

**PREPARED STATEMENT OF COLETTE ROUTEL
VISITING ASSISTANT PROFESSOR, UNIVERSITY OF MICHIGAN LAW SCHOOL
ASSISTANT PROFESSOR, WILLIAM MITCHELL COLLEGE OF LAW**

ON

CARCIERI V. SALAZAR

**BEFORE THE
UNITED STATES HOUSE COMMITTEE ON NATURAL RESOURCES**

WEDNESDAY, APRIL 1, 2009

The Indian Reorganization Act (“IRA”), 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq.*), is universally regarded as one of the most important pieces of legislation directly affecting Indians. When enacted by Congress in June 1934, it signaled a major reversal of governmental policy in Indian affairs. Previously, the United States had aggressively attempted to eradicate tribalism and assimilate individual Indians into white society. As the principal component of the Indian New Deal, however, the IRA was designed to promote tribal self-government and ultimately restore to Indian tribes the management of their own affairs.

Under the IRA, tribes were granted the ability to organize both constitutional governments and business corporations. The allotment program was abolished, and the periods of trust placed on Indian allotments were extended indefinitely. Unsold “surplus” lands and individual allotments could be returned to the tribe at the discretion of the Secretary of the Interior or individual allottee, respectively. The Secretary of the Interior was also authorized to acquire new trust land for Indian tribes and individual landless Indians. Lastly, individual Indians who sought positions in the Bureau of Indian Affairs were to be given preference in hiring.

The U.S. Supreme Court’s recent decision in *Carcieri v. Salazar* threatens to eliminate these important IRA benefits (and all benefits that Congress has subsequently tied to the IRA) for many Indian tribes. In *Carcieri*, the Court concluded that the term “Indian,” which is defined in the IRA to include “all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction,” unambiguously limits the benefits of the Act to those tribes that were under Federal jurisdiction on June 18, 1934. This decision is contrary to the legislative history of the IRA and contrary to decades of executive branch practice in administering the Act. Unless corrected

legislatively, *Carciari* will have a profound impact on the more than fifty tribes that have been recognized by the federal government since 1934.

I. BACKGROUND: LACK OF CONSENSUS REGARDING THE MEANING OF “INDIAN” AND “INDIAN TRIBE” PRIOR TO THE IRA

Today, it is generally well-settled that when statutes apply to “Indian tribes” that term is meant to refer only to federally recognized tribes (i.e., Indian tribes that have a government-to-government relationship with the United States). Likewise, the term “Indian” as used in most federal laws refers to enrolled members of federally recognized tribes. It is easy to forget, however, that this clarity is rather recent in origin.

Before 1934, Congress had already enacted hundreds of statutes that applied to “Indian country,” “Indian tribes,” “Indians,” “Indians not citizens of the United States,” and “Indians not members of any of the states.” These terms were left undefined by Congress. Consequently, the executive branch was entrusted with the authority to determine whether a particular tribe or individual Indian fell within the purview of a statute. Officials in the Department of the Interior made such determinations in an *ad hoc* manner; no criteria for tribal “recognition” existed. In fact, the concept of recognition of Indian tribes in the jurisdictional sense “was only beginning to take shape,” and it “was not universally applied, accepted or, frankly, understood.” William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 347 (1990). The terms “recognize” and “acknowledge” were more often used simply in the cognitive sense, indicating that a particular tribe was known to the United States. *Id.* at 339.

Once a determination had been made about the existence of a particular Indian tribe, federal courts generally refused to disturb that executive branch conclusion. *See, e.g., The Kansas Indians*, 72 U.S. 737, 755 (1866) (“If the tribal organization of the Shawnees is . . . recognized by the political department of the government as existing then they are . . . governed exclusively by the government of the Union”); *United States v. Holliday*, 70 U.S. 407, 419 (1865) (noting that “it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same”). But no comprehensive list of known Indian tribes was created before the enactment of the IRA.¹ As a result, situations necessarily arose where the executive branch had not previously considered the existence of a particular tribe.

