land Grab: The Truth About the Winning of the West* (New York: Dial Press, 1972), 27-8. Never, in all the battles with the Indian nations, did Congress declare war.
12. Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians* (Norman: University of Oklahoma Press, 1932), 229-50. See *Federal Indian Law*, 341. Joseph C. Burke, "The Cherokee cases: A Study in Law, Politics, and Morality," *Stanford Law Review*, Vol. XXI, no. 3 (February 1969), 500-31. Edwin A. Miles, "After John Marshall's Decision: *Worcester v. Georgia* and the Nullification Crises." *The Journal of Southern History*, Vol. 39, no. 4 (November 1973), 519-44.

38 Their Day in Court

13. Harmon, *Sixty Years*, 257-8.
14. See treaties with Otoe and Missouriia, 1854, Article 3 and with the Omaha, 1854, Article 3. Charles J. Kappler, *Laws and Treaties*, Vol. II (Washington, D.C.: Government Printing Office, 1904). See Appropriation Acts for the Indian Department of 1852, and 1854, 10 Stat. 42, 56, 333.
15. *59th Annual Report of the Commissioner of Indian Affairs to the Secretary of Interior*, 1890 (Washington, D.C.: Government Printing Office), CXXVI-CXXIV. See note 13.
16. 10 Stat. 612, February 24, 1855.
17. 11 Stat. 611, Articles 11 and 12.
18. Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* (Brooklyn: The Foundation Press, Inc., 1953), 109-19.
19. Section 9, 12 Stat. 765. March 3, 1863.
20. The story of the Indians during the Civil War is fragmentary. See Fairfax Downey, *Indian Wars of the U.S. Army, 1776-1865* (New York: Doubleday & Co., 1963), chapter 16. Annie H. Abel, *The American Indian as a Participant in the Civil War*, Vol. II (Cleveland: Arthur H. Clark, Co., 1919). Jay Monaghan, *Civil War on the Western Border, 1854-1865* (Boston: Little Brown & Co., 1955).
21. White Unionists, loyal "at heart," but trapped in an "insurrectionary region" finally succeeded in gaining a Southern Claims Commission (March 3, 1871, 16

Indian Rights and the Court of Claims 39

- Stat. 524) to hear their claims against the Union Army. 22,300 claims were filed and 7,100 were allowed for \$4.6 million. Frank W. Klingberg, "The Southern Claims Commission: A Postwar Agency in Operation," *The Mississippi Valley Historical Review* 32 (June-March 1945-46), 195-214. Also James G. Randall, *Constitutional Problems under Lincoln* (University of Illinois Press, 1964), 335-41.
22. Alvin Josephy, Jr., *The Patriot Chiefs: A Chronicle of Indian Resistance* (New York: Viking Press, 1958).
23. U.S., Congress, Senate, Committee on Indian Affairs, *Hearings on S. 2731 to create an Indian Claims Commission*, 74th Cong., 1st sess., June 10, 1935, 47.
24. An analysis of congressional and executive documents and reports reveals dozens of examples of Choctaw perseverance.
25. 16 Stat. 566, March 3, 1871.
26. Roy Robbins, *Our Landed Heritage: The Public Domain, 1776-1936* (Princeton: University of Princeton Press, 1942), 232.
27. 17 Wall. (84 U.S.) 211, 1872.
28. Cohen, *Legal Conscience*, 265.
29. Jack D. Forbes (ed.), *The Indian in America's Past* (New Jersey: Prentice-Hall, Inc., 1964), 109-110.
30. Josephy, *Patriot Chiefs*, 302.

40 Their Day in Court

31. Thomas Henry Tibbles, *The Ponca Chiefs: An Account of the Trial of Standing Bear* (Lincoln: University of Nebraska Press, 1972), 134.
32. 21 Stat. 504, chapter 139. March 3, 1881. The Choctaws resisted a motion to dismiss and won their case in 1884, 19 Ct. Cl. 243. They were awarded \$2.5 million less than the proposed Senate settlement but the Court let it stand (21 Ct. Cl. 59) until an appeal reversed the decision and reinstated the Senate offer plus another \$150,000 in damages, 119 U.S. 1, 1886.
33. 17 Ct. Cl. 3, "History, Jurisdiction, and Practice of the Court of Claims of the United States," by William A. Richardson.
34. *Elk v. Wilkins*, 112 U.S. 94, 1884.
35. *Jaeger v. U.S. et al.*, 27 Ct. Cl. 278, 1892.
36. *Felix v. Patrick*, 145 U.S. 317, 1892.
37. 59th Annual Report of the Commissioner of Indian Affairs. The numbers of claims and awards were derived from U.S., Congress, House, Committee on Interior and Insular Affairs, *Indirect Services and Expenditures by the Federal Government for the American Indian*, 86th Cong., 1st sess., 1959, 11-14; and U.S., Congress, House, Committee on Interior and Insular Affairs, *An Investigation of the Bureau of Indian Affairs*, pursuant to H. Res. 698, 82nd Cong., 2nd sess., Dec., 15, 1952, H. Rept. 2503, 1563-71.
38. 43 Stat. 253, June 2, 1924. The *Annual Reports* of the Indian Office of ten spoke of Indian patriotism in the post-war years.

Indian Rights and the Court of Claims 41

39. U.S. Department of Justice, Memorandum of George T. Stormont to Harry Blair on Indian Claims cases, March 5, 1934. Found in *Legislative Material on the Indian Claims Commission Act of 1946* (L.M. hereafter). Compiled and edited by Alice Ehrenfeld (associated with Riegelman, Strasser, Schwarz and Spiegelberg) and Robert W. Barker (associated with Ernest L. Wilkinson), 21-28. This document was privately printed in a limited number and was consulted by me on loan from John Vance, Commissioner, Indian Claims Commission. Also see Lewis Meriam, *The Problem of Indian Administration* (Baltimore: The Johns Hopkins Press, 1928), 805-11.
40. Blumenthal, *Dispossessed*, 174.
41. Meriam, *Indian Administration*, 805-11.
42. Samuel T. Dana & Myron Krueger, *California Lands* (Washington, D.C.: The American Forestry Association, 1958), 52-3. See U.S. Congress, House Committee on Indian Affairs, *Hearing on the H.R. 7838 to create an Indian Claims Commission*, 74th Cong., 1st sess., May 22, 1935, 10. At this hearing, Commissioner of the B.I.A., John Collier, deplored the fact that his office was continually required to report adversely or favorably on claims bills without adequate information, 8.
43. *Hearings on H.R. 7838*, 11. U.S., Congress, Senate, Subcommittee of the Senate Committee on the Judiciary, *Hearing on S. 3083*, 76th Cong., 3rd sess., Feb. 1940, 144-46.
44. *Hearings on S. 3083*, 142-3.

42 Their Day in Court

45. *Federal Indian Law*, 490.
46. *Hearings on S. 2731*, 13.
47. The details of this case are recounted in U.S., Congress, Senate, *To Amend the Klamath Jurisdictional Act of 1920*, 74th Cong., 2nd sess., 1936, Rept. 1749; and U.S., Congress, House, *To Amend the Klamath Jurisdictional Act of 1920*, 74th Cong., 2nd sess., 1936, Rept. 2354.
48. Trade and Intercourse Act of 1834. See U.S., Congress, House, *Investigation of Indian Frauds*, 42nd Cong., 3rd sess., March 3, 1873, Rept. 98.
49. John Kobler, "These Indians Struck it Rich," *The Saturday Evening Post*, Vol. 225, no. 10 (Sept. 6, 1952), 132-35.
50. *Hearings on S. 3083*, 1940, 139-40.
51. Meriam, *Indian Administration*, 805-11.
52. In the latter 19th century fees often ranged from as low as 1 percent to as high as 25 percent by contract, but the average was close to 10 percent. See 59th *Annual Report of Commissioner of Indian Affairs*.
53. Kobler, *Saturday Evening Post*. Also see statement of Ernest L. Wilkinson, U.S., Congress, House, Committee on Indian Affairs, *Hearings on H.R. 1198 and 1341 to create an Indian Claims Commission*, 79th Cong., 1st sess., March and June 1945, 81-84.
54. Statistics derived from government reports, see note 37.

Indian Rights and the Court of Claims 43

55. *Hearings on S. 3083*, 134.
56. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Attorney Contracts with Indian Tribes*, 83rd Cong., 1st sess., Jan. 16, 1953, S. Rept. 8. Also see U.S., Congress, Senate, Committee on Indian Affairs, *Hearings on S. 2755 and 3645*, 73rd Cong., 2nd sess., 1934, 246.
57. U.S., Congress, House, *Congressional Record*, June 23, 1937, 6237-67.
58. U.S., Congress, House, Subcommittee of the House Appropriations Committee, *Hearings on H.R. 8554, The Second Deficiency Bill for 1935*, 74th Cong., 1st sess., June 4, 1934, 682-83.
59. See the *Annual Reports* of the Commissioner of Indian Affairs and the Board of Indian Commissioners contained therein, 1870-1920.
60. U.S., Congress, House, *To Create an Indians Claims Commission*, 74th Cong., 1st sess., June 19 1935, H. Rept. 1268.
61. 299 U.S. 476, 1937 and 304 U.S. 11, 1938. Interest was allowed in the Cherokee cases filed in 1903 (docket nos. 23199, 23212 and 23214) and settled on March 20, 1905; and the Yankton Sioux case filed in 1924 (D-546) and settled on April 16, 1928.
62. *Hearings on S. 3083*, 140.
63. *Ibid.*, 67.
64. *Hearings on S. 3083*, 186, and see 3-11.

44 Their Day in Court

65. *Ibid.*, Statement of Ernest L. Wilkinson at 66 and 57.
66. Cohen, *Legal Conscience*, 264. 324 U.S. 335, 1945.
67. Klamath jurisdictional act of 1920, 41 Stat. 623. Ute (Confederated Bands), Ct. Cl. docket no. 30360, allowed May 23, 1910. The United States may consent to suit as in the formation of the Court of Claims, but this consent is subject to whatever limitations prescribed in the acts of consent. The offsetting of gratuities may be a condition of that consent (see 25 U.S.C. 475 and 70a). The burden is on the U.S., however to show that expenditures were gratuities, and on the Court to specify which gratuities are offset against the judgment. *Federal Indian Law*, 344-45. Sometimes the Court has allowed the U.S. offsets for education of the tribe's children in non-reservation schools (*The Blackfeet, Blood tribes v. U.S.*, 71 Ct. Cl. 1930, 308). The Court has allowed offsets for the cost of administration of government agencies, of superintendents, interpreters, teachers, Indian police, agency buildings, and so forth (*The Duwamish, Lummi, etc. Tribes v. U.S.*, 79 Ct. Cl. 530, 1934) on the grounds that these things were a benefit to the Indians. In another case, though, the Court excluded such gratuities on the ground that the maintenance of a government agency is simply the performance of a government function and that such expenditures were common to all tribes. (*The Assiniboine Tribe v. U.S.* Ct. Cl. 347, 1933). Sometimes the Court has declared this argument to exclude offsets for money spent for education and civilization, but usually the Court has allowed deduction even for this (*The Duwamish, Lummi Tribes*

Indian Rights and the Court of Claims 45

- v. *U.S. and the Crow Nation v. U.S.*, 81 Ct. Cl. 238, 1935).
68. 48 Stat. 984, 1934, sec. 13, 14 & 15.
69. 81 Ct. Cl. 101, 1935.
70. *Hearings on S. 3083*, 20.
71. *Hearings on H.R. 7837*, 22. *Hearings on S. 3083*, 104. Term "Indian giving" quoted in Glen A. Wilkinson, "Indian Tribal Claims before the Court of Claims," *Georgetown Law Journal*, Vol. 55, December 1966, 517.
72. U.S., Congress, House, Committee on Expenditures in the Executive Department, *Hearing on Indian Claims against the Government*, 74th Cong., 1st sess., March 8, 1935, 12.
73. *Ibid.*, 8.
74. 49 Stat. 571, sec. 2, Aug. 12, 1935.
75. *Hearings on S. 3083*, 150. Also see, U.S., Congress, Senate, Committee on Indian Affairs, *Hearings on H.R. 4497 to create an Indian Claims Commission*, 79th Cong., 2nd sess., June 1, 1946, 19.
76. *Hearings on H.R. 1198 and 1341*, 50.
77. *Hearings on S. 3083*, 207-8.
78. *Ibid.*, 89-90. The Atoka Agreement with the Choctaws and Chickasaws, approved by an Act of Congress on June 28, 1898 (30 Stat. 495) relieved them of reliability for expenditures for them by the U.S. But

46 Their Day in Court

in the *Leased District* case (docket 17641, Ct. Cl.) the U.S. set up these as gratuities under the act of Aug. 12, 1935 (49 Stat. 596) and they were allowed in spite of the earlier law. Also see *Hearings on H.R. 1198 and 1341*, 43. Attorney Paul Niebell, from the Creek Nation, noted the illegality of the Act of 1935 as used against his jurisdictional act of 1925.

79. U.S., Congress, House, *Congressional Record*, May 20, 1946, 5307-23.
80. *Hearings on Indian Claims*, March 8, 1935, 15.
81. See discussion of concepts involved in the *Georgetown Law Journal*, note 70. That the Indian right of occupancy is a property right has never been legally questioned. In 1910, the Court of Claims ruled that title was secured if the United States entered into a treaty with those who claimed an area of land as theirs (45 Ct. Cl. 440).
82. *U.S. v. Tillamooks*, 329 U.S. 40, 1946. *Northwestern Bands of Shoshone Indians v. U.S.*, 324 U.S. 335, 1945.
83. Cohen, *Legal Conscience*, 303.
84. *Fletcher v. Peck*, 10 U.S. (Cranch 6) 87, 142-3, 1810.
85. *Hearings on H.R. 4497*, 34.

The Evolution of the Indians Claims Commission 47

CHAPTER II

THE EVOLUTION OF THE INDIAN CLAIMS COMMISSION, 1928-46

The Court of Claims, narrowly circumscribed by the acts granting it jurisdiction, tried for sixty-five years to deal with Indian claims and failed. The government, the Indians, and impartial researchers all deemed the machinery related to this process to be inadequate. The result of the almost unanimous dissatisfaction was the establishment of a special commission to handle Indian cases exclusively under a broad new jurisdiction and with the firmly expressed goal of finality. But, the drive to create the Indian Claims Commission in 1946 did not take place in a vacuum; other issues surrounded the desire for a new procedure for Indian claims resolution. One was the increased awareness in Congress, stimulated by the numerous jurisdictional acts, of the moral wrongs that needed to be faced and righted. Another, connected to the first, was the growing movement for reform of Indian administration in the 1920's and 1930's. All parties believed that everyone would benefit if the government "got out of the Indian business." The Indian would gain more freedom and the government lose less money. Thirdly, the end of the claims would remove a troublesome and divisive burden from the Congress, the courts, and the bureaucracy. The consideration and passage of jurisdictional acts, the executive reports, and case formulation and litigation had begun to consume far too much time and resources.

Fourthly, there was the old matter of unsettled land title that these claims raised. This issue could not be left open and clouded. Lastly, by the 1930's the clash between the Interior Department and the Justice Department over Indian claims did not fit well with the broader issue of legislative reorganization.

This movement for greater congressional efficiency began in earnest in 1929 and culminated in the Legislative Reorganization Act of 1946. This Act encompassed the work of congressional committees and agencies. Thus an Indian Claims Commission, aside from the immense task of claims settlement, had also to be formulated and administered to meet these larger governmental demands. This was no mean task for Congress, involved as it was in the process itself, but it passed a suitable bill in 1946.

On the occasion of signing the Indian Claims Commission Act on August 13, 1946, President Truman closed his brief message with the following:

I hope that this bill will mark the beginning of a new era for our Indian citizens. They have valiantly served on every battle front. They have proved by their loyalty the wisdom of a national policy built upon fair dealing. With the final settlement of all outstanding claims which this measure insures, Indians can take their place without special handicaps or special advantages in the economic life of our nation and share fully in its progress.¹

This statement voiced most of the fundamental problems that had shaped the relation of the Indian to the federal government from the earliest days of the Nation. In declaring the national policy to be built upon "fair dealing,"

the President continued the myth that had long comforted whites and afflicted Indians. At the same time he left listeners wondering why the bill was necessary at all if indeed the United States had maintained a "national policy of fair dealing." Calling for the "final settlement" of all claims, he stressed the long intended program of the government to end its special relationship with the Indian tribes. This goal was politically popular but functionally unrealistic. Finally, he saw this legislation as encouraging the Indians to "take their place" in American society as equals to whites, in other words, to assimilate. This concept, the oldest of the United States policies, and the most consistently rejected by the Indians (and by the government as of 1934) was thus revived by the highest executive of the land.

The purpose of this new Commission was not simply to do justice for its own sake but to provide the means to achieve final settlement. The Commission was related to a desire "to wipe the slate clean" by making justiciable all wrongs "that weighed upon the white conscience," whether or not they could be brought before a court of law. Congress, observed historian Wilcomb Washburn, clearly intended to "unburden itself forever of all the sins of commission and omission committed in the past."² As often is the case with such landmarks in Indian administration this one was primarily designed to serve the government and not the Indian, or as a recent student of the Act noted; it was "government-oriented rather than Indian-oriented."³

But to indict the Congress for a selfish practicality, however imperfect, in the achievement of its chosen goals would be to obscure the other facets of the long history of the Act of 1946. Central to that Act was the recognition of a moral debt to the Indians. Few great powers have acknowledged such fundamental moral or legal debts especially from the pressure of a small, powerless minority

50 Their Day in Court

in their midst. But in 1946 the United States gave consent to suit and even allowed new grounds for action. Following the passage of the Act, one Washington jurist pronounced it "the greatest submission ever made by a sovereign state to moral and legal claims."⁴ This may be an exaggeration but it does point up the strain in the American character that recognizes the binding effects of the moral issues as well as the legal precepts. Congress chose in 1946 to combine the sometimes divergent issues of morality and law within a new forum. It seemed the only way, after many decades of default, to serve both.

The evolution of the Indians Claims Commission Act of 1946 was a long process in the context of American history. The Court of Claims had been indirectly open to Indian cases via the difficult procedure of the jurisdictional act since 1881, but this process was seldom satisfactory to any of the participants. In the last decade of the nineteenth century the government came under increasing criticism for not giving the Indians a special court for the redress of their grievances.⁵ The actions of the bureaucracy in charge of the administration of government-Indian relations were viewed as oppressive and a judicial remedy was seen as the answer.⁶

The first influential person to take up this theme in the twentieth century was Francis E. Leupp, Commissioner of Indian Affairs from 1905 to 1908. In his book, *The Indian and His Problem* (1910), Leupp recommended "the creation of a special court, or the addition of a branch to the present United States Court of Claims, to be charged with the adjudication of Indian claims exclusively." This Court was to be limited in life to five or six years and to accept all claims within a three year period. Leupp believed that "morally, it would be a happy day for the dependent race" if Congress were to obligate itself irrevocably never to entertain any more of the Indian claims. The claims, he

The Evolution of the Indians Claims Commission 51

wrote, served only to keep "a multitude of Indians in a state of feverish expectancy of getting something for nothing, which is fatal to their steady industry and peace of mind." He saw the "abatement of these evils" as a necessary step toward progress.⁷ Leupp felt that such an arrangement would "clear the atmosphere" and be fair to all sides, but that Congress was not the proper body to settle these cases for they involved judicial not legislative questions.

Nothing resulted directly from Leupp's suggestion but at least the idea of an agency to deal exclusively with Indian cases was loosed in government-Indian circles. Then, in 1913, in hearings before a subcommittee of the House Committee on Indian Affairs, Assistant Commissioner of Indian Affairs Edgar B. Meritt came to the conclusion that an investigatory commission should be established to sort out the Indian claims and prepare reports upon which basis Congress could dispose of the cases for all time.⁸ Meritt's suggestion received little attention and no action for fifteen years.⁹ There were many reasons for this but prime among them was the belief that the Indian was a vanishing race through death and assimilation, and Congress, accordingly, felt no great desire (or political pressure) to award substantial sums of money, even if deserved, to the nation's dwindling, nonpolitical wards. (In fact, Indian population had risen from a low of 243,300 in 1887 to 330,640 in 1913).

The concept of a national claims commission was nothing new to America. From 1803 to 1901, sixteen claims commissions were established by the United States under treaties, conventions, or agreements to distribute settlements with foreign nations to American citizens or to resolve mutual claims.¹⁰ Technically the two situations were not very similar but the differences were not unresolvable if the moral issue was kept in sight. But the comparison was never made nor legislation enacted, and Indian claims

languished in Congress, the bureaucracy, and the Court of Claims.¹¹

The claims of whites *against* Indians, though, in the late nineteenth century received due attention. The Indian Depredations Act of 1891 was meant to settle claims of whites for damages done to their property by Indians "in amity with the United States." The Court of Claims was designated to hear and decide the almost 11,000 claims totaling \$43.5 million.¹² Thus, while the Indian was himself barred from directly bringing suit in the courts he was being sued in them, by whites.

In 1928, with the publication of *The Problems of Indian Administration* (the *Meriam Report*), the concept of an Indian Claims Commission received the endorsement that was to carry it into law some eighteen years later. This work was done under the general direction of Lewis Meriam of the Institute for Government Research in Washington, D.C. at the request of the Secretary of the Interior, Hubert Work. Its authors considered but rejected a recommendation to Congress for a general jurisdictional act opening the Court of Claims to all the Indian cases at once.¹³ They thought that this approach would "burden" the Court and the Department of Justice.¹⁴ Nevertheless, the unsettled claims remained one of the major problems of Indian administration, and the *Report* insisted on their prompt settlement "regardless of validity," for they had a "bad psychological effect upon the Indians." Hopeful claimants, the *Report* stated, refused to work, improve their farms, or make definite plans for the future because they had been told, sometimes by unscrupulous attorneys, "that they are rich and can hope eventually to receive enough money through the settlement of tribal claims to enable them to live in comfort without effort on their part."¹⁵ Thus, echoing Francis Luepp, the *Report* called for a "special commission" to study the remaining claims without a

jurisdictional act. It proposed that this commission should submit recommendations to the Secretary of Interior "so that those claims which are meritorious may be submitted to Congress with a draft of a suitable bill authorizing their settlement before the Court of Claims."¹⁶

Congressional Indian Committees had, since 1924, expressed an interest in this concept.¹⁷ In response, the Institute for Government Research, in the fall of 1929, retained Nathan R. Margold, a New York attorney, to study Indian claims problems and to draft a bill for their solution. After a thorough study of the issues and people involved, Margold reported to the Senate Subcommittee on Indian Affairs in December 1930. He proposed that Congress create an Indian Claims *Commission* of six commissioners to hear and finally decide all claims within a fifteen year period.¹⁸ Nothing came of the Margold study. Earlier in the year a similar proposal suffered a similar fate. On January 6, 1930, Chairman of the House Committee on Indian Affairs, Scott Leavitt of Montana, had introduced a bill (H.R. 7963) to create a United States Court of Indian Claims. It was devised by the Department of Interior and backed by the Board of Indian Commissioners; it did not, however, have the blessing of the Attorney General.¹⁹ This *court* was to consist of three judges, have a five year filing period for all claims founded upon the Constitution, laws of Congress, treaties, and contracts, and render final decisions within a ten year life span. Federal gratuity payments were allowed as offsets against tribal awards and attorney fees were fixed at a maximum of 10 percent. The bill was not reported out of the Judiciary Committee to which it was referred, likely because, as Indian legal historian Vine Deloria has claimed, "the climate for reform had not yet reached the point where the United States wanted to have its past sins recited in a legal forum."²⁰

Meanwhile, Senate Hearings on "The Conditions of the Indians of the United States" continued on and off for a year and a half, from January 1930 to June 1931. Commissioner of Indians Affairs Charles J. Rhoads testified that practically every tribe or band of Indians in America had one or more claims against the government. It was imperative, he said, that "some sort of machinery to act as a sifter or separator" be set up to determine the "meritorious claims." This done Congress then could settle them directly or refer them to "some other tribunal for final determination of the exact amount due the Indians." Rhoads left it to Congress to determine the nature of the said "committee or commission" and the range of its power from merely investigatory to judgmental. But he did volunteer his opinion that these issues were "worthy of serious consideration."²¹

Following Commissioner Rhoads' reiteration of the now twenty-year-old call for action, Congress attempted to delve further into the problems of the claims system that then operated. Amid charges and countercharges, testimony established that the Court of Claims was not the source of delay. Spokesmen for the Department of Justice decried the "misconception that the Court of Claims was congested with Indian claims" and noted that *their* department was always ready for Indian case action. Justice labeled the General Accounting Office (G.A.O.) as the bottleneck, and pointed out that it was "only in the last five years" that Congress had provided funds for that Office to employ sufficient manpower to formulate the lengthy reports needed for the Indian cases.²² The Indian claims attorneys also unanimously named the G.A.O. as the single most important agent of delay, adding that the Justice Department, especially its head of Indian litigation, George T. Stormont, compounded the lag by a lack of guidance.

There was good reason for this accusation. As of December 1930, there were eighty-six suits pending trial; since 1919, Stormont had been in charge of Indian claims cases *without assistance*.²³ He testified that there were very few cases before 1922, and that a rush followed the Sioux petition of 1924. In his eleven-year tenure, fifteen cases were disposed. Stormont blandly added that petitions of claims, after reaching his office, were sent, *unexamined*, to the G.A.O. for report.²⁴ With knowledge of this situation the Committee pressed E.J. VanCourt, attorney for the Creek Indians, to assess Stormont's ability to handle the large number of new cases in a reasonable time. VanCourt stated that he believed that Stormont did not have "sufficient executive ability" for the task and that that was exactly the trouble. In later testimony VanCourt criticized the Justice Department for sending the petitions to the G.A.O. without first deciding questions of law, a practice that caused, by his conservative estimate, 90 percent more work.²⁵ It appears, from the mass of testimony, that Stormont had, in little over a decade, built a personal legal duchy in the Justice Department and, being no friend of the Indian, planned to defeat their claims by delay and thorough searches for all possible offsets to negate any potential awards.

The much maligned G.A.O., represented ably by its audit division chief, David Newmann, chose not to counter the claims attorneys and the Justice Department. Newmann testified that the G.A.O. employed fifteen men for seven years on the Sioux case report because "it really takes that long on some cases"! He then placed a share of the blame for delay on Congress and the Courts and called for a uniform jurisdictional act. "That is the thing that has given us trouble. One reads one way--one Indian tribe has a gratuity offset and one doesn't. That is the big trouble. The Court hasn't decided that yet."²⁶ This vacillation would continue

for sixteen more years but during that time many more tentative answers to the "Indian problem" would be set before Congress.

It was five years before Congress again held serious hearings on the question of revising the procedures for handling Indian claims, but these years were not entirely devoid of activity. In 1934 and early 1935, the proponents of an Indian court made two more efforts to establish an Indian Claims Court. On April 17, 1934, Senator William J. Bulow of South Dakota introduced a bill (S. 3444) to create such a court. This court was to be for the "immediate settlement by negotiation of all claims of any tribe or band of Indians now pending before the United States Court of Claims." It was to have five judges and be empowered to render decisions with finality. It was given broad latitude in hearing evidence and allowed to override the defenses based on legal technicalities rather than on case-merit used by the Court of Claims and the government in defeating former cases under jurisdictional acts. It was also, "within its discretion," allowed to consider *de novo* any final judgment entered by the Court of Claims within a period of twelve years previous to its own enactment. This last provision, plus the fact that no time limit was placed upon the life of the court, doomed this bill to death in committee. On January 21, 1935, Bulow again introduced S. 3444 (now S. 1465) to create an Indian Claims Court. This was the last effort to place the Indian claims in a *court* expressly designed for their adjudication.²⁷ Senate Bill 1465 suffered the same fate as the one before, largely because it was not, by this time, considered a practical answer to the claims situation. In a report to Elmer Thomas, chairman of the Senate Committee on Indian Affairs, Secretary of the Interior Harold Ickes argued against it, locating the unavoidable problem in the G.A.O. and not in the courts.²⁸ Another court would not change the situation at all as

Stormont had noted in 1930. Ickes then directed the Senators' attention to a bill recently introduced in the House to create an Indian Claims *Commission* instead of a court, which he considered preferable.

This shift was partially affected by the broader change in party, president, and cabinet. Harold Ickes was a practicing attorney in Chicago when appointed Secretary of Interior in 1933 by President Roosevelt. He had long associated with the Indian reform movement and, in 1929, publicly castigated Commissioner of Indian Affairs, Charles H. Burke, and his assistant, Edgar Meritt, both of whom he considered reactionary, corrupt, and tainted as appointees of Secretary of Interior, Albert B. Fall. He came into the government as a reformer and, most importantly, brought with him John Collier. Collier's efforts on behalf of the Indians went back some fifteen years and, more than any other man, he became the driving force behind Indian reform during his twelve-year tenure (the longest) as Commissioner of Indian Affairs. The pre-New Deal phase of reform that began in 1929 with the appointment of Ray L. Wilbur as Interior Secretary and Charles J. Rhoads as Indian Commissioner was accelerated by the Ickes-Collier team. Collier planned an Indian claims court and tried unsuccessfully to write it into his Indian Reorganization Act of 1934. But it was Rhoads' thoughts on the creation of a "special Indian claims commission" with essentially "judicial power" that his successors pressed for and got.

It was with the introduction, in March 1935, of H.R. 6655, an act to create an Indian Claims Commission, that the legislative movement to expedite Indian claims shifted irreversibly from the consideration of a judicial to a commission format. Both Congress and the Secretary of Interior now felt that a commission rather than an adversary proceeding could better "cut through" the red tape of bickering government agencies charged with the

58 Their Day in Court

preparation of Indian cases. An investigatory commission appeared to be a better vehicle for "claims involving history and anthropology as much as law."²⁹

House Bill 6655 was the first to be introduced into the Congress that expressly called for a commission, though the concept was not a new one. It provided for a Chief Commissioner and four associates and gave them broad jurisdiction to hear all claims "for compensatory damages against the United States of any Indian tribe, band, or other communal group of American Indians residing within the territorial limits of the United States and Alaska." Those claims already adjudicated were also allowed for consideration provided that any prior action be given cognizance. Its duty was to make recommendations to Congress for claims dismissal, direct settlement, or submission to the Court of Claims. Determination of fact was to be final. Lastly, Indians could file claims only for a period of five years and the Commission would expire after ten years unless extended by Congress. Though differing from the bill proposed by Nathan Margold to the Senate in 1930, there was enough similarity between the two to see the latter as an outgrowth of the earlier concept of a commission. Actually, this bill, introduced by Will Rogers (no relation to the humorist) of Oklahoma, was an administration measure. Margold had become a solicitor for the Department of Interior in 1933 and it is clear, with his presence, that the commission format was never dropped as a potential remedy for the claims problem, at least by the Interior Department.³⁰ This administration bill aroused a great deal of congressional and executive interest and the conferences on it led to the introduction of similar bills in both Houses.

Senator Elmer Thomas, the Populist silverite from Oklahoma who also supported the bonus marchers in 1932, introduced S. 2731 on May 1, 1935, and it was read and

The Evolution of the Indians Claims Commission 59

reported to the Committee on Indian Affairs. The bill was drawn in the Solicitor's Office of the Department of Interior with the consultation of the Justice Department. Its purpose in creating an Indian Claims Commission was to establish a fact-finding body to investigate "every conceivable"³¹ Indian claim and make "recommendations to Congress for action or nonaction."³² The committee report listed the benefits as follows: (1) to expedite the necessary work and eliminate the nonessential, (2) to advise Congress "in an authoritative and conclusive manner," (3) to provide a way in which "claims founded upon political wrongs" could be settled, (4) to make it more economical for the government and the Indians, and (5) to assure a "just determination and settlement of just claims" which will "improve the morale of the Indians and the effectiveness of the government service among them." In his report on the bill, Secretary Ickes stressed that it did not provide for the adjudication of any claims but only for their investigation. Its goal was the end of the "inequitable" process of jurisdictional acts that, after many years, allowed the government and the tribes to "go into combat" before the Court of Claims with the usual result of "justifiable dissatisfaction" by the claimants and their return to Congress for further redress. This commission, said the Secretary, would "completely change" this and its findings of fact would be a "permanent accomplishment." With these findings and recommendations, Congress and the tribes could "undoubtedly" agree on many direct settlements, "thus making unnecessary any litigation in the Court of Claims or the Supreme Court of the United States."³³

Ickes recommended enactment of the bill for the above reasons, but with one of his points the Justice Department was at odds. Justice was against giving *prima facie* weight to findings of fact by the Commission in proceedings before the Court of Claims. Accustomed to their

record of success in defeating Indian cases in the Court of Claims, they were wary of limiting that Court's discretion in its consideration of both law *and* fact. The Interior Department asserted, though, that this change in the bill would reduce the proposed Commission from a constructive fact-finding body to a "purely investigatory agency whose findings are merely evidence of the facts and no more." In effect, the Court of Claims would have a trial *de nova* of the facts setting no value on the work of the Commission and rendering its role meaningless.³⁴

Interior prevailed and, with minor amendments in committee, the bill was reported out. In Senate debate the three billion dollar figure of the potential claim total that Justice had raised as a scare tactic in previous hearings was brought up again to threaten a possibly severe strain on the Treasury. But, Senator Thomas quashed this maneuver by noting the full record of the Indian claims, which revealed actual awards amounting only to eighteen million dollars. He wryly observed that under the new Commission, as under the Court of Claims, "in the final adjudication if they should get a few dollars they would be lucky."³⁵ The bill passed the Senate on July 29, 1935.

At the same time that S. 2731 was being considered by the Senate Committee on Indian Affairs, an identical bill (H.R. 7837) was under consideration by the House Committee. In hearings and reports, monopolized by Interior, the Representatives heard Indian Commissioner John Collier state that the one hundred years his predecessor claimed would be necessary to settle the Indian cases was "far too optimistic and that centuries will have to be substituted for one century by the present rate and the present method." Collier bemoaned that there were "a great many valid Indian claims, valid humanely and morally, but such have no basis in law." The Indians, he continued, gain no satisfaction and "they feel aggrieved, and they have a

right to feel aggrieved." Another Interior official went over the basic points of the bill, pointing out that its "whole purpose...is to embrace all claims and get them out of the way as efficiently and as quickly as possible." The present system is "inadequate," stated yet another representative of Interior, giving birth to "stillborn acts" of little or no benefit to the claimants. Once more Francis Leupp was echoed in the charge that the faults "grow out of the fact that Congress is an inappropriate body to pass upon Indian claims without having responsible impartial advice." This Commission could aid the system by improving it where it was "weakest and most inefficient," that is, in the selection of the meritorious claims, in the proper settlement of non-judicial claims, in the preparation of more precise jurisdictional acts to attain the "most efficient and conclusive action," and in achieving a *final* disposition of all Indian claims.³⁶ Added to these benefits was the expectation, again by the Secretary of Interior, that Congress would "undoubtedly settle many cases directly." Rufus G. Poole, Assistant Solicitor for Interior, also saw the "vast majority" of Commission decisions being accepted "readily" by Congress. This would eliminate the "need of paying to private attorneys amounts which have aggregated millions, and which, before the final settlement is achieved under the now existing arrangement, would total tens of millions." Both Justice and Interior, of course, were budget conscious and not above raising the financial issue to scare Congress away from or toward enactment. Interior saw the total award recoveries under this act as not exceeding \$100 million at the very most.³⁷

In the House Committee the bill was amended rather more drastically than in the Senate. Representative Usher L. Burdick of North Dakota increased the commissioners from three to five, with two to be Indians. The initial number of three had been arrived at "rather arbitrarily" by the bill's

62 Their Day in Court

formulators in Interior, but many, including Commissioner Collier, saw five as better.³⁸ The period for receipt of claims was extended from five to seven years. And, a proviso was added to exclude the possible expenses of the Commission from being considered as an offset against any award. The bill was reported out with these amendments but passed over and tabled in the whole House and the 74th Congress expired before any further action was arranged.³⁹

Thus, 1935, the year of the claims *commission*, ended without a new law to aid Indian claimants but not without another to hinder them. An amendment drafted by Justice Department officials was quietly added by Representative Carl Hayden to a deficiency bill directing the Court of Claims to offset gratuities against Indian awards with specific exceptions.⁴⁰ Prior to 1920 only one jurisdictional act had allowed this practice and none of the sixteen awards to 1917 had gratuities offset against them. They began on an irregular basis with the Klamath act of 1920.⁴¹ Only the first of the six bills introduced into the Congress from 1930 to 1935 had allowed gratuities to be pleaded as offsets and only those expended "for the benefit of any such tribe or band or for their support and civilization." Certainly the 1930's were not yet the decade of the Indian's advancement in the legal forum.

But the claims of the Indians persisted. For some they represented a roadblock to Indian progress, for others a threat to the federal treasury. But these were white opinions; to the Indian the claims were symbols of long-standing crimes committed against them that their oral tradition kept fresh. They demanded redress for the claims on their own merit without concern for the tangential effects on the red man's culture or the white man's pocketbook. Many tribes had persisted for over a century in their pursuit of justice and the temporary setbacks of 1935 were taken in stride.

The Evolution of the Indians Claims Commission 63

In the area of cultural survival and in his relationship to the federal bureaucracy, though, the Indian had done well with the passage of the Indian Reorganization Act of 1934.⁴² The Indian population had continued to rise since 1917 when Commissioner of Indian Affairs Cato Sells declared that "the Indian is no longer a vanishing race." The Collier administration affected one of those periodic turnarounds that federal-Indian relations had gone through for a century and the mid-1930's saw, officially, a "new era of hope."

