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**The role of congressional control in the adjudication of Indian
claims in the United States Court of Claims**

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The University of Arizona, 1992

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THE ROLE OF CONGRESSIONAL CONTROL
IN THE ADJUDICATION OF INDIAN CLAIMS
IN THE UNITED STATES COURT OF CLAIMS

by

Adam Arnold Geldreich

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DEDICATION

This thesis is dedicated in loving memory of my Mother, Barbara Geldreich (d), who instilled in me the need for education and an innate sense of curiosity.

ACKNOWLEDGEMENTS

I have always believed that no one person does anything truly alone, and the writing of this thesis is no exception. Many family members, professors and friends have contributed to the completion of this work. My Father, Horace Arnold; and my three brothers, Rusty Arnold, Danny Arnold and Tracy Arnold, who supported me emotionally when I needed it most. I am also indebted to Mildred Cummins, who not only has provided love and unqualified support, but who has tolerated separation without complaint.

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ABSTRACT

Indian Claims in the United States Court of Claims possess the unique quality of close congressional scrutiny. Because of the long-standing legislative relationship existing between the legislative branch and Indian tribal groups, the experiences of tribes in the Court of Claims held particular dynamics which were exclusively distinctive in many ways.

It is my hypothesis that congressional plenary power over Indian tribes and the influential legislative control which Congress exercised over the Court of Claims combined to put Indians in a litigatory environment which doomed the possibility for the majority of tribes to achieve successful redress of grievances.

INTRODUCTION

In 1855 Congress created a Court of Claims for the purpose of adjudicating claims brought by citizens against the Federal Government. The success of this arm of the federal judiciary in relation to Indian claims from the aspect of Congressional control will be analyzed.

Prior to 1855 claims against the Federal Government were processed through a congressional committee on claims. As more and more claims were submitted for adjudication, the effectiveness of the committee was restricted. The increased workload resulted in the introduction of a bill which outlined the means by which a court of claims could be created.

The debate over this bill was comparatively short. The primary focus of contention was the future status of the newly created institution.

The debate raged over whether this new institution should be given authority commensurate with a court, or should it be treated more as an advisory body. Historically, Congress was to look upon the Court of Claims as both a court and an advisory body.

Congressional authority over the federal courts originated under Article I Section 8 of the Constitution

which authorized Congress to create...tribunals inferior to the Supreme Court. Under this directive, Congress is capable of passing laws which affect the status, makeup, and responsibilities of a federal court.

Congress, from the inception of the Court of Claims, was able to overturn a ruling handed down by the Court. Due to congressional ability to, at its own discretion, overrule a Court of Claims decision. Indian tribal groups which attempted to bring their claims to the court's attention faced a seemingly apathetic judiciary.

Constitutionally, Congress was given authority over "Commerce with foreign nations, and among the several states, and with the Indian tribes;" and "to constitute tribunals inferior to the Supreme Court." (Const. Article I, Section 8.) These two directives were to play an important role in the complicated process of Indian claims adjudication.

Therefore, With the actual creation of the Court of Claims in 1855, came an almost simultaneous assumption that the Court of Claims was a congressionally controlled court. This perception was to persist until 1953 when the Court of Claims was officially recognized by Congress as a judicial tribunal as stipulated by Article III of the Constitution.

American Indians, individually and tribally, have always possessed a unique legal status in the United States, primarily as a result of constitutional directive. The

constitution vests Congress, through the Commerce Clause, with authority over the Indian tribes. Over the many years of congressional involvement in Indian affairs, Congress has also exercised its authority to "regulate" Indian affairs, its war powers and its foreign relations treaty-making powers.

The Court of Claims was a product of 19th Century ethnocentric ideas. In 1855, Congress created the Court of Claims having no concept of minority participation in the claims process. Slavery was still an active economic institution in the southern states and Indians were still roaming freely over what later became the Western States. In other words, mid-19th Century America was still rather geographically confined to the eastern seaboard.

The plenary power of Congress over Indian tribes is founded on the concept of full and absolute power to affect change. Consequently, the plenary power of the Federal Government in conjunction with the realities of comparative power, as exhibited by the judiciary, have led federal courts to conclude that congressional authority over Indian affairs is beyond the scrutiny of the courts.

Citizenship and ownership were apparently very important factors in determining who achieved access to the Court of Claims.

Women, Blacks and Indians lacked the ability not only to gain citizenship in the early years of our national

history, but consequently were unable to be socially defined as property owners. It can, therefore, be generally concluded that the Court of Claims was closed to everyone but white male property owners.

The quality of decisions in the Court of Claims was dependent on the degree to which Congressional decree permitted. These decrees took the form of jurisdictional acts which, when applied to Indian claims, limited the extent to which the Court of Claims could make favorable decisions. The Court was required by Congress to interpret jurisdictional acts narrowly thus causing the Court to be less flexible in its ability to make decisions.

From 1881 to World War I, thirty-one (Indian) claims were filed with the Court of Claims, and fourteen resulted in recoveries. At the end of the war the Indians' show of patriotism resulted in the passage of the Indian Citizenship Act. Consequently, Indian claims filing increased "but the system remained unaltered" (Rosenthal:39, 1985).

Congressional and Indian objectives were sometimes vastly different. Congress was primarily interested in awarding monetary compensation; while Indians, not being generally interested in monetary compensation, instead, lobbied for the return of land. These differing motivations only complicated the Indian claims process and thus the swift completion of Indian claims adjudication.

In response to increased Indian claims activity, men and agencies, both in and out of government, revived proposals to simplify or streamline the process of claims adjudication. Some congressmen called for a general jurisdictional act to open the Court of Claims to the Indians instead of the narrowly defined ones with which the Court of Claims had to previously deal. This idea was similarly rejected by the Meriam Report. This idea was similarly rejected by the Meriam Report due to the "burdensome and unjust" nature of the proposal, while condemning the politics and miserliness of the claims process (Meriam et al 1928:805-11).

By 1940, though, the pressure for the creation of a new forum to resolve those "ancient claims" began to result in some action being taken. In 1946 in *United States v. Tallamooks*, the Supreme Court sustained the Court of Claims when it ruled in favor of allowing compensation for a taking of land held under "Indian Title" (329 U.S.:40, 1946). Prior to this ruling, awards were made only on claims involving recognized title. Consequently, in 1946, the same year that Congress created the Indian Claims Commission, the courts began to deal more fairly with the Indian tribes, and two obstacles were removed from the path of Indian claims settlement. First, the Indian, to gain compensation no longer had to have a title that was made legitimate through recognition of the United States. Second, the Indian Claims

Commission was created to simulate this need for a special jurisdictional act to allow entrance to the Court of Claims. The Indians believed that the government should pay the claims lodged against it by its Indian citizens, but they had a difficult time trying to convince Congress, the bureaucracy, in addition to all the other formidable groups who were arrayed against them.

The Court of Claims was found to be inadequate for the task of claims settlement, but the precedents provided by law and the previous experience of the Court of Claims in Indian claims adjudication kept it involved as an appellate body.

The purpose of this study is to help explain the role that congressional control of the claims process had on Indian tribal claims adjudication, and how such control eventually resulted in the creation of the Indian Claims Commission.

This thesis will focus on how congressional control was exercised in an effort to dominate the outcome of Indian claims by regulating via legislation, the Court of Claims itself.

Congressional control over the Court of Claims has never been closely scrutinized, nor has the effect of that control and its subsequent impact on Indian claims been documented. This thesis will focus on the duality which Congressional authority was able to bring to bear to

dominate the outcome of Indian claims and, in addition, the Court of Claims itself.

Chapter 1

A HISTORY OF THE CLAIMS PROCESS TO 1854

Sovereign Immunity and English Common Law

The American system for deciding claims against the federal government was, in the beginning, based on English common law. At the time of the Revolution, the concept of sovereign immunity was well established in England. Immunity, though, was not absolute. In fact, procedures had been created by which a subject could obtain redress against the Crown. Under the concept outlined under English common law, the sovereign could not be sued, nor could the Crown, in the King's Court, because the King was the head of those courts, and it was believed to be inappropriate for the King's own courts to render a judgement against him (Belz, Herman, Harbison, Winfred & Alfred 1983:41-42).

The practice of petitioning the King was extremely well recognized between mid-18th Century and Thomas Jefferson listed the King's failure to heed the petition for redress by the colonists as a grievance and condition of independence. The colonists did not forget the English tradition and adopted the basic concept as a matter of practice after the war. Although the recognition of the

legal principle of claims was present, the implementation concept was not.

Claims under the Articles of Confederation

The Articles of Confederation drafted during the Revolutionary War did not provide for the receipt of petitions against the government and the fledgling new government was not equipped administratively to deal with the inundation of claims that followed the war.

Nevertheless, the central government of the Confederation, did consider the claims and the procedures that were established set a precedent for the system that would be followed under the constitution and thereafter, for over sixty years. In his discussion of the origin of the U.S. Court of Claims, lawyer William Wiecek described the nation's first experience with petitions to the government as follows. Three factors determined the choice of a method for handling claims against the confederation: 1) the lack of administrative machinery; 2) the lack of a separate judiciary; and, 3) Congress's dissatisfaction with the performance of Robert Morris, the powerful Superintendent of Finance.

Since the Confederation Congress could not refer claims to separate executive or judicial officials. It was forced to handle them itself. However, the volume of post war claims made this impossible. Yet Congress was unwilling to trust Morris, whom it suspected of using public office for

private gain with the power of passing on claims. The resolution adopted after Morris left office in 1784 was to create a quasi-executive, three man board of treasury to which it shunted the flow of claims (Wiecek 1968:387-389). Consequently, the procedure used for handling claims by the Congress of the Confederation differed from the established English practice which gave the English citizen the right to petition the Crown. If the King received a petition of right from a subject involving a legal dispute, he could, at his discretion, refer the claim to one of the courts to hear the matter and do what was just, and if a claim was assigned to a court, the subject would have the benefit of a judicial trial. Conversely, under our system, the elected representatives in Congress and newly established Board of Treasury received and decided claims against the Federal Government. There was no mechanism by which a claim could receive judicial review. Since the United States had rejected the monarchy as the form of government as well as many of the trappings associated with it, it is not surprising that changes were made in the method by which citizens could petition the government. The important point for the future was that the right to petition the government had been retained.

