



## The Morning Star Institute

611 Pennsylvania Ave. S.E. • Washington, DC 20003 • (202) 547-5531 • Fax (202) 546-6724

STATEMENT OF SUZAN SHOWN HARJO, PRESIDENT, THE MORNING STAR INSTITUTE, FOR THE OVERSIGHT HEARING ON "STOLEN IDENTITIES: THE IMPACT OF RACIST STEREOTYPES ON INDIGENOUS PEOPLE," BEFORE THE COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, WASHINGTON, D.C., MAY 5, 2011

Mr. Chairman, Mr. Vice Chairman and Members of the Committee on Indian Affairs, thank you for holding this oversight hearing on this important issue. I am Suzan Shown Harjo, President of The Morning Star Institute, a national Native rights organization founded in 1984. I am Cheyenne & Hodulgee Muscogee and a Cheyenne citizen of the Cheyenne & Arapaho Tribes of Oklahoma.

I have been impacted by "Indian" stereotypes and involved in efforts to eliminate stereotyping of Native peoples in popular culture for most of my life. These stereotypes affect the good name, reputation and self-image of every single Native nation and person. As children, we walk through landmine fields of cultural stereotypes that slander, smear, mock or belittle our ancestors, heroes, leaders, families, friends and future generations. As Native nations, communities, organizations and individuals, we help each other to address the actions that target us or to stay out of harm's way. Some of our peoples cannot or will not stand up for themselves – they shut down, avoid the issue or, the saddest reaction of all, internalize the slurs and negative messages, and act out in self-destructive ways or take aim against the nearest available target – so, those of us who can, stand up for those who can't and for each other.

Race-based stereotypes pervade the culture and usually fall into four categories: the "safe savage," the "noble savage," the "good savage" and the "savage savage." Historical Native figures, such as Hiawatha and Pocahontas, are turned from fact to fantasy, from humans to cartoons. Fictional "Indian" characters, from "The Indian in the Cupboard" to the Indian butter maiden, are presented in diminutive, harmless form. These are "safe savages."

The category of "noble savage" includes the Keep America Beautiful "Indian" (a non-Native actor), who cried as trash was thrown at his feet, and the "End of the Trail" Indian draped over his horse in humiliation and defeat. The "good savage" includes any Native nation or person who ever blazed a trail or scouted out any Indian for the historic whiteman (or deceased Indians everywhere, as in the saying spawned by Gen. Phillip Sheridan: "The only good Indian is a dead one"). The "savage savage" includes the Cleveland Indians' "Chief Wahoo," the Florida State University's "Seminoles" or "Nole" logo and "Osceola" mascot and the Chicago Blackhawks' "Tommy Hawk" and other hideous, inhuman, insulting or just plain dumb-looking caricatures.

Disembodied "Indian" heads, wooden "Indians" and all symbols that replace human Indians – arrows, arrowheads, braids, feathers, spears and the like – can be disbursed into the other categories or lumped into one "missing savage" category, along with all stolen identities, such as the Jeep Cherokee or Apache Helicopter. Some of these involve the offense (or name-calling or bullying) side of stereotypes, some involve the cultural appropriation (or theft or larceny) side of stereotypes and others involve both.



Some of these are said to be good stereotypes, but there is no such thing as a good stereotype. A stereotype is a stereotype. They present to our children undesirable traits and ends, and the unattainable perfection and goals, when most Native people exist in reality and in the great middle range.

In 1990, Morning Star's *1992 Alliance* and The Elders Circle issued a public statement, which read in part: "We call upon the entertainment and news industries, the sports and advertising worlds and all those with influence in shaping popular culture to forego the use of dehumanizing, stereotyping, cartooning images and information regarding our peoples, and to recognize their responsibility for the emotional violence their fields have perpetuated against our children."

### **"Geronimo EKIA"**

Just this week, the landmines of stereotypes littered our lands and exploded in our homes, and we had no time to shield our children from them. As we were absorbing the news of the taking of Osama bin Laden by the heroic Navy SEALs, we also learned that his codename was "Geronimo" and that the first reports were that Geronimo had been ID'd and "Geronimo EKIA (Enemy Killed In Action)." Shortly thereafter, various spin cycles began, attempting to convince us that we hadn't heard or read what we heard and read – Geronimo stood for the operation to get bin Laden, not for the terrorist himself; Geronimo was used because he was hard to track or capture; Geronimo was the codename because the military picks obscure things the enemy would not know.

