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Charades, Anyone? The Indian Claims Commission in Context

WARD CHURCHILL

> For the nation, there is an unrequited account of sin and injustice that sooner or later will call for national retribution.
>
> —George Catlin, 1844[1]

One of the more pernicious myths shrouding the realities of Indian-white relations in the United States is that the United States has historically comported itself according to uniquely lofty legal and moral principles when interacting with "its" indigenous peoples. The idea has been around in the form of official rhetoric since at least as early as 1787, when Congress, already pursuing a practical policy going in exactly the opposite direction, used its enactment of the Northwest Ordinance as an opportunity to pledge itself to conducting its Indian affairs in "utmost good faith."[2] As President Harry S. Truman would put it 159 years later, it should be "perfectly clear...that in our transactions with Indian tribes we have...set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights."[3]

In 1985, the late Wilcomb E. Washburn, then preeminent "American Indianist" historian for the federal government's Smithsonian Institution, waxed a bit more expansive when he observed that "[b]ecause U.S. Indian policy is...supportive of Indian values and aspirations, questions that in other countries would not arise are the subject of intense debate in the United States.... [Hence,] in broad, general perspective, one is impressed with the extraordinary recognition to the now powerless Indian tribes of this country not only to maintain a secure trust-guaranteed and tax-free land base, but to exercise aspects of sovereignty that normally derive from the control of territory held by a powerful sovereign."[4]

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Lest it be argued that views like Truman's and Washburn's represent little at this point beyond quaintly jingoistic anachronisms, note should be taken that the United States is presently engaged at the United Nations (UN) in pushing its own version of Indian law as *the* model upon which the UN's incipient Universal Declaration on the Rights of Indigenous Peoples should be based. The United States is claiming that its own Indian policy is most worthy of emulation by the rest of the world. Conversely, the US has threatened to block any codification of Native rights in international law that fails to conform to its own purportedly exalted standards of enlightened humanitarianism.[5]

The expression of such sentiments is hardly a uniquely conservative vice. They are continually voiced by more moderate commentators. "Few great powers," observed liberal policy analyst Harvey D. Rosenthal in 1990, "have acknowledged such fundamental moral or legal debts, especially from a small, powerless minority in their midst," as has the United States with respect to American Indians.[6] Nor, by and large, will one encounter much of an alternative among what are ostensibly the more radical sectors of the Euramerican populace, a matter abundantly evidenced in the recent tirades of Bob Black, Larry Jarach, and other prominent "anti-authoritarians" in the pages of *Anarchy* magazine.[7]

From start to finish, then, and irrespective of ideological cant, the United States settler society's interpretation of itself is all but invariably adorned in "that protective cloak of righteousness which is the inevitable garment of the Anglo-Philistine."[8] As Rosenthal himself admits, the resulting hegemony—that the United States has always been "well-intentioned" in its relations with Indians—is one "that [has] long comforted whites and afflicted Indians" in the most grotesque manner imaginable.[9]

This last is not difficult to discern, at least for anyone willing to look at the matter honestly. Despite Washburn's glowing description of Native North America's "trust-guaranteed and tax-free land base," the fact is that reservation-based American Indians are the poorest people on the continent, receiving by far the lowest annual and lifetime incomes of any census group. Overall unemployment on most reservations hovers around 60 percent, while on some it has been in the ninetieth percentile for decades.[10] The most impoverished area of the United States for the past forty years is Shannon County, located on the Pine Ridge Sioux Reservation in South Dakota.[11]

The indices of poverty in Indian Country are now, as they have been throughout the twentieth century, of a sort more commonly associated with Third World locales than with those inside the earth's mightiest economic superpower.

> The Indian health level is the lowest and the disease rate the highest of all major population groups in the United States. The incidence of tuberculosis is over 400 percent higher than the national average. Similar statistics show that the incidence of strep infections is 1,000 percent, meningitis is 2,000 percent higher, and dysentery is 10,000 percent higher. Death rates from disease are shocking when Indian and non-Indian populations are compared. Influenza and pneumonia are 300 percent greater killers among Indians. Diseases such as hepati-

> tis are at epidemic proportions, with an 800 percent higher chance of death. Diabetes is almost a plague.[12]

Malnutrition claims Indians at twelve times the US national rate, while infant mortality runs as high as 1,400 percent of the norm.[13] In addition, "between fifty thousand and fifty-seven thousand Indian homes are [officially] considered uninhabitable. Many of these are beyond repair. For example, over 88 percent of the homes of the Sioux in Pine Ridge have been classified as substandard dwellings."[14] Consequently, Indians die from exposure at five times the national rate.[15] Under such conditions, despair is endemic, a circumstance engendering massive rates of alcoholism and other forms of substance abuse, as well as attendant social and familial violence, each of which takes its toll. The suicide rate among Native teenagers runs up to 10,000 percent that of non-Indian youth.[16]

All told, in a country where male life expectancy averages 71.8 years, a reservation-based American Indian man can expect to live only 44.6. Although his female counterpart lives about thirty-six months longer than he, her general population sister has an average life expectancy of 78.8 years.[17] Thus, each time an American Indian dies—or is born—on a reservation in the United States, a third of a lifetime is lost. To put it another way, one-third of each succeeding generation of American Indians has been annihilated in a quiet holocaust that has continued unabated since the "Indian Wars" supposedly ended in 1890.

The reason underlying this altogether dismal situation also seems strikingly apparent and can be found in the very trust status—about which Washburn professes such pride—in which indigenous property is held by the United States. Asserted most clearly in the Supreme Court's 1903 *Lonewolf* opinion, the federal government's self-assigned and perpetual "fiduciary authority" over Indians has afforded it the "plenary power" to dispose of Native assets in whatever manner it sees fit.[18] Hence, the abundance of minerals and other resources that grace many reservations have been exploited with increasing intensity over the past half-century at prices deeply discounted to corporate "developers" by the secretary of Interior (acting in his "trustee" capacity).[19] Both resources and profits have correspondingly flowed into the United States economy while Indians have been left destitute.

The term by which such relations between nations or peoples are customarily described is *colonialism*, albeit in this case of a sort in which the colonized are encapsulated within the colonizer's claimed domestic territoriality rather than of the more classical overseas variety.[20] Internal colonialism is colonialism nonetheless and it has been prohibited under international law since the UN Charter was effected in 1945.[21] In no small part, this is because to be colonized, whether externally or internally, is to be denied that range of self-determining prerogatives that, as a matter of law, comprise the most fundamental rights of any nation.[22] Colonialism is thus the very obverse of the sovereignty Washburn and his colleagues contend is exercised by indigenous nations in the United States. Moreover, given the nature of its impact upon Native people over the past one hundred years, it is fair to say that the US

internal colonial model offers ample confirmation of Jean-Paul Sartre's famous dictum that "colonialism equals genocide."[23]

NECESSARY ILLUSIONS

One would think that the astonishing gulf separating Washburnian descriptions of US benevolence towards Native peoples and the unremitting squalor to which those same peoples continue to be subjected at the hands of the United States might provoke what sociologist C. Wright Mills once termed "cognitive dissonance" among the public.[24] This, in turn, may generate the sort of outrage that would compel a constructive alteration in the relationship between the United States and those indigenous nations upon whose traditional territories the United States has constituted itself.

As Vine Deloria, Jr. long ago observed, however, it is a characteristic aspect of contemporary North American society that "no significant number of people will be stirred from their inertia to accomplish anything. They will not think. They will not question. And, most importantly, they will not object to whatever happens until it directly affects the manner in which they view their own personal survival."[25] More charitably, Imre Sutton has remarked that "other factors [also] inhibit our fullest perception of tribal grievances. Perhaps apathy or indifference prevails. Yet I am inclined to think that most Americans too readily believe that [American Indians have been] properly compensated" for whatever evils may have befallen them in the past, and that things really are "better" now.[26]

There are a number of reasons why this (mis)impression has come to be so deeply rooted in the mainstream American mind, beginning with the relentless drumbeat of official pronouncements such as Truman's and extending through the matrices of news packaging, media depiction, and the spin so carefully put to truth by myriad "responsible scholars" such as Washburn and Rosenthal who infest the academic milieu.[27] The cornerstone upon which the whole proposition's credibility may rest, however, assumes a much more concrete form—that of the federal government's Indian Claims Commission (ICC), an entity maintained from 1946 to 1978 for the express purpose of resolving outstanding grievances accumulated by Native people against the United States during the course of the latter's expansion and consolidation over the preceding two centuries.[28]

The prevailing view is that the ICC represented "the greatest submission ever made by a sovereign state to moral and legal claims," as one federal jurist put it at the time.[29] Its purpose was "to do justice for its own sake" where American Indians were concerned.[30] Over the past three generations, it has thus become a veritable truism among members of the dominant settler society that "no stronger motive than conscience has compelled this nation...to grant its indigenous minority the right to seek redress" through such a mechanism.[31]