Claims Under the First Amendment to the Constitution

When the founding fathers replaced the Articles of Confederation with the Constitution in 1789, the new Constitution did not mention the right to petition the government (Nichols 1978:4).

Prior to the time when Virginia ratified and accepted the Constitution in 1789, the Virginia Convention proposed a Bill of Rights which included in Article XV, the right to petition or apply to the legislature for redress of grievances (Schwartz 1971:842).

Thus, at the time the Constitution was being ratified, proposals were being made to amend the Constitution to include a right to petition the Government for redress of grievances, and the formulation of the right to petition the government by the Virginia Assembly contemplated that application.

When the first amendment was adopted in 1791 as a part of the Bill of Rights it guaranteed the right of the people to petition the government for redress of grievances (Const. Amendment No. I). Structurally, therefore, the petition did not necessarily have to be received by Congress. The people were simply guaranteed their right to petition the government and the manner of petitioning was not specified.

By the time the Constitution was adopted on March 4, 1789 Congress had not completed creating a new process by which to process claims, and therefore, claims were

processed continually under the methods outlined under the Articles of Confederation. The administrative responsibility of hearing many of the claims was assigned to the newly established Treasury Department. Congress provided that the auditor receive all public accounts or claims, certify the balance and transmit them to the comptroller for his decision (Act of September 2, 1789, Ch. 12, 1 Stat. L. 66).

The exact role of the Treasury in processing the claims was unclear, even at that time. This confusion is exemplified by a letter written by James Madison, a Congressman from Virginia, noted in 1789 that the comptroller of the Treasury's role was a mixture of judicial and administrative functions, and Madison advocated that the comptroller's function should be viewed as judicial in nature with a right of appeal to the Supreme Court outlined under the old articles of confederation. More importantly, because Article I, Section IX of the new constitution required that, "...no money should be drawn from treasury, but in consequence of appropriations made by law," Congress was not willing to accept a system for the independent judicial determination of claims (Const. Article I, Section IX).

Congress must have seen this section as a directive to retain control over public expenditures, and while the initial processing of claims at the Treasury Department was

not considered a violation of the constitutional restriction, Congress was not willing to delegate the ultimate responsibility for approving claims to an executive agency or to a judicial or quasi-judicial body. Some believed that if a court were created to decide claims against the government, Congress would be required to make payments in accordance with the court's determination and that such a procedure would clearly violate Article I, Section IX. While historical events in later years would cause Congress to take a more liberal interpretation of the requirement of Article I, Section IX, Congressional concern over controlling payments from the Treasury may well have been a result of the gross national debt of the newly created United States which was largely domestic. The size of the debt for this new country would have induced the members of Congress to watch public expenditures carefully. Also, the country had a population of only 3,929,214 in 1790 (U.S. Bureau of Census of Population, PC (1)-A1 U.S. Summary 1-49). The people, for the most part, must have been more interested in building a life for themselves in the United States than in prosecuting actions against the government. For, the number of claims asserted in the years before 1800 were marketably less than in the years that followed. Thus the first system chosen by Congress for processing claims against the government provided a practical yet largely

ignored means of solving them (Judiciary Act of 1789, Stat. L. 73).

After 1800 experimentation was the rule of the day. Congress continued to experiment with various methods of disposing of demands against the government. One method that was to be used through the coming years was the creation of special commissions to act on claims.

Claims of the War of 1812

The War of 1812 was a devastating war in term of loss of property to private citizens since much of was fought in the United States in frontier areas. During the post-war reconstruction period of 1816 Congress passed an act authorizing the appointment of a special commissioner to hear and decide claims against the federal government, for property that was lost, captured, destroyed or being used while in connection with military service during the war (Act of April 9, 1816, Ch. 40, Section II, 3 Stat. L.: 263). The act allowed a recovery for such things as the loss of a horse or a rifle by a volunteer while in military service or damage of private property taken by the army for its use during the war (Nichols 1978:7). The 1816 act made the commissioner's actions subject to the rules and regulations of the President. And it also provided that the decisions of the commission were final if in favor of the claimant. This was the first time that Congress gave one or more special commissioners final authority to bind the government

for the payment of claims. It was not a satisfactory experience. Seven months after the act was passed, President Madison suspended the functions of the special commissioner and asked Congress to more clearly clarify or define the scope of the Commissioners duties under the act (Vol. 30 Annals of Congress:20).

On March 3, 1817, Congress amended the 1816 act to further define the types of claims recognizable under the act to require the commissioner to assign persons to take statements from those in the vicinity where the claims arose, and to provide that the commissioners decisions would be reviewed by the Secretary of War in all matters involving claims under \$200 (Act of March 3, 1817, Ch.1010, Vol. 3, Stat. L. 397). Consequently, the Commissioners decisions were no longer final on sizeable claims. This experience under the 1816 act may have affected the thinking of the members of Congress for many years on the wisdom on delegating final authority to make awards (H.R. Rep. No. 386, 22nd Cong., 1st Sess.).

Congressional Disposition of Claims 1817-1849

In the period after 1817, the Department of Treasury continued to hear a number of claims, but Congress also considered many of them itself. Both the House and the Senate had general standing committees on claims as well as special standing committees too hold hearings on claims relating to public lands, private lands, pensions, and

claims from the Revolutionary War (Wiecek 1968:392). Also, other congressional committees such as the House Committees on Commerce and Ways and Means handled the claims along with other duties (H.R. Report No. 404, 22nd Cong.). There were, however, a number of inadequacies in the congressional consideration of claims which became increasingly more difficult to process as the years went by and the number increased. In retrospect it is easy to understand the difficulties which many citizens faced in presenting their claims and which Congress encountered in considering them in the first half of the 19th Century.

Transportation to Washington, D.C. was difficult during this period. Railroads were in their embryonic stage and the claimant and his witnesses generally had to travel by horse or by ship. Communications with people in Washington were usually carried on by mail and delivery was slow, when the petitioners were located some distance from Washington, D.C. Other communicational tools such as the telegraph and the telephone were not invented until much later. In some cases it was burdensome, if not impossible to assemble the necessary documentation to support a claim. Duplicating machines did not exist for the provision of multiple copies of each document to everyone involved in a transaction and the central repository for many of the documents was the National Archives in Washington, D.C. which was not readily accessible to persons elsewhere.

In view of these and other difficulties in presenting claims it is not surprising that many congressional hearings were held in the absence of the claimant or any supporting witnesses. Often a friend or an agent presented the claim based on his knowledge of the facts with supporting affidavits and whatever additional documentation was available (Richardson 1881, 82:4; Devereux 1856:8). The problem of ascertaining the facts would have made it difficult even for a judicial tribunal to reach a proper decision in many cases, but the problem was compounded by Congress. Congressional committees were not judicial bodies and they had little time to investigate each case (Richardson 1881, 82:4). Often Congress could not effectively examine witnesses or secure witnesses for the government. The government was not even represented by counsel. The claimant often represented their cases through influential friends who would appear before committees or see members in private (Richardson:4). This system permitted fraudulent, exorbitant, or unjust claims to be presented and considered in view of the inability of Congress to give them careful examination, became extremely difficult to deal with (Richardson:4; Devereux:8). What resulted was congressional inaction. William M. Wiecek, in his article The Origin of the United States Court of Claims has determined that of 14,602 claims presented to Congress in the years 1831 to 1837, 8,811 received no action.

Action on the 5,891 which received any attention was not necessarily final or favorable origin of the United States Court of Claims (Wiecek:392). Also, a congressional report disclosed that between 1838 to 1848, 17,573 private claims were presented to Congress. Of these only 8,948 were acted on in any way and only 910, less than 10 percent were approved by both Houses (H.R. Rep. No. 498, Vol. 3, 30th Cong, 1st Sess. 1848).

Delays in the resolution of claims meant that the honest ones were often passed over and bills for the claimants had to be revived year after year. If the petitioner was awarded a sum after a delay of several years, no interest was paid because of the rule which forbid it (Wiecek 1968:394). When the members of Congress considered the request, it did not have the benefit of legal precedent to provide a guide for consistent depositions, rather, each application was considered separately from those that had gone before it, unless someone had drawn a comparison from memory. (Without legislation to support it, the dependency on memory would eventually prove faulty.)

One commentator had suggested that there were three reasons why Congress did not take any steps during the period prior to 1838 to establish a judicial body to handle claims against the United States: 1) two separate claims systems were functioning, the Congressional Committee System and the Treasury Department System and Congress may not have

wanted to undertake a grand scale of reorganization at that time; 2) there were doubts as to the constitutionality of establishing alternative methods which could remove ultimate responsibility of congressional action and; 3) historically Congress had postponed judicial organization until unremedied needs gathered compelling momentum for action (Wiecek 1968:393).

Certainly, in the years after the Revolutionary War Congress had established itself as a branch of the government, ultimately responsible for hearing and resolving claims. It could not be expected to transfer this responsibility without a compelling reason for doing so, especially in view of the constitutional requirement in Article I, Section IX, that Congress retain control over appropriations from the Treasury. Congress would almost certainly have been opposed to the transfer of the right to hear all claims to a court or a commission organized for that purpose. Moreover, it would have been difficult to organize a new system under which some claims would be resolved by a court or a commission, while all others would be disposed of by Congress. Thus, the congressional difficulty in separating Congress from its Article I, Section IX responsibility was a deterrent to change in the 1830s and 1840s and caused considerable controversy in the 1850s. Despite the problems involved in altering the congressional system, it is noteworthy that the First

Amendment guarantees to each United States citizen the right to petition the Government for redress of grievances. If this provision is viewed as including the requirement that the petitioner should receive fair consideration and a prompt decision than the system used by Congress in the period from 1830 to 1855, can be perceived as being too cumbersome and lacking in procedures which some members of Congress felt the First Amendment required (Wiecek:394).

