

Notes & Comments

“HAIL TO THE POTOMAC DRAINAGE BASIN INDIGENEOUS PERSONS” JUST DOESN’T HAVE THE SAME RING: IS THE NAME “REDSKINS” OFFENSIVE ENOUGH TO OUTWEIGH TRADITION?

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I. INTRODUCTION

As we approach the beginning of the 2006 pro football season, fans in our nation's capitol anxiously anticipate the next chapter in the rebirth of the Washington Redskins. Daniel Snyder, one of the brash, young dot.com millionaires of the late nineties, purchased the Redskins, one of the National Football League's most venerable franchises, in 1999.¹ Almost immediately, Snyder made his mark on the team, firing longtime employees and selling the naming rights of the stadium where the team plays its home games.² Instead of the stadium being named for longtime Redskins owner Jack Kent Cooke, it now bears the name of a leading overnight shipping company.³ Snyder immediately invested some of his millions into player acquisitions, investing close to \$40 million in signing bonuses⁴ in an attempt to win the Super Bowl, and to win it soon.⁵

As Snyder's aggressive efforts to win the Super Bowl bear fruit, protests over the inflammatory nature of the team's nickname are sure to bloom as well. For some Native

¹ *Snyder and company close deal, take over Redskins* (posted July 15, 1999, visited July 2, 2000) <http://sportsillustrated.cnn.com/football/nfl/news/1999/07/15/redskins_snyder/>. Snyder purchased the Washington Redskins on July 14, 1999 for \$800 million. He became, at age 34, the youngest majority owner in the NFL. At the time of the purchase, his only firm position was that the Redskins' name would be retained in spite of protests and objections from Native American groups.

² *Redskins move Casserly aside* (posted July 24, 1999, visited July 2, 2000) <<http://www.jsonline.com/packer/ap/jul99/ap-fbn-redskins-ca072499.asp>>. Despite public promises to the contrary, Snyder demoted the team's longtime General Manager just 10 days after completing the purchase. Additionally, he fired 25 employees after earlier promising to retain all employees who worked for the Redskins.

³ *Jack Kent Cooke Stadium to be no longer* (posted Aug. 18, 1999, visited July 2, 2000) <http://cbs.sports.com/u/ce/multi/0%2C1329%2C1266990_59%2C00.html>. See also Thomas Heath, *RFK's Mid-Life Crisis*, June 25, 2000, WASHINGTON POST at D1.

⁴ *NFL Notebook – Vikings, Bengals Hope Young Guns Can Pass Stress Tests; QBs Culpepper and Smith Will Be Given Keys To The Offense, But The Biggest Question Is: Can They Handle It?*, ST. LOUIS POST-DISPATCH, June 25, 2000, available in 2000 WL 3533467.

⁵ Curt Sylvester, *Skintight: Just win, right now* (posted Dec. 2, 1999, visited July 2, 2000) <http://www.freepress.com/sports/lions/skins2_19991202.htm>

Americans, the term “redskin” is as much an affront as the terms “nigger”, “spick”, or “kike” are to other socioeconomic groups.⁶ In a somewhat sarcastic bow to today’s heightened sense of political correctness, Gregg Easterbrook, a columnist for the NFL.com website, sardonically refers to the Redskins as the “Potomac Drainage Basin Indigeneous Persons”.⁷

Native Americans have recently made some headway in their attempts to force the franchise or the NFL to change the Redskins’ nickname, but have not yet succeeded. This article will examine the background of this problem and analyze the options available to Native Americans. It will further issue a call for Congress to honor its commitment to “protect” Native Americans by taking action to prohibit defamation of this kind.

II. BACKGROUND

A. Categories of Team Names – What is Potentially Offensive?

Critics will argue that the era of political correctness has gone too far when we begin to criticize team nicknames that have been in place for over 70 years. Moreover, as you will see, it is difficult to find a team nickname that can avoid potentially offending or disturbing someone.

Some team nicknames steer clear of offending any human groups. Animal names such as the Bears,⁸ Eagles,⁹ Hawks,¹⁰ and Orioles¹¹ could only be considered offensive to the most

⁶ *McBride v. Motor Vehicle Division of Utah State Tax Commission*, 977 P.2d 467, 468 (1999). Native American petitioners successfully appealed the issuance of vanity license plated bearing the word “Redskin” and variations on the word. They submitted various affidavits from Native Americans testifying that the term is offensive and derogatory to them personally. Also received into evidence were the results of a survey showing that over 72% of tribal leaders surveyed did not find the term “Washington Redskins” offensive. The Utah Supreme Court found that the Tax Commission here applied the wrong standard by evaluating the offensiveness of the term according to their own individual tastes or their view of the general public’s opinion. *Id.* at 471. Instead, the Tax Commission should have applied a reasonable person standard to the evaluation of the term “Redskin”. *Id.* at 472.

⁷ Gregg Easterbrook, *Everybody had a grade-A draft, right down to the hundredths of a second*, NFL.com, available at <http://www.nfl.com/nflnetwork/story/7286047>

⁸ The Chicago Bears are a franchise in the National Football League.

ardent of naturalists. Names inspired by nonliving objects also avoid criticism. Team names such as the Stars,¹² Jazz,¹³ Red Sox,¹⁴ and Heat¹⁵ rarely offend. Generally, nicknames that might be considered offensive fall into three categories.

