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Richard J. Ansson Jr.

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BOOK REVIEW

THE INDIAN CLAIMS COMMISSION: DID THE AMERICAN INDIANS *REALLY* HAVE THEIR DAY IN COURT?

*Richard J. Ansson, Jr.**

Wild Justice. By Michael Lieder & Jake Page. New York: Random House, Inc. 1997. Pp. 318. $ 25.95.

I. Introduction

Devised by Congress in 1946,[1] the Indian Claims Commission Act created and empowered a Commission to address grievances between the federal government and Indian tribes (p. v).[2] *Wild Justice*, by Michael Lieder and Jake Page, explores whether the Act was wisely conceived and whether the Commission was able to fulfill the Act's congressional mandate (p. v).[3] In so doing, the authors provide an insightful look at the claims before the Commission and also render an impassioned examination of the relationship between the federal government and Indian tribes.[4]

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* L.L.M., 1998, University of Missouri at Kansas City College of Law. J.D., 1997, University of Oklahoma College of Law. B.A., 1994, University of Oklahoma. Member of the Choctaw Nation. Member of the Creek Nation.

1. Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, § 2, 60 Stat. 1049, 1050 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978) (defining the types of cases that could be heard before the Commission).

2. The Commission decided 610 claims (p. 65) brought by 170 Indian tribes (p. v). When the Commission was disbanded, sixty-five cases remained, and those cases were transferred to the Court of Claims (p. 65).

3. *Wild Justice* also details the claim of the Chiricahua Apaches and uses their claim to examine the Indian Claims Commission (p. vi). This review does not critique the Chiricahua Apaches' claim. However, it should be noted that by documenting the Chiricahua's claim these authors add much to an area that has received relatively terse treatment from scholars. *See* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 779-84 (1992).

4. Little scholarly work has examined the Indian Claims Commission. For a historical discussion of the Indian Claims Commission, see HARVEY D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION (1990). Rosenthal's work, however, may lack objectivity because he was the Indian Claims Commission's historian. Newton, *supra* note 4, at 771 n.96.

For additional excerpts briefly discussing the Indian Claims Commission, see WILCOMB E. WASHBURN, RED MAN'S LAND/ WHITE MAN'S LAW 101-08 (2nd ed. 1995); Newton, *supra* note 4, at 769-83; Harvey D. Rosenthal, *Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission*, *in* IRREDEEMABLE AMERICA 35-70 (Imre Sutton ed. 1985);

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This review examines the exceptional perspective *Wild Justice* sheds on the performance of the Indian Claims Commission.[5] Part II surveys the Indian tribes' abilities to sue the federal government prior to the Commission's inception. Part III discusses the federal government's rationale for creating a Commission. Part IV investigates whether the Commission fulfilled its congressional mandate. Part V concludes that the authors of *Wild Justice*, by evaluating the Indian Claims Commission, made an invaluable contribution to a scarcely documented segment of American Indian law.

II. Indian Claims Prior to the Indian Claims Commission

Before the Indian Claims Commission Act created a special tribunal for tribes to sue the United States, the doctrine of sovereign immunity prevented tribes, like other individuals, from suing the government without its consent (p. 52).[6] However, individuals and tribes could assert their claims against the government before Congress (p. 52).[7] In 1855, Congress created the Court of Claims to hear monetary suits brought against the federal government (pp. 52-53).[8] In 1863, Congress amended the 1855 bill[9] and, in doing so, excluded any Indian claim dependent on a treaty between the tribe and the United States (p. 53).[10] This provision endured for eighty-three years and forced tribes to petition Congress, like all claimants before 1855, for a special jurisdictional act that would allow the tribes to assert their complaints in the Court of Claims (p. 53).[11]

Russel Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 7 (1982); Sandra C. Danforth, Note, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359 (1973); Howard M. Friedman, *Interest on Indian Claims: Judicial Protection of the Fisc*, 5 VAL. U. L. REV. 26 (1970); and John T. Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. REV. 325 (1969).

