CERF/CERA REPORT

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5 Words Dangerous to the "We the People"

by Butch Cranford, CA

You may be wondering what 5 words could be dangerous to "We the People." I will attempt in this article to explain why the 5 words that follow are so dangerous. I believe that *"Congress Needs To Do Something"* have been and are a danger to "We the People" and a serious threat to our constitution.

The genesis for my concern came about recently as I was watching one of the shows on Cable News that use a panel of talking heads to discuss the issue or crisis of the moment. During their back and forth discussion one of those alleged "experts" concluded and stated that *"Congress needed to do something"* and the entire panel agreed. *"Congress needs to do something"* is a too often repeated mantra in the bubble that is Washington, D.C. I believe it is simply not even close to a proper response to any of the many issues or crisis our nation faces. It is the D.C. go to response for every issue that comes along and it is simply the wrong response.

So what would be a proper response to those issues or crisis? Based on my lay knowledge of our Constitution, I believe the proper and correct response to any and every issue or crisis should be, **"does Congress have Constitutional authority to take action."** I have seldom if ever, in my more than fifty years of listening to and watching the news from D.C., ever heard any talking head or any member of the U.S. House of Representatives or U.S. Senate ever ask **"does Congress have Constitutional authority to take action."** It seems that no matter the issue or crisis it is inevitable that a bill will soon be introduced in either the House or Senate to deal with the issue or crisis with no consideration as to whether **"Congress has Constitutional authority to take action."** Ignoring our Constitution is dangerous to the "We the People" and our Constitution but Congress regularly and routinely ignores their "limited" Constitutional powers.

I have frequently asked members of Congress about the Constitutional authority for fee to trust. I am always informed that the Constitutional authority for fee to trust is the "commerce clause" with no explanation as to how acquiring land in trust for Indians has anything to do with regulating commerce.

Some members of Congress understand the "limited power" the U.S. Constitution grants to Congress and are aware that many of the bills proposed and passed by Congress are without any Constitutional authority. They have proposed a simple fix. These members have introduced bills requiring every bill introduced to include the Article, Section, and Clause of the Constitution that authorizes Congress to take the proposed action.

You would think the 535 members of Congress who all have sworn an oath to protect and defend the Constitution would immediately adopt and include in the House and Senate rules a rule that every bill introduced include the Article, Section, and Clause of the Constitution authorizing Congress to take the action proposed. This proposed fix has failed multiple times in the Congress and is the best evidence that Congress is well practiced in ignoring their "limited" Constitutional power and routinely introduce and pass legislation wherein they actually accrue and assign to themselves power and authority beyond their "limited" Constitutional power and authority. With that accomplished, they then delegate those accrued "unconstitutional" powers to the executive branch.

Sadly, this is not a new or recent phenomenon. My long association with CERA and a 17 year challenge to a fee to trust for a casino for the Ione Band leads me to offer the following example of Congress accruing to itself an authority not found in the Constitution and then delegating it to the executive branch. The origins of fee to trust for Indians is found in the 1934 Indian Reorganization Act.

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In 1934 *"Congress needed to do something"* *"to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes."*

In furtherance of these questionable constitutional purposes the Congress included at Section 5 the following; *"**Sec. 5.** The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing lands for Indians."*

The authority for Congress to acquire State land for federal purposes is found at Article 1, Section 8, Clause 17 where Congress is authorized *"to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."* No authority to purchase land for Indians in this clause. Congress then delegated the unconstitutional authority created by Congress to acquire land for Indians to the Secretary of the Interior.

Congress simply accrued and assigned to itself the authority to acquire land for Indians where no such authority exists in the U.S. Constitution and then delegated this non existent authority to the Secretary of the Interior, and the unelected bureaucrats in the Department of the Interior. Unelected bureaucrats whose constitutional duties are to execute the laws of the United States. These bureaucrats have also taken an oath to protect and defend the Constitution and I submit that would include protecting and defending the Constitution from the Congress if necessary.

Bureaucrats are always interested in more authority – Constitutional or not? To my knowledge, since 1934, no Secretary of Interior or any other bureaucrat at the Department of Interior has ever questioned whether Congress has any authority to acquire land for Indians which could be delegated to the Secretary of the Interior. Bureaucrats at Interior developed regulations to formalize the process for acquiring land in trust for Indians and since 1934 thousands of acres of privately owned state lands have been taken into trust for Indians and this unconstitutional acquiring of lands in trust for Indians continues to the present. If you or your town or community has been impacted by a fee to trust action it is simply the fallout from Congress *"needing to do something"* and then doing something it had no Constitutional authority to do.

