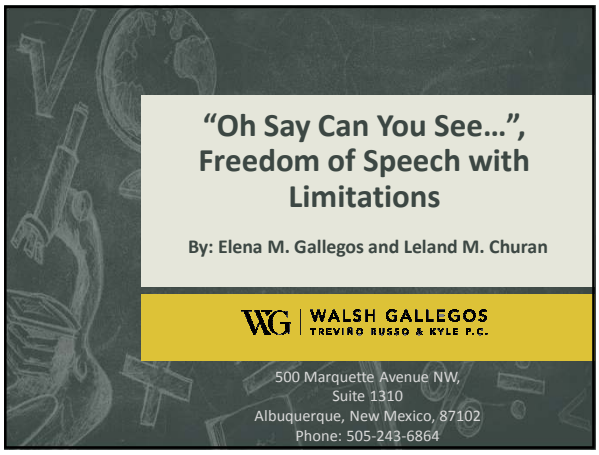

"Oh Say Can You See…", Freedom of Speech with Limitations

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First Amendment of the US Constitution

- "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

First Amendment of the US Constitution

- "Yet no right is absolute." *See U.S. v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012)

In the News

- Former 49ers Quarterback Colin Kaepernick takes knee during national anthem: http://www.latimes.com/sports/nfl/la-sp-chargers-kaepernick-20160901-snap-story.html
- Several University of New Mexico football players take knee during national anthem in game against the Air Force Academy: https://www.abqjournal.com/1071588/handful-of-lobos-kneel-during-national-anthem.html

Presidential Involvement

Student Issues

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)

- Students in West Virginia refused to salute the flag during the daily, required Pledge of Allegiance.
- The students refused on religious grounds.
- The student's, Jehovah's Witnesses, cited Exodus 20:4-5 for the notion that they were not to "bow down" or to serve any "graven image."
- They believed the flag was a "graven image" and saluting it would violate God's commandments.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)

- The Supreme Court held that the students could not be forced to salute the flag and the school could not punish them for their refusal.
- "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement."
- "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 Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)

- "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces ranks, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)

- Students wear black armbands to protest the Vietnam War.
- On December 14, 1965, the principals met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if the student refused he or she would be suspended until the student returned without the armband.
- On December 16, 1965, Mary Beth Tinker (13), and Christopher Eckhardt (16) wore black armbands to their schools. John Tinker (15) wore his armband the next day.
- They were all suspended pursuant to the policy.
- They did not return until after New Year's Day.

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)

- Key Quotes:
  - "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment."
  - "It does not concern aggressive, disruptive action or even group demonstrations."
  - "Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"
  - "The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners."

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)

- Is fear of disruption enough to justify the restriction?
  - "The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands."
  - "But, in our system, 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."

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)

- Is fear of disruption enough to justify the restriction?
  - "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."
  - "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)

- The standard in the school-student context:
  - There must be evidence that the restriction on expression is necessary to avoid material and substantial interference with schoolwork or discipline.

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)

- Holding:
  - "[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."
  - "These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them."

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)

- Holding (continued):
  - "They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression."
  - "Reversed and remanded."

Texas v. Johnson, 491 U.S. 397 (1989)

- How do we know when conduct implicates the First Amendment? "[W]e have long recognized that [the First Amendment's] protection does not end at the spoken or written word."
  - (1) Is there an intent to convey a particularized message?
  - (2) Is there a great likelihood that the message would be understood by those who viewed it?
- As in *Tinker*, courts have recognized that this can be done through expressive conduct
  - Examples: wearing black armbands to protest the Vietnam War, attaching a peace sign to a flag, sit-ins in a "whites only" area to protest segregation.

The Circle School v. Pappert, 381 F.3d 172 (3rd Cir. 2004)

- In 2002, the Pennsylvania legislature passed a law requiring recitation of the Pledge of Allegiance or the national anthem at the beginning of each school day.
- Under the new law, students could decline to participate on religious or personal grounds, but the school was then required to give notice to their parents.

