

## The Commonwealth of Massachusetts

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EXECUTIVE DEPARTMENT,  
STATE HOUSE, BOSTON 02133, March 8, 1971.

*To the Honorable Senate and House of Representatives:*

In accordance with the provisions of Article LVI of the Amendments to the Constitution, I am returning, herewith, House Bill No. 4172 entitled "AN ACT REQUIRING THE DAILY RECITAL OF THE PLEDGE OF ALLEGIANCE."

This legislation is similar to a bill which reached my desk last year, in that it requires a teacher to cause his pupils each day to salute the flag and recite the pledge of allegiance. Failure of a teacher to salute the flag, or to cause his pupils to do so, shall be punished by a fine.

The Attorney General last year advised me that the 1970 bill was in violation of the Constitution of the United States. He refers to his 1970 opinion, which is attached, in again informing me that the bill before me is also unconstitutional. He stated

"It is the compulsory recitation requirement which renders the bill unconstitutional."

The United States Supreme Court, in 1943, ruled that "action of 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 reserve from all official control." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Shortly after that opinion, the Attorney General in 1943 ruled that prior holdings of the Supreme Court to the contrary upholding the pledge requirement were expressly overruled by the *Barnette* case. This position has been consistently maintained by every attorney general since that time.

Two purposes can be accomplished by amending the present form of this bill. First, by eliminating the compulsory recitation requirement which the Attorney General has ruled unconstitutional, we can save other important parts of the statute designed to instill the virtues of patriotism and love of country in our young people. Second, we can provide for a constitutional alternative to the compulsory flag salute by authorizing recitation and reading of

selected portions of documents of great historical and patriotic significance not only to our nation but to our state as well; not only the Declaration of Independence, but also the United States Constitution, its forerunner the Massachusetts Constitution, addresses of significance in our national history or expressive of our national goals and aspirations — such as the Gettysburg Address, President Lincoln's Second Inaugural Address, and President Kennedy's Inaugural Address. By permitting local school committees to expand the richness and variety in patriotic exercises, it will be possible to improve the program while at the same time avoiding the constitutional disabilities detailed in the Attorney General's opinion.

I recommend, therefore, that the bill be amended as follows: —

By striking out all after the enacting clause and inserting in place thereof the following: —

Chapter 71 of the General Laws is hereby amended by striking out section 69, as most recently amended by chapter 77 of the acts of 1969, and inserting in place thereof the following section: —

*Section 69.* The school committee shall provide for each schoolhouse under its control, which is not otherwise supplied, flags of the United States of silk or bunting not less than two feet long, such flags or bunting to be manufactured in the United States, and suitable apparatus for their display as hereinafter provided. A flag shall be displayed, weather permitting, on the school building or grounds on every school day and on every legal holiday or day proclaimed by the governor or the President of the United States for especial observance; provided, that on stormy school days, it shall be displayed inside the building. A flag shall be displayed in each assembly hall or other room in each such schoolhouse where the opening exercises on each school day are held. Each teacher shall conduct for the pupils under his charge an opening exercise program of voluntary participation in readings or recitations, both, of selected and appropriate portions of the declaration of independence, the constitution of the United States, the constitution of the commonwealth, or other documents or addresses selected by the school committee for their significance in our national history or expression of goals or aspirations of our nation. A flag shall be displayed in each classroom in each such school-

house. Failure for a period of five consecutive days by the principal or teacher in charge of a school equipped, as aforesaid, to display the flag as above required shall be punished for every such day by a fine of not more than five dollars. Failure of the committee to equip a school as herein provided shall subject the members thereof to a like penalty.

Respectfully submitted,

FRANCIS W. SARGENT,  
*Governor of the Commonwealth.*

## The Commonwealth of Massachusetts

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### OPINION OF THE ATTORNEY GENERAL.

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May 27, 1970.

The Honorable FRANCIS W. SARGENT, *Acting Governor of the Commonwealth*, State House, Boston, Massachusetts 02133.

DEAR GOVERNOR SARGENT: — You have requested my opinion as to the constitutionality of a proposed statute which would require the compulsory recital of either the “Pledge of Allegiance to the Flag,” together with a salute to the flag, or a designated portion of the Declaration of Independence in the public schools of the Commonwealth. The bill passed by the General Court is H. 5385 and would amend General Laws, chapter 71, section 69 by striking out the fourth, fifth and sixth sentences thereof and inserting the following language:

“Each teacher shall cause the pupils under his charge to recite each day at said opening exercise, in unison with him, either the ‘Pledge of Allegiance to the Flag’, while saluting the flag, or the following portions of the Declaration of Independence, to wit: ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor’. Failure for a period of five consecutive days by the principal or teacher in charge of a school, equipped as aforesaid to display the flag as above required or to salute the flag and recite said pledge or said portions of the Declaration of Independence, or to cause, the pupils under his charge to do so, shall be punished for every such day by a fine of not more than five dollars.”

First, I note that the language of H. 5385 is similar in all respects, except for the addition of the provision pertaining to the Declaration of Independence, to the language of H. 481 of 1965.

In response to a request for an opinion from the Senate with respect to the constitutionality of H. 481, the then Attorney General, Edward W. Brooke, concluded:

“It is my opinion that to the extent such a statute would require school children to recite the pledge, it would be unconstitutional and void. The question of the validity of such a law was adjudicated over twenty years ago in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The holding of that case is clear:

‘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 (whose principles are made applicable to the state through the Fourteenth Amendment) to reserve from all official control’. *Id.* at 642.

“The factual distinction between the law involved in *Barnette* and the one to which your question relates are insignificant. The principles enunciated in *Barnette* apply equally to both. Nothing which has intervened since that decision has weakened or cast doubt upon the continuing vitality of these principles.

“It is, accordingly, my considered judgment that the portion of the proposed statute set forth above which requires public school children to recite each morning the pledge of allegiance to the flag, and which imposes criminal penalties for failure so to do, is beyond the power of the Legislature to enact. If enacted, such a statute would be unconstitutional and void.”

Attorney General Brooke’s opinion was rendered in 1965. Since that date there have been no intervening decisions or constitutional amendments which would allow a change in the result. I therefore conclude that H. 5385 would, if enacted, be unconstitutional. The fact that the bill permits an option of reciting the pledge or a portion of the Declaration of Independence does not alter this conclusion. It is the compulsory recitation requirement which renders the bill unconstitutional. *West Virginia State Board of Education v. Barnette*, 319 U.S. at 633.

You have asked the further question whether H. 5385 "remove[s] from Massachusetts law the requirement that each classroom display the American Flag?" St. 1969, c. 77 amended G. L. c. 71, § 69 by inserting therein a sentence, which became the fifth sentence of the section, as follows: "A flag shall be displayed in each classroom in each such schoolhouse." H. 5385 would amend the section by striking out that sentence, as well as the sentences immediately preceding and following it, and no comparable provision is inserted in lieu thereof. I therefore conclude that the requirement that a flag be displayed in each classroom would be repealed by H. 5385.

Very truly yours,

ROBERT H. QUINN,  
*Attorney General.*