"Congress needing to do something" is dangerous when no one in Congress is willing to challenge whether any proposed legislation is Constitutional during debate in either the House or Senate. It is time for our elected representatives to hear from us, that "We the People" are fed up with a Congress that routinely ignores its "limited" Constitutional powers.

"Congress needing to do something" for every issue or crisis has become even more dangerous because we now have a Congress that according to its interpretation and use of the Commerce clause, now believes it "CAN DO ANYTHING."

It is time for "We the People" to reclaim our Constitution by holding OUR representatives accountable to their oath to protect and defend the Constitution. Imagine what might happen if we began to question what Article, Section, and Clause of OUR Constitution authorizes them to introduce any proposed legislation. And then challenge that the Commerce clause does not authorize them to do everything. If this sounds like work, it is. But if we do nothing, nothing is going to change. So let's get busy and let our Congressmen and Senators know that "We the People" are paying attention. Write a letter, send an e-mail, or make a phone call and let your representative know that Congress has "limited" Constitutional powers. I can think of no better way for our representatives to get to know "We the People."

HELP!

CERA/CERF has filed two amicus briefs with the United States Supreme Court for this session of the court at considerable expense. Will you help to defray the cost with a donation? We need your help!
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"Done Deal"

by Kim Shea, MA

"Done Deal"—an agreement that has been made and cannot be changed.

When the U.S. Department of Interior formally recognized the Mashpee Wampanoag Indian Tribe, it represented, in my mind, a scandal of historic injustice for American tax paying citizens everywhere. When I heard that the tribe had purchased land in neighboring Middleboro to build a casino on trust land, I didn't believe it could happen and was shocked when I was told it absolutely was going to happen and there was nothing I could do about it. The tribe was federally recognized, it was their right, they had deep pocket foreign investors financing them and they had our elected officials on their side. It was a done deal.

It has been thirteen years since I first heard about the "done deal" regarding the Mashpee Wampanoag tribe's plan to build a casino on trust land in Middleboro, MA with seven of those years fighting the fee to trust acquisition in East Taunton, MA. To this day, there is no casino on trust land anywhere and little or no chance of it ever happening. In the early days in Middleboro, I knew nothing about Federal Indian Policy, never even heard of the IRA and was completely confused as to what "land in trust" meant to the town, surrounding communities and the State as a whole. In fact, it was this "done deal" perception back in 2007 that lead to the single largest town meeting in state history where Middleboro residents approved a casino deal with the tribe while simultaneously voting against allowing a casino in their town in a non-binding vote. The resident's didn't actually want a tribal casino in their town but were told by their own town officials that it was a done deal, the law was on the side of the tribe and if the town didn't vote to make that done deal more done, then they would lose out on the best deal possible and still have a casino.

A decade sure does make a difference – that and the people who never once bought into the "done deal" narrative, including myself. So exactly what did we do? We banded together, we educated ourselves, we questioned everything and everyone including our elected officials at the local, state and federal level … and we fought. We fought hard.

As early as 2010, the latest news was that the tribe was breaking its "done deal" with Middleboro and moving camp to neighboring New Bedford, then it was on to Fall River reiterating the "done deal" mantra to the local government and residents of their chosen area. Then in 2012, the Tribe finally settled itself in the quiet bedroom community of East Taunton, a small subset of the City of Taunton, where they wooed the Mayor and city officials with promises of jobs and money while once again touting the done deal mantra which forced a vote on the city … because, you know, it was their only chance to get the best deal possible or nothing at all except a casino in their community. Alas, as in Middleboro, there were residents of Taunton who questioned everything, educated themselves, and fought – fought hard. As it happened in Middleboro, the residents who opposed the land in trust in Taunton were labeled as xenophobes, skinheads and racists by tribal leaders and casino proponents. They were vilified on social media and in the local newspapers. However, this battle wasn't being fought and won in the court of public opinion, and even though it was being played out on social media, the law was still on our side and we were prepared for the inevitable.

