

IN THE DISTRICT COURT OF THE MUSCOGEE (CREEK) NATION DISTRICT COURT
OKMULGEE DISTRICT FILED

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NANCY JUNKICH
CLERK
MUSCOGEE (CREEK)
NATION

FRED JOHNSON,)
)
 Plaintiff,)
)
 vs.)
)
 MUSCOGEE (CREEK) NATION)
 OF OKLAHOMA CITIZENSHIP)
 BOARD,)
)
 Defendant.)

Case No. CV 2003-54

TRIAL BRIEF
(INCLUDING PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW)

COMES NOW Plaintiff, Fred Johnson, and submits his Trial Brief, Including Proposed Findings of Fact and Conclusions of Law.

I. SUBJECT MATTER OF THE CASE

This case arises out of Plaintiff, Fred Johnson's, entitlement to and attempts to acquire citizenship in the Muscogee (Creek) Nation. The case is a judicial appeal from a final administrative decision by the Muscogee (Creek) Nation Citizenship Board (hereinafter, "Citizenship Board") denying Muscogee (Creek) Indian citizenship to Plaintiff. As such, the case involves allegations of arbitrary and capricious decision-making, and abuses of discretion by the Citizenship Board. Plaintiff's assertions regarding the Citizenship Board's impermissible conduct and behavior include both (a) that the Citizenship Board's procedures and actions in denying citizenship to Plaintiff over the years, and (b) that certain legislative acts on which the Citizenship Board's most

recent denial was based -- NCA 01-135 and NCA 02-078 -- deprive Plaintiff of one or more the following legal rights:

1. Plaintiff's right to equal protection under the Muscogee (Creek) Constitution or the Indian Civil Rights Act of 1968, or both;
2. Plaintiff's right to due process under the Muscogee (Creek) Constitution or the Indian Civil Rights Act of 1968, or both;
3. Plaintiff's right to citizenship under the Creek Treaty of 1866 (14 Stat. 785).

Plaintiff contends that he is eligible for citizenship in the Muscogee (Creek) Nation pursuant to the Treaty of 1866, pursuant to the Muscogee (Creek) Nation Constitution, and pursuant to the Muscogee (Creek) Nation citizenship code as it existed prior to the enactment of NCA 01-135 and NCA 02-078 in 2001 and 2002, respectively. Plaintiff also contends that NCA 01-135 and NCA 02-078 are unconstitutional, and are therefore void and without force and effect ab initio.

Hence, this case involves the personal history of Plaintiff and his Muscogee (Creek) Indian ancestors. Further, the case requires a thorough understanding of the history of the rights to Muscogee (Creek) Indian citizenship held by Muscogee (Creek) Indians who happen also to have ancestors of African descent.

III. PROPOSED FINDINGS OF FACT

A. The Law

(1) The Muscogee (Creek) Constitution

Article II, Section 1 of the Constitution provides:

Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in The Muscogee (Creek) Nation.

Article III, Section 1 of the Constitution provides, in pertinent part:

The Principal Chief shall appoint, subject to majority approval of the Muscogee (Creek) National Council, a Citizenship Board comprised of five (5) citizens who shall be charged with the responsibility of the establishment and maintenance of a Citizenship Roll, showing degree of Muscogee (Creek) Indian blood based upon rolls prepared pursuant to the Act of April 26, 1906, (34 Stat. 137)

Article III, Section 2 of the Constitution provides, in pertinent part:

Persons eligible for citizenship in the Muscogee (Creek) Nation shall consist of Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the act of April 26, 1906 (34 Stat.137)....

Article III, Section 3 of the Constitution provides, in pertinent part:

(a) All persons eligible for citizenship shall register as an applicant for citizenship; and

(b) The Citizenship Board shall certify citizenship, and the declaration of citizenship may be affirmed at any time with the name of the individual being entered on the citizenship roll, and the persons being recognized as a citizen of The Muscogee (Creek) Nation, provided that:

(1) the person is a Muscogee (Creek) Indian by blood whose name appears on the final rolls as provided by the Act of April 26, 1906, (34 Stat. 137), or the person is a lineal descendant of a Muscogee (Creek) Indian by blood whose name appears on the final rolls as provided by the Act of April 26, 1906, (34 Stat. 137)....

(2) Act of April 26, 1906 (34 Stat. 137)

Section 3 of the Act of April 26, 1906 provides, in pertinent part:

That the approved roll of Creek freedmen shall include only those persons whose names appear on the roll prepared by J. W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior.

(3) Muscogee (Creek) Citizenship Code Prior to August 23, 2001, provided in pertinent part:

(1) Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in the Muscogee (Creek) Nation, and in pursuance thereof, the Citizenship Board *shall* [emphasis added]:

A. Utilize records of the former Creek Nation Election Board, the former Creek Constitution Commission, the United States Bureau of Indian Affairs, and other suitable records, to identify persons who are Muscogee (Creek) Indian by blood.

B. Utilize records of and meeting with organizations of Muscogee (Creek) Indians by blood to identify persons who are Muscogee (Creek) Indian by blood.

C. Contact by mail every person identified to the Citizenship Board as a Muscogee (Creek) Indian by blood, in order to provide adequate information and necessary forms for their application for citizenship.

D. Upon the request of any application for citizenship, convene a hearing as an evidentiary proceeding to determine whether that person is a Muscogee (Creek) Indian by blood. In such proceedings, the burden of proof shall be upon the applicant, to demonstrate a preponderance of evidence that they are a Muscogee (Creek) Indian by blood. The applicant and any member of the Citizenship Board may subpoena witnesses.

(2) Evidence of Degree of Muscogee (Creek) Indian blood shall be based upon the Degree of Muscogee (Creek) Indian blood shown for all direct ancestors on the final rolls prepared pursuant to the Act of April 26, 1906 (34 Stat. 137); *and based upon direct ancestors enrolled on previous tribal enrollment hereinafter-listed, notwithstanding the lack of a listed Degree of Muscogee (Creek) Indian blood on such other enrollment*

Name of Roll

Roll Code

1814 Creek Roll (Jackson Treaty Roll)	Unknown (BIA)
1832 Creek Roll (Heads of Household)(Removal Treaty)	Micro 1832
1836-38 Creek Emigrant Lists & Muster Rolls	BIA #299
1834-1836 Creek Removal Rolls & Lands Registers	BIA #285 & 287
Same-Index	BIA # 285
1857 Creek Old Settler Rolls	FWFARC #100-064
1857 Upper & Lower Creek Per Capita Rolls	FWFARC #10002 & #100024
1858 Creek Per Capita Rolls	FWFARC #100, 025
1869-70 Loyal Creek Claim Roll	BIA #687-8

1867 Creek Annuity Payroll	FWFARC #100, 598
1870 Creek Orphan Roll	BIA #915
1885-1896 Creek Citizenship Commission	FWFARC #100, 166
1890 Creek Roll Tribal	FWFARC #100, 599
1891 Creek Roll and Supplement	FWFARC #100, 603
Authenticated Index of 1890 Creek Roll	FWFARC #100, 601
1895 Creek Roll Tribal	FWFARC #100, 604
Authenticated Index of 1895 Creek Roll	FWFARC #100, 602
1904 Creek Self-Emigrant Roll	BIA #916

(Emphasis added).

(4) Muscogee (Creek) Citizenship Code After Adoption of NCA 01-135 and NCA 02-078 provided in pertinent part:

A. Opportunity for Citizenship. As provided in the Muscogee Nation Constitution at Article, II, Section 1, "Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in the Muscogee (Creek) Nation."

B. In order to implement this Code, the Citizenship Board shall utilize the 8x10 Certificates of Degree of Indian Blood of the United States Department of the Interior, and other suitable records.

(5) Article II of the Creek Treaty of 1866 (14 Stat. 785) provides in pertinent part:

The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude . . . shall ever exist in said Nation; and inasmuch as there are among the Creeks many persons of African descent . . . it is stipulated that hereafter these persons, lawfully residing in said Creek country, under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of said Nation to settle within the limits of the jurisdiction of the Creek Nation as citizens [thereof], shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds; and the laws of said Nation shall be equally binding upon and give equal protection to all such persons . . .

(Emphasis added.)

B. Plaintiff's Lineal Muscogee (Creek) Indian Ancestry

1. Plaintiff was raised with the knowledge of his Muscogee (Creek) Indian ancestry and his Muscogee (Creek) Indian family oral history since he was a child. Plaintiff's grandfather, Cooper Davis', primary language was Creek, he physically looked like a Creek, he dressed and groomed himself in Creek fashion, and he lived in accordance with Creek traditions and customs. Plaintiff's great-great-grandfather, Ben Marshall, was second chief of the Creek Nation in 1846 and was a major figure in Muscogee (Creek) history before, during and immediately after removal.

2. Plaintiff applied for citizenship in the Muscogee (Creek) Nation beginning as early as 1994, at which time he was given an application for a Certificate of Degree of Indian Blood from the Bureau of Indian Affairs and denied citizenship.

3. The Citizenship Office and the Citizenship Board offered no assistance to Plaintiff in making his applications for citizenship beginning in 1994, including offering no guidance, explanation or copy of any requirements of Muscogee (Creek) Nation ordinances, or a summary thereof, regarding eligibility for citizenship or the procedure for applying for citizenship, and including no instruction regarding or help in identifying or locating required documentation to support his application.