Geronimo was picked for the same reason that the term "Indian country" is still used to mean enemy territory. The "savage savage" Indian-as-enemy stereotype is so deeply embedded in the American psyche that there are those who fear that Indians, once in control of anything, will treat white people as badly as the historic whiteman treated us. (Chiricahua Apache sculptor Bob Haozous often makes the point that he means no offense to white people and only those who behave today like the historic whiteman behaved toward us in the past need feel offended.)

One of the first communications I received on the bin Laden codename was from Dr. Tom Holm (Cherokee-Creek), a Marine veteran of the Vietnam War and a retired professor of Political Science and Native American Studies at the University of Arizona: "I honor those members of our armed forces who have found and killed a particularly evil enemy of the U.S. I am, however, dismayed that...the code that our forces used to transmit the fact of bin Laden's death was 'Geronimo-KIA.' I remember very well that in Vietnam our commanders habitually called areas where the NVA and VC had control, 'Indian Country.' High schools and colleges across the nation use the image of the Native American warrior as team mascots. We have fought these false, harmful, and degrading stereotypes for years to no avail.

"As a professor, I wrote two books on Native American servicemen and women. Native Americans served in the U.S. military in greater proportional numbers than any other group. The San Carlos Apache reservation, from whence the real Geronimo escaped the oppressive conditions of 19<sup>th</sup> century Indian policy, can boast that of their entire population fully eleven percent have served or are currently serving in the U.S. armed forces. Geronimo surrendered his small band of followers in 1886, only to be imprisoned (along with numerous Apache men, women, and children), and exiled from his own land for the rest of his life. Native Americans have served in every American war, only to have our lands taken away. Why do we Native American veterans have to suffer the indignity of continually being referenced as the principal enemy of the U.S.?"

My father, Freeland E. Douglas (Muscogee Creek), was a WWII hero with the Thunderbird 45<sup>th</sup> Infantry Division, Company C, which was comprised solely of Indian men from Chilocco Indian School in Oklahoma. In training camp and on the troop ship across the Atlantic Ocean, he and his schoolmates in Co. C developed a code based on words and phrases from the heritage languages they were beaten for speaking in the federal boarding schools, and based on the coordinates of the Chilocco structures and landscapes. The Co. C men were highly decorated; among them was Ernest Childers (Muscogee Creek), who was the first Native American soldier to receive the Medal of Honor. Eric Morris wrote in his *Circles of Hell: The War in Italy, 1943-1945*: "The Germans had been told that the Forty-fifth Infantry was a National Guard outfit manned largely by Red Indians, racially inferior people who had no love of the white man and probably wouldn't fight. How wrong they were."

These "Red Indians" fought and won battles in North Africa, Sicily, Anzio, Rome and into Austria and Germany; some of them and their replacements liberated the Dachau Concentration Camp. Dad was seriously injured at Monte Cassino, Italy; after his legs were saved, but riddled with shrapnel he would carry for the rest of his life, he returned to Chilocco as a disabled veteran, completed his senior year, reentered the Army and went to the Presidio of Monterey, where he learned many other languages and code-making and code-breaking. He was later stationed in Naples, Italy, with Allied Forces Southern Europe, NATO. He was an ally, not an enemy. His Muscogee (Creek) Nation stands by its Treaties with the United States, which promise to be allies forever in peace and friendship, not enemies. This country is our country in a way that it cannot be to any other peoples who now share it with us. We should not be treated this way in our own homelands.

When people representing the U.S. reach back a century to take a gratuitous swipe at Geronimo as an enemy and to equate him with a terrorist, they are insulting all Native American nations and people. We well understand that attitudes lead to actions and actions reflect attitudes. We know that heinous things were done to our ancestors, and to our peoples in our lifetimes, and that they grew out of anti-Indian and anti-treaty attitudes, name-calling and bullying. That is why we take the matter of stereotypes so seriously and believe that we should not be subjected to denigrating names, imagery and behaviors in polite society. If it is permissible to refer to us in disparaging ways, it signals that even worse things can be done.

