

**The original documents are located in Box 9, folder “Indian Claims Commission”
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Handwritten: Pack
Sachse
739-2123

THE WHITE HOUSE
WASHINGTON

Handwritten: Pack 739-2105
Sachse
Frank
Ideo

July 12

Handwritten: Dris Meisner
739-5137

LG:

OMB and Frank Zarb have gone over that Sioux Option Paper Issue # II and have no problem with the idea of your sending a letter to Silberman.

The letter itself has been gone over informally with Harry Sachse of Bork's staff and in part with Carl Stoiber of Pottinger's staff. Both of them very strongly support me in the conviction that this is the right time to raise this issue with Silberman.

PS: The "Battleground for technicians" phrase is Sachse's own and I hope you keep it; the last paragraph is Stoiber's suggestion particularly.

Handwritten: Read



Handwritten: OK

July 15, 1974

Dear Larry:

This is to raise with you personally an area of issues which deserves more attention than either of us has been giving it: litigation and appellate strategy in Indian claims cases.

The Indian Claims Commission, as you know, is the judicial body which is the court of first resort in these cases. The Commission was established by the Congress to "hear and determine" claims against the United States on a very wide range of grounds: "law", "equity", "fraud, duress, unconscionable consideration, mutual or unilateral mistake", and "claims based upon fair and honorable dealings". The intent of the Congress was to have these claims examined, judged, paid and finished with expeditiously and under more liberal than usual criteria. But that is not what has happened.

611 cases have been docketed; some 200 are still pending, and the Commission goes out of business in another three years with the Court of Claims inheriting whatever is left. 194 of the Commission's cases have been appealed to the Court of Claims, 32 by the Government, 26 in cross-appeal, and of course each appeal adds some 12-18 months to the adjudication period.

Upon some inquiry, I find that the Department of Justice's Indian Claims section is very diligent in defending the government's legal and financial interests in these cases, but rarely consults the Commissioner of Indian Affairs in this process, or the Solicitor of the Department of the Interior, in reviewing its litigating and its appellate options. Instead of an instrument for resolving these questions promptly, the Commission is being used as a battleground for technicians and the frequent appeals to the Court of Claims are dragging out the whole process.

A case in point of watershed dimensions is pending right now before Bob Bork -- the famous Sioux case involving violation of the Treaty of 1868. The Commission has determined a judgment amount but a recommendation has been made to appeal the "5th Amendment Taking" issue to the Court of Claims. We apparently are going to allege that a Court of Claims decision of 1942, (before the passage of the Claims Act) finished the matter when it in effect blessed the violation -- by the Congress -- of the Treaty of 1868 on the theory that Congress has plenary powers to do so.

From various points of view -- equity, "fair and honorable dealings", sanctity of treaties, the purpose of the Claims Act itself -- this particular appeal and others like it should, I believe, be reviewed, especially in light of the President's own declaration on Indian affairs of July 8, 1970.

Perhaps an informal consultative process could be instituted whereby Justice regularly touches base with the Commissioner or the Solicitor at Interior (who represent the United States' interest as trustee for the Indians) and arranges for an exchange of views about appellate strategy in this and similar claims cases.

Actually my hope is that the general principle could be adhered to of not appealing Claims Commission judgments and decisions unless the Solicitor General considers that an egregious mistake has been made. Otherwise we may be in this claims business for another decade -- to the detriment of the Commission, the Court of Claims, the Indians and ourselves and contrary to the intent of Congress.

I understand that under Jon Rose's direction you have a re-examination underway of Departmental structures and policies in the Indian area; you might add this area of issues to that agenda (with the note, however, that there is a deadline of August 12 for the Sioux appeal decision itself). When your internal exercise is at the right stage, I would be interested in hearing how it is coming along.

Best,

Leonard Garment

Mr. Larry Silberman
Deputy Attorney General
Department of Justice
Washington, D. C.

cc: Mr. Bob Bork
Mr. Wallace Johnson

bcc: Stan Pottinger
Kent Frizzell
Morris Thompson

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