CERF/CERA REPORT

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Ever So Elusive Justice

By Butch Cranford - CA

The times are certainly changing and as I sat down to write for this CERA Report I am fearful for our Country as I watch and listen to news reports from around the United States. Such strife, division, and violence in an alleged search for as yet an undefined "justice" by those who have foolishly chosen violence and intolerance as the primary tools in their "alleged" quest for justice.

CERA, as an organization, is engaged in its own search for "justice" and I, as an individual, am also in a search for justice. It is my fervent hope that my fellow citizens are similarly searching for justice at some level in their lives as well but doing so respectfully and without violence.

But what is it that we seek, this "justice?" Webster defines justice in several ways including the following which I find best aligned with my concept of justice which may or may not be just. **Justice is "conformity to truth, fact, or reason" as well as "the establishment or determination of rights according to the rules of law or equity."**

In addressing the first definition, you could conclude that justice is never changing, as conformity to truth, fact, or reason is all that is required. However, in considering the 2nd definition which employs the words "establishment" and "determination" it occurs to me to think of justice only in the narrow view of the first definition does not serve us well in our search. However, looking only to the 2nd definition's broader view does not serve our search for justice well either. Both, I believe, are essential if we ever hope to "establish justice" as stated in the Preamble to our Constitution.

The first definition is used to find and know justice while the 2nd definition requires the establishment of "truth, fact, and reason" in law. Knowing and doing are two vastly different things. The establishment or determination of rights is based on the rule of law or equity (fairness). And on what is law or equity presumed to be founded but truth, fact, and reason? If that is correct, why would anyone be searching for justice?

Based on my own experience, a search for any justice begins when the rule of law or administration of the law do not conform to truth, fact, or reason. The U.S. Constitution as written is the Supreme law of the land until amended to correct a defect in order to establish justice and form a more perfect Union. Our Constitution is the guiding light of justice for the United States.

CERA's search for justice is based on a belief that Federal Indian Policy is unConstitutional. CERA's search is a serious and enormous undertaking and has within it a multitude of smaller searches of which my search is but one and is limited to:

1. Whether Congress has authority to acquire land in trust for Indians and

2. When that authority was delegated to the Secretary of the Interior in 1934, does the Secretary have authority to acquire land in trust for tribes not recognized in 1934 and under federal jurisdiction in 1934.

As to the first question whether Congress has authority to acquire land in trust for Indians, I invite you to "search" the U.S. Constitution for such authority. I have "searched" and to use the words of Supreme Court Justice Thomas, "I cannot find it in my Constitution."

Congress has "limited" Constitutional authority to acquire land for the use of the federal government but the authority does not mention Indians. (see Article 1 Section 8 Clause 17) However, current federal law authorizes the Secretary of the Interior to acquire land in trust for Indians pursuant to Section 5 of the 1934 Indian Reorganization Act (IRA). Now a "search" is required to determine whether the law (IRA) as administered by the Secretary of the Interior, other Officials at the Department of Interior, and the Bureau of

Indian Affairs was followed.

The search begins with this question; is the manner in which those officials, in their administration of the IRA for acquiring land in trust for Indians in conformance with the "law?" According to the Department, it was in conformance with the IRA as interpreted by the Department until the Supreme Court decided the Department's interpretation and administration of the IRA was not in conformance with the IRA in *Carcieri* 2009. The Court held that the Secretary had no authority to acquire land in trust for tribes that were not recognized in 1934 and not under federal jurisdiction in 1934 in answer to the questions presented by plaintiff *Carcieri* in the Cert Petition and accepted by the Court.

"Justice" for the plaintiff, *Carcieri,* came with the Supreme Court's rejection of the Department's interpretation that did not conform with the IRA (law). CERA, I, and others thought "justice" and settled law was the result of the *Carcieri* decision. Not exactly, as the Department simply created and implemented an "administrative fix" for *Carcieri* in 2010 which was documented in M opinion M-37029 in 2014. The Department used this fallacious fix from December 2010 to March 2020 to continue to take land into trust for tribes "not recognized in 1934." A number of lawsuits challenging the Department's "administrative fix" were filed. One of those lawsuits came from No Casino In Plymouth (NCIP) in 2012 challenging an approval to take land into trust for the Ione Band.

