

# THROUGH THE GREED, IGNORANCE, AND POWER BEHIND THE LAW, A PEOPLE STILL REMAIN

ALICE ENG\*

**WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES.** By MICHAEL LIEDER & JAKE PAGE. New York: Random House. 1997. Pp. 304.

America's historical inability and unwillingness to understand the distinct culture and beliefs of Native American people are associated with the ineffectiveness of legal redress of Native American claims by the Indian Claims Commission.<sup>1</sup> Although the horrendous maltreatment of the Native American population by the Federal Government in past centuries is now common knowledge,<sup>2</sup> what few people recognize is that the abuse of Native American dignity continues today.<sup>3</sup> Socially and legally, America remains incapable of understanding the cultural differences between Native Americans and Anglo-Americans.<sup>4</sup> This lack of comprehension, especially surrounding the way each culture views land and treaties, precludes recognition and awareness of these differences in the development of legal redress of Native American claims.<sup>5</sup> Although technically classified as past grievances, the trickery and deception that characterized the Government's actions against Native Americans are continually validated by law.<sup>6</sup> With every obstacle to legal and moral vindication that Native American people are forced

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\* Staff Writer, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

<sup>1</sup> See MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* 265-69 (1997). The time period from 1946 to 1978 marked the existence of the Commission whose purpose was to finally decide Native American claims against the Federal Government, not only for those relying on legal principles, but also for those based on moral considerations. See *id.* at 65-66.

<sup>2</sup> See *id.* at 255.

<sup>3</sup> See Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 754 (1992) [hereinafter Newton, *Courts of the Conqueror*].

<sup>4</sup> See Tracy N. Zlock, Note, *The Native American Tribe as a Client: An Ethical Analysis*, 10 GEO. J. LEGAL ETHICS 159, 166 (1996).

<sup>5</sup> See *id.*

<sup>6</sup> See LIEDER & PAGE, *supra* note 1, at 68; Newton, *Courts of the Conqueror*, *supra* note 3, at

to surmount in their search for justice, in whatever form it exists,<sup>7</sup> Native Americans are still degraded.

With a compelling perspective that approaches Native American legal issues from both a social and legal viewpoint, Michael Lieder and Jake Page unfold the legal tale of Native American claims in the context of the human drama of fundamental dignity and respect.<sup>8</sup> Appreciating the correlation and interconnection of societal values with the laws created by the people spawned by this same society, the authors seek to expose the cyclical nature of the effects and influences of the law amongst those who create it and those who must obey it.<sup>9</sup> Although the law is molded by society, not all of those who have a hand in shaping it are subject to it. As a result, a gap in comprehension develops between those who create the laws and those for whom the laws are created. While such a gap may not determine whether the laws are obeyed, it diminishes the law's effectiveness; effectiveness is based not solely on obedience of the law but also on the respect accorded it.<sup>10</sup> Respect for the law is not a matter of right, for all that the law declares is not always right or fair, but a matter of merit since people will respect only that which respects them.

Michael Lieder and Jake Page, a lawyer and a professional writer respectively, portray a more complete story of Native American claims by combining the social elements of culture and religion with the legal elements of rights.<sup>11</sup> Through the illustration of the struggle of the Chiricahua Apaches in their tedious and tormenting path to and through the American legal system for redress of wrongs committed

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754. The abuse Native American tribes previously suffered at the hands of the Government continues today, in substance if not form, since the laws remain in the Government's promulgation. See Newton, *Courts of the Conqueror*, *supra* note 3, at 754. However, "Indian tribes have refused to disappear despite the genocide of the 18th and 19th centuries, the neglect of the first half of the 20th century, and the genocide-at-law that continued well into this century." *Id.*

<sup>7</sup> See LIEDER & PAGE, *supra* note 1, at 90-91.

<sup>8</sup> See *id.* at v-vi.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* at 265-69. Native American tribes did not understand the Anglo-American concept of "property" and thus did not respect the laws governing property as a commodity to be bought and sold as reflected in the words of Tecumseh, "Sell a country! Why not sell the air, the clouds and the great sea, as well as the earth? Did not the Great Spirit make them all for the use of his children?" *Id.* at 269.

<sup>11</sup> See *id.* at vi. Before entering law school, Michael Lieder spent four years working for two of the principal lawyers discussed in the book during their representation of tribes under the Indian Claims Commission Act. See *id.* Jake Page is not a lawyer but a professional writer, whose mission was to ensure that the legal analyses of the book were understandable to non-lawyers while unfolding the human dramas underlying each of the cases for the reader. See *id.*

by the Government against them, Lieder and Page detail the failure of the Indian Claims Commission to accomplish the goals under which it was created: to make amends for the wrongs committed against Native American tribes and to put an end to their claims once and for all.<sup>12</sup> In unveiling the failure of the Indian Claims Commission, the authors demonstrate two points. First, they highlight the enduring degradation of Native Americans who have encountered continuous obstacles and barriers to their legal and moral claims, which are an extension of the humiliation they confronted in their early dealings with the Government.<sup>13</sup> Secondly, Lieder and Page provide an analysis of the fundamental problems with the Indian Claims Commission Act through the illustration of claims brought by Native American tribes which exposed the limitations of the American legal system.<sup>14</sup> These limitations primarily resulted from the narrow white American cultural vision afforded the "translation of Indian culture into the language of the law."<sup>15</sup> The word most difficult to translate accurately from Native American culture into Anglo law is "justice" since Native American tribes could find no justice in the purely monetary awards granted to them in the shadow of a hollow victory.

The Chiricahua Apaches provide a prime example of how resolute Native American tribes can be in their struggle for justice, to accept not just what the legislature and the courts are willing to give them but to fight until they receive all that they deserve.<sup>16</sup> Final resolution of their claims will result only when the law becomes flexible enough to encompass the historical and cultural implications these claims have legally as well as morally.<sup>17</sup> By understanding the particular culture and history of Native Americans, lawmakers could approach a level of comprehension of and affinity to the real dilemma that Native Americans face.<sup>18</sup> Only then could lawmakers adequately address the under-

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<sup>12</sup> See LIEDER & PAGE, *supra* note 1, at x, 146.

<sup>13</sup> See *id.* at 89–92.

<sup>14</sup> See *id.* at 266–72.

<sup>15</sup> Zlock, *supra* note 4, at 166.

<sup>16</sup> See LIEDER & PAGE, *supra* note 1, at 4. Although the land claim of the Chiricahua Apaches was very important, they felt that the time they spent imprisoned by the Government was paramount. See *id.* at 108. The Chiricahua Apaches pursued their imprisonment claim, which the Government contended was individual, not tribal in nature, even though no previous decision precisely addressed the issue before the Commission. See *id.* at 105–08.

<sup>17</sup> See Zlock, *supra* note 4, at 166–67.

