American Indian Law Review

Volume 27 | Number 2

1-1-2003

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SEEKING ACCEPTANCE: ARE THE BLACK SEMINOLES NATIVE AMERICANS? *SYLVIA DAVIS V. THE UNITED STATES OF AMERICA*

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This note addresses some of the issues associated with the controversy between the Black Seminoles and the Seminole Nation (the Nation). The first part discusses who the Black Seminoles are, how they relate to the Nation, and supplies background information on *Davis v. United States*. The second part discusses the historical background of the different classifications within the Nation and how they developed. Third, the note addresses the different aspects of the Judgment Fund Award (the Award) followed by a discussion of the procedural problems of the *Davis* case and the resulting problems faced by the Black Seminoles. Additionally, this part addresses the process of how the United States District Court for the Western District of Oklahoma reached its decision. Finally, the note explores the options available to both the Black Seminoles and the Nation.

I. Categorization of the Seminole Nation

The Nation was created when runaway African slaves and various Indian Nations settled together in Florida.[1] The Africans who settled with the Native American groups were referred to as the "Estelusti".[2] The Nation is different from other indigenous Native American tribes in that its formation occurred as a result of European conquest.[3] Refugees from primarily the Creek nation settled in Florida along with the Africans.[4] An alliance formed between Native Americans and the Africans because the Africans were well adapted to Florida's tropical terrain and were able to share their methods of cultivation

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1. WILLIAM LOREN KATZ, BLACK INDIANS: A HIDDEN HERITAGE 50 (1986); *see also* Davis v. United States, 199 F. Supp. 2d 1164, 1167 (W.D. Okla. 2002).

2. Davis v. United States, 192 F.3d 951, 954 (10th Cir. 1999).

3. Natsu Taylor Saito, *Articles and Essays: From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law* 45 VILL. L. REV. 1135, 1144 (2000) (noting that several cases involving the Seminole tribes in general speak of the migratory origin of the Seminole people and how the various Indian tribes and the Africans that later became known as Seminoles all migrated to Florida in an attempt to flee European conquest).

4. KATZ, *supra* note 1, at 50.

with the Native Americans.[5] Today, the Estelusti are called the Black Seminoles. The Black Seminoles assimilated with their Indian counterparts by providing their skills and services to the tribe;[6] in return, the Native Americans provided protection from slave hunters from the North.[7] This cooperative relationship between the Indians and the Africans has existed since the Nation's creation.[8]

The Seminoles and the Africans created a system of government independent from one another.[9] However, the Nation functioned as a unit in resistance to British aggression and slave raids from the North.[10] During the Seminole Wars, both Africans and Indians worked together in strong resistance against the United State's aggression.[11] Africans and Indians coexisted as partners in Florida and continued that partnership until the creation of the Dawes Commission (the Commission).

The following is a time line of the sequence of events as they relate to the Seminoles.

1700s – Indian and African migration to Florida begins.

1816 – The Seminole Wars begin.[12]

1821 – Florida becomes part of the United States.[13]

1823 – Seminole's cede land to the United States; Seminole Nation removed to Oklahoma under the Camp Moultrie Treaty.[14]

1866 – Treaty signed between the United States and the Seminole Nation recognizing all Black Indians as full citizens with all the rights and privileges of citizenship.[15]

1893 – Congress creates Dawes Commission to produce a membership list for all Indian tribes in Oklahoma.[16]

1906 – Freedmen and Seminole Blood Rolls created.[17]

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5. *See id.*
6. *Davis*, 199 F. Supp. 2d at 1167-68.
7. *Id.*
8. *See* KATZ, *supra* note 1, at 50-88.
9. *See id.* at 50-51.
10. *Id.* at 52.
11. *Id.* at 60.
12. *See id.* at 53.
13. Davis v. United States, 199 F. Supp. 2d 1164, 1168 (W.D. Okla. 2002).
14. *Id.*
15. *Id.*
16. *Id.* at 1169 n.2.
17. *Id.* at 1168.

