

The National Anthem & the NFL:

Is the national anthem a proper symbol of
America or a symbol of its racist past?

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The A-Mark Foundation

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I. Executive Summary

Professional sports in the United States often play the national anthem, “The Star-Spangled Banner,” at the start of an event. On September 1, 2016, San Francisco 49ers quarterback Colin Kaepernick inspired a national debate over social justice issues, police brutality, and patriotism when he knelt during the national anthem before a football game. Players and fans typically stand with their right hands over their hearts.

He told the media, “I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color... There are bodies in the street and people getting paid leave and getting away with murder.”¹

Other players in the National Football League (“NFL”) and in other sports also began to kneel during the national anthem. A debate over the propriety of protesting during the national anthem at sporting events erupted nationwide.²

1 Steve Wyche, “Colin Kaepernick Explains Why He Sat during National Anthem,” nfl.com, August 27, 2016

2 Ed Uszynski, “What You Might Be Missing in the Kneeling Debate,” athletesinaction.org, May 23, 2018

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Amid the discussion over kneeling, “The Star-Spangled Banner” received heightened scrutiny and questions were raised as to the nature of the song.³ Part of the controversy comes from the little-known third stanza: “No refuge could save the hireling and slave / From the terror of flight or the gloom of the grave”

Some people say the national anthem glorifies America’s racist past, and note that protests are political speech protected by the First Amendment to our Constitution. Those opposed to protesting say dissenters don’t support our country, are un-American, and that athletes should keep their politics out of sports.

These issues are emotional and political for many, business for others, and the differing views of the national anthem have created a lot of anger and dissension among players, fans, teams and others.

II. The Origin and a Little History About the National Anthem and its Author

August 1, 1779: The writer of the national anthem, Francis Scott Key, was raised by a family who owned slaves at a time and place in America where and when slavery was legal.⁴ Born in Frederick County, Maryland, on August 1, 1779, Key became a lawyer, a U.S. attorney for the District of Columbia⁵ and poet who passed away on Jan. 11, 1843.⁶

During his lifetime, Key owned slaves and set some of them free,⁷ and opposed the abolitionist movement⁸ but also represented freedom-seeking slaves in court.⁹ Key reportedly believed in freeing slaves only if they were immediately sent back to Africa. His public record made adopting

3 CBS News, “National anthem lyrics prompt California NAACP to call for replacing song,” cbsnews.com, November 8, 2017

4 Marc Leepson, “Francis Scott Key: AMERICAN LAWYER,” Britannica.com, accessed 10/14/2017

5 “1814: Key pens Star-Spangled Banner,” History.com, accessed 10/12/2017

6 “Francis Scott Key,” Biography.com, accessed 10/12/2017

7 Marc Leepson, “Francis Scott Key: AMERICAN LAWYER,” Britannica.com, accessed 10/12/2017

8 Christopher Wilson, “Where’s the Debate on Francis Scott Key’s Slave-Holding Legacy?” SmithsonianMag.com, accessed 10/12/2017

9 Priscilla Queen v. Francis Neale, EarlyWashingtondc.org, accessed 10/12/2017

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“The Star-Spangled Banner” too controversial a choice for the national anthem prior to his death in 1843.¹⁰

War of 1812: During the War of 1812, the British invited thousands of American slaves to join them in the war against the United States. In order to receive freedom for themselves and their families, the men enlisted in the British Colonial Marines.¹¹

September 7, 1814: A week before Francis Scott Key wrote what is now known as “The Star-Spangled Banner” (now also known as the national anthem), he was detained on a vessel by the British while negotiating the release of U.S. prisoners in British custody during the War of 1812.¹²

September 13, 1814: The British “barrage of Fort McHenry began eight miles away”¹³ while Key watched from that vessel.

September 14, 1814: Key wrote about the event to the tune of “Anacreon in Heaven”¹⁴ (a popular British drinking song) and took it to his brother-in-law Judge Joseph Hopper Nicholson, who “had it printed and distributed around the city.”¹⁵

September 21, 1814: “Defence of Fort M’Henry” is published in *The Baltimore [Maryland] Patriot* on September 21, 1814.¹⁶

October 19, 1814: The song¹⁷ “Defence of Fort M’Henry” was renamed “The Star-Spangled Banner” and printed in music sheet form by Thomas Carr of Baltimore a short time after its

10 Jefferson Morley, “Even Republicans Should Care about the Racist History of ‘The Star-Spangled Banner,’” *washingtonpost.com*, August 28, 2020