Mexican War Claims Commission

With the end of the Mexican-American War in 1849 Congress again had to deal with a number of post war claims. In the Treaty of Guadalupe Hidalgo the United States had agreed to provide \$3,250,000 to pay the claims of persons who suffered damages in the war. The Mexican War Claims Commission was established to fulfill this commitment. The commission consisted of three members appointed by the President and was created to serve for a period of two years. While the statute did not explicitly authorize the commission to make final awards binding upon the government, Article XV of the treaty provided that the decisions of the Board of Commissioners would be final and conclusive if made in accordance with certain principles described in an earlier convention between the two countries (C. Perry, 102 the Consolidated Treaty Series 1848-49;47, 1969). As a result, the decisions of the commissioners were able to be final under the treaty.

Because Congress had appropriated a fixed amount to handle those claims, Article I, Section IX under the constitution was not violated via congressional eyes. In order to ensure that judgments did not exceed the total amount authorized by the treaty, the commission certified the amount of its judgments to the Treasury Department, which paid each claimant his ratable share of the total appropriated fund in money or government stock (Nichols 1978:11).

The Commission was innundated by a large number of demands, all of which had to be resolved prior to a final payment in order to determine a ratable share allowable under each claim. It did not, however, perform its duties well. Frauds and other irregularities marred its performance and the commission was subsequently viewed by some as setting a bad precedent for establishing a court or similar tribunal to settle claims against the government (Wiecek 1968:391). Nevertheless, in the late 1840s an increasing number of congressmen became dissatisfied with the existing methods for processing claims. In 1848 the House Committee on Claims described the congressional procedures as a system of unparalleled injustice and wholly discreditable to any civilized nation (Wiecek:392).

In the period from 1849 to around 1855, nine different bills were introduced in Congress to relieve Congress of the claims workload. Representative John A. Rockwell of

Connecticut introduced several bills to establish a commission on claims, but his bills were not enacted (Wiecek:394). Both Congressman Rockwell and Senator Petit introduced bill that would have jurisdiction to the District Courts to hear claims against the government. This approach was also not adopted (Wiecek:394).

In the early 1850s, Congress became more receptive to the idea of establishing a permanent body to handle claims. Several defects in the congressional system were becoming increasingly alarming. Under one instance it was shown that Congress had appropriated funds to pay a \$7,000 claim twice (37 Cong. Globe; 32nd Cong., 2nd Sess., 1854:72). Claimants grew bolder in their attempts to influence members of Congress considering private claims. Private claims agents even posed as press reporters and pestered congressmen on the floor of the House (Wiecek:395). The opportunity to exercise such influence created an atmosphere that was right for scandals. And bribery scandals were publicized in the late 1850s. In the year 1852 Congressman Campbell of Illinois expressed his feelings on the matter as follows:

I apprehend that there is not a gentleman on the floor who has paid any attention to the progress of private claims through the House who is not fully impressed with the knowledge of the necessity for the adoption of some measure or some rule of calculating to facilitate action upon them.

Continuing, Congressman Campbell stated:

It is not alone the rejection of private claims which may be in themselves meritorious which is vexatious to the claimants, but it is the great delay occasion to them after they have presented their claims to the House for adjudication. They remain here only one session, and perhaps two.

Concluding his remarks, Congressman Campbell declared:

Finally, they are compelled to confide their claims to some of the numerous agents who are to be found here, and when they have been prosecuted to a successful termination, after their own expenses have been taken out, and the percentage, which is generally the largest part of the claim has been paid to their agents they have very little left for themselves (31 Cong. Globe; 32nd Cong., 2nd Sess. 1852:100).

By 1854 a large number of the members of Congress began to feel Congress should change its role in hearing claims against the government (Nichols 1978:13). Although members of Congress began to feel that Congress should change the role of hearing claims against the government, it was just as determined to strictly adhere to its interpretation of Article I, Section IX. As a result it is very clear that even in the early stage of our national history any creation of a Court of Claims as an autonomous decision-making body was already in question.

Chapter 2

CONGRESSIONAL CREATION AND CONTROL OF THE COURT OF CLAIMS 1855-1863

Creation of the Court of Claims and Beginning of Operations

By the end of 1854 a new sense of urgency required both the Congress and the Senate establish a commission for the examination and adjudication of private claims. On December 6, 1854 Senator Broadhead of Pennsylvania introduced a bill (S. 499) for that purpose. Senator Broadhead was a member of the Senate Committee on claims and had experience with the problems encountered by Congress in considering claims. The bill had been prepared carefully and was apparently discussed with other members of the Claims Committee, so that when it was referred to that committee for consideration, it was quickly reported back apparently without amendment.

In the debate that followed in the Senate, discussion focused on whether the new tribunal should be a fully amended independent court or a commission which would merely report its conclusions to Congress for final action (Cong. Globe, 1854:70-74). Others questioned whether the commissioners should be appointed for a term of years or removable by the President as the bill provided. Senator

Hunter of Virginia proposed an amendment to appoint judges with life tenure in order to give the judges the independence they would need to render impartial determination (Cong. Globe:71).

Because of the controversy over the bill, it was referred on December 18, 1854 to a select committee consisting of Senators Broadhead of Pennsylvania, Hunter of Virginia, Clayton of Delaware, Jones of Tennessee, and Clay of Alabama (Cong. Globe:74). Two days later the committee reported a substitute bill (S. 523) entitled "An Act to Establish a Court for the investigation of Claims against the United States." The substitute bill which was later to become the original Court of Claims Act provided for the creation of a court rather than a commission, with the judges to have life tenure during good behavior. Nevertheless, it did not clearly address what later would become a critical issue, whether the decisions of the court would be final.

In the course of the debate over the substitute bill, Senator Stephen A. Douglas of Illinois strongly argued that the court should have an independent status and that the Court's decision should be final in absence of the extraordinary showing to the contrary to Congress, he left the impression that final authority should rest with Congress when making the final claims determination.

Senator Douglas supported the creation of a court of Claims whose judgments were to be reviewed by Congress. Douglas believed that this procedure would make the decisions more binding while simultaneously providing the Senate and House of Representatives with a stronger sense of authority.

Douglas' contention was that only with the implementation of a judicial tribunal could decisions be binding on the government, theorizing that committees on claims could only report their findings to Congress.

Douglas went on to elaborate:

I want an adjudication in which I could put the same credence that I would give to a decision of the Supreme Court of the United States, so that when a report is made to us, unless some extraordinary cause appeared to the contrary, we should appropriate at once the money, or if they reported adversely, decide against the claim.

He continued:

For these reasons I desire this to be a court with the first men of the country upon the bench and the first lawyer of the country for the Attorney of the United States before the court. Here I will remark that I do not think that the salary proposed to be allowed to the attorney is sufficient to commend the first talent, and I believe that the highest interest of the country will be dependent on this court so far as money is concerned (Cong. Globe:113,114).

On December 21, 1854, at the conclusion of the debate the substitute bill was passed by the Senate. With unanimous approval on the part of the Senate, the bill went to the House of Representatives on January 24, 1855 where it was referred first to the Judiciary Committee and then to

the House Committee on Claims. The House Committee on Claims reported the bill back with minor amendments and it was passed by the House on February 23, 1855 in the form adopted by the Senate without the proposed House amendments. President Franklin Pierce signed the bill into law on February 24, 1855 (10 Stat. L. 612).

Although Congress had previously attempted to create quasi-judicial bodies to adjudicate claims against the federal government, the 1855 act was the first time Congress tried to implement a permanent body of a judicial nature to act on claims against this same government. Congress carefully limited the types of cases that could be filed directly with the court. The original act provided that the court would receive and file without reference, by Congress claims founded: 1) on any law of congress; 2) upon any regulation of an executive department and; 3) upon any contract with the United States Government, express or implied. For claims of this type, the court had nationwide jurisdiction. The court would also hear claims referred to it by either house of Congress.

Contracts are agreements between two or more competent parties based on legal consideration to do or refrain from committing an act. In historical context those defined as competent in the early years of our national history were white male property owners. Women, blacks and Indians could not theoretically make contracts that were enforceable in a

federal court because they were not judged to be competent to handle their own affairs. Consequently, in the social environment of mid-19th century America, the Court of Claims was established to exclude specific groups that were determined to be socially and racially inferior.

The exclusion of torts from the Court of Claims bill as a condition under which judgments could be made is understood when viewed in terms of law. Tort is perceived judiciously as being a civil wrong under which a legal breach of duty is committed by the defendant.

The essential elements in tort law are that there exists a duty between the parties involved, a breach of that duty established, and finally, a connection between the defendants' conduct and the harm to the plaintiff.

By the exclusion of torts as a consideration for a decision by the Court of Claims, the Court could neither review the conduct of Congress or the federal government as defendants in an action.

The consequential impact of exclusion of torts from the Court of Claims' authority was to play an important role when Indians gained access to the Court of Claims twenty-six years later.

The Court of Claims was perceived by Congress, the Supreme Court and the Court of Claims itself as a constitutional court according to John Devereux in his article, The Court of Claims: Its Origin and Progress. The

perception of the Court of Claims as a constitutional court with appellate authority residing with the Supreme Court, was to largely be assumed until 1863 when Congress resolved the issue.

Questions began to immediately arise as to why persons who had suffered an injury at the hands of a governmental representative should have to bear the burden of obtaining a reference by Congress to the Court of Claims; whereas, a person with a contractual claim was not required to follow that procedure (Devereux 1856:16-17). This, of course, was a valid criticism, however, Congress believed that in view of past difficulties with a special commission, it was unwilling to transfer all classes of claims to the new court. As a result, Congress chose to establish the court on an experimental basis with limited jurisdiction, feeling that inequities in the systems would be corrected in later years. The speed of correcting these inequities would meet the demands of the public, of course. Congressional inability to foresee inequities and take care of those inequities beforehand, was to be disadvantageous to minorities, particularly Indians.

