



# CERF/CERA REPORT

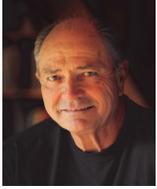


MEMBER UPDATE

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## A Message from the Chair of CERA by Butch Cranford, CA

### AN INTRODUCTION TO FEDERALISM

As we leave 2018 behind, CERA looks forward to 2019 and continues to challenge a still out of control Federal Indian Policy. Our dedication to the proposition that our government is one of limited and specific powers clearly enumerated in the Constitution has not changed. To better inform the Board and all our members, our attorney Lana Marcussen, suggested that we consider including in this CERA Report a discussion of “federalism.” What follows is a basic introduction to “federalism” which will be greatly expanded on in an upcoming special CERA Report.

Let’s begin with a definition of federalism. The definition offered by Webster is: “**the distribution of power in an organization (as a government) between a central authority and constituent units.**” For the United States, federalism is the distribution of power among the three branches of the federal government, shared with the individual States, and subject to the will of the People from whom all governmental authority is derived. The People are the source of power for local, State, and federal governments in the United States.

Colonial America consisted of thirteen separate colonies chartered by the King of England and administered by Governors or Administrators appointed by the King. This form of governance was generally acceptable until America’s involvement in the Seven Years War of Europe known in America as the French and Indian war. The war was a costly British victory resulting in massive British debt that the King and his Ministers believed the American colonies should help repay. The King and his

ministers began arbitrarily taxing the colonies with a series of unpopular taxes. The most famous reaction to these taxes “without representation” in the colonies was the Boston Tea Party where a group of Americans dressed as Indians and tossed several tons of tea into Boston Harbor.

Despite pleas from the Colonies, the King and his ministers continued to abuse the Colonies which led eventually to the Declaration of Independence and the American Revolution. The events leading up to the revolution were instructive for the Founders and they knew from experience that the distribution of power (federalism) within the British empire left the colonies with little or no power and nearly all or all power with the King. Too much King, not enough Colonies, and nothing of the People was not a proper distribution of power (federalism) for the American Colonies.

The thirteen States had significant differences in history, geography, population, size, economies, and politics. The Articles of Confederation, the Founders initial attempt at forming a federal government was a failure because too much power was retained by the States and almost no power was vested in the federal government. Each State wanted all the powers of a sovereign nation but they eventually realized the national government needed more power if the United States was to survive and prosper as an independent nation of the world.

The Articles failed because the distribution of power (federalism) was not properly balanced. The sorry state of affairs was, according to George Washington, in such a state as; “*If you tell the Legislatures that they have violated the treaty of peace and invaded the prerogatives of the confederacy they will laugh in your face,*” and “*What a triumph for the advocates of despotism to find that we are incapable of governing ourselves.*” During the Revolution, Washington and the Founders realized that the Articles

did not distribute the powers of government in a way that would allow the United States to survive as a nation and changes were needed.

Congress called a convention to amend the Articles of Confederation which opened on May 25, 1787. However, the convention delegates began considering an entirely new form of government with a more robust balance of power between the federal government, the States, and the People (federalism). After four months of heated debate a majority of delegates on September 17, 1787 approved and signed a new Constitution for the United States calling for a government unlike any developed in the history of the world. This new Constitution created a unique solution for sharing power with a balance of power between the States, the national government, and the People (federalism). This Constitution was approved by the People and so began our journey toward “a more perfect union.”

The new Constitution’s “federalism” was unique and innovative in its distribution, limitations, and divisions of power. As stated in the Preamble, “We the People of the United States do ordain and establish this Constitution...” which authorized a federal legislature consisting of two houses, an executive branch with a President, and a judicial branch with a Supreme Court. All three branches were vested with limited and specific powers by the People. Our Constitution specifically enumerated the limited powers of both the federal government and the State governments. A system of checks and balances was provided within and between the three separate branches of the national government as well as checks and balances between the States and the national government to guard against tyranny. In 1787 the Constitution contained little with respect to the rights and powers of the people but that oversight was remedied when the Bill of Rights was added in 1789 and the Tenth Amendment declared “The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

With the addition of the Bill of Rights, the Founders had created a system of government where the various powers of government were limited, enumerated, and separated. This design of separate

limited powers provided a balance of governmental powers (federalism) unlike any in history. The Founders created a form of government (federalism) where there was not too much national power, not too much State power and in theory all power to the will of the People. Ben Franklin on leaving Constitution Hall was asked whether we had a republic or a monarchy and he replied, “**A republic, if you can keep it.**” – an insightful and prescient precursor to the challenge of adhering to our Constitution and its federalism as envisioned by the Founders. This concludes this basic introduction to federalism.