The most cursory examination of the record reveals the untruths embedded in such postulations. Had the United States ever actually been motivated by its collective conscience to dispense justice to Indians, it might all along

have simply elected to comply with the extant requirements of international law rather than ignoring them and seeking to pervert them to its own ends (a stance it still displays).[32]

Even within the framework of its own judicial structure, the United States might easily have provided Native peoples, whose land was so systematically expropriating, some measure of redress at least as early as 1855, when it created a special court to "hear and determine all claims founded upon any law of Congress, or upon any contract, express or implied, with the government of the United States."[33] Instead, in 1863, Indians were specifically denied access to the court of claims by a Congressional act.[34]

> [Moreover, at] the same time the right to redress claims was being circumscribed *for* the Indian it was being expanded for the white man *against* the red man. The claims of whites for "depredations" committed against them by Indians under treaty were first recognized in an act of 1796. This act and ones following it in 1834 and 1859 provided for indemnification of losses from Indian depredations to be paid out of Indian annuities or "out of any money in the Treasury not otherwise appropriated." Thus, though the Indian could not sue the government, he could be "sued" by it (and denied counsel) in the name of its citizens and be subject to forced payment of claims from his treaty funds. By 1872 (the depredation legislation was renewed in 1870, 1872, 1885, 1886 and 1891) close to 300 claims were settled against the Indians for over $434,000. This amount was 55 percent of what was claimed.[35]

Indeed, although they were obviously considered human enough to convey land title by treaty and to compensate Euramericans for losses (real or invented), US courts never formally conceded that Indians were actually "persons" capable of legal standing in their own right until the *Standing Bear* case of 1879.[36] This led, in 1881, to an act permitting Native people to sue in the court of claims, but only in the event that they obtained specific legislative authorization whenever they sought to do so.[37] The expensive and time-consuming burden of acquiring a predicating act of Congress each time they desired access to the claims court had the entirely predictable effect of constraining Indians' ability to avail themselves of it. Hence, from 1881 to 1923, only thirty-nine Native claims were filed.[38]

A further complication was that in considering claims prior to authorizing them for adjudication, Congress was positioned to alter them substantially. This it did with consistent abandon, invariably rejecting attempts to recover unceded land.[39] Legislators habitually deleted provisions for payment of interest, even on matters dating back a century or more.[40] And, with equal frequency, they introduced provisions requiring that judicial awards forthcoming to the Native plaintiffs, if any, be subject to "gratuitous offsets" equal to whatever monies the government could be said to have already expended "in their behalf."[41]

The gratuitous offsets constituted an especially onerous imposition insofar as they placed Indians in the position of retroactively subsidizing "services"

they never wanted and, in many cases, vociferously opposed. "Gratuities allowed," Rosenthal notes, "included the payment of [federal] Indian agents [and] police, judges, interpreters, maintenance and repair of agency buildings, teachers, and prorated expenses for education of Indian children at various institutions."[42] He concludes, with typical understatement, that most "of these 'gratuities' were more for the benefit of the government than the Indians."[43]

For its part, the US Department of Justice devoted itself to delaying and otherwise obstructing Indian claims cases by all possible means. Years, often decades, passed while federal attorneys "prepared themselves" not to insure that the government's self-assigned fiduciary responsibility to Indians was fulfilled, but to see to it that Native claimants received nothing, or next to nothing, in court.[44] As was observed in 1940, it "cannot be shown that the [US attorneys] in a single case investigated the complaints...of the Indians with a view towards doing justice to them."[45]

On the contrary, the energy of Justice Department personnel was spent prodding the General Accounting Office (GAO) to dig up offsets with which to diminish or nullify awards expected to accrue from claims they knew to be valid. If offsets could be advanced in an amount equal to or exceeding the amount of the potential award in any case, the claims court could be expected to dismiss it out-of-hand.[46] The fruits of such tactics are altogether unsurprising.

> The Wichita of Oklahoma first gained the right to sue in an act of 1895 but were stalled until a jurisdictional act of 1924 led to a final dismissal in 1939. The Klamath in Oregon gained their act in 1920 [but] were dismissed in 1938.... The Northwestern Band of Shoshone of Utah and Idaho [having begun their efforts in 1879] received their act in 1926, and saw dismissal in 1942. The Osage of Oklahoma [after spending forty-eight years in the process] gained a jurisdictional act 1921, and were dismissed in 1928.[47]

And so it went. By the latter year, Senator Linn Frazier of North Dakota, a member of the Committee on Indian Affairs, estimated that at the then current rate it would take another 172 years to wade through the eighty-six pending cases he believed would eventually go to trial.[48] In the sixteen instances where awards had actually been made at that point, the court had allowed a mere $13.6 million against claims totaling $346 million. Offsets amounting to $11 million were then deducted, leaving Indians with a paltry $2.65 million overall.[49]

All told, by 1946 the attorney general was able to report that Indians had been awarded only $49.4 million—well under 10 percent of the gross amount claimed in the cases involved—offset by $29.4 million in gratuity deductions.[50] This afforded those indigenous nations filing the suits an aggregate payout of only $20 million, from which they had to absorb legal costs, the expense of lobbying Congress to gain authorization, and so on. At best, the federal government's vaunted "due process" was for Indians essentially a break-even endeavor, while a number of people lost large chunks of their lives and appreciable sums attempting it.[51]

Truly, the United States proved itself an "unsympathetic foe" of indigenous nations, a "tough and clever opponent" to Native sovereignty when it used its own courts to defend against the claims of its Native "wards."[52] It can be argued—and has been often enough—that this is exactly as it should be in an adversarial system of justice like that of the United States.[53] Perhaps this is true, although the blatant systemic conflict of interest with which the process was riddled from top to bottom seems to suggest something else.[54] In any event, the portrait thus presented is anything but that of either a government or society committed by its conscience to doing the right thing, morally or legally.

FOOT-DRAGGING IN THE FIRST DEGREE

It's not that the government lacked alternatives to the courts in dealing with Indian land claims, even within its own politico-judicial structure. During the nineteenth century, sixteen separate commissions were created by the United States under various treaties, conventions, and agreements to dispense settlements from foreign nations and to resolve mutual claims.[55] The last of these, which convened in 1901, had barely completed its work when former Indian Commissioner Francis E. Leupp, in 1910, recommended the establishment of something like a claims commission to expedite the processing of Indian claims cases.[56]

In 1913, Assistant Commissioner of Indian Affairs Edgar B. Merritt went further, testifying before the House of Representatives that an "investigatory commission...or comparable body" should be created to prepare reports and recommendations allowing Congress—rather than the court of claims—to "make some permanent disposition" of Native claims. This approach, he argued, would not only be more "prompt and efficient" than the judicial process, but would also produce more "equitable" outcomes.[57]

Such proposals were met with legislative yawns, in part because Leupp and Merritt were both avid proponents of assimilation, a national policy then in full force and designed to bring about the disappearance of the last traces of indigenous cultures in the United States.[58] Since it was generally believed that the last Indians were rapidly "vanishing" and would likely "die off" long before their claims ever came to trial, there seemed no pressing need for improvement in the mechanisms for dealing with them.[59]

It was not until the 1920s, with the increasingly proliferate discovery of mineral deposits on Indian reservations, that attitudes began to change.[60] Loath to recreate the irrational squandering of resources that occurred in Oklahoma when reservations were abolished and underlying oil deposits opened to the ravages of "free enterprise" at the turn of the century, at least some policymakers began to cast about for ways of retaining these new finds under a central planning authority.[61] The most logical route to this end resided in continuing the government's administration of the reservations "in trust" for an indefinite period, a matter requiring the abrupt abandonment of assimilation policy as it had been configured up till then.[62]

In 1928, the Meriam Commission, a body of one hundred prominent business and civic leaders assembled by Secretary of the Interior Hubert Work

to consider the "Indian Question," recommended exactly that.[63] The group, echoing Leupp's earlier suggestion, also urged that a "special commission" be created, separate from the courts, to investigate and draft legislation by which Congress could resolve whatever Indian claims were deemed "meritorious."[64] The idea was seconded a year later by Nathan R. Margold, a New York attorney specializing in Indian law and policy who had been retained by the Institute for Government Research to study the situation.[65]

Although Congress was relatively quick to reorganize the reservations for long-term existence by passing an act for this purpose in 1934, it consistently balked at addressing the claims issue.[66] To a significant degree, this was due to the Justice Department's outright hostility toward any measure that might serve to accomplish such objectives. Attorney General Francis Biddle eventually summed up the department's position, stating that it would cost "huge sums"—he estimated $3 billion or more—to achieve anything resembling an equitable and comprehensive disposition of Native claims. Since it would be "inordinately expensive" for the United States to actually pay for what it had taken from Indians, he reasoned, it would be better to do nothing at all.[67]

