6-6-1896

Indian Depredation Claims

54TH CONGRESS, 1st Session. SENATE. REPORT No. 1133.

IN THE SENATE OF THE UNITED STATES.

JUNE 6, 1896.—Ordered to be printed.

Mr. BROWN, from the Committee on Indian Depredations, submitted the following

REPORT:

[To accompany S. 2726.]

The Committee on Indian Depredations, having had under consideration Senate bill 2726, being a bill to amend an act entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March 3, 1891, and having had under consideration sundry other bills, resolutions, and petitions on the same subject, respectfully report:

The original act authorized recovery only where the property injured was that of those who were at the time citizens of the United States, and the Supreme Court having so construed that act, the committee think that by act of law the jurisdiction of the court should be extended; that the Government is in duty bound to pay the claims, not only of those who at the time were citizens, but those who were intending to become citizens, who were inhabitants and residents of the United States for that purpose, whether they had expressly declared their intention or not. We have accordingly amended the first section so as to include those who had declared their intention to become citizens, also those who at any time since the transaction have become citizens or may become such before the final adjudication of the matter. The committee also think that the language of the statute referring to the Indians who commit the injury as being in amity with the United States is too limited in that respect, and that the United States should pay for the injuries that have arisen from any Indians with whom they have ever made treaties of peace, as, under the decision of the Supreme Court of the United States on this subject recently rendered, no Indians are in amity, within the definition of the former statute, unless absolutely at peace, not having any outbreak or trouble with the United States. The injuries complained of, for which the United States should make reparation, are the occasions when peaceable Indians have gone upon the warpath temporarily, or for a longer period. Such Indians were at peace with the United States, and in amity, and afterwards in amity again; and the tribes, wherever it is possible, should be made to pay for the wrongs done during these outbreaks. We have therefore extended the statute in that direction.

The committee received many petitions and protests from persons engaged in practicing before the Court of Claims in these cases, show-

ing that the business of the Court of Claims was very much delayed, and that it would take a long time to dispose of the business now on hand with the present method. It may be necessary in the future to provide an entirely new and different court, or add to the number of judges. For the present the committee content themselves with recommending the addition of another Assistant Attorney-General. Some additional help is absolutely necessary to enable the Government to dispose of the business.

We have also provided a method for taking testimony in this class of cases, where witnesses can be examined and cross-examined and the testimony no longer be subject to the criticism of being ex parte.

We submit herewith certain petitions, testimonials, and letters of the Attorney-General on this subject.

Your committee report the bill (S. 2726) back with the following amendments, and recommend its passage as amended:

First. On the first page, line 12, after the word "citizens" insert the following: "or persons who had declared their intention to become citizens."

Second. On the first page, in line 13, after the words "United States" insert "who have since become citizens of the United States, or who shall have become citizens of the United States before the final adjudication provided for in this act."

Third. After section 3 add the following, as section 4:

SEC. 4. That testimony may be taken in any cause pending in said court by the claimant, on giving sixty days' notice of the time, place, names of witnesses to be examined, and officer before whom such testimony may be taken, to the Attorney-General of the United States; and such notice shall also be accompanied by a copy of the interrogatories to be administered to the witnesses. Such testimony may be taken before any commissioner of the circuit court of the United States, at any place within the United States, as designated in said notice. At the time fixed for taking said testimony the Attorney-General or his assistant may file before said officer such questions by way of cross-examination as he sees fit, and in like manner, on giving similar notice, the Attorney-General or his assistant may take testimony before any commissioner of the circuit court of the United States.

Fourth. After said section 4 add the following, as section 5:

SEC. 5. That to facilitate the speedy disposition of the cases herein provided for in said Court of Claims, there shall be appointed, in the manner prescribed by law for the appointment of Assistant Attorneys-General, one further and more additional Assistant Attorney-General of the United States, who shall receive a salary of two thousand five hundred dollars per year.

Fifth. After said section 5 add the following, as section 6:

SEC. 6. That section two of said act be amended by inserting after the words "but no case shall be considered pending unless evidence has been presented therein," the the words: "*Provided, however*, That any affidavit of the claimant or of others shall be considered evidence within the meaning of this provision."

DEPARTMENT OF JUSTICE,
Washington, D. C., May 12, 1896.

SIR: In accordance with the request of your committee of April 30, 1896, I herewith submit a report on Senate bill No. 2726, entitled "A bill to amend an act entitled 'An act to provide for the adjudication and payment of claims arising from Indian depredations,' approved March third, eighteen hundred and ninety-one."

Assuming that it is the purpose of the resolution to secure a Department report as to how the liability of the United States in the cases filed in the Court of Claims under the act of March 3, 1891, will be affected by the proposed amendment, and what objections there may be to the said amendment as curtailing the defenses or

disregarding settled legal principles, I have the honor to submit the following statement:

(1) With reference to that clause of the bill providing a recovery for those who were not citizens of the United States at the time of their losses, it is believed that it will fix liability upon the United States in cases involving more than $1,000,000, which would otherwise be dismissed because of the alienage of the claimants. There are, however, no data from which the amount may be positively determined. Nor is the Department able to supply accurate data, even upon a careful examination of the files of the 10,841 cases brought under the act of March 3, 1891, as to how many aliens temporarily within the United States at the time of the alleged taking or destruction of their property would be affected in comparison with the number of aliens sustaining the losses who came to the United States with the intention of becoming citizens. In either event, the proposed amendment is a matter of grace on the part of the Government, if enacted into law, for a class of persons whom Congress saw fit to ignore in providing the means of investigation and payment of claims for losses at the hands of Indians. (See act of 1885, 23 Stat. L., 376; act of 1886, 24 Stat. L., 33; act of 1887, 24 Stat. L., 464; act of 1888, 25 Stat. L., 234; act of 1889, 25 Stat. L., 998; act of 1890, 26 Stat. L., 356; act of 1891, 26 Stat. L., 1009; act of March 3, 1891, 26 Stat. L., 851.)