11 “The War of 1812,” PBS SoCal, *PBS.org*, accessed 10/14/2017

12 “Francis Scott Key: 1780-1843,” *USFlag.org*, accessed 10/16/2017

13 Cate Lineberry, “The Story Behind the Star Spangled Banner: How the Flag That Flew Proudly over Fort McHenry Inspired an Anthem and Made Its Way to the Smithsonian.” *SMITHSONIAN.COM*, March 1, 2007

14 Michael Muskal, “Related story: ‘Star-Spangled Banner’: Anthem Was Once a Song of Drinking and Sex,” *LATimes.com*, September 13, 2014

15 “The Star-Spangled Banner, 1814 (copy c. 1840),” *digitalhistory.hsp.org*, accessed on 10/18/2017

16 “Lot 274: THE STAR SPANGLED BANNER – Baltimore Patriot & Evening Advertiser. Baltimore: Munroe & French, No. 54 South Street, 21 September 1814.,” *Christies.com*, accessed 10/11/2017

17 Christopher Klein, “HISTORY STORIES: 9 Things You May Not Know About ‘The Star-Spangled Banner,’” September 12, 2014 – “‘The Star Spangled-Banner’ was not a poem set to a melody years later. Although Key was an amateur poet and not a songwriter, when he composed his verses, he intended them to accompany a popular song of the day.”

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publication as “Defence of Fort M’Henry.”¹⁸ It is performed for the first time at the theater on Holliday Street also in Baltimore, Maryland.¹⁹

The 1800s: Before “The Star-Spangled Banner” became the national anthem in 1931, Key’s song was the de facto anthem for many, in addition to many other patriotic songs during that time period before and after the Civil War.

According to History.com, “During the Civil War, ‘The Star-Spangled Banner’ was an anthem for Union troops...”²⁰ Marc Ferris, author of *Star-Spangled Banner: The Unlikely Story of America’s National Anthem*, told USA Today.com for an article on September 26, 2017:

“‘The North won the tug of war,’ Ferris says. ‘The irony is that the South’s anthem, Dixie, was written by an anti-slavery Northerner whereas the Star-Spangled Banner, the anthem of the North, was written by a slave-holding Southerner whose family supported the Confederacy’ long after Key died in 1843.”²¹

July 26, 1889: The Secretary of the Navy “designated” that “The Star-Spangled Banner” be played “at the raising of the flag,” according to the Library of Congress.²²

September 5, 1918: Key’s song first came into prominence at a sports game during the 1918 World Series.²³

April 15, 1929: Rep. John Linthicum of Maryland on April 15, 1929,²⁴ introduced the legislation calling for Key’s song to be the national anthem. The final law was titled: “CHAP. 436. An Act To make The Star-Spangled Banner the national anthem of the United States of America.”

18 Robert M. Poole, “Star-Spangled Banner Back on Display,” *SmithsonianMag.com*, November 2008

19 Spencer C. Tucker, *The Encyclopedia Of the War Of 1812*, Books.Google.com, 2012

20 Christopher Klein, “9 Things You May Not Know About ‘The Star-Spangled Banner’,” *History.com*, 2014, accessed 10/19/2017

21 Erik Brady, “How national anthem became essential part of sports,” *USAToday.com*, September 26, 2017

22 “SONG-COLLECTION: Star Spangled Banner,” *LOC.gov*, accessed 10/12/2017

23 “1918 World Series key in US love affair with national anthem,” *USAToday.com*, July 3, 2017

24 “Historical Highlights: The Designation of the ‘Star-Spangled Banner,’” U.S. House of Representatives: History, Art & Archives, *History.House.gov*, accessed 10/12/2017

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March 3, 1931: “The Star-Spangled Banner” was instituted as the National Anthem by President Herbert Hoover on March 3, 1931. On March 3, 1931, President Herbert Hoover signed H.R. 14, from the 71st Congress (1929–1931).²⁵

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the composition consisting of the words and music known as The Star-Spangled Banner is designated the national anthem of the United States of America.”²⁶

1940s: According to the book *Pigskin: The Early Years of Pro Football* by Robert W. Peterson:

“During the war [WWII], playing the national anthem had become a ceremonial prelude to NFL games. [NFL] Commissioner Elmer Layden announced that the anthem would continue to be played.”²⁷

August 12, 1998: According to U.S. Code “Title 36 – Patriotic and National Observances, Ceremonies and Organizations,”²⁸ the following is the suggested code of conduct for non-military individuals observing the National Anthem when a flag is displayed:

“(A) all present except those in uniform should stand at attention facing the flag with the right hand over the heart; (B) men not in uniform should remove their headdress with their right hand and hold the headdress at the left shoulder, the hand being over the heart; and ... (2) when the flag is not displayed, all present should face toward the music and act in the same manner they would if the flag were displayed.”