The facts of the NCIP case are very simple and straightforward and a just decision is easily reached IF the law is administered as written and determined by the Supreme Court in *Carcieri*. The first question is; was the Ione Band of Indians recognized in 1934? To determine this would require a search for the "facts" related to the Ione Band and any alleged recognition. In 1934 there were two methods by which a tribe could have been recognized. Recognition with a treaty ratified by the United States Senate or recognized with an Act of Congress. It should not be difficult to produce either of these documents as evidence of recognition. It is, however, impossible to produce documents that do not exist – even for the DOI and BIA.

A search of documents reveals that they do not exist and in fact the Ione Band admitted in federal court in a 1990 lawsuit that they were not a treaty tribe and there was no Act of Congress recognizing the Ione Band. In addition, Ione admitted that it had not filed a petition for recognition pursuant to 25 CFR 83 and in fact has never filed a Section 83 petition for recognition. It was and is clear beyond any doubt that Ione was not recognized in 1934 and has never been recognized by any lawful means.

So exactly what has NCIP been searching for for the past 17 years? First, any DOI, BIA, or NIGC official who was or is willing to follow the law and *Carcieri* based on the factual documented history of the Ione Band and to date we have found none. Not finding one such official, our search turned in 2012 to finding a federal Judge who is willing to follow the law and *Carcieri* based on the factual history of the Ione Band. The District Court Judge who heard our 2012 challenge case was not willing and a three Judge Panel at the 9th circuit was not willing either. NCIP's search continued with renewed vigor and hope in 2018 with the filing of a new challenge to the Department's unlawful and unjust 2012 approval of fee to trust for the Ione Band.

Recently, the Department's administration of fee to trust took an unexpected turn with the Department's March 9th withdrawal of M-37029 with M-37055. M-37055 determined the criteria used to determine Ione was eligible for fee to trust was wrong and issued new criteria that complies with the IRA and the Supreme Court's *Carcieri* decision that a tribe must have been recognized in 1934 to be eligible for fee to trust. The criteria used to issue the 2012 ROD approving the taking of 228.04 acres into trust for Ione was determined by the Department to not be consistent with the ordinary meaning (reason), statutory context (law), legislative history (fact), or contemporary administrative understanding of the phrase (establishment of rights according to law) "recognized Indian tribe now under federal jurisdiction." Very clearly not consistent with justice.

NCIP's search should now be over but not quite. The Ione Band in concert with some federal officials turn their unlawful administration of fee to trust in a new direction. With the withdrawal of the criteria used to issue the 2012 ROD plan B is now required, created, and initiated. Plan B involves even more unlawful activity by the BIA. Eleven days after the withdrawal of M-37029 the Sacramento BIA Acting Director accepted 10 parcels totaling ~ 225 acres in trust for the Ione Band and claimed the Indian Land Consolidation Act (ILCA) (25 U.S.C. 2202) as

authority for this acceptance.

This is utter nonsense because the ILCA requires a tribe to own trust or restricted fee land and the Ione Band has claimed it is "landless" for at least the past 17 years. Then they ignore that Section 5 of the IRA specifically authorizes the Secretary of the Interior and only the Secretary of the Interior to acquire land in trust for Indians and not Acting Regional Directors.

NCIP's search for justice now requires another legal challenge to the Department's administration of the IRA and fee to trust. And NCIP filed a challenge to the unjust fee to trust acceptance in July 2020. Truths are hidden, facts ignored, and reason absent in the arbitrary, capricious, and corrupt world of Federal Indian Policy and its "anything goes" administration of fee to trust. In the world of Federal Indian Policy justice is elusive, is easily sidetracked, too often delayed, sometimes held hostage, frequently ignored and always misused, and abused by DOI, BIA, and NIGC officials to the exclusion and detriment of the law, truth, fact, reason and ultimately "justice."

