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To Kneel or Not to Kneel: A Balancing Act of First Amendment Rights



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Chynna Breann Hibbitts^[1]

The First Amendment of the United States Constitution, is a symbol of the possibilities citizens have to speak our minds, gather peacefully, print without repercussion, and worship as one pleases.^[2] Though these are bestowed fundamental rights, there have been questions about what is protected speech and what is not. While most Americans appreciate these rights that are afforded to them, many feel the need to place restrictions on those who do not celebrate them in the same ways.^[3] Now, at the forefront of this current controversy is to sit, kneel, or stand for the national anthem.

With the rising polarization in the nation surrounding this issue, it is not the first time nor the last in which the right to “free speech” will be tested and scrutinized. For instance, in *Texas v. Johnson*, burning the American flag is constituted as symbolic free speech, ^[4] yet in *United States v. O’Brien*, burning one’s draft card is prohibited means of free speech.^[5] Though case law has fluctuated overtime, the means in which protest are made have been expanded to more national platforms in public stadiums and arenas.^[6] Though there is some debate about whether or not professional athletes should “shut up and play ball” or take a stand for social injustices and causes that may be dear to them, the spectators’ acceptance of such practices remain inevitable.

Historically, sports have been used as a sparkplug for debate about race, gender, judicial fairness and patriotism.^[7] For example, Major League Baseball (“MLB”) created a “Civil Rights Game” in honor of the retirement of Jackie Robinson’s uniform number, forty-two.^[8] MLB player Carlos Delgado also faced a reign of boos after he chose not to stand for “God Bless America” to protest the United States insertion in Iraq.^[9] More recently, players within the National Basketball Association (“NBA”) declined trips to the White House after winning the NBA Championship in protest of President Trump.^[10] Now, players in the National Football League (“NFL”) are being faced with the same scrutiny.

Standing for the anthem is a long, time-honored tradition. However, in light of recent events professional football players have used their national stage to protest injustices by kneeling for the national anthem prior to the beginning of their games.^[11] Colin Kaepernick, former quarterback in the NFL has been the source of much contention in the United States regarding our most fundamental principle.^[12] When the

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controversy first began, Kaepernick was one of the first players to kneel during the anthem to bring awareness of police brutality, and social injustices targeting minority ethnic and racial groups.[13]

On October 15, 2017, Kaepernick filed a grievance against the NFL that resulted in an arbitration hearing.[14] Within section two of the grievance, Kaepernick's lawyers go through a list of claims that allegedly violate the NFL's Collective Bargaining Agreement anti-collusion policy.[15] After Kaepernick filed his grievance the NFL issued a protective order that spans to all parties involved, up to and including all thirty-two NFL teams and their front office personnel.[16] It was also reported that after the protective order was in place, the NFL hired a firm to poll fans on Colin Kaepernick.[17] Although the NFL conducting the poll does not prove collusion it did provide an initial threshold showing of plausible evidence of collusion.[18]

On August 21, 2018, Broncos General Manager, John Elway, was under fire for reportedly violating the gag order that had been put in place in May. Elway stated that "he [Kaepernick] had his chance to be a Bronco, but turned it down." [19] These comments were made after discussing a backup quarterback for the team, and if he had considered Kaepernick as an option.[20] Elway followed with letting reporters know that they had offered Kaepernick a contract.[21] Ten days after Elway's comments the NFL was denied summary judgment in the collusion suit.[22] The arbitrator hearing the case ruled against the league, after the NFL requested dismissal of the case on the grounds that Kaepernick and his legal team had not presented sufficient evidence to proceed.[23] Going forward, it is not clear whether or not the collusion case will go to trial or the NFL will decide to settle, but Nike has aided in keeping the story in the limelight.[24]

In early September, Nike launched a new campaign making Colin Kaepernick the face of the company.[25] He tweeted a photo of himself with the caption "believe in something, even if it means sacrificing everything—a nod to the collusion suit and losing his contract to play in the NFL.[26] This ad campaign re-ignited the controversy from the initial kneeling protest. Thousands of people took to boycotting Nike and their products due to the fact that Kaepernick is now the face.[27] Though some were angered at the company for perpetuating what is thought of as an insult to servicemen and women, others were empowered by the ad and continue to support oppressed minorities in their social plight.[28] Nike, despite some speculation of dropping stock, has gained approximately six billion dollars in market value since the ad campaign first started.[29]

The next step—barring a settlement—will be the trial. Based on reports, Kaepernick's lawyers will look to subpoena President Donald Trump and Vice President Mike Pence, along with other NFL officials who spoke out against players kneeling during the anthem.[30] At the conclusion of the trial, the nation will still be faced with the social injustices from which the kneeling protest began. Moving forward, the United States remains to be polarized by the situation, with many unable to reconcile between the 1st Amendment right to protest, and respect for the military. There is no end in sight for this perpetual circle, one can only hope this has opened hearts and minds to the true underlying problem that the country is faced with.

