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Gregory L. Peterson

E. Barrett Prettyman Jr.

Shawn Francis Peters

Bennett Boskey

Gathie Barnett Edmonds

See next page for additional authors

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Recollections of West Virginia State Board of Education v. Barnette

Authors

Gregory L. Peterson, E. Barrett Prettyman Jr., Shawn Francis Peters, Bennett Boskey, Gathie Barnett Edmonds, Marie Barnett Snodgrass, and John Q. Barrett

ARTICLES

**RECOLLECTIONS OF
WEST VIRGINIA STATE BOARD OF
EDUCATION V. BARNETTE***

GREGORY L. PETERSON
E. BARRETT PRETTYMAN, JR.
SHAWN FRANCIS PETERS
BENNETT BOSKEY
GATHIE BARNETT EDMONDS
MARIE BARNETT SNODGRASS
JOHN Q. BARRETT

WELCOMING REMARKS

GREGORY L. PETERSON†

Welcome. The Robert H. Jackson Center exists to preserve and advance the legacy of Justice Jackson through education, events, and exhibitry. Today's special gathering, featuring the Barnett sisters and the attorney who served during 1943 as the senior law clerk to the Chief Justice of the United States, Harlan Fiske Stone, furthers that mission.

During World War II, Gathie and Marie Barnett, along with their parents and other Jehovah's Witnesses, challenged the constitutionality of compelling school children to pledge allegiance and salute the American flag. Their Supreme Court victory, *West Virginia State Board of Education v. Barnette*,¹ is now a constitutional law landmark. It is a case in which Justice

* These proceedings, cosponsored by the Robert H. Jackson Center and the Supreme Court Historical Society, occurred at the Jackson Center in Jamestown, New York, on April 28, 2006. The following remarks were edited for publication.

† Partner, Phillips Lytle LLP and Chair of the Board of Directors, Robert H. Jackson Center, Inc.

¹ 319 U.S. 624 (1943). During the litigation, courts misspelled the Barnett family surname as "Barnette."

Jackson wrote for the Court one of his most eloquent and important opinions during his thirteen years as a Justice.

The Jackson Center has been privileged, during its young existence, to host other significant protagonists in and witnesses to Justice Jackson's life and work.² These guests have included Nuremberg prosecutors who were Jackson's colleagues in Germany sixty years ago, Jackson Supreme Court law clerks from the 1940s, Jackson Supreme Court law clerks from the 1950s (including one who is with us again today), law clerks who worked at the Court during the pendency of *Brown v. Board of Education*,³ law clerks who were present during the Court's deciding of *Brown II*,⁴ Supreme Court litigant Fred Korematsu,⁵ and, to dedicate the Jackson Center formally in 2003, Chief Justice of the United States and former Jackson law clerk William H. Rehnquist.⁶ We thank all of our generous guests, the community, the institutions that have cosponsored various events and many others who make this work possible.

² See generally Jackson Center Events, www.roberthjackson.org/events/future events (last visited Aug. 23, 2007); Jackson Center Video and Audio Archive, <http://www.roberthjackson.org/Center/videolist> (last visited Aug. 23, 2007).

³ See John David Fassett, Earl E. Pollock, E. Barrett Prettyman, Jr. & Frank E.A. Sander, *Supreme Court Law Clerks' Recollections of Brown v. Board of Education*, 78 ST. JOHN'S L. REV. 515 (2004) (moderated by John Q. Barrett).

⁴ See Gordon B. Davidson, Daniel J. Meador, Earl E. Pollock & E. Barrett Prettyman, Jr., *Supreme Court Law Clerks' Recollections of Brown v. Board of Education II*, 79 ST. JOHN'S L. REV. 823 (2005) (introduced and moderated by John Q. Barrett).

⁵ See *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting writ of *coram nobis*).

⁶ See Remarks of Chief Justice William H. Rehnquist at the Dedication of the Robert H. Jackson Center, Jamestown, New York (May 16, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_05-16-03.html.

WELCOMING REMARKS

E. BARRETT PRETTYMAN, JR.†

Thank you. I am so proud to be a member of the Board—a new member of the Board—of the Jackson Center and also Vice President of the Supreme Court Historical Society. The two organizations have sponsored events before, all of which have gone extremely well. We at the Society love to do business with the Jackson Center because these people don't just talk or plan; they actually do things and get things done, as evidenced by this large crowd and these wonderful guests today.

At first glance, it might seem that the Supreme Court Historical Society and the Jackson Center do entirely different things, in the sense that the Center focuses on one man—a man, Justice Jackson, incidentally, who is a great hero of mine, a very important figure in my life—whereas the Society focuses on the Supreme Court as an institution. But at second glance, you know that the institution is really the story, the history, of a great many men and two women who have sat on that Court. So both are really focusing on the same thing, except one man here and many people there.

Again, welcome to you all. We are so glad you came. To our guests, I am as excited as you are. Thank you.

† Of Counsel, Hogan & Hartson LLP, Vice President, Supreme Court Historical Society, and Member of the Board of Directors, Robert H. Jackson Center, Inc. Mr. Prettyman served as Justice Robert H. Jackson's law clerk during the Supreme Court's October Terms 1953 and 1954 and, upon the Justice's death in October 1954, clerked for Associate Justices Felix Frankfurter and John M. Harlan, successively, during the remainder of the 1954 Term.

INTRODUCTION

PRELUDE TO *BARNETTE*: THE JEHOVAH'S WITNESSES
AND THE SUPREME COURT

SHAWN FRANCIS PETERS†

Good morning. I have to be honest: I love events like this. They give us an opportunity to look at the judicial system in general and great cases, in particular, from new and interesting and varied perspectives.

I think we often look at judicial opinions as these fully formed, perfect entities that magically appear from the Supreme Court. And while I agree that they are the products of great learning, they are also the products of social, political, cultural and even idiosyncratic personal forces as well. It is one of the things that will happen today: We will be looking at those forces as they shaped *West Virginia v. Barnette*. My job is to provide a little bit of background on what happened before 1943 and the *Barnette* flag salute case. To that end, the first thing I would like to talk about is the Jehovah's Witnesses and the Supreme Court.

Between 1938 and 1946, the Supreme Court handed down twenty-three opinions dealing with the Jehovah's Witnesses, an enormous number of cases for such a short period of time. I think of that when I go to my local coffee shop and I use a little punch card every time I refill my coffee. I have thought that the Witnesses—if there had been a sort of “frequent litigant” program in those days—would have filled up their cards quite frequently. And it is worth noting too that the cases that reached the Supreme Court were only the top of the litigation pyramid. It is important to look at lower levels as well, lower federal as well as state courts. And in fact, during that same period, the Witnesses were involved in hundreds of cases in these lower courts. They involved some really profound issues: speech, religion, freedom of assembly, freedom of conscience, and the context of military service. These were vitally important, not only for the Witnesses themselves but, more broadly, for all Americans.

† University of Wisconsin-Madison School of Education and author of *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (University Press of Kansas 2000).

It is important to realize that, today, we think of the courts as being concerned with civil liberties and civil rights. You can pick up the paper frequently and read about the courts rendering judgments in these matters. But that was not always the case in the nineteenth century and well into the twentieth century. The Supreme Court was concerned primarily with economic regulation and not civil rights and civil liberties. That is a phenomenon of the twentieth century. The Witness cases are important because they made the Court think about those things in a sustained way for the first time. In the 1960s there was something that has been referred to as the “rights revolution,” and one of the things I argued in my book, and I still believe very fundamentally, is that the Witness cases sort of set the stage for that upheaval in the 1960s. By going to the Supreme Court over and over again, they made the Justices wake up to the Bill of Rights in a way that they had not previously done. My favorite quote relating to this is from Justice Stone. He wrote to a colleague, “I think [that] the Jehovah’s Witnesses ought to have an endowment in [light] of the aid . . . they give [us] in solving the legal problems of civil liberties.”⁷ They did not get their endowment. I think that was a joking suggestion, but it highlights the fact that the members of the Court themselves realized that they were undergoing a transforming experience in the 1930s and 1940s because of the Jehovah’s Witnesses.