1950 – Indian Claims Commission suit filed by the Seminole Nation and the Florida Seminoles for compensation for ceded land.[18]

1976 – Indian Claims Commission awards compensation to "the Seminole Nation as it existed in Florida on September 18, 1823."[19]

1990 – Congress passed the Distribution Act detailing the use of the Judgment Fund Award.[20]

1991 – Usage Plan passed by the Nation excludes Black Seminoles from participation in programs furnished by the Award.[21]

The Dawes Commission was designed to create a membership roster of who was Seminole Indian based on whether African heritage was present.[22] To aid in this classification, the Commission created two rosters, the Seminole Freedmen Roll and the Seminole Blood Roll.[23] The Seminole Freedmen Roll was a listing of Seminole Tribe members of African descent, while the Seminole Blood Roll was a roster of the non-African descent Seminoles.[24]

The Commission's method of classifying who was Seminole by blood created an arbitrary division in the Nation.[25] The artificiality of the division is apparent in two ways. First, because the Seminoles have a matrilineal tradition, a person whose mother was Seminole and father was African was enrolled on the Blood Roll.[26] Conversely, if a person had an African mother and an Indian father he would be enrolled on the Freedmen Roll.[27] Second, if a person had half Seminole blood and half African blood, he would be enrolled on the Freedmen Roll.[28] In contrast a person with one-quarter Seminole blood and three-quarters white blood would be enrolled on the Blood Roll.[29] The Commission did not deny that the Seminoles enrolled on the Freedmen Roll had Seminole blood;[30] however, because their ancestors were listed on the Freedmen Roll, Seminoles today with African ancestry are

18. *Id.* at 1169.

19. *Id.* (citing Seminole Nation v. United States, 387 Indian Claims Comm'n Dec. 91 (Dockets 73 and 151)).

20. *Davis*, 199 F. Supp. 2d. at 1170.

21. *Id.* at 1171.

22. *See id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Davis v. United States, 192 F.3d 951, 954 (10th Cir. 1999).

27. *Id.*

28. *Davis*, 199 F. Supp. 2d at 1168.

29. *Id.*

30. *Id.*

denied their Seminole heritage. This fact is demonstrated in Part II's discussion of the Judgment Fund Distribution Programs instituted by the Nation.

II. The Judgment Fund Award

What is the purpose of the Judgment Fund? The Fund is supposed to compensate Indian Nations for losses suffered as a result of the United States' broken treaty promises.[31] Under the Indian Claims Act, various Indian Nations received monetary compensation for lands ceded to the United States.[32] *Davis* arose as a result of a system designed to distribute the Judgment Fund to Seminoles not descended from Africans.

In 1976 the United States gave a $56 million award to the Seminole Nation for tribal lands taken in 1823.[33] Following the judgment, the Bureau of Indian Affairs (BIA) issued a "Research Report" which excluded the participation of the Black Seminoles in the Fund.[34] Aware that Congress would never approve a fund distribution plan that excluded the Black Seminoles, the BIA knew that it had to assist the tribe in creating a distribution plan excluding Black Seminoles that would still receive congressional approval.[35] The planned exclusion succeeded because the United States took the Seminole land in 1823, at a time when the Black Seminoles were not officially recognized as members of the Seminole Nation.[36] Herein lies the critical problem for the Nation.

The 1976 decision of the Indian Claims Commission granted the $56 million award to the Nation based on the tribe's recognized composition in 1823.[37] Under the laws of the United States in 1823, people of African descent were not viewed as humans, but as property. After the end of the American Civil War, slavery was abolished and the United States government moved toward recognizing Africans as humans. With this historic conclusion of slavery, Black Seminoles became recognized as part of the Nation in

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31. Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 73 (1977).

32. *See generally id.*; Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765 (D.D.C. 1986). These are only two examples of cases brought by various tribes like the Caddo, Delaware, Sioux of South Dakota, etc. for compensation for tribal lands ceded to the United States.

33. *Davis*, 199 F. Supp. 2d at 1167.

34. *Id.* at 1169.

35. *Id.* at 1169-70.

36. *Id.* at 1170.

37. *Id.* at 1169.

