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THE FLAG SALUTE CONTROVERSY: 2008-2009: POLICY IMPLICATION

Overview

More that sixty-years ago the United States Supreme Court made it clear that a state statute requiring public school children to salute the flag violated the First Amendment. In the case before the Court a recitation of the Pledge of Allegiance was regularly carried out each day and a student's refusal to salute the flag was treated as an act of insubordination. In the Court's own words, "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." West Virginia State Board of Education v. Barnette (1943) In so ruling the Supreme Court explicitly overturned what had been the law of the land established in Minersville School District v. Gobitis (1940) where the high court did not consider the requirement of saluting the flag in any way repugnant to the United States Constitution. It should be pointed out that in both cases the objecting parties were motivated by their religious beliefs.

Barnette Applied. In the post-Barnette era the issue quieted as local public school systems worked to enact and implement policies that preserved the requirement that the Pledge of Allegiance be said in each public school but at the same time honored the requests of students who did not wish to participate. More often than not school policies allowed students to be excused from the daily exercise by either leaving the classroom or standing silently while the Pledge was said. The general rule was that so long as a student who refuses to participate is quiet and does not disrupt the exercise or infringe on the rights of other students he/she would not be chastised or in some other way punished. Vacca and Bosher (2008)

Barnette Expanded. The flag salute issue became active again in the late 1960's and early 1970's as lower courts (state and federal) began to receive new challenges from public school students. In the new cases students claimed their objections to reciting and standing during the Pledge of Allegiance were based on political as well as religious grounds. Holden v. Board of Education (N.J. 1966), Frain v. Baron (E.D.N.Y. 1969), State v. Lundquist (Md. 1971), and Goetz v. Ansell(2nd Cir. 1973). During this era of new cases the courts remained constant in their attitude that objecting students were "free not to participate" (see also, Sherman v. Consolidated School District No. 21 [7th Cir 1992]) and could leave the room during the exercise.

However, the courts added a new option. Objecting students who chose to stay in the room did not need to stand during the exercise so long as they remained seated and silent. Again the courts stressed that objecting students could neither disrupt the exercise nor interfere with the rights of other students.

The Newdow Decision. In June, 2002, a three judge panel of the United States Court of Appeals for the Ninth Circuit ruled (by a vote of 2-1) that recitation of the Pledge of Allegiance by students in public schools violated the Establishment Clause of the First Amendment. In its rationale the Court focused on the phrase "one nation under God" and the "impressionability of schoolchildren." In the Court's opinion, these two factors when linked together equate to an "impermissible endorsement of religion." Newdow v. U.S. Congress (9th Cir. 2002) Two years later, however, the United States Supreme Court held that the parent (Newdow) lacked standing to sue on behalf of his daughter; thus, in its narrow ruling the high court left in tact the phrase "one nation under God" in the Pledge. Elk Grove v. Newdow (2004), rehearing denied (2004)

In a post-Newdow case out of Virginia, the United States Court of Appeals for the Fourth Circuit held that the phrase "one nation under God" in the Pledge of Allegiance, when said by public school students as a part of a state statutory requirement, does not violate the First Amendment. Myers v. Loudoun County (4th Cir. 2005), aff'd. (4th Cir. 2005) In this case the appellate court differentiated between a *patriotic (*i.e.*, ceremonial) exercise* and one that is *religious* in nature. Moreover, said the Court, simply because the words "under God" are included does not make the Pledge a religious exercise.

Suffice it to say, over the past three years the flag salute controversy has remained quiet. Recently, while doing research in the law library, I came across a court decision from the United States Court of Appeals for the Eleventh Circuit that once again provides us with an opportunity to revisit this potentially volatile subject and to review the state of the law. The purpose of this commentary is to present the facts in the case and to treat the Court's rationale as it relates to potential policy implications for local public school boards.

Frazier Ex Rel. Frazier v. Winn (11th Cir. 2008)

Facts: In Frazier an eleventh grade student in a Palm Beach County, Florida, public high school, by and through his mother, filed a complaint in a federal district court seeking both declaratory and injunctive relief. At issue was the constitutionality of a State of Florida statute (*Fla. Stat.* 1003.44 [1] 2008, hereafter referred to as the Pledge Statute). The statute in question required public school students to recite the Pledge of Allegiance in school, unless a student had prior parental permission not to participate in the exercise. More specifically, the Pledge Statute, as applied to students by the school system, required that the pledge "shall be rendered by students" and "shall be recited at the beginning of the day in each public elementary, middle, and high school in the state." Students had a right not to participate (i.e., be excused) from the exercise if they: (1) first obtained written parental permission requesting that their son/daughter be excused from recitation of the Pledge of Allegiance, and (2) stood at attention during the Pledge exercise, even if excused by a parent.