One category of potentially offensive team nicknames is based upon the physical or regional characteristics of a certain group. For example, extraordinarily tall people might take offense at team names such as Giants¹⁶ or Titans¹⁷. Others might be offended by the name Yankees¹⁸ (based on lingering animosities originating with the Civil War), while numerous protests have occurred regarding the University of Mississippi's continued use of the name Rebels.¹⁹ Additionally, several women's teams have objected to use of names denoting the

⁹ The Philadelphia Eagles are a franchise in the National Football League.

¹⁰ The Atlanta Hawks franchise is a member of the National Basketball Association.

¹¹ The Baltimore Orioles are one of the member franchises of Major League Baseball.

¹² The Dallas Stars play in the National Hockey League.

¹³ The Utah Jazz is a franchise in the National Basketball Association.

¹⁴ The Boston Red Sox are members of Major League Baseball.

¹⁵ The Miami Heat play in the National Basketball Association.

¹⁶ The New York Giants are members of the National Football League; the San Francisco Giants are members of Major League Baseball.

¹⁷ The Tennessee Titans play in the National Football League.

¹⁸ The New York Yankees are members of Major League Baseball.

¹⁹ See Darrell Williams, *Ole Miss Should Break From Past*, NEW ORLEANS TIMES-PICAYUNE, Nov. 1, 1998 at C13, available in 1998 WL 16072873. The University of Mississippi not only uses the mascot name Rebels, but also has adopted the Confederate Flag as its symbol. While many of the school's students have protested these names and symbols based on their offensive propensities toward African-Americans, the school has been reluctant to change for fear of alienating alumni from the mid-1950's who provide considerable financial contributions to the school.

female composition of their teams, such as Alabama's use of the name Lady Tide.²⁰ As the age of political correctness evolves, examples like these that might be considered extreme today will become the focus of protests in the future as nicknames considered to be more objectionable are replaced.

Another potential area of controversy involves teams named after occupational groups. These groups have taken no offense, since use of the names Packers,²¹ Steelers,²² Cowboys,²³ and Brewers²⁴ are typically used to glorify these professions, rather than to demean them. This idea of glorification is precisely the same argument that proponents of "Redskins" use to justify their position²⁵, citing the pride with which they carry the name.²⁶ Is it possible, however, that a

²⁰ See *Gender-based nicknames draw opposition from women's teams*, FORT WORTH STAR-TELEGRAM, Mar. 28, 1993, available in 1993 WL 9258125. In 1987, the University of Alabama stopped referring to its women's athletic teams as the Lady Tide and began referring to them as the Crimson Tide, identical to the men's team.

²¹ The Green Bay Packers are members of the National Football League. Their name originated from the meat packing plant that was the chief employer in Green Bay, Wisconsin. Many of the team's players in the 1920's worked during the week at the plant.

²² The Pittsburgh Steelers play in the National Football League. Much like the Packers, the Steelers derive their name from the chief industry in the region (the Steel industry).

²³ The Dallas Cowboys are members of the National Football League. The name "Cowboys" was selected as the winner in a contest among fans of the expansion team and was inspired by the team's Texas location and its associated western affiliation, rather than the glorification of an occupational group (since there were few working Cowboys in Dallas at the team's inception in 1960).

²⁴ The Milwaukee Brewers are members of Major League Baseball. Similar to the Packers and Steelers, their name was inspired for one of Milwaukee's chief industries, the brewing industry.

²⁵ See Leonard Shapiro, *Offensive Penalty Is Called On 'Redskins': Native Americans Protest The Name*, WASHINGTON POST, Nov. 3, 1991 at D1. John Cooke, son of Redskins owner Jack Kent Cooke and team vice president, stated that the Redskin name has "come to represent the best of the culture—bravery, organization, the whole works. The name Redskins means football in Washington. We honor Native Americans. We believe that...[the Redskin name] represents the finest things in Indian culture."

²⁶ See Doug Grow, *The Way To Redskins Owner's Heart Is Through His Wallet*, MINNEAPOLIS STAR TRIBUNE, Sept. 11, 1992 at 3B. Jack Kent Cooke, at that time the owner of the Washington Redskins, responded to a 1988 letter from Phil St. John, leader of "Concerned American Indian Parents" by writing, "With some interest, and I must say some amazement, I read your letter. I can hardly conceive of this fine organization carrying any title other than the one it so proudly bears. I find it difficult to accept your statement that the name Redskins is racist, derogatory, and demeaning to American Indians. Basically, I want you to know that I'm totally out of sympathy with your project."

member of one of these professions (an employee at a meat packing plant, for example) might someday be offended that his or her profession is being associated with a sport known for its violence (and its numerous off-the-field problems)?²⁷

Thus far, the concern over nicknames based on racial or ethnic origin has focused on Native American nicknames.²⁸ However, other ethnic groups may have a legitimate gripe as well. Names like the Celtics and Vikings, combined with their use of stereotypical mascots, could easily be considered offensive to people of Irish and Nordic descent, respectively. Even one of the most hallowed of all college football programs, Notre Dame, could be considered culpable for its nickname, the Fighting Irish.