5. The unique perspective set forth in *Wild Justice* can be attributed to the authors' use of unpublished Indian claims materials. The authors retrieved such materials from the National Archives in Washington D.C.; the private files of two noted Indian claims attorneys — Israel S. Weissbrodt and Abraham W. Weissbrodt; and four presidential libraries — Harry S Truman, Dwight D. Eisenhower, Lyndon B. Johnson, and Richard M. Nixon (p. 273).

6. The doctrine of sovereign immunity developed under English common law and was quickly adopted by other European countries (p. 52). The United States claimed this same privilege at its inception (p. 52).

7. The Treasury Department would then investigate the claim leaving Congress to decide whether it should award monetary compensation (p. 52).

8. This court was severely hampered because Congress had to ratify its holdings (p. 53).

9. The 1863 amendment changed "the court's structure, procedures, and powers and, most important, provided that judgments of the Court of Claims were final, like the judgments of other courts" (p. 53).

10. The authors asserted that Congress passed this forbidding legislation because some tribes had supported the Confederacy and other tribes had continually been engaged in warfare with the United States government (p. 53).

11. The authors noted that the tribes still could have theoretically brought suit "based on a law, regulation, or contract *other than* a treaty [because] only claims based on treaties were

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Between 1855 and 1946, some tribes obtained special jurisdictional acts (p. 53).[12] However, Lieder and Page assert that this system yielded unsatisfactory results for several reasons (p. 53). First, most tribes did not have the financial resources[13] to procure a lawyer to "investigate the tribe's history, assess which claims had probable merit, draft a bill that would allow the tribe to bring those claims, and find one or more legislators willing to introduce it" (pp. 53-54).[14] Second, those tribes that obtained legal representation encountered a cumbersome congressional approval process where the prospect of securing approval was notably bleak (p. 55).[15] Finally, those few tribes that attained special jurisdictional acts generally received an unfavorable judgment from the Court of Claims (p. 56).[16]

III. The Creation of the Indian Claims Commission

Shortly after President Roosevelt's election, John Collier, the newly appointed Commissioner of Indian Affairs, began lobbying Congress to enact legislation that would enable Indian tribes to recover for past wrongs committed against them (p. 59). Collier contended that claims awards "would add to the tribal assets and reflect the country's renewed commitment to treating Indians fairly" (p. 59). After years of struggling to create a tribunal that would resolve past wrongs committed against Indian tribes,[17] Congress

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expressly precluded" (p. 53).

12. Most tribes did not try to obtain special jurisdictional acts (p. 53).

13. Some tribes had substantial sums of money in the United States Treasury; however, the government prohibited the tribes from using these funds to hire attorneys because the government deemed such use of money inappropriate (p. 54).

14. A few tribes unsuccessfully represented themselves (p. 54). Other tribes attempted to hire attorneys on a contingency basis; however, most lawyers would decline to represent the tribes because of the magnitude of the task and the risk of no recovery (pp. 54-55).

15. Several factors contributed to the authors' contention. First, too many special jurisdictional acts were brought before the Committee (p. 55). For example, the authors noted that the Indian Affairs Committee had forty-nine special jurisdictional acts before it in 1930, and during this session, the committee lacked both the time and the resources to consider the merits of each bill (p. 55). Second, if the bill made it to the full Senate and House, the bill was passed only "if no member objected to it when it was called for consideration; if only one member objected, the bill was passed over until the next call of the consent calendar, but if three members objected, the bill was struck" (pp. 55-56). Most bills were struck down by an overaggressive congressman (p. 56). For example, between 1941-1946, only one jurisdictional bill gained congressional approval (p. 56).

16. The authors noted that the Court of Claims usually rendered a decision twelve years after the passage of a special jurisdictional act (p. 56). The tribes recovered claims in only 28 of 134 cases docketed between 1886 and 1946 (p. 56). Further, after 1920, the tribes almost always lost because special jurisdictional acts allowed the government to "offset all sums expended for the benefit of the tribe, with a few exceptions, against the amount to which a tribe was entitled" (p. 56).

17. Between 1934 and 1940, Congress failed to pass several bills that would have created a tribunal charged with investigating legal and moral Indian claims (p. 60).