For most of the period from 1935 to 1937 Congress did not act on a Commission, but it and the Courts were otherwise involved with Indian claims. In this period the Court of Claims awarded over ten million dollars in four Indian cases. In one of these, interest amounted to one and a half times the principle and in another over twice the principle. These cases shocked the administration, the Department of Justice, and the Congress. Central to these decisions was the *Klamath* case. Its retrial on the merits of the claim earlier denied by the courts for lack of jurisdiction, and the award of \$5.3 million including interest was a significant jump over the previous high award of \$3.5 million.⁴³

Before the Klamath decision had been handed down, a bill to establish an Indian Claims Commission was again introduced in the Senate and later in the House. This bill was identical to S. 2731 which passed only the Senate in 1935. Senate 1902 was a departmental measure drawn by Secretary Ickes after a consultation with Justice which had recommended minor changes. It passed the Senate after Senator Elmer Thomas had met Senator William H. King's objection to the five year filing period and reduced it to three. The House received the bill on April 23, 1937 one day after it had passed the Senate.⁴⁴ The Committee on Indian Affairs proceeded to amend the bill to require one of the

three Commissioners to be an Indian, to reduce their salaries from \$10,000 to \$7,500, to reinstate the five year filing period, and to drop a phrase that appeared to tie the hands of future Congresses. After three weeks it was reported out to the House and it reached the floor a month later. There then followed the most prolonged congressional debate to date on a special agency for Indian claims settlement.⁴⁵

It is worth following the House debate on S. 1902 in some detail for it reflects most clearly the many issues, arguments, and facets of the process to enact this particular, unique piece of legislation. In this arena we can see the financial fears, the political chicanery, the side issues the moral case, and numerous demonstrations of the profound ignorance of Indian matters at the highest levels of government that had so long been a cause of much of the friction between Indian tribe and American nation.

In 1937, as in 1935, the Indian Claims Commission was defeated in the floor debate of the House of Representatives. Representative John J. Cochrane of Missouri feared a raid on the treasury and spoke strongly in opposition to the bill: "I cannot conceive the House will put its stamp of approval on such a bill if the facts were in the possession of the members." The "facts" for Cochrane were of an entirely monetary nature. "You can disregard millions and think of billions if the Indian claims ever get into the hands of this commission and the right to offset the claims by the government is denied."⁴⁶ He noted that since 1873, Congress had spent \$600 million for Indians; the government was not stingy. "I have spent three years in working, not playing on Indian claims, and I have stopped dozens of them from being passed by this House," he said proudly. When he could not stop a jurisdictional act he moved to limit awards.

Cochrane's attitude, though, was not based on empty fears. As Chairman of the Committee on Expenditures in

the Executive Departments he was notified (in 1935) that "billions" might have to be awarded by the Court of Claims on jurisdictional acts. He recalled that in conference with the Assistant Attorney General and a representative of the Comptroller General's Office, the Committee was told that "something had to be done." Feeling that the Committee on Indian Affairs "could do nothing" he went to the Appropriations Committee and together they unobtrusively secured an amendment to the second deficiency bill for 1935 for gratuity offsets. This led the Indian attorneys to seek amended jurisdictional acts, one of which, the Klamath Act, was passed while Cochrane was ill and at home on doctor's orders. The subsequent and substantial Klamath award of over five million dollars was seen as a fiscal threat by the Justice Department and Cochrane. Cochrane also saw only attorney's tricks in this victory and, acknowledging that he was "probably looked on as the outstanding enemy of the Indians in Congress," explained that his enemy was the attorney for the Indian; "lawyers, not Indians, are pushing these claims."⁴⁷ This combination of sophistry and ignorance stood out even in Congress.

Still, other Representatives sided with Cochrane, John M. Costello of California called for the bill's defeat, asserting that any commission's work should be handled by the Indian Bureau. His colleagues quickly pointed out to him that the Bureau was not a court and he fell silent. Thomas O'Malley of Wisconsin, ignoring the statutory fact of their 10 percent limitation, claimed that lawyers took the greatest part of the recoveries in most cases and went on to say the "the Indian claim business is the biggest racket in the country." For O'Malley, the Commission bill was a creation of the Indian attorneys "to get around" the Court of Claims (and the deficiency amendment) for another day in court. "We do not need this bill," he continued, and "if we cannot defeat it, we must amend it so the claimant cannot

go back 150 years to Manhattan Island and have some shyster lawyer dig up a descendant of some blanket Indian and make a million dollar claim against the government." Applause followed this stirring oration. William M. Colmer of Mississippi was more moderate, but still negative. He favored justice for the Indians and personally thought they had been done a great injury in the past. However, he urged the bill's defeat out of "a keen desire to be fair with some 130,000,000 American citizens who are taxpayers," and was against "a bill which provided for an additional bureaucracy."⁴⁸

But S. 1902 had its defenders and, whereas the thrust of its enemies' arguments was chiefly financial, that of its friends was in the main, moral. Representative Will Rogers of Oklahoma noted that the Indian Office, Departments of Interior, Budget and Justice, and the President supported the bill. The Senate had twice passed it and the House Committee on Indian Affairs twice reported it.⁴⁹ Rogers' fellow Oklahoman, Wesley E. Disney, rose to refute the warning of Walter M. Pierce of Oregon that the bill opened the "floodgates" of the treasury, pointing out that in spite of the billion dollars claimed the actual net recovery rate in Indian cases was 2.3 percent and that the gross figures were used, as often before, as a "campaign issue here in the House to defeat the bill."⁵⁰ Usher Burdick of North Dakota then reviewed some particularly inequitable cases lost in the Court of Claims and asked; "Is that Justice?" His answer: "I do not care if it results in a judgment for five million dollars or ten or fifty, if it is right between man and man, if it's justice to those Indians, let us pay it and not refuse because some say it is too much."⁵¹ "He who denies justice denies the Lord," preached the Alaskan delegate Anthony J. Dimond. Then, hitting hard and true, Dimond said simply that, "anyone who has made even a superficial examination of the relations of the government of the United States with

the native Indian races must be convinced of the manifold injustices suffered by the native inhabitants of the country at the hands of the supreme political power." He lauded the accuracy of Helen Hunt Jackson's book, *A Century of Dishonor*, (1881) and agreed that treaties were as "scraps of paper" but that now the "conscience of the country has been awakened to the true situation." His examination of the claim of the California Indians led him to believe that they were entitled to much more than stated and to lament that "the question seems not to be what justice rightly demands in their case by how then can be kept from securing the payment of their just claims."⁵² Francis H. Case of South Dakota added: "How can we preach love for the Constitution if we do not carry out our treaties?... This bill does not create new claims; it simply seeks to determine what is right. The gentlemen who are afraid of this bill are afraid of the facts. If you are not...you ought to vote for this bill."⁵³ Applause also followed this less rousing but more accurate appraisal of the bill. Knute Hill of Washington facetiously attacked the bill's enemies. "He (O'Malley) does not represent any Indians because he comes from the city of Milwaukee. The gentleman from California (Costello)...represents those Indians in Hollywood who are on the screen, not real Indians." He then chastised his colleagues for not reading the bill or its hearings and thus being misled into voting for crippling amendments. Jack Nichols of Oklahoma claimed such amendments were "purely for the admitted purpose of fixing the legislation so that it probably would be inoperative if it were adopted."⁵⁴ The amendments were nevertheless accepted by large margins and the bill was defeated by a vote of 176 to 73 on June 23, 1937.

The next three years were devoid of commission legislation. On the Hill, Commissioner Collier "supposed" that another bill would be presented but admitted that the

momentum was down. "We have felt rather hopeless since last year; we got beaten so badly on the House floor largely," he thought, "through misapprehension." This confusion still persisted as Representative James M. Fitzpatrick of New York demonstrated when he asked Collier if he thought the claims were "brought in by outsiders who tried to commercialize them." Collier replied that there were "undoubtedly" some cases of this sort but added that "many exist where the Indians are well aware that there has been a moral wrong or an injustice done to them."⁵⁵

It seemed that no amount of testimony or evidence could drive home the simple fact that the Indian was himself aware that he had been cheated and could demand redress without the external prodding of "shyster lawyers." The savage could grasp the concepts of the white's law as he had persistently demonstrated since the days of the Marshall Court. The Indian was surrounded, bound, and tied in a web of white man's laws as no other American citizen. He knew these laws in theory as the Constitution stated them and in practice as his many treaties perverted them. The problem was not one of Indian but of white ignorance. This ignorance, on the part of the mass of the white population toward an invisible minority allowed another minority in and out of the government to manipulate the laws and the Indians to ends not benefitting the Indians or the American people at large. The evil conspirators, it could as well be argued, were not behind the Indian urging him into court but were set in front of him blocking his way.

During the lull in Indian legislative action after 1937, those in government who feared Indian successes moved as they had in 1935 to limit Court of Claims awards and thus "protect" the government. Alarmed by a burden of interest that exceeded 500 percent⁵⁶ in many claims, the Justice Department drafted a bill to meet the problem by

amending the Judicial Code "in respect to the jurisdiction of the Court of Claims in certain cases."⁵⁷ Senator Henry F. Ashurst of Arizona introduced it and, after consideration of suggested amendments by the Interior Department, S. 3083 resulted. It was meant to stiffen the gratuities act of 1935 but went beyond that end to deal with the specter of interest raised in the *Klamath* and *Shoshone* cases of 1935. The bill proposed applying gratuitous offsets first to accrued interest, making interest not an element of "just compensation," and, when allowed, to limit its accrual to six years maximum. As earlier discussed, resistance to this tactic was fierce, especially as to its constitutionality and S. 3083 was never reported out of committee.

But it was at this same hearing that Commissioner Collier again pushed forward the position of Interior. "Some of these claims are political and moral, not legal, and ought to be settled as an act of grace. If they are going to be settled at all, they should be settled directly by Congress and not thrown into the courts." He then sweetened the offer by adding that an investigatory commission could do the job in "ten years without any difficulty."⁵⁸ Thus, after two full years, Commissioner Collier and Interior had recovered from their period of hopelessness to revive in Congress the concept of an Indian claims commission and push the debate into its second decade.

It was in 1940 that the second phase of Indian claims legislation for a special agency ended. It will be recalled that the first three bills introduced into Congress from 1930 to 1935 called for an Indian claims "court." The next five bills of the 1930's advocated an Indian claims "commission" that differed substantially from the court concept. Basically, this commission was to be a fact-finding body with power only to recommend remedies to Congress, but with its findings of fact to be given *prima facie* weight in review. This second phase ended on July 25, 1940 when the

70 Their Day in Court

last of these type bills was introduced by Senator Thomas of Oklahoma as S. 4206. It was almost identical to the House amended version of S. 1902 of 1937 and was referred to committee where it died.

The evolution of Indian claims legislation in the decade of the 1930's was not unlike the process that American society as a whole was undergoing. The *Meriam Report* of 1928 signaled a change in the system of Indian claims settlement and the financial debacle of the following year heralded change for the nation at large. The first tentative steps to meet the Indian problem were unsatisfactory but persisted into the next administration and were there superseded by new innovations as Roosevelt succeeded Hoover and the second New Deal followed the first. The signs of revival in 1938 met temporary defeat but rallied as the War approached. Most of the War years, of course, were spent by Congress on matters other than Indian affairs but as the War ended in victory for America its aftermath meant the same for a revived Indian claims bill.

As would be expected in these years of depression and war, the Indian's situation could not be isolated from the broader context of the country they inhabited. Not surprisingly many members of the House felt strongly their duty as guardian of the nation's purse. Record unemployment heightened the hostility toward those who sought "to get something for nothing." The voice of a small, politically impotent minority was easily lost in the welter of voices in the Congresses of the Depression Decade.⁵⁹ And, that voice was only one generation from the war whoop and a "stringent military occupation." (One western reservation did not see the end of the Army presence until the 1920's). From the end of the Indian Wars to just before World War II, "the tribes were thought of as defeated nations and were so treated and so held captive.... Neither side, during that time, had a great deal to say to the other. It would have

The Evolution of the Indians Claims Commission 71

been a conversation between prisoner and jailer."⁶⁰ But the Indian, secure in the justness of his cause, persisted where and when he could; his depression had begun long before 1929.

The third, and final phase of claims legislation began on August 1, 1940 with Senator Thomas' introduction of S. 4234.⁶¹ This was the most extensive and detailed bill ever written to create an Indian claims commission. (Its thirty-seven sections greatly expanded the previous high of thirteen and were even greater than the twenty-six of the final act). The Justice Department principally drafted the bill with the aid of Interior in 1939. Unlike all previous bills it designated the commission an "independent agency of the executive branch of the government" and gave it the authority to make *final* determination of the claims on matters of fact *and* law. Review on questions of law and final determination were allowed by certiorari to the Court of Claims. Its jurisdiction was to embrace all outstanding tribal claims of a legal, equitable or moral nature presented within a five year limit. The remainder of its added breadth was taken up with the establishment of a separate investigatory branch to be located in the office of the President and headed by a Director of Indian Tribal Claims Investigations. This director would, in effect, be to the commission as the former bills related the commission to the Congress. The commission had thus matured from a fact-finding advisory body to a self-contained agency able to conduct its own investigations, determine the facts, adjudicate the legal issues, and make a final determination. Congress still had final review when it received the complete report on each case.

The evidence of interdepartmental maneuvers is scanty but it appears that between February and June 1939 Justice and Interior, in a series of conferences, agreed that the former bills were of a too limited nature and hammered

remained alive until it was reintroduced into both Houses in the Spring of 1941 as S. 1111 and H.R. 4339.

Attorney General Francis Biddle readily agreed to the "fundamental concept" of S. 1111 to dispose of claims not ordinarily justiciable and based "upon vaguely defined principles of moral philosophy and fair dealings," and he thought their "prompt and final" disposition "greatly to be desired." He believed, however, that if the bill was to receive favorable consideration by Congress it had to be amended. As introduced, the bill provided that if Congress failed to act favorably upon a final report of the commission within ninety days of filing, and award would be paid as with the Court of Claims judgments. Justice noted that with the "very large amount of urgent business" before Congress and the complexity of the claims cases it would be difficult for Congress to act at all in so short a period. This, in effect, might make the commission "not a fact-finding body...but virtually a court" and "have the effect of a surrender by Congress of this very necessary prerogative to sift and control this unusual type of claim against the government." Thus, "under any circumstances," stressed the Attorney General, this portion should be struck.⁷⁰

Justice was equally adamant on the subject of offsets. The Attorney General allowed that the gratuitous expenditures excluded were similar to those acknowledged in previous acts, but he noted that they related to claims presented to the Court of Claims for adjudication which was not necessarily appropriate in a bill establishing a commission format. He felt that the kind of claims allowed called for a "complete picture" of *all* expenditures made for the tribes to be presented to Congress.⁷¹

The Justice Department was not alone in its opposition to the new bill. The Office of the Comptroller General had not heretofore reported directly to Congress on

Indian claims bills of this nature but it had long handled part of the case workup for Justice. Comptroller General Lindsay C. Warren stated that in his preparation of the accounting reports, it appeared (as David Newmann had said in 1930) "impractical to accelerate to any appreciable extent" this precise work and this "element of delay will be present irrespective" of the method of settling the claims. He warned, however, that the bill would greatly broaden the basis for Indian claims, reopen many settled cases, encourage the filing of questionable claims, and be no bar to future claims as no statute can bind a subsequent Congress. Warren thought it probable that the bill would expedite some claims but questioned whether these would balance the "undesirable effects." He also suggested for consideration the question of whether justice to the Indians now living required disposition of their claims on the liberal basis proposed in S. 1111, and added that, "presumably, most of the important and reasonably well founded claims of Indian tribes or groups have been asserted by them and determined prior to this time." Warren offered these problems for consideration, but made no recommendation as to the merits of the bill and closed his report with the suggestion that the commission be expressly directed to allow offsets, including gratuities, and to tighten the loose language of the bill.⁷²

President Roosevelt's attitude remained quite consistent throughout his first two terms. He was concerned for the Indian's future and very informed about their past. His knowledge of the work of the Indian Service was detailed and he even "astounded" Collier in their interviews. Collier recalled, in a 1936 meeting to discuss a bill for the California Indian's claims, that the President was unsympathetic to the method of dealing with the Indian claims in the courts. Roosevelt saw the government's Indian responsibilities directed toward the future and not the past,

76 Their Day in Court

and that the Indians would be better served if furnished with an adequate land base, economic assistance, and personal and group education. This would be the useful course for the government, said FDR according to Collier, rather than "just paying out moneys on account of wrongs done to the dead."⁷³

The Office of the Budget, as Commissioner Collier feared earlier, reflected the negative position of the administration on Indian claims legislation. In a letter from President Roosevelt in response to the Secretary of Interior's request to be heard on S. 1111 that position was confirmed. After careful consideration the President demurred on support for the bill.

If the Indian claims could be disposed of with finality through the establishment of an Indian Claims Commission, my attitude might be somewhat different. The past history, however, of these claims demonstrates the futility of any hope that this purpose would be thus accomplished. Final action by the Claims Commission would be no bar to the representation of the claims to the Congress by the dissatisfied Indians or their attorneys.

In a conciliatory manner he added that he did not think the failure of enactment would "adversely affect the general welfare of our Indian population" and held the matter open for discussion with the Bureau of the Budget.⁷⁴

The Office of the Solicitor in the Department of Interior was not long in responding to the President's olive branch. By October 1941 it had prepared amendments that were thought to "come close to guaranteeing" finality. Basically, the amendments were designed to bar attorneys from the further pursuit of claims which had been disposed

The Evolution of the Indians Claims Commission 77

of by the commission. This could be done through the old procedure requiring approval by the Secretary of Interior of contracts between attorney and tribe. Solicitor Nathan Margold believed that if simply by further amendment Budget approval might be attained then the Department should "make every effort to that end" rather than "return to the point from which we started in 1935."⁷⁵ John Collier concurred and Acting Secretary of Interior John J. Dempsey requested by letter a conference with Harold D. Smith, Director of the Budget.⁷⁶ No answer was forthcoming and no conference ever took place as a result of Dempsey's request. Conjecture, and the long history of bureaucratic hostility to the Indian's claims, lead one to assume that a practical settlement of the points of dispute was not truly desired by all.

By the end of the year the Senate Committee had considered its reports and amended the proposed bill in two areas. First, in Section 15, it limited attorney fees to a maximum of 10 percent of recovery and barred any government employee from aiding the claimants while in office and for two years after departure from office. Secondly, in Section 24, it attempted to meet the objections of the Attorney General and extended the ninety day congressional consideration period to 120 days, adding that a concurrent resolution of both Houses could reject the commission's determinations within that time. Also in this section the Committee tried to further guarantee finality by deeming the dispositions of the commission as *res judicata* for all future consideration. This amended bill was reported by Senator Thomas on December 15, 1941.

Senate Bill 1111 reached the Senate floor for debate in January 1942. It fared poorly. Senator Walter F. George of Georgia condemned the provision that Congress delegate its legislative powers to a commission. For this reason, "if for no other, the bill should go over and should not be

favorably considered at any time by the Congress." The Senator was dismayed by the broad jurisdiction of the Commission and rejected giving to it powers to set aside treaties, which are "not judicial in a proper sense."⁷⁷ It appears that the report of the Attorney General was worded so as to skillfully play on the vanity of Congress on the issue of prerogative and, if so, it was successful. A week later a letter from Richard S. Whaley, Chief Justice of the Court of Claims, was read in the Senate in response to implications that the Court was responsible for delay on Indian cases. Justice Whaley noted that in the period from October 1939 to January 1942 the Court had disposed of forty-four Indian cases, leaving thirty-nine not tried. With few exceptions, he stated, the work of the Court is current to 1938 and there were no "old cases on the Court of Claims docket."⁷⁸ This information seemed to obviate the need of a special commission to unburden the Court. There was no vote on the bill and it was returned to committee.

By this time, though, America was deeply engaged in foreign as well as domestic crises. The Depression siphoned public sympathy from the Indian and distracted Congress from their claims. The war years left even less time for Indian matters. The Depression years (1929-39) saw ninety-nine Indian claims cases filed in the Court of Claims with fifty-six dismissals and eight awards. That decade also saw a sharp drop in filings from the eighty-four of the first half to only fifteen in the second half. During the War years, Indians filed only four cases with the Court, which dismissed two plus twenty previous ones and made one award on a case pending for thirteen years.⁷⁹

During the post-1934 period Indians focused their attention on two other areas of action other than the federal courts. First, the bills for an Indian claims commission of 1935 and 1937 had attracted a great deal of hope and effort, and, second, the War brought forward a strong patriotic

response from the reservations. In all, some 70,000 Indian men and women left their homes to serve in the armed forces (25,000) or defense industries. By 1942, 40 percent more Indians had enlisted than had been drafted and they went on to win over two hundred of the highest medals for valor. This record is somewhat enhanced considering that the total Indian population of 1940 was 333,000. The War, as we now know, was lost for the Axis by late 1942, a fact that its participants knew by early 1943. In a security not felt for three years, the domestic and pre-war issues surfaced once again.

The last round in the fight for the Indian claims commission began on April 27, 1944. Representative Usher Burdick of North Dakota introduced H.R. 4693 to create such a commission. This bill was similar to the much debated S. 1111 of 1941 in its unamended form. It differed in not providing for appeal by certiorari to the Court of Claims but allowing appeal on questions of law only to the Supreme Court. Interestingly, it appears that the bill might have been too hastily revised and the intent of its authors in the Committee on Indian Affairs was somewhat obscured. They seem to have intended to eliminate the Court of Claims as an appellate court but left reference to it in the bill. Some of the confusion could have been caused by the fact that one-half the members of the House and Senate Committees on Indian Affairs were new to their jobs between 1940 and 1944. In his written report to the Committee, Secretary Ickes noted the errors and offered corrections to "clarify" the bill. He suggested it be amended to gain his approval by expressly limiting the commissioners to singular employment, insuring finality by careful scrutiny of attorney contracts by the Secretary of Interior as suggested in S. 1111, and by adding a claims investigation division to work for the commission and the Indians. In an attached memo, Secretary Ickes reviewed the frustrating

80 Their Day in Court

history of claims legislation. He quoted from the *Meriam Report* and recalled the Committee's hearings of the 1930's when the "fundamental need" of claims settlement was accepted. House Bill 4693, he said, would end the claims problem and result in an "ultimate saving" to the government in the long run and a "substantial improvement in the government's present unsatisfactory relations with the Indians in this respect."⁸⁰ Little note seems to have been taken of the Secretary's suggestions and the bill, as it stood, died in Committee.

But the closing months of the year saw a good deal of "Indian activity." At the Republican Convention in Chicago in June the Indian plank of the platform adopted pledged an "Immediate, just and final settlement of all Indian claims between the government and the citizenship of the nation. We will take the politics out of the administration of Indian Affairs." The following month the Democrats found no room for Indians on their platform. On November 16, in Denver, seventy-five representatives of fifty-one tribes from twenty-one states met to form the National Congress of American Indians. In the United States Congress, Representative Burdick again introduced another bill into the House. This bill (H.R. 5569) was a greatly scaled down version of its immediate predecessor. Its jurisdiction was slightly more limited, it was less specific on offsets, and no annual report was provided. The section on the reception of claims was narrowed, as was that on attorney representation. And, several other small deletions were made which amounted to leaving more of the administrative procedure to the commission's discretion. The 78th Congress took no action on this latter bill but did leave instructions for the following Congress.

Meanwhile, the House had ordered in 1943 a select committee of its Committee on Indian Affairs to investigate "whether the changed status of the Indian requires a

The Evolution of the Indians Claims Commission 81

revision of the laws and regulations affecting the American Indian." The committee finished its report by the end of 1944. The select committee had interviewed 250 Indians and concluded that it was time for complete assimilation and that one of the factors retarding this goal was the backlog of unsettled claims cases. It recommended that the 79th Congress enact an Indian claims commission to file and consider all Indian claims until December 31, 1950, classify them as legal or moral, certify those legal to the Court of Claims for determination, and make recommendations to Congress for the amount of settlement on meritorious moral claims. Lastly, this commission, which was to have an Indian member, was to complete its work by December 31, 1955.⁸¹

Early in 1945 two bills were introduced in the House of Representatives, a final version of which became law in 1946. On January 8 and 10, William Stigler of Oklahoma and Charles Robertson of North Dakota (both members of the Committee on Indian Affairs) introduced, respectively, bills 1198 and 1341 to create an Indian claims commission. Both of these bills were identical to the last bill (H.R. 5569) of the preceding Congress excepting a proviso in 1198 that at least one commissioner be an Indian.

The most extensive hearings on these bills to date were held in five sessions over a four month period. For the first time in hearings on this legislation several Indians testified as witnesses and with minor exceptions they unanimously favored enactment of H.R. 1198. Secretary Ickes strongly supported the bill's intent and the Indian Affairs Committee, now under the chairmanship of Henry M. (Scoop) Jackson of Washington, was determined to act favorably upon it or one similar in purpose.⁸² Chairman Jackson's perception of that purpose was clear: "We are being harassed constantly by various pieces of legislation," he said, "and we plan to dispose of all those routine claims

and let the Commission decide what the obligation is of this government to the Indians...and appropriate the money.... I think that is our congressional intent."⁸³ On this there was near unanimous agreement among the witnesses at the hearings.

One of the key persons to testify to the Committee, a man who we have heard from before and will again, was Ernest L. Wilkinson. In a long and detailed statement, Wilkinson tried to impress upon the Committee the need for such a bill. He had not been very "enthusiastic" about former claims commission bills because of their lack of finality, but he saw H.R. 1198 as meeting that deficiency. He also was troubled and moved to act by the Supreme Court decision in the *Northwestern Band of Shoshone* case (1945). Wilkinson was incensed by the decision that the Shoshone treaty was not a recognition of Indian title, that treaties were not contracts, and that the case was a matter for Congress not the Court, and he deemed it "the most reactionary Indian opinion ever delivered by the Supreme Court." Contrary to Justice Robert H. Jackson's opinion, he continued, Indians had a "very definite concept of the title to their land" as study of the evidence showed. Wilkinson was further angered by the "innuendo" in the decision that the jurisdictional bill in the case was drafted to benefit the attorneys, a persistent belief in Indian claims cases. He countered this with his own record. He had been prosecuting Indian cases in the Court of Claims for ten years as successfully "as any other attorney" and he had won five out of nine cases, but due to their "burdensomeness" had yet to collect one cent. He had dissolved partnerships because others were unwilling to make the investment in time and money necessary in such cases when they could earn three to four times as much in tax law with two to four times the contingent fee. On the *Northwestern Shoshone* case alone, Wilkinson spent seven years and \$12,000 of his own funds

only to lose all. He assured the Committee that "prosecuting Indian cases is not the dream that it is generally made out to be" and that his other practice supported the effort. John R. Murdock of Arizona thanked Wilkinson for this revelation by noting that he among others had the "impression that the fee was one of the chief motives behind the claims." This did not deter Wilkinson from then proceeding to suggest amending the bill to raise fees from 10 to 15 percent. He also recommended that its jurisdiction be broadened to hear claims on grounds of "unconscionable consideration," a basis recognized in the then famous *Klamath* case.⁸⁴ The Committee undoubtedly was impressed by Wilkinson's knowledge of Indian law and his words carried weight accordingly.

Other Indian attorneys of record presented their specific cases and pressed for the bill. Paul M. Niebell, attorney for the Creek Nation, dealt with several of the vestigial reservations of some Representatives. Asked innocently by Nat Arnold of Missouri why the federal guardian had not looked after its wards all along, Niebell replied that it took the consent of the government to sue but when that was ever sought "some Congressman who might not have any Indians in his district would say: Here is another raid upon the Treasury and would object; and so they just could not get the bill through Congress." Mr. Niebell was also pleased that the new bill was a "fairer forum" allowing Indians the same moral claims which the government had been allowed under the Act of 1935 regarding offsets of gratuities. Lastly, Niebell realistically pointed out that the proposed ten year life of the Commission was not consistent with the history of this type of prolonged litigation. Representative William Stigler diplomatically noted that a longer tenure would cause more difficulty in getting the bill through Congress and left it to

84 Their Day in Court

Niebell to observe that Congress could amend it if there was still some work to be done.⁸⁵

The Department of Interior was very much interested in the passage of this bill. Secretary Ickes sent a detailed report to the Committee along with Associate Solicitor Felix S. Cohen to review the bill's amendments. The amendments of Interior amounted to a restructuring of H.R. 1198 along the lines of H.R. 4339 of 1941 with the addition of amendments offered on H.R. 4693 of 1944. That is, Interior called for the broadest possible jurisdiction to hear all manner of claims, guarantee finality, establish an investigation division and allow review by the Court of Claims and the Supreme Court. Newly conceived additions to the bill opened the Court of Claims to all future Indian claims on a parity with those by other citizens, allowed offsets only as permitted against any white citizen, and eliminated the language in Section 1 making the commission an independent agency of the Executive Branch of the Government. This last suggestion was Wilkinson's and was concurred in by Cohen in conference. They thought it "best to let the bill speak for itself," for its functions were "really partly legislative and partly judicial, rather than executive," and they felt it not desirable that "any part of the Executive Branch of the Government tell the Commission how to decide a particular case."⁸⁶ The Committee, in possession of this mass of testimony and faced with the need for some hard politico-legal decisions, retired to mull and ponder the law and a great deal of American Indian history.⁸⁷

On October 25, 1945, Chairman Jackson introduced H.R. 4497, the Committee substitute for the reworked and debated H.R. 1198 and 1341. That the Committee was most receptive to the hearing testimony was amply demonstrated by its new bill. The "new" commission was no longer an agency of the executive branch of the government. Its

The Evolution of the Indians Claims Commission 85

jurisdiction was broadened to include claims based on "unconscionable consideration." An investigation division was inserted. The appellate provisions were altered to allow appeal to the Court of Claims by an interlocutory order and on final decisions on questions of law, and these to be subject to review on certiorari to the Supreme Court. And, the Court of Claims was opened to the Indians for all future claims.⁸⁸

This comprehensive and far reaching measure was presented to the Committee of the whole House on December 20, 1945 with a lengthy report and a strong recommendation for passage. In its report, the Committee on Indian Affairs stated that the bill was "primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted." The report noted that Indians were rewarded with citizenship for patriotism following World War I and that it was "only fitting" that this same quality was again rewarded by the removal of the "last serious discrimination with which they are burdened in their dealings with the federal government." Hereafter, the Court of Claims would be open to Indians and end the need to accord special treatment to their claims. But it was thought advisable to establish the commission to deal with the backlog of cases accumulated over the eighty-two years Indians had been denied equal access to the courts. To further impress the moral issue of the old claims the Committee report included a letter from a group of Indians of the State of Washington. It follows:

We are told that you...have said that our claims are too old. Who made them old; who delayed the settlement? We are your children; we are your wards; we can do nothing without your consent. We have been--we are now helpless unless you act. We cannot bring

suit against you in your courts. If settlement with us has been delayed, it has been due to your own fault. It is not the fault of the poor, ignorant, helpless Indian. Will you take advantage of your own fault? Will you say, I delayed a long time settling with my children; now because I delayed so long I will not settle them at all? An Indian does not so pay his debts. If he cannot pay it his children pay it. We cannot believe that you...meant to take advantage of the poor Indian, and refused to pay him because of your own delay.⁸⁹

One can pause in wonder at the "ignorance" of the poor Indian who wrote this skillfully constructed plaint.

The Committee also dealt with the more practical aspects of the proposed commission. It recalled previous executive reports that indicated that settlement of the claims would allow a 50 percent reduction in the \$30 million spent annually by the Bureau of Indian Affairs. This would amount over the next fifty years to \$750 million, "many times the most optimistic estimate made by the Indians of probable recoveries on all existing claims." A House Report maintained that about \$43 million had been recovered to date in the Court of Claims and "these funds have been used generally in such a way to minimize or eliminate federal gratuity appropriations for several tribes." The chief effect of the present procedure, said the Report, "is to foster and multiply controversies without settling them, and to provide perpetual jobs for lawyers in private practice and in government." The commission could remedy this and in the "long run such a solution would make it possible to *terminate* [my emphasis] a substantial part of the

continuing federal appropriations for Indian administration."⁹⁰

The Committee clearly leaned toward the ideals of the Interior Department but the Indian's old adversaries in the Justice Department were still active. In his report to the Committee, Attorney General Francis Biddle cautioned Congress that the bill would cost "huge sums" of money and in effect create a court and bind Congress with its decisions, thus constituting a surrender by Congress of its very necessary prerogative to sift and control this unusual type of claim against the government.⁹¹ The arguments of Justice (and those of Interior) were rather consistent for over a decade. Its intent to defeat too "liberal" of a bill was also constant. At a conference with Interior, in March 1946, Justice appeared to approve an "informal compromise agreement" on several adjustments to the bill but then proposed twenty-three (nineteen more than agreed upon) new amendments to the Committee. En toto, their effect was to cut many "identifiable groups" of Indians from the scope of the bill, to strike from the list of claims those based on fraud, duress, mistake and taking of lands without compensation (the most common kind), to disallow commission discretion on offsets, to ban transfer of suits from the Court of Claims, to remove the investigation division, to limit commission access to records (though the House Committee was unanimously against this), to deny the judicial character of the commission, to prevent compromise settlements, to deny the power of final decision, and to close the Court of Claims to post-1946 claims. If accepted, these amendments would have destroyed the commission and deprived the bill of its chief grounds of support. Chairman Jackson advised Interior that the large number of Justice amendments, submitted so close to the floor debate, would, after the Committee had unanimously reported the bill and

88 Their Day in Court

secured a rule thereon, end its chance of passage that session.⁹²

The delaying game of the adversaries of the Commission had nearly run its course, but some momentum remained. The Committee rejected the proposed amendments of Justice and the bill reached the House floor on May 20, 1946. Adolph Sabath of Illinois called for the bill's passage in the interest of the Indians as well as the Nation, for, said Sabath, if not "we will have claims coming before us for perhaps another twenty-five years." John Taber of New York, a "guardian of the Treasury," then read letters into the record from the Comptroller and Attorney Generals which amounted to the last gasp of the opposition in the House of Representatives. Comptroller Lindsay Warren repeated his opinion of 1941 that "irrespective of the forum" provided for Indian claims settlement, the preparation of the necessary reports could not be accelerated. He feared the reopening of old claims and urged, for his approval, that offsets be provided as in the act of 1935. Attorney General Tom Clark also opposed the bill. He warned that the breadth of its jurisdiction and the vagueness on offsets would make the potential of one and a half billion dollars in claims more of a reality that it had been in the past.⁹³

With bipartisan support, Chairman Jackson retorted that the bill was not "novel or unprecedented" because his Committee had formulated it from past jurisdictional acts. "From an economic standpoint," Jackson continued, "we have come to the conclusion that this is about the only solution.... Our only real interest is to try to economize in this matter." The unanimous feeling of the Committee, he concluded appealing to the pursestring heart of Congress, was that "we will go a long way toward cutting down the cost of the Bureau of Indian Affairs." Francis Case of South Dakota sincerely added the old and now almost requisite congressional benediction on its Indian programs: "with

The Evolution of the Indians Claims Commission 89

these old claims passed upon, the road will open for a new day in the life of the Indians of this nation; now they will know where they stand...either the claims will be marked as good for settlement or good for nothing." Fellow South Dakotan, Karl Mundt, combined justice with national self interest:

For a hundred and seventy years the total of our annual appropriation for this purpose (Indian administration) has been growing. Today our Indian population is increasing twice as fast as our white population. Unless we do something to reach a fair, just, and permanent solution to the Indian problem that will incorporate the Indian into our national economy, we are going to have to look forward to spending increasing millions every year on Indian Administration.... That would be the result of defeating this legislation.

Mundt felt that the cost of the commission would be "as a drop in the bucket" compared to the \$300 million the next decade of administration would cost.⁹⁴ The bill's advocates had come to the floor prepared and, after agreeing to a few small, concessionary amendments, gained a unanimous vote in its favor. It was now the Senate's turn.

Hearings before the Senate Committee on Indian Affairs on H.R. 4497 began on June 1, 1946; the Committee also met on June 12 and July 13.⁹⁵ The first witness was Representative William Stigler, over from the House to press the bill which he, being part Choctaw, had been interested in for many years. Ernest Wilkinson was then called and stressed that the heart of the bill was to "finally adjudicate these claims rather than have an advisory investigation of

the particular claims which would have to come back to Congress and require future action by the Congress.⁹⁶ In his testimony, the new Commissioner of Indian Affairs, William A. Brophy, showed himself to be more of a student of the *Meriam Report* than a disciple of his predecessor.⁹⁷ "My own personal feeling and the official feeling of the Department" is that this bill will "probably make it possible for large numbers of Indians" to surrender their tribal membership which they retain in the expectation of a settlement.⁹⁸ This was a weaker endorsement, certainly, than those of the Ickes-Collier administration but a positive one.⁹⁹

Still, the Justice Department held its line against the liberality of the new bill. "We feel," said its representative, J. Edward Williams, "that the provision for finality is objectionable...it eliminates Congress in the allowance of these claims," for these awards should "go through as a matter of grace and not as a matter of right." Williams also alerted the Congress to the prospect of some "three billion dollars worth of claims" that could be refiled based on moral considerations, and urged the specific allowance of offsets and the defense of *res judicata* for the government. Other Justice officials felt "very, very strongly" that tighter checks should be on a commission dealing with such large sums and commissioners whose discretion could open the "doors of the Treasury." "The real issue in this case," these officials still feared, was the scheming Indian lawyers who had fought "to the last ditch" for an act that allowed the claims to "go through automatically."¹⁰⁰ By 1946, this kind of rhetoric had lost much of its appeal.

