

Don B. Miller
Don B. Miller, P.C.

Testimony
Before the Subcommittee on Asia, the Pacific
And the Global Environment

Committee on Foreign Affairs

United States House of Representatives

Oversight Hearing on the Compact of Free Association with the Republic of the Marshall Islands (RMI): Medical Treatment of the Marshallese People, U.S. Nuclear Tests, Nuclear Claims Tribunal, Forced Resettlement, Use of Kwajalein Atoll for Missile Programs and Land Use Development.

May 20, 2010

House Subcommittee on Asia, the Pacific and the Global Environment

Oversight Hearing on the Compact of free Association with the Republic of the Marshall Islands (RMI): Medical Treatment of the Marshallese People, U.S. Nuclear Tests, Nuclear Claims Tribunal, Forced Resettlement, Use of Kwajalein Atoll for Missile Programs and Land Use Development .

May 20, 2010

Chairman Faleomavaega and members of the Subcommittee, I am Don B. Miller, of Boulder, Colorado. It is an honor to appear before you today. I was asked to provide the Committee my assessment of the Congressional Reference process and its suitability for furthering the nuclear claims case of the Marshallese people impacted by nuclear testing.

I. INTRODUCTION

For the last 26 and one half years, I have represented the Alabama-Coushatta Tribe of Texas in Congressional Reference No. 3-83. My practice is limited to the field of Federal Indian Law, and, prior to opening my own law office in 2001, I was an attorney with the Native American Rights Fund for 27 years. For virtually my entire legal career, I have represented Indian tribes in large land-claim cases before the federal courts and Congress. Because the history of the Alabama-Coushatta claim may be instructive to the Committee in its evaluation of whether Congress should afford the Marshallese people an opportunity to seek redress for damages caused by nuclear testing, I will first briefly describe the proceedings in Congressional Reference No. 3-83.

In November, 1983, the House Judiciary Committee referred the Alabama-Coushatta land claim to the Court of Federal Claims. The United States had failed to provide notice to the Tribe of its eligibility to file claims against the United States under the Indian Claims Commission Act of 1946. That Act established a commission to hear legal and equitable claims for money damages against the United States accruing before 1946 and imposed a five-year statute of limitations for Indian tribes to file their claims. In 1970, long after the 1951 filing deadline, the Alabama-Coushatta Tribe learned of the Indian Claims Commission and filed its land claim by intervening in the timely filed case of another tribe claiming the same area of East Texas. After trial, the Commission dismissed the Alabama-Coushatta claim for lack of jurisdiction because it had not been filed before the 1951 deadline. But the Commission later denied the other tribe's recovery to the area claimed by Alabama-Coushatta because the Alabama-Coushatta Tribe had proven that it possessed aboriginal title to that area before its claim had been dismissed.

Denied an opportunity to present its meritorious claims before the Indian Claims Commission on jurisdictional/statute-of-limitations grounds, the Alabama-Coushatta

sought a Congressional Reference. In 1983, in the 98th Congress, the sixth in which the private relief bill had been introduced, the House Judiciary Committee passed House Resolution 69 and referred H.R. 1232 to the United States Claims Court (now the Court of Federal Claims). H.R. 1232 directed the Court, among other things, to determine whether the Tribe's claim should be paid notwithstanding the bar of the statute of limitations.

Congressional Reference No. 3-83 was contentiously litigated from early 1984 to 2000, when a Review Panel of the Court of Federal Claims concluded the liability phase of the case with a 96-page opinion finding that the Tribe had (once again) proven its aboriginal title and that it had not received the required notice of opportunity to file its claim before the 1951 limitations period expired. The review panel recommended "that the United States Government pay full monetary compensation to the Tribe for 2,850,028 acres of the Tribe's aboriginal lands illegally occupied by non-Indian settlers after 1845." *Alabama-Coushatta Tribe of Texas v. United States*, 2000 WL 1013532 (Fed.Cl.).