<sup>18</sup> See *id.* Comprehension of cultural differences is essential to effective representation and legal redress. See *id.* Otherwise the motives and objectives of tribal litigation consistent with Native

lying moral and practical concerns of Native American legal claims.<sup>19</sup> The spirit of the Native American claim embodies the need to be reunited with the land from which Native Americans draw their identity as a people.<sup>20</sup> Additionally, this spirit encompasses Native Americans' need for human respect which mandates that the Government acknowledges fault for the wrongs committed against them.<sup>21</sup> But like the spirit of Native American people, whether united or divided, the spirit of the claim will not be conquered until wild justice is realized; for that which grows in the wild has the most tenacious roots.

Part I of this book review will provide a general overview and discussion of the unique cultural perspective of Native Americans and the tensions inherent in the Anglo-American/Native American relationship. Part II will discuss the history and legislative intent behind the Indian Claims Commission Act of 1946. Part III will outline the obstacles Native American tribes faced in complying with the Act's requirements. In Part IV, the various types of claims brought by Native American tribes will be analyzed to reveal their underlying problems. The issues and concerns raised by Lieder and Page, while not new, are insightful to demonstrate the improvement potential inherent in the process of trial and error that can be made in the nature of law in the Native American context.<sup>22</sup>

## I. NATIVE AMERICAN CULTURE AND ANGLO-AMERICAN/NATIVE AMERICAN TENSION

Fundamental to the examination of the inadequacy of the Indian Claims Commission to address Native American claims is the understanding of the distinctive cultural characteristics and lifestyles of Native American people before governmental intrusion.<sup>23</sup> Arranged in

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American culture will continue to be considered insignificant and any legal satisfaction the tribes receive will offer no real cultural and moral satisfaction. *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.* at 159. To Native American tribes, land could not be separated from the very essence of who they were as a people. *See* LIEDER & PAGE, *supra* note 1, at 269. "[W]hen the United States took part or all of a tribe's aboriginal land, it didn't just take something of monetary value; rather, it took a crucial means for the tribe to maintain its identity." *Id.* The Pueblo of Taos was the first Native American tribe to seek return of their land. *See id.* at 193. The bowl-shaped watershed surrounding Blue Lake, the center of their religion, was believed to be the place where the souls of the dead retreated and from where life is given to the people of today. *See id.* The area was finally returned to the Taos Indians in December 1970. *See id.* at 194.

<sup>21</sup> *See* LIEDER & PAGE, *supra* note 1, at 92-93.

<sup>22</sup> *See id.* at 265-69.

<sup>23</sup> *See id.* at 268-69.

relatively small groups that included a handful of extended families, the Chiricahua Apaches received instruction and direction from influential heads of family, but decisions were made communally.<sup>24</sup> Rather than politically organized around centralized authority, the Chiricahua Apaches were united under one name and differentiated from other tribes by common language and customs.<sup>25</sup> United by common language and custom, the Chiricahuas also shared a common vision of life which revolved around their special relationship with the land.<sup>26</sup> The land represented the foundation of their history, survival, and cultural influences such that their tribal identity could not be divided into economic, political, or religious dimensions.<sup>27</sup> Therefore, land was not property to be sold or traded, valued only for the monetary rewards it could bring, but derived its value from the historical and spiritual meaning that created tribal identity.<sup>28</sup>

While Native American cultural beliefs are important to comprehending the types of claims Native American tribes brought before the Commission, these beliefs are equally significant to understanding the attitude with which these tribes brought their claims.<sup>29</sup> The Apache code of honor demanded that each individual take responsibility for his or her own actions.<sup>30</sup> Fueled by the fighting rage of *indeh*, meaning dead, in their pursuit of wild justice, Geronimo, the military leader and figurehead of the Chiricahua Apaches, and his warriors were bound by the Chiricahua spirit to continue fighting and resisting as part of the Apache code of life.<sup>31</sup> Life and honor were related principles behind the Apaches' vision of existence.<sup>32</sup> The Apache code of life governed the actions they are compelled to take, while their code of honor commanded the attitude with which their actions were taken.<sup>33</sup>

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<sup>24</sup> See *id.* at 6–8.

<sup>25</sup> See *id.* at 7.

<sup>26</sup> See Zlock, *supra* note 4, at 166–68.

In our day each remaining acre is a promise that we will 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 have any people become more closely attached to the land, religiously and traditionally.

*Id.* at 168 (quoting the Declaration of Indian Purpose).

<sup>27</sup> See LIEDER & PAGE, *supra* note 1, at 268–69.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.* at 97.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 4.

<sup>32</sup> See LIEDER & PAGE, *supra* note 1, at 4, 117.

<sup>33</sup> See *id.* The Apache code of life spurred them to continue fighting even though they knew

Thus, when Geronimo resisted the Federal Government after it had repeatedly cheated and deceived his people of the land it promised them, he considered the implications his actions would have not only for himself but also for his fellow people.<sup>34</sup> For all practical intent and purposes, it was pointless, if not impossible, to distinguish between individual tribulation and that suffered by the tribe.<sup>35</sup> The Chiricahua Apaches were a people of principle and honor, but most importantly they were one people united.<sup>36</sup> The fate of one lay in the hands of another.<sup>37</sup>

Once the rationale behind Native American beliefs is understood, the opposition between these beliefs and Anglo-American legal concepts can be examined. The tension arising between these two concepts stems from the position Native American tribes enjoyed as sovereign groups, a status which the Government stripped them of through one significant legislative act.<sup>38</sup> Before the arrival of European nationals onto American land, Native American people controlled their actions and lived under their own guidelines.<sup>39</sup> As the United States Government developed and gained power with the passage of time, it trampled the sovereignty of Native American tribes.<sup>40</sup> The loss of sovereign status resulted not only in a limitation of actions for Native Americans, but more importantly in an annihilation of autonomy and control over their own fate.<sup>41</sup>

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they could not win, while their code of honor required them to take responsibility for their actions once they were taken. *See id.* For the Apaches, every action has a consequence; thus life and honor are inextricably intertwined. *See id.*

<sup>34</sup> *See id.* at 97.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See* LIEDER & PAGE, *supra* note 1, at 97. The fate of imprisonment of the individual Chiricahua Apaches actually seemed to lie in the hands of two others, Geronimo and the Federal Government. *See id.* at 28, 97. Due to his rebellion, Geronimo implicated his fellow Chiricahuas in his eyes as well as those of the Government. *See id.* However, the Federal Government imprisoned all the Chiricahuas, even those who took no part in the outbreak or resistance. *See id.* During this imprisonment, over half of the Chiricahua population was born into captivity as prisoners of war. *See id.* at 28, 43.

<sup>38</sup> *See* Susan Lope, Note, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims*, 23 Sw. U. L. Rev. 331, 333-36 (1994). Congress passed the Indian Department Appropriations Act on March 3, 1871. *See id.* The Act stripped Native American tribes of their sovereignty by declaring "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." *Id.* at 336.

<sup>39</sup> *See id.* at 333-34.

<sup>40</sup> *See id.* at 334-35.

<sup>41</sup> *See id.* at 335-37.

