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ARIZONA ATTORNEY GENERAL

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STATE CAPITOL
PHOENIX, ARIZONA

December 1, 1965

DEPARTMENT OF LAW OPINION NO. 66-1 (R-31)

REQUESTED BY: The Honorable Sarah Folsom
State Superintendent of Public Instruction

QUESTION: Would it be constitutional to institute a program in our schools providing for a salute to the flag and other patriotic exercises as meet the requirements of the different grades; also to make provisions for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day, Flag day and other legal holidays of like character? Provision shall be made to excuse from participation any student or teacher who for religious reasons does not wish to take part in the exercises.

ANSWER: Yes.

The pertinent statute of the State of Arizona is as follows:

Article 4, Chapter 10, Sections 15-1031, 15-1032.

"Sec. 15-1031. A. The school authorities of a public school shall purchase a United States flag, flag-staff and appurtenances and display the flag upon or near the public school building during school hours and at such other times as they direct.

"B. The state superintendent of public instruction shall prepare for use in the public schools a program providing for a salute to the flag and other patriotic exercises, as meet the requirements of the different grades. He shall also make special provisions for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day, Flag day and other

legal holidays of like character.

"Sec. 15-1032. The state superintendent of public instruction shall estimate the necessary annual expenses of each county in developing and encouraging patriotic exercises in the public schools. The estimate shall be approved by the state board of education and paid to each county from the appropriation to the state board of education."

The First Amendment to the Constitution of the United States reads as follows:

"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."

Basically, the answer to your question is that your office has the statutory duty to follow the mandate set forth in Sec. 15-1031 above quoted which requires a patriotic program in the public schools including a salute to the flag. The statute further prescribes that the superintendent shall make "special provision for the observance of Lincoln's birthday, Washington's birthday, Memorial day, Flag day and other legal holidays of like character."

The only problem presented in carrying out the mandate of the Legislature of Arizona is that the First Amendment to the Constitution of the United States has been held to relate to State and local action through the vehicle of the Fourteenth Amendment.

In 1940 the Supreme Court of the United States in Minersville School District v. Gobitis, 310 U.S. 586, 84 L.Ed. 1375, 60 S.Ct. 1010, 127 ALR 1493, held that the requirement of participation by pupils in public schools in a flag salute does not infringe, without due process of law, the liberty guaranteed by the Fourteenth Amendment in the case of a pupil refusing to participate upon sincere religious grounds.

The court cited several cases and concluded at page 1379:

"In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure that orderly, tranquil, and free society without which religious toleration itself is unattainable."

The court further held at page 1382:

"That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise."

Three years later (1943), in the case of West Virginia State Board of Education v. Barnette, 63 S.Ct. 1178, 319 U.S. 624, 87 L.Ed. 1628, 147 ALR 674, the Supreme Court of the United States held that the action of the State Board of Education of West Virginia in requiring public school students to salute the flag on the penalty of expulsion transcended constitutional limitations. The court held in that case at page 1639:

"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."

The court then expressly overruled its holding in the Gobitis case.

In 1942 the Supreme Court of Arizona spoke on this subject in a criminal case in interpreting the question of saluting the flag as it relates to the First Amendment of the Constitution (State of Arizona v. Davis, 120 P.2d 808, 58 Ariz. 444). In this case, parents of two minor children were charged with contributing to their delinquency by encouraging them not to salute the flag. The parents relied upon the First Amendment to the United States Constitution, alleging that it was their privilege to teach their interpretation of the Second Commandment to their children. At that time Gobitis was still the ruling case. However, the then Chief Justice of Arizona, Alfred C. Lockwood, quoted from the Gobitis case, distinguished its holding and, in effect, was one year ahead of its overruling by the Supreme Court by holding at page 451 "* * * that defendants cannot be punished for expressing a right guaranteed by the Federal Constitution." The court further held at page 451:

"It will be noted, however, and this is of vital importance in the present case, that the court limits this freedom to reasoning and persuasion. It has been well said that belief cannot be compelled, and we think the First Amendment does not extend to any person, whether he be a parent or not, the right under the guise of religious liberty to compel others to conform to conduct in which he believes. But the information in the present case alleges not only that the defendants did 'teach and instruct' their children in regard to their conduct, which right is given them by the First Amendment, under the decision in the Gobitis case, but that they did also 'direct and command' them to follow this belief of the parents, regardless of their own belief. This, we think, goes far beyond the rights guaranteed under the First Amendment. The vast majority of our people believe, and we think correctly so, that the salute to the flag, which typifies our country and the principles upon which it is founded, is a wise, reasonable and patriotic

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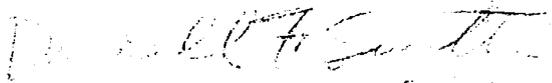
Page Five

exercise and that it is in the interest of the welfare of the children of the country that they participate in this simple exercise, and that a failure to follow the almost universal custom in this respect does tend to injure the morals and future welfare of the children in ways too numerous to mention. Any attempt to direct or compel a child to refuse to follow the national custom in this respect in our opinion does contribute to the delinquency of the child, and may properly be made a crime by the state without violating the First Amendment."

In other words, the court held that the requirement of saluting the flag would violate the First Amendment, but that the charge of contributory delinquency could be justified on other grounds.

In the light of West Virginia State Board of Education v. Barnette, supra, it is the opinion of this office, according to the present status of the law, that if any child in public school alleges the salute to the flag infringes upon his religious freedom as guaranteed by the First Amendment to the Federal Constitution, such child should be excused from giving a salute or pledge. All others may be required to engage in a learning experience leading to respect for this country's flag.

Respectfully submitted,


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The Attorney General

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