1866.[38] The classification of Black Seminoles both on the Dawes Rolls and in 1823 is at the heart of the matter at hand. The distinct classifications present the first issue in the dilemma the Nation faced when it accepted the Award based on the composition of the Seminole Nation in 1823.[39]

On April 25, 2002, the United States District Court for the Western District of Oklahoma granted summary judgment against the plaintiffs in *Davis v. United States*.[40] This case arose out of a conflict over how the funds awarded to the Nation, from the United States government, were to be distributed among its members.[41] The *Davis* plaintiffs are members of the Nation who are either Black or of mixed Black and Seminole Indian heritage.[42] According to the fund distribution plan established by the Nation, the Black Seminoles are not eligible to participate in programs funded by the Award. This is because it was not until 1866 that the Black Seminoles were accepted as full members of the Nation,[43] and the award was to be distributed to the Nation as it existed in 1823.[44]

Represented by Silvia Davis, the Dosar Barkus and Bruner Bands (the Bands) of the Seminole Nation of Oklahoma commenced the action underlying the *Davis* case.[45] The Bands based their claim on the theory that their exclusion from participation in the Award constituted racial discrimination.[46] The suit was brought against the United States Department of the Interior and the BIA.[47] The Nation was not joined as a defendant because it enjoys sovereign immunity. Herein rests the source of *Davis's* procedural problem.[48]

III. Procedural Hurdles in Davis v. United States

Because of its sovereign immunity, the Seminole Nation of Oklahoma was not joined as a defendant and the *Davis* court ruled that the Nation was an indispensable party without whom the case had to be dismissed.[49] The court

38. *Id.* at 1168.
39. *See id.* at 1169.
40. *Id.* at 1180.
41. *Id.* at 1167.
42. *Id.*
43. *Id.* at 1168.
44. *Id.* at 1170.
45. *Id.* at 1167.
46. *Id.*
47. *Id.*
48. *Id.* at 1173.
49. *Id.*

reasoned that any ruling regarding the Award would likely impact the Nation's interest, therefore it must be joined in the suit.[50]

Based on rule 19(b) of the Federal Rules of Civil Procedure,[51] the court looked at four factors in determining that the case could not proceed without the Nation.[52] First, the court examined whether any decision by the court regarding the fund would prejudice the Nation.[53] The court concluded that because the Black Seminoles sought a ruling permitting their participation in the Award programs, any action taken by the court is likely to interfere with the Nation's system of managing the distribution of the Award.[54] The Black Seminoles' challenge of the prejudicial nature of the requirements for participating in Award programs, directly involves the Nation's management of the fund distribution.[55] The court reasoned that "[c]onflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence."[56] Furthermore, the court recognized that a decision affecting the system of determining eligibility for participation in judgment fund programs tramples on the Nations' ability to determine its own policies as a sovereign.[57]

Second, the court looked to see if the case could proceed without prejudice to the Nation.[58] The court found that any action it took would "trample on the Seminole Nation's sovereign right to make its own laws and be ruled by them."[59] Additionally, the court feared that a Black Seminole success in this action could impose an inconsistent legal obligation on the BIA.[60] If the BIA adjusted the eligibility requirements for the Award programs, it would be seen as a violation of tribal laws.[61]

The third factor the court examined was whether the Black Seminoles could receive the remedy sought if the case proceeded without the Nation.[62] The

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50. *Id.* at 1164.
51. *Id.* at 1175.
52. *Id.*
53. *Id.* at 1176.
54. *Id.* at 1177.
55. *Id.*
56. *Id.* at 1176 (citing Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 774 (D.D.C. 1986)).
57. *Davis*, 199 F. Supp. 2d at 1177.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

court determined that even if the Black Seminoles won their suit, it would not be binding on the absent Seminole Nation. Consequently, the Black Seminoles would not receive the relief sought and the matter would remain unresolved.[63]

Finally, the court examined whether the plaintiffs would have any other recourse if the case were dismissed.[64] The court found that the plaintiffs would not have inadequate remedy because there was no alternative forum for this suit.[65] Nonetheless, the court dismissed the claim for nonjoinder.[66]

