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PREFACE AND ACKNOWLEDGMENTS

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In 1946, President Harry S. Truman signed into law an act of Congress that established a tribunal unique in history. The Indian Claims Commission remains the only judicial body ever created to award money to redress the wrongs done to a native population arising from the expansion of Europeans.

For three decades, the Commission decided claims brought by over 170 Indian tribes, until it was disbanded in 1978 and its few remaining cases were transferred to the United States Court of Claims. It heard evidence about life before the advent of white men and about much of the history of the relations between the United States government and the tribes it encountered. Despite the novelty of the Commission and the fascination of its subject, very little has been written about it. In this book, we explore whether the Indian Claims Commission Act was wisely conceived, how well the legal system was able to carry out the congressional purposes in passing the act, and, to the extent the purposes were frustrated, what that says about the capabilities of this country's legal system and about the relationships between the federal government and Indian tribes.

Although these issues require the analysis of legal decisions, we are not writing primarily for lawyers and presuppose no knowledge of legal jargon or doctrine. We hope that the book will appeal to readers who have never endured a first-year law school class, as well as to lawyers.

Our personal backgrounds reflect the diversity of our intended audi-



Money is like muck, not good except it be spread.

—SIR FRANCIS BACON

In all, the Indian Claims Commission awarded tribes \$818 million over its thirty-one years of existence. Through the end of 1994, when fewer than ten cases remained undecided, the Court of Claims has awarded tribes an additional \$400 to \$500 million in Indian Claims Commission Act cases, bringing the total to about \$1.3 billion.¹

As of 1980 about 1.5 million Native Americans lived in the United States, so the awards have averaged less than \$1,000 apiece. In the lawsuit-happy United States of the late twentieth century, \$1,000 per person is a pittance. Under an act passed in 1988, citizens of Japanese ancestry who were interned during World War II became eligible to receive \$20,000 apiece, as well as a formal apology from Congress.²

Once tribes procured these judgments, they had to decide how to spend the money. For the most part, they followed Sir Francis Bacon's advice: they spread the money widely among their members.

After the Commission or Court of Claims entered a judgment, the United States Treasury set aside sufficient funds to pay the award. Unfortunately for the tribes, the Treasury is not like a bank from which an ac-

count holder may easily withdraw its funds. An appropriate government official must authorize the removal of funds from the Treasury, and governmental approval of a plan of distribution was required before an official could authorize the withdrawal of Indian judgment funds.

The requirement of governmental approval created a situation unique in all of Anglo-American jurisprudence: a defendant determined how a successful plaintiff could use the funds awarded from the defendant. The incongruity was all the more striking for awards in accounting cases. The power to dictate how funds would be distributed arose out of the United States' continuing role as Indians' trustee, even though, in the accounting cases, the government paid money to compensate tribes for its shortcomings in that role.

The procedures by which the government devised, evaluated, and approved distribution plans changed over the years, as did the purposes that the plans were designed to achieve. During the 1950s, Congress enacted legislation after each award authorizing a plan for the distribution of the money. Although there were no set procedures, apparently officials of the Bureau of Indian Affairs generally consulted with some tribal members and drafted legislation for Congress. Little was needed in terms of procedures because there were few final awards and because there was little disagreement about how they should be distributed. Most of the acts provided for the distribution of the entire award, less attorneys' fees and expenses, equally among tribal members. Generally no money went to the tribal governments for use on tribal projects. Tribal members wanted the money, and these "per capita" distribution plans were consistent with the prevailing federal policy of terminating the special relationship between the United States and Indian tribes and ending the tribal way of life for Native Americans.³

But in 1961, the assistant secretary of the Interior Department enunciated a new strategy in a congressional hearing to consider a plan of distribution for the Omaha tribe of Nebraska: "We believe that a judgment recovered by an Indian tribe should ordinarily be regarded as a tribal asset, and that the individual members of the tribe have no right to a per capita distribution. The money should be programmed as other tribal funds. Exceptions will need to be made, of course, when the tribe that recovers the judgment does not have a cohesive membership or organization." The plan thus divided recipients of awards into two groups. For descendants of aboriginal groups most of whose members didn't live

on or near a reservation, such as the Fort Sill Apaches or the Indians of California, awards would continue to be distributed primarily per capita. In much of the country outside the Southwest, more than half of many tribes' members live off reservations. Under those circumstances, if awards were spent by modern tribal organizations, the tribal members located far from the reservations would probably realize few benefits. But the Interior Department intended to push for a very different disposition of awards made to aboriginal tribes most of whose members lived on or near a reservation, such as the Mescalero, Chiricahua, and Lipan Apaches who were members of the Mescalero Tribe of the Mescalero Reservation, as well as awards to the modern tribe itself, such as for accounting claims. Those awards, the Interior Department maintained, should be devoted primarily, if not solely, to tribal projects.⁴

The Interior Department's new policy for the distribution of awards was part of the general shift away from termination and toward the strengthening of tribal institutions. The practice, however, fell short of the policy. Even for tribes whose members lived primarily on or near the reservation, generally only about 20 percent of the money was devoted to tribal programs. The balance of the awards was distributed per capita.⁵