After this final liability opinion issued, the damages phase of the case began. The Tribe and the United States Department of Justice, weary after almost 17 years of hard-fought litigation, entered into a negotiation process to attempt to agree on the amount of damages due under the Court's liability ruling. In February, 2002, 19 years after the Tribe filed its complaint in Congressional Reference No. 3-83, the United States and the Tribe stipulated that the amount of damages due under the liability decision is \$270.6 million. In October, 2002, the Chief Judge of the Court of Federal Claims transmitted to Congress the Review Panel's recommendation that the United States pay the Tribe \$270.6 million and that the amount did not constitute a gratuity. It is noteworthy, as an illustration of how vigorously the Government contested the Alabama-Coushatta claim, that even after losing twice in the Congressional Reference review process and exhausting all of its appeals, the Department of Justice still refused to accept the validity of the Court's liability ruling and preserved its right to object to the ruling before Congress.

To date, Congress has not acted on the Court's recommendation in Congressional Reference No. 3-83, although we are hopeful that implementing legislation will soon be introduced in the 111th Congress.

II. THE PURPOSE OF THE CONGRESSIONAL REFERENCE PROCESS

The House Judiciary Committee's Rules of Procedure for Private Claims Bills, noting that the right to petition for redress of grievances is guaranteed by the First Amendment to the Constitution, state that "[i]n connection with its jurisdiction over claims, the [S]ubcommittee [on Immigration, Citizenship, Refugees, Border Security, and International Law] considers private bills extending relief to individuals who have no other existing remedy." (A private bill provides relief to specified individuals, including corporate bodies, and is to be distinguished from legislation of general applicability.) The House rules further state that when the Subcommittee is asked to decide whether

relief should be granted, its inquiry will be guided by principles of justice and equity and that the Subcommittee's task is to determine whether the "equities and circumstances of a case create a moral obligation on the part of the Government to extend relief." The United States Constitution, art. I, § 8, cl. 4, empowers Congress to pay the nation's debts, and the Supreme Court has held that Congress may pay moral or even honorary debts as well as legal debts.¹

The requirement that parties seeking private relief have no other existing remedy is central to the private relief process, and the Subcommittee's Rule 9 expressly provides that "[t]he subcommittee shall not consider any claim over which another tribunal, court, or department has jurisdiction, until all remedies under such jurisdiction are exhausted." The note accompanying Rule 9 states that in the settlement of claims, Congress is always the place of last resort and requires that, if Congress has provided another means of obtaining redress, the claimant must provide proof that such other avenues have been exhausted before the Subcommittee may consider the claim.

In certain cases, Congress may wish to refer the private claim to the Court of Federal Claims for findings, conclusions and a recommendation. The reasons why Congress might want to refer a claim have been summarized by Jeffrey Glosser as follows:

There are several rationales for wanting private claims evaluated by judicial methods in an adversary proceeding, in lieu of private legislation. First, the facts and the applicable law are so complex that the matter can be resolved best through a court proceeding. Second, the claim should be established by competent evidence which can be evaluated best by a court. Third, the cognizant congressional committees lack the time, facilities, and expertise necessary to hear the evidence and make determinations on the issues. Fourth, the claim requires a trial proceeding which may be protracted and which may need to be held in a location other than Washington, D.C. Fifth, the [Court of Federal Claims] is an impartial and independent tribunal whose processes are careful and evenhanded.²

To provide for such cases, Congress has granted jurisdiction and set forth the process to be followed. *See* 28 U.S.C. §§ 1492 (jurisdiction) and 2509 (process). Essentially, these statutes make it possible for either House of Congress to request an advisory opinion from the Court of Federal Claims. Commentators have noted that the congressional reference procedure makes the Court of Federal Claims an arm of Congress. After the proceedings in the Court of Federal Claims have concluded, no judicial review is available and the matter is returned to Congress with a recommendation. It is then up to Congress to grant or deny relief.

¹ *Pope v. United States*, 323 U.S. 1 (1944).

