

# The persecution of West Virginia Jehovah's Witnesses and the expansion of legal protection for religious liberty.

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## INTRODUCTION: JEHOVAH'S WITNESSES AND RELIGIOUS LIBERTY

Few Americans are aware of the valuable contribution Jehovah's Witnesses have made to our nation's laws. A mention of them brings to mind the picture of persistent, sometime annoying, teams of door-to-door preachers whose aggressive proselytizing campaigns have made them a symbol of the troublesome irritants of daily life. Legal scholars, however, have long acknowledged Jehovah's Witnesses as champions in the constitutional battle to protect religious liberty.(1) A 1942 examination of the sect's contributions to protection for the free exercise of religion contended:

Seldom if ever, in the past has one individual or group been able to shape the course, over a period of time, of any phase of our vast body of constitutional law. But it can happen, and has happened here. The group is the Jehovah's Witnesses.(2)

During the 1940s, legally significant Jehovah's Witnesses litigation arose in almost every state. Justice Harlan Fiske Stone noted the importance of this legislation. "I think the Jehovah's Witnesses ought to have an endowment in view of the aid they give in solving legal problems of civil liberty," he quipped in a letter.(3)

Scholars have seldom noted that the legal influence of Jehovah's Witnesses was not limited to constitutional law; the sect's efforts also led to the expansion of legal protection for free exercise of religion in other areas of law. Four cases that arose in West Virginia are particularly worth examining because they significantly expanded legal protection for religious liberty, each in a different area of law. In the first case, an early example of "new judicial federalism," the Hancock County Circuit Court used the West Virginia Constitution to increase protection for the free exercise of religion beyond the safeguards provided by the U.S. Constitution. The second instance, the infamous Richwood castor oil case, expanded the protection of religious liberty through judicial interpretation of the Civil Right Act. The third action concerned the firing of seven glassworkers in Clarksburg; it brought about an unprecedented use of administrative law to protect the free exercise of religion. The final case, a 1943 landmark U.S. Supreme Court decision that expanded the constitutional safeguards for free exercise of religion and freedom of speech, was also a bellwether case that reflected the U.S. Supreme Court's move toward more expansive protection of First Amendment rights.

The Jehovah's Witnesses' aggressive, unconventional style of evangelism resulted in many confrontations in communities across the United States. Sociologist M. James Penton reported, "Between 1933 and 1951 there were 18,866 arrests of American Witnesses and about 1500 cases of mob violence against them."(4) To cope with these problems, the sect established its own legal department and sustained a determined campaign of litigation to assert the right to freely exercise its beliefs.(5) By 1950, Jehovah's Witnesses had won 150 suits in state supreme courts and more than thirty precedent-setting decisions in the U.S. Supreme Court.(6) These cases contributed significantly to broadening the protection of the free speech and religious liberties guaranteed by the First and Fourteenth Amendments and by various provisions of state constitutions.

Animosity toward the Jehovah's Witnesses resulted, in large part, from the militant methods they employed in promulgating their beliefs. The sect began its aggressive campaign of door-to-door proselytizing in the late 1920s. Convinced that any concessions to the convenience of the public were

an affront to Jehovah, the Witnesses accepted none of the constraints usually imposed by time, place, or propriety. A contemporary observer frankly summarized a widely held perception of members of the sect:

Witnesses assume an exceedingly aggressive, intolerant, and even boorish attitude toward a prospective convert, apparently assuming that, since he is himself the repository of all religious wisdom, the other must be a dolt if he does not immediately see the light.(7)

Throughout the 1930s, the dogmatic, uncompromising message of the Witnesses was matched by an escalation of the contentious manner in which it was spread.(8) At times hundreds of Jehovah's Witnesses would descend on a small town going from door to door insisting aggressively that their message be heard.(9) They also began parading down main streets and picketing in front of Catholic churches on Sunday morning with signs that proclaimed such things as, "Religion is a Snare and a Racket."(10)

The sect was also scorned because of its contemptuous attitude toward secular authority and the widely held perception that Witnesses were unpatriotic. Their extensive disassociation of themselves from the government was particularly manifested in their refusal to salute the flag. Witnesses maintained that to salute would be to ascribe salvation to the government represented by the flag. They contended, therefore, that the flag salute was forbidden by the scriptural command against making and bowing down to graven images.(11) A seminal study of the nature of patriotism argues that Jehovah's Witnesses are among those people of faith "who take their religion most seriously and cannot, therefore, be patriotic."(12) This imputed lack of patriotism was the catalyst for most of the attacks on Witnesses, violence that escalated in 1939 and 1940.(13) These attacks coincided with the outbreak of World War II and a U.S. Supreme Court decision that held public schools could expel students who refused to salute the flag.(14) War-fever and heightened patriotism intensified hostility toward the Witnesses. Many people suspected them of being "fifth columnists" who sympathized with Nazi Germany and of undermining the potential American war effort.(15) In the early 1940s, state and local officials enacted new policies--or used existing laws--to regulate or suppress the sect's proselytizing activities.(16) During this period, hundreds of actions against Jehovah's Witnesses occurred in rural and small town America;(17) a number took place in West Virginia.(18) Most of these confrontations revolved around the refusal of Jehovah's Witnesses' to participate in flag salute ceremonies. A 1941 incident in Hancock County contained the standard elements of a typical conflict involving the Jehovah's Witnesses. The legal action taken to resolve it, however, was unusual.