Whatever, the "real" issues were, the Senate Committee reported out, on July 15, 1946, a substantially altered bill. The center of the debate was on Section 2 of the bill's jurisdiction. The Senate chose to limit the claims to those in law or equity rather than those of a broader moral

basis. It also made offsets less discretionary, disallowed transfer of suits from the Court of Claims, and, most importantly, struck the clause allowing final determination to the commission. Carefully guided by Senator Elmer Thomas, who finally saw an opportunity in the same session to agree with the House and have the matter settled, the bill was read for a third time and passed unanimously.¹⁰¹ Since the alterations were so substantial the House asked for a conference which was approved on July 20th.¹⁰²

In conference, a more committed House representation, with the aid of a convincing memorandum from Ernest Wilkinson on gratuities, was able to win assent to the bulk of its bill and resolve all minor differences by the 27th of July.¹⁰³ It was then favorably reported again by the Senate Committee and passed once more on the 2nd of August. Back in the House, Karl Mundt, speaking for the successful conferees, declared the new commission to be able "to dispose of all Indian claims in a manner consistent with the principles of Christian statesmanship for which this nation has always stood" and to be "an example for all the world to follow in its treatment of minorities." The bill unanimously passed the House on August 2, 1946.¹⁰⁴

Of course, there was still the hurdle of presidential approval but little trouble was expected and none materialized. Secretary of Interior Julius A. Krug could not "over-stress the necessity" of the bill's enactment nor "recommend too strongly" to the Director of the Bureau of the Budget its favorable report to the President. He noted that the cost of the commission itself would not exceed \$200,000, that Indian monetary recoveries should continue to be low (as in the Court of Claims), and that it was "probable that most of the more meritorious and substantial Indian claims have already been litigated." And, even if awards were gained, he wrote, "appropriations for Indians will tend to be reduced in proportion to the amounts which

92 Their Day in Court

the Indians may recover from the government by virtue of the operation of this measure." He then predicted that the bill would make many tribes "self-sustaining."¹⁰⁵ To the President, Secretary Krug wrote that H.R. 4497 was "certainly the most important Indian legislation enacted in more than a decade," and that it would "strengthen our moral position in the eyes of many other minority peoples" in little nations abroad. He felt a veto would be "tragic" for the congressional relations of the Department that had sponsored this bill from start to finish. Krug then proceeded to arrange for special ceremonies to mark "such a significant event in the history of this nation's relations with its oldest minority race," and to honor "our good friends in Congress who have done so much work on this bill"--before they left town. He then attached a statement (quoted in part at the beginning of this chapter) for President Truman to read publicly.¹⁰⁶

I am glad to sign my name to a measure which removes a lingering discrimination against our First Americans and gives them the same opportunities that our laws extend to all other American citizens to vindicate their property rights and contracts in the courts against violations by the Federal Government itself. This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this

The Evolution of the Indians Claims Commission 93

continent more than 90 percent of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings--the largest real estate transaction in history--we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgement of impartial tribunals. We stand ready to correct any mistakes we have made.

But this Act, so important to Indian Affairs, had company in the month of August. Coincidental with the passage of H.R. 4497 was that of the Legislative Reorganization Act of August 2, 1946. Congress had been working since the late 1920's to tighten its procedures for greater efficiency. The Administrative Reorganization Act of 1939 was passed to simplify the bureaucracy. The Act of August 2, 1946 intended to streamline the procedures of Congress. Under its provisions, the standing committees on Indian Affairs, established in the early 1930's, became subcommittees under the new Committees on Interior and Insular Affairs. Provisions were also made for simplifying Indian appropriations bills and the exercise of legislative oversight at the committee level was authorized. The importance of Indian Affairs was further demoted by the passage of the Indian Delegation Act of August 8, 1946, whereby the Secretary of Interior was authorized to delegate power and duties formerly within his realm to the Commissioner of Indian Affairs who was granted the power to redelegate.¹⁰⁷

The drift of Indian affairs in the twenty-year period ending in August 1946 and the fact that the above acts were passed in the same month as the Claims Commission Act

show the intimate connection between Indian claims reform and the desire of the government to terminate its long-standing relationship with the Indian tribes. The claims stood in the path of assimilation and non-assimilation maintained the expensive, archaic Indian Bureau which in turn symbolized government waste and inefficiency. The legislation to resolve all of these roadblocks came to fruition in August 1946. Generally, the intent behind each act was sincere but the results were less than rewarding.

The passage of the Indian Claims Commission Act capped sixteen years of intensive political campaigning for an idea almost half a century old. This struggle involved ardent friends of the Indian on one side, vigorous defenders of the government on the other, and many sincere middlemen who tried to serve justice as they saw it. To the credit of Congress, the moral issues were openly faced and debated. This debate engendered much divisiveness but the substantial problems were finally overcome or compromised and the moral issues were recognized by the Act along with the purely legal and financial consideration. Of course, the goal of increasing governmental efficiency by the resolution of Indian claims was not reached simply by passage of this Act. It was a projected hope, and though the legislators planned that one decade would bring results rather than three, their ideal, in context, was not unrealistic. The participants in the creation of the Commission now looked forward to see the fruits of their labors.

NOTES

1. *Public Papers of the Presidents of the United States*, Harry S. Truman 1946 (Washington, D.C., 1962), 414.
2. Wilcomb E. Washburn, *Red Man's Land/White Man's Law* (New York: Charles Scribner's Sons, 1971), 83.
3. Sandra C. Danforth, "Repaying Historical Debts," *The North Dakota Law Review*, 49 (Winter 1973), 361.
4. John Kobler, "These Indians Struck it Rich," *The Saturday Evening Post*, 225 (Sept. 6, 1952), 132.
5. Department of the Interior, *Federal Indian Law* (New York: Association on American Indian Affairs, Inc., 1966), 541n.
6. James B. Thayer, "A People Without Law," *Atlantic Monthly*, 68 (October 1891), 540ff.
7. Francis E. Leupp, *The Indian and His Problem* (New York: Charles Scribner's Sons, 1910), 194-6.
8. U.S., Congress, House, Subcommittee of the Committee on Indian Affairs, *Hearings on Appropriations Bill of 1914*, 64th Cong., 2nd sess., 1913, 99.

9. John Vance, Chairman of the Indian Claims Commission from 1969 to 1970, revived this theme in a journal article and in a Senate hearing, but nothing resulted. See, John Vance, "The Congressional Mandate and the Indian Claims Commission," *North Dakota Law Review*, Vol. 45 (Spring 1969). U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearings on Indian Claims Litigation*, 91st Cong., 2nd sess., April 10, 1970.
10. Richard B. Lillich, *International Claims: Their Adjudication by National Commissions* (Syracuse, New York: Syracuse University Press, 1962), 6-10. Lillich notes that no major work has been written on the national claims commissions, but several exist on the international agencies. The U.S. Foreign Claims Settlement Commission is today a permanent body for adjudicating such claims. International law has become a billion dollar business. Prior to 1948, the U.S. national commissions had dispersed approximately \$100 million of claims funds and twice that since 1948. Also see A.H. Feller, *The Mexican Claims Commissions: 1923-34* (New York: Macmillan Co., 1935), for a detailed background on the Mexican-U.S. claims. Under the 1924 claims convention, the U.S. filed 2,781 claims for \$513,694,267.17 and Mexico less than half that. From the 148 cases heard, the U.S. collected \$4.61 million, Mexico \$39,000. See also, Marjorie M. Whiteman, *Damages in International Law*, III (Washington, D.C.: U.S. Government Printing Office, 1943), for extensive charts at 2068 ff.

11. Neither was a comparison made with the work and precedents of the federal commissions for regulatory purposes. These first appeared in 1887 with the establishment of the Interstate Commerce Commission. But little or nothing was known of their relations to Congress or the President until the investigations under the *President's Committee on Administrative Management* was established in 1937. The twenty year struggle for the Interstate Commerce Commission (24 Stat. 379, Feb. 4, 1887), showed striking parallels to that for the Indian's commission. Five other commissions followed the I.C.C. by 1930 and seven more by 1938. The 1930's saw at least 100 bills introduced in any one Congress for the creation of independent federal agencies. Legislation cannot constitutionally be delegated by Congress but "quasi-legislation" or "judicial" powers can (*Humphrey's Executor v. U.S.*, 295 U.S. 602, 1935). To do this, a standard limiting the delegation of power must be present, even if vague (293 U.S. 388, 1935; 295 U.S. 495, 1935). See Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941), especially vii, 5, 40, 428-34.
12. Act of March 3, 1891, 26 Stat. 851. Also see the *Annual Report of the Commissioner of Indian Affairs*, 1894, 71.
13. Actually, on December 10, 1915, two bills were introduced into the Congress with such intent but died. S. 1542 (64th Cong., 1st sess.) authorized any tribe, nation or band of Indians to submit claims against the U.S. to the Court of Claims with the right of appeal of either party to the Supreme Court.

98 Their Day in Court

- House Bill 3684 allowed all Indians of Oklahoma to submit claims to the Court of Claims not heretofore determined by the Supreme Court.
14. Lewis Meriam, *et al.*, *The Problems of Indian Administration* (Baltimore: The Johns Hopkins Press, 1928), 805-11.
 15. *Ibid.*, 468.
 16. *Ibid.*, 48.
 17. From 1881 to 1923 only 39 cases were filed with the Court of Claims. From 1924 to 1929, 59 were filed. 1930 was the peak year with 31.
 18. U.S., Congress, Senate, Subcommittee of Committee on Indian Affairs, *Hearings on the Survey of Conditions of Indians in the U.S.*, part 25, 70th and 71st Cong., 13670-77.
 19. U.S. Department of Interior, *Annual Report*, 1930, 46. At this time the Commissioner of Indian Affairs Charles J. Rhoads reported that 50 cases were before the Court of Claims with a face value of \$1,699,000,000 and 15 more were in preparation. See *Survey of Conditions of Indians*, 13411. Also this bill faced the last Republican majority in House until the 80th Cong. 1947.
 20. Vine Deloria, Jr., (ed.), *Behind the Trail of Broken Treaties* (New York: Delacorte Press, 1974), 220.
 21. *Hearings on Survey of Conditions of Indians*, 13409-10. Mr. Rhoads thought that H.R. 7963 "looked good."

The Evolution of the Indians Claims Commission '99

22. *Ibid.*, 13413-14.
23. *Ibid.*, 13533.
24. *Ibid.*, 13552-54.
25. *Ibid.*, 13530, 13566.
26. *Ibid.*, 13418.
27. On February 27, 1934 a hearing was held before the Committee on Indian Affairs in the U.S. Senate (73rd Cong., 2nd sess.) on S. 2755, introduced by Senator Burton K. Wheeler. This bill was to aid Indian self-government, economic enterprise, education, land conservation and "promote the more effective administration of justice in matters affecting Indian tribes and communities by establishing a Federal Court of Indian Affairs." Title IV of this bill was to establish a seven man court to aid in the work of the I.R.A. but not "in cases over which exclusive jurisdiction has been granted by Congress to the Court of Claims." 28
28. *L.M.*, 63.
29. Deloria, *Behind the Trail*, 221.
30. Harold Ickes was acquainted with Lewis Meriam, John Collier, and Nathan Margold before his appointment as Secretary of Interior in 1933. He noted that "the idea that Collier and Meriam and Margold had developed was that we couldn't do much for the Indians by way of the Commissionership alone, but if we should have say, the First Assistant Secretaryship of the Interior

100 Their Day in Court

besides, it would be all to the good for the red men." See the *Autobiography of A Curmudgeon* (New York: Renal and Hitchcock, 1943), 266.

31. U.S., Congress, Senate, Committee on Indian Affairs, *Hearings on S. 2731 to Create an Indian Claims Commission*, 74th Cong., 1st sess., June 10, 1935, 24.
32. U.S., Congress, Senate, Committee on Indian Affairs, *Indian Claims Commission Act*, 74th Cong., 1st sess., May 13, 1935, S. Rept. 1002 to accomp. S. 2731.
33. Ibid.
34. *Hearings on S. 2731*, 33.
35. U.S., Congress, Senate, *Congressional Record*, July 29, 1935, 11975.
36. U.S., Congress, House, Committee on Indian Affairs, *Hearings on H.R. 7837 to create an Indian Claims Commission*, 74th Cong., 1st sess., May 22, 1935, 6-24.
37. U.S., Congress, House, Committee on Indian Affairs, *Indian Claims Commission Act*, 74th Cong., 1st sess., June 19, 1935, H. Rept. 1268 to accomp. H.R. 7837, 3, 28-30.
38. Ibid., 33.
39. A single objection on such bills in the House can postpone them until their next call and then three objections can strike it from the Consent Calendar for the rest of the session.
40. An Act of Aug. 12, 1935, 49 Stat. 596.

The Evolution of the Indians Claims Commission 101

41. See Ernest Wilkinson on the subject, *L.M.*, 695-702.
42. Act of June 18, 1934, 48 Stat. 984, Sec. 15 of the Act exempted expenditures made under it form being considered as offsets in any Indian suit.
43. Allowed in Court of Claims on June 7, 1939. See *Klamath Indians v. U.S.* 296 U.S. 244. Also see *Shoshone Tribe v. U.S.*, 82 Ct. Cl. 23. for earlier high award see *Ute Indians v. U.S.*, 45 Ct. Cl. 440, May 23, 1910.
44. H.R. 5817 had been introduced by Representative Rogers of Oklahoma on March 22, 1937. It was identical to the unamended S. 1902.
45. U.S., Congress, House, Committee on Indian Affairs, *Indian Claims Commission*, 75th Cong., 1st sess., May 13, 1937. H. Rept. 810 to accomp. S. 1902. Also see S. Rept. 230 on the same bill, March 23.
46. U.S., Congress, House, *Congressional Record*, June 21, 1937, 6058.
47. Ibid., June 23, 6241-52.
48. Ibid., 6246, 61, 41.
49. Ibid., 6239. Mr. Rogers noted that FDR had asked that the bill be enacted during the 75th Cong., 1st sess.
50. Ibid., 6248.
51. Ibid., 6244.

102 Their Day in Court

52. Ibid., 6250-51. The California Indians filed a claim of \$12.8 million in the Court of Claims on August 14, 1929.
53. Ibid., 6247.
54. Ibid., 6265.
55. U.S., Congress, House Subcommittee of Appropriation's Committee, *Hearings on Interior Department Appropriations for 1939*, 75th Cong., 2nd sess., 1938, 35-6.
56. See Howard Friedman, "Interest on Indian Claims: Judicial Protection of the Fisc," *Valparaiso University Law Review* 5 (Fall 1970), 26-47.
57. S. 2164 was introduced on April 13, 1939 and referred to the Committee on the Judiciary.
58. U.S., Congress, Senate, Subcommittee of the Committee on the Judiciary, *Hearings on S. 3083*, 76th Cong., 3rd sess., 1940, 16-18.
59. In 1938, seven states still denied the franchise to Indians and not until 1948 did all allow the vote.
60. Stan Steiner, *The New Indians* (New York: Harper & Row, 1967), 83.
61. The Oklahoma Senator had great constituent pressure for claims legislation. Remnants of 32 tribes resided in Oklahoma and comprised a population of 61,000 out of a total Indian population of 334,000 in 1940. Under the Commission Act, 29 of these tribes filed 264 claims out of the total of 852. The next highest

The Evolution of the Indians Claims Commission 103

- total, by state, was Michigan with 59; Connecticut had one. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on the Independent Offices Appropriations Bill for 1954*, Pt. III, 83rd Cong., 1st sess., 1953, 593-601.
62. Letter from the Office of the Attorney General to the Director of the Bureau of the Budget, Oct. 4, 1940, *L.M.*, 379-81.
 63. U.S., Department of Interior, Memorandum from Solicitor to Secretary of Interior, March 1941, *L.M.*, 383-88.
 64. U.S., Department of Interior, Memorandum from Assistant Commissioner of Indian Affairs William Zimmerman to Commissioner John Collier, March 14, 1941, *L.M.*, 410-12.
 65. U.S., Department of Interior, Memorandum from Commissioner of Indian Affairs John Collier to the Secretary of Interior on S. 4234, March 1941, *L.M.*, 386-88.
 66. Memo, Zimmerman to Collier, see note 63.
 67. Ibid.
 68. Memo, Solicitor to Interior Secretary, see note 62.
 69. Virgil J. Vogel, *This Country Was Ours: A Documentary History of the American Indian* (New York: Harper & Row, 1972), 270-77. Party Platforms began in 1840. Indians were not mentioned in any platform until 1872 when the Republican Party claimed that it had "initiated a wise and humane

104 Their Day in Court

- policy toward Indians." Indians were ignored by all minor parties until 1948, except for a brief mention in the American Prohibition platform of 1884. In 1928, 1932 and 1936 the Republicans made brief reference to Indian rights.
70. U.S., Congress, Senate, Committee on Indian Affairs, *Indian Claims Commission Act, 77th Cong., 1st sess., 1941, S. Rept. 909 to accomp. S. 1111.*
 71. Ibid.
 72. Ibid.
 73. John Collier, *From Every Zenith: A Memoir* (Denver: Sage Books, 1963), 294-99.
 74. U.S., Department of Interior, Letter from FDR to Secretary of Interior, August 8, 1941, *L.M.*, 414.
 75. U.S., Department of Interior, Memorandum from Solicitor Nathan R. Margold to the Secretary on S. 1111, Oct. 29, 1941, *L.M.*, 416.
 76. U.S., Department of Interior, Letter from the Secretary of Interior to the Director of the Bureau of the Budget on S. 1111, Nov. 4, 1941, *L.M.*, 415.
 77. U.S. Congress, Senate, *Congressional Record*, Jan. 6, 1942, 27. Also see Friedman, "Interest on Indian Claims," note 56. FDR in his veto message to Congress regarding the Turtle Mountain Indian's jurisdictional act in January 1941 made the same point.

The Evolution of the Indians Claims Commission 105

78. U.S., Congress, Senate, *Congressional Record*, Jan. 12, 1942, 248-9.
79. U.S., Congress, House, Committee on Interior and Insular Affairs, *Indirect Services and Expenditures by the Federal Government for the American Indian*, Print no. 14, 86th Cong., 1st sess., 1959, 11-14. And see U.S., Congress, House, Committee on Interior and Insular Affairs, *An Investigation of the Bureau of Indian Affairs*, pursuant to H. Res. 698, 82nd Cong., 2nd sess., Dec. 15, 1952, H. Rept. 2503, 1563-71.
80. U.S., Department of Interior, Report of Secretary Ickes to James F. O'Connor, Chairman of the Committee on Indian Affairs, House, April 1944, *L.M.*, 452-55. The Investigation Division suggested by Secretary Ickes was largely derived from Sec. 29 of S. 4234 of 1940.
81. A report at the end of the year called for the assimilation of the Indian and the final settlement of his claims and urged the 79th Congress to enact a Claims Commission. U.S., Congress, House, Select Committee of the Committee on Indian Affairs established pursuant to H. Res. 166, *An Investigation to Determine whether the changed status of the Indian requires a revision of the laws and regulations affecting the American Indian*, 78th Cong., 2nd sess., Dec. 23, 1944.
82. Other friends of the Indian in key positions were Democratic Senators Robert S. Kerr of Oklahoma and James E. Murray of Montana, Republican Representatives Karl E. Mundt and Francis Case of South Dakota and Democratic Representative

106 Their Day in Court

- William G. Stigler of Oklahoma. Also, April 1945, the legislature of Oklahoma memorialized Congress to pass a commission bill.
83. U.S., Congress, House, Committee on Indian Affairs, *Hearings on H.R. 1198 and H.R. 1341 to Create an Indian Claims Commission*, 79th Cong., 1st sess., March 2, 3, 28, and June 11, 14, 1945, 68.
 84. *Ibid.*, 81-88. Mr. Wilkinson represented the Klamath of Oregon, the Blackfeet of Montana, the Northwestern Shoshone of Idaho, the Bannock of Idaho, the Western Shoshone of Nevada, the Paiute of Nevada and California, and the Ute of Utah and Colorado. Also see *Northwestern Band of Shoshone v. U.S.*, 324 U.S. 335, 1945.
 85. *Ibid.*, 32-42.
 86. *Ibid.*, 149-50. This language had been in all the bills since S. 4234 of 1940.
 87. At this time, also, on June 26, Senator Harlan J. Bushfield of South Dakota, introduced Senate Jt. Res. 79 which was referred to the Indian Affairs Committee. It proposed to appoint five members from each House to study and make recommendations on the claims. Of the five members, four were to be members of the Indian Affairs Committee on Appropriations. They were to be appointed by the President of the Senate and Speaker of the House respectively. The fact that the enormity of the task would make it a full-time job for the ten congressmen doomed any serious consideration of this Resolution.

The Evolution of the Indians Claims Commission 107

88. Interestingly, at this same time another claims commission was active. The United States and Mexico had signed a convention on Nov. 19, 1941 (56 Stat. 1347, 1942) to provide for the adjustment of mutual claims which arose between 1868 and 1940. Under this agreement the U.S. was relieved of all liability for Mexican claims and Mexico agreed to a lump sum of \$40 million for the American claims. The Act of 1942 created an American-Mexican Claims Commission to disperse the money. Its three members were to examine the claims and render final decisions on certain types of unadjudicated cases and to hear appeals on older cases. This Commission was to expire on April 5, 1945 but was extended for two years. By 1945, it had examined 504 claims and certified awards of \$24.5 million leaving 162 pending on final decision and 418 with yet no action. U.S., Congress, Senate, *Determination and Payment Against the Government of Mexico*, 79th Cong., 1st sess., 1945, Rept. 113.
89. U.S., Congress, House, Committee on Indian Affairs, *Creating an Indian Claims Commission*, 79th Cong., 1st sess., 1945, H. Rept. 1466 to accomp. H.R. 4497.
90. *Ibid.*
91. *Ibid.*
92. U.S., Department of Interior, Office of the Solicitor, Memorandum from acting Solicitor Felix Cohen to Commissioner of Indian Affairs on H.R. 4497, April 22, 1946, *L.M.*, 586-94.

108 Their Day in Court

93. U.S., Congress, House, *Congressional Record*, May 20, 1946, 5307-11.
94. *Ibid.*, 5312-20.
95. H.R., 4497 was introduced in the Senate on May 21, 1946.
96. U.S., Congress, Senate, Committee on Indian Affairs, *Hearings on H.R. 4497 to Create an Indian Claims Commission*, 79th Cong., 2nd sess., 1946, 9. Also see the corresponding report, no. 1715.
97. Mr. Brophy succeeded Mr. Collier in March 1945 and Secretary Ickes resigned on Feb. 13, 1946.
98. *Senate Hearings on H.R. 4497*, 15.
99. In the *Annual Report* of the Secretary of the Interior, 1946, Commissioner Brophy wrote that 1946 was a "bright" year for the establishment of an Indian Claims Commission, 377.
100. *Senate Hearings on H.R. 4497*, 16, 73-5.
101. U.S., Congress, Senate, *Congressional Record*, July 17, 1946, 9218.
102. House managers, appointed on July 19, were Henry Jackson, A.M. Fernandez, William Stigler, Karl Mundt, and Charles Robertson. The Senate managers, appointed the following day, were Joseph O'Mahoney, Elmer Thomas and Robert LaFollete, Jr.

The Evolution of the Indians Claims Commission 109

103. Letter from Ernest L. Wilkinson to members of the House Conference Committee, July 18, 1946, *L.M.*, 695-702. Also see Wilkinson's letter to the members of the Senate Subcommittee of the Committee on Indian Affairs appointed to amend H.R. 4497, June 4, 1946, *L.M.*, 654-5. And, U.S., Congress, House, Conference Committee, *Creating an Indians Claims Commission*, 79th Cong., 2nd sess., 1946, H. Rept. 2693, to accomp. H.R. 4497.
104. U.S., Congress, House, *Congressional Record*, July 30, 1946, A. 4923.
105. U.S., Department of Interior, Letter from Secretary J.A. Krug to the Director of the Bureau of the Budget, Aug. 2, 1946, *L.M.*, 711-12.
106. U.S., Department of Interior, Letter from Secretary Krug to President Truman, Aug. 1, 1946, *L.M.*, 713-14.
107. Legislative Reorganization Act, 60 Stat. 812, Aug. 2, 1946. Indian Delegation Act, 60 Stat. 939, Aug. 8, 1946.

CHAPTER III

THE INDIAN CLAIMS COMMISSION:
THE FORMATIVE DECADE, 1947-1957

The enactment of the Indian Claims Commission ended the nearly twenty-year struggle for a special Indian claims forum. The hopes of the Indian and the desires of Congress were realized in law; the question then arose if they would be fulfilled in practice. What really had this new Act done? What would it accomplish? What could it change? These were the questions about which many persons involved with Indian affairs were reticent in spite of the optimism surrounding the passage of the new landmark in Indian law. The next decade provided some of the answers.

There was good reason for reserve since the gap between theory and practice was especially pertinent in Indian affairs. The question of the payment of interest had been left unsettled. Indian attorneys were still suspect as always. The claims processing procedure was unaltered. The large number of cases represented by the jurisdictional acts was undiminished and even increased under the Commission Act with the new ease of presentation and expanded "causes of action." The savings to the government in time and money were yet to be determined, as was the economic and emotional redress to the Indian. It took eighteen years to evolve and pass the Act creating the Commission; and

112 Their Day in Court

thirty-two more attempting to work out the results of that action. Much of the "delay," which the Commission was created to obviate, was rooted in the attitudes and ignorance of the men who pushed and passed the Act; and the general nature of the American Government and the specific complexity of its relationship to the Indian tribes.

Not surprisingly, even before the new Commission was constituted, its enemies moved to quash it. In January 1947, Senator Harlan J. Bushfield of South Dakota introduced a bill to repeal the Commission Act. Bushfield had sponsored a similar attempt on the Indian Reorganization Act the previous year and had otherwise shown himself a firm guardian of the public treasury, at least from Indians. The bill never left the Committee but it reflected a hostility to the new Commission by many Congressmen that showed itself repeatedly in the following years.¹

The Commission, created on August 13, 1946, was finally constituted when its three appointed members were sworn in on April 10, 1947. President Truman named as assistant Commissioners Louis J. O'Marr, an ex-Attorney General of Wyoming and William M. Holt, a Nebraska lawyer. As Chief Commissioner he appointed Edgar E. Witt, a former Lieutenant Governor of Texas. Witt had been appointed chairman of two Mexican Claims Commissions by President Roosevelt and the second had ended its work in 1947. Though it was pointed out in the Senate confirmation hearing that Witt knew "little if anything about Indians," the experienced nominee of Truman and protege of Senator Tom Connally, easily won unanimous confirmation.²

The Commission began its first full fiscal year of operation in July 1947 with an appropriation of \$150,000. It had adopted its rules of procedure and had sent its notice to most Indian groups in June, but it had no funds to publish the rules until July so claims were not presented

The Indian Claims Commission: The Formative Decade 113

until then. By the end of the calendar year seventeen claims were filed for an aggregate amount of \$253 million.³ In almost every one of the claims filed, the government asked for an extension of the sixty days allowed it to submit an answer and the work moved slowly. By 1956 the Justice Department had received over 5,000 extensions of time to file pleadings and of the 852 causes of action almost 200 were yet unanswered.⁴ This source of delay, from the first days of the Commission, was to plague it throughout its life. But the other two main participants in these claims, the Commission itself and the Indian attorneys, also became impediments to rapid progress and that responsibility revolved among the three through the ensuing years.

A more aware Congress might have dealt at the onset with the deficiencies of the law which allowed this delay but Congress had more important issues to occupy its time and this obscure Commission became visible only when public attention made it politically necessary. During the House appropriations hearings for fiscal year 1949 the questioning of Commissioner O'Marr showed that not only had the Representatives not read the Commission's enabling act but that they were only vaguely aware of its existence. They were aware, though, of a Senate report on the Commission's activities which made the newspapers. Responding to a complaint (complainant unidentified) on the inactivity of the Commission, the Senate Committee on Expenditures in the Executive Department sent a staff member anonymously to investigate. In his ensuing report, the agent deemed the complaint accurate and, after narrowly reviewing the legislative history of the Commission, he concluded that it was an unnecessary agency. He recommended its dissolution and the transference of any of its duties to the Court of Claims and the Bureau of Indian Affairs.⁵ When later asked about this Senate Report, Commissioners Holt and Witt denied its

validity and wondered as to the witnesses' motives.⁶ This report was not pursued in the press or in Congress and was dropped.

The Commission's first full year of operation was not over when it received yet another broadside in Congress. Again the source of much of the hostility was an unyielding ignorance in Congress of Indian history in general and the Commission Act in particular. Senator Kenneth McKellar of Tennessee, outraged at a provision that waived the statute of limitation (mentioned in passing by Commissioner O'Marr) howled that he could not see how it was possible that such a bill go through Congress. "I cannot conceive of a bill to give claims of that kind to people so far back as 1801 and 1865, with interest thereon during all that time. It looks like a scheme, really, to defraud the government."⁷ The Senator's amazement belied the fact that he had been in the Senate from 1917 and had been President Pro Tempore of the Senate at the time the Commission Act was passed. But McKellar was not alone. Earlier in 1947, Arthur V. Watkins, the new chairman of the Senate Indian Subcommittee, had called a confirmation hearing on Truman's appointees to the Commission. Two veteran members from states with large Indian populations announced to Watkins that they were unaware of the Act's passage, were against it, and refused to attend the hearing.⁸

It soon became apparent that the Senate report was wrong in its opinion that the Commission was not needed, but it was correct in its observance that the early work of the Commission was slow. In its first year it was authorized twenty-three employees but employed only twelve and turned back \$64,000 of its \$150,000 budget. Not until 1951 did the Commission expend the full amount of its appropriation.⁹ In 1948 the Commissioners estimated that anywhere from 200 to 500 claims would be filed.¹⁰ The cases came in slowly over most of the five-year filing

period, and with 263 in by early 1951, Chief Commissioner Witt thought that 300 would be the total. Also, by this time, twenty-five cases had been decided (two for an award total of \$3.5 million, nine dismissed, and fourteen withdrawn). Representative John Phillips of California thought it an easy task to finish by 1957,¹¹ but his optimism was unfounded and his calculations devoid of variables. In hindsight, Phillips' thinking was incredibly simplistic, but consistent with past congressional thought on this subject.

In the summer of 1951, there occurred a dramatic change which destroyed the predictions made for the size of the final claims docket. It appears now that many of the Indian attorneys held off on filing to await the outcome of the early decisions. Also many tribes had difficulty securing legal representation. And, as always in these claims, the case work-up was tedious and time consuming. The result was that in the last weeks of the five-year filing period the activity increased tremendously. As this rush developed, congressional friends of the Indian made an attempt to extend the filing period for one year. Three bills were introduced to affect this extension but House Joint Resolution 210 was given preference. The House Committee on Interior and Indian Affairs, the Interior Department, and Chief Commissioner Witt spoke in favor of extension but the Senate Committee and the Justice Department were against it. No compromise could be agreed upon and the Resolution died. The flurry of claims filing intensified and ended with 530 causes registered in the last month and a half to bring the total to 852, more than ever contemplated by anyone involved in this process. This total was soon consolidated into 370 dockets which represented around 600 claims.

The years of Commission "inactivity" were now over. Personnel and funds not needed before were now in urgent demand. Witt sought to increase the Commission's staff

from eleven to eighteen in order to handle the work the government had finally prepared. By 1954 he had the added help and set to work on the mass of material before the Commission.

The Commission had some 600 claims before it, only fifty-five of which had been adjudicated by the end of 1954. Primarily these claims, most of which were concerned with western lands (almost one-third were filed by twenty-nine tribes of Oklahoma alone)¹² dealt with the undervaluation of tribal lands transferred to the United States in treaties of purchase. But many concerned the failure of the government to abide by treaty provisions and called for a historical accounting. Almost all the 176 known tribes or bands filed one or more claims on old grievances. Only seventeen tribes (as of July 1951) were undecided as to their desire to file claims and several said they had none.¹³ Some tribes, though, continued to show the characteristic Indian disinterest in the white man's legal machinations. The Hopi refused to file a claim on the grounds that they already possessed the whole western hemisphere "long before Columbus' great great grandmother was born" and they would not ask a white man "who came to us recently, for a piece of land that is already ours."¹⁴ (This disdain mellowed, though, for the Hopi filed with the Commission ten days before the final date.)

By the end of the filing period in 1951 it was obvious to most persons involved with these cases that the next five years would not be nearly enough to complete the claims litigation. Bureaucrats, however, often march to their own drum. At hearings in 1954, with only sixty claims settled, Chief Commissioner Witt calmly noted that the Commission was steadily moving along with its work and that the small staff was able to handle the limited amount of cases developed by the undermanned Justice Department.¹⁵ They were, as the procedures had developed,

moving as fast as possible. But the pace of the claims litigations was far from rapid enough for Congress and, as the expiration date for the Commission approached, all the old and some new arguments were raised for and against its existence.

Tied closely to the history of Indian claims and the evolution of the Commission was the role of the Indian attorney. As related earlier, in the pre-Commission days, the attorneys saw the government as an exploiter of the Indians and the government accused the attorneys of opportunism. The attorney's position was sounder but the opinion of the Indians on the issue should have been the decisive one. The Indians saw the attorneys as their friends, or at least the best spokesman of their interests. In hearings, Choctaw representatives clearly saw the need for a tribal lawyer, especially in cases against the government. Likewise the Klamath leaders testified that:

We do not ourselves have the ability to frame legislation nor can we expect Senators and Congressmen, pressed as they are with other duties, to study our problems and draft the necessary legislation. We have found from experience that during the last four years, when we have had tribal attorneys, that we have made more legislative progress than for a score of years prior thereto.¹⁶

Many such statements attest to the fact that the tribes were aware of the need for proper representation but it was a constant struggle to secure and hold this help.

The Commission Act did not alter the process of attorney approval. Contract approval still had to be obtained through the Bureau of Indian Affairs and the Secretary of Interior. Often arbitrary judgments of B.I.A.

officials and months of delay in approval, or disapproval, denied the tribes the best legal aid. Matters were further complicated in the early 1950's when Commissioner of Indian Affairs, Dillon Myer, a rabid terminationist, refused approval of tribal contract for a number of attorneys trusted and requested by the tribes. In the previous decade no tribe was refused the lawyer of its choice; but under Myer over forty complained of Bureau interference.¹⁷ Nevertheless, by early 1951, 219 contracts had been approved and eighteen more were in the process.¹⁸

Then, dramatically, in 1952, an incident occurred that could have tipped the scales against the new Commission and its proponents. In April, Louis A. Youpe filed in the United States District Court for the District of Columbia a case against a number of Indian attorneys. His suit was occasioned by the existence of a rather unconventional employer. It happened that an organization known as the Joint Efforts Group was formed, with approval of the Commissioner of Indian Affairs, on December 17, 1948 to set up a research office in Washington, D.C. to expedite the formulation and prosecution of cases before the Commission. A New York firm was retained as coordinator and twenty-one firms contributed \$21,000 each to share fact and law common to all cases. Youpe claimed that he was hired by the Group to line up contracts but was never paid. For his job of solicitation he was allowed \$60,000 and spent, for gifts and persuasion, \$2,500 per tribe. A subcommittee of the Senate Committee of Interior and Insular Affairs, created in 1951 to investigate the relationship between Indian tribes and attorneys, "uncovered" this case and evidence of other questionable activity. Its report on this matter noted unethical behavior, but condemned only the conduct of attorney James E. Curry, a lone operator. It concluded that the Joint Effort Group's actions, at the very least, gave

cause to believe that the "interests of the Indians in substantial claims against the United States may be prejudiced." The report called for further investigation but none ever took place and the issue dropped from sight.¹⁹

The question of why the congressional enemies of the Indian attorneys did not exploit this case cannot be firmly answered because there is no further reference to the Group in the public record. But speculation can provide part of the answer. First, the Commissioner of Indian Affairs had approved the Group's formation because solicitation, in the case of the Indian tribes after 1946, was deemed ethical if all their claims were to be brought forward. Second, the activities of the Group's office in D.C. were legitimate and of sound business practice. Third, the reputation of twenty-one prestigious law firms, mostly in New York and Chicago, was not a target the Congress cared to attack too vigorously. And, lastly, the Group's work was largely finished by the mid-1950's.

Though Congress took no action against specific firms, it did continue to snipe at the proverbial shyster who symbolized to many congressmen a vague conspiracy to profit from the enactment of the Commission and its perpetuation. This theme was inextricably interwoven with the Commission in some minds and cropped up for decades before and after 1946. Representative Warren G. Magnuson of Washington reflected this to Chief Commissioner Witt in a 1953 appropriation hearing. Witt testified that because of the deluge of claims and his small staff he could not promise to finish by 1957. (This was a reversal of his stand in 1951.) Magnuson returned that: "As long as you have these Indian lawyers downtown, you will go on forever." Witt replied in the negative and pointed out that no more claims could be filed by law and that the attorneys want to finish, by he could do little to dispel such a deep rooted belief.²⁰

120 Their Day in Court

In spite of the flak thrown at the Commission from its earliest days it was the law of the land and, beginning in April 1947, it had a job to do. That job, essentially, was to settle the backlog of over 600 Indian tribal claims against the government that had accrued to August 12, 1946. It was estimated that the tribes spent one million dollars preparing their cases for trial.²¹ By August 1951 all of the claims were filed and the government had readied its defense; and the claimants' attorneys their prosecution on a substantial number. The gap between law and its execution had now to be closed. As foreseen by some, it was a weighty task.

The Commission was a new concept for the Indians and it embodied unprecedented causes for legal action. Not only the tribes, but often their attorneys and the Commission, were in the dark as to what constituted evidence. The immediate difficulty was to distinguish the role of a commission from that of a court. It will be recalled that the earliest legislation to enact a claims forum was in the form of a court, but after 1935 the commission framework was settled upon. In spite of this titular designation, history proved stronger than nomenclature. Since 1881 it was the Court of Claims that had handled all Indian tribal cases and it was to this body of precedent that the new Commission looked. These procedures and theories were perforce largely adopted by the Commission, in effect making it a court, a reality formally acknowledged by Chief Commissioner Witt early in the life of the Commission.²²

But, there were other reasons, less weighty than sixty-five years of historical precedent, why the Commission became a court. First, the government feared a giveaway or a "raid on the treasury" if in the settlement of these old claims the Commission was given what was thought to be too much discretionary freedom. Second, the Indian attorneys resisted a procedure that could have eliminated the need for their services. And lastly, the

The Indian Claims Commission: The Formative Decade 121

Indians wanted their own lawyers and an adversary process, fearing another agency making decisions above their heads without their participation. The commission concept was meant to avoid the inefficient litigatory process and the evils of the past but, even if it could have met this goal, it was not to be.