It is no wonder that some people in the Washington Metropolitan Area are insensitive and tone-deaf when it comes to Native peoples. The atmosphere is toxic for and about Native peoples during football season. The Washington professional football club with the despicable team name and its paid fans with their hideous costumes, ridiculous dances and woo-woo-woo "Indian" sounds sets a level of insensitivity that would make most people think they could get away with any pejoratives toward Native peoples, living or dead, even to the point of branding some as enemies. It used to be that every trashcan in Washington, D.C., had the football club's logo plastered on all four sides. The practice was discontinued when we filed suit against the disparaging team name, so at least our lawsuit got the "Indian" heads off the trashcans.

### **Movement to Eliminate "Native" Sports References**

I have been involved in the movement to eliminate "Native" names, logos, symbols, behaviors and other references in American sports for many decades, first as a young Native woman who was influenced, informed and encouraged by Native students and the National Indian Youth Council, which shaped that movement in the early 1960s. One of the NIYC founders, Clyde Warrior (Ponca), focused on the University of Oklahoma's objectionable mascot, "Little Red."

NIYC worked with a broad coalition of OU students, faculty, administrators and support committees of women and students of color and, in 1969, formed an NIYC chapter on campus in memory of Clyde Warrior, whose brief, catalytic life had ended months earlier. They were branded as "militants" and "troublemakers." As community organizer Frances Wise (Waco & Caddo) is fond of saying, "We didn't start the trouble; the trouble was already there; we're here to do something about it."

Native students called "Little Red" the "dancing idiot." It was portrayed by white male students until the late-1960s, when Indian male students got the job and were used by administrators and fans to illustrate "divided Indian opinion" on the subject. The 1969 "Little Red" was Ron Benally (Navajo), who stunned the mascot's boosters when he sat out the big Thanksgiving game, saying he would not dance if other Native students opposed it. He was the darling of the fans, when they thought he was going to entertain them with his "Indian" dance, and the object of their pejorative and chants when he did not. In 1970, after a Native sit-in at the OU president's office, the school's human relations committee called for the "total abolishment of Little Red....Perhaps for the first time since statehood, Oklahomans have the proposition forcefully thrown up to them that being Indian is being a certain kind of human being and not an object of entertainment." OU quickly retired "Little Red."

In 1970, the University of Oklahoma became the first American university to eliminate "Indian" stereotypes in its athletic program. "Little Red" was followed soon thereafter by the Stanford University "Indians" in California in 1973; the Dartmouth College "Indian" in New Hampshire in 1974; and the Syracuse University "Saltine Warrior" and the St. Bonaventure University "Brown Squaw" in New York in 1975. (Seneca clanmothers and a chief informed the St. Bonaventure players and faculty in 1975 that "squaw" was a vulgarism for woman or meant vagina in certain Iroquoian and Algonquian languages, and the women's team abandoned the name immediately, without fanfare; it took another 20 years for the athletic program to drop "Brown Indian.")

Duane Bird Bear (Mandan-Hidatsa, Knife Clan), who was the spokesperson for the widespread coalition that got rid of the Dartmouth "Indian," coined the term "cultural drag" to describe the "Indian" get-ups worn by sports fans and trick-or-treaters. Chris McNeil (Tlingit), Mary McNeil (Winnebago), Lois Risling (Hoopa, Yurok & Karuk) and many others at Stanford ended "Indians" and dealt with the backlash that almost reinstated the stereotype. Onondaga Chiefs Irv Powless, Jr., and Oren Lyons were among those who convinced Syracuse to drop the "Saltine Warrior," which began as a joke in 1931, when a student rag reported that fictitious artifacts were unearthed by construction on campus, including a "portrait of an early Onondaga chief, O-gee-ke-da Ho-achen-ga-da, the saltine warrior Big Chief Bill Orange."

American sports teams started out with only colors. OU is Big Red; Stanford is Cardinal, the color; Dartmouth, Big Green; and Syracuse is Orange, the color, which led to the fruit. The first federal Indian boarding schools and some mission schools in the late-1800s were trying to detribalize and deculturalize Indian students and establish a pan-Indian identity, with a Plains Indian look. They named their athletic programs "Indians," "Warriors," "Chiefs" and "Braves," and these seem to have encouraged non-Indian schools to adopt "Indian" sports identities.

Most of the teams with "Indian" references and nearly all those with dancing mascots began at a time when actual Native American people could not dance on the reservations without permission of the federal Indian agent, under the *Civilization Regulations*, a 50-years-long formal plan to destroy American Indian religions, cultures and ways of life. The federal rules were issued by Interior Secretaries in 1884, 1894 and 1904, and were vigorously enforced by each one until the New Deal policies of President Franklin Roosevelt. They were not withdrawn

until 1935. The generational oppression of the *Civilization* policies forced Native American religions and languages underground, and many of them never reemerged.