#### USING THE STATE CONSTITUTION TO SAFEGUARD RELIGIOUS PRACTICE

High school senior Joseph Clementino resolutely petitioned the Hancock County Board of Education to allow him to graduate with his class--the Weir High School class of 1941. Over the previous two months, he and at least twenty-five other Jehovah's Witnesses students in West Virginia's northernmost county had been expelled from school because they refused to salute the flag. The board was unimpressed by Clementino's sincerity or tenacity, and it turned a deaf ear to the teenager's request to be readmitted along with his nine-year-old brother, Albert.(19) Clementino did not graduate with his class, but that was not the only cost of his adherence to religious convictions. The following year, his father and four other fathers of expelled children were indicted for violating the state's draconian truancy law.(20)

Throughout America, children of Jehovah's Witnesses were being expelled from schools because they refused to take part in flag-salute ceremonies. Three years earlier, in 1938, Jehovah's Witnesses families in Pennsylvania requested a federal court to issue an injunction prohibiting the Minersville School District from expelling children who refused to salute the flag. They claimed that the expulsions violated the U.S. Constitution's First Amendment provision protecting the free exercise of religion. After the Jehovah's Witnesses won in the Federal District Court and at the U.S. Court of Appeals, the school district asked for a review by the U.S. Supreme Court. In *Minersville School District v. Gobitis*, the Court ruled that schools did not violate the Free Exercise Clause of the First Amendment when they expelled students who refused to salute the flag.(21) Eighteen months after the *Gobitis* ruling, the

West Virginia State Board of Education adopted a resolution that required students to salute the flag and provided that refusal to salute the Flag [sic] be regarded as an act of insubordination, and refusal shall be dealt with accordingly."(22)

In Hancock County, after students were expelled for refusing to salute the flag, the county's prosecuting attorney punished them further by obtaining misdemeanor truancy indictments against five fathers of expelled children.(23) Circuit Judge J. Harold Brennan consolidated the indictments into one case,(24) which could have easily been an open-and-shut matter. The Gobitis decision, after all, held that such expulsions did not violate the Constitution; moreover, the State Board of Education made student participation in flag-salute ceremonies a requirement for attending school. Finally, the previous year, the West Virginia legislature responded to students' refusal to salute the flag by amending the school law. The new provisions required that students who were expelled for not complying with school regulations must comply with those requirements before readmission and that they were unlawfully absent until the requirements were met.(25) A strict application of the letter of the law would require a sure and speedy conviction.

Judge Brennan, however, was clearly uneasy with the question posed by this case and explained "that he could not take upon himself `the right to hold a religious view unreasonable.'"(26) He enunciated a broad understanding of what constitutes religious liberty:

The moment that any court takes to itself the right to hold a religious view unreasonable, that moment the American courts begin to deny the right of religious freedom. The very purpose of our guarantees of freedom of religion is that unpopular minorities may hold views unreasonable in the opinion of the majorities.(27)

Judge Brennan recognized, though, that his construction of the meaning of the free exercise of religion was broader than that of the U.S. Supreme Court's decision in Gobitis. Therefore, he decided this case based on the provisions for religious liberty in the West Virginia Constitution. Today, a state court occasionally rules that its state constitution provides more extensive protection of basic rights than the United States Constitution,(28) but in the 1940s such rulings were quite rare. Nevertheless, Judge Brennan held that expulsion of the school children in Hancock County violated the religious liberty provisions of the state's constitution.

The West Virginia Constitution provides that "no man shall be compelled to frequent or support any religious worship, place of ministry whatsoever; nor shall any man be forced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or beliefs...."(29) Citing this provision, Judge Brennan held that it would be difficult to maintain that a court has the right to fine or imprison a man because he will not force his child to do a positive act wholly inconsistent with the religious beliefs of them both."(30) Judge Brennan relied on the West Virginia Constitution to safeguard religious liberties that were not protected by the Bill of Rights. His decision is particularly noteworthy because it was the first of four decisions in which state courts used their state constitutions to protect the religious freedom of school children who refused to salute the flag.(31) Unfortunately, other public officials in West Virginia were not as concerned about religious liberty as Judge Brennan; two years earlier a Nicholas County deputy sheriff was a ringleader in one of the most bizarre of all the attacks on Jehovah's Witnesses.

#### THE CASTOR OIL INCIDENT: STATUTORY PROTECTION OF RELIGIOUS LIBERTY

Deputy Sheriff Martin Catlette watched approvingly as fellow members of the American Legion forced four Jehovah's Witnesses to drink large doses of castor oil. Earlier that bright Saturday morning in June 1940 in Richwood, West Virginia, Catlette detained the Jehovah's Witnesses in the mayor's office at the town hall. The previous day, two of the young missionaries were in Richwood engaged in house-to-house canvassing. A West Virginia State Police officer interrupted their work, questioned them and seized a petition they were circulating. Several members of the American Legion, including Deputy Catlette, confronted the Witnesses, demanded that the two men leave town, and ordered them to stay away.(32)