On September 18, 2015, the Assistant Secretary of the Interior, Kevin Washburn, issued a written Record of Decision approving the Mashpee tribe's land in trust application and acquired 170 acres of land in Mashpee for tribal administration, preservation and culture as well as 151 acres of land in East Taunton for a 400,000 square foot casino/resort and ancillary facilities and declared the acquired land(s) the tribe's "initial reservation." It is relevant to the matter at issue here that Assistant Secretary Washburn specifically found that "the Mashpee tribe is eligible to receive land into trust under the IRA" pursuant to the second definition of "Indian" set forth in section 479 of the IRA. The Record of Decision intentionally misinterpreted the second definition of Indian in the IRA and the Secretary's authority to take land under the IRA, and it was done to specifically benefit this tribe at the expense of our state and local governments by avoiding the question of federal jurisdiction altogether. The Record of Decision issued by the Department was seriously flawed and was subsequently challenged by a small group of citizens in Federal Court in *Littlefield v. U.S. Department of the Interior.*

In that case, the Plaintiffs challenged the Secretary's determination that the Mashpee tribe was an eligible beneficiary of the IRA provision that grants the Secretary authority to acquire

and hold land in trust "for the purpose of providing land for Indians." Specifically, the Plaintiffs argued that the Mashpee tribe did not qualify as "Indians" under the second definition section of the IRA and therefore the Secretary lacked authority to acquire land in rust for their benefit. The Department contended that the second definition of "Indian" at issue was ambiguous, that the Secretary permissibly interpreted it to include the Mashpee tribe, and that the Secretary's interpretation was entitled to deference. The Plaintiffs argued that the phrase "such members" found in the second definition plainly referred to the entire preceding clause in the first definition of "Indian" ("all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"). U.S. District Judge William Young agreed with the plaintiff's interpretation and held, "*With all due respect, this was not even close. To find ambiguity here would be to find it everywhere").* Judge Young concluded that the land was taken into trust unlawfully because the Mashpee tribe was not under Federal jurisdiction in 1934 and therefore the Secretary lacked the authority to take land in trust on behalf of the Tribe under the IRA. The matter was remanded back to the Secretary for reconsideration.

On remand, both parties were asked to submit their arguments regarding "under federal jurisdiction" status of the tribe. For two years we provided documents and historical records to the Interior Department to prove, contrary to the tribe's submissions, that the tribe was in fact not under federal jurisdiction in 1934. In 2018 the Department released its final decision and found that the tribe was not under federal jurisdiction in 1934 and therefore was not eligible for trust land under the IRA. The tribe has since appealed the original court ruling in *Littlefield v. U.S. Department of the Interior* without the support or backing of the Interior Department itself, while simultaneously filing an APA complaint in the Washington DC court against the Interior Department's final decision. The plaintiffs in *Littlefield v. U.S.* are intervenor defendants in that lawsuit.

The appeal in the Massachusetts court was recently heard and we are patiently waiting for the decision. Those of us who have fought this from day one have always been clear about one fact – our fight and subsequent lawsuit has never been about building a casino, it has been about holding the government accountable for its decisions being lawful and in accordance with their own rules and regulations when taking land into trust for gaming purposes and is something we will fight for all the way to the Supreme Court if necessary. The decision out of the court of appeals and the DC courts will be what leads us next, or what finally puts this to bed.

There is so much more to this story that it isn't possible to be told in the space allowed in this article. At this point we can only wait and see how this all plays out in the courts, but after a decades-long campaign founded on lies, deceit, revisionist history and more lies by tribal leaders as well as local, state and federal lawmakers, we are still standing. This "done deal" is still not the set-in stone "right" of the tribe as was touted to us back in 2007.

Occasionally we make decisions that we know will change the course of our lives and the decision to seek and hold onto truth in this instance is why we are still standing. There is a quote from one of my favorite authors that comes to mind as I think back on these thirteen years and the idea of the done deal – *"A done bun can't be undone"*- literally meaning that there is no going back once the bread is baked … unless of course, as in our situation, it was never baked to begin with.

Be the change you want to see in the world.

We the People

Amendment IX

Ratified December 15, 1791

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment X

Ratified December 15, 1791

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.

… 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**

Clarence Thomas and the Lost Constitution

by Myron Magnet

Clarence Thomas is our era's most consequential jurist, as radical as he is brave. During his almost three decades on the bench, he has been laying out a blueprint for remaking Supreme Court jurisprudence. His template is the Constitution as the Framers wrote it during that hot summer in Philadelphia 232 years ago, when they aimed to design "good government from reflection and choice," as Alexander Hamilton put it in the first *Federalist,* rather than settle for a regime formed, as are most in history, by "accident and force." In Thomas's view, what the Framers achieved remains as modern and up-to-date – as avant-garde, even – as it was in 1787.