In deciding to dismiss this case, the court acted in conformity with prior similar cases.[67] Sovereign immunity has historically been used as a shield to protect Indian Nations against suits. In the *Davis* case, the United States gave the Award to the Nation and with the assistance of the BIA, the Nation created a distribution plan that had the effect of excluding the Black Seminoles.[68] Any suit regarding the fund would affect the Nation's interests in the fund, therefore, the court's ruling was logical in requiring that the Nation be joined in the suit.[69]

In ruling that the Nation must be joined, the *Davis* court followed precedent.[70] For example, in *Hodel* the Department of the Interior ordered the return of tribal lands to three separate tribes based on the population of each tribe at the time of the Department's decision.[71] In *Hodel*, the Caddo Tribe had a larger population than the Wichita and Delaware tribes, and the Caddo sought an adjustment to the amount of land they received.[72] The court dismissed the case because the Wichita and Delaware tribes would have to be joined and joinder was not possible because both tribes enjoyed sovereign immunity.[73] Just as in the *Davis* case, any decision that the *Hodel* court made, with regard to one tribe, would have an effect on the non joined tribes, all of whom were recipients of income from the restored land.[74]

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63. *Id.*
64. *Id.*
65. *Id.* at 1177-78.
66. *Id.* at 1178.
67. *See generally* Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765 (D.D.C. 1986); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).
68. *Davis*, 199 F. Supp. 2d at 1171-72.
69. *Id.* at 1176.
70. *Id.*
71. *Hodel*, 788 F.2d at 780.
72. *Id.* at 767-68.
73. *Id.*
74. *Id.* at 765.

While it may be true that the Black Seminoles participated in various aspects of tribal life, they were not entitled to the rights and privileges of citizenship in the Nation until 1866.[75] The Nation's use of 1866 as the marker of recognition of citizenship of the Black Seminoles adds insult to injury because, as members of the tribe as it exists today, the Black Seminoles should be able to participate in all tribal programs. This should not present a problem because the Nation acknowledges that the Black Seminoles are members with all the rights and privileges membership entails.[76] Unfortunately, the Seminole Nation indirectly used the argument that the Black Seminoles were property and not property owners in 1823, and designed the Award distribution program with eligibility requirements in line with this reasoning.[77]

The Nation could make a better argument by acknowledging that the land given to the Black Seminoles by the Nation falls in the category of courtesies extended to the Black Seminoles for services provided to the tribe. Both the land ceded to the United States and the land used by the Black Seminoles was property of the Nation. Merely because the Black Seminoles were allowed use of the land as their own does not mean they are entitled to compensation based on the Nation's cession of Florida to the United States. The Black Seminoles used the land with the knowledge and authorization of the rightful owner, the Seminole Nation. Consequently, in 1976 when the Nation was compensated for land lost in 1823,[78] it is understandable that they would want to exclude the Black Seminoles.

If the Nation had advanced the above argument, it may have reduced the controversy surrounding this topic. The problems encountered by the Nation result from how the Indian Claims Commission[79] defined receipts of the Award and the Nation's application of the Dawes Commission's citizenship criteria.[80] The Commission's Seminole Blood Roll excludes Seminoles who may have African ancestry,[81] but the Award was to be distributed to all citizens of the Seminole Nation.[82] The Nation's creation of Award programs

75. *See id.*

76. *See generally id.*

77. *See* Davis v. United States, 199 F. Supp. 2d 1164, 1170 (W.D. Okla. 2002).

78. *Id.* at 1169.

79. *Id.*

80. *Cf. id.* at 1168. The text does not indicate that the Dawes Commission intended to establish citizenship criteria in the Seminole Nation by blood only. However, the two rolls the Dawes Commission created had the practical effect of excluding those persons descended from a Freedmen enrollee.

81. *See id.*

82. *See id.* at 1171.

that base participation on whether the person is descended from a Freedmen [83] or a Seminole by blood[84] created the Nation's current problem. As evidenced by the *Davis* case, the Nation's exclusionary practice did not go unchallenged.

