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The Congressional Mandate and the Indian Claims Commission

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THE CONGRESSIONAL MANDATE AND THE INDIAN CLAIMS COMMISSION

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On August 13, 1946, the Indian Claims Commission was created when President Harry S. Truman signed the Act, saying, "I hope that this bill will mark the beginning of a new era for our Indian citizens. They have valiantly served on every battlefront. They have proved by their loyalty the wisdom of a national policy built upon fair dealing. With the final settlement of all outstanding claims which this measure insures, Indians can take their place without special handicap or special advantage in the economic life of our nation and share fully in its progress."[1]

Congress assigned the Indian Claims Commission a life of ten years, five years for the Indian tribes to file their claims and five years for the Commission to hear and determine claims. Over twenty-two years after the creation of the Indian Claims Commission most of the claims have not been heard and determined.

On October 5, 1968, Presidential nominee Richard M. Nixon said "the sad plight of the American Indian is a stain on the honor of the American people." President Truman's hope had not been realized. Mr. Nixon pointed out that Indians have a high mortality rate, a low education level, an unemployment rate ten times the national average, an average family income often below $500 per year, inadequate housing and suffer from unwise and vascillating federal policies.[2] In short, the Indians have not taken their place, without special handicap or special advantage, in the economic life of our nation.

Why has the Indian Claims Commission failed to accomplish the Congressional mandate? In my opinion, the Commission has failed because it adopted all of the procedures utilized under the various jurisdictional acts prior to the creation of the Indian Claims Commission; procedures which must in a large measure have contributed to the protracted passage of time which had so frustrated the Indian claimant and the Congress. They were procedures which were familiar to the lawyers who represented the claimants and the

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1. *Statement by the President Upon Signing Bill Creating the Indian Claims Commission*, August 3, 1946, PUBLIC PAPERS OF THE PRESIDENT, HARRY S. TRUMAN, 1946, 414 (1962).

2. 114 CONG. REC. E8785 (daily ed. Oct. 9, 1968).

government before the Court of Claims. But if familiarity was a good reason to adopt the procedures in 1946 it is an equally good reason to abandon them in 1969. Congress has directed the Commission to complete the task of hearing and determining the claims before it by April 10, 1972. In the three years remaining the Commission must complete more work than it has completed in twenty-two years.

Is there some far reaching innovative procedural change which could enable the Commission to accomplish the Congressional mandate? I believe there is. The analysis and views expressed in this article are my own. They are expressed as an individual and not as a spokesman for the Indian Claims Commission.

BACKGROUND

The creation of the Indian Claims Commission was the culmination of years of national discourse and travail. Americans sensitive to the problems of the Indian and aware of the seeming stain on the national honor were searching for a solution to the problem early in the nineteenth century. Up until that time, the treatment of the native inhabitants of North America equated to the rationale set forth in Thomas More's *Utopia* in 1516. There, native inhabitants who refused or were reluctant to dwell under Utopian law were driven off the land and if they continued to resist had full scale war made against them. The most just cause of war was "when any people holdeth a piece of ground void and vacant to no good or profitable use: keeping others from the use and possession of it, which, notwithstanding, by the law of nature, ought thereof to be nourished and relieved."[3] A hundred years later Sir Walter Raleigh noted that people participate in mass deception when "a number can do a great wrong and call it right, and not one of that majority blush for it."[4]

Although Thomas Jefferson believed the Indian to be equal in body and mind to the white man, Theodore Roosevelt, who, if sometimes wrong was seldom in doubt, referred to the Indians as "the weaker race" and those concerned with the plight of the Indian as "foolish sentimentalists." In an all conclusive burst of rhetoric he said that "to recognize the Indian ownership of the limitless forest and prairies of this continent—that is, to consider the dozen squalid savages who hunted at long intervals over a territory of a thousand square miles as owning it outright—necessarily implies

3. T. MOORE, UTOPIA (1516), *as found in* W. WASHBURN, SEVENTEENTH-CENTURY AMERICA, ESSAYS IN COLONIAL HISTORY 24 (1959).

4. 8 WORKS OF SIR WALTER RALEIGH 291, *as found in* W. WASHBURN, SEVENTEENTH-CENTURY AMERICA, ESSAYS IN COLONIAL HISTORY 24 (1959).

a similar recognition of every white hunter, squatter, horse thief, or wandering cattleman."[5] Congress thought otherwise.