(2) The amendment sought to be effected by the words, in lines 15 and 16, on page 2 of the printed bill, "or which had prior to such taking or destruction entered into any treaty of amity, peace, or friendship" would include almost all tribes of depredating Indians, and would provide a recovery in fully 90 per cent of the claims which have been filed, since by far the greater number of depredations in these cases were committed by Indians whose tribes were at some time previous to the depredations in treaty relations with the United States. The effect of such provision would be to make the United States and Indians liable for losses that might have occurred during a flagrant Indian war, and thereby to disregard the familiar principles that a treaty may be abrogated by acts of hostility, or by the making of a new treaty, or by the proclamation of the President.

The proposed amendment making the existence of treaty the test of liability instead of the actual amity of the tribe would charge the tribe primarily, and the United States secondarily, with acts of tribes provoked to hostility and war by our own people—perhaps by the very people who suffered the losses, as judicially declared in Love *v.* The United States and the Rogue River Indians (29 C. Cls. R., 345)—and would operate to charge the annuities of the Indians whether hostilities were instituted or begun by our own people and whether the depredations were acts of retaliation by the tribes, and therefore blameless, or not.

The present law is in redemption of the early promise of the Government to make eventual indemnification in such cases. Every act in which that promise appears has required that the Indians committing the depredation be in amity with the United States as a condition precedent to the right to demand such eventual indemnification. No one, therefore, is disappointed or deceived in his reliance on the promise if payment is made of such claims only as arose from depredations committed by Indians actually in amity with the United States. This proposed amendment is therefore not required by any existing obligations on the part of the United States and still less by any treaty obligation of the tribes in general (as hereinafter shown), and payment of such claims would be merely a gratuity to persons who took upon themselves the risks incident to Indian warfare.

The effect of the amendment, considered with reference to the Indian tribes, would be to make them liable to judgments, and to charge their annuities with damages, for depredations for which they had not assumed liability by treaty.

Out of a total of 666 treaties with the Indian tribes only 44 contain provision for the payment, out of the annuities or otherwise, of claims arising from depredations; even this number is further reduced by various considerations; and of those that were in full force at the time of the commission of the depredations for which claims are pending many imposed conditions which have never been complied with by those who would claim indemnity under their provisions. It would be manifestly unjust to make the mere fact that a treaty had once been entered into—although that treaty may have been abrogated within a year after its ratification, and although it never contained any agreement on the part of the Indians to pay for depredations—a basis for a judgment against the tribe for such depredations.

The jurisdictional act for the adjudication and payment of claims on account of Indian depredations as interpreted by the courts is in accord with the general policy of the Government, and of all Governments, not to pay for property destroyed in war. The amendment suggested by the bill in this regard is therefore antagonistic to the policy of the United States and of Governments generally. Predicated upon what writers on international law have declared with respect to the Government indemnifying all those whose property has been injured in time of war, a thing which such writers have declared to be impracticable, committees in Congress have

reported adversely to legislation providing for the payment of Indian claims in cases of war, "believing the whole revenue of the United States would scarcely be commensurate to meet the demands of applicants in similar cases." (Am. State Papers, Vol. Claims, p. 222.) This was in 1800, and subsequently, in 1838, a committee of Congress, for the same reasons, reported adversely on claims of citizens of Alabama and Georgia for losses sustained during the Creek war of 1836. (House Report No. 932, second session Twenty-fifth Congress.)

This report was cited with approval, and its reasoning followed in a later report on the same subject (House Report 1028, second session Twenty-fifth Congress), and in this later report are cited numerous examples of the application of the principle to other sufferers by acts of war. In the same year a report was made to Congress denying compensation to sufferers from the depredations of the Sac and Fox Indians in Illinois in 1832, in which it was doubted whether it was within the constitutional powers of the Government to make compensation for property destroyed by the public enemy in time of war.

The decisions of the Court of Claims of the United States are in full accord with this doctrine, holding generally that the acknowledgment of liability for such injuries by the Government would take from its citizens one of the strongest inducements to protect their property and furnish the enemy with an additional reason for destroying it. (In re Cassius M. Clay, C. Cls. R., 21, first and second session Thirty-fourth Congress; Loranger *v.* United States, 96 C. Cls. R., first session Thirty-fifth Congress; Peter M. Palliet, C. Cls. R., 220, first session Thirty-sixth Congress; Mary A. Williams, C. Cls. R., 231, first session Thirty-sixth Congress; Valk *v.* United States and Rogue River Indians, 29 C. Cls. R., 62.)