²⁷ *PETA has issues with Green Bay nickname* (posted June 26, 2000, visited July 2, 2000) <<http://espn.go.com/nfl/news/2000/0626/605330.html>>. In a letter to Green Bay Packers President Bob Harlan, PETA (People for the Ethical Treatment of Animals) vegetarian campaign coordinator Bruce Friedrich stated that the nickname Packers promotes “violence and bloodshed because it refers to meat packers, or those who work in slaughterhouses”. As an alternative, he suggested the team change its name to either “Pickers” or “Six-Packers” (in honor of Wisconsin’s brewing industry).

²⁸ Professional teams currently using Native American team nicknames include the Washington Redskins (football), Kansas City Chiefs (football), Atlanta Braves (baseball), Cleveland Indians (baseball), and the Chicago Blackhawks (hockey). The only remaining Division I college program still using a nickname related to Native Americans is the Florida State Seminoles, as several programs have changed their nicknames over the past two decades in response to the controversy.

B. Justifications, Value, and Economic Impact of Team Names

The financial value of team logos and mascots is a major source of team and league revenue. In 1990, for example, professional athletic licensing generated an estimated \$3.8 billion.²⁹ These significant revenues are not limited to the professional ranks, however. In 1989, collegiate licensing exceeded one billion dollars – more than double the total from just three years earlier.³⁰ Even though licensing revenues have fallen slightly in the wake of Michael Jordan's retirement and Major League Baseball's labor problems, retail sales of sports licensed products in 1999 totaled \$12.1 billion.³¹ As revenues from these products increase, owners can be expected to become more protective of these valuable symbols of their teams. The sacrifice of revenues and costs associated with name changes are often cited by sports executives as reasons to stay with existing team names that might be considered offensive.³²

C. Protests Over Team Names

Protests concerning Native American nicknames reached their zenith in the early 1990's. In 1991, activists from a variety of ethnic and racial groups participated in protests during the 1991 World Series featuring the Atlanta Braves.³³ These protests, organized by the American Indian Movement ("AIM"), attracted over 1,000 participants and generated substantial media

²⁹ Chuck Stogel, *Teams Logos Turning Into Gold*, SPORTING NEWS, Nov. 12, 1990, at 48.

³⁰ Gerald Eskenazi, *Sports Logos Now Symbols of Big Profits*, NEW YORK TIMES, June 19, 1989, at A1.

³¹ *Slump Continues, Though Baseball Trends Up*, THE LICENSING LETTER, March 6, 2000, available in 2000 WL 10436511.

³² See Raad Cawthorn, *Baseball Indians Receive Sympathy But No Promises*, ATLANTA CONSTITUTION, Nov. 22, 1991, at H8. The president of the Atlanta Braves cited business considerations as the reason that a name change would be detrimental to the franchise.

³³ *Id.*

exposure to the cause.³⁴ After brief discussions with representatives of the movement, officials of the Atlanta Braves announced that a “name change would be detrimental to the Braves’ organization because of ‘business considerations.’”³⁵

Undeterred, AIM took advantage of another opportunity for media exposure to the cause during the Super Bowl just three months later. About 3,000 protesters from groups such as AIM, the National Association for the Advancement of Colored People (“NAACP”), the Urban Coalition, and the National Organization for Women (“NOW”) demonstrated outside the Hubert H. Humphrey Metrodome in Minneapolis, Minnesota while the Washington Redskins played Super Bowl VVXI inside.³⁶ While this protest succeeded in calling attention to the problem of Native American nicknames, it did little to inspire action by the National Football League (“NFL”). NFL Commissioner Paul Tagliabue responded to the protests by remarking that while the league is sensitive to Native American objections to these names, the NFL does not believe that such names are demeaning.³⁷

While these protests have had little effect in persuading professional teams to be more sensitive toward Native Americans,³⁸ they have been much more successful in propelling

³⁴ *Id.*

³⁵ Raad Cawthorn, *Baseball Indians Receive Sympathy But No Promises*, ATLANTA CONSTITUTION, Nov. 22, 1991, at H8.

³⁶ Paul E. Loving, *Native American Team Names in Athletics: It’s Time to Trade These Marks*, 13 LOY. L.A. ENT. L.J. 1 (1992).

³⁷ Mike Freeman, *NFL Deadline for Plan B Slips to Mar. 1, NFLPA Says Move Is Political*, WASHINGTON POST, Jan. 25, 1992, at D7.

³⁸ See *Hail to the Redskins*, WASHINGTON POST, Jan. 20, 1984, at N7. As a response to Native American protests of the 1970s, the team changed the lyrics of the Washington Redskins’ fight song. The original lyrics included: “Scalp ‘em, swamp ‘em, we will take ‘em big score. Read ‘em, weep ‘em, touchdown, we want heap more!”. The new version replaced these lyrics with “Run or pass or score – we want a lot more! Beat ‘em, swamp ‘em, touchdown – let the points soar!”.

amateur sports and the media toward change. At least three major universities have responded to complaints of Native American student groups by changing their nicknames from “Indians” to less offensive alternatives.³⁹ In Minneapolis, the Concerned American Indian Parents were successful in convincing several local schools to change their names (based on Native American themes) and also influenced the local school board to adopt a policy that encouraged abandoning such names.⁴⁰ In 1988, the Michigan State Civil Rights Commission found that the use of Indian images in team logos and as mascots was “racist and discriminatory” and recommended that the practice be discontinued because its effect was “prevalent and destructive”.⁴¹ As a result of the Commission’s report, Eastern Michigan University also changed its Native American nickname.⁴²

Certain sectors of the media have responded to the use of these nicknames with protests of their own. The Oregonian⁴³ initiated the media participation in the movement by deciding to discontinue the use of any potentially offensive nicknames in its publication.⁴⁴ Washington radio station WTOP also stopped using the name Redskins for a six-month period in 1992.⁴⁵ Less than

³⁹ See Julia Kazaks, *North Dakota Alters Indian Mascot*, STANFORD DAILY, Oct. 27, 1987 at 6. In addition to North Dakota, both Stanford and Dartmouth have changed their nicknames.

