THE STATE OF KANSAS v. SMITH: THE COMPULSORY FLAG SALUTE AND RELIGIOUS FREEDOM

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There is not a country in the world where Frederick the Great's principle, that everyone should be allowed to go to Heaven his own way, is so fully applied.—James Bryce, THE AMERICAN COMMONWEALTH.

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CHAPTER I

INTRODUCTION

Few would contend that the schools, both public and private, were not a potent instrument for the development of patriotism. Loyalty to one's country and a respect for its flag seem rather elementary to the average American. The training of children in citizenship is frequently emphasized as one of the objectives of the American educational system.[1] As of 1940 every state required classes in the daily curriculum that would inculcate some of the principles of good citizenship.[2] The American educational system adopted the American Flag as the symbol for the development of patriotism. There was, however, a wide divergence of opinion on the best method for inculcating "good citizenship" in school children. Patriotic organizations such as the Daughters of the American Revolution developed the principle of "For God and Country" and saw in the flag a symbolism which we have normally associated with "Americanism."[3] Educators took a somewhat different and more pragmatic view, and approached the use of the flag and patriotic ceremonies for their didactic merits. What method or ceremony would be the most effective for instilling patriotism? Mere recitation and constant repe-

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[1]Ward W. Keesecker, "The Flag in American Education," School Life, XXV (December, 1939), 74-75.

[2]David R. Manwaring, Render Unto Caesar (Chicago, 1962), 1.

[3]Ibid., 6.

tition did not produce loyal and patriotic citizens. It seemed there should be some direct relationship between what the flag "stood for" and the methodology whereby those values would be communicated to, and inculcated in, the American student.[4]

Origin of the Flag Salute

On June 14, 1777, the Continental Congress meeting in Philadelphia established the flag of the United States and approved it for official use.[5] For over a century following, there appeared to be no generally accepted or official ceremony whereby civilians could show their respect to their nation's flag. The flag-salute ceremony in use today originated in the early 1890's when Francis Bellamy and James B. Upham embarked on a campaign to awaken a sense of patriotism in the school children of the nation.[6] October 12, 1892, marked the 400 anniversary of the discovery of America by Columbus. Both Bellamy and Upham conceived the idea that this day should be made a national holiday. Articles in support of this idea were published by these two men in Youth's Companion magazine with which both were associated. They presented their patriotic program to the convention of state superintendents of education held in Brooklyn in February, 1892. Their program was heartily adopted. President Harrison issued a

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[4]"Compulsory Flag Salute," The Journal of Education, CXX (April 19, 1937), 195.

[5]"The Flag Salute," The Journal of the National Education Association, XXXII (December, 1943), 265.

[6]Mary Tierney Coutts, "How the Flag Pledge Originated," The Journal of Education, CXXV (October, 1942), 225.

proclamation declaring October 12, 1892, a national holiday.[7] In 1916 President Woodrow Wilson proclaimed June 14th as Flag Day, an observance which since that time has been celebrated throughout the United States.

The original Bellamy and Upham program included as its climax a salute to the flag spoken in unison. Those participating in the flag-salute recited the following pledge:

> I pledge allegiance to my flag and the Republic for which it stands, one nation indivisible, with liberty and justice for all.[8]

At the words "to my flag," the right hand was extended, palm up and slightly raised, toward the flag. This position was maintained until the pledge was concluded, then the arm was dropped to the side. National conferences of 1923 and 1924 changed the pledge to

> I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one nation, indivisible, with liberty and justice for all.[9]

A decade later many people objected to the "stiff-arm" form of salute because of its similarity to the Nazi and Fascist salutes. Congress, therefore, changed the salute in 1942 by a joint resolution to provide that the salute should be rendered by placing the right hand over the heart.[10] In 1954, the relevant part of the pledge was revised to read ". . . one nation under God, indivisible . . . ."[12] From its

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[7] "The Flag Salute," The Journal of the National Education Association, XXXII, 265.

[8] Ibid.

[9] Ibid.

[10] Ibid. Public Law No. 829 (1942).

[11] Public Law No. 396 (1954).

inception, the flag-salute was designed as a secular ceremony to increase one's respect for his country.

The Salute as an Educational Device

James A. Moss, a well-known flag authority, considered patriotism to be love for one's country, loyalty to its ideals and traditions, and devotion to its welfare. Moss characterized false patriotism as "flag-worship," saluting the flag without a sincere understanding and appreciation of the ideals and institutions it symbolized.[12]

Training for citizenship was frequently emphasized as one of the objectives of American education. There was, however, wide divergence of opinion on the best methods of accomplishing that end.[13] Every state either required or sanctioned programs designed to demonstrate respect for the American flag. Statutes in each state required the teaching of those elements regarded as essential to the liberties of a free people.

Leading educational journals and authorities questioned the value of the flag-salute. In an editorial, the Journal of Education commented, "How often can the exercise be repeated without becoming tiresome, and to some extent losing its significance?"[14] The article recommended that the dissenting child should be given more comprehensive instruction for loyalty rather than to force the lips to

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[12]James A. Moss, The Flag of the United States: Its History and Symbolism, (Washington, D.C., 1933), 85. Emphasis added.

[13]Keesecker, School Life, XXV, 74.

[14]"Compulsory Flag Salute," The Journal of Education, CXX, 195.

[illegible] what the heart denies.[15] The basic question was one of loyalty, [illegible] manner in which the child expressed it.

Eight thousand pupils from the fourth to the twelfth grade inclusive wrote the pledge of allegiance as an experiment for comprehension and precision. Not one paper was perfect.[16] Another study revealed an equally sobering result. The pledge was written by 2,883 children. The chief criterion for scoring the papers was "the meaning revealed."[17] The result revealed that the principal error was non-comprehension. The children wrote words with no plausible resemblance to the text or meaning of the pledge. Substitutions, omissions, transpositions, insertions and misspellings revealed further that the students failed to comprehend the meaning of the flag-salute. One example from this study read, "I pledge a legend to the United States of America—one nation in the vestibule and that's all."[18] The author of the study concluded that a child's oral repetition of allegiance to the nation's flag had decided limitations.[19] Citizenship was a matter of the character and attitude of the total personality of a man or woman. This was not to be obtained in an "academic corner at nine on Tuesday morning by words and gestures which a child repeats automatically."[20]

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[15]Ibid.

[16]A. C. Moser and Bert B. Davis, "I Pledge A Legion." The Journal of Educational Sociology, IX (March, 1936), 437.

[17]Herbert T. Olander, "Children's Knowledge of the Flag Salute," Journal of Educational Research, XXXV (December, 1941), 300.

[18]Ibid., 304.

[19]Ibid., 305.

[20]Harold Benjamin, "With Liberty and Justice For All," National Parent-Teacher, XXXV (November, 1940), 9.

Another study with members of a junior class resulted in less than half the class writing the pledge correctly.[21] Convinced of the futility of the flag-salute ceremony, W. C. Ruediger stated unequivocally that "it would be hard to devise a means more effective for dulling patriotic sentiment,"[22] than the flag-salute. The same author went on to conclude that "needless compulsory routine tends to set up in some minds an antagonistic attitude."[23] Poet Carl Sandburg mourned

> Such regimented oathtaking has in the past never achieved constructive good. It is failing today in Nazi Germany. It failed in Prohibition America. It failed in the reconstructed states of the South. It failed with Joan of Arc and with Galileo.[24]

Early Religious Opposition

Refusal to salute the flag in nearly all cases has been based on religious scruples.[25] "If I salute the flag I cannot go to heaven," were the words of a 12-year-old Jehovah's Witness, Dorothy Leoles.[26] Minority religions objecting to the salute were not unpatriotic or disloyal to the government of the United States. Refusal to salute and disloyalty or disrespect were not the same thing. Nor did these non-saluting religions contest the right of others to engage in such

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[21]"I Pledge a Legion," The Journal of Education, CXX (March 1, 1937), 123.

[22]W. C. Ruediger, "Saluting The Flag," School and Society, IL (February 25, 1939), 249.

[23]Ibid.

[24]"Devils Emblem," Time, XXVI (November 18, 1935), 59.

[25]"The Flag, The Pledge, and God," Awake, XLVI (June 8, 1965), 8.

[26]"Witness and Justice," Time, XXX (December 27, 1937), 34.

activities.[27]

The earliest recorded opposition to the flag-salute on religious grounds occurred in 1918 within the Mennonite sect.[28] A nine-year-old girl in Ohio had been sent home repeatedly for refusing to give the salute to the flag. The court viewed such actions as disrespectful and the forerunner of disloyalty and treason.[29] The American Civil Liberties Union was eager to challenge the constitutionality of the flag-salute law by court action, but the Mennonites' doctrine of non-resistance would not allow them to act as plaintiffs in a court of law. The Mennonites were unwilling to participate in the flag-salute ceremony because of their extreme opposition to war.[30] Although they honored and respected the flag, pledging allegiance implied a promise to defend it against possible enemies, thereby conflicting with their opposition to war and the taking of human life. Other religious groups such as The Jehovites viewed the flag-salute ceremony as idolatrous. The Elijah Voice Society based its unwillingness to salute on its refusal to recognize the authority of any earthly government. A similar position was taken by The Church of God.[31]

The specific religious problem that arose over the compulso-

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[27]"Christian Conscience and the State," Awake, XLVI (August 8, 1963), 16.

[28]Manwaring, Render Unto Caesar, 11.

[29]Troyer v. State, 21 Ohio N.P. (N.S.) 121, 124 (C.P. 1918) as cited in Manwaring, Render Unto Caesar, 11.

[30]Elmer T. Clark, The Small Sects In America (New York, 1939), 224-27.

[31]Manwaring, Render Unto Caesar, 11-14.

ry flag-salute was whether one's religious beliefs excused one from participating in a ceremony that had a completely secular purpose, i.e., inculcating patriotism. The religious objection to the compulsory flag-salute in the majority of cases came from the very small sects holding extreme views on Christianity and the state. No set pattern had yet been established on how to deal with those who objected to the salute. Punishment of non-saluters took many forms: allowing the child to come to school after the flag-salute exercises; permitting the children to remain home and attending no school at all; enrolling children only after long and vigorous protests on behalf of the non-saluters. In extreme cases the parents were sentenced to jail and their children placed in custody of the state.[32] None of the early clashes led to a direct court test of the constitutionality of the compulsory flag-salute ceremony as applied to religious objectors because of the conscientious inability of the parents to sue in courts.

The Purpose of This Study

The precise question at issue in all the flag-salute cases was the right of a person entertaining sincere religious objections to a regulation which the rest of society regarded as intrinsically secular to be excused from that regulation. Long before the flag-salute cases arose,[33] both the state and federal courts had accepted governmental authority to regulate religious practices deemed inimical

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[32] Ibid., 11-16.

[33] Reynolds v. U.S., 8 Otto (98 U.S.) 145 (1878); David v. Beason, 133 U.S. 333 (1890); Hamilton v. Regents of University of California, 293 U.S. 245 (1934).

to the public welfare. Obviously regulation must prevail in at least some cases. The most plausible solution seemed to be for the reviewing court to weigh the particular circumstances and determine whether the social need for conformity to the secular regulation was great enough to override the individual's religious claim.

It is the purpose of this study to explore the particular circumstances in the Jehovah's Witnesses' flag-salute cases to determine the justification and practicality of the compulsory flag-salute. Did the refusal to salute the American flag deprive the government or society of any interest or function to which it was entitled? The details of the Smith case are used in this study to illustrate the particular circumstances the courts were forced to weigh between the years 1935 to 1943.

CHAPTER II

THE WITNESSES AND THE SALUTE

Statutory Basis for the Flag-Salute

The first "flag-salute" statute originated in New York in 1898. The law which the New York legislature adopted became a model which other states, in many instances, adopted verbatim. It provided that

> It shall be the duty of the state superintendent of public instruction to prepare, for the use of the public schools of the state, a program providing for a salute to the flag at the opening of each day of school and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools.[1]

This statute was adopted in 1907 by the Kansas Legislature with virtually no changes.[2] The statute was not altogether clear. It did not state whether the local school authorities were required to use the program prepared by the state superintendent, nor was any provision included providing for the expulsion of those who did not salute for reasons of conscience. The law did not contain a penalty clause. It would seem that the legislators expected that all children would participate in the flag-salute ceremony. Undoubtedly refusals to render the salute would be difficult to imagine, but in the event

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[1]New York Laws (1898), Chapter 481.

[2]Kansas Laws (1907), Chapter 319.

that they did occur, they would presumably be handled like any other rebellion against school routine.

Massachusetts, on the other hand, passed a different type of flag-salute statute in 1935. This type illustrated the effects of the extreme nationalism rampant in the Twenties and Thirties.[3] Although the Massachusetts statute included a penalty provision for school authorities, it made no explicit provision for expelling non-saluting students.

> Each teacher shall cause the pupils under his charge to salute the flag and recite in unison with him at said opening exercises at least once each week the "Pledge of Allegiance to the Flag." Failure for a period of five consecutive days by the principal or teacher in charge of a school equipped as aforesaid to display the flag as above required, or failure for a period of two consecutive weeks by a teacher to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do, shall be punished for every such period by a fine of not more than five dollars.[4]

The Jehovah's Witnesses

The Witnesses began as a small Bible class under Charles Taze Russell near Pittsburgh, Pennsylvania, in 1872.[5] From that small and simple origin, the Witnesses today have or claim over 1,034,268 members, earning the reputation as the world's fastest growing religion.[6] Their total number of publications including Bibles, books, magazines,

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[3]Samuel Eliot Morison, The Oxford History of the American People (New York, 1965), 883-85.

[4]Massachusetts Laws (1935), Chapter 258.

[5]Watchtower Society, Let God Be True (New York, 1946), 20.

[6]Watchtower Society, 1966 Yearbook of Jehovah's Witnesses (New York, 1965), 38. See also, William J. Whalen, Faiths For the Few (Milwaukee, 1963), 77.

and tracts totaled 403,604,742 in 1965.[7] The Society has had three presidents since it was founded, and each left his distinctive mark on the Society. Charles "Pastor" Russell, who was its leader until his death in 1916, gave the society its scriptural orientation and reliance on the printed word.[8] "Judge" Joseph Franklin Rutherford (1916-1942) succeeded Russel and instituted several major revisions in Russell's theology which gave the Witnesses the militant and somewhat defiant character which is usually associated with them.[9] Under Rutherford the name of the Society, Jehovah's Witnesses, was officially adopted in 1931.[10] Prior to this time, members had been given several names, the most common of which were International Bible Students Association and "Russellites." Rutherford also originated the Society's flag-salute doctrine in 1935. Nathan H. Knorr, the present leader, made the Witnesses less "combative" in their approach and somewhat more "respectable."[11]

In the Witness theology the Bible was the center of God's revelation. It alone could enlighten men and show him the correct or proper path.[12] Any doctrine taught by man that contradicted the Word of God was a lie and proceeded from the Devil.[13] Because of

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[7]Watchtower Society, 1966 Yearbook of Jehovah's Witnesses, 58.

[8]Watchtower Society, Jehovah's Witnesses in the Divine Purpose (New York, 1959), 16-22.

[9]Ibid., 64-73.

[10]Ibid., 322.

[11]Manwaring, Render Unto Caesar, 17.

[12]Joseph Franklin Rutherford, Religion (New York, 1940), 16-17.

[13]Ibid., 59. See also John 17:17 and Psalm 119:105.

their exclusive reliance upon Sacred Scripture, the Witnesses did not consider themselves to be a religion or a sect, but rather an "association" of believers. Rutherford referred to organized religion as a "snare and a racket originating with the Devil."[14] All organized religions, and especially the Roman Catholic Church, were condemned by the Witnesses because they were believed to be more political than Christian in their operation.[15] The Witnesses have remained aloof from most contemporary and well-known religions for this reason.

The Witnesses' message centered around the belief that this evil world was in imminent danger of the violent end which Scripture called the Battle of Armageddon.

