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# Repaying Historical Debts: The Indian Claims Commission

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# REPAYING HISTORICAL DEBTS: THE INDIAN CLAIMS COMMISSION

## I.

## INTRODUCTION

The fate of the Indian population has been one of the neglected themes of American history. Historians sympathetic with the expansion across the continent of the growing white population have minimized the fact that one concomitant of this process was the often ruthless conquering of the numerous aboriginal societies who had populated virtually the entire area of the United States when the Europeans arrived. The continent was not "empty" when the European-Americans persevered in their expansionist and land hungry drives westward. To study the records of these Indian-white relations is to discover a history of conquest and ill-treatment which would not be acceptable under any rules of "civilized" warfare, even at that time. These encounters were not merely between independent groups of whites or colonies and Indian societies, but they were encouraged and increasingly directed by the developing United States Government. Though there are exceptions to this pattern, the theme which emerges is one where Indian groups were treated as bothersome, but sufficiently weak, obstacles whose way of life could be repeatedly upset as they were moved from one area to another. Treaties guaranteeing tracts of land "in perpetuity" to displaced Indian groups were broken as soon as the government discovered some need for the awarded area. Other treaty provisions for food, medicine, tools, annuities and other supplies to assist destitute and disintegrated Indian societies to rebuild were ignored as often as not. It is perhaps a reflection of growing Indian activism, combined with the awareness brought by the civil rights movement of unresolved social conflict in the United States, that these realities of American history are now being explained in scholarship, that the American population is beginning to see the visibly impoverished and disoriented condition of large portions of Indian society as related to the history they have known as Americans, and the government is looking for new ways to improve conditions for Indians and to rectify historical wrongs.

This note will address itself to the government's attempt finally to come to terms with historical injustices. One of the lesser known components of the government's recent policy toward Indians is embodied in the Indian Claims Commission, a structure established in 1946 with the explicit purpose of disposing of all pre-existing Indian claims against the government. The focus there will be on this Commission, with the purpose of studying how the government dealt with the question of what constitutes just redress to the aggrieved parties. Specifically, attention will be directed toward the ways in which this moral element was continually given secondary importance to issues of expediency, convenience and rational bureaucratic concerns, as a result of which, the potential for awarding just compensation in terms of what would have been appropriate to the claims was not realized.

The structure of this analysis is based on the historical development of the claims policy and on the problems in implementation, which reveal in the ways they were solved, the above-mentioned priorities. The reasons which motivated the government to take up the task of creating an Indian claims policy, and the priorities given these reasons will be discussed from a historical perspective. Provisions of the resultant Act will be described in the context of comparing them with alternatives considered in the course of the decision making process. This will reveal conflicting conceptualizations of the proposed structure that relate to how the Commission was dealing with the question of just redress and that have continued to be debated throughout the Commission's life. In addition, the solutions reached to the problems of Commission structure and certain procedural issues, particularly from the standpoint of their implications for the way the Commission perceived Indian claims and defined just redress, will be presented. From the perspective of the claims themselves, the limitations to just redress, which resulted from the process of filing claims and from the decisions reached by the Commission, will be shown.

## II

## IMPETUS FOR A NEW CLAIMS POLICY

The first response to the recognized need for some governmental structure to have jurisdiction to hear Indian claims was the establishment of the Court of Claims in 1855. However, in 1863, because of support by some Indian tribes for the Confederacy,[1] Indians were barred from presenting claims unless they could obtain special

1. H. FEY & D. MCNICKLE, INDIANS AND OTHER AMERICANS; TWO WAYS OF LIFE MEET 105 (1959).

enabling legislation from Congress. Since Indians were not citizens at that time,[2] such action was not objected to on constitutional grounds. However, growing governmental dissatisfaction with this cumbersome procedure prompted the search for an alternative. The Meriam Commission report[3] of 1928 recommended the establishment of a special commission for this purpose, and the first bill to establish such a structure was introduced into Congress in 1930.[4] This impetus culminated in passage of the Indian Claims Commission Act on August 13, 1946.[5] The Indian Claims Commission was to have a ten year existence during the first five of which "any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska"[6] could present claims. After August 13, 1951, no further Indian claim originating before the date of the Act was ever to be brought before the government. The processing of the three hundred seventy claims, which were divided by causes of action into six hundred five dockets, sixty-two per cent of which were not filed until the last six weeks of this five-year period,[7] could not be completed within the statutory time limit. The Act was extended in 1955, 1960, and 1965 and a bill for a further extension until 1977 is now before Congress.

Congress took an interest in changing the procedure for processing Indian claims for three main reasons. First, there was widespread dissatisfaction with the existing procedures, both in Congress and out. Secondly, Congress felt that awards to Indian tribes would provide some of the resources necessary to implement current government policy in Indian affairs. Lastly, Congress was aware that a moral wrong remained to be righted. It is to be noted that here in these first efforts to facilitate claims processing the most important concerns of Congress were government-oriented rather than Indian-oriented, in the sense that even though it was recognized that this policy would deal with long neglected injustices, the hearings and debates never centered on creating a policy which would be most effective first and foremost in redressing these injustices, which to the Indians formed the heart of the matter. In terms of the purpose of this note, however, the emphasis will

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2. Citizenship to all Indians was awarded in 1924.

3. L. MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION 48 (1928).

4. H.R. 7963, 71st Cong., 2nd Sess. (1930).

5. Indian Claims Commission Act § 1, ch. 959, § 1, 60 Stat. 1049 (1946), *as amended*, 25 U.S.C. § 70 (Supp. III, 1964). The text of the Act, amended as of April 10, 1967, is given in Appendix I.

6. *Id.* at § 70 a.

7. *Hearings Before the Subcomm. of the Department of the Interior and Related Agencies Appropriations for* 1960 *of the House Comm. on Appropriations*, 86th Cong., 1st Sess. 1079 (1952). [hereinafter cited as *Hearings* for appropriate year.]

be evaluating the manner and extent to which this policy did fulfill the moral obligation.

In the first instance, the dissatisfaction with existing procedures was expressed to Congress largely by the Departments of Interior and Justice, through reports and bills proposing changes. They were the first formally to sponsor Meriam's idea that the new structure should be a commission, though as early as 1913, this idea was expressed before the House Committee on Indian Affairs by Commissioner on Indian Affairs Meritt.

The work in 1930 of the subcommittee of the Senate Committee on Indian Affairs to investigate the prosecution of Indian claims brought the defects of the system into full view.[8] Requiring potential Indian claimants to obtain jurisdictional legislation was inefficient, time-consuming and costly to the Indians, Congress and the Departments involved. With this piecemeal approach, it was feared that perhaps a century or more would pass before all claims were heard. Political considerations, such as the standing in Congress of the bill's sponsor, the make-up of the Indian committees and the attitude of the current administration, were often more important than the merits of the cases in determining whether or not the enabling legislation would be passed. Some tribes unfamiliar with the necessary procedures were at the mercy of opportunistic lawyers who expended tribal resources and used political methods to obtain jurisdictional acts for claims without merit, which were subsequently dismissed by the Court of Claims.[9] Before a petition was heard by Congressional committee, it was sent to the Department of the Interior for a report. The Department objected to this procedure, feeling a conflict in its responsibility to promote the Indians' interests on the one hand and in having to consider petitions often charging the Department with irregularities in its dealings with the tribes on the other. Such conflicts aside, however, the Department's recommendations also often reflected the attitudes of the current administration. Inconsistencies were common in the decisions by Congress to favor or reject petitions and in the provisions included in bills passed, not only from claim to claim but in the outcome of a given petition on two separate filings.

Congress was pressured by the growing number of petitions for jurisdictional acts and unable to study each case adequately. As one result, the provisions in the act passed were often inappropriate to the particular claim; when the Court of Claims dismissed

8. *Hearings on H.R. 7837 Before the House Comm. on Indian Affairs,* 74th Cong., 1st Sess. 29 (1935) [hereinafter cited as *Hearings on H.R. 7837*]. Much of the information in this section comes from a statement by Rufus G. Poole, Assistant Solicitor, Department of the Interior at 16-31.

9. *Id.* at 17.

cases for want of jurisdiction, Indians were poorer and older but very little closer to settlement than when they filed their original petition. They could only continue by returning to pressure Congress further by requesting amendments to their original act. The settlement of many Indian claims required political decisions in the form of judging the provisions of a given treaty, and only in the rare cases where Congress had enabled the court to revise a treaty could the court prosecute such claims. Although these claims often had merit and the treaties, if considered as contracts in an equity court would have been subject to reformulation, Congress was reluctant to grant broad jurisdiction, partly because it did not have time to obtain adequate knowledge of the cases.

Few complaints were lodged against the work of the Court of Claims itself; the length of time required for cases to be decided was not the result of court delays. Rather, it came from the provision that every Indian claimant before the court was entitled to a full-scale investigation by the government covering the facts of the case, defenses against it and set-offs against the claim. For claims dismissed on the facts, the years of time and thousands of dollars spent on the cases was an obvious waste.

A final aggravation with this procedure concerned the issue of setoffs, counterclaims and gratuities which could be charged against a recovery. Provisions of which government expenditures were to be charged to the tribe were inconsistent from case to case both in the jurisdictional acts and in the Court of Claims decisions. As the number of claims grew, the requirements became increasingly severe, in part, it seemed, to hold down the cost of claims payments made. In some cases they completely eliminated the recovery. Because, however, the amount of the setoff payment could not be known until the end of the proceedings and because of the possibility of returning to Congress for an amendment to the jurisdictional act provisions concerning set-offs if the sum proved high, the situation did not deter Indians from the expensive process of pressing their claims.

A second reason for Congressional interest in claims was related to the use of award funds which would be received by the tribes, an issue with which the Commission itself was never to be directly involved. Although decisions regarding the use of Commission-awarded funds were the responsibility of the tribes, Congressmen and other government officials were aware of the potential implications of placing a large amount of money in the hands of the Indians and attempted to influence its use. Eventually the Bureau of Indian Affairs was able to require tribes to prepare programs for the

use of these funds before they were disbursed and to participate in their preparation.[10] Officials themselves differed as to the optimum use of funds, but they realized that through this erasing of an historical wrong advances could be made toward the solution of certain contemporary problems. One common threat running through the particular suggestions made was that these funds could lessen the degree of government involvement in Indian affairs, positively stated as increasing the degree of Indian economic independence. According to one report, settling claims would reduce federal expenditures for the Bureau of Indian Affairs by 50 per cent,[11] an opinion which has long since proved to be invalid.

Two methods of award fund dispersal were seen by government officials as helping to achieve government disengagement. In the first place, the claims settlement per se would increase Indian migration to urban areas, erroneously equated with integration, because some Indians hesitated to leave their reservations for fear of being excluded from a claims award.[12] Award funds, in addition, would facilitate the move to the city for those interested. As Lurie has written however:

> Ideally, claims payments would give Indian people the necessary stake to begin a new life as ordinary citizens far from the reservations. In actual fact, the amounts paid were relatively small on a per capita basis and Indian communities persisted.[13]

Many per capita payments were too small to provide more than short-run economic gains. The per capita distribution of the Commission award to the Indians of California, for example, was about six hundred dollars and, in order to use this money, the poorest Indians were required to go off welfare.[14] The award thus was exhausted by providing funds for subsistence expenditures for a short time, after which the Indians again became welfare recipients.

Secondly, it was felt that tribes should create long-range development schemes for their reservations, to be financed as far as possible by award monies. The government's financial burden would thereby be eased, first, because it would not have to supply funds

10. Witt, *Nationalist Trends Among American Indians*, in THE AMERICAN INDIAN TODAY 108 (L. Stuart & N. Lurie ed. 1968) [hereinafter cited as NATIONALISTIC TRENDS].

11. UNITED STATES CODE CONGRESSIONAL SERVICE—LAWS OF THE 79TH CONGRESS, 2nd Sess., (Jan. 14, 1946—Aug. 2, 1946) 1354 (1946). [hereinafter referred to as 79TH CONGRESS].