Dec 16, 2014: There has been legislation proposed since 1931 making other songs, such as “America the Beautiful,” the national anthem. A more recent one came in 2014 introduced by

25 “Historical Highlights: The Designation of the ‘Star-Spangled Banner,’” U.S. House of Representatives: History, Art & Archives, History.House.gov, accessed 10/12/2017

26 “The Statutes at Large ... from April, 1929, to March, 1931 ... Vol. XLVI: Session III: H.R. 14, Public, No. 823, Chapter 436,” LOC.gov, Page 1508

27 Robert W. Peterson, *Pigskin: The Early Years of Pro Football*, Books.Google.com, Published by Oxford University Press, accessed 10/19/2017

28 “USCode, Title 36 – Patriotic and National Observances, Ceremonies and Organizations: Subtitle I – Patriotic and National Observances and Ceremonies: Part A – Observances and Ceremonies: Chapter 3. National anthem, Motto, Floral Emblem, March, and Tree,” USCode.House.gov, Enacted by Public Law 105-225, August 12, 1998, 112 Stat. 1253, accessed 10/12/2017

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Sen. Thomas Harkin (D-IA): “[S. 3020 \(113th\)](#): A bill to establish the composition known as America the Beautiful as the national anthem,” according to GovTrack.us accessed October 19, 2017.

September 13, 2017: The reference to slaves in the national anthem may be a reason for someone reportedly spray painting “Racist Anthem” on the base of Key’s statue in Baltimore, Maryland, on September 13, 2017. In response to the vandalism, Eric Holcomb, executive director of the city’s Commission for Historical and Architectural Preservation said:

“It’s so counterproductive, what they’re doing,’ he said. ‘History’s messy. It’s nuanced. It’s something to talk about, not something to erase.’²⁹

June 20, 2020: Protestors brought down a statue of Francis Scott Key in San Francisco’s Golden Gate Park. This action was accompanied by renewed calls to choose a new national anthem.³⁰

January 13, 2021: Congressman James Clyburn (D-SC) [introduced a bill](#) to make “Lift Every Voice and Sing,” also known as the Black National Anthem, the new national anthem of the United States.

III. The National Anthem and Athlete Protests

1967: In his memoir titled *I Never Had It Made*, 1962 National Baseball Hall of Fame inductee Jackie Robinson (1919-1972), wrote: “As I write this twenty years later, [from 1947 World Series, around 1967] I cannot stand and sing the anthem.”³¹ Cornel West wrote the following in the introduction to Robinson’s memoir:

“And yet, his disillusionment with America is real. Robinson cannot stand and sing the national anthem or salute the flag. His deep patriotism and his hatred of white supremacy will not allow him to engage in such empty gestures of

²⁹ Colin Campbell and Sean Walsh, “Baltimore to Keep, Clean Defaced Francis Scott Key Statue,” BaltimoreSun.com, September 13, 2017

³⁰ Jody Rosen, “Commentary: It’s Time to Cancel ‘The Star-Spangled Banner.’ Here’s What Should Replace It,” latimes.com, July 14, 2020.

³¹ Craig Calcaterra, “Jackie Robinson: ‘I Cannot Stand and Sing the Anthem. I Cannot Salute the Flag,’” MLB.NBCSports.com, August 29,

2016

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country-worship. He knows that 'money is America's God' and that he is 'a black man in a white world.'

1968: Other athletes who openly protested the national anthem include Olympic medalists Tommie Smith and John Carlos in 1968.³² According to SmithsonianMag.com, in an article titled "Olympic Athletes Who Took a Stand" from August 2008:

"Smith and Carlos, winners of the gold and bronze medals, respectively, in the event, had come to the ceremony dressed to protest: wearing black socks and no shoes to symbolize African-American poverty, a black glove to express African-American strength and unity. (Smith also wore a scarf, and Carlos beads, in memory of lynching victims.) As the national anthem played and an international TV audience watched, each man bowed his head and raised a fist. After the two were banished, images of their gesture entered the iconography of athletic protest."³³

March 12, 1996: National Basketball Association (NBA) Denver Nuggets player Mahmoud Abdul-Rauf³⁴ was suspended for protesting the national anthem. The NBA, unlike the NFL, has a rule that players stand for the performance of the national anthem.³⁵ Like Kaepernick, a reporter first noticed that Abdul-Rauf was not traditionally observing the performance of the national anthem:

"Like Kaepernick, Abdul-Rauf said he viewed the American flag as a symbol of oppression and racism. Abdul-Rauf also said standing for the anthem would conflict with his Muslim faith. 'You can't be for God and for oppression. It's clear in the Quran, Islam is the only way,' he said at the time. 'I don't criticize those who stand, so don't criticize me for sitting.' "