> It is the "time of war!" It is to be the final war. All the hosts of heaven will with the most intense interest behold it. The faithful on the earth will discern it and have full assurance in advance of what shall be the result. The zero hour has struck, and the Mighty Warrior, leading his invincible host, is marching to the attack. The deluge was the climax of the first world of wickedness and violence, and that foreshadowed the climax of the "present world" of wickedness and violence. Let those who love Jehovah and his kingdom now note the onward march of the heavenly host and with eagerness await the result as foretold in the prophecies.[16]

At the battle of Armageddon, the heavenly forces will be led by Christ, will take Satan prisoner, and will destroy all his works and all those who give their allegiance to him. Only the faithful will survive and the earth will be restored to its original splendor. Christ will then reign for a thousand years, but Satan will be

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[14]Rutherford, Religion, 104.

[15]Ibid., 31.

[16]Ibid., 335.

released for a short time to tempt the people once more. Satan and all those who follow him will be destroyed, and those remaining will live forever with Jehovah God.[17]

All the governments of the world--democratic, communistic, Fascistic--to the extent that they usurped the power of Jehovah's theocracy they became tools of Satan.[18] Christ Jesus was the Head of the "whole nation," God's kingdom, which was devoted exclusively to carrying out Jehovah's purpose. He, according to Acts 4:24, was the Sovereign Ruler of the universe. The rulers of this earth did not represent Jehovah God because they persecuted those who did good works.[19] Witnesses made a solemn covenant to obey God's law. Because Jehovah God required full obedience as a condition to receiving everlasting life, the Witnesses uncompromisingly based all their actions on their religious beliefs.[20] They would be obedient to God's commandments or they would not live: "Covenantbreakers . . . are worthy of death."[21]

The flag-salute to the Witnesses was exclusively a religious matter. The flag represented the ruling power of the government, "all of whom are against Jehovah God and His kingdom under Christ."[22] To salute the flag meant, in effect, that the person recognized the sovereignty of the government represented by the flag and ascribed salvational power to it. This view is not entirely without biblical

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[17] Ibid., 326-330.

[18] II Cor. 4:4; I John 5:19; John 14:30.

[19] Joseph Franklin Rutherford, Salvation (New York, 1939), 225.

[20] Joseph Franklin Rutherford, God and State (New York, 1940), 3-5.

[21] Romans 1:31-32.

[22] Rutherford, Salvation, 260.

support. The Book of Exodus forbid the making of a graven image and bowing down to it. The Book of Daniel relates the story of the three young men saved by God from death in a fiery furnance because they refused to bow down to an image constructed by King Nebuchadnezar.[23] To salute the American flag or any other flag would be a direct violation of Exodus 20:2-6:

> I am Jehovah thy God . . . thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: thou shalt not bow down thyself to them, nor serve them: for I Jehovah thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me; and showing mercy unto thousands of them that love me, and keep my commandments.[24]

Because Satan was the invisible ruler of this world, Witnesses did not consider themselves to be citizens of this world, but rather citizens of God's government.[25] For this reason they did not vote, did not hold political office, and did not fight in the armed services. Whenever there was a conflict between their Bible-based beliefs and a command or regulation from an earthly government, the resolution was in the pattern of the first-century Christians: "We must obey God rather than men."[26] The Witnesses were loyal and obedient to the government of the United States or any other government only in so far as it did not conflict with their loyalty to God.

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[23]Daniel 3:1-30.

[24]Joseph Franklin Rutherford, Loyalty (New York, 1935), 21.

[25]Ibid., 19.

[26]Acts 5:29.

They objected to certain aspects of the government, but not to the government as a whole. For this reason the Witnesses proposed an alternate pledge which did not violate their conscience and at the same time gave honor to the flag in so far as it represented those things which did not conflict with God's orders

> "I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.
>
> "I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.
>
> "I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.[27]

Essentially this pledge contained the same idea of reverence for the American flag and honored what the flag represented. Since in essence it was identical to the commonly accepted pledge, some accommodation should have been made. This alternate pledge should have removed doubts about the loyalty of the Witnesses. The question which faced each of Jehovah's Witnesses was literally: "Shall I obey every command of man and die, or shall I obey Jehovah God and live?"[28] They took literally the command of Christ that no man could serve two masters. Witnesses believed that one must follow the commands of God revealed to him through his conscience. To do otherwise would be jeopardize his salvation. In actual practice, this procedure presented no insurmountable dilemma for the state to resolve. In the pluralistic American society with its separation of church and

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[27]Rutherford, God and State, 28.

[28]John Haynes Holmes, "The Case of Jehovah's Witnesses," Christian Century, LVII (July 17, 1940), 897.

state, no religious doctrine was given a preferential status. All faiths were equally tolerated. The individual was free to believe any religious dogma he chose but the state possessed the authority to determine when the practice of any belief was inimical to the safety of the state and the society as a whole. The state therefore had the right to override one's religious practice when such a practice challenged the very stability of the state itself.

Witness Persecution

The Jehovah's Witnesses entered the constitutional controversy over the flag-salute issue in 1935. Because the acquisition of justice was not a concept adverse to God's laws, the Witnesses sanctioned use of legal means to achieve their ends. So persistent and uncompromising was the Witness quest for justice in their behalf, that out of a total of fifty-five test cases taken to the Supreme Court of the United States on various matters of a religious nature, they won forty-four.[29] However, the Witnesses met with much opposition.

Most, if not all, of the opposition to the Witnesses had the flag and the flag-salute as its cause.[30] Persecution, however, merely strengthened their belief that they were battling the hosts of Satan, and that the millennium was drawing near.[31]

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[29]Richard Harris, "A Reporter at Large: I'd Like to Talk to You for a Minute," New Yorker, (June 16, 1956), 88.

[30]Victor W. Rotnem and F.G. Folsom, Jr., "Recent Restrictions Upon Religious Liberty," The American Political Science Review, XXXVI (December, 1942), 1062.

[31]Harris, New Yorker, (June 16, 1956), 87.

Witness persecution took many different forms. Typical of economic persecution was the expulsion of a teacher in Canonsburg, Pennsylvania, for refusing to honor what was termed "the flag of horror and hate."[32] Teachers in Sacaususe, New Jersey, Shelburne Falls, Massachusetts, and Los Angeles, California, were expelled for similar reasons. Members of the Ku Klux Klan paraded in front of George Leoles' shop in Atlanta, Georgia, to protest his apparent lack of patriotism in instructing his daughter not to salute the flag. Shortly after this incident he sold his shop.[33]

Mob violence was perhaps the most frequent display of anti-Witness feeling. In Litchfield, Illinois, almost the entire town mobbed a group of sixty Witnesses who were canvassing the area and placing their literature. State troopers were needed to restore order.[34] On June 9, 1940, 2,500 towns-people sacked and burned the local headquarters of the Witnesses in Kennebunk, Maine. Six Jehovah's Witnesses were arrested and the police seized some weapons and other "dangerous" material. Similar incidents of mob violence were recorded in forty-four states between 1940 and 1944.[35]

Another type of persecution, directed against the Witnesses and their flag-salute position, was the use of violence to force individual Witnesses to salute. Seventy Witnesses were jailed in

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[32]"Breeding Peace Martyrs in Cradle: Children of Jehovah's Witnesses Refuse to Salute the Flag," Literary Digest, CXXI (May 2, 1936), 18.

[33]"Witness and Justice," Time, XXX (December 27, 1937), 34.

[34]Rotnem and Folsom, The American Political Science Review, XXXVI (December, 1942), 1061.

[35]Harris, New Yorker, (June 16, 1956), 87.

Odessa, Texas. No formal charges were filed against them. The County Attorney said they would be held "until they saluted the American Flag."[36] A Witness was beaten until he kissed the flag.[37] Four Pennsylvania children, after receiving a thorough beating, were threatened with sentences to a training school unless they saluted the flag.[38]

A patriotic organization, the American Legion, joined in the fight against the Witnesses. The following appeared in the New Orleans Times-Picayune on June 30, 1940:

> We, the American Legion, in cooperation with the police department, are making every effort to round up these "Witnesses." It is the duty of every citizen to report these persons to the police. The literature being issued by members of this Organization is printed chiefly in Germany by German printers and on German paper.[39]

Witness refusal to salute the flag was considered by many to be an act of disrespect to the country, an act of disloyalty. Chief Justice Russell of the Georgia Supreme Court stated in his decision in the Leoles case that the flag was the symbol of the United States and it was very little to expect those who seek its benefits to respect its flag.[40] Following this same "benefit" idea, Witnesses were struck from the relief rolls in Clarksburg,

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[36] New York Times, June 2, 1940, 14.

[37] "Jehovah's Witnesses—Victims or Front?" Christian Century, LVII (June 26, 1940), 813.

[38] "Breeding Peace Martyrs in Cradle: Children of Jehovah's Witnesses Refuse to Salute the Flag," Literary Digest, CXXI, 18.

[39] H. Rutledge Southworth, "Jehovah's 50,000 Witnesses," The Nation, CLI (August 10, 1940), 111.

[40] Leoles v. Landers, 184 Ga. 580, 192 S.E. 222 (1937).

West Virginia, for refusing to salute the flag.[41]

By far the most extreme method of dealing with non-saluting Witness children was sending them to training schools as delinquent children. Two Belchertown, Massachusetts, boys and their sister, ranging in age from six to nine, were sentenced to Hampden County Training School and their father was fined forty dollars.

The flag-salute and the Witnesses were not limited to the United States; neither was their persecution. More than 1,000 of Jehovah's Witnesses were put into Nazi concentration camps for daring to tell Hitler that the Third Reich was "the Devil's Kingdom."[42]

Nearly all the cases of mob violence against the Witnesses had been perpetrated because of the flag-salute issue. Much of this resulted from the United States Supreme Court's Gobitis decision of June, 1940 which upheld the action of a Pennsylvania district school board in expelling two children from the public schools for refusal to salute the flag as part of a daily school exercise. From May to October, 1940, 335 cases of mob violence in forty-four states involving 1,448 persons were recorded.[43] Rutherford himself found it necessary to condone the use of force to repell any resistance Witnesses might experience while proselytizing.[44]

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[41]"Witnesses Examined," Time, XXXVI (July 29, 1940), 40.

[42]"Breeding Peace Martyrs in Cradle: Children of Jehovah's Witnesses Refuse to Salute the Flag," Literary Digest, CXXI, 18.

[43]William G. Fennell, "The Reconstructed Court and Religious Freedom: The Gobitis Case in Retrospect," New York University Law Quarterly, XIX (November, 1941), 42.

[44]Rutherford, Religion, 296.

CHAPTER III

FLAG SALUTE LITIGATION

The primary issue in the flag-salute cases was the delicate problem of balancing conflicting religious and social interests. Both the state and federal courts had established a number of precedents in dealing with this dilemma before the Witness cases arose in 1935. In general, however, there was a tendency among the citizenry to minimize the importance of the flag-salute cases because they involved the rights of the unpopular Jehovah's Witnesses.[1] Several other factors complicated the flag-salute litigation before both state and federal Supreme Courts. The issue arose during a period when a wave of patriotism was sweeping the nation because of an impending crisis with Germany and Japan. To many the Witnesses' position on the flag-salute appeared to be disrespect or even contempt for the flag. The Witnesses did not always present a "respectable" appearance and at times became somewhat obnoxious. Witness membership was small when the issue arose in 1935 which gave it a strong "exceptional" appearance. Against the background of a developing world crisis, lack of understanding and an unfavorable image, the Witnesses entered the legal arena in 1935.[2]

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[1]"A Crisis in the Supreme Court," Christian Century, LX (January 13, 1943), 38.

[2]Rutherford, Loyalty, 16.

For one hundred years following the adoption of the First Amendment, the guarantee of free exercise of religion against federal encroachment remained untested.[3] With the Mormon polygamy cases of 1878,[4] the United States Supreme Court devised a frame of reference which viewed such freedoms on three different levels: the right to believe, the right to advocate religious beliefs, and the right to practice one's religious beliefs. The right to believe was absolute and could not be abridged. The right to advocate and to practice one's religion could, however, be curtailed. According to the Court, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[5]

Massachusetts

With few exceptions the state courts dealt with the Witness cases on similar grounds. Much of this was due to the uniform position taken by the Witnesses themselves. The first of the Witness flag-salute cases came from Massachusetts.[6] Ironically, it not only produced a legal precedent for future litigation, but it also produced the Witness theology on the flag-salute itself. Carleton B. Nicholls, Jr. was enrolled in the third grade at the

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[3]Richard J. Regan, American Pluralism and the Catholic Conscience (New York, 1963), 77.

[4]Reynolds v. United States, 8 Otto (98 U.S.) 145 (1878).

[5]Ibid., 166.

[6]Nicholls v. Lynn, 297 Mass. 65, 7 N.E. (2d) 577 (1937).

Breed school in Lynn. A school regulation required the giving of the flag-salute at least once a week. On September 30, 1935 Nicholls repeatedly refused to join in the flag-salute exercise because it constituted an act of adoring and bowing down to the flag. The school committee then voted to exclude Nicholls until "he, of his own free will, shall be willing to subscribe to the laws of Lynn School Committee and Commonwealth of Massachusetts."[7] Prior to the Nicholls case, the Witnesses had not formulated a doctrine on the salute. On October 6, 1935, "Judge" Joseph Rutherford expressed the official position of the Witness Society on the flag-salute in an interview by the Associated Press.[8]

> The Nicholls lad . . . has made a wise choice, declaring himself for Jehovah God and his kingdom . . . all who act wisely will do the same thing.

The Massachusett's Court in dealing with the Nicholls case established several precedents that influenced decisions of other state courts. Briefly, the court contended the following: the school board could legitimately require the salute of those educated in the public school system; the purpose of the flag-salute ceremony was to inculcate patriotism and had no reference whatsoever to religion; the court could not concern itself with "matters of policy or wisdom of school board regulations."[9] With few variations, this position was adopted by the majority of the state courts.

The burdensome expense of private instruction made mandatory

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[7] Ibid., 66-67.

[8] Rutherford, Loyalty, 16.

[9] Nicholls v. Lynn, 297 Mass., 65-73.

by the expulsion from the public schools was another issue that arose in the Witness flag-salute cases. The issue first arose in the Massachusetts case of Johnson v. Deerfield.[10] Again, the Witnesses presented their familar objection to the flag-salute on religious grounds. The main thesis advanced by the plaintiffs was that the flag-salute law deprived them, without due process of law, of liberties guaranteed to them by the Fourteenth Amendment to the Federal Constitution. These liberties were the right of religious freedom and the right to obtain an education in the public schools.[11] The plaintiffs also considered the rights of parents in regard to the upbringing of their children. They claimed that their right to send their children to a public school had been recognized in the United States Supreme Court decision of Pierce v. Society of Sisters.[12] In that decision the Court held invalid an Oregon law requiring all children to attend public schools for the first eight grades. The decision mentioned the liberty of parents and guardians to direct the upbringing and education of children under their control. However, that decision could be of only limited benefit to the Witnesses because it was highly property-oriented, showing most solicitude for the investors and proprietors of the private schools. The Pierce decision clearly sanctioned the power of the state to require of private schools

> that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that

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[10] Johnson v. Deerfield, 25 F. Supp. 918 (1939).

[11] Ibid., 921.

[12] 268 U.S. 510 (1925).

> nothing be taught which is manifestly inimical to the public welfare.[13]

In general, the Courts were reluctant to allow a parent to have his child excused from one or more of the courses in the public school curriculum.[14] The Massachusetts Court overruled the Witnesses on the basis that the Federal Supreme Court had previously dismissed two appeals from state courts for want of a substantial federal question.[15] Dismissal for want of substantial federal question meant that the question brought to the Supreme Court for decision was so clearly undebatable and devoid of merit as to require dismissal for want of substance.[16] The Massachusetts Court again reiterated that the compulsory flag-salute was "wholly patriotic in design and purpose."[17] The Witnesses appealed this case to the United States Supreme Court but the Supreme Court affirmed the judgment of the lower court on the basis of several earlier per curiam decisions.[18]

What gradually developed in the flag-salute cases was the

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[13] Ibid., 535.

[14] Samuel Benedict Memorial School v. Bradford, 111 Ga. 801, 36 S.E. 920 (1900); State ex rel. Andrews v. Webber, 108 Ind. 31, 8 N.E. 708 (1886); Cross v. Board of Trustees, 129 Ky. 35, 110 S.W. 346 (1908); Wulff v. Inhabitants of Wakefield, 221 Mass. 427, 109 N.E. 358 (1915); Kidder v. Chellis, 59 N.H. 473 (1879); Sewell v. Board of Education, 29 Ohio St. 89 (1876); Donahoe v. Richards, 38 Me. 379 (1854); Guernsey v. Pitkin, 32 Vt. 224 (1858). These state cases did not permit parents to excuse their children from school programs.