In 1973, the procedures for deciding upon and approving distribution plans were revised. The Indian Claims Commission Act had been enacted largely to save Congress the time and effort consumed by considering special jurisdictional acts for each tribe. As the pace of adjudication in the Indian Claims Commission accelerated during the 1960s, Congress, and particularly the committees dealing with Indian affairs, could not keep up with the demand for distribution acts that followed each award. Long delays in getting funds to the tribal beneficiaries resulted, and consideration of more substantive Indian legislation was postponed. In the early 1970s about half the time of the House and Senate subcommittees dealing with Indian affairs was devoted to consideration of distribution acts. Despite all of that work, Congress in 1973 still had a backlog of over thirty tribes awaiting distribution acts.⁶

To eliminate this legislative overload, Congress in October 1973 enacted the Distribution of Judgment Funds Act, applicable to all tribes. This act, which was amended in 1983, requires the secretary of the interior to prepare and submit to Congress a plan for distribution of each award within a specified time after a judgment is entered (since 1983,

this has been a year, with the possibility of a 180-day extension). Unless Congress disapproves the plan within 60 days, the plan becomes effective. Between 1973 and 1983 a resolution passed by either house of Congress was sufficient to express disapproval; since 1983 a joint resolution has been required.⁷

These procedures constitute a workable, albeit unconstitutional, compromise between no congressional involvement and the requirement that Congress enact a plan for distribution. In 1983, the Supreme Court ruled unconstitutional a provision in an immigration statute that, like the Distribution of Judgment Funds Act, allowed one house of Congress to block an administrative action by disapproving of it. The Court reasoned that when Congress "vetoed" an administrative action it effectively legislated, but the Constitution allows Congress to legislate only by passing an act and, if the president vetoes the act, by overriding the veto with a two-thirds majority. In response, Congress amended the immigration act, the Distribution of Judgment Funds Act, and other legislation to require disapproval by a resolution adopted by both houses of Congress. Like a one-house veto, however, a congressional resolution is not subject to presidential veto.⁸

Congress has not tried to use its veto power over a plan of distribution, in part because the procedures and criteria created in October 1973 reduce the bases for viable disputes over a distribution plan. The act requires the Department of the Interior to provide "legal, financial, and other expertise" to assist a tribe receiving an award to prepare a distribution plan. Moreover, the department must hold a public hearing after appropriate notice to obtain the testimony of tribal leaders and members concerning the use of the funds and to assure that the desires of any dissenting members of the tribe are fully considered. These provisions, if followed, vitiate any complaints from tribal members that they didn't have an opportunity to voice their opinions about distribution of an award.⁹

More important for this book, the Distribution of Judgment Funds Act also establishes guidelines for plans for distribution of funds. A "significant portion" of any judgment, but not less than 20 percent, must be devoted to "common tribal needs" or other tribal purposes unless the secretary of the interior determines that the particular circumstances of

a tribe clearly warrant less. The 1983 amendments to the act didn't alter this requirement.¹⁰

During congressional hearings concerning the act, the Department of the Interior urged that the 20 percent figure be increased to 25 percent. Even 25 percent represented a huge retreat from the official 100 percent goal. Congress, however, knew that many tribes, not just those with members scattered off-reservation, wanted to distribute the entirety of awards per capita, and enshrined the 20 percent compromise.¹¹

Despite the department's desire to allocate as much of the awards as possible to tribal programs, it continued to allow tribes with scattered members to distribute the entirety of awards per capita. The Fort Sill Apaches, for example, were able to convince the Department of the Interior that, with no reservation and members dispersed around the country, all of their share of the aboriginal land and trespass awards the Weissbrodts obtained during the 1970s should be distributed per capita.

Tribes generally opted to distribute as much money as permitted per capita primarily because individual tribal members wanted to decide themselves how their share of the money would be spent. Officials in the Bureau of Indian Affairs, with their lingering racist and paternalistic attitudes, objected to the per capita distributions because they believed that the individuals squandered their money at the invitation of merchants who extended easy credit terms.¹²

Most tribes may also have chosen per capita payments due to a well-placed mistrust of the federal government. The secretary of the interior openly informed Congress in 1971 that payment of Indian claims would not be a net loss because applying judgment funds to existing federal programs would reduce the need for further funding of those programs. Carried to its logical extreme, this also would mean that the Indians would realize no net benefits from the claims. If the government already were paying \$10 million a year toward activities on a reservation and, after the tribe received a \$4 million judgment, the government reduced its support to \$6 million, the Indians' condition would not have been improved at all. At least if the money were spent quickly on items that the government had not previously been providing, tribal members would be assured of some benefit.¹³

Finally, Indians' decisions to distribute money per capita reflected a lack of faith in tribal governments and the political weakness of most tribal leaders. As has been shown, most tribes had no native institutions

that were distinctly governmental; those institutions generally did not exist until the 1930s, when they were imposed in a constitutional form foreign to Indian cultures. Even when tribal governments began to expand their spheres of activity in the 1960s, the Bureau of Indian Affairs placed significant restraints on them. It is not surprising then that most tribal members preferred to have money under their personal control rather than that of the still-novel tribal governments of uncertain authority.¹⁴