Principles in Anglo-American legal theory failed to adjust to the unique circumstances and position of Native Americans.<sup>42</sup> While the Anglo-American legal system has long imposed specific duties and strict standards of conduct for private trustees, it has ignored the consequences of such trust relationships for a once sovereign people.<sup>43</sup> In order for the United States to advance its own interests it needed to subordinate those of Native Americans.<sup>44</sup> Thus a conflict of interest was created.<sup>45</sup> The Federal Government declared itself the trustee for Native American funds received from the sale of the rights to resources on Native American land to non-Indians.<sup>46</sup> Life before reservations for Native Americans consisted of absolute control and autonomy to dispose of and use their land.<sup>47</sup> But once the Government denounced Native American sovereignty and assumed management powers over tribal lands, resources, and money, Native Americans had practically no input in the management of these resources.<sup>48</sup> The fact that the Government could just assert for itself such a position of control and dominion over a proud and independent people intensified the already unstable relationship between the two groups.<sup>49</sup> While Anglo-American legal concepts exacerbated the tension between the Government and Native Americans, this tension escalated even further when the Government ignored its own legal concepts.<sup>50</sup> Inherent in Anglo-

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<sup>42</sup> See LIEDER & PAGE, *supra* note 1, at 116–17. Although the theory of eminent domain is straightforward in stating that the Government has the power to take private lands without the landowner's agreement, the Fifth Amendment guarantees the landowner a recourse. *See id.* However, the differences between Indian and non-Indian eminent domain claims illustrate the specific situation of the Native American tribe. *See id.* Included in these differences are the lack of title and definitive boundaries to the aboriginal land of the Native Americans, their disagreement with the Anglo-American concept of land ownership, and the cultural value and relationship of the land to their people. *See id.*

<sup>43</sup> *See id.* at 230; Lope, *supra* note 38, at 337–38. A major characteristic that set the scene for the trust relationships between the United States and Native American tribes was the fact that the Government was the largely self-appointed trustee for the Native Americans, assuming the role without their consent. *See Lope, supra* note 38, at 336–37.

<sup>44</sup> *See Lope, supra* note 38, at 336–38.

<sup>45</sup> *See id.*

<sup>46</sup> *See LIEDER & PAGE, supra* note 1, at 230.

<sup>47</sup> *See Lope, supra* note 38, at 334–35.

<sup>48</sup> *See LIEDER & PAGE, supra* note 1, at 230.

<sup>49</sup> *See id.*; Lope, *supra* note 38, at 336–37. The relationship between the United States and Native Americans had been marred by the United States inability or unwillingness to keep its promises. *See Lope, supra* note 38, at 337. Therefore, Native Americans have had a long and hard battle to redress even the most basic of claims. *See id.*

<sup>50</sup> *See LIEDER & PAGE, supra* note 1, at 218. For example, the Anglo-American legal system imposes significant duties and strict standards of conduct on private trustees. *See id.* at 230. As self-appointed trustees for the Native American tribes, the United States Government was bound

American law is the principle that "every individual has an obligation not to interfere with the freedom of another, except in certain defined circumstances."<sup>51</sup> However these circumstances may be defined, justice mandates that the innocent should not be punished for crimes they have not committed. The Government violated this principle when it imprisoned the entire group of Chiricahua Apaches for the crimes committed by a few.<sup>52</sup> In this manner, the tension is attributable to the lack of honor and honesty the Government demonstrated in its relations with the Chiricahuas.

Finally, Anglo-American/Native American tension is caused by the lack of comprehension of and flexibility for different beliefs and cultures in Anglo-American law.<sup>53</sup> The theory of eminent domain provides that the Government has the power to take private lands without the landowner's agreement.<sup>54</sup> To balance such a broad power, the Fifth Amendment guarantees that a landowner is entitled to the value of the property at the date of the taking plus the interest calculated from that date to the date of the award.<sup>55</sup> However, in considering the obstacles to establishing proof of ownership by legal title to land, which Native Americans lacked since their land was aboriginal in nature, such Anglo-American legal concepts failed to account for differences in culture and circumstance.<sup>56</sup> Additionally, the view that the compensated taking of land was legitimate completely ignored the fact that land was more than a financial interest for Native Americans;<sup>57</sup> to them the land was their life blood and nowhere in the law is that recognized. Tensions between Anglo-American legal concepts and the Native American culture forced to fit within those confines are caused by power discrepancies, disregard for basic human integrity, and lack of understanding. It is not difficult to imagine why Native Americans are always on their guard when it comes to the Government. Betrayal once may be forgiven but betrayal again will never be forgotten.

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by traditional trustee obligations not to divert assets of the trust to its own benefit or that of third parties, to charge a fair price for the lease of trust resources, and to keep account for its management of trust assets. *See id.* at 230. The Court of Claims and the Indian Claims Commission found that the Government did not fulfill its obligations and duties as a trustee. *See id.* at 233, 244-47.

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 28, 43.

<sup>53</sup> *See id.* at 266-69; Zlock, *supra* note 4, at 166.

<sup>54</sup> *See* LIEDER & PAGE, *supra* note 1, at 116.

<sup>55</sup> *See id.* at 116-17.

<sup>56</sup> *See id.* at 117.

<sup>57</sup> *See id.* at 116-17, 269.



Once united under the name of Chiricahua Apaches, the Fort Sill and Mescalero Apaches share a history, a culture, a language, and an experience of imprisonment that will always bind them to one another.<sup>58</sup> Along different paths, these two tribal groups fought through the legal realm for redress of their claims only to find that they eventually arrived at the same place.<sup>59</sup> Below is a brief overview of each group individually as they currently exist but this review will show how they previously existed under the name Chiricahuas.

The Fort Sill Apaches were named for the location of the reservation on which they eventually settled and remained.<sup>60</sup> During the nineteen years they were confined as prisoners of war on the Fort Sill Reservation,<sup>61</sup> the Chiricahuas were converted from a life where subsistence depended on hunting and gathering to one where agriculture and raising cattle were the staples of survival.<sup>62</sup> At the end of their imprisonment, the Fort Sill Apaches were promised allotments of 160 acre parcels, which not all of them received.<sup>63</sup> Allotment was a federal Indian policy from 1880 to 1920 which signified a departure from the tribal way of life in favor of a push toward individualism.<sup>64</sup> Although less tied to the tribal group, exposed to Christianity, and better educated, the Fort Sill Apaches clung to their tribal heritage through informal family gatherings on the weekends and the singing of the Lonesome Songs, a reflection and yearning for a life they no longer had and some would never know.<sup>65</sup>

While the Fort Sill Apaches were forging a new life in the Anglo world, the Mescalero Apaches were striving to return to a land and life they once had.<sup>66</sup> Upon arriving at the Mescalero Reservation in New

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<sup>58</sup> See *id.* at 6-7, 49, 82.

<sup>59</sup> See LIEDER & PAGE, *supra* note 1, at 82, 113-14.

<sup>60</sup> See *id.* at 40, 78.

<sup>61</sup> See *id.* at 40, 49. The Chiricahua Apaches arrived at the Fort Sill, Oklahoma Reservation in 1894 and were not given the freedom to leave until the end of 1912 when the Chiricahuas decided individually whether they wished to remain at the Fort Sill Reservation or to head Southwest to Mescalero. See *id.*

<sup>62</sup> See *id.* at 7, 71, 77.