Hence, this new "Court" that was not a court was constituted to hear evidence of an undetermined nature under new "causes of action" on an unforeseen number of claims. It is hardly surprising that it did not function efficiently in its early years. Many of the late-filed cases were ill-prepared and often in need of years of further research. In others, the tribes lost the full-time efforts of their attorneys, for the burden of contingent-fee contracts that necessitated the attorney's out-of-pocket financing was often too heavy to bear. Add to this the fact that these cases were lengthy by nature and it can be seen that the first five-year adjudication period was one of orientation, not one of final settlement.

The Commission evolved a workable procedure and the Court of Claims and the Supreme Court, its appellate bodies did the same. The great majority of claims, being land cases, were heard in three stages: title, value-liability, and offsets. The title phase was often the most difficult one for the Commission. Establishing the "definable territory the Indians occupied exclusively" was a most complex undertaking and required the labor of experts in the field and in the archives. The Indian claimants learned quickly to resolve their mutual claims to a common area so as not to destroy their claim to exclusive title. If and when the first stage was decided in favor of the tribe, that is if undisputed recognition of the land claimed was allowed, then the trial proceeded to the next stage. At least two years or more were required here for preparation. Valuation-liability was usually the most lengthy part of the trial and required the

expert knowledge of many specialists and diligent research in a mass of governmental records. Many judgments on inclusion of pertinent information distilled from this vast amount of material had to be made along the way. With the liability of the United States Government established, the last stage, that of determination of allowable offsets, took place before a final award could be made. These stages required two interlocutory judgments and a final judgment by the Commission. Each stage almost always received motions for rehearing (and appeal after 1960) and the final judgment was appealable to the Court of Claims and to the Supreme Court through a writ of certiorari. This process took from eight months to three years as a matter of course. Also there were numerous miscellaneous motions for time extensions on the admission of new evidence. Consequently, the time span of from six to twelve years spent on these cases was not so outsized as it first appeared.

This procedure created costs for the government exclusive of the Commission itself. By the late 1950's forty-three members of the Indian Claims Section of the Lands Division in the Justice Department, which defended the United States against claims, ran an annual bill of \$623,000. The Indian Tribal Claims Section of the Claims Division of the Government Accounting Office, responsible for the determination of gratuitous expenditures for the offset stage, had almost ninety-employees at work for over \$500,000 annually, totaling seven million dollars by 1963.²³ The commission itself ran on a budget of \$178,000 for the year 1958.²⁴

As the Commission neared its first expiration date it seemed that Congress, as revealed yearly in appropriation hearings, was not so much concerned with the cost of the Commission's operation or even the \$10 million in final awards, but with the prospect for the completion of all the claims. The task before the Commission when seeking funds

from Congress was to rationalize the seeming delay and to present its plans for streamlining.

Congress could well be unruffled by the early financial picture. The total operating expense was relatively small and the Commission budget had only grown from \$86,000 in 1948 to \$122,000 by 1956. Also the dire warnings of the Justice Department that the awards could total several billions of dollars seemed unconfirmed, a point that the Indian attorneys had previously argued. By 1956, less than \$10 million had been awarded on a total of \$800 million claimed. Even when the political issue of delay was combined with the financial questions, Congress could take some fiscal satisfaction from the fact that the government seemingly got the better of the Indian once more. Chief Commissioner Witt pointed out in hearings in 1956 that, if anything, the delay was costing the Indians more than the government in lost use of award moneys. The government was not obliged to pay interest and, said Witt, "I guess the government is really saving in the way of interest as much as this Claims Commission is costing it."²⁵ Though this statement was undeniably true, Congress wanted action, not excuses.

The apparent slow progress of the Commission's work and the probability of the job being an unending one troubled Congress most. Chief Commissioner Witt often attempted to explain that the nature of the litigation precluded quick resolutions but he was usually unsuccessful. Justice Department representative Perry Morton concurred, stating, "there is nothing as complex as these cases."²⁶ Outside of government, interested parties were also anxious about the Commission's progress. In late 1954, specialists with extensive experience in Indian claims work gathered at a symposium in Detroit to explore mutually the problem of expert courtroom testimony and propose remedies for the

124 Their Day in Court

difficulties that had arisen. All groups, so they declared, wanted quicker action.

As mentioned before, the determination of tribal boundaries, duration of tribal possession of the land, and the appraisal of its value called for the advice of expert witnesses. The use of anthropological information in these cases goes back at least to 1895 but it was garnered from recognized publications. The use of the personal testimony of experts only predated the establishment of the Commission by one year.²⁷ Without this material the job of the Commission would have been impossible. But the massive, often technical input of the experts frequently served as much to complicate the litigatory procedure as to clarify it. Anthropologist Julian H. Steward of the University of Illinois noted that "virtually no evidence presented in these cases can properly be called 'primary evidence,' 'first hand knowledge,' or an 'eyewitness account'" and "it is therefore ridiculous to proclaim that the facts speak for themselves."²⁸ The Commissioners learned this reality quite early and asked for more than the "facts" as they were. For their total consideration they openly asked for theories, interpretations, and the reasoned deductions that led the expert to the formulation of his final opinion. This type of evidence was presented and allowed because the expert witness, unlike the ordinary witness, was not bound by the hearsay rule.²⁹

But this flexibility in the courtroom context was a two edged sword. Experts on opposite sides of a case, holding like theoretical views and examining the same evidence, often came to contrary conclusions. This confused all participants and led to smears upon the integrity of the various involved professions. The phrase, "liars, damn liars, and expert witnesses," offended some and amused others but hurt all in the work of the Commission.³⁰

The Indian Claims Commission: The Formative Decade 125

A disinterested appraisal of the experts' role in these claims should be less harsh. It was a difficult, if not impossible, task. They were asked to discuss Indian property ownership when the concept, in the European sense, did not exist among the tribes before intercultural contact. They were forced to determine territorial exclusivity when the variety of tribal use of all natural resources was bewildering. And, even the basic terminology was unstable for the word "tribe" was an artificial designation or even a outright creation of the whites. According to Morton Fried, professor of anthropology at Columbia, the experts were asked to prove a lie; the idea that "claims for indemnification should require acceptance of a myth to satisfy the legal preconceptions of an infringing state" was ridiculous. (These preconceptions included both the acknowledgement of permanent tenure and the idea of sale and alienation of land).³¹ Another prominent anthropologist, Nancy O. Lurie of Harvard, suggested that the experts discuss their information together "as fellow scientists rather than antagonists pitted against one another,"³² but this, of course, was possible only if the Commission was one in fact and not functionally a court. In spite of the deficiencies of the process, attorney Donald C. Gormely, of one of the most prominent firms engaged in Indian law (Wilkinson, Boyden, Cragun & Barker, Law Offices, Washington, D.C.) wrote that where expert opinion had been employed "there was no question but that the tasks of the Commission and the counsel had been greatly aided, and the cause of justice forwarded."³³ There was little doubt that many of the complex issues of these cases would have had to be adjudged in the dark if not for the great amount of light shed upon them by the scholarship of the experts.

Another hotly contested issue (and agent of delay) of Indian claims was that of gratuitous offsets. The debate

over the justice of offsetting gratuities did not end with the passage of the Commission Act of 1946. Though the Act eliminated about one-fourth of the more than fifty categories of gratuities, the remaining ones brought a debate on every case where allowed. To be allowable as an offset the item claimed must have been a gratuitous expenditure made without obligation on the part of the government to make it, or the Indians to repay it. It also must have been of benefit to the entire tribe. And, the nature of the claim and the whole course of dealing between tribe and government had to have warranted the offset. Since almost one-half of the \$19 million awarded by 1958 was subject to offsets, the issue was a major one.³⁴

The gratuities issue was not resolved in the first decade of the Commission but a trend was set. In its early days the Commission allowed higher percentages of offsets than in its later decisions. In a case decided in 1957 only \$440,000 was allowed of the \$2 million pleaded by the government. In a similar (pre-1946) case, before the Court of Claims, all \$2 million was allowed and the provisions of the Commission Act itself would have permitted close to one million.³⁵ But, in this same case, even the \$440,000 was eliminated on rehearing. Clearly, by 1957 the threat of offsets was greatly diminished for the claimant. It would continue to be discredited as a tool for the government's defense, and almost fall into disuse by the 1960's with offsets allowed only as in other claims cases.

The debate on renewal of the life of the Commission began in 1955. In that year the Senate had passed a bill granting a five-year extension, but Senator Allen J. Ellender of Louisiana was able to gain a motion to reconsider the vote, himself favoring only two years. In 1956, the House passed a bill granting five more years to the Commission. This was halved by a Senate bill but the five years was finally agreed upon in conference. A house amendment to

speed up the litigation by the use of hearing examiners was cut from the bill because it conflicted with the Administrative Procedures Act and suggested possible undesirable precedents resisted by the Justice Department.³⁶ Thus, of the 189 measures proposing Indian legislation submitted to the House Subcommittee on Indian Affairs in 1956, a brief one among the fifty that became law was that which simply continued the Commission for five more years.³⁷

The questions and problems in law that arose in the first decade of the Commission were equal in complexity to the procedural development. For this reason their parallel elaboration deserves a separate chapter.

NOTES

1. S. 405, 80th Cong., 1st sess., 1947. S. 978, 79th Cong., 2nd sess., 1946.
2. U.S., *Congressional Record*, Senate, Vol. 106, Pt. 8, 86th Cong., 2nd sess., May 23, 1960, 10782. Oscar Chapman, then the Acting Secretary of the Interior, recommended to President Truman that Felix Cohen be named chief of the commission but to no avail. Donald Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (Albuquerque: University of New Mexico Press, 1986), 30.
3. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on Independent Offices Appropriations Bill for 1949*, 80th Cong., 2nd sess., 1948, 271-87.
4. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 9390 for Appropriations for Interior and Related Agencies for 1957*, 84th Cong., 2nd sess., 1956, 552-8. Chief Commissioner Witt at first used this figure of 852, and referred to all separate causes of action listed on the tribal petitions as claims. Many tribes had several claims on their petitions. The Chippewa listed 57 and the Potawatomi 92.

5. U.S., Congress, Senate, 80th Cong., 1st sess., 1947, Rept. 778.
6. See note 3.
7. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on the Independent Offices Appropriations Bill for 1949*, 80th Cong., 2nd sess., 1948, 99-102.
8. U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearings on a bill to amend the Indian Claims Commission as Amended*, 90th Cong., 1st sess., S. 307, 1967, 8.
9. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on the Independent Offices Appropriations Bill for 1952*, 82nd Cong., 1st sess., 1951, 203-6.
10. See note 3.
11. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on the Independent Offices Appropriations Bill for 1952*, 82nd Cong., 1st sess., 1951, 28-37.
12. For a breakdown of claims by state see U.S., Congress, House, Subcommittee of Committee on Appropriations, *Hearings on the Independent Offices Appropriations Bill for 1954*, 83rd Cong., 1st sess., Pt. 3, 1953, 593-601.

130 Their Day in Court

13. U.S., Congress, House, *Providing a One Year Extension of the Five Year Limitation on the Time for Presenting Indian Claims to the Indian Claims Commission*, 82nd Cong., 1st sess., Pt. 3, 1953, 593-601.
14. Frank Waters, *Book of the Hopi* (New York: The Viking Press, 1963), 322.
15. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on the Independent Offices Appropriations Bill for 1955*, Pt. I, 83rd Cong., 1st sess., 90-98.
16. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on Interior Department Appropriations Bill for 1941*, Pt. II, 76th Cong., 3rd sess., 1940, 528-88.
17. Aubrey B. Willacy, "Note; Contract Approval: Attorney and Indians" *Howard Law Journal*, Vol. 15, no.1 (Fall 1968), 149-63. See also Felix S. Cohen, "The Erosion of Indian Rights" *The Yale Law Journal*, Vol. 62, no. 3 (February 1953), 371-2.
18. See note 3.
19. U.S., Congress, Senate, *Attorney Contracts with Indian Tribes*, 83rd Cong., 1st sess., 1953, Rept. 8. Also see U.S., Congress, House, Committee Reprint no. 38, *Present Relations of the Federal Government to the American Indian*, 85th Cong., 2nd sess., December 1958, 204-7.
20. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on the First*

The Indian Claims Commission: The Formative Decade 131

- Independent Offices Appropriations Bill for 1954*, 83rd Cong., 1st sess., 1953, 214-17.
21. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Amending the Indian Claims Commission Act to accomp. S. 751*, 87th Cong., 1st sess., May 1961, Rept. 208.
22. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on Interior Department and Related Agencies Appropriations bill for 1956*, 84th Cong., 1st sess., 1955, 573-80. This fact had also been acknowledged by a later Chief Commissioner and the chief government attorney. See Ralph Barney, "Indian Claims or the Historical Appraisal" *The Appraisal Journal*, Vol. 31, no. 2 (April 1963), 170. And U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 5279 on Appropriations of Interior Department and Related Agencies for 1964*, 88th Cong., 1st sess., 1963, 1217-23.
23. U.S., Congress, House, Committee Print no. 14, *Indirect Services and Expenditures by the Federal Government for the American Indian*, 86th Cong., 1st sess., October 1959, 5-8. Also see U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 10802 on Appropriations for Interior Department and Related Agencies for 1963*, 87th Cong., 2nd sess., 1962, 773-88.
24. The annual budget of the Commission, beginning with its first full year of operation in 1948 to 1957 was \$85,000; \$77,000; \$82,000; \$95,000; \$92,000; \$91,000; \$110,000; \$117,000; \$121,000; and \$132,000;

132 Their Day in Court

These figures were compiled from the hearings on the annual appropriation bills. For specific years, see bibliography.

25. For all annual summation figures quoted see the *Annual Report* of the Commission beginning in 1968. Also see note 4.
26. See note 4. In 1846 the Attorney General of the United States wrote in his report to the President: "There is nothing in the whole compass of our laws so hard to bring within precise definition or logical or scientific arrangement, as the relation in which the Indian stands to the United States."
27. "Anthropology and Indian Claims Litigation: Papers presented at a Symposium held at Detroit in December 1954," *Ethnohistory*, Vol. 2, no. 4 (Fall 1955), 336.
28. *Ibid.*, 300.
29. *Ibid.*, 290.
30. *Ibid.*, 364.
31. Morton H. Fried, "The Myth of Tribe" *Natural History*, Vol. 84, no. 4 (April 1975), 12-20.
32. *Ethnohistory*, 360.
33. *Ibid.*, 336.
34. See note 19, *Present Relations*, 44.
35. *Ibid.*, 58-63.

The Indian Claims Commission: The Formative Decade 133

36. U.S., Congress, House, *Terminating the Existence of the Indian Claims Commission*, July 1956, Rept. 2719. At the time the U.S. Tax Court had sixteen members and thirty-two attorney aids, and the U.S. Court of Claims had five members and fourteen commissioners.
37. 70 Stat. 624, July 24, 1956.

CHAPTER IV

LAW AND PRECEDENT: 1947-1957

The most persistent theme of the legislative history of the Indians Claims Commission was that the Indians should have "their day in court." The forum created for this purpose was a commission, but its method was adjudicatory. It functioned largely as did the Court of Claims and its expanded grounds for government liability gave the Indian a wider scope for claims presentation and the potential for greater success in award recovery.

The "causes of action" granted by the Act were five in number. These allowed any identifiable group of Indian claimants residing in the United States or Alaska to sue the government for: (1) claims in law or equity, (2) tort claims, (3) claims based on fraud, duress, unconscionable consideration, mutual or unilateral mistake, (4) claims based on the taking of lands without payment of the agreed compensation, and (5) claims based upon fair and honorable dealings not recognized by existing rules of law or equity.¹ Parts (1), (2), and (4) were clear cut and found in the broader civil law and applicable to all citizens. But parts (3) and (5) created the *new* causes of action. The former allowed the Commission to "go behind" or treat the Indian treaties *as if* revised, and the latter gave cognizance to the broad concept of moral claims. The reaction to these causes of action by the claimants on the one side and the Justice

Department on the other, and the theoretically neutral Commission and Court of Claims in the middle, formed the legal history of the Indian Claims Commission.

The Act of 1946 laid out the general framework for the prosecution of the claims. The tribes could secure representation freely, subject to the approval of the Secretary of Interior. The Indian Claims Section of the Lands Division in the Department of Justice defended the government as designated by the Act. The Indian Tribal Claims Branch of the General Accounting Office (G.A.O.) garnered the vital government information and data needed by both sides and presented it in a detailed report to all parties (the G.S.A. handled this job after February 27, 1965). If a trial, with appeals, led to a final money award, the only kind allowed the Commission, it was certified and reported to Congress. The Commission, as with the Court of Claims, was not required to justify its decisions or to account for the amounts awarded, though some legislators hostile to the Commission sought such an accounting.² Congress was allowed to refuse award payment but it never did and all awards were automatically referred to the Treasury and the Bureau of the Budget and included in the next appropriation bill. Final payment to the Indians was then withheld until Congress directed how it should be distributed among the various members of the tribes.

The many tribal land cessions to the United States made up the main source of alleged wrongs that the Indian claimants sought to redress. They held that the United States acquired valuable land for unconscionably low prices in bargains struck between unequals. The typical case before the Commission was a claim for additional compensation over the amount originally granted in the "taking" of the land. Just over 80 percent of these "takings" were by treaty and involved some compensation in the form of money, goods, services or a combination of the three. If

the Commission recognized government liability for "grossly inadequate" consideration, the difference between that consideration and the fair market value of the land at the time of the treaty was awarded, subject to appeal.³

The other type of claim that embodied most of the remaining non-land cases was that for a government accounting. When Chief Justice Marshall, in *Cherokee Nation v. Georgia*, changed the status of tribes from that of foreign nations to one of national wards, he established the fiduciary responsibility of the federal government to the Indians. This relationship has been reasserted in many court rulings since 1831. The government, as legal guardian for the tribes, was thus held strictly accountable for its management of tribal funds. The mismanagement, misfeasance, or mishandling of such funds constituted a major source of Indian claims. Again, the General Services Administration provided the detailed accounting reports for all cases, either to establish offsets for the land cases or to show fiscal irresponsibility in the accounting cases. In most of these cases a long and complex trial was necessary because, as historian Thomas LeDuc has pointed out, "the material facts are not only embarrassingly abundant but buried in a mass of irrelevant government records."⁴ The attorney's job was the disinterment of this material.

The Commission Act provided that the government should be represented by the Attorney General or his assistants. Upon being served with a petition by the claimant, the Justice Department had sixty days to answer. The government was permitted all defenses except statute of limitations or laches. Justice was allowed to move for dismissal of the claim on summary judgment if the petition did not, in its opinion, state a claim upon which relief could be granted. Failing this, and so as not to default, it had to state its defense within sixty days unless gaining a Commission extension. If then, as in the first phase of a

land claim trial, liability of the United States was recognized by the Commission, the trial moved to the second or valuation phase.

In the first phase the consulting experts were likely to be historians and anthropologists. The Attorney General offered in evidence, beside the testimony of his experts, duly certified information and papers from any department or agency of the government. This material was subject to approval by the Commissioners on its competency, materiality, and relevancy. Justice could, within sixty days of the liability ruling, amend its original answer by setting forth the amount of offsets or counterclaims against the claimant as authorized by the Act.

In the second, or valuation phase, the government's and claimant's contracted expert appraisers valued the land as of the treaty date and the records were combed to determine the compensation received by the Indians.⁵ The Commission determined the fair market value, compared it with the compensation received to determine the government's liability and thus fixed the size of the award, if any. During this phase Justice attempted to hold the appraised value low and to peg the original compensation high.

The final phase was that of offsets. These were, again, the gratuities given by the government to the claiming tribe after the date the claim arose. The Attorney General, on receipt of petition, requested compilation of offsets by the General Services Administration. When computed, those gratuities allowed by law were deducted from the total award made in the valuation phase.

Whenever there was a question as to the Commission's conclusion regarding a so-called "error" of fact or law, or there was newly discovered evidence, a motion for rehearing might be filed within thirty days. The parties could also appeal each interlocutory decision, though

this was not done until after 1961, and the final decision to the Court of Claims. Questions of law could be appealed by writ of certiorari to the Supreme Court.

It was only late in the second decade of the Commission's life that the claimants first pressed the accounting cases, the second most numerous type of claim. These cases required an accounting by the government of any funds belonging to Indians, how they came into being, how they were expended, and what balances were held in the United States Treasury. Many of these records were quite old and the accounting involved thousands of transactions. The government attorneys filed these reports with the Commission and later answered the exceptions made by the claimants. A trial was then held to determine the degree, if any, of fiduciary culpability on the part of the government.

Of course, there were numerous claims that involved neither land nor accounting. Many were not formulated into definitive cases as of August 1951 and remained undefined years later. Others grew out of new interpretations of the Act's causes for actions as generated during the life of the Commission. Yet other claims found precedents in the often liberal rulings of the Court of Claims to inspire formulation.

The Indian attorney's role in these cases was generally the counterpart of that of the Justice Department lawyer. He must have been admitted to practice before, and in good standing in, the Supreme Court of the United States or in any other Federal Court, or in the highest Court of any State or Territory. No member of or delegate to Congress could practice before the Commission.⁶ Upon his employment, subject to approval of the Secretary of the Interior, he registered a certified copy of the contract with the Commission. He was to work with the tribe to formulate its claim and file twenty copies of the claims petition with

the Commission. When the issue was joined, as in a land case, he secured his experts and employed them to best use. If he established liability and showed a sufficiently gross disparity in the compensation to secure an award, he then had to meet the counterclaims set up by the government within forty days. With approval of the Commission, he also could call upon any department of the government for relevant information. The appellate procedure was open to him, and as representative of claimant it was even more requisite for him to press his case to the fullest.

Unlike the Attorney General, however, the case did not end for the Indian attorney on final decision. He had then to make application before the Commission for fees and reimbursable expenses. A detailed petition was filed with the Indian Claims Commission and the Commissioner of Indian Affairs, and served on the Attorney General. Payment from the claimant's award was usually approved, but on occasion the Commission determined that a further hearing was necessary. At this hearing the attorney had to justify his fee and expenses in order to receive emolument but valid challenges sometimes resulted in a reduced figure. In no case could the payment exceed ten percent of the final award as set by Section 15 of the Act, and though a few fees were as low as six percent before 1968, all were allowed the maximum after that year.

The Commission molded its rules of procedure after a court and functioned largely as one. Technically it was a quasi-judicial branch of the legislature. The Commission sent, as required, a written explanation of its function to all potential claimants (Section 13a) and followed this up (Section 17) with a notice for claims presentation. Eventually it received 852 causes of action (a single tribe often having several) that it consolidated into 370 dockets representing some 590-617 claims, the number varying as consolidation or separation of claims necessitated. It also

was authorized (Section 13b) its own Investigation Division to check all claims referred to it, but this power was rarely used or even recognized until 1967 when it became an issue. The Commission's principal office was in the District of Columbia but its members were free to travel for field hearings, onsite land inspections, and conferences whenever necessary. All of its rulings were subject to appeal by Indian and government lawyers and the Commission itself could ask the Court of Claims for guidance. Appeals might result in affirmation, reversal, remand for future consideration or any combination of the three. Its final report to Congress ended its duty and forever barred "any further claims or demand against the United States."⁷

Within this procedural context the Commission and the adversaries began the battle over the interpretation of the complex legal issues raised by the new Act. The great bulk of the early debate surrounded the extent of the participation of the Court of Claims, the use of the legal defense of *res judicata* or previous decision, tribal existence as an entity capable of bringing suit and the definition of "identifiable group," the determination of exclusive occupation of territory, the payment of interest, and, most important, the establishment of Indian title. Each of these issues deserves separate attention.

The position that the Court of Claims took in its first appellate decisions critically affected the direction of the Commission. In the *Osage* case (docket 9) the Court proclaimed its intention to review thoroughly the facts of the cases appealed from the Commission decisions. It recognized its role, under Section 20 of the Act, to determine if the Commission's findings of fact were supported by "substantial evidence" and whether conclusions of law were valid and supported by the findings of fact. The Court then ensconced itself more deeply in the claims process. It searched the legislative history of the

Commission Act and prior judicial decisions to determine the Commission's obligations and concluded that the Commission's jurisdiction "did not embrace matters of a technical or highly specialized character," and in the issues before it the Court was as expert as the Commission to hear and decide. The Commission dismissed both the *Osage* case and the *Pawnee* case (docket 10) on the grounds that the evidence was inadequate to support their claims. The Court reversed these decisions acting the role of the loose constructionist in its interpretation of the Act, as it felt Congress had intended. In the *Pawnee* case the Court criticized a wanting Commission for drawing inferences, speculative in character, from material in excerpts without reference to the documents as a whole.⁸ It also went on to note that the Commission was part of the termination policy and was granted broad powers to help effect that policy. One of these powers was investigatory (Section 13b) and could be used when necessary to hasten the work. In this case the Court itself conducted the investigation, unearthed new evidence, and established the liability of the government. Thus an early, conservative Commission was balanced by a more liberal Court, seasoned in Indian matters and willing to take up the responsibility of achieving the congressional intent.⁹

The Court intended to recognize and use the broader scope of the new act and not repeat its own history under the narrow jurisdictional acts that had so inhibited claims resolution from 1881 to 1946. "If the Court of Claims in this and some other early appeals," asserted Indian attorney Glen Wilkinson, "had left the interpretation and determination of the Indian claims to the process of strictly adversary proceedings, it is doubtful whether the Pawnees would have been successful to any extent."¹⁰ This liberal stance of the Court set the Commission on a wider path and kept it from repeating many of the sins it was created to remedy.

Throughout the life of the Commission, the Indian successes often depended on the makeup of the Court and shifted as its membership did.¹¹

The first case of the Commission, that of the *Western (Old Settlers) Cherokee*, involved the legal principle of *res judicata*. *Res judicata* makes a prior judgment binding in a second suit on the same cause of action between the same parties. This principle is applied to ensure finality of judgment and to protect litigants from a multiplicity of suits. The first judgment determines every issue in the second suit which was or could have been litigated in the initial suit. But it is only used when the totality of the circumstances indicates that fairness to all the parties will best be met by allowing a prior judgment to control a subsequent dispute. The Western Cherokees alleged that a mistake was made in the writing of their treaty and they claimed damages under the fair and honorable dealing clause. The government contended that the involvement of the same facts and the same parties made it *res judicata* and the Commission held with this defense. The Commission denied both actions and the case was dismissed as *res judicata* on motion by defendant. Since over one-third of the claims had been submitted to the Court of Claims prior to 1946 by earlier jurisdictional acts this precedent could have destroyed in the breach many of the Indian claims with the Commission. The Court of Claims, however, reversed the Commission holding and this potential precedent. It held that a prior decision on the same subject matter with the same parties did not bar the claim, because the 1946 Act had created new "causes of action" not considered justiciable in prior action. That is, not only the same facts and the same parties must be present, but the same cause of action for the defense of *res judicata* to bar the claim. The situation did occur later to allow *res judicata* as a defense, but only rarely because the Commission Act

had greater breadth than most of the jurisdictional acts. Again, it was the Court of Claims that moved decisively to broaden a narrow determination of the Commission.¹²

Another early decision of the commission was that on which particular parties were allowed to bring suit. One of the first matters of precedent under the Commission Act was the exclusion of individual claims. Some early pressure on behalf of individual claimants necessitated a definitive ruling and affirmation of Section 2 which states that the Commission shall hear and determine claims "on behalf of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska." Acceptance of individual claims, it was decided, was against the intent of Congress and would have resulted in a docket too huge to manage. Thus the Commission held to the claims generated from the 176 groups recognized by the Indian Bureau and notified by the Commission in July 1947. But this ruling did not leave the Commission without problems with Section 2.

The expression "tribe" often has been a tricky one for the experts on Indian affairs. The term "nation" was most often used in the seventeenth and eighteenth centuries and was a more appropriate designation than tribe. Tribe came to be used generally after the federal government began exclusively handling Indian relations. Indians, said anthropologist A.L. Kroeber, were distinguished as they lived in a "tribal condition" or in a settled, "civilized condition." Nationality tribes were treated as sovereign-state tribes, for it made dealings more convenient and practical. "It was we Caucasians," said Kroeber, "who again and again rolled a number of related obscure bands or minute villages into the larger package of a 'tribe,' which we then putatively endowed with sovereign power and territorial ownership which the native nationality had mostly never even claimed."¹³

For the courts the question of tribal existence had generally been treated as a simple yes or no issue. Many Supreme Court decisions affirmed that it was up to the political arm of government to define tribal existence. But, tribes could exist for some purposes and not for others. For political and administrative purposes a number of tribes were treated as one. Congress also assigned separate status to a tribal component for other reasons. The considerations used to determine that a group constituted a tribe or band have been: (1) that it has had treaty relations with the United States, (2) that it has been denominated a tribe by Act of Congress or Executive Order, (3) that it has been treated as having collective rights in tribal funds, even though not expressly designated a tribe, (4) that it has been treated as a tribe or band by other tribes, and (5) that it has exercised political authority over its members, through a tribal council or other governmental forms. Also regarded as proof of tribal existence, but not as conclusive evidence, was the existence of special appropriation items for the group, its social solidarity, and various ethnological and historical consideration.¹⁴

The claims were generally presented in the context of this tribal presupposition and were thus potentially as faulty as the notion of tribe. In cases where tribes appeared not to have existed or failed to fit the white's political construct, they could be excluded from suit and thus penalized when, in fact, their land use and possession was a reality. Under these circumstances Congress recognized the category of "other identifiable group" in 1946 to include all groups that might suffer exclusion by definition.¹⁵

The early litigation had few problems with the terms tribe and band, for all sides recognized in general their historic meaning. This new term, "identifiable group," though, brought conflict. Commissioner Louis J. O'Marr complained to Congress in 1949 of the lack of precedent for

defining this term.¹⁶ By 1955 the agencies involved had yet to define it. But, in two of its earliest cases, the Commission held the claimants to be such a group. The rationale employed was that each group had a claim separate and distinct from its larger, parent entity. Although government lawyer Ralph Barney questioned the principle governing this procedure and saw it as based only on the exigencies in each case, it was more than that.¹⁷ Congress had delegated to the Commission the right, as mentioned above, to separate groups for claims purposes. The Commission often found this power practical and equitable. And, when it was not so liberal in the use of this catch-all category, as in the *California Indians* case, the Court of Claims reversed it. The Commission had ruled that the "Indians of California" were not a single group (technically this is beyond doubt), had no common claim, and were therefore not an identifiable group within the meaning of the Act. The Court held that Congress intended this designation to enlarge the category of groups of Indians entitled to present claims, and not to limit this right only to those groups existing when the claim arose and having at the time of suit a common group claim.¹⁸ The Commission was created to hear and bring finality to *all* Indian "tribal" claims; this category of identifiable group facilitated that task.

The most difficult factual problem facing the Commission was the question of what definable territory the Indians occupied exclusively. The Act allowed claims (Section 2) arising from the "taking" of lands "owned or occupied" by claimants without proper compensation. The Commission, following the Supreme Court ruling in *U.S. v. Santa Fe Pacific R.R. Co.* (1941), held that *exclusive* occupancy had to be shown in a definable territory to establish aboriginal possession. Only when Indian title rested on exclusive tribal use and occupation from "time immemorial" could compensation be declared valid. The

Indians, thus, had a vested interest in the concept of tribe in the twentieth century as the whites did in the nineteenth and were obliged to prove its existence.¹⁹ Herein rested the role of the anthropologist.

The job of the expert, at this point in a land case, was critical for the claimant. The Court of Claims held that use and occupancy was to be inferred from all the facts and circumstances in each case. If the government demonstrated that more than one tribe used a particular area, exclusivity was denied and recovery on said area was usually disallowed. The claimant's task to demonstrate this exclusivity was most difficult. Occupancy itself was an arduous matter to prove conclusively. As it pertained to Indian title, exclusivity referred to land-resource use. Most Indians were organized in small, localized, autonomous units ranging in size from the single family to multi-family groups and each unit habitually exploited specific areas in their food quest. Rarely did a group's numbers exceed 500, with only a few reaching 2,000 or more. To qualify for occupancy, land use must have been consistent, either continual or seasonal, and the use must have been of vital importance in the economy of the people constituting the group; forays into another area for "extras" did not fit this definition.²⁰

The qualifying term, "exclusive," added immeasurably to the problems presented above. Not thinking of land *per se* in terms of ownership but of the resources on it, tribes claimed the berries but allowed others to exploit the furs. Exclusivity was exclusively a white man's concept. But occupation and exclusivity were yet further complicated by the second qualifying term of "time immemorial." Selectively, this term had some meaning, but for many Indian groups it could not be applied. Many *in situ* by 1700 were not there in 1600 and others *in situ* by 1800 were not there in 1700.²¹ Obviously the Commission,

even with the aid of the experts, could not secure definitive "facts" on these issues and had great latitude for seasoned judgment. Each case, usually laden with an enormous mass of data, had to a degree to be considered separately. No doubt a trio of Solomons would have been hard put to render judgments satisfactory to all in these cases. Of course, if it was shown that the government had recognized the rights of a tribe to a specific tract, then it was unnecessary for the tribe to prove its actual use and occupancy of that area.

The recognition by the government of Indian rights in the land, or "recognized title," presented the Commission, as it did the Court of Claims before it, with the major battle in claims litigation. It was *Indian title* that was established when continuous, exclusive occupation was demonstrated. This in jurisprudence was a question of *fact*. *Recognized title* was always a result of congressional action, a question of *law*. This took the form of a treaty or presidential agreement which specifically granted to a tribe permanent legal rights of occupancy in a sufficiently defined area.

Before the Act only a claim based on recognized title could receive compensation. Out of the 370 petitions filed pursuant to the Act, seventy-two involved Indian title with no ratified treaty of cession, but these seventy-two petitions were later divided into 249 claims, a substantial portion of the total litigation docket of 610 claims.²² In the *Alcea* case the Supreme Court apparently had decided that the taking of land held under Indian title was compensable under the Fifth Amendment. But in a subsequent *per curiam* decision in the same case, the Court held that its earlier decision had rested on a statutory direction to pay and not on any obligation under the Constitution. Therefore, it was still held that compensation in these cases was a political matter for Congress, not a legal one for the courts. The Supreme

Court ruled in *Tee-Hit-Ton Indians v. U.S.* that their land was held merely by the grace of the sovereign, so that whatever interest they had in it could be terminated without obligation to compensate under the Fifth Amendment. Only recognized title called for such compensation on taking and the Tee-Hit-Ton had no such recognition. But the Court indicated that this decision might not affect the claims before the Commission because the *Tee-Hit-Ton* case did not come under the Commission Act nor was it connected with congressional intent in that Act. The Court of Claims, in the same year as the *Tee-Hit-Ton* case (1955), upheld a Commission decision that Indian title was compensable; but *solely* under Section 2 of the Commission Act and within the Commission's jurisdiction which only recognized "takings" before 1946. This was the landmark *Otoe & Missouri* case.²³

The case of *Otoe and Missouri Tribe of Indians v. U.S.* was a leading one in Indian jurisprudence and a critical precedent for the Commission. Until the Court of Claims ruling in May 1955, the Commission, explained Chief Commissioner Edgar Witt, was still "in sort of a stage of indecision" as to the compensability of Indian title.²⁴ Before the *Otoe* case a half dozen cases involving Indian title were heard by the Commission and dismissed due to their failure to prove exclusive use and occupancy. In the *Otoe* case this criterion was satisfied and the Commission took the next step and ruled that its Act provided a remedy for seizure of lands held under Indian title. It was a momentous trial involving hundreds of documents and exhibits and 1,500 pages of testimony in hearings. And, it was a signal victory for the claimants.²⁵

The government, of course, appealed. Justice Department lawyers argued that the Commission Act did not create new "causes of action" and that if Indian title was to be recognized, Congress must have expressly

authorized it. The Court of Claims rejected their contention as not consistent with the wording of Section 2 which provided for revision of treaties and fair and honorable dealings. The Court held that since the terms "treaty" and "dealings" were not qualified or limited to recognized title they also referred to such actions with tribes holding only Indian title.²⁶ Again, liberally guiding or backing the Commission, the Court held for the generous intent of the Act. Judge Benjamin H. Littleton ruled with no dissent, that

Congress wished to settle all meritorious claims of longstanding of Indian tribes and bands whether the claims were of a legal of equitable nature which would have been cognizable by a court of the United States had the United States been subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature not cognizable in courts of the United States under any existing rules of law or equity.²⁷

Hence, for the Commission, Indian title was again regarded as valuable as fee simple title; a principle given little recognition for 120 years. The Commission, upheld by the Court in February 1956, awarded the Otoe and Missouriia over one million dollars on their claim.

But the *Otoe* case did not end with the award; it had yet one more "trial" to win. The Justice Department, having lost in the Commission and the courts (its appeal to the Supreme Court was denied), attempted to politically nullify the Otoe victory. It hoped to change the law by employing the scare tactic that it had used for some twenty years. Assistant Attorney General Perry W. Morton appeared before the Senate subcommittee on Indian Affairs and informally submitted a proposed amendment to the 1946 Act

to alter the Commission's jurisdiction as written in Section 2.²⁸ Citing a potential three billion dollar claims total for suits involving nearly one-half of the United States acreage, Justice ignored the small actual award total. Commissioner Edgar Witt, who wrote the Otoe opinion for the Commission, called the government's claim "nonsense" and directed those frightened by it to the award record.²⁹ This defense had defeated such threats before and was still effective because the ratio of recovery to claim had changed little. Otoe attorney Luther Bohanon used Commission statistics to show that by July 1955 only \$11.3 million had been awarded on \$775 million claimed.³⁰ Speaking for the cause of justice, and aware of these figures, the Committee reported that "to accept this request coming from the Justice Department almost four years after the deadline for filing claims would, it seemed to the Committee, lay the Congress open to the charge of bad faith," and "only be the basis of new claims to be filed before Congress in the future."³¹ Indian title was now secured as a compensable right under the Commission's jurisdiction.