The Circle School v. Pappert, 381 F.3d 172 (3rd Cir. 2004)

- The Third Circuit held that the parental notification provision violated the student's right to free speech.
- The Court found that the state law discriminated against students based on their viewpoint.
- That is, it discriminated against students who exercised their First Amendment right not to speak.
- Yes, the First Amendment protects against compelled expression.
- The state law had a "chilling effect" on speech by providing a disincentive (parental notification) only to those students who opted out of reciting the Pledge or the National Anthem.

Recap

- The First Amendment protects free speech.
- This protection extends to more than just spoken or written words.
- It protects expressive conduct.
- It also protects the choice not to speak.

Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008)

- This case challenged a Florida law that required students to recite the Pledge and "show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes."
- Student could be excused from reciting the pledge, but only with parent permission.
- Students could not be excused from standing during the pledge.

Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008)

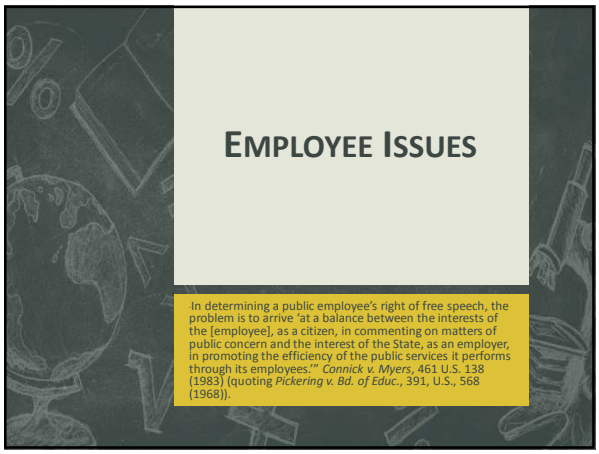
- Regarding the right to be seated during the pledge:
  - The Eleventh Circuit held that it is well established that "students have a constitutional right to remain seated during the pledge."
  - You can require a students to be non-disruptive, but you cannot require a student to stand.
- However, the Eleventh Circuit saw the issue regarding parental consent provision differently than the Third Circuit.

Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008)

- The court stated that in *Barnette*, the sole conflict was between the authority (school) and the rights of the individual (student).
  - That was no the case according to the court here.
- "We see the statute before us now as largely a parental-rights statute. As such, this case is different from *Barnette*."
- Parents also have a Fourteenth Amendment (liberty) right to control the upbringing of their minor children.
- "And this Court and others have routinely acknowledged parents as having the principal role in guiding how their children will be educated on civic values."
- "We conclude that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech."

Student Takeaways

- Can you force a student to stand and say the Pledge of Allegiance?
  - No.
- Can you restrict a student from kneeling during the National Anthem?
  - It is likely similarly expressive conduct protected by the First Amendment, so no.
- Can you notify a student's parent when a student refuses to say the Pledge, or kneels during the National Anthem?
  - Maybe.
- Can you require students to be non-disruptive during the Pledge of Allegiance/National Anthem?
  - Yes.



PICKERING V. BD. OF EDUC. OF TOWNSHIP HIGH SCHOOL DISTRICT 205, 391 U.S. 563 (1968)

- Mr. Pickering, a teacher sent a letter to the local newspaper regarding a proposed tax increase that was critical of the way in which the school board and superintendent had handled past proposals to raise new revenue for the schools.
- The district dismissed the teacher because, according to the district, the letter was "detrimental to the efficient operation and administration of the schools of the district" and, therefore, it had grounds to dismiss under state law.

PICKERING V. BD. OF EDUC. OF TOWNSHIP HIGH SCHOOL DISTRICT 205, 391 U.S. 563 (1968)

- The Supreme Court held that "to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court."
- "[A]bsent proof of false statements knowingly or recklessly made by him [or her], a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

BUT WHAT ABOUT WHEN THE SPEECH IS IN THE WORK PLACE?

- At school or a school function?
- In the general presence of students?
- In a capacity one might reasonably view as official?

GARCETTI V. CEBALLOS, 547 U.S. 410 (2006)

- In this case, the US Supreme Court further clarified the extent to which an employee has free speech rights in the workplace.
- Ceballos was employed as a district attorney and wrote a memo recommending dismissal of a case.
- Ceballos then claimed he was reassigned to another position, transferred to another courthouse, and denied a promotion because of the memo.