<sup>63</sup> See *id.* at 76-77. Among those who received their 160 acre allotments, many found the parcels unusable because they became increasingly smaller with each division among all familial heirs as required by the intestate deaths of Native Americans. See *id.* at 77. The divided and various interests held in one parcel of land complicated the issue of who would live on or farm it. See *id.*

<sup>64</sup> See LIEDER & PAGE, *supra* note 1, at 40, 77-78.

<sup>65</sup> See *id.* at 78-79.

<sup>66</sup> See *id.* at 47, 70. The Mescalero Apaches were so named for the Mescalero Reservation they settled on and the consolidation of the various tribes on this reservation resulted in the creation of the Mescalero Tribe. See *id.* at 70, 74. The move to the Mescalero Reservation meant

Mexico, the Mescalero Apaches experienced the isolation that came with starting over.<sup>67</sup> Their Government-imposed training in ranching and agriculture ill-prepared the Mescalero Apaches for life in an area where the growing season was too short to sustain consistent yields in oats, their only cash crop, and where the herd was too small to produce sufficient income or jobs.<sup>68</sup> Dependent upon the Government for housing and forced to live in a geographic area not entirely of their own choosing, the Mescalero Apaches soon found themselves destitute.<sup>69</sup> However, under the options presented in the Indian Reorganization Act, the Mescalero Reservation adopted a constitution and bylaws which effectively established the Mescalero Tribe.<sup>70</sup> The tribal council was composed of a ten-person business committee.<sup>71</sup> This new legal identity voluntarily assumed by the separate tribal groups on the Mescalero Reservation implicitly required that each distinct tribal and cultural unit relinquish their separate ethnic identities to gain recognition as a political group.<sup>72</sup>

## II. INDIAN CLAIMS COMMISSION ACT (1946)

On August 13, 1946, the Indian Claims Commission Act was passed by Congress and signed into law by President Harry Truman.<sup>73</sup> With unprecedented value and effect, this Act granted the Commission the jurisdiction to hear any claim brought by any "Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska" that accrued on or before the date of the passage of the bill.<sup>74</sup> Technically, Native American tribes would be placed on the same ground as all other Americans

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the continuation of a tribal way of life on tribally owned lands with other Indians. *See id.* at 47. There were nearly a half million acres to live on with mountains, grass, streams, deer, and elk. *See id.* at 70.

<sup>67</sup> *See id.* at 70-72, 74.

<sup>68</sup> *See id.* at 71.

<sup>69</sup> *See* LIEDER & PAGE, *supra* note 1, at 70-71.

<sup>70</sup> *See id.* at 74.

<sup>71</sup> *See id.*

<sup>72</sup> *See* LIEDER & PAGE, *supra* note 1, at 74; William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 336 (1990). Tribes acknowledged under 25 C.F.R. 83 are established as an "Indian" tribe only within the meaning under federal law which does not account for the numerous definitions of "tribe" that exist in an ethnic sense. *See* Quinn, *supra*, at 336.

<sup>73</sup> *See* LIEDER & PAGE, *supra* note 1, at 64.

<sup>74</sup> Indian Claims Commission Act §§ 2, 24 (formerly codified at 25 U.S.C. §§ 70a, 1505, omitted from Code upon Commission termination on Sept. 30, 1978), *quoted in* LIEDER & PAGE, *supra* note 1, at 64-65, 82.

in terms of opportunity and access to bring property and contract claims against the Federal Government.<sup>75</sup> Among the barriers lifted by the passage of the Act was the waiver of the statute of limitations and sovereign immunity.<sup>76</sup> Respectively, these doctrines would have barred those suits not brought within a specified time period after the occurrence of the claim and those brought against the Government without its consent.<sup>77</sup> The Act specified that claims were to be filed before the Commission within five years of the Commission's creation or they would be forever barred.<sup>78</sup> After all claims were filed, the Commission was granted an additional five years to issue a decision.<sup>79</sup> Similar to the limited remedies available to the Court of Claims, the Commission could only grant monetary awards.<sup>80</sup> Development of problems concerning resources to hear these claims caused the Commission's deadline to be extended five times beginning in 1957, in five year increments.<sup>81</sup> In light of the problems faced by the Commission, it was not surprising that the Commission was ultimately dissolved in 1978.<sup>82</sup>

The Commission's failure was partially due to its inability to satisfy the intent behind the Act, mainly because of the mind-set with which it carried out its operation.<sup>83</sup> Some legal scholars have asserted the major purpose of the Indian Claims Commission Act was to eliminate the cloud hanging over non-Indian titles.<sup>84</sup> In reality, the fact was that in 1946, tribes did not pose a threat to the land titles of non-Indians.<sup>85</sup> Perhaps by compensating Indian tribes for the land deceptively confiscated from them, the Government was indirectly acknowledging fault without directly apologizing for the wrongs it committed.<sup>86</sup> However, to acknowledge fault is completely different than offering an apology for it.

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<sup>75</sup> See LIEDER & PAGE, *supra* note 1, at 64-65.

<sup>76</sup> See *id.* at 52, 65-66; Newton, *Courts of the Conqueror*, *supra* note 3, at 768, 792.

<sup>77</sup> See *id.*

<sup>78</sup> See LIEDER & PAGE, *supra* note 1, at 65.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.* at 52-53, 271.

<sup>81</sup> See *id.* at 65.

<sup>82</sup> See *id.*

<sup>83</sup> See LIEDER & PAGE, *supra* note 1, at 146. The Commission took on the role of a social welfare agency, dispersing limited compensation to tribes to ensure some recovery. See *id.* But the Commission's most important goal was putting an end to Indian claims. See *id.* To achieve this goal, they devised fictions which distorted judgments on aboriginal land claims to the point where they hardly resembled traditional Anglo-American notions of judicial proceedings. See *id.*

<sup>84</sup> See *id.* at 175.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.* at 116, 146.

Established in the aftermath of World War II, the Commission may have reflected the United States' sensitivity to the parallel barbarous treatment of racial and ethnic minorities in Europe.<sup>87</sup> Whatever humane considerations the United States may have had in the creation of the Act, a practical purpose that weighed heavily in its favor was the final resolution of Indian claims.<sup>88</sup> Such resolution would only be possible if all of the injustices suffered by Native Americans were heard and compensated.<sup>89</sup> Given the nature and history of treatment of Native Americans by the United States Government, the essence of the Chiricahuas' claims against the Government centered around their humanitarian claim for respect and fairness in light of their twenty-seven year imprisonment rather than on their economic claims for land or mismanagement of trusts.<sup>90</sup> Anticipating that this source of discontent would spur Native American tribes to continue to bring claims and have them resolved before they could finally be put to rest, the Legislature inserted a "fair and honorable dealings" clause in the Act.<sup>91</sup> Clause 5 of the Act provides for "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."<sup>92</sup> The Act provided for an Investigation Division to assist in the factual support needed for these claims in light of the difficulty tribes and their attorneys had in obtaining documentation and factual findings to support their cases.<sup>93</sup> However, an Investigation Division was never established, thus resting the burden of fact-finding on attorneys.<sup>94</sup> The fact that non-economic claims were quickly disposed of due

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<sup>87</sup> See Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468 (1994) [hereinafter Newton, *Compensation*].

