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Developing a Legal Offense Succeeds in *Brackeen v. Haaland*

By Attorney Lana Marcussen – AZ

For many years CERA/CERF have been working to force changes to federal Indian policy. We have caused lots of change in how Indian law cases are argued but so far had not managed to force the Department of Justice (DOJ) and the federal government to end the promotion of tribal sovereignty that has been federal Indian policy since 1970 and the Nixon administration. Arguing for federal political accountability and using our extensive research we have gotten major changes in how federal territorial power is defined. Limiting federal territorial authority has allowed the federal courts to limit overall expansion of federal authority. But we have had to wait for the DOJ to sue someone sympathetic to our cause or find a group close enough to an asserted federal action to have standing to try to defend against the new attempted federal extension of authority or jurisdiction. We have slowed federal expansion but we have not had the ability to take any of that extended federal authority or jurisdiction back because we did not have a legal offense, only a defense.

With the help of many people involved through CERA/CERF, I started working on a legal offense about 12 years ago after the decision in *Carcieri v. Salazar* in 2008. In *Carcieri*, we finally proved to the Supreme Court of the United States that they could not trust the facts presented by the DOJ in any Indian case. Rewriting the facts was a deliberate major part of the Nixon Indian policy justified by claiming the Indian trust relationship required presenting the best facts the DOJ could manufacture to promote tribal sovereignty. How were we supposed to ever be able to fight this federal Indian policy when the federal lies were getting more and more extensive? What we needed was a way to raise the fundamental constitutional issues without having the benefit of the Civil Rights Acts or Fourteenth Amendment. We could not use the tools of the Civil Rights movement because the Nixon

administration had managed to get the Supreme Court to buy into the ultimate untruth – that tribal governments are political and not racial entities in the case of *Morton v. Mancari* in 1974. Ironically, this decision became law the very same year that President Nixon was forced to resign for his overall skullduggery against the American political system.

Many legal scholars have speculated over the years about the potential of creating a legal offense against what seemed like unlimited expansion of federal authority and jurisdiction. The thinking mostly revolved around the idea of creating a cause of action for a constitutional legal wrong – a constitutional tort – was the phrase used by attorneys, but how?

Using our modernized federalism argument of political accountability, I began to wonder if we could enforce the constitutional structure itself to impose limitations on the federal government. That is what we were doing on the defense so could we argue that the constitutional structure and the specific constitutional clauses making up that structure were individually enforceable to bring back their intended limitations as a legal offense? With the help of Doug Herthel and several others in Santa Ynez and Los Olivos, California, I was able to construct the first rough version of a true constitutional offense. Over the next four years and the additional assistance of the Village of Hobart, Wisconsin, I finally figured out how an individual and State entities could enforce the constitutional structure to protect against further federal expansion. We could use a violation of the constitutional structure as the cause of action to strike down specific federal laws or actions. This has now become known as the Anti-Commandeering argument and is a direct outgrowth of political accountability federalism.

With the help of the Goldwater Institute and Dr. William Allen it was decided to try this brand-new argument out against the Indian Child Welfare Act statute adopted by Congress in 1978. Starting with a couple of cases in Arizona that created good results, the argument was then used in Texas in the consolidated cases recently decided by the En Banc Circuit Court of Appeals in *Brackeen v. Haaland*.

This case involved the rights of Indian children to be adopted by non-Indian families as being in the best interests of the children. Family law is supposed to be primarily State interest. Yet, as part of its claimed plenary authority over Indians, the Congress in 1978 passed a law completely stopping state courts from dealing with Indian children in the same way it treated all other children. Congress defined the best interests of the Indian child as always belonging to the Indian tribe – just as slave owners argued before the Civil War that Black persons were incapable of taking care of themselves and needed special laws for their protection that included being “owned” by their caretakers. It was part of this section of the Indian Child Welfare Act that prevented other experts from testifying as to the best interests of the child that was struck down as unconstitutional in *Brackeen*. This means the best interests of tribally enrollable children cannot be dictated by Congress.

We picked the Indian Child Welfare Act as the first target for our new legal offense because I was completely convinced that the reason Congress had become so unaccountable was from preserving the Civil War Powers in the 1871 federal Indian policy. I wondered if claiming that state law was being unconstitutionally commandeered by the federal government by this federal Indian statute was going to force these retained war powers to the surface. In *Brackeen*, the generally conservative Fifth Circuit literally split in half writing two 165-page opinions trying to figure out how to apply this new legal offense. Both opinions are well written and well researched. They split on whether the United States government is literally relying on preserved Civil War powers for its claimed authority to enact the Indian Child Welfare Act.