Although the new court possess some disadvantages, it did possess some advantages. One of the greatest of which was that the new court provided the establishment of a system for going outside Washington, D.C. to collect evidence relating to claims that were filed. Since many of

these claims formally acted on by Congress had been considered in ex parte proceedings when the petitioner was represented by a friend or claims agent, Congress saw the need to provide the court with the mechanism for obtaining evidence that was reliable. Under Article III of the Act, the Court of Claims was able to appoint commissioners to take testimony and investigate claims. The Commissioners could issue subpoenas to require the attendance of witnesses and were authorized to receive sworn testimony. Court of Claims Rule 9 provided for the appointment of permanent commissioners. They were not lawyers but, merely compiled the transcript of the testimony, which was sent to the judges for consideration. Benjamin Harrison who would later become the country's 23rd president, served as a commissioner (Devereux:34).

While all these advances were being heralded, measures were also taken to protect against the perpetuation of frauds on the court. Article VI of the 1855 Act provided, for example, that a person who knowingly and willingly swore falsely in a proceeding before the court could be guilty of perjury. The use of commissioners to transcribe testimony along with the imposition of other judicial procedures gave the court the necessary tools to deal with the actual controversy and resolve complex issues.

The act also provided that the government should be represented by an attorney called the "solicitor" for the

United States (Richardson 1881-82:8). He was appointed by the President with the advice and consent of the Senate. This was promoted as being a major advance, because it meant that cases could be fully represented and argued too the court. In the early cases before the court, both sides were often represented by council and briefs were filed (Richardson:8).

The Act of 1855 contained several other significant advantages over previous systems. For example, the use of judicial procedures greatly improved the quality of the evidence. Section 5 of the 1855 Act gave the parties the right to examine witnesses, while Section 11 empowered the court to call upon the executive department for any information or papers necessary for the examination of a particular claim.

In addition, the Act provided for three judges who were to be appointed by the president with the advice and consent of the Senate and who would hold their offices during good behavior. A yearly compensation of \$4,000 payable quarterly, was fixed for the judges. This was a high salary at the time. Justices of the United States Supreme Court were being paid \$4,500 and other federal judges were being paid less than \$4,000 a year (Nichols, taken from Peele:17). Theoretically, these salaries were designed to attract competent and well-respected people to the court.

After the Act was passed, controversy continued as to whether decisions of the court were entitled to be final. If the Court's decisions were not final, questions arose as to whether or not Congress should merely give them perfunctory review and disagree with the court only in rare instances.

Section 9 of the 1855 Act clearly specified that a decision by the court which was adverse to the claimant would be conclusive if affirmed by Congress. Thus it can be established that congressional power over the Court of Claims was firmly entrenched. This provision mandated congressional review and acceptance of the court's decision where the decision was adverse to the claimant. And such decisions were required to be placed on the congressional calendar for speedy consideration. The Act did not, however, contain provisions specifically granting Congress the power to reject the decision of the court which was in favor of the claimant. However, Congress was not adverse to doing so when it felt that Article I, Section 9 of the Constitution, which gave Congress control of the national "purse strings," mandated it. Although the Act simply provided that the court should make a report to Congress on each decided case, setting forth the material facts of the case, the opinion of the court and the reasoning upon which the opinion was based. The Act also stated that the Court should prepare bills in favor of claimants in those cases in

which they were found to be entitled to relief. Theoretically, there was some room for argument that Congress was required to enact without further review, the bills proposed by the court.

The argument that Congress was firmly bound by the decisions of the court in favor of the claimant was quickly and summarily put to rest by Congress itself. As specified by the law, Congress received enough material to examine each case if it chose to do so. The Act required that the reports of decisions to Congress must be accompanied by the briefs of the solicitor for the government and the claimant as well as the record of the testimony in each case. When the reports of decisions and the accompanying material reached Congress, the House decided to refer them to the Committee on Claims. Some members had argued that the court's decisions should be reviewed by Congress as a whole. In that case, the decisions would have been accorded the deference given to the report of the Congressional Committee, and the court's decisions would probably not have received careful scrutiny. However, when this idea was proposed, by House resolution, it was voted down by a vote of 62 to 78 (Wiecek 1968:397-8).

Consequently, when the cases were received from the court they were sent to the Committee on Claims where they were carefully reviewed and the decisions rendered in favor of the claimant were often rejected or no action was taken

(Richardson 1881-82:8-9). The reasons responsible for this action being taken were, the claims process had quickly evolved into an adversarial exercise that prompted the Committee on Claims, an extension of Congress, to protect the national treasury from being drained. What resulted was that Senator Douglas' position that Congress should provide only perfunctory review had been totally abandoned. Therefore, not only was Congress still plagued by a heavy workload, despite the initial action of the court, also claimants were being subjected to a two-step review; one by the court, and a second by Congress, and they incurred the additional delay and expense of a second review.

While the lack of finality in the court's decisions was the major problem inherent in the 1855 Act, there were several other deficiencies that soon became apparent. There was no statute of limitations for suits against the government and claims could be filed many years after the action had arisen. This could theoretically benefit everyone, including Indians. In addition, since the court had only three judges to handle the claims that had formerly occupied a large part of the time of many congressmen, the court was not sufficiently staffed to handle the many claims that were filed. Also, no provision in the law allowed the government to assert a setoff or counter claim, a procedure not utilized in the congressional system, but one which was appropriate in a judicial forum. These and other initial

problems would be remedied over the years, particularly that of counter claims which would ultimately be disadvantageous to Indian tribes who attempted to gain entrance to the Court of Claims.

In order to establish the proper judicial character of the court, it was believed to be important that the first judges be distinguished lawyers and judges. People whose opinions would be respected and who could be expected to conduct the proceedings of the court in the highest judicial tradition. The first two judges (John James Gilcrest and Isaac N. Blackford) were appointed in March of 1855 and the third judge (George P. Scarborough) was appointed in May of that same year. When he was appointed, Judge Gilcrest was serving as the Chief Justice of the Superior Court of New Hampshire the states's highest court. Isaac Blackford formerly served as judge on the Indiana Supreme Court for more than 35 years, and George Scarborough was recognized as an eminent lawyer in Virginia (211, Court of Claims Reports, the United States Court of Claims, A History:Part 1, the Judges, 1855-1876).

On May 11, 1855 with Judge Gilcrest, having been chosen as presiding judge, the Court of Claims commenced operations.

The Finality Judgment Problem

While the 1855 Act creating the Court of Claims gave it some of the attributes of a judicial tribunal, the Court of Claims had not been given the ability to render a final judgement in the cases brought before it. Therefore, despite the judicial nature of the proceedings before the Court of Claims, in actuality, it served as an advisory commission to Congress, and as such could not fully meet the purposes for which it was created. This fault compelled an early observer of the 1850's to write: "When this new judicial tribunal was erected, the hearts of many were cheered with the hope that they saw the goal of the weary race they had been running from youth to age in order to obtain rights denied or dues withheld." (Devereux:45). Therefore, because of congressional inability to incorporate a system into the Court of Claims whereby its decisions were final, the 1855 Act can only be viewed as a beginning. The concern of a lack of finality in Court of Claims judgments finally gave voice in 1861 in a statement made by Abraham Lincoln in his annual message to Congress in which he urged: "It is important that some more convenient means should be provided if possible for the adjustment of claims against the government especially in view of the increased number by reason of the war. It is as much the duty of the government to render prompt justice against itself in favor of citizens

as it is to administer the same between private individuals." (62 Cong. Globe, 2nd Sess., 1862:App. 2).

President Lincoln's address coupled with an extraordinarily large number of war claims in the early 1860's prompted Congress to consider the issue of reform of the Court of Claims without delay. Bills were introduced in both Houses of Congress with most of the congressional debate centering on the finality of judgement issue. The fight for reform in the House was led by Congressman Porter of Indiana who personally shepherded his bill through the Judiciary Committee onto the floor of the House for debate and passage. The most important provision of Congressman Porter's bill was Article V which read: "Either party may appeal to the Supreme Court of the United States from the final judgement or decree which may hereafter be rendered in any case by said court, wherein the amount in controversy exceeds \$3,000 under such regulations as the said Supreme Court may direct." (Act of March 3, 1863, 12 Stat. L. 766).

1863 Court of Claims Bill

The resulting response from the Senate was not long in coming. Senator John P. Hale of New Hampshire waged an all-out war against the bill's passage, contending that the Court of Claims was a potential retreat for lame ducks. Senator Hale argued that the 1855 Act should not be amended at all, but rather should be repealed (63 Cong. Globe; 37th

Cong., 3rd Sess. 1863:415). The Senate was closely divided on the finality issue. So close, in fact, that only by the Vice President Hannibal Hamlin's tie-breaking vote was the finality section allowed to remain in the bill (Wiecek 1968:400). Senator Hale was to later undermine the future of the finality provision when he had included in a bill that he sponsored a certain provision which read: "No money shall be paid out of the treasury for any claim passed upon by the Court of Claims until after an appropriation, therefore, shall be estimated by the Secretary of the Treasury." (Hoyt 1967:21). This provision, which would become Section 14 of the Act proved to be extremely troublesome and had the effect of undermining the finality provision so sorely needed by the Court (Hoyt:21). The result was that Senator Hale's amendment persuaded several undecided senators to vote for the bill as a whole with a final passage coming by a vote of 23 to 16 (Hoyt 1967:20). On the following day, March 3, 1863, President Lincoln signed the bill into law (12 Stat. L.:795).

