U. S. Supreme Court… Briefing On Indian Common Law and Federal Indian Policy

By: Elaine D. Willman, MPA
Village of Hobart, WI

I was in Washington D.C. and attended the April 1st House Natural Resources Committee hearing on the *Carcieri* bill. One particularly irresponsible quote from Washington State Jay Inslee was: "Well, we'll just reverse it (*Carcieri)* - we can worry about the language later..." Congressional respect for the Supreme Court is wanting, at best.

Here is the backstory. There's a major separation of powers battle going on between Congress and the Supreme Court. And the Court knows how to fight. Back in the 1830s, there were three landmark Supreme Court cases issued by Chief Justice John Marshall, - the cases known as "the Marshall Trilogy" of Indian law that set the country on a course of segregation for Indians, declared them "dependent wards", declared them "separate sovereigns" and declared a "federal trust relationship" - fiduciary duty owed to the poor Indian wards. That was then (180 years ago) and this is now:

In 2009 we have what will likely come to be known as "The Roberts Trilogy" of the Chief Justice John Roberts Court. Below are three recent cases and their respective issues (think of the foundational pillars of Indian policy –federal trust relationship, dependent wards, separate quasi-sovereigns, and diminishment of state sovereignty):

Carcieri v. Salazar (Feb. 24, 2009 ruled 6-2-1, but a near 8-1 by the Court: FEE -TO-TRUST. This case ruled that Secretaries of Interior have been abusing their authority for over 75 years by taking land from a state (with no compensation) and transferring it to the United States in trust for tribes that were: 1) *not* federally recognized; or 2) had *no* federal jurisdiction within their former reservation), on/before June 1, 1934 when the Indian Reorganization Act was passed by Congress. Of 562 existing tribes, only about 130 were "federally recognized" on/before June 1, 1934.

OHA v. State of Hawaii (March 31, 2009) ruled 9-0 by the Court: STATE SOVEREIGNTY/AUTHORITY. This case ruled that congressional edicts (i.e. the Native Hawaiian Apology Resolution of 1993) do not trump a state's authority over its lands given in Organic and Enabling acts to states in absolute fee, at the time of their statehood. It also ruled that federal legislation may not trump the sovereignty of our co-sovereign states.

Navajo Nation v. Salazar (April 6, 2009) : FEDERAL TRUST RELATIONSHIP WITH TRIBES. This case ruled that to establish a federal "trust" relationship, a tribe or federal entity must look to express language within a congressional statute or regulation, and may no longer rely upon common law (i.e. the Marshall Trilogy noted above).

As powerful as the *Carcieri* ruling was in determining that Secretaries of Interior have been abusing their authority for 75 years, and have no authority to take lands from states and give them to tribes that did not exist on/before June 18, 1934 - - this case is just Strike One, and not even as powerful as the *Hawaii* case.

The issue in the Navajo case was: Does the federal government have a trust relationship with the Navajo Nation? The 9-0 unanimous ruling affirmed that there is no federal trust relationship with the Navajos, unless one can be found in express language of a federal statute. Note: there is precious little "express language" within any federal statute that creates a "trust" relationship. And, since the Navajos have an enormous and legitimate reservation, and are a major Indian tribe, it can be anticipated that if the feds have no federal "trust" relationship with the Navajos, impliedly they have no federal trust relationship with ANY tribe. It will be very interesting to see how the breadth and depth of this ruling plays out in the future.

The issue in *Hawaii* was: Does a federal act ("Apology Resolution to Native Hawaiians") create an obligation upon the State of Hawaii to give 1.2 million acres of Hawaii's "ceded" lands to Native Hawaiians? The court (Justice Alito) wrote the ruling. It was very short, very simple, and clear. It said:

1) No substantive grounds are found in the federal Apology Resolution for Native Hawaiians (passed by some of the same Congressional fools at the hearing on April 1);

2) No federal law can trump a state's sovereign authority over lands given to the state through its organic and enabling acts. In Hawaii's case, the state was granted 100% ownership of all lands within the islands in absolute fee...no obligation respecting "ceded" lands accrues to Native Hawaiians;

3) A disclaimer exempting one (federal) sovereign entity does not create an obligation to another co-sovereign (state). There was a promise in the Apology Resolution that Native Hawaiians would not make claims against the federal government; so, of course, they immediately made land claims against the state - hence this case.

The politically vulnerable State Supreme Court of Hawaii found "substantive weight" in a bunch of foolish "whereas" clauses in the Apology Resolution, and Hawaii's own State Supreme Court was all too willing to give up 1.2 million acres of land (1/3 of Hawaii soil) to the Native Hawaiians (persons having "one-drop" of blood quantum. Total insanity.

There are several beautiful aspects of the Hawaii ruling:

1. There is now absolutely no land base upon which the "Akaka Bill" can be passed. CERA has been greatly helpful in successfully defeating the Akaka Bill (a bill to create a Native Hawaiian "tribe and reservation" - separate sovereignty in Hawaii...for about 5 years now, but every year the bill comes back, and it's back again THIS year...expected to pass in the House, and could even pass in the Senate. The new Hawaiian "tribe" however, now has no land upon which to start their separate government or sovereignty.