More recently, Congress has shown less restraint in dictating how funds have been distributed. The Indian Gaming Regulatory Act of 1988 permits tribes to operate gambling enterprises under defined circumstances. For about two hundred tribes, gambling has brought significant income for the first time since they were placed on reservations, especially if a tribe's land is located within a few hours of a major metropolitan area. The Gaming Act, however, requires the tribes to spend gambling revenue on specified types of social, welfare, and economic-assistance programs, and many tribes, not just the Pequots as discussed in Chapter Nine, have used gambling revenues to improve the lives of tribal members significantly. In early 1996, only about 10 percent of the tribes operating gambling enterprises were distributing any of the profits per capita. The federal government has justified cutbacks in assistance programs to Indians by citing the gambling earnings applied to social, welfare, and economic programs, one of the benefits that government officials vainly had hoped to realize from the Indian Claims Commission Act.¹⁵

Possibly Indian Claims Commission Act awards would have improved Indians' lives more if they hadn't been distributed per capita, but the method of distribution was not the major problem. The size of the awards was. Gambling has had a more positive impact on the quality of life on reservations than did the Indian Claims Commission Act primarily because tribal income from it reached over \$4 billion in 1994 alone, more than two and a half times the total amount of the awards under the Indian Claims Commission Act.¹⁶

The recent history of the Apaches on the Mescalero Reservation helps to demonstrate that the distribution of Commission awards played at most a minor role in determining their impact. The Weissbrodts ob-

tained \$36 million in judgments between 1966 and 1981. In 1990 the reservation had about 3,200 tribal members. Thus, the awards averaged about \$11,000 per person, many times greater than the national average under the Indian Claims Commission Act. After deduction of 10 percent for attorneys' fees, over \$32 million remained for use by the Apaches.¹⁷

Wendell Chino, as head of the tribe, has proven adept at obtaining money from the federal government and elsewhere. With these funds as well as significant percentages of the Indian Claims Commission awards, Chino has led the tribe during the last few decades on a series of ambitious projects, exploiting the reservation's three major natural resources: timber, range, and natural beauty. The tribe runs its own logging industry and maintains a herd of six thousand to seven thousand head of beef cattle. It has built and operates a four-hundred-room luxury resort hotel and casino, the Inn of the Mountain Gods, and a ski resort, Ski Apache. Other income has been devoted to a scholarship fund. The tribe has had money to try to improve the lives of its members.¹⁸

Yet the substantial amount of judgment funds and the enduring efforts of Chino and the tribal government have not lifted many of the people out of poverty. The tribal industries don't create enough jobs, and little private business has developed on the reservation. Almost 50 percent of the reservation population lived below the poverty level as of the early 1990s. Desperate to bring additional income and employment to the reservation, Chino even has obtained by referendum the tribe's approval to negotiate the use of a corner of the reservation as a short-term repository for nuclear waste. The very willingness to consider such a possibility shows the straits in which the Mescalero tribe, including the descendants of the Chiricahua Apaches who fought for so many years to live in their homeland, still finds itself.¹⁹

United States. Under its terms, which were approved by the Interior Department on February 15, 1940, Lewis agreed that his compensation would be totally contingent on a recovery for the tribe.²⁹

Despite the difference in approach, the Oklahoma Chiricahuas fared no better than their New Mexico counterparts. World War II intervened before Lewis could make any progress, and the contract expired.

At the war's onset, then, what had formerly been the Chiricahua tribe had divided into two groups, each seeking redress from the government along different avenues. One was called the Fort Sill Apache Tribe, at best a loosely federated group of families with a shared heritage living on separate plots of land in the manner of the white culture around them. The other lived in the remote Southwest, among other Apache groups into which they were gradually assimilating. But despite being separated by approximately five hundred miles and by divergent attitudes concerning tribal relations, the groups were not completely distinct. Many of the Oklahoma Chiricahuas had friends and relatives at Mescalero, and vice versa. They also held in common the same ancient memories and grievances. With the passage of the Indian Claims Commission Act in 1946, however, they finally had a realistic opportunity to win compensation for those wrongs—the ghosts of the Lonesome Songs that haunted them still.



THE COMMISSION BECOMES A COURT

Meet the first beginnings; look to the budding mischief before
it has time to ripen to maturity.

—WILLIAM SHAKESPEARE

When President Truman signed the Indian Claims Commission Act into law on August 13, 1946, the law, and the tribunal it called for, were without precedent. No other country colonized by Europeans had ever allowed its displaced natives to sue for wrongs done to them decades, even centuries, before. No other American law had instructed a tribunal to resolve disputes based not only on established legal principles but also on an undefined standard of fair and honorable dealings. Indeed, a great deal in the act was left open to interpretation, and the Indian claims commissioners, who would be primarily responsible for interpreting its ambiguities, had not been identified. Even the language that specified their qualifications left a great deal open to chance and politics.