This bill, although it treated the finality issue with less urgency than some congressmen would have liked, added two judges to the Court of Claims. In addition, it provided for the appointment of a Chief Justice from among those already sitting on the bench. Another important provision of that act of March 3, 1863, provided that the court's jurisdiction be expanded to include counter claims and

setoffs of the United States against claimants, thus removing one bothersome omission in the act providing for the creation of the Court of Claims (12 Cong. Globe, Section 3). But of all of the provisions in the 1863 Act, the most important one relevant to Indian participation in the claims process was Section 9, which read in part "that claims brought by Indian nations were exempt from the authority of the Court of Claims." (12 Cong. Globe, Section 9, 765-67).

Apparently, one reason for the exclusion was that Indians were not then United States citizens (Getches & Wilkinson:185). The reasoning which compelled Congress to invoke this section involved the concept of original Indian title, which was not viewed originally by Congress as a compensatable property right. It is obvious, therefore, that the addition of Section 9 in the 1863 Act was more complex than many authorities believed.

The Reason behind Indian exclusion from the another claims process initiated from the hostilities which certain bands of the Sioux Tribe conducted against citizens of the State of Minnesota in 1863 whereupon the President exercised his authority to abrogate all rights stipulated in any treaty signed by a tribe involved in hostilities against the United States (12 Stat. L.:528).

These abrogated rights included: 1) the right to claim and occupy previously assigned reservations; 2) the right to

receive annuities; 3) the right to initiate claims against the federal government.

Consequently, the federal government, as early as 1862 had the legislative authority to exclude Indians or any other group with whom the United States signed treaties, from the claims process. The Court of Claims Bill of 1863 clarified the status of Indian tribes, as far as claims were concerned, for the next eighteen years.

As a result, Indians with grievances were required to petition Congress for redress. It is clear that as the claims procedure was broadened and simplified for Americans, the judicial process was further restricted for the tribal Indians. This restriction did not end the Indian persistence in seeking redress for the many wrongs perpetuated against them. For Indian tribes which had a history of long and close contact with white culture, it was of little surprise, while those farthest from white contact still had the problem of exclusion to face. The closing of the Court of Claims to Indian tribes was just one more example of the power which Congress was able to exercise over Indian tribal groups, an ability which persists until this day. With the Indians thus being denied equal access to the Court of Claims by the use of Section 9 of the 1863 bill, Congress could at its own discretion, control the ability of Indian tribes to take that first faltering step toward re-establishing Indian independence from federal

domination. The only way to gain redress of wrongs committed by the United States against the Indian tribes, was by utilizing United States courts, and Congress had effectively, at least for the time being, closed that avenue. This only reinforced the feelings of dependency on the Federal Government which Indian tribal people were trying to discard, while simultaneously strengthening the congressional belief in its ability to exercise its plenary powers over Indian tribes. Thus, the tribes found themselves in a judicial no-redman's-land (Rosenthal, Ch. 2:38, Irredeemable America).

The only alternative, therefore, was that Indians petition Congress for redress. Unfortunately, the belief in the concept of congressional power over Indian affairs made it difficult for a tribe to persuade Congress to enact the necessary legislation. As a result of congressional concerns relating to the massive influx of post Civil War claims, it would take eighteen years (1863-1881) before Indians would again be a position to have their claims heard before the Court of Claims.

Chapter 3

THE CREATION, STRUCTURE AND CONGRESSIONAL MANIPULATION OF INDIAN JURISDICTIONAL ACTS 1863-1935

With the passage of the Act of March 3, 1863, (Stat. L. Vol. 12:765, Section IX) tribal claims based on treaties were excluded from the general jurisdiction of the Court of Claims, thus Indian tribes were not only relegated to the status of foreign nations, (12 STAT. L.:765) but also totally excluded from the claims process based on the inescapable fact that all Indian claims were based on treaties signed with the United States.

Barred from direct access to the Court of Claims Indian Tribes were forced to appeal to Congress to have their grievances heard. The petitions to Congress, which various Indian tribes filed didn't automatically guarantee that Congress would responsibly and effectively process them.

The Indians lost their lands through a combination of fraud and force which the Indian not only realized, but at least for the time being had to accept. It wasn't until 1871 that the possibility of gaining eventual redress of grievances became remotely attainable. In 1871 the treaty making process was formally ended and with it the fiction of the "independent nation" status of Indian tribes. Although the treaty making process was seemingly dead, a proviso of

the Indian Department Appropriations Act of 1871 seemed to resurrect the future of Indian claims litigation.

This proviso stated "...that nothing herein contained shall be construed to invalidate or impair the obligations of any treaty heretofore lawfully made and ratified with any such treaty, nation or tribe." (Stat. L., Vol. 16:544-45).

The significance of the Indian Department Appropriations Act (1871) was even more profound than initially realized, for with the passage of this act Congress no longer was required to garner the cooperation and permission of the Indian tribes, before changes could be made relating to U. S. Indian relations. The Federal Government no longer had to practice diplomacy and go among the Indians seeking changes in the status of tribes or the manner in which the federal bureaucracy served them.

Instead, a senator or congressman needed only to convince his fellow legislators that a statutory change relating to Indian affairs was necessary and it stood a good chance of eventually becoming administrative policy. Indians, as a political topic, were consequently relegated to a level which attracted the attention of specific committees, but not the intense congressional debate as in previous years, therefore, it can be concluded that due to the passage of the Indian Appropriations Act of 1871, Indians were not only relegated to inactive participants in their own destiny, but conversely empowered with the ability

to keep their past alive and consequently the possibility of future Indian tribal claims litigation in the United States Court of Claims. The Indian Appropriations Act (1871), while terminating treaty-making as an active national policy on the part of the United States, did not nullify or invalidate any of the obligations of the federal government established by treaty. Consequently, any violations of an existing treaty by the federal government would effectively establish the foundation for a future Indian claim against the United States.

The judicial recognition which Indian tribes continued to seek despite the legislative barriers and rules was ultimately realized with the passage of the first Jurisdictional Act in 1881.

The Ponca Case

In January 1881 a presidential commission of investigation expressed its conviction, based on the Ponca case, that, "It is of the utmost importance to white men and red men alike that all Indians should have the opportunity of appealing to the courts for the protection and vindication of their rights of person and property." (Tibbles 1972:134).

The removal of the peaceable Poncas from northeastern Nebraska was a tragic instance of bureaucratic blundering and insensitivity. The reservation had been specifically

guaranteed to them by treaty in 1865. Later the government deeded it to the Sioux and in subsequent years worked without success on the Brule Sioux to occupy it. In 1876 Congress authorized the Interior Department to remove the Poncas to the Indian Territory to make way for the Brule. The Ponca were not consulted. They first learned of this plan the following year when an Indian office official came to them announcing the move. They said they would rather die than to leave their homes. Their frantic protest to the government officials were ignored and a detachment of twenty-five soldiers were sent to force their removal.

Thus, through persuasion and a threat of coercion, the Poncas started out 681 person led by their chief, Standing Bear. By this time it was late summer and their journey was described in Angela Debo's' "History of the Indians of the United States" as two months of disaster with torrential rains, swollen rivers and even a tornado. A number died on the way. There seemed to have been no preparation made to receive them and they continued to die, constantly begging for permission to return home. Standing Bear lost two family members during the journey, including a little son. Much public indignation had been aroused in Nebraska about the treatment of the small, inoffensive tribe. T. H. Tibbles, an Omaha newspaper man, became their champion and public-spirited Nebraskans raised money to employ council and apply for the Chief's release on a writ of habeas

corpus. The case was tried at the Federal District Court at Omaha. The government argued that Indians were not persons within the meaning of the Constitution and thus were not eligible for the writ. The trial was a dramatic occasion in a court room crowded with white sympathizers of the Poncas. Standing Bear spoke "eloquently". A few days later, the judge filed a decision that became a landmark in Indian law, holding that an Indian is a person and is entitled to the same constitutional protection as a white man. The friends of the Indians hoped to carry the case to the Supreme Court for a final ruling. The government, though, shrank from appealing the decision, Standing Bear and his followers were released and they went to Nebraska. After an investigation at the order of President Hays, Congress made an appropriation early in 1881 to compensate the Poncas for their loss and to establish them in their new home. Provisions were also made for them to return, if they wished, to their Nebraska reservation.

Later that same year, the passage of a special jurisdictional act allowed the Choctaw Indians access to the Court of Claims for resolution of their claims going back fifty years. In this case, the Choctaw nation claimed compensation for various breaches on the part of the United States of the Treaty of September 27, 1830 (Act of March 3, 1881, Vol. 21, Stat. L.:504). By the terms of that treaty, the Choctaws contended that they were entitled to the net

proceeds of the lands ceded by them to the United States. Thus the precedent was established allowing the Court of Claims to adjudicate claims arising from treaty violations committed by the United States Government (Treaty of Dancing Rabbit Creek, Vol. VII, Stat. L.:333). Others would follow, but only through the lengthy process of a special jurisdictional act issued by Congress.

Perception of and Problems with Indian Claims

Little enthusiasm for these claims could manifest itself within government in the last years of the nineteenth century and the early years of the twentieth century. During the period from 1881 to World War I thirty-one claims were filed in the Court of Claims. Between the end of World War I and the passage of the Indian Claims Commission Act in 1946, one-hundred and eleven claims were filed and litigated (Hearing on H.R. 1341 and H.R. 1198 before the House Committee on Indian Affairs, 79th Cong., 1st Sess., 1045:163-66).

Thus, in the sixty-five years between the passage of the first jurisdictional act in 1881 and the passage of the Indian Claims Commission Act, (60, Stat. L. 1,052) one-hundred and forty-two claims were adjudicated.

Although this may sound like an exorbitant number, "...it pales in comparison with the number filed during the five-year period from August 1946, when the Indian Claims Commission Act became effective, and August 1951, the cutoff

date within which claims could be filed." (Wilkinson, Indian Claims:512). During that five year period 370 petitions involving approximately 850 claims were filed (Wilkinson:512).