With our first offensive salvo against federal Indian policy in *Brackeen* we have opened the discussion about where all this claimed federal authority over Indians is really coming from. The DOJ and more radical Indian tribes are extremely upset that we have succeeded in getting the federal courts to seriously question the legitimacy of the “plenary” or “unlimited” federal authority over Indians. So upset that it is uncertain whether the United States and Indian tribes will appeal the *Brackeen* decision to the Supreme Court once the adoptions are completed in the state court. (Further appeal in the case was stayed by the Fifth Circuit to allow the completion of the adoption of the Indian children by their non-Indian parents.) It will be interesting to see

whether *Brackeen* has ended or whether the United States and Indian tribes will attempt to overturn the adoptions raising whether the specific provision that allows such challenges in the Indian Child Welfare Act is itself a constitutional violation.

Importantly for us, *Brackeen* has made clear that individuals have standing to enforce the constitutional structure to prove harm to their rights and liberty interests using the anti-commandeering argument as decided by all 16 judges on the Fifth Circuit. The Fifth Circuit also very much agreed that we have a legitimate new legal defense. The Fifth Circuit had major trouble reconciling our new constitutional structure argument with the Civil Rights arguments. This specific conflict led into the war powers discussions. This demonstrates how controlled the Civil Rights arguments have been by the federal DOJ and how contradictory those arguments actually are. While full constitutional civil rights and liberties are demanded generally for all racial minorities, by contrast, all Native Americans are still wards of the federal government not entitled to any constitutional rights according to current federal Indian policy. This complete contradiction exists because the federal courts have never required the United States to define where in the Constitution this unlimited federal power over Indians comes from.

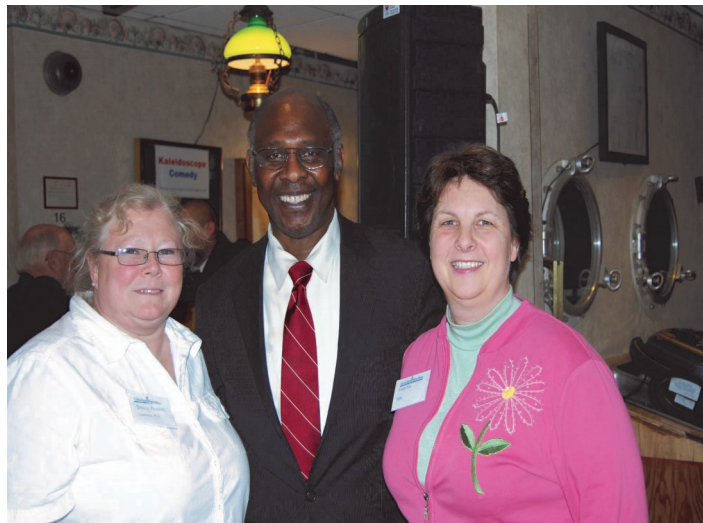
Knowing that *Brackeen v. Haaland* was pending before the En Banc Fifth Circuit Court of Appeals, CERF decided to submit an amicus curiae brief to explain to the Supreme Court how the new legal offense of anti-commandeering fits in with political accountability federalism to call into question whether the United States and DOJ should be promoting tribal sovereignty against all other interests. In the case of *United States v. Cooley*, the DOJ is actually requesting the Supreme Court to expand tribal inherent sovereignty to allow Indian tribes to detain and search non-Indians even outside of federal Indian country. Since Indian tribal governments are considered to be outside of the Constitution this literally means that the DOJ was arguing to deprive all non-Indians of all constitutional rights at the whim of any Indian tribal government that came into contact with a non-Indian. DOJ apparently believed that after the *McGirt* decision last term that the Robert’s Supreme Court had become more welcoming of increasing tribal sovereignty. The *Cooley* case

gave us the perfect opportunity to put accountability federalism all together to explain how it can be used to reel in the claimed unlimited federal power over Indians. Why is the DOJ still promoting tribal sovereignty rather than requiring equal rights for Native Americans? It was made quite clear in the oral argument in Cooley that the majority of Justices believe it is time for the Supreme Court to finally define what this federal power is and where it come from. The pending case of United States v. Cooley will be decided by the end of June this year by a Supreme Court that knows it may have to rule on Brackeen net term.

Now CERA/CERF really need your help to advance our new legal offense. For whatever reasons the conservative legal think tanks and law groups are shying away from using political accountability federalism and our new anti-commandeering legal offense. The Goldwater Institute and all other groups have not only not embraced the huge victory of Brackeen but have literally not mentioned it even as it has roiled federal Indian law and created all new political discussions about where the federal claims of authority originate. We need your help to talk up our great breakthrough. We are well positioned from our amicus brief in United States v. Cooley to immediately advance our offense to finally get fee to trust and other federal expansion claims declared unconstitutional. I just don't understand why the conservative groups cannot see how wrong federal Indian policy is. No one should be denied constitutional rights and liberties for any reason, especially not because of their race as Indians.