History teaches that achieving justice is often arduous, requires diligence, determination, sacrifice, and a dedicated commitment to find the truth, find the facts, and understand reason. Finding justice often takes decades of work to find, understand, and finally determine and establish justice. CERA remains adamantly committed to those ideals in its pursuit of justice for Federal Indian Policy as do I and No Casino In Plymouth for justice in the administration of fee to trust.

A civilized "just" society demands that its citizens never surrender to "injustice" at the hands of its government. That is why CERA is committed to establishing justice in Federal Indian Policy and it is why I and a host of other every day citizens all across the United States commit ourselves to challenge "injustice" as we go about our daily lives. Many of the "landmark" decisions of the Supreme Court that protect our liberty and rights had their genesis with a single citizen seeking justice. As heirs to the Founders it is our obligation and duty to challenge injustice peacefully and with perseverance. To do otherwise is, in my opinion, unAmerican and it is this never ending quest to "establish justice" in order to form "a more perfect union" that distinguishes the United States and We, its citizens, from all other nations.

In closing, I recently found this from Justice Oliver Wendell Holmes dissent in *Abrams v. the United States* 1919. A freedom of speech case that I believe is appropriate for 2020. *"Persecution for the expression of opinions seems to me perfectly logical, if you have no doubt of your premises or your power and want a certain result* ***with all your heart you naturally express your wishes in law*** *and sweep away all opposition. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct* ***that the ultimate good desired is better reached by the free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."*** **(emphasis added)**

The Reality of the McGirt v. Oklahoma Decision

By Lana Marcussen - AZ

McGirt v. Oklahoma was the final political accountability federalism decision this past Supreme Court term. While it appears that McGirt was a win for the Indian tribes, analyzing McGirt in the context of the major changes of federal law contained in five other political accountability Supreme Court decisions issued from June to July completely changes the picture. In reality, the McGirt decision really was a decision that the Supreme Court was not going to clean up the mess made by Congress with federal Indian policy. Considering the major changes in law to the federal territorial power and federal land law, there is a question now over the constitutionality of many parts of federal Indian law, including the Major Crimes Act (the subject of McGirt).

McGirt was the last decision issued for the 2019 Supreme Court term. The decision itself is not what anyone expected. What that means is no party or amicus argued for the reasoning actually adopted by the Supreme Court in making the decision. As in all Supreme Court decisions the reasoning is more important than the result of the particular case. The reasoning or rationale lasts and gets applied in subsequent rulings and indicates the direction the Court is taking. Just looking at the McGirt decision in a vacuum without the other political accountability rulings is enough to

convince any reasonable person that McGirt signals a major change in federal Indian law. While the tribes are trying to argue this change is in their favor and supports tribal sovereignty, the truth is much more complex.

The McGirt majority brought back the Removal Act of 1830 and applied it to decide the case. The Removal Act of 1830 was the huge piece of legislation that set the assimilation policy. This is the law that caused the huge falling out between President Andrew Jackson and Chief Justice John Marshall in the 1830's that resulted in the trail of tears. Since the Civil War, the United States Department of Justice (USDOJ) has tried to make the Removal Act disappear from our history and inapplicable as a matter of law. Put simply, the federal Indian war power policy of 1871 is not compatible with the assimilation policy of the Removal Act. Either the Indians as persons can become part of the American people under the assimilation policy or they cannot become citizens and will remain federal wards as potential belligerents. These contradictory positions are what created the schizophrenic nature of federal Indian policy that made it very difficult to fight.