Another key issue of precedent for the Commission was that of interest on the awards. In one of the Commission's earliest decisions, the *Loyal Creek* case, it ruled, and was affirmed by the Court of Claims, that interest not be allowed on the award. The Commission and the Court were guided not so much by the Creek's case as by the firm rulings of previous Supreme Court decisions. Soon after, in the *Osage Nation* case, the Commission confirmed and broadened the denial of interest under its provision for "fair and honorable dealings." Interest was also denied in this case which was tried under the provision for "unconscionable considerations." Relying on the *Creek* case, but revealing some equivocation as to the justice of its stand, the Court of Claims affirmed the Commission and held that no "taking" of the Osage's property occurred in the

constitutional sense. These rulings preserved the precedent on this issue.³²

Behind the precedent, and the most compelling reason for it, as discussed above in the *Tillamook* cases, was what has been called "judicial fiscal responsibility." Interest is due only in cases of a Fifth Amendment "taking," a very small portion of the claims. If allowed under other forms of taking, interest alone could have mounted into the billions of dollars. This at least was the argument used by the Solicitor General on appeal in the second *Alcea* case. The award of \$15 million interest on a \$3 million settlement seemed to bear him out and the Court reversed itself.³³ Most government officials agreed with this "financially judicious" stand and thus the Commission and the Court of Claims adhered to the earlier Supreme Court ruling that "Congress, not this Court or other federal courts, is the custodian of the national purse."³⁴

The Commission, as might be expected of any such litigatory body that was engaged in resolving ancient and fiercely partisan issues, had its proponents and detractors. Chief Commissioner Witt, speaking to a House Appropriations Committee towards the end of the Commission's first decade, attempted to pinpoint the higher purpose of his agency. "We have tried to keep in mind the interests of the taxpayers but also what is right for the Indians," but "above all be fair." The Indians may have been conquerors themselves but it was a fact

that the Christian spirit and the human spirit actuate our type of people, requiring us to do justice towards these people, and not just undertake to say that 'to the victor belongs the spoils,' and 'get hither' to the vanquished; that we owed them a moral duty of some compensation for taking away from them the

lands where we found them, from which they were then making their livelihood.³⁵

There is no reason to doubt Witt's sincerity in his comments but at the time he spoke the moral jurisdiction of the Commission had barely been considered and the case disposal record stood at fifty-three dismissals to seven awards.

The Court of Claims was less apostolic than Witt but also saw the Commission as a positive agent of good. In the *Otoe and Missouri* opinion the Court wrote of the Commission Act:

It is both remedial legislation and special legislation. It broadens the government's consent to be sued and as such is in derogation of its sovereignty. It confers special privileges upon the Indian claimant apart from the rest of the community, and to some extent is in derogation of the common law. This was, we think, because of the peculiar nature of the dealings between the government and Indians from the very early times. On the other hand, it remedies defects in the common law and in pre-existing statutory law as those laws affected Indians, and it was designed to correct certain evils of long standing and well known to Congress.³⁶

Here the Court concisely codified the philosophy behind its guidance of the Commission via the appellate process. Its grasp of intent and history was solid but it too was constricted by precedential, financial, and statutory limits

it could not supersede, even in the name of justice. Other parties felt less restricted and saw less justice.

For the expert witness, the Commission often provided lucrative employment but many were less than happy with the forum for the presentation of their labors. Anthropologists were especially bitter, possibly smarting from the fact that they as a body of experts were not consulted before the passage of the Act. Professor J.A. Jones of Indiana University claimed that everyone whom he had talked to seemed convinced "that a more unwieldy piece of machinery to effect remedial action on Indian claims against the government could not have been deliberately devised." Jones suggested that an anthropologist be one of the three Commissioners and that expert witnesses be picked and paid by the Commission subject to cross-examination by both attorneys. This, certainly would have relieved the strain of the adversarial process on a profession generally in sympathy with the Indians and their claims, but it was never seriously considered.³⁷

Indian opinions regarding the early work of the Commission were harder to gather. Shirley Hill Witt, a Mohawk, a charter member of the National Indian Youth Council, and a Ph.D. from the University of New Mexico wrote that, as of 1946, the Commission, the Indian attorneys, and the Indians were all in the dark as to what should be acceptable as evidence. The new "causes of action" had no real precedents. The Commission often gave no weight to Indian testimony and "soon the matter was taken from the hands of the Indian and placed solely in those of the lawyers, who were free to compromise and make deals as they could.... Again the mysterious processes of the white man's world were closed from viewing."³⁸ This theme and the following one had been heard before.

Vine Deloria, Jr., a Standing Rock Sioux from the Pine Ridge Reservation of South Dakota, was equally as

unenthusiastic about the work of the Commission. Deloria, a teacher, author, former Executive Director of the National Congress of American Indians, and an attorney himself, was sharply critical of those early participants in the Commission's work that transformed it into a court and not into a more flexible and simple, but less moral and precedential-ridden, commission. He saw this move as largely the work of the attorneys involved, especially the Indian attorneys. "High moral purposes aside, this Act provided a long and lucrative future for a select group of attorneys in Indian law and career employees of the United States."³⁹

The Indians did not understand the scope of the Commission's Act. They thought that all claims could now be resolved. The Sioux and others sought compensation for relatives massacred at sites such as Wounded Knee or Sand Creek.⁴⁰ The Apache hoped to recover for their United States Army scouts wrongly imprisoned with Geronimo. The Gros Ventres claimed payment for guide service rendered by Sacajawea to Lewis and Clark. And the Mandans imagined a settlement for all the buffalo hides lost to white "poachers."⁴¹ But the Commission had greatly restricted its jurisdiction to a narrow scope of claims. Its conception as a court, and the reliance on precedents that followed, guaranteed this path.

To Deloria this conception was a perversion. Those claims based upon "fair and honorable dealings not recognized by any existing rule of law or equity" appeared to him to cover *all* treaty violations. But the Commission "studiously avoided this section of its jurisdiction" to deal mainly with land cessions or accountings of tribal funds. It was clear to Deloria that under a Commission concept this section could have been a catchall for all moral claims, but in practice it became merely a means of securing relief, failing all other causes, for the *accepted* claims.⁴²

The framers of the Act of 1946 never believed that they could please every party. They may have pleased no one. High moral purpose does not guarantee success nor does a new law assure redress of evil, especially when enmeshed in the bureaucratic machinery dependent on the oil of federal funds. Yet, the Commission, the Courts, the attorneys, and all the others involved in these claims did their duty as they saw it from 1947 to 1957. The Commission assembled a formidable docket soon after it was constituted. Under its rules of procedure the advocates of both sides vigorously attacked the mountainous legal and material problems presented by the 151-year-claim backlog. The Court of Claims strove to add its wisdom, experience, and guidance to this difficult process. The Commission faced and resolved many issues and saw new ones created in this first decade. Next, though the tenure of the Commission, made unrealistically short by the Act of 1946, had to be extended.

NOTES

1. Section 2, 60 Stat. 1049, Aug. 13, 1946. Also see *Federal Indian Law* (New York: Association on American Indian Affairs, 1966), 356-9.
2. Robert W. Barker, "The American Indian, Federal Citizen and State Citizen," *Federal Bar Journal*, Vol. 20, no. 3, Summer 1960, 244-7.
3. See the first *Annual Report* of the Indian Claims Commission, 1968, for a summary of the work of the Commission.
4. Thomas LeDuc, "The Work of the Indian Claims Commission Under the Act of 1946," *Pacific Historical Review*, Vol. 26, no. 1, February 1957, 2. Another useful early survey of the Commission is that of Nancy O. Lurie, "The Indian Claims Commission Act," *The Annals of the American Academy of Political and Social Science*, Vol. 311, May 1957, 56-70.
5. No compilation of the Indian attorneys' expense for experts is available and little of the government's. The one report of the Justice Department, though, may be a fair sample. The Department spent less than \$2.5 million from 1954 through 1962 for its expert witnesses. Only \$176,000 was spent in 1961

- and \$411,106 in the peak year of 1960. U.S., Congress, House, *Establishing a Revolving Fund*, 88th Cong., 1st sess., July 1, 1963, Rept. 492, to accomp. H.R. 3306.
6. U.S., Congress, House, Subcommittee on Indian Affairs, *Hearings on H.R. 2536 and related bills to Terminate the Indian Claims Commission and for other purposes*, 90th Cong., 1st sess., March 1967, appendix 5, 209. Claude Pepper of Florida and D.C. represented the Ridaught Band of Choctaws in between his terms in Congress.
 7. See the Act of 1946 and the "General Rules of Procedure for the Indian Claims Commission," revision of Chapter III of Title 25 of the U.S.C., part 503, *Federal Register*, Vol. 21, no. 216, Nov. 6, 1956. These Procedures were revised in 1968, and printed by the Commission.
 8. *Osage Nation v. U.S.*, 1 Ind. Cl. Comm. 43, 1948, rev'd 119 Ct. Cl. 592, 97 Fed. Supp. 381, 1951. *Pawnee Tribe v. U.S.*, 1 Ind. Cl. Comm. 230, 1950, rev'd 124 Ct. Cl. 324, 109 Fed. Supp. 860, 1953.
 9. Interestingly, this Commission, which took an early conservative stance and then became more liberal, followed an opposite pattern from the otherwise often similar regulatory commissions. See Marver H. Bernstein, *Regulating Business by Independent Commission* (New Jersey: Princeton University Press, 1955), 74-90.
 10. Glen A. Wilkinson, "Indian Tribal Claims before the Court of Claims," *Georgetown Law Journal*, Vol. 55, December 1966, 520-22.

11. Interview with Margaret Pierce, Commissioner, Indian Claims Commission, Washington, D.C., Aug. 12, 1974. Mrs. Pierce was law clerk to the Court of Claims at the time (1948-59) and knew well the claims the men and the law.
12. *Western Cherokee v. U.S.*, 1 Ind. Cl. Comm. 20 aff'd 116 Ct. Cl. 665; *Blackfeet v. U.S.*, 2 Ind. Cl. Comm. 302; *Assiniboine Indian Tribe v. U.S.*, 2 Ind. Cl. Comm. 272. *Federal Indian Law*, 347; *Chickasaw Nation v. U.S.*, 132 F. Supp. 199, (1955); *Choctaw Nation v. U.S.*, 121 F. Supp. 206, (1954), *cert den.* 348 U.S. 863 & 135 F. Supp. 536, (1955). Also see the Wilkinson article at 519, note 10. For an exposition on a specific example, see "Res Judicata--Judgment in Suit between Navajo and Hopi Tribes Held to Estop Individual Navajo Indians not parties to the Prior Suit from Asserting Aboriginal Title Claim to Ancestral Lands," *Rutgers Law Review*, Vol. 26, Summer 1973, 909-28.
13. A.L. Kroeber, "Nature of the Land-Holding Group," *Ethnohistory*, Vol. 2, no. 4, Fall 1955, 304.
14. *Federal Indian Law*, 455-63.
15. See note 13, 314.
16. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on Independent Offices Appropriations Bill for 1950*, 81st Cong., 1st sess., 1949, 629-46.
17. Ralph Barney, "Legal Problems Peculiar to Indian Claims Litigation," *Ethnohistory*, Vol. 2, no. 4, Fall 1955, 318. The two early cases were the *Loyal Creeks*

160 Their Day in Court

- v. U.S., 1 Ind. Cl. Comm. 22 and the *Western Cherokees v. U.S.*, 1 Ind. Cl. Comm. 165.
18. 1 Ind. Cl. Comm. 358, 1950; 122 Ct. Cl. 357.
19. *U.S. v. Sante Fe Pacific R.R.*, 314 U.S. 339, 1941. Morton H. Fried, "The Myth of Tribe," *Natural History*, Vol. 84, no. 4, April 1975, 12-20. See also *Snake Indians v. U.S.*, 125 Ct. Cl. 241, 254, 1953; and Ralph Barney, "The Indian Claims Commission--the Conscience of the Nation in its Dealings with the Original Americans," *Federal Bar Journal*, Vol. 20, no. 3, Summer 1960, 238.
20. J.A. Jones, "Problems, Opportunities, and Recommendations" *Ethnohistory*, Vol. 2, no. 4, Fall 1955, 349-350. Also see Peter Farb, *Man's Rise to Civilization as Shown by the Indians of North America From Primeval Times to the Coming of the Industrial State* (New York: Avon Books, 1968), chapters X & XII.
21. *Ibid.*, J.A. Jones, 351.
22. Donald C. Gormley, "The Role of the Expert Witness," *Ethnohistory*, Vol. 2, no. 4, Fall 1955, 12n. Berlin B. Chapman, *Otoe and Missouri, A Study of Indian Removal and the Legal Aftermath* (New York: Times Journal Publishing Company, 1965), 250-1.
23. For a concise survey of this issue see the *Harvard Law Review*, Vol 69, 1955, 147-51. *Otoe and Missouri Tribes of Indians v. U.S.*, 131 Ct. Cls. 593, 1955.

Law and Precedent 161

24. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 5085 making appropriations for Interior and Related Agencies for 1956*, 84th Cong., 1st sess., 1955, 714-20.
25. Chapman, *Otoes*, 242.
26. See note 10, 523-4. Note, *University of Florida Law Review*, "American Indian Land Claims: Land v. Money as a remedy," Vol. 25, 1972-3.
27. *Otoe and Missouri Tribes of Indians v. U.S.*, 131 Ct. Cl. 594, 1955.
28. U.S., Congress, Senate, *Terminating the Existence of the Indian Claims Commission*, 84th Cong., 2nd sess., April 11, 1956, Rept. 1727 to accomp. H.R. 5566.
29. U.S., Congress, House, Subcommittee of the Committee of Appropriations, *Hearings on Appropriations for Interior Department and Related Agencies for 1957*, 84th Cong., 2nd sess., 1956, 624-34.
30. Chapman, *Otoes*, 250-1. And see Harold Fey and D'Arcy McNickle, *Indians and other Americans* (New York: Harper & Row, 1970), 123.
31. See note 28.
32. *Loyal Creek Indians v. U.S.*, 97 F. Supp. 426 (Ct. Cl.), *cert. denied*, 342 U.S. 813, 1951. *Osage Nation v. U.S.*, 97 F. Supp. 381 (Ct. Cl.), *cert. denied*, 342 U.S. 896, 1951. For a good review of the issue of interest see Howard M. Friedman, "Interest on Indian Claims: Judicial Protection of the Fisc," *Valparaiso University Law Review*, Vol. 5, 19, 26-47. Friedman is Associate

Professor of Law at the University of Toledo and a former staff attorney for the Commission.

33. See note 4. The Thomas LeDuc article presents a lengthy discussion on this case.
34. *U.S. v. Standard Oil Co.*, 322 U.S. 301, 314, 1947.
35. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on Appropriations for Interior Department and Related Agencies for 1956*, 84th Cong., 1st sess., 1955, 573-80.
36. *Otoe and Missouri Tribe of Indians v. U.S.*, 133 Ct. Cl. 593, 1955. A future scholar may care to explore the precedents here for the affirmative action rulings of the 1970's.
37. See note 20. *Ethnohistory*, 355-6.
38. Shirley Hill Witt, "Nationalistic Trends Among American Indians," Stuart Levine and Nancy O. Lurie, eds., *The American Indian Today* (Deland Florida: Everett Edwards, Inc., 1971), 63.
39. Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (New York: Delacorte Press, 1974), 225-6.
40. *Ibid.*, 222-4.
41. John Kobler, "These Indians Struck It Rich," *The Saturday Evening Post*, Vol. 225, no. 10, Sept. 6, 1952, 132-5.

42. Deloria, *Behind the Trail*, 223.

CHAPTER V

INTERLUDE: THE COMMISSION AND
THE POLICY OF TERMINATION, 1946-1960

A facet of Indian Affairs, parallel in development to the Commission, was the policy of termination. Simply, termination was the title for the plan to end the role of the federal government as legal guardian of the Reservation Indians. Those in favor of termination held that government supervision of the tribes posed "limitations" to the Indian's progress and assimilation. The terminationists intended to "free" the tribes from all bureaucratic control.¹ The movement began in 1946 and by 1948 its adherents had captured the key congressional committees. The election of a sympathetic Dwight Eisenhower in 1952 gave them enough support to pass termination legislation. This initiative marked for Congress another switch in its characteristically vacillant stance on Indian Affairs, and was the second important turnabout in twenty years.

The other major turning point in Federal-Indian relations in the twentieth century was the passage of the Indian Re-organization Act (I.R.A.) in 1934. This landmark legislation recognized the Indian's culture and his right to *self-determination*. The ultimate goal of this act and its framers was assimilation; nearly the same aim as that of their nineteenth century predecessors. It varied in that the Indians were encouraged to accomplish this in their own way and at their own pace, with the *aid* of the government rather than at the *direction* of the government.

Commissioner John Collier expressed the role of the Indian Bureau as "moving from guardian to advisor, from administrator to friend in court."² But Collier urged that federal supervision be maintained until Indians reached a cultural parity with whites. Indian Commissioner William Zimmerman, Collier's successor, followed him on this path but the post-war atmosphere brought new pressures to bear on the reservations.

The concept of "terminating" government control over Indian life, first broached in Congress in the early forties, moved from ideal to action after the War. Its roots were also in the old assimilation policy, but it too differed. In essence it stood assimilation on its head; instead of the Indian departing from the reservation and allowing the government role to wither, the government would withdraw and allow the Indian to wither. The desire to "get the government out of the Indian business" not surprisingly became linked with the movement for the Indian Claims Commission. This alliance of the Commission and termination legislation continued after 1946 but, as the Commission was so quiescent in its first decade, the termination aspect became the area of major stress. It received the attention of the press and upon it Congress pinned its greatest expectations in Indian affairs.

The 80th Congress was committed to reducing big government and the Bureau of Indian Affairs (B.I.A.) became a prime target. Congress used a report of Commissioner Zimmerman, containing an outline of *suggested* criteria for Bureau withdrawal as hard evidence of the readiness of select tribes for termination. The Hoover Commission, set up by Congress in 1947 to report on the organization of the executive branch, strongly stated that "complete integration" of the Indian should be the goal of federal policy.³ Two years later, an updated report of this Commission further recommended that the B.I.A. be

transferred from the Interior Department to a new department of Social Security and Education and that the Indian Claims Commission be attached to it as an appeal board with independent powers of review on Indian claims. Chief Indian Claims Commissioner Edgar Witt decried this proposal as wasteful and nonproductive.⁴ It went no further but the pace of termination quickened. The pressure on Congress was great and the first session of the 80th Congress saw eighty-seven bills to direct the Secretary to sell Indian lands, purchased under I.R.A. provisions, to whites.⁵ By 1950, termination, originally known as "withdrawal programming," had formally been initiated by the B.I.A. Indian lands receded and no help was in sight.

The emergence of Republican power promised a continuance of the terminationist policy. General Dwight Eisenhower's campaign gained support, in part, on the pledge to reduce federal spending. But powerful interests resisted this trend when it affected themselves and much of the pledge was deflected to the less politically potent, especially the Indian. In 1952, the House conducted an extensive investigation of Indian affairs and the Bureau. This inquiry laid the groundwork for, and rationalization of, the move to terminate the tribes. But the political decision for this "administrative" policy was actually made two years before.

In August 1953, the 83rd Congress passed one bill and a concurrent resolution that made termination a statutory rather than merely an administrative reality. House Concurrent Resolution 108, which set the pattern for the termination process, passed with no opposition and was endorsed without debate in the Senate. This was the highpoint of the termination drive. It named thirteen tribes as ready for release from federal supervision and passed termination acts for eight of those by August 1956 on the data collected by Indian Commissioner Dillon Myer. Two

more termination acts were passed by 1958 and the last two followed in the years 1959 and 1962. Public Law 280 permitted state law to supersede federal and tribal law in five states. These five moved to implement P.L. 280 on their own initiative, without consulting the tribes. President Eisenhower criticized this bill but signed it. Commissioner Myer, unlike Collier, was one to follow Congress not lead it in Indian affairs. He wrote to all bureau officials that "we must proceed, even though Indian cooperation may be lacking in certain cases."⁶ This was more in keeping with traditional policy than the Collier administration.

But it was not just Commissioner Myer and a fiscal-minded Congress that plagued the Indians in the early 1950's. The McCarthy days were not those of benign concern for minorities. The Red Scare put a damper on any liberal approach to Indian culture and cast a more than suspicious pall over the Collier days and programs.⁷ The Korean War also tightened the domestic budget and strengthened the hand of those in office in favor of cutting costs. Lastly, in 1954, Arthur V. Watkins of Utah became the Chairman of the Indian Subcommittee of the Senate Interior Committee. Watkins was a conservative and assimilationist and worked to solve the "Indian problem" by termination. He was seen at the time by at least one Indian spokesman, Vine Deloria, Jr., as an arch enemy of Indian interests and a symbol of the new policy.⁸ Watkins, though an advocate of termination, was not an enemy of the Indian, as his later work on the Commission demonstrated.

A familiar pattern re-emerged in mid-century. As outlined by Indian historian, Wilcomb Washburn, we see an aroused Congress cloaking its own interests in a rhetoric of generosity toward the Indian. At the same time, it issued intimidating instructions to the Executive Branch to carry out the new policy with the "unspoken assumption that the

Indians could be cajoled, forced, frightened, or persuaded into recognizing the benevolent intent of the framers."⁹

But by 1954 the momentum for termination had slowed. Indian resistance to rapid termination stiffened and they were unwilling to participate in the pretermination programs. Without Indian support the policy came to a standstill. In 1958, Secretary of Interior Fred A. Seaton, slowed the withdrawal pace. He publicly reassured the tribes by stating his interpretation of House Concurrent Resolution 108 as "an objective, not an immediate goal."¹⁰ His successor, Stewart L. Udall, appointed a task force to review federal Indian programs and it recommended a de-emphasis on termination.¹¹ Indian Commissioners Philleo Nash (1961 to 1966) and Robert Bennett (1966 to 1969) avoided talk of or a stand on termination. The policy died officially when President Richard M. Nixon, in his July 8, 1970 Indian Message to Congress, declared it "wrong" and asked for its repeal.

The Indians largely opposed termination, fearing the loss of their land, which was their sole base of cultural survival.¹² This fear was not unfounded. In July 1947 there were 54.6 million acres of tribal fee lands, tribal trust lands, and individual trust lands owned by Indians, but by the end of 1957 this acreage had declined to 52.5 million.¹³ The bulk of this land was sold to whites.¹⁴ This, plus the one-half million acres lost to the government for war-time needs, wiped out over one-half of the gains in land acquisition stimulated by the I.R.A. The pace of land loss became so alarming that in May 1958 a moratorium on such sales, requested by Senator James E. Murry of Montana, was effected for that session of Congress.¹⁵

In the context of post-War American history the first decade of the Claims Commission emerged as something new yet old. It is impossible to say if the Commission represented the end of the Collier era or the beginning of

that of termination; it stood between. Like other post-War Indian programs it was motivated in part by the overall policy of eliminating the Indian as an unassimilated minority within American society.¹⁶ The persistent claims of the Indians were long considered a hinderance to their cultural integration and the Commission was in part devised to eliminate that particular obstacle. Its passage in 1946, and the ordered list of Indian groups ready for "independence" presented to the Senate in 1947, were twin pillars of the policy of "bureau withdrawal" coveted by Congress. Proponents of the Commission's continuing existence stressed that its awards would help facilitate termination by ending old grievances and staking new beginnings.¹⁷ (In fact, the per capita payments were small and Indian recipients rarely used their awards for furtherance of the Bureau programs or ever intended to.)

But the Indian communities and identity persisted. Congress had tried many times before termination to end the existence of Indian tribes by simple legislative fiat and failed. Tribes once dissolved, often several times, by one Congress were recognized later by another.¹⁸ In fact the Commission itself became an agency for this very thing while trying to accomplish the opposite. Its provisions often liberally recognized as legal entities "any Indian tribe, band or other indentifiable group" and created groups that formerly had not existed. The Commission, enacted in theory to remove a stumbling block to assimilation, in practice helped to redefine "Indianess" for some groups and reawaken cultural pride for all.

If these acts and actions were contradictory and confusing on the one hand they were consistent on the other, for as one historian has observed, the hallmark of American-Indian relations has been the "failure to pursue one goal persistently."¹⁹ And, not surprisingly, as the early 1950's saw the policy of termination in vogue, the late

1950's saw its end and the return to government support. Much of the better side of the American character was submerged in those early years by the McCarthy hysteria and the "reverses" of the Cold War, but it resurfaced. Legal scholar Felix Cohen noted that the Indian, like the miner's canary, "marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith."²⁰ Certainly this is debatable historically, but the Indian has, at times, evoked the best of intentions and rhetoric from varied and sincere corners of America. Within this context the Commission entered its second decade of operation.

NOTES

1. The Termination policy is best exemplified in House Concurrent Resolution 108, 83rd Cong., 1st sess., passed Aug. 1, 1953.
2. Harold E. Fey and D'Arcy McNickle, *Indians and other Americans: Two Ways of Life Meet* (New York: Harper & Row, 1970), 160.
3. *The Hoover Commission Report: On Organization of the Executive Branch of the Government* (New York: McGraw-Hill Book Co., Inc., 1947), 463-73).
4. U.S., Congress, Senate, *Progress on Hoover Commission Recommendations*, 81st Cong., 1st sess., 1949, Rept. 1158, 378.
5. Wilcomb Washburn, *Red Man's Land / White Man's Law* (New York: Scribner, 1971), 82.
6. *Ibid.*, 85. An excellent, short survey of the growth of the termination policy can be found in Theodore W. Taylor, *The States and Their Indian Citizens* (Washington, D.C.: U.S. Government Printing Office, 1972), Chapter IV.
7. Collier had worked during the World War I period in the urban community center movement in New York City where he acquired a strong belief in local

community control. He saw the New Deal Indian program as an opportunity to apply his principles on a large scale. But, to some, his plan reflected more big government and central planning. Graham D. Taylor, "The Tribal Alternative to Bureaucracy: The Indian's New Deal, 1933-45," *Journal of the West*, Vol. 13, no. 1, January 1974.

8. Vine Deloria, Jr. "The War Between the Redskins and the Feds," *The Indian in American History*, ed. Francis P. Prucha (New York: Holt, Rinehart & Winston, 1971), 119. See Watkin's speech in favor of Menominee termination, U.S., Congress, Senate, *Congressional Record*, Vol. 99, Part 7, July 18, 1953. An accurate, but too late refutation of Watkin's speech and documentation can be found in U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearings on American Indian and Alaskan Native Policy*, 92nd Cong., 1st sess., 1971, 107-15.
9. Washburn, *Red Man's Land*, 85.
10. Taylor, see note 6, 65.
11. *The Task Force on Indian Affairs, Report to the Secretary of Interior*, July 10, 1961.
12. The Indian's relation to the land was very personal but whites in the highest level of the government were often attuned to it. See the opinion of the Supreme Court speaking for the Indians in *U.S. v. Kagama*, 118 U.S. 375, 383, 1885.
13. U.S., Congress, Senate, *Memo of the Chairman to the Committee on Interior and Insular Affairs, U.S. Senate: An Analysis of the Problems and Effects of Our*

174 Their Day in Court

- Diminishing Indian Land Base, 1948-1957, 85th Cong., 2nd sess., December 1959, 101.*
14. *The 1961 Commission on Civil Rights Report Book V: Justice* (Washington, D.C.: The Government Printing Office, 1961), 123.
 15. See note 13 xvii. A detailed survey of the effects of termination on one tribe can be found in Gary Orfield, *Report on the Termination of the Menominee Reservation* (Chicago: University of Chicago Press, 1965). For the Klamath's story see Fey and McNickle, note 2, Chapter XV.
 16. Washburn, *Red Man's Land*, 103-4.
 17. Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (Albuquerque: University of New Mexico Press, 1986), chapt. 2.
 18. *Federal Indian Law* (New York: Association on American Indian Affairs, 1966), 466.
 19. Loring B. Priest, *Uncle Sam's Stepchildren: The Reformation of United States Indian Policy, 1865-87* (New Brunswick, New Jersey: Rutgers University Press, 1942), 251-2.
 20. William Brandon, *The Last Americans* (New York: McGraw-Hill Co., 1973), 432.

The Second Decade: Arthur Watkins and Reform 175

CHAPTER VI

THE SECOND DECADE:
ARTHUR WATKINS AND REFORM, 1957-1967

The enabling act of the Commission granted it a ten year life span and did not provide for extension on the contingency that it might not complete its work. During the final debate on the Commission's legislation the framers recognized that the decade allotted for its job was insufficient, but they were also aware of their power to remedy that fault when necessary. Thus, the original time allotted the Commission was not the result of shortsightedness on the part of Congress but of political sagacity. The Act also complied with the legal principle that restricted a too-liberal grant of power and life to "quasi-judicial" agencies. Therefore Congress extended the life of the Commission in 1956, and again in 1961, 1967, 1972, and 1976 because the job was still unfinished. But, with each extension came a growing impatience in Congress with the Commission's slow progress and a resolve to speed the claims process. In 1960, Arthur V. Watkins, an outspoken terminationist, became Chief Commissioner. He greatly increased the efficiency and output of the claims settlements but was still found wanting by an exasperated Congress. The extension act of 1967 removed the incumbent Commissioners, increased their number from three to five, and tightened the procedures. The intent of Congress in the

strong wording of this act was to bring a quick end to a task that had already taken double the time allotted it by the original act. The fact was, though this was never conceded by Congress, that the time span of twenty years (or even thirty as it developed) was not an exorbitant one to resolve the immense and complex backlog of work involved in over 600 claims covering 150 years. The case exhumation and presentation, and the defense in the courtroom context was inherently a lengthy procedure. The Commission could and did tighten its own procedures where lax, but it had to function within the limits set by Congress in its Act, the precedents allowed by its adversary forum, and the always difficult legal issues of Indian law.

The second decade of the Commission's existence began with an attack on its procedures and goals. A hostile article in the *Reader's Digest* titled, "Must We Buy America From the Indians All Over Again?", brought more public attention to the Commission than it had yet received. The author ridiculed the claims and the Commission Act with misleading and inaccurate information.¹ The wide distribution of this magazine brought in constituent mail to the Senators and Representatives and they proceeded to demand an explanation from the Commissioners, though mostly ignorant themselves of the very existence of the Commission, let alone its work. There was little public follow-up but Representative Ed Edmondson of Oklahoma entered a defense of the Commission the following month in the *Congressional Record*. He corrected the errors of the article and praised what he saw as a "noble" piece of legislation. Edmondson assured his colleagues that the small percentage of successful claims awards, less than two percent, did not constitute a threat to the Treasury.² But the theme and misinformation of that article, which had plagued claims legislation from the beginning, continued for the life of the Commission.

Amidst rare public criticism and occasional congressional prodding, the Commission persisted in its work. Its staff had grown to fourteen and operated on a budget of \$132,000 for 1957. However, Chief Commissioner Edgar Witt asked for seven additional staff attorneys to meet the expected increase in work resulting from a \$300,000 grant to the Justice Department to expedite their role in processing Indian claims.³ So far the Commission had completed eighty cases and awarded \$17.1 million on the fifteen claims allowed as valid. With less than 15 percent of the dockets completed, Witt testified that the "work is right up to time practically." But the Commission was not "up to time" for at its rate of settlement another fifty years would be needed to complete its docket, not the five years left to it.

The members of the Appropriations Committees were unsatisfied and sought ways to hasten the work. In 1958, with a budget now expanded by \$45,000, Commissioner William M. Holt told a concerned appropriation committee that there was nothing it could do to speed up the Commission's work. He gently lectured the committee members on the complex legal processes of the claims and the lengthy appeal procedure, and concluded the work "to be moving along rapidly" as possible.⁴ By the end of 1959, the Commission had dismissed 30 more claims; accorded some attention to 466 of the original 852 causes, had a stable budget for two years in a row, and Chief Commissioner Witt declared that his staff was adequate. Again Witt had to explain to Congress that most of the delay was "inherent in these cases" and not the fault of the Commission. But, responding to a query on obdurate attorneys he laid the major portion of blame on the government lawyers. This stirred a controversy never to be resolved but often debated with fervor.

Many in Congress were honestly concerned with the indirect expenses of the Indian claims in the perpetuation of the Commission, but they were also worried about the direct cost. Witt met Arizona Senator Carl Hayden's question as to whether we were buying America back again (probably prompted by the *Reader's Digest* article) with a firm negative and went on: "the truth of the matter is that there are about as many claims that appear before us when Indians receive no compensation whatsoever, as there are claims in which they received too little, and in many they have received only a few cents per acre for land that we found of greater value."⁵ He stressed that the government was only paying additional compensation and, fortunately, without interest. Reiteration on this point was often necessary for freshmen congressmen and those incumbent legislators who refused to believe it.

From mid-1959 into 1961 the work of the Commission languished. In the summer of 1959 Commissioner Louis J. O'Marr resigned and Arthur V. Watkins was appointed to replace him. The following year Chief Commissioner Witt resigned and Watkins succeeded him. T. Harold Scott, an attorney from Boulder, Colorado who had worked for the Federal Trade Commission, took Watkins' seat on the Commission. Watkins had been elected to the Senate from Utah in 1946 and 1952 (he lost to Frank Moss in 1958) and was a member of the Subcommittee on Indian Affairs for that period being its chairman for his last four years in office. He remained in Washington after his defeat as a consultant to the Secretary of Interior until his appointment to the Commission. His appointment was a political one⁶ and many friends of the Indian believed that this advocate of the Termination Policy was unfit for the position. But, as noted above, the goals of Termination and the Claims Commission were seen as parallel for the twenty years before 1960 and Watkins thus was a logical choice.

The testimony of his fellow Senators at his confirmation hearing (nine of them appeared and were most eloquent on his behalf) indicated that he was a man of integrity, a trait he often showed in his tenure on the Commission.⁷

This "period of transition," as Watkins later referred to it, during which the two new Commissioners learned their job, slowed the progress of claims settlement.⁸ The increase of work from the meager output of the early and mid-1950's to the settlement of fourteen dockets per year from 1957 through 1959, with a peak of twenty in 1960, fell off to ten in 1961 and only six in 1962. It did not surpass twenty again until 1965.⁹ But this "transition" effected a striking change in the management and production of the Commission, due, no doubt, to the efforts of the new Chief Commissioner.

After his appointment to the Commission, Watkins lost little time in initiating changes necessary to increase its output. He knew well and shared the feelings of Congress toward the Commission, and its concern about the seeming delay of progress.¹⁰ Watkins had observed when first appointed that the government and Indian lawyers set the hearings by mutual agreement and then notified the Commission. He felt that this leisurely procedure was untenable and planned a regular calendar *controlled by the Commission*. In September 1960 the Commission called the first calendar conference. The participants were told that "justice delayed is often justice denied" and informed that, to end much of the delay, a continuous three-year schedule of hearings would be followed. By this calendar, the commission would hear an average of thirty claims per year and limit continuances to extreme emergencies.¹¹ The effect was not immediate and the Indian attorneys did not rush to schedule their cases, but Watkins declared an end to the loose practice that had allowed up to thirty-five continuances on one case.

With Watkins on the Commission, as member and as Chief, its pace quickened in 1960. In addition to his tightening of the trial schedule he established a definitive program for "compromise settlement," that is, settlement "out of court." There were issues, or whole claims, that were best decided without the long expensive need for a trial. Watkins intended to facilitate this process whenever possible or when mutual agreement seemed likely. Prior to 1960 the procedure for compromise settlement followed that of the Court of Claims; the Commission had no program of its own. The new Chief Commissioner believed that compromise offered "the greatest hope" for finishing the Commission's work more rapidly.¹² Time would prove his optimism only partly justified.

Chief Commissioner Watkins was also very determined to assure finality on the claims in line with the intent of the Act. Along with the procedure for compromise he established one to better inform the Indians of the exact nature of the settlement and gain their unquestioned approval on signed documents. Watkins felt strongly that it was up to the Commission "to see that the Indians themselves, not just the attorneys...knew what kind of a settlement they were having made on their behalf."¹³ Some Indian attorneys were indignant, but Watkins felt that the signatures of Indian representatives must accompany those of the contract attorney and the assistant attorney general. Until this decision the tribes did not participate in the final approval. The Commission was firm and established the "Omaha Rule" to obviate future recriminations in cases of compromise by bringing the Indian voice more into the process of final settlement.

The Commission entered the final year of its second five-year extension with a none too impressive record but with signs of new life. Its staff in 1961 was seventeen strong with a budget over \$205,000, and Watkins asked for

a 40 percent increase in both for 1962. As of 1960, some 125 cases had been disposed and \$42 million awarded. These low annual award totals began to rise rapidly after 1960. The cumulative total to 1959 of \$20 million more than doubled in 1960 and this figure quintupled by 1966. This pointed to a higher final award total than the \$250 million projected by a knowledgeable claims attorney of record in 1960.¹⁴ Nineteen sixty-one was a low point in case-disposal over the previous five years but the award total was five times that of 1959. Watkins was anxious to move ahead and complained that the eighty person staff at the General Accounting Office was behind in its work of gathering the information required by the Commission.¹⁵ Nevertheless the new trial calendar was rigorously enforced. Of the 104 cases set for 1960, eighty-six were heard and only eighteen received continuances for good cause.¹⁶ Five cases, already processed by 1960, matured to awards totaling \$15 million. But the Commission still had the bulk of its work ahead of it: 471 of the 596 dockets remained. (Watkins dropped any use of Witt's figure of 852.) An administration bill calling for another extension was submitted to Congress in 1961. The fight was on again.