4. Over the years, on a number of successive attempts to apply for citizenship, personnel in the Citizenship Office turned down Plaintiff's applications for citizenship, telling Plaintiff that he lacked, and was required to provide, documentary proof that one of his lineal ancestors on the 1906 final rolls had Muscogee (Creek) Indian blood in order to support his claim to eligibility for citizenship.

5. Plaintiff researched primary historical sources and found documentary proof that he had a lineal ancestor on the final rolls prepared pursuant to the Act of April 26, 1906, and that he has Muscogee (Creek) Indian blood. Specifically, Plaintiff found primary historical documents that prove the following:

(a) Plaintiff's great-great-grandfather (Ben Marshall, Second Chief of the Creek Nation in 1846) was listed on the 1832 Creek Census,

(b) Plaintiff's Great Grandfather (Joe Davis) was listed on the 1867 Dunn Roll,

(c) Plaintiff's Great Grandmother (Bina Davis) was listed on the 1867 Dunn Roll),

(d) Plaintiff's Grandfather (Cooper Davis) was listed on the 1867 Dunn Roll, the 1890 Arkansas Town Roll, the 1895 Arkansas Town Roll, the 1906 Creek Freedman Roll, and can be proven to have had 3/4 quantum of Muscogee (Creek) Indian blood.

6. Plaintiff submitted an application for citizenship to the Citizenship Office on or about June 8, 2000. The application was complete in its entirety.

7. In proving his eligibility for citizenship in the Muscogee (Creek) Nation, Plaintiff offered the following documented facts: (a) Plaintiff's direct lineal ancestor, Cooper Davis, was listed on the final rolls of the Muscogee (Creek) Nation pursuant to the Act of April 26, 1906, (b) Cooper Davis was identified on his Old Creek Series Card as having 3/4 Muscogee (Creek) Indian blood, (c) Cooper Davis' full sister, Fanny Childers was listed on the final rolls of the Muscogee (Creek) Nation pursuant to the Act of April 26, 1906 and identified thereon as having 3/4 Muscogee (Creek) Indian blood, (c) Ben Marshall was listed on the 1832 Creek Roll.

8. The Citizenship Board denied the application on the basis that Plaintiff's lineal ancestor with documented Muscogee (Creek) Indian blood was on the Freedman Roll. The Board's decision was set forth in a letter from Roberta Haney, Manager of the Muscogee (Creek) Nation Citizenship Office, dated January 10, 2003. In the letter, the Board's stated reason for denying Plaintiff entitlement to citizenship was: "the documentation that you have submitted is not sufficient evidence proving that you are a direct descendent (sic) of a person who is listed on the original Creek by blood roll or the 1906 Dawes Roll." Further, the letter states: "It appears that you are tracing back to Cooper Davis #1931 (sic) listed on the Freedmen Roll."

9. Plaintiff appealed the final administrative decision of the Citizenship Board to the Muscogee (Creek) Nation District Court on or about December 12, 2003.

10. The Citizenship Board denied Plaintiff's appeal by letter from Roberta Haney, Manager of the Muscogee (Creek) Nation Citizenship Office, dated January 10, 2004. In the letter, the Board's stated reason for denying Plaintiff's entitlement to citizenship was: "sufficient evidence has not been provided to prove that you [Plaintiff] are Creek by blood."

B. Muscogee (Creek) Nation Citizenship Rights Through Time

1. From the beginning of documented history, the Muscogee (Creek) Nation has included persons of various races, including persons with Indian, White, and African ancestry, and any combination thereof.

2. In 1867, the Muscogee (Creek) Nation gathered at the request of Indian Agent J.W. Dunn to identify and list the individual members of the Nation who were entitled to payment for their ceded lands in Alabama. As a result of that gathering, J.W. Dunn

compiled a roll of the Muscogee (Creek) Nation's citizens, which came to be known as the Dunn Roll. Listed on the Dunn Roll were all of the Nation's then-gathered citizens, including persons with African ancestry. The Dunn Roll is that roll referred to in Section 3 of the Act of April 26, 1906 as "the roll prepared by J. W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven."

3. Between 1866 and 1906, the Muscogee (Creek) Nation created numerous rolls of its citizens, including among them the rolls identified in the pre-2001 Citizenship Code § 3006.

4. In compiling the final rolls of the five civilized tribes pursuant to the Act of April 26, 1906, the Dawes Commission used the hypo-descent rule to establish, inter alia, two rolls of citizens of the Muscogee (Creek) Nation: one roll of Freedman, the other roll of non-Freedmen. In accordance with the hypo-descent rule, the goal of the Dawes Commission was to place all Creek citizens having any African ancestry on the Creek Freedman Roll, and all other Creek citizens on the (non-Freedman) Creek Roll. The Dawes Commission did not intend the Creek Freedman Roll to comprise, and the Creek Freedman Roll did not comprise, persons having no Creek ancestry (or blood). In fact, the Creek Freedman Roll consisted mostly of persons having Creek ancestry (or blood).

5. In 1979, the Muscogee (Creek) Nation adopted its current Constitution.

6. In 1981, the Muscogee (Creek) Nation National Council enacted the Nation's first Citizenship Code under the new Constitution.

7. The 1981 Muscogee (Creek) Nation Citizenship Code remained substantially the same in content until August 23, 2001 – a period of approximately 20 years.

8. Under the Nation's 1981-2001 Citizenship Code, persons who had a direct lineal ancestor on Creek Freedman Roll prepared pursuant to the Act of April 26, 1906 (hereinafter, "1906 Freedman Roll") were eligible for citizenship in the Muscogee (Creek) Nation provided that they could show that their ancestor had Muscogee (Creek) Indian blood.

9. Under the Nation's 1981-2001 Citizenship Code, applicants -- including those applicants relying on an ancestor listed on the 1906 Freedman Roll -- could use numerous pre-1906 rolls of the Nation's citizens in order to prove they had Muscogee (Creek) Indian blood, including, among others, the 1832 Creek Roll, the 1890 Creek Roll and the 1895 Creek Roll.

10. Under the Nation's 1981-2001 Citizenship Code, applicants -- including those applicants relying on an ancestor listed on the 1906 Freedman Roll -- could request a hearing at which they were allowed to prove their Muscogee (Creek) Indian blood by a preponderance of the evidence.

11. Under the Nation's 1981-2001 Citizenship Code, the Citizenship Board and Citizenship Office were required to provide assistance to persons who wished to apply for citizenship in the Muscogee (Creek) Nation, by helping them identify and locate records tending to prove their lineage and Muscogee (Creek) Indian blood.

12. Under the Nation's 1981-2001 Citizenship Code, applicants were provided no right to appeal any denial of citizenship by the Citizenship Office or Citizenship Board.

13. On or about August 23, 2001, the Muscogee (Creek) Nation enacted NCA 01-135 which substantially changed eligibility requirements for citizenship in the Muscogee (Creek) Nation. NCA 01-135 was intended by the Citizenship Board, the National

Council, and the Principal Chief of the Muscogee (Creek) Nation to *eliminate* the possibility that persons having any African ancestry whatsoever could be eligible for citizenship in the Muscogee (Creek) Nation, regardless whether those persons had ancestors of Muscogee (Creek) Indian blood. NCA 01-135 was enacted without any prior notice or opportunity to be heard being provided to persons whose ancestors were listed on the 1906 Freedman Roll.

14. On or about May 10, 2002, the Muscogee (Creek) Nation enacted NCA 02-078, which amended NCA 01-135. NCA 02-078 was intended by the Citizenship Board, the National Council, and the Principal Chief of the Muscogee (Creek) Nation to “plug a hole” left by NCA 01-135 in relation to their goal of eliminating the possibility that persons having any African ancestry whatsoever could be eligible for citizenship in the Muscogee (Creek) Nation, regardless whether those persons had ancestors of Muscogee (Creek) Indian blood. NCA 02-078 was enacted without any prior notice or opportunity to be heard being provided to persons whose ancestors were listed on the 1906 Freedman Roll.

C. Muscogee (Creek) Indian 1866 Treaty Rights

1. In 1832, the United States forcibly removed the Creeks from their traditional homelands (Alabama, Georgia, South Carolina, and Florida) and sent them to live in what is now Oklahoma.

2. The Treaty of 1866 was one of five treaties signed in the immediate aftermath of the U.S. Civil War by the Federal Government and the Five Civilized Tribes of Oklahoma.

3 People of African descent, both free and enslaved, were apart of the individuals who were removed during the forced removal of the Creeks.

4. At the conclusion of the United States Civil War, the United States government negotiated and signed a new treaty with the Creeks on June 14th, 1866.¹

5. The foundational document establishing the jurisdiction of the modern Muscogee (Creek) Nation, the Treaty of 1866, concluded June 14^t, 1866 provides, in pertinent part:

Inasmuch as there are among the Creek many persons of African descent...it is stipulated that hereafter these persons, lawfully residing in said Creek country, under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of said Nation to settle within the limits of the jurisdiction of the Creek Nation as citizens [thereof], shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds; and the laws of said Nation shall be equally binding upon and give equal protection to all such persons. . . .