Congress did not authorize the *Regulations*, but it looked the other way during the half-century they criminalized all traditional ceremonies and dancing, "roaming away from the reservation" and interfering with children being taken away to boarding schools. The *Regulations* outlawed the Sun Dance "and all other similar dances and so-called religious ceremonies." A subsequent *Circular* instructed all Indian agents to "undertake a careful propaganda against the Dance," which meant to smear the names and reputations of any kind of ceremony and its participants.

The *Civilization Regulations* also banned the "usual practices" of a "so-called 'medicine man' (who) operates as a hindrance to the civilization of a tribe"... who "shall adopt any means to prevent the attendance of children at the agency schools" or who "shall use any of the arts of a conjurer to prevent the Indians from abandoning their heathenish rites and customs." Indian people were subject to starvation and imprisonment sentences if convicted of *Civilization* "offenses" or "any other, in the opinion of the court (of Indian offenses), of an equally anti-progressive nature," were "confined in the agency guardhouse for a term not less than ten days, or until such time as he shall produce evidence satisfactory to the court, and approved by the agent, that he will forever abandon all practices styled Indian offenses under this rule."

We still experience efforts to "civilize" us, but we no longer are outlaws for dancing. What we are dealing with in the modern era are the vestiges of racism from earlier times and backlashes to our current struggles to exercise our treaty and sovereign rights and to attain human and civil rights.

The good news in the area of athletic programs is that we, Native peoples and friends collectively, have eliminated over two-thirds of the "Native American" sports references. In 1970, when "Little Red" fell, there were over 3,000 of these "Indian" stereotypes. Today, there are fewer than 1,000. A societal sea change has taken place in educational sports and we're only doing clean up now. Each of the 2,000 changes in "Indian" references at elementary, middle and high schools and colleges and universities has been a community effort, even if started by one student, family or teacher.

I wrote about a handful of these efforts -- some successful, some not, some in between -- in *Just Good Sports: The Impact of "Native" References in Sports on Native Youth and What Some Decolonizers Have Done About It*, a chapter in *For Indigenous Eyes Only: A Decolonization Handbook* (SAR Press, 2005). In addition to the offense and hurt behind the struggles, I found that the efforts themselves were empowering and confidence building for the Native students.

It's a different matter in professional sports, where no franchise has done away with its "Indian" reference. In educational sports, most people who work in schools care deeply about the emotional, physical and mental health and well being of the students. Oftentimes, they can do little or nothing to change anything that has been institutionalized. In this subject area, they can do something to avoid long-term conflict, improve a racially charged situation and make definitive, positive change. In pro sports, it seems to be all about the money, with little or no regard for a small population or "handful of militants" and "their amici cohorts," as Pro Football, Inc., called the seven of us who engaged in an orderly legal process and the National Congress of American Indians, the National Indian Education Association, the National Indian Youth Council and TICAR, the Tulsa Indian Coalition Against Racism.

## What Can Congress Do?

What can Congress do about this complex problem? One quick and symbolically important step would be to affirm the 1999 decision of the Trademark Office that the term “redskins” is one that may disparage Native Americans and is therefore not eligible for trademark registration. Obviously, this action would address very little of the much larger problem, but it is a symbolically important place to start and it is an action that would correct a wrong committed by a federal government agency. The federal government should set an example and do its part by reversing its own contribution to the use of racist and stereotyped terms concerning Native Americans.

The term “redskins” is the most vile and offensive term used to describe Native Americans. It is most disturbing to the overwhelming majority of Native Americans throughout the country that the professional football team in the Nation’s Capitol uses a team name that demeans us. Of course, Congress cannot pass a law that prevents people from using racist terms or a law that dictates the team name for the Washington football team. Congress, however, can correct the error committed by the United States Trademark Office when it erroneously registered trademarks that use the term “redskins.”