[15] Leoles v. Landers, 302 U.S. 656 (1937); Hering v. State Board of Education, 303 U.S. 624 (1938).

[16] Johnson v. Deerfield, 25 F. Supp. 918 (Mass. 1939).

[17] Ibid., 920.

[18] Johnson v. Deerfield, 306 U.S. 621 (1939).

application of the "secular regulation" rule, i.e., there was no constitutional right to exemption on religious grounds from the compulsion of a general regulation dealing with non-religious matters.[19] This concept or approach to conflicts between religious beliefs and secular requirements was established in the first Mormon polygamy case.

> Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land.[20]

Georgia

The state courts emphasized both the secular nature of the flag-salute and also its specific purpose of inculcating patriotism. Georgia's experience with the Witnesses approximated that of Massachusetts. A sixth grader, Dorothy Leoles, refused to participate in the flag-salute ceremony on the familar grounds that it was bowing down in worship of an image in the place of God. "If I salute the flag I cannot go to heaven," Dorothy contended.[21] She was expelled from school by the Atlanta School Board. On May 13, 1937, the Georgia Supreme Court handed down its decision unanimously affirming the action of the school board.[22] However, in this case the court appeared somewhat more stringent than the Massachusetts Court by futher maintaining:

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[19]Manwaring, Render Unto Caesar, 51.

[20]Reynolds v. U.S., 166-67.

[21]"Witness and Justice," Time, XXX, 34.

[22]Leoles v. Landers, 184 Ga., 585-86, 192 S.E. 218 (1937).

> The act of saluting the flag of the United States is by no stretch of reasonable imagination "a religious rite." It is only an act showing one's respect for the government . . . so for a pupil to salute the flag in this country is just part of a patriotic ceremony . . . and is not a bowing down in worship of an image in the place of God . . . .[23]

New Jersey

The New Jersey Supreme Court dealt with the flag-salute issue along the same lines as the Massachusetts and Georgia courts. The flag-salute was a completely secular ceremony with no reference whatsoever to religion. The decision of Hering v. Board of Education handed down on February 5, 1937 rebuked the Witnesses for their position.

> The pledge of allegiance is, by no stretch of the imagination, a religious rite.. . . those who do not desire to conform with the demands of the statute can seek their schooling elsewhere.[24]

Here again the case was appealed to the United States Supreme Court but as in the Leoles case, the Court dismissed it for lack of a substantial federal question.[25]

New York

The Witnesses had a more favorable experience in New York. Mr. and Mrs. Charles Sandstrom had been convicted in the Justice Court of the town of Brookhaven of failing to keep their daughter, Grace, in some school. Their flag-salute position had made it

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[23] Ibid.

[24] Hering v. State Board of Education, 117 N.J.L.455, 189 Atl. 629 (1937).

[25] Hering v. State Board of Education, 624 (1938).

impossible for her to attend in accordance with the school rules. Later, the Suffolk County Court affirmed the conviction.[26]

On January 17, 1939, the New York Court of Appeals unanimously reversed the convictions; a majority, however, upheld the constitutionality of the flag-salute requirement.[27] The general approach taken by the court discouraged further punitive action against the Witnesses and recommended "more patience and some tact" in the methods chosen to inculcate patriotism. On the subject of prosecuting the parents for violations against the state truancy laws, the court contended that the refusal to salute was the personal decision of the child and that the parents wanted their child in school. But the court was most emphatic on the religious significance of the flag-salute.

> Saluting the flag in no sense is an act of worship or a species of idolatry, nor does it constitute any approach to a religious observance. The flag had nothing to do with religion, and in all the history of this country it has stood for just the contrary, namely, the principle that people may worship as they please or need not worship at all.[28]

Justice Lehman concurred with the reversal of the lower court's decision, but in a separate opinion contended that the flag-salute rule and the expulsion were both illegal and unconstitutional. Compelling the flag-salute against the sincere religious convictions of parents and their children was clearly a violation of religious freedom. The New York flag-salute statute of 1898 did not direct

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[26]167 Misc. 436, 3 N.Y.S. 2d 1006 (1938).

[27]People ex rel. Fish v. Sandstrom, 279 N.Y. 523, 18 N.E. 2d 840 (1939).

[28]Ibid., 529-30.

the expulsion of students for not saluting the flag. Justice Lehman referred to the "manner" in which a child could display his respect and loyalty to the flag of the United States. It was this "accommodation" which few courts recommended or even suggested. With reference to Grace Sandstrom Justice Lehman held that

> She does not insist upon doing an act which might harm herself or others; she does not refuse to do an act which might promote the peace, safety, strength or welfare of her country . . . she asks only that she not be compelled to incure the wrath of her God.[29]

The Gobitis Case

The issues and circumstances surrounding the Gobitis case followed the established pattern of other flag-salute litigation. On November 6, 1935, the local school board at Minersville, Pennsylvania, adopted a school regulation requiring all teachers and pupils of the schools to salute the American flag, a refusal to salute would be regarded as an act of insubordination.[30] The children of Walter Gobitis were thereupon expelled for refusing to salute. Several issues arose as this case made its way to the Supreme Court of the United States. The father claimed financial inability to keep his two children in private schools.[31] Because of this financial disability, the children by reason of the compulsory flag-salute regulation, would be compelled to participate in an act of worship contrary to the dictates of their consciences unless they were excused

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[29] Ibid., 538-39.

[30] 21 Fed. Supp. 581 (E.D. Pa. 1937).

[31] Ibid., 584-85.

from the exercise. The Pennsylvania Constitution provided that all men had the right to worship God "according to the dictates of their own consciences."[32] From its very inception, the United States District Court for the Eastern District of Pennsylvania considered the flag-salute regulation a religious matter. Judge Albert Branson Maris in his decision on December 1, 1937, stated:

> If an individual sincerely bases his acts or refusals to act on religious grounds they must be accepted as such and may only be interferred with if it becomes necessary to do so in connection with the exercise of the police power, that is, if it appears that the public safety, health or moral or property or personal rights will be prejudiced by them.[33]

Judge Maris went on to rebuke those courts that had overlooked the fundamental principle of religious liberty in the flag-salute cases.

> No man, even though he be a school director or a judge, is empowered to censor another's religious convictions or set bounds to the areas of human conduct in which those convictions should be permitted to control his actions, unless compelled to do so by an overriding public necessity which properly requires the exercise of the police power.[34]

On June 18, 1938, Judge Maris handed down his final decision in the Gobitis case. His decision in the District Court touched upon the reasonableness of the flag-salute for the teaching of patriotism.

> The enforcement of defendants' regulation requiring the flag salute by children who are sincerely opposed to it upon conscientious religious grounds is not a reasonable method of teaching civics, including loyalty to the state and Federal Government but tends to have the contrary effect upon such children.[35]

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[32]Pennsylvania Constitution, Section 3 of Article I.

[33]21 Fed. Supp., 584.

[34]Ibid.

[35]24 Fed. Supp. 271 (e.D. Pa. 1938), 273.

He went on to reject the "secular regulation" principle by holding that the refusal to salute the flag could not remotely prejudice or imperil the well-being of society.[36]

The case was appealed to the Circuit Court of Appeals and on November 10, 1939, it unanimously affirmed the decision of the District Court.[37] The decision in the Circuit Court again considered the religiosity of the flag-salute and again rejected the "secular regulation" rule. Justice William Clark concluded that whenever the American society had overruled religious objections, it usually did so in cases involving anti-social actions, but in most of the instances the objector was not forced to commit a sacrilege. A Morman, Clark contended, was not damned for monogamy.[38] Up to that time, Justice Clark noted, the state had penalized religiously motivated refusals to act only in cases involving military service and vaccination. Military service was in a category by itself, but Clark weighed the compulsory flag-salute as a "vaccination" against the "disease" of non-patriotism, from the point of view of the seriousness of the disease and the efficacy of the remedy. As to the "seriousness" of the disease, he observed that even mercenary troops were used to win wars. Patriotism was an added rather than an essential advantage.[39] As to the efficacy of the compulsory salute, Clark concluded that the resentment in the particular circumstances of the Witnesses, clashed with and canceled the very "affection

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[36] Ibid., 274.

[37] Minersville School District v. Gobitis, 108 F. 2d 683 (1939).

[38] Ibid., 690.

[39] Ibid., 691.

sought to be instilled."[40]

The school board then entered a petition for a writ of certiorari with the United States Supreme Court. The brief was short and simply stated (a) that the decisions of the lower courts conflicted with the Supreme Court's decision in the Leoles, Hering, Johnson, and Gabrielli appeals; (b) that they conflicted with the state court decisions in these cases and in Nicholls, Sandstrom and Estep; and (c) that the flag-salute regulation and the expulsions thereunder in no way violed either the United States or Pennsylvania Constitutions.[41] On this basis the United States Supreme Court granted a writ of certiorari.[42]

The Gobitis Case in the Supreme Court

The Court might conceivably have reversed the decision of the lower courts without argument or opinion on the basis of its previous per curiam decisions. It appeared that the extraordinary persistance of the Witnesses and the defiance by two federal courts convinced the justices that a more extended treatment was necessary.

On June 3, 1940, the United States Supreme Court rejected the Gobitis plea for religious freedom and upheld the flag-salute rule. The opinion of Mr. Justice Frankfurter ran as follows: First, although the Constitution protected freedom of religious belief, that freedom was not absolute, nor did it relieve the citizen

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[40] Ibid.

[41] Brief in Support of Petition for Certiorari, Minersville School District v. Gobitis, 310 U.S. 586 (1940).

[42] 309 U.S. 645 (1940).

of his obligation to obey the general laws of the land or discharge his political responsibilities. Second, the Court held that national unity was the basis of national security and also that the ultimate foundation of a free society was the binding tie of choesive sentiment. Third, the rule of the local school board must be viewed as though it were the action of the Pennsylvania state legislature. Since the Pennsylvania legislature prescribed the salute, the regulation of the local school board had the effect of law. Viewed as a state law, the flag-salute regulation had a legal standing which created a basis for which court act on against violators could be justified under the truancy statutes. Since the flag-salute requirement was an issue of educational policy, the courtroom was not a proper arena to determine its suitability. The state legislature had decided that the requirement was an appropriate means to evoke a unifying sentiment. For the Court to hold the requirement void as abridging religious liberty would be for the Court to pass on a "pedagogical and psychological" dogma in an area that the Courts have no competence.[43] Fourth, the state could not validly compel all children to attend the public schools.

> But it is a very different thing for this Court to exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country.[44]

Fifth, to grant exceptions to dissidents would be to introduce

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[43] Minersville School District v. Gobitis, 310 U.S. 597-98.

[44] Ibid., 599.

elements of difficulty in the school discipline and might weaken the effect of the exercise on the other children.[45]

Justice Frankfurter's opinion held the state legislatures competent to determine matters of educational policy. It further held that the compulsory flag-salute was not protected by the First Amendment. The question of the flag-salute ultimately was one of adjustment between the power of government and the constitutional rights of the citizens. Frankfurter's decision resolved the question in favor of the state. The flag-salute did not touch the First Amendment. In effect Frankfurter's reasoning left the "secular regulation" rule unimpaired. However, the state appeared to be in no desperate or critical situation that could only be solved by compelling school children to salute the flag in what was for them a ceremony in violation of religious conscience. It would appear somewhat incongruous that a cohesive sentiment so essential to national unity could be achieved by compulsory methods that violated one's religious conscience.

Mr. Justice Stone was the sole dissenter. He held that the flag-salute requirement was unique in that it sought to coerce a child to express a sentiment which violated his religious conscience. Stone's opinion centered entirely on the First Amendment. The First Amendment protected both freedom of religion and freedom of thought—two concepts basic to the flag-salute issue. While admitting that religious liberty was not absolute, Stone regarded freedom of thought as absolute. He could not approve compulsory public affirmations which

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[45]Ibid., 599-600.

were contrary to one's religious conscience. National unity might be achieved by means of the compulsory salute but there were other ways of achieving the objective. Failure to salute did not deprive the government of any interest or function which it was entitled to maintain. The Court ought not to refrain from reviewing the legislative judgment as to the policy of the law where religious liberty as guaranteed by the Bill of Rights was at stake. The interest of the state in maintaining discipline in the public schools did not justify the compulsion imposed by the school regulation.[46]

The Gobitis decision upheld only the expulsion of non-saluters without any express indorsement of attempts at further punishment of expellees or their parents. The Witnesses and their allies seemed definitely and finally to have lost their long fight; this, the reaction to the Gobitis decision was unfavorable in many periodicals. The Christian Century was generally sympathetic toward the Witnesses and reacted strongly and adversely to the Gobitis decision. It attacked the necessity or wisdom of a compulsory flag-salute. Saluting the flag was merely an arbitrary piece of ritual which was one way of expressing and teaching loyalty. Willingness to salute the flag was no criterion of loyalty.[47] The New Republic attacked the wisdom of the compulsory salute. It held that the government was in no desperate or critical situation that could be solved only by the compulsory salute. There were other and better ways to teach loyalty and

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[46]Ibid., 601-607.

[47]"The Flag Salute Case," Christian Century, LVII (June 19, 1940), 791.

patriotism.[48] The Catholic Education Review implied that Justice Frankfurter had broken sharply with judicial tradition by failing to pass on an educational matter of a state legislature. This the Court had done in the earlier cases of Meyer v. Nebraska and Pierce v. Society of Sisters.[49] If the trend continued of the various legislatures determining educational policies irrespective of the religious tenets of various denominations, the legal position of churches in the United States would no longer be founded upon faith and reason, but upon the effectiveness of their legislative lobbies.[50] Time magazine attributed much of the unrest and hysteria in the country to the Gobitis decision.[51]

Regardless of how popular or unpopular the Gobitis decision was, it added strength to the decision of the school boards that made the flag-salute a condition for attending the public schools.

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[48]"Frankfurter v. Stone," The New Republic, CII (June 24, 1940), 843.

[49]James Joseph Kearney, "Supreme Court Abdicates as Nation's School Board," Catholic Educational Review, XXXVIII (October, 1940), 457-460.

[50]Ibid.

[51]"Radicals' Fifth Column," Time, XXXV (June 10, 1940), 22.

CHAPTER IV

THE SMITH CASE, THE SETTING

Kansas Constitution and Statutes

When the Kansas Constitution became effective, January 29, 1861, no federal constitutional provisions on freedom of religious belief were applicable to the new state. The first eight amendments of the constitution, dealing with personal rights, were held by the Supreme Court to be applicable only to Congress and other departments of the Federal Government.[1] In 1940 the Supreme Court held in Cantwell v. Connecticut that the First Amendment was applicable to state laws and their enforcement.[2] However, on the subject of religious freedom, the Kansas Bill of Rights was more explicit than that of the federal constitution. The Kansas Bill of Rights stated that

> The right to worship God according to the dictates of conscience shall never be infringed . . . nor shall any control of or interference with the rights of conscience be permitted.

The records of the Convention proceedingsof July 18, 1859, show virtually no disagreement on the adoption of the religious liberty clause. The original religious liberty clause, however, initially included an exception which was ultimately rejected:

> The liberty of conscience hereby secured shall not be so

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[1] Barron v. Baltimore, 7 Pet. 243 (1833).

[2] Cantwell v. Connecticut, 310 U.S. 296 (1940).

> construed as to excuse acts of licenteousness or to justify practices inconsistent with the peace or safety of the state.[3]

The Kansas flag-salute statute adopted in 1907 was virtually identical with the first such law passed in 1898 in the state of New York. The statute authorized the state superintendent of public instruction to prepare a program that provided for a salute to the flag at the opening of each school day.[4] On September 13, 1940, J. S. Parker, attorney general of Kansas, suggested that the district school boards suspend any non-saluting student for a period not to exceed sixty days. Only after this sixty day period should the state's truancy laws be enforced against such non-saluting students.[5]

The flag-salute statute prescribed no penalties against either the teacher or student for non-compliance. The statute clearly defined the manner in which the salute was to be given. In accordance with the 1907 statute the state superintendent of public instruction prepared a "Manual of Patriotic Instruction" containing 287 pages.[6] On page seventeen of the manual it gave the flag-salute procedure

SALUTE WHEN GIVING THE PLEDGE

> In pledging allegiance to the flag of the United States of America, the approved practice in schools, which is suitable also for civilian adults, is as follows:
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> Standing with the right hand over the heart, all repeat together the following pledge:

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[3]Kansas Convention Proceedings, 1859, 287. Emphasis supplied.