A. Bureau of Indian Affairs Research Report

Once the Indian Claims Commission awarded compensation to the Nation,[85] the BIA presented a report on how the funds should be distributed.[86] The Research Report "concluded that the Black Seminoles were not eligible to share in the Judgment Fund Award."[87] In preparing the Research Report, the BIA looked at the Nation's early history.[88] In spite of the fact that Black Seminoles were recognized as citizens of the Nation,[89] the BIA concluded that only Seminoles by blood should receive the benefits of the Award.[90]

The BIA realized that Congress would not accept any distribution plan excluding the Black Seminoles because of two basic problems.[91] First, for the purposes of identifying and distributing the Judgment Fund Award, "citizen" included Black Seminoles.[92] Second, because the Black Seminoles are classified as citizens, the Nation would have to create a different roll that only included Seminoles by blood.[93] To accomplish the goal of excluding Black Seminoles from participation,[94] the BIA worked with the Seminole Nation in designing a plan acceptable to Congress that excluded the Black Seminoles.[95]

B. 1991 Usage Plan

The BIA and the Nation used the fact that Black Seminoles were not formally recognized as citizens until after 1823 to create the criteria for

83. *Id.* at 1168.
84. *Id.*
85. *Id.* at 1169.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *See id.*
93. *See id.*
94. *Id.*
95. *Id.* at 1170.

participation in Award programs.[96] The resultant product was the Seminole Nation Usage Plan, commonly called the 1991 Usage Plan.[97]

The Usage Plan established programs such as "elderly assistance program, a children's clothing program, a burial program, a higher education program and a household economic assistance program,"[98] to be funded by the Award.[99] Participation in these programs is based on meeting eligibility requirements, which in most cases require membership in the Nation and proof of descendence from a member of the Nation as it existed in 1823.[100] The second requirement is met when an individual shows that he is a descendant of a tribal member registered on the Seminole Blood Roll.[101] Such eligibility requirements have the practical effect of excluding Black Seminoles from participating in all similar fund programs.[102] Upon examination of this issue, Congress found that the "proposed definition of eligibility is acceptable."[103]

IV. Do the Black Seminoles Have Other Options?

Are there other avenues the Black Seminoles can pursue in gaining participation in the Award without requiring the Nation to be joined in the suit? Among the arguments the Black Seminoles could raise is that the Award funds are held in trust by the United States and as such the federal government has an obligation to properly identify the beneficiaries and distribute the funds.[104] It is a common problem faced by the United States when determining individual tribal members to be compensated.[105] In situations where the United States fails to identify the recipients properly, it may be obligated to compensate the members of the tribe that it failed to identify.[106] Hence, the Black Seminoles could claim that they should have been compensated in a manner similar to the Seminole Nation.

Another potential argument is that even if the accepted theory is that the Black Seminoles settled in Florida as a separate group, an area of land that

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96. *See id.*
97. *See id.* at 1171.
98. *Id.*
99. *See id.*
100. *Id.* at 1172.
101. *Id.* at 1168.
102. *Id.* at 1172.
103. *Id.*
104. *See* Loudner v. United States, 108 F.3d 896, 900 (8th Cir. 1997).
105. *See* Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 768 (D.D.C. 1986).
106. Pam-To-Pee v. United States, 187 U.S. 371, 379 (1902).

they occupied and used was taken from them.[107] Furthermore, both the Nation and the United States acknowledge that the Blacks that settled in Florida assimilated with the Seminoles by blood.[108] The result of this miscegenation was the creation of the Estelusti, a separate band of the Seminole Tribe.[109] In the alternative, the Estelusti could be classified as another tribe displaced by the United States and entitled to compensation and a remedy on this basis.