It is quite obvious then, based on the record of Indian claims litigation in the Court of Claims between 1881-1946 that Indians didn't achieve the level of access which they would later achieve under the Indian Claims Commission. Nor did the Indians achieve the level of litigatory success they would in the Indian Claims Commission (Deloria & Lytle 1983:147).

The problems which led to this comparatively lop-sided success rate were many. The first and seemingly most insurmountable was the bureaucratic process through which Indian claimants had to wade even to have their grievances heard. The second reason many of these early claims proved unsuccessful was the relief which these claims might grant were ineptly defined by the Jurisdictional Act (Meriam Report 1928:805-11). The third reason for the comparatively high mortality rate of early tribal claims was the often narrow construction applied to the jurisdictional acts by the Court of Claims and the Supreme Court.

The process of getting claims to the point of being introduced to the Court of Claims for adjudication has always been arduous, sometimes taking years to accomplish. There was no general rule as to who could initiate the first

move which would eventually culminate in the introduction and passage of a jurisdictional act. Sometimes, as in the case of the Sioux tribe, the tribal council would consult with their superintendent who would advise them about their chances of getting their claim heard. This procedure first had to be sanctioned by the Bureau of Indian Affairs before it could be carried out.

...the Superintendents in charge of the various Indian tribes...have been instructed to aid the Indians so far as possible and to take such other steps as may be necessary to have them submit the names of suitable attorneys to represent them before the court. (Report of Commissioner on Indian Affairs 1921:55).

Even though it was more common for superintendents to be consulted first before tribes proceeded with their efforts to achieve redress in the Court of Claims, occasionally, there was a deviation.

With the increased number of opportunities for tribes to achieve access to the Court of Claims in the early decades of the twentieth century, attorneys and their respective law firms began to exercise initiative and pursue efforts to encourage and subsequently represent tribes in their litigation before the court. These "ambulance chasers" were very adept at gaining the confidence of the various tribes. This is not meant to imply that all attorneys who involved themselves in the early stages of Indian claims litigation were self-absorbed.

In fact, attorneys became important cogs in the process of working to get the necessary legal documentation compiled to justify the writing of petitions which were then forwarded to the appropriate representatives.

There were three basic components which help make up a petition: 1) A clear concise statement of the facts on which each claim is based, including the facts upon which the court's jurisdiction depends; 2) The time when and place where the claim arose; 3) The items and amounts claimed (U.S.C.A. Title 28, Rule 35:194).

With this information in his possession the representative in question could then write and introduce a bill on the floor of Congress. From the floor of Congress, the jurisdictional bill could be referred to the appropriate committee (in this case the Indian Affairs Committee) where testimony on the particular bill was taken.

It was then that the committee made its recommendations in writing to Congress. The bill would then be forwarded to the Senate where the exact same process was repeated.

At any time during the proceedings, the bill could die in committee whereupon the bill could be reintroduced in the next session, if the bill survived to Congress to be voted on by both houses. If the jurisdictional bill passed, it was then sent to the White House for the President's signature. Even at this point, the signing of the jurisdictional bill, converting it into a jurisdictional act

was not assured, for the President could then veto the bill causing the process to start all over again (Franklin Delano Roosevelt, The Chippewa Indian Jurisdictional Bill 1934, after Congress passed it earlier that same year).

Even if tribes were able to successfully survive the legislative gauntlet and receive permission to have their claims adjudicated in the Court of Claims, they still had to face the reality that the Court, when dealing with the responsibility of monetary compensation, had to function within the strict parameters established by the jurisdictional acts.

This put the majority of Indian tribes at a distinct disadvantage when dealing with the Court of Claims, for the Court could only grant the types of relief outlined in the Jurisdictional Act. For example, in *Northwestern Bands of Shoshone Indian v. United States*, (95 Court of Claims Report 1942:642) the bands pursued efforts to recover damages for an unlawful taking of their lands in violation of the Treaty of Box Elder (13, Stat. L. 1863:663). Even though the Court agreed that the evidence supported the contention that the Indian had exclusively used and occupied all or a portion of the area they claimed and had been deprived of continued use by action of the United States, the Court dismissed the claim because the jurisdictional act (45 Stat. L.:1407, see *Smith Indian Claims*, Vol 2:272-81) authorized recovery on a claim resulting from a treaty.

Another example in which Indians were unsuccessful due to limitations in the jurisdictional act (41 Stat. L.:623) was Klamath and Modoc Tribes v. United States (81 Court of Claims Report 1935:79, see Smith, Vol. 1:39-43). This was an "unconscionable" claim based on the charge that the Indians were paid \$108,750 for 87,000 acres of land and timber which the court determined was worth \$2,980,000.

The claim was dismissed on the grounds that the Indians had signed a "release" for the value of the land taken and that Congress did not exclude the release in the jurisdictional act. Later, Congress was to amend the act excluding the release, thus, consequently allowing the Court to make an award, (85 Court of Claims Reports 1937:451) including interest, of \$5,313,347.32 after offsets.

Jurisdictional Acts and Their Narrow Interpretation

Indian claimants were faced with yet another problem related to the jurisdictional act if and when they reached the Court of Claims, it involved the often narrow interpretation applied to the jurisdictional acts by the Court of Claims and the Supreme Court.

The language and reasoning of the cases cited thus far indicates that Indian cases were perceived and handled with little concern for impartiality by the Court of Claims.

This situation would later be resolved as congressional conscience matured, and jurisdictional acts were broadened to expand the interpretive powers of the Court of Claims.

The ability of the Court of Claims to interpret a jurisdictional act is dependent on many factors, the most important of which is the construction of the act itself, and in the case of Indian claims, the Court of Claims was confined in its ability to render a decision by the terminology exclusive to each act.

In some cases the jurisdiction (25 Stat. L.:694) was conferred as to "the claims of" or "all claims (34 Stat. L.:1,055) or "all legal and equitable claims" (41 Stat. L.:404) or "all claims of whatsoever nature" (39 Stat. L.:47) or "all legal and equitable claims of whatsoever nature." (45 Stat. L.:1,249).

In some instances, the Court was to also consider "any right of set-off or counter-claim by the United States as against the tribe," (39 Stat. L.:47) sometimes to exclude gratuities (39 Stat. L.:47) while at other time including gratuities (41 Stat. L.:404).

In some of these cases Congress was willing to limit the jurisdiction of particular acts "to claims occurring under the provisions of treaties or acts of Congress or both;" (40 Stat.L.:1,316) in other instances, the jurisdiction was limited "to a determination of the amounts of money due of claimed the Indians from the United States under any treaty of law of Congress." (39 Stat L.:47).

In most instances, however, jurisdiction was conferred "to hear, determine, and render judgment" (28 Stat.

L.876-98) or "to hear and determine and render final judgment" (43 Stat. L.:729) or "to hear, adjudicate, and render judgment" (44 Stat. L.:807) or "to hear, determine, adjudicate. and render final judgment." (34 Stat. L.:1,055).

The jurisdictional acts were clearly unique documents meant to deal with issues relating to specific tribal concerns. Early congressional desire to give the Court of Claims "unrestricted latitude in adjusting and determining the said claim" did not provide the required jurisdiction to adjudicate (25 Stat. L.:694). This act, although giving the Court of Claims more influence on Indian claims than ever before, still lacked the explicit promise of giving the Court unrestricted latitude in deciding Indian claims cases.

With the onset of the twentieth century, the Court of Claims was given authority to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians...settled and incorporated into the Cherokee Nation...." (26 Stat. L.:636). Congress was just beginning to reflect the concern for law and equity in Indian issues and applying those concepts to Indian tribal claims. This change in attitude affected the phraseology of future jurisdictional acts issued by Congress.

Yet, the phraseology was anything but unique. The evolution of the phraseology was the result of increased congressional awareness of the complex issues involved in

Indian claims cases, and sincere efforts on the part of the government to see these claims resolved. The less restrictive nature of phraseology in jurisdictional acts evolved with the concurrent maturing of congressional attitudes, relating to Indian issues in Congress and the nation.

Regardless of the sincerity of the government in wanting to satisfactorily conclude Indian claims litigation, in those cases which were fortunate enough to reach the Court of Claims at least one more hurdle impeded the successful conclusion of Indian litigatory efforts.

Most jurisdictional acts directed the Court to establish setoffs against gratuitous expenditures made by the United States for the benefit of the tribes involved. (Setoffs were, in large part, devastatingly effective in reducing or, in some cases, totally eliminating the monetary award granted by the court.) The effect of this type of deduction was catastrophic to the eventual outcome of many tribal claims.

One such case which amply demonstrates this point is *Chippewa Indians v. United States* (91 Court of Claims Reports:97). The Chippewa Indians which inhabit portions of the present States of Minnesota and Wisconsin sued under a jurisdictional act which allowed the Court of Claims:

...to hear examine and adjudicate and render judgment in all legal and equitable claims...for damages pertaining to loss of lands and timber totaling 180,381 acres...alleged to have taken

place as a result of the passage of the Act of January 14, 1889. Simultaneously, the court was instructed "to hear, examine, consider and adjudicate any claims which the United States may have (had) against the Chippewa Indians.... (44 Stat. L.:555).

The Court determined that the Chippewa were correct in their claim for so much as might exceed the total of any off-sets to which the Indians were entitled under the jurisdictional act.

The Court found that the tribe was entitled to recover \$1,277,800.74. The Court decided also, that as a matter of law that the United States was entitled to off-sets totaling \$4,675,590.81. Consequently, the initial award was absorbed by the amount of off-sets, leaving the Chippewa Band of Indians without compensation for their lost lands and timber.

The issue of off-sets was considered during hearings before the Senate Committee on Indian Affairs in 1935. The most damning evidence against off-sets was given by a witness who worked as an assistant solicitor for the Department of the Interior, who perceived the deductions as being "grossly unfair" to the tribes, noting that between 1924 and 1935 "in every case but two, where the jurisdictional act allowed setoffs of gratuities and where a recovery had...been won in the court, the petition had...been dismissed because the recovery was exceeded by setoffs (Hearings on S.2713 before the Senate Committee on Indian Affairs, 74 Cong., 1st Sess. 1935:12-13).