However, as noted in my opening, it is my privilege to announce that CERA will publish a special CERA Report which will clarify and expand on this limited introduction to federalism and inform as to whether we have been faithful to the “federalism” as developed and documented in our Constitution by our Founding Fathers.

This special in depth CERA Report dedicated to Federalism will be researched and authored by two well qualified individuals familiar to CERA members; CERA Attorney Lana Marcussen and legal scholar Darrel Smith. Their Federalism paper will include discussion of the Constitution, its enumerated powers, the Federalist Papers, significant Congressional legislation, landmark Supreme Court decisions with reference and discussion of the “unenumerated” powers created or discovered by the Court, and various actions by the President and Executive branch. So, let’s buckle our legal seat belts in anticipation of a serious and challenging legal journey to learn if federalism in the 21<sup>st</sup> century is the federalism of 1787 and if not why not.

I take this opportunity to thank Lana and Darrel in advance for suggesting this interesting, and informative way for CERA to begin 2019. I am looking forward to the Special Report on Federalism by Lana and Darrel and hope that now you are as well.

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## **New York State wins Arbitration**

*by Jerry Titus, NY*

According to the Indian Gaming Regulatory Act of 1988, (IGRA) for an Indian Tribe to have casino gaming they must have a gaming compact with the state.

In 2002 the Seneca Nation of Indians (SNI) and New York State entered into a compact of fourteen (14) years with a seven (7) year automatic renewal. Included in this compact was a revenue sharing provision that provided for the State to receive 25% of the slot machine drop, and the state would share those funds with the host communities. Also included in the compact was a provision for arbitration if there was a disagreement between the parties.

The SNI discontinued revenue sharing payments at the end of the 14<sup>th</sup> year of the gaming compact. When the payments stopped the State chose to seek arbitration.

SNI says that the compact does not specifically address continued revenue sharing payments beyond the 14<sup>th</sup> year. It seems odd to me that it would have to be written in the compact if it was automatically renewed for seven (7) more years. The arbitration panel agreed with New York and ordered that the payments are due. I would think that automatic renewal would mean that all provisions would remain in place, whether specifically written in or not.

The Seneca people were angered by the ruling but maybe they should look at it another way. The Seneca leadership keeps telling about giving 1.4 billion dollars in revenue sharing payment and investing one (1) billion dollars in developing their casinos. However, they don't say anything about the other two (2) plus billion dollars that the Seneca got, and this money is just from the slot machines. Nothing is said about the revenue from the table games, restaurants and hotel.

The other thing that is peculiar is, if they felt that the money wasn't owed, why did they put it in escrow? Apparently, they weren't totally convinced that the payments didn't end after fourteen (14) years.

In an article in Indian Country Today about the decision one Seneca Nation councilor said there was no other explanation but that this ruling was a case of blatant, willful racism. It is sad that they want to play the race card when a ruling doesn't go in their favor.

Another article states that the Seneca feel that the courts and apparently arbitration panels do not always decide cases on the law, even their law. This statement seems strange when the panel consisted of Henry Gutman a lawyer representing the State of New York, Kevin Washburn, University of New Mexico Law School Professor, former Interior Department Official and Chickasaw Nation member; representing the Seneca Nation and William Bassler, a professional arbitrator, mediator and former federal judge, jointly designated by Washburn and Gutman. It would seem with the background of these three panelists that the law would be their primary concern.