The next day, 29 June 1940, the two missionaries, accompanied by seven others of their faith, returned to recover their petition. Three of them went to the town hall with a letter entreating the mayor to provide them with police protection as they continued to canvass the bustling little mountain town. When they reached the mayor's office, Deputy Catlette confronted the Witnesses and detained them. He then telephoned members of the American Legion and said, "We have three of the sons of bitches and we want you to round up the rest."(33) Soon, a Legionnaire brought the other six Witnesses into the office, which shortly thereafter fairly bristled with indignant members of American Legion Post 97. One of the veterans was a doctor; he prepared the debilitating doses of castor oil.(34) This event was among the most outrageous of the numerous of brutal assaults on Jehovah's Witnesses that swept America during June 1940.(35) The criminal prosecution that followed the attack, however, conferred it with historical significance and the appellate decision in this case upheld an interpretation of the federal civil rights statute that expanded protection for religious liberty.(36)

The confrontation with Jehovah's Witnesses in Richwood began when Charles Jones and C. A. Cecil came to Richwood to work as door-to-door preachers of the sect's apocalyptic message. The two native-born West Virginians came from Mount Lookout, a little community at the opposite end of Nicholas County.(37) They rented sleeping quarters in a Richwood rooming house and began distributing their sectarian literature. The men also sought signatures on a petition, which objected to the State of Ohio's cancellation of a contract, which allowed the Jehovah's Witnesses to use the Ohio State Fair Grounds for their national convention.(38) Even though the doorbell-ringing Jehovah's Witnesses hailed from nearby Mount Lookout, residents of Richwood quickly pegged them as outsiders. Among the townspeople, speculation burgeoned concerning the objective of the members of the nonconformist sect.

The house-to-house canvassing by these men raised suspicion among members of the American Legion. A veterans' organization founded in 1919, the Legion fostered patriotism and especially promoted the American flag as the preeminent icon of Americanism. It lobbied for statutes to protect the flag and urged state lawmakers to require public schools to conduct the flag salute daily. The Richwood post, like local Legion posts around the nation, actively promoted respect for the flag and salute ceremonies in the schools. Throughout America, members of the Legion frequently participated in persecutions of Jehovah's Witnesses.(39) In Richwood, Legionnaires instigated the police investigation of the door-to-door preachers.

On Friday, 28 June, Jones and Cecil were summoned to the State Police headquarters in Richwood. There, Officer Bernard McLaughlin questioned them about their work, and members of the American Legion also interrogated them. Three of the Legionnaires, Lee Reese, Louis Baber, and Deputy Sheriff Catlette, accused the Jehovah's Witnesses of being spies and Fifth Columnists and ordered them to leave town within four hours. Late in the afternoon, Jones and Cecil made their way back to Mount Lookout.(40)

After the Witnesses departed, members of the American Legion went to the home of Mrs. Maggie Stark, where the Witnesses rented sleeping accommodations. Mrs. Stark allowed a search of the house, which did not locate any additional Witnesses. That evening, the Legionnaires expanded their extralegal investigation. They contacted the attorney general of Ohio and were reportedly told that the communist beliefs of the Jehovah's Witnesses led to the denial of the Ohio State Fair Ground for their national convention. The Legion inquisitors examined the literature distributed by the Witnesses, which confirmed that members of the sect would not swear allegiance to the Constitution or salute the American flag.(41) The Legionnaires also discerned something sinister about a petition addressed to the governor of Ohio being circulated by Jehovah's Witnesses in West Virginia. Furthermore, they discovered a map, drawn by the Witnesses, showing the area of Richwood they had canvassed.(42) To these self-proclaimed patriots, these maps provided clear evidence that the Witnesses were spies. (43)

The following morning, Jones and Cecil returned to Richwood accompanied by seven other Witnesses from Mt. Lookout: Walter Stull, 31; Arthur Stull, 30; Howard Stull, 20; Carlton Stull, 27; John Leedy, 39; Harding Legg, 21; and Robert Shawver, 18.(44) The nine men, traveling in two cars, arrived at the Richwood Town Hall at about 10:30 a.m.; they intended to demand their confiscated petitions. Cecil,

Jones, and Carlton Stull left the others in the cars and went to the mayor's office; there Deputy Sheriff Martin Catlette confronted them. He converted the office into a makeshift jail and detained the Witnesses. He asked Richwood Chief of Police Bert Stewart to watch the office door to ensure that the Witnesses did not escape. Deputy Catlette spent about ten minutes telephoning members of the American Legion informing them that the Jehovah's Witnesses had returned. Within an hour the news spread through Richwood and hundreds of people converged on the town hall.(45)

One of the first to arrive was Legionnaire Louis Baber. He went to the cars in front of the town hall and told the Witnesses that they were needed inside and escorted them to the mayor's office. Men from Post 97 and the nine Witnesses now filled the office to capacity. Catlette took control of the situation. He removed his deputy sheriffs badge and proclaimed, "What is done from here on will not be done in the name of the law."(46) Among the Legionnaires was a physician, who brought a stomach pump and a large container of castor oil. Fifty-six years later, Harding Legg recounted,

I remember the doctor well.... He had a rubber hose, which looked to be at least a quarter of an inch. And he said, "If you don't drink it, we will force it down." Now who in the world would not drink it? Would you stand up there and let them punch it down your throat, a rubber hose? We didn't have no alternative.(47)

C.A. Cecil initially resisted; they forced him to drink sixteen ounces of castor oil. Carlton Stull, Walter Stull, and Harding Legg each drank four ounces.(48) The Legionnaires compelled the sectarians to drink the castor oil, a strong laxative, to cause their humiliation and degradation.