I will talk briefly about some of those cases. I will let the experts talk about *West Virginia v. Barnette*, since they know much more than I do. And to set the stage for that case, the first question to address is, why were there so many Jehovah’s Witnesses cases in the 1930s and 1940s? There are a lot of reasons, and I will highlight a couple. I wish I had more time to explore the rich and fascinating history of the Witnesses as a people. One thing that is important to realize is that there are different forms of religious worship for members of various faiths. The Witnesses, like many Christian denominations, traced their origins back to the Apostles and the apostolic era. And the Apostles were nothing if not active. They had a very public ministry, preaching the gospel not only amongst themselves but also going out among the people and hitting the

⁷ See SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* 186 (University Press of Kansas 2000).

bricks, to put it in contemporary parlance. In the 1930s and 1940s, the Witnesses carried on that tradition in a very unique and interesting way. For them, worshipping was going forth, distributing tracts, preaching on street corners, selling Bibles—in short, doing all of this very public work in a way that other churches did not do, preaching the gospel that way, in the public sphere.⁸

Second is the matter of the flag salute, which I am sure our other guests will speak about more authoritatively. The Witnesses came to believe that the salute to the flag was a form of idolatry, which amounted to the worship of a graven image as prohibited by the scriptures. These two things, among others, had precipitated some conflict in the 1930s. Towns throughout the country responded to the public worship of the Witnesses by restricting it in various ways. They passed ordinances trying to prohibit people from distributing tracts. They attempted to regulate that religious practice. There were also some rumblings regarding the flag salute. Were the Witnesses sufficiently patriotic? Should school children be allowed to opt out of the flag salute?

These matters simmered in the 1930s, but they really came to a boil in 1940. As you know, the United States did not formally enter World War II until 1941. However, the war in Europe had started long before that, and there had been a period in the winter of 1939–1940 that had been known as the “Phony War.” There was this lull in the fighting in Europe. People were not entirely sure what was going to happen. But by the spring of 1940, people knew that the Nazis were on the march. The Low Countries fell to the Nazis; France fell to them as well. People in the United States were keenly aware of those developments even though the United States was not involved in the war, and people wondered why the Nazis were so successful, essentially over-running the European continent. One of the explanations was that spies, saboteurs, and “Fifth Columnists” had helped the Nazis prevail in Europe. In the United States, in ways that parallel our contemporary situation, people started looking for internal enemies. And one of the groups that they latched onto was the Jehovah’s Witnesses, primarily because of the flag salute

⁸ For more on the beliefs and practices of the Jehovah’s Witnesses, see M. JAMES PENTON, *APOCALYPSE DELAYED: THE STORY OF THE JEHOVAH’S WITNESSES* (2d ed. 1997).

issue. They were perceived as being unpatriotic. Now, if you know a little of the history of the Witnesses, this is incredibly ironic. Witnesses were being persecuted in Nazi Germany and forced into the concentration camps because of their refusal to offer the Hitler salute. So they were being persecuted in Nazi Germany and then simultaneously being perceived of as traitors in the United States. It was very incongruous, but unfortunately it was what happened, starting primarily in the spring of 1940.

Matters came to a head in June of 1940 with a case called *Minersville School District v. Gobitis*,⁹ the first flag salute case. It was the forerunner to the *Barnette* case that we will hear more about later. The *Gobitis* case originated in Minersville, Pennsylvania. Some young Witness children were expelled from their public school for refusing to salute the American flag. The legal issue in that case was whether their First Amendment liberties—their religious liberty in particular—were violated by the application of the school regulation to them. I should point out that while the factual backgrounds of the *Gobitis* and *Barnette* cases were in many ways parallel, the legal issues, as the Court sorted them out, were different. The *Gobitis* case was decided primarily as a religion issue, but the *Barnette* case was decided somewhat differently, on speech grounds. And, again, we will hear more about that later.

In June of 1940, the Supreme Court ruled against the Witnesses in the *Minersville* flag salute case by an eight to one margin. It was a really resounding defeat for the Witnesses. Justice Stone was the only Justice to dissent. The eight in the Court's majority were led by Felix Frankfurter, and many people at the time were surprised that he had written this decision. Frankfurter was known as a firebrand liberal. In the 1920s, he had defended Sacco and Vanzetti, the notorious Italian anarchists who had been charged with murder in Massachusetts. He had been involved in numerous civil liberties causes over the years. In this case, it appeared he had broken with his background. Frankfurter's personal history is interesting, and the effect of the war on him, in particular, was really profound. Americans were afraid of the war, and they were starting to think of it more intensely. And Justice Frankfurter, in the spring of 1940, was really obsessed with the war. He was a

⁹ 310 U.S. 586 (1940).

European by birth, and in some ways that profoundly influenced his interpretation of the first flag salute case. He believed, if I can briefly summarize, that in periods of wartime, national unity is the most important thing. The country really has to come together, or there will not be any country to grant civil liberties. In these times of crisis, he advocated subordinating civil liberties to the greater good. The clash that he had with Justice Stone on those matters was really a classic. It boiled down to a conflict between state power and individual liberties. Justice Stone, in 1938, two years before, had written in a most famous Supreme Court footnote of the need to protect discrete and insular minorities.¹⁰ Justice Stone believed that, especially in wartime, it was important to defend people in these minority groups. The opinions that Frankfurter and Stone wrote in the *Gobitis* case were very learned; they were complex in many ways. And there is correspondence between these two Justices as well in which they worked out these ideas. It was a very lofty process, and fascinating to read.

Unfortunately, the public perception was not so lofty when the opinion in the *Witness* case came out; the general public misinterpreted the Supreme Court's conclusion in that first flag salute case. People throughout the country mistakenly believed that the Supreme Court had said that the Jehovah's Witnesses were traitors. That was completely inaccurate. The Court never even came close to saying that. But that was the misperception that took hold in small towns throughout the country. And what transpired was a really amazing public reaction to a Supreme Court decision, one unparalleled in American history.

Following controversial decisions today, we have protests, people call talk radio, they get mad, and so forth. But after the first flag salute case, something of a different magnitude happened—there were actually violent attacks on Jehovah's Witnesses. Mob attacks transpired in places like Litchfield, Illinois; Rockville, Maryland; and Kennebunk, Maine. Witnesses were fired from their jobs, they were denied relief benefits, and children were expelled from schools. (That is the one part that people sort of got right. The Court had essentially given its approval to the expulsions.) It was an unprecedented reaction to a Supreme Court decision, and it was an unprecedented outbreak

¹⁰ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

of religious persecution. People contemporaneously and subsequently have recognized it as the worst outbreak of religious persecution in the United States in the twentieth century.

I will read to you a description of the attack in Kennebunk, Maine, which was a particularly grievous breach of civil liberties. A mob attacked a Kingdom Hall of the Jehovah's Witnesses and burned it, more or less, to the ground. And this is from the *Boston Globe*, its account of that persecution:

The mob made two visits and set two fires. The first burned out part of the building's interior but was extinguished quickly. The second . . . completed the destruction.

Before each of the fires the mob ransacked the building . . . and removed tracts, furnishings and members' personal belongings. These were burned in piles in a street of this ordinarily placid town.¹¹

At the time, people were sort of horrified that this was happening. John Haynes Holmes of the American Civil Liberties Union coincidentally owned a summer home near Kennebunk, Maine, and so he was attuned to what was happening. He wrote that the persecution sounded like the Jews in Germany but it happened to be the Jehovah's Witnesses in the United States.¹²

Others commented as well. Eleanor Roosevelt was writing a newspaper column at the time, and she commented on it. And members of the Supreme Court became aware of it, too. They often, I think, create the perception that they are these Olympian figures who somehow live above current events and shut out what is going on. I think in general that is not true, and in the case of the flag salute and the Jehovah's Witnesses, it was definitely not true. Immediately, three members of the Supreme Court realized what had happened. Justice Douglas, Justice Murphy, and Justice Black very quickly realized that they had made a mistake in ruling against the Jehovah's Witnesses in the first flag salute case. So they did something that was really extraordinary: They publicly admitted that they had messed up. I know that where I work, people do not frequently admit their mistakes. I certainly do not. And the members of the Supreme

¹¹ *Maine Riot: Two Men Wounded; Mob Burns Quarters of Jehovah Sect*, BOSTON GLOBE, June 10, 1940, at 1.