Congressional consideration of the bill of extension for the Commission mostly took place in May 1961. It was a short, unheated debate and it appeared that fourteen years of operation had established the Commission's legitimacy, at least among most of the members of the Indian committees. Some Congressmen showed signs of appreciation and even sympathetic understanding of the many agents of delay. But other members of Congress, as before, still revealed their partial or total ignorance of the Commission and its work.¹⁷ All the parties involved, though, concurred that the original time period was too short for the unexpected work load the Commission received and they agreed that another extension was

necessary to give the claimants their "day in court."¹⁸ The Interior committees, nevertheless, flatly rejected the Commission's bill which called for a ten-year extension to finish the remaining 468 cases at a one per week rate. The consensus that emerged was that the growing experience of the Commission, its better accommodations, and the new trial calendar offered real hope for completion by 1967. Some members of the House Committee on Interior and Insular Affairs were less optimistic and clearly saw that this process would probably be before them again soon. More time, these Committee members felt, would only mean more delay and less pressure on the participants to perform. They strongly urged on all parties that a "real effort be made in the course of the next five years to complete as many cases as possible."¹⁹ Reworked bills were then submitted to the Indian committees requesting a five-year extension, expansion of the Claims Commission membership from three to five, and the authorization of the use of hearing examiners to accelerate the work.²⁰

By holding the Commission's renewals to five-year stretches, the Congress intended not to allow it to become a permanent government fixture. Theirs was a sincere desire to retain some semblance of the original Act's intent to create a temporary agency. The problem of giving the Indian his due had to be balanced somehow with giving him his walking papers, that is, ending government supervision. And, what was accomplished had to be done with finality, for the specter of the old jurisdictional acts haunted the Commission's work as it had all earlier efforts at claims settlement. A Senate Committee report echoed two generations of claims rhetoric when it recognized these facts and concluded:

It cannot be stressed too strongly that the Claims Commission Act was passed by

Congress to give the Indians their day in court to present their claims of every kind, shape and variety. Until all these claims are heard and settled, we may expect the Indian to resist any effort to terminate federal supervision and control over them.²¹

The Commission extension act of June 1961, like that of 1956, simply provided a quinquennial extension of the Commission.²² The other suggested amendments could not be agreed upon and were dropped. It was in 1967 that a less complacent Congress would radically alter and try more vigorously to force the Commission to realize its goal of extinguishing itself and its claims docket. Before that, the Commission disposed of 106 more cases, awarded another \$170 million, and incurred several new frustrations.

The third lease on life for the Commission began, as before, with the now usual congressional attack on the Indian attorney. This had almost become a *pro forma* facet of the appropriations hearings. Representative Ben Jensen of Iowa brushed aside Watkins' more knowledgeable statements with the charge that the claims attorneys lived off the Indians. But Watkins, no great friend of the claimants, showed the integrity attributed to him in his confirmation hearing with the forthright reply that the Indian attorneys were "fighters and doing their job well." The Chief Commissioner explained that about 100 lawyers (Jensen insisted that there was a far greater number of greedy attorneys after the "big money") worked for tribes that rarely had money, paid no retainer, and offered no guarantee of a payday that often was delayed fifteen years or more. Through 1962, the work of these lawyers had resulted in only thirty-seven awards versus 105 dismissals. The cumulative total of attorney fees from the victories was nearly \$7.5 million. (This figure represents ten percent, the

maximum fee allowed by law, of the \$75 million awarded through 1962.) These millions, divided among 100 firms and individuals over sixteen years, did not represent the "big money." Watkins sincerely felt that able men got a "good fee for a good gamble."²³ Watkins then retaliated against the constant petty attacks on the role of his Commission and Indian attorneys in securing moneys owed to the Indian tribes. He noted that the 1962 federal budget for Indian programs was \$265 million and charged: "What we award will never be a settlement, will never be a solution to the Indian problem. You can dish it out a lot faster than we can ever enter judgments."²⁴ This honest outburst, flung in the faces of his former colleagues, was necessary but little appreciated at the time. It loomed larger in the next decade.

The early 1960's also saw the establishment of the Revolving Fund for expert assistance loans. This Fund was necessitated by the rulings in the *Crow* and *Northern Paiute* cases of 1961.²⁵ Prior to these cases expert witnesses were sometimes employed by the Indians on a contingent fee basis. This practice was allowed as in other courts, and the testimony was weighed in the light of the financial interest of the witness in the outcome of the case. Even when the attorneys salaried and employed the experts, the fact of the lawyer's own contingency contract disturbed some observers. Suspicion, abuse, and the "temptation toward colored testimony" brought this to a head in the above cases and the Commission ruled against the contingency use of witnesses as contrary to public policy.²⁶ The Commission recommended that Congress make funds available for this cost, which many an impecunious tribe could not bear.²⁷ Congress held hearings on the matter and no opposition to the plan surfaced, but it took little action on the fund for two years.

The new ruling and the congressional delay had its effect on the work of the Commission. The calendar

conference held in December 1962 to program 135 cases over a three year period scheduled only the ninety-six that were ready. Watkins held the Indian's lack of funds responsible for the delay.²⁸ This lax schedule of the Commission brought action in Congress. A bill introduced by Representative James A. Haley of Florida emerged from a sharp committee debate to become law in late 1963. This new law, not funded until July 1964, provided for a \$900,000 Fund for interest-bearing loans to be made available to only those tribes without other funds to employ expert witnesses. Repayment was to be out of awards or to be declared nonrepayable at the discretion of the Secretary of Interior in cases of dismissal. This fund was fully subscribed by July 1966 with half again its amount in applications pending. Some thirty tribes sought loans and Congress doubled the fund total in 1966.²⁹ The work of the Commission proceeded.

The activity of the Commission under Watkins' rule showed, overall, a firm departure from that under Witt. The number of case-disposals, after the "transition period" and a low point of 1962, was almost tripled in 1963. The number of major, non-final case decisions doubled in the same period.³⁰ More than twice the number of awards were made from 1960, when Watkins became Chief Commissioner, to 1964 than in the previous thirteen years of the Commission's life. But Watkins was often discouraged and frustrated, and honest enough to admit it. Appeals on more than one-half of the cases, overwhelmingly by the claimants, slowed the work greatly. On occasion the Court of Claims reversed itself after the Commission had gone ahead on cases based on a previous ruling. This forced the Commissioners to reconsider those cases effected in order to carry out the new ruling and avoid repetition. The problem of impecunious Indians, resulting from the 1961 denial of contingent-contracts for expert witnesses, was not solved until 1964,

and slowed until mid-decade the hopes for a greatly accelerated program. In hearings on his annual appeal for funds, Watkins lamented: "No matter how hard we try to speed up our activities, we find something happens that makes our efforts somewhat ineffectual."³¹

But the Chief Commissioner was not dejected for long and, in spite of the obstacles, the Commission functioned quite well, especially for the claimants. The three-year period from 1964 to 1966 saw more awards (forty-eight) than in the seventeen years previous (forty-five). The \$111 million paid out in those three years was also greater than the total to 1963. At the same time, the number of dismissals was lower than any previous three-year period.³² Watkins was proud of his record and reported in 1966 that the Commission had heard every case the Indians had readied and had the capacity for up to fifty more if the attorneys were prepared. Immodestly, he informed Congress that before his appointment in 1959 only fifteen awards had been made for a total of \$17.1 million, but from 1959 to 1966 sixty-five more were added for \$147 million.³³ One year later, facing the tension of the third extension and possibly fearing for his own tenure, he quoted similar figures. In a very pointed manner, he noted that during Witt's thirteen and one-quarter years, twenty-eight awards were made for \$37.3 million, but under his own chieftainship, a period of six and three-quarter years, seventy-five awards were made for \$163 million. "These figures tell their own story," Watkins continued, "it is one of heavy acceleration in the adjudication process since July 1, 1960. This cannot be successfully disputed."³⁴ This was true, but Congress chose not to dispute but to dispose--of Arthur V. Watkins.

It is interesting to note at this point the change in general attitude. In earlier years, dismissals were stressed; now it was awards. From 1960 to 1967 awards outnumbered

dismissals in every year but two. In the decade before, this was true only in one year. The eight-year period from 1960 to 1967 saw 83 awards to 44 dismissals. The totals to 1959 were 88 dismissals to 17 awards. Behind this change was the fact that the Termination Policy had largely died by 1960. Congress had softened its position on Indian affairs in general and fiscal stringency in particular. In 1960 the new Democratic administration symbolized the return to government spending. President John F. Kennedy spoke out as a friend of the Indian. The fear of an Indian raid on the Treasury continued to trouble only a few diehards in Congress. On the Commission, Watkins became more familiar with the facts of many of the Indian claims and wanted to do justice as he saw it. Commissioner Scott was always liberal toward the Indian cause. The post-1960 goal of the commissioners as they saw it, and perceived Congress to see it, was to settle and pay up, not to defeat and save up.

The congressional debate over the third renewal of the Commission's life in 1967 was by far the fiercest of the three and rivaled that war of words over the original Act. As the end of its twentieth year of operation approached, the Commission still had over one-half of its docket to complete. Some in Congress felt that they had been patient enough and that the Commission had run out of time, finished or not. But more felt that a firmer congressional direction was in order and it was within this much larger group that the debate on the manner of expediting the claims proceeded.

Congressional action on Commission extension began late in 1966. An early bill (S. 3068) called for a simple five-year renewal of the Commission but the Senate was in a get-tough mood and amended it to strictly enforce the trial calendar. The bill passed the Senate in 1966 but did not gain approval in the House. The 90th Congress then took up the question and the debate went down to the wire of the

Commission's expiration. With the need for an extension agreed upon by all parties, the debate focused on three issues; the length of the extension period, the rigidity of the new trial calendar, and the expansion of the Commission membership.³⁵ The debate of 1967 occasioned a thorough revival of all the fundamental issues of the Commission's creation and an opportunity to acquaint many in public and private life with its very existence. This seemed to be necessary. As Chief Commissioner Watkins pointed out: "Indeed, after twenty years I find that, with the exception of members of the Indian subcommittees, there are still many members of Congress who are not very well informed about the Commission and its activities."³⁶

The first issue, that of time, was easily resolved. The idea of only a two-year extension was first considered merely as an emergency measure and rejected in the light of the amount of work that remained to the Commission. Also, the threat of so short a tenure, a Commission report warned, would cause an "immediate exodus of our ablest staff lawyers."³⁷ Another five-year extension period was a foregone conclusion but both Watkins and the Indian Law Committee of the Federal Bar Association felt that a seven-year period would be more realistic.³⁸ Actually, they wanted ten years but half-heartedly pushed for seven, knowing that five had become institutionalized. The other two issues were not so easily disposed.

Congress thought that the statutory imposition of a firm trial calendar was the most expeditious way to hasten the claims cases to final resolution. A House and a Senate bill called for a five-year extension and a new section (27) establishing this calendar. This section provided for a trial date for all pending claims no later than January 1, 1970. If a claimant was "unable or unwilling" to proceed, the Commission was to dismiss with prejudice and thus preclude review. It provided for one six-month extension for good

cause and a stay on this if a compromise was in the process of sincere negotiation. By these measures the Congress expressed its intent to end finally the life of the Commission in 1972 and to require certification from the Commission that all claims would be disposed by that date. And, of course, the requisite disclaimer was added declaring that: "Until all these claims are heard and resolved, we may expect the Indians to resist any effort to terminate federal supervision and control over them." The Senate finally moderated its more stringent stance on the wind-up date but stressed its resolve to ride herd on the Commission. If this work was not finished by 1972 it would be "unfortunate" but the Indian lawyers would "have only themselves to blame."³⁹

The last issue was that of increasing the number of Commissioners, which was yet another attempt to hasten the end. This simple desire for efficiency was complicated, though, by the open expression in Congress to remove Arthur V. Watkins. Debate in the House Committee on Interior and Insular Affairs revealed this intent.⁴⁰ In his bill for extension, Ed Edmondson of Oklahoma called for "new blood" to be added to the Commission with two new members and said further that the present Chief Commissioner should not be eligible for the position.⁴¹ The hostility to Watkins in the House was subtle but unmistakable. It appears that many representatives had settled on the Chief Commissioner as the most handy scapegoat for the seemingly interminable delay of the claims cases. Watkins' inability to answer statistical queries on the Commission's past performance, such as a breakdown of the 133 dismissals to date by year, did not aid his image in hearings.⁴² Edmondson conceded that the Congress must share the blame for the delay, and admitted that Congress was responsible for placing too great a load on too small a

190 Their Day in Court

commission from the start, yet Watkins was to receive the punishment.

Watkins, confident in his record as he knew it and had presented it, fought back. He noted that he found the records of the first thirteen years grossly inadequate and he could not spare the months necessary to tabulate them. The choice confronting him was: compile the record or get on with the cases and he chose the latter. He assured the Committee that the desired information would soon be forthcoming.⁴³ Further, the Commission had moved its quarters three times in its lifetime and only in 1966 did it gain adequate space and equipment. Watkins recalled how Congress had denied his request for hearing examiners and how consequently the work output was substantially slowed. He stressed that the Commission needed more attorneys and staff to hasten its work, but he was firmly against the addition of more commissioners. He claimed that the "new Commission" would cost an additional \$239,000 per year and it would take the new members two to three years to learn the ropes and become effective.⁴⁴ In this opinion the Justice Department concurred: "In what we can hope is the twilight of the Commission's existence this could tend to delay rather than expedite its final determination of these Indian claims."⁴⁵

Congress seemed unafraid of an added expense and demanded more firmness of administration. Committee members in hearings forced Watkins to admit that he had never dismissed a case for lack of prosecution. His explanation that "we just had the feeling that if we did, the Court of Claims would probably set it aside if an appeal were made" was not only honest but accurate.⁴⁶ Regardless, it was not an answer that Congress wanted. When Watkins told a Senate Committee that the Commission was "practically without power to require diligence in the prosecution of claims" the committee disagreed.⁴⁷ Section 9

The Second Decade: Arthur Watkins and Reform 191

of the Act gave the Commission "power to establish its own rules of procedure" and it had, but this vague wording permitted Watkins to do little more than he had done. The new statutory provisions of the renewal act for 1967 finally put teeth into the trial calendar set up by Watkins, but Congress had decided that "new blood" should exercise the new power. Watkins fought well yet was rejected by the lawmakers who hoped that a change of personnel, along with the change in the Act, would bring progress. He resigned on September 30, 1967, nine months before the new law would have forced his replacement. Commissioner Holt was not reappointed and Commissioner Scott, though reappointed, was not confirmed. Both left the Commission in June 1968.

The bill that finally became law on April 10, 1967 was a compromise agreement.⁴⁸ It renewed the Commission for five more years and expanded it to five members; the President would designate a "chairman." The seated Commissioners were to continue in office only until June 30, 1968 unless reappointed by the President and confirmed by the Senate prior to that date. The new law established a firm trial calendar and targeted, with exceptions, 1970 as the final year for the trial of all pending claims.

But hopes and laws of legislators often are defied by the facts. As of March 1967, 347 dockets were pending, forty-two had seen no action at all, and over twenty tribes or bands were without counsel.⁴⁹ In twenty years, some 250 cases were completed, could the remaining 340 be disposed in five? A Department of Interior report early in 1967 saw this as doubtful; there was simply too much work for five years, regardless of the new calendar rigidity, an expanded Commission, or whatever.⁵⁰

In the period under discussion two main legal problems beset the Commission, and both affected its efforts to expedite the workload. One was the confusion

over Clause 3 of Section 2 of the Act. This clause, among other things, allowed claims that would result if dealings between the Indians and the United States were revised on the ground of "unconscionable consideration." In one of the Sioux cases, decided in 1956, the Court of Claims ruled that unconscionable consideration was that which was "so much less than the actual value of the property sold that the disparity shocks the conscience." The Court acknowledged that no exact formula existed to measure the disparity between payment and value and used "very gross" as its guide until 1961.

The "very gross" cases were easy for the Commission to handle, but when the payment approached 50 percent of the value more precision was required. In the *Miami Tribe* case the Court concurred with the Commission that payment of less than half the true value was unconscionable. Then the problems began. When the Commission denied liability of the government, that is when the compensation was more than half the true value, the Court consistently reversed it by finding a smaller figure for the payment or a larger value for the land, or claiming the value figure ruled on by the Commission to be a minimum.

The Court guided the Commission in the 1960's as it had done in the 1950's in the direction of a more liberal attitude toward the claimant. To Watkins it was clear that the court favored, "as a matter of simple justice," payment in all cases where the consideration paid did not measure up to the fair market value. But the Court's conduct "confounded" the Commission and slowed its progress. Watkins recommended in 1966 and 1967, that "inadequate" be substituted for "unconscionable" in the Act by amendment and the government simply be allowed to pay the difference when established.⁵¹ This was never done but the Commission and the Court moved in that direction nonetheless.

The other main issue besetting the Commission was that of "compromise settlements." The original Act allowed for the non-litigatory settlement of claims by the government with the approval of the Commission. The claimants had long been allowed this right under the jurisdictional acts with approval of the Secretary of Interior. In the political arena, the Republican platform of 1956 had urged "the prompt adjudication or *settlement* of pending Indian claims," and the Indian plank of the Democratic platform of 1960 insisted that the claims be "settled promptly whether by *negotiation* or other means, in the best interests of both parties"⁵² [emphasis added]. But the Commission did not approve a compromise settlement until 1960. This late date can be mostly accounted for by the fact that the claims attorneys advanced their strongest cases first and pushed for full settlement. Also, it was longstanding policy of the Justice Department not to make settlement offers but to await them. Possibly, too, as historian Thomas LeDuc has written, this policy reflected the traditional hostility and resistance to these claims within the Department of Justice. Unable to defeat them all, the Department precipitated much footdragging and carried through on the long, expensive litigation process.⁵³

After Arthur Watkins became chief commissioner the Commission inaugurated a policy of encouraging settlement. One-half the cases of 1959 and 1960 were settled by compromise and thirty-two of fifty-one cases from 1961 to 1965. Watkins was encouraged by the efficacy of this procedure.⁵⁴ He related that government and Indian attorneys advised him that possibly over half of the remaining cases could be settled, and he saw a chance of ending the Commission's work "within a reasonable length of time."⁵⁵ Watkins reassured the Senate that the Commission would encourage further settlements.

The Justice Department, also feeling the heat from Congress over its role in prolonging the Commission's life, supported Watkins on the issue of settlement. One Justice official contradicted his own earlier statement that "it was department policy to await offers," and claimed that they were anxious for proposals and did in fact solicit them. Attorney General Ramsey Clark even wrote that they "pushed settlements" to hasten the cases. Another Justice Department attorney observed that more compromises, and thus more speed, would occur in the future, for "if half the State of Oklahoma has been valued by the Commission or the Court of Claims, then we can certainly have a basis to determine what the other half of the state is worth."⁵⁶ They had cause for encouragement. Out of the ninety-four final awards by 1966 for a total of \$194 million, full settlements were negotiated in thirty-eight for \$87 million. Thirty other compromise settlements had been reached on secondary considerations such as offsets.⁵⁷ But, though, settlements affected some savings in time and expense, the benefits proved to be limited because most settlements were reached only after substantial adjudicative work had already been done.⁵⁸

Another thorny issue highlighted in the 1967 debate was the one that had nettled the Commission hearings from its conception to its third renewal--that of the Indian attorney. This time, in keeping with the theme of delay, the attorneys were attacked as the prime agents of procrastination. Watkins, often a defender of claims attorneys, but under fire himself in 1967, held them responsible for the delays of the mid-1960's.⁵⁹ The Justice Department also hastened to name the claimants as the source of the delay that so riled Congress, its paymaster. The Department of Justice's attitude, asserted its representatives, had never been to defeat the claims by delay or otherwise but "merely to make sure that the

tribunal deciding them has all the evidence before it."⁶⁰ As a matter of fact, declared the Attorney General, the department had been the aggressor, contrary to the general litigatory norm where the defendant is the slow party. Department of Justice figures revealed that they had asked for eighty-one cases over and above the seventy-six set at the three-year calendar call in 1962 while the claims attorneys asked for only eighteen. From 1964 to 1967 the claimants asked for triple the extension time for briefing and further preparation.⁶¹ Also, at the calendar call in 1965, Justice was ready with three times the number of cases as were the claimants. Of the 122 appeals to the Court of Claims filed by 1967, 100 were by the claimants.⁶²

The Indian attorneys certainly cannot alone be fixed with the blame. Many devoted men were intimately involved with the these cases since before the Commission's existence. The number of tribes without counsel varied through the years due to expiration of contracts and death of attorneys, but of the 591 dockets in 1967, only six were without counsel.⁶³ This group of men, representing some sixty-five firms, faced many of the same problems as the government plus some of their own. One-third of their number had central offices in Washington, D.C. and the rest were scattered over the country. Four of the largest firms held 100 dockets among them and a dozen individuals divided another 100. The remaining 400 dockets were dispersed among the other fifty.⁶⁴ Some faced the problem of a too small staff and needed to attend to other work to pay their bills, necessitating some footdragging on the Indian cases. Others were delayed mainly by Justice and General Service Administration holdups. To these attorneys, on contingency fee, the accusation of delay by salaried government officials must have been galling.

Yet other problems plagued the claims attorney, whether in large or small firms. Death or illness of key

196 Their Day in Court

people was a disruptive factor in cases covering twenty years. Expert witnesses were limited in time and number. Cases often depended on rulings in other claims for their own continuance. The Commission often held cases up to three years before a decision. Restrictive rulings by the Commission necessitated the time-consuming appeals the claimant's attorneys had to make to properly represent their clients. A survey, taken in 1967 by the National Congress of American Indians, revealed that the claims attorneys were ready with their cases and only delays not of their making kept them from finishing up their work by 1972.⁶⁵ It was a long, arduous, and frustrating path for many of these lawyers and the record of 131 dismissals to 100 awards through 1967 was not an encouraging one. But the over \$20 million in fees derived from the victories was obviously incentive enough for the attorneys to see the claims through. It was a "good fee for a good gamble" as Watkins had said earlier.

To some, though, it was too good. Hank Adams, a member of the Board of Directors of the National Indian Youth Council, considered the \$226 million in award money no "great boon to the Indians," benefiting only a few. He felt the percentage allowed to a "selected band of lawyers and law firms" in fees to be excessive, and noted that it was almost double the \$12 million spent for Office of Economic Opportunity programs on reservations in 1967.⁶⁶ Adams failed to note that the \$20 million in fees was spread over twenty years and thus, on a yearly basis, only one-twelfth of the O.E.O. budget for 1967. The lawyers were limited to a 10 percent maximum fee and, in the very large awards, this was often reduced. (This percentage was far lower than in similar civil cases.) Their fees were not excessive. As to the benefit to the Indians of their awards, this was clearly not the affair of the claims attorneys.

The Second Decade: Arthur Watkins and Reform 197

The placing of blame for delay in these cases was as complex as everything else connected with them. Watkins' defensiveness under great pressure was understandable. He considered his record, compared to his predecessor, as laudable and refused to be singled out for censure. Justice, possibly beleaguered with its seventeen lawyers and twelve clerks arrayed against the sixty-five of the claimants, made its case upon its recent record and not its less impressive past. Nevertheless, it was common knowledge that the lead Government attorney on these claims, Ralph Barney, fought each case tooth and nail and was a lion in defense of the Federal Treasury. But the Lands Division of the Justice Department had shown this stubborn resistance to the claimants long before the advent of the Commission. Their misplaced professional pride reflected the "bureaucratic ethos at its worst" and obscured the benevolent purpose of the Commission. These professionals felt an "irritation at the Indian claimants which seems to be a part of the mental equipment of those in government dealing with Indians."⁶⁷ The charge that Justice, the General Accounting Office, and the Commission moved too slowly and sat on cases had some merit. That they were anti-Indian and purposefully obstructionist is difficult to document without bias. But it can be safely asserted that most of the delay can be largely accounted for by other factors such as the original enormous workload, the lack of sufficient personnel, the use of the adversary versus cooperative conception of the Commission, the mass of data involved and generated, the appellate processes, and the complex interaction of all these elements.

Using the word in its broadest sense, the "trials" of Indian claims settlement were many. The Commission's second decade began with little more promise than its first decennium closed. Under the unaggressive leadership of Edgar Witt, the Commission had completed only 12 percent

of its caseload by 1957. By 1960 some 490 cases still remained on the docket. But, in 1960, Arthur V. Watkins became Chief Commissioner and immediately began a reform program that dramatically boosted the performance of the Commission, doubling its annual output. More importantly, for the Indian claimants, Watkins' tenure witnessed a 50 percent reduction in dismissals and a 500 percent increase in awards. The award total in 1960 stood at \$42 million and at \$226 million by 1967. Watkins could not, though, speed the Commission's work to the satisfaction of the Congress whose irritation grew concomitantly with the length of the life of the Commission. All the parties to the Commission's creation and function contributed to its seemingly slow progress. But Congress, the paymaster, was the only one unwilling to see the prime agents of delay as the construction of the Act of 1946 and the nature of the cases themselves. Congress resented the implication of the former and never understood the latter. So, in turn, the blame was fastened on the attorneys, the bureaucracy, the Commission; and these three, under pressure, were often set against each other. It was frustration all around. Eventually the blame devolved on Watkins and the Commission. Watkins was removed and the Commission redesigned. Twenty years after the dream of "finality," Congress tried again.

The work of the Commission in the 1960's reflected a change in Indian policy from that of the late nineteenth century and early twentieth century. The disregard of tribal rights, characteristic of that period, was replaced by an attitude that the historic injustices committed upon the Indian needed to be redressed.⁶⁸ The Commission, for all its faults, was designed to recognize and deal with those wrongs. Within limits, it continued to do that job.

NOTES

1. Blake Clark, "Must We Buy America From the Indians All Over Again?" *Reader's Digest*, March 1958, 45-49.
2. U.S., House, *Congressional Record*, Extension of Remarks on Hon. Ed Edmondson of Oklahoma, "The Truth About the Indian Claims Commission," Wed., April 16, 1958.
3. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 5189 making Appropriations for Interior and Related Agencies for 1958*, 85th Cong. 1st sess., 1957, 193-98.
4. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 10746 making Appropriations for Interior and Related Agencies for 1959*, 85th Cong., 2nd sess., 1958, 13-20.
5. U.S., Congress, Senate, Subcommittee of the Committee of Appropriations, *Hearings on H.R. 5915 for Appropriations for Interior and Related Agencies for 1960*, 86th Cong., 1st sess., 1959, 43-50.
6. *New York Times*, Jan. 29, 1959, 10.

200 Their Day in Court

7. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearings on the Nominations of Arthur V. Watkins to be Associate Commissioner of the Indian Claims Commission*, 86th Cong., 1st sess., Aug. 11, 1959.
8. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 6345 for Appropriations for Interior and Related Agencies for 1962*, 87th Cong. 1st sess., 1961, 485-96.
9. All figures of final settlements come from the *Annual Report* of the Indian Claims Commission and will not be noted hereafter.
10. Watkins expressed this concern to Chief Commissioner Witt when first appointed to the Commission in 1959. Witt told him that he had once felt the same way and had discussed it with his sponsor, Senator Tom Connally. Connally told Witt not to worry and to "let nature take its course," for more speed would necessitate government borrowing of interest. There is no direct proof of Witt's deliberate obstructionism or collusion with the Senate besides Watkins' reminiscence, but Witt's record makes a strong circumstantial case. U.S., Congress, House, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearings on H.R. 2536 and Related Bills to Terminate the Indian Claims Commission and for other purposes*, 90th Cong., 1st sess., March 1967, 64.
11. U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearings on S. 307 A Bill to Amend the Indian*

The Second Decade: Arthur Watkins and Reform 201

- Claims Commission Act of 1946 as Amended*, 90th Cong., 1st sess., February 1967, 20.
12. See note 11, 15-18.
 13. See note 10, 42-3.
 14. Robert W. Barker, "The American Indian, Federal Citizen and State Citizen," *Federal Bar Journal*, Vol. 20, Summer 1960, 246-7. Barker's pessimistic estimate was surpassed by 1968.
 15. See note 8.
 16. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 10802 for Appropriations for Interior and Related Agencies for 1963*, 87th Cong. 2nd sess., 1962, 773-88.
 17. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on Appropriations for Interior and Related Agencies for 1962*, 87th Cong., 1st sess., 1961, 876-91.
 18. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Amending the Indian Claims Commission Act*, 87th Cong., 1st sess., May 9, 1961, Rept. 208 to accomp. S. 751. And see U.S., Senate, *Congressional Record*, 87th Cong., 1st sess., Feb. 2, 1961, Vol. 107, Pt. 2, 1618-19.
 19. *Ibid.*, S. Rept. 208.
 20. Compare Senate Rept. 208 to House Rept. 2719 on H.R. 5566 of the 84th Cong., 2nd sess., July 16, 1956 for similar rejection of hearing examiners. Also see

202 Their Day in Court

- U.S., Congress, House, Committee on Interior and Insular Affairs, *Amending the Indian Claims Commission Act*, 87th Cong., 1st sess., May 23, 1961, Rept. 424 to accomp. H.R. 4109, and U.S., Senate, *Congressional Record*, 84th Cong., 1st sess., 1955, Vol. 101, Pt. 9, 11019.
21. Ibid.
22. 75 Stat. 92, June 16, 1961.
23. U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on Appropriations for Interior and Related Agencies for 1963*, 87th Cong., 2nd sess., 1962, 1402-13. Also see Note, "Indian Claims Commission: Discretion and Limitation in the Allowance of Attorneys' Fees," *American Indian Law Review* Vol. III, no. 1, 1975, 115-135.
24. Ibid.
25. *Crow Indians v. U.S.*, Ind. Cls. Com., Docket 54, 29 May 1961; and *Northern Paiute v. U.S.*, Ind. Cls. Com., Docket 87, 3 July 1961.
26. U.S., Congress, House, Committee on Interior and Insular Affairs, *Establishing A Revolving Fund From Which the Secretary of Interior May Make Loans to Finance the Procurement of Expert Assistance by Indian Tribes in Cases Before the Indian Claims Commission*, 88th Cong., 1st sess., July 1, 1963, Rept. 492 to accomp. H.R. 3306.
27. See note 16.

The Second Decade: Arthur Watkins and Reform 203

28. See note 26.
29. 77 Stat. 301, Nov. 4, 1963; 80 Stat. 814, Sept. 19, 1966; and P.L. 93-37, May 24, 1973. The fund was raised to \$2.7 million in 1973.
30. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on Appropriations for Interior and Related Agencies for 1964*, 88th Cong., 1st sess., 1963, 1217-23.
31. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 10433 for Appropriations for Interior Department for 1965*, 88th Cong., 2nd sess., 1964, 1104-1113.
32. An analysis of the summary chart, giving a breakdown of cases by year from 1947, in the *Annual Report* of the Indian Claims Commission reveals these facts.
33. U.S., Congress, House, Subcommittee on Indian Affairs, *Extending the Termination Date of the Indian Claims Commission to April 10, 1969*, 89th Cong., 2nd sess., Aug. 6, 1966, Rept. 1854 to accomp. H.R. 5392.
34. See note 10, 72.
35. U.S., Congress, Senate, Subcommittee on Indian Affairs, *Terminating the Existence of the Indian Claims Commission and for other purposes*, 89th Cong., 2nd sess., Sept. 6, 1966, Rept. 1587 to accomp. S. 3068. And see note 11, 1-4.
36. See note 11, 8.

204 Their Day in Court

37. See note 10, 8.
38. See note 11, 38.
39. U.S., Congress, House, Committee of Conference, *Amending the Indian Claims Commission Act*, 90th Cong., 1st sess., April 6, 1967, Rept. 179 to accomp. H.R. 2536.
40. See note 10, 115-17.
41. *Ibid.*, 14.
42. *Ibid.*, 80.
43. *Ibid.*, 87-88.
44. *Ibid.*, 7, 89; see note 11, 36.
45. *Ibid.*, 37.
46. *Ibid.*, 82.
47. See note 11, 35.
48. 81 Stat. 11, April 10, 1967.
49. U.S., Congress, House, Subcommittee on Indian Affairs, *Amending the Indian Claims Commission Act*, 90th Cong., 1st sess., March 16, 1967, Rept. 132 to accomp. H.R. 2536.
50. See note 11, 4.
51. See note 10, 53-56.

The Second Decade: Arthur Watkins and Reform 205

52. Virgil Vogel (ed.), *This Country was Ours: A Documentary History of the American Indian* (New York: Harper & Row, 1972), 270-77.
53. Thomas LeDuc, "The Work of the Indian Claims Commission under the Act of 1946" *Pacific Historical Review*, Vol. 31, no. 1, February 1957, 15.
54. See note 11, chart on 47.
55. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 6767 for Appropriations for Interior Department for 1966*, 89th Cong., 1st sess., 1966, 631-35.
56. See note 10, 30-31.
57. See note 11, 74.
58. *Annual Report of the Indian Claims Commission*, 1973, 2.
59. See note 35.
60. See note 10, 29.
61. *Ibid.*, 12.
62. See note 11, 67.
63. See note 10, 27.
64. *Ibid.*, 207-10. The four firms with the most cases were: Wilkinson, Cragun and Barker, Washington, D.C.; Hoag and Edwards, Duluth, Minnesota;

Weissbradt, Weissbradt, and Lif tin, Washington, D.C.;
and Paul M. Niebell, Washington, D.C.

65. Ibid., 95-99.

66. Ibid., 90.

67. Wilcomb Washburn, *Red Man's Land/White Man's Law*
(New York: Chas. Scribner & Sons, 1971), 116.

68. Wilcomb Washburn, (comp.) *The American Indian and
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York: Random House, 1973), 2536.

CHAPTER VII

EXPANSION, REORGANIZATION, AND "FINAL" RENEWAL: 1967-1978

With the renewal act of 1967, Congress forcefully declared its intent to finalize the Indian claims and end the Commission. To accomplish this goal Congress expanded the Commission, guaranteed it a change of personnel, and more rigidly directed its work schedule. Nevertheless new problems arose. In a brief revolt, short-term chairman John Vance attempted to restructure the Commission and failed. Rulings that were too liberal, in the opinion of the Justice Department, promised to complicate and lengthen the Commission's docket. And the dormant accounting cases surfaced to befuddle all the parties involved in their settlement. However, under assiduous congressional guidance, specifically by the Indian subcommittees, the Commission did indeed perform in an impressive fashion, accomplishing in five years 63 percent of the work total compiled in the previous twenty years. Congress was so struck that in 1972 it benevolently agreed that another renewal was a necessity but decreed it to be the last and further tightened the procedural strictures. The Commission did not complete its task and left a still active docket as a legacy to the courts.

The third decade of the Indian Claims Commission began on April 11, 1967. There was little for its members to

herald besides the fact of its renewal. The act of extension in 1967, in effect, made the three incumbent commissioners lameducks. The enlargement of the Commission and its turnover of membership dominated its activities for over two years after the renewal of April 1967. Chief Commissioner Watkins retired in October 1967, nine months before the date set for new appointments or a reappointment he knew was not for him. This left Commissioners William Holt and T. Harold Scott without a chairman and the Commission without the necessary three members for a quorum.

Three new men were appointed to the Commission in December 1967, and the year 1968 opened with the full complement of five commissioners as required by the extension act of 1967. But the new trio was inexperienced and the President designated no chairman until March. One year of the third five-year renewal thus passed in confusion and reorganization; the same period that Congress had strongly expressed its will to see the Commission wind up its work. About 40 percent of the task was completed in the previous twenty years; the remaining 60 percent was targeted for extinction in the next five. By early 1968 the chances for this seemed as remote as they were in the 1946 projection.

Nevertheless, the congressional mandate for "new blood" had been fulfilled--three-fifths of the expanded Commission was newly appointed by 1968. These positions were filled by John T. Vance, Richard W. Yarborough, and Jerome K. Kuykendall. Vance had been an attorney in Montana and was on the faculty of the law school at the University of North Dakota when appointed to the Commission. In his statement to the Senate confirmation committee he said that he could "bring no expertise on Indian problems as such" to the Commission but that he believed himself qualified. This seeming deficiency had not

affected the appointment of his predecessors, and since his other credentials met the requirements of the Act of 1946, he was confirmed. Yarborough had practiced law in Texas before becoming a legislative assistant to his father, Senator Ralph W. Yarborough, in 1958. Kuykendall was a Seattle attorney in private and public practice from 1932 to 1953. From 1953 to 1961 he served as Chairman of the Federal Power Commission but returned to private practice in Washington, D.C. until appointed to the Indian Claims Commission.¹ It was January 1968 before the Commission began operating with its full complement and in March, Commissioner Vance became chairman. Three months later, the unrenewed terms of Commissioners Holt and Scott expired leaving the three newcomers with a bare quorum.

It was almost a year before the Commission returned permanently to full strength. Margaret Pierce became a fourth Commissioner in October 1968. Pierce spent most of her legal career with the federal government and was the law clerk and court reporter of decisions for the Court of Claims from 1948 until her appointment. She was, without doubt, the most qualified appointee to the Commission. She had done most of the Indian work for the Court of Claims after 1950 and "cut her teeth" on the Alcea Band of Tillamooks case. When the appeals from the Commission began to reach the Court they were turned over to her and she continued to assist in most of these until becoming Reporter of Decisions in 1959.² Parenthetically, Pierce was questioned the longest and most intensely of the five new appointees and the tone of her hearing made it obvious that sex was the restive factor. (A five and one-half month "recess appointment" was given to ex-Governor of Maryland Theodore R. McKeldin in November 1968.) In May 1969, Congress appointed Brantley Blue the fifth permanent Commission member. Blue had practiced law in Kingsport, Tennessee and had been a city judge there before his

appointment. He was, having Lumbee ancestors, the first Indian member of the Commission.³ Jerome Kuykendall, a Republican, was soon after, in June 1969, appointed chairman in place of Democrat John Vance to square with the new administration and for other reasons to be discussed later. This last alteration rounded out the Commission's composition, which remained in effect until the demise of the Commission on September 30, 1978.