12. WORKSHOP ON AMERICAN INDIAN AFFAIRS, FEDERAL INDIAN LEGISLATION AND POLICIES—A STUDY PACKET 125 (1956); 79TH CONGRESS, *supra* note 11, at 1351.

13. Laurie, *Historical Background* in THE AMERICAN INDIAN TODAY 81 (L. Stuart & N. Lurie ed. 1968).

14. Collier, *The Red Man's Burden Ramparts* (Feb. 1970), *as reprinted in* 2:1 AKWESASNE NOTES 36 (Jan.-Feb., 1970).

to finance the schemes it was encouraging and, secondly, in the long run successful development programs would provide a continuing source of income enabling tribes to provide by themselves the goods and services formerly in the Bureau's budget. One success story in this regard concerns the six hundred Mountain Utes who received an award of $7,200,000 in 1950, about the time that oil and natural gas were discovered on their reservation. The development program, devised by the Utes and the Bureau of Indian Affairs, allowed cash grants to individual tribesmen to alleviate current poverty and established programs for public health, improvement of land and water resources and education.[15]

This attitude that tribal economic independence provided an adequate foundation for tribal autonomy and government withdrawal was to blossom in 1954 into the policy of termination. Though the Indian Claims Commission Act bears resemblance to policies of the period when John Collier was Commissioner of Indian Affairs, and although it is an overstatement to say that the Act was passed "so as to expedite termination,"[16] one effect of the Commission was to provide the tribes with funds which could aid them in becoming self-sufficient and in this sense was consistent with termination objectives. Among the errors of the termination policy was the idea that the apparent economic independence of a reservation was a sufficient criterion for terminating federal government responsibility. Even if such were the case, the experience of disbursing Commission-awarded funds has shown the difficulty of implementing a policy of encouraging economic independence. Factors such as the population and wealth of a tribe, the reservation's natural resources and the amount of the Commission's award limited the scope of any plan. Because decisions about the use of award funds had to be approved by tribal membership, Indian opinions were another important constraint. Government influence was determined by the ability of the Bureau to convince tribal leadership and members of its preferences. Tribal leadership often disagreed with the membership over the issue of per capita payments versus a lump sum use of the awards.[17] Individual Indians typically favored the former, so as to improve their personal standards of living. Insofar as these funds would be used to take Indians from the reservation, government officials advocating Indian integration favored such an alternative. Tribal leaders and others seeing per capita payments as economically non-productive preferred to use funds for schemes which would benefit the tribe as a whole over

15. W. HAGAN, AMERICAN INDIANS 167-68 (1961).
16. *Id.* at 167.
17. Witt. NATIONALISTIC TRENDS, *supra* note 10, at 108.

the long run, an attitude supported by government advocates of termination. A complete evaluation of the benefits which did accrue to the tribes from Claims Commission-awarded funds will have to wait until the Commission completes its work. It can be said, however, that the government is now more cognizant of the difficulties in eliminating Indian poverty, creating economic self-sufficiency and removing government responsibilities and has repudiated its termination policy.[18] Claims awards can at best only provide some economic assistance toward a goal which requires more than mere economic change among Indians.

Thirdly, in creating an Indian claims policy, Congress saw itself as righting a moral wrong in two respects. In the first place, in establishing some kind of machinery for hearing Indian claims, it removed the discrimination Indians had suffered by being barred from obtaining due process in the courts, a condition which had been unconstitutional since Indians obtained citizenship in 1924. It might be said that in having a special Commission for the hearing of their claims alone, the Indians were actually being given preferential treatment representing a reverse discrimination. A special structure was necessary, however, in order not to burden the Court of Claims with a backlog of claims which, because of their similarities, could most efficiently be disposed of by a special temporary structure. All claims accruing after the passage of the Act were to be dealt with in the same manner as claims by all other citizens.

In the second respect, Congress intended the policy it would create would eliminate a moral wrong by hearing all outstanding claims, not only those with bases in law or equity but those of a moral nature. "In order to settle finally any and all legal, equitable and moral obligations that the United States might owe to the Indians, Congress passed the Indian Claims Commission Act. . . ."[19] For this purpose Congress specifically included in the Act provisions allowing for such claims. "The basis for presenting a claim under this [special provision] might be considered a 'moral' basis. For under the wording of the law, it is not necessary that the claim be one which either a court of equity or law would consider."[20] Shortcomings in this regard of the policy as implemented concern not only the failure of this special provision which Congress did include to be fully used. They

18. 116 CONG. REC. 23131 (daily ed., July 8, 1970) (The American Indians—Message from the President of the United States). A full study of the termination of the Menominee Tribe of Wisconsin is given by Gary Orfield in A STUDY OF THE TERMINATION POLICY (Denver: Natl. Cong. of Amer. Indians, n.d.) [hereinafter referred to as TERMINATION].

19. I.C.C. ANN. REP. 1 (1969).

20. Selander, *Section 2 of the Indian Claims Commission Act*, 15 GEO. WASH. L. REV. 416-17 (1947).

relate also to other areas such as the nature and amount of compensation and the way claims were construed, seen in terms of the procedure by which they were decided. Some of these shortcomings could have been averted, as will be shown, had Congress directed its efforts more specifically at this factor motivating its creation of a claims policy.

## III

## EVOLUTION IN POLICY OUTPUTS

Thus motivated, Congress worked to improve the Indian claims processing situation. During the early discussions in the Indian committees, the commission was envisioned as being an "agency of Congress"[21] to aid in processing jurisdictional acts. The claims cases themselves would continue to be heard by the Court of Claims. By 1946 when the Act was passed, however, the scope of the Commission's jurisdiction had been widened and its functions altered. In order to illustrate the evolution in the nature of the proposed commission—and also describe some of the important characteristics of the Act—a comparison will be made of the provisions of a proposed Act, which passed the Senate in 1935 with the actual version. In this way parts of the policy-making process can be analyzed by looking at two proposed statutes embodying sets of choices among alternative means suggested as solutions to the problems which motivated the policy-formation. The resultant Act was the document through which Congress communicated to those in the structure it was creating the particular ways it was to function and areas in which discretion was to rest with the Commission, thus setting the stage for what was to follow. Later the focus will be on implications of the Act's specifications, the Commission's use of the discretion allowed it, the recurrence of some of the same issues as were debated prior to the Act—partly because of ambiguous provisions contained within—and the effectiveness of the policy in accomplishing the goals which motivated its passage.

The scope of the two bills is similar in terms of the types of claims which were to be brought before the proposed commissions, though the wording of Section 2 describing the types underwent minor variation. This reflects continuing agreement in government that the commission formed was to dispose of all outstanding

21. *Hearings on H.R.* 7837 *supra* note 8, at 7.
22. S. 2731, 74th Cong., 1st Sess. (1935), introduced into the House of Representatives as H.R. 7837, 74th Cong., 1st Sess. (1935).

claims with finality.[23] Thus though S.2731 states that the Commission shall "investigate all claims"[24] and the Act says "[t]he Commission shall hear and determine the following claims,"[25] the subsequent clauses in both bills provide for the same range of claims.

The authority delegated by Congress to the Commission was much broader than was envisioned in 1935. Thus S.2731 says:

> It shall be the duty of the Commission to investigate all claims against the United States . . . and to ascertain and determine all of the facts relating thereto and all questions of mixed law and fact as may be incidental to such determination and, on the basis of the facts found by it, to ascertain and determine the merits of all such claims and make findings with reference thereto.[26]

According to the 1946 Act, "The Commission shall hear and determine the following claims. . . ."[27]

Likewise, the outputs of the two commissions had different purposes. Thus, according to the 1935 bill:

> The Commission shall make a detailed report to Congress of its findings of the facts of each claim, the conclusions reached as to the merits of such claim and the reasons therefor, together with an appropriate recommendation for action or nonaction by that body.[28]

Congress was to be provided with a recommendation based on an impartial study of a claim in order to determine whether or not it should be heard in the Court of Claims. This was an improvement over the previous procedure in that the Department of the Interior was no longer required to produce such an evaluation and Congressional committees could make decisions on each claim more quickly and reliably. Congress was not only to be supplied with an evaluation of each claim, but the Commission was empowered to make specific recommendations suggesting that the claim be dismissed, that Congress make an award without a court hearing or that unanswered questions of law remained and that a jurisdictional act should be passed allowing the Court of Claims to hear

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23. Among those who voiced such an opinion were President Harry Truman when he signed the Act, Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N. D. L. REV. 325, 330 (1969); Congressmen on the Indian Committees, *79th Cong. Rec.* 1356; and the Commission itself. I.C.C. ANN. REP. 1 (1969).

24. S. 2731, 74th Cong., 1st Sess. § 2 (1935); *Hearings on S. 2731 Before the Senate Comm. on Indian Affairs*, 74th Cong., 1st Sess., 1 (1935) [hereinafter referred to as *Hearings on S. 2731*].

25. 25 U.S.C. § 70a (1970).

26. S. 2731, 74th Cong., 1st Sess. § 2 (1935); *Hearings on S. 2731* at 2.

27. 25 U.S.C. § 70a (1970).

28. S. 2731, 74th Cong., 1st Sess. § 3 (1935); *Hearings on S. 2731* at 2.

the case. This again was an improvement in lightening the load of the Court of Claims and in enabling Congress to pass jurisdictional acts appropriate to each claim, so that they could be disposed of by the court without requiring Indians to return to Congress for amendments.

In the Act, in contrast, the Commission replaced the Court of Claims almost entirely. The Act provides that:

> The Commission's report to Congress determining any claimant to be entitled to recover . . . shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.
>
> The payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against the claimant . . . shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.[29]

Thus Congress gave the Commission authority equivalent to that of the Court of Claims, except that either party to the claim could appeal the decision to the Court of Claims, "which Court shall have exclusive jurisdiction to affirm, modify, or set aside"[30] the Commission's final determination. The disputants were also given the right of further appeal to the Supreme Court. Additionally the Commission was encouraged to obtain instructions concerning disputed questions of law from the Court of Claims.[31]

While giving the Commission broader jurisdiction by delegating it the authority not only to replace Congress in judging the merit of claims but to perform the work of the Court of Claims, Congress also changed provisions dealing with the way the Commission was to function. Essentially, the 1935 Commission was to be an investigatory body, but in the 1946 Act provisions were included allowing the Commission to function as both an investigator and a court. The 1935 bill states: "The Commission shall make a thorough search for all evidence affecting such claims. . . ."[32] While both bills provided that the commission have access to all government documents it might find necessary and that authorized personnel might examine witnesses and take depositions,[33] additional provisions are

29. 25 U.S.C. § 70u (1970).

30. 25 U.S.C. § 70s (1970).

31. *Id.*

32. S. 2731, 74th Cong., 1st Sess. § 7; *Hearings on S.* 2731 at 3.

33. S. 2731, 74th Cong., 1st Sess. § 7; *Hearings on S.* 2731 at 3; 25 U.S.C. §§ 70 m, 70q (1970).

made in the 1935 bill to facilitate investigatory activities. The proposed commission was enabled to employ:

> such experts, field investigators, or professional and clerical assistants as may be necessary to fulfill duties which cannot be properly performed by persons already engaged in the Government service. At the Commission's request, the General Accounting Office, the Land Office, and the Bureau of Indian Affairs may transfer or temporarily assign to the Commission such of their employees as are specifically qualified to assist the Commission in the performance of any of its duties under the Act.[34]

In the 1946 Act, however, investigatory functions were seen as being performed by one part of the Commission, an Investigation Division, rather than constituting the work of the Commission as a whole. Thus Section 13(b) of the Act says:

> The Commission shall establish an Investigation Division to investigate all claims referred to it by the Commission for the purpose of discovering the facts relating thereto. The division shall make a complete and thorough search for all evidence to the Commission.[35]

By thus including provisions for both court and investigative functions, Congress left ambiguities concerning the way the Commission was to function. It was left to the Commission to decide within what kind of structure it would function as a court and to what extent it would serve as an investigator. Congress gave the Commission responsibility for making final decisions on claims but did not state how the Commission was to arrive at these decisions. "The Commission shall have power to establish its own rules of procedure."[36] Debate on this issue, which was intermittently carried on within the Commission and by others connected with it and which has never been settled to the satisfaction of all participants, has been the result in part of the ambiguous character of the Act.

