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## **Skip the Apologies and Pass the Justice: End Jim Crow in Indian Country**

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On June 18 the U.S. Senate passed Resolution 26, which apologized "for the enslavement and racial segregation of African-Americans" but precluded reparations. Rather than pass a disclaimer disguised as an apology for slavery, the U.S. Senate should instead end Congress' disparate treatment of Native American Freedmen: Jim Crow and the 'one-drop' rule are still alive and well in Indian Country.

President Obama's hands-off attitude only added to more than 100 years of discrimination against Freedmen. During his presidential campaign, he opposed the Black Congressional Caucus' attempt to withhold funding from the Cherokee Nation after they disenfranchised Cherokee Freedmen. He believed the courts were the better forum for deciding the rights of Cherokee Freedmen, not Congress. More recently, several Caucus members called on Attorney General Holder to investigate the Five Civilized Tribes' racial discrimination against Freedmen. Both sides are missing the point, that in 1896 Congress documented Indian ancestry on the Dawes Rolls in a racially discriminatory manner. The issue is neither one of blood quantum nor sovereignty, but Congress' duty to remedy the lasting harms they caused by violating Equal Protection.

The Dawes Rolls created a racial hierarchy between Native American Freedmen and

"by-bloods" by placing Freedmen at the bottom of the totem pole. Used for identifying land allotment eligibility under the Dawes Allotment Act, the Rolls were established consistent with the prevalent "one-drop" rule of the era. Just prior to Final Roll documentation, the U.S. Supreme Court affirmed the 'one drop' rule in 1896. Homer Plessy, who from all appearances was white, was arrested for sitting in the segregated "whites only" train section in Louisiana after identifying himself as having African ancestry. Initiated as a test case, the Court ruled he had to sit in the car designated for blacks, even though he only had 1/8th African ancestry.

The Rolls discriminated against Native Americans with African ancestry by merely identifying them as Freedmen, without bothering to identify their Indian ancestry. Native Americans with Caucasian ancestry were identified by blood quantum to 1/32nd degree of "Indian by Blood." This 'paper-bag' test for Native American identity reinforced the stigmatic badge of slavery against persons with African Ancestry. Freedmen challenged their segregation from 'Indians by Blood,' but in 1906 Congress barred the transfer of Freedmen to the 'by-Blood' rolls. Thus began a century of Freedmen litigation seeking equality with 'Indians-by-Blood,' who were unjustifiably granted the advantage of using the Dawes Rolls for documenting lineage.

Oklahoma codified the 'one-drop' rule into its constitution in 1907 when it was consolidated with Indian Territory and admitted as a state. The constitution applied "colored" or "negro" to "all persons of African descent." By contrast, being Indian was equated to being "White" by defining the term "white race" to include "all other persons." Public schools, hospitals, and even pay-phones were legally segregated until the constitution was amended in 1978.

Congress inflamed racial tensions by apportioning government benefits based on blood quantum rather than from treaties and historical context. In 1990 they excluded Seminole Freedmen from sharing in monies divided between Florida and Oklahoma Seminoles in the Seminole Indians Judgment Funds Act. The Act fractured relations between Oklahoman Seminole Freedmen and Seminole-by-Bloods, which ended with the BIA siding with tribal leaders in denying Freedmen their share of the award.

This treatment of Seminole Freedmen underscores the arbitrary racial character of the Dawes Rolls. Seminoles coalesced in Florida largely from escaped slaves and indigenous peoples disenchanted with Southern plantation system of slavery. Former slaves freely intermarried within Seminole society, shared African methods of crop cultivation, and fought shoulder to shoulder with their indigenous brethren under the most miserable conditions against American troops seeking their land. Congress recognized the integral role black slaves played in Seminole society by not mandating separate rolls for Seminole Freedmen as they had for the Cherokee, Chickasaw, Choctaw, and Creek. Yet the Seminole were nonetheless segregated consistent within the era's racial norms.

Ultimately, the issue is neither sovereignty nor blood, but a core conceptual premise of the Fourteenth Amendment. When the government creates a discriminatory harm because of race, be it Native American, or African American, or by creating a racial hierarchy between the two, they have a duty to repair the lasting effects of that harm. The harm becomes more insidious when inflicted on the two 'involuntary' minorities responsible for the birth and wealth of this nation.

Congress needs to skip the apologies and pass the justice. Rather than issue hollow palliatives, Congress can best facilitate the healing process between Freedmen and "by-Bloods" by reforming the law consistent with Equal Protection. First, the invidious racial discrimination of the Dawes Rolls must be repealed by granting Native American Freedmen full access to the same government benefits afforded to Native Americans 'by-blood'.

Second, Congress must remove the economics underlying the racial bias against Freedmen. Rather than burden tribes with unfunded mandates, Congress must proportionally increase tribal grants to reflect full Freedmen citizenship. Only then can traditional tribal values be rescued from a blood fetishism fueled by perverse incentives pitting one disadvantaged group against another.

There is a certain irony in the fact that our founding fathers were inspired by the color-blind, egalitarian values of indigenous Americans, yet Congress later legislated racial strife into the tribes in a way that persists to this day. The Dawes Rolls are but another vestige of slavery whose unlawful racial effects can be readily remedied by appropriate legislation. Congress can heal this rift by creating an incubator, rather than an incinerator, in which the human needs and aspirations of all Dawes Rolls descendants can be mutually recognized and empowered.

**BlackCommentator.com** Guest Commentator, Kevin James, is an attorney and former FDNY fire fighter and arson investigator. He lobbied for passage of New York State's historic fire-safe cigarette act, and was a Revson Fellow at Columbia University from 2002-2003. In 2005 he assisted the Center for Constitutional Rights with the Vulcan Society lawsuit against the New York City Fire Department as an Ella Baker law intern. [Click here to contact Mr. James.](#)



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