¹² See PETERS, *supra* note 7, at 104–07.

Court almost never do. But, in a case that was decided between *Gobitis* and *Barnette*, those three Justices wrote a small joint opinion in which they said the first flag salute case had been wrongly decided. It was really an extraordinary public admission of their error. The mob attacks and the other forms of persecution helped them to rethink Justice Frankfurter's opinion in that case. And, to their credit, they 'fessed up rather quickly. After that, you could start doing the math in your head. The original decision in this first flag salute case had been eight to one, with only Justice Stone dissenting. Now, Justice Stone had three more people on his side, and very quickly the Court's split on the flag salute issue became in effect five-to-four, rather than eight-to-one.

Other things happened to change the dynamic of the Court. For the Roosevelt era, I think that you needed a kind of baseball scorecard to see who was coming and who was going on the Supreme Court. Justice Byrnes served for one Term, and Justice Jackson joined the Court; before that, he had been Attorney General. In that role, in 1940, he had become aware of the mob attacks on the Jehovah's Witnesses as well. Because he was the country's chief law enforcement officer, reports of the mob attacks, firings and expulsions repeatedly crossed his desk. The Justice Department had an embryonic Civil Rights Section—it was not the most effective thing at that point; it was sort of brand new—but it funneled information to Jackson. He knew what was going on. Moreover, he published a book shortly before he joined the Court in which he hinted at his disapproval for the first flag salute decision. The book was *The Struggle for Judicial Supremacy*, and he singled out the *Gobitis* decision as an exception to the Court's usual vigilance "in stamping out attempts by local authorities to suppress the free dissemination of ideas, upon which the system of responsible . . . government rests."¹³ So the *Gobitis* decision, in Jackson's mind, was an exception to that kind of vigilance. He also later wrote in some other correspondence, "When I came on the Court, I agreed with Stone that I didn't think . . . [thê] flag salute was constitutional."¹⁴ So he came to the Court favoring a reversal of *Gobitis*.

¹³ ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 284 (1941).

¹⁴ PETERS, *supra* note 7, at 239.

Now Justice Stone had himself plus those three other Justices who had admitted their mistake and Justice Jackson; that's five. And that's all you need. They get a sixth; a Justice named Wiley Rutledge, who had served on a lower federal court. He had also written unfavorably about the first flag salute case. So that turned the tables—it was now a six-to-three majority against the flag salute. And it is not surprising to me that the Court changed its mind regarding the flag salute. It happens. People's ideas evolve. Their perceptions evolve; their understanding of the values that the Constitution embodies evolves as well. What is striking is that it happened so fast. I have been talking about the first flag salute case—that was 1940. The Court changed its mind in three years, essentially reversed itself. I am not aware of any other decision that has been overturned so quickly. You think about the great civil rights decisions or the infamous civil rights decisions from the nineteenth century. It took almost a century for the Court to get there. In the case of the Jehovah's Witnesses, it happened much more quickly. It happened in only a handful of years.

Unlike the first flag salute decision, the second flag salute decision, in *West Virginia v. Barnette*, met widespread approval. By 1943, the United States had entered the war, and after some rough going in the early part of the conflict, it was going better for the United States. We were still a long way from victory in the Pacific or in Europe, but people were a bit less tense. The fears of saboteurs and spies and "Fifth Columnists" had dissipated somewhat. So the *Barnette* decision was received more favorably. My favorite account is from *Time* magazine, which, in classic *Time* fashion, had a brief, concise article. The headline of that story was "BLOT REMOVED."¹⁵ And in the remainder of our program, you'll hear from people explaining how and why that stain was expunged. Thanks.

THE ROUNDTABLE DISCUSSION

Moderator: Thank you very much and welcome. My name is John Barrett. I am a Professor of Law at St. John's University in New York City and the Elizabeth S.

¹⁵ *Blot Removed*, TIME, June 21, 1943, at 16.

Lenna Fellow here at the Robert H. Jackson Center in Jamestown, New York.

Our topic today is a great event of sixty years ago and today in our constitutional history, the Supreme Court's decision in the landmark case *West Virginia State Board of Education v. Barnette*. I am very pleased to introduce three special guests and protagonists in those events who will be part of a conversation that of course considers the law, the finished product and the correct, I think all would agree, destination of this story. But the human realities of school children and lawyers and judges and law clerks were parts of the complicated path that many traveled to produce this landmark decision. I am very pleased—as a lawyer and constitutional law professor, it is my honor—to introduce the “Barnette” sisters, Marie Barnett Snodgrass and Gathie Barnett Edmonds. They have traveled from West Virginia to be with us. Thanks to alphabetical order, they were, as the “Barnettes,” the first names among the prevailing plaintiffs in that great case. It is a delight to welcome them to the Jackson Center.

I am also pleased to introduce Mr. Bennett Boskey. He is a lawyer from Washington, D.C., a graduate of Williams College and Harvard Law School. Following his law school accomplishments, he became a law clerk, first to Judge Learned Hand at the United States Court of Appeals for the Second Circuit in New York City, then to Associate Justice Stanley F. Reed at the Supreme Court. Mr. Boskey then, beginning in summer 1941, served as Chief Law Clerk to the new Chief Justice of the United States, Harlan Fiske Stone. Mr. Boskey served as Chief Justice Stone's senior law clerk (of two law clerks) for the next two Terms of the Court, a two-year run that culminated in June 1943 in the *Barnette* decision. It is a pleasure to welcome Bennett Boskey to the Jackson Center.

Mr. Boskey: Thank you.

Moderator: Let me begin with Gathie and Marie and the people who are important, very important, actors in the legal story and, of course, in your lives. I would like to hear about your backgrounds, your parents, and your family upbringing.

Mrs. Edmonds: Well, they raised us as Jehovah's Witnesses from birth, and that is the way we grew up—to obey them and our God Jehovah and all their laws. We had a very nice childhood.

Moderator: Had they been raised as Jehovah's Witnesses?

Edmonds: No.

Moderator: Was that something they came to in adulthood?

Mrs. Snodgrass: Yes. They started studying about 1933. My mom was—

Moderator: What town were you growing up in?

Snodgrass: Well, we lived close to Charleston which is the capital of West Virginia. We lived in the country about five to six miles out of town.

Moderator: What was your father's work?

Edmonds: He worked for E.I. du Pont, the chemical company.

Moderator: Was he a crusader on issues of rights?

Edmonds: Not really. He was just a faithful Witness and he believed in the Bible and what it taught, but he really wasn't a crusader. He was just a teacher, a Witness.

Moderator: Let me turn to your schooling. You are not twins, but I believe your schooling began around the same point in time. Tell me about that and the school that you began to attend.

Snodgrass: Well, I started at an early age of five. Gathie didn't start until she was seven, because of circumstances at home. We first attended a little

two-room school in the country and then we moved closer into town. The year that the flag salute came up we were going to another school closer in to Charleston. Of course the weather, you know— We lived in the country, and so we moved in closer to town so that Dad could get to work easier and all the things that offered.

Moderator: What was the name of the school?

Edmonds: Slip Hill Grade School.

Moderator: It ran from the first grade up to what level?

Snodgrass: Sixth grade, I believe.

Moderator: How many students were in the building?

Snodgrass: It had four rooms, I think. Four rooms—

Moderator: So you went from a small school to this big school—

Snodgrass: Yes.