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finally passed[18] and the President signed[19] a bill providing for such on August 13, 1946 (p. 64).[20]

Under the Act, a tribe could bring suit for monetary damages arising from any legal wrong committed by the United States (pp. 66-67).[21] The Act also authorized the Commission to decide moral claims based "on contentions that treaties, contracts, or agreements would not have been entered but for the government's fraud, duress, or unconscionable actions," (p. 66)[22] and "'upon fair and honorable dealings that are not recognized by any existing rule of law or equity'" (p. 67).[23] Finally, the Act provided that the Court of Claims and the Supreme Court would have appellate review over the Commission's decisions (p. 88).[24]

IV. The Indian Claims Commission and the American Judicial System

Throughout its existence, the Indian Claims Commission adjudicated land claims, cultural destruction claims, and mismanagement claims (p. 229).[25]

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18. The authors argue that such a turnabout came for several reasons. First, many Indians were decorated war heroes (p. 60). Second, many proponents of termination believed that once Indian tribes were awarded claims by a tribunal the progressive tribal members would leave their reservations (p. 61). Finally, Congress was presented with a palatable bill that had been fashioned and shepherded through Congress by Felix Cohen and Ernest Wilkinson (p. 62).

19. President Truman stated, in a press release drafted by Felix Cohen, that the bill "'removes a lingering discrimination against our First Americans and gives them the same opportunity that our laws extend to all other American citizens to vindicate their property rights and contracts in the courts against violations by the Federal Government itself . . . . With this final settlement of all outstanding claims which this measure ensures, Indians can take their place without special handicap or special advantage in the economic life of our nation and share fully in its progress'" (p. 64).

20. The act empowered the Commission to "'hear and determine claims of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska' that accrued on or before August, 13, 1946" (p. 64). Claims arising thereafter would be tried in the Court of Claims (p. 65).

21. When awarding monetary damages, the act allowed the Commission to deduct standard offsets (p. 67). However, the act also provided that if the United States had generally maintained exemplary relations with a tribal entity the government could deduct expenditures spent gratuitously for the tribe (p. 67). Such services excluded funds spent on administrative, educational, health, or highway programs (p. 67).

22. Indian tribes could not bring these claims normally because treaties could not be revised under contractual principles (p. 66).

23. Even though the provision failed to impose standards on how fairness and honor should be evaluated, it nevertheless forced the Commission to impose liability against the United States if the Commission found that the United States had harmed the tribes unfairly or dishonestly (p. 67). The authors also note that "the special provision . . . was necessary because of the unique nature of the relationship between the United States and the tribes over the years. Indians depended on the United States to protect them, and the United States repeatedly claimed it was acting in the tribes' best interest" (p. 67).

24. The Supreme Court was largely uninterested in hearing decisions arising from the Indian Claims Commission (pp. 265-66).

25. Tribes had five years to file claims (p. 65). The Commission had an additional five years

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When deciding these claims, the Commission heard evidence about life prior to European encroachment and about the relations between the United States government and the tribes (p. x). These claims presented the Commission with many unique jurisprudential and evidentiary issues (p. 90).[26] The commissioners and the lawyers could not ignore these issues, and in the end, their ability to resolve them would determine the ultimate success of the Commission.

A. The Indian Claims Commission and the Claims

1. Evidentiary Issues

The Commission encountered forbidding evidentiary issues when it adjudicated aboriginal land claims. In bringing such claims, tribal attorneys sought redress from the federal government for lands the United States confiscated from the tribes (p. 90).[27] When adjudicating these claims, the Commission had problems identifying the particular tract of land taken (pp. 269-70). These claims posed troubling evidentiary issues because written records identifying Indian lands were nonexistent and oral accounts of land holdings were held to constitute inadmissible hearsay (pp. 269-70).[28] As a result, tribal attorneys strove to prove aboriginal land claims by soliciting the testimony of anthropologists and historians (p. 270). However, in most instances, this testimony was also flawed because it rested on the availability of oral, written, and physical information (p. 270).[29]

In mismanagement claims, tribal lawyers sought redress from the government for its mismanagement of tribal funds and other assets (p. 229). Mismanagement claims produced evidentiary problems so great that the Commission only heard the full merits of one claim (p. 246).[30] These claims presented an odd combination of too much information in some circumstances and too little in others (p. 270). For instance, it was impossible to evaluate the

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to decide the claims (p. 65). A total of 370 tribal petitions were filed under the act and more than 600 cases were docketed (pp. 89-90).