⁴⁰ Dan Fields, *Notes On A Scorecard*, SPORTS ILLUSTRATED, Feb. 1, 1988, at 10.

⁴¹ MICHIGAN DEPARTMENT OF CIVIL RIGHTS, MICHIGAN CIVIL RIGHTS COMMISSION REPORT ON USE OF NICKNAME, LOGOS, AND MASCOTS DEPICTING NATIVE AMERICAN PEOPLE IN MICHIGAN EDUCATION INSTITUTIONS (1988) at 14. The Commission found that four of 52 colleges, 62 of 711 high schools, and 33 of 605 junior high schools had Native American team nicknames or logos.

⁴² *Id.* at 26, 29.

⁴³ The OREGONIAN is a daily newspaper published in Portland, Oregon.

⁴⁴ See William A. Hilliard, *To Our Readers*, OREGONIAN, Feb. 16, 1992, at D1. (“[T]hese names tend to perpetuate stereotypes that damage the dignity and self-respect of many people in our society and that this harm far transcends any innocent entertainment or promotional value these names may have.”)

⁴⁵ See Leonard Shapiro, *WTOP Won’t Say ‘Redskins’: Radio Station Heeds Native Americans’ Distaste*, WASHINGTON POST, March 15, 1992, at D1. Just six months later, the station (under new ownership) reversed its

two years after the Oregonian began its boycott of Native American nicknames, the Minneapolis Star Tribune decided not to use some offensive names as well.⁴⁶

In the wake of these isolated victories, Native Americans have recently turned to the courtroom in their efforts to eliminate the use of the term “Redskin” in professional sports. Native American claims for relief hinge on two important legal questions. First, it is important to consider whether the special “trust” relationship between Indian tribes and the federal government results in any special obligation for the United States to protect Native American rights, specifically regarding the use of such defamatory terms. Second, one must consider whether Native Americans are entitled to the same civil rights protections accorded ethnic groups that originated on foreign soil.

D. Why Is This The Federal Government’s Problem?

The government of the United States has a special responsibility to the sovereign Indian nations that reside within its borders. Early in the development of the U.S., the U.S. Supreme Court recognized and defined this special relationship in *Cherokee Nation v. Georgia*.⁴⁷ Though the Court was divided three ways (in a 2-2-2 split), Justice Marshall described the Cherokee Nation as a “domestic dependent nation”:

policy. See also Jeffery Yorke, *On The Dial—Skins, Namely, Back at WTOP*, WASHINGTON POST, Nov. 10, 1992, at C7.

⁴⁶ Tim J. McGuire & Julie Engebrecht, *To Our Readers*, MINNEAPOLIS STAR TRIBUNE, Feb. 5, 1994, at 2C. The newspaper agreed not to use the names Redskins, Redmen, Braves, Indians, Tribe and Chiefs in news stories. Instead, they agreed to use only the city names represented by those teams. The newspaper stated that they would not alter quotes or photographs to comply with this policy, but that they would strive to avoid using images of fans “mocking Native Americans”.

⁴⁷ 30 U.S. (5 Pet.) 1 (1831).

“They may, more correctly, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty of the United States, that any attempt to acquire their lands, or to form a political connexion [sic] with them, would be considered by all as an invasion of our territory, and an act of hostility”.⁴⁸

Thus, it appears from the opinion in *Cherokee Nation* that the United States has a duty and obligation to protect Indian tribes from threat of harm, either foreign or domestic. Certainly, the federal government has assumed this obligation repeatedly since *Cherokee Nation* in 1831.⁴⁹ While the federal government has not interceded to force the Washington Redskins to change their name, it has made some effort to diffuse this difficult and controversial problem.

In an attempt to persuade Redskins’ owner Jack Kent Cooke to voluntarily change the name, Senator Ben Nighthorse Campbell introduced the District of Columbia Stadium Act of 1993.⁵⁰ Senator Campbell’s bill would have authorized the construction and operation of a new stadium for the Redskins, built with federal funds.⁵¹ The Act also included a provision that would have prohibited the use of the stadium by teams with nicknames and trademarks which

⁴⁸ *Id.* at 17-18.

⁴⁹ See generally, *United States v. Creek Nation*, 295 U.S. 103 (1935); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379-80 (1st Cir. 1975).

⁵⁰ See generally S. REP. NO. 1207, 103d Cong., 1st Sess. (1993). At that time, the Redskins played their home games at RFK Stadium in Washington, D.C.