² Jeffrey M. Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 *American University Law Review* 595, 605 (1976) (footnotes omitted).

Congress rarely utilizes the congressional reference procedure. Several research memos in our files state that in many years, Congress will not refer any cases to the Court of Federal Claims (or its predecessor courts), and that Congress' average number of references over the past forty-plus years has been in the range of three to four per year. Indeed, it appears that the 108th, 109th and 110th Congresses may not have referred any cases, with the most-recent reference occurring just over eight years ago in the second session of the 107th Congress, when the House Judiciary Committee approved H. Res. 103, referring H.R. 1258 to the U.S. Court of Federal Claims.³

III. THE PROCESS OF REFERRING A CLAIM TO THE COURT OF FEDERAL CLAIMS.

The process of referring of a claim to the Court of Federal Claims is usually initiated by the claimant's own Representative or Senator, who introduces a private relief bill that identifies the claimant, describes the nature of the claim and authorizes and directs payment of the claim, leaving the amount to be paid blank. After the bill has received a bill number, usually within one or a few days, the Representative then introduces a resolution which, if approved, directs referral of the private relief bill to the Chief Judge of the United States Court of Federal Claims. Thereafter, the resolution and bill be referred to the Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.⁴

The bill's sponsor then is responsible for requesting Subcommittee action and providing the Subcommittee with sufficient evidence showing that all other remedies have been exhausted and why the claim should be paid. Thereafter, the Department of Justice, and perhaps other agencies, will be asked to file a report on the matter. The Congressional Budget Office will provide a cost estimate, which can be expected to find no significant impact on the Federal budget because any payment would depend on further Congressional action and pay-as-you-go procedures would therefore not apply.⁵ The Subcommittee may or may not conduct a hearing.

If the Judiciary Committee acts favorably, referral resolutions are sent with a committee report to the House floor and placed on the Private Calendar. The Congressional Research Service Guide to Legislative Process in the House states that the Private Calendar is called on the first and third Tuesdays of each month. If objection is made by two or more Members to the consideration of any measure called, it is recommitted to the committee that reported it. There are six official objectors, three on the majority side and three on the minority side, who make a careful study of each bill or

³ See H.R. Rep. No. 444, 107th Cong., 2nd Sess. (May 7, 2002).

⁴ Rule XII 2(d) of the Rules of The House of Representatives prohibits referral of private claims bills to a committee other than Judiciary *or* Foreign Affairs except by unanimous consent. However, research has failed to reveal any instance over the last four decades where a private bill has been referred to any committee other than Judiciary.

⁵ See, e.g., H.R. Rep. No. 444 at 3.

resolution on the Private Calendar and who will object to a measure that does not conform to the requirements for that calendar, thereby preventing the passage without debate of nonmeritorious bills and resolutions.⁶

IV. PROCEEDINGS IN THE UNITED STATES COURT OF FEDERAL CLAIMS.

Upon referral of a bill for private relief, the Court's clerk assigns a docket number and notifies all known interested parties that they have 90 days in which to file a complaint. Copies of the notices must be provided to the Department of Justice. To the extent feasible, the Rules of the Court of Federal Claims will apply. Thus, the proceedings usually will be fully adversarial, differing at the trial level very little from the proceedings before the Court in any non-reference case. However, as in "regular" court cases, adversarial proceedings may be avoided by negotiation and stipulation either in the liability phase of a case or, after the liability phase has concluded, in the damages phase. Glosser notes that the need for trial also may be obviated if the claim had been previously filed as a legal suit. In such cases, at least with regard to those issues that were the subject of agreement and stipulation in the earlier litigation, "the record of the prior legal claim could make trial in the congressional reference case unnecessary."⁷

After the complaint is filed, the Chief Judge designates by order a judge of the Court to serve as the hearing officer and three other judges to serve as the review panel, designating one as the panel's presiding officer. Section 2509 requires the hearing officer to

determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

To ensure that Congress is as fully informed as possible, Appendix D to the Rules of the Court of Federal Claims, which sets forth the procedure to be followed by the court in congressional reference cases, additionally requires the hearing officer to "find the facts specially."