2. The discussion by the High Court of a state's authority over its lands was so substantive in the Hawaii ruling that it extends to all 50 states in terms of reasserting a state's authority over pubic domain lands. This was a federalism case, and it went far to balance the relationship between states and the federal government;

3. The ruling makes it impossible (compounded by Carcieri) for the federal government to create any new reservations anywhere;

4. The ruling (too soon to tell yet since it just came down) may go far to balance Oklahoma's sovereign authority which has been almost entirely eroded by the Oklahoma tribes who have no reservations but claim the entire state as "Indian country."

These three cases from the Roberts Court: fee-to-trust, state authority over its lands, and the severe restraint upon the federal government's "trust" relationship with Indian tribes, could actually spell the coming end of Title 25 Indian policy, and Title 18 Indian policy-law enforcement.

As shocking as all this seems, the reality is that what the Court giveth (Marshall Trilogy) the Court can taketh away (new “Roberts Trilogy”).. And it appears that our U.S. Supreme Court has been paying close attention to the Constitutional abuses by Congress, federal agencies and the Executive branch. The Court has been alarmed by the excessive special preferences, the spread of tribal authority over non-tribal persons and lands across the country, fueled by the steroids of gambling.

We have turned a corner. A significant, landmark corner. And isn't it interesting that mainstream media has not yet surfaced this profound change in Indian law. And Congress just can't "fix" it fast enough. We expected the *Navajo* ruling to be issued first and were stunned to see the *Hawaii* ruling come out sooner than *Navajo* (the Court had just heard oral argument on *Hawaii* a very few weeks previous). The Court scooted the *Hawaii* ruling out first, exactly one day before the April 1 hearing of the House Natural Resource Committee on the *Carcieri* ruling. The Court was actually sending Congress a strong warning that they should make no effort to fix the *Carcieri*

ruling. But of course, the tribally-funded Congressmen at the House Committee were either entirely unaware that the *Hawaii* ruling was out, and/or they were oblivious to the power and strength of that ruling. The *Hawaii* ruling makes it constitutionally impossible for Congress to "fix" *Carcieri*.

It is my belief that every major legislative, executive and even judicial branch of our American government, and all of mainstream media - have been so entirely permeated with political/financial influence of the tribal and other gaming industries—Governors, state legislators, state supreme courts such as Hawaii, Washington, Wisconsin, Minnesota - beastly state supreme courts - - the House, the Senate, both political parties—*only* the U.S. Supreme Court remains untouched by the tribal political power and gaming money.

These cases are the equivalent to *Brown vs. Board of Education* for Indians. These cases will lead to the end of Indian segregation through tribal governments and reservations because the underlying origins of Indian law are: the *Marshall Trilogy* of 1830s, The Department of War and War Powers Act, and known to few...the dreadful *Dred Scott* decision...and federal powers used to implement territorial powers to free slaves by calling them "federal instrumentalities" (property) that the federal government could take from southern slave owners...and then set free. During the post Civil War years, a federal Freedman's Bureau was the instrument that the federal government used to assert territorial powers over slaves. This Bureau when no longer needed was transitioned to become the Bureau of Indian Affairs to extend federal territorial powers over lands and Indians.

Those same federal territorial powers were used for Indian treaties and to set up reservations. The "dependent wards of the federal government" were in fact, "federal instrumentalities (property)...not persons…and still are in 2009.

As of 1937 and to the current date, Indians are still property ("federal instrumentalities") of the federal government by their enrollment in a federally recognized tribe, and all of this travesty was ramped up significantly during the Nixon years, with Nixon's executive powers going behind the back of Congress and the Courts.

The Indian Civil Rights Act of 1965 was sheer pabulum, lacking any enforcement. Enrolled tribal members have no civil rights within their government or reservation. The dual-citizenship set up in the Indian Reorganization Act of 1934 created a situation where citizenship in an Indian tribe essentially creates the legal conversion of a person (citizen) to a property (federal instrumentality).

Much more will be revealed about these three historic cases. I encourage you to google the U.S. Supreme Court docket to read them all, not just for the specific facts at issue, but for the legal principles that the Court put in play with these rulings.

The difficult thing over the next few months will be a matter of waiting for others (tribal governments and the gaming industry) to fully understand the impact and reach of these cases, and then for the humongous outcry that will no doubt follow. The other dilemma remains to be seen: Will Congress, governors, state legislators and state supreme courts follow, or utterly ignore the rulings of our Highest Court. The sad state of affairs, but so intended by our Constitution, is that the U.S. Supreme Court does not have the enforcement powers over its rulings so who among federal and state leaders has the will?

Citizens Equal Rights Alliance (CERA) is a national organization focused on the rights of tribal members and flawed federal Indian policy. CERA has believed all along that all of federal Indian policy is outside the four corners of the U.S. Constitution. In a sense, when it comes to federal Indian policy, the U.S. Supreme Court in 2009 seems to be at the same crossroads with its colleague branches (Congress and the Executive Branch) that it was at in the early formation of the Court, when in *Marbury v. Madison* in 1830, the Court established its authority to determine "what the law is." Today's Court appears to be taking a lead to rein in the overreaching by Congress and Executive Orders that has led to the explosion of unconstitutional federal Indian policy.

Elaine Willman is Director of Community Development and Tribal Affairs for the Village of Hobart, Wisconsin, a suburb of Green Bay. Ms. Willman is a Board Member of the national group, Citizens Equal Rights Alliance, and author of ***Going To Pieces**…**the dismantling of the United States of America.*** Contact: toppin@aol.com