⁵¹ *Id.*

“exploited any racial or ethnic group”.⁵² Had this bill passed, it would have caused problems not only for the Redskins, but also the Kansas City Chiefs. Senator Campbell made a strong and impassioned argument for the bill’s approval in the Senate,⁵³ but the issue was rendered meaningless before the Senate had the opportunity to vote by Jack Kent Cooke’s decision to build a privately funded stadium in Maryland.⁵⁴ It was likely no coincidence that this new location was chosen in part because it was less likely to be affected by federal interference than a stadium located in the federally managed District of Columbia.

There are two general approaches available for use in attempts to compel the Redskins football club to change its name. As you will see, Native Americans have won their first skirmish applying the trademark approach, but may have achieved only a symbolic victory. The next step for Native Americans is to attempt the alternate method in the hope that the federal government will recognize its obligation under *Cherokee Nation* and assist in the effort to eradicate the defamatory Redskin name.

III. ANALYSIS

A. Two Approaches To Solving The Problem

⁵² *Id.*

⁵³ See 139 CONG. REC. S8493 (daily ed. July 1, 1993) When introducing the bill, Senator Campbell remarked: “As the only American Indian serving in Congress, I am disturbed that individuals, organizations, and groups continue to use terms and slogans that are disparaging and disrespectful to racial and ethnic groups. Although Native American people represent one of the smallest population groups, the contributions they have made to this country’s rich history have been significant...It disturbs me that today, these insensitive terms continue to be used freely...I will tell you that these practices are not only offensive to Indian people but they also perpetuate the stereotypes that society has of Indian people.”

⁵⁴ See Thomas Heath, *RFK’s Mid-Life Crisis*, June 25, 2000, WASHINGTON POST at D1.

Federal trademark law defines a trademark as “any word, name, symbol, or device” which is used to identify and distinguish goods from the goods of another.⁵⁵ The first federal statute to prohibit registration of marks based on their content was the 1905 Trade-mark Act.⁵⁶ Congress later enacted the Lanham Act of 1947,⁵⁷ which further defined offensive matter by forbidding trademarks which “consist of or comprise matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”⁵⁸ Once a trademark has been issued pursuant to the Lanham Act, it may be challenged by any third party that can show that the trademark was improperly issued under the Act.⁵⁹

On September 10, 1992, a group of Native Americans (hereinafter “NA”) took the first step toward cancellation of the Washington Redskins’ trademark by filing a Petition For Cancellation with the United States Patent and Trade Office (“USPTO”).⁶⁰ The petition was filed against Pro Football, Inc. (“PFI”), the corporate entity that owned the trademarks.⁶¹ The Petition claimed that the term “Redskins” is a “pejorative, derogatory, degrading, offensive,

⁵⁵ 15 U.S.C. § 1127 (1988).

⁵⁶ 15 U.S.C. § 85(a) (1905). “No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark – (a) Consists of or comprises immoral or scandalous matter”.

⁵⁷ 15 U.S.C. §§ 1051-1127 (1994 & Supp. IV 1998).

⁵⁸ 15 U.S.C. § 1052(a).

⁵⁹ 15 U.S.C. § 1064. Cancellation proceedings are typically held before the Trademark Trial and Appeals Board, which is a part of the Trademark Section of the United States Patent and Trademark Office. See also 15 U.S.C. § 1070.

⁶⁰ See *Harjo v. Pro Football, Inc.*, 30 U.S.P.Q.2d (BNA) 1828-29 (P.T.O. 1994). The petition sought to cancel not only the trademark of the “Washington Redskins”, but also “Redskins”, “Skins”, “Redskinettes”, “The Redskins & Design”, and “The Redskins” (with stylized letters).

⁶¹ *Id.*

scandalous, contemptuous, disparaging and racist designation for a Native American person.”⁶² Therefore, it violated 15 U.S.C. 1052(a).⁶³

PFI asserted a litany of defenses to the Petition.⁶⁴ NA responded with a motion to strike some of these defenses. Most intriguing among these were the defenses of lack of standing, laches, and equitable estoppel.⁶⁵ On March 11, 1994, the Trademark Trial and Appeal Board (“TTAB”) ruled on NA’s motion. The TTAB found that NA had standing, based on the fact that they had demonstrated a belief that the term was disparaging as applied to Native Americans. This belief comprised a personal interest by NA in the outcome of the proceeding and thus constituted standing.⁶⁶ The TTAB also dismissed PFI’s laches and equitable estoppel defenses, citing a compelling public interest that superseded the failure by any Native Americans to challenge the trademark during the decades since its registration.⁶⁷

A three-judge panel of the TTAB ordered the cancellation of federal registrations of the Washington Redskins on April 2, 1999.⁶⁸ The decision relied on testimony from various experts that the term “Redskin” was pejorative and on a survey that found that 46% of the general public found the term offensive.⁶⁹

⁶² *Id.* at 1829.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1830.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1831.

⁶⁸ *See Harjo v. Pro Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705 (P.T.O. 1999).

⁶⁹ *Id.* at 1732-34.

The victory may have been merely symbolic, however. The decision does not prevent the Redskins from using the trademarks; instead, it merely prevents the team from using federal law to prevent the unauthorized use of the trademarks.⁷⁰ Moreover, the decision does not take effect until the Redskins have exhausted their right to appeal.⁷¹ The team has stated that it will likely appeal the decision to the United States Court of Appeals.⁷² It remains to be seen, however, if the TTAB's decision will not only eliminate federal protection of the trademarks, but will eliminate common-law trademark protection as well.⁷³

Even if the federal government decides to intercede on behalf of Native Americans, its power is limited in the area of Patents and Trademarks. In fact, it could be argued that the finding of the TTAB (stripping the Redskins of federal trademark protection) is as strong a finding as that body can provide. In the wake of this decision and the Redskins' insistence on continuing to use the name, Native Americans must now turn to a different approach in their effort to persuade the Redskins football team to change its name.