The amendment suggested by the bill would not reach that class of cases where amnesties have been extended by the United States to the tribes, as, for instance, to the Creeks and Seminoles, by Article XXII of the treaty between the United States and the said tribes, proclaimed August 28, 1856 (11 Stat. L., 699), and Article I of the treaty of August 11, 1866 (14 Stat. L., 785). (See Garrison et al *v.* The United States and the Creek Indians, 30 C. Cls. R., 272.)

It is proper to state here that the amendments suggested by the bill would not provide a remedy for the depredations of the Creeks on claims from Georgia and Alabama, inasmuch as these claims for the most part depend upon the report of the Creek Commission, in which they state that in most, and indeed nearly all, the cases they required only testimony as to the claimant's circumstances before and after the loss of the property claimed; that is, before and after the Creek war—before the retreat of the whites from the country and after their return, six months or more afterwards. "Proof of this one fact only could be obtained by them."

Department experience teaches that a considerable number of Indian depredation claims are State claims and depend for recovery upon the ex parte affidavits of claimants and their witnesses, reports of special agents or other officers, and other papers filed in the Departments or in the courts relating to the depredations, but made competent evidence by the fourth section of the act of March 3, 1891. Where the losses arose during our Indian wars, the difficulty of defending claims sustained by ex parte evidence of the character referred to is greatly enhanced.

(3) The adoption of the provision in section 2 of the bill under consideration, permitting judgment to go without regard to the identification of the Indians, will render it impossible, where the Indians are not identified, to show whether they were ever in treaty relations, or whether they were hostile or in amity at the time of the depredation, since, as is evident, it is impossible to predicate amity or hostility of unknown Indians; and, furthermore, will make it to the interest of the claimants not to identify the Indians. The proposed amendment deprives the defendants of any defenses except those which go to the mere fact of a loss and the values of the property alleged to have been taken, and questions of title, ownership, and statutes of limitation, which infrequently arise.

The aggregate amount claimed in the 10,841 cases which have been filed in the Court of Claims is, in round numbers, $44,000,000. A conservative estimate of depredation claims thus filed would show at least $22,000,000 in the claims not within the jurisdiction of the court under the act of March 3, 1891. That act being jurisdictional and not creating liability, it will be seen that the proposed amendment would make the tribes and the United States liable for the additional $22,000,000. The removal of the defenses of alienage and hostility of the tribes and the waiver of the identification of the depredating bands or tribes would result in making the probable liability of the United States on account of these claims in round numbers, estimating cases disposed of and making due allowance for the reduction of values and the insufficiency of the evidence in particular cases, $30,000,000.

Respectfully,

JUDSON HARMON, *Attorney-General.*

HON. JOHN L. WILSON,
Chairman Committee on Indian Depredations,
United States Senate, Washington, D. C.

DEPARTMENT OF JUSTICE,
Washington, D. C., March 6, 1896.

SIR: I am in receipt of your communication of the 24th ultimo, transmitting to me S. 38, being a bill to amend an act entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March 3, 1891, with a request, pursuant to resolution of the Committee on Indian Depredations, that I examine the bill and submit to the committee a report as to the provisions contained therein.

The proposed amendment enlarges the jurisdiction of the Court of Claims—

(1) By the addition of a new class of cases.

(2) By the admission of cases of two classes which are barred under the provisions of the act of March 3, 1891.

The new class of cases over which the jurisdiction of the court is extended by the bill is described in lines from 7 to 11, inclusive: "All Indian depredation claims which heretofore have been examined, allowed, and an award made therein by any State board of examiners, duly appointed under the authority of the legislature of such State for that purpose." In such cases the court is authorized to render judgment in favor of the State whenever it shall appear that the State board has allowed or that the State has paid or promised to pay the claim (lines 14, 15, 18).

It would be difficult to approximately estimate the number of claims that would be included in the above description. Two States, so far as my knowledge extends, have appointed State boards or commissions for this purpose—Oregon and Kansas. My information is that no claims have been paid by Kansas; but if the clause requiring judgment to be entered in favor of the State wherever a mere allowance is to be made by the State board be literally construed, the number of valid claims from Kansas would probably exceed the number from Oregon. Probably by far the greater number of such claims from both States named have been heretofore filed in the Court of Claims, the States having paid but few of such claims.

The proposed amendment would give to the States, in cases where said States have paid such claims, an advantage that the act of March 3, 1891, does not give to claimants in this, that where the States have paid for the depredations of hostile Indians the court would be obliged to render judgment for such State irrespective of the amity of the tribe doing the depredation. The act of March 3, as construed, excludes the jurisdiction of the court in all cases of individual claimants where the Indians doing the depredation were not in amity with the United States, except in allowed cases.

The classes of claims now barred which would be admitted by the proposed amendment are:

(1) Those claims which accrued prior to June 1, 1865, but which were prior to March 3, 1891, filed in any of the Departments of the Government, except the Interior Department, or before the Court of Claims, or with any State board of examiners, and which have not been examined or allowed. This class would probably be small; it might include some claims filed in the War Department and possibly some presented to the Texas commission. The claims embraced in this class are at present barred by the first proviso of section 2 of the act of March 3, 1891.

