Proud Traditions: Reflections of a Lifelong Washington Redskins Fan on the Harjo Decisions & the use of Native American Names in Sports

By:

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> It is an abomination that Indians are still perceived by many as heathens and scalp hunters, which is still being helped to be a perpetuated thought due to these symbols and mascots, etc. Other groups of people would not wish their names desecrated in such a fashion. To use the Indian names in such a fashion is irreverent and hinders the cause of freedom that we still seek to attain.
>
> -Lone Eagle Eye, Blackfoot[2]

> It is my opinion that mascot and other uses of Native American tribe names, terms, etc., causes the world to acknowledge and respect us. The use of these Native American names for our weapons systems, mascots and products brings honor and recognition to Native Americans.
>
> -Mark Thornton, Cherokee[3]

Introduction

As the warmth of the sun's morning rays began to break through the cracks in my blinds, anticipation of the day's events startled me into a quick wake-up. On many of those Fall Sundays my father and I planned to watch our beloved Washington Redskins take the field. I lived for each of those days; my heart pounding with excitement during the time leading up to the game. I vividly remember watching my 'Skins wreak havoc up and down the field while the concrete stands of Robert F. Kennedy Stadium shook and seemingly swayed below my feet. I remember the slow ascent up the metro escalator crowded with scores of fans adorned in burgundy, gold, feathers, and face paint as if it were only yesterday. Moments later the sounds of drums and chants of "let's go Redskins" would grow louder as we disembarked onto the street platform. The short walk to the stadium, amid the throngs of fans and chortlings of street vendors, was filled with more chants. Young and old. Women and men. Black and White. It did not matter, all were dressed virtually the same, wearing "Native" headdresses of all sizes and forms that symbolized support for the beloved home team.

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[2] *American Indian Opinion Leaders: American Indian Mascots, Respectful Gesture or Negative Stereotypes*? IndianCountry.com, *at* http://www.allarm.org/articles/indiancountrytoday.html (last visited Nov. 20, 2004).

[3] *Id.*

The above is the context for my arguments in favor of and against removal of Native American names from sports. It is a context in which, absent any personal heritage, my thoughts are far removed from any association of the team with racial denigration toward any group or person, specifically, Native Americans. Moreover, in contemplation of anyone else, it would be exceedingly surprising for me to learn that most, if not all, of the remaining jubilant ticket holders was consciously aware that the feathers sticking out of their cap were offensive to members of a particular Indian tribe, if not the entire race of Native Americans. As such, I would be equally surprised by compliance with a request that fans cease dressing and acting like Indians, even if they were fully cognizant that the term "redskin(s)" is derogatory in nature.

Certainly, to those individuals not intensely passionate about a specific team or even sports in general, the change of a team name is simply just a change in the name. As well, many others recognize that the team remains the same irrespective of what they call themselves or whether they retain the symbolism of their sport's franchise. However, as a lifelong Redskins fan, it is difficult for me to agree with this hypothesis. From my standpoint, without Native American heritage or personal exposure to the derogatory use of the term "redskin(s)," it is difficult not to side with the team owners, particularly because the term "Redskins," as used in connection with the professional football team, evokes good memories from my childhood (as I am sure it does for countless others), of family togetherness and tradition. In contrast, the litany of injustices suffered by American Indians, including: genocide, forced removal from their homelands and a trail of broken treaties with the United States Government, provides a strong, if not overwhelming argument in favor of erasing Native American names and imagery from the American sports landscape.

Conflicting viewpoints and contrary perspectives are key reasons why the debate over the use of Native American names in sports continues and why the owners steadfastly oppose changing the name of their team. The support of loyal fans and staunch traditionalists provides owners with an additional reason to stay the course. Conversely, the viewpoints of Native Americans, along with the passionate opposition of the use of these names in sports by other groups, provide Native Americans with a reason to pursue further avenues of resolve.

As stated above, the debate over whether Native American names and their corresponding images should be used in sports is driven by divergent perspectives that are equally volatile in emotion. From the Native Americans' point of view, the ultimate goal is to disallow reference to Indian heritage in any form or manner that can be perceived as derogatory. This is directly in keeping with the historical tradition of Native Americans as being an intensely proud and passionate people. It is also in keeping with their understanding of the racial connotation engendered each time they are portrayed as being "on the warpath," and "whooping it up." The passion and pride inherent to Native Americans is a source of continued motivation toward the ultimate goal of complete removal of their names from sports. Ironically, driving the passion of many owners and sports' fans to retain Native American names in sports is the perceived notion that the use

of Native American names connotes honor and respect, thereby precluding any argument that there is any intent to injure or harm.

Indicative of the burning passion that underlies the desire to retain Native American names in sports is the reality that, in Washington, D.C., where the Redskins and politics are the two most important issues, the Redskins take top billing from September to December (and into January when the team is successful). As a result, the whoops and hollers from proponents of Native American names in sports are heard both within the halls of Congress as well as at the stadium, while the Native American's calls for political correctness simply fall on deaf ears. Here again, opponents of the retention of Native American names in sports simply note that, regardless of whatever honorable intentions may exist, the term "redskins" is nonetheless disparaging. The argument that the use of the term "redskin(s)" in association with the professional football team bears no ill-will or intent to disparage Native Americans is offered by the owners and other proponents of the retention of the name solely as a moral justification for the use of the term. The issue, from a public policy and potentially legal standpoint, is not whether the actors intended to offend Native Americans. Rather, the proper position for considering this issue is whether a group of people are actually offended. As will be discussed in the following cases, the more principled position should be that of Native Americans, not the general public. Therefore, while fans may argue that they do not intend to disparage Native Americans, the owners should keep in mind that Native Americans are driven to eradicate the use of their names in sports by the act of using their names, and not merely the intent underlying the use of their names in sports.

The United States has transformed into a society filled with affirmative action and political correctness, due in part to the Civil Rights movement of the mid to late-twentieth century. As such, the question of why team owners steadfastly refuse to alter the names of their teams, even if the team name is perceived as disparaging in the eyes of the people it purportedly honors, takes on added volatility. However, for Native Americans, this battle is more a battle to eliminate stereotypes of their people as "whooping savages" that lead to a continued perpetuation of Native American inferiority, than one of political correctness.

In performing research for this paper, there is no doubt in my mind that the term "redskin(s)" is offensive to at the least a minority of Native Americans as well as a share of the general population. In addition, it is apparent that for the first part of the last century the term "redskin(s)" was used as a derogatory term for Native Americans, much as "nigger" was used with respect to African Americans. The divergent perspectives previously discussed are at the heart of the conflict surrounding the issue of the use of Native American names in sports. The following pieces exemplify the divergent nature of the two perspectives. In the hearts and minds of Redskin's fans, the Redskin's fight song honors Native Americans because its use is designed simply to cheer on the home team. On the other hand, Native Americans see the use of the term "Redskin(s)" as derogatory due to the historical nature of the term, as shown below in the passage, "Redskin a Hate Word Defined."

Redskins Fight Song[4]

Hail to the Redskins! Hail Victory!

Braves on the Warpath! Fight for old

D.C.! Run or pass and score -- we want a

lot more! Beat 'em, Swamp 'em,

Touchdown! -- Let the Points soar! Fight

on, fight on 'Til you have won Sons of

Wash-ing-ton. Rah!, Rah!, Rah!

Hail to the Redskin! Hail Victory!

Braves on the Warpath!

Fight for old D.C.!

"Redskin" A Hate Word Defined:[5]

"Long ago when our people first met You gave us a name to express your hatred. That name was "REDSKINS". You viewed the "REDSKIN" as a big dumb animal. You slaughtered our children as you would slaughter the wolf. You skinned the bodies of our families and made leggings and tobacco pouches. You turned in the REDSKIN of the Native American for bounty. Yes, you took away our religion, and you said, "What animal understands a higher power?" You confined us to areas because the modern man keeps animals in a game reserve. It was your game, your sport and your joy. When we hear and read the name REDSKIN, we remember the past. This is the modern day, the dawn of the 21st century, but as Human Beings, we see you have no respect for us in the present. We are not allowed to move freely or to be free from your words of hate. We are treated like you treat the animals, "Stay out of sight and keep quiet REDSKIN, and you can have your life". A REDSKIN

[4] *Redskins Fight Song, at* http://www.thehogs.net/History/fightSong.php (The original lyrics of the song were as follows, with removed lyrics in bold: Hail to the Redskins! Hail Victory! Braves on the Warpath! Fight for old **Dixie**! Run or pass and score -- we want a lot more! **Scalp 'em,** swamp 'em -- **We will take 'em big score Read'em, weep 'em, touchdown - we want heap more** Fight on, Fight on -- 'Till you have won Sons of Wash-ing-ton. Rah!, Rah!, Rah!) (last visited Nov. 20, 2004)

[5] *Redskins, A Hate Word Defined, at* http://www.iwchildren.org/redskinhate.htm (last visited Nov. 20, 2004).

In its original form, the Redskin's fight song evoked derogatory images of Native Americans, which Native Americans argue continue to stigmatize them today. Looking at the original lyrics it is easy to see that Native Americans were viewed as savages in the Redskins early years. Yet over time, the original words were lost through revision and a new meaning was forged through many hard fought battles on the football field. Of course, this does not take away the significance of the original lyrics and adds more fuel to the fire on the derogatory nature of the term "redskin(s)" as used in a professional sports context. Can erasing the words "scalp em'" really erase the memories of the original intentions of the creator of the fight song? Does taking the patently offensive words away make the song less offensive? It does not appear as though a mild cleansing of a racially offensive song would appease Native Americans as many of us would like to believe. However, of note, no mention was made of the original song lyrics as an indication of the derogatory nature either in the Trademark Board case or in the District Court.