After the Jehovah's Witnesses had choked down the castor oil, the Legionnaires tied the Witnesses by the left wrists three or four feet apart along a rope. Their captors led the nine men out of the town hall and through a jeering mob of more than fifteen hundred people. They marched down the street to the Richwood Post Office. There, the captives refused to salute the flag, thereby confirming the mob's suspicion that Jehovah's Witnesses were indeed Fifth Columnists. The Legionnaires led the men, "tethered like cattle," to the Stark house. The Witnesses carried their belongings from the house with their right arms. Then, they walked back to Main Street and marched west to the town limits. The townspeople advised them never to return(49) and that if they returned, they would be confronted with buckshot."(50)

Area newspapers provided only limited coverage of the event.(51) Nevertheless, news of the attack spread slowly throughout south central West Virginia. Soon after the attack, the United States Attorney for the southern district of West Virginia learned of its nature and of the participation of the two police officers. He passed that information on to the Federal Bureau of Investigation to investigate. Over the next two years, however, the prosecution of the attackers fell victim to foot-dragging and indecision by the local U.S. Attorney, the F.B.I., and high officials in the Department of Justice.(52) In Washington, the case attracted the attention of the Civil Rights Section of the Department of Justice. In February 1939, Attorney General Frank Murphy had established the Civil Rights Section to study and combat, by criminal prosecution, if need be, the violations of citizens' constitutional and statutory civil rights. Hundreds of attacks against Jehovah's Witnesses were reported to the Civil Rights Section; government lawyers chose the Richwood attack and several other serious assaults on Witnesses to present to grand juries; but none of the juries returned indictments. Consequently, the Civil Rights Section proceeded with a different tack in the Richwood case. This new strategy led to the only civil rights conviction in the United States arising out of an attack on Jehovah's Witnesses.(53)

The U.S. attorney in Charleston, Lemuel Via, was reluctant to proceed with the prosecution. Via's hesitancy was the product of both the nature of civil rights litigation and the characteristics of the office of U.S. Attorney. Victims of civil rights violations are usually part of an unpopular, or even despised, segment of the community. The members of both grand juries and trial juries are apt to share the prejudices of the accused and be reluctant to decide against them.(54) Furthermore, every U.S. district court is located within the boundaries of a single state. Each state's U.S. senators exercise considerable influence over the appointment of U.S. district judges and U.S. attorneys, thereby "ensuring a strong local coloration in district court personnel and decisions."(55)

U.S. Attorney Via requested that a criminal division lawyer be sent from Washington to help with the prosecution. He argued that the presence of such an attorney "would remove the question of local prejudices and faction from the picture and would have a very fine effect on the jury."(56) He also maintained that the presence of a lawyer from Washington "would be an open avowal to the grand jury and the petit jury that this case was being prosecuted by the Department of Justice, rather than the United States Attorney."(57) Like all U.S. attorneys, Via had local loyalties; he did not want to alienate police officers because his success as a prosecutor depended to some degree on their goodwill and cooperation. Moreover, as the Richwood attack demonstrated, Jehovah's Witnesses were quite unpopular among the general public. Therefore he approached the prosecution of Catlette and Stewart cautiously. He hoped that the presence of a lawyer from Washington would indicate the decision to prosecute was not wholly his.

In the spring of 1942, Raoul Berger, a lawyer from the Justice Department's criminal division, traveled to West Virginia to assist the U.S. attorney in presenting the case against Catlette and Stewart to the grand jury. The grand jury proved to be hostile to the Jehovah's Witnesses and refused to return an indictment. Berger recorded the grand jurors' unfriendly attitudes in a memorandum for the case file:

Unfortunately, the jury was patently unfriendly to the "Witnesses" from the outset, as their queries showed. The witnesses were repeatedly questioned about the particulars of their religion, their refusal to bear arms, their invasion of Richwood in search of "trouble." We were asked if one who refuses to defend his country has constitutional fights, etc. etc.(58)

The participation of the lawyer from the Department of Justice evidently did not, as U.S. Attorney Via predicted, cause the grand jurors to overcome local prejudices.

The Civil Rights Section attorneys in Washington maintained their resolve to pursue a prosecution. They wanted a conviction in at least one case involving attacks on Jehovah's Witnesses. Therefore, Assistant Attorney General Wendell Berge directed the U.S. Attorney in West Virginia to proceed with the prosecution by filing for an indictment by information--a prosecutor's formal statement of the evidence against the accused person.(59) The Fifth Amendment requires that an indictment for "capital and otherwise infamous" federal crimes must be issued by a grand jury. The U.S. Supreme Court has construed an infamous crime to be one for which a person may be sentenced to a penitentiary for more than one year.(60) Misdemeanors are crimes for which the punishment is imprisonment for less than a year. Federal courts may issue indictments for misdemeanors based on information. The information filed by the U.S. Attorney accused Catlette and Stewart of a misdemeanor--depriving the Jehovah's Witnesses of their civil rights under color of state law, a violation of Title 18, Section 52 of the United States Code (1925). A crime committed under color of law is one perpetrated by public officials while using the authority of their office.(61)

The color of law statute originated in the Civil Rights Act of 1866.(62) It received little use, however, having been applied in only two reported federal district court cases.(63) The statute's usefulness in protecting civil rights was, therefore, largely untested. Furthermore, the phrase "color of law" was not clearly defined. It was clear that it applied to public officials, who, while they perform a duty imposed on them by statute, violate the civil rights of others.(64) Did it also apply, as in the Richwood case, to officials, who are not performing a statutory duty, but who interfere in the civil rights of others in a way that violates the laws prescribing the officials' powers and duties? In pursuing the prosecution of the Richwood case, the Civil Rights Section argued for acceptance of the second application of the statute.