After the hearing officer issues a decision, the parties have 30 days to file either a notice accepting the decision or a notice of intent to except to the report, i.e., appeal.

⁶ <http://www.rules.house.gov/archives/lph-calendars.htm> (website visited on May 13, 2010).

⁷ Jeffrey M. Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 American University Law Review 595, 609 (1976) (footnotes omitted).

Regardless of whether the parties accept or except to the report, it, together with the record in the case, will be transmitted to the review panel. If no party files a notice of intent to except, the review panel must nonetheless review the hearing officer's report and, if it is considering a material modification, it must notify the parties and set up a briefing schedule and oral argument, if requested. If one or more notices of intent to except are filed, the review panel must issue a briefing schedule and conduct oral argument, if requested.

The review panel may not set aside the hearing officer's findings of fact unless it finds them to be clearly erroneous, giving due regard for the hearing officer's judgments about the witnesses' credibility. The review panel may not set aside the hearing officer's conclusions of law unless, on de novo review, justice shall so require. If the review panel determines that a case should be returned to the hearing officer for some reason, such as the need for additional findings of fact, it may so order. After the case has been fully briefed and argued, the review panel must, by majority vote, adopt or modify the hearing officer's findings and conclusions and file its report with the clerk for service on the parties.

Thereafter, the parties have 14 days to file a motion for rehearing to alter or amend the review panel's report, together with a brief in support. A response is not required, but may be filed within 14 days. Oral argument on a motion for rehearing is not permitted. If rehearing is denied, the adversarial proceedings are over. If rehearing is granted, the review panel takes whatever further action it deems appropriate for the particular case. At the conclusion of proceedings before the review panel, the Chief Judge may not entertain further appeals. Final decisions of a review panel may not be appealed to any court, i.e., judicial review is unavailable.

When all proceedings are concluded, the Chief Judge is required to transmit the report of the review panel to the house of Congress that referred the matter in the first instance.

V. BACK IN CONGRESS: ACTING ON THE CHIEF JUDGE'S RECOMMENDATION.

House initiated reference cases are returned to the Clerk of the House of Representatives. It is unclear whether the case is then automatically sent back to the Judiciary Committee, or whether the Committee simply is notified that the Chief Judge's recommendation has been received. Presumably, the sponsoring Member (or the Member currently occupying the sponsor's seat) is also notified. Almost always, the Chief Judge's recommendation will be returned to a later Congress than that which referred the matter to the court in the first instance. Thus, when a referred case is returned with a favorable recommendation, a new private relief bill must be introduced.

If the Chief Judge's recommendation is negative, i.e., the report of the review panel concludes that payment of the claim is not justified, the sponsoring Member (or the Member currently occupying the sponsor's seat) will likely be reluctant to introduce

legislation to authorize payment of the claim. If the Chief Judge's recommendation is favorable, the sponsoring Member or his replacement will generally introduce a new private relief bill to implement the recommendation.

Because the composition of the House subcommittee considering the bill is usually different from that of the subcommittee at the time of the bill's reference, the subcommittee can generally be expected to hold a hearing on bills to implement favorable recommendations.

Congress has almost uniformly honored the court's recommendations in congressional reference cases. Apparently, there is only one instance where Congress has refused to follow the favorable recommendation of the court.⁸

After the legislation implementing the court's favorable recommendation is passed by both houses of Congress, it must be signed into law by the President. Glosser notes that (at least in 1976, when he wrote his article) there have been only two instances where the President has vetoed congressional reference legislation.⁹

V. SUITABILITY OF THE CONGRESSIONAL REFERENCE PROCESS TO FURTHER THE CLAIMS OF THE MARSHALLESE PEOPLE AFFECTED BY NUCLEAR TESTING.