As a regular attendee of Redskins games, I have witnessed many occasions in which Redskins fans use the song to cheer on the home team after every score. In this context, it is difficult to perceive the use of the song as denoting any meaning other than honor and respect. Clearly, in the context of a celebratory response to a touchdown, "Hail to the Redskins," carries no purposeful, disparaging use of the word "redskin." However, it is hard to ignore the original lyrics of the song and disagree with the Native American point of view. The phrase "scalp em'" leads directly into the argument against the use of the term "redskin(s)" in sports and the article, "*Redskin's a Hate Word Defined*," provides further explanation as to the reason why Native Americans are opposed to the use of the term, in sports or anywhere. The problem, perhaps, is that the majority of people outside of Native Americans do not understand the derivation of the term "Redskin(s)," or that it symbolizes and carries many painful memories of past injustices. Without such an understanding, generations of Americans will continue to receive a skewed, limited perspective of the ill treatment received by our indigenous peoples. Surely in our society it cannot be expected that the history books our children read will contain information regarding the use of Native American skins as "leggings and tobacco pouches." Unless more is done to educate the general population regarding the derivation of the term, acceptance of the Native American position that the term "redskin(s)" is derogatory when used in any fashion is likely to be rejected. Although ignorance of the racist origins of the term does not indicate that the term is not offensive, the fact remains that the general population will not condemn something that it does not understand, nor perceive as being racially motivated.

An appropriate manner in which to begin a discussion of whether Native American names and the corresponding images are derogatory is through an examination of the history of two team names, Washington Redskins and Cleveland Indians. This section offers evidence on both sides of the issue of whether Native American names and the corresponding images are derogatory in nature. Subsequently, the most current approach to removing Native American names from sports, Section 2(a) of the

Trademark Act, also known as the Lanham Act will be analyzed.[4] The analysis includes a summary of the recent decision, *Pro-Football, Inc.* v. *Harjo*[5] (*Harjo II*), and its predecessor case, *Harjo v. Pro-Football Inc.* (*Harjo I*).[6] This leads into an introspective look into the potential long-term ramifications of the recent decision on future lawsuits under the Lanham Act. Finally, although Native Americans are an under-represented and under-financed minority, the conclusion is reached that Native Americans nevertheless need to pursue a solution to this issue through the legislature, rather than the judiciary.

History of Team Names

Washington Redskins

One of the most storied franchises in the National Football League (NFL) history, the Washington Redskins did not originate in the District of Columbia. In actuality, George Preston Marshall purchased a then-inactive Boston NFL franchise that played on the same field as the then-active National League Baseball team known as the Boston Braves.[7] To prevent the obvious confusion between the two teams, Marshall officially changed the name of the franchise from the "Boston Braves" to the "Boston Redskins."[8] Further, it is said that Mr. Marshall renamed the team the "Redskins" in honor of the team's Native American head coach, William "Lone Star" Dietz.[9] Several years later, when the team relocated to Washington, D.C., the Washington Redskins were created.[10]

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[4] The Trademark (Lanham) Act, 15 U.S.C. §1052 provides: "no trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it--

> (a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which **may disparage** or falsely suggest a connection with persons, living or dead, institutions, beliefs, or **national symbols**, or bring them into **contempt**, or **disrepute**; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 2(9) of the Uruguay Round Agreements Act) enters into force with respect to the United States. (emphasis added).

[5] *Pro-Football, Inc., v. Harjo*, 284 F. Supp. 2d 96 (D.D.C., 2003) [hereinafter *Harjo II*)
[6] *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705 (TTAB, 1999) [hereinafter *Harjo I*]
[7] *Harjo II*, 284 F. Supp. 2d at 104.
[8] *Id.*
[9] *Id*.
[10] The two images depicted in this footnote provide support for the opponents of removing Native American names from sport. One of the main arguments in favor of keeping the names and associated logos is that they are not used for the purpose of insulting or discriminating against, but rather in honor of Native Americans. The first picture below is of William "Lone Star" Dietz, the coach mentioned above, who the original owner of the present day Washington Redskins named his team after. The second image is the current logo of the Washington Redskins. These two images bear a striking resemblance and bolster arguments that the logo honors, rather than discriminates against Native Americans.

As a matter of record, there is no existing evidence that Marshall named the Redskins for exploitative purposes (like the Cleveland Indians, discussed *infra*) or with racial animus. Of course, while this may appear admirable, the essential question is not whether the name Redskins is intended to disparage, but rather whether the term in any use is disparaging to Native Americans.

Cleveland Indians

Similar to the history of the Redskins, the Indians claim the origin of their team name is traced to a decision to honor a Native American, specifically Louis Sockalexis, the first American Indian to play in the major leagues.[11] In recent years, some researchers have called this long-believed story into question. [12] One such rebuttal of the Cleveland Indians' claim is noted in the book, "*An Act of Honor or Exploitation?: The Cleveland Indians' Use of the Louis Francis Sockalexis Story*." In the book, author Ellen J. Staurowsky argues that the name "Indians" "and its attendant logos, were more likely chosen for exploitative purposes."[13] This contention fuels the debate over whether the images associated with team names are disparaging to Native Americans. The claim is supported by the use of "Chief Wahoo," a caricature first portrayed in the local newspaper, the *Cleveland Plain Dealer* in the 1940's.[14] Team owner Bill Veeck

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William "Lone Star" Dietz

Current Washington Redskins team logo.

[11] There are conflicting reports as to whether the team in fact was named after Sockalexis for admiration purposes or otherwise. One version opined the following: "actually calling the team "Indians" was done to disrespect Sockalexis, and served to ridicule him in city after city the team played in." *at*, http://www.jerrydj.com/Racism/sockalexis/ (last visited Nov. 20, 2004). Further evidence that the team was named Indians for all of the wrong reasons is the following excerpt: "Tapping into a public consciousness that still remembered the Indian Wars of the 1870s, spectators for opposing teams were reported to have showered racial slurs and invectives on the Penobscot Indian when he stepped to the plate. Fans imitated war whoops and war dances when Sockalexis came to town. He was **exploited** by those who had a business interest in baseball (i.e., the club owners and the press) and who, aware of the public's great curiosity in Sockalexis, cultivated his Indian image for the purpose of selling tickets and newspapers." *The Story of Louis Sockalexis*, The Baseball Reliquary, Inc., *at* http://www.baseballreliquary.org/story_of_sockalexis.htm (last visited Nov. 20, 2004).

[12] *Id.*

[13] *Id.* (1998 SOC of SPORT J.)

[14] *Indian Mascots, Symbols, and Names in Sports: A Brief History of the Controversy*, *at* http://www.humboldt.edu/~go1/kellogg/mascots.html (Nov. 20, 2004).

subsequently placed the caricature on the team's caps in 1951, and on the team's jerseys from 1952 on.[15] Chief Wahoo is seen as a grinning, buffoonish abomination and the negative image the character projects is the reason Native Americans object to its use. James Fenelon, a Dakota academician, describes Chief Wahoo as an "unambiguous racial icon meant to symbolize stereotypical and usually negative images of Native people as 'wild' but 'friendly' savages.[16] In contrast, although it is said that the Redskins logo portrays Indians in a stoic and honorable manner, the heroic depiction is seen as irrelevant by opponents of the retention of Native American names (and images) in sport. This makes a strong argument for the point that Native Americans object to the overall use of their names and associated images, not just the manner in which the names were adopted or subsequently used.

Harjo I: *Harjo v. Pro Football, Inc.* - Decision of the Trademark Trial and Appeal Board

In 1992, Suzan Shown Harjo and six other Native Americans filed a petition with the U.S. Department of Commerce's Patent and Trademark Office in an effort to compel cancellation of the registered marks owned by Pro-Football, Inc., which controls the Washington Redskins. A case of first impression for the Trademark Trial and Appeal Board (Board), Harjo filed a petition claiming that the registration of the marks violated section 2(a) of the Lanham Act.[17] In part, the complaint consisted of the following:

> …petitioners assert that the word "redskin(s)" or a form of that word appears in the mark in each of the registrations sought to be cancelled; that the word "redskin(s) was is a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person" that the marks in Registration Nos. 986,668 and 987,127 "also include additional matter that, in the context used by registrant is offensive, disparaging and scandalous"; and that registrant's use of the marks in the identified registrations "offends" petitions and other Native American….further, that the marks in the identified registrations "consist of or comprise matter which disparages Native American persons, and brings them into contempt, ridicule, and disrepute" and "consists of or comprise scandalous matter."

Harjo I, 50 U.S.P.Q.2d at 4.

Further, in an effort to gain protection from the federal government, the petitioners asserted that in order to determine the section 2(a) issues raised in this case, the Board should apply the Indian Trust Doctrine.[18] In determining whether a trust

[15] *Harjo I*, 50 U.S.P.Q.2d at 5.
[16] *Id*.
[17] *Id.* at 3.
[18] *Id*. at 13-14. In layman's terms, the Indian Trust Doctrine means that the U.S. Government owes a fiduciary obligation to protect the interests of its Indian wards. (The Trust Doctrine evolved from Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). In the case, which involved an action to enjoin enforcement of state laws on lands guaranteed to the Cherokee Nation by

obligation existed, the opinions in *Mitchell v. United States*, 445 U.S. 535 (1980), and *Mitchell v. United States*, 463 U.S. 206 (1983) served as guiding principles for the Board.[19] Further, a litany of cases including *Jones v. Meehan*, 175 U.S. 1, 10-11 (1989), *Choate v. Trapp*, 224 U.S. 665 (1912), and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) stand for the proposition that as a "corollary to the trust doctrine…the meaning of certain treaties, agreements, statutes and administrative regulations must be construed favorably to the Indians.[20] In support of this line of cases, the Supreme Court recognized that "statutes passed for the benefit of the Indians are to be liberally construed, and all doubts are to be resolved in their favor."[21] As a matter of first impression in relation to the Trademark Act, the Board found the Indian trust doctrine inapplicable to this case.[22] Specifically, the Board found "no basis for petitioners' contention that the trust relationship applies even in the context of a statute, such as the Trademark Act, that has broad application to both Native Americans and non-Native Americans. Following the preliminary matter of whether the Indian trust doctrine applied to the case before it, the Board undertook a legal analysis of the section 2(a) grounds asserted. The Board phrased the question as, "whether, under the Section 2(a) grounds asserted, the service marks that are the subjects of the six registrations in this proceeding shall remain registered."[23]

In its decision, the Board determined three issues: "whether the registrations (1) consist of or comprise matter which disparages Native American persons, (2) brings them into contempt, ridicule, and disrepute" or, (3) "consists of or comprises scandalous matter."[24] On the first issue, disparagement, the Board used a two-step process to come to its conclusion.[25] "First, what is the meaning of the matter in question as it appears in the marks, and as those marks are used in connection with the services identified in the registrations?"[26] Second, is this meaning one that may disparage Native Americans?[27] In determining the answers to these questions, the board emphasized that the relevant time period for analysis was the date of the initial registration of the marks.[28]

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treaties, Chief Justice Marshall observed that Indian Tribes, rather than being foreign states, "may, more correctly, perhaps, be denominated domestic dependent nations…in a state of pupilage, "and concluded, "their relation to the United States resembles that of a ward to his guardian.")