Justice Kavanaugh in his dissent in McGirt points out that the Creek nation had fought on the side of the Confederacy in the Civil War and that he believed that voided the promises made in the Removal Act and pre-Civil War treaties. This was the legal rationale of the 1871 Indian war power policy that ended treaty making. The majority rejected that Congress had revoked all the promises made in the pre-Civil War treaties in the peace treaty made after the war that did contain major penalties including making the Creek owned slaves members of the tribe and disestablishing about a third of the reservation. The majority ruling acknowledges the punishment Congress imposed but ruled that the reservation created by the terms of the Removal Act was not disestablished by Congress in the peace treaty or subsequent legislation. By reviving the Removal Act the Supreme Court has decided in McGirt that the Native Americans can and will all be treated as citizens of the United States.

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So while the McGirt decision affirms the continuing existence of the Creek reservation it also contains a very blunt warning to the Creek Nation not to try to expand tribal jurisdiction over non-Indians. Justice Gorsuch completely changed how treaties are to be interpreted and applied. Justice Gorsuch said that the Indian treaties are to be read as regular federal statutes. It has been true from the beginning that ratified treaties are all made actual law of the United States and included in the statutes at large as of their ratification date. But we have not read any Indian treaty as a regular federal law since the Civil War. Indian treaties are subject to the overriding trust authority of the United States over the Indians. Justice Marshall created this overriding trust relationship in Worcester v. Georgia (1832) when he ruled the Removal Act unconstitutional for violating this created trust relationship. By applying the Removal Act as the applicable regular federal law Justice Gorsuch has impliedly overruled Worcester v. Georgia. This position is made even stronger by the one page dissent of Justice Thomas that pointedly attacks the jurisdiction of the Supreme Court over state law decisions. The only case ever removed from state court by the Supreme Court on its own motion was Worcester v. Georgia.

Justice Gorsuch also ruled in McGirt that the only Constitutional provision that applies to interpret Indian treaties is the Indian Commerce Clause. As Justice Gorsuch says this is the only clause in the Constitution that specifically mentions authority over Indian tribes. Justice Gorsuch cautions not to over read the very brief Indian Commerce Clause to imply authority in Congress under other Constitutional clauses. He includes the Supreme Court itself in this analysis for lumping laws together under their disestablishment line of cases to confront the dissent of Chief Justice Roberts.

The Chief Justice and three other justices would have ruled that the Creek reservation was disestablished by Congress in creating the State of Oklahoma. But as Justice Gorsuch said, Oklahoma made the disestablishment position very difficult by arguing that no Creek reservation was ever created. Oklahoma's position was based on the fact that the Removal Act that established the Creek reservation in Oklahoma had effectively been interpreted out of ever having existed by the 1871 Indian Policy and arguments of the USDOJ for 150 years. CERA and CERF have been arguing for about ten years that the Removal Act should be considered good law and applied. In fact this is the reason CERF did not submit an amicus brief

in the McGirt case. CERF did not want to contradict the position taken by the State of Oklahoma. It is impossible to assert that a reservation has been disestablished if the reservation was never created at all.

My opinion is that McGirt represents a necessary correction in federal Indian law that makes Indian law comply again with Constitutional law. My opinion is backed up by two huge rulings applying political accountability federalism to the territorial authority of Congress in Puerto Rico v. Aurelius and the decision in Atlantic Coast Pipeline v. U.S. Forest Service which changes federal land law. In early June, a unanimous Supreme Court reeled in the authority of Congress to claim continuing extra constitutional power under the Territory or Property Clause in a set of consolidated cases over the continuing authority of Congress over Puerto Rico. The sweeping ruling written by Justice Breyer brings back the Northwest Ordinance and finally ends the application of the Dredd Scott decision in modern law. For the purpose of interpreting the McGirt decision, the Puerto Rico decision literally rejects the authority of Congress to do the 1871 Indian policy. Bringing back the Removal Act and the assimilation policy to decide McGirt applies the rationale of the Puerto Rico decision. The Puerto Rico ruling expressly states that Congress has no extra constitutional authority to continue its authority in a territory. This unanimous ruling could cause many federal laws to be unconstitutional including the Indian Reorganization Act of 1934 that is the basis for federally delegated tribal sovereignty. The Puerto Rico decision is already being confronted by Congress in legislation to restore parts of the Voting Rights Act that was struck down in an opinion about ten years ago written by Chief Justice Roberts.