## IV

## IMPLEMENTATION: STRUCTURAL ALTERNATIVES

The fact that the Commission was to perform both adjudicative and investigative functions and the delegation of authority to the Commission to determine the structure within which these functions

34. S. 2731, 74th Cong., 1st Sess. § 9; *Hearings on S.* 2731 at 3.
35. 25 U.S.C. § 701 (b) (1970).
36. 25 U.S.C. § 70h (1970).

would be carried out gave rise to disagreement over the way in which the Commission was to function. The Commission has functioned in such a way that its adjudicative responsibilities have taken precedence. The problems which it has encountered in settling claims and the inaccurate interpretation that Indian claims were matters to be tried as in a typical court structure suggest that an alternative structure would have been better. An alternative would have improved the processing of this particular type of claim; it would have required viewing the purpose of the Commission more from the perspective of the claimant and less from a legal, bureaucratic orientation.

Congress in creating the Act and the Commission in forming its structure made little effort to consider the views of the Indians. Those involved—Congress, the Bureau of Indian Affairs, the Department of Justice, the Commissioners and lawyers formerly involved in Indian litigation—were groups primarily concerned with the instrumental rather than the ideological issues. As with the preceding jurisdictional act process, claimants were free only to accept or reject the Commission if they wanted to have their claims heard. For those groups who reacted negatively to this policy, cooperation with the Commission was more capitulation than redress.[37] What is missing from the attitude of those who did make the decisions about the Act and the Commission's structure is an awareness of the fact that claims cases differ from typical court cases in that in principle it has been acknowledged that the claimants have legitimate grievances for which they are entitled to redress. With such an orientation, decision makers would have more easily been able to realize that what was necessary was finding the facts of the cases—and thereby discovering those particular cases where the evidence did not support the claim—rather than proving guilt or innocence. Developing a structure on the basis of this orientation would have mitigated many of the problems the Commission-as-court has encountered.

The history of Indian claims policy has been characterized by indecisiveness over the question of structure. The earliest solution for dealing with Indian claims was to group them with all other claims cases to be heard before the Court of Claims. Bills

37. One such group was the Seminole Indians who were not interested in monetary compensation for their historical grievances as offered by a white dominated government and only reluctantly agreed to file a claim on the initiative of lawyers. Interview with William Sturdevant, September 2, 1971. One group of Seminoles remained intransigent and threatened to go to the United Nations with their grievance, wanting their land back, not money. The issue was settled for the Commission by the Court of Claims on a procedural issue such that claims were to be presented by officially designated representatives of the tribes and no separate group had a right to intervene, and could only present testimony. *Hearings for* 1960 *Before the House Committee on Appropriations,* 86th Cong., 1st Sess. 1086 (1959).

before Congress in 1930, 1934 and 1935 to improve Indian claims processing suggested a separate court which would deal exclusively with Indian claims. As the dissatisfaction in Congress with the process of passing jurisdictional acts was one of the important reasons for the search for a new policy, and as it became clear that the problem lay in the need to improve information gathering prior to the passage of enabling legislation, and not in the congestion in the Court of Claims, greater interest was given to establishing a commission which would be attached in some way to Congress. Thus, bills introduced in 1935, 1937, 1940, 1941, 1945 and 1946 called for some form of a commission.[38] In hearings on a 1935 bill, efforts were made to stress that the proposed structure was "not a court,"[39] but rather an "agency of Congress"[40] or a "legislative arm of Congress."[41]

This thinking led to a claims processing policy which can be viewed in three phases; this is exemplified by S.2731 above. The new commission would streamline the process of information gathering, and its jurisdiction would extend to making recommendations to Congress on the basis of its investigations. Congress was the focal point in the second phase of the decision making process. It could finally dispose of claims, by rejecting them or granting awards, or it could stipulate that a court hearing was necessary to resolve all relevant issues. In such cases the required process of litigation and finally decision-making would be delegated to the Court of Claims, in the third phase. What is important to understand here is that it was not seen as necessary to proper claims handling that all claims receive a court hearing.

One aberration in this process of choosing an acceptable claims policy came in 1945 in the form of H.R.1189 which proposed the creation of "an independent agency of the executive branch of the government, to be known as the Indian Claims Commission. . . ."[42] At the suggestion of Felix S. Cohen, then Associate Solicitor for the Department of the Interior, and Ernest L. Wilkinsen, a lawyer long associated with Indian claims cases, this definition of the Commission was deleted because, along with appearing to "have no legal significance," the phrase was "not entirely consistent with the functions of" the Commission which, again, was to be an "agent

38. Vance, *supra* note 23, at 327-28; *Hearings on H.R.* 7837 at 23.

39. *Hearings on H.R.* 7837 at 7, 26.

40. *Id.* at 7, 12.

41. *Id.* at 10.

42. *Hearings on H.R.* 1198 *and H.R.* 1341 *Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess., 1 (1945) (emphasis added).

of the Congress"[43] whose functions would be "partly legislative and partly judicial, rather than executive."[44]

This phased approach to claims settling was missing from the policy set out in the Act as passed. Congress gave the Commission jurisdiction to perform the functions in alll three of the above phases, and it left to the Commission responsibility to determine how this single body would carry out these functions. Thus in instructing the Commission both to conduct investigations and to hear claims cases Congress saw no inconsistency; both functions had been considered necessary to claims settling as Congress had viewed earlier bills. The difficulty resulted from the strong emphasis given by the Commission to the court function. Since the Commission decided that its cases were already too adjudicated, the idea of its performing investigations on these same cases seemed contradictory. The role of the Commission-as-investigator became ambiguous. The Commission went back to the model of the Court of Claims in structuring itself, not being instructed to use the phased approach seen in earlier bills and not considering that this might not be the most appropriate precedent. This situation may largely be attributed to the fact that in the immediate change from the Court of Claims to the Commission as the locus of hearing Indian claims, there was a large carry-over of personnel associated with such cases, i.e., the lawyers for the plaintiffs and those from the Department of Justice as defendant. These people were influential in determing the Commission's structure and helped perpetuate an adjudicative environment in the Commission.

The alternate phased approach was developed by Congressmen in response to what was seen from their perspective as a solution to their difficulties in claims processing. The Act did not communicate this approach to the Commissioners, who were given rein to establish procedures as they saw appropriate. However, it did include provisions for court hearings. Thus, though Congress had earlier given preference to a commission format, a court structure could and did result, and the Investigation Division became a residual element.

The Commission has minimized the operations of the Investigation Division, and the debate which has continued because of dissatisfaction with the Commission's functioning primarily as a court has centered around the use of this Division. The attitudes about the Commission's proper structure have varied from that of Commissioner Witt who explained, "It is called a commission.

43. *Id.* at 140.
44. *Id.* at 149.

We are in reality a court."[45] Commissioner Vance concluded a critique of the Commission's functioning by stating, "The Commission has chosen to sit as a court, and, as a result, the Congressional mandate has been utterly frustrated."[46]

In an early case, *Pawnee Indians v. United States*,[47] the Court of Claims on appeal interpreted Section 13(b) of the Act and resolved the concern felt by the Commission over whether it was statutorily required to establish a continually operating Investigation Division. The Court ruled that:

> Section 13(b) of the Act does not make mandatory the referral of every claim to the Division for investigation. . . . It is within the discretion of the Commission to refer a claim to it or not to do so. It is the primary duty of the parties to gather the evidence and present it to the Commission.[48]

The Investigation Division has continued to exist, because of the statutory requirement, but its functions have been unimportant. Originally the Commission set up the Division with a Chief Investigator and one lawyer as staff member. When the Chief left the Commission he was not replaced and the Commission began to designate the members of its legal staff as attorney-investigators. The Division made minor reports on five early cases, but because both litigants were preparing their court presentations by independently conducting wide ranging investigations on their cases, the output of the Investigation Division was soon seen as unnecessary and most investigatory activities were abandoned. Since then, the Division has functioned in occasional circumstances. In some cases, the tribal lawyer's contract expired, was not renewed and no replacement was found. In others, the tribes were unable to obtain any legal counsel. Such situations usually arose with claims of doubtful validity or minimal evidence which would not likely result in an award. Because, however, these claims had been filed, the

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45. *Hearings for* 1956 *Before the House Comm. on Appropriations,* 84th Cong., 1st Sess. 574 (1955).

46. Vance, *supra* note 24, at 335.

47. In this section I am relying heavily on an explanation of the Investigation Division's functions provided by the Chief Commissioner Watkins in response to a request by James A. Haley, Chairman, Subcommittee on Indian Affairs for the House Committee on Interior and Insular Affairs prompted by a complaint by the plaintiff in the Indians of California case raised at the time Congress was holding hearings prior to the awarding of judgment funds to the effect that at some point during the claims determining process they had requested information from the Commission and did not receive it. *Hearings on California Indians Judgment Fund,* 1966, *Before the House Committee on Interior and Insular Affairs,* 89th Cong., 2nd Sess., 190 (1966). Parenthetically, the section of Watkins' letter which responds to this specific complaint states, "There is little, if any, demand from Indians or their counsel for information from our very limited investigations. A few Indians have mentioned it to us recently, but when we have explained the situation to them they seemed to be satisfied.' " *Id.* at 195.

48. *Id.* at 193, 194.

Indians had the right to have them heard, and the Commission had the Division function as investigator and counsel for the plaintiff. In another situation, similar to that which prompted the opinion in the *Pawnee* case, if the Commission had reason to doubt that all relevant evidence had been uncovered, it could either direct the parties to research certain issues or, because "Congress assigned an unusual and broad function to the Commission with respect to its investigatory powers,"[49] the Division could perform the investigation, acting as "an *amicus curiae*."[50]

Once established, the Commission's structure has been remarkably resistent to change. Procedures have been modified in response to instrumental problems within the court format, as will be shown in the following section, but no suggestion for over-all restructuring has been seriously considered. Such suggestions have not been made in terms of the phased approach mentioned above, which would have brought both investigation and litigation meaningfully into the Commission and would probably have offered the most successful alternative. Because of the polarization brought about by a Commission functioning as a court, the issue unfortunately has been viewed in terms of having either a court or an investigating body.

One of the objections raised to the Commission's investigatory powers is that the integrity of the lawyers for the plaintiff and the defense would require that they not accept the results of investigations not conducted under their own auspices. Without doing their own research, it is asserted, they could not know if investigations have been adequate. Furthermore, the need for the parties to study the conclusions of the Division's research would also prolong the process; as Commissioner Arthur V. Watkins explained:

> Our experience is that the parties would take exception to whatever was reported unless it was in their favor. If they didn't approve of the investigation reports they would undoubtedly move to strike them from the record. All of these items would be time consuming and could easily add another five to ten years to the life of the Commission.[51]

Thus, he concluded, "an investigation as envisioned in the Claims Act would be very costly, impractical, time consuming, and in many instances useless."[52]

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49. *Id.* at 193.
50. *Id.* at 194.
51. *Id.* at 195.
52. *Id.*

These problems all reflect the attachment to the adjudication of claims which has characterized the Commission in operation. Had the process been looked on less unifunctionally, these problems would not have been as serious. Claims have been viewed as cases bringing together two disagreeing parties who by presenting their sides of the dispute before an adjudicator, in this case the panel of Commissioners, can have their conflict resolved. Had it been accepted that claims-settling dealt rather with finding facts on cases which in principle have been acknowledged as valid, it would not have been necessary for both the Indian groups and the Department of Justice to conduct separate investigations. The immense and costly task of bringing to light a body of largely historical facts would then not have needed to be duplicated, but could have been entrusted to the Commission as an impartial arbitrator. The experts hired by the Commission for this purpose would be essentially the same people as have been used by the parties. Disputed points and suspected inaccuracies in the Commission's findings could have been subjected to further research. The question of how the Indians and the Department of Justice would know if the findings were faulty without conducting their own studies is the same problem the Commission has already successfully confronted, as mentioned in connection with the *Pawnee* case. Since, however, Commission-conducted investigations would not be those of the "opposing party," there would be less reason to suspect the validity of the findings.