Moderator: —Slip Hill with all of four rooms. What is your memory of how many kids were in a room?

Snodgrass: Oh, probably about the average it is even today— about twenty-five.

Moderator: Was there an American flag in the classroom?

Edmonds: At first there was just a picture of the flag on the wall, until the War started. Then they put up a real flag.

Moderator: Had your parents alerted you to this issue of flag salute as you were beginning your school years?

Edmonds: Well, they just taught us the purpose of our faith, which is to give our devotion and worship to Jehovah God, not to any image of any sort, and we were taught that the bowing down to the flag, saluting it, was like a bowing down and giving reverence to it—it was like an idol. So we believe definitely not to worship idols.

- Snodgrass: And of course they were aware of what was going on in the world and aware of the other things that happened, so I shouldn't say I recall them telling us, but I'm sure they talked to us about what might happen and what our reaction should be to it. And showed us the Bible approves of what we believed in and what we should say.
- Moderator: Okay. Now you were a precocious early reader, but I suppose you weren't reading about the *Gobitis* case?
- Snodgrass: No.
- Moderator: You didn't know this was swirling around?
- Edmonds: No. Not at that age.
- Moderator: Bennett Boskey, you were a school boy and working your way up through school. Do you remember flags in your classrooms in New York City?
- Boskey: Not really, but they may well have been there—it was long before this.
- Moderator: That's true. Perhaps flags were in your law school classroom? Or maybe not.
- Boskey: Not a bit.
- Moderator: Now, Gathie, you said the flag appeared once the War started. For the United States, that is December 1941. How did the trouble begin in the winter of early 1942?
- Edmonds: Well, I guess the teacher had noticed we weren't saluting the flag. She obviously told the principal. He was the one who asked us about it. And he told us he had orders from the Board of Education that if we didn't salute it, we would have to go home. Our teacher was very nice. She said if it was up to her, it wouldn't make a difference. But according to the Board of Education, we had to go home.

- Moderator: Were there other Witnesses who were children in Slip Hill School?
- Edmonds: Not at our school. In the community and the towns and around, there were several children at that time.
- Moderator: According to your faith, what were you permitted to do, and what was your behavior while the other children would stand and salute the flag and recite the pledge?
- Edmonds: Stand there very respectfully.
- Moderator: But silently, and not with your hand either at your heart or extended toward the flag?
- Edmonds: We respect the flag and what it stands for. We don't have anything against that. We just don't believe in worshiping or saluting it.
- Moderator: Did the principal have an understanding attitude, or was he disapproving?
- Edmonds: He was a little bit disapproving, more so than the teacher. He tried to tell us we needed to do it, but he wasn't really hateful or anything.
- Moderator: And I assume he reached out to your father to talk about this behavior problem involving his girls?
- Edmonds: Not really.
- Snodgrass: I think he did go to the house once and talked to him. And he found out more, you know, maybe more than what we could tell him, but they told him the same things we had.
- Moderator: What was your parents' decision about how to handle this situation: The school has a mandatory flag salute, thanks to the State Education Department regulation, and you have your religious belief?
- Edmonds: When we went home, of course, they understood and they said not to worry about it. And our uncle

helped us get a lawyer, Mr. Horace Meldahl in Charleston, who was a very understanding person, a nice person. He told us that we had to go back to school every morning for a while.

Moderator: Why was that?

Edmonds: So they wouldn't fine our dad or put him in jail.

Snodgrass: So they couldn't say we were just being truant. And so we went every morning and stayed until the flag salute, and they'd tell us to go home. It was fortunate that we lived fairly close—we didn't have a long distance to go.

Moderator: And that was the end of the school day for you?

Edmonds: Yes. Once the truant officer came and asked my mother why we weren't in school, and she could say, "Well, we sent 'em and they sent 'em home." So that kind of took, you know, the edge off of them. Our parents didn't keep us home.

Moderator: Were you aware that other school children were having a similar experience?

Edmonds: Yes.

Moderator: Did the lawyer from Charleston become involved in their matters too?

Snodgrass: Yes. He was the representative in Charleston. He contacted the lawyer for the Watchtower Society and they kind of coordinated taking it to the courts.

Boskey: Is that when Hayden Covington got involved in the case?

Edmonds: Yes. He came to Charleston.

Moderator: At the beginning?

Edmonds: Yes.

Snodgrass: When it got into the courts. When it got far enough to get into the courts. Yes.

- Edmonds: Some of the other children had a lot harder time than we did. In fact, our cousins, some of them had to— They weren't allowed on the school bus. They had a good ways to walk, they were made fun of, and one of them got beat up. So you know, we had it fairly easy that way, because the students at the school we went to didn't have anything else to do with us, but they weren't actually all that mean to us. They just kind of ignored us.
- Snodgrass: They weren't cruel.
- Edmonds: No, not like some of them were.
- Moderator: How did your classmates treat you as this was all developing?
- Snodgrass: Well, they were curious about it. We talked with them. But they weren't mean to us either. Like Gathie said, they kind of ignored us some, but they weren't really mean.
- Edmonds: We had a harder time after we got back in school.
- Moderator: Let's get there in a moment. The period you were out of school—in and out on a daily basis, but largely missing school because of the flag salute—lasted how long?
- Edmonds: Well, when it went to federal court, they decided in our favor, against the school board,¹⁶ and so we got to go back to school the following fall behind the class.
- Moderator: Fall of '42?
- Edmonds: Yes.
- Snodgrass: We were out from about the first of March until the rest of the year.
- Moderator: And then you were held back the next year?

¹⁶ See *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251 (S.D. W. Va. Oct. 6, 1942) (John J. Parker, Circuit Judge, joined by Harry E. Watkins and Ben Moore, District Judges).

- Snodgrass: Half a grade, yes.
- Edmonds: And we had moved into Charleston in the meantime and so we started at a bigger school, a nicer school. When we first started, I know my mother went over to sign us up and the teachers really didn't want us to come. They said, "No, they can't come." And she said, "yes they can because the court settled in our favor," and so she wanted to sign us up. And teachers didn't really— Our teacher we had, she wasn't really— She didn't want us, I don't think.
- Snodgrass: She wasn't thrilled with us.
- Edmonds: She kind of ignored us. She wouldn't really help us get caught up in our work or anything, and I think she said it wasn't her fault that we were kept out, so we just had to catch up ourselves.
- Moderator: Was that what you had to deal with that entire next year, the 1942–43 school year that ends with the Supreme Court decision? Did you have a sense that the school system was doing something wrong to you, or was it just a situation that was above your heads as girls?
- Edmonds: Yes.
- Snodgrass: I think so. We were really a little bit young to think, I guess, about the Supreme Court levels. We just knew we couldn't go to school.
- Moderator: Did your parents think about it as a grave injustice they were experiencing?
- Edmonds: No, not really. They knew what was going on—a lot of patriotism at the time and people's emotions were running high, you know. But they didn't have ill feelings towards anyone.
- Moderator: In the community, did your family or extended family have experience with hostility, mobs, rough stuff?

- Edmonds: Not directly. We just heard about it. Some of them had a real bad time.
- Moderator: Bennett Boskey, you were a young lawyer working for a Federal Circuit Judge and then a Justice of the Supreme Court. The *Gobitis* case was decided by the Court before you were a Supreme Court law clerk.
- Boskey: Well, it was decided before I even finished as a Court of Appeals law clerk.
- Moderator: Yes, thank you. What is your recollection of this issue as it is taking shape?
- Boskey: Well, I probably had a view about it. I remember reading the *Gobitis* case. My personal view was in agreement with Justice Stone's dissent in the *Gobitis* case, but apart from that, it had no immediate impact. We didn't have cases coming to the Second Circuit at that time that involved Jehovah's Witnesses. So in my first year as a law clerk with Judge Hand, it never came up. We had things much more important, like East River collisions.
- Moderator: The Port of New York thanks you.
- Let's introduce another protagonist in this story, your June 1941 boss, the new Chief Justice, Harlan Stone. Tell us about him.
- Boskey: Well, Harlan Stone had been an Associate Justice for a reasonably long time. He had been appointed by his friend, President Coolidge. They had known each other way back—Coolidge had made him Attorney General in order to clean up the scandals in the Justice Department that included the Teapot Dome situation and various other things. He had been a successful Attorney General.
- He was put on the Court and he had found himself in harmony on many, many things with Justices Holmes and Brandeis and Cardozo. And it doesn't

matter that they were in the minority in the Court at that time. And as a matter of fact, they had weekly conferences among themselves prior to the Court's main Conference, in which they thrashed out what their respective views were on cases. Now when Stone was appointed Chief Justice, he thought it would be unsuitable to continue these partial Court Conferences and so they stopped.