District Judge Ben Moore presided over the trial on 2-3 June 1942 in the United States District Court in Charleston. Eight of the Jehovah's Witnesses who were attacked in Richwood testified at the trial. They explained why they came to Richwood and recounted what happened to them at the hands of Catlette, Stewart, and the mob.(65) The U.S. Attorney argued that both Catlette and Stewart, as officers of the law, were required to maintain the peace and protect the Witnesses in the exercise of the rights and privileges secured or protected by the Constitution and laws of the United States. Their failure to do this, he contended, violated the color of law provision of the civil rights statute. Catlette's

defense was that he did not act under color of law, and that the government failed to show any statute of West Virginia under which he acted. Furthermore, Catlette claimed that because he removed his deputy sheriff's badge, he did not act as a law officer. During his testimony Catlette revealed that, while the Jehovah's Witnesses were being paraded through the streets, he took a man into custody. The judge asked him if he was acting as a deputy sheriff or a private citizen. Catlette replied he acted as a private citizen, but conceded he never before had taken someone into custody as a private citizen. In his testimony, Catlette emphasized that the Jehovah's Witnesses refused to salute the flag. (66)

The government charged that Richwood Police Chief Bert Stewart aided and abetted Catlette. Stewart denied a connection with the attack and claimed that he did not know of it until it had almost ended. In response, the Witnesses testified that, on the morning of the attack when they arrived at the town hall, they gave Stewart a letter requesting police protection. They claimed further that, when they were held in the mayor's office, Stewart acted as a doorkeeper. (67) On 3 June, the jury returned a guilty verdict against both Catlette and Stewart. (68) Nine days later, Moore passed judgment in the case. He fined Catlette \$1,000.00 and sentenced him to one year imprisonment at the Federal Prison Camp at Mill Run, West Virginia. He fined Stewart \$250.00. (69)

Catlette appealed his conviction and the Fourth Circuit of the U.S. Court of Appeals heard oral argument on the case in Baltimore, Maryland on 13 November 1942. The court affirmed the findings of Judge Moore. The most significant issue in the appeal was Catlette's argument that the U.S. attorney's information failed to show that Catlette was acting within the scope of his authority during the attack, on the Witnesses. (70) During arguments the court asked the government's attorneys to file a memorandum of law with references to the statutory and common law duties of sheriffs in West Virginia. (71) This memorandum established that West Virginia common law requires a sheriff to preserve the peace, and more specifically to protect prospective victims from assault or illegal restraint in the officer's presence. Moreover, the state statutes authorize deputy sheriffs to discharge the duties of the sheriff. (72) The court ruled an official's failure to perform a duty to protect people in the exercise of their civil rights was a violation of the color of law provision. Catlette had violated the statute because he failed to perform his duty to protect the Jehovah's Witnesses in their activities.

Ruling against Catlette, the court rejected the contention that "an officer can divorce himself from his official capacity merely by removing his badge of office before embarking on a course of illegal conduct." (73) The court held,

We must condemn this insidious suggestion that an officer may thus lightly shuffle off his official role. To accept such a legalistic dualism would gut the constitutional safeguards and render law enforcement a shameful mockery. (74)

It also addressed the significance of the attack on the Jehovah's Witnesses in Richwood and the importance of protecting the civil liberties of all citizens:

We are here concerned only with protecting the rights of these victims, no matter how locally unpalatable the victims may be as a result of their seeming fanaticism. These rights include those of free speech freedom of religion, immunity from illegal restraint, and equal protection. (75)

The judges of the U.S. Court of Appeals shared Judge Moore's abhorrence of this blatant disregard for the constitutional guarantee protecting the free exercise of religion.

This case resulted in several significant legal developments. (76) It was the Department of Justice's newly-established Civil Rights Section first prosecution--and one of the few ever undertaken--that used the color of law section of the civil rights statute to enforce the protection of religious liberty. The case also broadened the application of color of law provision. This ruling of the court of appeals embraced the understanding that the color of law statute applied to those instances when a public official acted in violation of the laws prescribing his powers and duties. Three years later, in its decision in *Screws v. United States*, the U.S. Supreme Court accepted this construction of the statute.

(77) This case also resulted in the only successful federal prosecution of persons involved in the numerous brutal assaults on Jehovah's Witnesses. Moreover, it demonstrated the difficulty of procuring a grand jury indictment for attacks on unpopular minorities. Finally, it was the first civil rights prosecution in which the Civil Rights Section proceeded with an indictment by information after a grand jury failed to indict.

#### CLARKSBURG FIRINGS: ADMINISTRATIVE PROTECTION OF RELIGIOUS FREEDOM

The day after the jury found Catlette and Stewart guilty, George C. Schmidt, a Charleston, West Virginia attorney retained by the Window Glass Cutters League of America, wrote to the union's national president. He was concerned regarding the implications of the Catlette trial for the union. In December 1941, seven Jehovah's Witnesses had been fired from a window glass plant in Clarksburg. The lawyer had heard that the fired worker might be planning to sue members of the union who had provoked their dismissal. Schmidt contended that the outcome in the Catlette prosecution indicated the possibility of plaintiff success should the fired workers proceed with a lawsuit. The union, he argued, should regard the firing as a serious matter.(78) The dismissal of the Clarksburg glasscutters was the third incident involving West Virginia Jehovah's Witnesses that expanded legal protection for religious liberties. The workers' efforts to regain their jobs resulted in an unprecedented use of administrative law to enforce the civil rights of victims in cases of religious discrimination.