GARCETTI V. CEBALLOS, 547 U.S. 410 (2006)

- The court found that Ceballos' expressions were made pursuant to his job duties.
- "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."
- Ceballos did not act as a private citizen in conducting his daily professional activities, which included writing the memo.
- As the court put it, "when public employees make statements pursuant to their official duties, whether on or off school property, they are not speaking as citizens for purposes of the First Amendment and their communications may be properly subject to employer discipline."

Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017)

- Kennedy, a football coach engaged in prayer on the 50-yard line immediately following games while in the view of students and parents. He also led the students in pre- and post-game prayers.
- School attempted to accommodate Kennedy by allowing him to pray on the 50-yard line after students went home.
- Kennedy was placed on administrative leave after he continued to pray on the 50-yard line immediately after the game and ultimately not recommended for rehire at the end of the year.
- Kennedy sued and claimed he was retaliated against for engaging in speech protected by the First Amendment.
- The Ninth Circuit said Kennedy's speech was not protected by the First Amendment because he spoke as a public employee and not a private citizen.

Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017)

- "…Kennedy's job was multi-faceted, but among other things it entailed both teaching and serving as a role model and moral exemplar. When acting in an official capacity in the presence of students and spectators, Kennedy was also responsible for communicating the District's perspective on appropriate behavior through the example set by his own conduct."
- The court noted the difference between praying silently alone and praying immediately after the game in front of students and parents, observing that Kennedy had refused the accommodation of praying alone outside of view, and instead insisted on directing his speech towards the students and spectators.

Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017)

- "Mindful of those facts, by kneeling and praying on the fifty-yard line immediately after games while in view of students and parents, Kennedy was sending a message about what he values as a coach, what the District considers appropriate behavior, and what students should believe, or how they ought to behave."
- Because the coach "spoke" his opinion as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents, he was subject to discipline for his conduct and had no valid First Amendment claim. His "speech" owes its existence to his positon as a public employee and the "First Amendment is not a teacher license for uncontrolled expression…"

Kennedy v. Bremerton Sch. Dist, 860 F.3d 813 (9th Cir. 2017)

- Guide posts the court used to reach its decision:
  - Is the employee:
    (i) at school or a school function;
    (ii) in the general presence of students; and
    (iii) acting in a capacity the public could reasonably view as official?
  - Does the speech "owe its existence" to the employee's position with the school district?
  - Did the content of speech fall within the employee's assigned "curriculum"?

Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192 (10th Cir. 2007)

- The Tenth Circuit's take:
  - An employee's official job description is important, but not dispositive "because speech may be made pursuant to an employee's official duties even if it deals with activities that the employee is not expressly required to perform."
  - "[I]f an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties."

Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192 (10th Cir. 2007)

- The Tenth Circuit's take (continued):
  - Speech is not a part of an employee's official duties when it involves speech that the employee is not required to report, the speech occurred off-campus and after hours, and the speech was directed at citizens not employed by the school district.
  - The district cannot dictate an employee's off-duty, off-campus speech directed to the general public.

Employee Takeaways

- An employee speaking on a matter of public concern is protected by the First Amendment.
  - Matters of public concern are matters of interest to the community, whether for social, political, or other reasons. *See Lighton v. University of Utah*, 209 F.3d 1213 (10th Cir. 2000).
- However, the employee must be speaking as a private citizen, not within their capacity as a public official (see guideposts).

Employee Takeaways

- Can you force a school employee to salute and recite the Pledge of Allegiance? Can you prohibit a school employee from kneeling for the National Anthem?
  - While this is going to be a fact specific inquiry, most likely.
  - However, you should consult your legal counsel in making this determination.

Parting Sentiment

- This First Amendment framework "reconcile[s] the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission." *Borough of Duryea, Pa. v. Guarnieri,* 564 U.S. 379, 386 (2011).
- "[A] citizen who accepts public employment 'must accept certain limitations on his or her freedom….' The government has a substantial interest in ensuring that all of its operations are efficient and effective. That interest may require broad authority to supervise the conduct of public employees." *Id*.

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