As noted above, the congressional reference process is structured to evaluate equitable and moral claims for which no legal remedy exists. Prior to the mid-1980s, moral claims and equitable claims were often considered to be roughly equivalent, embodying the principle of "what the Government ought to do as a matter of good conscience."¹⁰ More than a half century ago, the Claims Court eloquently elaborated on the principle that might properly inform Congress' inquiry here as well as, one would hope, the Court of Federal Claims' inquiry, should the claims of the Marshallese be referred:

In its broadest and most general signification, equity denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men – the rule of doing to all others as we desire them to do to us; or as it is expressed by Justinian – "to live honestly, to harm nobody, to render every man his due." It is therefore the synonym of natural right or justice. . . . It is grounded in the precepts of the conscience, not in any sanction of positive law.¹¹

In more recent congressional reference cases, however, the Court of Federal

⁸ See Glosser, *supra* 25 A.U.L.R. at 627 and notes 217 & 218.

⁹ *Id.* at 628.

¹⁰ *B. Amusement Co. v. United States*, 148 Ct.Cl. 337, 342 (1960).

¹¹ *Gay Street Corp. v. United States*, 130 Ct.Cl. 341, 350 n.1 (1955).

Claims has sometimes adopted a more pinched view of what constitutes an equitable claim. In a 2004 case, for example, the court stated:

Equitable claims . . . arise from "an injury occasioned by Government fault" when there is "no enforceable legal remedy--due, for example, to the bar of sovereign immunity or the running of the statute of limitations." Under the prevailing view, in order to recover on an equitable claim, the plaintiff must show two things: that "the government committed a negligent or wrongful act" and that "this act caused damage to the claimant." What is wrongful or negligent action under this standard? As noted above, wrongful conduct carries with it an element of fault. It thus entails more than a mere error or questionable exercise of government discretion; rather, there must be some violation of a standard of conduct established by statute or regulation or a recognized rule of common law, and that violation must damage the claimant. This occurs not only when a plaintiff has a claim under a statute that is otherwise barred by sovereign immunity, but also, for example, when the government acquires benefits through the overreaching of its agents, when government officials act outside the scope of their authority, or when government actions have resulted in unjust enrichment. To support an equitable claim based on a negligent action, fault of a different sort must be shown: the plaintiff must demonstrate that "the government possessed a duty . . . , that the government breached that duty, and that the breach caused the plaintiff's damage." Outside the wrongful or negligence spheres are governmental actions that violate only principles of ethics or morality--such actions, even where they offend the conscience, give rise only to a gratuity.¹²

In 2009, a review panel in a congressional reference case stated its understanding of what constitutes an equitable claim:

For a claimant to assert a viable equitable claim in a congressional reference case, he or she must demonstrate that the government committed a negligent or wrongful act and that this act caused damages to the claimant. A claimant has a cognizable equitable claim in a congressional reference case when a plaintiff has a claim under a statute that is otherwise barred by sovereign immunity, . . . when the government acquires benefits through the overreaching of its agents, when government officials act outside the scope of their authority, or when government actions have resulted in unjust enrichment.¹³

Other cases, however, have continued to recognize that an equitable claim, "in the context of a congressional reference, does not mean a claim in equity in the technical sense, but rather a broad moral right to recover based upon general equitable

¹² *J.L. Simmons Co., Inc. v. U.S.*, 60 Fed.Cl. 388, 394-395 (Fed.Cl. 2004) (citations and footnotes omitted).

¹³ *Land Grantors in Henderson, Union, Webster Counties, KY v. U.S.*, 86 Fed.Cl. 35, 57-58 (Fed.Cl. 2009) (citations omitted).

considerations.”¹⁴

To encourage the court to fully take into account the substantial moral and humanitarian dimensions of the Marshallese claims, the House might consider informing the court that it intends to weigh such claims by the broader standard and it would appreciate the court’s recommendation taking that into account.¹⁵

Under either standard, however, it would appear that the congressional reference process is ideally suited to address the claims of the Marshallese People affected by the United States Nuclear Testing Program. While I have at best a superficial understanding of the nature and scope of the claims at issue, the documentation I have reviewed over recent weeks shows that the United States undertook, and breached, a number of solemn fiduciary and contractual obligations to the Marshallese People. Several times, it appears that the United States gave assurances upon which the Marshallese relied in good faith to their extreme detriment. Thus, it seems likely that the requirement of a wrongful act by the United States causing damages to the claimant could be satisfied and an equitable claim demonstrated.