The voice of President Franklin D. Roosevelt crackled from the radio in the warehouse washroom, "Yesterday, December 7, 1941--a date which will live in infamy--the United States of America was suddenly and deliberately attacked by the naval and air forces of the Empire of Japan."(79) About eighty workers at the Pittsburgh Plate Glass Company's Works No. 12 in Clarksburg, West Virginia listened intently to the six-minute speech in which the president asked the Congress to declare war on Japan. They felt anger as they heard the description of Japanese attacks on Pearl Harbor, Guam, the Philippine Islands, Wake Island, and Midway Island. They were sad as the president solemnly related "that very many American lives have been lost."(80) At the conclusion of the speech, the "Star Spangled Banner" reverberated from the radio. As the men stood and removed their caps, they were annoyed that Clyde Seders neither stood nor removed his cap.(81) For Seders, a Jehovah's Witness, such deference was contrary to his religious belief. For the other men present, Seders's behavior was unpatriotic, if not in outright complicity with the enemy.

Within an hour, word of Seders's nonconformity had spread throughout the plant warehouse and the workers in the shipping department refused to work with him.(82) When plant superintendent Howard Halbach approached him, Seders explained that his religion compelled his behavior. Halbach told him that if he did not change his attitude he must either quit or be fired. Seders quit his job at the end of the day.(83) Seder's behavior drew the attention of the workers to other Jehovah's Witnesses employed by the plant. The incident upset most of the glass workers, many of whom were veterans of World War I and members of the American Legion.(84) They chose a fellow veteran and Legionnaire, Clarence James, to confront the Jehovah's Witnesses and test their patriotism. Accompanied by about one hundred men, James asked three Jehovah's Witnesses if they would salute the flag and defend the country. The men answered that they would not.(85)

The Jehovah's Witnesses' stance on the flag salute clearly conflicted with the sense of patriotism burgeoning among the people of Clarksburg and contributed to the growing animosity toward the sect. In July 1940, several Jehovah's Witnesses in Clarksburg had been removed from the relief roles because they refused to salute the flag.(86) A year later, tensions had heightened between the Jehovah's Witnesses and the other citizens of this industrial town of 30,500 in the center of the state. On 5 August 1941, the local school board unanimously adopted the policy that "children failing to pledge allegiance to the Flag [sic] will not be admitted to school this fall."(87) Soon after the term began, school officials expelled several Jehovah's Witnesses children and the sect opened West Virginia's first "Kingdom School" in Clarksburg's Northview neighborhood.(88) On 16 December, the regular meeting of the Norwood Local of the Window Glass Cutters League of America considered a motion to notify the plant management "that we refuse to work with any person male or female who refuses to salute the flag of the United States of America."(89) After much discussion the members voted to table the proposal.(90) The American Legion in the Clarksburg area was conspicuous in

promoting respect for the flag. On 18 December, an editorial in The Clarksburg Exponent praised the Legion for placing flags in every schoolroom in the county and promoting the Pledge of Allegiance.(91) On 17 December, the day before the editorial appeared, the American Legion had sponsored a flag raising and salute ceremony at the glass plant, and the company urged employees to attend. Six Jehovah's Witnesses, in an effort to avoid confrontation, stayed away from the ceremony;(92) union leaders and the company management noted their absence.(93) The next day, one of the six men, Paul Schmidt, was fired because his failure to attend the flag ceremony irritated members of Local No. 2 of the Glass, Ceramic, and Silica Sand Workers of America.(94) Over the next few days, five more Jehovah's Witnesses were fired or resigned under pressure because other workers refused to work with them.(95) The last of them, Paul Schmidt's son, Bernard, was fired on 24 December.(96)

The matter of the firing of the Jehovah's Witnesses would have ended with the last worker's dismissal, had it not been for the persistent, year-long effort of Paul Schmidt to regain their jobs. Schmidt had worked many years as a glasscutter(97) and had been employed at the Pittsburgh Plate Glass plant for more than twelve years.(98) To provide for his family and gain reinstatement to his job, Schmidt pursued several courses of action.(99) But his eventual success grew from the complaint he filed with the President's Committee on Fair Employment Practice.

The action taken by the Committee on Fair Employment Practice made this case significant. Most legal studies that investigate religious freedom examine civil liberties and protection from government interference with religion provided by the United States Constitution and the constitutions of the various states. The Clarksburg firings, though, concerned civil rights protection from religious discrimination by private employers. The 1940s predated the extensive government protection of people's civil rights that followed the enactment of the Civil Rights Act of 1964. Yet, during World War II, a small executive office served as an equal opportunity agency to protect the employment rights of minority groups. President Franklin Roosevelt's Executive Order 8802 had created that agency, the Committee on Fair Employment Practice. The committee was to promote full employment in defense industries and the government by ending discrimination "because of race, creed, color, or national origin."(100) From its creation in June 1941, until its termination in June 1946, the committee reviewed nearly 12,000 complaints of discrimination and resolved approximately 4,800 of them.(101) About 80 percent of the complaints were based on claims of racial discrimination; African Americans filed most of them. Nearly 14 percent of the alleged discrimination was based on national origin, chiefly against Mexican Americans; close to 6 percent of the cases were claims of religious discrimination, made primarily by Jews.(102) The committee's limited authority emanated from the president and was delineated in four executive orders.(103) Its specified powers were to investigate complaints and issue non-binding directives. In its fight against discrimination, the committee relied heavily on bluff and negotiation. Its behind-the-scenes bargaining and mediation in the firing of the Clarksburg Jehovah's Witnesses demonstrated how extensively it depended on such tactics.