Nov. 4, 2015: It was discovered that patriotism was being manufactured through the use of the anthem and other military displays at sports games. In 2015, Sens. Jeff Flake (R-AZ) and John

32 David Ng, "How 'The Star-Spangled Banner,' racist or not, became our national anthem," LATimes.com, September 6, 2016

33 David Davis, "Olympic Athletes Who Took a Stand: For 40 years, Olympians Tommie Smith and John Carlos have lived with the consequences of their fateful protest," SmithsonianMag.com, August 2008

34 Ryan Vooris, "10 Athletes Who Made Bold Political and Social Statements," BleacherReport.com, August 30, 2010

35 Zach Lowe, "Memo reinforces rule that NBA players, coaches stand for anthem," ESPN.com, September 30, 2017

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McCain (R-AZ) released a report that exposed the Department of Defense's practice of paying sports teams to promote patriotism:

"Certain contracts show that DOD paid for specific activities including on-field color guard performances, enlistment and re-enlistment ceremonies, performances of the national anthem, full-field flag details, and ceremonial first pitches and puck drops."³⁶ (underlining added)

August 26, 2016: A San Francisco 49ers NFL quarterback, Colin Kaepernick, who was spotted *sitting* for the anthem during the third preseason home game on August 26, 2016, although he had sat for the anthem previously while out of uniform. The next game, he "*took a knee*," kneeling on one knee on the sideline while the national anthem was played.

After he was spotted sitting at the third preseason game, Kaepernick said he was protesting a country that "oppresses black people and people of color."³⁷

August 27, 2016: In response to Kaepernick's decision to protest during the National Anthem, the San Francisco 49ers issued a statement on August 27, 2016:

"The national anthem is and always will be a special part of the pre-game ceremony. It is an opportunity to honor our country and reflect on the great liberties we are afforded as its citizens. In respecting such American principles as freedom of religion and freedom of expression, we recognize the right of an individual to choose and participate, or not, in our celebration of the national anthem."³⁸

August 27, 2016: In response to Kaepernick's decision to protest during the National Anthem, The NFL also issued a statement on August 27, 2016:

"Players are encouraged but not required to stand during the playing of the national anthem."³⁹

36 "PAID PATRIOTISM? FLAKE & McCAIN RELEASE NEW OVERSIGHT REPORT," McCain.Senate.gov, Nov. 4, 2015

37 John Branch, "The Awakening of Colin Kaepernick," NYTimes.com, September 7, 2017

38 Steve Wyche, "Colin Kaepernick Explains Why He Sat during National Anthem," NFL.com, August 27, 2016

39 Ibid.

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August 28, 2016: Although sports players protesting the national anthem is not a new phenomenon, Kaepernick's protest comes at a time when many in the United States are debating the future of statues and documents, from the Constitution of the United States to statues of Robert E. Lee, that were created in or commemorate an era in history that condoned slavery.

On August 28, 2016, Kaepernick spoke about his reason for protesting during the performance of the national anthem:

“Yes. I'll continue to sit. . . I'm going to continue to stand with the people that are being oppressed. To me this is something that has to change. When there's significant change and I feel like that flag represents what it's supposed to represent, this country is representing people the way that it's supposed to, I'll stand.”⁴⁰

August 28, 2016: In the article, “Colin Kaepernick is Righter Than You Know: The National Anthem is a Celebration of Slavery,” written by Jon Schwartz⁴¹ two days after Kaepernick was spotted sitting during the national anthem, there is a breakdown of the origin of the national anthem and the writer's interpretation of the lines in the third stanza about the “hireling and slave” lines:

“So when Key penned ‘No refuge could save the hireling and slave / From the terror of flight or the gloom of the grave,’ he was taking great satisfaction in the death of slaves who'd freed themselves. His perspective may have been affected by the fact he owned several slaves himself.”

Jon Schwartz notes that he had gained some insight from an even earlier article by Andrew Cockburn in the September 2014 issue of *Harper's Magazine* online at Harpers.org.

August 28, 2016: The same day, Radley Balko, an opinion blogger for *The Washington Post's* “The Watch,” re-Tweeted TheIntercept.com article on Kaepernick's protest:

40 Chris Biderman, “Transcript: Colin Kaepernick addresses sitting during national anthem,” NinersWire.USAToday.com, August 28, 2016

41 “Before joining First Look, Jon Schwarz worked for Michael Moore's Dog Eat Dog Films and was Research Producer for Moore's ‘Capitalism: A Love Story.’ He's contributed to many publications, including the *New Yorker*, the *New York Times*, *The Atlantic*, the *Wall Street Journal*, *Mother Jones*, and *Slate*, as well as NPR and ‘Saturday Night Live.’ In 2003 he collected on a \$1,000 bet that Iraq would have no weapons of mass destruction.” TheIntercept.com, accessed 10/19/2017

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“Damn. Did not know this. The third verse of the U.S. national anthem literally celebrates the deaths of slaves.”