The uncertainties did not end there. Nobody knew how many Indian groups would avail themselves of the opportunity to sue the United States. Perhaps by way of reassuring Congress that the law would not open a Pandora's box of claims that would strip the federal treasury, witnesses had testified during the hearings that most of the "better" Indian claims had already been presented to the U.S. Court of Claims—and by and large defeated by government attorneys. But no one knew

the history of all, or even a large percentage, of the tribes, so it was difficult to speculate about the number—or the nature—of possible claims. Predictions of how successful any Indian claim might be before this tribunal were merely guesswork.

The act, in effect, created a *tabula rasa* awaiting the etcher's acid, and this came in the form of a handful of early decisions by President Truman, the commissioners, and the attorneys for both the tribes (the plaintiffs) and the Justice Department, which represented the United States (the defendant). Some of these decisions were thoughtfully considered, but many were ingrained and unquestioned rejections of possible approaches to crucial issues, and all of them reduced the inherent uncertainties of the act and set the Commission on a largely irrevocable course. The first of these decisions, President Truman's selection of the initial commissioners, was one of the most important.

When it came to specifying the qualifications of the three commissioners, the Indian Claims Commission Act provided few constraints on the president's discretion. It required only two things. First, two of the three commissioners had to be members of the bar of the Supreme Court of the United States. This sounds relatively august, even exclusive, but virtually any lawyer admitted to the bar of any state for at least three years could, and still can, become a member of the bar of the Supreme Court by applying and paying a small fee. In essence, the president could pick two commissioners simply because they were lawyers. The second restriction was that not more than two of the three be members of the same political party, assuring a degree of political bipartisanship.¹

The early versions of the act had also required that at least one of the three commissioners be an American Indian. The House committee considering the bills deleted that requirement out of fear (however disingenuous) that none of the relatively few lawyers with Indian blood would be interested in serving. Instead, the committee expressed in its report accompanying the bill the "hope that at least one member of the Commission will be an Indian, if an Indian of suitable qualifications is available. Such an appointment would help to instill confidence on the part of Indian litigants in the impartial character of the Commission."²

The recommendation had merit, and not just in creating an appearance of fairness. To the extent that an Indian lawyer was steeped in a

tribe's oral traditions and history, he would probably be more aware of the understandings, or misunderstandings, under which tribes operated when they entered into transactions with the United States and of the pressures that brought them to the bargaining table. Without exposure to those traditions and histories, a white lawyer might be more likely to interpret a decades-old agreement for the conveyance of land from a tribe to the government in the same manner that he would regard an agreement between two white men. By appointing at least one Indian to the Commission, Truman would have increased the chances that it would weigh the understandings of both parties. Four Indians, three of whom were attorneys and two of whom were sitting judges, were recommended, but all were quickly rejected. The wishes of congressional committee members do not bind the president unless they are incorporated in a statute. More than twenty years would pass before Richard Nixon appointed the one and only Indian to serve on the Commission.³

If he wasn't going to select an Indian, Truman could have appointed someone with sensitivity to the Indian perspective, an unparalleled knowledge of Indian law, and the trust of many tribal leaders. Soon after the act was signed, the acting secretary of the interior urged the appointment of Felix Cohen, and several legislators along with representatives of various Indian rights organizations quickly added their support. Truman, however, rejected this choice as well.⁴

Apparently, Cohen's expertise and sympathy for Native Americans disqualified him. In March 1947, Truman selected three non-Indians who had no experience with Indian affairs or Indian law. According to Edgar Witt, whom Truman appointed as chief commissioner, the president said he wanted to name individuals without "bias or prejudice one way or the other." A laudable goal on the surface, it was impossible to achieve.⁵

It is at least theoretically possible to find a neutral decision maker or arbiter for two disputants who have similar understandings of the rules of the transaction that gave rise to their dispute, such as two drivers who have an automobile accident and disagree about who is at fault. A decision maker also may be deemed neutral when two disputants have divergent understandings of the rules, but a higher authority recognized by both of them, such as the government, has established a binding interpretation of them. But when the disputants diverge markedly in their understanding of the rules and neither acknowledges a higher authority,

a decision maker would have to comprehend and equally weigh two radically different perspectives to be neutral. That is all but impossible. As a practical matter, in deciding whether the government had behaved fairly and honorably toward Indian tribes, each commissioner could give precedence either to Anglo-American principles or to the Indians' understanding of events. By nominating three non-Indians who had no understanding of the special relationship between the United States and the tribes, President Truman virtually ensured that the white man's perspective would prevail.