In these cases, federal courts were required to decide whether an Indian tribe was included within the scope of a particular statute. In 1901, the Supreme Court

¹ In 1894, the U.S. Census Office published a report that included a list of “Principal Tribes known to the Laws of the United States,” but as its name indicates, this was not a comprehensive listing of Indian tribes. *See Report on Indians Taxed and Indians Not Taxed in the United States at the Eleventh Census: 1890* (1894). This report was not updated, and no other list of Indian tribes was created by the federal government prior to enactment of the IRA.

finally provided a definition of the term “tribe” and “band” to aid lower federal courts in making these determinations:

By a “tribe” we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a “band,” a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design.

Montoya v. United States, 180 U.S. 261, 266 (1901). Yet even with this simple definition, confusion remained.

Some of this confusion was due to the fact that Indian status was not static. The purpose of federal policy prior to 1934 was to disband tribes and assimilate their members. Thus, the executive branch and the federal courts frequently decided that individual tribal members were no longer wards of the United States because they had abandoned their tribal allegiance. Abandonment could be inferred by, for example, living within white settlements, possessing a certain quantum of white blood, or owning property in fee. *See, e.g., United States v. Kopp*, 110 F. 160 (D. Wash. 1901) (concluding that Puyallup tribal member was not an “Indian” because he owned his allotted land in fee simple); *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856) (noting that “if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people”). Likewise, Indian tribes ceased to be under federal jurisdiction during periods of time when their membership as a whole was considered to have fully assimilated into white society. *Compare United States v. Joseph*, 94 U.S. 614 (1876) (concluding that the Pueblos were civilized and therefore, they were not an “Indian tribe” under the Trade & Intercourse Acts), *with United States v. Sandoval*, 231 U.S. 28 (1913) (concluding that members of the Santa Clara Pueblo were uncivilized, and therefore, within the purview of statutes prohibiting the giving of intoxicating liquors to “Indians”).

The IRA was drafted, debated and enacted against this backdrop.

II. MEANING OF INDIAN IN THE IRA: THE LEGISLATIVE HISTORY

It is difficult to ascertain the actual “intent” of any legislation, and the IRA is no different in this regard. In fact, the legislative history of the Act is particularly challenging because the two individuals primarily responsible for its passage – Commissioner of Indian Affairs John Collier and Senate Indian Affairs Committee Chairman Burton Wheeler – had divergent views about the ultimate aims of federal Indian policy. Senator Wheeler still believed that the government should be pursuing a policy of forced assimilation, because Indian societies were inferior. Commissioner Collier, on the other hand, believed not only that the federal government should abandon its policy of assimilation, but that it should encourage the continuation and revitalized of traditional tribal religious beliefs, arts and crafts, and cooperative

institutions. See generally Kenneth R. Philip, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM 1920-1954 (1977); Elmer R. Rusco, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 292-303 (2000). Because of these divergent perspectives, the legislative history of the IRA must be reviewed in its entirety to gain a full and correct understanding of who the Act was meant to benefit.

The original bill presented by Commissioner Collier in February 1934, took the unusual step of attempting to provide definitions for the terms "Indian" and "tribe":

The term "Indian" . . . shall include all persons of Indian descent who are members of any recognized Indian tribe, band, or nation, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-fourth or more Indian blood . . .

The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, band, nation, pueblo, or other native political group or organization.

THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 12 (Vine Deloria, Jr. ed., 2002). These definitions prompted a great deal of debate between Collier and Wheeler.

In six different hearings held throughout April and May of 1934,² Senator Wheeler expressed his concern that the IRA, as proposed, would apply to an unnecessarily broad number of people. *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2744 and S. 3645 Before the Senate Committee on Indian Affairs, 73d Cong. 266* (1934) (hereinafter "Senate Hearings"). First, he complained that non-tribal Indians should have at least one-half Indian blood before they were brought under the Act.³ Collier ultimately agreed to this change. Yet as the hearings continued, Senator Wheeler proved far more adamant about another related topic: the need to ensure that the IRA would not require the guardian-ward relationship to be permanently maintained over tribal members that, in his mind, had already or would in the future become, fully assimilated into white culture.

² The Senate Committee on Indian Affairs held hearings on the draft bill on April 26, 28, 30 and May 3, 4, and 17, 1934.

³ Senator Wheeler stated:

I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods . . . If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done. What we are trying to do is get rid of the Indian problem rather than to add to it.