[4]Kansas Session Laws, 1907, Chapter 319, 492-493.

[5]State of Kansas v. Smith, "District Court Transcript," No. 4060, December 16, 1941, 79-80. Hereafter cited as "District Court Transcript."

[6]State of Kansas v. Smith, 155 Kan. 588, 590 (1942).

> "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands: One Nation, indivisible, with liberty and justice for all.
>
> At the words 'to the flag,' the right hand is extended, palm upward, toward the flag and this position is held until the end, when the hand, after the words 'justice for all,' drops to the side.[7]

The specific objection of the Witnesses was not the honor or respect displayed to the flag in the above procedure, but the manner prescribed constituted idolatry which for them would incur a condemnation by God.[8]

Kansas Flag-Salute Incidents Prior To 1941

The flag-salute issue in Kansas varied from accommodation to expulsion and prosecution. It appeared that no real legal attempt to expell non-saluting students was made prior to the Gobitis decision of June 3, 1940. The Smith case, decided by the Kansas Supreme Court in July of 1942, was the only Witness attempt to achieve an exemption from the compulsory flag-salute ceremony through the courts in Kansas.

Kansas had developed a record of compromising religious objectors to compulsory educational practices that conflicted with religious tenets. As early as 1904, a student was excused from attending an academic exercise which included a reading of the Twenty-First Psalm. He was permitted to enter the classroom fifteen minutes after the regular hour.[9]

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[7] Ibid.

[8] Rutherford, God and State, 28.

[9] J.B. Billard v. The Board of Education of the City of Topeka, 69 Kan. 55 (1904).

Kansas Witnesses, like those in other states, began their objection to the compulsory flag-salute ceremony shortly after "Judge" Joseph Rutherford's radio broadcast of 1935 prohibiting Jehovah's Witnesses from giving the salute under pain of risking eternal damnation. An article on freedom of conscience in a Witness publication of 1936 referred briefly to a Kansas situation in which a young junior high school girl was permitted to remain silent during the flag-salute ceremony.[10]

Mrs. Mildred Nagle of Holliday, Kansas, requested that the local school authorities excuse her two daughters from the flag-salute ceremony for religious reasons.[11] The matter was resolved by referring the issue to the state superintendent of schools who ruled that all children in the public schools must salute the flag when called upon by their teachers or some other competent school official.[12] Some schools adopted the policy of having the objecting students stand in a respectful silence during the flag-salute ceremony. This was the policy at the West Junior High School, Parsons, Kansas, The George Washington School, Parsons, Kansas, and in the Baxter Springs area prior to 1940.[13]

Kansas Truancy Laws

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[10]"Conscience and Freedom," Golden Age, XVII (August, 1936), 307.

[11]Kansas City Star, September 8, 1938, 9.

[12]The Tribune, (Great Bend, Kansas,) September 13, 1938, 3. No record reveals what further action, if any, was taken in this case.

[13]Interview with the principals of these schools, August 15, 1967. Most, if not all, of them were teachers in the school systems around 1940.

The truancy laws required that every parent, guardian or other person having control or charge of any child between the ages of seven and sixteen have such child attend continuously a public school or a private denominational or parochial school taught by a competent instructor for such a period of time as the public school was in session.[14]

The duties of the truant officer were clearly outlined in the 1935 statute. Upon learning of a truancy for a period of two or more consecutive days, the truant officer was to give verbal or written notice to parent or guardian to return the truant child to school the following day. If the truancy notice was ignored, the truant officer could make a complaint in the name of the state of Kansas and court proceedings could be instigated against the offenders.[15]

Lawton, Kansas, and the Smith Family

The small community of Lawton was located fifteen miles east of Columbus, Kansas, the county seat of Cherokee County in the extreme south-eastern section of the state, a mile from the Missouri border. Residents of Lawton were evenly divided between farmers and employees of a nearby smelting plant in Waco, Missouri. The local grade school in the fall of 1941 had some twenty-eight pupils in a small two-room school house employing the services of two teachers, Miss Ruth Turill and Miss Suzie Stone.[16] Mr. Willard

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[14] Kansas General Statutes, 1935, 72-4801.

[15] Ibid., 72-4802.

[16] Claude H. Nichols, County Superintendent of Public Instruction, Cherokee County, letter to author, August 21, 1967.

Canfield, treasurer of the Lawton school district, regarded the Lawton area as fairly conservative and "patriotic" in its outlook on civil affairs. Canfield felt that this was due in part to the many veterans from World War I living in the area. The community had received government aid through part of the depression in the form of surplus food commodities. The Smith family accepted food commodities from the government without any objections. In fact, at times Mrs. Smith wanted to exchange her portion of government butter for other commodities in the local grocery. This added to the "unpatriotic" image of their refusal to salute the flag. If one could receive governmental assistance, one should at least honor that government's flag was a prevalent Cherokee County attitude.[17]

Three members comprised the Lawton school board. George Merrick, resident of Lawton for seventy-three years in 1941, had been a board member of the Lawton school district for over thirty years. He testified that he had known the Smith family for a number of years prior to the flag-salute issue.[18] Clifford McFerron, a mild, soft-spoken man, had held the office of clerk of the school district for nearly three years in 1941.[19] The third member of the school board, Willard Canfield, was an outspoken man, a staunch believer in prayers in public schools and

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[17]Interview with Mr. and Mrs. Willard Canfield, August 15, 1967.

[18]"District Court Transcript," 23.

[19]Ibid., 29, 29 [sic] and personal interview with author August 15, 1967. The clerk of the District Court numbered two pages, "29." McFerron information was found on both pages.

patriotic exercises, and a veteran of World War I. Canfield was the treasurer for the school district in 1941. No record ever existed of any school regulation requiring the salute to the flag in the Lawton School.[20] It had become an informal "custom"—"the thing to do"—"everyone did it"—"no one had ever done otherwise or objected."[21]

James Alfred "Pete" Smith had been well-known in the town of Lawton and had attended the Lawton school as a boy. He had been born and raised in the near-by towns of Carl Junction and Joplin.[22] His family, however, had been residents of Lawton only three years before the flag-salute issue arose.[23] The Smiths were the only Jehovah's Witnesses the town had ever known.[24] Smith converted to the Witness sect at the time of his marriage to his wife, Inez. Although Smith professed Witness membership, he was not known to be an energetic proselytizer nor an extensive reader of Sacred Scripture. Most of that activity he left to his wife and children.[25] When cross-examined in the District Court hearing, Smith exhibited little knowledge of Scripture.[26] Lawton residents, all long time acquaintances of Smith, found it difficult to accept the new ministerial role he acquired when he embraced the Witness faith. Groups of Lawton school

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[20]Kansas v. Smith, "Abstract of District Court Hearing of Appellants," 11. Hereafter cited as "Abstract of District Court Hearing of Appellants."

[21]Clifford McFerron, interview with author, August 15, 1967.

[22]"District Court Transcript," 70.

[23]Ibid., 50.

[24]Clifford McFerron, interview with author, August 15, 1967.

[25]Ruth Turill, interview with author, October 14, 1967.

[26]"District Court Transcript," 69.

children frequented the Smith home late in the evening to request Smith to officiate at mock wedding ceremonies.[27] Incidents of this kind subtracted from the credibility of the Smith position among his local townsfolk. In addition, Smith admitted he had saluted the flag "occasionally" when he attended the Lawton school in the primary grades.[28]

The two children involved in the litigation both had an outstanding scholastic record of straight "A's." Barbara Smith, age nine, was beginning her fourth year in the Lawton school and Artye Lee Smith, age eight, was beginning her third. Both girls had received an "A" in conduct every year they attended the Lawton school.[29] During the entire legal proceedings no charge of insubordination was every made against the two children. The only rule they never complied with was that requiring the flag-salute.[30]

Ruth Turill, principal of the Lawton school, never made an issue of the flag-salute prior to 1941 and did not recall whether the Smith children had saluted or not. The typical opening exercises at most of the Lawton area rural schools included

(1) The Flag-Salute
(2) The Lord's Prayer
(3) A Patriotic Hymn.[31]

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[27]Ruth Turill, interview with author, October 14, 1967.

[28]"District Court Transcript," 70.

[29]Nichols' letter, August 21, 1967.

[30]"Abstract of District Court Hearing of Appellants," 6, 9, 10, 12.

[31]Columbus Daily Advocate (Columbus, Kansas,) December 29, 1941, 1. Also see "District Court Transcript," 5. Many social and civic affairs followed the same ritual.

Several school districts had been confronted with non-saluting incidents before the 1941 fall term. The question of "what to do with them" was a topic discussed at the pre-school teachers' institute.[32] The Smiths anticipated some difficulties over the flag-salute and talked with Miss Turill about the issue on the opening day of school. The Lawton school board had met informally before the opening of school and authorized the Lawton teachers to exclude any child who refused to salute. The board further prohibited the readmittance of any children expelled until they complied with the compulsory flag-salute regulation. In spite of this regulation, the Smith children were permitted to attend the entire first week of school without saluting, but were expelled on Monday of the second week.[33]

The Smiths requested and received a special meeting of the school board to explain their position and sought some accommodation, but the board was unwilling to compromise or make any accommodation. L. R. Mulliken, deputy county attorney, had advised the Lawton school board that the statutes of the state of Kansas penalized the county attorney, school directors and a number of other school officials one hundred dollars if they failed to enforce the law regarding the flag-salute.[34] The penalty must have been a very loose interpretation and application of the penalty for non-enforcement of Kansas G.S. (1935), 73-705—73-710, as no specific General Statute was in effect

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[32]Ruth Turill, interview with author, October 14, 1967.

[33]"District Court Transcript," 6.

[34]Ibid., 34. Mr. Canfield, treasurer of the school district, in a personal interview, claimed that this had a strong effect on the board.

in 1941 which authorized such a penalty.[35]

The testimony of the surviving members of the Lawton school board and Ruth Turill indicated that had the Lawton school district been free of outside duress, some accommodation would have been made. All the available evidence and testimony disclosed that the County Superintendent, Herbert Derfelt, demanded a uniform policy throughout Cherokee County.[36] Mrs. Inez Smith, in a letter to Clifford McFerron, June 29, 1943, shortly after the Barnette decision of the United States Supreme Court, wrote that "When an official one step above you told you such and such was the law you believed him."[37]

Miss Turill received a letter of advice, as did any other teacher who requested such, from the County Superintendent. Miss Turill's request was dated September 2, 1941—the second day of the school term. The school board had passed a verbal regulation prior to the first day of school. The board had put nothing in writing. Miss Turill wanted something definite in writing to enforce the flag-salute. This would remove the personal element from the matter as Mrs. Smith and Ruth Turill had been friends. It was this letter Ruth Turill gave Mrs. Smith to read on Monday of the second week of school.[38] The letter stated that a daily salute was required by law and that school boards were authorized to discipline any child refusing to give the salute. Parents would be subject to prosecution

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[35]State of Kansas v. Smith, 155 Kan. 596.

[36]Ruth Turill, interview with author, October 14, 1967. Also, Claude H. Nichols, interview with author, October 14, 1967.

[37]Letter of Mrs. Smith to Mr. C. E. McFerron, June 29, 1943. A copy of this letter is in the appendix.

[38]"District Court Transcript," 79. A copy of this letter is in the Appendix, copied from "District Court Transcript," 79-80.

if the refusal was persistent. With the enforcement of the flag-salute regulation, the Smith children never again attended the Lawton school, although they made several attempts.[39]

The Private Tutor

Subsequent to the September 18th truancy notice served by Floyd McElroy, truant officer for Cherokee County, the Smith employed for their children a private tutor from Carthage, Missouri. This arrangement continued for nearly three weeks. The elderly R. E. Holman held a life-time teaching certificate in three states, a M.A., a B.F. and an A.B.[40] He sympathized with the Smiths' dilemma and received little in the form of monetary remuneration beyond board and room. Upon investigation, the school board discovered that Holman did not possess a Kansas Teachers Certificate nor had he made application for one.[41]

C. J. Evans, attorney for Appellants, defended the private school arrangement before the Kansas Supreme Court and accused the school board of unjustly terminating the arrangement.[42] Evans went on to point out that Kansas compulsory school attendance laws were too vague to serve as a basis for a criminal offense. The statute did not clearly state an offense to apprise the accused of what action he must take. The law in question also provided no definition

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[39] Ibid., 6,7,54,55.

[40] "District Court Transcript," 52-53.

[41] "Abstract of Appellants' District Court Hearing," 17.

[42] State of Kansas v. Smith, "Appellant's Reply Brief," 12, 13, 17. Hereafter cited as "Appellant's Reply Brief."

of "private school," or what constituted a "competent instructor." Evans further contended that Kansas certification statutes applied only to the public schools. The state had been unreasonable in its truancy notice because the Smiths did not have sufficient time to procure and contract a "competent" instructor with a Kansas certificate.

The Kansas State Department of Public Instruction, however, had established a procedure for dealing with such circumstances.[43] The truancy laws of Kansas required that the instructor in a public, private, denominational or parochial school be competent and also that the instruction be given in the English language only.[44] The state determined the meaning of "competency" with its certification laws.[45] A person would have been "competent" if he met all certification requirements. Schools, to be properly accredited by the state, must employ certified teachers. Private and parochial schools had to meet the same standards if their graduates were to be admitted to public schools and colleges.[46] The compulsory school attendance law included no provision for private tutoring. School boards were willing to accept private tutoring for a child who was so handicapped that he could not go to school, providing he was tutored by a certified teacher and otherwise complied with local school requirements.[47] The

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[43]David W. Kester, School Attorney, State Department of Public Instruction, letter to author, July 12, 1967.

[44]Kansas General Statutes, 1935, 72-4801.

[45]David W. Kester, letter to author, July 12, 1967.

[46]Ibid.

[47]Ibid.

state of Kansas, like all other states, had made provisions for the certification of out-of-state teachers.[48] However, this would not have given the Smiths the right to employ a private tutor because the law made no provision for such an arrangement.

The Lawton school board, on the advice of the county superintendent, proceeded properly in terminating the private tutor arrangement. There was no affirmative action the school board was required to take in order to obtain proper certification for the private tutor. This was an action that Mr. Holman himself should have undertaken. Kansas had regulations for the certification of teachers with out-of-state-certificates. Mr. Holman never followed these. Any teacher, regardless of the number and kind of his degrees, could not accept money for teaching in Kansas if he was not properly certified.[49] However, even had Mr. Holman been duly certified by the state of Kansas, he was not contacted until after September 18, 1941. By that time the truancy notice had been given to the parents. Their offense under a strict interpretation of the state's truancy laws was already complete and consequently the private tutor arrangement had no legal bearing on the case other than that it showed the sincerity and determination of the Smiths to obtain an education for their children.

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[48]Kansas General Statutes, 1935, 72-1343. This section outlined the procedure Mr. Holman should have followed to secure Kansas certification.

[49]"District Court Transcript," 63.

The Columbus and Parsons Arrangement

With the discontinuance of the private tutor arrangement, the Smiths sent their children to the public school in Columbus, Kansas, approximately sixteen miles from Lawton. Although the state law required the State Superintendent of Schools to make provision for a daily salute to the flag in the public schools, it indicated no penalty for any non-compliance. It remained for the various school boards of the state to decide on what kind of penalty, if any, would be inflicted on those who refused the salute. While the Gobitis decision upheld the constitutionality of the salute ceremony, school boards were left with some discretionary power in dealing with the non-saluter. No expulsionary rule had been passed by the Columbus school board prior to 1941. It appeared that no regulation existed in the various surrounding schools unless Witness children were enrolled. The Smiths boarded their two children with a sympathetic Witness family. The two children were to be returned home for week-ends. The children started at the Columbus school on November 4, 1941, but were subsequently expelled the following day for refusing to give the compulsory flag-salute.[50] The Columbus school board had met that evening and passed the familar flag-salute requirement for admission. The children had actually been in the Columbus school only one day.[51] No infraction of any other rule was reported by the Columbus school board. The only reason for the expulsion was the failure to give the standard salute to the flag.