In 1855 the United States Court of Claims was established to permit suit to be brought against the government, but in 1863 the tribal claims based on treaties were excluded from the general jurisdiction of the court.[6] The tribes were treated in the same manner as foreign nations and were required to obtain a special jurisdictional act from Congress in order to take a case to the Court of Claims. This was clearly discriminatory since all other citizens of the United States had the right to sue in the Court of Claims without a special act of the Congress. Yet it was a beginning. It was Congressional recognition of the existence of valid claims, and, if the process required to get a special jurisdictional act passed was disheartening, at least a record of recognition of the claim was being made and the Indian was being given an opportunity to state his case in a public forum.

In 1928 the Meriam Report pointed out "the conviction in the Indian mind that justice is being denied" and that any cooperation between the government and the Indian was rendered extremely difficult by the long period of time, sometimes up to forty years, required to hear and determine the claims under the various jurisdictional acts.[7]

On January 6, 1930, a bill was introduced in the House of Representatives calling for the creation of a United States Court of Indian Claims. It failed to pass. In April, 1934, a Senate bill was introduced providing for the creation of an Indian Claims Court. It was reintroduced in January of 1935, and then in March of 1935 a bill to create an Indian Claims *Commission* was introduced in the House of Representatives. Harold L. Ickes, Secretary of the Interior, preferred the House bill and in a letter to Senator Thomas, Chairman of the Committee on Indian Affairs, dated March 27, 1935, wrote that the Senate bill "provides for a separate court to hear such claims, but I am reliably informed that the delay in handling such matters is not due to any congestion in the present Court of Claims, but rather to delays, apparently unavoidable, in other branches of the government in assembling the needed data for presentation to the Court of Claims through the Department of Justice."[8] He then noted with approval that the House bill

5. W. WASHBURN, THE INDIAN AND THE WHITE MAN, 132, 136, 424 (1964).
6. Act of March 3, 1863, 12 Stat. 765. For a comprehensive treatment of the history of the Indian Claims Commission, *see* N. LURIE, *The Indian Claims Commission Act*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL SCIENCE (May, 1957).
7. L. MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION (1928).
8. Letter from Harold L. Ickes, Secretary of the Interior, to Senator Thomas, Chairman of the Committee on Indian Affairs, March 27, 1935.

creating an Indian Claims Commission charged the Commission with the duty of investigating the claims and making an independent search for evidence and said: "It is believed that some legislation of that type would be preferable to the establishment of a new court for the adjudication of such claims."[9]

Apparently convinced, Senator Thomas introduced a bill in the Senate to create an Indian Claims Commission (S.2731) in May, 1935.

Bills to create an Indian Claims Commission were introduced again in 1937, 1940, 1941, 1944 and 1945.

Then in May of 1946, a young congressman from the State of Washington, Henry M. Jackson, rose on the floor of the House of Representatives and spoke for the nation saying: "Let us pay our debts to the Indian tribes that sold us the land we live on. . . . [L]et us make sure that when the Indians have their day in court they have an opportunity to present all their claims of every kind, shape and variety, so that this problem can truly be solved once and for all. . . ."[10] Congressman Jackson was the author of the bill signed into law by President Truman in August of 1946.

The Indian Claims Commission Act, signed into law on August 13, 1946, was designated Public Law 79-726. The original act provided for a Chief Commissioner and two associate Commissioners. The Act has been amended and the life of the Commission has been extended three times by Congress. In 1967 Congress amended the Act to provide two additional Commissioners so that now there are five Commissioners, one of whom is designated Chairman by the President. The last amendment extended the life of the Commission to April 10, 1972.

The Commission was given broad jurisdiction to hear and determine all claims against the United States on behalf of any "tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska."[11] It includes all claims at law or equity arising under the Constitution, laws or treaties of the United States, Executive Orders of the President, and all claims which the claimant would have been entitled to sue if the United States were subject to suit. It also includes all claims which arise if treaties,[12] contracts, or agreements between the claimants and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, or other equitable consideration. It further

9. *Id.*
10. 93 CONG. REC. 5312 (1946).
11. The Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. § 70(a)(2) (1964).
12. R. Barney, *Legal Problems Peculiar to Indian Claims Litigation,* 2 ETHNOHISTORY (1955). The article points up the difficulties as seen from the point of view of the author, who is Chief of the Indian Claims Section of the Land Divisions of the Department of Justice.

extends to all claims arising from the United States' taking of land owned by the claimant without the payment of compensation. Finally, the Commission's jurisdiction extends to all claims based "upon fair and honorable dealings which are not recognized by any existing rule of law or equity."[13] The termination date for filing claims before the Commission was August 13, 1951. Under Section twelve of the Act, any claim not filed within the five year period was to be forever barred by operation of law. Before the cut off date 370 claims or docket numbers were filed. Many of these claims, however, contained more than one cause of action. Some contained as many as fifteen or more. Consequently, many of the claims were broken down into separate docket numbers for each cause of action, making a total of 605 docketed claims.