Over and above the facts of the cases, any points of law to be determined could also be dealt within this framework. The legal reference points upon which claims decisions have been based are the decisions in earlier claims cases from the Court of Claims and the guidelines in the Act. As shall be shown in the section on Commission decisions, many of the decisions were without precedent and have resulted from the interpretations of the Act by the Commissioners and the Court of Claims. This process would remain unchanged were the Commission also to conduct investigations. The Department of Justice would continue to fulfill its statutory responsibility to defend the United States,[53] and counsel for the Indians could protect the position of the tribes against objectionable interpretations of fact or points of law by means of the statutorily required hearings on each case before a final decision can be made and the opportunity for appeal to the Court of Claims. These safeguards would insure that a fair hearing of each case would be brought about without using a court format.

53. *Id.* 25 U.S.C. § 70n (1970).

It has been asserted by lawyers and others favoring the court system that an adjudicative structure was the only one whereby Indians could obtain their "day in court" and that they would not trust a government-established commission to decide cases against the government. The Commission, however, has been established so as to be independent of the influence of other arms of government. The danger of pro-government bias would not change whatever the structure, and the present Commission has not been accused of partiality. As an impartial legislative body, using primarily academic experts from outside government, the danger of Indians not being given fair treatment would be remote. Hearings and appeals would provide the opportunities for objecting to Commission conclusions. Thus it would seem decisions satisfactory to Indians would result from a structure which did not carry the implication that no claim was seen as justified until the Indians had proved it to be so.

The experience of the experts employed by the Indian claimants and the Department of Justice who conducted investigations and presented findings illustrates the difficulties which the court format presented to settling Indian claims. One such expert has pointed out that "[T]he Court of Claims had used anthropological testimony on only three occasions and no precedents in testimony had been established in this regard, so that the role of expert witness was a new one for archaeologists, ethnologists and ethnohistorians."[54] The difficulties involved in the lengthy, intricate and at times conflicting presentations of evidence by experts were not anticipated by the Commission when it modeled itself after the Court of Claims. Likewise, most experts had no previous experience in working within a legal setting. They felt it incumbent upon them to adjust to the requirements made by the lawyers and the peculiarities of court procedures. Had the settling of claims cases not taken place within a court setting with two opposing parties, many of the difficulties of the Commission in obtaining information about claims would have been mitigated. Expert witnesses, testifying in the setting of a hearing, especially when under cross-examination at times approaching the character of "inquisition,"[55] by lawyers interested in stressing their own side of the case, have tended to becloud the issues by taking a defensive position. Had the Commission directed information gathering and employed scholars to work together in their research, differences among the experts could have

54. Lurie, *The Indian Claims Commission*, 311 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 60 (1957). [hereinafter referred to as the I.C.C.A.].

55. Lurie, *A Reply to the Land Claims Cases: Anthropologists in Conflict*, 3 ETHNOHISTORY 268 (1956). [hereinafter referred to as REPLY].

been ironed out before the presentation of conclusions to the Commission. Such an arrangement would also have enabled scholars to freely present relevant information of a social and cultural nature, without the constraints of working under the direction of lawyers. It would have given those professionals who were most familiar with this kind of information the responsibility for presenting it to the Commission, rather than having lawyers incorporate types of evidence with which they were unfamiliar into legal briefs.

Thus, experts and lawyers alike, have been inconvenienced by the difficulties of working together under the structure of the commission-as-court. Anthropologists have consciously attempted to adapt and have held discussions and conferences and written papers[56] focusing on issues such as protecting informants in presenting testimony, preserving relationships with tribes with which they want to continue to work (especially those who have been employed by the Department of Justice) and of the "problems of communication between anthropology and the law."[57] They have also recognized, however, that the requirement to join opposing camps was an unnecessary one for the critical element in claims settling of information gathering and that it inhibited their ability to present the facts. They have not expected to be influential enough to effect a complete restructuring of the Commission but have understood that their influence in the future should be applied at the policy-formation stage.

A non-court structure would also have been preferred from the perspective of the time the Commission would take to complete its work, an issue which has been important to Congress since before the Act was passed. In expressing the rationale for originally allotting the Commission a ten-year life span—within which, given the large number of cases facing the Commission it would not have been able, under any format, to complete its work—Congressman Henry Jackson referred to other commissions, using examples where a court structure had not been employed:

> When we set up a Court of Private Land Claims in California in 1851 we set a limit of 2 years on the presentation of the Spanish and Mexican claims. We cleared up the situation in that period of time and so far as I know we have not reopened the question since. From time to time we have set

56. Three such conferences were the April, 1954, meeting of the American Ethnographical Society in New Haven, Conn.; the Indian Claims Symposium at the December, 1954, American Anthropological Association meeting in Detroit, Mich., papers from which appear in 2:4 ETHNOHISTORY (1955); and the session on "Anthropology and Indian Land Claims Litigation" of the May, 1955, meeting of the Central States Anthropological Association in Bloomington, Indiana.

57. REPLY *supra* note 55, at 266.

> up other special temporary commissions on Indian claims such as the Dawes Commission and the Pueblo Lands Board, which were able to clear up within a few years problems that had been troublesome for many decades. The decisions of the Dawes Commission and the Pueblo Lands Board have not been overthrown either by the courts or by later Congresses. I think that we can expect as much finality in the work of this Indian Claims Commission provided we give it a jurisdiction broad enough to deal with the entire problem as it now exists and provided we require all Indian tribes to present their claims within 5 years or forever hold their peace.[58]

It was under the impetus of speeding up the Commission's work that the attempt was made, aided by the influence of John Vance on the Commission, to essentially re-structure the Commission by putting the Investigation Division into operation. The issue was brought before the Commission and described in hearings of the Senate Committee on Interior and Insular Affairs and was described by Vance in an article and in a memorandum to the Commission of October 28, 1969.[59] Vance has indicated that the currently operating Foreign Claims Settlement Commission provides a model of a successful non-adjudicative commission dealing with similar issues which it would have been wise for the Commission to use.[60] These efforts have resulted in procedural changes of a narrower scope, as will be discussed below, but no changes were made in the functions of the Investigative Division.

By structuring itself as a court, the Commission has complicated the procedure for settling claims, in a way which has not only been inappropriate to the most effective presentation of information, but has lengthened the life of the Commission. This has involved

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58. Vance, *supra* note 24, at 330, *quoting* 92 CONG. REC. 5313 (1946).

59. These documents and others related to this discussion are found in *Hearings on Status of Indian Claims Litigation Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 2nd Sess. (1970) (hereinafter referred to as *Heaings on Indian Claims Litigation*). The recommendations, as given in Vance's article, are as follows:

1. Refer all claims before the Commission to the Investigations Division as authorized in section thirteen (b) of the Act.

2. Authorize the Director of the Investigations Division to utilize the services of any employee of the Commission in making a complete and thorough search of the evidence affecting the claims. The employee should be authorized to administer oaths and examine witnesses as authorized in section eighteen of the Act.

3. Authorize the employment of an intermittent or regular basis of anthropologists, historians, ecologists, land appraisers, economists, accountants, investigators and such other persons as shall be necessary to complete the investigations.

4. Direct the Investigations Division to submit to the Commission all pertinent evidence and proposed findings of fact upon which a Commission decision can be based.

5. If the Commission agrees that the proposed findings are proper then a hearing should be called to give the interested parties an opportunity to be heard before the Commission makes its final determination as authorized in section seventeen of the act.

Vance, *supra* note 24, at 335-36. A slightly amended version appears in Vance's October 28, 1969, memorandum.

60. Interview with Commissioner John T. Vance, September 3, 1971.

"a bewildering series of hearings on title, value, offsets, attorneys fees and all the motions that any party chooses to present"[61] and compliance to the requirements of time demanded by the Indian and defense lawyers and their investigators.

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 has passed when it would have been possible to create a Commission most appropriate to its purpose.

## V

## IMPLEMENTATION: PROCEDURE

The early Commission, confronted with an unexpectedly large work load in the number of claims filed and in the complexity of the issues in deciding them, functioned slowly and rather inefficiently. It was criticized in Congress for not having made efforts at procedural reform to correct this situation.[62] In attempting to organize its operations and bring together the elements of trial proceedings and the requirements of preparing claims cases, the Commission evolved a working procedure including trial in several stages. Originally the Commission waited until all parts of a case were prepared before holding trial. This was seen as unnecessarily time-consuming and costly, especially for cases decided against the plaintiff on a question considered early in the trial. Later the several stage approach was adopted. It was facilitated by the opportunity for interlocutory appeal to the Court of Claims provided in 1960, which would not, however, prejudice the chance for later appeal on a question decided early in the trial.[63]

In the first, or title stage, the Indian claimants were to show they were "successors in interest" to those wronged. Among the issues here were defining which Indian group, in the hierarchy of Indian organization, was the party to the claim,[64] determining whether or not this group actually had title to the land (an important issue to be dealt with below) and defining the contemporary

61. Vance, *supra* note 24, at 334.
62. *Hearings on Indian Claims Commission Before the Subcomm. on the Dept. of Interior and Related Agencies of the House Comm. on Appropriations,* 87th Cong., 2nd Sess., 1403 (1963).
63. 25 U.S.C. § 70s (b) (1970).
64. A. Kroeber, *Nature of the Land-Holding Group,* 2 ETHNOHISTORY 303-12 (1955). *See also* Lurie, *Problems, Opportunities and Recommendations,* 2:4 ETHNOHISTORY 372 (Fall, 1965) [hereinafter refered to as *Problems*].

counterpart of the early group. The purpose of this stage was to establish the group legally entitled to serve as plaintiff. The question of what individuals were legally members of this group was left for Congress to decide in its responsibility for authorizing awards. In the value stage, used in land claims, the exact acreage was determined and evalulated, and from the value of the land taken the amount of compensation previously paid was subtracted, to determine the liability of the United States. The third stage involved the determination, with the help of reports by the General Service Administration, of gratuitous expenditures made by the government on behalf of the plaintiff. Such offsets as the Commission found were to be charged against the tribe and deducted from the amount owed. In cases where a dispute arose between the plaintiff and its counsel, a fourth stage was required to determine fees and expenses.

Within this procedural format, coordination of the participants presented a problem that has frustrated all attempts at speeding up the Commission's work. This is a problem related to the complex nature of the adjudicative claims processing procedure which could have been mitigated had a more simplified procedure, such as that of an investigative commission, been used. This alternative would also have put more of the participants directly under the authority of the Commissioners and given them more power to influence the pace of operations. The Indian claimants who set the Commission in motion by filing claims provided no problem of coordination or delay, being influenced by the pressure of a specific deadline. Since sixty-two per cent of the claims were filed within six weeks of that date, the Department of Justice was deluged with a large number of claims for which it had to prepare answers. The inadequate staff of the Land and Natural Resources Division of the Justice Department, charged with the defense of Indian claims, has been cited as the main reason for the delay the Department caused in the early period of the Commission's existence.[65] Thus, in 1958, Commissioner Witt stated:

> There are a hundred or more claims that have been pending before us, some of them 5 years—they cannot be pending less time than that, some of them have been pending longer—that the Department of Justice has not even as yet been able to make sufficient investigation to file an answer and set

65. Among the statements to this effect are those of Commissioner Witt in 1965. *Hearings for* 1957 *Before the House Comm. on Appropriations,* 84th Cong., 2nd Sess. 631 (1956); *Hearings for* 1958 *Before the House Comm. on Appropriations,* 85th Cong., 2nd Sess. 15 (1960).