The article also states that given historical and current trends and in light of the arbitration ruling the Seneca people are asking "Can we ever get a fair shake." Let's take a look back. When the lease for the City of Salamanca and Congressional Villages was about to expire, the Senecas complained about past inequities in the old lease so Congress passed the Seneca settlement act, which gave the Senecas sixty (60) million dollars (\$35 million from the Federal Government and \$25 million from New York State) and provided that any land they purchased with the funds would be held in restricted fee so that it was tax exempt. Then the act was fast tracked through Congress so there were no hearings or a chance for anyone to question what was going on. (A fair shake?).

After 1991 they purchased prime property in Buffalo, NY and Niagara Falls, NY, taking said property off the tax rolls and then built casinos on both the properties. They also built a casino in Salamanca, NY on their reservation. The casino in Buffalo was challenged in Federal Court and in that process the National Indian Gaming Commission (NIGC) came up with a "new" interpretation of the IGRA that favored the SNI. So, I think they got a better than "fair shake" there. None of their casinos are on federal trust land and it seems that the Bureau of Indian

Affairs (BIA), NIGC and Department of Interior (DOI) have made several decisions and actions that have greatly benefited the SNI.

One other place they got more than a fair shake is the fact that the Niagara Falls and Buffalo properties were purchased after 1988 in restricted fee. According to IGRA gaming isn't permitted on land purchased after 1988 except in a couple of situations. The Senecas don't fall in those exceptions. But then the NIGC came up with their "new" interpretation that I mentioned earlier. So I believe they got many "beneficial" fair shakes along the way.

## A Bit of History

by Clare Fitz, MN

It was 1830. Andrew Jackson was the President of the United States and Congress had passed the Indian Removal Act in May of that year and the President had signed it. In December of that same year the State of Georgia passed a law adding the area occupied by the Cherokee Nation to the State of Georgia, extending the laws of Georgia over the area, annulling all laws made by the Cherokee Nation, preventing any Indian residing in the Cherokee Nation from being a witness in a Georgia court in which a white person was a party unless the white person resided in the Cherokee Nation and requiring that any white person living in the Cherokee Nation get a license from the State of Georgia and swear to uphold the laws of Georgia. That action on the part of Georgia was the impetus for filing the case of Cherokee Nation v. Georgia.

The Cherokees had taken seriously the opinion expressed by many that they could become a part of the United States as citizens if they adopted the ways of the white man. Under the leadership of John Ross, a successful plantation owner in his own right even though he had been raised Cherokee, they were determined to do just that on the land they claimed as the Cherokee Nation. They adopted a constitution and set up a government patterned after that of the United States and with the assistance of missionary Samuel Worcester, were printing what was the first newspaper published by an Indian tribe. Georgia's new law was clearly a threat to John Ross's dream.

In the 1831 case of Cherokee Nation v. Georgia the Cherokees asked the United States Supreme Court for an injunction to stop the State of Georgia from depriving the Cherokees of their rights. William Wirt, the attorney general in the James Monroe and John Quincy Adams administrations argued that the Cherokee Nation was by the United States Constitution (Article III) and law, a foreign nation and therefore not subject to laws passed by the State of Georgia. Chief Justice John Marshall wrote the opinion of the court declining to rule on the merits of the Cherokee case on grounds that the Cherokee Nation was not a foreign nation and therefore the court had no original jurisdiction. He opined that the Cherokee Nation was not a foreign nation but rather a **"domestic dependent nation."** He continued to say that **"the relationship of the tribes to the United States resembles that of a 'ward to its guardian'."** But the court indicated that it might rule for the Cherokees in a case that was properly brought before them.

Following the case of Cherokee Nation v. Georgia, missionary Samuel Worcester was being hassled in an effort to provoke a legal action. Quoting from Steve Inskeep's book, *Jacksonland*, on pages 250-251, "the silver-haired chief justice [John Marshall] remained formidable deep into his seventies, a political as well as a judicial figure. During the summer of 1831 he exchanged letters with William Wirt telling the Cherokee lawyer exactly what to do: identify an individual with proper standing whose rights were denied before a Georgia state court. The decision by the state court could be appealed to Marshall's Supreme Court, which had the right to hear such appeals. This would create the basis for Marshall to draft a ruling that blocked Georgia from extending its laws over the Cherokees. In modern-day courtrooms it would be considered unusual, if not unethical, for a judge to give private strategic advice to a plaintiff with whom he sympathized. But concepts of ethics were different in 1831...."