6. Title 27, § 1-103(A) of the M.C.N.C.A.provides: “In all cases, the Muscogee (Creek) Nation Court shall apply the Constitution and duly enacted laws of the Muscogee Nation, the common law of the Muscogee people as established by customs and usage, and the Treaties and Agreements between the Muscogee nation and the United States.

7. Tile 27, § 1-101(A)(1) in pertinent part states “The authority of the Muscogee nation to adopt this title is based upon...the Treaty of 1866.”

¹ See Felix S. Cohen, Handbook of Federal Indian Law, 104 (1982).

8. The United States Congress passed the Curtis Act June 28, 1898 (30 Stat. 495); said Act provided for the forced allotment and termination of tribal land ownership and destruction of Creek government and traditional way of life.

9. The Curtis Act directed the Dawes Commission to create two lists of citizens of the Creek Nation eligible for allotment: 1) the "Creek Roll" which was purportedly composed of Creek citizens with Creek blood; and 2) the "Freedmen Roll" which was purportedly a roll of those citizens of the Creek Nation who were formerly enslaved Africans and devoid of any Creek blood.²

10. The Dawes Commission enrolled some Creeks of African descent on the "Freedmen Roll," regardless whether they or their ancestors were ever enslaved by the Creek Nation or how much "Creek" blood they actually possessed.³

11. The Muscogee Creek Nation considers all people enrolled as Freedmen on the rolls prepared pursuant to the Act of April 26, 1906 "Negro or their descendants who had been held in slavery by the Creek Nation prior to the Treaty of 1866."

12. In 1896, at the time of Dawes, the policy and practice of the United States was that if one was 7/8 another "race" and 1/8 Black/Negro, said individual was legally Black and legally subject to segregation.⁴

III. PROPOSITIONS OF LAW

A. Proposition 1: The phrase "Muscogee (Creek) Indian[s] by blood" in the Constitution of the Muscogee (Creek) Nation, Article II, Section 1, and Article III,

² See Felix S. Cohen, Handbook of Federal Indian Law, 431 (1982)

³ See Angie Debo, & *Still the Waters Run*. See Also Kent Carter who writes "in cases of mixed freedmen and Indian parents, which was common among the Creeks...the applicant was always enrolled as a 'freedmen'." Carter, Kent. *The Dawes Commission and the Allotment of the Five Civilized Tribes 1893-1914*. Orem, Utah: Ancestry.com (1999), p. 49.

⁴ See *Plessy v. Ferguson*, 163 U.S. 537 (1896)

Sections 2 and 3, means “a person[s] who has inherited genetic material from a Muscogee (Creek) Indian.”

(1) Plain language. Article II of the Constitution specifically grants to each “Muscogee (Creek) Indian by blood” the unqualified right to citizenship in the Muscogee (Creek) Nation. Article II, Section of the Constitution provides:

Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in the Muscogee (Creek) Nation.

The Court should interpret what the Constitution means by the phrase “Muscogee (Creek) Indian[s] by blood.” It is the exclusive duty of the Judiciary to render any such interpretation. As stated in Oklahoma City Muscogee (Creek) Association (OCMA) v. Muscogee (Creek) National Council, 1 Okla. Trib. 293 (1989), “Judicial interpretation of the Constitution of The Muscogee (Creek) Nation and Ordinances of The Muscogee (Creek) Nation is vested only in the Judicial Branch of this sovereign Nation.” Neither the legislative nor the executive branch of the Muscogee (Creek) Nation has a right to interpret the Constitution.

For guidance in interpreting the Constitution, this Court should heed the Muscogee (Creek) Nation Supreme Court’s observation in *Cox v. Kamp*, 5 Okla. Trib. 530 (1991), that the Constitution “must be strictly construed and interpreted, and where the Constitution speaks in plain language with reference to a particular matter, the Court must not place a different meaning on the words.”

Plaintiff submits that the phrase “Muscogee (Creek) Indian[s] by blood” in Article II of the Constitution is plain language. The phrase refers to Indians, who in this context are undoubtedly not the inhabitants of India, but rather the indigenous native peoples of the Western Hemisphere. The group of Indians to whom the phrase refers is further

defined as "Muscogee (Creek)" Indians, and therefore it refers to people who are members of the Muscogee (Creek) Nation, as opposed to members of other tribes or groups.

Further, the phrase "Muscogee (Creek) Indian[s] by blood" is clear and unambiguous. The Muscogee (Creek) Indians referenced are clearly not persons who are culturally Muscogee (Creek), or ethnically Muscogee (Creek), or politically Muscogee (Creek), or even Muscogee (Creek) "wanabees" – but rather Muscogee (Creek) "by blood." The term "by blood" means related by descent, lineage, ancestry, kinship. For example, the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Edition, © 2004, 2000 by Houghton Mifflin Company states:

Due to its importance to life, blood is associated with a number of beliefs. One of the most basic is the use of blood as a symbol for family relationships; to be "related by blood" is to be related by ancestry or descent, rather than marriage.

Thus, adding the qualifier "by blood" to the phrase "Muscogee (Creek) Indians" in Article II makes it absolutely clear that the Muscogee (Creek) Indians to whom the phrase refers are those who are *genetically* Muscogee (Creek) Indians. When the language "by blood" is used to qualify the term "Muscogee (Creek) Indians," the resulting phrase can only mean a person who is genetically a Muscogee (Creek) Indian, that is, a person who has inherited genetic material from a Muscogee (Creek) Indian. Further, in the collective sense, "Muscogee (Creek) Indian by blood" must refer to persons having common ancestors or common descendants – having a family lineage in common with a Muscogee (Creek) Indian.

Thus, in and of itself, Article II of the Constitution expressly grants a right to citizenship in the Muscogee (Creek) Nation to any person who is genetically a Muscogee (Creek) Indian.

Article III, Sections 2 and 3 of the Constitution also contain the phrase “Muscogee (Creek) Indian by blood.” Those sections of the Constitution provide, in pertinent part, as follows:

Section 2. Persons eligible for citizenship in the Muscogee (Creek) Nation shall consist of Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians by blood whose names appear on the final rolls an (sic) provided by the act of April 26, 1906 (34 State.137)....

Section 3.

(b) The Citizenship Board shall certify citizenship, and the declaration of citizenship may be affirmed at any time with the name of the individual being entered on the citizenship roll, and the persons being recognized as a citizen of The Muscogee (Creek) Nation, provided that:

(1) the person is a Muscogee (Creek) Indian by blood whose name appears on the final rolls as provided by the Act of April 26, 1906, 34 Stat. 137), or the person is a lineal descendant of a Muscogee (Creek) Indian by blood whose name appears on the final rolls as provided by the Act of April 26, 1906, (34 Stat. 137....

[Emphases added.]

The four uses of the phrase “Muscogee (Creek) Indian by blood” in Article III do nothing to change the clear and unambiguous meaning of the plain language in Article II. In fact, the phrases as used in Article III are exactly the same as the phrase in Article II, and they mean exactly the same as the phrase in Article II, that is, the phrases that appear

in Article III mean a person or persons who are genetically Muscogee (Creek) Indian. Furthermore, the reference in Section 3(b)(1) to a person who is a lineal descendant of a Muscogee (Creek) Indian is entirely consistent with and supportive of such an interpretation.

The only qualifier to the term “Muscogee (Creek) Indian by blood” in the Constitution appears in Sections 2 and 3 of Article III. Those sections delimit the Muscogee (Creek) Indian[s] by blood who are eligible for citizenship to those whose names “appear on the final rolls as provided by the Act of April 26, 1906,” or who are a lineal descendant of a such a person whose name “appears on the final rolls as provided by the Act of April 26, 1906.” The qualifier does nothing to change the meaning of the term “Muscogee (Creek) Indian by blood,” but merely identifies a baseline listing of Muscogee (Creek) eligible for citizenship. Those persons who are genetic descendants of Muscogee (Creek) Indians whose names do *not* appear on the final rolls as provided by the Act of 1906 are simply *not* eligible for citizenship in the Muscogee (Creek) Nation.

Thus, Article II of the Constitution expressly grants a right for citizenship in the Muscogee (Creek) Nation to any person who is genetically a Muscogee (Creek) Indian/ Further, Article III qualifies those genetically Muscogee (Creek) Indians eligible for citizenship by restricting such persons to those (a) whose names appear on the final rolls as provided by the Act of April 26, 1906, and (b) to any lineal descendant of the foregoing, that is to any person who has inherited genetic material from a Muscogee (Creek) Indian whose name appears on the final rolls as provided by the Act of April 26, 1906.

In summary, taken together, Articles II and III of the Constitution expressly grant a right of citizenship in the Muscogee (Creek) Nation to (a) any Muscogee (Creek) Indian whose name appears on the final rolls as provided by the Act of April 26, 1906, and (b) to any lineal descendant of the foregoing. Hence, this Court should rule that any person who has inherited genetic material from a Muscogee (Creek) Indian whose name appears on the final rolls as provided by the Act of April 26, 1906 is eligible for citizenship in the Muscogee (Creek) Nation. Further, since Plaintiff has proven that he has inherited genetic material from a Muscogee (Creek) Indian whose name appears on the final rolls as provided by the Act of April 26, 1906, or from a lineal descendant of a Muscogee (Creek) Indian whose name appears on the final rolls as provided by the Act of April 26, 1906, Plaintiff is eligible for citizenship in the Muscogee (Creek) Nation.