Senate Hearing, at 263-64.

More specifically, Senator Wheeler argued that certain Indians in California, Montana and Oklahoma were as capable of handling their own affairs as white men. He believed that these people should not be wards of the United States forever; at some point, they must be given the ability to manage their property as they deemed fit. Thus, Senator Wheeler repeatedly suggested that the draft bill be amended to ensure that the Secretary of the Interior would continue to have the discretion to decide that persons who had fully assimilated were no longer considered “Indians.” *See, e.g., Senate Hearing* at 66-68, 80, 150-51, 163-64, 175, 239, 266.

For example, Senator Wheeler’s concerns are captured in the following exchange with Commissioner Collier on April 30, 1934:

Senator Wheeler: . . . There are Indians on some of these lands that are, say, an eighth blood. They are just as much white men as any man sitting here, and most of them are just as capable of handling their own transactions as anybody else. Now, if you pass, for instance, this law, saying that they shall not in any instance permit an Indian to be granted any land in fee, it simply means that some of these Indians are going to have their land tied up when they ought to be handling it themselves.

We had an illustration of the former Vice President of the United States⁴ having his land in Oklahoma some place being handled by the Government of the United States and not having a fee patent to it.

Commissioner Collier: Upon his own petition, Senator.

Senator Wheeler: Yes; upon his own petition. That ought not to be permitted as a matter of fact. It ought to be handled by the former Vice President himself rather than by the Government of the United States, thereby saving the Government that expense.

Now, here is another case out in California, where we visited some of those reservations in northern California. There is not any more reason why those Indians out there should handle their own affairs than any white man. Hardly any of them are more than quarter-breeds, and most of them are eighths. They are white people. And yet the Government of the United States is handling their affairs. In my judgment, those Indians ought to have that land allotted to them. They ought to run their own affairs. They ought to come under the laws of the State of California, and the guardianship over those Indians ought to cease completely.

Now, if you are going to pass this bill in its present form, you are going to prevent these lands from ever being taken out from under the Government supervision.

⁴ Senator Wheeler is obviously referring to Charles Curtis, who served as the Vice President of the United States under Herbert Hoover. Curtis had approximately 1/3 Indian blood (Kaw, Osage and Pottawatomie) and as a tribal member, had been granted an allotment that was held in trust by the United States.

Senate Hearing at 150-51. In response to Senator Wheeler, Ward Shepard, a specialist on land policies in the Office of Indian Affairs, noted that the bill deliberately chose to eliminate the ability of the Secretary of the Interior to declare particular Indians fully assimilated or “competent.” Historically, it was this discretion that caused Indians to lose millions of acres of land.⁵ But Senator Wheeler was not deterred by these comments. He continued:

Senator Wheeler: I think the Secretary of the Interior ought to have some discretion in this matter, for the simple reason, as I have said to you, there are Indians in my State that are just as capable of handling their own private affairs as any white man in this room, and there are innumerable Indians in California of that kind. As I say, that one reservation we visited and had hearings, the Commissioner or his representative was present. They are white people. They are not Indians. They are just as capable of handling their own affairs as they can be, and, in my judgment, they ought to cease to be wards of the Government of the United States, and their property ought to be turned over to them, and they ought to handle it in exactly the same way that any white man handles his property.

What we are interested in particularly is protecting the long-haired Indians and the Indians that are incapable of handling their property. But we should not tie the Government up with handling property and keeping certain Indians as wards of the Government and their children as wards of the Government when they really no longer should be subject to that supervision.

Senate Hearing at 151.

Later in this same hearing, Senator Wheeler once again pressed the point. This time, however, Commissioner Collier agreed that the Secretary could retain discretion to decide that certain individuals would no longer enjoy the benefits of the Act:

Commissioner Collier: . . . May I advert for a moment to this question of allotment being wholly discretionary with the Secretary of the Interior? One of the horrible examples of the effects of allotment is the Quanitos, where the timber has all been allotted and the result has been disastrous. That was done not through the initiative of the Department, but as a result of a mandamus, and the court sustained the mandamus and required the Department to proceed and allot.

Senator Wheeler: Yes; but if you leave it to the discretion of the Secretary of the Interior and it is in his discretion, they could not go in and mandamus them to do it, if it were entirely within his discretion.