The new commissioners were strongly encouraged by Congress to complete their work. Chairman of the Senate Committee on Interior and Insular Affairs, Henry M. Jackson of Washington, anxious that the nominees get the "mood" of Congress, told them that the "job must be finished by 1972 or there is going to be trouble." He offered the aid of his committee to help in any way possible but warned that no further extensions would be considered. Arthur Watkins could not get anything "jarred loose," said Senator Clinton P. Anderson of New Mexico, we "hope you will surprise us." Nominee John Vance, obviously new to the claims business, saw no reason why he and his colleagues could not "handle this matter with dispatch and within the time set by the Senate."⁴ During her confirmation hearing, Margaret Pierce was also exhorted to work hard and she affirmed her intent to do so. Senator Frank E. Moss of Utah told the first woman nominee to the Commission: "I have great confidence in the resources of ladies and lady lawyers when they set their mind to get something moved. And if I felt that you had a set of mind that was to clean this thing up and get the backlog moved along, then I would vote for you with the greatest alacrity."⁵

Surprisingly, the "new Commission," in the midst of the sweeping personnel changes, managed to reorganize some aspects of its procedure and move, for the fourth time, to larger quarters to accommodate its expanded staff. Five more attorneys were approved to serve the two new

Commissioners and the 1967 budget of \$394,000 grew to half a million in 1968 (90 percent of the budget was expended for salary and personnel benefits required by law). This reorganization did cause a lag in case work according to Commissioner Scott's testimony in early 1968.⁶ In fact, case disposal had dropped from an all time annual high of 34 in 1965 to 14 in 1966 and only 9 in 1967. But the preparatory work, largely done by the staff attorneys, was still being vigorously prosecuted. This was born out when, in 1968, twenty-six dockets were completed.⁷

The new procedures adopted by the Commission were largely responsible for its increased output. The Commission completed the trial calendar called for in the extension act of 1967 in early 1968. It then established, in January 1968, the office of Chief Counsel to supervise and correlate the work of the professional staff of nine attorneys. On July 15, 1968, the amended General Rules of Procedure became effective. The Commissioners were aided in this revision of the procedures by an *ad hoc* committee of the plaintiff's and the Justice Department attorneys who had practiced before the Commission. The new rules clamped down on extensions, limited time for oral arguments, and made several other minor changes for efficiency. Also, two important major changes were made. Prior to 1968 more than one Commissioner was generally present at a trial. Under the new rules only one was required in attendance, which allowed his colleagues to attend to other duties or hear other cases. The second major change was the increase of pretrial conferences and procedures to shorten the actual trial. Expert witnesses were required to submit written testimony in advance and not to reiterate at the trial but proceed directly with the cross examination.⁸ The Commission then, in the post-trial procedures, when possible, informed the parties of the central issues and how they should be decided, and provided a basis for a

negotiated settlement. When the attorneys' briefs and proposed findings of fact were finally submitted, the Commission, sitting *en banc*, heard the oral arguments. A case commissioner then reviewed the material and, after examination by the other commissioners, his findings of fact, conclusions and opinions were issued. Appeals usually followed and often necessitated more work. Briefly, this was the basic, revised procedure of the Commission. It was still a tedious practice.⁹

The new commissioners did their best to streamline their work but many aspects, such as the presentation of the enormous documentary evidence and its examination, remained a lengthy process. Chairman John Vance, in 1969, decried that Congress had directed his Commission to adjudicate more claims by 1972 than were completed in the previous twenty-two years. He told an appropriation committee that the Commissioners "now certainly" worked fifty hours or more per week. They *might* finish by 1972, though, with twenty more staff lawyers to help them hold the 800 more hearings required by the regular Commission procedure.¹⁰ But it was precisely this procedure, no matter how efficiently made to function, that Vance had come to see as the real cause for the excessive years of the Commission's life. With his plea for twenty more lawyers, Vance really meant twenty investigators to staff the dormant Investigation Division of the Commission. Vance intended to alter drastically the whole direction of the Commission.

John T. Vance was appointed Chairman of the Commission on March 19, 1968 by Lyndon Johnson. Soon after his appointment, he decided that the entire role of the Commission had been misconstrued when it was constituted as a court. He noted that the Act did not require or even imply this construction or the use of adversary proceedings, the "same tortured and archaic procedures" as those used

prior to the Commission.¹¹ This was true; predecessor bills had dropped the word "court" after 1935. The Commission bill of 1946 purposefully incorporated an investigation division (Section 13b) to "make a complete and thorough search for all evidence affecting each claim." Soon after the Commission was established it activated the Investigation Division with a chief investigator and one attorney, later raised to two, as staff. Two years after the Division's creation its chief resigned and was never replaced. Hereafter, the attorneys hired were misleadingly designated "attorney-investigators" but did little investigative work of the nature implied in Section 13b. In five early cases, limited reports were made up by the Division but nothing afterwards. This function of the Commission was totally ignored by the Commissioners until the mid-1960's. Furthermore, Congress, in its almost total ignorance of the Act, as stressed before, showed itself to be unaware of Section 13b or its potential value to the cherished goal of rapid claims settlement.

In mid-1965, the Chairman of the House Subcommittee of Indian Affairs, James A. Haley, was alerted to the use of this division. In a letter to the Commission, Haley wrote that during deliberation in his subcommittees on the dispersal of a claims award, the question of the "adequacy or inadequacy" of a Commission investigation arose. He had been on the Committee since 1953 and declared that his was the first time he had heard of any mention of claims investigation by the Commission. (Had he never read the Act?) He requested information on Section 13b.¹² Watkins responded that he had been advised to leave the long defunct division rest because the Indian and the government attorneys insisted on their own investigations.

To buttress the correctness of the early direction of the Commission in this matter and his own continuance of

the adversary procedure, Watkins volunteered a brief history of the Division and his own opinions. He revealed that by the time the Commission was "ready for business" most of the experts were contracted by the claims attorneys or the government to prepare their cases. It was surmised at the time that 100 extra personnel would have been needed by the Commission to run an investigation division and their work would only duplicate that of the General Accounting Office at a cost of \$1 million per year. Also, the few attorneys in the Investigation Division were not qualified to do the work of experts. Watkins related that the early Commission saw Section 13b as an "unnecessary waste of effort and money." At an early point, Felix Cohen, solicitor for the Bureau of Indian Affairs and author of Section 13b (along with former Secretary of Interior Harold Ickes) was consulted. Cohen agreed that the section was probably not needed.¹³

The Court of Claims did not agree with the Commission on this issue in the early days. In 1953, in the *Pawnee Indians v. U.S.* case, the Court held that a Commission investigation might be necessary at times, as in the *Pawnee* case, to supplement the record and do justice. But the ruling left such action to the discretion of the Commission and nothing followed because such action did not fit the interpretation the Commission had construed from its Act, that is, to conduct itself as a court and to *hear evidence, not to develop* it. Watkins concurred in this and cited two sections from the Act to back up his point. Section 2 mentioned that all the claims might be "heard and determined by the Commission notwithstanding any statute of limitations or laches, but allowing all other defenses shall be available to the United States." Section 15 assigned the Attorney General or his assistants to "represent the United States in all claims" and granted him the authority to compromise for a settlement. To Watkins, these sections

"undoubtedly provided for an adversary adjudication much after the manner of all proceedings in the Court of Claims in which there is only one defendant, to witt; the United States." Watkins made a strong legal and practical argument. He then added that the Indians and their attorneys would be naturally suspicious of any investigation not under their own control and that there had been no demand for information from the Division, manned by one token "investigator" in 1965. He also remarked that a "few Indians have mentioned it to us recently, but when we have explained the situation to them they seemed to be satisfied."¹⁴

In 1968, John Vance reactivated the Investigation Division and intended to make it the heart of the Commission. He believed that the "bewildering series of hearings on title, value, offsets, attorneys fees and all the motions any party chooses to present" had unnecessarily complicated the task and greatly lengthened the life of the Commission. It had "become part of the problem it was created to solve."¹⁵ The proper restructuring, thought Vance, would end this confusion and allow the Commission to finish its work quickly. But the budgets allowed Vance did not provide for an Investigation Division revival, and it stagnated with a one-man staff aided by law students in the summer. Vance hoped to use it where no attorney represented a claimant, on the few old dormant cases to check validity and recommend dismissal or trial, or to aid claimants in gaining legal help.¹⁶ However, these inactive claims were fewer than a dozen and the arguments presented by Vance and his investigator to Congress for five more men and \$200,000 were unconvincing.¹⁷ The matter ended when Vance was replaced as Chairman by Commissioner Jerome K. Kuykendall in July 1969. Kuykendall did not share Vance's views on this issue and the Division was shelved again, forever.

216 Their Day in Court

But the debate over the Division persisted through 1970. All of the other four Commissioners were against Vance's position. Brantley Blue thought it good in theory only. He found, in discussions with all parties, that Watkins' prior stance was correct: both sides wanted their own experts and a courtroom presentation. Indian attorney Glen Wilkinson submitted that whatever its official name, the "Commission was designed to be a court and in it the Indians were intended to have their day." The National Congress of American Indians agreed. Most importantly, the new Chairman, Jerome Kuykendall, though seeing a secondary and supplementary role for the Division, did not believe that the Commission should divert its "major efforts from the primary task of adjudicating the cases on the basis of the evidence presented by the parties."¹⁸

In the face of widespread repudiation of his reorganization plan, Vance continued to stand by his earlier statements. He rejected the assertion that he wanted to deny the Indian his day in court and charged instead that the delay of adjudication had sent many a claimant to his grave unpaid.¹⁹ His was a lost cause and Kuykendall's popular stance prevailed. In fact, the justice of either position was long past meaningful debate. As one acute observer put it:

Because of the momentum which the Commission had established in its then twenty-three years of operation and of the preference by claimants that all cases be handled in the same manner, the confusion which would have resulted from structural reorganization in 1969 might have further prolonged the Commission's life and would have undermined some of the Commission's legitimacy. The time had passed when it would have been possible to create a

Expansion, Reorganization, and "Final" Renewal 217

Commission most appropriate to its purpose.²⁰

Under a new chairman, and with all plans for drastic realignment behind it, the Commission moved ahead with its still formidable workload. By July 1, 1969, the Commission had finished 51 percent of its work. In that year the five commissioners had eleven attorneys on the professional staff and a budget of \$619,000. The work output continued to rise from 1968 and the completed dockets for 1969 reached a new single-year high of forty-nine. The next year the awards total finally surpassed that of dismissals, 163 to 159. In 1970, with a budget now \$850,000 and five new lawyers on board, Chairman Kuykendall asked for five additional attorneys and a \$150,000 more to cover the added expenses.²¹ He complained of "tough, recruitment," though Vance disputed him, and pledged not to lower standards just to fill a vacancy. We need more attorneys, but competent ones, said Kuykendall, and the Commission's staff was not a "sinecure for the fatigued and fatuous."²²

In 1970, Kuykendall continued the reorganization of procedure. The Commission conducted a study of its accomplishments and future work needs. This had never been done before in an analytical manner. Kuykendall rightly saw that the Commission, as well as the Congress, never accurately knew the extent of its workload. This analysis was completed and made available to Congress and the Bureau of the Budget.²³ The problem then arose that though this analysis helped to define the overall labor picture its wording in legalese clouded its findings. The less precise, simpler language of earlier testimony--"awards and dismissals," was broken down into "case phases" and "substantive decisions." The explanation of the docket before Congress by Chief Counsel to the Commission Harry

E. Webb, Jr. was representative and is worth quoting at length.²⁴

Mr. Webb. These figures that we have supplied to the committee today are the first real accurate set of figures which this committee has had, and while I can't speak to what Commissioner Holt at the time had reference to, our present situation is totally accurate, insofar as it can be made.

Our figures, if they are properly read and understood, indicate that there are actually about 243 cases which we could be charged with, because of consolidations.

We have one situation in which there are 38 docket numbers involved. Now with that decision, we will remove 38 docket numbers from our count, you see.

As the chairman has pointed out, we have tried to be honest, we have had to use different sets of figures. Case phase decisions, substantive decisions, docket numbers, all of these are related; they are all important and they all must be considered, but they must be understood to be appreciated.

And I would be happy to meet with your staff later, if I may, and explain exactly how we arrived at these.

Senator Burdick. Well, let us work backwards, then. How many cases have you completely terminated, so far this year in 1970?

Mr. Webb. We have terminated 40 cases.

Senator Burdick. Now are these--

Mr. Webb. Case phases, sir.

Senator Burdick. Let us talk about cases.

Mr. Webb. In final judgments?

Senator Burdick. Claims, claims, filed. How many final judgments in the last four months?

Mr. Webb. I am sorry, sir. May I have a minute to find the number and make sure I have it right? There are 14 final awards in 1970 from June 30 of last year to date.

Senator Burdick. No appeals pending, and they are through.

Mr. Webb. No, sir.

Senator Burdick. No appeals pending--

Mr. Webb. Excuse me, sir. Excuse me. In the year 1969, we have a total of six consolidated cases which are on appeal.

Senator Burdick. All right, then six of the 14 aren't settled.

Mr. Webb. No sir; they are settled as far as we can settle them at the moment.

Senator Burdick. But they may come back to you.

Mr. Webb. That is right, sir; they may.

Senator Burdick. I know. I am trying to find out when they are completely concluded, and judgment is final. That is what I am trying to find out.

Mr. Webb. Yes, sir.

Senator Burdick. That is the only way we can gage this thing. All right, the next year, from 1967 to 1968, we had 23 cases. How many of those are final?

Mr. Webb. There are 16 of those that are actually final awards at the time.

Senator Burdick. And the preceding year, the seven, are they final?

Mr. Webb. Yes, sir.

Senator Burdick. They are final. Then we have to subtract the number of those still pending and on appeal from this list. You think you can finish this in another extension of 5 years?

Mr. Webb. I would be willing to say that I think we can, sir.

Senator Burdick. When you have only got half the job done in 23?

Mr. Webb. The difficulty in the past 23 years, I think, has been fairly well overcome, Senator. I think that with the staff that we are entitled to get, as of the 1st of July of this year, assuming that we are entitled to it, and with the fact that we have gotten so many of these docket phases into a position where they can become final, that I feel we are going to be able to do it. I certainly would--

Senator Burdick. If you will read the record of 1967, we heard the same thing at that time.

Mr. Webb. Yes, sir.

Senator Burdick. "We have got them in position, and we are ready." But we haven't.

Maybe the Congressmen understood this colloquy, but it cannot be known for certain.

Significantly, in 1970, Chairman Kuykendall told a Senate hearing that the Commission could not finish by 1972. But he tentatively told them that with the 1971 budget allowance for twenty-one lawyers and a firm adherence to the proposed schedule, they could finish by 1976. Five more years were necessary.²⁵

In 1971 the Commission's legal staff reached twenty-one and its budget one million dollars. It had completed forty-four more dockets since 1969 and had adjusted its progress "at a rate consistent with completion" by April 1977.²⁶ Kuykendall told the House Indian Subcommittee

that the "new Commission" had determinedly attempted a crash program in 1968 to finish by 1972 but staff shortages and delays in the General Services Administration and the Justice Department made it impossible. But, said the Chairman, since 1970 productivity was high and the prospect of completion by 1977 was very good.²⁷ He cautioned that non-renewal would mean that "those tribes who had cases not yet completed would get nothing on those claims;" about fifty tribes would not get their day in court.²⁸

As the Commission entered 1972, its last year of operation by the renewal act of 1967, the movement begun in 1970 for another extension gained momentum. The record stood at 164 dismissals and 182 awards for \$410 million; 264 cases were still pending. The Commission had forty-two employees and a budget of \$1,045,000 for 1972, a far cry from the \$85,000 of 1948 or even the \$180,000 of 1960. Chairman Kuykendall told the Senate Appropriation Committee that he "hoped" the Commission could finish in another five years.²⁹ What had previously been a vain hope was finally a possibility. The Commission's pace had indeed picked up. More dockets were completed by monetary awards from 1968 to 1972 than were made during the entire prior life of the Commission (102-100). The claimants were the beneficiaries of this period, because dismissals also favored them, 44 to 131.

The debate over the fourth renewal of the Commission was short and comparatively simple. It might have become bitter and extended as in 1967 on the ever pressing issue of the Commission's lifespan, but it did not. The new Commissioners were demonstrably competent and advanced their work quite well by complying with the calendar directed by the Act of 1967. Men like Quentin Burdick of North Dakota, who had voted against renewal in

1967, were in favor of renewal in 1972 for they saw it as the final extension.³⁰

The bills of renewal left little doubt as to the future of the Commission. Two similar bills were introduced in Congress, varying only in minor points. The House Committee on Interior and Insular Affairs considered allowing the Commission to end in 1972 and transferring all cases to the Court of Claims, but it concluded that such action would result in delay and not save any administrative expenses. It was willing to extend because the renewal bill provided for (1) automatic transfer of remaining claims, if any, to the Court of Claims in 1977, (2) dismissal with prejudice of dilatory claims, (3) progress reports to each session of Congress, and (4) yearly appropriations hearings before the Indian Committees. This bill was an administration measure worked out by the Commission and the Office of Management and Budget. With a few minor amendments to enforce calendar compliance it was accepted. Congressional intent was pointedly expressed that this renewal would be the last. "If delay on the part of the government threatens to defeat this policy, the Committee on Interior and Insular Affairs expects to be notified at the earliest opportunity." Congress intended to tighten further its scrutiny over the Commission's work.³¹

One source of delay that threatened to slow the Commission's progress more than any other was that of the "accounting cases." These claims, briefly discussed previously, involved some fifty cases that hinged on a government accounting of the use of Indian trust funds. The record of these funds usually covered many decades and involved thousands of financial transactions. The Justice Department had, as a matter of form to determine offsets, requested accounting reports on 578 claims since 1946. This work was done by the General Accounting Office (G.A.O.)

to 1965 and the General Services Administration (G.S.A.) afterwards and was completed by September 1971.³² When the numerous figures were totaled and arrayed in appropriate accounting form, the legal question then became whether the various summary expenditures charged against the Indians were proper. For example, did the government follow the *Menominee Rule* and expend money from non-interest-bearing funds before interest-bearing funds. The amount to make these funds "whole" for monies improperly spent was the basis for a money judgment. But, these claims had been pushed by plaintiff to the end of the docket in favor of the more familiar land claims and were neglected until the late 1960's. Even Senator Burdick, a long-time member of the subcommittee on Indian Affairs, met their appearance with surprise in 1972.³³

As it stood in 1971, the accountings already completed, the Commission could have dealt with them despite their complexities. But in 1966, a ruling in the *Southern Ute* case expanded the scope of these claims. Until this decision the accountings were required only up to 1946 in compliance with the Commission's Act that forbade consideration of any claim accrued after 1946. Nevertheless, the government had brought its reports up to 1951 because most of the records were located in Washington, D.C. and were complete from 1795 to 1951. The *Ute* decision, affirmed by the Court of Claims, held that the accountings must be updated from 1951 to be current with the date of trial, and in a more expanded accounting procedure.³⁴

This ruling, bitterly contested by the Justice Department, presented a potentially "insurmountable burden" to the G.S.A.³⁵ The records subsequent to 1951 were mostly in federal record centers in the Mid and Far West and in field offices of the Bureau of Indian Affairs. Also, the number of specialized personnel in the G.S.A. needed to handle this burden was "woefully inadequate."³⁶ When the

G.S.A. received this job from the G.A.O. in 1965 the work had been ongoing for forty years but was scheduled to end in six. The G.S.A. met this schedule and finished the ninety-six remaining petitions plus the nineteen added after 1965. It did this with its own personnel and the thirty-seven experts that transferred from the G.A.O. On schedule and with a declining workload on a terminal job, the G.S.A. allowed attrition to reduce its staff. Its director may have thought that the Justice Department would win its appeal on the matter to the Supreme Court, which it lost in April 1971. A G.S.A. representative, though, said that they could do the other work if funded. No request was made for funds, however.³⁷ Congress responded that it "did not care who did the work" and would hold Justice responsible for seeing that it was completed on schedule so as not to hinder the Commission's progress.³⁸ Senator Henry L. Bellman of Oklahoma, in hearings, asked government lawyer Ralph Barney if he thought the Commission was "perpetuating itself in business" by this ruling and Barney capily answered that he could only present the facts.³⁹ Kuykendall replied in a later report that it was Justice that was the agent of protraction by asking for 6,451 days of extension time between April 1970 and October 1971. The bottleneck of delay, claimed the Chairman, was not at the Commission but lay in the shortage of personnel in Justice and the G.S.A.⁴⁰ Between the charges and countercharges, both Barney and Kuykendall agreed that the Court of Claims could "readily handle" these cases if any remained after 1977.⁴¹ Thus assured, Congress passed the fourth renewal act on March 17, 1972.⁴²

The accounting issue was the main one in the debate over the fourth extension act but as an element of delay it was only one factor among many in the long history of items blamed for slowing the Commission's work and prolonging its life. Key legal decisions also contributed, at

least in the opinion of the Justice Department, to the unwarranted need for extension past 1972. Ralph Barney told a Senate hearing that there was nothing Congress could do to speed the work, it was "strictly a judicial question," and he felt that the loose interpretation of the Act of 1946 by the Commission and the Courts would prolong the claims settlement past 1977.⁴³

These "loose interpretations" occurred in several cases of the late 1960's and early 1970's to the consternation of Justice lawyers. In the *Lipan Apache* case, the Court of Claims reversed a long-held commission policy. In 1953, the Texas Cherokees were denied recovery for lands in Texas on the basis of original Indian title on the grounds that the Republic of Texas, the prior sovereign, did not accord Indians possessory rights to the land they occupied; and that the United States acquired no public lands in Texas. This ruling was applied again to the Lipan Apaches in 1965. In 1967, on appeal, the Court ruled that the tribes had the same right to establish title in Texas as in other states. This new decision resulted in previously decided claims being reopened. One such claimant, the Caddo Tribe, whose case had been dismissed in 1955 immediately petitioned for a rehearing. This angered and frustrated the Justice Department attorneys and they made insinuations of purposeful delay. Chairman Kuykendall defended the Commission's decision on the grounds of fairness to all tribes and denied the accusation of his Commission's engagement in a scheme to "make work."⁴⁴

The Justice Department was further angered in 1969 when three decisions appeared to it to establish a "pattern" that foreboded more and greater delays. In a Sioux case the Commission permitted the plaintiff to file a "severed" petition on a new claim not mentioned in the original petition filed on the deadline of August 13, 1951. It justified this in part by a Court of Claims ruling that the

whole context of these claims led them to be "somewhat more lenient in procedural matters than we might be in other classes of cases in which the relationship of the parties is not so special." Another Commission and Court decision rejected the government's effort to bar the Aleuts from the Commission on the grounds they were not Indians. They held that the Act was to include all American aborigines and not exclude the descendants of any pre-Columbian inhabitants of North America. In the *Cowlitz* case, dismissed in June 1969, plaintiff was allowed to reopen it by contending that the lands were taken under different circumstances and at different times than was previously argued.⁴⁵ The Justice Department fears were not without basis.

In 1970 the "liberality" of the Commission and the Court of Claims was further expanded. The process of offsets was a complicated one and over the years the Commission had increasingly narrowed the allowable categories. Its various formulas for offset denial had become complex and frustrating for the government lawyers. The Court disallowed one such formula in the *Delaware* case and then issued a simplified ruling in the *Assiniboine* case to guide future offsets. It held that the Commission could still deny offsets without explicit findings so long as it made it clear that it "fully examined the nature of the claim and the entire course of dealings and accounts and has reached the decision in good conscience."⁴⁶ In effect, by this ruling, all but legal offsets were disallowed.

It was also "in good conscience" that the Commission heard the *Taos Pueblo Indians* case in 1965.⁴⁷ The Taos claim was the only one with the Commission that requested return of land rather than a money judgment. In 1926 the Taos had agreed not to lay claim to the town of Taos for \$300,000 if the Pueblo Lands Board returned their sacred

Blue Lake area of 50,000 acres. The Board accepted their offer not to sue and forgot about the other half of the "bargain." The Taos rejected all the compromise plans offered by the Department of Interior. In the Commission, the case was hotly contested by Justice as contrary to the Act and all precedent. Government attorneys argued that a return of lands would threaten all title in the United States. The Commission thought otherwise in this instance and ruled that the land was under Indian title and the government had no right to sell it off to lumbermen to prevent it from "going to waste."

The Commission disregarded government warnings about this precedent because the case was considered unique. Three reasons were offered to defend this position: (1) the land was essential to the preservation of the Taos religion; (2) they had continued on the land despite alleged extinguishment of Indian title in 1906; and (3) the government had continued to recognize such use, and the special needs of the Taos for their land. No other tribe could make such claims. The ruling of the Commission was approved by Congress and a bill was enacted to hold 48,000 acres of Taos lands in trust, as a reservation for the Indians.⁴⁸ Soon after, as predicted, other tribes pressed for a similar judgment on this precedent. These were unsuccessful, for only a very small number of claims could establish that the United States took the land purely by simple usurpation or grossly unfair and fraudulent dealings under duress. Most dealings were proper, though unconscionable in consideration. For these the remedy was and still is money damages.⁴⁹

In the *Gila River, et. al., Indians* case, the Courts and the Commission drew the line on their "liberality." The Indians had claimed damages based on "injury to the tribal structure" resulting from the federal government's failure to provide adequate educational and medical facilities and

its subjugation of its ward to a state of "stagnation of self-expression and cultural impotency." This they claimed was not "fair and honorable dealing." The Commission and the Courts ruled against the claim for lack of jurisdiction. The claim and "cause of action" was held to be too intangible and not a tribal "property" loss as so far recognized. The Court of Claims wrote that the "fair and honorable dealings" clause was not meant to be a "catch-all allowing monetary redress for the general harm--psychological, social, cultural, economic--done the Indians by the historical national policy of semi-apartheid; that type of generalized reparations Congress has not yet granted."⁵⁰ These precedents and the remaining cases occupied the Commission in its last years of operation.

The Commission had led a busy existence in its fourth quinquennium. It changed all of its commissioners and many of its procedures. Its output over five years compared favorably with that of the eight-year period from 1960 to 1967: 44 to 43 dismissals and 102 to 83 awards. But with 227 pending cases, the Commission still had an arduous charge. To finish its total docket by 1977 it had to increase its annual decisions by 50 percent. This was a possibility but the accounting cases made it unlikely. If these bewildering claims were purposefully sidelined, though, only a 17 percent annual rate increase was necessary to finish the docket. The Commission was quite capable of this improvement and, by 1977, able to if not finish, leave a manageable residue to its successor. At least this was how Congress had legislated the future and the finale of the Commission. The "temporary" agency created in 1946 was, it seemed, close to the dissolution long ago slated for 1956.

Entering its last five-year renewal period in 1972, the Commission in its remaining years set itself to finish as much of its docket as possible. It also pushed for new

administrative measures it deemed necessary to hasten or facilitate its work. The Commissioners had gained enough expertise to finish the bulk of their cases, that is the land claims, by 1977, but there were still elements of the claims process that were largely beyond their control. Appeals to the Court of Claims were the right of the two contending parties and once a case was taken to the Court the Commission had to await its ruling. Also, with the "accounting cases," the Commission had to wait on the work of another agency. The General Services Administration developed the accounting reports which took twelve experts an average of two years to complete, and nothing could be done on the accounting cases until the reports reached all parties and were converted into claims and counterclaims. Even when this was accomplished, these cases presented new problems and lengthy trials not yet part of the experience of the Commission.⁵¹ Congress in 1972 may have set five years to end the Commission, but it seemed by 1973 that the Commission was not set to end its work.

Most of the snags that developed in claims resolution in the mid 1970's were not the fault of the Commission. It had ample staff (forty-two) and a budget in 1972 and 1973 of \$1,045,000 and \$1,075,000 respectively.⁵² But the eminent demise of the Commission presented a problem. Chairman Kuykendall became apprehensive about maintaining his legal staff past 1972. The renewal act of 1972 required a specific act of Congress to authorize the annual appropriations for the Commission, these being previously approved as part of the larger Interior Department and Related Agencies budget. In 1973, Kuykendall asked for the abrogation of this section and authorization of budgets to the end of the Commission's life. He urged this action to save "work and trouble" and to resolve the problem of retaining the professional staff in an "uncertain atmosphere" created by the need for yearly budget

retaining the professional staff in an "uncertain atmosphere" created by the need for yearly budget authorizations.⁵³ Congress was not swayed by his arguments and held to its law of 1972. Subsequent years soon proved Kuykendall's fears of staff losses to be unfounded.

Congress did move to eliminate other areas of claims delay. The Expert Assistance Loan Fund established in 1963 and doubled in 1966 was increased again in 1973 to \$2.7 million.⁵⁴ Funds were appropriated for the General Services Administration in late 1972 to rebuild its accounting staff from a low point of two. This staff had reached only nine by early 1973, but in another two years soared to 103.⁵⁵

A tangential area of inefficiency dealt with by Congress was that of legislative authorization of the judgment awards of the Commission. Prior to 1960, these awards automatically approved by Congress, were deposited in the Federal Treasury to the credit of the tribes and distributed by the Secretary of the Interior under an opinion of the Interior Solicitor without further congressional action. Many tribes had complained about this procedure and the amount of power left totally in the hands of the Secretary. After 1960, Congress enacted special legislation for each tribe setting forth the uses of the award money. But, this duty had become burdensome by 1970 and accounted for one-half of the Indian Subcommittee's legislative workload on Indian related matters. In 1973, Congress passed a law to return this task to the Secretary but with much tighter Committee oversight.⁵⁶

The question that arises at this point is what did the tribes do with their award money. The Commission had no role in the distribution of the funds. Under supervision of the Secretary of Interior and Congress, most of the award money was dispersed on a per capita basis. Of the \$106 million awarded by 1964, \$42 million had been distributed this way and much of the remainder was slotted to follow

232 Their Day in Court

on proper authorization.⁵⁷ The great percentage of these awards after 1964 followed this pattern, but the better organized tribes created programs to utilize their award more wisely. A portion of the award was invested and became a revenue-producing source. Other tribal programs, as that of the Ute of Utah or the Quinaielt of Washington, planned to establish funds for education scholarships and grants, pay tribal administrative costs, develop resources, acquire lands, and build tourist and recreational facilities. Tribes with little or no organization and dispersed membership, as the Southern Paiute and Colville Indians, generally had no interest in anything but per capita settlements.⁵⁸

Also beyond the reach of Congress and the Commission, interims of efficient action, was the process of appeal. Appeals to the Court of Claims and the Supreme Court were always a part of the Commission's litigation but their incidence increase slightly after 1972, amounting to one-third of the cases. Several of the accounting cases were on appeal by 1975 and promised to be a form of claim that would necessitate appeal in every case to the Court of Claims and even to the Supreme Court, which had only granted a review on certiorari thrice in the life of the Commission. In total, there had been 206 appeals. The Commission was affirmed in 96 of those, reversed in 79, and partially affirmed and reversed in the other 78.⁵⁹ Obviously, the appellate process itself, with an average appeal taking two years, was a major factor in the protracted life of the Commission, but it was a necessary one as long as the Commission was in fact a court.

The Commission's progress through 1975 was good. At the close of 1972, 227 of the 611 dockets were still pending but all of the land cases were in some advanced stage of litigation or on appeal. Early in 1973, the Commission worked out a projection of annual output to

Expansion, Reorganization, and "Final" Renewal 233

complete its cases by 1977. From 1973 through 1977 it proposed annually to complete 33, 43, 79, 47, and 25 cases respectively.⁶⁰ Through 1974 it was ahead of its schedule but appeals held up its progress. By March 1975, 176 dockets were still pending. The forty-four member staff, now operating on a budget of \$1,324,000 was deemed adequate by Chairman Kuykendall, at least to handle the work brought to it. But the appellate process and the holdup in the General Services Administration on the accounting reports limited that work. Kuykendall could not, in 1975, assure the Congress that the work would be completed by 1977 because of these factors. He did say, though, that it was not the Commission's intention to ask for an extension beyond 1977.⁶¹

Other agencies of government and the private sector, though, were active in promoting another extension past 1977. At the Commission's 1976 appropriations hearing, Court of Claims Judge Marion T. Bennett, urged another renewal. Indian attorney Glen A. Wilkinson spoke for the Court of Claims Committee of the Bar Association of the District of Columbia and recommended that the Commission be allowed to finish all of the claims.⁶²

The dissolution of the Commission as scheduled, it was claimed, would (1) leave some 120 dockets as a legacy to the Court of Claims, and unmanageable number not contemplated in 1972, (2) saddle the Court with the 51 complex accounting cases, (3) congest an already busy Court, (4) lead to further delay by the very process of transfer, (5) fail to utilize the expertise built up by the Commission, and (6) cause an injustice to the tribes that would not be heard by the same tribunal. These points were not so much untrue as, by 1976, insufficient.

The debate over a renewal of the Commission lasted for eighteen months. With little chance of gaining another five years, considering the directives of Congress in 1972,

the adherents of extension fought for three and one-half years. Several bills in the House and Senate had varying success but none could gain the assent of both bodies. In general, the bills made their case upon leaving as little work for the Court of Claims as possible, eliminating delay, and keeping Congress closely informed. Many legislators were swayed by the evidence for renewal, but the long history of the Commission loomed over the debate and the arguments, no matter how valid, had been heard too often. Those in Congress who were firm in 1972 remained adamant in 1976.

The result was a Congressional compromise on an administration bill allowing an 18-month extension. Public Law 94-465 was passed on October 8, 1976. This act extended the life of the Commission to September 30, 1978, and provided (1) that, no later than December 31, 1976, the Commission would certify and transfer to the Court of Claims all cases it determined it could not finish by September 30, 1978, (2) that, at any time prior to September 30, 1978, the Commission could transfer other cases, and (3) that all unfinished cases would be transferred to the Court of Claims on September 30, 1978.

With its end firmly in sight, the Commission continued its work and attempted to fulfill its mandate to lighten its remaining docket. By September 1976 it had disposed of 474 dockets and had 141 pending, 16 of these before the Court of Claims. Before the deadline of December 31, 1976, it certified 20 cases to the Court that it had determined could not be completed before 1978. The Commission ended its last full year of operation with 100 cases remaining and a fair chance at leaving a manageable remnant to the Court of Claims. The Court secured a law in July of 1977 (P.L. 95-69) to define more precisely the transference of claims and increase its staff to take over from the Commission. On September 30, 1978, the Indian

Claims Commission expired, leaving 68 dockets on its calendar as its legacy to the Court of Claims.

It had been a long and arduous thirty-two years for the Indian Claims Commission. As mentioned earlier, there is nothing easy concerning Federal-Indian law. Ten different Commissioners, with a staff that grew from twelve to thirty-seven at the end, had done their best to attack the 617 obstinate claims that were presented by August 1951. They faced, with the Indians, the Indian and Government lawyers, and the Congress, more than their share of exasperation. Hundreds of old tribal claims were dealt with in the attempt to once and for all *finalize* them. But, even as the Commission expired, some claims surfaced and resurfaced to again challenge Congress as they had before and maybe always will.

NOTES

1. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearing on the Nomination of John T. Vance, Richard W. Yarborough, and Jerome K. Kuykendall to be Commissioners of the Indian Claims Commission*, 90th Cong., 1st sess., Dec. 14, 1967.
2. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearing on the Nomination of Margaret H. Pierce to be a Commissioner of the Indian Claims Commission*, 90th Cong., 2nd sess., Oct. 9, 1968.
3. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearings on the Nomination of Brantley Blue to be a Commissioner of the Indian Claims Commission*, 91st Cong., 1st sess., April 24, 1969.
4. See note 1.
5. See note 2.
6. U.S., Congress, House, Committee on Appropriations, *Hearing on H.R. 17354 for Appropriations for the Department of Interior and Related Agencies for 1969*, 90th Cong., 2nd sess., 1968, 1803-16.

7. *Annual Report of the Indian Claims Commission*, 1974. All other final figures such as these will be from the same source and will not be cited.
8. *General Rules of Procedure*, of the Indian Claims Commission, 33 Federal Register 9236, 1968.
9. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearing on Indian Claims Litigation*, 91st Cong., 2nd sess., April 10, 1970, 3-4.
10. U.S., Congress, Senate, Committee on Appropriations, *Hearings on Appropriations for the Department of Interior and Related Agencies for 1970*, 91st Cong., 1st sess., 1969, 1239-64.
11. John Vance, "The Congressional Mandate and the Indian Claims Commission," *North Dakota Law Review*, Vol. 45 (Spring 1969), 325-36.
12. U.S., Congress, House, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on H.R. 8021 to provide for the disposition of Funds Appropriated to Pay a Judgment in Favor of Certain Indians of California*, 89th Cong., 2nd sess., May 2 & 3, 1966, 191.
13. U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 307 A bill to amend the Indian Claims Commission Act of 1946 as Amended*, 90th Cong., 1st sess., February 1967, 53-55.
14. *Ibid.*, 57.
15. See note 11.

238 Their Day in Court

16. *Annual Report of the Indian Claims Commission, 1968*, 20.
17. See note 10.
18. See note 9, 12-32.
19. *Ibid.*
20. Sandra Danforth, "Repaying Historical Debts: The Indian Claims Commission," *North Dakota Law Review*, Vol. 49 (Winter 1973), 380.
21. U.S., Congress, House, Committee on Appropriations, *Hearings on H.R. 17619 for Appropriations for the Department of Interior and Related Agencies for 1971*, 91st Cong., 2nd sess., 1970, 2209-29.
22. See note 9, 5. There is no hard evidence in the public record of the employment of lazy or incompetent staff except the few references as this one by Kuykendall. Blue also vaguely referred to the matter at the same hearing, 14. Kuykendall later on implied that the previous commissioners were "dead weight" removed for holding up the work; U.S., Congress, Senate, Committee on Appropriations, *Hearings on H.R. 9417 for Appropriations for the Department of Interior and Related Agencies for 1972*, 92nd Cong. 1st sess., 1971, 1433-50. Also see the Senate report that refers to the "dilatatory practices" permitted in the pre-1968 period by the Commissioners. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Amending the Indians Claims Commission Act of 1946 as Amended*, 92nd Cong., 2nd sess., March 2, 1972, Rept. 682 to accomp. S. 2408.

Expansion, Reorganization, and "Final" Renewal 239

23. See note 21.
24. See note 9, 34-6.
25. *Ibid.*, 7.
26. See note 22, *Hearings on H.R. 9417*.
27. U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearings on S. 2408 to authorize the Extension of the Indian Claims Commission, 92nd Cong., 1st sess., Oct. 21, 1971, 3-15, 40-1*.
28. See note 22.
29. U.S., Congress, Senate, Committee on Appropriations, *Hearings on Appropriations for the Department of Interior and Related Agencies for 1973*, 92nd Cong., 2nd sess., 1972, 2761-88.
30. See note 27.
31. U.S., Congress, House, Committee on Interior and Insular Affairs, *Extending the Life of the Indian Claims Commission, 92nd Cong., 2nd sess., March 1, 1972, H. Rept. 895 to accomp. H.R. 10390*. Also see S. Rept. 682, note 22.
32. See note 27, 35; see note 13, 7.
33. *Ibid.*, 21.
34. *Southern Ute Tribe v. U.S.*, docket no. 328, 17 Ind. Cl. Comm. 28, 63, 1966.