<sup>88</sup> See LIEDER & PAGE, *supra* note 1, at 146.

<sup>89</sup> See *id.* at 108, 146.

<sup>90</sup> See LIEDER & PAGE, *supra* note 1, at 108; Newton, *Courts of the Conqueror*, *supra* note 3, at 776-81. Grady Lewis, one of the lawyers for the Chiricahua Apaches, stated, "[I]t is known by everyone who has the slightest knowledge of the subject that the principal claim of the Fort Sill Apaches grows out of their imprisonment as prisoners of war." LIEDER & PAGE, *supra* note 1, at 108.

<sup>91</sup> See Indian Claims Commission Act § 2 (formerly codified at 25 U.S.C. §§ 70a, 1505, omitted from Code upon Commission termination on Sept. 30, 1978), *quoted in* LIEDER & PAGE, *supra* note 1, at 67.

<sup>92</sup> *Id.* The Act's intentionally open-ended language allowed the Commission to apply moral principles across the board in order to cover the entire course of the relationship between the Government and the Native American tribes. See Newton, *Courts of the Conqueror*, *supra* note 3, at 776-77. The Commission hoped that addressing the issues would finally put them to rest. See *id.*

<sup>93</sup> See LIEDER & PAGE, *supra* note 1, at 88-89; Newton, *Compensation*, *supra* note 87, at 468-69.

<sup>94</sup> See *id.*; Newton, *Courts of the Conqueror*, *supra* note 3, at 772-73. The Commissioner believed that the Investigation Division was an unfamiliar agency of questionable value. See LIEDER

to distinctions such as individual versus tribal claims<sup>95</sup> and duties expressly assumed by the Government versus implied duties based upon actions<sup>96</sup> illustrates how little weight the intent of the Act was given. As noble as the intent of the Act may have been, once in operation the focus of the claim always rested on the eventual outcome and the economic ramifications associated with it rather than on what the claim was really about.<sup>97</sup>

Perhaps to an even greater degree, the failure of the Indian Claims Commission Act could be attributed to the inability or unwillingness of the Government to open its mind and vocabulary to a different culture and way of life.<sup>98</sup> One of the greatest flaws of the Commission was its implementation of an adversarial system that operated more like a court than a commission that heard disputes.<sup>99</sup> While the American judicial system relies upon the adversarial system to bring out the facts leading to the truth, Native American disputes are mediated among tribal members to reach a just resolution.<sup>100</sup> In addition to this difference in approach, mediation was the more sensible of the methods of adjudication given the scarcity of factual evidence and documentation in these decades-old, if not centuries-old, claims.<sup>101</sup> In light of the past actions of trickery and deception taken by the Government against Native American people, the atmosphere of distrust would only be exacerbated by the additional opposition and conflict inherent in the adversarial process. The Commission naturally gravitated toward the adversarial model presented in the courts as the method of adju-

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& PAGE, *supra* note 1, at 89. Attorneys for both the Indians and the government placed little if any value on such a division, preferring to do their own research. *See id.*

<sup>95</sup> *See* LIEDER & PAGE, *supra* note 1, at 105–07. The Indian Claims Commission Act authorized claims to be brought “on behalf of any Indian tribe, band, or other identifiable group of American Indians.” Indian Claims Commission Act § 2 (formerly codified at 25 U.S.C. §§ 70a, 1505, omitted from Code upon Commission termination on Sept. 30, 1978), *quoted in* LIEDER & PAGE, *supra* note 1, at 105. In the Chiricahuas’ imprisonment claim, Commissioner Holt declared imprisonment to be a violation of personal rights of individual Indians and a personal wrong committed against each individual Indian rather than a wrong against the tribe of which the individual is a member. *See* LIEDER & PAGE, *supra* note 1, at 107. Therefore, he determined the claim was individual in nature and did not fit within the language of the Act. *See id.*

<sup>96</sup> *See* LIEDER & PAGE, *supra* note 1, at 217–18. Tribes could not recover under the fair and honorable dealings clause unless the Government had violated a duty assumed under a treaty, agreement, order, or statute. *See id.* at 217 (discussing Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194, 1197–1200 (Ct. Cl. 1970)).

<sup>97</sup> *See id.* at 92–93, 223–24.

<sup>98</sup> *See id.* at 265–69.

<sup>99</sup> *See id.* at 68, 88–89, 272.

<sup>100</sup> *See id.* at 68, 88.

<sup>101</sup> *See* LIEDER & PAGE, *supra* note 1, at 88–89, 269–71.

dication since it was "the white man's method of resolving disputes."<sup>102</sup> Contrary to the adversary system, mediation entailed compromise, negotiation, and perhaps vindication for the Indian tribes, a result the Government avoided at all costs.<sup>103</sup>

Functionally similar to the Court of Claims, the Commission was only authorized to award monetary damages.<sup>104</sup> In this way, the Commission completely disregarded the cultural differences in beliefs and life-style of the Native American tribes.<sup>105</sup> Monetary value of property held no meaning for Native American tribes.<sup>106</sup> Rather it was the religious and traditional connection Native Americans had to the land which held for them the promise that as long as they were never separated from the land they, as a people, would endure.<sup>107</sup> Although restoration of land as a remedy would have been very limited due to the broad distribution of aboriginal land to non-Indians and the development of the land that had occurred, it was a remedy that was possible to a limited extent.<sup>108</sup> The Government should have realized that the desire and need for their own land is so deeply embedded in the spirit of the Native American people that there will never be an end to Native American claims until the Government gets to the heart of the issue. No amount of money can put the hearts and minds of the Native American people to rest in the same way as the land their souls will always gravitate toward.

On December 11, 1962, the tribunal would finally hear the claims of the Chiricahua Apaches for the taking of their aboriginal land.<sup>109</sup> More than seventy-five years had passed since the Chiricahuas had been removed to Florida.<sup>110</sup> In this first step toward judicial redress of

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<sup>102</sup> See *id.* at 272.

<sup>103</sup> See *id.* at 93. "In many instances the government would have been better served by negotiated settlements. Instead, the government's attorneys not only asserted all available defenses to defeat tribes' claims, but throughout most of the Commission's history contested most cases to the bitter end." *Id.*

<sup>104</sup> See *id.* at 52-53, 271.

<sup>105</sup> See *id.* at 268-69. In addition to the white man's method of adjudication, the lawyers who presented and decided the cases would be overwhelmingly white men and the "only remedy would be the white man's favorite — money." *Id.* at 272.

<sup>106</sup> See LIEDER & PAGE, *supra* note 1, at 268-69.

<sup>107</sup> See *id.*; Zlock, *supra* note 4, at 166-68.

