Reproduced from the Collections of the Manuscript Division, Library of Congress

Supreme Court of the United States
Washington, D.C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

May 27, 1940

Dear Stone:

Were No. 690 an ordinary case, I should let the opinion speak for itself. But that you should entertain doubts has naturally stirred me to an anxious re-examination of my own views, even though I can assure you that nothing has weighed as much on my conscience, since I have come on this Court, as has this case. Your doubts have stirred me to a reconsideration of the whole matter, because I am not happy that you should entertain doubts that I cannot share or meet in a domain where constitutional power is on one side and my private notions of liberty and toleration and good sense are on the other. After all, the "vulgar intrusion of law" in the domain of conscience is for me a very sensitive area. For various reasons - I suspect the most dominant one is the old colored man's explanation that Moses was just raised that way - a good part of my mature life has thrown whatever weight it has had against foolish and harsh manifestations of coercion and for the amplest expression of dissident views, however absurd or offensive these may have been to my own notions of rationality and decency. I say this merely to indicate that all my bias and predisposition are in favor of giving the fullest elbow room to every variety of religious, political, and economic view.

But no one has more clearly in his mind than you, that even when it comes to these ultimate civil liberties, insofar as they are pro-

Reproduced from the Collections of the Manuscript Division, Library of Congress

tected by the Constitution, we are not in the domain of absolutes. Here, also, we have an illustration of what the Greeks thousands of years ago recognized as a tragic issue, namely, the clash of rights, not the clash of wrongs. For resolving such clash we have no calculus. But there is for me, and I know also for you, a great makeweight for dealing with this problem, namely, that we are not the primary resolvers of the clash. We are not exercising an independent judgment; we are sitting in judgment upon the judgment of the legislature. I am aware of the important distinction which you so skillfully adumbrated in your footnote 4 (particularly the second paragraph of it) in the Carolene Products Co. case. I agree with that distinction; I regard it as basic. I have taken over that distinction in its central aspect, however inadequately, in the present opinion by insisting on the importance of keeping open all those channels of free expression by which undesirable legislation may be removed, and keeping unobstructed all forms of protest against what are deemed invasions of conscience, however much the invasion may be justified on the score of the deepest interests of national wellbeing.

What weighs with me strongly in this case is my anxiety that, while we lean in the direction of the libertarian aspect, we do not exercise our judicial power unduly, and as though we outselves were legislators by holding with too tight a rein the organs of popular government. In other words, I want to avoid the mistake comparable to that made by those whom we criticized when dealing with the control of property. I hope I am aware of the different interests that are compendiously summarized by opposing "liberty" to "property". But I also know that the

Reproduced from the Collections of the Manuscript Division, Library of Congress

generalizations implied in these summaries are also inaccurate and hardly correspond to the complicated realities of an advanced society. I cannot rid myself of the notion that it is not fantastic, although I think foolish and perhaps worse, for school authorities to believe - as the record in this case explicitly shows the school authorities to have believed - that to allow exemption to some of the children goes far towards disrupting the whole patriotic exercise. And since certainly we must admit the general right of the school authorities to have such flag-saluting exercises, it seems to me that we do not trench on an undebatable territory of libertarian immunity to permit the school authorities a judgment as to the effect of this exemption in the particular setting of our time and circumstances.

For time and circumstances are surely not irrelevant considerations in resolving the conflicts that we do have to resolve in this particular case. Contingencies that may determine the fate of the constitutionality of a rent act (Chastleton Corp. v. Sinclair, 264 U.S. 543) may also be operative in the adjustment between legislatively allowable pursuit of national security and the right to stand on individual idiosyncracies. You may have noticed that in my opinion I did not rely on the prior adjudications by this Court of this question. I dealt with the matter as I believe it should have been dealt with, as though it were a new question. But certainly it is relevant to make the adjustment that we have to makewithin the framework of present circumstances and those that are clearly ahead of us. I had many talks with Holmes about his espionage opinions and he always recognized that he had a right to take into account the things that he did take into account when he wrote

Reproduced from the Collections of the Manuscript Division, Library of Congress

Debs and the others, and the different emphasis he gave the matter in the Abrams case. After all, despite some of the jurisprudential "realists" a decision decides not merely the particular case. Just as Adkins v. Children's Hospital had consequences not merely as to the minimum wage laws but in its radiations and in its psychological effects, so this case would have a tail of implications as to legislative power that is certainly debatable and might easily be invoked far beyond the size of the immediate kite, were it to deny the very minimum exaction, however foolish as to the Gobitis children, of an expression of faith in the heritage and purposes of our country.

For my intention - and I hope my execution did not lag too far behind - was to use this opinion as a vehicle for preaching the true democratic faith of not relying on the Court for the impossible task of assuring a vigorous, mature, self-protecting and tolerant democracy by bringing the responsibility for a combination of firmness and toleration directly home where it belongs - to the people and their representatives themselves.

I have tried in this opinion really to act on what will, as a matter of history, be a lodestar for due regard between legislative and judicial powers, to wit, your dissent in the Butler case. For please bear in mind how very little this case authorizes and how wholly free it leaves us for the future. This is not a case where confinement either of children or of parents is the consequence of non-conformity. It is not a case where conformity is exacted for something that you and I regard as foolish - namely, a gesture of respect for the symbol of our national being - even though we deem it foolish to exact it from

Reproduced from the Collections of the Manuscript Division, Library of Congress

Jehovah's Witnesses. It is not a case, for instance, of compelling children to partake in a school dance or other scholastic exercise that may run counter to this or that faith. And, above all, it is not a case where the slightest restriction is involved against the fullest opportunity to disavow - either on the part of the children or their parents - the meaning that ordinary people attach to the gesture of respect. The duty of compulsion being as minimal as it is for an act, the normal legislative authorization of which certainly cannot be denied, and all channels of affirmative free expression being open to both children and parents, I cannot resist the conviction that we ought to let the legislative judgment stand and put the responsibility for its exercise where it belongs. In any event, I hope you will be good enough to give me the benefit of what you think should be omitted or added to the opinion.

Faithfully yours,

Felix Frankfurter

Mr. Justice Stone.