District Court Decision. At trial the State of Florida stressed the "fundamental right of parents to control the upbringing of their minor children and to decide whether a child should participate in the Pledge." The State also argued that the Pledge Statute's specific language requiring "civilians" to stand does not apply to students excused from participating in the Pledge. The federal district court denied the State's motion to dismiss and granted plaintiff's motion for judgment on the pleadings. At 434 F.Supp.2d 1350 (2008) In the district court's view the request for parental consent was facially unconstitutional because it represents a restriction that "robs the student of the right to make an independent decision whether to say the pledge." What is more, said the

district court, requiring excused students to stand also is facially unconstitutional. The State of Florida appealed the decision, where the Eleventh Circuit affirmed in part and reversed in part.

Eleventh Circuit Court Decision. The Eleventh Circuit Court first addressed the state statute's requirement that "civilians must show full respect to the flag by standing at attention…." In the Court's opinion, because the Pledge Statute's requirement that "civilians" stand during the recitation of the pledge was severable from the remainder of the statute, a student in public school who is excused from pledging can't be required to stand. Requiring excused students to stand at attention during the Pledge of Allegiance violates the First Amendment. The Court pointed to the fact that the State of Florida itself had argued that the statute should be interpreted as requiring that "only students not exempt from reciting the Pledge should be required to stand during the exercise." The appellate court then added "[t]hat students have a constitutional right to remain seated during the Pledge is well established." Frazier Ex Rel. Frazier (11th Cir. 2008)

The Eleventh Circuit Court next addressed the parental permission requirement. In the Court's view because the "standing at attention" provision, which should not be enforced, is severable from the rest of the statute does not preclude the rest of the Pledge Statute from being otherwise enforceable. As such, the specific requirement that student's must first obtain parental permission to be excused from reciting the Pledge of Allegiance does not violate the First Amendment. The Court made it clear that the state's interest in recognizing and protecting the rights of parents on some education issues is sufficient to justify the restriction of some students' freedom of speech. Thus, said the Court, the district court erred in invalidating the parental permission requirement as a precondition of being excused from the Pledge exercise. Frazier Ex Rel. Frazier (11th Cir. 2008)

Policy Implications

Recognizing that the court decision presented in this commentary is only binding on the states located in the Eleventh Circuit and conceding that the court decision reviewed above does not completely settle the Flag Salute issue, local educational policy makers still can gain valuable information from the court's rationale in Frazier Ex Rel. Frazier (11th Cir. 2008). In my opinion because the events of the recent past have spawned a renewed emphasis on building a spirit of patriotism in our nation's future citizens we likely will see a resurgence of situations in local public school systems where some parents and students (citing religious, or political, or philosophical, or cultural grounds) might take issue with required patriotic exercises—the Pledge of Allegiance being one. If I am correct it behooves local school boards to have in place policies that can survive such challenges. What follow are suggestions gleaned from a review of the Eleventh Circuit's opinion in Frazier (2008) to consider as existing policies are reviewed and new policies are drafted for implementation.

Local school boards (the Board) must make it clear that:

- Requiring the daily recitation of the Pledge of Allegiance in all elementary, middle, and secondary schools in the school district is in compliance with the mandates of state law. Obviously, this suggestion is applicable only in states where an applicable statute exists.
- The Board considers the recitation of the Pledge of Allegiance to be a patriotic exercise and an integral part of the school's mission to assist in the preparation of our nation's future citizens.
- Students may be excused from the daily recitation of the Pledge of Allegiance where a parent has, at the beginning of the school year, completed, signed, and filed a formal written request with school officials asking that their son/daughter be excused from the daily Pledge exercise.
- Students who have formal parental permission are excused (opt-out) from the daily Pledge of Allegiance exercise. However, excused students must either stand silently, or remain seated and silent during the

exercise, and shall not engage in any acts of disrespect toward, or disruption of, or in any other way interfere with the rights of other students.

- Excused students shall not be subject to retaliation, chastisement, or punishment solely because of their non-participation in the Pledge of Allegiance exercise. However, any student (including excused students) who is disrespectful, or disruptive, or in some way interferes with the rights of other students during the Pledge exercise shall be subject to appropriate disciplinary policies, procedures, and penalties as outlined in the school system's Student Code of Conduct.

Resources Cited

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Note: The views expressed in this commentary are those of the author.