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Developments in U.S. Law: Government Speech Doctrine; Online Speech

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Two decisions in 2015 demonstrate the possible expansion, and potential limits, on the “government speech” doctrine as it implicates U.S. First Amendment rights. These are *Walker v. Texas Division, Sons of Confederate Veterans*, in which the U.S. Supreme Court rejected a First Amendment challenge to a state license plate scheme, and *In re Tam*, where the U.S. Court of Appeals for the Federal Circuit struck down part of the federal trademark registration law on First Amendment grounds. In the realm of online speech, the U.S. Supreme Court’s decision in *Elonis* clarified the nature of the intent standard required to prosecute the communication of threats.

Walker v. Texas Division, Sons of Confederate Veterans (U.S. Supreme Court, June 2015)

- The Supreme Court, in a 5-4 decision, held that Texas’s specialty license plate scheme, through which groups can apply for their own personal license plate design, is not subject to the limits imposed by the Free Speech Clause of the First Amendment because it conveys government speech. The state can thus control the content of license plates, and is not required to be viewpoint-neutral in granting or denying permission to create a specialty plate.
- The Sons of Confederate Veterans had their application for a specialty license plate denied on the grounds that members of the public would find it offensive, and filed suit claiming that the denial violated the First Amendment because it constituted viewpoint discrimination.
- The Supreme Court held that specialty license plates issued by the state convey government speech, and identified three relevant factors: i) whether the state or private speakers have historically used license plates to convey messages; ii) with whom license plates designs are identified in the public mind; and iii) who maintained direct control over the designs. In doing so, the Court rejected the argument that the government provides a forum for private speech through its specialty plates.

- A dissenting opinion by Justice Alito, joined by Justices Roberts, Scalia, and Kennedy, argued that the majority opinion threatens private speech rights by categorizing such speech as government speech and thereby stripping it of First Amendment protections. They provided examples of private speech that could be implicated by the decision, including campus billboards that are restricted to allow only those messages the university prefers.

In re Tam (U.S. Court of Appeals for the Federal Circuit, December 2015)

- The Federal Circuit, which is the specialized federal appeals court that reviews trademark and patent cases, held that Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), which bars registration of disparaging trademarks, is unconstitutional both facially and as applied under the First Amendment.
- The challenge was brought by a band called the Slants, which was denied federal trademark registration for its band name on the ground that it is disparaging within the meaning of the Lanham Act.
- The Federal Circuit, sitting en banc, ruled 9-3 that the disparagement clause of the Lanham Act violates the First Amendment on its face because it denies a government benefit to certain speakers on the basis of viewpoint. The court also found, 10-2, that Section 2(a) violates the First Amendment as applied to the Slants, with one judge joining the majority on the theory that, while commercial uses of trademarks can be regulated by Section 2(a), the Slants' use constitutes political expression that cannot be so regulated.
- In holding Section 2(a) facially unconstitutional, the majority rejected the government's argument that the trademark registration scheme conveys government speech per *Walker*, noting that the Patent and Trademark Office routinely registers trademarks that nobody would believe the government endorses. It additionally rejected the government's argument that, by listing registered trademarks in a database and issuing registration certificates, the government engages in speech and can select certain viewpoints.
- The case shows the potential reach of the government speech approach taken in *Walker*. The majority noted that if Section 2(a)'s disparagement clause is allowed to stand, the government would have similarly broad power to discriminate based on viewpoint in granting copyrights.

- *In re Tam* may still be appealed to the Supreme Court; there is also a pending case in the Fourth Circuit addressing the same issue with respect to the Washington football team, which had its trademark registration revoked under Section 2(a)'s disparagement clause. The issue will likely ultimately be decided by the Supreme Court.

Elonis v. United States (U.S. Supreme Court, June 2015)

- The Supreme Court, in an 8-1 decision, held that a federal law criminalizing the communication of a threat requires a mental state greater than negligence. The Court held the mental state requirement is satisfied if the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat, and declined to rule on whether a mens rea of recklessness would suffice. The Court also declined to address any First Amendment issues raised by the case.
- The case arose out of the conviction of a man who posted self-styled "rap lyrics" on his Facebook page, which included violent language and imagery about his soon-to-be ex-wife that caused her to fear for her life. The lower court had held that all that was required for conviction was an intent to communicate words that the defendant understands, and which a reasonable person would view as a threat.
- Although the Court ultimately did not address any First Amendment issues, the case implicates broader questions about the nature of speech on social media, and how to evaluate the relevant audience for purposes of identifying true threats.