August 30, 2016: Nate Boyer, both an ex-Green Beret and former NFL player, penned an “open letter”⁴² to Kaepernick on August 30, 2016, after Kaepernick was spotted sitting for the anthem. Nate Boyer is among those credited for Kaepernick choosing to “take a knee” instead of sitting while the national anthem was performed:

“We sorta came to a middle ground where he would take a knee alongside his teammates,’ Boyer says. ‘Soldiers take a knee in front of a fallen brother’s grave, you know, to show respect. When we’re on a patrol, you know, and we go into a security halt, we take a knee, and we pull security.’”

September 1, 2016: On September 1, 2016, San Francisco 49ers quarterback Colin Kaepernick inspired a national debate over social justice issues, police brutality, and patriotism when he knelt during the national anthem before a football game.⁴³ Players and fans typically stand with their right hands over their hearts.

IV. Response to the Protests and Ensuing Events

March 3, 2017: It is reported that Kaepernick opted out of his contract with the San Francisco 49ers, making him a free agent player who could sign with any team that wanted to hire him.⁴⁴ Within three months, news emerged that the team had told Kaepernick they did not plan to keep him. The 49ers General Manager John Lynch stated that the team planned to change its offensive strategy in a way that necessitated a different quarterback.⁴⁵ No team ended up signing Kaepernick.

42 Nate Boyer, “An open letter to Colin Kaepernick, from a Green Beret-turned-long snapper,” ArmyTimes.com, August 30, 2016

43 Barry Winner, “Colin Kaepernick: Timeline of the QB’s football and post-NFL days since he first knelt in 2016,” chicagotribune.com, June 7, 2020

44 James Brady, “Colin Kaepernick opts out of contract with 49ers,” SBNation.com, March 3, 2017

45 Will Brinson, “The 49ers would’ve cut Colin Kaepernick if he hadn’t opted out of his contract,” cbssports.com, May 31, 2017

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September 22, 2017: During a September 22, 2017, campaign rally for Senate-candidate Luther Strange in Huntsville, Alabama, President Donald Trump said:

“Wouldn’t you love to see one of these NFL owners when somebody disrespects our flag, to say ‘Get that son of a bitch off the field right now, out, he’s fired?’”⁴⁶

September 24, 2017: Not every player or team that observes the performance of the national anthem or protests during the national anthem is showing solidarity to any player or political issue. On September 24, 2017, the NFL team the Pittsburgh Steelers stayed in the locker room:

“‘We’re not going to play politics. We’re football players, we’re football coaches,’ Tomlin said. ‘We’re not participating in the anthem today - not to be disrespectful to the anthem, but to remove ourselves from the circumstance.’”⁴⁷

September 24, 2017: Only one player, a former Army Ranger, was not in the locker room and stood alone for the performance of the national anthem, a decision Alejandro Villanueva says he regrets because he didn’t support the team’s decision:

Villanueva said his presence on the field was a mistake, and only went out ahead of the National Anthem because he wanted to see the flag. When the anthem began, he did not want to move.⁴⁸

September 24, 2017: A World War II vet “took a knee” to support the player protest.⁴⁹

September 25, 2017: Some veterans disagree with the protests,⁵⁰ while others believe they served to protect the right to protest. The American Legion and The Veterans of Foreign Wars⁵¹ condemned the September 23-24, 2017, player protests as “disrespectful.”

46 Aric Jenkins, “Read President Trump’s NFL Speech on National Anthem Protests,” time.com, September 13, 2017

47 “Steelers don’t participate in national anthem, with exception of ex-Ranger Alejandro Villanueva,” USA Today.com, September 24, 2017

48 Solange Reyner, “Steelers’ Villanueva Apologizes for Standing for National Anthem,” Newsmax.com, September 25, 2017

49 M.L. Nestel, “The 97-year-old WWII veteran who took a knee to support NFL player protests,” ABCNews.go.com, September 25, 2017

50 Cam Inman, “Colin Kaepernick takes knee during anthem, joined by Eric Reid,” MercuryNews.com, September 1, 2016

51 Leo Shane III, “VFW, American Legion slam NFL players for anthem protests,” ArmyTimes.com, September 25, 2017

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September 26, 2017: In a Twitter message, President Trump made a suggestion to the NFL about player protocol for the national anthem:

“The NFL has all sorts of rules and regulations. The only way out for them is to set a rule that you can't kneel during our National Anthem!”