> up the defenses that it might have to the payment of the claim.[66]

Once the bulk of this work had been completed, the Commission found itself waiting for the Indian lawyers to prepare their full presentations. Thus in more recent times the plaintiff has been cited as the cause of delay.[67] The Commission has also been cited as a cause of delay because of the time it has sometimes required to hand down decisions.[68] In various appropriations requests the Commission has asked for funds to hire additional lawyers, and in 1967 the number of Commissioners was increased from three to five, partly to enable the Commission to process its work load more rapidly.[69]

One final reason for delay concerns claims which require a full accounting by the government of its handling of tribal funds. The General Accounting Office and, after 1965, the Indian Tribal Claims Branch of the General Service Administration have had the responsibility for making such accountings, and recently the inability to complete these cases has been attributed to the slowness of the G.S.A. Little can be done by the Commission in trying accounting cases before these reports are completed, and it is perhaps a measure of the work completed on land and other cases that recent concern has focused on this particular set of claims. Congress and the parties to the affected claims cited this problem in hearings held in 1970. The Commission was less concerned, it seems, because it was out of phase. A decision that the accountings be made up to the date of the trial, rather than up to 1946 when claims filing began, settled by appeal to the Supreme Court in the case of *Southern Ute Tribe v. United States*, has made the work load of the G.S.A. greater and more difficult. Accountings of recent transactions require obtaining records scattered throughout regional federal records offices and Bureau of Indian Affairs field offices. These records are not available with the older records in the Washington archives.[71] The G.S.A. staff working on claims

66. *Hearings for* 1958 *Before the House Comm. on Appropriations,* 85th Cong., 1st Sess. 730-34 (1957).

67. Examples are found in *Hearings on the Indian Claims Commission Act: Extension and Enlargement Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs* 90th Cong., 1st Sess., 108 (1967) [hereinafter referred to as *Hearings on I.C.C.A.*]

68. Some such criticism was made during the 1967 hearings to extend the Act by Indian lawyers, *Id.* at 97,99; and by Senator Ed Edmundson *Id.* at 110.

69. 25 U.S.C. § 70b (a) (1970).

70. *Hearings on Indian Claims Litigation Before the House Comm. on Interior and Insular Affairs.* 91st Cong., 2nd Sess. 25 (1970) (statement by tribal attorney Glen A. Wilkinson). Response by Commission Chairman Jerome K. Klykendall indicating the Commission and the Court of Claims decisions would be made shortly. *Id.* at 27.

71. *Id.* at 54 (statement by Dr. James B. Rhodes, Archivist of the United States, General Services Administration).

accountings has been allowed to dwindle from about eighty or ninety to two persons.[72] Enlarging this staff would help eliminate one of the current reasons for lack of coordination which delays the Commission's work.

The Commission has been criticized for failing to take the initiative of conducting investigations itself.

> Conforming to existing procedures, the Commission sat entirely as a judicial body performing no independent investigation of the claims filed before it but instead waiting for the claimants' attorneys and the lawyers of the Department of Justice to present the issues and the evidence to the Commission.[73]

Barker, while suggesting only changes aimed at accelerating the Commission's established procedures, asserted the Commission "should exercise aggressive leadership in requiring counsel to get cases prepared, heard and concluded."[74] Some changes have been brought about by a Commission more aggressive and pressured to finish its work.

The orientation toward procedural reform began in the early sixties and has continued to be important to the Commission. This impetus was spurred by Congressional dissatisfaction with the long life of the Commission, and its concern that the Commission may attempt to perpetuate itself. Thus, for instance, in 1961 it was recommended that ". . . Congress ascertain the reasons for the inordinate delay of the Indian Claims Commission in finishing its important assignment."[75] In 1967 Congressman John P. Saylor expanded on this issue in Committee hearings:

> . . . I certainly believe that this committee and our counterpart on the other side of the Capitol should be advised every year so we can ride herd on this Commission, so to speak, to see to it that they do their work and go out of business at the end of this period of time. [A bill to extend the Commission's life to 1972 was being discussed.] In other words, they have been in existence twice as long as they were sup-

72. Statements of staff size vary: Chief Commissioner Watkins gave the figure eighty in 1961 and 1963. *Hearings for* 1962 *Before the House Comm. on Appropriations*, 87st Cong., 1st Sess. 887 (1962); *Hearings for* 1963 *Before the House Comm. on Appropriations*, 87th Cong., 2nd Sess. 1410 (1963). Franklin Ducheneaux, Legislative Consultant to the National Congress of American Indians, gave the ninety and two figures. *Statement of the Witness of the National Congress of American Indians on S. 2408, a bill 'to Extend the life of the Indian Claims Commission, and for Other Purposes' before the Committee on Interior and Insular Affairs of the United States Senate* enclosed in a letter from Leo W. Vocu, Executive Director, N.C.A.I., October 26, 1971, at 3.

73. Vance, *supra* note 24, at 333.

74. Barker, *The Indian Claims Commission—The Conscience of the Nation in its Dealings with the Original Americans*, 20 FED. B.J. 240, 245 (1960).

75. American Indian Chicago Conference, *The Voice of the American Indian—Declaration to Indian Purpose*, University of Chicago, June, 1961, at 15.

> posed to have been originally, and while these cases are complicated, it seems to me that the Congress has been more than patient with the Commission.[76]

Reflecting its own concern with this problem, the Commission in a 1968 statement to the House and Senate Appropriations Committees asserted that "it 'will institute any innovations which will expedite its work'."[77]

Under Chief Commissioner Arthur V. Watkins, the Commission in 1960 began to maintain a calendar of hearings, whereby the parties agree in advance on a specific date for the presentation of their cases. While this has undoubtedly encouraged lawyers to prepare their cases more rapidly, requests for continuances have limited the effectiveness of this reform in accelerating claims processing.[78] The provision Congress added to the Act in 1967 requiring that a calendar be set up including a trial date earlier than December 31, 1970, for each claim and including strictures against continuances has added weight to this Commission policy.[79]

In 1968, as one of the changes Commission Chairman John T. Vance was able to make to expedite procedures, the Commission issued a policy statement on pretrial procedures. This included preliminary conferences which, unlike trial proceedings which at the time required a quorum of three Commissioners, were conducted by only a single Commissioner. Pretrial proceedings have reduced the number of issues to be dealt with at the trial hearings by producing stipulations on agreed facts.[80] The conferences have been favored by experts as an alternate to an investigatory Commission and have aided them in presenting their special types of evidence.[81] They have helped in eliminating differences which were "more apparent than real and were due to the nature of questions put to them in a litigious situation"[82] or to different theoretical perspectives.

Settling cases by compromise is another way to expedite the Commission's work. Some early cases were settled by compromise under rules established for the Court of Claims, but this method was replaced in 1960 by new procedures aimed at making such decisions more compatible with the Commission's aim of finally disposing of Indian claims. The key charge was to require that

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76. *Hearings on I.C.C.A. supra* note 67, at 108.
77. Vance, *supra* note 24, at 335.
78. *Hearings for* 1966 *Before the House Comm. on Appropriations,* 89th Cong., 1st Sess., pt. 2, at 10 (1965); *Hearings on I.C.A.A., supra* note 67, at 11, 32, 52-53, 68.
79. 28 U.S.C. § 1505 (1970).
80. United States Indian Claims Commission, Policy Statement § 101: Pretrial Instructions to Counsel, mimeo. July 15, 1968.
81. LURIE, REPLY, *supra* note 55, at 268, 275.
82. THE *I.C.C.A., supra* note 54, at 60.

compromises receive the approval of the Indian groups involved before they could be finally considered by the Commission. This provision was intended to eliminate the chance that Indian claimants would file suits against the government based on dissatisfaction with the compromises agreed to by their lawyers.[83] This attempt to improve compromise decisions reflects the Commission's view of compromises as a satisfactory, if not preferred, way of settling claims. Compromise decisions can shorten the trial process by eliminating the need for hearings on at least some phases,[84] although the value in this is reduced because they usually can be agreed upon only near the end of the trial proceedings,[85] and are made without recourse to lengthy appeals. Congress as well has favored compromise decisions as a means of successfully disposing of claims, shown in their addition of Section 27(b) to the Act. The new section provided that if a claim was not ready by its calendar date, with allowance for a maximum of one year of continuances, it was to be dismissed with prejudice *unless* a compromise was being negotiated,[86] no matter what the reasons for delay or the appropriateness of such a settlement.

The question of why Indian claimants should accept a compromise amount, through compromise procedures which often benefit the lawyers and the Commission more than the Indians, has only been answered by the statement that a full hearing might produce a settlement less than that reached by compromise.[87] Indians, it is said, might get just about as much money nevertheless. The faster settlement would provide awards which could begin to draw interest earlier, if investment is possible given the method of disbursement chosen.

This rationalization of the use of compromise becomes more acceptable if the Indians do approve the settlement. In regular proceedings Indian claimants can appeal a decision, even by replacing their lawyer if he should disagree (assuming that the B.I.A., which must approve all lawyers before they can work on claims cases, does not object). Compromises, however, are intended to produce agreements which, because they are agreed upon in advance by all parties, do not require appeal. In some instances it has been seen that Indians have not been given adequate opportunity to consider and respond to proposed settlements.

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83. *Hearings on I.C.C.A., supra* note 67, at 50, 138; Barker, *The Indian Claims Commission—The Conscience of the Nation in its Dealings with the Original Americans*, 20 FED. B.J. 240, 244 (1960).
84. *Hearings on I.C.A.A., supra* note 67, at 51; *Hearings on Indian Claims Litigation* at 43.
85. I.C.C. ANN. REP. at 5 (1969); I.C.C. ANN. REP. at 3 (1970).
86. This amendment was added in 1967. 25 U.S.C. § 70(w) (Supp. III, 1964).
87. *Hearings on Indian Claims Litigation* at 38.

In the case of the Winnebago Indians,[88] the haste and pressure of the lawyer in getting tribal approval, even though "his intentions were doubtlessly honorable," produced a rapid and positive vote on the proposed compromise partly because the Indians were given the impression that this would enable them to receive the award faster than if they voted after thirty or sixty days of deliberation. Indians who might have voted against the compromise had the feeling that a positive result was inevitable even though they did not understand or had misgivings over the compromise, not to mention grievances which they felt had never been considered by the Commission.

A second case is *Indians of California v. United States,* one of the biggest cases considered by the Commission, involving an "identifiable group" of Indians created for the purpose of claims litigation through the consolidation of those of the approximately five hundred California bands and tribelets that had filed claims.[89] This claim involved about seventy per cent of the land of the State of California. The compromise in this claim was described as "a real test of the compromise program."[90] According to expert testimony, without it the case would have taken another fifteen years to conclude.[91] Though success in concluding such a case may be seen as quite an accomplishment, the dissatisfaction expressed by some of the parties over the outcome reflects failure to fulfill the objective stressed as critical if a compromise program is to produce final claims settlements. When the Indians were asked to judge the compromise, some of them were dissatisfied with the agreement and with the procedures employed to obtain their vote to the extent of demonstrating to prevent the compromise from being finalized.[92] This description of how the vote was obtained reflects the view of the dissenting Indians and their reasons for seeing no benefit from working through the Commission in trying to resolve their differences:

> The Commission made a formal decision to submit a settlement to the claimant, Pitt River Indians of California [one component of the "Indians of California"] in a meeting of the tribe at Altruas [California]. The Bureau of Indian Affairs prepared a list of tribal members and sent out notifications. The meeting rejected the settlement. Thereafter,

88. Information for this example was provided by a letter and enclosures from Nancy Oestreich Lurie to John T. Vance, Commissioner, of August 1, 1969, given this author by Commissioner Vance.

89. *Hearings on I.C.C.A., supra* note 67, at 51. These figures are attributed to anthropologist A. L. Kroeber.