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[50] Ibid., 53.

[51] Ibid.

The children returned to the Lawton school each morning thereafter, but were sent home for refusing to give the flag-salute. It was obvious that the parents wanted their children in school and that their only objection to the school program was the compulsory flag-salute regulation. It was also apparent that the various school boards had in effect adopted the "secular regulation" rule in regard to the flag-salute. The school boards did not intend to persecute the Witnesses for their religious beliefs. They simply viewed the flag-salute ceremony as a patriotic exercise devoid of any religious significance.

Mrs. Inez Smith contacted Miss Willie Belle Jones, principal of the George Washington School, Parson, Kansas. This school was located approximately forty miles west of Lawton.[52] The school was unique in the Parsons community and also in the area because the school board of that school had not passed any expulsionary regulation for those who refused to salute the flag. The George Washington School had a policy of tolerance toward the plight of Witness children.[53] The Smith children boarded at the home of another sympathetic Witness family, Mrs. Bethyl Harris. Mrs. Harris had a son who had been expelled from the McKinley school in Parsons for the identical reason of refusing to give the flag-salute. The Smiths paid ten dollars a week for the board and room of their children at the Harris home.[54]

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[52]This arrangement was made secretly by the Smiths to prevent any further inconvenience while they waited for the District Court hearing. Cf. "District Court Transcript," 65 and Mrs. Inez Smith, letter to author, September 18, 1967. Copy of letter in Appendix.

[53]Miss Irene Knarr, instructor of the Smith children in 1941, interview with author, August 15, 1967.

[54]Mrs. Bethyl Harris, interview with author, August 15, 1967.

Mr. and Mrs. A. M. Johnson, parents of Mrs. Bethyl Harris, later testified at the District Court trial to the moral integrity and good conduct of the Smith children in Parsons.

Both children were admitted to the George Washington School on November 19, 1941.[55] Miss Irene Knarr received explicit instructions from the principal not to make an issue of the flag-salute. They were required to stand in respectful silence during the salute, but were not required to say anything. Provision was also made for the Smith children to be excused from all school activities which violated their religious beliefs such as the traditional Christmas gift exchange and the valentine-exchange. No evidence pointed to a decrease in the patriotic feelings of the other students in the room. No adverse circumstances were experienced by the school authorities. By a strange coincidence, the Smith children received more Christmas gifts and valentines than any other student in the room. Miss Knarr delivered them personally to the Smith children who were excused the day the exchanges were made.[56]

The school records indicated that the Smith children remained at the George Washington School until January 12, 1942, when they voluntarily withdrew because the Smith family moved to Kansas City, Missouri. No grades were recorded for the children because they did not complete a full grading period. No adverse comments were entered on their record.[57]

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[55]George L. Dove, present principal of the George Washington School, Parsons, Kansas, interview with author, August 15, 1967.

[56]Miss Irene Knarr, interview with author, August 15, 1967.

[57]George L. Dove, interview, August 15, 1967.

The Griggsby Case

A similar flag-salute case arose during the same 1941 school term in Cherokee County. Barbara and Patsy Griggsby, age sixteen and twelve respectively, were expelled from the Charter Oak School located four and one-half miles south of Galena, Kansas. The details and circumstances were identical to those of the Smith case. Walter Adams, director of the Charter Oak school board, required all school children to salute the flag.[58] There had been an informal meeting of the board with no written record of the flag-salute requirement with its expulsionary provision. Although the school term at the Charter Oak school began on August 25th, the Griggsby children did not actually start school until September 1st because of some confusion on which day the school term was to begin.[59] The children attended the Charter Oak school for six complete days but were formally expelled September 9th. Miss Lois Alleger, principal of the school, requested specific instructions from the county superintendent, Herbert A. Derfelt, and received the identical letter as Ruth Turill.[60] Once the children were expelled from the Charter Oak school, they did not return each morning as did the Smith children.

Mr. and Mrs. Olie H. Griggsby received a truancy notice on September 22, 1941.[61] On September 23rd the Griggsbys sent their

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[58]"Abstract of District Court Hearing of Appellants," 30.

[59]Ibid., 38.

[60]Ibid., 20.

[61]By coincidence, both the Truancy Notice served on the Smiths and the Griggsbys was lost by the respective truant officers before the District Court Trial.

children to the Smith home in Lawton to attend classes with the private tutor, R. E. Holman. They also petitioned the State Superintendent of Public Instruction to approve the private tutor arrangement, but the Griggsbys were convicted of truancy before the State Superintendent responded. The county school authorities refused to recognize the private tutor arrangement because Mr. Holman lacked a Kansas teachers certificate.

The Griggsbys then sent their children to the West Side School in the neighboring Tennessee Prairie District. This they did at the suggestion of Judge David Graves, Judge of the Juvenile Court, before their hearing in the Juvenile Court.[62] The school at first pleaded lack of desks and space, but when the Griggsbys offered to buy desks for their children and pay tuition, the West Side school board passed the compulsory flag-salute regulation as a requirement for admission. The children were then enrolled in the public school at Columbus, but were subsequently expelled with the Smith children because of their failure to salute the flag.[63] On November 19, 1941, the Griggsby children were enrolled at the George Washington School in Parsons, Kansas. Despite these various attempts to keep their children in school, the Smiths and Griggsbys were charged with a violation of the state's truancy laws because their children had been out of school for two consecutive days.

The Griggsby and Smith cases were consolidated in their appeal to the Supreme Court of Kansas. Because of their similarity,

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[62]"Abstract of District Court Hearing of Appellants," 37.

[63]Ibid., 36.

the decision of one would necessarily resolve the other. For the purpose of argument, however, the facts of the Smith case were used by Harry L. Porter, County Attorney, Cherokee County, Kansas and his Deputy County Attorney, C. E. Shouse in their Appellee's Brief to the Kansas Supreme Court.[64]

The genesis of the Kansas flag-salute controversy in 1941 stemmed from the sincere conviction that the compulsory salute was a violation of God's commandment and thereby constituted idolatry. The sincerity of the Smiths' or Griggsbys' religious convictions was never contested. All who knew the two Witness families offered ample evidence of their sincere religious and moral integrity. On the other hand, the school officials never regarded the compulsory flag-salute as anything more than a patriotic exercise. On September 29, 1941, the Smiths entered the litigation aspect of the flag-salute controversy confident that some adjustment or accommodation would be made for their religious convictions.

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[64] State of Kansas v. Smith, "Appellee's Brief," 6-7.

CHAPTER V

THE SMITH CASE: LITIGATION

The Juvenile Court

In 1941 the State of Kansas had no precedent case dealing with the flag-salute. Even before the beginning of the initial legal proceedings, the Smiths were determined to appeal their cause to the Kansas Supreme Court. Apparently both Judge Graves of the Juvenile Court and Judge Bowersock of the District Court agreed that only the Kansas Supreme Court could adequately determine the constitutional issue of religious freedom involved in the litigation. In her letter of September 18, 1967, Mrs. Smith wrote:

> From the first, Probate Judge Graves, Judge Bowersock and Mr. Mooneyham agreed that it would have to go to the Supreme Court for justice to be decreed.[1]

Ruth Turill and Clifford McFerron also related substantially the same idea—"that was the thinking in the whole matter anyway, that the whole matter would go to the Supreme Court."[2] The character and ability of the Smith children added to the desirability of appealing the case to the Supreme Court. The children were intelligent and well-behaved; the Smith family was well-known and in general quite respected in the community. Added to this the

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[1] Mrs. Inez Smith, letter to author, September 18, 1967.

[2] Clifford McFerron, interview with author, August 15, 1967.

school board also was not composed of "extremists or fanatics."[3] All these facts were indicative of strong potential for a precedent case on the flag-salute issue.

On September 29, 194., at 9:00 A.M., Mr. and Mrs. J. Alfred Smith were arraigned in the Juvenile Court in Columbus, Kansas.[4] The Smiths were not represented by an attorney: L. R. Mulliken, the assistant county attorney, represented the state, and there was no jury. Judge David C. Graves had previously shown some concern for the Witnesses' dilemma by suggesting that the Griggsby parents put their children in a neighboring school district which was, hopefully, somewhat more tolerant.

L. R. Mulliken charged the Smiths with alleged violations of the truancy laws of the state of Kansas. Mulliken based his principal argument on the truancy report of the Cherokee County truant officer, Floyd McElroy. McElroy had given the Smiths due notice on September 18th that their children had been illegally out of school since September 8th. The September 18th truancy notice required that the Smiths return their children to school immediately. McElroy's report simply stated that the Smiths had not complied with his order.[5] On September 24th, McElroy filed an official complaint in the Probate Court that the Smith children had been illegally absent from school for two consecutive days. Warrants were issued on September 27th for the arrest of the Smiths. The state's argument was based on the

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[3] Ruth Turill, interview with author, October 14, 1967. Miss Turill had nothing but the highest praise for the Lawton School Board.

[4] State of Kansas v. Smith, "Juvenile Court Transcript," No. 272, September 29, 1941, 1. Hereafter cited as "Juvenile Court Transcript.

[5] Ibid., 1-2.

truancy report and a strict application of the Kansas Truancy Laws. L. R. Mulliken never raised the constitutional issue of religious freedom. The flag-salute was nothing more than a patriotic exercise, a school rule with no religious significance. Accordingly, the Smith children were illegally absent from school and therefore truant.

The Smiths argued two points of view. They contended that their conduct had not violated the state's truancy laws. In addition they argued that their religious conscience forbade them to participate in the compulsory flag-salute. They wanted their children in school; in fact the Smith children had been sent to the Lawton school every morning but the school sent them home each day for not saluting the flag. They also had tried to maintain a private tutor arrangement but with no success. On the basis of this evidence they argued that they were not guilty of violating the state's truancy laws and requested an accommodation.[6]

The decision of the Juvenile Court rested solely on a narrow interpretation of the truancy laws. The evidence indicated that the Smith children had been absent from school for more than two consecutive days and therefore were guilty as charged. The state viewed the entire matter merely as a matter of law which the state had the legitimate power to exact from its citizens. Any other interpretation would challenge the authority of the state to enact legitimate educational requirements. It was evident that the state did not regard the flag-salute as a religious ceremony. Consequently, the Smiths

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[6]Ibid.

were fined $10.00 and costs amounting to $10.50.[7]

The Smiths requested and received an appeal to the District Court of Cherokee, Kansas, and bond was set at $50.00.

District Court: Trial and Decision

Following the appeal from the Juvenile Court hearing of September 29th, the Smith case entered the District Court sitting in Columbus, Kansas. Trial was held on December 16, 1941. The state of Kansas was again represented by L. R. Mulliken, Deputy County Attorney, of Columbus. The defendants engaged the services of a sympathetic lawyer from nearby Carthage, Missouri, R. A. Mooneyham. The Honorable Vernor J. Bowersock was the presiding judge.[8]

It was unfortunate for the Smiths that the District Court hearing occured nine days after the Japanese attack on Pearl Harbor. This incident naturally stirred patriotic feelings and provoked antagonism against whatever appeared to be "unpatriotic." The Columbus Daily Advocate made copious allusions to the American casualties at Pearl Harbor and now their sacrifices were symbolized in the flag itself. Not to salute the flag was to mock the sacrifices of the American soldiers.[9]

The Smiths' position was further jeopardized in the District Court hearing by the presence of several Jehovah's Witnesses who apparently exhibited an air of disgust and contemptuously viewed the whole proceedings as another attempt on the part of Satan to

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[7]Ibid., 2.

[8]"District Court Transcript," 1.

[9]Columbus (Kansas) Daily Advocate, December 17, 1941, 1.

test their covenant of righteousness with Jehovah.[10] In addition, little effort was made to really understand the Smiths' religious position on the flag-salute. Jehovah's Witnesses were a small sect in 1941.[11] Because of their size and "unusual" beliefs, it had become customary for some people to minimize the significance and importance of the flag-salute cases.[12] This was evident in the Smith case. The Lawton school board refused the Witness literature on the flag-salute. Herbert Derfelt, County Superintendent of Schools, when asked if he knew the religious aspect of the salute merely stated, "I didn't have time and wasn't interested in that phase of the case."[13] Judge Bowersock himself admitted to prejudice in the Witness cases; "They came with their Bibles and before long you got tired of the whole thing."[14]

The defendants waived their right to a trial by jury. The court had subpoened for testimony all the members of the Lawton school board, the principal of the Lawton school, the truant officer and the county superintendent of schools. The central question in the District Court hearing centered on the provisions of the state's truancy laws. The state merely held the matter to be a question of law. Had the Smiths violated the truancy laws? This could be de-

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[10]Ruth Turill, interview with author, October 14, 1967.

[11]The 1941 Yearbook of Jehovah's Witnesses published by the Watchtower Bible and Tract Society and the International Bible Students Association, listed some 90,674 members in the United States.

[12]"A Crisis in the Supreme Court," Christian Century, LX, 38-39.

[13]"District Court Transcript," 41.

[14]Vernor J. Bowersock, interview with author, October 14, 1967.

termined simply by the evidence. Mooneyham, on the other hand, argued on behalf of the defendants that the state could not interfere with the defendants' religious beliefs. He raised two questions. The Smiths had not violated the Kansas truancy laws and that a statute which deprived one of his religious liberty was unconstitutional. Mooneyham pointed out that the Smiths had shown an honest effort and made genuine sacrifices to keep their children in school, and were sincerely religious people. They had given their children the religious training they thought proper. Despite this, the Smiths were charged with willfully refusing to comply with the law and keeping their children out of school. The Smiths' conduct, therefore, did not fall under the truancy laws. Whether the truancy statutes were constitutional or not really was not the principal issue. Mooneyham contended that the Smiths had not violated the truancy law. The state's truancy statutes simply did not apply to the circumstances of the Smith case. If the state pursued the matter and charged the Smiths with truancy violations, then such statutes were unconstitutional because they deprived one of his religious liberty. To the Witnesses the flag-salute was a matter of belief and a religious practice. It contained nothing that endangered the state nor did the state prove a need for the compulsory salute that would override the Witnesses' request for exemption on religious grounds. "These defendants here, have not violated the law whether it is constitutional or not."[15]

Webster defines truant as "an idle vagrant; one who stays

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[15]"District Court Transcript," 57-58.

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Webster defines truant as "an idle vagrant; one who stays

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[15]"District Court Transcript," 57-58.

away from business or shirks duty, especially one who stays out of school without permission." Webster also gives "vagabond" as a proper synonym for truant.[16] Consensus and tradition had associated the idea of "playing hookey" with the meaning of truancy. Prior to the Smith litigation, a Wisconsin state court established the "hookey" connotation for the meaning of truancy.[17] Mooneyham argued from the "hookey" point of view. The parents had not been careless or remiss in their parental duties. They wanted their children in school; they sent their children to school; their children had been model and intelligent students. They had not been disloyal or unpatriotic; they were willing to stand at attention with a respectful silence during the flag-salute ceremonies. Their religious beliefs would not permit them to comply with a particular compulsory school regulation. The school, not the parents, kept the children from attending school. They had actually been in the Lawton classroom each morning for nearly two weeks in succession but were sent home by the principal just before the flag-salute exercises.[18]

According to the truancy notice served on the Smiths by the truant officer, September 18, 1941, the defendants were charged with truancy violations starting on September 8, 1941. However, on the morning of September 8th, Mrs. Smith was told by the principal of the Lawton school that if she sent the children to school that morning

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[16]Webster's Third International Dictionary, 2454.

[17]In re Ally, 182 N.W. 360, 362, 174 Wis. 85, cited in "Appellants' Brief," 9.

[18]"District Court Transcript," 68.

they would be required to salute the flag. If they refused to salute, as principal she was authorized to send the children home. Under those circumstances was she obligated to send them? The prosecution's sole charge was that she did not send them "back to that public school district."[19] The letter from the county superintendent addressed to the Lawton principal quoted the attorney general of Kansas, J. S. Parker, in his opinion of September 13, 1940, suggesting that non-saluting children be suspended from the school for a fixed period of time not to exceed sixty days. At the end of that time if they continued to refuse the salute, only then should the truant officer proceed in the manner prescribed by law.[20] No formal rule of suspension for sixty days was passed by the Lawton school board. Had such a procedure been followed, it would have given the Smiths ample time to enroll their children in a public school elsewhere with an acceptable accommodation on the flag-salute. The Smiths were not pursuing the flag-salute issue for any notoriety that might be derived from such a pursuit. They were sincere religious people whose modest income prohibited any ostentatious litigation.