October 1, 2017: Some networks decided to stop showing the performance of the national anthem at football games:

“Fox’s statement also said, however, that ‘our cameras are always rolling and we will document the response of players and coaches on the field.’ As of early Sunday afternoon, it was unclear how the network will ‘document’ the protests without airing the anthem.”⁵²

October 11, 2017: According to an NFL.com a league spokesman on October 11, 2017:

“The NFL has no plans to mandate players stand for the national anthem.”⁵³

October 11, 2017: Sports columnist Christine Brennan, on October 11, 2017, had suggested this option for NFL policy in a USA Today.com article:

“So, what to do? There's a very simple answer: Go back to the days before 2009 when teams were not required to come out of the locker room for some games until after the anthem was played (except for the Super Bowl and after 9/11).”⁵⁴

October 15, 2017: Colin Kaepernick filed a lawsuit against the NFL, claiming that the teams in the league colluded to prevent him from continuing to play professional football. After he left the 49ers in March 2017, no other team signed him to play. The New York Times noted that “nearly two dozen other quarterbacks have been signed, many of them with lesser résumés.”⁵⁵

52 David Z. Morris, “The Reason Why Fox Sports Isn’t Airing the NFL’s National Anthem Today,” Fortune.com, October 1, 2017

53 NFL.com, “NFL: No mandate for players to stand during national anthem,” nfl.com, October 11, 2017

54 Christine Brennan, “NFL, players have one easy answer for how to end protests on their own terms,” USA Today.com, October 11, 2017

55 Ken Belson, “Colin Kaepernick, Who Began Anthem Kneeling, Files Complaint Against N.F.L.,” nytimes.com, October 15, 2017

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October 17, 2017: On October 17, 2017, NFL leaders decided to continue the policy of not enacting any rule requiring players to stand and not protest during the performance of the national anthem.⁵⁶

According to the “2017 Official Playing Rules of the National Football League” on the NFL Operations website, a search does not turn up anything for “anthem” in the online PDF as of October 12, 2017.⁵⁷ Under Section 4 – “Equipment, Uniforms, Player Appearance,” in addition to what is acceptable to wear on the field, including the towel rules – “Players are prohibited from adding to these towels personal messages” – and penalties for when rules are broken during the game, there is a passage on “Personal Messages” under Rule 5:

“ARTICLE 8. PERSONAL MESSAGES. Throughout the period on game-day that a player is visible to the stadium and television audience ... players are prohibited from wearing, displaying, or otherwise conveying personal messages either in writing or illustration, unless such message has been approved in advance by the League office. ... The League will not grant permission for any club or player to wear, display, or otherwise convey messages, ... which relate to political activities or causes.”

October 17, 2017: President Trump criticized the NFL’s decision not to make a rule forcing players to stand during the anthem on Twitter:

“The NFL has decided that it will not force players to stand for the playing of our National Anthem. Total disrespect for our great country!”

May 2, 2018: Eric Reid, a former teammate of Kaepernick who also knelt during the anthem, also filed a collusion lawsuit against the NFL. He had continued to kneel after Kaepernick stopped playing, then was unable to sign with a new team after becoming a free agent.⁵⁸

May 23, 2018: The NFL announced a new policy that requires everyone standing on the sidelines to stand during the national anthem, but allowing players to remain in the locker room

56 Ken Belson and Kevin Draper, “Trump Criticizes N.F.L. for Not Penalizing Anthem Kneeling,” NYTimes.com, October 17, 2017

57 “2017 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE” (accessed October 18, 2017)

58 Harry Lyles Jr., “A law professor explains why it’ll be ‘a bitch’ for Eric Reid to prove NFL collusion,” sbnation.com, May 3, 2018

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during that time.⁵⁹ The new policy enacted fines for teams whose players were on the field but failed to “stand and show respect for the flag and the anthem.”

NFL commissioner Roger Goodell said:

“It was unfortunate that on-field protests created a false perception among many that thousands of NFL players were unpatriotic. This is not and was never the case.

This season, all league and team personnel shall stand and show respect for the flag and the anthem. Personnel who choose not to stand for the anthem may stay in the locker room until after the anthem has been performed.”

February 15, 2019: The NFL reached a settlement with Colin Kaepernick and Eric Reid in their legal claim alleging that teams colluded to keep them out of the league in response to their protests during the national anthem. The settlement remained confidential but was reportedly “considerably less than \$10 million.”⁶⁰

June 5, 2020: In response to the May 25, 2020, death of George Floyd while in police custody, the NFL released a statement featuring Commissioner Goodell.⁶¹ He said:

“We, the National Football League, condemn racism and the systematic oppression of Black People. We, the National Football League, admit we were wrong for not listening to NFL players earlier and encourage all to speak out and peacefully protest.”