(2) Citizenship Code Prior to August 23, 2001. Not only should the plain language of the Muscogee (Creek) Constitution lead the Court to interpret the phrase “Muscogee (Creek) Indian by blood” as meaning a person who has inherited genetic material from and Muscogee (Creek) Indian, but in addition for over twenty (20) years, the Muscogee (Creek) Nation itself also interpreted the Constitution in the same manner. The ordinances adopted by the National Council and signed into law by the Principal Chief which comprised the Muscogee (Creek) Citizenship Code between 1981 and August 23, 2001 are *consistent* with the foregoing interpretation of “Muscogee (Creek) Indian by blood,” and are *inconsistent* with the interpretation of the phrase urged by Defendant.

For ease of reference, the relevant provisions of the Code as it existed prior to August 23, 2001 will be referenced as the “Pre-2001 Code” and are set forth below.

Under the Pre-2001 Code, the Citizenship Board was given the responsibility of *assisting* applicants in proving their eligibility for citizenship. Section 3003 affirmatively required the Citizenship Board to act, providing in relevant part:

“Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in the Muscogee (Creek) Nation” [quoting the Constitution] and in pursuance thereof, the Citizenship Board *shall* [emphasis added]:

A. Utilize records of the former Creek Nation Election Board, the former Creek Constitution Commission, the United States Bureau of Indian Affairs, and other suitable records, to identify persons who are Muscogee (Creek) Indian by blood. . . .

The Pre-2001 Code defined “Muscogee (Creek) Indian by blood” as

[A]ny person listed upon the Finals Rolls of 1906 and enrolled with a listed quantum of Muscogee (Creek) Indian blood or not enrolled with a separated racial status listed in lieu of Muscogee (Creek) Indian blood (e.g., Cherokee, White, Spanish, etc.) notwithstanding a tribal town citizenship for such person

The Pre-2001 Code provided that evidence of Muscogee (Creek) Indian blood could be derived from a great number of different primary sources. Section 3006 provided:

Evidence of Degree of Muscogee (Creek) Indian blood shall be based upon the Degree of Muscogee (Creek) Indian blood shown for all direct ancestors on the final rolls prepared pursuant to the Act of April 26, 1906 (34 Stat. 137); *and based upon direct ancestors enrolled on previous tribal enrollment hereinafter-listed, notwithstanding the lack of a listed Degree of Muscogee (Creek) Indian blood on such other enrollment* [emphasis added].

<u>Name of Roll</u>	<u>Roll Code</u>
1814 Creek Roll (Jackson Treaty Roll)	Unknown (BIA)
1832 Creek Roll (Heads of Household)(Removal Treaty)	Micro 1832
1836-38 Creek Emigrant Lists & Muster Rolls	BIA #299
1834-1836 Creek Removal Rolls & Lands Registers	BIA #285 & 287
Same-Index	BIA # 285
1857 Creek Old Settler Rolls	FWFARC #100-064

1857 Upper & Lower Creek Per Capita Rolls	FWFARC #100023 & #100024
1858 Creek Per Capita Rolls	FWFARC #100, 025
1869-70 Loyal Creek Claim Roll	BIA #687-8
1867 Creek Annuity Payroll	FWFARC #100, 598
1870 Creek Orphan Roll	BIA #915
1885-1896 Creek Citizenship Commission	FWFARC #100, 166
1890 Creek Roll Tribal	FWFARC #100, 599
1891 Creek Roll and Supplement	FWFARC #100, 603
Authenticated Index of 1890 Creek Roll	FWFARC #100, 601
1895 Creek Roll Tribal	FWFARC #100, 604
Authenticated Index of 1895 Creek Roll	FWFARC #100, 602
1904 Creek Self-Emigrant Roll	BIA #916

Section 3006.B-D of the Pre-2001 Code provided a means by which an applicant for whose direct ancestors the final rolls provided pursuant to the Act of April 26, 1906 showed no degree of Indian blood (e.g., an ancestor on the Freedman roll) could have his or her degree of Muscogee (Creek) Indian blood determined by means of an evidentiary hearing in which the applicant was to be assisted in his or her research efforts by the Office of the Citizenship Board and the standard of proof was “preponderance of the evidence.” It provided in relevant part:

B. In all cases where the rolls provided pursuant to the Act of April 26, 1906 (34 Stat. 34) provide no Degree of Indian Blood or provide conflicting degrees for the direct ancestor and one or more of that ancestor’s immediate family, and the applicant has proven descent:

a. The applicant shall file a letter at the Office of the Citizenship Board requesting technical assistance in the determination of their Degree of Muscogee (Creek) Indian Blood.

c. The applicant shall be granted technical assistance by the staff of the Citizenship Board in the following manner:

1. All relevant records shall be searched. . . .

C. After receipt of relevant documents, the applicant shall have the right to request a hearing by the Citizenship Board to determine their degree of Muscogee (Creek) Indian Blood.

D. The hearing shall be an evidentiary proceeding where the burden of proof shall be upon the applicant to establish a preponderance of evidence of their degree of Muscogee (Creek) Indian blood. . . .

Thus, prior to the adoption of NCA 01-135 on August 23, 2001, an applicant for citizenship had the right to use the preponderance of the evidence standard of proof and data from numerous historical Creek rolls that pre-date the final rolls established by the Act of April 26, 1906 (34 Stat. 137) in order to prove that he or she had one or more direct lineal ancestors who had Muscogee (Creek) Indian blood. Further, the Citizenship Board was required by the Citizenship Code to assist the applicant in researching and proving his Muscogee (Creek) Indian blood, and if there was any doubt concerning the applicant's quantum of Muscogee (Creek) Indian blood, the Citizenship Board was required to decide the quantum by means of an evidentiary hearing.

B. Proposition 2: The phrases “final rolls prepared pursuant to the Act of April 26, 1906, (34 Stat. 137)” in Article III, Section 1 of the Constitution, and “final rolls as provided by the Act of April 26, 1906 (34 Stat. 137)” in Article III, Sections 2 and 3 of the Constitution include, without limitation:

- (1) persons whose names appear on the roll prepared by J.W. Dunn, under authority of the United States prior to March 14, 1867, and their descendants since born, and**
- (2) persons lawfully admitted to citizenship in the Creek Nation subsequent to March 14, 1867, and their descendants since born, and**
- (3) persons whose names appear on the “Creek Freedman Roll.”**

The Court should interpret what the Constitution means by the phrases “final rolls prepared pursuant to the Act of April 26, 1906, (34 Stat. 137)” in Article III, Section I of the Constitution, and “final rolls as provided by the Act of April 26, 1906 (34 Stat. 137)” in Article III, Sections 2 and 3 of the Constitution. It is the exclusive duty of the

Judiciary to render any such interpretation. As stated in Oklahoma City Muscogee (Creek) Association (OCMA) v. Muscogee (Creek) National Council, 1 Okla. Trib. 293 (1989), “Judicial interpretation of the Constitution of The Muscogee (Creek) Nation and Ordinances of The Muscogee (Creek) Nation is vested only in the Judicial Branch of this sovereign Nation.” Neither the legislative nor the executive branch of the Muscogee (Creek) Nation has a right to interpret the Constitution.

As stated above, for guidance in interpreting the Constitution, this Court should heed the Muscogee (Creek) Nation Supreme Court’s observation in *Cox v. Kamp* that the Constitution “must be strictly construed and interpreted, and where the Constitution speaks in plain language with reference to a particular matter, the Court must not place a different meaning on the words.” *Id.*, 5 Okla. Trib. 530 (1991).

Plaintiff submits that the phrases “final rolls prepared pursuant to the Act of April 26, 1906, (34 Stat. 137)” and “final rolls as provided by the Act of April 26, 1906 (34 Stat. 137)” in Article III of the Constitution are plain language, and that this plain language is clear and unambiguous. First, there is only one Act of April 26, 1906 that was signed into law as 34 Stat. 137. That Act is entitled “An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes.”

Second, one needs only to review the text of the Act of April 26, 1906, to determine what “final rolls” were “prepared pursuant to” or “provided by” that Act. As indicated in its title, the Act of April 26, 1906, was intended to provide for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory. Section 1 of the Act specifically identifies the Five Civilized Tribes in Indian Territory as comprising the

Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes. Further, Section 1 recognizes that the members of each of those five tribes include persons further identified both as “citizens” and “freedmen.”

A major focus of the Act of April 26, 1906, was on land allotments to individual members of the Five Civilized Tribes. See, for example, Sections 5-8, 14, 16, 19-23 of the Act. In order to accomplish the goal of allotting a finite quantity of land equitably to all tribal members, the Act sought to bring finality to the lists, or the “rolls,” of members of the Five Civilized Tribes that would be used as the sole basis for determining a tribal member’s eligibility for a land allotment. See, for example, *AND STILL THE WATERS RUN, THE BETRAYAL OF THE FIVE CIVILIZED TRIBES*, pp. 31-60, by Angie Debo, 1940: University of Princeton Press, Princeton, New Jersey; *THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914*, by Kent Carter, 1999: Ancestry.Com, Inc.