[19] *Harjo I*, 50 U.S.P.Q.2d at 16. These cases require consideration of (a) the underlying statutes, agreements, treaties or executive orders, (b) actual supervision over the property or rights in question and (c) the elements of a common law trust.)

[20] *Id.* at 18.

[21] *Id*. (citing *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976).

[22] *Id*. at 20.

[23] *Id* at 124.

[24] *Id.* at 124-56.

[25] *Id*. at 125.

[26] *Id*. at 125-32.

[27] *Id.* at 132-53.

[28] *Id*. at 124.

Meaning of the Matter in Question

To answer the first question, the Board began by examining the meaning of the word "redskin."[29] Evidence submitted by experts from both sides brought forth a plethora of differing meanings for the term. The Board found that, throughout this century, particularly from the 1960s to the present, the evidence in the record established the denotative meaning of the term "redskin(s)" in respect to Native Americans.[30] The Board found that the evidence establishes that "redskin(s) has remained a denotative term for Native Americans throughout this century, in particular, from the 1960s to the present."[31] Seizing on the respondent's contention that all professional teams have themes that are carried through in their logos, mascots, etc., the Board opined that it would be both "factually incomplete and disingenuous to ignore the substantial evidence of Native American imagery used by respondent, as well as by the media and respondent's fans, in connection with respondent's football team and its entertainment services" when determining the meaning of the term "redskin."[32] As such, the Board dismissed the respondents' argument that the term "redskin(s)" no longer carried a connotative meaning and simply denoted the professional football team the Washington Redskins.[33]

Whether the Matter in Question May Disparage Native Americans

The second part of the Board's analysis was determining whether the term "redskin(s)" disparages Native Americans. The Board considered a wide spectrum of evidence in determining this question by reference to the perceptions of Native Americans, not the general public.[34] Specifically, the Board looked to evidence "regarding the views of the relevant group, the connotations of the subject matter in question, the relationship between that matter and the other elements that make up the marks, and the manner in which the marks appear and are used in the marketplace."[35] Reaching a conclusion on the "cumulative effect of the entire record," the Board determined that:

> have petitioners clearly established ,by at least a preponderance of the evidence, that, as of the dates the challenged registrations issued, the word "'redskin(s),"' as it appears in respondent's marks in those registrations and as used in connection

[29] *Id.* at 125.
[30] *Harjo I*, 50 U.S.P.Q.2d at 125.
[31] *Id.*at 126. (Conversely, respondents argue that ""Redskins "has become "denotative of the professional football team"; and that although "deriving from the original, ethnic meaning of 'redskin,' the word "redskin(s)" was perceived in 1967 (the date of the first registration), and today, to be a distinct word, entirely separate from 'redskin' and the core, ethnic meaning embodied by that term.")
[32] *Id* at 128-29.
[33] *Id*. at 129-30.
[34] *Id*. at 132.
[35] *Id*. at 133.

with the identified services, **may disparage** Native Americans, as perceived by a substantial composite of Native Americans. (emphasis added).

Harjo I, 50 U.S.P.Q.2d at 135-36 (emphasis added)

In reaching its conclusion, the Board first looked at dictionary definitions of the word "redskin(s)" between 1966 and 1996, which were included in the record.[36] Surprisingly, the petitioners did not present any evidence of what the word "redskin" meant to people of Native American descent, instead relying on current dictionary definitions.[37] Approximately half of the definitions included a "usage label" indicating that "redskin(s)" is offensive slang and/or disparaging.[38] From this evidence, the board opined that a "not insignificant number of Americans have understood "redskin(s)" to be an offensive reference to Native Americans since at least 1966.[39]

Second, the Board took into account the historical documents containing the term "redskin(s)".[40] At the last part of the 19th century and the first part of the 20th century, the majority of sources (newspaper, magazines) portrayed Native Americans in a derogatory and/or negative manner.[41] The Board concedes and the parties agree that over the course of time, the word 'redskin(s)' began to fade as a reference to Native Americans.[42]

Initially, petitioners presented historical expert, Dr. Frederick Hoxie, who testified that he based his opinions on the published historical literature of the period.[43] Dr. Hoxie further testified that he encountered the word "redskin(s)" in American popular writing of the 19th century, including newspapers and 'settlers' writings.[44] In addition, although Dr. Hoxie opined that used in the context of these writings the word "redskin(s)" is a disparaging reference to Native Americans, he conceded that the word has not been used by historical scholars or during the modern period by the Bureau or Indian Affairs or its predecessors.[45] However, Dr. Hoxie concluded that the use of the word "redskin(s)" by respondent's football team is "inappropriate and disparaging" because the word is "an artifact of an earlier period during which the public at large was taught to believe that American Indians were a backward and uncivilized people."[46]

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[36] *Id.* at 137.

[37] As discussed above, the Board emphasized the importance of determining whether the term "redskin(s)" was disparaging from the perspective of the affected group, Native Americans. If evidence, such as " '*Redskin' a Hate Word Defined*", *supra* n. 5, were submitted by the petitioners, the subsequent district court decision might have turned out differently.

[38] *Harjo I*, 50 U.S.P.Q.2d at 138.
[39] *Id.*
[40] *Id*. at 138-39.
[41] *Id*. at 139-44
[42] *Id*. 142-43.
[43] *Id.* at 66.
[44] *Id*. at 70.
[45] *Id.*
[46] *Id*. at 70-71.

Although there is no reflection in the Board's opinion that the respondents presented a historical expert to rebut Dr. Moxie's conclusions, the testimony of David Barnhart and Dr. Ronald Butters addressed the issue of the negative connotation of the term "redskin(s)" in the latter part of the 20th century.[47] First, Dr. Butters concluded that as used, the term by itself is not disparaging, but rather "it was the context in which it was used that portrayed Native Americans in a negative manner."[48] Next, Dr. Butters supported the conclusion that any negative connotation associated with the term "redskin(s)" disappeared during the second half of this century by testifying that "during the second half of the century, the word has taken on '"an important, powerfully positive new meaning 'identifying the Washington, D.C. professional football team."[49]

Based on the historical evidence in the record (largely newspaper and magazine articles; extensive use of the term until the mid-point of the twentieth century, but a dearth of such articles afterwards), any negative connotation associated with the term "redskin(s)" disappeared shortly before the time Pro-Football registered its first mark in 1967.[50] The evidence does not contradict the fact that, over time, the term "redskin(s)" was used primarily to denote a professional football team, the Washington Redskins. In the record, but not addressed by the Board, were statements made by John Kent Cooke (at the time the executive vice-president of Pro-Football, Inc.) that the Redskins team name and logo "reflect the positive attributes of Native Americans" and that those attributes include "dedication, courage and pride."[51] While the correct viewpoint of the derogatory nature of the term "redskin(s)" is that of Native Americans, this testimony is indicative of the opinion that a negative portrayal of Native Americans does not exist when used in connection with the professional football team. Further, the comments made by Mr. Cooke must be taken with a grain of salt, recognizing that he is the long-time owner of the franchise, and is trying to protect not only his investment but his professional name as well. The Board agreed with the respondents that "the pejorative nature of 'redskin(s)' in the early historical writings of record comes from the overall negative viewpoints of the writings; however, the Board did not agree that the term 'redskin(s)' is neutral in its connotation.[52] In coming to this decision, the Board ignored its own directive by relying on historical evidence of to the derogatory nature of the term "redskin(s)" not from the time of registration, but for a period of time nearly thirty years prior to registration as well as evidence from the present day.

Third, the Board examined the telephone survey performed by Ivan Ross, a market research and consumer psychologist for the petitioners, concerning the perceptions of the general population, and Native Americans as to the term 'redskin(s)'

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[47] *Id.* at 79-80.
[48] *Id*. at 83.
[49] *Harjo I*, 50 U.S.P.Q.2d at 84.
[50] *Id*.
[51] *Id*. at 76..
[52] *Id.* at 142-43. (Rather, the Board concluded, "from the evidence of record that the word 'redskin(s)' does not appear during the second half of this century in written or spoken language, formal or informal, as a synonym for "Indian" or "Native American" because it is, and has been since at least the 1960's, perceived by the general population, which includes Native Americans, as a pejorative term for Native Americans.)

used as a reference to Native Americans.[53] Acknowledging that the survey contained flaws that limited its probative value, in addition to it supporting only the participants' views as of 1996, the Board nonetheless found "these results supportive of the other evidence in the record indicating the derogatory nature of the word "redskin(s)" for the entire period from, at least, the mid-1960s to present, to substantial composites of both the general population and the Native American population."[54]

Finally, although the Board concluded that the term "redskin(s)" identifies respondents' football team; it found the team name also carries the allusion to Native Americans as inherent in the original definition of the word.[55] The Board agreed with the above statements made by John Kent Cooke that the respondents at all times attempt to portray Native Americans in a positive manner. However, the collection of newspaper clippings submitted by both parties shows that the media continues to portray Native Americans as "either aggressive savages or buffoons."[56] Although not within the responsibility of the respondents to control, the actions of the fans and the media led the Board to conclude that, used in connection with the respondents' marks, the word "redskin(s)" retains its derogatory nature.[57] As such, the respondent's marks **may be** disparaging of Native Americans to a substantial composite of this group of people.[58]

Contempt or Disrepute

Due to the Board's belief that the analysis regarding disparagement and whether a mark brings an individual(s) into contempt or disrepute is essentially the same, the Board concluded, "the marks in each of the challenged registrations consist of or comprise matter….which may bring Native Americans into contempt or disrepute."[59]