Paul Schmidt's grievance reached the Committee on Fair Employment Practice by an indirect route. His initial step, on 16 January 1942, was to send Eleanor Roosevelt a complaint about the firings. He asked her to bring the matter to the attention of the president. Mrs. Roosevelt referred his letter to the committee,(104) but it was almost two months before Schmidt heard from the committee. On 7 March, the committee notified Schmidt that it had received information about the firings from Mrs. Roosevelt and asked for details about the situation.(105) He filed a formal complaint with the committee on 10 March.(106) Within a short time the committee began its investigation. Daniel Donovan, a committee field investigator, arrived in Clarksburg on 24 April and spent several days examining the situation and interviewing company managers, union officials, plant workers, and the fired workers.(107) He reported that his investigation "appears to confirm Mr. Schmidt's allegations."(108) Donovan concluded that the Jehovah's Witnesses lost their jobs because of their religious beliefs. He also determined that the Pittsburgh Plate Glass managers fired or forced the Witnesses to quit because a large number of the workers in the warehouse refused to work with them or handle glass cut by them. Furthermore, although this was not an official union action, officials of the union's locals did little or nothing to prevent the slowdown. In his meeting with more than one hundred warehouse workers who were members of the Glass, Ceramic, and Silica Sand Workers, Donovan found that generally the workers held that it was their responsibility as good citizens to compel the Jehovah's Witnesses to show respect for the flag.(109)

Soon after Donovan's investigation, the committee determined that the seven Jehovah's Witnesses had been discharged in violation of Executive Order 8802, and it began to encourage union officials to have the union workers accept the rehiring of the Witnesses. The workers at the plant were represented by two labor unions. The glasscutters were members of a craft union, the Window Glass Cutters League of America, which was affiliated with American Federation of Labor. The Glass, Ceramic, and Silica Sand Workers of America, an affiliate of the Congress of Industrial Organizations, represented most of the workers in the plant. The presidents of both the A.F.L. and C.I.O. were members of the Committee on Fair Employment Practice. The committee asked the presidents of the A.F.L. and the C.I.O. to contact the national presidents of their union affiliates and ask them to intercede with the union locals to bring the affair to an end. By 20 May, this softening strategy had begun, Frank Fenton, the director of organization for the A.F.L., wrote J. E. Mayeur, president of the Glass Cutters League, to encourage him to ameliorate the situation in his union.(110)

This intercession with the unions seems to have produced no result; neither the files of the committee, the American Civil Liberties Union, nor the Glass Cutters League indicate any development in the case between May and mid-August. By August, the fired worker's unemployment benefits were depleted. Paul Schmidt, without a way to support his family, found the situation to be "extremely terrifying."(111) He went to look for work in New York City, and then he went on to Washington, D.C. in order to present the committee "one last appeal for justice."(112) At the committee's headquarters, Schmidt found the Clarksburg case file buried under a stack of files about a foot deep.(113) But his visit had a positive effect; within a week, the committee increased its demands for a resolution of the case. On 19 August, the committee's executive secretary, Lawrence W. Cramer, sent letters to the presidents of the Glass Cutters League,(114) the Glass, Ceramic, and Silica Sand Workers,(115) and to the superintendent of Pittsburgh Plate Glass Company's Clarksburg plant.(116) He formally notified the unions and the company that the committee found that the workers had been discharged solely because they were Jehovah's Witnesses, and that this clear violation of national policy must be rectified. He requested that the president of the American Federation of Labor encourage action by the Glass Cutters League.(117)

On 26 August, Harry D. Nixon, secretary-treasurer of the Glass Cutters League, wrote to Stanley R. Meredith, head of the union's local at the Clarksburg plant, and asked him to address the matter. In his reply, Meredith did not take a strong position; he blamed the company management for the firing and claimed that he attempted to forestall that action. He suggested that the committee "should request that the company correct its action by wrongfully discharging these men."(118) Nixon delayed sending information from Meredith's reply to the committee because the union president, J.E. Mayeur, was away from the office. On 9 September, Frank Fenton of the A.F.L. again sent a letter to Mayeur, asking him to mediate the Clarksburg conflict.(119) On 14 September, Mayeur sent Fenton a copy of Meredith's September 1 letter,(120) but this letter did not satisfy the committee. After the committee investigated further, Cramer wrote Mayeur on 16 October. He rejected Meredith's explanation of firing of the Witnesses, but noted that Meredith was in favor of rehiring the Witnesses.(121) That same day Cramer notified the Clarksburg plant superintendent that the union favored rehiring the Jehovah's Witnesses, and requested that they be reemployed immediately.(122)

