1ST AMENDMENT AND OTHER CONCERNS ON APPEAL OF REDSKINS DECISION

There has been a lot of commotion over Wednesday's decision by the US Trademark Trial and Appeal Board to cancel several trademark registrations of the Washington Redskins originally recognized back in the 1960's by the United States Patent and Trademark Office (PTO). The full decision is here. It is quite long, detailed, and, at least facially, pretty compelling in its finding that the trademarks are "disparaging to Native Americans".

Before I go further, let me say that I agree with those who think Daniel Snyder and the Washington Professional Football Franchise should change their name. It may not be the most pressing issue in our society, but it is something for which the time has come. Josh Marshall posted his thoughts on this subject at Talking Points Memo, and I think he put it all in excellent perspective and I agree with his conclusions.

> The simple fact is we shouldn't be using whole peoples as mascots for sports teams. Whether or not Indians in America today find it offensive is almost beside the point. The fact that most do is just an extra reason to do away with the practice.
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> With all I've said, there's a part of me who feels like, 'We really can't have

> the Cleveland Indians anymore?' It feels like a loss – part of the landscape of American sports I'm attached to. But it's time.

Well said and, again, I agree. Josh's entire piece is not long and is worth a read.

That said, and as much as I would like to see the name changed, I have trepidation about the government forcing the issue through agency decisions on what is proper speech, and what is not.

Tradenames and trademarks are, by their nature, really public speech and, thus, at least where they interact with the government, should be entitled to First Amendment protection. Now First Amendment protection is never absolute, but it is presumptively extremely broad. Likewise, First Amendment protections are against governmental action restricting free speech, not necessarily against private persons or entities. If I refuse to listen to you or to print what you have to say, that would be censorship, but it is not First Amendment action. If I am the government and censor you, then that is a different matter and there is a First Amendment issue.

So, here, the TTAB has taken it upon itself to restrict, at least in some regards, the free expression of the Redskins, via refusal to extend the same protection offered other "acceptable" speech and they do so by obvious decree of a governmental entity. Now the TTAB decision made out a VERY thorough and facially compelling case for

"disparagement". But should the PTO, and likewise TTAB, be in the business of deciding what is and what is not acceptable speech? While I sympathize personally with the effort to get Snyder to change the name, I do have issue with the government being in the speech propriety business. I am not sure courts will agree with that position or not, but I think it is a quite

arguable point.

I am not the only one with this view. One of the greatest Constitutional voices of our time, and an unabashed liberal mind, Professor Erwin Chemerinsky. Here Erwin is quoted by Tony Mauro at the National Law Journal:

> "The difficult underlying question is the extent to which the First Amendment limits decisions of the U.S. Patent and Trademark Office," said Chemerinsky, dean of University of California, Irvine School of Law. "All grants of intellectual property, such as copyrights and trademarks, limit speech. But the court has been unwilling to use the First Amendment as a limit in this area."
> Nonetheless, Chemerinsky said, "This is different. This is the government making a decision on conferring a benefit based on the content of the speech. I think this raises a real basis for a First Amendment challenge."

Here is Professor Jonathan Turley in the Washington Post:

> When agencies engage in content-based speech regulation, it's more than the usual issue of "mission creep." As I've written before in these pages, agencies now represent something like a fourth branch in our government – an array of departments and offices that exercise responsibilities once dedicated exclusively to the judicial and legislative branches. Insulated from participatory politics and accountability, these agencies can shape political and social decision-making. To paraphrase Clausewitz, water, taxes and even trademarks appear to have become the continuation of politics by other means.

> What is needed is a new law returning these agencies to their core regulatory responsibilities and requiring speech neutrality in enforcement. We do not need faceless federal officials to become arbiters of our social controversies. There are valid objections to the Redskins name, but it is a public controversy that demands a public resolution, not a bureaucratic one.

Turley has quite a few tangents on which he attacks the TTAB decision, and his piece is worth the read for them.

And, batting cleanup Professor Eugene Volokh:

> My tentative view is that the general exclusion of marks that disparage persons, institutions, beliefs, or national symbols should be seen as unconstitutional. Trademark registration, I think, is a government benefit program open to a wide array of speakers with little quality judgment. Like other such programs (such as broadly available funding programs, tax exemptions, or access to government property), it should be seen as a form of "limited public forum," in which the government may impose content-based limits but not viewpoint-based ones. An exclusion of marks that disparage groups while allowing marks that praise those groups strikes me as viewpoint discrimination.

This is what I believe, and have been saying on Twitter since the decision was made public last Wednesday. This is also why I think there is a reasonable chance the decision is ultimately reversed on appeal. What the accurate odds are, I have no idea, but there is a very cognizable argument here.

There are two ways this will be viewed on appeal, the way the factual finding of "disparagement" is reviewed, and the way the ultimate conclusion of law as to "registrability" is viewed, and there are different standards of review for the two. The fairly recent, May 2014, case of *In Re: Pamela Gellar and Robert Spencer* provides the standard:

> The Board's factual findings are reviewed for substantial evidence, "while its ultimate conclusion as to registrability is reviewed de novo." *In re Fox*, 702 F.3d 633, 637 (Fed. Cir. 2012).

At first blush, you would think *Geller* is strong indication that the TTAB decision on Redskins will stand up on appeal, and strictly on the issue of "disparagement, it would be. But *Geller* does not touch the First Amendment argument.

The Federal Circuit, in complete dicta, discussed the First Amendment argument in the 1999 case of *Ritchie v. OJ Simpson*, and seemed to lean against recognizing it as controlling, but did not reach the merits in the least. And the Federal Circuit is a far different animal now than it was in 1999, not to mention the SCOTUS view on free speech, especially corporate, vastly different.

For this reason, I caution the real test on this lies not at the District or Federal Circuit Court of Appeals stage, but ultimately at the Supreme Court. And the Roberts Court has been dogged in protecting corporate free speech. Also keep in mind that the conservative majority on the Roberts Court, save for Clarence Thomas (who might as well be from his record) are all white ass honky men who are all long time residents of the Washington area and, undoubtedly, Redskins fans. I am sure you catch my drift here. Suffice it to say, it is effectively a new question, they are the ultimate law, and their view may not be yours.

Again, I have no idea how this goes, but I think it is a real and very substantive issue once this matter gets to federal court, and the TTAB did not particularly have the jurisdiction to even consider this, so this will be a new argument in federal court and not subject to any presumption against it because of the previous decision at the TTAB. This is what I was talking about on Twitter when I kept pestering people about "hey, what is the burden/standard of review on appeal". The answer was, and no one got this, a lot of the case will be considered *de novo*, which means the prior decision may mean little and end up of little to no moment.

That is obvious for issues and arguments that were not considered below by the PTO and TTAB, but also some that were. In fact, the way it will play out on the matters within yesterday's TTAB decision is that the factual findings below are reviewed for substantial evidence, and if found they will be upheld, but the ultimate conclusion as to registrability is reviewed *de novo*. And, keep in mind, "registrability" is the ultimate issue as to whether the "disparagement" finding precludes it. This is exactly where, and why, the First Amendment issue is going to be so critical.

It is a worthy issue for discussion, and resolution by the federal appellate courts. Remember, we don't have to approve of speech to protect it, indeed, the Constitution is about protecting that which the majority may, from time to time, not approve of or desire.