<sup>108</sup> See LIEDER & PAGE, *supra* note 1, at 193-94, 196-97. Both the Blue Lake watershed of the Taos and the land of the Yakimas were held by the Government as national forest land, enabling the Government to return the property to these tribes. See *id.* at 193, 197. Congress has the power to return all federally-held land to the Sioux. See Lope, *supra* note 38, at 358.

<sup>109</sup> See LIEDER & PAGE, *supra* note 1, at 147.

<sup>110</sup> See *id.*

their claims, the Chiricahuas may have believed their long wait was over.<sup>111</sup> But they were wrong; it would take another sixteen years before litigation of the Apaches' land claim would finally be concluded.<sup>112</sup>

### III. OBSTACLES TO SUCCESS IN FRONT OF THE INDIAN CLAIMS COMMISSION

To qualify for an aboriginal land claim, a Native American tribe had to prove that it constituted a "tribe, band, or an identifiable group of Indians" that owned or occupied a particular tract of land as required under the Indian Claims Commission Act.<sup>113</sup> Through subjective classifications of the Indian character, the Supreme Court arrived at certain definitions for "tribe" and "band".<sup>114</sup> A "tribe" was identified as a "body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."<sup>115</sup> Similarly, the Court defined a "band" as a "company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design."<sup>116</sup> The essential element of either definition was the concept that a "political unit, whether a state, a tribe, or a band, needed a recognized government or leadership that can command common action."<sup>117</sup> Recognition of a tribe or a band in the jurisdictional sense necessitated such distinctions to identify and limit the groups who could bring claim.<sup>118</sup> Regardless of whether these Native American groups were legally classified as tribes or bands or other identifiable Indian groups, their distinct differences separated them from mainstream Anglo-American society. Legally recognized or not, tribal identity needed no definitional parameters when it was so obviously a physical, behavioral, and ideological divider.

The Court of Claims ultimately found that the best way to distinguish which Native American groups fit within the boundaries of the

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<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See* Indian Claims Commission Act § 2 (formerly codified at 25 U.S.C. §§ 70a, 1505, omitted from Code upon Commission termination on Sept. 30, 1978), *quoted in* LIEDER & PAGE, *supra* note 1, at 119.

<sup>114</sup> *See* Montoya v. United States, 180 U.S. 261, 266 (Ct. Cl. 1901).

<sup>115</sup> LIEDER & PAGE, *supra* note 1, at 119 (discussing Montoya v. United States, 180 U.S. 261 (Ct. Cl. 1901)).

<sup>116</sup> *Id.*

<sup>117</sup> LIEDER & PAGE, *supra* note 1, at 119.

<sup>118</sup> *See id.*

Act was to look at Congressional intent.<sup>119</sup> The intent behind the Act was to allow all tribes, bands or groups of American Indians access to the court to have their claims adjudicated.<sup>120</sup> Since few Native American groups qualified as tribes or bands when they lost their aboriginal land,<sup>121</sup> such intent could only be satisfied by permitting groups of Native Americans to fall within the broad category of "other identifiable group."<sup>122</sup> Thus, the amorphous and ambiguous phrase "other identifiable group" was interpreted by the Court of Claims to encompass a broader vision of Native American organization and affiliation to comport with the intent of Congress.<sup>123</sup>

The second obstacle facing tribes that sought to bring aboriginal land claims before the Commission was determining the boundaries of the land owned by any identifiable group.<sup>124</sup> Taking a much more lenient view of boundaries, the Commission required a showing that the tribe exclusively occupied and used the land in order to prevail.<sup>125</sup> To facilitate and support the difficult and time-consuming fact-finding process, the Court of Claims appointed its clerk to research aboriginal land claims.<sup>126</sup> However, even this expanded network of research proved insufficient to establish land boundaries.<sup>127</sup> Consequently, to facilitate the establishment of land boundaries, one ingenious attorney for the Pawnee tribe entered into a series of stipulations with the attorneys for adjoining tribes.<sup>128</sup> The attorneys agreed to draw lines around their claims where each tribe agreed to relinquish claim to ownership of land on the other's side of the line.<sup>129</sup> Through collaboration, tribes definitively outlined the boundaries of their land, a feat that neither thorough investigation nor the true reality of aboriginal Native American life could accomplish.<sup>130</sup> The Commission gave these stipulations considerable weight in the establishment of boundaries of

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<sup>119</sup> See *id.* at 122–23 (discussing *Thompson v. United States*, 122 Ct. Cl. 348 (1952)).

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 119. Many Native American groups could not fit within the label "tribe" or "band" because they lacked a recognized government or leadership. See *id.* Among many Native Americans, "governmental" decisions, such as land use and raiding, were made by extended family groups. See *id.* at 120.

<sup>122</sup> See LIEDER & PAGE, *supra* note 1, at 123.

<sup>123</sup> See *id.* at 122.

<sup>124</sup> See *id.* at 123–24.

<sup>125</sup> See *id.* at 126.

<sup>126</sup> See *id.* at 128.

<sup>127</sup> See LIEDER & PAGE, *supra* note 1, at 128.

<sup>128</sup> See *id.* at 128–29.

<sup>129</sup> See *id.*

<sup>130</sup> See LIEDER & PAGE, *supra* note 1, at 116–17, 128.



aboriginal lands.<sup>131</sup> Although such methods as these constituted a divergence from the documentation and anthropological support offered by many tribes, the key point the Commission was emphasizing was that weakness of proof should not result in dismissal of a suit if it was clear that a tribe exclusively occupied and used some of the land.<sup>132</sup> Difficulties of proof should not bar recovery but should only affect the amount of recovery received.<sup>133</sup>

Lieder and Page present a valid point of how the obstacles Native American tribes faced prevented effective administration of the Indian Claims Commission Act. However, many of the difficulties the Commission and Court of Claims encountered were typical of the practical application and interpretation of any new legislative act by the judiciary. In resolving the primary issues of who could bring suit and what they needed to prove, the Commission struggled to apply the Act but eventually they looked toward the intent of, rather than the language used by, the legislature to guide them in their determination of Native American claims.<sup>134</sup>

#### IV. THE VARIOUS CLAIMS BROUGHT BY INDIAN TRIBES BEFORE THE COMMISSION

Many of the problems with the adjudication of the various claims brought by Native American tribes arose because of the inability of the Commission and the Government to comprehend the source of these claims.<sup>135</sup> In the Native Americans' claims for uncompensated taking of land, they had to prove control over certain tracts of land and the unjust acquisition of this land by the Government.<sup>136</sup> Beyond overcoming these obstacles, however, tribes still had to "walk through a minefield of liability-limiting rules."<sup>137</sup> Once the tribes won a claim, the monetary awards they received were subject to offsets by the Government. This permitted the Government to deduct amounts it expended for the support and maintenance of the tribes, while they resided on government reservations, from the award.<sup>138</sup> These offsets proved to be

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<sup>131</sup> See *id.*

<sup>132</sup> See *id.* at 129.