Such thinking was restated endlessly and with discernible vehemence by legislators such as Missouri's John J. Cochrane, who noted with pride in 1937 that he had personally prevented dozens of Native claims from being paid over the preceding three years. Congress, he said, could "disregard millions and think of billions if the Indian claims ever got in the hands of [a] commission" designed to treat such cases on their merits.[68] Thomas O'Malley of Wisconsin described the whole idea of Native compensation as "the biggest racket in the country."[69]

Others, plainly ignorant of the government's historical policy of denying Indians access to the US court system, now opined that Native claims cases were too ancient to be considered. William M. Colmer of Mississippi argued that while "a great injury [had been] done to Indians in the past," it would be unfair to "some 130,000,000 American citizens who are taxpayers" to make any serious contemporary effort to set things right.[70] O'Malley chimed in that it was absolutely necessary for Congress to prevent "some shyster lawyer" from "dig[ging] up a descendant of some blanket Indian and make a million dollar claim against the government" over Manhattan Island.[71]

Perspectives of this sort received substantial reinforcement from the Supreme Court. As late as 1945, Justice Robert H. Jackson, writing for the majority in *Northwest Bands of Shoshone*, held that the ongoing expropriation of Native land was not compensable because any injuries done to Indians were "committed by our forefathers in the distant past against remote ancestors of the present claimants."[72] Moreover, Jackson asserted, such claims should not be considered legally actionable, since Indians, unlike whites, traditionally possessed "no true conception" of property ownership.[73] In arriving at the latter conclusion, Jackson and his colleagues resorted to what has been called the Menagerie Theory. At base, this is the notion that Indians "are less than human and that their relations to their lands are not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined."[74]

President Franklin D. Roosevelt also made it clear on several occasions that he was "unsympathetic" toward the creation of a commission or comparable mechanism by which Indian claims might be resolved in an equitable manner. Purporting to be more preoccupied with the future than the past, he announced in 1936 that he would be unlikely to sign any bill that might lead to the government's "paying out monies on account of wrongs done to the dead."[75]

Given the negative consensus dominant in all three branches of federal government, proposals to establish a claims commission went nowhere for more than one-third of a century after Francis Leupp's initial recommendation. From 1930 to 1945, at least seventeen bills offering variations on the theme were rejected by Congress, most of them dying in committee before ever reaching either the House or Senate floor.[76] On the other hand, legislation was passed in 1935 to further entrench the practice of deducting gratuitous offsets from awards achieved through the court of claims.[77]

IN THE MATTER OF SELF INTEREST

Recitation of the ICC's background raises the obvious question of why the Senate and the House unanimously approved the creation of the ICC on 17 July and 2 August 1946, respectively.[78] There are two answers to this query, neither of them having the least to do with good conscience or legislative desires to see justice done to indigenous peoples encapsulated within the United States. Quite the opposite, Congress was demonstrably motivated by the crassest sort of national self interest.

One track along which things moved concerned the US ambition to assert itself as a planetary moral authority by way of organizing an international tribunal to oversee the punishment of Germany's nazi government in the aftermath of World War II.[79] First publicly articulated in 1944 over the strong objections of America's wartime allies, this precedential concept actually dated from 1943.[80] Eventually, US diplomats were able to negotiate the London Charter of 8 August 1945, setting in motion the Nuremberg Trials.[81]

A problem for the Americans all along, however, resided in their intent to prosecute the nazi leadership for waging aggressive war(s) for the purpose of acquiring *Lebensraum* (living space) at the expense of peoples they considered *untermenschen* (subhuman).[82] The sticking point was that from at least as early as the publication of *Mein Kampf* in 1925, Adolf Hitler had been at pains to explain that he based the nazi *Lebensraumpolitik* (policy of territorial expansion) on the United States' design of militarily expropriating American Indians during the nineteenth century.[83] As historian Norman Rich has summarized Hitler's thesis:

> Neither Spain nor Britain should be the models for German expansion, but the Nordics of North America, who had ruthlessly pushed aside an inferior race to win for themselves soil and territory for the future. To undertake this essential task, sometimes difficult, always cruel—this was Hitler's version of the White Man's Burden.[84]

So well-known was the correlation between United States and nazi expansionist policies by the war's end that graduate students were embarking upon studies of it.[85] Plainly, if the United States wished to assume moral high ground at Nuremberg and dispense anything more than mere victor's justice, it was vital that the country do something concrete to distinguish the contours of its own process of expansion from that pursued by the men in the defendants' dock.[86] In essence, it was understood that the whole historical pattern of US territorial growth needed to be placed, post hoc, on a footing that could be projected as consisting of acquisition by purchase rather than conquest, and the sooner the better.

Not coincidentally, in late 1943—at the moment the United States first became interested in staging a postwar trial of the nazi hierarchy—Congress quietly convened a select committee both to revive the long dormant and much reviled idea of a claims commission and to hammer out the details of how it would work.[87] Over the next year and a half, other sectors of the government were brought to accept that establishing the ICC was necessary to put a proper gloss on the United States' international image.

Hence, by 1945 even Attorney General Biddle, preparing to don the judicial robes in which he would sit in judgment at Nuremberg, grudgingly endorsed claims commission proposals (albeit he could not resist leaving behind suggestions as to how the final bill might be prevented from compensating Indians too "liberally").[88] The same can be said for Justice Jackson, the ink not yet dry on his description of Indians as a "menagerie" in *Northwestern Bands*, who was in the process of temporarily reversing roles with Biddle by taking leave of the Supreme Court to serve as lead US prosecutor in the case brought against Julius Streicher, a nazi publisher charged with depicting Jews as less than human.[89]

The extent to which Congress' belated creation of the ICC was intended not only as a measure fulfilling US domestic requirements, but also as a public relations gesture meant to resonate favorably at Nuremberg and elsewhere within the international community was quite evident in the way South Dakota Representative Karl Mundt introduced the bill authorizing it to the House. The commission, he said, would stand as "an example for all the world to follow in its treatment of minorities."[90]

Such posturing was amplified when President Truman, upon signing it, acquainted the public with the Indian Claims Commission Act on 13 August 1946. "This bill," he intoned with a straight face, "makes perfectly clear what many men and women, here *and abroad*, have failed to recognize, that...[i]nstead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 percent of our public domain."[91] No mention was made of which party it was that had set—and was continuing to set—the "sales" price, or whether the Native owners had wanted to sell their homelands.

A FINAL SOLUTION, AMERICAN STYLE

If the stench of hypocrisy emanated from the first of the United States' motivations in bringing the ICC into being, the second set of reasons were even

more malodorous. This had to do with a desire on the part of such unabashed foes of indigenous rights as Karl Mundt to impose what he called a "permanent solution to the Indian problem."[92] A "final settlement" of outstanding claims, it was argued, would position the government to terminate all further expenditures on behalf of Indians[93] and withdraw from its trust relationship with and recognition of the existence of selected peoples,[94] effectively bringing about their speedy dissolution and disappearance as identifiable human groups.[95]

The key for many legislators was how to accomplish the objective in the cheapest manner possible. "Our only real interest," said Representative and later Senator Henry M. "Scoop" Jackson of Washington, "is to try and economize in this matter."[96] Given that Jackson chaired the House committee responsible for drafting the bill ultimately enacted as law, it is not difficult to discern the reasoning underlying a number of its principle elements. For instance, although the act mandated that the ICC investigate and resolve all claims alleging "wrongful takings" of Native land, under no circumstances were Indians permitted to recover their property.[97]

Native people were to be neither compensated at a rate equivalent to the contemporary value of what they had lost, nor allowed to collect interest against whatever amount the commission concluded they should have received when their land was taken.[98] Moreover, the old practice of deducting gratuitous offsets from any monies awarded was carried over from the court of claims to the ICC.[99] With things thus stacked against them, as Oklahoma Senator Elmer Thomas had earlier remarked, Indians "would be lucky [if] in the final adjudication they should get [even] a few dollars."[100]

Cynical as it was, Thomas' insight was more than borne out when Chief Commissioner Edgar E. Witt reported to Congress in 1956 that the ICC, after a full decade of its operational existence, had by then awarded a payout of less than $10 million against aggregate claims exceeding $800 million.[101] A decade later, from the grand total of $194 million awarded by the ICC against nearly $2 billion in claims, "compromise settlements" had resulted in net payouts of only $87 million (including the $10 million reported by Witt).[102] Such puny awards were expressly construed under the 1946 act as precluding "any further claims or demand against the United States."[103]

Unquestionably, "Congress could take some fiscal satisfaction [in having] got the better of the Indian once more," even as the ICC averred to have "cleared title" to millions of acres of contested territory.[104] But this was not the worst of it. Since "the goals of Termination and the Claims Commission were seen as parallel for the first twenty years,"[105] a Native people's acceptance of even a pittance—which the Justice Department continued to insist was awarded only "as a matter of grace, not as a matter of right"[106]—often served as a pretext upon which it could be declared "extinct."[107]