In any event, the Court was in the middle at this time of a constitutional crisis that began to stop during the chief justiceship of Charles Evans Hughes. The Court had now turned down a great deal of the New Deal economic legislation, holding it unconstitutional, leading to President Roosevelt's plan to pack the Supreme Court with additional Justices, a plan that did not succeed but became unnecessary because the Court began to uphold these various congressional statutes.

Now Stone was the first of the Justices to use two law clerks. Maybe it would help if I gave you some impression of what the Court was like in those days. It was a smaller Court as far as law clerks were concerned. Each Justice had one law clerk, and when Stone became Chief Justice, he decided the Chief Justice should have two law clerks because he had more work to do, which was true, and the senior law clerk should be a law clerk who knew something already about the Court. That is how I came to be his senior law clerk. I had already been around the Court for a year. Stone was a very careful judge. He was open-minded about almost any kind of a case that he hadn't already taken a position on. And he did his best to decide what the law was or what the law ought to be, and to come out where he thought he should come out. He had lived through many dissenting opinions of his own.

You know in the recent hearings that some of you may have been listening to on the confirmation of

Supreme Court judges,¹⁷ all you kept hearing day after day was, is *Roe v. Wade* going to be overruled? And was it a terrible thing to overrule a constitutional decision? Well, a lot of the people on the Senate Judiciary Committee may believe it would be a terrible thing. The fact is that the history of the United States has been loaded with cases where constitutional decisions have been overruled. It's true, as our speaker Shawn Francis Peters said, not normally as quickly as the *Gobitis* case was overruled, but there is a long string of them. And many of them were cases where Stone had filed dissenting opinions, and I have to tell you, it was a matter of great gratification to Stone when his dissenting opinions in some of these earlier constitutional cases became the law of the United States. He did not think it was terrible to overrule a case. It ought to be overruled if it was wrong. He thought he knew what was wrong. But one of the other things about his relations, at least with me as a law clerk, was that we hit it off very well.

Cases came to the Court in two ways. I don't want to try to educate the audience on the complex jurisdictional statutes that enable the Court to take cases, but there are two routes to the Court, mainly. One is by an appeal as of right, and the other is by what's called a writ of *certiorari*. A writ of *certiorari* is a discretionary way of getting to the Court. You don't get there unless four of the Justices vote to grant a petition for *certiorari*. On the other hand, with an appeal as of right, you have a right to go to the Court and it should not decline to decide the case, except for some extraordinary reasons.

¹⁷ See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006); *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be the Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005).

The *Barnette* case was a case where there was an appeal as of right. So there was never any question that once the case had been decided by the so-called three judge district court in favor of the Jehovah's Witnesses, the Supreme Court would have to hear it on the merits.

Law clerks habitually wrote memoranda for their Justices about cases that came up on the docket for consideration preliminarily. In my case, this was before the days of computers; we would type up—or have typed up—a little memorandum and we used carbon paper for duplicates. Last week, knowing I was coming here, I looked up my duplicate memorandum in the *Barnette* case. I hadn't looked at it in over fifty years, and there it was—at least a copy of it—and the first paragraph said just what I told you now: that the case was an appeal, there it was and we would hear it. That's all it had to say.

And then I said, well, there are two things, Chief Justice, that you might be interested in. One was what the record showed, and what essentially one of you has already referred to: the respectful way in which the Jehovah's Witnesses said they would treat the flag. I just thought Stone would be interested in that, so I put it in this little memorandum. The other was a paragraph on a terribly technical subject about what was equity jurisdiction. Please don't think about that.

Moderator: We'll move on.

Boskey: It had nothing to do with this case. There was no question that there was equity jurisdiction.

Moderator: Marie and Gathie, did you have a sense that the Supreme Court was there for school children like you? Where something wrong was being done, that rescue might be in the Supreme Court? Was that its role?

Snodgrass: Not to me. I don't even remember realizing there

as a Supreme Court at that time. That's before history class and government classes.

Boskey: Well, didn't you at least meet Hayden Covington at one point—

Snodgrass: Oh, yes, yes, we met him.

Boskey: —your lawyer in the Supreme Court?

Moderator: Did you know that the Supreme Court or that the law was letting the principal do what he was doing to you? That there was something backing him up? That it wasn't just one man's pushy preference to send you home from school?

Edmonds: There was a school board and he was subject to that. And he said he had to do what they told him to do. He didn't have a choice.

Moderator: Let's talk about the intervening case, *Jones*,¹⁸ where the Court started to shift. That happened when you were working for Stone.

Boskey: That did indeed. It happened in a group of Jehovah's Witnesses cases that were being reargued because of the change in the composition of the Court. By a narrow margin, a series of cases had come up where the local ordinances that restricted the Jehovah's Witnesses in the dissemination of their literature—required them to pay license fees in advance for doing so—had come up to the Court, and by very narrow majorities these local ordinances had been sustained.¹⁹ And Stone had written a strong dissenting opinion for his group of four Justices.²⁰ It then became clear that there was a change in the composition of the Court and the cases were still pending—could be pending—on what's called a petition for rehearing.

¹⁸ *Jones v. Opelika*, 316 U.S. 584 (1942), *reh'g granted*, 318 U.S. 797, and *rev'd*, 319 U.S. 103 (1943).

¹⁹ See *Jones*, 316 U.S. at 600. The Court decided *Jones*, No. 280, *Bowden v. Fort Smith*, No. 314, and *Jobin v. Arizona*, No. 966, as consolidated cases.

²⁰ See *id.* (Stone, C.J., joined by Black, Douglas, and Murphy, JJ., dissenting).

A petition for rehearing in the Supreme Court of the United States is almost never granted. It is the most futile of all documents that anybody can file in the Supreme Court—

Moderator: You just lost a decision, and now you are asking the same Justices to turn on a dime, to say never mind.

Boskey: —and unless a Justice who voted in the majority changes his mind, the petition will be denied.

But here was an unusual set of circumstances. The Court composition had changed. When Wiley Rutledge came on the Court, it was known from his previous judicial expressions, because he had been on the Court of Appeals in the District of Columbia Circuit, that he was not with the majority of the Supreme Court. So they decided to reargue all these local ordinance cases. And they did reargue them. By then Rutledge and Jackson were both new Justices. Well, it was inevitable with Rutledge on the Court that the four who had been in dissent would now have five votes. It wasn't entirely clear how Justice Jackson was going to vote. As it turned out, Justice Jackson voted with the old majority. He believed that these local restrictions on disseminating literature were not unconstitutional.²¹ But in the course of it, Justices Black, Douglas, and Murphy decided to do what many people at the time thought was gratuitous, because the flag salute question was not involved in those cases. They filed a memorandum in those

²¹ See *Douglas v. Jeannette*, 319 U.S. 157, 166–82 (1943) (Jackson, J., joined by Frankfurter, J., concurring in the result and dissenting in Nos. 48–87, *Murdock v. Commonwealth of Pennsylvania (City of Jeanette)*, and No. 238, *Martin v. Struthers*); see also *Murdock*, 319 U.S. 105, 117 (1943) (Reed, J., joined by Roberts, Frankfurter, and Jackson, JJ., dissenting); *id.* at 134 (noting Jackson's statement that additional reasons for his dissent are stated in his concurring opinion in *Douglas*); *id.* (Frankfurter, J., joined by Jackson, J., dissenting); *Martin*, 319 U.S. 141, 154 (1943) (Reed, J., joined by Roberts and Jackson, JJ., dissenting); *id.* at 157 (noting, by cross reference, Jackson's concurring opinion in *Douglas*).

cases saying that they had changed their minds.²² And they meant it—they had changed their minds.