The congressional practice of selective imposition of setoffs was argued to be discriminatory. By allowing unlimited setoffs in some acts and limited setoffs in others while at the same time permitting some tribes to avoid setoffs entirely, Congress was in many cases imposing setoffs on tribes that could least afford it. As a consequence of this obvious inequity Congress adopted legislation which in effect, standardized the setoff provisions in the various jurisdiction acts (49 Stat. L.:596, 1935).

The legislation specified that expenditures relating to the particular sections of the Title 25 of the United States Code...shall not be charged as offsets against any claim on behalf of any Indian tribe or tribes now pending in the Court of Claims or hereafter filed (25 U.S.C. Sect. 475-A, 1976).

Theoretically, the passage of this legislation was to result in the redefinition of what was known as setoffs. Consequently, Indian tribes were given a better chance of receiving a monetary award without fearing that it would be absorbed by the imposition of offsets.

It was against this background of inequity, uncertainty and inconsistency that Congress beginning in the latter part of the 1920's sought to explore the possibility of creating a uniform procedure for handling the claims of all the Indian tribes.

Chapter 4

CONGRESSIONAL CREATION OF A NEW CLAIMS PROCESS: FROM
COURT OF CLAIMS TO INDIAN CLAIMS COMMISSION
1928-1946

The Court of Claims narrowly circumscribed by the Act's granting it jurisdiction in Indian claims cases, exercised superb judicial effort in trying to adjudicate tribal claims fairly. The failure of the court to succeed in this arena seemed to be well known by everyone but the Court of Claims itself. The government, the Indian and impartial research groups, represented by the Institute for Government Research, all agreed that the process of adjudicating Indian claims was inadequate.

The Meriam Report and the Search for a New Claims Process

In 1926, the United States Government commissioned the Institute for Government Research to prepare a report on the problems involved with Indian policy administration. The report, commonly referred to as the Meriam Report, was submitted to the Secretary of the Interior, Herbert Work, on February 21, 1928. At the time the report was submitted, there were approximately twenty tribal cases pending before the Court of Claims and several had obtained jurisdictional

acts. The section of the report pertaining to Indian tribal claims stated:

...The benevolent desire of the United States Government to educate and civilize the Indian cannot be realized with the tribes which have any considerable, unsatisfied, bonafied claim against the government...The simple cannons of justice and morality demand that no Indian tribe should be denied an opportunity to present for adjustment, before an appropriate tribunal, the rights which the tribes claim under recognized principles of law and government. (The Problem of Indian Administration, Meriam Report).

The indictment which this statement lodged was obvious. The inference was that the Court of Claims was an "inappropriate" forum for the adjudication of Indian claims.

Instead, the report recommended that a "special commission" be created to study those claims still lacking jurisdictional acts. In addition, the study proposed that this commission submit recommendations to the Secretary of the Interior "so that those claims which are meritorious may be submitted to Congress with a draft of a suitable bill authorizing their settlement before the Court of Claims." (Meriam Report 1928:805-11).

Thus, with the publication of the Meriam Report, the concept of an Indian Claims Commission received the endorsement that was to result in its passage into law eighteen years later, replacing the Court of Claims as the forum of arbitration for Indian tribal claims.

The Court of Claims, as the judicial body which had been responsible to Congress for making recommendations on

Indian tribal claims since 1881, must have felt that a burden had the potential of being lifted from its shoulders when the proposals of the Meriam Report became public.

The Court of Claims, from its inception in 1855, to 1928 had been increasingly burdened by an ever mounting number of claims it had been congressionally authorized to adjudicate. The judicial pressures under which the Court of Claims found itself must have given rise to hopes that the recommendations of the Meriam Report would be translated into legislative action.

In any event, the Meriam Report was to set into motion an effort to create a forum through which Indian tribal claims could efficiently be processed with the ultimate goal of finality. This would then free the Court of Claims docket so as to allow the Court to focus its attention on less complicated cases.

Control Efforts to Establish a New Claims Process

Congressional interest in the concept of an Indian Claims Commission was far from new. As early as 1924, both the Senate and House Committees on Indian Affairs expressed an interest in this idea. As a consequence, the Institute for Government Research, in the fall of 1929, retained Nathan R. Margold, a New York attorney, to analyze Indian claims and their problems with the objective of drafting a bill for their solution. After what seemed a comparatively

short time (considering the complexity of the issues involved) Margold reported to the Senate Subcommittee on Indian Affairs in December 1930. He proposed that Congress create an Indian Claims Commission consisting of six commissioners to hear and "decide with finality" all claims within a given period of fifteen years (Hearings on the Survey of Conditions of Indians, 71 Cong. 1931:13, 670-77).

It appears as though nothing resulted from the Margold Report, but during that same year of 1930, Chairman of the House Committee on Indian Affairs, Scott Leavitt of Montana, had introduced a bill (H.R. 7963) to create a United States Court of Indian Claims. This court was to consist of three judges, have a five year filing period for all claims founded upon the constitution, laws of Congress, treaties and contracts, and render final judgment within a ten year "life-span". Thus by 1930, the resolution of Indian claims was proposed under two forms of tribunal.

Both the Margold and Leavitt proposals for a forum through which Indian claims could be processed and adjudicated possessed inherent flaws. Both held unrealistic ideas concerning the amount of time it would require to process Indian tribal claims adequately, a problem which would continue to plague legislators even with the passage of the Indian Claims Commission Act in 1946.

Nevertheless, similar bills were introduced in succeeding sessions of Congress, and except for some

differences of opinion as to whether the forum should operate along the lines of a court or a commission, there was general agreement that legislation should be passed to put into effect the recommendations of the Meriam Report. Beginning in the mid-1930's a series of bills to establish an Indian Claims Commission were introduced. The opposition to such a proposal was to prove formidable. On August 18, 1941, President Franklin D. Roosevelt wrote Secretary of the Interior, Harold Ickes "...If Indian claims could be disposed of with finality through the establishment of an Indian Claims Commission, my attitude might be somewhat different, but", he continued, "the past history of these claims demonstrate the futility that any hope that this purpose would be thus accomplished." Continuing to elaborate, President Roosevelt concluded, "Final action by the Claims Commission would be no bar to the presentation of the claim to the Congress by the dissatisfied Indian or their attorney." (Vance:5).

It is obvious, therefore, that even though a more efficient means of dealing with Indian claims was desired, there were major differences of opinions as to how this was to be accomplished. Thus the future of the Court of Claims as an adjudicator of Indian tribal claims was clearly being threatened, beginning in the mid-1930's.

One question which faced congressional proponents of a new claims procedure, was whether all cases should be

instituted in the Court of Claims of referred to an administrative agency with limited authority to investigate and make recommendations to Congress.

With the introduction in March 1935 of H. R. 6655, an act to operate an Indian Claims Commission, the legislative effort to expedite Indian tribal claims shifted from the consideration of a judicial to a commission format. In the mid-1930's other court bills were discarded largely due to the fact that Secretary of the Interior, Harold Ickes considered a commission preferable to a forum based on legal principles. Both Congress and the Secretary of the Interior now felt that a commission rather than an adversary proceeding could more successfully work through the barriers presented by the government agencies charged with the preparation of Indian claims for the United States. It was believed that the adversarial relationship, which had manifested itself when Indian attorneys faced governmental representatives before the Court of Claims, would be eliminated with the creation of a commission. A commission appeared to be a more appropriate vehicle for "claims involving history and anthropology as much as law." (Deloria, "Broken Treaties" 1974:221)

This bill, in addition to three others, aroused a great deal of debate throughout the 1930's, although no legislation resulted (Hearings on H.R. 7838, House Committee

on Indian Affairs, Hearings on S.2731, 74 Cong., 1st Sess. 1935).

The content of these debates reflected the many issues, disagreements and the various facets of the process instrumental in the enactment of this legislation. Congressional concern over the financial impact and award would place on an already depleted depression era treasury in addition to the international political concerns of the 1930's were compounded conversely by the moral concerns and the increased awareness of Indian matters at the highest levels of government. Consequently, Indian tribal claims in the 1930's were placed in judicial suspended animation.

Predictably in these years of depression and war, the Indians' situation could not be isolated from the broader context of the country in which they lived. Predictably, many members of Congress felt strongly about their duty as guardians of the national purse. (Congress seems never to notice the inherent conflict of the guardian/ward relationship between Indians and the U.S. Government and Congressional responsibility as guardian of the National Treasury.) Massive unemployment heightened hostility toward those who seemingly sought "to get something for nothing." The fact that Indians were only asking for that which was due them by treaty was largely overlooked. The voice of a small, politically impotent minority was easily lost in the

multitude of voices in the many congresses of the depression era.

From the end of the Indian wars to just before World War II, "the tribes were thought of as defeated nations and were treated as such and thus held captive." (Steiner, "The New Indians" 1968:83). It was in this atmosphere of distrust and economic depression that the congressional grip on Indian affairs tightened even further. But the Indians, secure in the validity of their cause, persisted in their efforts to achieve redress wherever and whenever the opportunity arose, for their depression had begun long before 1929.

The Creation of the Indian Claims Commission

The final phase of the quest for claims legislation began on August 1, 1940 with the introduction of (S.4234). Unlike all of the previous bills, it provided the commission with the authority to make final rulings on the claims based on the matter of law and fact. The responsibility of commission review on questions involving law was allowed by certiorari to the Court of Claims. Its jurisdiction was to encompass all outstanding tribal claims of a legal, equitable, or moral nature presented within a five year period. Senate Bill 4234 thus established, through its statutory "recommendations", that its proposed commission conduct its own investigations, determine the facts of a

case, adjudicate the legal issues, and make a final determination. Thus, in this commission proposal, the commission had evolved from a fact-finding advisory body into a theoretically self-contained agency. Although the evolution of commission proposals seemed to have matured, Congress reserved the right of final review. Consequently, Congress, under this proposal was, like in the case of the Court of Claims, recommending the creation of another body whose determinations were subject to the final approval of Congress. This bill still fell short of the objectives which were desired, and as a result, like its successor (S.4349), was virtually ignored.

