

## Right to Dissent

[00:00:00] **Roman Mars:** Before 1935. The Gobitas family was mostly known for the homemade kielbasa and scrapple they sold out of their family grocery store in Minersville, Pennsylvania.

[00:00:09] **Elizabeth Joh:** But all of that changed on October 22nd, 1935. The Gobitas children attended the local school, which expected all the kids to recite the Pledge of Allegiance and salute the flag. As Walter's daughter Lillian later told the story, her ten-year-old brother, Billy, came home from school one day and said, "I stopped saluting. The teacher tried to put up my arm, but I held on to my pocket." Lillian thought to herself, "Oh my goodness. I should take my own stand." And the next day, she did. 12-year-old Lillian sat silently and did not salute the flag or recite the Pledge of Allegiance in her classroom. Lillian said her teacher was accepting, but some of the other kids weren't. When she returned to school, some kids threw stones at her. But she said, "I didn't care. I loved school. I was on the honor roll." But because they refused to recite the Pledge of Allegiance and salute the flag, the school superintendent expelled Billy and Lillian Gobitas for insubordination.

[00:01:11] **Roman Mars:** They'd be allowed to return to school if they'd salute and pledge.

[00:01:16] **Elizabeth Joh:** But they weren't going to. You see, Billy and Lillian's family were Jehovah's Witnesses, a Christian denomination founded in the late 19th century. One of the things Witnesses believe is their allegiance is only for God. Any other oath of allegiance would violate the Bible's command not to worship graven images. In the 1930s, the Witnesses were outspoken against the Nazi regime as Hitler rose to power. For that, Jehovah's Witnesses in Germany were persecuted for their resistance, including refusing to salute the Nazi flag. In 1935, the leader of the Witnesses, Joseph Rutherford, publicly declared that Witnesses should not participate in any oaths of allegiance, including to the American flag. So, the Gobitas children stayed home. Children harassed Lillian and Billy. The locals boycotted and threatened the family's grocery store. In 1937, Walter Gobitas filed a lawsuit in Philadelphia federal court.

[00:02:15] **Roman Mars:** His lawsuit claimed that the school's expulsion of his children violated the First Amendment.

[00:02:20] **Elizabeth Joh:** "The Constitution," he said, "protected Lillian's and Billy's right not to participate in the pledge. "Their case would eventually be heard by the United States Supreme Court.

[00:02:31] **Roman Mars:** Shockingly, we're now seeing a return of this debate about the symbols of patriotism.

[00:02:36] **Elizabeth Joh:** Like the Pledge of Allegiance, the flag, and the national anthem, and their relationship to the First Amendment and the right to dissent. President Trump himself has weighed in on this. He's tweeted about it a lot, so it's a good opportunity to find out what does the Constitution say about free speech and the right to dissent?

[00:02:57] **Roman Mars:** It's the amendment first in our hearts that everyone thinks they know, but they usually don't--number one with a bullet--the First Amendment. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length where we take the tweets and the rhetoric of the 45th president of the United States and channel our

collective terror into learning our Constitution like we never have before. Our music is by Doomtree Records. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. Let's start with the Constitution.

[00:03:56] **Elizabeth Joh:** The First Amendment says, "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."

[00:04:14] **Roman Mars:** Most people are familiar with the First Amendment's right to free speech. It doesn't give you the right to say or do whatever you want, but the Supreme Court has interpreted the amendment to impose some heavy burdens on the government's ability to prohibit or regulate speech.

[00:04:28] **Elizabeth Joh:** The Supreme Court was certainly aware of these traditions when it decided the case of *Minersville School District versus Gobitis* in 1940. And yet, in an eight-one decision, the Supreme Court ruled in favor of the school district.

[00:04:42] **Roman Mars:** The Supreme Court said the Gobitas children could be expelled for refusing to salute the flag.