Scandalousness

The Board indicated that to determine scandalousness, a two-part analysis is necessary.[60] First, the likely meaning of the matter in question is determined; second, whether, in view of the likely meaning, the matter is scandalous to a substantial composite of the general public.[61] As discussed in the disparagement section *supra*, the Board found that petitioners established the first part of the test. The Board concluded

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[53] *Id.* at 95-98. (The survey consisted of 301 American adults, and 358 Native Americans (a stratified sample). The groups were read a list of terms in varying order, "Native American," "Buck," "Brave," "Redskin," "Injun" "Indian," and "Squaw." The participants were asked whether or not they, or others, would be offended by the use of the term and, if so, why. The only pertinent information to arise out of the survey was in regards to the offensive nature of the term "redskin(s)." 46.2% (139/301) people out of the general population sample found the term offensive, with 36.6%(131/358) of the Native American sample finding the term offensive.)
[54] *Harjo I*, 50 U.S.P.Q.2d at 145.
[55] *Id.* at 146.
[56] *Id*. at 149.
[57] *Id*. at 150.
[58] *Id*.
[59] *Id*. at 153-54.
[60] *Id* at 154.
[61] *Id*.

that the evidence in the record established that during the relevant time period, "a substantial composite of the general population would find the word 'redskin(s)' as it appears in the marks herein in connection with the identified services, to be a derogatory term of reference for Native Americans.[62] Nonetheless, after examining the relevant time periods, the Board could not find by a preponderance of the evidence that, "the appearance of the word "redskin(s)," in the marks herein and in connection with the identified services, would be 'shocking to the sense of truth, decency, or propriety' to, or 'give offense to the conscience or moral feelings of, excite reprobation, or call out for condemnation' by, a substantial composite of the general population."[63] Letters from the general population and news articles in recognition of respondents' football team serves as evidence to support the Board's decision that the meaning of the matter in question was not scandalous to a substantial composite of the general public.[64] After determining that the term "redskin(s)" was in fact disparaging, the finding that the term was not scandalous to the general public points to a form of unconscious racism. That although the term offends the individuals it represents, the use of the term has sensitized the population into a belief that the term is not "shocking to the sense of truth, decency or propriety."

In Conclusion

The Trademark Trial and Appeal Board granted the petition to cancel the registration marks under Section 2(a) of the Trademark Act because the marks "may disparage Native Americans and may bring them into contempt or disrepute."[65] Conversely, the court denied the petition to cancel the registrations due to the registrations consisting of or comprising scandalous matter.[66] The effect of the Board's decision was to strip away the federal trademark protection Pro Football, Inc. enjoyed over its registrations containing the term "redskin(s)" or any derivation thereof. For the following reasons, it is this author's opinion that the Board manipulated the facts in the record and adjusted its analysis to reach a decision based on policy, rather than on legal grounds. This is not to say that the board could not have come to the same decision on other grounds, however, from the evidence in the record, the Board's decision is not adequately supported.

First, the Board's reliance on the survey evidence is the strongest support for the contention that the Board was determined to find in favor of Harjo. The small sample, only .00015%[67] of the Native American population (in addition to the fact that only 36.6% of the Native Americans surveyed found the term derogatory) cannot possibly be adequate support for the conclusion that a substantial composite of Native Americans found the term "redskin(s)" to be derogatory when used in reference to them, as concluded by the Board. The Board also relied on the survey statistics for members of

[62] *Id.* at 155.
[63] *Harjo I*, 50 U.S.P.Q.2d at 155-56.
[64] *Id.* at 156.
[65] *Id*. at 157.
[66] *Id*.
[67] This percentage was reached by dividing the number of Native Americans surveyed by the total population of 2.41 million Native Americans provided for in the record.

the general population, including the viewpoints of the incorrect group in its determination.

Next, when considering the historical evidence in the record discussed above, the Board once again ignored its own directive by relying on evidence as to the derogatory nature of the term "redskin(s)," not at the time of the registration but at a period of time nearly thirty years prior to the registration.

Finally, when considering dictionary evidence in its determination of whether the matter in question may disparage Native Americans, the Board incorrectly applied Supreme Court precedent. The evidence on record did not support the Board's decision in favor of the petitioner's argument that "redskin(s)" may disparage Native Americans, based on the Board's apparent reliance of a preponderance of the evidence standard throughout the course of its proceedings. It is assumed that this was the correct standard in this case because the Board never delineated the proper standard; however, it did refer to the satisfaction of this standard in several sections. Further, the dictionary definitions provided no evidence that Native Americans found the term disparaging, only that half of the dictionaries examined indicated the offensive nature of the term to the general population.

The decision of the Board was a positive solution in support of a significant social dilemma; however, the decision is without legal justification. Regardless of the Board's decision or if Pro-Football Inc. had not appealed the decision, state trademark law and common law trademark principles might still protect the marks at issue. Under common law trademark principles, "A designation cannot be a trade-mark or trade name if it is scandalous or indecent, or otherwise violates a defined public policy."[68] Following the Board's decision in regards to scandalousness, the Redskins would most likely not lose common law protection of their marks. Accordingly, the financial ramifications of the revocation of the marks would not prove as severe, in turn negating the purpose of the lawsuit in the first place. State statutes generally follow the direction of the Lanham Act and deny registration to offensive or disparaging marks.[69] Of course, whether the State (or District) would find the term disparaging is mere speculation. The importance of the Redskins to the local economy and the deep rooted social traditions associated with the team might bring an added element of political pressure to any decision on this matter.[70] Although people would like to think that a professional football team is not as important to a country as keeping its citizens free from discrimination, the fact remains that when used in the context of sports, a term like "redskin(s)" is looked at in a different context than it would be in everyday life. Following the Board's decision, the Redskins enjoyed five years of uninterrupted federal trademark protection pending its appeal. Next is an

[68] Justin G. Blankenship, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words that Offend?* 72 U. COLO. L. REV. 415, 451 (Spring 2001). [hereinafter *Cancellation of Redskins*]

[69] *Cancellation of Redskins*, at 448.

[70] If the district court affirmed the decision and Pro-Football Inc.'s marks were challenged under state trademark law, it would be interesting to see where the case was brought. Although the team is called the Washington Redskins they no longer play in Washington D.C., but in the suburbs of Maryland. Further, the team's administrative offices are located in Ashburn, VA.

analysis of the U.S. District Court decision of Pro-Football Inc.'s appeal of the Board's decision in *Harjo I*.

***Harjo II*: *Pro-Football Inc., v. Harjo* - Decision of the U.S. District Court**

Following the Trademark Trial and Appeal Board's (Board) decision ordering the cancellation of its six registration marks, Pro-Football Inc. filed a complaint[71] in the United States District Court for the District of Columbia seeking de novo review, pursuant to 15 U.S.C. § 1071(b).[72] [73] The court framed the issue as "whether the Board appropriately concluded that the marks at issue disparage Native Americans or cause them to be brought into contempt or disrepute."[74] After the determination of the issue, the court shifted its focus to the proper standard of review. Contrary to petitioners' assertion that the court adopt a "clearly erroneous/through conviction"[75] standard, the court determined the proper standard of review of the Board's decision was a "substantial evidence" standard.[76] Under this standard, Pro-Football Inc. carried the burden of proving the decision by the Board was not supported by "substantial evidence".[77] [78] Next, the court determined that the issue presented was ultimately "a fact-bound conclusion that rests with the fact-finder in the first instance."[79] Finally, although the issue presented was ultimately a fact-bound conclusion, the court opined the legal standard used to make a finding of disparagement and any other questions of law are reviewed by the court de novo.[80]

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[71] *Harjo II*, 284 F. Supp. 2d at 100. (*Pro* Football, Inc. filed five distinct causes of action: (1) The trademarks do not disparage Native Americans, (2) the trademarks do not bring Native Americans into contempt or disrepute, (3) section 2(a) of the Lanham Act violates the First Amendment because it is a vague, overbroad, and content-based restriction on speech. (4) section 2(a) is unduly vague in violation of the Fifth Amendment, and (5) the cancellation petition was barred by the doctrine of laches.)

[72] *Id.*

[73] § 1071(b) covers appeals to courts and consists of the following: (b) Civil action; persons entitled to; jurisdiction of court; status of Director; procedure **(1)** Whenever a person authorized by subsection (a) of this section to appeal to the United States Court of Appeals for the Federal Circuit is **dissatisfied with the decision of the Director or Trademark Trial and Appeal Board, said person may, unless appeal has been taken to said United States Court of Appeals for the Federal Circuit, have remedy by a civil action** if commenced within such time after such decision, not less than sixty days, as the Director appoints or as provided in subsection (a) of this section. **The court may adjudge that an applicant is entitled to a registration upon the application involved, that a registration involved should be canceled, or such other matter, as the issues in the proceeding require, as the facts in the case may appear.** Such adjudication shall authorize the Director to take any necessary action, upon compliance with the requirements of law. However, no final judgment shall be entered in favor of an applicant under section 1051(b) of this title before the mark is registered, if such applicant cannot prevail without establishing constructive use pursuant to section 1057(c) of this title. (bold added to show the emphasis in the opinion by the district court)

[74] *Harjo II*, 284 F. Supp. 2d at 99.

[75] *Id.* at 114.

[76] *Id.*

[77] *Id*.

[78] *Id*. at 115-116. (This standard requires the reviewing court to ask whether a "reasonable mind might accept" a particular evidentiary record as "adequate to support a conclusion.")

[79] *Id*.

[80] *Id.*

District Court's Analysis of the Board's Findings of Fact

The court noted that despite a vast array of evidence[81] presented by the parties, the Board made specific findings of fact in only two areas: (1) linguistics testimony, and (2) survey evidence.[82]

Linguistics Testimony

The district court held that the Board's findings of fact in regards to linguistic testimony are supported by substantial evidence.[83] However, the court failed to see the relevance of this testimony when both parties agreed about the historical and present day use of the term "redskin(s)."[84] In particular, both parties presented evidence that since the mid-1960s, the term "redskin(s)" appears only as a reference to the Washington Redskins football team. Although the court's commentary on the testimony is correct, it fails to focus on the critical issue facing this testimony and the case at large. The question is not whether the term redskin(s) is used predominantly to describe Native Americans, whether today or thirty years ago, but whether the term is disparaging to Native Americans in violation of the Lanham Act. Focusing on the absence of the word from the general populations vocabulary seems to minimize the powerful derogatory nature of the word at the time the marks were registered; in addition, as with so many other words in the English language, the disappearance of such a word does not necessarily take away its sting.