Mr and Mrs. Smith were charged with a criminal offense. Such an offense requires proof of an intention to commit a wrong against society. No such intention of deliberately keeping their children out of school was ever proven in the Smith case. The flag-salute position was part of a religious belief and was not communicated to

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[19] State of Kansas v. Smith, "Appellant's Reply Brief," 12.

[20] "District Court Transcript," 79-80. See Appendix for full text of letter. Also see Kansas General Statutes, 1935, 72-1029.

the children as a means of "keeping them out of school."[21] The children themselves exhibited every desire to remain in school and wept profusely when refused admittance.[22] The private tutor, Columbus and Parsons arrangements were further proof of the sincereity of the parents in attempting to give their children an education. It appeared illogical, therefore, that one who was kept away from school by the school itself was truant.

Several precedent cases from other states lent legal support to the Smiths' position that they had not violated the state's truancy statutes. In People ex rel Fish v. Sandstrom, the New York Court of Appeals explicitly dismissed the truancy charges against the parents on the grounds that the parents had shown ample proof of wanting to keep their child in school.[23] A similar decision was handed down in West Virginia.[24] Non-truancy decisions were reached in two other New York cases involving the same circumstances and statutes. Again there was no convincing evidence that the parents deliberately wanted to deny their children an education. Granted, decisions to the opposite had been reached in other states, but at least the Smiths were not without substantial legal precedent in support of their case.[25]

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[21] State of Kansas v. Smith, "Appellants' Brief," 8. Hereafter cited as "Appellants' Brief."

[22] Ruth Turill, interview with author, October 14, 1967.

[23] See above, Chapter II, 8.

[24] State of West Virginia v. Slaughter et al. (unreported), cited in "Appellants' Brief," 13, 14, 15.

[25] In re Jones, 175 Misc. 451; 24 N.Y.S. 2d 10, cited in "Appellants' Brief," 15-16. In re Anson Reed, 28 N.Y.S. 2d 92, cited in "Appellants' Brief," 16-17.

The Smiths made no effort to place their children in a parochical or private school. There were no existing established private schools available to which they might send their children. Columbus, Kansas had one Catholic grade school, but the Jehovah's Witnesses objected to such an arrangement on religious grounds. The financial status of the parents precluded sending the children any great distance.

Mooneyham's first argument was that the circumstances of the Smith case had not created an infraction of the state's truancy laws. He argued further that

> If they have a religious belief and they are honest in it then the State of Kansas cannot interfere with their right of this belief.[26]

The state had the right to require all that was necessary for the training of patriotism. However, the state never presented a convincing case for the compulsory salute, i.e., the necessity of overriding one's religious conscience in rendering that salute. If the compulsory flag-salute regulations interfered with the Smith's religious belief, and if the Smith children were expelled from school and their parents prosecuted as a result of their religious beliefs, then those regulations and laws were unconstitutional. When asked by the court if he was pleading not guilty to the truancy violation or whether he was challenging the constitutionality of the state's truancy laws, Mooneyham replied, "I am raising both questions, the Court please."[27] It appeared that the Smiths had no alternative but to raise both questions. Without raising the constitutional

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[26]"District Court Transcript," 57.

[27]Ibid., 58.

question, the prosecution could merely contend that the students were out of school for no valid reason. They simply refused to obey a legitimate school regulation and, as a result, the Smiths had actually kept their children out of school. Consequently, Mooneyham was forced to raise both questions.

According to the Witnesses, the flag-salute constituted a religious ceremony in which they were forbidden to participate under pain of ultimate damnation. Kansas truancy statutes were unconstitutional because they violated Section 7 of the Kansas Bill of Rights and also were in violation of Article I of the Bill of Rights of the United States Constitution which guaranteed freedom of religious belief.[28] The compulsory salute required the Witnesses to express publically a belief to which they did not subscribe. First Amendment liberties had acquired a "preferred position" connotation.[29] The preferred position doctrine held that in cases which involved First Amendment liberties, the burden of proof was upon the state to show a need to subject individual liberty to the demands of the state. Under ordinary circumstances the burden of legal proof was upon the state to show a need to subject individual liberty to the demands of the state. It became the obligation of the state to prove the constitutionality of a regulation.[30] The United States Supreme Court had prohibited a number of religious practices, such as bigamy and

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[28]"Abstract of Appellants' District Court Hearing of Appellants," 22.

[29]Kelly and Harbison, The American Constitution, 800.

[30]Ibid.

polygamy,[31] suttee,[32] thuggery and the religious belief in assassination,[33] and promiscuous sexual intercourse.[34] In all these cases specific adverse consequences of the forbidden action were made plain by general experience, or a case could be made for their evil effects. In determining the positive value of the compulsory flag-salute regulation, the court could not depend on experts to substantiate the necessary benefit society would derive from overriding the religious convictions of some of its citizens.[35] No psychological study or expert was ever introduced to clearly exhibit concrete advantages to the Witnesses and to society for compelling the salute. In fact much evidence existed illustrating the futility of the compulsory salute. Some people who willingly gave a voluntary salute found that it increased their own loyalty. The erroneous assumption that usually followed was that the compulsory salute would increase the loyalty of such "apparently" disloyal groups as the Witnesses. Witness objections to the compulsory salute were not whimsical protests of a few scattered individuals, but the ingrained belief of a specifically organized religion of citizens. As a result the Witness position was a religious matter and was insulated and protected by the First Amendment and the Kansas Constitution. It was the duty of the state to clearly

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[31] Reynolds v. United States, 145.

[32] Davis v. Beason, 133 U.S. 333 (1890).

[33] Mormon Church v. United States, 136 U.S. 1, 49 (1890).

[34] Davis v. Beason, 333 (1890).

[35] Contrast the proof of the value of vaccination described in Jacobson v. Massachusetts, 197 U.S. 11, 23-24 (1905).

demonstrate the value and need to override the Witnesses' religious convictions. Yet Mulliken argued solely from the truancy aspect.

> I think the Court please the issue in this case is whether or not Mr. and Mrs. Smith have complied with the notice that was served upon them by the truant officer to put their children in school on the day following the notice and everyday thereafter as the statutes provide.[36]

The state never raised the religious issue and therefore chose to ignore it completely. "The state isn't raising the constitutionality of the Statute. Undoubtedly defendant is."[37]

Religious opinion was a purely subjective matter. Many religious practices appeared at times to be ridiculous or without significance to members of other religions. There were in the United States in 1943 two hundred fifty-six religious sects, of which thirty-nine reported a total membership of less than five thousand.[38] It seemed logical that a variety of religious beliefs and practices were in effect. Mooneyham argued that every point.

> Instead of violating the law they are complying with the highest law, giving their children proper religion as they understand it. It is not what you believe or what I believe or the prosecution believes but as they believe. The right is guaranteed to them not by the Constitution alone, but by the Bill of Rights.[39]

The courts on the other hand were competent to judge when the public welfare was in fact jeopardized. That could be determined by analysing the right of the individual to his religious beliefs and practices, and the right of the state to protect and maintain itself. Official court

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[36]"District Court Transcript," 56.

[37]Ibid., 57.

[38]The World Almanac, 1943, 229-30.

[39]"District Court Transcript," 56.

determination of religious beliefs would border on an infringement of religious liberty and governmental interference in the prohibited area of religion.

L. R. Mulliken's concept of the Smith case centered around the evidence that the Smith children had been illegally out of school for more than two consecutive days. Ignoring the religious issue, that was all he needed to prove in order to convict the Smiths of violating the state's truancy statutes. He established this in his cross-examination of Mrs. Smith

BY MR. MULLIKEN:

Q. Now then were they in school on the 18th day of September, 1941?

A. No.

Q. Were they in school on the 19th day of September, 1941?

A. No.

Q. On the 20th?

A. No.

Q. On the 21st?

A. You are getting out of my line, I don't remember.

Q. Do you remember when you did start them to school in Columbus?

A. November 4th.

Q. And had they been in school before that?

A. Not attending any school; they had been reporting at the Lawton school but that is all.[40]

By this line of questioning, Mulliken had established the Smiths' truancy violation. Their children had been illegally out of school for more than two consecutive days and had refused to comply with the

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[40] Ibid., 65-66.

truancy notice given them on September 13, 1941 by Floyd McElroy, the Cherokee County Truant Officer.

Mooneyham moved to dismiss the case on the grounds that the information did not state facts sufficient to constitute any offense under the Kansas statutes. The complaint did not clearly inform the defendants of the nature of their offense. The Kansas truancy statutes and the compulsory flag-salute regulation were unconstitutional because they were violative of the Kansas Bill of Rights and also the Bill of Rights of the Constitution of the United States.[41] Because the Griggsby case raised the identical questions of law, it had been combined with the Smith case. They were argued jointly but were tried separately.[42]

The Columbus Daily Advocate devoted two front page columns to the District Court hearing.

"JEHOVAH WITNESS TRIAL IMPRESSES THE REPORTER AND HOW!"

The reporter viewed the flag-salute case as demonstrating a complete lack of patriotism on the part of the Smiths. Failure to salute mocked the sacrifices of America's fighting men at Pearl Harbor, Washington at Valley Forge and Lincoln at Gettysburg. The American Flag was a symbol of their sacrifices. Saluting the flag would be the very least a person could do to show his appreciation to a flag that had offered him an opportunity for the vest life in the world. The reporter viewed the Witnesses as misled in their religious beliefs. Their flag-salute position posed a threat to true patriotism. It was the reporter's hope that the Witnesses would soon learn to love the

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[41]"Abstract of District Court Hearing of Appellants," 22.

[42]"District Court Transcript," 77.

flag of the United States "before it's too late."[43]

The court took the case under adisement and on December 30, 1941, announced its judgment. The statutes were constitutional and the defendants were guilty as charged. They were fined $10.00 and costs. Although Judge Bowersock had complained bitterly about Bibles and profuse Scripture quotations, his decision appeared to have been free of prejudice and rested exclusively on matters of law. To him, the question was solely a matter of truancy and not a matter of religious liberty.[44] The Smiths entered their appeal to the Supreme Court of Kansas on December 30, 1941.

Mr. Smith had been an employee of the St. Louis Smelting and Refining Company in Waco, Missouri. Shortly after the decision in the District Court, Mr. Smith developed a lung condition which necessitated a change of occupations and a higher altitude. Mrs. Smith's immediate family lived in Spokane, Washington, so the family moved to that city. In the event that the Smiths would lose their appeal in the Kansas Supreme Court, the children were to be left in care of Mrs. Smith's family and then she and her husband would return to Kansas to serve whatever sentence they would receive.[45] To avoid any possible repercussions on the Witness that boarded the Smith children in Parsons, Kansas, the children were withdrawn from the Parsons school on January 12, 1942 under the guise that the family was moving to Kansas City, Missouri. Subsequently, they were again served truancy

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[43]Columbus (Kansas) Daily Advocate, December 17, 1941, 1.

[44]Judge Vernor J. Bowersock, interview with author, October 14, 1967.

[45]Mrs. Inez Smith, letter to author, September 18, 1967.

notices to return their children to some school.[46] The Smiths left Kansas with such secrecy that their attorney for the Supreme Court hearing, C. J. Evans, was unaware of their leaving. Evans notified the Smiths by letter, dated July 20, 1942, that it was now possible to return their children to school at Lawton without any interference. The letter was eventually forwarded to the Smiths at their Washington address.

The Supreme Court Trial and Decision

The two flag-salute cases—Smith and Griggsby—appealed from the District Court of Cherokee County were consolidated in the Supreme Court hearing. The cases involved the identical issues so the decision of one would necessarily resolve the other.[47] Clinton J. Evans, a Topeka attorney, R. A. Mooneyham of Carthage, Missouri, and Hayden C. Covington, national legal counsel for the Witnesses, prepared the "Appellants' Brief." In the absence of Hayden C. Covington, Clinton Evans argued the cause.[48]

Jay S. Parker, attorney general, H. Lloyd Ericsson, assistant attorney general, Harry L. Porter, county attorney of Cherokee County, and C. E. Shouse, deputy county attorney of Cherokee County, were on the briefs for the appellee. Edward Rooney, of Topeka, was on the briefs of the appellees as amicus curiae.[49]

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[46] Ibid.

[47] State of Kansas v. Smith, "Appellee's Brief," 6. Hereafter cited as "Appellee's Brief."

[48] State of Kansas v. Smith, Vol. 155, 588 (1942).

[49] Ibid.

The appellants relied upon two basic arguments:

1. The appellants were not guilty of violating the state's education statutes involved in the litigation before the court.

2. The same education statutes as construed and applied in the litigation were unconstitutional because they deprived appellants and their children of their constitutional rights.[50]

The Brief of the Appellees was short, less than seventeen pages, and centered solely on the question of law. Porter and Shouse contended that the parents were responsible for their childrens' absence from school.[51] They argued further that the constitutionality of the school law requiring a flag-salute by the attending children had already been settled by the United States Supreme Court in its Gobitis decision.[52] Therefore, the soundness of the Kansas flag-salute law, which was identical to that passed on by the United States Supreme Court, and the expulsion of non-saluting children could be accepted as an already established fact.[53] The question that then confronted the court was whether the rigidity of the school laws and the position of the parents created a situation which deprived the children of their right to an education because of their religious beliefs. It was the parents who were responsible for the attitude of their children. It would be "ridiculous" to hold the children accountable for their dilemma. To so reason would be "rank poppy-cock." Failure to acknowledge the right of the legislature to enact laws concerning

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[50]"Appellants' Brief," 2.

[51]"Appellee's Brief," 9.

[52]Ibid.

[53]Ibid.

educational procedures would "strike a blow at our national educational structure."[54]

The framers of the constitution created the office of state superintendent of public instruction with powers of the general supervision of education within the state. The powers of the state boardof education included:

> The board shall prescribe courses of study for the public schools of the state, including the common or district schools . . . they shall revise the several courses of study when in their judgment such revision is desirable; they shall have authority to make rules and regulations relating to the observance of the prescribed courses of study.[55]

The legislature further prescribed subjects that had to be taught in the schools of Kansas:

> That in each and every school district shall be taught orthography, reading, writing, English grammer, geography, arithmetic, history of the United States, and history of the state of Kansas, and such other branches as may be determined by the state board of education.[56]

The Supreme Court of Kansas in two separate cases indicated that the school board had the power of governing and controlling the schools under the authority of the constitution of the state and its various statutes.[57]

Under the truancy laws of Kansas, the parents had to send their children to a school. If the parents objected to the state schools, they had to avail themselves of private or parochial schools. Only

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[54]Ibid., 9-11.

[55]Kansas General Statutes, 1935, 72-102.

[56]Ibid., 72-1101.

[57]Williams v. Parsons, 81 Kan. 593 (1910). Nutt v. The Board of Education, 128 Kan. 507 (1929).

when the child had been unruly and disobedient, at the written consent of the parents or guardian, could proceedings be instituted directly against the child.[58] The Smith children were not reported as incorrigible and no attempt was made to secure private education until after their offense under the truancy statutes was complete.

> This case in the final analysis resolves itself to these simple conclusions. Either the defendants are guilty, the truancy laws of this state are unconstitutional or the evidence in these cases does not prove a public offense.[59]

Porter and Shouse excluded the religious aspect of the flag-salute completely. They likewise excluded the question of the wisdom of the Kansas legislature in requiring the flag-salute. The only question of law for the Supreme Court to decide in the opinion of the appellees was whether or not the state of Kansas had the requisite authority for a compulsory education system. The appellee's only comment on the Witnesses' objection to the compulsory salute was

> If the peculiar dogma espoused by the Jehovah Witnesses makes any part of the patriotic feature of the public school program impractical or embarrassing in its application then it is up to the legislature to find a remedy for the situation.[60]

This "legislative" adjustment of "embarrassing" school requirements appeared to be the very thing that the framers of the constitution wanted to avoid. The Kansas Bill of Rights was most emphatic on this point. The dictates of conscience were never to be infringed nor was there to be any interference with the rights of conscience. If the legislative remedy position was adopted, the

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[58]Kansas General Statutes, 1935, 72-4803.