[00:04:48] **Elizabeth Joh:** This was 1940. The next year, the United States would formally enter World War II. Fears about the forces of fascism abroad were running high. In the Gobitas case, the Supreme Court reflected those concerns. In the Court's words, "the question remains," the Court said, "whether schoolchildren, like the Gobitas children, must be excused from conduct required of all the other children in the promotion of national cohesion. National unity is the basis of national security." So, for the Court, the children could indeed be expelled for refusing to salute the flag. It was during this period that hundreds of Jehovah's Witnesses were subjected to violence and harassment for their refusal to participate in flag salutes. And the Gobitas decision made things even worse. On June 9th, 1940, just a few days after the Supreme Court issued its opinion, a mob of more than 2,000 people in Kennebunk, Maine, burned down the local Kingdom Hall, the Witness' place of worship. Many Witness children around the country found themselves expelled from school. So, here's an important aside. In American law, we have a tradition called "stare decisis." That's Latin for "to stand by things decided." So, what that means in practice is that American courts rely on prior cases or precedents to decide new cases. A good way to think about stare decisis is to use the metaphor of corral. Previous cases build upon others slowly over time to make the law. So, one consequence of this system with stare decisis is that courts--and especially the U.S. Supreme Court--are extremely reluctant to overturn prior cases. To overturn cases all the time would make the whole legal system unstable.

[00:06:40] **Roman Mars:** It's not often that the Supreme Court decides to overturn one of its previous cases. When it happens, it means that something big culturally has shifted or the court realizes that it has made a huge mistake.

[00:06:52] **Elizabeth Joh:** In a 1942 Supreme Court case--that's after the Gobitas decision--three of the Justices who had agreed that Lillian and Billy could be expelled from school took the extraordinary step of saying that the *Minersville* case had been a mistake. They said, "We think this is an appropriate occasion to state that we now believe it was wrongly decided. Certainly, our democratic form of government, functioning under the historical Bill of Rights, has a high responsibility to accommodate itself to the religious

views of minorities--however unpopular and unorthodox those views may be." Those were only three Justices. You need five Justices--a majority of the nine--to make new law."

[00:07:33] **Roman Mars:** By 1943, there was a changed Court. Not only had three Justices changed their minds, two new Justices had joined the Court.

[00:07:41] **Elizabeth Joh:** And they decided to hear a case that would be known as West Virginia versus Barnette. The West Virginia Board of Education had made the flag salute mandatory in school. Marie and Gathie Barnett, two Witness children, were expelled from the Slip Hill Grade School near Charleston. For refusing to salute, the Barnett children were called "traitors," "Nazis," "Japs," "fifth columnists," and worse. Their father, Walter, as well as a couple of other Witness parents, sued the Board of Education to stop them from requiring their kids to salute the flag.

[00:08:14] **Roman Mars:** This time, the Supreme Court ruled six to three in favor of the Barnetts.

[00:08:18] **Elizabeth Joh:** Requiring children to salute the flag and say the Pledge of Allegiance violated the First Amendment. Justice Jackson, who wrote the opinion for the Court, saw this plainly as an issue of free speech. Could the government force you to salute the flag and say the Pledge of Allegiance? The answer was no.

[00:08:37] **Roman Mars:** The answer is hell no.

[00:08:39] **Elizabeth Joh:** Unlike the time it decided the Gobitas case, the Court in the Barnett decision saw the role of speech, dissent, and patriotism in a very different way. The opinion stated that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters." And in one of the most famous passages of constitutional law, Justice Jackson stated:

[00:09:03] **Roman Mars:** "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 there are any circumstances which permit an exception, they do not now occur to us."

[00:09:27] **Elizabeth Joh:** The Court also overruled the case of Minersville versus Gobitis; it was no longer good law. Correcting the Court's mistake was more important than sticking with precedent.

[00:09:38] **Roman Mars:** Of the cases in which there has been something overturned, is it still exceedingly rare that it happens, like, in three years in this case?

[00:09:48] **Elizabeth Joh:** I mean, if anything, you know, one of the things that we can sort of see over time is that a case is overturned because our historical understanding of things has changed--that, you know, our ideas about justice or fairness or which groups ought to be recognized as deserving of protection understandably changes over time. But three years is hardly a lifetime. It's really just a sense that "wow, we've made a huge mistake." And I think part of it historically has to do with the fact that you could read the headlines and see that the Gobitas decision actually had a role in inciting violence. I mean, people felt spurred on. The Supreme Court said, "You can expel these children from school." And many people took it further and they assaulted Witnesses and they were terrorized in the

United States as well as elsewhere. I think one of the questions it raises is the legitimacy of the Court. We want the Court to be a kind of neutral institution. We live with this fiction that they're sort of up on high, making these very lofty, abstract decisions. But when they overturn a three-year-old precedent, that's really saying, "Wow, they're just human beings, and they realize they made a terrible mistake." And that's unsettling to us, right? We don't want the Court--the Supreme Court--to be an institution that just seems like the legislature or the executive where things can change all the time. We want it to be protected or insulated from outside forces. So that is a kind of destabilizing force. But here again and with Gobitas, think it's, you know, fair to say that the Court or a new majority of the Court felt like this was a huge mistake.