Moderator: Was Stone pleased that they inserted that into the licensing cases?

Boskey: He was certainly not displeased.

Moderator: Right. It beats being a lonely dissenter.

Boskey: That's right. It made it clear that there were at least four votes for his side of the *Gobitis* case, and there were two new Justices to be heard from. It was pretty clear what Wiley Rutledge was going to say. I have to say that, in spite of the things that Dr. Peters said to you, I do not think that it was inevitable, that everybody knew for sure, how Justice Jackson would vote in the flag salute case. There are other cases where as a Justice he repudiated positions he had previously taken as Attorney General, and he tried to approach a lot of things with a truly open mind on the second go around. I don't think anybody was one-hundred percent sure of how he was going to end up voting.

The *Barnette* case came before this three judge-court. In District Court, Judge Parker was the presiding Justice, and he said what lower courts seldom do. Lower courts theoretically are not supposed to anticipate reversals of Supreme Court positions. But Judge Parker was willing to say that the *Gobitis* case is very probably no longer the law. This makes us free, he said, to decide this the way we think it ought to be decided, and we think it ought to be decided in favor of Jehovah's Witnesses. So that's how it came about that in the Supreme Court the applicant for review was the State of West Virginia, not the Jehovah's Witnesses. And the Jehovah's Witnesses were defending the judgment below instead of their usual position of bucking them.

²² See *Jones*, 316 U.S. at 623-24 (Black, J., joined by Douglas and Murphy, JJ.).

Moderator: That is also how it came about, Marie and Gathie, that in the fall of 1942 you were back in school, even if the teacher wasn't thrilled about it.

Mr. Covington's name has come up. He was Hayden Covington, the Watchtower Society's Supreme Court champion. Do you remember meeting him as part of this legal process?

Edmonds: I remember meeting him, just a brief meeting in Charleston when he was there for the trial.

Snodgrass: Read a lot about him. Heard a lot of his speeches but—

Moderator: At the time or subsequently?

Snodgrass: Over the years.

Moderator: Did you have a sense that Jehovah's Witnesses were involved in a lot of Supreme Court litigation?

Edmonds: Not really. When we talked to the lawyers, you know, they tried to explain to us what they were going to do. Brother Covington was real nice about it, and even the lawyers, you know, in Charleston were very nice. We didn't really apprehend, I don't think, the— how far it would go, the importance of it.

Moderator: Did you attend court for any of the Charleston activities?

Snodgrass: We were there one time. We didn't have to appear at it—we didn't have to testify, but we were there as onlookers.

Edmonds: The only time I had to testify was the first time it went through a local justice of the peace. Of course he ruled against us, before we hardly even got there.

Moderator: You went through the motions?

Edmonds & Snodgrass: Yes.

- Edmonds: But in the higher courts, we didn't have to go.
- Moderator: Did you know that it was going to the Supreme Court after this victory at the three-judge court level?
- Edmonds: Yes, we were told it was going to be taken.
- Moderator: From Charleston, West Virginia, what did the Supreme Court in Washington mean to you?
- Edmonds: I don't know.
- Snodgrass: I can't really remember too much about it back then.
- Edmonds: I was glad they were going to let us back in school.
- Moderator: This case was not argued until the spring of 1943 in the Supreme Court. Bennett, did you attend the oral argument?
- Boskey: I don't really remember whether I did or not. I might have, because occasionally the law clerks would listen to oral arguments if they thought there was going to be something especially interesting coming up or an especially good argument coming up. I have to say that Hayden Covington argued many cases in the Supreme Court. Many of them were won by his side. There were those who said that his arguments had absolutely nothing to do with it, that it was because of the views that the Justices had come to already and not the briefs or the arguments being made by counsel that produced the result.

At the end of the argument week, in those days, the Conference of the Court—Conference spelled with a capital C—was still on Saturday; later it came to be on Friday. But the Conference would be held and a vote would be taken and the junior Justice would vote first—although he spoke last, he would then vote first. Nobody would be present in the Conference room except the Justices, which meant that the junior Justice would have to open

the door when there was a knock to deliver a message. Justice Breyer recently said that he was the junior Justice for eleven years, and for eleven years he was the one who had to open the door.

Moderator: Welcome, Justice Alito.

Boskey: He welcomed him indeed. In any event, a vote was taken at the Conference and then the Conference would break up and the Chief Justice, if he was in the majority, would be the one who would assign opinions. Now that is a tradition in the Court that goes back to Chief Justice Taney before the Civil War. And no Justice has ever seriously questioned the prerogative of the Chief Justice to assign opinions when he is in the majority. If he is not in the majority, then the Senior Justice in the majority assigns the opinion. Some Chief Justices are better than others in assigning opinions. There are many factors that enter into assigning opinions. I have written a little piece on the function of the Chief Justices in doing it²³ and as you look at it over time, it is obvious that, well, Hughes was magnificent at it. Everybody who watched the way in which Hughes assigned opinions thought that he did it in a way that brought out the greatest strength of the Court and got the Court's business done most efficiently.

Stone had a practice that I doubt that any of the other Chief Justices indulged in. After the Conference was over on Saturday, Stone would call me in. And he would tell me what the vote had been on every case and he would discuss with me the assignments he was about to make of opinions. On the little assignment sheet, when he decided to whom to assign opinions, he would write down the docket number of the case and these assignment sheets would be distributed to each of the Justices, either Saturday night if possible or Sunday

²³ See Bennett Boskey, *Opinion-Assigning by Chief Justices*, 25 SUP. CT. HIST. SOC'Y. Q. 14, 14–16 (2004).

morning, and the Justices could go to work on their opinions whenever they pleased. The tradition was that Justice Holmes would get these things and by Tuesday he had written his opinion. But not many Justices behaved that way.

I particularly remember the question of to whom should he assign the opinion in the *Barnette* case. And if you think we have time, I will go into that.

Moderator: Please continue—this is great.

Boskey: Well, one of the factors that is very important when there is a divided Court is to try to assign the opinion to somebody who will be sufficiently moderate in the way he writes it to hold the majority together, because the last thing you want is to have a draft opinion circulated that loses you some of the Justices on that side of the case.

Stone, having written the *Gobitis* case, would have been overjoyed to be the author of the opinion in the *Barnette* case. But he had better sense than that. He knew that he had a new Justice in Jackson. He knew that if Rutledge was given the opinion, he would write probably too wide an opinion to hold the six votes together. He had no hope that if Black, Douglas, or Murphy wrote the opinion, it would be sufficiently, narrowly constructed to hold the six votes together—it might lose Jackson. So we talked about it some and he decided the best thing to do for the Court to get an opinion which would be subscribed to by the maximum number of Justices, which in this case would be six, would be to assign the opinion to Jackson, whatever chances that might involve taking. And that's what he did. And that's how Jackson, who was a relatively junior Justice, ended up as the author of this terribly important opinion.

Moderator: Did you change his mind, or was Jackson his idea from the beginning?