Nowhere was this "alliance of the Commission and termination legislation" more blatant than in the appointment of former Utah Senator Arthur V. Watkins as chief commissioner in 1959.[108] A proverbial architect of US termination policy in the 1940s and early 1950s, Watkins was responsible to great degree for the formal nullification of more than one hundred targeted peo-

ples over the following decade.[109] These ranged from the populous and relatively solvent Menominees and Klamaths in Wisconsin and Oregon to the tiny "Mission Bands" of southern California. They did not, however, include a single nation whose reserved land base was endowed with mineral deposits federal planners wished to retain in trust.[110]

As head of the ICC, Watkins' stated objective was to "get the government out of the Indian business." His method was to accelerate the pace of awards to terminate "superfluous" peoples as much as possible.[111] In a stunning Orwellianism, he described this as "emancipation" (he was often referred to during the Eisenhower years as "The Great Emancipator").[112] In his *Red Man's Land, White Man's Law,* even Wilcomb Washburn was forced to choke on this one, outlining the whole minuet orchestrated by Watkins and his colleagues in terms of "Congress cloaking its own interests in a rhetoric of generosity toward the Indian."[113]

While until the end of the Second World War Native peoples "were thought of as defeated nations and were so treated and so held captive," the war's end altered the relationship "between prisoner and jailer" to that which existed between condemned and executioner, as many Natives were liquidated altogether.[114] The ICC was created and maintained largely to mask this ugly reality, sometimes making it appear the opposite of itself.

CHARADES, ANYONE?

When Congress established the ICC in 1946, it anticipated that the new body would be responsible for handling perhaps two hundred cases—a figure roughly corresponding to the backlog piled up in the court of claims—and that the task could be accomplished in five years.[115] By the end of 1951, the number of claims had reached 852, "more than ever contemplated by anyone in the process."[116] The life of the commission was therefore extended for another five years, a procedure that would be repeated several times before the ICC was finally phased out in 1978.

The protracted nature of the proceedings were not due simply to the unexpectedly large number of claims filed. In fairness to the commission, it should also be noted that the commission's extended length was not a direct result of its own faults. Rather, applying its usual perverse twist to the dictum that justice delayed is justice denied, the Justice Department asked for not less than 5,000 extensions in which to file its pleadings between 1951 and 1955 alone.[117] By 1960, Chief Commissioner Watkins—who, after all, wanted to speed things up for his own reasons—was complaining that US attorneys had received as many as thirty-five continuances in a single case.[118] A decade later, things were no better: in 1971, Watkins' successor Jerome Kuykendall observed that the Justice Department had requested some 6,451 days worth of extensions in active cases over the preceding eighteen months.[119]

Thus, despite having outlived its original charter six-fold, and notwithstanding its increasingly strenuous efforts to do so as time wore on, the commission was never able to complete its calendar. When it finally expired on 30 September 1978, the commissioners reported that the ICC had over three

decades disposed of 547 of the 615 dockets into which the original 852 claims had been consolidated. The remaining sixty-eight dockets were passed along, still unresolved, to the court of claims. Of the combined claims in which the ICC was said to have reached a final determination, about 45 percent had been dismissed without award.[120]

> The end result was that the Indian [nations] via a commission that cost the government only $15 million to operate for thirty-two years...paid $100 million in legal fees to pry loose some $800 million properly owed them. For thirty years most of this sum remained in the U.S. Treasury, interest free, at a benefit to the government.[121]

At the same time, the Department of Justice and its collaborators in the GAO expended approximately $200 million—an amount equal to one-quarter of total awards—on efforts to block or minimize each and every settlement.[122] So obstinately did they pursue these ends that when in 1955 the Otoes actually won a significant concession in legal principle from the ICC, federal attorneys stalled the resulting award for some months while lobbying Congress to rewrite the law in their favor.[123]

Such data cast in bold relief the contradictions inherent to the kind of subterfuge in which, as a matter of policy, any government sets out to play both (or several) ends against the middle. They do not, however, begin to address the real magnitude of the stakes involved in the ICC process. Aside from the sheer volume of claims that emerged, a development which seems to have genuinely taken all official parties by surprise, there is the matter of the scope of questions raised with respect to US territorial legitimacy.[124]

As early as 1956, the Justice Department warned Congress that the country's legal ownership of about half the area of the lower forty-eight states was subject to serious challenge.[125] By the mid-1960s, based in large part on research undertaken by the ICC in its struggles to document the basis for US assertion of title to each area within its putative domain, informed observers were reckoning that the United States had never acquired a valid proprietary interest in some 750 million acres.[126] In other words, "one third of the nation's land," as the Interior Department put it in 1970, still legally belonged—and belongs—to Native people.[127]

If the ICC accomplished anything of positive utility, it was, according to Vine Deloria, Jr., to "update the legal parity" of Indian land rights by "clear[ing] out the underbrush" that had obscured an accurate view of ownership of the United States.[128] Thereby, it can be said to have set the stage for the resolution of title questions, but not in any defensible legal, moral, or ethical sense to have "settled" them.[129] As things stand, such monetary awards as were made by the ICC—or the court of claims, for that matter—serve only as payment against "back rent" accrued through usage of Native property to which the United States has never held title.[130]

This has led many observers to conclude, along with American Indian Movement leader Russell Means, that the United States' portion of Native North America continues to be "illegally occupied in exactly the same way

France and Poland were illegally occupied by Germany during the Second World War." In Means' view, post hoc US awards of cash compensation for the expropriation of Native territory "no more puts things right than if the nazis had issued a check to the Vichy government in exchange for France after the fall of Paris." Anyone suggesting otherwise "is either ignorant of the facts, delusional or playing an elaborate game of charades to try and hide the truth."[131]

Far from being unrepresentatively extreme, Means' position, or something closely akin to it, has been repeatedly manifested in the reactions of indigenous nations to contentions that ICC awards might serve to "uncloud" title to their lands.[132]

> The Suquamish, Puyallup, and Stillaquamish refused their judgments on the grounds that their claims were never adjudicated, only those pushed upon them by their attorneys and the Commission. At a tribal council, the [Western Shoshones] voted to reject their settlement, claiming preference for land rather than money. The Oneida Indians of New York filed strong land claims for nearly six million acres of that state.[133]

Under the premise that the "Black Hills Are Not For Sale," Means' own Oglala Lakota people have adamantly refused to accept any part of an award that now totals more than $130 million, insisting that recovery of their treaty-guaranteed land base rather than monetary compensation is and always was the basis of their claim.[134] Hopi traditionals have taken an even harder line, observing that their land was already theirs "long before Columbus' great-great-grandmother was born" and that they would not dignify an upstart entity like the ICC by petitioning it for "a piece of land that is already ours."[135]

It follows that even if the United States were suddenly to evince a willingness to pay a fair price for Native property—something it has never shown the least interest in doing—it is unlikely that title questions would be much affected. To borrow from Richard A. Nielson, "land, not money, is the *only* remedy" to many Indian claims.[136] As the sentiment was expressed in the Declaration of Purpose of the 1961 American Indian Chicago Conference:

> [E]ach remaining acre is a promise that we still be here tomorrow. Were we paid a thousand times the market value of our lost holdings, still the payment would not suffice. Money never mothered the Indian people, as the land has mothered them, nor has any people become more attached to the land, religiously or traditionally.[137]

The only real question is whether the "preposterous" idea of restoring unceded Native land to its rightful owners is in any way feasible and, if so, to what extent.[138] With deadening predictability, naysayers argue that to attempt such "extraordinary" restitution would require a concomitant, massive, and wholly unwarranted dispossession of non-Indian property owners. Such notions, often advanced in highly sensationalized terms, have gone far towards keeping public opinion four-square against accommodation of indigenous land rights in any tangible form.[139]

The facts of the matter are, however, that, in addition to the roughly 50 million acres it presently "holds in trust" for Indians (about 2 percent of the forty-eight states), the federal government possesses some 770 million acres of parklands, national forests, wildlife preserves, military reservations, and so on. Collectively, the individual states hold yet another 78 million acres of unpopulated or sparsely populated land.[140] Clearly, it would be possible to return all 700 million acres indigenous peoples are now "short" from governmental holdings without revoking title to the individual holdings of a single non-Indian.