In fact, as explained below, in 1999, the Trademark Office admitted that it had committed a legal error when it registered the trademarks because trademarks that may disparage people are not eligible for registration. Congress should codify the 1999 decision of the Trademark Office in *Harjo et al v. Pro Football, Inc.*

By way of suggestion, my testimony includes a draft bill entitled, “Non-Disparagement of Native Americans in Trademark Registrations Act of 2011,” which would cancel the registrations of trademarks that employ the term “redskins” in reference to American Indian nations and people. Also included is a section-by-section analysis of the bill.<sup>1</sup>

According to a review of the Trademark Office web site, the Trademark Office has issued registrations for six trademarks that use the term “redskin” in reference to American Indian peoples. In addition, there appear to be five pending applications for registrations for such trademarks, three submitted by the owners of the Washington football team and two submitted by others (the pending applications are for “12<sup>th</sup> Redskin,” “Washington Redskins Cheerleaders,” “Redskins Broadcast Network R,” “Boston Redskins” and “Washington Redskins” used with certain items). Under the draft bill, the existing registrations would be cancelled and the pending applications would be ineligible for approval.

### **Background – The Trademark Office Admitted That It Erred In Granting Registration To Trademarks That Use The Term “Redskin” In Reference To American Indians**

In 1992, I learned that, between 1967 and 1990, the United States Trademark Office had registered six trademarks owned by the Washington NFL Team that use the term “redskins” or a derivation (such as “redskinettes” to refer to the team’s cheerleaders). Registering these trademarks was clearly an error on the part of the Trademark Office. Section 2(a) of the Lanham Act requires the Trademark Office to refuse to register any trademark that “[c]onsists of or

---

<sup>1</sup> I want to thank Paul Moorehead and Jesse Witten, attorneys with the law firm of Drinker Biddle & Reath LLP, as well as Philip Mause, a retired attorney formerly with that same law firm, for their assistance in drafting the bill and the section-by-section analysis.

comprises . . . matter which may disparage . . . persons, living or dead . . . or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a).<sup>2</sup> Because “redskins” is such a disparaging term, the Trademark Office erred when it granted the registration applications.

In September 1992, six other Native American people and I filed a petition with the Trademark Trial and Appeal Board (TTAB) asking the Trademark Office to correct its mistakes and cancel the registrations of trademarks that contain the term “redskins.” Section 14 of the Lanham Act permits petitions to cancel registrations when one believes that the Trademark Office has registered a trademark unlawfully. See 15 U.S.C. § 1064. My co-plaintiffs were Raymond D. Apodaca (Ysleta del Sur Pueblo), Manley A. Begay, Jr. (Navajo), Vine Deloria, Jr. (Standing Rock Sioux; 1933-2005), Norbert S. Hill, Jr. (Oneida), William A. Means, Jr. (Oglala Lakota) and Mateo Romero (Cochiti Pueblo).

In 1999, after seven years of administrative proceedings, including many depositions, written discovery and an adversarial proceeding, the TTAB ruled that the term “redskins” may disparage American Indians or bring them into contempt or disrepute. Accordingly, the TTAB granted our petition to cancel the registrations. See *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705 (TTAB 1999).

The Washington football team then appealed the TTAB decision to federal district court. Under the Lanham Act, a party dissatisfied with the Trademark Office’s decision on a petition for cancellation may appeal to a United States district court. See 15 U.S.C. § 1071(b). The Director of the Patent and Trademark Office cannot be made a defendant in such an appeal, but has the right to intervene. See 15 U.S.C. § 1071(b)(2). Rather, the defendant in an appeal is the other side to the petition to cancel. Consequently, we seven Native people had to defend the administrative decision of the Trademark Office for ten years.

To defend the appeal, we were required to find our own counsel (who represented us pro bono) and our own expert witnesses (who also provided their services pro bono) to defend an administrative action of a federal government agency. In most trademark cases this may make sense because most trademark cases involve disputes between two businesses over who gets the right to use a trademark. In our case, however, it seemed inappropriate to place the burden on private individuals who were seeking to correct a legal error made by the Trademark Office, an error that affects broad public policy concerns rather than private business interests.

Eventually, the Court of Appeals for the D.C. Circuit ruled, in 2009, that my fellow petitioners and I waited too long after our 18th birthdays to file our petitions to cancel with the TTAB. The D.C. Circuit held that our petition was barred by the doctrine of laches. See *Pro-Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009), cert. denied 130 S.Ct. 631 (2009); *Pro Football Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005).