Finality to the rolls was accorded in the Act by limiting the members of the Five Civilized Tribes whose names could be included on the final rolls to those persons whose names appeared on certain pre-existing rolls and certain of those persons’ descendants who were specifically identified by act and time. For example, Section 1 of the Act provided that persons whose names could be included in the final rolls were those whose names appeared on applications for tribal enrollment, made prior to December 1, 1905, as evidenced by records in charge of the Commissioner of the Five Civilized Tribes. Section 2 of the Act provided that additional persons whose names could be included in the final rolls were those minors living on March 4, 1906, who submitted an application for enrollment prior to 91 days following the approval of the Act, and whose parents were

enrolled or eligible for enrollment as Choctaw, Chickasaw, Cherokee or Creek tribal members.

Further – in contrast to Sections 1 and 2 of the Act which provided for inclusive rolls of *all* the citizens and freedmen of the Choctaw, Chickasaw, Cherokee and Creek tribes -- Section 3 of the Act restricted the roll of Creek freedmen to

...only those persons whose names appear on the roll prepared by J.W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior.⁵

Thus, the “final rolls” that were “prepared pursuant to” or “provided by” the Act of April 26, 1906, included:

(1) The citizens and freedmen of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, so long as the those citizens and freedmen:

(a) had been enrolled prior to or on the approval date of the Act (that is, April 26, 1906), or

⁵ Section 3 of the Act restricted the roll of Cherokee freedmen to:

... only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior.

(b) had applied for enrollment prior to December 1, 1905, and evidence of such application existed within the records of the Commissioner of the Five Civilized Tribes; and

(2) The minor children of the above-described tribal members:

(a) who were alive on March 4, 1906, and

(b) who submitted an application for enrollment within 90 days following the approval of the Act.

However, the “final rolls” of the Creek freedmen were further restricted . The final rolls of the Creek freedmen were restricted to:

(1) Persons whose names appear on the 1867 Dunn Roll, and their descendants since born, and

(2) Persons who had been lawfully admitted to citizenship in the Creek Nation subsequent to the preparation of the 1867 Dunn Roll, and their descendants since born.⁶

In conclusion, ten “final rolls” were prepared “pursuant to” or “as provided by” the Act of April 26, 1906: The final rolls of both the citizens and the freedmen of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes. Note, however, that the final roll of Creek freedmen was *not restricted* to “persons of African descent” as was the

⁶ The final rolls of the Cherokee freedmen were restricted to: to:

(1) Persons of African descent, either “free colored” or slaves of Cherokee citizens and their descendants who:

(a) were bona fide residents of the Cherokee Nation as of August 11, 1866, or

(b) actually returned and established such residency in the Cherokee Nation on or before February 11, 1867.

final roll of Cherokee freedmen. Furthermore, the final roll of Creek freedmen was known to *include* Creek citizens.

Hence, it should be the ruling of this Court that these ten rolls comprise the “final rolls” of the Act of April 26, 1906 that are referenced by Sections 1, 2, and 3 of Article III of the Constitution. Further, the Court should rule that since Plaintiff can prove he is a lineal descendant of a person whose name appears on one or more of these final rolls – including the “Creek Freedman Roll” – and that the ancestor from whom he is lineally descended had Muscogee (Creek) Indian blood, Plaintiff is eligible for membership in the Muscogee (Creek) Nation.

C. Proposition 3: NCA 01-135 and NCA 02-078 are unconstitutional -- on their faces or as applied, or both -- in that they deny Plaintiff, as a member of a suspect class, equal protection, substantive due process, and procedural due process under the Muscogee (Creek) Nation Constitution and the Indian Civil Rights Act of 1968; therefore, NCA 01-135 and NCA 02-078 are null and void, and without force and effect ab initio. As a result, the Muscogee (Creek) Nation Citizenship Code as it existed prior to the enactment of NCA 01-135 and NCA 02-078 is the currently the *only* effective citizenship code of the Muscogee (Creek) Nation, and all applications for citizenship – including Plaintiff’s application – must be reviewed for compliance with the Muscogee (Creek) Nation Citizenship Code as it existed prior to the enactment of NCA 01-135 and NCA 02-078.

(1) Muscogee (Creek) Nation Constitutional Right to Equal Protection and Due Process

The Muscogee (Creek) Nation judiciary has not addressed in significant detail in published opinions a person’s right to equal protection or due process under the Constitution of the Muscogee (Creek) Nation. However, the right to equal protection arising from the Constitution has been recognized by the Supreme Court of the Muscogee (Creek) Nation in *In the Matter of the Constitutionality of NCA-01-115*, 7 Okla. Trib. 366 (2002). In that case, the Court stated that, when dealing with constitutional issues, it looks to decisions of the United States courts as persuasive, but not controlling, authority.

Since the case did not involve a suspect classification, the Court applied the rational basis test, rather than strict scrutiny. However, from this case the Court should infer that the Muscogee (Creek) Supreme Court would require the application of *strict scrutiny to a compelling state interest* as the test for constitutionality of an ordinance involving a suspect class, such as race or national origin – as is the situation in this case in respect to Creek Freedmen.

(2) Applicability of the Indian Civil Rights Act of 1968 to the Muscogee Creek Nation

The Muscogee Creek Nation has adopted and is bound by the rules of law established in the Indian Civil Rights Act (“ICRA”) of 1968. Title 27 § 1-103 B clearly states that: “The Muscogee (Creek) Nation shall apply the Federal Indian Civil Rights Act of 1968 §§ et seq.” In addition, 27 MCNCA § 1-102 B establishes that “Muscogee Creek Nation courts shall have general civil jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the Muscogee Nation...which arise under Muscogee Nation Indian country regardless of the Indian or non-Indian status of the party.” 27 MCNA § 1-102 B. In fact, this court in Waggoner v. Muscogee (Creek) Nation, Div. of Health Admin., 7 Okla. Trib. 59, 2000 WL 33976301 (Muscogee (Cr.) D.Ct.) stated that the tribal courts are the most appropriate place to raise claims under ICRA. The court stated:

The Court will first address the Indian Civil Rights Act claim. This Court, finding pronouncements from federal and other tribal courts persuasive, views tribal courts as the most appropriate forum for adjudication of due process claims under the Indian Civil Rights Act of 1968. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978); White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir.1984); Committee for Better Tribal Government v. Southern Ute Election Board, No. 90-CV-35, 17 I.L.R. 6095, 6096 (S.Ute. Tr. Ct. Aug. 13, 1990). This court interprets the Indian

Civil Rights Act as an instructional set of minimum due process guidelines for tribal governments.”

Id at 59. The court also noted that “The fact that tribes are not bound by the Constitution of the United States does not eliminate the duty to provide individuals within the Muscogee (Creek) Nation's jurisdiction a forum to redress individual rights.” *Id.* The Indian Civil Rights Act, in conjunction with the Constitution, ordinances, laws, and procedures of the Muscogee (Creek) Nation and its agencies and political subdivisions, guarantees specific individual rights, including an expectation that these laws will be followed to ensure that individuals receive due process and equal protection in a variety of circumstances. *Id.* Thus Indians and non-Indians may raise violations of ICRA in the Muscogee Creek Nation Courts.

The purpose of Indian Civil Rights Act is to impose upon Indian tribal governments restrictions applicable to federal and state governments as well as to protect individual rights of Indians, while fostering tribal self-government and cultural identity. Civil Rights Act of 1968, §§ 202, 203, 25 U.S.C.A. §§ 1302, 1303. *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079.

However, in the instant case Plaintiff's the enrollment process for citizenship into the Muscogee Creek Nations is unconstitutional because the Citizenship Board and its agents and the current Citizenship Code intentionally discriminate and deny citizenship to applicants of African/Creek descent whose ancestors are listed as “Freedmen” on the Final Rolls of 1906, thus denying Mr. Johnson his right to due process and equal protection and thus a violation under ICRA.

(3) The Enrollment Process Is Unconstitutional Under the Muscogee (Creek) Nation Constitution and the ICRA Because the Citizenship Board Applies

Unconstitutional Law With Discriminatory Intent and Discriminatory Motive Based On a Racial or National Origin Classification.

The enrollment process is unconstitutional under ICRA because the Citizenship Board and its agents apply unconstitutional law with discriminatory intent and motive based on a racial or national origin classification and disproportionately affects the applicants of African/Creek descent. Courts have long held that where a law appears to be neutral on its face but is applied differently in manner to different classes of person with discriminatory intent, such law is unconstitutional. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Whenever a state law infringes upon a constitutionally protected right, the United States Supreme Court undertakes an intensified and strict equal protection scrutiny of that law. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899, 40 Empl. Prac. Dec. (CCH) ¶36158 (1986), appeal after remand, 840 F.2d 162, 45 Empl. Prac. Dec. (CCH) ¶37822 (2d Cir. 1988), on remand to, 713 F. Supp. 677 (S.D.N.Y. 1989); *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980), reh'g denied, 448 U.S. 917, 101 S. Ct. 39, 65 L. Ed. 2d 1180 (1980). Thus, classifications which are suspect (such as those based on race or national origin), or aimed at fundamental interests, such as citizenship, must pass the strict scrutiny test to survive an equal protection challenge. Further, where legislation involving suspect classifications or touching on fundamental interests, judicial review under the Equal Protection Clause requires an active and critical analysis. *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) Under the strict standard applied in such cases, the state bears the additional burden of establishing that it has a compelling interest that justifies the law, and that the law or ordinance is narrowly

tailored such that there are no less restrictive means available to effectuate the desired end. *Donatelli v. Mitchell*, 2 F.3d 508 (3d Cir. 1993).