The stage was set. The State of Georgia was trying to get the Cherokees to remove and Worcester and the Cherokee newspaper he supported were making the task more difficult. The State of Georgia had passed the law requiring that any white man who lived on Indian land must have a license from

the Governor of Georgia and to have taken an oath to support and defend the constitution and laws of the State of Georgia. Obviously, the laws of the State of Georgia and the laws of the Cherokee Nation the missionaries served were in conflict. Georgia was clearly trying to make it uncomfortable enough that the remaining Cherokees would remove.

Eleven missionaries, all of whom refused to sign the State's document, were arrested, tried in state court and sentenced to four years of hard labor in the state penitentiary. Nine of the eleven accepted Governor Gilmer's offer of clemency and left the state. Samuel Worcester and Elizur Butler stood their ground and were put to work at the state prison. This was the perfect case that John Marshall had asked for and John Ross, the leader of the Cherokees knew it.

The Cherokee attorney William Wirt appealed the case and Worcester v. Georgia was argued before the United States Supreme Court on February 20, 1832. Georgia, considering the case frivolous, sent no attorney to defend the state.

Worcester argued that he was in the Cherokee Nation under authorization from the President of the United States and the State of Georgia had no jurisdiction over him. He argued that several treaties that the United States had agreed to acknowledged that the Cherokee Nation was a sovereign nation.

In the decision handed down on March 23, 1832, Chief Justice John Marshall wrote, "This duty, however unpleasant, cannot be avoided." I guess he had forgotten his letters to attorney Wirt? He went on at great length to explain how the common law of Great Britain, that the United States had adopted, did not authorize the taking of Indian land without purchasing it or by conquest. He pointed to the treaties that had recognized the Cherokee Nation as a sovereign entity. He ruled that only the federal government was authorized to regulate Indian affairs, that the law passed by the State of Georgia was unconstitutional and that Samuel Worcester had been arrested under an unconstitutional law and that his conviction and sentence were null and void.

The opinion clearly states that it is the federal government that has jurisdiction over Indian tribes and is claimed as the justification for "**tribal sovereignty.**"

Andrew Jackson was the President and Lewis Cass was his Secretary of War. Both, perhaps for very different reasons, wanted the Cherokees to remove from Georgia. No effort on the part of the United States government was made to enforce the decision of the United States supreme Court

By 1833, Wilson Lumpkin, who as a Congressman had led the fight for passage of the Indian Removal Act, was now the Governor of Georgia. He signed a bill into law that repealed the law under which Worcester was convicted and Worcester and Butler were released from prison.

### **An Excerpt from forward written by Wm B Allen to "Voices Across America"**

The 1924 blanket grant of citizenship to all American Indians proved to be the gift of an "Indian giver," for a decade later Congress passed an Indian Reorganization Act, assuming a "plenary power" which no mere delegated authority can exercise over citizens. Congress reasserted authority over tribes as wards of the federal government. But once tribal members had become U.S. citizens they were no longer "outsiders." This claim of total power, then, means that Congress claimed authority under the Constitution to treat citizens as dependent wards. The implications for all citizens, and not merely Indians, are obvious. Persons who are "wards" can make no reasonable rights claims; for them, rules for their conduct must come before any rights they can enjoy. While children have rights as human beings, they are in fact wards who cannot defend their rights. They benefit rather from adult proxies, whose own individual rights serve to protect not only themselves but their offspring. Respecting people's rights, the U.S. Constitution prohibits the government classifying citizens by race, and the prohibition is absolute. Accordingly, the assertion of authority over Indians, *per se*, and Indian tribes in consequence, exceeds the authority of Congress. That is why the emancipation of Indians from an excessive claim of political power is the necessary condition to protect all United States citizens from an aggrandizing federal power.

*Federal Indian policy in 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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