Making matters worse, the administration made little effort to ferret out the best non-Indian candidates from the twenty-seven men and one woman recommended to it. Instead, and hardly surprisingly, it selected the candidates with powerful and active political backing. Truman was an embattled president in early 1947, facing vociferous opposition from a Congress that had fallen into the hands of the Republicans. Given such contemporaneous postwar crises as the spread of communism, the future of atomic weaponry, and the economic and political disarray of Europe, it is little wonder that the appointment of Indian claims commissioners was left to politics-as-usual.⁶

The nominee for chief commissioner, Edgar Witt of Texas, was one of the "closest friends" of Senator Tom Connally. Connally, a Texas Democrat and one of the congressional leaders on foreign affairs, started lobbying for Witt in June 1946, two months before the act was signed into law, and called or wrote the president on his behalf virtually every month until Witt was nominated. Texan Sam Rayburn, the Speaker of the House until the Republicans won control of Congress in the 1946 elections, seconded Connally's recommendation. Witt's backers could point to a long and distinguished career. At the age of sixty-eight, Witt had already been a private attorney, a member of the Texas state senate for twelve years, lieutenant governor for four years, and the chairman of two federal commissions resolving private claims arising from relations between the United States and Mexico. Witt's record, and the support of his powerful friends in Congress, were more than enough to secure his nomination.⁷

The FBI background report on the second nominee, William Holt of Nebraska, cast doubt on his ability to be an effective commissioner.

While his associates praised his character and morals highly, his grades in law school had been "below average," the president of the insurance company that he served as general counsel for thirteen years considered him "probably a poor trial attorney," and a justice of the Nebraska Supreme Court rated him "steady" but "not a brilliant attorney." Given the unique powers and unprecedented mandate of the Indian Claims Commission, these reservations might well have disqualified him, except that Holt's chief advocate was Republican Senator Hugh Butler of Nebraska, chairman of the Senate Committee on Public Lands, which included Indian affairs within its jurisdiction. Holt's nomination as a Republican member of the Commission was all but assured.⁸

The appointment of the third commissioner, Louis O'Marr, owed as much to fortuitous timing as to political logrolling. When President Truman sent the names of his three nominees to the Senate on March 7, 1947, O'Marr, then the attorney general of Wyoming, was not included. The third nominee was Charles Brannan, assistant secretary of agriculture and, of course, a Democrat. When O'Marr's main supporter, Senator Joseph O'Mahoney of Wyoming, learned of his candidate's omission from the list, he made what were, according to a presidential aide, some "very caustic comments" about Truman's selections. Then, on March 11, Brannan asked the president to withdraw his name. Not wishing to further offend O'Mahoney, the second-ranking Democrat on the Public Lands Committee, the president nominated O'Marr the very next day, without waiting for the FBI to conduct a background check.⁹

The three nominees sailed easily through the Senate confirmation process. Witt, Holt, and O'Marr were approved on April 8, 1947, about a month after their nominations, and sworn into office two days later.¹⁰

The personalities of the commissioners, along with their biases, would help to determine how well they worked with one another, with the attorneys who appeared before them, and with the legislators who had to appropriate money for the Commission and fund the judgments it handed down against the United States. Chief Commissioner Witt set the tone. Congressmen referred to him as "our long-time and good friend" and "distinguished friend," and attorneys who practiced before the Commission had similar affection for him. Not surprisingly, these attorneys found the Witt-led Commission to be a friendly, relaxed forum and one very willing to grant extensions that made scheduling orders all but meaningless.¹¹

For twelve years, Witt, O'Marr, and Holt worked together with remarkable unanimity. The Commission issued 169 opinions prior to O'Marr's departure. Of these, 157—over 90 percent—were decided unanimously. In the few dissenting opinions Witt was the most sympathetic toward the Indians. He dissented six times in favor of the Indians, once in favor of the government. O'Marr was the most predisposed toward the government. He dissented from the Commission's opinion five times, each time in favor of the United States. Both Witt and O'Marr occasionally also wrote concurring opinions, reaching the same result as the Commission for different reasons. Holt showed no signs of independent thinking. Over twelve years, he never dissented or concurred; he always agreed with one or both of his colleagues.

Before Witt, O'Marr, and Holt could write an opinion, they had to decide upon the procedures and structure of the Commission. They even had to determine what exactly was meant by the word *commission*.

Congress had debated the advantages of a court or a commission in resolving the Indians' claims, and it is important to understand some of the distinctions. Although many commissions now have the power to adjudicate disputes much like courts, during the 1930s and 1940s a commission was typically conceived as a fact-finding body that referred its recommendations to some other body, such as Congress, for decision or action. A court, on the other hand, hears adversarial arguments and renders a decision, subject only to appeal to a higher court.