A novel approach for Native Americans involves using Title II of the Civil Rights Act of 1964.⁷⁴ Title II provides that all persons enjoy the right to "full and equal enjoyment" of all places of public accommodation without regard to race, color, religion, or national origin.⁷⁵ The use of Native American nicknames denies full and equal enjoyment on the basis of race by

⁷⁰ See Brooke A. Masters, *Redskins Lose Right to Trademark Protection*, WASHINGTON POST, Apr. 3, 1999, at A1.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 42 U.S.C. § 2000a (1994).

⁷⁵ 42 U.S.C. § 2000a(a) (1994).

discouraging the patronage of Native Americans and creating unequal access to sports venues. Even if there is no discriminatory intent (as alleged by the Redskins' owners), Title II also prohibits unintentional discrimination.⁷⁶

To apply Title II, a nexus must be established between a team (in the present case the Redskins) and the stadium(s) in which it plays. Title II prohibits discrimination in “any motion picture house, theatre, concert hall, sports arena, stadium, or other place of exhibition or entertainment.”⁷⁷ The court has thus far applied a broad interpretation of what constitutes a public accommodation, holding that facilities such as swimming pools,⁷⁸ gymnasiums,⁷⁹ health clubs,⁸⁰ sports fields,⁸¹ and golf courses⁸² all can be considered closely connected to the organizations that operate them.

⁷⁶ See Note, *A Public Accommodations Challenge To The Use Of Indian Team Names And Mascots In Professional Sports*, 112 HARV. L. REV. 904, 913 (1999). No court has required a showing of discriminatory intent under Title II. The court in *Robinson v. Power Pizza, Inc.*, 993 F. Supp. 1462, 1465 (M.D. Fla. 1998), stated that a “lack of racial animus” is an insufficient defense to a Title II challenge, because plaintiffs “need not demonstrate discriminatory intent under a disparate impact theory”. See also *United States v. Gulf-State Theatres, Inc.*, 256 F. Supp. 549, 552 (N.D. Miss. 1966). Here, the court held that discrimination is prohibited by Title II “regardless of the presence or absence of racial prejudice in the minds of the defendants.”

⁷⁷ 42 U.S.C. § 2000a(b)(3) (1994).

⁷⁸ See Note, *A Public Accommodations Challenge To The Use Of Indian Team Names And Mascots In Professional Sports*, 112 HARV. L. REV. 904, 909 (1999) (citing *Smith v. YMCA*, 462 F.2d 634-48 (5th Cir. 1972)). The court held that the YMCA was a place of public accommodation, despite the fact that it offered such facilities for members only.

⁷⁹ *Smith v. YMCA*, 462 F.2d at 634-48.

⁸⁰ *Id.*

⁸¹ See Note, *A Public Accommodations Challenge To The Use Of Indian Team Names And Mascots In Professional Sports*, 112 HARV. L. REV. 904, 908 (1999) (citing *United States v. Slidell Youth Football Association*, 387 F. Supp. 474, 486 (E.D. La. 1974)). Here, the court held that a youth football league that operated a recreational facility was subject to Title II restrictions because the facility was a place of public accommodation.

⁸² See Note, *A Public Accommodations Challenge To The Use Of Indian Team Names And Mascots In Professional Sports*, 112 HARV. L. REV. 904, 913 (1999) (citing *Wesley v. City of Savannah*, 294 F. Supp. 698, 701-702 (S.D. Ga. 1969)). The court held that a private group sponsoring a golf tournament at a golf course generally open to the public was a violation of Title II's provisions against discrimination.

The key factor for this application of Title II is that the group (e.g., the Redskins) must be closely associated with a physical structure (e.g., a stadium). In contrast to the rulings cited previously, courts have held that the Boy Scouts of America are not subject to Title II restrictions because they do not have a link to any place of public accommodation;⁸³ instead, they conduct their meetings in churches, private homes, or outdoors.⁸⁴

In applying the “full and equal enjoyment” provisions of Title II, the court has consistently held that discrimination against patrons denies such enjoyment.⁸⁵ Moreover, the court has found that subjecting patrons to racial animus, even a single slur,⁸⁶ constitutes denial of “full and equal enjoyment”.⁸⁷

To be effective, a Title II challenge of the name “Redskins” must establish that the name is, in fact, a deterrent that effectively excludes Native Americans. A notable precedent for the premise that the offensive nature of a name is a deterrent is contained in the findings of the Rhode Island Human Rights Commission in *Urban League of Rhode Island v. Sambo’s of Rhode*

⁸³ See Note, *A Public Accommodations Challenge To The Use Of Indian Team Names And Mascots In Professional Sports*, 112 HARV. L. REV. 904, 913 (1999) (citing *Welsh v. Boy Scouts*, 993 F.2d 1267, 1269 (7th Cir. 1993)). The Seventh Circuit stated that Congress “never intended to include membership organizations that do not maintain a close connection to a structural facility.”