September 10, 2020: A poll released on the first day of the 2020 NFL season found that 56% of Americans supported athletes kneeling in protest during the national anthem, while 42% opposed it. The same poll found that 62% of Americans believed it was appropriate for athletes to use their platforms to express their thoughts on national issues.⁶²

59 NFL.com, “Roger Goodell’s statement on national anthem policy,” nfl.com, May 13, 2018

60 Ken Belson, “N.F.L. Settlement With Kaepernick and Reid Is Said to Be Much Less Than \$10 Million,” nytimes.com, March 21, 2019

61 Deena Zaru, “NFL Apologizes for ‘Not Listening’ to Players about Racism as Colin Kaepernick Remains Unsigned,” abcnews.go.com, June 7, 2020

62 Rick Maese and Emily Guskin, “Most Americans Support Athletes Speaking out, Say Anthem Protests Are Appropriate, Post Poll Finds,” washingtonpost.com, September 10, 2020

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September 12, 2021: The NFL announced plans to play the Black National Anthem, “Lift Every Voice and Sing,” ahead of “The Star-Spangled Banner” at every game in the 2021 season. The league pledged to spend \$250 million over 10 years combating racism.⁶³

February 13, 2022: Rapper Eminem knelt during his performance at the the Super Bowl LVI halftime show. Viewers equated his action with the form of protest initiated by Kaepernick, but there was no confirmation of Eminem’s intentions at the time.⁶⁴

V. The National Anthem

A. A Few Interpretations of the Third Stanza of the National Anthem: “No refuge could save the hireling and slave...”

There have been many critiques on having “The Star-Spangled Banner” as the national anthem. They range from the tune being too hard for average people to sing⁶⁵ to the song it too militaristic⁶⁶ and offends the British⁶⁷ to the lyrics of the third stanza being racist.

August 30, 2016: ConservativeReview.com interpretation on August 30, 2016:

“There's just one problem: These lyrics are describing slaves, who were, as King conveniently points out, hired by the British. This song is not about killing black slaves. It's about fighting the enemy, be he a decorated British officer or the escaped slave hired to do his dirty work.”⁶⁸

September 14, 2017: “For his time, he ought to be perceived as progressive,” Robert Devaney wrote in a Georgetowner.com article on September 14, 2017, in defense of Key after his statue was vandalized in Baltimore, Maryland. Devaney says Key was “conflicted about slavery”:

63 ArLuther Lee, “NFL to Play Black National Anthem at All League Games in 2021,” ajc.com, September 12, 2021

64 Dan Evon, “Did Eminem Kneel in Defiance at the Super Bowl?,” snores.com, February 14, 2022

65 Dr. George J. Svejda, “HISTORY OF THE STAR SPANGLED BANNER : FROM 1814 TO THE PRESENT,” Archive.org, accessed 10/15/2017

66 Harvey Wasserman, “We Need a New National Anthem,” Progressive.org, September 25, 2017

67 Dr. George J. Svejda, “HISTORY OF THE STAR SPANGLED BANNER : FROM 1814 TO THE PRESENT,” Archive.org, accessed 10/15/2017

68 Marian Weyo, “Enough already! Here's why our national anthem is not racist,” ConservativeReview.com, August 30, 2016

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“The accusation that the poem itself is racist is off the mark and lacks historical context. How is Key’s use of the word, ‘slaves,’ who were part of the enemy force, offensive? How many texts contain the word ‘slaves’? In such excluding minds, what’s next? The sculpture in Francis Scott Key Park on M Street in Georgetown, next to Key Bridge? What about the equestrian statue of liberator Simón Bolívar, a slave owner, at 18th Street and Virginia Avenue, across from the Organization of American States?”⁶⁹

September 15, 2017: Walter Olson in NationalReview.com questioned whether Key’s song is racist in a September 15, 2017, article subtitled “Its third verse uses the word ‘slave,’ but it may not have referred to chattel slavery in the South”:

“Was Key pursuing a grudge by describing, or misdescribing, the Corps of Colonial Marines as slaves? Or did he have the (predominantly white) conscripts in mind? Or was he just reaching for a common word pairing, familiar to his listeners, that provided him with a rhyme? There’s no record of him ever explaining why he chose those words. When we decide whether to give his words a reading that is charitable or otherwise, we make a choice too.”⁷⁰

September 27, 2017: Zahara Hill in Ebony.com wrote:

“Some interpret the verse as a celebration of the slaves’ deaths. Others say the song is simply a reflection of the era in which it was written. We say no matter Key’s intention, anything normalizing slavery is essentially racist and, consequently, unappealing.”⁷¹