In *Duro v. Reina*, 860 F.2d 1463, the dissenting opinion of Kozinski, who was also joined by Judges Trott and Leavy, provided compelling commentary, noting that tribal governments may no more discriminate on the basis of race than may a state. *Cf. Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to "enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive"). The dissent noted that the distinction based on Indian status is not a racial classification because factors other than race are taken into account. 851 F.2d at 1144. While this may be true when the distinction is made by Congress, *United States v. Antelope*, 430 U.S. at 645, 97 S.Ct. at 1398, it is most definitely not true when the distinction is made by a tribe. A tribe is a government entity. See *Wheeler*, 435 U.S. at 322-23, 98 S.Ct. at 1085-86. A government entity may not avoid strict scrutiny of a policy that discriminates against blacks, for example, by arguing that race was only one of many considerations. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66, 97 S.Ct. 555, 562-63, 50 L.Ed.2d 450 (1977). See *id.*(racially discriminatory factor need not be sole or even dominant concern to invoke strict scrutiny).

As, previously discussed, at the time Plaintiff applied for citizenship into the Creek Nation, he provided the Board with pertinent and relevant documents establishing his lineal descent to a person on the final rolls pursuant to the Act of April 26, 1906, and that he was in fact "Creek by blood." However, the Citizenship Board automatically

denied descendants of persons on the Freedman Roll without any inquiry as to whether the applicant has Muscogee (Creek) Indian Blood. Although the ordinances may appear neutral on their faces, the law applied by Citizenship Board categorically denies an applicants citizenship simply because an ancestor appears on the "Freedman Roll," as instead of not having Muscogee Creek Blood. Such action by the Citizenship Board and its agents is unconstitutional. The classification and use of the Freedman Roll is based on race, not blood. It is commonly, known that the Freedmen Roll consists of citizens of African and Creek blood. Such classification based on race and use of the rolls by the Citizenship Board triggers strict scrutiny of law. Secondly, citizenship and all the fruits associated with it, such as voting (among others), are constitutionally protected interests. Thus the court should apply a strict standard. Furthermore, the Nation bears the additional burden of establishing that it has a compelling interest that justifies the law, and that the law or ordinance is narrowly tailored such that there are no less restrictive means available to effectuate the desired end. The Indian Civil Rights Act and its equal protection guarantee must be read against background of tribal sovereignty and interpreted within context of tribal law and customs. *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5 (D.C.N.M. 1975) Civil Rights Act of 1968, §§ 202, 202(8), 25 U.S.C.A. §§ 1302, 1302(8). Clearly there is not a compelling governmental interest in denying citizenship to African descendants of Muscogee (Creek) Indians, nor is the ordinance narrowly tailored that there are no less restrictive means available to effectuate the desired end. Thus, this court should find that the Citizenship Board denied Mr. Johnson's right equal protection under ICRA and such action by the Citizenship Board is unconstitutional.

(4) The Citizenship Board violated plaintiff's rights to due process under the Constitution and the Indian Civil Rights Act and are therefore unconstitutional.

The Citizenship Board violated Plaintiff's rights to due process under the constitution and the Indian Civil Rights Act and therefore acted unconstitutionally. As discussed above, tribal governments are bound to providing Indian and non-Indians rights to due process and equal protection under ICRA. The Indian Civil Rights Act of 1968 provides that "[n]o Indian tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law...." 25 U.S.C. § 1302(8). Although the terms "due process" and "equal protection" as used in Indian Bill of Rights are construed with due regard for historical, governmental and cultural values of Indian tribe, and such terms are not always given same meaning as they have come to represent under United States Constitution; *Tom v. Sutton*, 533 F.2d 1101 C.A.9 (Wash.) 1976 ; 25 U.S.C.A. § 1302(6, 8), the equal protection clause of the Indian Civil Rights Act requires that tribal law be applied with an even hand, rather than being arbitrarily enforced in some cases and not in others. Civil Rights Act of 1968, §§ 202, 202(8), 25 U.S.C.A. §§ 1302 *Two Hawk v. Rosebud Sioux Tribe*, 404 F.Supp. 1327 D.C.S.D.,1975.

As previously discussed, citizenship is a fundamental right that triggers strict scrutiny analysis. Thus the court should apply a strict standard. Furthermore, the Nation bears the additional burden of establishing that it has a compelling interest that justifies the law, and that the law or ordinance is narrowly tailored such that there are no less restrictive means available to effectuate the desired end. The Indian Civil Rights Act and its equal protection guarantee must be read against background of tribal sovereignty and interpreted within context of tribal law and customs. *Martinez v. Santa Clara Pueblo*, 402

F.Supp. 5 (D.C.N.M. 1975) Civil Rights Act of 1968, §§ 202, 202(8), 25 U.S.C.A. §§ 1302, 1302(8). Clearly there is not a compelling governmental interest in denying citizenship to African descendants of Muscogee (Creek) Indians, nor is the ordinance narrowly tailored that there are no less restrictive means available to effectuate the desired end. Thus, this court should find that the Citizenship Board denied Mr. Johnson's of his right to due process under ICRA and such action by the Citizenship Board is unconstitutional.

Furthermore, the Court should find that Plaintiff had a vested property right to citizenship under the procedures established by the Citizenship Code as it existed prior to August 23, 2001. Plaintiff began his attempts to acquire citizenship in the 1980's or 1990's – long before the enactment of NCA 01-135 and NCA 02-078. Such a right cannot be extinguished without due process of law – even by a legislative enactment. A nation's legislative body may not, without notice and an opportunity to be heard, legally enact a law that causes a citizen of that nation to lose his/her citizenship rights.

Courts traditionally employ a two-tiered analysis to resolve equal protection claims. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980). When a **legislative act** operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right, the upper tier or "strict scrutiny" standard is applied, requiring the government to demonstrate that the challenged statutory classification is necessary to promote a compelling governmental interest. *Town of Beech Mountain v. County of Watauga*, 378 S.E.2d 780, 783 (N.C. 1989). Under this standard, the government need only show that the challenged classification bears some rational relationship to a legitimate governmental interest. *Id.*

In determining the appropriate standard of review in this particular case, NCA 01-135 (now section 406) and 02-078 (now section 403.B.) of the Muscogee (Creek) Nation Citizenship Code Ordinance operates to the disadvantage of a suspect class, Creek Freedmen. The United States Supreme Court defines a suspect class as one which has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16, 40, reh'g denied, 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418 (1973). Clearly, the circumstances and status of Creek Freedmen establish that this group has a history of purposeful unequal treatment, and has been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Several courts have noted that when a legislative body enacts legislation that affects relatively few people, such people are entitled to basic due process including *individual notice* and an opportunity to be heard. *Holbrook, Inc. v. Clark County*, 49 P.3d 142 (Wash.App.Div.2,2002) (When one person, or relatively few people, are exceptionally affected by a legislative decision on individual grounds, then such persons may be entitled to basic due process rights, including individual notice); *See U.S. v. LULAC*, 793 F.2d 636 5th Cir. 1986)(An individual is entitled to notice and hearing before a state action deprives him of life, liberty, or property); *Richardson v. Town of Eastover*, 922 F.2d 1152 (4th Cir. 1991)(When rule adopted for general application applies only to small number of persons, its characterization as "legislative enactment" becomes suspect, for purpose of determining whether due process requires that affected

party be given notice and opportunity to be heard); *Conway v. Searles*, 954 F.Supp. 756 (Vt. 1997)(Due process claim is available when legislature deprives property rights with legislation targeted at particular individual or group of individuals, or that was adopted during course of legislative process that was somehow defective.)

In determining when the dictates of due process apply, however, there is little guidance in formalistic distinctions between "legislative" and "adjudicatory" or "administrative" government actions. *Harris v. County of Riverside*, 904 F.2d 497, 502 (9th Cir. 1990). As the Supreme Court impliedly recognized in *Londoner v. Denver*, 210 U.S. 373, 385, 28 S.Ct. 708, 713, 52 L.Ed. 1103 (1908), in which it held there was a right to a hearing when "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds," finding "that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid." *Id.* The Court found that the Due Process Clause of the U.S. Constitution required that, *before* the legislative action occurs, the affected group must have had notice and an opportunity to be heard. *Id.* (emphasis added)

In the present case NCA 01-135 (now section 406) and 02-078 (now section 403.B.) of the Muscogee (Creek) Nation Citizenship Code Ordinance operates to the disadvantage of a suspect class, the Creek Freedmen, because no individual notice or opportunity to be heard was afforded to them that their rights to citizenship, a fundamental right, would be affected and practically terminated. Thus NCA 01-135 (now section 406) and 02-078 (now section 403.B.) are unconstitutional and deprive Plaintiff due process.