(2) All claims, in which no examination or allowance has been made, which have been or shall have been filed in any Department of the Government or in the Court of Claims or with any State board of examiners, between March 3, 1891, and the date of the passage of the proposed amendment. Such claims are now barred by the second and third provisos of section 2 of the act of March 3, 1891. This clause of the bill would seem to open the doors to all claims heretofore barred, if the claimants or their attorneys have the alertness or the good fortune to obtain the information which will enable them to file their claims before any of the tribunals named before the bill becomes a law. Incidentally it may be said that there are two petitions now in the Court of Claims, aggregating more than $30,000 in amount, which were filed after the 3d of March, 1894 (and which, therefore, are barred under the present statute), which would be valid claims under the proposed amendment.

There are two or three other features of the bill to which especial attention should be directed:

(1) By lines 11, 12, et seq., it is provided that wherever it shall satisfactorily appear to the court, "in any verified petition," that the claim has been allowed by a State board, the court may enter judgment. It goes without saying that the fact should appear by some means other than a verified petition before judgment could be rendered.

(2) The court is to render judgment in favor of the State, not only when the claim has been paid by the State, but whenever it has been allowed by any State board (lines 12, 13, 19, 20, 21). Inasmuch as the claimant is entitled to recovery in his individual capacity, wherever the claim has not actually been paid, the mere fact of an allowance by a State board certainly should not authorize recovery by the State.

(3) Judgment is to be entered in favor of the State wherever a claim has been paid

by the State, "either in money or by the issuance of any of its State bonds, or of certificates of indebtedness, or of allowance, or of award, or of other forms of obligations." This would seem to be inequitable, as the State board's certificate of allowance, for example, does not constitute either actual payment to the claimant or such an obligation on the part of the State as will insure ultimate payment; the bill does not even require it to be shown that the true redemption of the State's certificate of allowance in case judgment is rendered in favor of the State. Moreover, the same objection applies in this case as in the case last cited above: the claimant has a remedy as an individual, and has, no doubt, in the majority of cases, availed himself of that remedy.

(4) Another, and perhaps the most serious objection to the passage of the bill in its present form, is to be found in the fact that it relegates to the State board all the higher functions of the court, and leaves to the Court of Claims merely the ministerial duty of rendering judgment on being informed that the State board has made an allowance. The fact of allowance is the only fact necessary to be proven. The court can not consider and weigh the evidence; they can not admit the defense of a want of amity, or of a want of citizenship, or of just cause and provocation; they can not hear the defendant Indians in their own behalf; they can not inquire whether the claimant has sold or assigned his claim; they can not even ascertain whether he owned the property on which the claim is based. If the commission has allowed a claim, the court has nothing to do but render judgment; this, too, irrespective of those defenses applicable by the present law to all Indian-depredation claims.

The reasons assigned seem to justify the recommendation, if the principles for the adjudication of claims arising from Indian depredations are to be so radically changed as the proposed amendment suggests, that the bill at least be carefully revised and materially modified before it is reported.

Respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The CHAIRMAN OF THE COMMITTEE ON INDIAN DEPREDATIONS,
United States Senate.

[S. 38. Fifty-fourth Congress, first session.]

A BILL to amend an act entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March third, eighteen hundred and ninety-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March third, eighteen hundred and ninety-one, be amended by adding thereto as follows:

"The Court of Claims shall also have jurisdiction to adjudicate all Indian depredation claims which heretofore have been examined, allowed, and an award made therein by any State board of examiners, duly appointed under the authority of the legislature of such State for that purpose, and whenever it shall satisfactorily appear to said court in any verified petition therefor, filed therein, that any such State board has heretofore allowed or where it shall satisfactorily appear to said court that any State has heretofore paid any Indian depredation claim, either in money or by the issuance of any of its State bonds, or of certificates of indebtedness, or of allowance, or of award, or of other forms of obligations, that said court be, and it is hereby, authorized to enter up judgment in favor of such State for such amounts as said court shall find to have been so allowed or so awarded by such boards, or which shall have been so paid by such States, either in money or in bonds, or in certificates, or in other forms of obligations issued by such State in payment, or in satisfaction, or in evidence of allowance, or of award of such claims; and said judgments of said court shall be reported to Congress by the Attorney-General of the United States as other judgments in other cases are authorized to be reported by him under the provisions of said act; and whenever it shall satisfactorily appear to said court that any Indian depredation claim shall have been filed prior to the date of the passage of this act in any of the Departments of the Government of the United States or in the Court of Claims or with any State board of examiners of any State created by the laws thereof to examine the same, and wherein no examination thereof or any award or allowance or payment had been made therein, either by such State or by the United States, that said Court of Claims shall consider all such claims as pending, for all the purposes of an adjudication thereof by said court, in the same manner and to the same extent as if said claims had been pending before any of the Departments of the United States at the date of the passage of said act."

DEPARTMENT OF JUSTICE,
Washington, D. C., April 16, 1896.

SIR: For your information and such use as your committee shall make of it, I herewith hand to you copy of a circular under date of March 31, 1896, of the Attorney-General relating to the defense of Indian depredation claims.

The April trial calendar of the Court of Claims discloses 97 cases for trial, the amounts of which aggregate $308,483.91, while the April law calendar for the same month discloses 37 cases pending under motions for new trial, aggregating $227,256.89.

The total of 134 cases disclosed by the trial and law calendars generally exhibit the presentation to the court on my part for its action of cases involving $535,740.80 for the month of April.

The decisions of the Supreme Court in the class of cases taken there under the act of March 3, 1891, have relieved the congested condition of the business in the Court of Claims and the cases are being rapidly presented for trial at this time by the Department.