Another approach to this problem is to view the land settled by the Black Seminoles as taken by the United States in the same manner as the land of many Indian Nations. First, both the United States and the Nation acknowledge that the Black Seminoles were part of the original Seminoles that settled in Florida.[110] Second, the United States and the Nation are both aware that the land ceded to the United States in 1823 was the land settled by both the Black Seminoles and the Seminoles by blood.[111] Third, the Black Seminoles not only lived on the land, they also cultivated and improved the land.[112] Finally, when the Seminoles were removed to Oklahoma, the Black Seminoles made the same trek from Florida.[113] Therefore, the Black Seminoles could argue compensation is owed to them based on the same grounds on which the Nation received the Award.

The Black Seminoles could also argue that the Nation has a similar obligation to them, as does the United States. The Black Seminoles not only lived with the Nation, they stood along side them in battles against all aggressors.[114] The Black Seminoles helped in the cultivation of the land and were invaluable to the Seminoles as a whole because of their resistance to the malaria that plagued the Florida swamps.[115] As a people who worked and fought alongside the Seminoles, the Black Seminoles were, and should be, recognized and accepted by the Seminole Nation as equals.[116] Although it sounds simplistic, based on the above facts, the Nation could permit the Black Seminoles to participate in the Award. Even though the *Davis* court rejected

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107. *See Davis*, 199 F. Supp. 2d at 1168-69.
108. *See id.*
109. *See* Davis v. United States, 192 F.3d 951, 954 (10th Cir. 1999).
110. *See Davis*, 199 F. Supp. 2d at 1168.
111. *See id.* at 1167.
112. *See* KATZ, *supra* note 1, at 50-51.
113. *See Davis*, 199 F. Supp. 2d at 1168.
114. *E.g.*, KATZ, *supra* note 1, at 52-69 (detailing the most notable and documented of all the struggles the Black Seminoles and the Seminole Nation faced together the 1800's, the First and Second Seminole Wars).
115. *Id.* at 50.
116. *See Davis*, 199 F. Supp. 2d at 1168.

such arguments, the Nation's legislative and political system could reach a solution like the one stated here.[117]

The Black Seminoles could also argue that the Nation's interests are adequately represented by those who are already a party to the suit. The Citizen Pottawatomie Nation advanced this argument, but it was found to be unpersuasive because of possible conflicts of interest between the United States and the Citizen Pottawatomie.[118]

The creation of a system that rejects other Seminoles merely because they are mixed with African people, reflects negatively on the Seminole Nation. It is fundamentally unfair for the Nation to deny mixed Seminoles their ancestry and birthright. The Dawes Commission[119] created this artificial separation and it is within the power of the Nation to reject the old, racist standard for acknowledging Seminole blood. Unfortunately, upon an examination of the Nation's recent actions its intent becomes clear. This intent is reflected in *Seminole Nation of Oklahoma v. Norton* involving a recent amendment to the Seminole Nation's Constitution calling for the exclusion of Black Seminoles from participation in the Nation and the cessation of the recognition of Black Seminoles as Seminoles.[120]

V. Conclusion

We live in a society which claims that past wrongs will not be perpetuated. Under the guise of legal sounding categorization, the Dawes Commission established a system that continues to dehumanize Black Seminoles. If indeed the purpose of the Commission was to identify the heritage of Seminoles, then it would accept the Seminole blood as legitimizing any person with the required quantum of blood as Seminole. The current system recognizes the Seminole blood as legitimate based on what it is mixed with. If the Seminole blood is mixed with white blood, then that person is a legitimate Seminole;

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117. *Cf. id.* at 1177. The court did not elaborate as to why this remedy was inadequate. Looking at the hurdles the Black Seminoles had to overcome within the tribal system, it is possible the court concluded that any challenge brought to the tribe would likely fail. Here, the court failed to give credit to the Seminole Nation and the tribal system of adjudication when it concluded that a challenge within the tribal system was moot. The court failed to realize that merely because the people who created the eligibility requirements would be reviewing the Black Seminoles challenge, it does not necessarily follow that the tribe would not objectively consider any valid arguments advanced by the Black Seminoles.

118. Citizen Pottawatomie Nation v. Norton, 248 F.3d 993, 999 (10th Cir. 2001).

119. *Davis*, 199 F. Supp. 2d at 1168.