Congress decided that the Commission, despite its name, would function largely like a court. It would hear factual evidence presented by the Indians and the government, decide which version of the facts it believed, and make rulings of law subject to appeal to the Court of Claims. At Felix Cohen's urging, however, Congress provided that the Commission would also have the power to investigate the facts itself. In deciding court cases, judges and juries may not conduct their own factual investigations, but must (with limited exceptions) consider only the evidence presented by the opposing parties. Congress required that the Commission create an Investigation Division that would, at the Commission's request, uncover facts relating to claims and present them to the Commission, the Indians, and the government. This investigatory work appeared necessary for the fair resolution of decades-old, if not

centuries-old, claims, where any documentary evidence was generated exclusively by, and generally was solely in the possession of, the government.¹²

To the commissioners, accustomed to traditional judicial procedures, the Investigation Division was an anomaly, an unfamiliar agency of dubious value. Attorneys for both the Indians and the government placed little if any value on such a division, preferring to perform their own research or to have it done by employees or experts under their direct control. The staffing and functions of the Investigation Division, inchoate at best, soon withered away.¹³

Did the Commission's failure to create an effective investigative arm seriously interfere with its ability to resolve Indian claims fairly and efficiently? During the hearings in 1946, Cohen had argued, "Unless an Investigation Division is available to do a thorough job of uncovering the facts in these cases, which the Indians' attorneys seldom do, there can be no assurance that the Commission will have completed the job for which it was established when it comes to the end of its term." Cohen may have correctly assessed the performance of many Indian claims attorneys prior to passage of the act. And in one appeal in the following decade, the United States Court of Claims rejected the Commission's conclusions because of huge gaps in the factual record, and criticized the Commission for failing to conduct additional investigations (see Chapter Seven). But as more and more claims were tried, lawyers learned the types of information required and where the documents could be found, which diminished the need for the Investigation Division.¹⁴

Thus, the failure to establish an Investigation Division wasn't significant because of the possible impact on the quality of the presentation of Indian claims, but because of what it indicated about how the Commission would function. It might be called a commission, but it would operate almost exclusively like a court.

The commissioners notified all 176 tribes then recognized by the federal government of the existence of the Commission and of their right to file the petitions that would start the judicial process by identifying their claims. The act gave tribes five years, until August 13, 1951, to file. Until just before the deadline, petitions trickled in slowly. But by the deadline, 370 had been filed on behalf of almost every one of the tribes.

Many described multiple grievances, which, when divided, grew to more than 600 dockets.¹⁵

The claims speak cogently about the attitudes that lawyers for the Indians brought to their jobs. So great a majority were land claims that many people misidentified the Commission as the Indian Land Claims Commission. These claims typically asserted that the United States had acquired tribal land without paying any, or adequate, compensation. The tribes generally asked to be paid an amount equal to the fair market value of the land at the time it was taken, together with interest from the date of the alleged wrongdoing to the date that the Commission issued its judgment. These claims differed little from those that white citizens bring when a government acquires their land or other property without fair compensation. As will be discussed in a later chapter, the Indian land claims gave rise to many unique and difficult jurisprudential and evidentiary issues, issues that lawyers and the Commission could not ignore despite their best efforts to fit the cases into patterns with which they were comfortable. One Department of Justice lawyer would state that "there is nothing as complex as these cases," yet the legal theories underlying the claims—for example, that the government must pay fair value when it acquires property without the consent of the landowner—were well established in Anglo-American law.¹⁶

The second-largest group of claims sought an accounting of the government's management of tribal funds and other assets. About one-third of all tribes filed accounting claims. The United States has acted like a private trustee—indeed, over the years the government repeatedly has referred to itself as the Indians' trustee—once tribes ceded their aboriginal lands and were confined to reservations. Under Anglo-American law, a private trustee owns the property (including money) comprising the trust, but is obliged to manage it in accordance with the purposes of the trust. Often, trusts are established for the benefit of a person, such as a minor child, who is deemed incapable of managing the property. Throughout the nineteenth century and most of the twentieth century, the United States has deemed Indian tribes incapable of managing reservation resources themselves. If the beneficiary demands it, a private trustee must disclose in court its management of the property and money comprising the trust. In demanding an accounting, therefore, attorneys for the tribes were asking for no more than any other beneficiaries of trusts routinely received. Like the land claims, the Indians'

accounting claims raised a host of issues not faced in private litigation, but in theory they differed little from the accountings routinely required of private trustees.

In other words, in the vast proportion of the petitions, very few of the tribes' lawyers were willing to risk breaking uncharted legal ground. While the shelves of law books contained many decisions dealing with land and accounting disputes involving non-Indian parties, they had nothing to say about moral claims based on "fair and honorable dealings," a concept with little or no foundation in Anglo-American law. Almost all of the 370 petitions included only land and accounting claims, though many other types of claim could have been asserted. Indians had often been refused permission to practice their religion or to speak their own languages; they often were denied adequate education and deprived of the means of economic self-sufficiency. Adequate protection from the citizens of the United States had seldom been forthcoming. Animals, such as the bison, on which many tribes had depended for survival had been deliberately destroyed: General William T. Sherman, for one, had advocated the extermination of the bison as the most inexpensive way to terminate the culture and the resistance of the Plains Indians. Of course, a few attorneys did assert moral claims with no basis in Anglo-American law. One was made on behalf of the Chiricahua Apaches, who had been imprisoned for more than a quarter of a century.