October 2, 2017: Associate Professor Jason Johnson of Morgan State University, as quoted by HuffingtonPost.com contributor Gyasi Ross in an article titled “Maybe It’s Time For A New National Anthem (Or None At All): #TakeAKnee is not about the national anthem. But maybe it should be.”:

69 Robert Devaney, “In Defense of the National Anthem and Francis Scott Key,” Georgetowner.com, September 14, 2017

70 Walter Olson, “Is ‘The Star-Spangled Banner’ Racist?,” NationalReview.com, September 15, 2017

71 Zahara Hill, “The ‘Star-Spangled Banner’ Actually Is Racist, So Here Are Some Other Anthems We Can Get With,” Ebony.com, September 27, 2017

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“Essentially, Francis Scott Key was happy to see former slaves, who had joined the British as part of their Colonial Marines, getting slaughtered and killed as they attempted to take Baltimore...he’s essentially saying to these terrible, ungrateful, black people, this is the consequence of standing up against the United States.”⁷²

July 14, 2020: An article in the Los Angeles Times noted that scholars did not agree on what the controversial line was intended to convey:

“Historian Jason Johnson has called ‘The Star-Spangled Banner’ ‘a diss track to Black people who had the audacity to fight for their freedom.’ Marc Ferris, the author of ‘Star-Spangled Banner: The Unlikely Story of America’s National Anthem,’ has written that Key was likely using the term ‘slave’ more loosely, to describe ‘all of the monarch’s loyal subjects, including British troops — as contrasted with free patriot Americans.’”⁷³

June 28, 2021: Olympic track and field athlete Gwen Berry stated in an interview with the Black News Channel:

“If you know your history, you know the full song of the national anthem, the third paragraph speaks to slaves in America, our blood being slain... all over the floor. It’s disrespectful and it does not speak for black Americans. It’s obvious. There’s no question.”⁷⁴

B. The Lyrics to the National Anthem

“The Star-Spangled Banner”⁷⁵

*“O say can you see, by the dawn’s early light,
What so proudly we hail’d at the twilight’s last gleaming,
Whose broad stripes and bright stars through the perilous
fight*

⁷² Gyasi Ross, “Maybe It’s Time For A New National Anthem (Or None At All),” HuffingtonPost.com, October 2, 2017

⁷³ Jody Rosen, “Commentary: It’s time to cancel ‘The Star-Spangled Banner.’ Here’s what should replace it,” latimes.com, July 14, 2020.

⁷⁴ BNC News, “Gwen Berry Talks Decision to Turn Back on American Flag at Olympic Trials,” YouTube.com, June 28, 2021

⁷⁵ “The Lyrics,” Smithsonian Institute, AmHistory.si.edu, accessed 10/11/2017

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*O'er the ramparts we watch'd were so gallantly streaming?
And the rocket's red glare, the bombs bursting in air,
Gave proof through the night that our flag was still there,
O say does that star-spangled banner yet wave
O'er the land of the free and the home of the brave?*

*On the shore dimly seen through the mists of the deep
Where the foe's haughty host in dread silence reposes,
What is that which the breeze, o'er the towering steep,
As it fitfully blows, half conceals, half discloses?
Now it catches the gleam of the morning's first beam,
In full glory reflected now shines in the stream,
'Tis the star-spangled banner - O long may it wave
O'er the land of the free and the home of the brave!*

*And where is that band who so vauntingly swore,
That the havoc of war and the battle's confusion
A home and a Country should leave us no more?
Their blood has wash'd out their foul footsteps' pollution.
No refuge could save the hireling and slave
From the terror of flight or the gloom of the grave,
And the star-spangled banner in triumph doth wave
O'er the land of the free and the home of the brave.*

*O thus be it ever when freemen shall stand
Between their lov'd home and the war's desolation!
Blest with vict'ry and peace may the heav'n rescued land
Praise the power that hath made and preserv'd us a nation!
Then conquer we must, when our cause it is just,
And this be our motto - "In God is our trust,"
And the star-spangled banner in triumph shall wave
O'er the land of the free and the home of the brave."*

(underline added)

VI. Some Questions About This Controversy to Consider

1. Is the national anthem racist?
2. Are the non-violent protests to the national anthem by NFL and other players protected by the First Amendment, or do the sports teams have the right to treat the protestors punitively for their protests as long as the players are otherwise doing their jobs?
3. Should there be an NFL rule that players must stand without protest for the performance of the national anthem in the NFL?
4. Why is the national anthem played before sports games but not before performances of many other entertainment venues?
5. Has our government in any way promoted the performance of the national anthem at sports events, and if so, how and why?

Many other questions have arisen or will surely arise from these issues, and as is often the case on such controversies, what may initially seem black and white to some might look grayer on closer inspection.

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