Some Native leaders have suggested that as little as 50 million acres—that is, a doubling of the existing reservation land base—might be enough to stabilize indigenous nations, providing them the resources needed to alleviate, among other things, the dire conditions sketched in the opening section of this essay.[141] Far from responding favorably to such invitations to compromise, however, the government has elected not only to ignore them, but also to continue whittling away at what little remains of Indian Country. It should be noted that during the first ten years of the ICC, the Native land base was actually reduced from 54.6 million to 52.5 million acres.[142]

Merely putting a stop to this trend will not be enough. If the United States is ever to resemble in any fashion the resplendent characterizations put forth by its promoters and apologists, the attitudes and policies underlying the ongoing erosion of indigenous property rights must be reversed and Native people should be afforded the sort of territorial restitution to which they are entitled under international law.[143]

This, in turn, could serve as the pivot from which to get at an entire range of claims—everything from damages accruing through the government's sustained and systematic suppression of Native languages and religions to those resulting from the supplanting of traditional governments and economies—which the ICC refused even to consider.[144] Each of these is legally and morally compensable, and compensation might in such connections go a long way towards healing the gaping cultural and psychic wounds inflicted upon indigenous societies by the nature of US Indian policy.[145]

In the alternative, if the travesty of justice embodied in the ICC continues to be employed as "proof" that the United States has conducted itself "in good conscience" and "in accordance with a standard of fair and honorable dealings" with Indians, or that Native claims have been reasonably well "settled," then Russell Means' harsh remarks about nazis, charades, and illegal occupations may come to be seen as restrained in comparison to what follows. "There are," as Harvey Rosenthal has acknowledged, "much harder payments to be made" before the debts the US owes indigenous nations can ever honestly be marked "paid in full."[146]

NOTES

1. George Catlin, "Letter No. 58—The Northwest Frontier," in *Letters and Notes on the Manners, Customs, and Conditions of North American Indians*, vol. II (1844; New York: Dover,1973), 256.

2. 1 Stat. 50 (1787). The more practical policy was suggested in a written plan submitted to the Continental Congress by George Washington, shortly before he became president. In it, Washington recommended using treaties with Indians in much the same fashion that Adolf Hitler would employ them against his adversaries at Münich and elsewhere a century and a half later (lull them into a false sense of security or complacency that placed them at a distinct military disadvantage when it came time to confront them with a war of aggression). "Apart from the fact that it was immoral, unethical and actually criminal, this plan placed before Congress by Washington was so logical and well laid out that it was immediately accepted practically without opposition and immediately put into action. There might be—certainly *would* be—further strife with the Indians, new battles and new wars, but the end result was, with the adoption of Washington's plan, inevitable: Without even realizing it had occurred, the fate of all the Indians in the country was sealed. They had lost virtually everything"; Allan W. Eckert, *That Dark and Bloody River: Chronicles of the Ohio River Valley* (New York: Bantam, 1995), 440.

3. *Public Papers of the Presidents of the United States: Harry S. Truman, 1946* (Washington, DC: Government Printing Office, 1962), 414.

4. Wilcomb E. Washburn, "Land Claims in the Mainstream of Indian/White Relations," in *Irredeemable America: The Indians' Estate and Land Claims*, ed. Imre Sutton (Albuquerque: University of New Mexico Press, 1985), 26, 30–31. It is unsure exactly which "powerful sovereigns" Washburn considers "normal" in this instance. Certainly, the governments of such obviously weak states as Monaco, Liechtenstein, and San Marino enjoy a far greater degree of practical sovereignty than does any American Indian government in the United States, even though the latter are often territorially larger and, in many cases, more resource-rich; Vine Deloria, Jr., "The Size and Status of Nations," in *Native American Voices: A Reader*, eds. Susan Lobo and Steve Talbot (New York: Longman, 1998), 457–465.

5. Glenn T. Morris, "Further Motion by the State Department to Railroad Indigenous Rights," *Fourth World Bulletin* 6 (Summer 1998): 1–9.

6. H. D. Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* (New York: Garland, 1990), 49–50.

7. See the commentaries of Bob Black in particular in the "Letters" section of *Anarchy*, 1997–1999, inclusive.

8. William H. Harnell, *Man-Made Morals: Four Philosophies That Shaped America* (New York: Anchor, 1969), 238.

9. Rosenthal, *Day in Court*, 49.

10. See, for example, US Senate Committee on Labor and Human Resources, Subcommittee on Employment and Productivity, *Guaranteed Job Opportunity Act: Hearing on S. 777*, 100th Cong., 1st sess., 1980.

11. For a good profile midway through the period, see Cheryl McCall, "Life on Pine Ridge Bleak," *Colorado Daily* 16 May 1975.

12. Rennard Strickland, *Tonto's Revenge: Reflections on American Indian Culture and Policy* (Albuquerque: University of New Mexico Press, 1998), 53. Also see US Congress Office of Technology Assessment, *Indian Health Care* (Washington, DC: Government Printing Office, 1996).

13. See generally, US Department of Education Office of Research and Improvement, National Institute of Education, *Conference on the Educational and Occupational Needs of American Indian Women* (Washington, DC: Government Printing Office, 1980).

14. Strickland, *Tonto's Revenge*, 53.

15. US Department of Health and Human Services, Public Health Service, *Chart Series Book* (Washington, DC: Government Printing Office, 1988).

16. Strickland, *Tonto's Revenge*, 53.

17. US Bureau of the Census, *U.S. Census of the Population: General Population Characteristics* (Washington, DC: Department of Commerce, Economics, and Statistics, 1990), 3.

18. *Lonewolf* v *Hitchcock*, 187 US 553 (1903). There have, of course, been modifications to the *Lonewolf* doctrine over the years. Nevertheless, it continues to represent the essential framework within which US Indian policy is formulated and implemented; Ann Laquer Estin, "*Lonewolf v. Hitchcock*: The long Shadow," in *The Aggressions of Civilization: Federal Indian Policy Since the 1880s*, eds. Sandra L. Cadwalader and Vine Deloria, Jr. (Philadelphia: Temple University Press, 1984).

19. Ronald L. Trosper, "Appendix I: Indian Minerals," in *Task Force 7 Final Report: Reservation and Resource Development and Protection*, American Indian Policy Review Commission (Washington, DC: Government Printing Office, 1977); US Department of Interior, Bureau of Indian Affairs, *Indian Lands Map: Oil, Gas and Minerals on Indian Reservations* (Washington, DC: Government Printing Office, 1978); Louis R. Moore, *Mineral Development on Indian Lands: Cooperation and Conflict* (Denver: Rocky Mountain Mineral Law Foundation, 1983); Presidential Commission on Indian Reservation Economies, *Report and Recommendation to the President of the United States* (Washington, DC: Government Printing Office, November 1984).

20. Robert K. Thomas, "Colonialism: Classic and Internal," *New University Thought* 4:4 (Winter 1966–67).

21. 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 YBUN 1043 (entered into force 24 October 1945). For text, see Burns H. Weston, Richard A. Falk, and Anthony D'Amato, eds., *Basic Documents in International Law and World Order*, 2nd ed. (Minneapolis, West, 1990), 16–32 and esp. 27–30.

22. "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"; United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514 (XV), 15 UN GAOR, Supp. (No. 16) 66, UN Doc. A/4684, 1961. The same language is repeated in the International Covenant on Economic, Social, and Cultural Rights, UNGA Res. 2200 (XXI), 21 UN GAOR, Supp. (No. 16) 49, UN Doc. A/6316 (1967), entered into force 3 January 1976, and the International Covenant on Civil and Political Rights, UNGA Res. 2200 (XXI), 21 UN GAOR, Supp. (No. 16) 52, UN Doc. A/6316 (1967), entered into force, 23 March 1976. See Weston, Falk, and D'Amato, *Basic Documents*, 344, 371, 376.

23. Jean-Paul Sartre, "On Genocide," *Ramparts* (February 1968). This, at least in part, may be why the United States, virtually alone among UN member-states, refused to ratify the 1948 Convention on Prevention and Punishment of the Crime of Genocide (UNTS 277; entered into force 12 January 1951) for more than forty years and then attempted to do so by way of attaching a "sovereignty package" that would have allowed the country to exempt itself from any and all provisions it might find inconvenient. See Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Durham: Duke University Press, 1991).