The failure to assert claims based on fair and honorable dealings cannot be construed as either evidence of negligence by the tribes' attorneys or a conspiracy to deprive the Indians of their just awards. Rather, attorneys analyzed their clients' issues in light of contemporary legal concepts. Even if they recognized the possibility of asserting novel claims, they were unwilling to bear the risks of such lawsuits. The Indians, not as constrained by legal training or the costs of litigation, were more imaginative than their lawyers. Some, if not most, of their ideas would undoubtedly have been rejected out of hand by the Commission. For example, the Gros Ventres of Montana wanted remuneration because a member of the tribe (whom another tribe, the Shoshones, also claimed as one of their own) served without pay as a guide for the Lewis and Clark expedition during the first decade of the nineteenth century. The Commission might have found other claims not so easy to dismiss. The Mandans of North Dakota considered themselves entitled to compensation for the hides of all the buffalo slain on their lands by white

hunters, but their attorney dissuaded them, presumably because of the legal doctrine that wild animals are not owned by anyone. Under a fair and honorable dealings standard, however, the claim does not seem so far-fetched: the government had encouraged the destruction of the bison precisely in order to starve and freeze the Plains Indians into subjugation—a policy that caused the Indians what is called, in the cool language of the law, “damage.” Was the United States’ policy any more honorable than the recent efforts of armed groups in Somalia and the former Yugoslavia to deprive entire populations of food and clothing, which the United States and the United Nations now justifiably condemn?¹⁷

Obviously, there is no assurance that the Mandans’ proposed claim, or many other of the claims without precedent in Anglo law, would have succeeded. Few such claims were brought and they generally fared poorly. But whatever the sources of their reluctance, by not filing such claims the Indians’ attorneys assured that the tribes would not be compensated for them.

While claims attorneys struggled to determine the types of claims to file, the government’s litigators from the Department of Justice served notice with their first motions that they would fight the claims as aggressively as they would any other lawsuits against the United States.¹⁸ Legal ethics require lawyers to represent their clients zealously, and the government’s attorneys, like any others, worked to win the best possible monetary result for their client, the United States government. The Indian tribes, however, were not ordinary plaintiffs. The government had unilaterally assumed, and would continue to perform, the role of trustee or guardian, and as such, was obliged to act in the tribes’ interests.

The government’s dual position—defendant and trustee—could have, and perhaps should have, created a dilemma for its attorneys about the appropriate stance to take toward tribes’ claims. It didn’t. Even if the government attorneys recognized the existence of a conflict, they did not moderate their vigorous opposition to the claims. This surely saved the government money in the form of reduced damages, but the savings came at a significant cost. Like many plaintiffs, the tribes sought not only money damages but also vindication, some form of acknowledgment by the defendant or the court that they had been wronged. For the Indian

tribes, whose collective memories of the wrongs done them decades before still burned bright, this goal was usually strong. When the government’s attorneys succeeded in gaining the dismissal of a tribal claim on procedural grounds, they may have saved their client money but prevented a tribe from achieving any vindication—a feeling that would have strengthened the government’s relationships with many tribes.

In many instances the government would have been better served by negotiated settlements. Instead, the government’s attorneys not only asserted all available defenses to defeat tribes’ claims, but throughout most of the Commission’s history contested most cases to the bitter end. Not until 1958 did the government agree to a settlement. And in that case, the Coeur d’Alene tribe of the Pacific Northwest had been forced to prove the boundaries of its aboriginal territory and the value of that land at the time the government had taken it; all that remained to be adjudicated was the amount of offsets to which the government was entitled.

That pattern proved typical. In general, land claims were settled, if at all, only after tribal plaintiffs had survived a barrage of procedural motions from the Department of Justice and proved that the government was liable. The only outstanding issues resolved in negotiations were usually the number of dollars to be paid.

The Department’s opposition to settling Indian cases even drew congressional criticism. In 1956, Representative Stewart Udall of Arizona complained that few Indian claims cases had been disposed of because “the Department has adopted a policy of refusing to compromise cases out of court.” Whereas the Justice Department’s antitrust division had adopted a settlement policy that resulted in relatively rapid resolution of disputes involving big businesses, “this other arm of Justice has adopted a flat policy of no out-of-court compromises or settlements. To me that is a harsh and unrealistic policy, and I do not think it reflects credit on the Government of the United States.”¹⁹

The policy of filing myriad motions to dismiss and refusing to settle cases was primarily the product of one man, Ralph Barney. He headed the Department of Justice’s Indian Claims Section from the 1940s into the 1970s, with a staff that grew from a handful of attorneys to forty-three in the late 1950s. Short and stocky, Barney exuded energy and cockiness, reminding one lawyer of the baseball shortstop and manager Leo Durocher, who coined the phrase “Nice guys finish last.” Like other

good litigators, Barney loved to win, but some claims attorneys for the tribes believed that he was driven by anti-Indian feelings that went well beyond the zest for combat. He repeatedly bragged of the long years it took for Indians to recover under the act. Anyone on his staff willing to discuss settlement with Indians' attorneys quickly fell into disfavor, and he vociferously urged that the department appeal virtually every adverse judgment it received. Only when Barney's supervising assistant attorney general disagreed with his "hard-ball litigation" tactics, and was strong enough to override his recommendations, were settlements made with any consistency. That did not happen during the Truman and Eisenhower administrations.²⁰