In 2006, a group of young Native Americans filed another petition to cancel the registrations over six trademarks using the term “redskins” owned by the Washington NFL Football Team. They filed that petition after the courts held that we petitioners in the first case were too old to file our petitions. This action is currently pending before the TTAB and is captioned *Blackhorse et al. v. Pro-Football, Inc.*, No. 92/046,185 (TTAB). The *Blackhorse* plaintiffs are Amanda

---

<sup>2</sup> In addition, Article 1708 of the North American Free Trade Agreement requires the United States to refuse to register trademarks that “may disparage persons, living or dead, . . . or bring them into contempt or disrepute.”

Blackhorse (Navajo), Marcus Briggs-Cloud (Muscogee), Phillip Gover (Paiute), Jillian Pappan (Omaha) and Courtney Tsotigh (Kiowa).

The laches issue should not be relevant to their petition because of their young ages. However, they will face the same bizarre problem that we faced – the need to find pro bono counsel and expert witnesses (linguists, historians and sociologists), in order to defend the TTAB's ruling in federal court (assuming the TTAB reaches the same conclusion in *Blackhorse* as it did in 1999 in *Harjo* that the term "redskin" may disparage Native Americans).

Additionally, during the course of the first case, a number of new trademarks requests were held until the conclusion of our case. In February 2010, the Drinker, Biddle & Reath law firm filed letters of protest against the new requests on a pro bono basis for me and five other Native people: Manley A. Begay, Jr. (Navajo), Duke Ray Harjo II (Muscogee & Cheyenne), Robert Holden (Choctaw-Chickasaw), William A. Means (Oglala Lakota) and Mateo Romero (Cochiti Pueblo).

### **The Term "Redskins" Disparages Native Americans**

There can be no dispute that the term "redskins" disparages Native Americans and no trademark using the term should be registered. The following definitions of "redskin" from multiple well-respected dictionaries establish that the term is disparaging:

"Slang (often disparaging and offensive). A North American Indian." Random House Webster's Unabridged Dictionary (Random House, Inc., 2001).

"Usage. This term is rarely used today. It is perceived as insulting to Native Americans. – n. Older Use: Offensive. American Indian. [1690-1700]." Random House Webster's College Dictionary (2nd ed. revised, Random House, 2001).

"Offensive Slang. Used as a disparaging term for a Native American." The American Heritage College Dictionary (4th ed., Houghton Mifflin Company, 2002).

"a North American Indian (usually construed as offensive)." The New Lexicon Webster's Dictionary of the English Language (Vol. 2, Lexicon Publications, Inc., 2004).

"a No. American Indian – use, taken to be offensive." Webster's Third New International Dictionary of the English Language Unabridged (3d ed., Merriam-Webster, 1993).

"1. offensive term: an offensive term for a Native North American (dated); 2) Caribbean somebody of European and African ancestry: a light-skinned person with African features, usually of mixed European and African origin (sometimes offensive)." Encarta World English Dictionary (Online edition) [http://encarta.msn.com/dictionary\\_1861700097/definition.html](http://encarta.msn.com/dictionary_1861700097/definition.html).

"colloq. offens. A Native American." The Oxford American Dictionary and Thesaurus (2nd ed., Oxford University Press, Inc. 2003).

### **Numerous Schools Have Changed Their Team Names**

Because of the disparaging nature of the term, numerous universities and schools have ceased using "Redskins" as their team name in recent years, including:



Miami University (Ohio) – to Red Hawks  
Arvada Senior High School (Arvada, CO) – to Reds  
Bell-Chatham, Illinois Board of Education school district  
Canajoharie, New York school district  
Frontier High School (Deerfield, MA) – to Redhawks  
Grand Forks Central High School (Grand Forks, ND) – to Knights  
Hiawatha, Kansas school district  
Monticello High School (Monticello, MN) – to Magic  
Naperville Central High School (Naperville, IL) – to Redhawks  
Parsippany-Troy Hills High School (Parsippany, NJ) – to Redhawks  
Rickards High School (Tallahassee, FL) – to Raiders  
Saranac Lake, New York school district  
Scarborough High School (Scarborough, ME) – to Red Storm  
Seneca High School (Louisville, KY) – to Redhawks  
Southern Nazarene University (Bethany, OK) – to Crimson Storm

Likewise, in 2005, the National Collegiate Athletic Association, the governing body for college athletics, condemned the use of these disparaging references and banned the use of “Native” names, logos and mascots by colleges and universities during its championship tournaments.

Indeed, there is widespread objection throughout numerous segments of society to “Indian” sports mascots in general and to use of the term “redskins” in particular. American Indian tribes and organizations, governmental bodies, civil rights organizations, religious groups, professional societies, and newspaper articles and editorials have all condemned the use of the term “redskins” and “Indian” sports mascots.