Dr. Ross Survey

The court sharply criticized the Board's findings of fact as to the survey performed by respondent's expert, Dr. Ross. Before the court discussed the deficiencies in the Board's findings, it agreed with the Board's conclusion that "the survey represents nothing more than a survey of current attitudes at the time the survey was conducted."[85] [86] However, the court did not agree that substantial evidence supported the Board's conclusion that the methodology was proper to extrapolate the survey results to the Native American population at large.[87] In support of its decision, the court first pointed to the Board's failure to address Dr. Jacoby's critique of how the respondents improperly extrapolated the results of the survey to the "views of the Native American population as a whole."[88] In particular, the court emphasized that because Dr. Jacoby did not testify

[81] "even though it (the Board) spent fourteen pages cataloguing the evidence in the case…" *Harjo II*, F. Supp. 2d at 119.
[82] *Id*.
[83] *Id*.
[84] *Id.*
[85] *Id*.
[86] As indicated earlier, the point in time when the marks were registered, not the time of the lawsuit was the relevant period for determining the nature of the term "redskin(s)."
[87] *Harjo II*, F. Supp. 2d at 19.
[88] *Harjo I*,50 U.S.P.Q.2d at 99-100. (In addition to several other criticisms of the survey, Dr. Jacoby focused on the limited sample of Native Americans polled. It was Dr. Jacoby's contention that the Native American sample was too geographically limited to be representative of Native Americans as a whole. Further, Dr. Jacoby opined that the method for determining whether a participant is Native American is

before the Board, the Board owed an explanation in its decision as to why it favored one survey over another.[89] After examining Dr. Jacoby's criticism, the court did not feel that the survey sufficed as an indicator of the views of Native Americans as a whole.[90] An example of the court's discontent with the Board's analysis and the results of the survey is an intriguing dialogue between the court and counsel for the defense, in a July 23, 2000 motions hearing. In this hearing, the court questioned the extrapolation methods employed.[91] Presented with the opportunity to rebut Dr. Jacoby's criticism, the defendants merely restated the results of the survey. Due to the Board's failure to address Dr. Jacoby's criticism, coupled with the fact that the defense had no answer to the offered criticisms, the court held that the Board's decision to extrapolate the survey results was not supported by substantial evidence.[92]

Before addressing the issue of disparagement, the court stated its conclusions regarding the legal analysis used by the Board. First, the court agreed with the Board that the proper standard to decide the issue was "preponderance of the evidence." Second, given that the Board supported its meaning of "may disparage," discussed *supra*, with the presentation of evidence showing the ordinary and common meaning of the term, from the viewpoint of the referenced group, and in relation to "the goods and services identified by the mark in the context of the marketplace," the court found no error in the approach of the Board in its analysis of disparagement.[93] Finally, the court agreed with the Board's two-step process in answering the question of disparagement discussed *supra.*

After acknowledging that the Board applied the correct legal analysis in answering this question, the court nevertheless found the Board's decision unsupported by substantial evidence. [94] In reaching this conclusion, the court followed the same analysis as the Board. First, it addressed the "meaning of the matter in question and, second, answered the question of whether the matter in question may disparage Native Americans.[95] The court broke down the analysis further into the following sections: (1) "equating the views of the general public with those of Native Americans";. (2) "the

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flawed; that the birthday sample method employed (no description of what the sample entailed) violates the randomness of the survey and, further, that the age parameters include participants who could not reflect the state of mind of people in 1967, the year Pro-Football registered its first trademark.)

[89] *Harjo II*, 284 F. Supp. 2d at 120.

[90] *Id*.

[91] *Id*. at 120-121. (During the hearing, defense counsel opined that extrapolating the survey results would result in somewhere between 700-800,000 Native Americans finding the term "redskin(s)" offensive to themselves. The defense reached this number by multiplying the purported number of Native Americans at the time (2.41 million) by the percentage of Native Americans in the survey who found the term "redskin(s)" offensive. Agreeing with the district court, it is this author's opinion that it is almost comical that the defense extrapolated a survey of a mere 358 people, 131 finding the term offensive to approximately ¾ of a million people.)

[92] *Id*. at 121.

[93] *Id.* at 123.

[94] *Id*. at 124.

[95] *Id.*

derogatory nature of the word "redskin(s)"; and, (3) the word "redskin(s)" as a term of "disparagement".[96]

Meaning of the Matter in Question

As discussed above, the court agreed with the Board's decision to consider the marks in the context in which they are used in the marketplace. Because the use of the marks alludes to Native Americans, two of which depict Native American imagery/portraits, the court could not disagree that there was substantial evidence to support the Board's decision that "redskin(s)" refers to both the Washington Redskin's football team as well as Native Americans.

Whether the Matter in Question May Disparage Native Americans

The court began its analysis of this question by acknowledging the Board's proper formation of the issue as: "whether the word "redskin(s)" may be disparaging of and to Native Americans, as that word appears in the marks in the subject registrations, in connection with the identified services, and during the relevant periods."[97] After reviewing the Board's findings of fact, the court concluded that no direct evidence existed to answer the legal question posed, especially when used in the context of Pro-Football's entertainment services.[98] In support of this conclusion the court first pointed to the Board's admission of its inability to settle the dispute that existed between the parties' experts as to the connotative meaning of the term "redskin(s)."[99] Further, the survey, which the court already acknowledged as having limited value did not address the views of the participants about the word "redskin(s)" as a reference to Native Americans at the time of the initial registration in 1966.[100] Although the Board acknowledged that the relevant time period for evaluating the views of Native Americans was at the time of the registration of the marks, the Board nonetheless ignored its own directive and found 1992 to be relative time period. Next, the court addressed another contradictory statement and application by the Board in coming to its decision. Although the Board stated it came to its conclusion "based on the cumulative effect of the entire record," the Board only made findings of fact in the two areas discussed above and, further, failed to weigh the conflicting evidence and address criticisms.[101] As such, the court opined that the Board reached its decision to cancel the trademarks improperly, by piecing together bits of limited undisputed information from the record.[102] To support the court's conclusion that the decision of the Board cannot withstand the deferential level of judicial scrutiny provided by the substantial evidence test, the court reviewed point-by-point whether "substantial evidence" supports the Board's disparagement finding.[103]

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[96] *Harjo II*, 284 F. Supp. 2d at 126-136.
[97] *Id.* at 127
[98] *Id*.
[99] *Id.*
[100] *Id.*
[101] *Id*. at 127-128.
[102] *Id*.
[103] *Id*.

Equating the Views of the General Public with Those of Native Americans

In renouncing the Board's holding, the court emphasized that the Board's insistence on the perceptions of the general public as an indicator of how Native American's would perceive the term "redskin(s)" was misplaced.[104] First, the court directed its attention to the Ross survey, which contradicted the Board's statement that "the evidence supports the conclusion that a substantial composite of the general public finds the word "redskin(s)" to be a derogatory term of reference for Native Americans (with the corresponding inference that a substantial composite of Native Americans would similarly perceive the word)." The results of the survey revealed that only 36.6% of Native American's found "redskin(s)" to be offensive, while 46.2% of the general population found the term offensive as a reference to Native Americans. It was the courts opinion that because the survey included Native Americans, and they in turn found the term "redskin(s)" to be less offensive than the members of the general population surveyed, the opinions of the general population could not by inference be extrapolated to mirror the views of Native Americans. In this vein, the District Court stuck to the guidelines outlined by the Board in its analysis. The survey evidence regarding the opinions of the general population is wholly irrelevant to the debate under this particular trademark analysis.[105] The question could be raised what would have happened if the survey's were reversed, i.e., if 46.2% of Native Americans found the term "redskin(s)" to be disparaging. Due to the relevant time period, it appears that even had this occurred, or even if 100% of the Native American population surveyed found the term disparaging, the courts decision would have come out the same. The reason for the courts focus on this survey is because of the Board's reliance on the results when coming to its decision. By focusing on the gap between Native American views and those of the general population, the court tends to minimize the importance of the viewpoints of the Native Americans involved in the survey. To avoid a critique of such a minimization all the court had to do was point to the irrelevance of current viewpoints when determining the issue in this case.

Second, as the Board made clear, the proper inquiry in deciding whether "redskin(s)" is disparaging, is whether the referenced group finds the term disparaging, the inquiry does not focus on the "American Society as a whole."[106] Thus, by relying on the views of the general public to substantiate its decision, the Board erred and in turn, its decision was found to be unsupported by substantial evidence.

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[104] *Harjo II*, 284 F.Supp.2d at 128.

[105] From a policy standpoint, the figures showing that almost 50 percent of the general population found the term to be offensive provide strong evidence that the term "redskin(s)" should be removed from the professional sports context. However, this evidence would be better served when fighting the use of the marks in other avenues, such as the legislature, which will be discussed at length later in this paper. Unfortunately for Harjo, the sampling of Native Americans it presented the court with was not as opposed to the term as Harjo would have liked. In addition, the difficulty of presenting evidence from the relevant time period proved equally as daunting for the respondents.

[106] *Supra* note 35 at 129-30.

Third, in the court's opinion the limited number of plaintiffs in the original suit (seven Native Americans) did not constitute a "substantial composite" of Native Americans.[107] The court further opined that, because the Board did not use any independent or additional evidence to support its conclusion, it was impossible to "reasonably corroborate its decision to equate the views of the American public with the views of the Native American population."[108] While the court is correct in noting that the number of plaintiffs in the original suit was not large, focusing on this number once again makes the court appear to minimize the importance of the issue and the opinions of the few plaintiffs that brought the issue to light.