[00:11:13] **Roman Mars:** So, let's reluctantly talk about Trump.

[00:11:16] **Elizabeth Joh:** With Trump, we've got a new debate about patriotic displays and a person's right not to take part. It started on August 14th, 2016. The San Francisco 49ers were about to play a preseason game with the Houston Texans in Levi's Stadium. That's in Santa Clara, California. Colin Kaepernick, who was a quarterback for the 49ers, decided to remain seated while his teammates stood for the playing of the national anthem. Almost nobody noticed. But Kaepernick did it again and again. A few weeks later, a picture of his silent protest showed up on Twitter. When he was asked about it, Kaepernick said he was sitting out the national anthem to protest against social injustice and in particular, to protest police brutality against African Americans. Then, on September 1st, 2016, Kaepernick was joined by his teammate, Eric Reid. And they decided not to sit but to kneel while the other players stood for the national anthem at a game in San Diego. Their decision to "take a knee," as it's now become known, slowly spread among a number of other NFL players. And while the idea of taking a knee as a silent, peaceful protest took hold, Kaepernick himself left the 49ers in March of this year. No NFL team has shown any interest in hiring him since that time.

[00:12:35] **Roman Mars:** And then came President Trump.

[00:12:37] **Elizabeth Joh:** On September 22nd, Trump was speaking at a rally in Huntsville, Alabama, to support Luther Strange's ultimately unsuccessful run for Senate. It was there that Trump turned to the topic. "Wouldn't you love to see one of these NFL owners," ask Trumped, "when somebody disrespects our flag, to say, 'Get that son of a bitch off the field right now! Out! He's fired! He's fired!'" And the crowd responded with cheers. Trump did two things here. He called attention to taking a knee without naming Kaepernick himself. And he also turned the reason behind taking a knee from a protest about police brutality to the disrespect of the American flag.

[00:13:19] **Roman Mars:** He also tweeted about it.

[00:13:21] **Elizabeth Joh:** The next day, Trump tweeted, "If a player wants the privilege of making millions of dollars in the NFL or other leagues, he or she should not be allowed to disrespect our great American flag or country and should stand for the national anthem. If not, you're fired. Find something else to do." The next day, more than 100 NFL players and even some owners protested. They took a knee or locked arms while the national anthem was played in football stadiums around the country that Sunday.

[00:13:52] **Roman Mars:** And Trump kept tweeting.

[00:13:54] **Elizabeth Joh:** That Sunday, he tweeted, "If NFL fans refuse to go to games until players stop disrespecting our flag and country, you will see change take place fast. Fire or suspend."

[00:14:06] **Roman Mars:** The following week, he also tweeted.

[00:14:09] **Elizabeth Joh:** "Very important that NFL players stand tomorrow and always for the playing of our national anthem. Respect our flag and our country." And on October 23rd, he tweeted, "Two dozen NFL players continue to kneel during the national anthem, showing total disrespect to our flag and country. No leadership in NFL." Now that the president is taking a long, drawn-out interest in the topic, what does this mean? A lot of people have been talking about the First Amendment rights of NFL players. It's true that NFL players have free speech rights like you and me. That's true, but it's not exactly what matters. The First Amendment is a restraint on what the government can do to you when you exercise your free speech rights. It doesn't apply to private actors, like the NFL. The NFL is a private employer like any other private company. So, could someone like Kaepernick ever claim that the NFL is interfering with his First Amendment rights? Not really. That's not the kind of situation the First Amendment is designed to address. There might be labor law issues that come up from the players union agreements if the NFL punishes its players for protesting. But it's not a matter of constitutional law.

[00:15:23] **Roman Mars:** There is an exception to watch out for, though.