CERF did write an amicus brief for the Atlantic Coast Pipeline case arguing that "magic" language allowing federal agencies, especially the USDOJ, to choose how to grant right of ways over federal lands had to be stopped. CERF explained how the schizophrenic Indian and federal land policy needed to be completely reconsidered to impose Constitutional limitations on the authority of Congress and federal agencies over the federal lands. Justice Thomas wrote a wonderful opinion in the Atlantic Coast Pipeline case treating the federal lands as lands owned by the United States without any special authority and ending any "transitional language" that could change jurisdiction without changing ownership of the land. Between the Puerto Rico and Atlantic Coast Pipeline decisions everything CERA/CERF have been asking for as fundamental corrections to what happened with the Dredd Scott decision and Reconstruction to create unlimited federal authority have been adopted by the Supreme Court.

CERA/CERF will be arguing that McGirt must be interpreted in conjunction with Puerto Rico v. Aurelius and Atlantic Coast Pipeline. If I am right, the Nixon Indian policy ended with the McGirt decision. To make matters more complete there are three other decisions at the end of the term reinforcing this position. Two major separation of powers cases and one case limiting the authority of Congress and the federal agencies in federal administrative law reinforce our position. While it first looks like the Indian tribes won McGirt, the reality is that McGirt is the first case that places the Indian tribes back under the Constitution.

Federal Indian Policy is unaccountable, destructive, racist and unconstitutional. It is, therefore CERF and CERA's mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the United States.

Help!

Curt Knoke, Treasurer

Thank you to all who renewed their Membership dues and to those who contributed extra dollars toward the expenses of the writing and filing of amicus briefs CERA/CERF has been sponsoring in recent years.

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The annual premium for Directors and Officers insurance is about $1,500 for CERA and about the same for CERF. This cost is born by the board members. Maybe you could sponsor a board member's insurance. That would be about $100 for each board member.

If you have not yet paid your dues please remit in the enclosed envelope.

Whatever you give please know that it is most appreciated! THANK YOU!

FEDERAL TERMS:
The ABC's of FIP (Federal Indian Policy)

AG: Attorney General, William Barr, head of the Department of Justice (DOJ) appointed by the President of the US **(Part of the Executive Branch)**

BIA: Bureau of Indian Affairs, a division of the Department of Interior with a budget in the BILLIONS. The majority of that budget stays in Washington for administrative costs. This agency also handles recognition of new tribes. Currently 560 recognized tribes with 200 more applications. Recognition of a tribe enables them to receive millions of federal dollars. *There is no known plan to eliminate federal dollars when a tribe establishes a successful casino**. (part of the DOI, Executive Branch)**

CBO: **Congressional Budget Office.** The Congressional Budget Office is a bipartisan federal agency that analyzes the economy for the U.S.

DAWES ACT OF 1887: Law that initiated the process of assimilation by allotting land to the individual Indians and held in trust by the federal government for a period not to exceed 25 years. This act was a deliberate attempt to end the segregation and dependent status of Indians. **(Legislative Branch)**

DOI: Department of the Interior, David Barnhart, has final say to Trust Land. **(Executive Branch)**

DOJ: Department of Justice, William Barr United States Attorney General **(Executive Branch)**

EIS: Environmental Impact Statement. When a proposed tribal activity has significant environmental impact, it should be required to develop a full environmental impact statement. An abbreviated version of this document is called an EA. Environmental Assessment. **(Part of DOI part of Executive Branch)**

EPA: Environmental Protection Agency. This agency is federal. They have regions all across the United States, **(Part of Executive Branch)**

FEDERAL OR STATE RECOGNITION: Federal government or states applying restrictions of use on behalf of the Indians. **(Part of BIA part of Executive Branch)**

FEE SIMPLE: Land under which the owner is entitled to unrestricted powers to dispose of property, and which can be left by will or inherited. Commonly a synonym for ownership. Subject to taxation.

