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Opinion No. 02-038

SB 2599/HB2549 - Pledge of Allegiance - Public Schools - Constitutionality

## QUESTION

Whether SB 2599/HB 2549, relative to instruction in and recitation of the "Pledge of Allegiance"[1] in public schools, violates any provision of the Tennessee or United States Constitution.

## OPINION

SB 2599/HB 2549 does not violate any provision of the Tennessee or United States Constitution.

## ANALYSIS

In the landmark decision of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the Supreme Court held that the West Virginia State Board of Education could not compel public school students to salute the United States flag and recite the Pledge of Allegiance when such actions violated their religious beliefs. The plaintiffs in *Barnette* were Jehovah's Witnesses, and they considered the flag a "graven image." By saluting the flag and reciting the "Pledge of Allegiance," they would be violating one of the Ten Commandments.[2] The Court found that compelling such a recitation was "a compulsion of students to declare a belief" and that the "flag salute is a form of utterance." *Barnette*, 319 U.S. at 631-32, 63 S.Ct. at 1182. On that basis, the Court held:

> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and

[1]4 U.S.C. § 4 sets forth the "Pledge of Allegiance" and the manner it is to be delivered stating: "The Pledge of Allegiance to the Flag, 'I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.', should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute."

[2]Exodus, Chapter 20, Verses 4 and 5 state "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow done thyself to them nor serve them." *See Barnett*, 319 U.S. at 629, 63 S.Ct. at 1181.

> 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.

*Barnette*, 319 U.S. at 642, 63 S.Ct. at 1186. Thus, the basis of the Court's decision is that the government cannot compel speech because "[t]o believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." *Id.*[3]

Since *Barnette,* lower courts have held that a statute giving students the option of "standing at attention" or "leaving the classroom" during the "Pledge of Allegiance" is also unconstitutional. *Lipp v. Morris*, 579 F.2d 834 (3rd Cir. 1978)("[t]his mandatory condition upon the student's right not to participate in the flag salute ceremony is an unconstitutional requirement that the student engage in a form of speech and may not be enforced."); *Goetz v. Ansell*, 477 F.2d 636, 638 (2nd Cir. 1973)("If the state cannot compel participating in the pledge, it cannot punish non-participation. And being required to leave the classroom during the pledge may reasonably be viewed by some as having that effect, however benign defendants' motives may be.") On the other hand, Courts have held that "schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate." *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437, 439 (7th Cir. 1992).

As for whether the voluntary recitation of the "Pledge of Allegiance" led by school officials and teachers violates the Establishment Clause by the use of the words "under God," the Supreme Court in dicta has indicated that recitation of the "Pledge of Allegiance" does not constitute the establishment of religion. *See Lynch v. Donnelly*, 465 U.S. 668, 676, 104 S.Ct. 1355, 1361, 79 L.Ed.2d 604 (1984)(includes the "Pledge of Allegiance" in a list of civic exercises with religious connotations which the Court implied is permissible); *Abington School District v. Schempp,*, 374 U.S. 203, 303-04, 83 S.Ct. 1560, 1614 10 L.Ed.2d 844 (1963)(Brennan, J., concurring)("reciting the [P]ledge [of Allegiance] may be no more of a religious exercise than reading aloud of Lincoln's Gettysburg Address"); *Lynch*, 465 U.S. at 716, 104 S.Ct. at 1382 (Brennan, J., dissenting)("the reference to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because [it has] lost through rote repetition any significant religious content."). *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 602-03, 109 S.Ct. 3086, 3106, 106 L.Ed.2d 472 (1989)("Our previous opinions have considered in dicta . . . the pledge, characterizing them as consistent with the proposition that the government may not communicate an endorsement of religious belief.... We need not return to the subject of 'ceremonial deism,' ... because there is an obvious distinction between creche displays and references to God in . . . the pledge.")

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[3]The Court in *Barnette* did not address the question of whether the mandatory recitation of the "Pledge of Allegiance" constituted an establishment of religion in violation of the Establishment Clause because the words "under God" were not contained in the "Pledge of Allegiance" at that time. That language was added by Congress in 1954. *See* 68 Stat. 249 (1954).

Presently, there is no state statute in Tennessee mandating recitation of the "Pledge of Allegiance" in public schools. Tenn. Code Ann. § 49-6-1001 does state that "[a]ll boards of education shall direct and all teachers employed by the public schools shall give instructions to the pupils of the schools, and shall have the pupils study as part of the curriculum, the uses, purposes and methods of displaying the American flag and other patriotic emblems, and the history and usage of the pledge of allegiance to the flag of the United States of America."

SB 2599/HB 2549, if enacted, would mandate that "[e]ach [public] board of education shall require the daily recitation of the pledge of allegiance in each classroom in the school system and shall ensure that the flag of the United States is in place in each classroom." This proposed legislation, however, would not require "student[s] [to] be compelled to recite the pledge of allegiance if the student or student's parent or legal guardian objects on religious, philosophical or other grounds to the student participating in such exercise." Rather, it would permit students "who are thus exempt from reciting the pledge of allegiance [to] remain quietly standing or sitting at their desks while others recite the pledge of allegiance and [t]o make no display that disrupts or distracts others who are reciting the pledge of allegiance." Thus, by providing the option for students to either sit or stand during the "Pledge of Allegiance," SB 2599/HB 2549, if enacted, would withstand a constitutional challenge on First Amendment grounds.[4]

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[4]Finally, SB 2599/HB 2549 does not address the issue of whether teachers are required to recite the "Pledge of Allegiance" leaving it to the State Board of Education to "develop guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance to the American flag in public schools." The Supreme Court has not directly addressed this issue, and the lower courts are not in agreement. *See Palmer v. Board of Education of City of Chicago*, 603 F.2d 1271, 1274 (7th Cir. 1979)(upheld the dismissal of a Kindergarten teacher (a Jehovah's Witness) who refused to lead her class in the "Pledge of Allegiance" as part of the curriculum noting that her "right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy.") *But see Russo v. Central School District No. 1*, 469 F.2d 623, 633 (2nd Cir. 1972)(high school art teacher's First Amendment rights were violated by her dismissal when she was discharged for standing silently at attention during the pledge of allegiance when school regulations required her to participate). Accordingly, this Opinion does not address that issue.

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