240 Their Day in Court

35. See note 9, 54.
36. See note 31, H. Rept. 895.
37. See note 27, 35-42.
38. See note 31, H. Rept. 895.
39. See note 27, 35.
40. See note 22, S. Rept. 682.
41. Ibid., see note 27, 34.
42. 86 Stat. 114, March 30, 1972.
43. See note 27, 22.
44. Ibid., 41. *Texas Cherokee v. U.S.*, 2 Ind. Cl. Comm. 516; *Lipan Apache Tribe v. U.S.*, 15 Ind. Cl. Comm. 532, 180 Ct. Cl. 487, 1967.
45. *Sioux, Medawakanton, & Wahpakoota v. U.S.*, docket no. 363-B; *Confederated Salish and Kootenai Tribe v. U.S.*, 189 Ct. Cl. 4; *U.S. v. The Native Village of Unalakleet, et al.*, 188 Ct. Cl. 1; *Cowlitz Tribe v. U.S.*, docket no. 218.
46. *U.S. v. Delaware Indians*, 192 Ct. Cl. 385; *U.S. v. Assiniboine Tribe, etc.*, 192 Ct. Cl. 679.
47. *Pueblo de Taos Indians v. U.S.*, docket no. 357, Ind. Cl. Comm.
48. 84 Stat. 1437, Dec. 15 1970.

Expansion, Reorganization, and "Final" Renewal 241

49. Richard A. Nielsen, "American Indian Land Claims: Land v. Money as a Remedy," *University of Florida Law Review*, Vol. 25 (Winter 1972), 320-23.
50. *Gila River Pima-Maricopa Indian Community v. U.S.*, 190 Ct. Cl. 790. For detailed legal exposition on this case see, James M. Kelly, "Indians--Extent of the Fair and Honorable Dealings Section of the Indian Claims Commission Act," *St. Louis University Law Journal*, Vol. 15 (Spring 1971), 491-507 and Marsha Moses, "Administrative Law--The Indian Claims Commission's Jurisdiction to Hear Claims Based on Injuries to Tribal Structure," *Wayne Law Review*, Vol. 20 (July 1974), 1097-1108.
51. U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 721, A Bill to Authorize Appropriations for the Indian Claims Commission for Fiscal Year 1974 and for other purposes*, 93rd Cong., 1st sess., Feb. 16, 1973, 14-15.
52. U.S., Congress, Senate, Committee on Appropriations, *Hearings on H.R. 8917 for Appropriations for the Department of Interior and Related Agencies*, 93rd Cong., 1st sess., 1973, 149-85.
53. See note 1, 3-4.
54. 87 Stat. 73, May 24, 1973.
55. U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 876 to Authorize Appropriations for the Indian Claims Commission for Fiscal Year 1976*, 94th Cong., 1st sess., April 18, 1975, 78.

242 Their Day in Court

56. 87 Stat. 466, Oct. 19, 1973. U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 106, A Bill to Provide for Indian Awards Distribution*, 93rd Cong., 1st sess., April 13, 1973; U.S., Congress, House, Committee on Interior and Insular Affairs, *Providing for the Distribution of Funds Appropriated for Indian Claims Awards*, 93rd Cong., 1st sess., July 16, 1973, H. Rept. 377 to accomp. H.R. 8029.
57. Alan L. Sorkin, *American Indians and Federal Aid* (Washington, D.C.: Brookings Institution, 1971). This form of distribution followed that used for earnings from gas, oil and mineral deposits on reservation land. Between 1949 and 1966 such income amounted to \$571 million, half of which was distributed per capita.
58. A good sample of the Public Laws authorizing judgment distribution can be found in U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Committee's History, Jurisdiction, and Summary of its Accomplishments During the 87th and through to the 90th Congress*, 92nd Cong., 1st sess., September 1971, 13-31 and 77-198. See specifically P.L. 90-531 and 91-420.
59. U.S., Congress, House, Subcommittee on the Committee on Appropriations, *Hearings on Appropriations for the Department of Interior and Related Agencies for 1975*, Pt. 1, 93rd Cong., 2nd sess., 1974, 392-401.
60. See note 1.

Expansion, Reorganization, and "Final" Renewal 243

61. U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on Appropriations for the Department on Interior and Related Agencies for 1976*, 94th Cong., 1st sess., March 12, 1975, 203-7.
62. See note 5.

CONCLUSION

The process of Indian claims resolution has been a lengthy one and the Indian Claims Commission was simply an element of that process. Very few of the legal issues of Indian history have progressed to a point where a conclusion can be written to them. The legal history of Indian claims is certainly not one of these few. The Commission terminated in 1978 but, in spite of the congressional mandate that Indians and Indian claims also terminate, they persisted. The Commission did not fulfill its mandate to achieve a truly *final* settlement of these claims. Drawn as it was and following the procedure it did, finality was impossible. It emerged, as one scholar has noted, as a "legal-bureaucratically oriented structure more concerned with accomplishing its task than insuring that all just claims receive a hearing and appropriate compensation." A more innovative type of compensation, land instead of money, would not only have paid on the grievance but eliminated it.¹ That this was never seriously considered is reflected in the early rejection of the commission format and the adoption of that of a claims court narrowly construed to redress property damages with money payments. This is hardly surprising for, as legal scholar Morton E. Price wrote:

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If there had been full compensation, the Indians would have gathered enormous

wealth, either in land or money. Economic development--in the sense of providing immediate financial security--would have been assured.... On the other hand, it was preposterous to recognize fully such extraordinary claims of a handful of poor people, even to the extent that they were based on legitimate entitlement.²

This most probably was the opinion of the government and the majority of Americans, in 1946, 1970, and even today.

To have been a success the Commission would have had to involve the Indians directly in its formulation and operation. But, as always, it was a case where "primarily white bureaucrats attempted to deal with Indian issues without consulting those who both knew more about the problems and were to be bound by the resultant policies."³ Nevertheless, Indian resentment at this old ploy was temporarily suppressed by a guarded hopefulness about the potential of the new Commission of 1946. Their optimism quickly waned as it became obvious that the Commission would break little new ground and was really a government measure to enhance its own efficiency by disposing of the old claims and terminating the Indian tribes. Indian disillusionment smoldered through the 1950's and into the 1960's but was not acknowledged by the Commission, the B.I.A., or the news media.

In the mid-1960's, Indian unrest began to surface. Nevada Shoshone representative, Josephine C. Mills, wrote in 1964 that the Indians were experiencing "one of the greatest injustices" ever forced upon them. "There is no longer any need to shoot down Indians in order to take away their rights and lands," said Mills, "legislation and the combination of three forces, our own attorneys, the Indian Claims Commission and the Indian Bureau, does the trick

legally."⁴ Three years later, before a Senate hearing, Hank Adams of the National Indian Youth Council, denounced the claims awards, the Indian attorneys, and the use of the award moneys by the government as "supplemented appropriations" to "failure ridden" Bureau of Indian Affairs programs. Adams recommended, if this alleged practice continued, that the Commission be terminated.⁵ Of course, the Commission was not dismantled, or even altered, in spite of the bold attempt of Commissioner John Vance in 1969. Indian frustration burst out in a dramatic fashion in late 1972. The B.I.A. headquarters building was seized and held for a week in November. Prominent among the twenty demands of the braves was a call for a thorough review of Indian treaty commitments and violations, and a demand for the elimination of the system that had resulted in unending and expensive legal battles for Indian rights which produced indecisive results.⁶ Then came Wounded Knee. The seventy-one day seige in early 1973 was partially a result of an alleged century of treaty violations and the failure of the Commission to redress them. This uprising further accentuated the growing Indian militancy. Later that year the government created the American Indian Policy Review Commission and provided for five Indian members, but no firm federal action resulted.⁷

These failings of the Commission were not simply caused by ignorance or shortsightedness. All through the history of the Commission, interested parties saw the situation in a clear light and spoke out. In a 1935 hearing on a nearly commission bill, Interior Department attorney Rufus Poole stressed the government's intent to create a commission not a court. In this forum, he felt that the "vast majority" of claims decisions would never reach the courts but be settled directly by Congress on advice from the commissioners.⁸ In 1940, Indian Commissioner John Collier accented the moral over the legal aspect of the claims and

urged Congress to settle them directly and not to "throw them into the courts."⁹ In 1945 Interior Solicitor Felix Cohen wrote that the proposed commission ought to operate as an "administrative agency" and not on a purely legal level as does the Court of Claims.¹⁰ The passage of the Act in 1946 and subsequent structuring of the Commission silenced most of this opinion except from the "inaudible" Indian quarters. Only in 1969 did John Vance lead an unsuccessful attack on the established adversary procedures.¹¹ Historian Wilcomb Washburn vigorously concurred with Vance's stand against the use of litigatory proceedings on Indian claims and noted that, indeed the very purpose of the act was to relieve the tribes of the necessity of "fighting tiresome battles through the intricate legal apparatus of the white world."¹² To add to this partial list of the unheeded, the statement of Indian attorney Robert C. Bell at the renewal hearing in 1971 is most appropriate. Bell had been engaged with Indian claims for thirty-three years and ruminated that the Commission was created to do justice and equity in Indian cases and save the time of Congress. It failed in this because the government's lawyers did not like to lose, even in a just cause, and what was supposed to be an "expeditious inquiry or investigation and settlement of just claims," turned into a very slow moving adversary proceeding.¹³

Bell's attack on government lawyers had been made for four decades by Indian attorneys and the evidence generally supported this position. These protectors of the Treasury, who were in effect doing their job as prescribed by the Act of 1946, rarely took comfort in Attorney General Tom C. Clark's declaration of 1945 that "the government does not lose any case if by its results justice is done." Congress ever after quoted this phrase to Justice Department lawyers on Indian cases, as Lands Division attorney Donald Mileur recalled in a 1974 hearing, facetiously adding that "when we lose a case, that makes us

feel good."¹⁴ But to blame the government attorneys for doing their job, even too conscientiously, is to miss the real source of the problem--Congress. It was Congress that passed the law that designated the Attorney General to defend the United States and it was Congress that did not alter its new agency when it became obvious that it was not "new" and was running long past its allotted time.

It is exactly because of the fact that the Commission-Court was improperly constituted and narrowly construed its jurisdiction that the repressed Indian displeasure with its work lead the tribes to reject many of its decisions and declare new claims. In the last year of the legislative history of the Commission (1945), a House Report warned:

In order that the decisions reached under the proposed legislation shall have finality it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims. If any class of claim is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts. And if the class of cases omitted is one which Congress has in the past declared to be worthy of a hearing, in one or more jurisdictional acts, it is probable that future Congresses will likewise grant a hearing to such claims, and the chief purpose of the present bill to dispose of the Indian claims problem with finality, will have been defeated.¹⁵

Congress proceeded to write a law that was broad enough, but then the Commission and the courts interpreted that law far more narrowly than its wording mandated. This result

was not surprising since there was as little Indian input in the first decade of operation as in the creation of the Act.

Consequently, tribal revolts sprang up. In the same manner that the Hopi never accepted the premise of the Commission in 1946, so others rejected it thirty years later, even after receiving sizeable awards. The Suquamish, Puyallup, and Stillaquamish, refused their judgments on the grounds that *their* claims were never adjudicated, only those pushed upon them by their attorneys and the Commission.¹⁶ At a tribal council, the Northern Paiutes voted to reject their judgment, claiming misrepresentation and declaring preference for land rather than money.¹⁷ The Oneida Indians of New York filed two strong land claims for nearly six million acres of that state. And the Ogala Sioux rejected their share of the \$122.5 million settlement on eight Sioux tribes from the Black Hills of South Dakota. When their suit to block payment was lost on appeal, they turned to the United Nations in a futile attempt to make their claim a human rights issue.¹⁸ Other claims were pressed at the state level.

This issue of land versus money payment, dealt with only once by the Commission in the *Taos* case, appears never to have been totally understood or accepted by the Indians. Many Indians see the situation as does Vine Deloria, Jr., that is, the Commission did not liquidate Indian rights or even Indian title but simply "updated the legal parity" of the land purchases as of the date the United States made them. Rather than finally settling the Indian claims, says Deloria, the Commission worked "merely to clear out the underbrush and allow the claims created by the forced political and economic dependency during the last century to emerge."¹⁹

The key issue that the tribes wanted to "emerge" was that of land title. The Western Shoshones and others believed that their title as delineated in their treaty, was

never extinguished by cession or conquest. They saw the establishment of the Commission as tacit acknowledgment of this belief. Legal scholar Jack Forbes noted that the United States, through the Commission, was not merely seeking to compensate the tribes for inadequate treaty payments, but in fact to acquire the "Indian title" for the first time.²⁰ That Congress was long ago aware of this unstressed motive can be seen in a statement by Henry Jackson in the House in 1946. Urging acceptance of the Commission bill, Jackson touted its role in termination and added that to allow these claims to persist was "to perpetuate clouds on white men's titles that interfere with the proper development of our public domain."²¹ Jackson was responding to a vague congressional uneasiness in spite of the fact that Interior Solicitor Felix Cohen had written in 1945 that all fears as to the security of the white's title to America were unfounded. Cohen reminded his readers that the belief that America had been "taken" was only a fable. In truth, all but a few tracts in the Southwest had been purchased legally by treaty. The payment was often unconscionable, but the title was secure.²² The Commission was established only to adjust inadequate compensation where proven. The future of this debate lies now in a more searching examination of the treaties and the intent of both participants. It also lies in how far the Indians are able to push their land claims and how far the United States is willing to recognize them. Between these contending positions the treaties will be interpreted or reinterpreted or even revoked as the ripening climate of American opinion allows it to happen.

It is around the issue of land, as in the past, that the future of Indian-white relations will be decided. The land has always been vital to the Indian, especially as it shrunk from his grasp, and is now becoming more important to whites as population and resource pressure shrink it for all.

Since 1934 Indian efforts have been directed toward increasing their land base. They made some gains with John Collier as Indian Commissioner, but after World War II were on the defensive again. In 1947, Ruth M. Bronson, a Cherokee, warned the Annual Meeting of the Indian Rights Association that "the danger of another Teapot Dome did not pass away with the apprehension of Albert Fall. Nor does all the cupidity in dealing with Indians and Indian property belong to the generation of our forefathers."²³ Bronson was trying to alert her fellows to the Alaskan situation but it was too late. The Organic Act of 1884 which established civil government in Alaska provided that the natives should not be removed but left acquisition of title to their land to future legislation. The Alaskan Native Claims Act of 1971 was similar to most of the Indian treaties. The native Alaskans ceded all but 40 million acres for \$1 billion and lost all other claims, title, and mineral rights.²⁴

The attack on Indian land continued. The Senecas of New York lost land to the Kinzua Dam project, the Soboba and La Jolla of California to the Metropolitan Water Companies, the Paiute of Nevada to the Federal Bureau of Reclamation, the Mandan on the upper Missouri River to the Army Corps of Engineers, and the Navajo-Hopi of Arizona to developers.²⁵ Meanwhile land acquisition by state and other government units was stimulated by the \$1 billion in federal aid made available in 1964.²⁶ The period from 1944 to 1971 saw seventy-seven major enactments, statements, and actions pertinent to land-use policy and it was a major issue in the 1970's. The 91st to 93rd Congresses had some 600 land-use related bills introduced.²⁷ There was a scramble on and the Indians were in greater peril of losing their remaining acres than at any time since the mid-1940's. This, plus the facts that a good portion of the land designated as prime for strip mining coal lies within the

reservations of the West and the recent shift in the American population to the Southwest, could leave the tribes landed and rich or landless and poor.

For the Indian the land situation is critical. He does not have land resources in sufficient quality or quantity for self support. In the 1950's the government answer to this was relocation. This policy was simply another attempt to remove the Indian from his land and press his assimilation. It was a miserable failure.²⁸ But, assuming a favorable atmosphere, the nation could have taken the opposite approach and *increased* the Indian's land holdings. The tribes have sufficient labor, one-half their labor force being unemployed, and adequate capital with over \$400 million in trust funds, to build themselves a future.²⁹ In fact, they have achieved concrete successes when given a fair opportunity as in the cases of the Navajo-Hopi rehabilitation program; and the Cheyenne River Sioux, Rosebud Sioux, and Crow enterprises.³⁰ But these successes depended on an expanding land base or guaranteed security in the land possessed. Both of these factors have been rare in American-Indian history.

For the government, the ability to meet the modest needs of the Indians was well within the realm of possibility. Of course, any land transfer program would have to be guided by honest, intelligent people devoted to the best interests of *all* American citizens instead of developers and speculators devoted only to their own profit. The federal government still owns over one-third of the total American land area, or 770 million acres. Each of the fifty states owns lands for a total of 78 million acres. The Indians hold 50 million acres in trust, or 2 percent of the land, and their leaders have estimated that twice this amount would serve their needs. With 37 percent of our lands still in government hands, a good deal of it held under dubious title according to the tribes, the Indian's request

for survival is not beyond reason or legislation. Proportionally the federal government could supply 45 million acres from its uncommitted 670 million and the states five million. Not only might this be a more reasonable method of handling Indian claims but it just might also be more economical. Giving land to Indians as an economic base is far less costly than transfer payments. Of course, this would be more politically controversial. Transfer payments (per capita awards) go *through* the reservations to the non-tribal regional economy; land would go *to* the Indians and stay.³¹ If the Department of Interior could report in 1963 that it had a long-range goal of acquiring 4.5 million acres under the Migratory Bird Conservation Act to preserve migratory waterfowl resources for the future, surely it could devote the same care to Indian culture.³²

The tribes, now as always, acutely feel the need to preserve their land. At the important American Indian Chicago Conference in June 1961, 460 Indians of ninety tribes convened. In their Declaration of Indian Purpose they said:

In our day each remaining acre is a promise that we will still be here tomorrow. Were we paid a thousand times the market value of our lost holdings, still the payment would not suffice. Money never mothered the Indian people, as the land has mothered them, nor have any people become more closely attached to the land, religiously and traditionally.³³

This peaceful rejection of the white attitude that all things have their price became a militant counterattack in the following decade when no relief from encroachment on Indian lands and rights was forthcoming.

The Commission might have firmly and creatively met these issues but it did not. In the *Taos* case of 1965 it brushed close to the Indian heart and found that "religion permeated the Pueblo's way of life," but held it as an isolated example. The end result was that the Indian tribes via a commission, that cost the government only \$15 million to operate for thirty-two years, (another \$200 million was expended by the other agencies involved) paid \$100 million in legal fees to pry loose some \$800 million properly owed them. For thirty years most of this sum remained in the U.S. Treasury, interest free at a benefit to the government. Not only was the government not "buying back America," but its belated adjustments on the original improper treaty payments were in cheaper dollars than those of 1946, not to mention the last century. All parties would have been better off, one tribal attorney wrote; if the government had simply transferred \$150 million to a trust account in 1946 and allowed the claimant to reap thirty years' interest.³⁴ Little if any time was saved for Congress in its handling of these claims. The Commission as an element of the termination policy was as effective in that area as that policy itself. Indian Bureau costs were not reduced by any award of the Commission. The Indians, from their viewpoint, benefited very little from the often small and quickly squandered per capita awards. And, if anything, many of these cases were less final than before.³⁵ In airing out the treaties to pay up the original bills, the other commitments such as land title opened whole new vistas to the searching eye of the law and tribes now more seasoned in that law.

In spite of this generally dismal record, the Commission did have some positive effects. For one, some tribes have used their awards wisely and aided their economies. Secondly, others have hired full-time legal counsel to serve their ongoing interests.³⁶ The Commission, with its extended tenure, raised the "legal consciousness" of

the tribes. Thirdly, some segments of American society, in public and private life, have concomitantly had their own legal consciousness raised concerning Indians, reservations, and the tribal relation to the American Government via the ancient but active treaties. And, lastly, the ethno-historical research findings amassed as a by-product of the Commission's work constitute an unprecedented source for the study of Indian-white relations. These were not minor accomplishments.

The last question that needs an answer is did the Indians gain "their day in court?" Technically, the answer is yes. The Commission was a court, complete with appellate bodies. The tribes, represented by some of the best legal talent in the country, prosecuted to a finish 549 claims and won awards on fifty-seven percent of them. But the Commission was created for the express purpose of circumventing the "technical" letter of the law and allowing moral claims heretofore "not recognized by any existing ruled of law or equity." This is how the Indians understood and expressed most of their claims. The Commission and the attorneys, though, "refined" them into language for a presentation that had long been recognized by existing rules of law or equity--money damages for injuries against property and breach of contract. In this sense the Indians did not have their day in court. It might be said that the Indian had his *hour* in court and it should be added that he is still seeking the other 23.

This struggle for Indian culture and claims has run through American history for over 150 years. Possibly it will continue for another century or until America finds an accommodation with these internal wards of its conscience. There is no easy solution to this problem, or maybe no solution at all. For, at best, the existence of a tribal society within the borders of a highly technical culture is tenuous. It is not that the tribal society materially threatens the

technological way of life, but that it presents a moral threat to settled myths. It keeps the past alive and presents questions for the future. What has befallen them, what is to be done with them? Maybe, as one reported has observed, "like the early Christians within Rome, the Indians have to be converted or devoured--but legally."³⁷ Conversion has failed, and a legal consumption through assimilation, allotment, and termination also has been fruitless. It remains an opportune moment for America to face squarely these peoples and its past shuttered away in reservations and by myths. Maybe enough time has passed to appreciate that the triumphs of the frontier period were mitigated by the sordid dealings with the Indians. This record is all to well documented in 370 treaties and thousands of related documents. "To dust off and to pour over these old account books might show us what investments to avoid in the future. That would certainly be one path evening the balance of the future, though the debits of former errors will remain forever old debts beyond reparations, atonement or forgiveness."³⁸ The Indian Claims Commission took a short step in this direction but offered only money. There are much harder payments to be made.

NOTES

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2. Harold Fey and D'arcy McNickle, *Indians and Other Americans: Two Ways of Life Meet* (New York: Harper & Row, 1970), quoted at 123.
3. See note 1.
4. Virginia I. Armstrong (ed.), *I Have Spoken: American History Through the Voices of the Indians* (New York: Pocket Books, 1972), 175.
5. U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 307 A Bill to Amend the Indian Claims Commission Act of 1946 As Amended*, 90th Cong., 1st sess., February 1967, 91.
6. U.S., Congress, House, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearings on the Seizure of the B.I.A. Headquarters Building*, 92nd Cong., 2nd sess., December 1972, 163.
7. Sen. Joint Res. 133, Dec. 5, 1973. This resolution called for a report to Congress as had its many predecessors and authorized \$2 million for the effort.
8. U.S., Congress, House, Committee on Indian Affairs, *Hearing on H.R. 7837 A Bill to Create an Indian Claims Commission*, 74th Cong., 1st sess., May 22, 1935, 28. Poole also believed that the total recovery would be \$100 million at the very most, 30.
9. U.S., Congress, Senate, Subcommittee of the Committee on the Judiciary, *Hearings on S. 3083*, 76th Cong., 3rd sess., Feb. 13-16, 1940, 16. Collier thought that an investigative Commission could finish the task in ten years "without any difficulty," 18.
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11. John Vance, "The Congressional Mandate and the Indian Claims Commission," *North Dakota Law Review*, Vol. 45 (Spring 1969), 325-36.
12. Wilcomb Washburn, *Red Man's Land/White Man's Law* (New York: Scribner, 1971), 106.
13. U.S., Congress, Senate, Subcommittee On Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 2408 A Bill to Extend the Indian Claims Commission*, 92nd Cong., 1st sess., Oct. 21, 1971, 46.

14. U.S., Congress, House, Subcommittee on Indian/Affairs of the Committee on Interior and Insular Affairs, *Hearing on H.R. 16170 to Amend the Act of August 13, 1946*, 93rd Cong., 2nd sess., Aug. 8, 1974, 29.
15. U.S., Congress, House, Committee on Indian Affairs, *Creating an Indian Claims Commission*, 79th Cong., 1st sess., December 1945, H. Rept. 1466 to accomp. H.R. 4497.
16. U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 721 A Bill to Authorize Appropriations for the Indian Claims Commission for fiscal year 1974 and for other purposes*, 93rd Cong., 1st sess., Feb. 16, 1973, 118.
17. Richard Clemmer, "Land Use Patterns and Aboriginal Right: Nevada," *The Indian Historian*, Vol. 7 (Winter 1974), 38.
18. Peter Matthiessen, *In the Spirit of Crazy Horse* (New York: Viking Press, 1981), 527-29.
19. Vine Deloria, Jr., *Behind the Trail of Broken Treaties* (New York: Delacorte Press, 1974), 227. R.T. Coulter and S.M. Tullberg, "Indian Land Rights," S.L. Cadwalder and Vine Deloria, Jr., *The Aggressions of Civilization* (Philadelphia: Temple University Press, 1984), 204.
20. Jack Forbes, "The 'Public Domain' of Nevada and its Relationship to Indian Property Rights," *The Nevada State Bar Journal*, Vol. 30, 1965, 45.

21. U.S., Congress, House, *Congressional Record*, May 20, 1946, 5312.
22. See note 10, 279.
23. Wayne Moquin (ed.), *Great Documents in American Indian History* (New York: Praeger, 1973), 319ff.
24. The Organic Act of 1884, 23 Stat. 24, May 17, 1884. Alaskan Native Claims Act, P.L. 92-203, Dec. 18, 1971. The Indians of Alaska totally ignored the I.C.C. and the Act of 1971 was deemed settlement of all Alaskan claims.
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27. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *National Land Use Policy Legislation 93rd Congress: An Analysis of Legislative Proposals and State Laws*, 93rd Cong., 1st sess., April 1973, 23-37.
28. LaVerne Madigan, *The American Indian Relocation Program* (New York: The Association on American Indian Affairs, Inc., 1956).

262 Their Day in Court

29. Edgar S. Cahn (ed.), *Our Brother's Keeper: The Indian in White America* (Washington, D.C.: New Community Press, 1969), 92.
30. See note 24, 447.
31. Russel L. Barsh, "Indian Land Claims Policy in the United States," *North Dakota Law Review*, Vol. 58 (1982), 77.
32. See note 25, i & 13.
33. Fred Eggan, *The American Indian: Perspective for the Study of Social Change* (Chicago: Aldine Pub. Co., 1966), 166.
34. See note 31, 23.
35. Government attorney A. Donald Mileur expressed a widely held opinion in government that the Act of 1946 was a mistake, the Indians were not helped financially by it and its function has been a "legal farce." Interview with A. Donald Mileur, attorney for the Land and Natural Resources Division of the Department of Justice, Washington, D.C., August 11, 1974.
36. Stuart Levine and Nancy O. Lurie (eds.), *The American Indian Today* (Deland, Florida: Everett Edwards, 1968), 175.
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APPENDIX A

MEMBERS OF COMMISSION SINCE ITS ESTABLISHMENT

MEMBERS OF THE INDIANS CLAIMS COMMISSION

Edgar E. Witt (D-Texas) Appointed Chief Comm. April 10, 1947	April 10, 1947 to June 30, 1960
William M. Holt (R-Nebraska)	April 10, 1947 to June 30, 1968
Louis J. O'Marr (D-Wyoming)	April 10, 1947 to July 31, 1959
Arthur V. Watkins (R-Utah) Appointed Chief Comm. July 1, 1960	Aug. 15, 1959 to Sept. 30, 1967
T. Harold Scott (D-Colorado)	July 1, 1960 to June 30, 1968
John T. Vance (D-Montana) Appointed Chairman March 19, 1968	Dec. 19, 1967 to Sept. 30, 1978
Jerome K. Kuykendall (R-Virginia) Appointed Chairman June 11, 1969	Dec. 19, 1967 to Sept. 30, 1978
Richard W. Yarborough (D-Texas)	Dec. 28, 1967 to Sept. 30, 1978
Margaret H. Pierce (R-Washington, D.C.)	Oct. 16, 1968 to Sept. 30, 1978
Theodore R. McKeldin (R-Maryland)	Nov. 21, 1968 to May 1, 1969 (Interim Appointment)
Brantley Blue (R-Tennessee)	May 2, 1969 to Sept. 30, 1978

APPENDIX B

FISCAL YEAR TOTALS OF DOCKETS COMPLETED
AND AWARDS

Fiscal Year Totals of Dockets Completed and Awards¹

Fiscal Year	Number of Dkts. Completed			Total Amt. of Awards	Cumm. Total of Awards
	By Dismissals	By Awards	No. of Awards		
1947	----	----		\$ ----	\$ ----
1948	----	----		----	----
1949	7	----		----	----
1950	12	----		----	----
1951	7	2	2	3,489,843.58	3,489,843.58
1952	8	3	3	2,998,220.02	6,488,063.60
1953	7	----	----	-----	6,488,063.60
1954	8	1	1	927,668.04	7,415,731.64
1955	4	1	1	864,107.55	8,279,839.19
1956	1	3	3	1,515,494.95	9,795,334.14
1957	12	1	1	433,013.60	10,228,347.74
1958	10	4	4	6,860,238.54	17,088,586.28
1959	12	2	1	3,288,974.90	20,377,561.18
1960	7	13	8	21,588,007.51	41,965,658.69
1961	5	5	5	14,926,255.11	56,891,823.80
1962	5	2	3	18,063,859.65	74,955,683.45
1963	9	8	9	18,319,187.20	93,274,870.65
1964	7	9	11	15,796,254.69	109,071,125.34
1965	7	27	17	57,019,352.93	166,090,478.27
1966	2	12	11	38,701,569.58	204,792,047.85
1967	2	7	6	21,497,766.74	226,289,814.59
1968	3	23	16	43,576,732.73	269,866,547.32
1969	23	24	20	32,025,817.01	301,892,364.33
1970	2	14	13	44,254,099.43	346,146,463.76
1971	4	20	16	46,621,560.61	392,768,024.37
1972	11	14	10	33,078,111.56	425,846,135.93
1973	11	32	18	40,837,122.35	466,683,258.28
1974	11	24	20	46,409,564.06	513,092,822.34
1975	3	9	7	35,945,458.57	549,038,280.91
1976	----	15	11	63,055,867.25	612,094,148.16

Fiscal Year	Number of Dkts. Completed			Total Amt. of Awards	Cumm. Total of Awards
	By Dismissals	By Awards	No. of Awards		
July to Sept '76	----	5	4	27,825,465.90	639,919,614.06
1977	----	11	12	67,604,270.07	707,523,884.13
1978	4	31	24	110,648,722.51	818,172,606.64
Totals	204	342	274		

1. This tabulation includes final awards and dismissals entered by the Commission through September 30, 1978. The 342 dockets shown as completed by awards include 20 dockets not reported to the Congress as concluded. Seventeen of these dockets have final awards entered totaling \$88,137,342.21 on which appeal time is running (Dkts. 13-E; 15-D; 29-B and 311; 15-L, 29-I and 216; 74; 133-A and 302; 272; 313; 314-A; 314-B; 332-C; and 352 and 369-A); two having final awards totaling \$31,596,419.79 are pending before the Court of Claims on appeals from the Commission's determinations (Dkts. 236-E and 326-K); and one having a final award of \$1,115,706.20 affirmed by the Court of Claims is pending on a petition to the Supreme Court for a writ of certiorari to the Court of Claims (Dkt. 169). Appeal time is running from orders dismissing three of the 204 dockets shown completed by dismissals (Dkts. 120, 130 and 252).

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274 Their Day in Court

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276 Their Day in Court

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284 Their Day in Court

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BIBLIOGRAPHICAL ESSAY:

Commission related material since 1978

BIBLIOGRAPHICAL ESSAY

When Congress created the Indian Claims Commission in August of 1946, it was an event hardly noticed. Thirty-two years later the Commission's demise was probably even of less note. Much Indian law and history has been written by the Commission and a good deal by external commentators on its crucial rulings and cases, but little has been written on the Commission itself. This was true during the Commission's life and even more so since its death in 1978.

Yet this barely heralded landmark in twentieth century Indian affairs has had its few persistent observers even since its demise. In March of 1978, Nancy Oestreich Lurie wrote an excellent survey article, "The Indian Claims Commission," for *The Annals of the American Academy*¹ in which she updates an earlier (1957) essay in the same journal and outlines the work of the Commission and critiques its failure properly to respond to Indian grievances as expressed by Indians rather than their white legal spokesmen. She also noted the positive achievements of the Commission including the huge mass of research material that it generated and its effect on Indian legal consciousness. As an introduction to the Commission her work is unusually good.

Another 1978 article, John White's, "Barmecide Revisited: The Gratuitous Offsets in Indians Claims Cases," *Ethnohistory*,² stands alone on this subject so important to

the Commission. White reviews the basic concept of offsets,³ their specific use in Indian claims, their relations to non-Indian law, and the moral arguments for their use. He notes that even if the fiscal use of offsets could be rationalized they were still unjust, mean-spirited and an insult to the tribes, especially the Sioux of Missouri. This article is essential for anyone who delves into one of the most complex issues in the history of the I.C.C.

In 1982, Russel L. Barsh wrote "Indian Land Claims Policy in the United States" for the *North Dakota Law Review*. This fine article, though largely concerned with claims award distribution and the Alaskan claims, provides an excellent and biting critique of the Commission's failure in its main goals of resolving old claims and terminating government services to Indians. He forcefully reviews the issue of land versus money awards as one explanation of the Commission's failure and as a suggestion for resolving future claims.⁴

In his *American Indians, American Justice* (1983),⁵ Vine Deloria, Jr., offers us little on the I.C.C. but he does make some judicious comments on the work of the attorneys that practiced before it. He credits most, both Government defenders and Indian advocates, as sincere but misguided. All of Deloria's works are an excellent guide to American Indian legal history.

In 1984, Francis Paul Prucha's massive *The Great Father: The United States Government and the American Indians*⁶ was published. As expected of a scholar of this calibre, it is a fine contribution. Prucha is aware of the importance of the Commission in Indian history. But in a work of such sweep the Commission commands only five pages for itself. He shows an excellent grasp of the Commission's history. His command of the primary sources on the Commission is thorough and he uses H. Rosenthal's

works on the Commission more thoroughly than any other author on Indian/Government relations.

Another useful article is by Caroline L. Orlando, "Aboriginal Title Claims in the Indian Claims Commission: *U.S. v. Dann* and the Due Process Implications." *Boston College Environmental Affairs Law Review*, (1985).⁷ This issue of aboriginal title was a major one for Indians before and during the Commission's tenure and Orlando gives a sound review of its history. She also updates this subject, still so vital to many Indians, by using the 1983 *Dann* case to explore the continuing challenge of Indians during the 1980's to the rulings of the I.C.C. and Federal Courts.

In 1986, Donald L. Fixico published *Termination and Relocation: Federal Indian Policy, 1945-1960*.⁸ In chapter two, "The Indian Claims Commission and the Zimmerman Plan," Fixico discusses quite succinctly the relation between termination and the I.C.C., and the desire of both programs to cut government expenses and remove impediments to Indian assimilation. Unfortunately, the author is vague and misleading in his references to the legislative history of the Commission and much of the complexity of the relation of the Commission to termination is missed. But the post-1946 relationship of the Commission to the context of termination legislation is presented very well to the benefit of the reader.

Milner S. Ball's "Constitution, Court, Indian Tribes", *American Bar Foundation Research Journal* (1987),⁹ contains little on the I.C.C. but it is such an excellent review at length (140 pages) of the historical context of Indian land loss, the complexities of the resultant Indian law, and tribal relations to the U.S. Government that it must be mentioned as a perfect introduction to a most intriguing story.

The reader is also urged to consult three other reference sources for materials related to the I.C.C. First, Rory Snow Fausett and Judith V. Royster, "Courts and

Indians: Sixty-five years of Legal Analysis: Bibliography of Periodical Articles Relating to Native American Law, 1922-1986."¹⁰ Second, E.B. Smith, *Indian Tribal Claims Decided in the Court of Claims of the United States*.¹¹ Smith, a former chief of the Indian tribal claims section of the G.A.O., compiled and briefed the 225 major cases heard by the Court from 1881 to 1947. This book, published in 1976, gives the researcher exploring the background of the I.C.C. an indispensable source. Thirdly, the *American Indian Journal and Institute for the Development of Indian Law*,¹² begun in 1975, is worth pursuing for later developments in the unfolding Indian legal history.

H. Rosenthal's work, "Their Day in Court: A History of the I.C.C., 1946-78",¹³ remains the only full scale institutional history of the Commission. It can be read in condensed form in the *Final Report* of the I.C.C. (1979)¹⁴ or in a revised and updated abridgment in Imre Sutton's *Irredeemable America* (1985).¹⁵ Sutton's book contains excellent articles on Indian land claims and can be usefully consulted by anyone wishing information on the Commission, its work, and its meaning for Indians and America.

Lastly, the classic treatment of the subject, Felix S. Cohen's *Handbook of Federal Indian Law* appeared in a new edition in 1982. As a reference source this work is nearly indispensable.¹⁶

The topic remains open. The issues of the Commission's failure to satisfy many tribal claims is yet alive. The unsettling of title to much of America still haunts some jurists. The place of the I.C.C. in American/Indian legal history is undecided. And, certainly, the moral issues between nation and tribe, unresolved by the I.C.C., still confound the successors of those legislators who, in 1946, tried to confront this issue in law but were defeated by tradition.

NOTES

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2. John White, "Barmecide Revisited: The Gratuitous Offsets in Indian Claims Cases," *Ethnohistory*, Vol. 25, Spring 1978, 179-92.
3. Offsets are any expenditures that are allowed as deductions from a final award. Gratuities were defined as the cost of annuity goods beyond the treaty stipulations expended for the benefit of the tribe.
4. Russel L. Barsh, "Indian Land Claims Policy in the United States," *North Dakota Law Review*, Vol. 58, 1982, 7-82.
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Their day in court