26. Due to the number of claims and their complexities, the Commission was unable to decide the claims within the time period provided by the Act, and as a result, Congress was forced to extend the Commission's life on numerous occasions (p. 65).

27. The tribes also "asked to be paid an amount equal to the fair market value of the land at the time it was taken, together with interest from the date of the alleged wrongdoing to the date the Commission issued its judgment" (p. 90).

28. The Commission formulated a test for trying land claims (p. 162). Under this test, the Commission determined the size of the claimed land base, the date the land was taken or ceded to the United States, and the land's value at the date of taking or cession (p. 163).

29. Once boundaries were established, it was even more challenging to determine the land's value because "there was *no* market for such vast tracts of undeveloped land on the outskirts of the country's frontier" (p. 270).

30. Mismanagement cases were not heard by the Commission until the late 1960s due to the amount of accounting work needed to document these claims (p. 234). All of the mismanagement claims, except one, were settled out of court (p. 253).

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thousands of disbursements from trust funds because any such attempt would have overwhelmed both the Commission and the attorneys (p. 270).[31] Therefore, the Commission and the attorneys were forced to review the reports of an Indian tribe's supervisory agent for an explanation of reservation expenditures (p. 270). However, examining this information was not overly beneficial because most agents trumpeted the wise use of their expenditures (p. 270).[32]

2. Jurisprudential Issues

Jurisprudential issues impeded the Commission's ability to resolve cultural destruction claims. In bringing these claims, tribal lawyers sought redress from the United States for its deliberate destruction of tribal cultures (p. 228). The Commission, however, rebuffed these claims without trial and without reason "even though the language of the Act seemed to give the Commission the authority to hear them under the fair and honorable dealings clause" (p. 267).[33] The authors argued that the Commission so ruled because it was simply "unable to transform legal theories based on the rights of individuals in order to recognize the fundamental injury that tribal groups had suffered: the destruction of their identity and culture" (p. 267).[34]

B. The Commissioners

The Commission's inability to solve evidentiary and jurisprudential issues was further exacerbated by the fact that the vast majority of commissioners[35]

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31. The authors note that "[i]n typical trust-fund cases the wisdom of even a hundred-dollar disbursement by a private trustee can generate many pages of documentary evidence and argumentation" (p. 270).

32. The authors assert that tribal lawyers could usually uncover an accurate account of Indian expenditures by examining a succeeding agent's report on the Indians' condition (p. 270). Such a report would critically detail the prior agent's expenditures (p. 270). Unfortunately, the likelihood of finding accurate reports was stymied by a relatively low agent turnover rate (p. 270).

33. Even if the Commission had adjudicated cultural destruction claims, the authors maintained that the Commission would have been forced to resolve two vexing issues (p. 267). First, the Commission would have been compelled to identify exactly what comprised a culture — something anthropologists cannot agree upon (p. 267). Second, the Commission would have been constrained to determine whether a tribe had a monetary compensatory right in culture — something the legal system has not contemplated (p. 267).

34. The Court of Claims, affirming the Commission's decision, held that "unless the government had expressly agreed not to destroy tribal existence or had expressly agreed to provide the foundation for a new life for the tribe, the Indians could not recover for these largely noneconomic injuries" (p. 228). This decision effectively made it impossible for tribes to successfully maintain a claim for cultural destruction (p. 211).