Thank you to everyone that has supported us to create this real offense! Please continue your support as we continue to develop it in new cases.

CERA Membership Dues-\$35
Send to: CERA
PO Box 0379
Gresham, WI 54128
We need your support!



A Memory

CERA Board Chairwoman Linda Eno (right), Dr. William Allen, former Chairman of the U.S. Commission on Civil Rights under President Reagan (center) and the late Sandy Reichel, mayor of Wahkon, MN (left) at a past CERA conference in Washington, D.C.

Why did the colonists declare independence from Great Britain?

He [the king of Great Britain]has refused his Assent to Laws, the most wholesome and necessary for the public Good.

He has forbidden his Governors to pass laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.

He has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole purpose of fatiguing them into Compliance with his Measures.

He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.

He has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the Dangers of Invasion from without, and Convulsions within.

He has endeavored to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the Tenue of their Offices, and the Amount and Payment of their Salaries.

He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out our Substance.

He has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

For quartering large Bodies of Armed Troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all Parts of the World:

For imposing Taxes on us without our Consent:

For depriving us, in many Cases, of the Benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended Offences:

For abolishing the free System of English Laws in the neighboring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People.

He is, at this Time, transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny, already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy the Head of a civilized Nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands.

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“The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power.” *Alexander Hamilton, 1775*

Revisited

By Butch Cranford – CA

Recently, I wrote an article for the CERA Report entitled “It’s Not Just A ‘No Action Required’ Oath of Office” which was well received by some readers and not well received by other readers. I stand by the article as written. However, to those readers who thought the article was political or not faithful to the mission and objectives of Citizens Equal Rights Alliance I offer the following.

Our, “We the People” Constitution was not written by politicians and is not a political document. It was written by elected “representatives” of the People and adopted by the “People” of the original thirteen States. It is the Supreme Law of the United States and is the lawful foundation of our system of government. It is a document of law wherein we the Sovereign People granted “limited” authorities to a federal government and the several States. I hope we can agree that the Constitution is a document of law and not of politics.

The article addressed a series of various administrative actions where it was clear beyond doubt that the Supreme Law of the land had not been complied with and was violated. It was also clear that many elected representatives who, pursuant to the Constitution, willingly bound themselves by solemn Oath to support and defend the Constitution against all enemies, foreign and domestic, failed their Oath. I did not identify any of those representatives by name.

I believe the article to be factual as to the actions at issue and to the violation of the Constitution. I did not mention any political party nor did I include any reference to liberal or conservative or include any other words that would infer anything political. I did mention one elected official by name as well as her position as Speaker of the House of Representatives but I did not include anything related to her political persuasion and included her with many other congresspersons who have publicly honored their Oath by contesting what they believed to be unconstitutional actions in similar circumstances in past years as required by their Oath.

CERA has been and remains dedicated to the preservation of and compliance with our Constitution at all levels of government and to its being supported and defended by the representatives we elect pursuant to authority granted exclusively to the State legislatures in the Constitution. The Constitutional issue I wrote about is but one of many instances where our representatives have failed the People and the Constitution in their Oath. At the time, that issue was the most recent failure but since then legislation has been introduced in Congress where no Constitutional authority exists for the proposed legislation. Sadly, introduction of legislation where no Constitutional authority exists is not a recent phenomenon but has been business as usual in the Congress for decades. An example familiar to CERA members is an entire United States Code Section (25 U.S.C.) which is dedicated to an unconstitutional Federal Indian Policy.

Honoring our duty as citizens to support and defend the Constitution is precisely what CERA has been doing by challenging an unconstitutional Federal Indian Policy for nearly forty years. This is a Constitutional duty that CERA honors without regard to political affiliations. We need more of our “representatives” to honor their Oath, do their duty, and support and defend the Constitution without regard to political affiliations. A return to our principles of “limited government” so wisely set forth in the Constitution is needed and will only be accomplished if we the People demand our elected representatives honor the Oath and support and defend the Constitution.

In retrospect I failed in that article to remind readers that the “Oath” is not just an Oath to “support and defend” the Constitution. It is an Oath to support and defend “We the People” who ordained and established the Constitution for the United States and elected them. As Sovereign United States Citizens, we have a duty to support and defend our Constitution if our elected representatives fail to and that is precisely what CERA has been doing for decades.

Finally, the inclusion of the Oath in the Constitution is a protection against the Constitution becoming a “political” document. Supporting and Defending the Constitution, the Supreme LAW of the United States, is not a matter of politics. It is a matter of LAW, if we are indeed a Nation of Laws.