[59]"Appellee's Brief," 14.

[60]Ibid., 16.

the position of the churches would no longer be founded upon faith and reason, but upon the effectiveness of their legislative lobbies.

The brief for the appellants reiterated many of Mooneyham's arguments in the district court on truancy violations. The Smiths had no criminal intent, and the court records were unanimous on the good character of the children in question. They had not willfully stayed away from school or "played hookey." The compulsory flag-salute ceremony was the sole reason for their non-attendance in school. Such circumstances did not constitute truancy. This non-truancy position had been upheld in various state courts.[61]

The compulsory flag-salute in reality was forcing a religious practice upon those to whom it was repugnant and hence was unconstitutional. No question was raised of the school board's power to make rules for the teaching of loyalty and patriotism except

> When it comes to making a rule requiring them to bow down to an image or salute a flag, which is exactly the same within the meaning of the Scriptures, and then expels the child and proceeds against the parents under truancy law, that raises the point that causes violation of the United States Constitution and also of the express commandment of God written at Exodus 20:2-6.[62]

The appellants sought protection of their parental rights in the direction of their children's education in the case of Pierce v. Society of Sisters.

The essence of the appellants' argument that the statutes in question were unconstitutional as construed in the Smith case was that by coercing the children to render the salute and the prose-

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[61]"Appellants' Brief," 11-18.

[62]Ibid., 23.

cution of the parents of non-saluting children, an "interference with and encroachment upon the liberties of the individual" resulted.[63] Even though the practice of polygamy was forbidden, the Mormon considered such a practice to be within the confines of his religious conscience, nevertheless, he was not condemned or damned by the practice of monogamy. To compel a Witness child to salute the flag in the traditional manner, would be to force that child to perform an action which according to his conscience would deny him eternal union with Jehovah. The crux of the whole matter related to method. Granted that the object was proper, was it constitutional to attempt to achieve it by the compulsory ceremony, rather than by other available methods? "If I salute the flag, I cannot go to heaven."[64] The courts never really established an absolute necessity for the salute. Where exceptions were made, no concrete harm to the welfare of the state was ever proven. The compulsory salute was not really necessary since the objective sought could have been achieved by some other means.

A rule of conduct which compelled the individual to manifest subjective beliefs in a specified manner, such as the compulsory flag-salute, was an obvious attempt to control and direct the inner thoughts and beliefs of an individual.[65]

The appellants once again contended that under the circumstances they had not violated the Kansas truancy statutes and that

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[63] Ibid., 39.

[64] "Witness and Justice," Time, XXX, 34.

[65] "Appellants' Brief," 40.

for them, the compulsory flag-salute violated their freedom of religious belief and, therefore, was unconstitutional.

The unanimous decision of the Kansas Supreme Court, handed down July 11, 1942, was a definite victory for the Witnesses and religious freedom. Justice Harvey at the outset of the court's opinion dismissed the Gobitis case by holding that it had no bearing on the Smith case. He pointed to the fact that three of the justices who had concurred in the Gobitis decision had now changed their position and believed that Gobitis had been wrongly decided.[66] Further, in deciding the Gobitis case, the Supreme Court regarded the flag-salute regulation as valid under the constitution and statutes of Pennsylvania.

> We think the real problem before us is whether regulations of the school boards in question are valid under the constitution and laws of our state.[67]

The Kansas statute regarding the salute to the flag was not conceived by the legislature as a penalty statute. It provided no penalty, either against the state superintendent for failure to outline a patriotic program, or against those conducting the schools for the failure to carry out such a program.

Section VII of the Kansas Bill of Rights and Article VI, Section II of the Kansas Constitution providing for the establishment of a system of schools, must be construed together. The legislature of Kansas had never in its past history excluded any child solely because of his sincere religious beliefs or those of his parents. The Gobitis decision was responsible for the expulsion of the

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[66] Jones v. Opelika, 316 U.S. 584 (1942).

[67] State of Kansas v. Smith, 594.

children from the Kansas schools. Kansas, however, had no valid state law for expelling a child for not saluting nor could such a law be validly enacted in the state of Kansas.

Justice Harvey ended his decision with an explicit comment on the religious beliefs of the Jehovah's Witnesses. The unreasonableness of their religious beliefs was not an issue. "It is enough to know that their beliefs are sincerely religious."[68] Their religious tenets did not prevent them from being "good, industrious, home-loving, law-abiding citizens."[69] The judgment appealed was reversed and the appellants discharged.

Prior to the Supreme Court's decision, the Smiths had been under a court order to return their children to school immediately and the parents were subject to the statutory penalties for truancy violations. The Kansas decision was a definite victory for religious freedom. The Smith decision established once and for all the constitutional invalidity of the compulsory flag-salute for the state of Kansas. It gave the state a uniform standard that broadened the limits of religious freedom. The Smith decision produced a uniform standard for all the schools in the state. This standard did away with the previous inconsistencies of some school boards that varied in their admission requirements.

The Lawton school board complied immediately with the Supreme Court's decision. The Smith children were invited back to the school without any further complication. This most likely was a courtesy the

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[68] Ibid., 596-97.

[69] Ibid.

local school board extended to the Smiths. No further court action was required to reinstate the Smith children.

The Columbus Daily Advocate merely reported the conclusion of the case without comment.[70] The Smith family had already moved to Spokane, Washington. On a return visit to Lawton, James Alfred Smith suddenly passed away of a heart attack. Mrs. Smith, together with her children, continues to reside in Spokane, Washington, to the present day.[71]

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[70] Columbus (Kansas) Daily Advocate, July 13, 1942, 1.

[71] Mrs. Inez Smith, letter to author, September 18, 1967.

CHAPTER VI

AFTERMATH: GOBITIS OVERRULED

Before the Gobitis decision, only eighteen states expelled pupils for refusing to salute the flag. Within six months after Gobitis, all forty-eight states followed suit; the Witnesses experienced mob violence and attempts to prosecute the nonsaluting children as juvenile delinquents.[1] The Witnesses claimed that 20,000 children had been expelled from school because of the Gobitis case.[2] The Court made the fundamental error of assuming that uniformity meant unity. This assumption could only result in the suppression of minority practices. Victor Rotnem, head of the Justice Department's Civil Rights section and F. G. Folsom, also of the department, linked the Gobitis decision to the increase in Witness persecution

> This ugly picture of the two years following the Gobitis decision is an eloquent argument in support of the minority contention of Mr. Justice Stone. The placing of symbolic exercises on a higher plane than freedom of conscience has made this symbol an instrument of oppression of a religious minority . . . it seems probable that a reversal of that ruling would profoundly enhance respect for the flag.[3]

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[1]Harry N. Rosenfield, "Nobody Has To Salute United States Flag," The Nation's Schools, XXXII (August, 1943), 46.

[2]Ibid.

[3]Victor W. Rotnem and F. G. Folsum, Jr., "Recent Restrictions Upon Religious Liberty," American Political Science Review, XXXVI, 1063.

Leading legal periodicals were nearly unanimous in their criticism of the Gobitis decision of 1940.

The Smith case of Kansas was but one of the flag-salute cases that viewed the Gobitis case as inapplicable to the circumstances in its state litigation. The Washington Supreme Court refused to accept the Gobitis decision on the basis that three of the justices had changed their mind and felt that it had been wrongly decided.[4] On June 8, 1942, the Court gave its ruling in Jones v. Opelika. A majority of five justices of the United States Supreme Court upheld the constitutionality of a city ordinance of Opelika, Alabama, which required book-peddlers to procure a ten dollar city license before doing business. This the Witnesses refused to pay on the grounds that such a fee was an infringement upon religious freedom. However, Justice Black, Douglas and Murphy took the opportunity to comment on their previous concurrence in the Gobitis decision that they now felt had been wrongly decided. This open and frank admission on the part of the Court sounded the eventual death knell for the unpopular Gobitis decision. With Justice Jackson and Rutledge as new appointees to the Supreme Court, and the growing unpopularity of Gobitis in legal circles, it appeared that the days of the Gobitis precedent were numbered. Such was the environment in which the Witnesses made their final and successful bid to have the United States Supreme Court uphold their right to refuse the compulsory flag-salute.

West Virginia

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[4] Bolling v. Superior Court, 16 Wash. 2d 373, 133 P 2d 803.

During this period of the flag-salute litigation, West Virginia law required that all children be kept in school between the ages of seven and fourteen. Parents who did not comply with this requirement were subject to criminal prosecution. Any child who was truant of his own volition might be proceeded against as a juvenile delinquent.

In 1941 West Virginia added an amendment which provided that any child expelled or suspended from school for refusing to comply with school rules might not be readmitted unless he complied with the rules. In the meantime such a child would be deemed "unlawfully absent" and would be subject to the consequences.[5]

West Virginia law required every school, public or private, to give instruction in United States History and Civics which was designed to foster and inculcate Americanism in the West Virginia school children.[6] On January 9, 1942, the state board of education passed a resolution dealing with the flag-salute issue based on the power granted the board from the law above. The resolution quoted at great length from Frankfurter's Gobitis opinion. It stressed the contention that national unity was the basis of national security. To achieve this objective, the flag-salute would not become a regular part of the school program in the public schools. Participation in the salute ceremony was mandatory on the part of the teachers and the pupils. Refusal to salute the flag would be regarded as an act of insubordination and would be prosecuted. As a result of this regulation,

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[5]West Virginia Acts (1941), Chapter 32.

[6]Ibid., Chapter 38.

Witness children were expelled from school in almost every county of the state during 1942.

Walter Barnette, Lucy B. McClure and Paul Stull, all Jehovah's Witnesses, brought a suit against the state of West Virginia to secure an injunction restraining it from enforcing the flag-salute regulation.[7] The decision reached by the three-judge district court for the southern district of West Virginia, delivered on October 6, 1942, was a clear victory for the Jehovah's Witnesses.

> We are clearly of the opinion that the regulation of the Board requiring that school children salute the flag is void in so far asit apolies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined.[8]

The opinion of the district court stressed the need and urgency of the circumstances that would justify the overriding of one's religious beliefs.

> To justify the overriding of religious scruples . . . there must be a clear justification therefor in the necessities of national or community life. Like the right of free speech, it is not to be overborne by the police power, unless its exercise presents a clear and present danger to the community . . . can it be said . . . that the requirement that school children salute the flag has such direct relation to the safety of the state, that the conscientious objections of plaintiffs must give way . . . .[9]

The Board of education brought the case to the United States Supreme Court by direct appeal.[10]

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[7] Barnette v. West Virginia State Board of Education, 47 F. Supp. 251 (S. D. W. Va. 1942), "Plaintiffs Brief," 6.

[8] Barnette v. West Virginia State Board of Education, 47 F. Supp. 251 (1942).

[9] Ibid., 253-55.

[10] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), 630.

In the Supreme Court

It seemed that any further appeal to the Supreme Court would be precluded by the decision in the Gobitis case. With two exceptions, the Court was composed of the same members as in 1940. The unpopularity of the Gobitis decision had a marked effect on the Justices. In his dissenting opinion, Frankfurter alluded to the strong public reaction to the 1940 ruling—"the Court has no reason for existence if it merely reflects the pressures of the day."[11]

On June 14, 1943, Flag Day, the Supreme Court affirmed the decision of the District Court by a vote of six to three. The Gobitis case and the earlier per curiam flag-salute dispositions were expressly overruled. The majority opinion of the Court was delivered by Justice Jackson. Justices Reed and Roberts briefly noted their dissent. Both continued to adhere to the views expressed by the Court in the Gobitis decision. They offered no further comment.

Jackson's opinion constituted a refutation of Frankfurter's opinion in Gobitis. Jackson first distinguished the flag-salute issue from previous license tax cases such as Jones v. Opelika by stating:

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual.[12]

The Barnette decision was not based on religious freedom, although this definitely was the basis of the concurrence of Justices Black

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[11] Ibid., 665-66.

[12] Ibid., 630.

and Douglas, and in part of Justice Murphy, and an important part of the opinion for the Court. The Court relied on the constitutional guarantee of freedom of speech. The gist of the Court's opinion was contained in its statement that

> It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish . . . freedom of speech, of press, of assembly, and of worship may not be infringed on . . . slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.[13]

Justice Jackson applied the "clear and present danger" doctrine which had originated in Schenck v. United States in 1919.[14] Schenck dealt with the proximity of harm and the Espionage Act of World War I. The Roosevelt Court of the late 1930's invoked the "clear and present danger" doctrine with fair consistency to protect the civil liberties of minorities.[15] The Court, however, had abandoned this doctrine in its Gobitis decision. That divergence in 1940 was probably due to the impending crisis with Germany and Japan.[16] This appeared evident in the stress Frankfurter placed on the need to build up a "cohesive sentiment" to establish national unity and also to keep the proper balance between the United States Supreme Court and the various state legislatures. Jackson, however, had the advantage of knowing the effects of the 1940 decision. The

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[13] Ibid., 633-639.

[14] 249 U.S. 47 (1919).

[15] Kelley and Harbison, The American Constitution, 810.

[16] Ibid., 811-12.

circumstances and results that followed the June 3, 1940, decision illustrated that Gobitis was condemned by the effects it had produced. The resulting mob violence and Witness persecution was a far cry from the national unity or cohesive sentiment intended by the Gobitis decision.

Another advantage Jackson had was that Congress had also adopted a much more lenient policy with religious dissenters. It permitted conscientious objection to the draft. It also liberalized the oath and salute to the flag by permitting civilians to show respect for it by simply standing at attention, men removing their hats.[17]

Frankfurter's contention that the flag-salute regulation was an educational matter and, therefore, should be left to the individual legislatures lest the Court become "the school board of the nation" was dealt with directly by the Jackson opinion. The Court was performing a judicial, not an educational, duty. To the idea that such laws as these should be corrected, if wrong, soley by legislative action, he countered:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[18]

Finally, Jackson struck at the heart of the Gobitis decision, the

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[17] Public Law 623, June 22, 1942.

[18] West Virginia Board of Education v. Barnette, 638.

balance between national unity and religious freedom. National unity which officials might foster by persuasion and example was not in question. The real problem was the means, the method employed to achieve national unity. Did the constitution permit such a compulsory method to obtain the desired end? The compulsory flag-salute and pledge transcended constitutional limitations and invaded the sphere of intellect and spirit which was contrary to the purpose of the First Amendment. The compulsory flag-salute was viewed by the Court as an abridgement of freedom of speech. Viewed as an infringement of free speech it broadened the extent of the constitutional protection to include more than just the Witnesses.

Justices Black and Douglas concurred, explaining that they had held as they did in the Gobitis case because they did not want the United States Constitution to be a rigid bar to state regulation of conduct, but after reflection they were convinced that although the principle was sound, nevertheless it was wrongly applied to the case at hand.[19] Justice Murphy concurred separately adding also that reflection convinced him that his responsibility was to uphold spiritual freedom to its farthest reaches.

> Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged."[20]

The long dissent of Mr. Frankfurter pointed out that all the Supreme Court had a right to decide was whether the flag-salute rule

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[19] Ibid., 640-45.

[20] Ibid., 646.

was within the power of the state to adopt. The constitution protected religious freedom by granting religious equality, not civil immunity. "Its essence is freedom from conformity to religious dogma, not conformity to law because of religious dogma."[21] The state had the legitimate right to determine what it felt was an effective means for promoting good citizenship. If any accommodation was to be made, it was to be made by the state legislatures, not the Supreme Court.

> For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.[22]

The Court, in Frankfurter's opinion, was not the primary protector of liberties involved in the Bill of Rights. The respective legislatures were also guardians of those liberties. The Court's only function was to determine whether the various legislatures had exercised a reasonable judgment. To strike down the West Virginia flag-salute regulation would be an intrusion upon the power of the state. The compulsory flag-salute was not in essence different from compulsory vaccination, compulsory military training and medical treatment. Constitutionality was not synonymous with wisdom. Compulsion was one thing, but the person involved had the opportunity to change the law by the normal political channels.[23] Abandonment of the "secular regulation" rule would open a veritable Pandora's Box. Was the Court prepared to handle the questions of Bible-reading, theories of evolution, and parochial school problems? There were

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[21] Ibid., 653.