90. *Id.* at 63.

91. *Id.* at 51.

92. *Id.* at 63, 51.

admittedly upon the urging of the attorney for the Pitt River Indians, the Commission changed its decision in order to provide for a mail ballot for those who had not voted at the meeting. Incidentally, the proposition submitted by mail was different from the proposition submitted at the meeting, and the mail ballots were sent to 100 or more people than were on the list to be invited to the meeting. The Bureau then announced that the total ballot narrowly approved the settlement.[93]

In requiring Indian lawyers to solicit the opinion of the Indians on the proposed agreement, the Commission was placing the Indians in a more important position than they had held at any other point in the claims determining procedure. Throughout most of the procedure, they held a role secondary to that of their lawyers and the legal framework of which they were a part, which was more or less foreign to them. They were called upon to give evidence and provide a token presence at hearings, and hopefully, they had some leverage in deciding strategy and goals. In this one step, however, the Indians were able to express their opinion, even to the extent of vetoing the result of all litigation on their claim. In this light, the dissatisfaction expressed may be indicative of a more widespread attitude held by Indian claimants which has no opportunity to surface. The opposition of lawyers to obtaining tribal approval, the haste and anxiety over getting the necessary votes and the supportive efforts of the B.I.A. and of the Commission in these efforts, in turn, may all reflect a concern that this procedure not be allowed to open upon the gap separating the primarily white, legal-bureaucratic framework within which claims adjudication—as well as virtually all Indian-government relations—occurs, from the Indian viewpoint. The government pattern as shown in claims policy relegates Indian participation to passive acceptance of these bureaucratic requirements if they are to obtain any redress. Perhaps it can be said that the Indians have compromised all along and that when given an opportunity to express their opinion over a specific issue, their negative vote reflects at least in part an opinion over much broader issues, such as the way in which claims are settled, the types of claims which are not taken into account and the nature and amount of awards.

## VI

## IMPLEMENTATION: USE OF SECTION 2 OF THE ACT

Section 2 of the Act contains a comprehensive listing of the

93. Cassandra Dunn and Aubrey Grossman For the Legal Staff, Letter to Fellow Lawyers, August 3, 1970. Enclosure in letter from Sara Greenfelder, *infra* note 109.

types of claims to be filed. The five clauses in this listing are not in the form of mutually exclusive categories intended to limit the types of claims filed. Rather, they were designated as guides for the filing of claims on the basis of any and all Indian grievances, with the one proviso that they were to apply only to groups, not individuals. Section 2 states:

> The Commission shall hear and determine . . . (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cessation or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.[94]

Clauses 1 and 2 cover typical claims cases in law or equity, based on the Constitution, laws, treaties or executive orders or sounding in tort. Clause 2 is a specific application of principles of the Federal Tort Claims Act, also passed in 1946, eliminating the United States' immunity from suits in tort.[95] Clauses 3 to 5 provided the Commission with jurisdiction beyond that allowed in a regular claims court. In clause 3, Congress gave the Commission authority to perform the political function of going behind a treaty, necessary in hearing any case where provisions of the treaty itself formed the basis of the claim. Clause 4 acknowledges government liability in transactions involving land held by so-called "Indian title" or "aboriginal title," which had never been specifically recognized by Congress. In writing the fifth clause, Congress created a new cause of action, assessed as the most unique feature of the Act, appearing to be an "unprecedented jurisdiction for any court."[96] This clause confers broad jurisdiction on the Commission to hear cases which arise from moral wrongs. Although some cases dealt

94. 25 U.S.C. § 70a (1970).
95. Selander, *Section 2 of the Indian Claims Commission Act,* 15 GEO. WASH. L. REV. 388, 403 (1947).
96. Barney, *Some Legal Problems Under the Indian Claims Commission Act,* 20 FED. B.J. 235, 238 (1960).

with under clauses 3 and 4 could also be argued on the basis of "fair and honorable dealing," the particular purpose of this clause was to give claims with no other basis an opportunity to be heard.

In assessing the claims actually filed under these provisions it will be seen that a narrow range of claims formed the large bulk of those filed. The clause 5 provisions were narrowly construed and thus the full potential of the Act was not realized. There is no statistical analysis of the six hundred and five dockets in terms of causes of action, which would have enabled a more specific statement about the use of Section 2. Thus a non-quantitative breakdown based on descriptions in the literature concerning claims filed will be presented here.

The great majority of claims filed involved disputes about land; the close association of the Commission with land cases has even led to its being erroneously referred to as the Indian Land Claims Commission.[97] Disputes typically involved the issue of whether inadequate compensation or no compensation was paid when Indian groups ceded territory to the government or were forcibly removed. Such cases could fall under clause 4 when no formal government recognition of the Indians' claim to the land had been given by Congress. When a treaty recognized the cession of land, claims would be filed under clause 3 if the terms of the treaty were viewed as unjust or under clause 1 if they had never been carried out by the government.

Among other claims made were those involving the failure of the government to fulfill other treaty obligations, such as the agreement to provide reservation schools, annuity payments or equipment.[98] Another group dealt with claims in tort and commonly required the government to account for its management of the tribal funds which it held because of its fiduciary relationship to the Indians. These last two categories of claims, however, were often filed merely as adjuncts to the land claims which formed the main focus of the cases.

Particularly in regard to clause 5, "the spirit of the law,"[99] it is clear that the provisions of Section 2 were not used to their full potential. John Collier, former Commissioner of Indian Affairs, described the reason for this final clause:

> A considerable number of claims and grievances do not grow out of the legal facts but essentially out of the moral parts

97. Lurie, *Problems, supra* note 64, at 372.
98. *Hearings on H.R.* 1198 *and H.R.* 4341 *Before the House Committee on Indian Affairs* at 96.
99. Lurie, *Problems, supra* note 67, at 371.

> of the record. There are a great many valid claims, valid humanely and morally, but such as have no basis in law.[100]

Some of these valid claims which this provision might have been used to support but which were not filed are given in the following:

> Any ethnologist can think of dozens of examples of losses not recognized by any rule of law or equity. . . . [These include claims] of broken cultures, of grievances against the government not for loss of property in economic terms but the loss of a way of life, of social and psychological inadequacy which resulted from fair, honorable and even benign motives on the part of the Government. . . . any of these claims would require peculiar interpretations in the attempt to gain restitution,[101]

and clause 5 was to give such claims the opportunity to receive a hearing.

In considering the reasons for this small number of types of claims, it is to be noted at the outset that the Commission itself had no role in claims filing, aside from assuring that all Indian groups were informed of the five year deadline,[102] a function it has never been accused of being derelict in performing.[103] Certain categories of claims were not filed because of clear legal restrictions. Claims involving grievances where a state government had jurisdiction, including those resulting from dealings between tribes and the colonies, were not acceptable. This explains why relatively few claims involving land along the eastern seabord were filed. Secondly, claims arising after 1946 were not to be accepted. The Act, however, did provide that such claims would come under Court of Claims jurisdiction, eliminating entirely the need for jurisdictional acts.[104] Some post-1946 claims, however, such as those for Alaska and for water rights in the Southwest, involve important issues of government policy and have been dealt with by Congress and the executive branch.

The most important reason for the limited variety in the claims filed was related to the nature of compensation to be awarded and to the novel character of parts of Section 2. Although nowhere in the Act is it explicitly stated that recoveries were to be monetary, the wording of the Act indicated that this was the legislative intent.

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100. *Hearings on* 7837 *supra* note 8, at 6.
101. Lurie, *Problems, supra* note 67, at 372.
102. 25 U.S.C. § 70k (1970).
103. One exception to this concerns native groups in Alaska who have asserted they were never informed of their rights. It appears, however, that, if true, the claims of those groups date later than 1946 and would not fall under Commission jurisdiction and that, furthermore, Alaskan claims are being dealt with by a special non-Commission procedure. 90th Cong., *Hearings on I.C.A.A., supra* note 67, at 20-21.
104. Indian Claims Commission Act of August 13, 1946, ch. 959, § 24, 60 Stat. 1049, 1055.

Section 19 reads, "The final determination of the Commission . . . shall include . . . a statement (a) whether there are any just grounds for relief of the claimant and, if so, the *amount* thereof . . . ," and Section 22 states ". . . there is hereby authorized to be appropriated such *sums* as are necessary to pay the final determination of the Commission."[105] In filing claims for "highly tangible losses such as land, or matters regarding payment for such land and administration of material needs of Indians once placed under government supervision,"[106] there was a continuity between pre-Commission procedures using the Court of Claims and operations under the Commission. Innovations in Section 2 were not widely used, particularly if they called for the risks of using new causes of action to file complicated claims based largely on intangible losses for which there were no precedents to indicate how assessments might be made and thus how large recoveries would be. Lawyers who were instrumental in preparing claims for filing thus concentrated with the tribes on those claims with the greatest previously indicated potential for large monetary returns. One suggestion has been made which might have been used to alleviate some of the difficulties in filing such novel claims to the effect:

> . . . that bothersome phrase 'fair and honorable dealings' . . . indicates a social awareness on the part of legislators but lack of social scientific facts to develop constructive legal measures for the alleviation of gnawing bitterness on the part of Indians and satisfaction of the sense of national obligation that led to the enactment of the Indian Claims Commission.
>
> . . . had the wording of the Act been less emotionally weighted in terms of fair and honorable dealings and concerned instead with ethnological concepts of cultural integrity and functional expediency, it would permit objective presentation of facts on such matters and be no more far-fetched than such established legal precedent of claims based on 'mental anguish' or 'loss of companionship'. . . .[107]

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105. U.S.C. § 70u (1970).
106. Vance, *supra* note 24, at 372.
107. Lurie, *Problems, supra* note 64, at 373. On implication of the dissatisfaction felt by social scientists raised over the wording of Section 2(5) and which, hopefully, can be avoided in the future as scholars concerned with Indian affairs gain more experience and influence in dealing in a legal context and with government officials is that such scholars should participate more actively in the formation of legislation concerning Indians. Lurie recognizes this when she writes the Act "stands as a warning that the [ethnological] profession in the future ought not leave such matters almost exclusively in the hands of lobbyists and legislators of commendable intent, but with little social scientific training." *Id.* at 365. This is an opinion shared by Steward, *"Theory and Applications in a Social Science,"* 2:4 ETHNOHISTORY 292-302 (1955). This absence of participation by academic experts is noted also by Gary Orfield in his study of the termination policy. As he writes:

> [t]he massive record of testimony on the termination bills is perhaps most surprising for what it fails to contain. In more than 1,700 pages of testimony there is no statement by a sociologist, an anthropologist, a social worker, or

One of the important areas of dissatisfaction with the Commission from the Indian perspective concerns the provision that awards be monetary. Claims typically arose from the taking of Indian land by the government to facilitate the westward movement of the white population across the continent. Given the strong attachment to land which has remained one of the persistent characteristics of Indian societies, just compensation would involve return of at least some of the land which was taken, not a monetary substitute. The importance of land to the Indians has been widely documented, and the following quotation from the "Declaration of Indian Purpose" produced by the 1961 American Indian Chicago Conference is representative of this attitude.

> When our lands are taken for a declared public purpose, scattering our people and threatening our continued existence, it grieves us to be told that a money payment is the equivalent of all the things we surrender. Our forefathers could be generous when all the continent was theirs. They could cast away whole empires for a handful of trinkets for their children. But 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.[108]

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anyone else trained in the social sciences. Although most reservations have been studied by social scientists concerned with Indian acculturation, the only evidence presented to the committee was a letter from an economics student who had spent a summer on one reservation.

Orfield, *supra* note 18, at 11-12. Further study by Orfield has shown this to be an overstatement, but the point it makes remain valid.