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[2] See U.S. CONST. amend. I.

[3] Benjamin Hoffman, *The Deafening Silence of Colin Kaepernick*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/sports/colin-kaepernick-nfl-anthem-kneeling.html>.

[4] *Texas v. Johnson*, 491 U.S. 397 (1989).

[5] *United States v. O'Brien*, 391 U.S. 367 (1968).

[6] See *Ludtke v. Kuhn*, 461 F. Supp. 86, 93–96 (S.D.N.Y. 1978) (holding that a professional sports team that receives municipal aid toward the costs of use of a publicly owned stadium engages in "public action" when it denies female reporters access to the team's clubhouse facilities located within the stadium); see also *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (explaining that there is no rigid yardstick to determine whether state action in a given case exists, and that "[o]nly by sifting

facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance"). See generally Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities*, 20 MARQ. SPORTS. L. REV. 411 (2010) (explaining the symbiotic relationship between free speech in public sports forums and if a state has an overriding interest to mute speech).

[7] DeSiato, *supra* note 6, at 432; see also Marc Edelman, *Standing to Kneel: Analyzing NFL Players' Freedom to Protest During the Playing of the U.S. National Anthem*, 86 FORDHAM L. REV. ONLINE 1, 3–5 (2018).

[8] DeSiato, *supra* note 6, at 433.

[9] *Id.*

[10] Donald Judd, *Golden State Warriors swap White House visit for African-American history museum*, CNN (Feb. 27, 2018), <https://www.cnn.com/2018/02/27/politics/golden-state-warriors-white-house-visit-donald-trump/index.html>.

[11] See Hoffman, *supra* note 3.

[12] *Id.*

[13] *Id.*

[14] *Colin Kaepernick files grievance against NFL, alleging collusion*. CBS NEWS/ASSOCIATED PRESS (Oct. 15, 2017, 9:50 PM), <https://www.cbsnews.com/news/colin-kaepernick-nfl-grievance-collusion-national-anthem-protest/>.

[15] Claimant Colin Kaepernick's Demand for Arbitration at 6, *Kaepernick v. Nat'l Football League* (Oct. 15, 2017).

[16] Nancy Dillon & Evan Grossman, *NFL reportedly hired firm to poll fans on Colin Kaepernick and sports law expert says it could bolster QB's collusion case*, N.Y. DAILY NEWS (May 25, 2018), <http://www.nydailynews.com/sports/football/kaepernick-poll-bolster-qb-collusion-case-nfl-article-1.4007494>.

[17] *Id.*

[18] *Id.*

[19] Kathleen Joyce, *Colin Kaepernick's lawyer says John Elway violated gag order after contract comments*, FOX NEWS (Aug. 21, 2018), <http://www.foxnews.com/sports/2018/08/21/colin-kaepernicks-lawyer-says-john-elway-violated-gag-order-after-contract-comments.html>.

[20] *Id.*

[21] *Id.*

[22] *Colin Kaepernick's collusion case against NFL heading to trial*, CBS NEWS/ASSOCIATED PRESS (Aug. 30, 2018, 5:24 PM), <https://www.cbsnews.com/news/colin-kaepernick-collusion-case-against-nfl-trial-arbitrator-announcement-today-2018-08-30/>.

[23] *Id.*

[24] Ken Belson & Kevin Draper, *Colin Kaepernick's Nike Campaign Keeps N.F.L. Anthem Kneeling in Spotlight*, N.Y. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/sports/kaepernick-nike.html>.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Kate Gibson, *Colin Kaepernick is Nike's \$6 billion man*, CBS News (Sept. 21, 2018), https://www.cbsnews.com/news/colin-kaepernick-nike-6-billion-man/?ftag=COS-05-10aaa0h&utm_campaign=trueAnthem%3A+Trending+Content&utm_content=5ba5c81b9ebbef0001d6be40&utm_medium=trueAnthem&utm_source=facebook.

[30] Dillon & Grossman, *supra* note 16; Edelman, *supra* note 7, at 14–15.

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