24. C. Wright Mills, *The Power Elite* (New York: Oxford University Press, 1959).
25. Vine Deloria, Jr., "Non-Violence in American Society," *Katallegete* 5:2 (1974); reprinted in *For This Land: Writings on Religion in America*, ed. James Treat (New York: Routledge, 1999), 44–50, 45 (quote) .
26. Imre Sutton, "Prolegomena," in Sutton, *Irredeemable America*, 6.
27. This is hardly the only connection in which such things are true. For an excellent overview of the same process at work in other dimensions, see Noam Chomsky, *Necessary Illusions: Thought Control in Democratic Societies* (Boston: South End Press, 1989).
28. See John T. Vance, "The Congressional Mandate and the Indian Claims Commission," *North Dakota Law Review* 45 (Spring 1969): 325–36.
29. Quoted in John Kobler, "These Indians Struck It Rich: The Utes' Treaty Land," *Saturday Evening Post*, 6 September 1972, 132.
30. Rosenthal, *Day in Court*, 49.
31. Sutton, "Prolegomena," 5. Not least among the problems of such formulations is the unanswered question of exactly how American Indians, formally recognized by the United States through a lengthy series of eighteenth- and nineteenth-century treaties as constituting separate and distinct nations, have come to be construed as a "minority" group *within* the United States during the twentieth century. This issue is fundamental because under international law, it has long been the case that a nation, having once recognized the sovereignty of another, has no legal authority whatsoever to unilaterally demote it at some later point. Alteration in the sovereign status of any nation legitimately occurs only on the basis of its voluntary consent to the change; L. Oppenheim, *International Law: A Treatise*, 5th ed. (London: Longman's, Green, 1955), 120. Also see Robert T. Coulter, "Contemporary Indian Sovereignty," in *Rethinking Indian Law*, National Lawyers Guild (New Haven: Advocate Press, 1982), 109–120, esp. 118.
32. See notes 5, 21, 22, and 23. Also see my essay, "Perversions of Justice: Examining the Doctrine of U.S. Rights to Occupancy in North America," in *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice*, eds. David S. Caudill and Steven Jay Gold (Atlantic Highlands, NJ: Humanities Press, 1995), 200–220.
33. 10 Stat. 612, 24 February 1855.
34. 12 Stat. 765, 3 March 1863. Section 9 specifies that the court of claims "shall not extend to or include any claim against the Government...growing out of or dependent on, any treaty stipulation entered into with...the Indian tribes."
35. Rosenthal, *Day in Court*, 9–10.
36. *United States ex rel. Standing Bear* v *Crook*, 25 Fed. Cas. 695 (C.C.D. Nebraska, 1879). For context, see Thomas Henry Tibbles, *The Ponca Chiefs: An Account of the Trial of Standing Bear* (Lincoln: University of Nebraska Press, 1972).
37. 21 Stat. 504, Chap. 139, 3 March 1881. See generally, E. B. Smith, *Indian Tribal Claims Decided in the U.S. Court of Claims* (Washington, DC: University Publications of America, 1976).
38. US House of Representatives Committee on Interior and Insular Affairs, *Indirect Services and Expenditures by the Federal Government for the American Indian*, 86th Cong., 1st sess. (1959), 11–14.
39. Richard A. Nielson, "American Indian Land Claims: Land versus Money as a Remedy," *University of Florida Law Review* 25 (Winter 1972): 308. Also see Smith, *Tribal*

Claims; Glen A. Wilkenson, "Indian Tribal Claims Before the Court of Claims," *Georgetown Law Journal* 55 (Dec. 1966): 511–528.

40. Howard Friedman, "Interest on Indian Land Claims: Judicial Protection of the Fisc," *Valparaiso University Law Review* 5 (Fall 1970). Also see Smith, *Tribal Claims*, and Wilkenson, "Tribal Claims."

41. John R. White, "Barmecide Revisited: The Gratuitous Offset in Indian Claims Cases," *Ethnohistory* 25 (Spring 1978): 179–192. Also see Smith, *Tribal Claims*, and Wilkenson, "Tribal Claims."

42. Rosenthal, *Day in Court*, 30. For a good overview of Native resistance to the government's imposition of compulsory schooling—to take but one example—see David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875–1928* (Lawrence: University Press of Kansas, 1995).

43. Rosenthal, *Day in Court*, 30–31.

44. It was officially estimated during the mid-1930s that it took, on average, a full ten years from the time an Indian claims case was authorized by Congress until it actually came to trial; US House of Representatives Committee on Indian Affairs, *Hearing on H.R. 7838 to Create an Indian Claims Commission*, 74th Cong., 1st sess. (1935), 10.

45. US Senate, Subcommittee of the Senate Committee on the Judiciary, *Hearing on S. 3083*, 76th Cong., 3rd sess. (Feb. 1940), 139.

46. "The General Accounting Office estimated, in 1935, that it had [by that point] spent one million dollars examining some 1.38 million 'claim instances' and over 83,000 accounts for reports" to US attorneys working on the nullification of Indian claims cases; Rosenthal, *Day in Court*, 30.

47. Ibid., 20.

48. Quoted in Walter Hart Blumenthal, *American Indians Dispossessed: Fraud in Land Cessions Forced Upon the Tribes* (Philadelphia: G. S. McManus, 1955), 174.

49. Rosenthal, *Day in Court*, 30.

50. *Hearings on S. 3083*, 20. "From 1881 to 1946, 219 claims were filed with the Court of Claims. Of these cases only thirty-five won awards which totaled $77.3 million or an average of $1.2 million per year in net recoveries"; Rosenthal, *Their Day in Court*, 24.

51. The brunt of this fell on already impoverished Native peoples, but it also included more than a few of the white attorneys who represented them. For example, Francis A. Goodwin, a lawyer in Washington state who took on the case of the Nez Perce, lost twelve years and $5,000 of his own funds in a losing effort. See US House of Representatives Committee on Indian Affairs, *Hearings on H.R. 1198 and 1341 to Create an Indian Claims Commission*, 79th Cong., 1st sess. (March and June 1945), 81–84.

52. Rosenthal, *Day in Court*, 23, 32.

53. The position has been taken in a number of works. See, for example, Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987).

54. Such bias is likely inherent to any process of this sort; Richard B. Lillich, *International Claims: Their Adjudication by National Commissions* (Syracuse: Syracuse University Press, 1962).

55. Ibid., 6.

56. Francis E. Leupp, *The Indian and His Problem* (New York: Scribner's, 1910), 194–196.

57. US House of Representatives, Subcommittee of the Committee on Indian Affairs, *Hearings on the Appropriations Bill of 1914*, 64th Cong., 2nd Sess. (1913), 99.

58. See generally Henry E. Fritz, *The Movement for Indian Assimilation, 1860–1890* (Philadelphia: University of Pennsylvania Press, 1963); Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880–1920* (Lincoln: University of Nebraska Press, 1984).

59. See Brian W. Dippie, *The Vanishing American: White Attitudes and U.S. Indian Policy* (Middletown, CT: Wesleyan University Press, 1982); Christopher M. Lyman, *The Vanishing Race and Other Illusions* (New York: Pantheon, 1982).

60. The kickoff came with Standard Oil's preliminary exploration of the Navajo Reservation from 1919 to 1921, under provision of the 1918 Multiferous Minerals Act; Lorraine Turner Ruffing, "Navajo Mineral Development," *American Indian Journal* 4 (Sept. 1978): 2–15.

61. See Terry P. Wilson, *The Underground Reservation: Osage Oil* (Lincoln: University of Nebraska Press, 1985).

62. An interesting take on this is provided by Hollis Whitson and Martha Roberge in their "Moving Those Indians Into the Twentieth Century," *Technology Review* 9 (July 1986).

63. Lewis Meriam, et al., *The Problems of Indian Administration* (Baltimore: Johns Hopkins University Press, 1928).

64. Ibid., 48.

65. US Senate, Subcommittee of the Committee on Indian Affairs, *Hearings on the Survey of Conditions of Indians in the United States*, 70th–71st Cong. (1928–29), 13670–13677.

66. Indian Reorganization Act, ch. 5776, 48 Stat. 948, now codified at 25 USC, 461-279. For background, see Laurence C. Kelly, *Assault on Assimilation: John Collier and the Origins of Indian Policy Reform* (Albuquerque: University of New Mexico Press, 1983); Vine Deloria, Jr., and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon, 1984).

67. US House of Representatives Committee on Indian Affairs, *Creating an Indian Claims Commission*, 79th Cong., 1st sess. (1945), 1466.

68. *Congressional Record*, 21 June 1937, 6058.

69. Ibid., 6246.

70. Ibid., 6241.

71. Ibid., 6261.

72. *Northwest Bands of Shoshone Indians* v *United States*, 324 US 335 (1945); quoted in Felix S. Cohen, *The Legal Conscience: Selected Papers* (New Haven: Yale University Press, 1960), 264. The takings in question were only sixty to seventy years old at the time Jackson wrote, meaning that the "ancestors" involved were the parents and grandparents and of the Shoshone claimants.

73. Ibid., 302.

74. Ibid., 303.

75. For an overall description of Roosevelt's attitude, including the statement quoted, see John Collier, *From Every Zenith: A Memoir* (Denver: Sage Books, 1963), 294–299.

76. These included HR 7963 (1930), which was never reported out of the House Judiciary Committee; S. 3444 (1934) and S. 1465 (1935), both of which died in com-

mittee; HR 6655 (1935), which suffered the same fate; S. 2731 (1935) and HR 7837 (1935), both of which were reported out—S. 2731 was actually approved by the full Senate—but passed over and tabled in the House until the congressional session expired; S.1902 (1937), which was again passed by the Senate, but, despite being considerably amended in committee, was voted down by the full house (176 to 73); S. 3083 (1939), which died in committee; S. 4206 (1940), killed in committee; S. 4234 (1940), killed in committee; S. 4349 (1940), on which the congressional session expired before a vote was taken; S. 1111 and HR 4693 (both 1941), which were hashed about interminably and then tabled; HR 4593 and HR 5569 (1944), both of which died in committee; HR 1198 and HR 1341 (both 1945), both of which were killed before reaching the floor. These are summarized in Rosenthal, *Day in Court*, 53–84.