⁵ Competency determinations had resulted in the issuance of fee simple patents to many Indian allotments that were then lost due to back taxes, shady dealings, or outright theft.

...

Commissioner Collier: ...we feel that looking back over the admitted errors of the past administrations, which have had terrible consequences, Congress ought to control that situation.

Senator Wheeler: But the trouble is Congress cannot control it. I mean it is something that the Congress cannot control, because you have individual Indians on some of these reservations that are absolutely competent to take care of their own land, and they ought to be given the right to take care of their own land and carry on their own property if they are capable and want to do it, and they are capable of doing it.

Commissioner Collier. If that were left as a discretion [sic], if it can be given the strong advantages we are talking about, it would be relatively unimportant then. We are not insistent upon that.

Senate Hearing at 163-64.

On May 17, 1934, however, when the Committee was reading through the bill for the final time, Commissioner Collier had still not incorporated the change suggested by Senator Wheeler. It was at this point that the phrase “now under Federal jurisdiction” was finally inserted into the IRA:

Senator Wheeler: But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called “tribes” there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Senator O'Mahoney: If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition [sic].

Commissioner Collier: Would this not meet your thought, Senator: After the words “recognized Indian tribe” in line 1 insert “now under Federal jurisdiction”? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Senate Hearing at 266. And thus, the bill was amended.

This legislative history demonstrates that the Supreme Court’s decision in *Carcieri v. Salazar* is exactly backwards. The addition of the phrase “now under federal jurisdiction” to the definition of “Indian” was not intended to fix application of the Act to only those under jurisdiction in 1934. Senator Wheeler repeatedly stated that he was concerned about Indians that were, at the time, admittedly under federal jurisdiction. The phrase in question was inserted to ensure that the Secretary would continue to have discretion to decide that individual Indians who had fully assimilated would no longer be granted the benefits of the IRA. “Now” must therefore refer to the date that the Act is being applied to the particular Indian in question.

Justice Thomas’ majority opinion in *Carcieri v. Salazar* fails to contain any discussion of this legislative history.⁶

III. EXECUTIVE BRANCH PRACTICE

Rather than discussing the legislative history of the IRA, the majority in *Carcieri v. Salazar* supports its decision by reference to a single letter written by Commissioner Collier, which claims that the term “Indian” includes “all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act.” That letter, however, was written almost two years after the bill was enacted.

More revealing than this single, informal piece of correspondence is the consistent history of formal executive branch decisions acknowledging that certain groups are Indian tribes under the IRA. During 1934-35, Commissioner Collier decided that 258 groups were eligible to organize under the IRA. Yet after that initial wave of “recognition” decisions, Collier and others continued to recognize and apply the IRA to tribes without any consideration of whether they were “under federal jurisdiction” as of June 18, 1934. Additionally, for the past 25 years, the agency’s construction of this statutory provision has been embodied in formal regulations that allow any Indian tribe currently recognized by the federal government to take advantage of the IRA’s benefits. Since these regulations were promulgated, sixteen tribes have – often at the explicit direction of Congress – endured the grueling process of obtaining federal recognition through the Department’s formal administrative process codified at 25 C.F.R. Part 83. The Supreme Court’s decision in *Carcieri* threatens to eliminate many of the most important benefits of federal recognition for these administratively recognized tribes, even though in most cases, after reviewing copious volumes of primary and secondary documentation, the Department concluded that mistake or oversight was all that precluded their recognition in 1934.

I encourage the members of this Committee to right the injustice that *Carcieri v. Salazar* will cause by amending the definition of “Indian” contained in the IRA.

⁶ Justice Breyer’s concurrence does refer to the legislative history of the IRA, but after seeming to review only a three-page excerpt of the Committee’s final hearing, he misinterprets the discussion.

Disclaimer: The comments expressed herein are solely those of the author as an individual member of the academic community; the author does not represent the University of Michigan or William Mitchell College of Law for purposes of this testimony.

Colette Routel

Visiting Assistant Professor, University of Michigan Law School

Email: croutel@umich.edu

Phone: 612-360-3436

http://cgi2.www.law.umich.edu/_FacultyBioPage/facultybiopagenew.asp?ID=414