Vine Deloria's angry chapter *'Anthropologists and Other Friends"* in CUSTER DIED FOR YOUR SINS (1969) makes the same point in a more guarded fashion. Cynical and bitter about the harm anthropological studies have had on Indian communities and in governmental policy formation, he acknowledges that social scientists have the real needs and work to provide them. In his impassioned discussion of the termination policy, which could be applied to claims and other policies as well, he writes:

> Compilation of useless knowledge [by anthropologists] 'for knowledge's sake' should be utterly rejected by the Indian people. We should not be objects of observation for those who do nothing to help us. During the crucial days of 1954, when the Senate was pushing for termination of all Indian rights, not one single scholar, anthropologist, sociologist, historian, or economist came forward to support the tribes against the detrimental policy. [This overstatement relied on Orfield's original findings.]
>
> How much had scholars learned about Indians from 1492 to 1954 that would have placed termination in a more rational light? Why didn't the academic community march to the side of the tribes? Certainly the last few years have shown how much influence the academic can exert when it feels impelled to enlist in a course. Is Vietnam any more crucial to the moral sense of America than the great debt owed to the Indian tribes?

108. American Indian Chicago Conference, *The Voice of the American Indian—Declaration of Indian Purpose,* University of Chicago, June, 1961, at 16. [Hereafter referred to as *"Declaration"*. Other statements making the same point are found in Lurie, *Problems, supra* note 64, at 372; U. STEWART, THE QUIET CRISIS 4-7 (1963); EGGAN, FRED, PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 274 (October, 1965); United States Commission on Civil Rights, *Justice: Report,* at 116 (1961); and in a statement by anthropologists Stanley Diamond, William H. Fenton and William C. Sturdevant in U.S., Congress, House, Committee on Interior and Insular Affairs, *Kinzua Dam Seneca Indian Relocation. 8th Cong.,* 1st Sess., 1963, serial no. 6, p. 505.

A comment signifying a similar Indian opinion directed to the work of the Commission comes from the Committee of Concern for the Traditional Indian.

> We [the Committee] are interested in it [the Commission] inasmuch as it has been one of the vehicles employed by the federal government to disinherit Indian people from their land. It has also been useful in that it has determined that lands were *unjustly* taken from the Indians, but to then turn around and tack a price on that land and give the original inhabitants a choice of accepting the money or not (not a choice of money or land) is unjust in itself.[109]

In a few cases claimants chose to make an issue of their desire for land, rejecting the Commission's settlement. One such case involves the Pitt River Indian component of the Indians of California claim, who have decided to refuse payment of their portion of the award and demand return of their land. It is uncertain whether any court "has jurisdiction to put the Indians back in possession of their land" since "the title of the United States cannot be litigated except by the Indian Claims Commission."

> Most lawyers can be expected to 'be practical' and smile at the idea that the Courts would return land to the Indians. They may be right that, despite pious phrases, there is no real intention on the part of the legal system and the courts to end the 'heritage of centuries of injustice' (Nixon) or to offer the protection of the Constitution to 'the American Indians who have been oppressed and brutalized and deprived of their ancestral lands'. (Nixon) We choose instead the position of Judge David Bazelon of the United States Court of Appeals that 'moral arguments backed by the hard facts of discrimination and deprivation are still the most important force . . . in the court room'.[110]

The most famous of such cases is that of the Taos Pueblo who were actually awarded a portion of their ancestral lands, formerly a part of a national forest preserve, which was of religious significance. The return of the Blue Lake shrine and some surrounding land was the result of initiative taken by the federal executive branch of the government which, through extensive lobbying of the Senate, was able to obtain the necessary legislation over the objection of the Senate Interior and Insular Affairs Committee.[111]

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109. Letter from Greensfelder to the Committee of Concern for the Traditional Indian, September 19, 1971.

110. Cassandra Dunn and Aubrey Grossman For the Legal Staff, letter to Fellow Lawyers, August 3, 1970, enclosure in letter from Sara Greensfelder, *supra* note 109.

111. Interview with member of President Nixon's staff, September 12, 1971.

This effort by President Nixon was much publicized as an example of the administration's benevolence and new thinking on Indian affairs. However, they strongly denied it being a precedent for the awarding of land, describing it as merely an act in respect of Indians' religious beliefs.[112]

A final type of claims which was not considered by the Commission is that which resulted from the government's policy of allotment,[113] which was a misguided attempt to make Indians into small farmers on the model of white Americans by allotting plots of land to individual Indians, who would receive title after a period of years. Any remaining reservation land was sold. This policy was, as termination, repudiated by the government but not until after it had resulted in disastrous losses, largely at the hands of land hungry whites who were successful in obtaining the Indians' land, often fraudulently and at prices much below market value. These claims were not heard because they would have been filed by individual Indians, which was beyond the jurisdiction of the Act. The government has left unsettled this type of legitimate grievance.

Given the gap between the limitation placed on the nature of awards to be made by the Commission and that which would have been more satisfactory to the Indians, it is to be hoped that in the future the government will evaluate its need for removing Indians from their lands on the basis of the history of Indian-white land dealings, the cultural importance of the land to the Indians and the requirements of economic viability of tribal units, as well as of government needs and the availability of alternate means to satisfy those needs. The decision on the Alaskan natives claims case, unusual in the size of the award in land and in the inclusion of royalties for mineral resources, gives some cause for hope; but this case was aided by an equally unusual amount of hard fighting, organization, expense and public concern from publicity and has not been everywhere lauded as a real victory for the Indians.[114] The taking in 1964 of 10,000 acres of Seneca land by the Army Corps of Engineers for the Kinzua Dam, though $3 million was paid, was a loss to the Senecas because the value of their land to them could not be measured in money.[115] The Tuscaroras in New York were paid $850,000 for five hundred fifty-

112. *Id.* Nixon's speech, 116 CONG. REC. 23131.

113. Lurie, *The Body From Boston and the Omaha Indians*, 3 THE AMERICAN WEST 31-33, 80-84 (1966).

114. One statement showing the danger to the way of life to some Alaskan natives as a result of the pipeline which would be built on their land is, Frank, Richard, *"An Alaskan's View of His Land,"* in 3:9 AKWESASNE NOTES 5 (1971) *excerpted from, Not Man Apart*, a FRIENDS OF THE EARTH PUBLICATION, November, (1971).

115. *The Angry American Indian: Starting Down the Protest Trail*, TIME, Feb. 9, 1970, at 14, 18.

three acres in the late 1950's for a dam, while Niagara University received $5 million for two hundred acres.[116] Such examples reflect a continuation of the historical pattern and if the Commission was to eliminate once and for all the grievances which result from such relations with Indians, the government, it would seem, must reorient its viewpoint so as to prevent the development of new grievances.

## VII

## COMMISSION DECISIONS

The first category of decisions to be considered deals with the question which arose early in the Commission's life of whether claims would be accepted if no formal government recognition had ever been made of the Indians' title to the land claimed. This question was answered in the case of *Otoe and Missouria Tribe of Indians v. United States*,[117] where the Court of Claims ruled in favor of claims based on unrecognized aboriginal or Indian title. Because of the large number of claims where no recognized title or treaty existed to substantiate the claimants' original right, without this decision the Commission would have been forced to exclude many claims which were legitimate. Many tribes had never been involved in government relations which left a record of official recognition that they held land. As a result of this decision, to establish the title of their ancestors to the land, claimants must either produce some evidence of government recognition or of their long term exclusive occupation of the land.

In the category of land claims questioning the amount of compensation paid, the formula which has evolved is narrow and ad hoc. Generally, in those cases where land was taken without compensation, whether or not the taking was agreed to, the right of the claimant to recover is clear; but in cases where the full price was never paid or where the agreed selling price is claimed to have been too low, the issue of whether the consideration paid is "unconscionable"[118] must be decided. The difference between the fair market value and the amount paid must be "very gross"[119] or so large as

116. *Id.*

117. Otoe and Missouria Tribe of Indians v. United States, 131 F. Supp. 265 (Ct. Cl. 1955), *cert. denied*, 350 U.S. 848 (1955).

118. 25 U.S.C. § 70a (3) (1970).

119. Osage Nation of Indians v. United States, 97 F. Supp. 381 (Ct. Cl. 1951), *cert. denied*, 342 U.S. 896 (1951).

to "shock the conscience,"[120] in order to be found unconscionable.[121] In particular cases it has been held that a fifty per cent disparity[122] or a payment of only sixty-five per cent of the minimum value of the land[123] was a very gross difference. To impose such a requirement is entirely inconsistent with the intent of the policy to compensate *all* proved claims.

In an attempt to eliminate this ambiguity, the Commission tried to have Congress amend the Act, changing "unconscionable" to "inadequate,"[124] but such an amendment was never passed. Such a change would also have removed this restrictive interpretation of "unconscionable" and made it possible to make awards for any disparity between the actual and fair prices. As a result, in adherence to the Act, the Commission feels it must deal with questions of payment in terms of an ill - but restrictively-defined moral basis rather than on a more straightforward consideration of equity. This has increased the number of appeals to the Court of Claims, which has found grounds, in a number of such cases at least, to reverse the Commission's decision.

> The Court of Claims has made it abundantly clear that it apparently favors, as a matter of simple justice, payment to Indian tribes in all cases where the consideration paid to said tribes for their land does not measure up to the then fair market value. As a strict matter of equity and not taking into consideration the strict terms of the Act with respect to 'unconscionable' consideration, the Commission cannot find fault with that position.[125]

Despite the Commission's strict construction of the Act, decisions on this issue can be made with the realization that the conscience of the Court of Claims is somewhat easily shocked. Given the Act's wording, however, it must be realized that in order for claimants to receive *any* payment for their losses, they must somehow prove an unconscionable disparity, and once proved, they are subject to being compensated fully, not just to the level considered "conscionable." Tribes can thus be barred from receiving an award simply because they unfortunately were paid some small amount for their land at the time of taking.

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120. Sioux Tribe of Indians v. United States, 146 F. Supp. 229 (1956).

121. Osage Nation of Indians v. United States, 97 F. Supp. 381 (Ct. Cl. 1951), *cert. denied*, 350 U.S. 848 (1953). Lummi Tribe of Indians v. United States, 181 Ct. Cl. 753 (1967).

122. Miami Tribe of Oklahoma v. United States, 281 F.2d 202 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1960).

123. Lummi Tribe of Indians v. United States, 181 Ct. Cl. 753 (1967).

124. *Hearings on I.C.C.A.*, *supra* note 67, at 53-56, 69.

125. *Id.* at 55.

Once it was accepted that the claimants were entitled to additional payment for their land, further decisions were made to arrive at the amount of that compensation. The general formula evolved for these awards viewed just compensation as the true market value at the time of taking, less compensation previously paid and the value of any offsets which might be deducted. In determining how much land was to be included with Indian holdings, the Commission early established a precedent favoring a more liberal interpretation of land use than that proposed by the Department of Justice. It decided[126] against the ecological theory newly developed by experts working for the Department whereby land use was calculated on the basis of the area needed to supply daily needs. The Commission preferred the older theory which considered land use in terms of a way of life and acknowledged that some land claimed by Indians was used less intensively.[127]

In regard to the payment of interest on unpaid compensation for land, the Commission adopted the general pattern of United States courts. Unless there existed a specific legal agreement requiring interest or unless the taking occurred in violation of the Fifth Amendment to the Constitution, no interest was to be paid.

In determining the value of the land, appraisers, who functioned as experts in this phase of the cases and who were faced with the difficult task of valuing large tracts as of a century or more ago, were instructed to incorporate as many factors as possible into their calculations. Thus they considered location, natural resources such as timber, minerals and water, and the value of similar adjacent land on the open market. As these valuations were all made *as of the time of taking,* however, no compensation was given for the future profit which could have been made by the Indians from the land or its resources, whether from agriculture, proximity to markets, timberland or rich gold, silver or other mineral resources, which in some cases motivated the removal of the Indians in the first place.[128]

In claims regarding government responsibility to provide necessities of life, and the equipment necessary for making a living such as educational and health facilities, the Commission has relied on government obligations to each tribe as stipulated in treaties or other formal agreements and an unsystematic consideration of the kind of relationship which existed between government and tribe, such as whether it was technically one of guardian and ward.