- Boskey: No, I don't think I changed his mind. I may have helped solidify his view, but we were not in different views on it.
- Moderator: In private, how was Chief Justice Stone thinking about these Jehovah's Witness cases and their trajectory during these years?
- Boskey: Well, he thought that the United States had gone through an unparalleled period of persecution of Jehovah's Witnesses. He thought it was terrible. And that the Court ought to do something to help bring it to a halt. And I think it is fair to say that it did do something to help bring it to a halt. Unlike *Brown v. Board of Education*, where two generations later people are still scrapping about the schools, I think—
- Moderator: And race.
- Boskey: —it's really relatively peaceful in the realm of the Jehovah's Witnesses.
- Moderator: Marie and Gathie, it was your case that was in the Supreme Court—did you know that so many brilliant people were wrestling with the implications of this, and what the right decision was, and how to write an explanation of it? What is it like to be waiting for the Supreme Court?
- Snodgrass: I don't remember having a sense of that at that time. As a nine-year-old, I really didn't think that deeply about things.
- Moderator: And you were back in school—you'd already won.
- Snodgrass: Right.
- Moderator: Did you like going back to school?
- Edmonds: Yes.
- Snodgrass: We were pretty good students. And we didn't want to be out of school. We weren't kids who looked for

ways to stay home. So we wanted to be in school. We were glad of it.

Moderator: So it wasn't like Judge Parker ruined everything for you.

Edmonds: No. We were glad to get back.

Moderator: Now, Bennett, in the opinion-writing process, do you remember Jackson drafting and circulating and how Stone interacted with him?

Boskey: Well, what happens when opinions are written, they are circulated to the other members of the Court in printed form as drafts and any Justice has liberty to send back, orally or in a letter or writing something on the margin, however he pleases, any suggestions. And when you see fifty years later the papers of a Justice—which you are now beginning to see sometimes only three years later, but in the old days it was fifty years later—you see there is a great deal of written correspondence about opinions. One Justice will write something to another saying, "I suggest you change this sentence." Or, "I'll go along with the opinion if you take out this sentence." All kinds of suggestions. The correspondence that Mason published first in his biography of Stone shows that Stone made certain suggestions to Jackson and I think Jackson accepted them graciously.²⁴ You normally do if you can do it with a straight face.

Sometimes Hughes would accept things in his opinions, in order to get an opinion that became the opinion of the Court with the maximum number of Justices, that looked absolutely unbelievable. Some looked as if they were in conflict with something else in his opinion. But that didn't bother Hughes as much as the problem of getting a united opinion of the Court. There's

²⁴ See ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 600-01 (1956).

one opinion of Hughes, for example, in a voting rights case in which nine Justices voted, on which Hughes said as to a particular issue, the Court “is equally divided.”²⁵ Harry Shulman, who was then the Dean of the Yale Law School, wrote an article about this entitled *Sawing a Justice in Half*.²⁶

I later found out through Felix Frankfurter what had really happened in that case. Justice McReynolds, who was a very ornery Justice, used to go off a little bit early before the end of the Term on vacation. And in this particular case, the point involved was a new point that came up after Justice McReynolds had gone off on vacation. And nobody was going to try and call him back—he would have told them, frankly, “Go to hell.” He wouldn’t have come back. So Hughes just said, “On this issue, the Court is evenly divided.”

Moderator: You just mentioned another person we need to talk about, Felix Frankfurter—

Boskey: Yes.

Moderator: —who was your professor and an important mentor—he awarded you the Hand clerkship, and he was on the Court as a Justice during your Reed and Stone clerkships. He was somebody you had a very close relationship with. He wrote the Court’s opinion in *Gobitis*—

Boskey: He did indeed.

Moderator: —and now is becoming the dissenter in *Barnette*.

Boskey: There’s a published story of his dissenting opinion. He had a law clerk at that time who had been a classmate of mine, Philip Elman, and Phil gave an oral history to Columbia University. Columbia has probably the most ambitious oral history project, at least in legal matters, in the country. At some

²⁵ *Coleman v. Miller*, 307 U.S. 433, 447 (1939).

²⁶ See Note, *Sawing a Justice in Half*, 48 YALE L.J. 1455 (1939).

point, Philip was persuaded later on in life to give an oral history to this project. After Phil died, it was published by the University of Michigan Press in a book called, *With All Deliberate Speed: The Life of Philip Elman*. He has pages in there about how Felix worked on this very ardent dissent in the *Barnette* case. If you read those pages you see that from the beginning, contrary to Frankfurter's practice with Phil on all other cases where he had an opinion, he told Phil not to work on this opinion. Phil said that every now and then Frankfurter would have a thought. He would put it down on a little piece of paper and put it in a drawer. He told Philip he shouldn't look at the drawer and should ignore it all, etc. Ultimately, there were a lot of pieces of paper in that drawer. One night, when the opinion finally had to be written, Felix invited Philip over for dinner. After a great dinner with an undue amount of wine, Felix said to him, finally, "Now let's go to work on the *Barnette* opinion." Then he pulled out all these papers. He kept handing them over to Phil saying, "Put them all together." That's how that opinion got written. As I say, Phil told the whole story.²⁷

- Moderator: Frankfurter's dissenting opinion in *Barnette* is an adamant defense of the *Gobitis* position. It is a deeply personal, extremely passionate, eloquent, brilliant Frankfurter opinion. But in our view, most of us would say it was wrong, as he had been wrong in *Gobitis*. Did you ever talk to him about this later in life?
- Boskey: Never. A lot of people did, and actually there were various people at the Court at the time who tried to persuade him to take out that first sentence. They did not succeed.
- Moderator: Why don't you quote or paraphrase that first sentence. The gist of it is what?

²⁷ See NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN, AN ORAL HISTORY MEMOIR 111-15 (2004).

Boskey: Well, it said “Somebody who had belonged to the most violently” Maybe I’d better give you the exact wording—I brought this opinion, the *Barnette* opinion, with me, and I have to tell you that this morning, when I got up early, I reread it.

Moderator: I did too.

Boskey: Coming to Frankfurter’s observations, here we are. It says, “One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.”²⁸ I’ll also add the second sentence: “Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges”²⁹ He felt very strongly on the subject as you can see.

Moderator: Did he ever reconsider, to your knowledge?

Boskey: I don’t think so. And you know, when you’re trying to draw the line between what obligations the state may impose and what are the limits of religious freedom or freedom of the press or free speech, it’s always a question of where the line is drawn. No rights under the Constitution are absolutely absolute. They’re all subject to some constraint, in my humble opinion. It is hard to say that those who shared the Frankfurter view were clearly wrong. It isn’t something on which they can say the answer is obvious. Now it’s a great tribute to Jackson and the others that they came out where they did. But that doesn’t mean it’s easy. These are difficult matters—that’s what makes these opinions important.

Moderator: Marie and Gathie, let me go to that decision day as you learned about it. You had already won a year

²⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

²⁹ *Id.* at 646–47.

earlier. You were back in school. You were young girls. But now your case is won in the Supreme Court. Do you remember that day or getting that news?

Edmonds: I do. I remember that the lawyers, of course, called my uncle and my dad and then they told us. I was glad about it.

Snodgrass: That's about it. I can remember they were calling and telling us we'd won. Of course we were very pleased with that.

Moderator: Was there interest at the local level? Were people following this? Did they know you had this case?

Edmonds: Not at that time.

Moderator: They do today—here we are.

Did the climate improve for Jehovah's Witnesses in your community over—?

Edmonds: Yes, yes, very favorable.

Moderator: Do you think the decision played a role in that?

Edmonds: I think so.

Moderator: Bennett, the decision came down on June 14, 1943, which happened to be Flag Day.

Boskey: And a month before Bastille Day.

Moderator: Was that just the next Monday that rolled around or was *Barnette* aimed at that decision day?

Boskey: Oh, I don't think it was aimed at it. The Court has always tried to hand down decisions as soon as they're ready, without regard to considerations that would make it easier for the press or easier for the litigants.

Moderator: Do you remember being in Court on the announcement day?

Boskey: No, I do not remember.

Moderator: How did Stone feel about this vindication?

Boskey: As I said earlier, he was always gratified when views that he had expressed, which had been minority views, became the law of the United States.

Moderator: That's fair. Let me push you a little bit. This isn't just a question of legislative power under the common—

Boskey: No, no, no. I am talking about constitutional—

Moderator: Constitutional liberties. Okay.