By December 31, 1968, the Commission had dismissed 149 docket numbers and had completed the hearing and determination and entered final judgment in 134 docket numbers.[14]

Final judgments entered by the Commission by that date amounted to $284,223,012.16.[15]

Before creating the Indian Claims Commission, Congress specifically rejected the proposal to create an Indian Claims Court. Dissatisfaction with both the jurisdictional acts and the timeless procedures utilized to present claims under the Act before the United States Court of Claims had been expressed in a pledge by both major political parties to settle once and forever the Indians' claims against the United States. Congressman Carl Mundt expressed the frustration of Congress that the life tenure of an Indian claim could last twenty to forty years.

> That process is enormously costly and unsatisfactory to everyone. It means that Government clerks and attorneys in the Interior Department, the Department of Justice and the General Accounting Office spend years and years examining and re-examining Indian claims in an effort to determine whether the Indians should have a day in court. . . . [A]nd of course, when a special jurisdictional bill is enacted, the process of investigation starts all over again. Then, only too often, the Court of Claims or the Supreme Court finds some fault with the language of the jurisdictional act, and the Indians come back for an amended jurisdictional act, and the merry-go-round starts up again. In the last 20 years the General Accounting Office alone spent over a million dollars ($1,000,000.) in reporting on Indian claims bills. And not one cent of that went to any Indian to settle any

13. The Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. § 70(a) (1964).
14. *Final Judgments Certified to the Treasury Department by the Indian Claims Commission* 19 (Dec. 31, 1968).
15. *Id.*

> claim. Justice and Interior and the committees of Congress have probably spent comparable sums. That, in the judgment of your committee, threatens to be an endless waste of the taxpayers' money. This dilly-dallying with the claims problem, according to our Investigating Committee's findings, promises to 'continue to be a real roadblock on the path to Indian independence 100 years from now'. For that reason your special investigating committee recommended that legislation be adopted to fix the final date after which no more Indian claims would be considered by any agency or instrumentality of the Government and to provide for a claims commission that would find the facts and make final determinations on all pending Indian claims cases within a period not exceeding ten years. We ought to have a definite time table; we ought to know that, once having given the Indians a fair opportunity to present their cases, this chapter in our history and this expense to our taxpayers will be concluded once and for all. That is my chief concern in the bill that is before us.[16]

Congress was confident the Commission could do the job in the time allowed. It passed Congressman Jackson's bill when he assured them:

> . . . . 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 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.[17]

In rejecting the idea of an Indian Claims Court, Congress carefully gave to the Indian Claims Commission all the necessary tools to control at every stage the hearing and determining of the claims before the Commission.

Secretary Ickes had preferred the 1935 House Bill (H.R.6655) creating an Indian Claims Commission to the Senate Bill creating

16. 92 CONG. REC. 5816 (1946).
17. *Id.* at 5818.

an Indian Claims Court. Section seven of the House Bill creating a Commission provided that:

> [T]he Commission shall make a complete and thorough search for all evidence affecting such claims, utilizing all documents and records in the possession of the Court of Claims and the several government bureaus and offices. The Commission or any of its members or authorized agents may hold hearings, examine witnesses, take depositions in any place in the United States and any of the Commissioners may sign and issue subpoenas for the appearance of witnesses and the production of documents from any place in the United States, at any designated place of hearing.[18]

Section eight provided:

> The Commission shall give notice and an opportunity for hearing to the interested parties before making any final determination on the claim. A full written record shall be kept of all hearings and proceedings of the Commission and shall be open to inspection by the attorneys concerned. Whenever a final determination is reached by the Commission upon any claim, notice thereof shall be given to the tribe, band, or group concerned. Within twenty days thereafter written objection thereto may be filed with the Commission by any interested party. . . .[19]

Section nine provided for the adoption of rules and "of such experts, field investigators and clerical assistants as may be necessary to fulfill duties which cannot be properly performed by persons already engaged in the government service."[20]

From 1935 until the enactment of the Indian Claims Commission in 1946 the word *court* was never mentioned again in any proposed bill.