(5) Impact of Unconstitutionality of NCA 01-135 and NCA 02-078

Regarding the impact of an unconstitutional ordinance on the present case, Plaintiff offers to the Court as persuasive authority the wisdom of the Oklahoma Supreme Court in dealing with unconstitutional legislative enactments. In *Morgan v. Daxon*, 49 P.3d 687, 701 (Okla. 2001), the Oklahoma Supreme Court recently stated:

“Generally speaking an unconstitutional law confers no rights, creates no liability, and affords no protection. *Oklahoma Education Ass’n, Inc. v. Nigh*, 642 P.2d 230, 239 (Okla. 1982). Consistent with this rule we have explained that the invalidity of an unconstitutional statute relates to the date of the statute’s enactment and not to some later date: ‘The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the Constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the Constitution.’ *State ex rel. Tharel v. Board of County Commissioners of Creek County*, 188 Okl. 184, 107 P.2d 542, 547 (1940), and quoting with approval from *State ex rel. Nuveen v. Greer*, 88 Fla. 249, 102 So. 739, 745 (1924).” *Ethics Commission of State of Okla. v. Cullison*, 1993 OK 37, 850 P.2d 1069.

Similar to the Oklahoma Supreme Court, this Court should rule that since NCA 01-135 and NCA 02-078 are unconstitutional, by operation of the Muscogee (Creek) Nation Constitution, they are void, and without force and effect ab initio. Therefore, Plaintiff’s application for citizenship should be reviewed for compliance with the Muscogee (Creek) Nation Citizenship Code as it existed prior to the adoption of NCA 01-135 and NCA 02-078.

D. Proposition 4: NCA 01-135 and NCA 02-078 are ultra vires acts of the Muscogee (Creek) Nation National Council, and are therefore null and void, and without force and effect. As a result, the Muscogee (Creek) Nation Citizenship Code as it existed prior to the enactment of NCA 01-135 and NCA 02-078 is currently the *only* effective citizenship code of the Muscogee (Creek) Nation, and all applications for citizenship – including Plaintiff’s application – must be reviewed for compliance with Muscogee (Creek) Nation Citizenship Code as it was existed prior to the enactment of NCA 01-135 and 02-078.

It is fundamental that the denationalization of a citizen by legislative enactment, in the absence of any form of renunciation of citizenship by the citizen, is so fundamentally unfair, so offensive and repugnant to basic human rights, that it is beyond the power of government. There is no legal precedent regarding this issue within the Muscogee (Creek) Nation's judicial opinions. However, the Muscogee (Creek) Nation Supreme Court has held that we should look to opinions of the United States federal courts as persuasive authority in matters regarding constitutional issues. *In the Matter of the Constitutionality of NCA-01-115*, 7 Okla. Trib. 366 (2002). A case practically on point is the United States Supreme Court case, *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590 (1958).

In *Trop*, the United States Supreme Court held that a Congressional enactment which authorized expatriation of a citizen was beyond the powers of Congress and hence unconstitutional. The *Trop* case involved a Congressional statute that deprived a person of his rights to citizenship for committing the most heinous of crimes against his nation, that of desertion at time of war. In that case, even in the face of Congress having a legitimate reason for punishing deserters, punishment by depriving a deserter of his citizenship -- one of his most fundamental rights -- was held to be unconstitutional as beyond the authority of Congress.

In the present case, the only "crime" committed by Plaintiff is having as an ancestor a citizen who happened to be listed on the Creek Freedman Roll. Although the contrast is striking between the facts underlying Plaintiff's denial of citizenship and the facts underlying the denial of citizenship in the *Trop* case, the difference supports Plaintiff's position. If the right to citizenship is so fundamental—so important -- that the

United States Congress cannot take it from a wartime deserter, then surely the Muscogee (Creek) National Council cannot take the right to citizenship from a person because of his race, national origin, or color.

As Chief Justice Earl Warren declared in *Trop*, *Id.* at 92:

It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show renunciation of citizenship. (Emphasis added.)

On the foregoing basis alone, the Chief Justice said, the summary judgment granted to the United States Government by the Court of Appeals for the Second Circuit, should be reversed.

But the United States Supreme Court went even further. The Court acknowledged, *Id.* at 94, that the law at issue in that case did provide the accused deserter “at least the safeguards of an adjudication of guilt by a court-martial” – a safeguard that is totally lacking in the Muscogee (Creek) National Council’s NCA 01-135 and NCA 02-078. Regardless of the existence of that due process safeguard in *Trop*, however -- and even assuming for purposes of argument that citizenship may be divested pursuant to some governmental power – the Supreme Court held that denationalization in and of itself was cruel and unusual punishment that is violative of the Eighth Amendment to the United States Constitution.

The Court’s opinion that denationalization is cruel and unusual punishment is instructive regarding the impact of NCA 01-135 and NCA 01-078 on Plaintiff and others similarly situated with regard to citizenship in the Muscogee (Creek) Nation. The Court stated (*Id.* at 101):

There may be involved [in denationalization] no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some right, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of every-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as a punishment for crime....

In effect, the Court concludes, denationalization is worse than death.

The United States Supreme Court also offers comments, appropriate to consider in the present case, regarding its judicial duties to defend the United States Constitution

(Id. at 103-4):

In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case.

Like the United States Supreme Court in the *Trop* case, this Court should grit its teeth, shoulder its burden, and fulfill its duty to protect the individual rights of Plaintiff under the Constitution of the Muscogee (Creek) Nation. The Court should hold that NCA 01-135 and NCA 02-078 are unconstitutional because they effectively deprive Plaintiff of his constitutional rights to citizenship in the Muscogee (Creek) Nation.

E. Proposition 5: Plaintiff's right to citizenship in the Muscogee (Creek) Nation is protected by the Creek Treaty of 1866.

(1) The Court has a duty to apply Article II of the 1866 Treaty and grant individuals enrolled as Freedmen by the Dawes Commission, and their descendents, the opportunity for citizenship with all the rights and privileges of other citizens within the Muscogee (Creek) Nation.

Pursuant to M.C.N.C.A. 1-103(A), this court must apply the “treaties between the Muscogee Nation and the United States.” One such treaty required to be enforced by this Court is the Treaty of 1866. Specifically, Article II of the Treaty of 1866 states in pertinent part:

Inasmuch as there are among the Creek many persons of African descent...it is stipulated that hereafter these persons, lawfully residing in said Creek Country, under their laws and usages, or who may return within one year from the ratification of this treaty...shall have and enjoy all the rights and privileges of native citizens...and the laws of said Nation shall be equally binding upon and give equal protection to all such persons. See. Treaty of June 14, 1866, (14. Stat. 785.).

Therefore, this Court has a duty to declare that the treaty rights of the so-called Freedmen pursuant to Art. II of the Treaty of 1866 must be recognized within the Muscogee (Creek) Nation.

This is not the first time this Court has been required to interpret the continuing viability of a provision from a Treaty signed during the 1800’s. In *Muscogee (Creek) Nation v. The American Tobacco Company*, 5 Okla. Trib. 401, this court cited and based its ultimate ruling on the fact that “the United States Supreme Court has developed canons of treaty construction to be applied when interpreting Indian treaties. The canons are sympathetic to the Indian, resolve ambiguities in favor of the Indians, and require that the language in an Indian treaty be understood today...as that same language was understood by the tribal representatives in the 1800s, when the treaty was negotiated.” *American Tobacco* at 10. In *American Tobacco*, Defendants, tobacco companies, challenged the Creek Nation’s ability to assert personal and subject matter jurisdiction by invoking a specific provision of the Creek Treaty of 1856. *Id* at 1. This Court, while finding against Defendants, held that the “specific treaty language Defendants wish to

invoke is inapplicable to the Defendants...[because] the then Muscogee (Creek) commissioners...did not have any earthly idea or understanding in August 1856 that 142 years later, present-day Defendant corporations would argue in a court of law that they were white persons under the Treaty of 1856.” Id. at 10.

In the case at bar, Plaintiff strongly urges this Court to follow its own precedent in the above-cited case, and rule that Article II of the Creek Treaty of 1866 is still valid because: 1) said article is not ambiguous; and 2) the language of Treaty is “understood today...as that same language was understood by the tribal representatives...when the treaty was negotiated.” Id. Therefore, all individuals enrolled as Creek Freedmen by the Dawes Commission and made final pursuant the Act of April 26, 1906 are entitled to full citizenship rights within the Muscogee (Creek) Nation.

(2) Article II of the Treaty of 1866 has not been abrogated by the Congress of the United States of America.

Plaintiff acknowledges that the powers of Native Nations (“Native”) like the Muscogee (Creek) Nation do and should have the inherent powers of any other sovereign around the world. Moreover, Plaintiff acknowledges the language of the court in *United States v. Wheeler*, 435 U.S. 313, 323 (1978), that “until Congress Acts, the tribes retain their existing sovereign powers.” Plaintiff urges the court to heed further language of the *Wheeler* court that highlights that the Supreme Court has consistently held “the sovereignty that the Indian tribes retain is of a *unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance...tribes possess those aspects of sovereignty not withdrawn by treaty or statute.*” (emphasis added) *Wheeler* at 323. So, the issue at hand is whether the citizenship rights of those persons of African

descent that were granted by the Treaty of 1866 are still valid. This ultimately is a question of treaty abrogation.