120. *See* Seminole Nation of Okla. v. Norton, 223 F. Supp. 2d 122, 125 (D.D.C. 2002).

but, if the Seminole blood is mixed with the blood of a black person, then the Seminole blood is treated as if it does not exist.[121] The impact of such an arbitrary recognition of Seminole blood is clear in the criteria established by the Seminole Nation and the BIA for participation in the Award programs.[122]

The Award was granted to the Seminole Nation as it existed in 1823.[123] Legally speaking, the Black Seminoles were classified as property in 1823 and not as property owners, hence not a part of the legally recognized Nation. As property, the Black Seminoles had no rights and were not recognized as humans but as objects to be traded and sold. In the twenty-first century, it is acknowledged that the dehumanization of African descendants prior to the abolition of slavery was wrong. Consequently, it is best for both the Nation and the BIA to eliminate any references regarding the status of Blacks prior to 1866.

Establishing 1866 as the date of official recognition of the Black Seminoles as citizens is contrary to the fact that the Black Seminoles were part of the Nation well in advance of 1866.[124] The Nation's use of this argument is flawed because it uses a classification that relies on the legal status of Blacks prior to the end of slavery. The fund distribution program approved by Congress in the twentieth century relegates Blacks to the legal status of being viewed as slaves and property. Such status is inconsistent with the modern view that recognizes the inherent wrongs of slavery and the classification of humans as property.[125]

Regardless of when the Black Seminoles were accepted as members of the Seminole Nation with all the rights and privileges that such an acceptance entails, they should be permitted to participate in the Award programs. The Nation should not disinherit the Seminoles with African heritage today when the Tribe acknowledged and recognized the Black Seminoles as full members in 1866.[126] Until very recently, the Dosar Barkus and Bruner Bands of the Seminole Nation of Oklahoma[127] have participated as full members of the tribe. It appears that the arbitrary division created by the Dawes Commission[128] succeeded in breaking the bonds that existed for generations between the Black Seminoles and the Seminoles by blood. Recent

121. *See Davis*, 199 F. Supp. 2d at 1168.
122. *See id.* at 1169-70.
123. *Id.* at 1169.
124. *See id.* at 1168.
125. *Id.* at 1171-72.
126. *See id.* at 1168.
127. *Id.* at 1167.
128. *See id.* at 1168.

developments like the *Davis* case and the amendment to the Constitution of the Seminole Nation[129] reflect the rift created between the two Seminoles.

As a sovereign, the Seminole Nation has the right to include or exclude anyone from membership and its benefits. Had the Nation chosen to permit participation in Award programs based on their own system of who is classified as Seminole by blood, the resultant Black Seminole exclusion may have been palatable. Unfortunately, the Nation chose to use a system of recognition established by the party responsible for the taking of Indian lands and creating the dispute — the United States government.

The Nation would be best served by disassociating itself from the categorizations created by the Dawes Commission. The Nation should embrace the fact that Florida was the land of the Freedmen Seminoles and the Seminoles by blood and any compensation granted to the Nation, regardless of events that occurred to amalgamate the tribe, rightfully belongs to the two Seminoles. The denial of Black Seminoles from participation in programs should not be a result of arbitrary rolls created by the Commission.[130] The Seminole Nation should look back at history and remember that "[p]eople of African descent participated in the formation of the Seminole nation before the United States even existed as a nation."[131]

The ultimate question of whether the Black Seminoles are Native Americans is answered by the recent developments within the Seminole Nation in the negative. Because the Nation moved to amended its constitution to exclude Black Seminoles from membership,[132] and because the Judgment Fund Program eligibility requirements purposely exclude Black Seminoles,[133] the logical conclusion is that the Black Seminoles are no longer welcome or accepted as members of the Seminole Nation.

129. *See* Seminole Nation of Okla. v. Norton, 223 F. Supp. 2d 122, 125 (D.D.C. 2002).
130. *See Davis*, 199 F. Supp. 2d at 1168.
131. Saito, *supra* note 3, at 1173.
132. *See Seminole Nation*, 223 F. Supp. 2d at 125.
133. *Davis*, 199 F. Supp. 2d at 1170-72.