The provisions of sections seven, eight and nine of the 1935 bill were included in the 1946 Act in: section four, which provides for the appointment of a clerk and such other employees "as shall be requisite to conduct the business of the Commission;"[21] in section nine, which provides that "the Commission shall have power to establish its own rules of procedure;"[22] in section thirteen, paragraph (b), providing for the establishment of an Investigation Division and requiring the Division to "make a complete and thorough search for all evidence affecting each claim, utilizing all documents and records in the possession of the Court of Claims

18. H. R. 6655, 74th Cong., 1st Sess. (1935).
19. *Id.*
20. *Id.*
21. The Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. § 70 (c) (1964).
22. *Id.* at § 70(h).

and several government departments . . .;"[23] in section fourteen, which gave "The Commission" the power to call upon any of the departments of the government for any information it may deem necessary," specifically authorizing ". . . the use of all records, hearings, and reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business;"[24] and, section seventeen provides that: "The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim."[25]

There was only one major difference in the 1935 bill and the 1946 bill which later became law. The 1935 bill provided that "all determinations of fact by the Commission shall be final and conclusive and shall not be open to reexamination in the Court of Claims or in any judicial or other proceedings."[26] The bill signed into law in 1946 provided for review by the Court of Claims and a further appeal to the Supreme Court. Also, in section twenty, paragraph (a), the bill authorized the Commission to "certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim: and thereupon the Court of Claims may give appropriate instructions on the question certified and transmit the same to the Commission for its guidance and the further consideration of the claim."[27] It seems that Congress intended to give the Commission a tool by which it could avoid protracted appeals by soliciting guidance from the Court of Claims, an appellate arbiter.

COURT VS. COMMISSION

Congress had rejected the idea of an Indian Claims Court. Instead it had created an Indian Claims Commission and, as suggested by Congressman Jackson, has given it broad jurisdiction. It empowered the Commission to investigate the claims; to call on other agencies of the government for assistance; to call on the Court of Claims for assistance; to approve compromise claims; to hear and determine the claims; to give reasonable notice to interested parties; and, to provide interested parties an opportunity to be heard before making any final determination upon any claim.

The Congress required the Attorney General to represent the United States and authorized, *but did not require,* the Indian claimants to be represented by counsel.

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23. *Id.* at § 70(1).
24. *Id.* at § 70(m).
25. *Id.* at § 70(p).
26. H. R. 6655, 74th Cong., 1st Sess. (1935).
27. The Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. § 70(s) (1964).

Congress further gave the broadest possible appeal jurisdiction to the Court of Claims allowing the Court, upon appeal, to determine whether the findings of fact of the Commission are supported by substantial evidence and authorizing the Court to go into "the whole record or such portions thereof as may be cited by any party. . . ."[28]

Congress directed the Commission to:

> [E]stablish 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 affecting claims, utilizing all documents and records in the possession of the Court of Claims and the several Government departments, and shall submit such evidence to the Commission. The Division shall make available to the Indians concerned and to any interested Federal agency any data in its possession relating to the rights and claims of any Indian.[29]

In an apparent attempt to facilitate the work of the Investigation Division, Congress specified that "any member of the Commission or any employee of the Commission, designated in writing for the purpose by the Chief Commissioner, may administer oaths and examine witnesses. . . ."[30] The Act stated further that "[t]he Commission shall have the power to call upon any of the departments of the Government for any information it may deem necessary. . . ."[31]

How did the Commission utilize these sections? The Commission established the Investigation Division on paper, and for budget purposes, listed one of the members of the professional staff as Director of the Division. It assigned no staff to the Division and a search of the files and records of the Commission indicate that at no time did the Director do more than send out inquiries by mail to the various tribes. 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 for the Department of Justice to present the issues and the evidence to the Commission. Although nothing in the Act required the claimants to have a lawyer, no claim made any progress unless the claimants were represented by a lawyer. In section fifteen of the Act, Congress has said that a "group of Indians *may* retain to represent its interest in the

28. *Id.* at § 70(a).
29. *Id.* at § 70(1).
30. *Id.* at § 70(q).
31. *Id.* at § 70(m).