126. *Decisions* 8 IND. CL. COMM. 1, 31-36 (July 31, 1959).
127. Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926 (Ct. Cl. 1959).
128. Examples of this are the Sioux and the California Indians who underwent wholesale displacement in the gold rush and received no compensation for the gold. *See, e.g.,* Sioux Tribe of Indians v. United States, 146 F. Supp. 229 (Ct. Cl. 1956).

Thus two tribes who had been similarly treated would be differently compensated by the Commission depending on whether certain formalized arrangements—now, as then, of much less importance to the Indians than to the government—guided the government's action. It was within the limits of Section 2, particularly if clause 5 had been viewed broadly, for the Commission to have looked more often to the moral and equitable rather than legal considerations and to have considered compensating all Indians on the basis of the way they were dealt with, not primarily on the basis of the existence of non-existence of formalized agreements.

One of the considerations influencing the amount of compensation paid was the question of how much the Commission was going to cost the government. During the discussions preceding passage of the Act and in its early history, concern was voiced over this issue, particularly by Congressmen and the Department of Justice. One Congressman was worried that from the number of claims which would be filed, a tremendous amount of monetary compensation would be requested. He concluded that a commission which was being delegated such great power, more than a court because of its ability to decide moral questions, should be closely supervised by Congress.[129]

Such supervision did not occur until much later, motivated by concern about the amount of time the Commission was taking to complete its work, not about excessive awards, which was a problem that never materialized. One further incident occurred, early in the Commission's life, before anxiety about the cost of the Commission was finally laid aside. When it was decided that land claims based on Indian title were to be eligible for compensation, the Department of Justice estimated that there was a potential recovery of over three billion dollars. In response to these figures, the Commission replied that as of 1957 awards amounted to about one per cent of the amounts claimed, and thus there was no cause for alarm on the basis of the Department of Justice's estimate.[130] The reasons for such a large differential remain to be evaluated in full, but one factor was the exaggerated amounts claimed, partly as a tactic to make the recoveries as large as possible and partly because those filing claims before a Commission which had never issued a decision had no way of knowing on what basis compensation would be calculated. Other reasons are the efforts of the defense in limiting recoveries and the amounts deducted from the awards

129. *Hearings on Indian Claims Commission Act, H.R.* 4497, *Before the Senate Comm. on Indian Affairs,* 79th Cong., 2nd Sess., 62-63 (June 1, 12; July 13, 1946) (Statement by Sen. Chambers).

130. *Hearings for* 1957 *Before the House Comm. on Appropriations;* 84th Cong., 2nd Sess. 632-33 (1953).

as offsets. The argument that award monies would result in less federal spending for Indians has not proven to be the case.[131] In general, then, it would seem that the decision to consider claims based on Indian title and the decision to evaluate land as of the time of the taking were complementary and effected a necessary compromise without which the Commission would be ineffective and economically infeasible.

The Act[133] gives the Commission broad discretionary authority to determine what offsets may be charged against a claim, beyond the limits of well-defined categories of expenditures which are statutorily defined. The Act permits the Commission, if it wishes, to assess all acceptable gratuitous expenditures made for the tribe and offset some or all of these if it decides that the "nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action. . . ."[134] The situation regarding offsets is analogous to that of "unconscionable consideration," in that the decisions in both depend on a moral judgment. They are reflective of the Commission's concern for equity. Thus in a recent decision the Commission attempted to stipulate that offsets would only be allowed when they exceeded five per cent of the award. This rule was rejected by the Court of Claims on the basis that it amounted to unauthorized payment of interest,[135] and it was stated that offsets

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131. 79TH CONGRESS, *supra* note 11, at 1354.

132. The part of the Act concerning offsets, found in Section 2, is as follows:

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 *Stat.* 1136; 28 *U.S.C. sec.* 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty, or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934, (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriations of allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

Indian Claims Commission Act of Aug. 13, 1946, 60 Stat. 1949, 1050.

133. 25 U.S.C. § 70a (1964).

134. United States v. Delaware Tribe of Indians, 427 F.2d 1218, 1221 (Ct. Cl. 1970), *citing* 25 U.S.C. § 70a (1964).

135. United States v. Delaware Tribe of Indians, 427 F.2d 1218 (Ct. Cl. 1970).

must be determined on an item-by-item and case-by-case basis.[136] The Commission had

> . . . admitted that this case-by-case, item-by-item review by as uncertain a compass as is furnished by the statute has led to results that, if not inconsistent, at best furnish little predictive value from the Commission's offset precedents.[137]

Had such a formula been used it would have assured equal treatment of all claims, which the Commission likely attempts to provide nevertheless. This, however, begs the larger question of why any such offsets should be charged, simply because a tribe has chosen to avail itself of the opportunity to obtain redress for its grievances, particularly in view of the degree to which certain particularly intangible components of these grievances have largely not been assessed. Meriam expressed a similar attitude in 1928 in stating:

> It is difficult to see why a particular group of Indians who have been treated with injustice by the government should have deductions made for gratuities already given them, when other Indians who have suffered no wrongs are permitted to keep their gratuities in full.[138]

The use made of the final class of claims given in Section 2 (". . . claims based on fair and honorable dealings that are not recognized by any existing rule of law or equity") should also be considered. Because the majority of claims filed were based on land, they were pleaded under other clauses in Section 2. Usually some reference was made as well to clause 5, as it was broader and it was felt that claims too weak to be won on the basis of the more stringent requirements of those other clauses could be successfully argued as involving an absence of "fair and honorable dealings." The Commission has held that if a claim could be tried under law or equity, clause 5 was not usable,[139] even though it was acknowledged that some claims have a basis under both clause 5 and another clause.[140] It has been held that if a claim fails under the other clauses, it will then be considered on the basis of the "fair and honorable dealings" provision of clause 5.[141]

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136. *Id.*
137. *Decisions,* 21 IND. C. COMM. 23.
138. L. MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION 807 ('928).
139. Blackfeet & Gros Ventre Tribe v. United States, 119 F. Supp. 161, 167-68 (Ct. Cl. 1954), *cert. denied,* 348 U.S. 83 (1954); Osage Nation of Indians v. United States, 131 F. Supp. 265 (Ct. Cl. 1951), *cert. denied,* 342 U.S. 896 (1951).
140. *Id. See, e.g.,* United States v. Kiowa, Comanche and Apache Tribes of Indians, 163 F. Supp. 603 (Ct. Cl. 1958), *reconsideration denied,* 166 F. Supp. 939 (Ct. Cl. 1958), *cert. denied,* 359 U.S. 934(1958).
141. Osage Nation of Indians v. United States, 97 F. Supp. 381 (Ct. Cl. 1951), *cert. denied,* 342 U.S. 896 (1951); Otoe and Missouri Tribe of Indians v. United States, 131 F. Supp. 265 (Ct. Cl. 1955), *cert. denied,* 350 U.S. 848 (1955).

Clause 5 thus becomes secondary to the others, to be used as a last resort. Because of the relatively small number and the diversity of cases tried under clause 5, little can be said in regard to guidelines which might have been established as a basis for such decisions. It has been indicated in a negative way that a moral case could be proven only after a very thorough and careful consideration not only of what was actually done, but also of that which was not done and of the motives and circumstances surrounding and underlying the overt acts of the parties and their intentions.[142] Thus, for example, it was asserted in one case that even though there was technically no guardian-ward relationship between the government and a tribe, the relationship involved special responsibilities by the government. Clause 5 was thus infrenquently and very cautiously used and did not produce awards for the claimants based on considerations of the moral issues of which they were well aware and which the Act intended to be considered.

The guidelines which the Commission wanted to establish regarding "unconscionable consideration" and offsets seem to reflect an interest by the Commission in facilitating the claims settling process by deciding certain recurring issues. These efforts, as well as those dealing with aboriginal title and the interpretation of land use, reflect a liberal interpretation of undefined issues in the Act in favor of the claimants, an orientation which likely influenced the objections of the Department of Justice. In a larger sense, however, the Commission's failure to question the charging of offsets *per se*, its willingness to calculate awards on the basis of loss of land alone and its failure to make Section 2, clause 5 an important and broadly interpreted basis for awards reflect limits beyond which the Commission did not venture in attempting to activate fully the potential of this claims policy to redress grievances.

## VIII

## CONCLUSION

Creating a policy aimed at compensating for their losses was a laudable if long overdue effort. In formally recognizing that there were grievances to be settled, in providing a forum for their hearing and in awarding some compensation the claims policy was beneficial to many Indian groups and has in general had a positive impact on Indian-government relations.

Just redress was seen as compensation for past wrongs which had to be proven through court proceedings. Grievances were seen

142. Gila River Pima-Maricopa Indian Community v. United States, 140 F. Supp. 776 (Ct. Cl. 1956).

primarily in terms only of the tangible losses which they involved, based mainly on the default of legal obligations or on considerations of equity among claimants. Compensation was in money, a fine which the government could pay with facility. This view of just redress was derivitive rather than causative, in that in the creation and implementation of this policy concerns of efficiency were more important than a conscious orientation toward providing the most just compensation. The way just redress came to be defined was the result of the attitudes of the decision-makers who were most influential in determining how the Commission was to function. The tension in regard to the proper functioning of the Commission was caused by individuals and groups who held a different view of just redress and attempted to change the Commission.

Among the inadequacies in this concept of just redress was that of monetary awards, seen as incommensurable with the nature of the claims. The idea that money could be substituted for land, not to consider the related grievances, did not accord with the meaning of the losses to the claimants. It would have been more appropriate, though difficult and innovative, to have considered the types of compensation—land among them—which would have eliminated rather than made payments against the grievances. In this light it might have been productive to view the causes for the claims as in part the result of the way Indian-government relationships were conducted in the past and to view compensation with regard to current relationships as participated in by the descendants of both parties. Just redress would then have been viewed as an attempt to re-orient contemporary relations so as to change patterns which continue to produce grievances among Indians.

Government policy making, in general and regarding the Commission as well, has typically been carried out by government departments attempting to decide what would be successful ways of dealing with the issues at hand. Much of the frustration in Indian-government relations has resulted from the government's inability to establish effective policies on its own, recognized by Indians and government alike as stemming at least in part from the absence of Indians and Indian points of view and preferences. The Commission, for example, emerges as a legal-bureautically oriented structure more concerned with accomplishing its task than ensuring that all just claims receive a hearing and appropriate compensation. No one understands this characterization more clearly nor is less surprised by it than the Indian claimants. For them this policy presents no new departure from former policies created in a bifurcated atmosphere where primarily white bureaucrats attempted to deal with Indian issues without consulting those who

both know more about the problems and were to be bound by the resultant policies.

Insofar as government has attempted to re-orient its approach to Indian policy-making to include Indian participation, it has been frustrated by the strength of the entrenched departments and ideas; but it can only be said that efforts at making such changes will produce at minimum fewer failures in creating Indian policy and less aggravation and disappointment to Indians—whose government is in principle committed to their betterment but continually misses the mark. Policy making with Indian participation may ultimately be the only way problems of Indian administration can successfully be solved. The question of how Indian opinion—which cannot be seen as unified any more than that of other minority groups in this country—should be represented is one which would have to be carefully considered if participation by Indians were seriously intended to bring about improved policy-making. The existence today of a growing number of Indians who are educated and able to function in a white man's government while committed to representing the values of their Indian culture would hopefully lessen the difficulty of the transition to an Indian-white partnership or even Indian dominated Indian affairs bureaucracy.

In terms of just redress, then, it can only hypothetically be asserted that had Indian participation in relation to the Commission existed in ways other than their being required to prove what had already been accepted in principle, Indian satisfaction that their claims had been heard and that they had received just compensation would have been greater. While accepting the important work that the Commission has done in dealing with one of the long unsolved problems of Indian-government relations, such an atmosphere would have made it more possible to say that the Commission had successfully accomplished the purpose for which it was created.

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