Respectfully,

CHARLES B. HOWRY,
Assistant Attorney-General.

The CHAIRMAN OF THE COMMITTEE ON INDIAN DEPREDATIONS,
United States Senate.

DEPARTMENT OF JUSTICE,
Washington, D. C., March 31, 1896.

TO CLAIMANTS AND ATTORNEYS:

The recent decisions of the Supreme Court of the United States in the cases of Benj. H. Johnson *v.* The United States et al. (160 U. S., 546), Samuel Marks et al. *v.* The United States and the Bannocks, and Alvin C. Leighton *v.* The United States and the Ogallala Sioux Indians, involving the construction of the act of March 3, 1891 (26 Stat. L., 851), render necessary the following suggestions for the advancement and final disposition of Indian depredation claims. The prompt and ready compliance on the part of those prosecuting the claims with these suggestions will free the Department from the labor and embarrassment involved in the effort to have proof taken in cases not within the jurisdiction of the court under the recent decisions, and will greatly facilitate the early advancement of meritorious claims, and particularly those where special reasons exist for closing the proof. The Department force for investigating cases in the field and taking the proof, as well as that employed in the court in the preparation and argument of cases being quite limited, I deem it proper to add that delays will continue to be inevitable; but with the cooperation of those prosecuting the claims in the matter of taking proof and retaining in the files for Department attention only those claims which of right should be prosecuted under the principles of the decisions mentioned, it is believed that the work may now be put in shape to be closed within a comparatively short period of time. The following rules are therefore adopted, supplemental to those heretofore promulgated under date of September 28, 1893, for the defense of Indian depredation claims, to wit:

"1. Claimants and attorneys representing claims are requested to submit to the Assistant Attorney-General in charge revised lists of pending claims of citizens whose property was taken or destroyed by any band, tribe, or nation of Indians in amity with the United States where proof is desired by such claimants; and a separate list of pending claims of aliens at the time of the depredation and of persons (whether aliens or citizens) whose property was taken or destroyed by any band, tribe, or nation of Indians not in amity with the United States at the time of the taking or destruction of the property of such persons.

"2. Special attention will be undertaken by the Department in affording claimants an opportunity to present their proof in cases of citizenship and in cases where the defendant band, tribe, or nation of Indians was in amity with the United States at the time of the alleged depredation where such claimants and their witnesses are aged and infirm, subject to the exigencies of the defense, if such claimants and those representing them will give the necessary information duly verified, and promptly cooperate with the Department to this end by supplying typewritten abstracts of such affidavits and testimony as may be on file where the same has not been printed under the order of the court.

"3. Where, from the record in the case, the claimant appears to have been an alien at the time of the commission of the alleged depredation, and where the band, tribe, or nation of Indians charged was not in amity with the United States at the time of the alleged losses, according to the precedents established by the Court of Claims, the Department will not undertake to afford facilities for taking further proof for such claimants, except in cases where pending appeals may reverse the

findings of the Court of Claims, and then only pending these appeals at the discretion of the Department, subject, however, in all cases to the orders of the Court of Claims."

The Department will continue to present test cases respecting the amity or want of amity of particular bands or tribes of Indians for decision as early as practicable. Up to this time the Court of Claims has established the hostility of Indians as follows:

Apache	1855	1 C. Cls., Alire.
Apache, Mescalero	April 23, 1869	2976, Montano.
Arapahoe	May 26, 1867	819, Leighton.
Bannock	June, 1878	3104, Dixon. 3105, Marks et al.
Cheyenne, Northern	May 26, 1867	819, Leighton.
Cheyenne, Southern	July 5, 1874	1900, Meloche.
Cow Creek	1861	1415, Bailey.
Creek	May, 1836	3141, Daniel.
Do	1836	3584, Wellborn.
Klikitat	March 26, 1856	2280, Bush.
Mohave	January to July, 1859	31, Barrow et al.
Navajo	August and September, 1851	2066, Casados.
Do	August 29 to December 25, 1858	31, Barrow et al.
Nez Percé	September 13, 1877	923, Woolverton. 2811, Stone.
Pitt River	May, 1858	1416, Adams.
Piute	June, 1878	3104, Dixon. 3105, Marks. 3106, Riddle. 3107, Short. 6568, Wilson.
Pottawotamie	1812	7931, Loranger.
Rogue River	August 3 to September 10, 1853	277, Myer. 1420, Ross.
Do	October 9, 1855	280, Love.
Do	February, 1856	475, Valk.
Sioux (Minnesota)	August 18, 1862	3683, Darling. 9341, Darling. 3856, Wright.
Sioux, Brulé	May, 1867	4634, Penny.
Sioux, Ogallala	November 6, 1865	4634, Penny.
Do	April 10, 1867	820, Leighton.
Do	June 15, 1867	817, Leighton.
Do	August 1, 1867	818, Leighton.
Yakima	March, 1856	2280, Bush.

JUDSON HARMON, *Attorney-General.*

[Before the honorable Committee on Indian Depredations, United States Senate.]

In the matter of Senate bill No. 2247, entitled "An act to amend an act entitled 'An act to provide for the adjudication and payment of claims arising from Indian depredations,' approved March 3, 1891."

The proposed amendment is to give (or restore) the right to recover for depredations to persons who have declared their intention to become citizens and whose claims are already filed in the Court of Claims.