[00:15:25] **Elizabeth Joh:** There are reports now that some public high school football players have decided to join these protests. They have decided to take a knee or to refuse to participate during their national anthems. Now, if the public school were to punish these students for their peaceful protest, that might be a First Amendment problem. They would be in the same position as the Barnetts and the Gobitases. But I want to emphasize there is a similarity between the Gobitas and Barnett children and every NFL player who takes a knee. And that has to do with Trump's tweeting. Kaepernick began sitting out the national anthem as a protest about police brutality. And Trump turned this into a controversy about patriotism, the flag, and the national anthem. The growing number of NFL players taking a knee are either protesting police brutality, President Trump, or both. Whatever their motivations, they're peaceful dissenters. And that's the important thing. One of the values behind the First Amendment's protection of free speech is the right to dissent--the right to have an unpopular opinion. Trump's demand that those taking a knee be fired isn't really a First Amendment problem, but his tweets grate against First Amendment values. And as the elected leader of the United States, that's troubling. That's how the stories of Kaepernick and the Witnesses are similar. And despite their differences, the situations that the Gobitases, the Barnetts, and the NFL protesters find themselves in raised the question of whether we should be forced to participate in patriotic ceremonies.

[00:16:58] **Roman Mars:** The Supreme Court's answer in the Barnett case is no, we don't have to participate.

[00:17:03] **Elizabeth Joh:** The First Amendment protects our right to dissent, even as Trump seems to tweet against it.

[00:17:09] **Roman Mars:** Find out what happened to the Gobitases and what we should be thinking about when Trump tweets anti First Amendment rhetoric after this.

[00:17:17] **Elizabeth Joh:** So as a postscript for the Gobitases, the Gobitas children grew up. Billy Gobitas became a piano tuner and an insurance executive. He died in 1989. Lillian Gobitas died in 2014 at the age of 90. She met her husband, Erwin Klose, while attending a Jehovah's Witness convention in Europe in 1951. That was just a few years after he'd been released from a Nazi concentration camp. He'd been sent there for refusing to serve in the German army and to salute the Nazi flag.

[00:17:47] **Roman Mars:** Here's another piece of trivia about the Gobitas and Barnett cases.

[00:17:51] **Elizabeth Joh:** The Barnetts and the Gobitases are forever enshrined in constitutional law. But for whatever reason, it's so sad that in each of their cases, the clerk of the Court misreported their names. So, their names are misspelled in each of these Supreme Court cases for eternity.

[00:18:09] **Roman Mars:** Well, why can't you change that?

[00:18:10] **Elizabeth Joh:** I don't know why they never bothered to or tried to, but they're not spelled correctly. So here you are. You're in a famous Supreme Court case, and it's not actually your name. Two times.

[00:18:20] **Roman Mars:** Two times around the same type of a case. That's crazy. That makes me question the validity of the Court more than them changing their minds in three years.

[00:18:29] **Elizabeth Joh:** They can't get the spelling right. Yeah. That was a problem.

[00:18:33] **Roman Mars:** Trump tweeting isn't exactly passing the Sedition Act. You know what I'm saying? And so, part of me thinks this is, like you said, not in keeping with American values in the way that I interpret them. But part of me thinks, you know, he's tweeting, and there's no action here that's actually, like, relevant. And it isn't about something that I can actually do--something that's really damaging to my vision of what America is and what the Constitution says. So where does this type of tweeting land for you? And is there a difference between what it can actually do and what its symbolism means to you?

[00:19:11] **Elizabeth Joh:** It's two things, right? I mean, it is a symbolism of the so-called "leader of the free world," his own values, and what they convey to not just the United States but the rest of the world. If we can't display a respect for free speech and dissent, how could we possibly expect that of other countries where we might criticize them? So that certainly has very practical repercussions. And then in terms of constitutional law--that's right. I mean, what Trump is doing doesn't seem to be a First Amendment problem as it stands now. But the problem is all of these interpretations of constitutional law--they don't occur in a vacuum. They occur in a cultural context. They occur against, you know, what are people saying and thinking. And even if the Justices never say so, they interpret their values against the background of it. Now, it might be that if there's a First Amendment case that talks about dissent sometime in the near future, they might be aware that--in this environment, where the president himself seems to be disdainful of the right to dissent--we want to push back and say, "There is actually a right to dissent, and we are going to reaffirm that right now." Or in a more troubling sense, you might have Justices who think, "Well, we'll bend to that change in the rhetoric, and maybe we'll relax those standards in the First Amendment, even though it's not a First Amendment problem."

Again, law doesn't occur in a vacuum. It occurs in history and against whatever the important people of the day are saying.

[00:20:37] **Roman Mars:** This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at [trumpconlaw.com](http://trumpconlaw.com), on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. Since a bunch of you have been asking me on Twitter, that first song is called Xanthrax by the new group SHREDDERS. Their first album is out November 3rd. You can find out all about Doomtree Records, get merch, and learn about current tours at [doomtree.net](http://doomtree.net). We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and donors who are listeners just like you.