What the Framers envisioned was a *self-governing* republic. Citizens would no longer be *ruled*. Under laws made by their elected representatives, they would be free to work out their own happiness in their own way, in their families and local communities. But since those elected representatives are born with the same selfish impulses as everyone else – the same all-too-human nature that makes government necessary in the first place – the Framers took care to limit their powers and to hedge them with checks and balances, to prevent the servants of the sovereign people from becoming their masters. The Framers strove to avoid at all costs what they called an "elective despotism," understanding that elections alone don't ensure liberty.

Did they achieve their goal perfectly, even with the first ten amendments that form the Bill of Rights? No – and they recognized that. It took the Thirteenth, Fourteenth, and Fifteenth Amendments – following a fearsome war – to end the evil of slavery that marred the Framers' creation, but that they couldn't abolish summarily if they wanted to get the document adopted. Thereafter, it took the Nineteenth Amendment to give women the vote, a measure that followed inexorably from the principles of the American Revolution.

During the ratification debates, one gloomy critic prophesied that if citizens ratified the Constitution, "the forms of republican government" would soon exist "in *appearance* only" in America, as had occurred in ancient Rome. American republicanism would indeed eventually decline, but the decline took a century to begin and unfolded with much less malice than it did at the end of the Roman Republic. Nor was it due to some defect in the Constitution, but rather to repeated undermining by the Congress.

The result today is a crisis of legitimacy, fueling the anger with which Americans now glare at one another. Half of us believe we live under the old Constitution, with its guarantee of liberty and its expectation of self-reliance. The other half believe in a "living constitution" – a regime that empowers the Supreme Court to sit as a permanent constitutional convention, issuing decrees that keep our government evolving with modernity's changing conditions. The living constitution also permits countless supposedly expert administrative agencies, like the SEC and the EPA, to make rules like a legislature, administer them like an executive, and adjudicate and punish infractions of them like a judiciary.

To the Old Constitutionalists, this government of decrees issued by bureaucrats and judges is not democratic self-government but something more like tyranny – hard or soft, depending on whether or not you are caught in the unelected rulers' clutches. To the Living Constitutionalists, on the other hand, government by agency experts and Ivy League-trained judges – making rules for a progressive society (to use their language) and guided by enlightened principles of social justice that favor the "disadvantaged" and other victim groups – constitute real democracy. So today we have the Freedom Party versus the Fairness Party, with unelected bureaucrats and judges saying what fairness is.

This is the constitutional deformation that Justice Thomas, an Old Constitutionalist in capital letters, has striven to repair. If the Framers had wanted a constitution that evolved by judicial ruling, Thomas says, they could have stuck with the unwritten British constitution that governed the American colonies in just that way for 150 years before the Revolution. But Americans chose a written constitution, whose meaning, as the Framers and the state ratifying conventions understood it, does not change – and whose purpose remains, as the Preamble states, to "secure the Blessings of Liberty to ourselves and our Posterity."

In Thomas's view, there is no nobler or more just purpose for any government. If the Framers failed to realize that ideal fully because of slavery, the Civil War amendments proved that their design was, in

Thomas's word, "perfectible." Similarly, if later developments fell away from that ideal, it is still perfectible, and Thomas takes it as his job –his calling, he says – to perfect it. And that can mean that where earlier Supreme Court decisions have deviated from what the document and its amendments say, it is the duty of today's justices to overrule them. Consequently, while the hallowed doctrine of *stare decisis* – the rule that judges are bound to respect precedent – certainly applies to the lower courts, Supreme Court justices owe fidelity to the Constitution alone, and if their predecessors have construed it erroneously, today's justices must say so and overturn their decision.

To contemporary lawyers and law professors, this idea of annulling so-called settled law is shockingly radical. It explains why most of Thomas's opinions are either dissents from the Court's ruling or concurrences in the Court's ruling but not its reasoning, often because Thomas rejects the precedent on which the majority relies. Content with frequently being a minority of one, he points to Justice John Marshall Harlan's lone dissent in the 1896 *Plessy v. Ferguson* case as his model. The majority held in *Plessy* that separate but equal facilities for blacks in public accommodation were constitutional. Harlan countered: "Our Constitution is color-blind and neither knows nor tolerates classes among citizens … The law regards man as man." "Do we quote from the majority or the dissent?" Thomas asks. Like Harlan, he is drawing a map for future justices, and he will let history judge his achievement.