The recent decision of the United States Supreme Court in the case of Benjamin H. Johnson, appellant, *v.* The United States and Ute Indians, No. 325, has affirmed the Court of Claims that in order to recover under the act of March 3, 1891, the claimant must have been a fully naturalized citizen at the date of the depredation. In this case the claimant was not a citizen at the date of the depredation, but became such before the passage of the act of March 3, 1891. The treaty with the Utes of October 7, 1863 (13 U. S. Stat. L., p. 673), provided for indemnity to "white inhabitants" for property taken by the Utes without provocation, etc., and an examination of the treaties with other Indians shows that "residents" and "inhabitants," or "white residents" and "white inhabitants," are the classes protected by treaties, and the words "citizens" or "citizens of the United States" do not in this relation appear at all in the treaties.

The general act regulating the conduct of Indians and of "white inhabitants" toward each other, approved June 30, 1834, expressly provides for indemnity to "inhabitants" and "citizens." (Rev. Stat., sec. 2156.) Also by said act all "white persons" are held responsible for property taken by them from the Indians in double the value thereof. (Sec. 2154, ibid.) So that neither by the treaties or statutes has

any distinction been made between "inhabitants" or classes of white persons, nor has the Interior Department in its adjudication of claims ever in fifty years made any distinction between the claims of "citizens" and the claims of "residents" or "inhabitants," and the Indians have been required to pay "inhabitants" of the United States without distinction. Also, these "inhabitants," without reference to citizenship, have always been held to strict accountability by the United States for their behavior toward the Indians.

The act of March 3, 1891, struck down the remedy and took away the forum provided by law for three classes of persons, viz:

First. Of those who had filed their declaration of citizenship before, but had not taken out their final papers at the date of the depredation, but had done so before the passage of the act of March 3, 1891.

Second. Of those who had filed their declaration of citizenship after the depredation, but had not taken out their final papers at the passage of the act of March 3, 1891.

Third. Of those who are aliens.

This amendment will restore the rights and remedy taken away from the first two classes, provided that they have filed their claims in the Court of Claims within the statutory limitation which expired March 3, 1894, while the aliens are left without any remedy.

The questions, first, of the vested rights of these classes of persons under the treaties and statutes, and second, whether the act of March 3, 1891, was retrospective, have been duly argued in said cause, and the court has decided that Congress could and did take away the rights of these classes of persons before the Interior Department, and gave them no other tribunal; and, substantially, that while this may have been unjust, inequitable, and a breach of faith in the Government with these persons, yet that is not a question for the court.

It is admitted that the act of Congress regulating conduct of "inhabitants" and Indians toward each other, and the Indian treaties protecting "white inhabitants" was for a purpose; was for the best interests of the Government as a public policy and to encourage foreign and other emigration to the border and the reclaiming of the waste lands. We invited these foreign people to abandon their country and to adopt ours, promising them the equal protection of our laws and treaties. They accepted, settled on our border, exposing their families and property to all the dangers, and even horrors, incident to that act. They became denizens and incipient citizens, and so declared themselves. They obeyed our statute, which required them to make no effort to obtain private redress for wrong done to their property or to their families by the Indians, and they were promised that if they obeyed this law the United States would see to it that they had proper redress, and that it would compel the Indians to pay for the property they might take from such settlers.

How the act of March 3, 1891, harmonizes with or meets these promises let the recent decision answer.

Practically under this decision we can not allow the Indians to rob "inhabitants" because they are not citizens, for fear they will extend their jurisdictional privilege to full-fledged citizens of the United States; but according to it, the act and the treaties now protect the property of "citizens" only, or if the United States claims otherwise, and compels the Indians to pay for property taken from all denizens or "inhabitants," then the United States collects of the Indians and gives the denizen or prospective citizen nothing. He is robbed by the Indians and the retaken property of these settlers or its value is collected by and appropriated to the use of the United States, which in many instances has used these depredation acts as an argument to get land ceded by the Indians, and then getting the land has refused to pay the settlers for losses—a very dishonorable course for a Government, which in such cases is equitably but a trustee for settlers; a principle which in justice ought to be the governing principle in a great many of these Indian depredation claims. In the case of Love *v.* The United States and Indians (29 C. Cls. R., p. 332) Justice Nott of that court said:

"When the grant of jurisdiction passed to the court there were claims resting on treaties and statutes in which there were terms broad enough to include 'inhabitants.' In such cases it would be no defense for the Indian defendants to say that 'inhabitants' whom they had despoiled were not citizens, and conversely if the United States secured stipulations in favor of 'inhabitants,' on the faith of which aliens went into the dangerous vicinage of the Indians, it was but right to allow them the jurisdictional privilege of prosecuting their claims."

Nevertheless Justice Nott, under the late decision, is wrong, for the Indians do repudiate and do deny responsibility, and plead successfully that the claimant was not a citizen of the United States at the time they robbed him. And while most of these two classes referred to have, since the depredation, become citizens, and others have declared their intention to become such, they are now, like the alien, without redress; and those not yet citizens and on the border can be plundered at will by

the Indians, while if they attempt to get private redress or revenge they are punished by law.

Protection against barbarians has always been given by civilized white nations to white people, whether citizens or not, when such nations have quasi jurisdiction over such barbarians. Yet in this case the Government has abandoned those who have relied upon its pledges, made also when it claims to be guardian of these wards of the nation, for whose acts it ought, in some degree, to be responsible, and particularly when it has by law prohibited these prospective citizens from making reprisals or punishing the offending Indians.