FEE-TO-TRUST: Fee land claimed by the Department of Interior and title taken as trust land for the benefit of an Indian Tribe **(Executive branch)**

IBIA: **Interior Board of Indian Appeals**: An appeals board established by the department of Interior with regard to Indian decisions. **(Executive branch)**

ICCA: 1946 Indian Claims Commission Act was passed in an attempt to put an end to all Indian Land Claims. This act was originally set to end in 1951 but was extended to the 1970's. Any claim that was or could have been filed was supposed to be finalized. **(Law passed by legislative branch)**

ICRA: Indian Civil Rights Act of 1964 **(Legislative branch)**

ICWA: Law enacted affecting tribes jurisdiction over children of Indian Heritage. **(Legislative branch)**

IRA: Indian Reorganization Act. A Congressional Act overturning the Dawes Act, terminating privatized land and reestablishing some reservations. **(Legislative branch)**

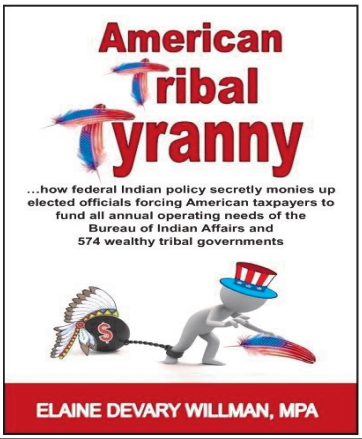
American Tribal Tyranny

How federal Indian policy monies up elected officials forcing American taxpayers to fund all operating needs of the Bureau of Indian Affairs and 574 wealthy tribal governments.

In the early 1800's two feuding national leaders, President Andrew Jackson and Chief Justice John Marshall perpetrated a fraud against American citizens and taxpayers with an unconstitutional Federal Indian Policy. Over the next 200 years, from the 1820's through 2020, every American taxpayer of every other ethnicity became an indentured servant required to annually fund one ethnicity, American Indians.

The author's first two books, *Going to Pieces* (2005) and *Slumbering Thunder* (2016) provide historical and contemporary background on the fraudulent "trust" relationship with Indians. This new and hard-hitting book, *American Tribal Tyranny*, fully exposes exactly how and what happened that has resulted in required annual taxpayer funding for all the basic needs of 574 tribal governments, with an additional 400 tribes waiting in the wings for their "federal recognition" over all other American ethnicities. There is something entirely wrong with this picture, and blatantly unconstitutional. This new book will undoubtedly annoy the Indian industry, who profit from this scam, while denying enrolled tribal families their civil and equal rights.

The U.S. Constitution never intended all taxpaying Americans to be forever indentured servants to one ethnicity – enrolled tribal members – who comprise less than 1% of their country's population. Tribal governments receive multimillions of dollars annually while tribal families have remained in abject poverty for decades. This book is intended to educate citizens and elected officials so that one day the United States can be restored to One Nation Under God.



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POTUS: President of the United States **(Executive branch)**

SCOTUS: Supreme Court of the United States **(Judicial branch)**

SCOTUS BLOG: A web site that follows the opinions and orders of SCOTUS **(News outlet regarding Judicial Branch)**

TSTS: Treatment Similar to States – Some federal environmental laws authorize EPA to **treat** eligible federally recognized Indian tribes in a **similar** manner as a **state.**

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… We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness … **excerpt from the Declaration of Independence 1776**

"Fight for the things that you care about. But do it in a way that will lead others to join you."

Ruth Bader Ginsburg

New Book Coming soon…
"the Pendulum"
from Indian Removal
to buying Mille Lacs

by Clare Fitz
with Lauralee O'Neil

Federal Indian policy is unaccountable, destructive, racist and unconstitutional. It is therefore CERF and CERA's mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the United States

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