35. President Truman sanctioned this practice when he selected three non-Indian individuals with no experience in Indian law or Indian affairs (pp. 84-85). The candidates selected had strong political support (p. 86). Edgar Witt of Texas was chosen to serve as chief commissioner and had the support of his good friends, Sen. Tom Connally of Texas and Speaker of the House Sam Rayburn (p. 86). William Holt of Nebraska obtained the support of the Public Lands Committee

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were not familiar with Indian cultures (p. 265) and "had no understanding of the special relationship between the United States and the tribes" (p. 86).[36] This, according to the authors, "ensured that the white man's perspective would prevail" (p. 86).[37] Indeed, when adjudicating disputes, the commissioners almost always construed decisions in favor of the government (pp. 119-26). In fact, if not for the Court of Claims overruling many of the commissioners' decisions,[38] most tribes would have been unable to successfully litigate claims before the Commission (pp. 122-25).[39]

C. Tribal Lawyers & The Commission

The Commission's ability to resolve Indian claims was further hampered by the failure of tribal lawyers to adequately represent their clients and to

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chairman — Republican Sen. Hugh Butler of Nebraska (pp. 86-87). Louis O'Marr had the backing of the second-ranking Democrat on the Public Lands Committee — Sen. Joseph O. Mahoney of Wyoming (p. 87).

President Eisenhower employed similar standards when he appointed former Utah Sen. Arthur Watkins (pp. 159-60). Watkins had been a very strong opponent of Indians' claims, and while serving on the Commission, Watkins ruled as much for the government as previous precedents would allow (pp. 159-60). President Eisenhower also nominated T. Harold Scott, a career bureaucrat, who had previously served as an attorney with the Federal Trade Commission (p. 160).

President Johnson's first three appointees — Richard Yarborough, John Vance, and Jerome Kuykendall — all had powerful congressional support and all lacked any Indian experience (pp. 202-03). Richard Yarborough's father was a senator from Texas (p. 203). John Vance, a Montana Democrat, had the support of the Senate majority leader from Montana (p. 202). Jerome Kuykendall was recommended to President Johnson by the Senate minority leader (p. 203).

36. Felix Cohen had been considered for the position; however, President Truman excluded Cohen from the Commission due to his sympathy with Indian causes (p. 85). Apparently, President Truman wanted to appoint unbiased individuals to the Commission (p. 85). The authors assert that this decision although laudable was highly impracticable because such an adjudicator unfamiliar with Indian affairs would have to evaluate two radically different perspectives to truly maintain neutrality (pp. 85-86).

37. President Johnson's final appointee and President Nixon's only appointee were both familiar with Indian issues (p. 204-05). In 1967, President Johnson appointed Margaret Pierce (p. 204). Pierce was formerly a Court of Claims law clerk (p. 204). In 1969, President Nixon appointed Brantley Blue (p. 205). Blue was a Lumbee Indian (p. 205). The Commission they served on was the most productive and pro-Indian (p. 205). However, this Commission's options were limited because the previous commissions had already determined the legal parameters of the Commission (p. 205).

38. For example, the Commission employed stringent standards when determining whether Indian claimants constituted a band or a tribe (p. 119). This holding only allowed a few tribes to bring suits before the Commission (p. 119). The Commission also established that Indian claimants had to overcome a high evidentiary threshold to prove land ownership (p. 124). This holding prevented most tribes from recovering damages for the loss of their lands (p. 124). The Court of Claims overturned both decisions (pp. 122-25).

39. Once the commissioners realized that the Court of Claims wanted to resolve issues within the spirit of the act, the commissioners decided that the purpose of the act "was to give some, but not excessive, compensation" (p. 137).

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adeptly assert novel claims (p. 266).[40] Of the 370 petitions filed, almost all sought redress under land or accounting claims (p. 91). The authors of *Wild Justice* contend that tribal lawyers could have asserted more original claims (p. 91).[41] For example, tribal lawyers could have argued that various federal policies purposely destroyed Indian societies and their culture (pp. 91- 92).[42] Admittedly, the authors realize that the Commission probably would have rejected such claims; however, by not asserting these claims, tribal lawyers certainly guaranteed that their clients would not receive compensation for such wrongs (pp. 91-92).[43]