Finally, the court held the Board improperly shifted the burden of proof by reaching its conclusion due to an absence of evidence to the contrary.[109] The court found by shifting the burden to petitioners' Pro-Football Inc., the Board's decision was not supported by substantial evidence.[110]

The Derogatory Nature of the Word "Redskin(s)"

At the beginning of its opinion, the court stated it would not come to a decision on whether Indian names in sports, specifically the "redskin(s)," were in fact derogatory towards Native Americans.[111] Nonetheless, in the second part of its analysis of whether the matter in question may disparage Native Americans, the court examined the derogatory nature of the term "redskin(s)." In support of its opinion that the Board's decision to "conflate the views of the general population with those of Native Americans" was not supported by substantial evidence, the court first looked to dictionary evidence in the record.[112] The court found that the Board's reliance on derogatory usage labels in its conclusion was mere speculation due to a lack of evidence existing in the record as to the "purpose and methodology for including or not including usage labels in dictionaries."[113]

Next, the court opined that evidence regarding "whether a number of Americans have understood 'redskin(s)' to be an offensive reference to Native Americans," provides no indication as to whether Native Americans find the term offensive.[114] Because an analysis of the disparagement of a term focuses on the viewpoint of the group who purportedly find it offensive, in the eyes of the court this evidence could not support an ultimate decision.[115] Third, the court pointed out that some of the dictionary evidence in the record, specifically in relation to usage labels, refers to the term "redskin(s)" as an "often offensive" term.[116] Conversely, it opined, there are contexts in which the term is

[107] *Harjo II*, 284 F. Supp. 2d at 129.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 1.
[112] *Id.* at 130
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

not offensive, such as in connection with the Pro-Football team, which the Board did not address in its opinion.[117] Finally, the court once again criticized the Board's failure to look at both sides of the evidence in the record.[118] The court opined that, just as the Board (pointing to contradictory testimony of linguistics experts) could not conclude that, "the lack of such (usage) labels in the other excerpts of record establishes that the word "redskin(s)" was **not** considered offensive during the relevant time period," conversely, the same testimony should not have led it to its decision to find the term offensive in the eyes of the American public.[119]

Switching to the Board's evaluation of the historical nature of the term "redskin(s)," the court determined the Board's conclusion was not supported by concrete evidence.[120] The court found no evidence in the record to support the inference that the term "redskin(s)" dropped out of use as a term for Native Americans because the term was derogatory.[121] Further, the court disagreed with the Board's correlation between the drop-off of the term "redskin(s)" as a reference for Native Americans with a finding that the term is pejorative.[122] In its analysis, the District Court might have come up a bit short-sighted in not finding a correlation between the drop-off of the term "redskin(s)" and a potential finding that the term was (is) pejorative. It would appear that many terms used in the early part of the century to describe other races similarly disappeared from the general population's usage because of the disparaging nature of the term(s). Unfortunately, the respondents did not focus on this potential connection, which contributed to a decision in favor of Pro-Football, Inc.

The preceding discussion indicates that the court did not agree with the Board's decision to allow for the extrapolation of the survey data to the Native American population as a whole. Further, the court concluded that, even if it agreed to the extrapolation, it nonetheless would find the evidence insubstantial to support a finding of disparagement.[123] Through the dictates of the Lanham Act, and the guidance of the Board in its opinion, it is apparent that the relevant time period for determining whether the term "redskin(s)" is derogatory, is the date when the marks were registered. Because the survey data was gathered in 1996, its results have no bearing on the question of whether the term "redskin(s)" was a pejorative term for Native Americans.[124] As such, the court concluded that the survey evidence did not substantially support the finding of the Board that the term "redskin(s)" is derogatory.[125]

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[117] *Harjo II*, 284 F. Supp. 2d at 130.
[118] *Id.*
[119] *Id*. at 131.
[120] *Id.*. (The historical evidence relied on by the Board included the following: "That redskin(s) does not appear during the second half of this century in written or spoken language, formal or informal, as a synonym for 'Indian' or 'Native American' because it is, and has been since at least the 1960's, perceived by the general population, which includes Native Americans, as a pejorative term for Native Americans.")
[121] *Id.*
[122] *Id.*
[123] *Id*. at 133.
[124] *Id*. 132.
[125] *Id*. at 133.

The Word "Redskin(s)" as a Term of Disparagement

In its decision, the Board concluded that the derogatory connotation of the word "redskin(s)" extends to the term "redskin(s)" as used in connection with Pro-Football's entertainment services.[126] However, the court noted that the Board's analysis did not delve into a necessary discussion of the relation of the term with Pro-Football Inc.[127] services. The court pointed to two flaws in the Board's finding that the term "redskin(s)" was disparaging when used in the context of Pro-Football's professional football club. First, the Board's decision relied on the perceptions of the general public, which, as discussed above, is not dispositive as to whether the term "redskin(s)" is disparaging to Native Americans.[128] Second, contrary to the Board's finding, the court opined that fans dressed in costumes, in addition to fans performing mock pow-wows in the stands, is evidence of a derogatory meaning, but not conclusive evidence that the term "redskin(s)," as used in connection with the registered marks is derogatory.[129] The court warned that if it were to follow this logic (behavior of fans as indicating a derogatory nature), the possibility of a slippery slope resulting existed in which, any actions by the media or fans construed as insulting to Native Americans, would result in the cancellation of all professional sports teams' trademarks.[130] Although a slippery slope is a possibility in this regard, this statement appears to be an attempt to sidestep evidence in favor of the respondents. Although the fans might not realize that they are offending the Native Americans, the act of "whooping it up" perpetuates long-standing stereotypes of Native Americans that brought about this lawsuit. Whether a slippery slope would result is something that the courts deal with every day, and can avoid by carefully crafting its holding. That all professional sports teams' trademarks would be cancelled seems unfathomable, when considering the fact that only a handful of teams possess references to Native American tribes.

Another flaw in the Board's reasoning, as pointed out by the court, relates to its dependence on the testimony of the defendants.[131] The defendants who testified expressed their individual opinions that they were "seriously offended" by Pro-Football's uses of the term in connection with its services.[132] The court opined that these individual views could not be extrapolated to the entire Native American population, similar to the

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[126] *Harjo II*, 284 F. Supp. 2d at 133
[127] *Id*. at 130.
[128] *Id.* at 131.
[129] *Id*.
[130] *Id*. at 131. "Under the broad sweep of the TTAB's logic, no professional sports team that uses Native American imagery would be permitted to keep their trademarks if the team's fans or the media took any action or made any remark that could be construed as insulting to Native Americans." (Of course, this is the goal of defendants, to remove all Indian names from sports. This part of the opinion indicative of the barriers Native Americans face in their uphill battle against the removal of these names. Native Americans argue that all trademarks **should** be cancelled, and that teams **should** be responsible for the actions of the media and fans due to the derogatory nature of the team's name, and the marks associated with that name.) (emphasis added)
[131] *Id*. at 135.
[132] *Id*. (in addition, witnesses did not testify in front of the Board. The opinions expressed by respondents were reflected in deposition testimony prior to the hearing.)

inability to extrapolate the results of the survey to the entire Native American population.[133] The court stopped short of eliminating the possibility of extrapolating any collection of individual viewpoints; however, it stated that seven people out of 2.41 million are not a "reasonable proxy for a substantial composite of the entire Native American Population."[134] Due to the lack of substantial evidence on whether the term "redskin(s)" is disparaging, the court held that the decision of the Board to strip Pro-Football of its registered marks must be reversed.[135]

Before reaching the final issue the court discussed if whether the respondents had presented "better" evidence, would the result have been different? In addressing this question, it is clear that the court was looking for evidence that Native Americans regarded the term "redskin(s)" as disparaging prior to the creation of Pro Football Inc.'s trademarks. Because of this requirement, the respondents faced an uphill battle from the beginning. Absent the use of a time machine to survey Native Americans prior to registration of the trademarks, it is impossible to get an accurate accounting of what exactly the views were at that time. Because of this insufficiency, any survey after the fact should have no bearing on a decision by either the court or the Board. The remaining evidence presented in the case by both sides shows the ease with which a positive can be spun out of a negative and the reverse. Both the petitioners and respondents presented evidence that contradicted the other side, essentially creating a draw. Having determined that the Board's finding of disparagement was not supported by substantial evidence, the court offered an alternative that could have far-reaching effects on future litigation on this issue, at least with respect to suits brought under section 2(a) of the Lanham Act.

Pro-Football's Defense of Laches Bars Defendant's Challenge

Offering an alternative to a finding of non-disparagement, the court held that Pro-Football Inc. is entitled to the use of laches as a defense due to the extensive delay by respondents in filing the initial lawsuit in 1992.[136] Pro-Football registered its first mark in 1967, with the defendant filing the initial lawsuit in this case in 1992. The passing of twenty-five years (35 at the time of this decision) resulted in an absence of evidence of disparagement in the record, either direct or circumstantial.[137] As such, the decision of the Board as to disparagement was inferential. In response to the defendant's argument that a laches defense is unavailable in the context of a Section 2(a) petition for cancellation (where a public interest is at issue), the court opined that allowing a so-called "public-interest" exception to a laches defense would theoretically allow a party to, delay indefinitely filing a cause of action.[138] The court further opined that the policy behind trademark law would be undermined if the court allowed a result like this to occur.[139] After concluding the availability of laches as a defense generally, the court

[133] *Harjo II*, 284 F. Supp. 2d at 135.
[134] *Id.*
[135] *Id.* at 136.
[136] *Id.* (The doctrine of laches bars relief to those who delay the assertion of their claims for an unreasonable time.)
[137] *Id.*
[138] *Id.* at 138.
[139] *Id.* at 139.

applied the three-part analysis for determining availability in the matter at hand.[140] The court reconstructed the analysis to fit the facts of this case, in order to proceed with its analysis in a more succinct manner.

Under the court's reconstructed analysis, the first prong is satisfied if the Native Americans substantially delayed prior to commencing their challenge to the "redskin(s)" trademarks.[141] Pro-Football Inc. registered its first trademark in 1967.[142] The court recognized that some of the challenged marks were not registered until a short time prior to this lawsuit; however, it opined that all of the marks were relatively the same and should not be "considered in a vacuum."[143] Finding the delay of twenty-five years sufficient to allow for a laches defense, the first prong was met.

