

NATIONAL ANTHEM CAN'T BE FORCE FED

By: Jack Greiner on February 12, 2021 on graydon.law

As the father of four athletes and a sports fan generally, I have heard a lot of renditions of the National Anthem. [This one](#) is and always will be my favorite. I like the ritual, and I do look forward to the end of the pandemic when we can attend sports events and join in the singing, off key though I may be.

And while I stand at attention with my hand over my heart for the Anthem, not everyone does. Colin Kaepernick chose to take a principled stand against police brutality and knelt during the playing. More recently, Dallas Mavericks owner [Mark Cuban](#) announced that the Mavericks would not play the Anthem before home games. According to Mr. Cuban, “[w]e respect and always have respected the passion people have for the Anthem and our country.” But we also loudly hear the voices of those who feel that the Anthem does not represent them. We feel that their voices need to be respected and heard, because they have not been.”

This was apparently too much for Texas Lt. Governor Dan Patrick, who introduced a bill in the Texas Legislature called the [Star-Spangled Banner Protection Act](#). The Act would mandate that the Anthem be played before all events that receive public funding.

The Lt. Governor has indicated he is confident that the Legislature will pass the Act. But I suspect that is as far it will get, because it is hard to imagine how this thing would survive a First Amendment challenge. The First Amendment’s guarantee of free speech means that the government can’t prohibit speech, but it also means the government can’t compel speech. And **requiring** a private business to play the Anthem would be compelled speech.

If he gets a moment, the Lt. Governor may want to take a few minutes to read the U.S. Supreme Court’s decision in [West Virginia State Board of Education v. Barnette](#). In that case, the Supreme Court upheld the right of a Jehovah’s Witness follower to refuse to recite the Pledge of Allegiance at the start of the school day. In the majority opinion, Justice Robert Jackson famously wrote: “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.”

Simply put, neither Lt. Governor Patrick nor the Texas Legislature can force anyone to behave in what they view as a patriotic manner. Justice Jackson was the lead prosecutor for the United States in the [Nuremberg war crimes trials](#) following World War II. I suspect that experience showed him in vivid fashion what force fed patriotism can lead to. Before he goes much further with this political stunt, Lt. Governor Patrick should reflect on Justice Jackson's wise words,