Thomas's opinion in the 2010 *McDonald v. Chicago* case takes us back to the first of three acts in the drama of constitutional subversion. Thomas agrees with the majority that Chicago's ban on owning handguns violates the Fourteenth Amendment, but disagrees on why. The Fourteenth Amendment deems everybody born or naturalized in this country, and subject to its jurisdiction, to be a citizen of the United States and of the state where he lives, and declares that no state may "abridge the privileges or immunities of citizens of the United States." What the drafters meant by that language was that former slaves were full American citizens, and that no state could interfere with their federally protected rights – including, said one senator in framing the amendment, "the personal rights guaranteed and secured by the first eight amendments of the Constitution." The rights guaranteed by the Bill of Rights, observed a typical commentator of the time, "which had been construed to apply only to the national government, are thus imposed upon the states." And the feds, the amendment's chief draftsman declared, have the power to enforce them.

Perfectly clear, right? Well, no – not once the Supreme Court got hold of it. As Thomas recounts in *McDonald*, the Court's first pronouncement on the Fourteenth Amendment came in its 1873 *Slaughter-House Cases* ruling, which drew a distinction between the privileges and immunities conferred by state citizenship and those conferred by national citizenship. The latter, the Court held, include only such things as the right to travel on interstate waterways and not to be subject to bills of attainer. All the rights having to do with life, liberty, and property attach only to state citizenship, not national, so they *aren't protected* by the Fourteenth Amendment. One of the four dissenting justices correctly noted that the majority opinion "turns … what was meant for bread into a stone."

The day before the Court handed down its bizarre *Slaughter-House* decision, the worst atrocity of the terrorist campaign in the South to nullify Reconstruction had occurred. Black Louisianans, aiming to safeguard Republican victories in contentious recent elections, occupied the courthouse in the county-seat hamlet of Colfax. Mounted White Liners – and anti-black militia like the KKK – massed in the surrounding woods, prompting more frightened blacks to crowd into the courthouse. On Easter Sunday, the White Liners set the courthouse ablaze and shot those who ran out the door or jumped out of the windows. That evening, they shot the captive survivors.

No Louisiana district attorney was going to charge the murderers, so a federal prosecutor convicted three of them of violating a congressional enforcement act that made it a crime to conspire to deprive someone of the privileges or immunities of U.S. citizenship. But in its 1876 *Cruikshank* decision, the Supreme Court overturned the convictions. The rights enumerated in the Bill of Rights aren't the privileges or immunities conferred by U.S. citizenship, the Court held, citing *Slaughter-House* as the precedent. They come from the Creator, and the first eight amendments merely forbid *Congress* from abridging them. Moreover, the murderers were individuals, and the Fourteenth Amendment refers only to states. That was the end of the Fourteenth Amendment's Privileges or Immunities Clause.

In time, the Court rigged a work-around. The Fourteenth Amendment forbids states from taking away a citizen's life, *liberty*, or property without "due process of law" – which really means, the Supreme Court asserted out of the blue during the New Deal, that some liberties are so basic that no state can invade them, a doctrine dubbed "substantive due process." Thomas calls this smoke and mirrors in his *McDonald* opinion. Even worse, the "substantive due process" doctrine allows judges to conjure up imaginary rights out of thin air, *making law* instead of interpreting the Constitution. Why, Thomas asks, is the Court treating *Slaughter-House* and *Cruikshank* as sacrosanct? It doesn't hesitate to overturn laws passed by Congress and signed by the president when it thinks the Constitution doesn't allow them. Why should it treat the errors of previous Courts with any more respect? Yes, the Chicago handgun ban is unconstitutional, Thomas writes. But that's because it abridges citizen's Second Amendment right to keep and bear arms as guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment. Why not junk the mumbo-jumbo of "substantive due process," on which the majority of his colleagues are relying in this case, and return to the original test?

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To be continued and concluded in the June issue of the CERA/CERF REPORT

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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*

Jackie Allen… In Memoriam

CERA is sad to report the passing of one of our courageous Board members, Jackie Allen. Jackie was a classic example of a citizen willing to study, learn and become knowledgeable in federal Indian policy, and was comfortable communicating with Senators and Congressmen in Washington, D.C. She was often the first person our D.C. Conference attendees would meet as she managed our Registration Tables and ensured that the needs of attendees were always met.

Jackie was born in 1948 and lived most of her life in Toppenish, Washington on the Yakama Reservation with her husband of several decades, Gerry Allen, a son, and many nearby family members.

Jackie's friends in the Northwest may wish to attend her Memorial Service on March 20th at the Toppenish Eagles.

CERA thanks Jackie for her years of dedication and service. She is deeply missed.

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"Never doubt that a small group of thoughtful, committed citizens can change the world, indeed, it's the only thing that ever has."

Margaret Mead

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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