### **Congress Should Act And Not Obligate The *Blackhorse* Petitioners To Litigate**

As explained above, Congress should act to correct the erroneous legal decision of the Trademark Office, a decision that the agency has itself admitted was wrong. By registering the trademarks, the Trademark Office has effectively subsidized the use of a vile, racist term, and the government should reverse that perverse result.

Leaving this matter to the *Blackhorse* petitioners is no solution, but an abdication of Congress’s responsibility to govern. The *Blackhorse* petitioners are young people who are trying to live their lives, enjoy their families and pursue their careers and interests. They filed their petitions with the TTAB to correct an injustice, and they have received pro bono legal assistance from the law firm of Drinker Biddle & Reath LLP.

Even after the TTAB rules in their favor (assuming it does not reverse its own 1999 ruling), the *Blackhorse* petitioners would then have to defend the agency’s action in federal district court, finding pro bono legal counsel and experts (linguist, historian, sociologist) also willing to serve pro bono. That is because, as noted above, the Lanham Act does not require the Trademark Office to defend its decision on appeal. Rather, the Act leaves it to the petitioners to defend the agency’s decision. See 15 U.S.C. § 1071(b)(2). If Congress agrees with the TTAB that “redskins” is a term that may disparage American Indians, Congress should step in and enact legislation.

Enacting the draft bill would not be unfair to the owners of the Washington football organization. First, American Indian people – as individuals and through organized associations, such as the National Indian Youth Council and the National Congress of American Indians – have protested

the name of the team on myriad campuses since the early 1960s, and well before the team owners applied for many of their registrations. Second, the Lanham Act has been clear since 1946 that trademarks that disparage are not entitled to registration and disparaging trademarks may be canceled at any time. See 15 U.S.C. §§ 1052(a) & 1064. In addition, the Washington team owners have known since my colleagues and I filed our petition in 1992 -- and since the three trademark judges of the TTAB decided unanimously in our favor in 1999 -- that its registrations were legally vulnerable. The owners have had many years to plan their business accordingly.

Furthermore, the draft bill would not cancel the trademarks, but merely cancel the registration of the trademarks. Canceling a trademark registration does not cancel the trademark because one's right in a trademark arises under the common law based on one's use of the mark. See, e.g., Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812 (1st Cir. 1987) (holding that "the cancellation of a trademark registration does not extinguish common law rights that registration did not create"). Miller v. Glenn Miller Productions, 454 F.3d 975 (9th Cir. 2006) (stating "[r]egistration does not create a mark or confer ownership; only use in the marketplace can establish a mark."); Fossil, Inc. v. Fossil Group, 49 U.S.P.Q.2d 1451 (TTAB 1998). Rather, in the Lanham Act, Congress provided that a registered trademark carries with it certain benefits that an unregistered trademark lacks.<sup>3</sup>

Finally, nothing in the bill would limit free speech or would require the owners of the Washington NFL Team to change the team's name. Although the bill ensures that the federal government would not subsidize the use of the term "redskin" through trademark registration, no person or entity would be constrained to use that racist term if inclined to do so. The federal government, however, should play no role whatsoever in promoting disparaging and racist speech.

## **Conclusion**

I respectfully urge the members of the Senate Committee on Indian Affairs to support legislation that would affirm the Trademark Office's 1999 decision that trademarks using the term "redskin" in reference to Native Americans are not eligible for registration and that all such existing registrations should be cancelled. To assist the Committee, I have provided a draft bill entitled "Non-Disparagement of American Indians in Trademark Registrations Act of 2011."

Thank you.

---

<sup>3</sup> These benefits include: (i) federal jurisdiction for infringement without the necessity of any required amount in controversy; (ii) increased recovery in infringement actions, such as lost profits, costs, treble damages and attorneys' fees; (iii) registration serves as prima facie evidence of the validity of the mark, registrant's ownership of the mark nationwide, and the registrant's exclusive right to use the mark; (iv) registration may become "incontestable" as conclusive evidence of registrant's exclusive right to use the mark; (v) registration serves as constructive notice to others of the mark and eliminates any good faith adoption of confusingly similar marks; (vi) owners can use the ® symbol with the mark; and (vi) a registration may be filed with the U.S. Customs Service to prevent importation of infringing foreign goods.