⁸⁴ *Welsh v. Boy Scouts*, 993 F.2d at 1275.

⁸⁵ See Note, *A Public Accommodations Challenge To The Use Of Indian Team Names And Mascots In Professional Sports*, 112 HARV. L. REV. 904, 911 (1999) (citing *Black v. Bonds*, 308 F. Supp. 774, 776 (S.D. Ala. 1969)). The court considered forms of discrimination in a restaurant, and found that regardless of whether “discrimination is embodied in an absolute denial of service, or a practice of ‘delayed service,’ is of little import, for both are equally condemned by the Civil Rights Act”.

⁸⁶ See *Jones v. City of Boston*, 783 F. Supp. 604, 605 (D. Mass. 1990). Use of the term “nigger” by a bartender when referring to the plaintiff constituted a showing of denial of equal access and, thus, a Title II violation, because the term “nigger” is “intimidating by its very nature”.

⁸⁷ See *King v. Greyhound Lines, Inc.*, 656 P.2d 349, 351 (Or. Ct. App. 1982). Here, the court found that a plaintiff was denied full and equal accommodations when he was attacked with racial slurs. The court further analogized that arguing otherwise would be akin to equating separate accommodations with equal accommodations.

Island [hereinafter *Urban League*].⁸⁸ The Commission found that the name “Sambo’s” had a strong negative impact on blacks and that its use violated the state public accommodations statute.⁸⁹ Thus, its use discouraged patronage by blacks and denied equal access to public accommodations.⁹⁰ Additionally, the magnitude of the protests described earlier in this paper offers additional evidence that substantial numbers of Native Americans (and other ethnic groups) are offended by the name “Redskins”.

Critics might contend that the application of Title II to team names swings the pendulum too far and would result in the elimination of all team names from sport. To the contrary, Title II protects only those groups classified by race, color, religion, or national origin. This would limit potentially affected team names to a select few. Applying the negative impact standard used in *Urban League* would restrict the team names potentially vulnerable to such a challenge to only two – the Washington Redskins and the Notre Dame Fighting Irish. Of these, opponents of Notre Dame’s team name would be hard pressed to show that substantial numbers of Irish descendants are offended by the name (especially in light of the school’s affiliation with the Catholic Church and the significant portion of Irish descendants who are Catholic as well).

B. But What About Free Speech?

Those who would oppose the application of Title II to the term “Redskins” would likely argue that the prohibition of such names impose on the owners’ First Amendment right to freedom of speech. It is likely, however, that courts would apply the doctrine of commercial

⁸⁸ File Nos. 79 PRA 074-06/06, 79 ERA 073-06/06, EEOC No. 011790461 (R.I. Commission for Human Rights 1981).

⁸⁹ *Id.* at 17-18.

⁹⁰ *Id.*

speech to the issue of team nicknames. The Supreme Court has determined that trade names are a type of commercial speech.⁹¹

To determine what comprises commercial speech, the government must apply the four-prong intermediate scrutiny test defined by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁹² First, the court must determine whether the First Amendment protects the speech in question.⁹³ Second, the government must demonstrate that it has a substantial interest in regulation.⁹⁴ Third, regulation must directly advance the government interest⁹⁵ and, fourth, the regulation must be designed to achieve the necessary regulatory result.⁹⁶ It is important to note that the proffered regulation does not have to be the least restrictive alternative available.⁹⁷

To assess the likelihood of protection for the “Redskin” name, the *Central Hudson* test should be applied. Does the First Amendment protect this form of speech? Speech that is intended to deceive the public rather than inform it, or speech related to illegal activity are forms of speech not protected under the First Amendment.⁹⁸ Since the use of the term “Redskins” by

⁹¹ See *Friedman v. Rogers*, 440 U.S. 1, 11 (1979). Here the Court held that once a trade name has been used for some time, it becomes a part of a commercial transaction.

⁹² 447 U.S. 557 (1980).

⁹³ *Id.* at 563-64.

⁹⁴ *Id.* at 564.

⁹⁵ *Id.*

⁹⁶ *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

⁹⁷ *Board of Trustees v. Fox*, 49 U.S. 469, 476 -81 (1989).

⁹⁸ *Central Hudson*, 447 U.S. at 563-64.

the football club is not used for deceptive purposes and is not illegal, the term is likely protected by the First Amendment.

Does the government have a substantial interest in regulation? It is here that the government's obligations under *Cherokee Nation* come into play. If, as Justice Marshall asserts, the United States has a responsibility to Indian tribes much like a guardian to his ward, it would seem likely that the federal government has a substantial interest in the regulation of the name "Redskins". Moreover, the government's interest in protecting public venues from discrimination would appear to be substantial (considering Title II) as well.

Does the regulation of the speech directly advance the government's interest? Regulation will not be applicable unless it provides more than "ineffective or remote support for the government purpose."⁹⁹ Cessation of the use of the name "Redskins" would not only promote improved relations between the federal government and the tribes, but it would provide "full and equal access" to sports venues across America that currently feature and promote the offensive term when the Redskins come to town.

Finally, would regulation (in this case, eradication) of the term achieve the necessary regulatory result? The Supreme Court has held that the remedy requires a "fit between the government interest that is not necessarily perfect, but reasonable."¹⁰⁰ Not only can it be argued that there is no reasonable alternative or remedy other than the cessation of use, but the National Football League has demonstrated in previous instances that mascot names may be changed not only at the owner's discretion,¹⁰¹ but may also be mandated by the league itself.¹⁰²

⁹⁹ *Id.* at 564.