<sup>133</sup> See *id.*

<sup>134</sup> See LIEDER & PAGE, *supra* note 1, at 122–23 (discussing *Thompson v. United States*, 122 Ct. Cl. 348 (1952)).

<sup>135</sup> See LIEDER & PAGE, *supra* note 1, at 265–69.

<sup>136</sup> See Newton, *Courts of the Conqueror*, *supra* note 3, at 819.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.* at 818–19.

particularly insulting to the Indian tribes because the offset items were often neither needed nor desired, especially the religious education provided by missionaries, and corresponded with the lack of trust and respect the tribes accorded the word of the Government.<sup>139</sup> The Commission derived a formula for applying offsets to monetary awards.<sup>140</sup> Awards of those tribes who resisted the Government and signed a treaty only after a war would not be subject to offsets because the treaty could not be compared to a contract nor did it constitute partial compensation.<sup>141</sup> On the other hand, if a tribe voluntarily ceded land by treaty, offsets would be deducted from the award.<sup>142</sup> The treaty of peace (no offsets allowed)/treaty of cession (offsets allowed) distinction emphasized the irony of the situation in that those who peacefully ceded their land to the Government would be liable for offsets while those tribes who resisted would not.<sup>143</sup> What was termed a treaty of peace really resulted from resistance and conflict while a treaty of cession took place peacefully.<sup>144</sup> Ironically, the Government ultimately punished those tribes who believed them and cooperated with them for being gullible, while rewarding those tribes who stood their ground and resisted for being contrary.

Along these same lines, the political division between aboriginal and legal title to land emphasized how little it paid to cooperate with and trust the Government. The Supreme Court held, in the landmark case involving the Tee-Hit-Tons of Alaska, that title is legally recognized if Congress or a treaty declares it permanently belongs to the Native Americans.<sup>145</sup> The Government would only be required to pay compensation for recognized land.<sup>146</sup> Conversely, land without congressional recognition, or land not addressed in a treaty, was not a property right and thus not compensable.<sup>147</sup> While the Government may choose to protect the Native Americans' right of occupancy, it may terminate this right at any time and dispose of the lands without a legal obligation

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<sup>139</sup> See *id.* at 819-20.

<sup>140</sup> See *id.*

<sup>141</sup> See Newton, *Courts of the Conqueror*, *supra* note 3, at 819-20.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955).

<sup>146</sup> See *id.*

<sup>147</sup> See LIEDER & PAGE, *supra* note 1, at 135; John Skinner, *Native People, Foreign Laws: A Survey Comparing Aboriginal Title to Property in the United States and Australia*, 19 SUFFOLK TRANSNAT'L L. REV. 235, 240-42 (1995).

to compensate Native Americans.<sup>148</sup> Aboriginal title arose not from occupation for long periods of time but from the Government's post facto beneficence.<sup>149</sup> Similarly, this concept guided the determination of whether interest would be applied to monetary awards.<sup>150</sup> The Supreme Court devised a method of determining when interest is due to Native Americans.<sup>151</sup> Acting as a sovereign and confiscating tribal land required the Government to pay interest but acting in its capacity as trustee and converting tribal land into money did not.<sup>152</sup> Obviously, no interest would be owed for land not recognized by treaty or statute since compensation for the taking of such land was not even mandated.<sup>153</sup>

Considering the culture and spirit of the Native American people, perhaps the most troubling aspect of their land claims was the prerequisite that they had to concede that they no longer owned their aboriginal land before their claim for uncompensated taking could be heard.<sup>154</sup> As this was the only property-related claim the Commission recognized, Native American tribes faced the choice of legally conceding their lack of title in their land, or being unable to get their claims adjudicated.<sup>155</sup> But since what they ultimately hoped for was the restoration of their land, and money was of little importance, there was little actual difference.

In the Chiricahuas' land claim, based upon uncompensated taking of their aboriginal land, the tribe encountered numerous obstacles which they slowly but steadfastly overcame.<sup>156</sup> Reports of government agents who worked with the Chiricahua leader, Mangas Coloradas,

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<sup>148</sup> See LIEDER & PAGE, *supra* note 1, at 135.

<sup>149</sup> See *id.*

<sup>150</sup> See *Sioux Nation of Indians v. United States*, 448 U.S. 371, 408–10 (1980).

<sup>151</sup> See Newton, *Courts of the Conqueror*, *supra* note 3, at 822.

<sup>152</sup> See *id.*

<sup>153</sup> See *id.* at 825.

<sup>154</sup> See LIEDER & PAGE, *supra* note 1, at 186. The Indian Claims Commission could only grant money damages, therefore attorneys advised tribes to drop any claims for present possession of property even though they could prove the Government had not formally confiscated it. See Newton, *Compensation*, *supra* note 87, at 470.

<sup>155</sup> See LIEDER & PAGE, *supra* note 1, at 187–88. Although Congress possessed the supreme power to extinguish aboriginal title, Congress did not need to be involved. See *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 347 (1941). The Government's actions of taking land were not necessarily Congressional action, they were construed as the Executive Department's actions that had been ratified by Congress. See LIEDER & PAGE, *supra* note 1, at 187. "If a tribe had brought a lawsuit contending that they still owned part or all of their aboriginal territory, any court would have concluded that Congress had ratified the president's actions." *Id.* at 188.

<sup>156</sup> See *id.* at 164–67.

verified that all the Indians identified as Chiricahuas were "identically the same people," overcoming a primary hurdle of tribal identification.<sup>157</sup> Next, the Chiricahuas' lawyers persuaded the Commission to reject the Government's "maximum habitat areas" argument to define the tribe's territory as those areas exclusively used and occupied by them for hunting and gathering purposes.<sup>158</sup> Lastly, the Chiricahuas were able to establish the date of taking as the last event in the Apache resistance, Geronimo's surrender to the Government.<sup>159</sup> With these obstacles behind them, the Chiricahuas found themselves the recipients of a \$16.5 million award.<sup>160</sup>

Although land claims comprised the largest portion of claims, accounting and mismanagement claims were brought by an increasing number of tribes.<sup>161</sup> Most accounting reports recurrently demonstrated that the Government had expended some tribal funds to run the agency.<sup>162</sup> But the complexity of the claims involving minute details over long periods of time rendered these cases virtually untriable.<sup>163</sup> In light of the complex nature of these claims, settlement was encouraged and eventually became the norm.<sup>164</sup> Consequently, all tribes bringing accounting and mismanagement claims recovered something in the settlement of these cases.<sup>165</sup>

As with most accounting and mismanagement claims, the Chiricahuas settled their claim against the Government.<sup>166</sup> The Fort Sill Apaches did not have any tribal property or funds and while the Mescalero Apaches had tribal moneys and valuable forest resources, neither wanted to spend years litigating the case.<sup>167</sup> The Government relied roughly on prior decisions to arrive at a \$2 million settlement offer which the Mescalero Chiricahuas accepted.<sup>168</sup>

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<sup>157</sup> See *id.* at 164.

<sup>158</sup> See *id.* at 165.