To satisfy the second prong, the Native Americans had to be aware of the trademarks during the period of delay.[144] For many of the same reasons the first prong was satisfied, the court found the defendants had notice.[145] First, the marks were published in the United States Patent and Trademarks Office *Official Gazette*,[146] providing the defendants with constructive notice.[147] In addition, the court found actual notice in the defendant's own statements that they had "long known about and objected to the name of the Washington Football franchise."[148] Due to the finding of both actual and constructive notice of Pro-Football's marks, the court held the second prong was satisfied.[149]

The final prong in analyzing the availability of a laches defense in this case is satisfied if Pro-Football's ongoing development of goodwill during the period of delay engendered a reliance interest in the preservation of the trademarks.[150] The court set forth the following guidelines for determination of economic prejudice, an essential element needed to satisfy the third prong. Economic prejudice arises from investment and development of the trademark; continued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence of prejudice.[151] The NFL is a multi-billion dollar industry. In 1999, the Washington Redskins were purchased for 800 million dollars by Daniel Snyder, of which a substantial portion can be attributed to the sales of merchandise in connection with the "redskin(s)" registered marks.[152] Relying

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[140] *Harjo II*, 284 F. Supp. 2d at 139.
[141] *Id.*
[142] *Id.* at 140.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] The *Official Gazette* is a publication of the USPTO, which lists all patents/trademarks registered. At this point, parties have an opportunity to raise objections to registrations for matters such as disparagement.
[147] *Id.*
[148] *Id.* at 141.
[149] *Id.* at 141-42.
[150] *Id.* at 142.
[151] *Id.*
[152] Today, the Redskins are worth over one billion dollars and are the most valuable team in the National Football League according to *Forbes* Magazine. *'Forbes': Redskins are top NFL Franchise, available at,*

on common sense as its strongest support for a finding of economic disparagement, the court noted that, "Pro-Football will suffer some economic hardship, otherwise, there would be no point to this legislation being used as a vehicle to force Pro-Football to change the name of the team."[153] After determining that the third prong of the analysis was met, the court held Pro-Football was entitled to laches as a defense to defendant's petition for cancellation of its marks.[154]

While the court's decision allows for the use of laches as a defense for registered trademarks, the question remains as to whether a new team would be allowed to register a logo/name that used Native American imagery or verbiage. A similar debate over the connotative and denotative meaning of the words would likely take place, however, in today's politically correct climate it appears unlikely that a new team would select a name that is disparaging to a group of persons.

Decision

In conclusion, the court reversed the Board's determination of disparagement.[155] Further, the court granted summary judgment to Pro-Football on its first, fourth and fifth claims.[156]

Brief Analysis of *Harjo I & Harjo II*

Prior to any analysis, it is easy to conclude that from a purely legal standpoint, the U.S. District Court's decision to reverse the Trademark Trial and Appeal Boards (Board) decision is correct. However, Judge Kottar-Kelley's decision to pass on the issue of whether the term "Washington Redskins" may disparage Native Americans, exemplifies judicial avoidance of a critical public policy issue.

After more than ten years of litigation, and despite recognizing the relative social importance of this issue, the court nevertheless avoided full venture into a public policy debate on its merits. Conversely, the Board's decision focused too much on the current viewpoints of both Native Americans and the public at large, i.e., public policy concerns, rather than focusing on the legal issues directly before it.

The evidence on the record is inconclusive to support of the Board's conclusion that the word "redskin(s)" may be disparaging of and to Native Americans. This is not to say that the term is not disparaging, but as discussed earlier, the evidence required to prove such disparagement was not presented by the respondents; and likely was not available to present in the first place.

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http://www.usatoday.com/sports/football/nfl/redskins/2004-09-03-forbes-rankings_x.htm (last visited November 20, 2004).

[153] *Harjo II*, 284 F. Supp. 2d at 144.

[154] *Id.*

[155] *Id.*

[156] *Id.*

If the Trademark Act was a statute passed for the benefit of the Indians, the Supreme Court precedent would support the Board's liberal construction of the Act, and its resolution of doubts within the record (conflicting expert testimony) in favor of the Indians. However, as the court pointed out, the Trademark Act was not enacted for the sole protection of Indians. Thus, a liberal construction in their favor was not warranted. The decision of the district court to reverse the Board's decision in favor of Pro-Football, Inc. delivered a serious setback to Native American efforts regarding the use of their names in sports. However, was this decision merely a setback or were the implications for the future far more reaching, indicating the end of the road for Native Americans on this critical issue?

Effect of District Court Decision

Although further appeal is an option, [157] Judge Kottar-Kelley's decision in *Harjo II* all but delivers the death knell to Native American's hopes of eliminating the use of their names in professional sports via the Lanham Act.[158] Due to the court's *de novo* review of the Board's decision in *Harjo I*, it is highly unlikely that a reviewing court would find the decision to be clearly erroneous. Much of the evidence on the record equally supports both petitioner and respondent, and the decision that a finding of disparagement was supported by substantial evidence would likely go undisturbed. Assuming that a reviewing court determined the decision to be clearly erroneous with regard to the disparagement issue, the court's alternative method of reaching the same result, laches, appears to be an insurmountable obstacle to further action under the Lanham Act.

In addition to the Redskins, the four other professional sports teams with Native American names are most likely protected by the courts ruling that permits laches to be used as a defense. Since laches bars relief to those who delay the assertion of their claims for an unreasonable time, the trademarks owned by the Cleveland Indians, Atlanta Braves, Chicago Blackhawks and Kansas City Chiefs appear safe at this time, pending a potential review by the Supreme Court. Interestingly enough, there have been no challenges through the legal system regarding any of the other Native American names for Professional Sports teams.

Another eleven years has passed since the initial filing of the *Harjo* case. Even if one of the teams failed to register a trademark in its name or image until 1992, the laches defense still would serve as a protector of the marks. As such, the court's analysis regarding the Redskin's trademark is equally applicable to any of the remaining teams: First, a substantial delay would be present if a claim were now filed against one of the teams listed above. Second, it cannot be argued that Native Americans had no knowledge of the other teams, especially with respect to the Braves, whom many Native Americans picketed at the 1991 World Series. Finally, all of the teams continue to

[157] Further, since the next level on appeal is the United States Supreme Court, it is debatable whether the court would even grant *certiorari* on this issue.

[158] In fact, Harjo will appeal the U.S. District Court's decision in *Harjo II*. James R. Grimald, *Taking a New Team to Court*, WASHINGTON POST (Nov. 3, 2003).

develop the goodwill of their trademarks through merchandising, advertising and ticket sales, thus engendering a reliance interest in the preservation of the trademarks.

The decision to attack the Redskins use of the term "redskin(s)" under the Lanham Act was a creative approach on the part of *Harjo et al.* Perhaps, if the court heard the case thirty years ago, the decision would be different. Unfortunately for Native Americans, this was not the case. Whatever the reason for the delay, be it lack of resources; or an unwillingness to challenge a major corporation; or a recently developed aversion to the use of the names, the delay ultimately cost them an opportunity for cancellation. Whether or not the delay to sue was one of choice, the American judicial system does not allow for a bite at the apple outside of the reasonable time period. What this decision points to though, is the need for Native Americans to pursue another avenue of redress in their quest to eliminate the use of their names from professional sports. During this mission, they must ask such questions as whether the judicial system is the proper and most expedient way to achieve their desired result. Of course, the broader question is whether Native Americans might be better served by seeking redress through the legislature as opposed to the judiciary?

Action Through the Legislature

The Harjo cases represent the only occasions in which Native Americans brought suit against a professional sports team for the use of their names and corresponding images. Language from the decision in *Harjo II* delivers a profound message regarding the courts willingness to come to a determination of whether the use of the term "Washington Redskins," and implicitly other professional sports teams with Native American names, may be disparaging to Native Americans.

> "While the National debate over the use of Native American terminology and imagery as depictions for sports teams continues to raise serious questions and arouse the passions of committed individuals on both sides of the issue, the court's decisions on the motions before it does not venture into this thicket of public policy."

Harjo II, 284 F. Supp. 2d at 99.

The court's reluctance in *Harjo II* to delve deeper into this important public policy issue leads to the conclusion that in order to bring about change, Native Americans are better served fighting its disparity battle through the legislature as opposed to the court system. However, to this date, no state legislature has passed a law prohibiting the use of Native American names in professional sports; and all prohibitions against the use of Native American names in sport have occurred at educational institutions; including middle schools, high schools and public universities. It is important to note that the

changes at these levels occurred through a combination of pressure exerted by school boards, residents, students, and even the U.S. Justice Department.[159]

Logically, it can be assumed that similar pressure extended to the realm of professional sports by persons advocating the removal of Native American names from sports might prove equally successful through the legislature of individual states or the United States Congress. Although there is an informal demarcation line between professional and non-professional sports, there is no reason why it cannot be crossed. A review of our country's history regarding civil rights strongly suggests that dedicated individuals committed to change may compel an entire change in society. For example, the efforts of Martin Luther King, Jr., Malcolm X, and Rosa Parks paved the way for African-Americans to be successfully integrated into a predominantly white society. Needless to say, African-Americans prior to that time did not enjoy much political influence, similarly to today's Native Americans. It is likely that persistence and patience in combination with pressure placed on the state legislatures and U.S. Congress are what will bring about the desired changes for Native Americans.

State Legislative Efforts

The most recent legislative action challenging the use of Native American names in sports transpired in California. In 2004, Assemblywoman Jackie Goldberg introduced Assembly Bill 858 in an effort to prohibit the use of specific Native American Names by all public education institutions. In 2003, Goldberg also introduced such legislation, bill AB 2115, entitled the, California Racial Mascot Act, Assembly Bill 2115, failed to pass by a final vote of 37-31.[160] The pertinent part of the 2004 bill included the following:

> **Section 1** -
> The legislature finds and declares all of the following:
> (a) The use of racially derogatory or discriminatory school or athletic team names, mascots, or nicknames in California public schools is antithethical to the California school mission of providing an equal education to all.
> (b) Certain athletic team names, mascots, and nicknames that have been and remain in use by other teams, including school teams, in other parts of the nation are discriminatory in singling out the Native American/American Indian community for the derision to which mascots or nicknames are often subjected.
> (c) Many individuals and organizations interested and experienced in human relations, including the United States Commission on Civil Rights, have concluded that the use of Native American images and names in school sports is a barrier to equality and understanding and that all residents of the U.S. would benefit from the discontinuance of their use.

