

SCOTUS: Definition of Hate Speech and Other Important Developments Under the First Amendment

On June 19th, 2017, the United States Supreme Court reached two important conclusions in terms of the First Amendment. In *Matal v. Tam*, 581 U.S. ____ (2017), the Supreme Court provided a useful definition of what a hate speech is as well as it's relation to the First Amendment. The highest Court also had the opportunity to decide once and for all if a trademark constitutes a representation in any way of the government's point of view.

You may be asking why this case is important to Law Enforcement operations. For years DLG has focused on crowd control and management policies, training and articles. You can find a few previously prepared articles on crowd management on our [publication page](#). The occupy movement has given us a glimpse of what we can expect to see in the future. Preparation to address these crowds is best achieved through policy, training and application of how to manage crowds while protecting First and Fourth Amendment rights. In teaching officers the protections afforded by the First Amendment we focus on content neutral-time, place or manner restrictions, i.e. don't focus on what the protestors say but what they do. So which part of this focuses on what is hate speech is?

Facts:

Simon Tam is the lead singer of "The Slants". He chose this moniker in order to reclaim and take ownership of stereotypes about people of Asian ethnicity. The group draws inspiration for its lyrics from "childhood slurs and mocking nursery rhymes" and has given its albums names such as *The Yellow Album* and *Slanted Eyes, Slanted Hearts*.

Tam sought federal registration of "THE SLANTS," on the United States Patent and Trademark Office (USPTO), but an examining attorney at the USPTO rejected the request, applying the USPTO's two-part framework and finding that "there is . . . a substantial composite of persons who find the term in the applied for mark offensive. The examining attorney relied in part on the fact that "numerous dictionaries define 'slants' or 'slant-eyes' as a derogatory or offensive term." The examining attorney also relied on a finding that "the band's name has been found offensive numerous times"—citing a performance that was canceled because of the band's moniker and the fact that "several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive."

Tam contested the denial of registration before the examining attorney and before the USPTO's Trial and Appeal Board (TTAB) but to no avail. Eventually, he took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment's Free

Speech Clause. The majority found that the clause engages in viewpoint-based discrimination and that the clause regulates the expressive component of trademarks. Consequently, it cannot be treated as commercial speech and the clause is subject to, and cannot satisfy, strict scrutiny. The majority also rejected the Government's argument that registered trademarks constitute government speech, as well as the Government's contention that federal registration is a form of government subsidy. The majority also opined that even if the disparagement clause were analyzed under this Court's commercial speech cases, the clause would fail the "intermediate scrutiny" that those cases prescribe.

Decision and Reasoning

The Supreme Court affirmed the Federal Circuit's judgment holding that:

1. The First Amendment prohibits Congress and other government entities and actors from abridging the freedom of speech; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely.
2. The Free Speech Clause does not regulate government speech. The Government's own speech is exempt from First Amendment scrutiny.
3. The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others, but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing.
4. Public expression of ideas may not be prohibited merely because the ideas are offensive to some of their hearers. For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content and speaker based restrictions are permitted.
5. **Hate speech is speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.**

Conclusion

This case is important because it finally concluded that trademarks constitute private, not government speech. Such conclusion could easily be extended to other situations where we need the government's protection or authorization to conduct our business. Additionally, by issuing an opinion as to what a hate speech is, the Court is giving law enforcement additional tools when they have to be in the middle of any kind of exercise under the First Amendment. Even in situations where what we hear can offend or affect us in any way, knowing what is protected and what is not, allow us to prepare better for these situations.



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