GLEN W. COOPER,
79 Corcoran Building, Washington.

NOTE.—The fact that the Interior Department, up to March 3, 1891, could only investigate and adjudicate these claims, and that to pay them a special appropriation was required from Congress, does not change the fact that this Department was a forum for these claimants. The Court of Claims does not do any more, as its judgments, under the act of March 3, 1891, also require a special appropriation by Congress.

BRIEF OF COUNSEL FOR CLAIMANTS.

I deem it proper in this connection to call attention to the following extracts from the reports of the Commissioner of Indian Affairs for the years 1890 and 1891. These extracts give a short summary of the legislation relating to Indian depredations which culminated in the act of March 3, 1891:

"Indians have depredated upon the property of white people and of other Indians from the time of the earliest settlements. Many of the Indian wars which disturbed the frontiers and threatened the existence of exposed villages in Colonial times originated in this way, and early efforts were made to prevent or remedy the evil by legislation.

"The first of such legislation is found in the act of May 19, 1796 (1 Stat. L., 472), which provided that if the Indians took or destroyed property the owner should present his claim to the superintendent or agent of the tribe charged, who would demand satisfaction from the Indians. If it was not made within eighteen months the superintendent was to report the claim and his action thereon to the President, and 'in the meantime, in respect to the property so taken, stolen, or destroyed,' the United States guaranteed to the party injured an eventual indemnification, 'provided he did not seek private satisfaction or revenge.' This act also provided for 'deducting the amount' out of the annual stipend which the United States is bound to pay the tribe; and further, that the Indian charged might be arrested, etc. This and subsequent conciliatory acts also provided that if the property of a friendly Indian should be taken by a white man the same should be paid for out of the Treasury of the United States, provided the Indian did not seek private satisfaction or revenge.

"The act 'to regulate trade and intercourse with the different tribes and to preserve peace on the frontiers,' approved June 30, 1834 (4 Stat. L., 749), not only reenacted all the provisions above mentioned, but restrained white people from going onto the reservations without a license from the agent or other person in charge. It also provided that claims against Indians should be barred unless presented within three years from the date of the injuries complained of. The law stood thus until the act approved February 28, 1859 (11 Stat. L., 401), repealed that clause of the act of June 30, 1834, which provided that the indemnity should be made out of the Treasury of the United States, but left unchanged and unrepealed the obligation of the Indians to pay for the losses out of their annuities. By a joint resolution of June 25, 1860, Congress declared that this repeal should not be so construed as to destroy any right to indemnity which existed at the date of the same, i. e., February 25, 1859, from which it would seem that claims originating prior to that time were not affected by the act of that date.

"The act of July 15, 1870 (16 Stat. L., 360), provided that no claim for Indian depredations should be paid in future except by special appropriation by Congress. The act of May 29, 1872 (17 Stat. L., 190), directed the Secretary of the Interior to prepare rules and regulations prescribing the manner of presenting depredation claims under existing laws and treaties and the kind and amount of testimony necessary to establish their validity; also, to investigate the claims presented and report them to Congress each session, whether allowed or not, together with the evidence upon which his action was based. Since this date this office has prepared these reports, and the work was done by its civilization and educational division until after the passage of the act of March 3, 1885. It was then transferred to the depredation division, which, however, did not receive official designation as such until January 1, 1886.

"A clause in the Indian appropriation act of 1885 (23 Stat. L., 376) set aside $10,000 'for the investigation of certain Indian depredation claims.' This act provided (1) for making and presenting to Congress at its next session a complete list of all Indian depredation claims then on file and (2) for the investigation and report to Congress of all depredation claims in favor of citizens of the United States chargeable against any tribe of Indians by reason of treaty stipulations. The first part of this work was transmitted to Congress March 11, 1866, and is to be found in Executive Document No. 125, Forty-ninth Congress, first session.

"To carry out the second requirement the Secretary of the Interior was authorized to cause such additional testimony to be taken as would make it possible to form a just estimate of the kind and value of the property damaged or destroyed. For this purpose special agents were employed and sent to the scenes of the alleged depredations, and additional clerks were appointed in this office to report the claims to the Department for transmittal to Congress as rapidly as investigated. The number of employees in this division, exclusive of the special agents (who are five in number), has been as low as two and as high as six; there are now four.

"Much of the first year's work was rendered useless for the following reason: The construction placed upon the act of March 3, 1885, by both the Indian Bureau and the Department of the Interior, was that claims barred by the limitation clause of the act of June 30, 1834 (4 Stat. L., 731, sec. 17), were not entitled to investigation on their merits. Hence they were examined to see whether they have been filed 'within three years from the commission of the injuries,' and, if not, they were briefly reported as 'barred' and not entitled to consideration. When quite a number had been thus disposed of, Congress, by the act approved May 15, 1886 (24 Stat. L., 44), which appropriated $20,000 for continuing the investigation of the class of claims designated in the act of March 3, 1885, added the clause 'and the investigation and report shall include claims, if any, barred by statute, such fact to be stated in the report.' This change in the law necessitated a return from Congress or the Department of all claims which had been reported as 'barred' and not examined on their merits. (See report of Commissioner of Indian Affairs for 1890, p. CXXVL.)