One claim that the government's attorneys prudently did agree to settle, on the eve of trial in 1973, demonstrates the potential value of settlements achieved without the bitter taste of litigation. The United States purchased Alaska from Russia in 1867, and as traders and other American citizens filtered into the new territory, naval officers were appointed to protect American lives and property. Angoon, a fishing village located near present-day Juneau and populated by about 420 Tlingit Indians, was located within the naval protectorate. The Tlingits traded with white merchants, and by the 1880s some even were employed by traders.²¹

On October 22, 1882, the premature explosion of a harpoon bomb killed a shaman, or "medicine man," serving on a whaling boat operated by the Northwest Trading Company. The natives of Angoon forced the boat and its launches to shore, because under Tlingit custom all economic activities were taboo during the four-day mourning period, and demanded compensation of two hundred blankets from the company. If a member of one social unit (a clan) was killed or injured by a member of another clan, the offending clan had to pay compensation or the injured clan would exact justice—in the form of "an eye for an eye, a tooth for a tooth." For purposes of compensation, the Tlingits treated the Northwest Trading Company as a clan. Unlike in nineteenth-century Anglo law, fault was irrelevant—compensation was owed even if there had been neither intent to injure nor even negligence. The idea is hardly far-fetched. In the early twentieth century, every state adopted workers' compensation laws. If those laws had been in effect in 1882, the

Northwest Trading Company might well have owed compensation to the family of the dead shaman.²²

The naval commander, E. C. Merriman, made no attempt to comprehend the "savages'" customs and resolved to punish the Tlingits. He assembled a force of over seventy officers, sailors, and marines and proceeded to Angoon with a heavily armed boat to demand a fine of four hundred blankets or he would destroy the village. It is unclear whether the two alternatives were communicated to the villagers, but on October 26, 1882, Merriman opened fire. The bombardment destroyed most of the village's houses, after which sailors and marines looted the existing structures, then deliberately set them on fire. They also systematically destroyed food stored for the winter and the Tlingits' canoes.²³

Under the Indian Claims Commission Act, attorneys for the Tlingits filed a claim to recover the damages to the tribe caused by the bombardment—the only claim ever filed under the act for damages resulting from an attack on a tribe by government forces. In 1973, almost a century after the assault, attorneys agreed, subject to approval by the tribe, to settle the claim for \$90,000, the estimated value of the tribal property destroyed during the assault. (Prior decisions of the Indian Claims Commission, discussed later in this book, had made clear that the Tlingits could not recover for the deaths or the destruction of property owned by individuals.) One of the tribe's attorneys traveled to Alaska to explain the proposed settlement to them. After he had done so, several old men who had arrived at the village hall carrying paper bags began to retell the story of the bombardment.

At the appropriate point the elders revealed the contents of their bags—the cannon balls that had destroyed the village. Nearly one hundred years before, the villagers had buried the evidence of the wrong done to them. Now that, in their view, the government was at least indirectly admitting its fault, the cannon balls could finally be unearthed. The amount of the settlement might have been a pittance, but the Tlingits felt partly vindicated. As the president of the village's central council said, "Basically all we want is for the U.S. Government to admit that they did a serious wrong to the Angoon people."²⁴

The people of Angoon later sent a delegation to Washington, D.C., to request an official apology from the assistant secretary of the navy. The navy's only response was a letter stating, "The destruction of Angoon should never have happened, and it was an unfortunate event in our his-

tory." While the letter did not assuage any feelings of injury, it did not entirely erase the goodwill gained when the government showed itself willing to settle the score before the Indian Claims Commission. It was an opportunity missed in too many other cases.²⁵

By August 1951, the deadline for filing petitions, the Indian Claims Commission became, for all intents and purposes, the Indian Claims Court. Whether such a body that looked, sounded, and acted like a court would meet the goals that Congress had intended—resolving all Indian claims, making amends for all past wrongs, and putting the Indians in a position to become self-supporting—remained to be seen.



THE FEDERAL BUREAU OF THE
IMPROVEMENT CLAIM

Territory is but the body of a nation. The people who inhabit its hills and valleys are its soul, its spirit, its life.

—PRESIDENT JAMES A. GARFIELD

Under the Apache code of honor, an individual takes responsibility for his or her own actions. It is easy to imagine, then, that Geronimo sometimes pondered the situation in which he and his handful of adherents had placed the other Apaches who came to be known generically as the Chiricahuas. But it is impossible to imagine that either he or any of the other Chiricahuas distinguished between the pain they suffered from exile and imprisonment as individuals and that of the group as a whole. Obviously, both Geronimo and Chato, the army scout he distinguished, would have been aware during their time as prisoners of war of both the Chiricahuas' way of life and members of the tribe themselves were dying. But to distinguish between one's own tribulations and those of one's people would have been incomprehensible, without any practical consequences. Yet upon passage of the Indian Claims Commission Act, this odd duality became a critical issue, as the Chiricahuas and their attorneys soon discovered.