Boskey: I mean there were a lot of cases in the field, and those of you who are here today are probably not interested in the field, concerning the power of the state to tax what had been regarded as immune interstate commerce. Stone had a minority view. Suddenly the majority view unraveled and the law became his way. There were other constitutional things that came around to his way and it pleased him. I don't say that he was an unduly vain man, but this made him feel good.

Moderator: More than sixty years later, here we are. It obviously has great importance in our constitutional law. How do you think about the legacy of *West Virginia State Board of Education v. Barnette*?

Boskey: Well, I think it is one of the cases that is not likely to be overruled.

Moderator: Is it a case that you regard as limited to its context? Is it about the 1940s? Or is it about the schools? Or is it about Jehovah's Witnesses?

Boskey: Well, if you read and reread the opinion, as you and I both did this morning, you will see that it's written with an elegance and an eloquence that has application way beyond its borders.

- Moderator: As the victors, how do you sisters think of this case? How do you think about being the Barnette sisters? The Court misspelled your name, but it is your case, and it is your principle that was vindicated. What does that mean to each of you in the lives you have lived since then?
- Edmonds: Well, I'm glad that it meant freedom for everyone, for their beliefs and that we could stand up for them and be proud of them and I'm glad that it was in our favor. And it helped out through the years for our children, when they had to face the same issue in school all the time. I'm just glad that everybody got, you know, helped by it.
- Snodgrass: About the same thing. I am especially happy that it helped the kids after us, who came after us. Even, like she said, down to this day. It's still giving them a freedom to go to school without harassment and everything. And it, I guess, it really means more to us today than it did sixty some years ago. Of course we think more about it today than we did then.
- Moderator: I heard a wonderful anecdote as we were preparing yesterday. Someone locally was meeting with a school administrator in Jamestown. They were discussing this upcoming event and the visitor to the school started to explain *West Virginia State Board of Education v. Barnette*. The school administrator stopped the visitor, opened a desk drawer and pulled out some kind of district decree which makes it clear that that principle is alive and well in our schools. We all owe each of you a lot of thanks for that.
- Edmonds: It is alive. I remember when my older son was sent to the office for not saluting the flag. The principal came back and said your teacher obviously doesn't remember the Supreme Court decision.

Moderator: That's great. On behalf of the Robert H. Jackson Center and the Supreme Court Historical Society, please join me in thanking Bennett Boskey, Gathie Edmonds, and Marie Snodgrass for this wonderful conversation.

CLOSING REFLECTIONS ON JACKSON AND *BARNETTE*

JOHN Q. BARRETT†

This conversation has, quite properly, not exaggerated the importance of Justice Jackson. But it is fitting to close a discussion at the Robert H. Jackson Center with a few words about the man whose eloquent writing for the Supreme Court majority of June 1943 literally is *West Virginia State Board of Education v. Barnette*.

A number of facets of Robert H. Jackson's life and background seem to be related to the judge he became and the opinion he wrote in *Barnette*. There is, first, the basic geography: Jackson's formative places had Jehovah's Witnesses and others who were devout believers in distinctive, often non-majoritarian, religious faiths and spiritual beliefs.

Robert Jackson was born in Pennsylvania—not quite in Minersville, which is near Allentown and gave rise to the *Gobitis* case, but about 250 miles away in Warren County's Spring Creek. As a boy, he moved north with his family across the New York state line to Frewsburg, where he attended grade school and high school. He then moved to nearby Jamestown, where he spent a final high school year, apprenticed in a law office, became a lawyer and spent the next twenty years in private life. In each of those places, Jackson learned of religious and philosophical differences and experienced the individuality, coexistence, and toleration that became his own creeds.

The particular strains of free thought and belief that Jackson knew in his locales included the history of the Mormons, who

† Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, NY (www.roberthjackson.org). © 2007 by John Q. Barrett. I am grateful to my research assistants Richard C. Spatola and Scott K. Maxwell for their work on this entire transcript.

found their faith in western New York and passed through Chautauqua County, where Frewsburg and Jamestown are located, on their westward trek. During his boyhood, Jackson learned of the Spiritualist community that had once flourished in the woods of Pennsylvania's Kiantone Creek valley, and he spent hours exploring the haunting ruins of houses and other buildings that had been its "Domain." Young Robert Jackson also knew Lily Dale, another Spiritualist community just north of Jamestown and Chautauqua Lake that is, to this day, a strong and distinctly minority belief system. The Jamestown in which Jackson apprenticed and became a lawyer included Jehovah's Witnesses (then called Bible Students), both English- and Swedish-speaking. In 1910, more than 5,000 Bible Students from across the United States and abroad arrived in Jamestown for a nine-day convention in nearby Celeron, and they were received warmly. Jackson's region and he, in sum, knew devout, and different, believers much like the Barnetts.

A second facet of Jackson's background that seems relevant to what he wrote in *Barnette* is his direct experience with religious difference: He was one of those people who were different from the majority on matters of faith and belief. The Jacksons, including Robert, were Christians and believers in a general sense, but they were agnostic among denominations and they were not regular church-goers like almost everyone else in their communities. (They also were active Democrats in a region of pervasive Republicanism.) Jackson's own individuality and non-conformity in his beliefs were generally accepted—his own places, including his schools, gave him room and support to be unorthodox.

A third facet of Robert Jackson's background that seems connected to *Barnette* is his upbringing: He was raised to value the freedom of individuals to believe as they wished, and to respect exercises in individuality and freedom. Jackson learned this from his environment and through observation. He also learned it directly from his parents. When Robert Jackson was a young boy, for example, his mother spanked him soundly for parroting to an Irish girl who worked for the family some ugly comments he had heard from an anti-Catholic bigot. When he was in high school, his father, hearing that Robert and a friend had attended and mocked a religious revival meeting, reprimanded him in salty language. Both incidents stuck with

Jackson—he recalled and recounted each as a Supreme Court Justice.

In 1940, when the Supreme Court in *Gobitis* affirmed, in the form of the compulsory school flag salute, a government imposition of orthodoxy on schoolchildren who were Jehovah's Witnesses, Robert H. Jackson was the Attorney General of the United States. He was serving in President Franklin Roosevelt's Cabinet, he was deeply involved in the World War preparatory efforts that were the context for the Court's decision, and he also was, by then, a friend of Justice Felix Frankfurter, the decision's author. Notwithstanding all of that, Jackson instinctively and vocally opposed the Court's decision, including once on the fringes of a Cabinet meeting and another time in a heated argument at the home of the Librarian of Congress, Archibald MacLeish.

A defining piece of Robert H. Jackson is, of course, *Barnette* itself. He wrote that opinion explaining constitutional freedom of belief with his distinctive, and perhaps never-matched among Supreme Court Justices, literary skill. In the opinion-drafting process, he was assisted significantly and mentored by Chief Justice Harlan Fiske Stone, the *Gobitis* dissenter. Stone occupies, with the Barnett sisters and their family and fellow plaintiffs, the top of the list of the case's heroes.

Interestingly, the judgment and values that Justice Jackson articulated in *Barnette* remained visible in his later, biggest work. At Nuremberg, Germany during 1945 and 1946, evidence of persecutions of Jehovah's Witnesses was part of the criminal case that chief prosecutor Jackson and his colleagues made against the principal surviving Nazis.

It is appropriate to conclude this event with two paragraphs from Justice Jackson's June 14, 1943, opinion for the Supreme Court in *Barnette*:

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to

exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

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.³⁰

In an ironic way, those words in that opinion have become something of an American—I use the word cautiously—prayer. They are part of what we are as a polity. They form a central part of our civic constitution. They remind us of our freedom, in our earliest years in school and throughout life, to believe devoutly and practice sincerely the ideas and faiths that call to us.

We are lucky to have here people who in very direct ways helped to sustain that freedom: the two litigants, and the senior law clerk. We thank you very much.

³⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943).