presentation of claims before the Commission an attorney . . ." and then added in the same section the statement that "the Attorney General or his assistants *shall* represent the United States in all claims presented to the Commission. . . ."[32]

The matter was further complicated by the position taken by the Bureau of Indian Affairs and the Solicitor's Office of the Department of Interior. Section fifteen of the Act stated that Indians organized under the Wheeler-Howard Act of June 18, 1934, could hire a lawyer as provided in their constitution and by-laws. The next sentence said that "the employment of attorneys for all other claimants shall be subject to the provisions of Sections 2103-2106, inclusive, of the Revised Statutes."[33] This is the provision in the United States Code which states that no attorney shall be hired by an Indian tribe without the written approval of the Secretary of the Interior and the Commissioner of Indian Affairs.

Although the language clearly differentiates between tribes organized under the Wheeler-Howard Act and "all other claimants,"[34] the Commission, the Secretary of Interior, the Commissioner of Indian Affairs, and by acquiescence, the Congress insisted that all attorneys for the tribes go through the complicated procedure of having their contracts approved by the Secretary and the Commissioner.[35]

Although Congress authorized the Attorney General or his assistants "with the approval of the Commission, to compromise any claim presented to the Commission . . .",[36] it is the policy of the Department of Justice *not* to make settlement offers.[37]

Although Congress has provided that the Commission need only "give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim . . .",[38] the Commission, submissive to the requests of the lawyers who practice before it, has provided for a bewildering series of hearings on title, value, offset, attorneys fees and all the motions that any party chooses to present.

The Commission has seldom requested instructions from the Court of Claims on questions of law as provided in section twenty

32. *Id.* at § 70(n). (emphasis added).
33. The Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. § 70(n) (1964).
34. *Id.*
35. Wheeler Howard Act, 48 Stat. 987 (1934), 25 U.S.C. § 476 (1964).
36. The Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. § 70(n) (1964).
37. *Hearing on S. 307 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs,* 90th Cong., 1st Sess. 68 (1967). Senator McGovern was questioning Edwin L. Weisl, Assistant Attorney General, Land and Resources Division, regarding settlement of the claims. Mr. Weisl answered, "Well, it is the long-standing policy of the Department of Justice in all cases in which money judgments are involved not to make settlement offers on its own, but to await them from the other side . . ."
38. The Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. § 70(p) (1964).

of the Act even though there have been 122 appeals from the Commission's Interlocutory Orders and Judgments.

To summarize, the Indian Claims Commission has failed throughout the time of its existence to exercise the initiative in hearing and determining the claims filed before it. It has not certified questions of law to the Court of Claims, it has given only lip service to the Congressional directive to establish an Investigation Division. In the face of the Justice Department's policy against initiating settlement of claims, it has not actively encouraged the settlement of the claims and, throughout the years of its existence, it has accommodated itself to the narrow interpretation of the law applied by the Commissioner of Indian Affairs and the Secretary of Interior with regard to the claimants' lawyers.[39] The Commission has chosen to sit as a court and, as a result, the Congressional mandate has been utterly frustrated.

A PROPOSAL

In March 1968 the Indian Claims Commission made a statement to the House and Senate Appropriations Committee that it "will institute any innovations which will expedite its work." Although the Commission has during the last year instituted pretrial conferences, reduced the time required for presenting expert testimony, and reduced the time required for hearings at every stage of the cases, it is my opinion that, even at the present rate of production, which is almost double that of preceding years, the task cannot be completed in the time remaining using existing procedures.

In my opinion, no amendment to the act would be required to institute the following innovations to existing procedures which can enable the Commission to accomplish the Congressional mandate by April 10, 1972, the termination date:

1. Refer all caims 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 on an intermittent or regular

39. Note, *Contract Approval: Attorneys and Indians*, 15 How. L.J. 149 (1968).

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 Investigation Division to submit to the Commission all pertinent evidence and proposed findings of fact upon which a Commission opinion can be based.

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

In my opinion the adoption of this procedure would greatly increase the number of compromise settlements, it would remove the Commission from the confining situation wherein its production is controlled to a large extent by the ability of the Justice Department and the petitioners' attorneys to process claims, and it would show the Congress that the Indian Claims Commission is determined to meet the termination date set by Congress.[40]

40. For other excellent treatments of the subject, see Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511 (1966) and Thomas Leduc, *The Work of the Indian Claims Commission Under the Act of* 1946, Feb. 1957, PACIFIC HISTORICAL REVIEW 1.