D. The Justice Department & The Commission

The Commission's ability to deliberate Indian claims was also encumbered by the tenacity of the government's lawyers (pp. 92-93). The authors attest that this policy was formulated at the behest of Ralph Barney (p. 93).[44] Barney headed the Department of Justice's Indian Claims Section from the 1940s into the 1970s (p. 93). Under Barney's leadership, the lawyers from the Department of Justice aggressively asserted every available defense, contested cases to their bitter end,[45] and rarely agreed to settle[46] (pp. 92-93). Indeed, any attorneys under his direction that discussed settlement with tribal attorneys "quickly fell into disfavor,[47] and he vociferously urged that the department

40. On this point, another commentator noted that many lawyers did not assert novel claims because they had become "accustomed to working in the court of claims, where rigid rules of evidence and well-established procedures for appraisal of actual losses were commonplace . . . ." VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 142 (1983).

41. The authors argue that only a few lawyers — most notably the lawyers of Weissbrodt & Weissbrodt; Wilkinson, Cragun & Barker; and Z. Simpson Cox — explored the limits of the Commission's jurisdiction.

42. For example, the attorney for the Mandans of North Dakota dissuaded the tribe from seeking compensation for buffalo that had been slain on their lands by white hunters because under established legal doctrine wild animals are not owned by anyone (pp. 91-92). However, the authors maintain that under the fair and honorable dealings clause this claim was viable because "the government had encouraged the destruction of the bison precisely in order to starve and freeze the Plains Indians into subjugation" (p. 92).

43. The authors state that the failure to advance moral claims cannot be viewed as negligence by the tribal attorneys (p. 91). Instead, the authors claim that these "attorneys analyzed their clients' issues in light of contemporary legal concepts" and "were unwilling to bear the risks of such lawsuits" (p. 91).

44. Barney repetitively bragged about the Department's ability to prolong, if not completely thwart, the Indians' ability to recover monetary compensation under the act (p. 94).

45. Should lawyers for the government have been so adversarial? The authors argue that "[t]he government's dual position — defendant and trustee — could have, and perhaps should have, created a dilemma for its attorneys about the appropriate stance to take toward tribes' claims" (p. 92).

46. The Justice Department's decision not to settle drew congressional criticism because the Justice Department's antitrust division had adopted a policy that encouraged rapid resolution of disputes (p. 93).

47. Generally government attorneys were found to have "established a proud and just record

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appeal virtually every adverse judgment it received" (p. 94).[48] Even when the Justice Department had fully exhausted its legal alternatives, Barney would not relinquish his quest to defeat Indian claimants, and in these instances, he would implore Congress to overturn the Commission's rulings (pp. 138-39).[49]

V. Conclusion

When the United States government created the Indian Claims Commission, it did so "to give the tribes a fair chance to win money for past wrongs" (p. 68). The authors of *Wild Justice*, in examining whether the Commission fulfilled the Act's congressional mandate, determine that the Commission was not able to satisfactorily adjudicate claims cases (p. 272). Indeed, the authors assert that this failure resulted from the Commission's inability to resolve the many unique jurisprudential and evidentiary issues before it (p. 272). The authors further note that the Commission's failure to adequately adjudicate claims cases was exacerbated by ineffective commissioners and lawyers (pp. 265-66). As a result of these shortcomings, the authors conclude that the Commission was forced to devise "a set of principles designed to give every tribe the appearance of its day in court" (p. xi) while effectuating closure on Indians' claims (p. 146).

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in their representation of the United States and did not become emotionally 'anti-Indian' although the pressures to adopt personally the postures they were expected to carry into the courtroom must have been tremendous." DELORIA, *supra* note 40, at 147.

48. A decision by Barney could not be overridden unless the supervising attorney had enough political muscle to dismiss Barney's recommendation (p. 94). This did not occur during the Truman or Eisenhower administrations (p. 94).

49. For example, the authors note that the Justice Department tried to persuade the Indian affairs committee to prohibit Indian claimants from receiving damage awards for the loss of aboriginal lands (pp. 138-39). This committee was unreceptive so the Justice Department sought the support of the appropriations committee (p. 139). The appropriations committee agreed with the Justice Department; however, various congressmen thwarted the appropriations committee's attempt to narrow the Indian Claims Commission's scope (pp. 139-40).

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