77. Act of 12 August 1935 ("Gratuities Act"), 49 Stat. 596.

78. Indian Claims Commission Act, 60 Stat. 1049 (1946).

79. For the best overview of US insistence on this idea in the face of staunch allied opposition to it, see Bradley F. Smith, *The Road to Nuremberg* (New York: Basic Books, 1981), chaps. 2 and 3.

80. Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record* (Stanford: Hoover Institution Press, 1982), 6.

81. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, 59 Stat. 1544, 82 UNTS 279; Weston, Falk, and D'Amato, *Basic Documents*, 138–139. On the ensuing prosecution of primary nazi leaders, see Eugene Davidson, *The Trial of the Germans, 1945–1946* (New York: Macmillan, 1966). Concerning the subsequent series of prosecutions of lesser nazi defendants, see John Alan Appleman, *Military Tribunals and Military Crimes* (Westport, CT: Greenwood Press, 1954). With respect to related prosecutions of Japanese, see Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (New York: William Morrow, 1987).

82. As formulated in a 25 July 1945 "Memorandum to All Legal Personnel" prepared by Colonel Murray C. Bernays, a key figure in US war crimes policy development, the four overarching categories of activity for which the top nazis should be tried were "the 'Nazi master plan' (aggressive war conspiracy); 'preparatory measures' (preparations for aggression); 'occupying neighboring German areas'; and 'military conquest' (acts of aggression and war crimes, covering the period 1939–45)." In only slightly revised form, this was the schematic actually adopted for the Nuremberg prosecutions; Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977), 65.

83. Adolf Hitler, *Mein Kampf* (New York: Reynal and Hitchcock, 1939), 403, 591; *Hitler's Secret Book* (New York: Grove Press, 1961), 46–52. Another iteration will be found in a memorandum prepared by an aide, Colnel Freidrich Hössbach, summarizing Hitler's statements during a high-level Führer conference conducted shortly before Germany's 1939 invasion of Poland; *Trial of the Major Nazi War Criminals Before the International Military Tribunal*, vol. 25 (Nuremberg: International Military Tribunal, 1947–49), 402–413.

84. Norman Rich, *Hitler's War Aims: Ideology, the Nazi State, and the Course of Expansion* (New York: W. W. Norton, 1973), 8. Also see John Toland, *Adolf Hitler* (New York: Doubleday, 1976), 802.

85. See, for example, Frank Parella, *Lebensraum and Manifest Destiny: A Comparative Study in the Justification of Expansionism* (Ph.D. diss., Georgetown University, 1950).

86. Since it is now fashionable to view the North American Indian Wars and the crimes of nazism as belonging to entirely different epochs, it is important to remember that the Wounded Knee Massacre—generally considered to be the last round of the former—occurred in 1890, and that the latter commenced when Hitler came to power only forty-two years later. Predictably, under the circumstances, claims of "victor's justice" being visited upon the nazis were raised rather forcefully by German defense counsel Hermann Jahrreiss in his opening statement to the Nuremberg Tribunal; less expectedly, by individuals like Senator Robert A. Taft in the United States. See Jay W. Baird, ed., *From Nuremberg to My Lai* (Lexington, MA: D. C. Heath, 1972), 84–90, 107–113.

87. US House of Representatives Select Committee of the Committee of Indian Affairs, *An Investigation to Determine Whether the Changed Status of the Indian Requires a Revision of the Laws and Regulations Affecting the Indian*, 78th Cong., 2nd sess. (23 Dec. 1944).

88. The effect of the justice department's recommended changes to the Claims Commission Act would have been to "cut many 'identifiable groups' of Indians from the scope of the bill, to strike from the list of claims those based on fraud, duress, mistake and the taking of lands without compensation (the most common kind), to disallow the commission discretion on offsets, to ban transfer of suits from the Court of Claims, to remove the [commission's] investigation division, to limit the commission's access to records...to the judicial character of the commission, to prevent compromise settlements, to deny the [commission's] power of final decision, and to close the Court of Claims to post-1946 claims"; Rosenthal, *Day in Court*, 87.

89. See "In the Matter of Julius Streicher: Applying Nuremberg Standards to the United States," in my *From a Native Son: Selected Essays in Indigenism, 1985–1995* (Boston: South End Press, 1996), 445–454. Also see Robert H. Jackson, *The Nürnberg Case as Presented by Robert H. Jackson, Chief of Counsel for the United States* (New York: Alfred A. Knopf, 1947).

90. *Congressional Record*, 30 July 1946, A. 4923.

91. Truman, *Papers*, 414 (author's emphasis).

92. *Congressional Record*, 20 May 1946, 5319.

93. US Department of Interior Report to the House, 1945; quoted in Rosenthal, *Day in Court*, 86–87.

94. US withdrawal from its trust relations with indigenous nations would have been fine had it been attended by a simultaneous relinquishment of its claim to title and jurisdiction over their territories. Since it was not, however, it amounted to a final and illegal absorption of them into the US territorial corpus; see, for example, Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 1993), 5–6.

95. See, for example, the statement of Indian Commissioner William A. Brophy; US Senate Committee on Indian Affairs, *Hearings on H.R. 4497 to Create an Indian Claims Commission*, 79th Cong., 2nd sess. (1946), 15. It should be noted that such goals are entirely consistent with the definition of genocide advanced by Raphaël Lemkin when he coined the term in his *Axis Rule in Occupied Europe* (Washington, DC: Carnegie Endowment for the Promotion of World Peace, 1944), 78.

96. *Congressional Record*, 20 May 1946, 5312.

97. The sole exception was the case of *Pueblo de Taos* v *US* (Doc. No. 357, Ind. Cl. Comm. (1965)), in which 48,000 acres in the Blue Lake area were actually restored at

the request of President Richard M. Nixon. This outcome was, however, explicitly predicated on a 1926 arrangement negotiated by the Pueblo Lands Board in which the Indians agreed to drop a suit for $300,000 in compensation for reserved land onto which the town of Taos, New Mexico had been steadily expanding. The case was therefore defined as "unique," and found to hold no precedential value in other land claims settlements; Nielson, "Land Claims," 320–323.

98. The ICC rationalized its "judicial fiscal responsibility" in denying awards interest against unpaid principle in perfectly circular fashion. In the case of *Loyal Creeks* v *US*, 1 Ind. Cl. Comm. 22 (1951), it held that since the taking of Creek land during the 1830s had been extra-constitutional, it lacked a legal authority on which award interest against unpaid principle. Of course, if the taking were extra-constitutional, principle should never have been at issue in the first place since no valid transfer of title to the US had ever occurred. This meant that the land remained Creek property, subject to recovery. But here the commissioners argued that the 1946 act itself afforded them a legal authority upon which to deny any such remedy. This juridical conundrum is discussed at some length in Thomas LeDuc's "The Work of the Indian Claims Commission Under the Act of 1946," *Pacific Historical Review* 26:1 (Feb. 1957): 1–16.

99. Rosenthal, *Day in Court*, 138.

100. *Congressional Record*, 29 July 1935, 11975.

101. US Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 9390 for Appropriations for Interior and Related Agencies for 1957*, 84th Cong., 2nd sess. (1956), 552–558.

102. US Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearings on S. 307, A Bill to Amend the Indian Claims Commission Act of 1946*, 90th Cong., 1st sess. (1967), 74.

103. General Rules of the Indian Claims Commission, chap. 3, 25 USC 503 (1968).

104. Rosenthal, *Day in Court*, 123.

105. Ibid., 178.

106. *Hearing on S. 4497*, 16.

107. In the so-called "Pit River Claim Settlement" of the mid-1960s, for example, an award of $29.1 million—approximately 47 cents per acre—was authorized as retroactive payment for virtually the entire state of California. Checks were then issued as per capita payments to individuals identified as members of "California Indian Bands." As each check was cashed, the signature on it was tallied as a "vote for termination" (the only way an Indian could vote *not* to be terminated was thus to refuse his or her portion of the settlement). On this basis, it was claimed that the termination of the Juaneños and a number of other Mission Bands in the Los Angeles and San Diego areas had been "voluntary"; see generally, Florence Connolly Shipeck, *Pushed into the Rocks: Southern California Indian Land Tenure, 1769–1986* (Lincoln: University of Nebraska Press, 1988).

108. Rosenthal, *Day in Court*, 166, 178.

109. All told, 109 peoples, or portions of peoples, were terminated under a series of specific statutes accruing from HCR 108 between 1953 and 1962, the great bulk of them by 1958 (one group, the Poncas of Oklahoma, was terminated in 1966). A handful, such as the Menominees in Wisconsin and Siletz in Oregon, were "reinstated" during the 1970s; see generally, Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945–1960* (Albuquerque: University of New Mexico Press, 1986).

110. US House of Representatives, *Present Relations of the Federal Government to the American Indians*, 85th Cong., 2nd sess. (Dec. 1958).