[22] Ibid., 647.

[23] Ibid., 649-56.

more than 250 distinctive established religious denominations. To what limits would the Court go to sanction the particular scruples of each?[24]

Jackson's opinion clearly refuted Frankfurter's concern that the accommodation was to be made by the state legislatures. Certain subjects were by their very nature withdrawn from the political debates and majority vote. The rights guaranteed by the Bill of Rights were not subject to the effectiveness of one's legislative lobby. The common good of society made compulsory vaccination and medical treatment mandatory. The protection of minority views on constitutional rights is never afforded in elections to the state legislatures or even to Congress. This is the obligation of the courts and especially of the Supreme Court, whose Justices are given life tenure in order to keep them free from the effects of popular passions.

It would appear logical that individual problems could be solved by the Court weighing the right of the individual with the state's right to maintain itself and the health and well-being of society itself. This it has done since the first Mormon cases.

The general reaction to the Barnette case in both the legal periodicals and the more popular news magazines was favorable. Typical was the appraisal by Time: "Blot Removed."[25] David Lawrence in U.S. News and World Report applauded the Jackson opinion as a "masterful presentation of the far-reaching implications of the

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[24] Ibid., 638.

[25] "Blot Removed," Time, XLI (June 21, 1943), 16.

Bill of Rights."[26] The New York Times joined in the approval of the Barnette decision.

> That a democracy, in time of war, and at a time of intense patriotic emotions, could excuse any resident from saluting its flag is impressive evidence of the high regard in which the Bill of Rights is held in this country.[27]

Jackson's majority opinion furnished a more realistic approach to the flag-salute issue. The Witness position did not really conflict with the rights of other individuals, nor did it endanger the power of the state. In short it presented no clear or present danger to merit an encroachment on religious freedom.

Conclusion

Accommodation to the Witnesses on their flag-salute position was but another example of what Justice Jackson meant when he stated:

> 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.[28]

By passing the immediate salutary effect on the Smith family itself, what exactly did the Smith case accomplish? The 1943 Supplement to the 1935 General Statutes of Kansas noted below those statutes dealing with truancy and patriotic exercises:

> School regulation expelling pupil for refusal to salute flag held invalid; freedom of religion. State v. Smith

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[26]David Lawrence, "Revelations of a "Reconstructed Court," U.S. News and World Report, XIV (June 25, 1943), 26.

[27]"Civil Liberties Gain by the Flag Decision," New York Times, XCII (June 20, 1943), 10E.

[28]West Virginia Board of Education v. Barnette, 642.

[illegible] 538, 539, 590, 592, 147 P. 2d 518.

The confusion and lack of consistency or uniformity which had plagued many Kansas schools on the flag-salute issue were finally and definitely resolved by the Smith decision. Anyone who had conscientious scruples about saluting now had the assurance that these scruples would not be violated no matter which school he attended. Paul G. Kauper in his Thomas M. Cooley Lectures at the University of Michigan Law School commented:

> Indeed, we are indebted to the Jehovah's Witnesses for the contribution they have made to constitutional doctrine through their sturdy and persistent assertion of religious freedom.[29]

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[29]Paul G. Kauper, Frontiers of Constitutional Liberty (Ann Arbor, 1956), 109.

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APPENDIX

"HERBERT A. DERFELT
SUPERINTENDENT

OFFICE OF
THE COUNTY SUPERINTENDENT

CHEROKEE COUNTY

COLUMBUS, KANSAS

"Miss Lois Alleger, Ruth Terrill, Graves, Lathrop, Galena, Kansas

"Dear Miss Alleger:

In reply to your letter of Sept 2 concerning the saluting of the American Flag. I have this suggestion to offer. The Supreme Court of the United States has rendered a decision in which it holds that school district board of education have the power and authority to require the saluting of the flag as part of the school curriculum since education is compulsory in Kansas the child may be compelled to salute the flag.

The United States Supreme Court in an opinion filed on June 3, 1940, held that it is within the power of a school district board to exact participation in the flag salute ceremony as a condition of children's attendance at school.

Under date of September 13, 1940, Honorable J.S. Parker, Attorney General of Kansas, cited various sections of the school laws and handed down the following opinion.

'In view of all these statutes, I suggest the following procedure: If the children refuse to salute the flag, the district board should suspend or authorize the director to suspend them from the privileges of the school for a fixed period of time not to exceed sixty days. At the expiration of said suspension and when the children return to school, if they again persistently refluse to salute the flag, the truant officer should report said fact to the parents of the children, and if they thereafter fail to compel the good conduct of their children in school, they or either of them who are the cause of the children's refusal to salute the flag should be proceeded against, unless they state in writing to the truant officer that such children are beyond their control. In that event, the children should be proceeded against under Chap. 38, Art. 4, G.S. 1935, as delinquent children.

The following facts are apparent:

1. The salute is required by law daily.
2. School Boards are authorized to discipline pupils who refuse to give it.
3. Parents are subject to prosecution if refusal is persistent.
4. The Patriotic Manual contains full directions for giving the salute.

Sincerely yours,
Herbert A. Derfelt
County Superintendent
Columbus, Kansas".

7011 North [illegible] Street
Spokane (14), Washington
June [illegible], 1943

Mr. C. E. McFerron
Lawton, Kansas

Dear Mr. McFerron,

I suppose by now that you have read of the reversal of the decision of the United States Supreme Court in 1940 concerning the flag salute issue.

I am writing you at this time to thank you for the stand you took in September 1941. Perhaps you think this odd considering the mental torture we went through with at that time not to mention what it cost us financially. The reasons we are thankful are these: (1) it gave us a chance to prove our integrity to God ....(2) it gave us a chance to fight for one of the freedoms of the United States.

What took place in Lawton was typical of what took place in the countries which Hitler took over. He forced people to salute the swastika and say Heil Hitler! (incidentally over 6000 J. W. are interned in German Concentration Camps for refusing to do that very thing). What a desecration to our own stars and stripes that stand for freedom, liberty and justice to be so misused by some lower officials to ruin freedoms in these U.S. as it has done in those dictator ruled countries over there.

We broke no law because there is no such law that enforces flag saluting. The U.S. Supreme Court decision of 1940 was: "That is with-in the power of the school board to enforce flag saluting **if they so desire**." In the school laws of Kansas a flag saluting ceremony has to be held every morning but nothing is said of a compulsory salute. We knew what we were doing and what rights we had. All of you felt triumphant when we lost both trials but we knew we would have to carry it to a higher court to get a decision of justice. You wouldn't believe us when we told you what was right.

You with your small position on the school board in reality knew nothing of the laws. When an official one step above you told you such and such was law you believed him. It seems you didn't care enough about your country to find out what was right. You were too scared to fight for the Constitution and the Bill of Rights. You took an easy way out...that of following the crowd. You wouldn't fight for these liberties with legalities even though in all probability your ancestors shed blood for these rights to get them established. You are the kind who take freedom for granted. It is your kind of dilatoriness that lets dictatorship creep upon you and realize it only when it is too late to fight for freedom.

True Americans who love the U.S. are ready to fight for freedom at the first sign of any of those freedoms being taken away. If not with carnal weapons then with legal ones. We didn't take anyone's word for it. We would not be dictated to by anyone.

We made a covenant with God to do His will and one of His commandments is:..."thou shalt not bow down and worship any image.....thou shalt have no other gods before me." Flag saluting, to us meant just that. We not only proved we could be faithful (with the Lord's help) but also that we would help maintain freedom in the U.S.

You know Job, Daniel and the three Hebrews (to name a few) were persecuted for their beliefs but remained faithful

to that pure belief of worship of God.

We knew at the begin in[g] you did not understand what it was all about but as time went on you didn't care. You were willing to throw us to the wolves to save yourselves (so you thought). The Kansas Supreme Court showed you up quite a lot but the decision of U.S. Supreme Court proves that thro[ugh] being served you denied the Constitution and the Bill of Rights.

It is all over now and we hold no hard feelings though we easily could. The U.S. Supreme Court hase been man enough to admit they were wrong because it put too much power in the lower officials hands and could and was misused. Truly they are great men. Only contempt and pity can be felt for anyone in your position who so ignorantly was used to try to destroy one of the freedoms especially at a time of of crisis such as faces the world to-day.

In God's kingdom there will be complete freedom, a freedom not known or even conceived to-day by the human mind and that kingdom will eventually be set up regardless on anyone or anything. It will be established by God himslef and Christ Jesus in spite of anything and it shall stand forever.

Even though at the time we tried to tell you what we were doing, you wouldn't listen or couldn't realize the seriousness of the issue. We hope you do now and see how despicably wrong you were.

God in His own due time punishes those who persecute His people. Do you remember what happened to the men who persecuted Daniel by throwing him in lion's den and the men who threw the three Hebrews into the fiery furnace??

Sometime you will have the feeling we had those months when it looked like we might have to go to Jail for a while or our girls might be taken from us. You will remember us then. Do not think you are the only one who was used to undermine freedom in the U.S. There are hundreds of officials all over the U.S. who have been to feel insignificant by this decision.

Perhaps you think it odd that we would have gone to jail rather than pay a fine. It was the principal of the ting that would have made us take a ajil sentence rather than pay a small fine of ten dollars. We knew we weren't guilty and if we had payed the fine we would have been admi tting guilt. Also all the desciples of Christ payed no fines when they went to jail for going around preaching their beliefs.

You shoulld be glad that we forced to come out here on account of my health as it would embarrassing for you for our children to able to attend school at Lawton after all was said and done to keep them out.

So once again we say we bear you no ill will. That isn't for man to remember........ but the Heavenly Father will.

Very sincerely,

J Alfred (Pete) Smith

N. 7511 Regal Street

Spokane, Washington 99207

September 18, 1967

Mr. Ronald Paplau

708 North 18th Street

Kansas City, Kansas 66101

Dear Mr. Poplau:

Your letter came as quite a surprise but surely you are a teacher of more than history and speech by psychologically mentioning those names at the beginning. Yes, of course they brought back memories. At the time occurrences can be quite stirring but in later years the memories connected with these troublesome events can be very soul-satisfying and a peaceful serenity that comes with a job well done.

I am kept so very busy and this year has been unusually so and so at first I thought it a waste of time to reply. My reaction was: " Why bring this up after all these 36 years? " Especially so when you've had access to all the legal documents available. You've no doubt used these since you said you have been researching a year. I suppose that you have used the brief(I've often wondered why they use the word brief), (Smile.) filed by our attorney Mr. Mooneyham with the Kansas State Supreme Court. Since you have been using it you are no doubt more familiar with the details of the trial now than I am, after these many years.

You also have probably had access to the pamphlet that the KBOC printed concerning their decision. Atty. Clinton Evans who presented the case (in place of Mr. Covington) wrote us a letter of

congratulations and 10 copies of this pamphlet suggesting that we might like to send copies to the authorities involved. My husband wrote the letter you said Clifford gave you and mailed it along with one of the copies as well as the other members of the school board. Mr. Evans also informed us in that letter that now we could send our girls back to school in Sept. without any interference what-so-ever. This letter was written to us July 20th, 1942. [illegible] letter was forwarded to us from Lawton.

Mr. Mooneyham mailed us copies of the items printed in the Kansas City Star and Joplin Globe about the court's decision and you have had these, haven't you? This leaves little for me to add.

You've talked to so many of those involved and have their personal reactions I suppose you want mine now after all these years. I can well imagine how much you enjoyed researching that 14 hours, in collecting material for your book. (First, as to what you wrote in the P.S. to your letter about what Willard Canfield said — I'm not too surprised).

Although my husband was born and reared mostly around the Lawton area the 6 years we lived there was my first experience in a small community of narrow horizons. We had been back here 4 times by the time my husband died and I've been back twice since. The community (as a whole) appeared to have not noticeably changed.

The general atmosphere in Lawton at that time was a gradual coolness and rumors but nothing brought out in the open; vague behind-the-back whispers. This seemed to be the tenor of the entire affair.

To Barbara Ann and Artye Lee the public criticism was something to put up with for taking a firm stand on doing what is right and not doing something they felt to be wrong. They were expelled from school for refusing to salute the flag. They would stand with respect but this wasn't enough and so they were refused permission to attned until they conformed to the authorities use of that law. We, however, were arrested each time for refusing to send our children to school, therefore not complying to the compulsory school attendance law, and this was the only grounds we were permitted to defend ourselves. This in Biblical terms as well as legal is called "framing mischief by law." From the first Probate Judge Graves, Judge Bowersock and Mr. Mooneyham agreed that it would have to go to State Supreme Court for justice to be decreed.

When Mr. Mooneyham and Mr. Evans mailed us the news of the K.S.S.C.'s decision we were releived and grateful for all who stood by us. We felt privileged to have been used by Jehovah to give a witness in that area, while at one and the same time help to establish a truer freedom of worship in the U.S. I've always felt this deeply because some of my relatives were at San Jacinto, one died at the Alamo; some were law officers and rangers (even the skeleton in the closet of a bad one) (SMILE!) While they used carnal weapons we used spiritual ones- the sword of the spirit-the Bible-God's word.

My husband at that time worked at the sampling plant of the St. Louis Smelting and Refining Co. He was strong, former athlete and found that he had loose dust in his lungs. Dr. advised since there were no spots involved that to move to a higher altitude and a change of occupations would take care of it and it did in less than 2 years. Mr. Mooneyham had by this time filed our brief in the KSSC and

... came out here to Spokane to a higher altitude as we felt the tour job there was done, and as my family was here, should we have to go back to leave time, they could be able to care for the children while we would be gone. We were so grateful to Jehovah that he never permitted us at any time to be jailed or the girls to be taken from us.

Our move out here enabled the children to enjoy educational advantages not available back there; my husband's job was a better one and to be prospered. The second year we were here we bought a home on an acre of ground in the suburbs, which is where I still live.

Anything that happens to us during our lifetime leaves it's mark and influences us. It is up to each individual how to accept these things and profit by them or permit them to tear us down. I have always tried to guide my life by Bible principles which leaves little room for inner conflict and disturbances. I have tried to have all these things help me to grow in empathy.

I don't consider my life having been difficult; although at the moment some things have seemed almost insurmountable. The tragedy 14 years ago of losing my husband was a terrible blow, however, what happened to me is no more than has happened to millions of women. It was a drastic adjustment to make, but there again I have the memories of a very satisfactorily comfortable and happy marriage. These have become a part of me and I guess the only way I can express it is: that they form a sort of a backlog of security-they're there, but seldom conscious of their presence. Thankful for what I had, not sorry for what could have been.

My buying hobby as a florist became a way to make a living (with the help of Social Security). I built on and had cooler and business phone installed and arranged everything so that I opened the shop May 1, 1955. By having the business in my home I could be with the children more and not hire someone to care for the young ones and I was able to maintain a more nearly normal home life for them (without a father). At that time Barbara Ann and Alfye Lee were married and Ronnie 17, Marvin 15 and Timmie only 4. I had 2 grandchildren at that time and now have 15 with the 16th expected next month.

Tim the youngest is 18 now and and we've been alone for past 10 years since the boys married. We lead very full lives, with our secular work, ministerial work, and enjoying all the usual entertainments for relaxation. We have enjoyed quite a lot of travel since we attend 2 semi-annual assemblies locally, and then the one large annual convention of Jehovah's Witnesses. We try to combine our vacations at the same time taking from 2 to 5 weeks and do some sightseeing. We've covered the U.S. (also one into Canada and Old Mexico) except for the New England States. We attended the Society of American Florists convention in Wash. D.C. 5 years ago and was able to see and do just about everything there is to do and see. It was all very exciting-even saw the U.S. Supreme Court Chambers.

Tim loves history and his teacher 2 years ago tried to interest him in becoming a teacher as he felt he would make a successful one. He has learned the floristry quite well but he doesn't want that as his vocation and I have felt that he needed to be out in the men's work-a-day world. I was very happy when he became interested in Distributive Education and began working toward that goal and made it. This is his last year in high school and he has a part time job at Sears since just before school was out in June. He is a salesman and doing unusually well.

All my children live in Spokane, so I am able to enjoy my grandchildren, watching them grow up. With their free time seldom coincid-