(continued from pg. 4)

He has excited domestic Insurrections amongst us, and has endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.

In every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.

Nor have we been wanting in Attentions to our British Brethren. We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native Justice and Magnanimity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which, would inevitably interrupt our Connections and Correspondence. They too have been deaf to the Voice of Justice and of Consanguinity. We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the rest of Mankind, Enemies in War, in Peace, Friends.



HAPPY INDEPENDENCE DAY!!



A Memorial for Long Time CERA Board Member Dennis Williams

by Lana Marcussen - AZ

Dennis Williams had been a proud CERA Board member since 1996. Dennis always spoke of his connections to CERA to anyone on the Navajo Nation, wanting them to understand that he believed that all people, including tribal members, are entitled to full constitutional rights and protections. Dennis, who worked for the Window Rock School District for over 40 years as a diesel mechanic and bus driver, was a well respected and well-liked member of the community.

Dennis became involved with CERA after he was cheated out of some of his mother's land by the Navajo Nation probate court nine months after the court had ruled that Dennis was the intended heir to Boko Toh canyon and had awarded the land to him. Long after the 30-day window to appeal had passed, Navajo Attorney Allen Sloan, substituted the appeals case number from a properly appealed car repossession case onto new papers that challenged Dennis' rights to the canyon by another Navajo person that was not even related to Dennis. Dennis was not even allowed to enter papers to object to the bogus appeal. Allen Sloan and his partner, Lawrence Ruzow, had been appointed special attorneys for the probate courts of the Navajo Nation. They used their special status to manufacture a scheme that cheated many people out of land they should have inherited using the legal precedent established against Mr. Williams.

CERA became involved on behalf of Dennis Williams when he was jailed by the Navajo Nation Court for not paying a contempt fine for continuing to object to the stealing of his land. Mr. Williams was the first Native American granted habeas corpus relief by a federal district court after the passage of the Indian Civil Rights Act in 1968. The Indian Civil Rights Act actually takes all constitutional rights away from tribal members unless they can prove that they have exhausted all potential tribal remedies and are wrongfully jailed by a tribal court. The only remedy allowed by the Indian Civil Rights Act is to be released from a tribal court jail under order of a federal district court under a petition for habeas corpus.

Dennis was released by federal court order from the Window Rock jail in April 1998. It took two more years before the Navajo Nation courts cancelled the contempt fine against Mr. Williams. No court was willing to allow Mr. Williams to litigate the wrongful appeal of the probate proceedings that had stolen his land even after he was released from jail. Finally, the Navajo Nation Grazing Committee allowed Dennis to file an appeal three years ago to explain how his land had been taken. By that time, the Grazing Committee members had realized that with each land use or grazing permit renewal or transfer that some land was taken away from the permittee as a sort of extortion payment. Legal counsel for the Grazing Committee had traced the source of this permit extortion to the case precedent against Dennis Williams.

Dennis always tried to attend the CERA conferences in Washington D.C. after he was released from jail. He was living proof that we could overcome some of the great injustices of federal Indian law that grants plenary authority to Congress to deprive tribal members of their natural rights to the same laws that apply to all Americans. It was wonderful to introduce members of Congress to the Native American man who broke open the Indian Civil Rights Act. Dennis was always the first to ask to go out for the great seafood available in the Washington area. Dennis loved trying new types of food and generally was just really fun to have around. To me he was a second father, even giving me away when I married fellow CERA board member Ben Saucerman in 2003.

With the filing of the appeal allowed by the Grazing Committee to the Navajo Agriculture Department, the whole story of what had happened to Dennis was laid out with the evidence we had fought so hard to obtain. The evidence clearly proves the switching of the appeal case numbers onto his case that had never been appealed from the probate court. Evidence was also submitted proving that the person who received his land had changed his name illegally on a grazing permit to make it appear he was related to Dennis when he was not. With the appeal, Dennis Williams standing in his community that had been tarnished by his continuous resistance to the land fraud was completely restored. Finally, everyone, even members of the immediate family, fully understood what had happened to Dennis to keep him fighting for justice for all Indian people.

CERA/CERF dedicated their amicus curiae brief in *United States v. Cooley* to Mr. Dennis Williams, a Navajo man who believed that all people should have full constitutional rights and protections. CERA/CERF also very much appreciate the honor and respect paid to Mr. Williams at the end of his life by all Navajo officials and chapter house members. The public acknowledgement by the Grazing Committee of how wrongfully Mr. Dennis Williams had been treated was greatly appreciated by the whole Williams family. As Dennis taught us, the Dine (Navajo) are a great people who deserve full constitutional rights.

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