111. Rosenthal, *Day in Court*, 175–198.

112. Richard Drinnon, *Keeper of Concentration Camps: Dillon S. Myer and American Racism* (Berkeley: University of California Press, 1987), 208–209.

113. Wilcomb E. Washburn, *Red Man's Land, White Man's Law* (New York: Scribner's, 1971), 81–86, 103–104.

114. Stan Steiner, *The New Indians* (New York: Harper and Row, 1967), 83.

115. Chief Claims Commissioner Witt estimated in early 1951 that the number might ultimately run as high as 300 by the time the filing period expired at the end of that year; US House of Representatives, Subcommittee of the Committee on Appropriations, *Hearings on the Independent Office Appropriations for 1952*, 82nd Cong., 1st sess. (1951), 28–37.

116. Rosenthal, *Day in Court*, 115.

117. *Hearings on HR 9390*, 552–8.

118. *Hearings on S. 307*, 20.

119. US Senate Committee on Appropriations, *Hearings on H.R. 9417 for Appropriations for the Department of Interior and Related Agencies for 1972*, 92nd Cong., 1st sess. (1971), 1433–1450; Committee on Interior and Insular Affairs, *Amending the Indian Claims Commission Act of 1946 as Amended*, 92nd Cong., 2nd sess., Rept. 682, (2 March 1972).

120. Indian Claims Commission, *Final Report* (Washington, DC: Government Printing Office, 1978). Through 1962—the termination era—there were 105 dismissals versus thirty-seven awards. The ratio improved thereafter, although the average award amount obviously remained quite small.

121. Rosenthal, *Day in Court*, 255.

122. During the late 1950s, the ICC was funded at the level of $178,000 annually. At the same time, the Justice Department was expecting upwards of $600,000 and the GAO about $500,000 per year "defending" the United States from having to pay its debts; *Indirect Services and Expenditures 1959*, 5–8. Also see US Senate, Subcommittee of the Committee on Appropriations, *Hearings on H.R. 10802 on Appropriations for Interior Department and Related Agencies for 1963*, 87th Cong., 2nd sess. (1962), 773–788.

123. *Otoe and Missouria Tribe of Indians* v *United States*, 131 Ct. Cl. 593 (1955). The size of the award, which was small, was not itself at issue. Rather, it was the ICC's decision to base it on "aboriginal title" per se rather than on some earlier recognition of that title. When the court of claims upheld the ICC position on appeal, and the Supreme Court declined to review the matter, the justice department set out to change the law itself, renewing Francis Biddle's absurd contention that it would cost taxpayers $3 billion in awards if Congress failed to comply with the attorney general's wishes; US Senate, *Terminating the Existence of the Indian Claims Commission*, 84th Cong., 2nd sess., Rpt. 1727 (11 April 1956). In the face of this—not to mention the pattern of behavior described in association with notes 117, 118, and 119—the contention advanced by Rosenthal (*Day in Court*, 197) that it would be "biased" to suggest the justice department was objectively "anti-Indian and purposefully obstructionist" in its handling of Indian claims cases is simply laughable.

124. It is true that the United Nations Charter provides that exercise of the right of self-determination by all peoples be balanced against the need to preserve the territo-

rial integrity of UN member states. It is presumptive, however, that the territory in question have been in some sense legitimately acquired; see, for example, Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978).

125. Rosenthal, *Day in Court,* 151.

126. This includes land title "secured" by fraudulent treaties or agreements, lands appropriated by a unilateral act of Congress, and lands confiscated without even the latter pretense of legal justification. These are issues entirely separate from that of lands for which some arguably legitimate form of Native consent to cession was obtained, but for which they were uncompensated or uncompensated at the time. This last is all the ICC was authorized to adjudicate, although, as with the Western Shoshone Land Claim, it often attempted to "create title where none had previously existed" whenever it came upon any of the first three situations; Jack D. Forbes, "The 'Public Domain' of Nevada and Its Relationship to Indian Property Rights," *Nevada State Bar Journal* 30 (1965): 16–47; Russel L. Barsh, "Indian Land Claims Policy in the United States," *North Dakota Law Review* 58: 1–82;

127. Public Lands Law Review Commission, *One Third of the Nation's Land* (Washington, DC: US Department of Interior, 1970).

128. Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (New York: Delacourt Press, 1974), 227.

129. Robert T. Coulter and Steven M. Tullburg, "Indian Land Rights," in *Aggressions of Civilization,* 204.

130. See the 1967 statement by National Indian Youth Council representative Hank Adams to the US Senate; *Hearings on S. 307,* 91.

131. Videotaped interview, April 1982; tape on file.

132. The term accrues from Scoop Jackson's assertion, made during his advocacy of the Claims Commission Act in 1946, that failure to dispose of Native claims would "perpetuate clouds upon white men's title that interfere with development of our public domain"; *Congressional Record,* 20 May 1946, 5312.

133. Rosenthal, *Day in Court,* 250. On the Suquamish, Puyallup, and Stillaquamish, see US Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 721, A Bill to Authorize Appropriations for the Indian Claims Commission for Fiscal Year 1974 and Other Purposes,* 93d Cong., 1st sess. (16 Feb. 1973), 118. On the Shoshone see Elmer R. Rusco, "Historic Change in Western Shoshone Country: The Establishment of the Western Shoshone National Council and Traditionalist Land Claims," *American Indian Quarterly* (Summer 1992): 337–360. On the Oneida, see Arlinda Locklear, "The Oneida Land Claims: A Legal Overview," in *Iroquois Land Claims,* eds. Christopher Vescey and William A. Starna (Syracuse, NY: Syracuse University Press, 1988), 141–153.

134. At issue is the Black Hills area of South Dakota, guaranteed by the 1868 Fort Laramie Treaty but taken by the US in 1877. The original award was for $17.5 million, interest free; *Sioux Nation* v *U.S.,* 220 Ct. Cl. 442, 601 F.2d 1157 (1975). On appeal, the Supreme Court, deeming the matter compensable under the Fourth Amendment, added 5 percent simple interest, making the gross amount awarded $122.5 million. By referendum, the Lakotas declined to accept; *Sioux Nation* v *U.S.,* 488 US 371 (1980). During the 1980s, New Jersey Senator Bill Bradley attempted to resolve the issue by introducing a bill in which the award would have been paid as an indemnity, certain

lands would have been restored, and a split jurisdiction effected over the rest. The plan was opposed by South Dakota's congressional delegation and therefore withdrawn; see "The Black Hills Are Not For Sale: The Lakota Struggle for the 1868 Treaty Territory," in my *Struggle for the Land: Native North American Resistance to Genocide, Ecocide and Colonization*, 2nd ed. (Winnipeg: Arbiter Ring, 1999).

135. Richard O. Clemmer, *Roads in the Sky: The Hopi Indians in a Century of Change* (Boulder: Westview Press, 1995), 187.

136. Nielson, "Indian Land Claims," 308.

137. Quoted in Fred Eggan, *The American Indian: Perspectives for the Study of Social Change* (Chicago: Aldine, 1966), 166.

138. As legal scholar Morton E. Price opined, "It was preposterous to recognize fully such extraordinary claims of a handful of poor people, even if the were based on legitimate entitlement"; quoted in Harold Fey and D'Arcy McNickle, *Indians and Other Americans: Two Ways of Life Meet* (New York: Harper and Row, 1970), 123. No indication is offered as to why this would have been any more "preposterous" to recognize these particular claims than to recognize the extraordinary claims of, say, the richest 3 percent of Americans to ownership or control of about one-third of the nation's wealth.

139. See the examples of such misinformation discussed by Paul Brodeur in his *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England* (Boston: Northeastern University Press, 1985). Also see Alan Van Gestel, "When Fictions Take Hostages," in *The Invented Indian: Cultural Fictions and Government Policies*, ed. James E. Clifton (New Brunswick, NJ: Transaction Books, 1990), 291–312.

140. For breakouts of this acreage, see Public Lands Law Review Commission, *One Third of the Nation's Land*. For analysis, see Barsh, "Land Claims Policy."

141. Rosenthal, *Day in Court*, 253.

142. US Senate Memo of the Chairman to the Committee on Interior and Insular Affairs, *An Analysis of the Problem and Effects of Our Diminishing Indian Land Base, 1948–1957*, 85th Cong., 2nd sess. (Dec. 1959), 101.

143. In international law, there are two primary principles of restitution: (a) "*restitutio integrum*" (restoration of the former legal situation) and, (b) "*restitutio in natura*" (returning of something wrongfully taken to its original owner). Acts of compensation or reparation are considered only if the former legal situation cannot be restored. Istvan Vasarhelyi, *Restitution in International Law* (Budapest: Hungary Academy of Science, 1964), 74.

144. Deloria, *Trail of Broken Treaties*, 223–226.

145. Consider as analogs the compensation customarily awarded for such things as "mental anguish," "pain and suffering," and "discrimination" in US civil law.

146. Rosenthal, *Day in Court*, 257.