<sup>159</sup> See *id.* at 167. Generally, the later the valuation date, the higher the value for two reasons: first, prices of most commodities, including land, increased throughout most of this country's history; and second, miners, ranchers, and settlers developed new ways of using land previously thought unusable. See *id.* at 165. Also, the later the valuation date, the greater the likelihood that minerals discovered on the land in the late 1870s and early 1880s would have been discovered before the date of taking. See *id.* at 166.

<sup>160</sup> See LIEDER & PAGE, *supra* note 1, at 167.

<sup>161</sup> See *id.* at 246-47.

<sup>162</sup> See *id.* at 246.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.* at 253.

<sup>165</sup> See LIEDER & PAGE, *supra* note 1, at 253-54.

<sup>166</sup> See *id.* at 253.

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

The underlying problem with all Indian claims was not the complexity of the facts, but the nature of the trust relationship between the Government and Native American tribes.<sup>169</sup> The fiduciary relationship symbolized the loss of Native American sovereignty which, up until the middle of the nineteenth century, ensured that they were treated as sovereign nations who were co-equals with the United States and European nations.<sup>170</sup> But with the advent of the "discovery doctrine" and the growing breadth and power of the United States, the sovereignty of Native Americans was usurped.<sup>171</sup>

The final blow came in the form of the Indian Department Appropriations Act of 1871.<sup>172</sup> The Act stripped all Indian nations or tribes within the United States of their status as independent nations or tribes with the power to contract with the United States by treaty.<sup>173</sup> With one sweeping act, the Government wiped away a whole people's worth and place in society and resigned them to the wardship of the government that disempowered them. Relegated to a position of inferiority and dependency, Native Americans were not only stripped of their rights as a sovereign nation but they were robbed of their freedom in a country founded on exactly that principle.<sup>174</sup>

As much as the devaluation of their status offended the Native Americans, more offensive was the evidence of their dependency.<sup>175</sup> Native Americans lost control over funds, resources, economic means, and education.<sup>176</sup> The actual control the Government had over much of the management of resources and decision-making capabilities that characterize a trust relationship<sup>177</sup> pushed Native Americans to the receiving end of the relationship where they finally realized that not only were they no longer their own people standing on equal ground as other nations, they were dependent on these nations for their livelihood.

Finally, along with dependency and loss of sovereignty, the inefficiencies of the fair and honorable dealings clause of the Indian Claims Commission Act<sup>178</sup> compounded the feeling that Indians were

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<sup>169</sup> See Lope, *supra* note 38, at 334-38.

<sup>170</sup> See *id.* at 333-34.

<sup>171</sup> See *id.* at 336.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.*

<sup>174</sup> See Lope, *supra* note 38, at 331-38.

<sup>175</sup> See Newton, *Courts of the Conqueror*, *supra* note 3, at 805.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* at 804.

<sup>178</sup> See Indian Claims Commission Act § 2 (formerly codified at 25 U.S.C. §§70a, 1505, omitted

not fit to be afforded the basic decencies and autonomy humans deserved as a virtue of their mere existence. One such decency is to be free from unwarranted imprisonment.<sup>179</sup> Yet, not even the fair and honorable dealings clause could redress that claim.<sup>180</sup> The Chiricahua Apaches' imprisonment claim was dismissed because it was an individual rather than a tribal claim and because the Government had not expressly undertaken a specific duty toward them by treaty, statute or agreement.<sup>181</sup> Such great effort was expended to circumvent the principles of fairness and honesty that in the attempt to go around the issue the argument was already lost. The Commission found imprisonment to be of an individual nature rather than a tribal one but each person was not imprisoned for who they were but for the tribe they belonged to. By the end of their imprisonment in 1912, only six male participants in the outbreak of 1885 and 1886 were still living, while over half of the Chiricahuas were born into captivity.<sup>182</sup> Is it even possible for innocent people who are born into captivity to be imprisoned for who they were individually rather than for their affiliation with a tribal identity?

As for the express agreement argument, the Government from the very beginning, through its actions, expressly agreed to give the Chiricahuas a protected reservation in exchange for cession of their aboriginal land.<sup>183</sup> When the Government reneged on its promise, it ostensibly released the Chiricahuas from punishment due to resistance or actions motivated by self-preservation. If the Government is justified in taking action in complete opposition to that which it expressly agreed to take, it should be held accountable for actions taken yet never addressed at all. The fair and honorable dealings clause has tarnished the principles of fairness and honesty merely by offering such ludicrous arguments in its defense.

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from Code upon Commission termination on Sept. 30, 1978) *quoted in* LIEDER & PAGE, *supra* note 1, at 67.

<sup>179</sup> See LIEDER & PAGE, *supra* note 1, at 218.

<sup>180</sup> See *id.* at 107.

<sup>181</sup> See *id.* at 209, 216–17. The Indian Claims Commission Act permitted claims to be brought “on behalf of any Indian tribe, band, or other identifiable group of American Indians.” *Id.* at 105. This meant that claims brought had to be tribal, not individual, in nature. See *id.* The reason for this interpretation was to prevent every individual Native American or his descendants from suing for every wrong committed against him such that the Indian Claims Commission would never finish its business. See *id.*

<sup>182</sup> See *id.* at 43.

<sup>183</sup> See LIEDER & PAGE, *supra* note 1, at 17–18.

The most important claim to the Chiricahuas was their imprisonment claim,<sup>184</sup> partly because the primary source of their maltreatment flowed from their imprisonment, partly because it was the gravest blow to their autonomy, independence, and dignity. However, the imprisonment claim was dismissed quickly because only individuals could be imprisoned, not tribes.<sup>185</sup> Thus any claim for imprisonment must come from the individual.<sup>186</sup> The Chiricahua Apaches rephrased this claim to allege that they, as a tribe, sustained injury to their function as a tribe and won the battle to survive the Government's motion to dismiss.<sup>187</sup> But as the tale of Native Americans goes, they ultimately lost the war.<sup>188</sup>

## V. CONCLUSION

At the close of a long and bitter war, the one belief and theory that still inspired Geronimo and his Chiricahua brothers was *indeh*, meaning dead.<sup>189</sup> In the face of immense Government opposition, many of the Chiricahua Apaches pronounced themselves dead. But as the fighting spirit raged on, *indeh* began to signify wild justice.<sup>190</sup> Even with the ultimate realization that death lay in the horizon, the Chiricahua Apaches approached death with the spirit of life and with the hope that justice was still obtainable. The dual facets of *indeh* signify the spirit of the Chiricahuas—fighting to the death; fighting until justice is attained; fighting for a justice that only comes with resistance; justice in death. However one interprets it, until the Government can begin to see and adjust the law to reflect the reality that for one group of Native American people, notions of death and justice can come from the same source, there will never be an end to Native American claims and justice will remain wild.

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<sup>184</sup> See *id.* at 108.

<sup>185</sup> See *id.* at 107.

<sup>186</sup> See *id.*

<sup>187</sup> See *id.* at 111.

<sup>188</sup> See LIEDER & PAGE, *supra* note 1, at 111.

<sup>189</sup> See *id.* at 4.

<sup>190</sup> See *id.* at 24.