The courts have considered the Marshall Islanders’ claims and have ruled with finality that their claims are barred by the lack of federal court jurisdiction and the political question doctrine. Moreover, the courts have explicitly recognized that payment of the claims asserted in the Nuclear Claims Tribunal is a matter solely to be resolved by Congress.

So, while the congressional reference procedure appears to be an appropriate process for Congress to employ to assist in its evaluation of the United States’ responsibilities to the Marshall Islanders, it should be noted that, if our experience in the Alabama-Coushatta case is any guide, the Marshall Islanders will likely be facing many additional years, if not decades, of hard-fought, expensive litigation against the United

¹⁴ *INSLAW, Inc. v. U.S.*, 35 Fed. Cl. 295, 302 (Fed.Cl. 1996).

¹⁵ Because “[t]he House that refers a bill for a report pursuant to 28 U.S.C. §§ 1492 and 2509 cannot in the resolution to refer, or in its report on the resolution alter the statutory standards,” *Paul v. U.S.*, 20 Cl.Ct. 236, 267 (Cl.Ct. 1990), the most the Judiciary Committee could do would be to recommend or request that such a standard be employed. However, because decisions of the Court of Federal Claims in congressional reference cases are advisory and carry no binding precedential effect, *id.* at 266, a hearing officer or review panel considering referred Marshallese claims would seem to be free to adopt either the broad view or the more constrained view of what constitutes an equitable claim and thus might well take Congress’ request into account. Moreover, even if the court were to employ the narrow definition of equitable claims and conclude that payment of the Marshall Islanders claims would be a gratuity, it could still recommend favorably on the claims. And finally, because the report of the Chief Judge in a congressional reference case is merely a recommendation, Congress would be free to act favorably on the claims regardless of the court’s characterization of the payment as in satisfaction of an equitable claim or a gratuity.

States. It might further be noted that after the Marshall Islanders spent long years pursuing their claims in their first round of federal court litigation, the United States forced them out of federal court and into another Congressionally created forum, the Nuclear Claims Tribunal. They spent an additional two decades litigating in that forum to no avail because Congress did not adequately fund it. Now, after an additional decade of litigation in their second round of federal court litigation, Congress is considering once again directing them into a lengthy and expensive litigation process.

I understand that that may well be the best Congress can do, and that simply doing the right thing and concluding the matter by paying the Nuclear Claims Tribunal's awards is likely not politically feasible. But in light of the role the United States has played in delaying compensation and prolonging the litigation woes of the Marshall Islanders, might it not be appropriate for Congress to consider establishing a fund for use by the Marshall Islanders in obtaining expert assistance, other than the assistance of counsel, for the preparation and trial of their referred claims before the Court of Federal Claims? Congress established a similar fund for use by American Indian tribes and recognizable groups in pursuing their claims before the Indian Claims Commission.¹⁶ That fund was a revolving loan fund, but in light of the apparent equities here, Congress might wish to consider establishing a fund from which grants would be made.

VI. CONCLUSION

Under the circumstances in which the Marshall Islander now find themselves, the congressional reference process appears to be the best, and perhaps only, avenue through which Congress can address the claims of the Marshallese People affected by the United States Nuclear Testing Program.

I commend the Chairman for his willingness to explore options for addressing these difficult and complex issues. Thank you for the opportunity to appear before you and I will be pleased to answer any questions you may have or provide additional information in the future should the Committee so require.

¹⁶ 25 U.S.C. § 70n-1; Pub.L. 88-168 §1, Nov. 1, 1963, 70 Stat. 301 (repealed).