Again, in his report of 1891, the Commissioner says:

"May 17, 1796, under the approval of George Washington, Congress solemnly promised eventual indemnification to the citizens and inhabitants of the United States who might, through no fault of their own, lose their property at the hands of the Indians who were holding treaty relations. In the nearly one hundred years that have elapsed since that date the promise has been kept in regard to not more than 3 per cent of the claims which have been filed. The law forbade these claimants, under penalty of losing the amounts of their claims, from attempting by private efforts to recover their property where such efforts might involve the country in an Indian war—in the language of the law, from taking 'private satisfaction or revenge.' Becoming thus, by its own law, their agent and attorney, and forbidding them in any other course of procedure, the Government appeared bound by honor and good policy to redeem its pledges and faithfully carry out its promises.

"On the last day of its last session Congress enacted a law 'transferring jurisdiction as to the adjudication of all these claims from the Interior Department to the Court of Claims.' This office has long desired and frequently recommended that some such action should be taken; and while the measure adopted by the last Congress does not, in some of its respects, meet my entire approval, yet in the main I welcome its enactment, and am glad that a step has been taken looking to the ultimate redemption of the obligations of the United States." (See Report of the Commissioner of Indian Affairs for 1891, p. 117.)

For nearly one hundred years prior to the year 1891, as the above report states, the United States had kept its promise in respect to scarcely 3 per cent of these claims. Then was passed the remedial act of March 3, 1891, which was intended to afford general, speedy, and substantial relief. One provision of the act (sec. 13) directed that the investigation by the Interior Department, ordered by a previous act, should cease, and that the claims and business should be transferred to the court. Another section (sec. 12) provided for the appointment of an Assistant Attorney-General to defend the interests of the United States and the Indians, while all through the act are found unusual and explicit directions intended to secure to the claimants an early hearing and a speedy adjudication of these long-delayed claims.

Five years have elapsed since the passage of the act of 1891, and let us briefly examine the results reached in that time. The facts I am about to cite are for the most part taken from the last official report of the Attorney-General, and therefore are free from the suspicion of being colored in the claimants' favor.

On page 51 of that report is found the following:

Cases filed under the act	10,811
Cases reduced to judgment	914
Judgments favorable to defendants	431
Judgments favorable to claimants	513

Number of judgments from November 1, 1894, to November 5, 1895.....	44
Amount of judgments favorable to claimants.....	$1,115,186
Amount of judgments in cases in which motion for new trial is pending.	$364,251

Thus, out of a total of 10,841 cases, only 944 have been tried in five years, and only 44 in the last year; but even these figures are misleading, for of the 431 judgments in favor of the defendants a large number were given in cases dismissed by consent or as duplicate cases, while of the 513 judgments in the claimants' favor nearly three-fourths, I believe, were given in cases known as "preferred cases." Preferred cases are those that had been very carefully examined by the Interior Department, both in the office and in the field, and favorably reported on and recommended for payment by the Secretary of the Interior, many of them more than once, which cases, it was supposed, would consume comparatively little time, either of the Attorney-General's or of the court's, but even of these about one-third, as shown by the above schedule, are held up on motions for a new trial under that anomalous provision of the Revised Statutes, section 1088, which authorizes the Attorney-General to move for a new trial at any time within two years after judgment.

With such progress fifty years or even more would hardly seem too long to allow for the final disposition of these cases, were it not for the fact that long before that time the claimants would have died, their evidence have perished, and the United States would then have the proud satisfaction of knowing that by a policy of delay and obstruction it had accomplished, though at a very considerable expense, that which it could have accomplished in a manlier way by open repudiation with no expense at all.

Again, let us glance at some points of practice.

The act provides that in preferred cases the court shall render judgment on the award of the Interior Department unless either the claimant or the United States shall elect to reopen the case and try the same before the court; the act provides that the court shall make rules for the taking of the testimony of witnesses; the act provides that it shall be the duty of the Attorney-General to appear and file his defense of whatsoever nature within sixty days after the petition is served on him, unless the time shall be extended by the court by order made in the case, and even contemplating the possibility of the Attorney-General's neglecting or disregarding this provision, the act further provides that in that event the claimant may at once proceed to prove his case, under such rules as the court may make in the premises.

Now, with all these elaborate provisions of the act of 1891, to afford the claimant speedy justice so far as it was possible after the long delay he had already suffered, what is the result? If he has a preferred case, he must get the Attorney-General to consent to a submission or stipulation before the court will act; if he wishes to take the testimony of his witnesses who are aged and passing away, he must supplicate the Attorney-General to appoint a time and place—the rules of court afford him no other practical relief; if he wishes a case heard that he has prepared and is ready in, he must (it may be for years) await the pleasure of the Attorney-General. Indeed, if the X-rays were thrown on the Court of Claims one might almost expect to see the office of the Attorney-General.

No right-thinking person, it seems to me, can compare the provisions of the act of 1891 with the results that have obtained from it in practice without seeing that there is there something radically wrong. It may be that no individual is in fault; it may simply be that the machinery is cumbrous and obsolete; but in that case the sooner it is abolished and a more modern method substituted the better. At any rate, it is the duty of Congress to seek out the cause of this miscarriage of justice and to apply the remedy. For of all forms of injustice, that in the name of justice and under the color of law, is the most unseemly.

O