With the onset of World War II, the congressional debate on Indian tribal claims was silenced. This situation, meanwhile, was not being repeated in the Court of Claims, in fact, tribes found themselves in a legislative bottleneck. Tribes were finding themselves in situations whereby decisions were being handed down by the Court of Claims and because of the war, the congressional review procedure was stagnating. Consequently, the claims process was being held hostage by international events. But in 1944, with the war beginning to wind down, the final push for the establishment of a commission began.

Revised versions of previous bills were presented and Congress showed renewed interest in finally resolving the issue of Indian claims litigation.

The most extensive hearing on these bills were conducted a year later. Congressman Henry M. Jackson of Washington, Chairman of the House Committee on Indian Affairs, made his objective known when he stated: "We are being harassed constantly by various pieces of legislation and we plan to dispose of all those routines and let the commission decide what the obligation is of this government to the Indians...and appropriate the money." (Hearings on H.R. 1198 and H.R. 1341, 79 Cong., 1st Sess. 1957:68).

On October 25, 1945, Chairman Jackson introduced (H.R.4497) which contained many of the ideas that had been expressed in the many bills since 1935. The jurisdiction of the bill was to include moral claims based on "unconscionable consideration" and "fair and honorable dealings". Consequently, those claims which the Court of Claims determined involved these two concepts such as in the case of the Sioux Tribe of Indians v. The United States would be resubmitted to this proposed commission (Sioux Tribe of Indians vs. the U.S. 1942; Court of Claims Reports, Vol. 60:1049). Theoretically, this would terminate the need to give Indian tribal claims special treatment. What Jackson did not comprehend was that the creation of a special commission to deal exclusively with Indian claims was unique in itself and thus constituted "special treatment." It was believed advisable to establish a commission whose job it would be to deal with the backing of

cases which had accumulated over the eighty-two years (1863-1945) Indians had been denied equal access to the federal courts. The bill seemingly passed the House with ease, and after a conference and making some alterations, the Senate on August 2, 1946 (Indian Claims Commission Act 1946, Stat. L., 600:1049-55).

There was still the anticipated hurdle of presidential approval to surmount, but little trouble was expected and none materialized.

At the signing of the bill, President Truman conceded that mistakes had been made, but he continued:

I hope that this bill will mark the beginning of a new era for our Indian citizens. They have valiantly served on every battlefield. They have proved by their loyalty, the wisdom of a national policy built upon fair dealing. With the final settlement of all outstanding claims which this measure insures, Indians can take their place without special handicaps or special advantages in the economic life of our nation and share fully in its progress. (Public Papers of the Presidents of the U.S.; Harry S. Truman 1946, GPO 1962:414).

The passage of the Indian Claims Commission Act concluded sixteen years of intensive campaigning for a concept many decades old. The campaign involved ardent friends of the Indian on one side and combative defenders of the government on the other. Congress, to its credit, debated and ultimately faced the moral issues involved in Indian claims litigation.

The debates resulted in creation of factionalism, but the problems inherent in Indian claims adjudication were

finally addressed either by compromise or unanimous agreement. The moral issues were congressionally recognized and effectively dealt with by the act along with the legal and financial considerations. Consequently, the final and just resolution of Indian tribal claims was a realistic possibility and, although legislators believed that it would take one decade to achieve results rather than three, their hopes of finally adjudicating all tribal claims was now attainable.

The Indian Claims Commission and the Changing Role of the Court of Claims

With the passage of the Indian Claims Commission Act, the status of the Court of Claims changed. Now the Court of Claims as well as the Supreme Court, were given the responsibility of being the courts to which the Commission's final judgments could be appealed. This newly acquired appellate status (Indian Claims Commission Act, Subsection A) promoted the Court of Claims into an advisory position.

In considering any claim the Commission at any time may 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 questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim. (Indian Claims Commission Act, Section 21).

It is obvious that the previous experience of the Court of Claims in Indian claims litigation played a significant role in establishing the Court of Claims as an advisory body to the newly created commission, as well as its status as a court. As a consequence of this new status, the court no longer was required to supply Congress with reports or recommendations on Indian tribal claims, instead the Claims Commission was directly responsible to Congress (Hearings before Subcommittee on Indian Affairs on Arapahoe and Cheyenne Indians' Jurisdictional Act, H.R. 2775, 77th Cong., 3rd Sess.).

The early 1940's were years in which the Court of Claims persisted in its judicial mission as the arbiter of Indian claims litigation. This was occurring while Congress was considering the possible development of a commission. The massive influx of Indian claims cases into the Court of Claims was not significantly effected by the hearings which were being conducted over the various Claims Commission bills.

The Court of Claims during this period was described by Congressman, James F. O'Connor of Montana, a member of the Committee on Indian Affairs, as a court which "has got to carry out the instructions of Congress." (Hearings before Subcommittee on Indian Affairs on Yakima Indians' Jurisdictional Act, H.R. 2390, 76th Cong., 1st Sess:14; Statement made by Committee Member, Congressman James F.

O'Conner of Montana). This perspective was a result of a longstanding tradition of legislative control. As a consequence, autonomy for the Court of Claims was impossible to obtain, making the Court an extension of congressional will within the federal judiciary.

The legislative control which was pervasive throughout the relationship which existed between Congress and the Court of Claims, caused a conflict of interest to arise when the Court was required to adjudicate Indian claims cases.

Under Article 3, Section 8 of the Constitution, Congress is given the authority to regulate Commerce...with the Indian tribes. The question of conflict arises when a tribe has a claim against the government which it is required to submit to a court that "has got to carry out the instructions of Congress." This conflict of interest immediately jeopardized the ability of tribes to achieve fair and autonomous decisions on their claims.

The Court of Claims could only make recommendations to Congress which the Court of Claims had no legislative authority to enforce. Consequently, even if the Court of Claims had been sympathetic to the Indians, which there is ample evidence to support, the Court was unable to express and translate this sympathy into legislative action.

It is obvious, therefore, that when dealing with Indian claims there is no separation of powers. Congress is ultimately responsible for the fair implementation of rights

as they apply to Indian tribes and, until Congress is willing to insure that tribes receive equal access to the courts for the purpose of resolving all disputes against the government in a fair, impartial and equitable manner, Indian tribal groups will continue to lobby for the reopening of the claims process.

Congressional control of the national "purse strings" complicate the adjudication of Indian tribal claims. In the 1930's, tribal groups that pushed for the payment of interest on lands acquired by the government through "fraudulent" means had to face a depression era congress that was afraid the interest "would run into hundreds percent." John Collier, Commissioner of Indian Affairs during this period wrote representatives Knute Hill on the subject of interest saying:

...In cases in which just compensation is awarded by the courts for lands taken from an Indian tribe by the United States...this question of interest is to be answered in the negative (Ibid. 24). Conversely, in cases where just compensation was not paid by the government, the courts had the authority to grant interest. (Hearings, H.R. 2390 1934:24).

In determining whether granting interest was applicable in a particular case, the Court of Claims had to: 1) depend on the jurisdiction act to provide the authority to address the question; 2) request government records, which were not always complete or accurate from the various federal agencies involved.

Thus, the Court of Claims was dependent on the federal government and its many agencies and departments when it came to rendering a fair and accurate decision on the issue of interest in an Indian claims case.

CONCLUSION

From the moment the first Indian tribe received permission from Congress to bring suit against the federal government for redress of grievances in the Court of Claims, Indians were at a disadvantage.

The Jurisdiction of the Court of Claims in Indian cases was expressly outlined by the jurisdictional act which Congress exclusively created for that case. The court of Claims was required to interpret the jurisdictional acts narrowly thus providing the Court of Claims little flexibility and not autonomy in reaching a decision.

At the same time Congress, by constitutional mandate, is authorized to control the national "purse strings". This, consequently, provides Congress with the ability to refuse to grant an award based on the impact of that award on the federal treasury.

When Congress first authorized the passage of the Court of Claims bill in 1855, the federal government had no concept of minority participation in the claims process. Consequently, no provision was made for that eventuality, and Indians had to persist against a reluctant government to gain equal access to the federal courts.

The desire of Indians to achieve redress was hindered by a Congress which had plenary powers over Indian affairs,

thus, Indians were dependent on the prevailing mood of Congress if Indian tribal claims were to be resolved.

The power of Congress over Indian affairs in the late 18th and early 19th centuries was absolute. When Indians finally gained access to the Court of Claims, Congress used the various jurisdictional acts to restrict the interpretation of issues thus providing the court with little ability to exercise true judicial power. The Court of Claims made recommendations to Congress without the accompanying ability to enforce. This lack of ability was legislatively sanctioned by Congress.

As a consequence of these legislative limitations, the Court of Claims was doomed to be ineffective from its inception. Congress lacked the desire to surrender even a portion of its power in Indian affairs to a judicial body which possesses the authority to render monetary judgments. Congress wished to maintain control of the national purse strings which, consequently, made Indians dependent on the changing mood of the American conscience, as reflected by Congress, if they were to have their claims adjudicated to the satisfaction of the claimants and thus far the American conscience had not been all that concerned with Indian satisfaction with claims awards.

The adversarial relationship inherent in Indian claims against the federal government required that Indians prove, beyond a shadow of doubt, that the government had in fact

committed that which was stipulated in the original petition. Contrary to Indian law, in Indian claims cases the government was automatically provided with that shadow of doubt which is an extension of the control that the legislative branch exercised over the Court of Claims.

Consequently, the majority of Indian tribes were faced with an exercise in futility when trying to get their claims adjudicated, to the Indians' satisfaction.

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