¹⁰⁰ *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993).

¹⁰¹ See *Why Did The Houston Oilers Select "Titans" As Their New Nickname Upon Relocating To Tennessee*, ORLANDO SENTINEL, Jan. 29, 2000 at B8, available in 2000 WL 3575808.

Had the Redskins not availed themselves of federal trademark protection many years ago, the name “Redskins” would have been less likely to have been considered commercial speech and therefore not subject to the *Central Hudson* test. Thus, ironically enough, the Washington Redskins’ initial protection and commercial use of the Redskins’ trademark has become the basis upon which its owners are not entitled to First Amendment protection of the name.

C. Proposed Methods For The Federal Government To Honor Its Commitment

The federal government has leverage if it is inclined to assist in efforts to convince the Redskins to abandon the offensive name and symbol. Foremost among these is the use of future federal funding. Much like the government exercises its influence over school desegregation and high speed limits, the government could withhold federal funding and assistance for stadium projects designed for NFL teams. Even privately held facilities like that owned by the Redskins must depend on federal assistance in land acquisition, highway access and signage. Clearly, such efforts by the federal government would be considered no more than a hindrance (albeit a significant one). Actions like this, however, would serve as a “shot across the bow” of the NFL and the Redskins, providing ample warning of a potential federal action that would almost certainly inspire the NFL and the Redskins to reconsider this issue.

The National Football League has been involved in numerous federal lawsuits over the past three decades.¹⁰³ Most of these lawsuits have involved the potential for antitrust action by the federal government. Unlike Major League Baseball, the NFL does not enjoy an official

¹⁰² See Kathy Kudravi, *ANOTHER VIEW The names are different, but they’re still my Browns*, FORT WORTH STAR-TELEGRAM, Sept. 12, 1999, available in 1999 WL 23949050.

¹⁰³ See generally *Jones v. National Football League*, 515 U.S. 1137 (1995); *National Football League v. U.S. Football League*, 493 U.S. 1071 (1990); *National Football League v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984).

antitrust exemption provided by Congress.¹⁰⁴ Instead, the NFL has relied (in labor actions) on a nonstatutory labor exemption that shields the NFL from antitrust challenges so long as their relationship with the players union is based on a collective bargaining process.¹⁰⁵ The use of this exemption is purely discretionary by the court and could be refused for a variety of reasons, including discrimination (such as the use of the term “Redskins”).

Such an action would not be unprecedented. The Court recently held that the nonstatutory exemption did not apply in a case where a general contractor discriminated against nonunion firms when awarding subcontracts.¹⁰⁶ The Court based its decision on the anticompetitive effects of granting a claim for the exemption.¹⁰⁷ It seems likely that the Court would consider discrimination against Native Americans a sufficient basis for denial of the exemption as well. The challenge would be for Native American groups to justify intervention in an NFL labor action in order to argue this point.

One final significant obstacle remains in the Native American pursuit of eradication of the “Redskin” name. A substantial number of elected and appointed federal officials live in or near Washington, D.C. and support the Redskins. It is doubtful that many of these fans will be sympathetic to the offense taken by Native Americans unless they are forced to take a position publicly. Thus, any effort to invoke legal power to force change would need to be accompanied

¹⁰⁴ See *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). Major League Baseball, as recognized in this decision, is the only major professional sport to enjoy a federal antitrust exemption provided by Congress. While the NFL has often enjoyed preferential treatment in labor actions, *supra* note 104, it has yet to be accorded the same privileges as those granted to Major League Baseball.

¹⁰⁵ *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1048 (D.C. Cir. 1995).

¹⁰⁶ *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 621 (1975).

¹⁰⁷ *Id.*

by political action in the form of media exposure to the problem and public identification of those in power who are unwilling to act.

IV. CONCLUSION

Many will read this article and wonder if there are not more important battles to be fought against racial insensitivity. They will stand behind tradition and moderation and will make excuses for why Native Americans shouldn't be offended by the use of the term "Redskin".

Yet many of these same critics called for removal of the Confederate Flag from the South Carolina Capitol, calling the flag a symbol of hatred and racism.¹⁰⁸ The same sort of symbol flies across our televisions and sports pages every fall Sunday – only this time it represents the capitol of our entire nation, not just a single state. When the cost of change is small and the magnitude of the message conveyed so great, the choice appears obvious.

Moreover, the United States has a solemn obligation, borne of hundreds of treaties with the Indian nations, to protect Native Americans from those who would do them harm. Certainly, the federally sanctioned and endorsed use of a racial slur and offensive symbol is harmful to Native Americans. It is time for the United States to hold up its end of the bargain by using its power and influence to make the only proper use of the word "redskin" relate to potatoes, not pigskins.

¹⁰⁸ See Darrell Williams, *Coaches Get Behind Flag Proposal*, NEW ORLEANS TIMES-PICAYUNE, Jan. 21, 2000 at D7, available in 2000 WL 6532306. Notable basketball coaches supported the movement to remove the Confederate Flag as the South Carolina state flag and the movement to recognize the Dr. Martin Luther King, Jr. holiday.