Any discussion of Indian treaty abrogation must first begin with *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). In *Lone Wolf*, the Court held that Congress pursuant to its plenary authority possesses “the power...to abrogate the provisions of an Indian treaty.” *Lone Wolf* at 558. Since *Lone Wolf*, the United States Supreme Court has consistently held that in reference to Indian treaties, “the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.” *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

Moreover, in the seminal case on Indian treaty abrogation, *United States v. Dion*, 476 U.S. 734, the U.S. Supreme Court established that there must be “clear and plain evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating the treaty.” *Dion* at 739-40. The *Dion* decision is consistent with the long settled tenet that treaty rights are too fundamental to be easily cast aside, and “absent explicit statutory language, [the courts] have been extremely reluctant to find “Congressional abrogation of treaty rights.” See *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979).⁷ Plaintiff contends that no

⁷ A long standing principle of Indian treaty law is that treaty right and protections belong not only to Native nations as nations, but also to the individual members of those nations. *United States v. Winans*, 198 U.S. 371, 381 (1905); *United States v. Dion*, 476 U.S. 734, 734. This is important because Freedmen were members of the nation before being summarily rejected and expelled, without notice, from the nation, and were therefore unable to challenge their prospective expulsion within the federal courts.

such “clear evidence” exists that could be construed to suggest that Congress intended to abrogate the Treaty of 1866.

Plaintiff anticipates that Defendant will cite the Federal Court’s holding in *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439., to argue that Article II of the Treaty of 1866 is abrogated. In *Hodel*, the court held that the Oklahoma Indian Welfare Act of 1936 (“OIWA”) repealed the Curtis Act of 1898, and allowed revived the Creek Nation’s tribal courts. *Hodel* at 1447. However, there are sharp distinctions between the case at bar and *Hodel*. Most notably, the Treaty of 1866 was a bilateral agreement negotiated and signed by two sovereign nations utilizing their executive and legislative governmental powers. On the other hand, the Curtis Act was an oppressive law that was unilaterally enacted without any input from the Creek Nation and which destroyed the Creek Nation’s tribal courts. As a result, for the Creek Nation to legally revive their courts, the Curtis Act had to be repealed. Next, the Federal court in *Harjo v. Kleppe*, 420 F.Supp. 1110, held that the executive and legislative powers of the Creeks had never been lost. Therefore, the Treaty provisions negotiated and signed by the Creek Nation’s executive and legislative branches never lost validity.⁸ As a result, the repealer clause the *Hodel* court relied on to repeal the Curtis Act would not have any applicability to Article II of the Treaty of 1866

(3) Federal Case Law and Policy Clearly Indicates that the Treaty Provisions Signed in 1866 Granting Freedmen Citizenship Rights Within the Five Tribes of Oklahoma Are Still the Supreme Law of the Land.

Plaintiff urges the Court to rely on its rational in *American Tobacco* in concluding

⁸ Title 27, § 1-103(A) of the M.C.N.C.A.. provides “In all cases, the Muscogee (Creek) Nation Court shall apply the Constitution and duly enacted laws of the Muscogee Nation, the common law of the Muscogee people as established by customs and usage, and the Treaties and Agreements between the Muscogee nation and the United States.”

that Article II of the Treaty of 1866 has not been abrogated. In *American Tobacco*, this Court reasoned that the defendant tobacco companies' reliance on federal cases to support their position that the applicable provision of the Treaty of 1856 was still binding upon the Creek Nation were not persuasive because said Federal cases "stopped short of addressing the...issues presently before the court." *American Tobacco* at ___. However, Plaintiff can cite specific federal cases and executive branch policy that have considered the very issue at bar --; the citizenship rights of Freedmen pursuant to post-Civil War Treaty of 1866 -- and concluded that such rights are still valid.

In *Seminole v. Norton*, 223 F. Supp.2d 122, the court recognized that it had a duty to uphold the Seminole Nation's right to self-determination and integrity. *Seminole* at 7. However, the court agreed with the Department of Interior ("DOI") and Judge Kollar-Kotelly finding in *Seminole v. Norton*, 206 F.R.D. 1 (D.D.C.), 2001("Seminole I") that the Seminole Treaty of 1866 "secures the rights of the [Seminole] Freedmen to be a part of the nation." *Seminole* at 134. The DOI's and the Federal court's continual recognition of the Seminole Freedmen's right to citizenship within the Seminole nation makes sense since the Seminole Treaty of 1866 has not expressly abrogated by Congress as required by *Dion*.

Likewise, it should be clear to this Court that because 1) the Seminole Treaty of 1866 and the Creek Treaty of 1866 contain identical language and meaning regarding the citizenship rights of Freedmen, and 2) Freedmen citizenship rights pursuant to the Seminole treaty of 1866 have not been abrogated according to DOI and the Federal courts, Article II of the Creek Treaty of 1866 must not have been abrogated, must still be

the supreme law of the land, and must therefore be enforced by this court pursuant to M.C.N.C.A. Title 27, § 1-103(A) .

In conclusion, the Creek Treaty of 1866 was signed by two sovereign governments on April 14, 1866. The Creek Nation recognizes and relies on the authority and scope of the 1866 Treaty. Article II of the 1866 Treaty provided that people of African descent, free or slave, living among the Creeks were to be adopted as full citizens. The Creek Nation now considers all persons of African descent that became citizens of the Creek Nation according to the Treaty of 1866 to be “Freedmen” as “pursuant to” or “as provided by” the Act of April 26, 1906. The Treaty has not been abrogated, and the citizenship rights of those protected by Art. II of the Treaty are still valid and protected by the supreme law of the land.

By continually allowing the Creek Nation to exclude Creek Freedmen and their descendents from participating as full citizens, with all rights and privileges that come with citizenship in the Creek Nation, this Court would be sanctioning the Creek Nation’s: 1) blatant disregard of its own Constitution, which requires that rights and privileges of individual citizens of the Muscogee (Creek) Nation in their trust relationship with the United States of America as members of federally recognized tribes not be abridged; 2) blatant disregard of its own ordinances, which require this Court to apply the treaty rights including the 1866 Treaty ; 3) blatant disregard of its Treaty responsibilities. It would also be setting a precedent of not fulfilling its obligation pursuant to the Treaty of 1866 – a dangerous precedent which will be noticed by its treaty partner, the United States of America.

By ruling that the Article II of the Treaty of 1866 is still valid, the Creek Nation will be protecting its own tribal interest because it will be supporting itself as a nation of laws and integrity because “a great nation, like a great man keeps it word.”⁹ Moreover, the Nation will strengthen other treaty rights and bilateral agreements (such as gambling compacts) against unilateral abrogation by entities looking to rid themselves of agreements and contracts with the Creek Nation. To rule against the validity of Article II of the Creek Treaty of 1866, the Creek Nation will be sending a strong message to local, state, and federal officials that it believes that bilateral, negotiated provisions of any contract (or treaty) can be breached at the whim or convenience of the breaching party.

Therefore, because of the legal and policy arguments stated herein, the Court should rule that all Creeks enrolled as Freedmen on the “final rolls” pursuant to the Act of April 26, 1906, as referenced by Sections 1, 2, and 3 of Article III of the Constitution and Section 3001 of the M.C.N.C.A., are entitled guaranteed full citizenship within the Muscogee (Creek) Nation pursuant to Article II of the Creek Treaty of 1866, and the Court should recognize its obligation to “apply Treaties between the Nation and the United States.” Further, the Court should rule that since Plaintiff can prove he is a lineal descendant of a person whose name appears on the Creek Freedmen roll, then pursuant to the explicit provisions of the Constitution of the Muscogee (Creek) Nation and the Treaty of 1866, Plaintiff is eligible for membership in the Muscogee (Creek) Nation.

IV. PROPOSED CONCLUSIONS OF LAW

1. Plaintiff was wrongfully denied citizenship by the Defendant. Plaintiff is entitled to citizenship in the Muscogee (Creek) Nation.

⁹ Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1916).

2. The Defendant violated and the Citizenship Code violates Plaintiff's Equal Protection rights under the Muscogee (Creek) Nation Constitution and the Indian Civil Rights Act of 1968.

3. The Defendant violated and the Citizenship Code violates Plaintiff's Substantive Due Process rights under the Muscogee (Creek) Nation Constitution and the Indian Civil Rights Act of 1968.

4. The Defendant violated and the Citizenship Code violates Plaintiff's Procedural Due Process rights under the Muscogee (Creek) Nation Constitution and the Indian Civil Rights Act of 1968.

5. The phrase "Muscogee (Creek) Indian[s] by blood in the Muscogee (Creek) Nation Constitution means a person[s] who has inherited genetic material from a Muscogee (Creek) Indian.

6. The phrase "final rolls prepared pursuant to [or provided by] the Act of April 26, 1906 (34 Stat. 137" in the Muscogee (Creek) Nation Constitution includes the Creek Freedman Roll.

7. Article II of the Creek Treaty of 1866 is controlling law and protects Plaintiff's right to citizenship in the Muscogee (Creek) Nation.


8. NCA 01-135 and NCA 02-078 are unconstitutional, and are therefore null void and with force and effect ab initio.

9. NCA 01-135 and NCA 02-078 are ultra vires legislative acts, and are therefore null void and with force and effect ab initio.

10. The Citizenship Code applicable to Plaintiff's case is that which existed prior to August 23, 2001.

10. The Citizenship Code applicable to Plaintiff's case is that which existed prior to August 23, 2001.

Respectfully submitted this 26th day of August, 2005.



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CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 26th day of August, 2005, I caused at true and correct copy of the foregoing to be hand-delivered to the following person or his office:

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