

Anthem outrage much ado about nothing

By ERWIN CHEMERINSKY

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I long have believed that the national anthem does not belong at baseball and football games and other sporting events. I am skeptical that the routine singing accomplishes anything except giving fans a few more minutes to get to their seats. Patriotism is a wonderful value, but having people stand and maybe sing the national anthem really doesn't advance it in any way. Look around at any sporting event and you will see that the vast majority of fans regard it as a rote exercise. Thus, the entire controversy over Colin Kaepernick, the quarterback on the San Francisco 49ers, refusing to stand during the singing of the national anthem seems to me much ado about nothing.

I confess that when the national anthem is sung I always rise out of respect for the occasion and to not call attention to myself, but I never sing. That, though, is because singing is one of those things I never do in public. I don't even sing in the shower. At my eighth grade graduation, the 200 students sang a few songs. My music teacher told me that under no circumstances was I to sing or utter a sound, but rather just to mouth the words. Her admonition left a lasting impression.

The national anthem has been part of sporting events for a long time. Apparently, the tradition began in the 1918 World Series between the Red Sox and the Cubs. This was in the midst of World War I and in the seventh inning stretch in game 1, a military band played the Star Spangled Banner. It was a huge hit and repeated at the next games. Over the following several years, it became common practice to play the song at World Series and holiday games. Over time, it became the custom to sing it before every baseball game and other sports events then copied the practice. Congress actually did not adopt the Star Spangled Banner as the national anthem until 1931.

After 9/11, the practice began of adding a rendition of "God Bless America," sometimes to the singing of "Take Me Out to the Ballgame" at the seventh inning stretch, at many baseball games. This seems a doubling down on the idea that patriotic songs at sports events accomplish something. I just never have understood what.

Without a doubt, the songs are a message of patriotism. But people never should be forced to express a message with which they disagree. I think one of the most important Supreme Court cases in American history was *West Virginia Board of Education v. Barnette* in 1943, which declared unconstitutional a state law that required that children salute the flag. Decided during

World War II, Justice Robert Jackson, writing for the court, eloquently said: “[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. ... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.”

If standing for the national anthem is a message of patriotism and respect for the country, any person – including an athlete – should be able to sit to refuse to express this message and even a contrary one. Colin Kaepernick has said that he will not stand during the national anthem so as to express his discontent with how African Americans are treated. He should be able to do so.

Professional athletes, especially starting quarterbacks on NFL teams, have a prominence that allows their messages to be heard. Kaepernick is not the first athlete to use his visibility to express a political view. Most famously, Mohammed Ali did so in opposing the Vietnam War in the 1960s. At the 1968 Olympic Games in Mexico City, Tommie Smith and John Carlos, sprinters who had won a gold and a bronze medal, bowed their heads during the national anthem and each raised a black-gloved fist and kept them raised until the anthem was finished.

Of course, athletes, like Kaepernick, may face consequences for their conduct. Some fans will boo them, though others will cheer for them. Endorsement contracts will be less likely. If their talents are marginal, they may be less likely to have a job. But all of that should be for them to weigh in deciding how to express themselves.

The national anthem is sung at baseball games as a way of reminding us of the wonderful country we live in. A large part of what makes it so wonderful is the freedoms we possess, including freedom of speech. It is sadly ironic to see the intense criticism of Colin Kaepernick for exercising the very freedom that we celebrate by singing the national anthem.

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