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Friday Night Slights

Last football season, Colin Kaepernick of the San Francisco 49ers made headlines when he kneeled during the national anthem to protest social injustice. Professional, collegiate, and school-aged athletes followed his example, as did marching band members and cheerleaders, triggering strong reactions and leaving public school officials grappling with how to address these game time political statements. As football season gets underway this year, kneeling during the national anthem as a form of political protest will continue. Several NFL players have already taken a knee during pre-season games. Couple that with an increasingly uneasy and divisive political climate, and it seems likely that schools will be facing these silent protests once again.

Adding to the controversy, Jerry Jones, owner of the Dallas Cowboys, announced last month that he "feel[s] so strongly that the act of recognizing the flag is a salute to our country and all of the people that have sacrificed so that we can have the liberties we have." Many school district administrators, board members, coaches and community members echo Jones's sentiment and would add that teaching civic duty and respect is part of a school district's mission. Yet what can schools do in response to protests without violating those very liberties the flag and our national anthem represent? As long as the protests do not cause significant disruption, the short answer is not much.

At the height of World War II, the Supreme Court had the opportunity to consider whether a student could be compelled to stand for the pledge of allegiance and salute the flag in *West Virginia v. Barnette*, 319 U.S. 624 (1943). During the Vietnam War, it considered whether students could peacefully protest the war by wearing black armbands. *Tinker v. Des Moines*, 393 U.S. 503 (1969). In both cases, the Court determined that a student's First Amendment right to free expression could not be abridged except when necessary to "prevent grave and immediate danger to interests which the State may lawfully protect" or if the behavior "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

The protestors' critics find irony in protests against flag ceremonies that celebrate the very liberties that protect the protestors' right to protest. But, as the Supreme Court recognized in Barnette,

> ***[t]o believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds . . . . Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.***

School officials often point to the fact that extracurricular activities are a privilege and not a right as support for the idea that a player could be kicked off the team for failing to stand for the national anthem. The Texas Supreme Court has indeed held that "students do not possess a constitutionally protected interest in their participation in extracurricular activities." *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556 (Tex. 1985). However, participation cannot be conditioned upon renunciation of a student's fundamental Constitutional right. The Supreme Court in *Tinker* recognized that a student's First Amendment rights extend not only to the classroom, but also to "the cafeteria, [and] the playing field."

Similarly, enforcement of extracurricular or student codes of conduct is not a compelling reason to deny a student's First Amendment right to peacefully protest. Unlike a threatening post on Instagram or a curse word shouted in the hallway, "pure speech", such as the political message being expressed by students passively kneeling during the national anthem, is subject to heightened protection by the courts.

If student passive political expression can only be curtailed when substantial disruption of school activities is reasonably anticipated, how much disruption is enough? That is a good question that requires a case-by-case analysis. *Tinker* provides this guidance:

> ***Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.***

The Supreme Court's language makes clear that prohibiting expression requires much more than a desire to avoid the discomfort and unpleasantness that surround an unpopular viewpoint. It must be based on actual, documented substantial disruption or reasonable anticipation of substantial disruption.

If actual disruption is anticipated, there are other options available that do not curtail Constitutional rights. For example, the District could take steps to control the forum so as to avoid the disruption. When cheerleaders at a high school in Pennsylvania knelt during the anthem while World War II veterans presented the flag, community members were understandably indignant. The backlash included hundreds of angry calls to the school's administration. As a result, the district rescheduled the homecoming game and closed the stands to all spectators other than the parents of football players. Perhaps a more limited, but equally effective response, would be choosing to not play the anthem, thereby avoiding any risk of disruption.

In the aftermath of Hurricane Harvey and in light of the overwhelming patriotism and solidarity shown by Texans, as well as by people from all over this great nation, it would be nice to think that this is an issue Districts will not have to add to their already full plates this school year. We can only hope.