[159] Kristen E. Behrendt, *Cancellation of the Washington Redskins Federal Trademark Registration: Should Sports Team Names, Mascots and Logos Contain Native American Symbolism?* 10 SETON HALL J. SPORT L. 389 (2000).
[160] Alliance Against Racial Mascots (ALLARM), (June 9, 2003), *available at*, http://www.alarm.org (last visited Nov. 24, 2003).

(d) No individual or school has a cognizable interest in retaining a racially derogatory or discriminatory school or athletic team name, mascot, or nicknames.

Section 2 221.3(a) All public schools are prohibited from using any of the following school or athletic team names, mascots or nicknames:

1) Redskins
2) Indians
3) Braves
4) Chiefs
5) Apaches
6) Comanches
7) Papooses
8) Warriors, if accompanied by Native American Imagery, including, but not limited to, a mascot.
9) Sentinels, if accompanied by Native American Imagery, including, but not limited to, a mascot.
10) Any other American Indian tribal name

AB 858, Reg. Sess. (Ca. 2003).

Unlike its predecessor Bill, AB 2115, the California State Senate approved Bill 858 by a 22-10 margin. Although the Bill was approved by the Senate, Governor Schwarzenegger vetoed the legislation.[161] Schwarzenegger pointed to the need for local school boards to retain "general control over all aspects of their interscholastic policies."[162] Although the bill was vetoed by the Governor, the vote in the Senate shows that the views of the general public, as they pertain to the use of Native American Names in sports are slowly progressing towards a change in favor of Native Americans. However, even if the bill had been enacted, its application would have been limited to education institutions within California, with no bearing on any professional teams using the exact same names and/or mascots. Further, both the sponsoring of the Bill and the success of the vote at the cabinet level shows that the legislative process is a viable option to pursue in the effort to remove Native American names from sports. To note, Goldberg declared that she would once again introduce the Mascot bill once the new legislative session began in December.[163]

Similar Bill as Applied to Professional Sports

Ironically, a valid argument could also be made that the same assembly persons who voted yes for the removal of the names from educational institutions would not vote the same if asked to vote on a similar bill regarding professional sports teams. This is because professional sports teams are multi-million dollar entities that are typically privately-owned and not averse to exerting political pressure in order to obtain results

[161] Aurelio Rojas, *School Mascot Measure Vetoed*, The Sacramento Bee, *available at*, http://www.sacbee.com/content/politics/ca/story/10831494p-11749444c.html (last visited Nov. 20, 2004).
[162] *Id.*
[163] *Id.*

that meet their needs. With the limited financial resources and political influence of Native Americans in this country, their attempt to legislatively bring about removal of their names from professional sports teams will continue to meet significant resistance. However, the failure to achieve immediate success should not derail the efforts of Native Americans and the hundreds of organizations that advocate the removal of their names from sports due to the past success of other minorities to minimize and/or eliminate racism through persistence. In addition, if this issue means as much to Native Americans and the hundreds of organizations that they proclaim, the potential for immediate success should not matter. In *Harjo*, it took only seven individuals to almost take away the trademarks of the revered Washington Redskins. However, while this observation provides support for the pursuit of removal through the court system, the decision in *Harjo II* may also serve as a red flag that courts are reluctant to rule in favor of Native Americans on this issue. Therefore, a successful disposition by the courts in favor of Native Americans could continue to prove elusive.

Is the Pursuit of a Legislative Solution Worthwhile?

In battle, no victory comes without its share of obstacles. The first battle, *Harjo I*, provided a victory for Native Americans. *Harjo II*, served as a most resounding defeat. Finally, while the pursuit of a legislative solution to this issue is full of difficulties, this suggested path must be traveled to satisfy the ultimate desire of removing Native American names from sports.

As of mid-2001, pressure exerted on school boards has resulted in more than 600 academic institutions changing or eliminating the use of Native American images in association with their sports teams.[164] This provides an indication that the war can be won, however long it might take. As mentioned above, significant obstacles (lack of financial resources and lack of political power) in pursuing a resolution through legislative means exists for the Native American. These impediments are not insurmountable for the following reasons.

First, Native Americans are becoming increasingly a more financially independent minority. Revenue from Indian casinos in fiscal-year 2002 exceeded fourteen billion dollars.[165] The financial commitment necessary to exert political pressure or influence members of the political community is not beyond the capabilities of casino revenues. Without knowing the exact disbursement of funds from the individual casinos, it is impossible to say how much money each tribe can, or is willing to, contribute to fight this battle. It seems logical, however, that contributing a portion of Native American casino revenues toward legislative efforts would be in the overall best interests of Native Americans.

Second, although Native Americans do not currently possess the necessary political power to induce immediate change, the financial resources listed above and the

[164] SOC of SPORT J. *supra* note 15.
[165] *Tribal Gaming Revenue*, National Indian Gaming Commission, *at* http://www.nigc.gov/nigc/nigcControl?option=TRIBAL_REVENUE

hundreds of organizations in support of the removal of names can precipitate a new era of political power for Native Americans. In 2001, the United States Commission on Civil Rights issued a statement on the use of Native American images and nicknames as sports symbols.[166] While alluding to the potential for freedom of expression challenges under the First Amendment, the commission recommended that Native American names and images not be used in sport. Specifically, the commission expressed the feeling that they are (referring to the names) "particularly inappropriate and insensitive in light of the long history of forced assimilation that American Indian people have endured in this country."[167] Other minority groups such as the NAACP, National Association of Black Journalists, National Association of Hispanic Journalists, the Rainbow Coalition and the United Methodist Church, all endorse eliminating the use of Native American names and images in sports. It is not difficult to anticipate the significant political pressure these groups could exert in order to eventually bring about a change, and usher in a new era of professional sports teams, sans references to the indigenous persons of our country.

The possibility of change though legislative measures is an option that Native Americans need to consider in view of the decision in *Harjo II*. Due to the tension surrounding this highly combustible public policy issue, it appears as though the court system would rather leave this issue to the hands of the legislature. To paraphrase 6th Circuit, Chief Judge Edwards in, *Local 1330, United Steel Workers of America v. United States Steel Corp*., 631 F.2d 1264 (1980):

> "Formulation of public policy on the great issues involved in whether Native American names/images used in sport are derogatory is clearly the responsibility of the legislature of the states or of the Congress of the United States."[168]

Conclusion

Commentators argue that if a team called the "Los Angeles Hispanics" or New York WASP's existed, society would force a change.[169] However, despite the potential

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[166] *Statement of the United States Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols*, (2001), *at* http://www.aics.org/mascot/civilrights.html (last visited Nov. 20, 2004).

[167] *Id.*

[168] The original language in this case was the following: "In the view of this court, formulation of public policy on the great issues involved in plant closings and removals is clearly the responsibility of the states or the Congress of the United States." Although the issue in the case and the issue at hand are factually distinct, by adopting the phraseology, the author is just giving an example of another public policy issue the court system decided not to rule on. The language best supports the thesis of the paper that the legislature, rather than the court system will best satisfy Native American objectives.

[169] One example comes from an article published by the Hamline Law Review, where the author began with a mock introduction of the NFL's Pro Bowl (all-star game). "Welcome Football Fans! We are reporting live from Robert F. Kennedy Stadium, where today…we bring you the Pro Bowl. We have players from all the teams -- the New York WASPs, the Detroit Ay-Rabs, the Los Angeles Hispanics, the Chicago Blackskins, the Miami Hymes….and, of course, that home-town favorite…the Washington Redskins." Bruce C. Kelber, *Scalping the Redskins:" Can Trademark Law Start Athletic Teams Bearing*

persuasiveness of an argument of this nature, and the unlikelihood of such an event, the argument is predominantly used for shock value. For example, as much as the term "nigger" pervaded throughout society prior to the Civil Rights movement, no team was ever branded with this moniker. This is because, as a whole, society was deeply cognizant of the discriminatory nature and denigrating effects of the "N" word and fortunately, its use as a name for a professional sports team was never tested. From a similar perspective or racial context, it is easy to sympathize with the plight of Native Americans. It is conceded that were society to view the term "redskin(s)" with as much revulsion as the term "nigger," the use of Native American names in sports would be as extinct as the dinosaur. The sad reality is that although the derogatory nature of a term should be examined from the perspective of the people it offends, the viewpoints of society as a whole dictate decisions and compel whatever changes are to occur. If Native Americans are to succeed in evoking change, the American population must first be educated regarding the extreme derogatory nature of the term. Perhaps the most essential step required in order to achieve the objectives of Native Americans is for them to build a solid foundation of support with the American public through continued education efforts. To this regard, the likelihood of having the state legislatures or the U.S. Congress, or both, put this war to an end seem less remote and the preceding battles fought at the court level appear simply as appropriate requisites to success.

Current State of *Harjo*

Over one year ago the United States District Court for the District of Columbia and Judge Kottar-Kelley passed down its decision to allow Pro Football Inc., and the Washington Redskins to retain its trademarks registered over forty years ago. Although Harjo et al vowed to appeal the decision to the highest court in the land, the Supreme Court, as of the date of this publication no such appeal had been filed. In addition to the failure to appeal the decision in Pro-Football, Inc. v. Harjo, a new survey was published by the Annenburg Public Policy Center of the University of Pennsylvania on September 24, 2004, which gives further credence to the position of Pro-Football, Inc., that the term "redskin(s)" as used in conjunction with the professional football team, the Washington Redskins, is not offensive to Native Americans (as well as the other individuals surveyed).[170] Although the survey indicates that ten percent of the Native American population surveyed find the term offensive, almost 65,000 people surveyed (65,047 of all races and nationalities surveyed in all) did not find the term offensive.[171] The fact remains that until the general public is educated on the racial origins of the term "redskin(s)," the term will continue to be revered as a denotative term for the Washington Redskins professional football franchise and the elimination of the term will prove a daunting task for those opposed to its use.

Native American Nicknames and Images on the Road to Racial Reform? 17 HAMLINE L. REV. 533 (Spring, 1994).

[170] Joyce Howard Price, *Indians Give a Cheer for the Name "Redskins,"* THE WASHINGTON TIMES, 2004 *available at*, http://www.washtimes.com/national/20040925-121238-9407r.htm (last visited Nov. 20, 2004).

[171] *Id.*