When the company did nothing to reinstate the workers, the committee grew impatient and discussed the matter on 9 November.(123) On 24 November, it drafted a notification letter to the company(124) that was by far the most forceful directive given by the committee in this matter. It directed the immediate reinstatement of the Jehovah's Witnesses to the positions they held at the time of their dismissal, with full seniority based on employment since their initial hiring. It further required the company to notify the unions of the reemployment and that the unions would be expected to exercise control over the behavior of their members.(125) In order to increase the effect of its directive, the committee issued a news release for publication the following Sunday, 29 November 1942.(126) This statement called the directive "an unprecedented action," and reiterated the points made in its notice to Pittsburgh Plate Glass Company. It also revealed that the committee had notified the unions to "exercise the necessary controls over their members."(127) The news release resulted in national coverage of the story.(128)

Both the company and the unions resisted the committee's directive. When the Pittsburgh Plate Glass

Company received notice of the directive, it asked the committee for a reconsideration of the matter. (129) After William M. Saas, president of Local No. 2, Glass, Ceramic, and Silica Sand Workers, was notified, he met with two large groups of his union members and explained the order to them. He then informed the management that his workers would not accept the fired workers back in the plant.(130) The heads of the locals of both unions in the Clarksburg plant, Saas and Stanley R. Meredith, chief preceptor of the Norwood Local, Window Glass Cutters League, went to Washington to object to the committee's directive. They met informally with the committee the afternoon of 4 December(131) and argued that the committee had reached a decision without hearing their views on the rehiring.(132) At its 7 December meeting, the committee agreed that it would provide the company and the unions the opportunity to present their arguments at its meeting on 21 December.(133) It allotted the company, the unions, and the Jehovah's Witnesses one-half hour each to present their views.(134) The committee was, nevertheless, beginning to weaken resistance to the reinstatement of the fired workers. Three days before the hearing, J.E. Mayeur, national president of the Glass Cutters League, advised the committee that his union "has, and has had, no objections to the continuance of Paul G. Schmidt and Bernard L. Schmidt in the employment of the Pittsburgh Plate Glass Company."(135) He stated further that the union's policies provide its members protection against discrimination, and that all members of the union must comply with that policy.(136)

The committee's hearing on the Clarksburg case, on 21 December, one of only thirty public hearings held during the committee's five-year existence,(137) lasted all day.(138) The union members did not present formal arguments. They were, rather, witnesses on behalf of the company position, supporting it in affidavits appended to the company's brief.(139) The company's main argument was that rehiring the Jehovah's Witnesses would cause the plant's seven hundred workers to organize a walkout, thereby imperiling wartime production.(140) But in its brief and in the hearing, the company presented several other arguments. It maintained that its actions against the Jehovah's Witnesses, based upon their refusal to participate in patriotic exercises, were not discrimination based on creed and that the fired workers were impeding the war effort at the plant.(141) The company further argued that the reinstatement of the fired workers would, in fact, be contrary to the express purpose for which the committee was created: to ensure an adequate workforce for wartime production.(142)

Each of the eleven men who testified for the company, emphasized two points: that most of the workers would walk out if the Jehovah's Witnesses returned to work and that the Jehovah's Witnesses were unpatriotic.(143) The testimony of Paul Schmidt closed the hearing. He was confident of a favorable outcome. He had prepared testimony for the hearing that would demonstrate that he was fired because of his beliefs, rather than because he could not get along with other workers, a claim he called "an absurd charge."(144) He said that he did not attend the flag ceremony at the plant because he had been warned there could be violent attacks on him and the other Witnesses. He stayed away to avoid a confrontation.(145) He also maintained that he would not have saluted the flag had he attended the ceremony.(146) Schmidt explained his attitude toward America at the time of the bombing of Pearl Harbor by claiming,

As far as my attitude toward the country, at that time, I believe, it was the attitude of a true patriot, of a man that loves his country, of a man who has gazed upon the National Emblem and has said to himself: "This is my own, my native land."(147)

Pittsburgh Plate Glass Company's attorney, Leland Hazard, asked Schmidt to justify various beliefs of Jehovah's Witnesses. The chairman did not allow such questions. The committee's function, he said, was not to determine if a particular religious belief is excluded from the protection of Executive Order 8802.(148)

Throughout the hearing, the company and the men representing the workers were uncompromising in their view that the reemployment of the Jehovah's Witnesses would precipitate a walkout at the plant. Newspaper coverage of the hearing emphasized that the workers would not accept the return of the fired men.(149) The American Civil Liberties Union issued a press release, meanwhile, claiming the walkout "nonsense" and encouraged the committee to stand by its order.(150)

For the committee, the hearing confirmed its earlier findings. It continued to press for the reinstatement of the Jehovah's Witnesses, though it postponed issuing another order. Instead, the committee began negotiations with the company and the unions to ensure that there would be no resistance at the plant when the Witnesses returned to their jobs. By early March, the committee had drafted the substance of its Summary, Findings and Directions.(151) Over the next two weeks, the committee and the company's attorney reached agreement on the wording of the final order.(152) The national and local officers of both unions were also informed and asked to take action to prevent union members from interfering with the company's compliance with the order.(153) William Saas, the president of the local chapter of the Glass, Ceramic, and Silica Sand Workers negotiated for some changes in the wording of the final directive. He also continued to predict a walkout when the Witnesses returned to work.(154) At its meeting on 15 March, the committee considered changes recommended by the company's counsel and adopted the final wording of its findings.(155)

Monday, 27 March, was set as the date for the workers' return. The company drafted a notice explaining the behavior it expected of the plant employees and sent it to union officials for their response.(156) To ensure a peaceful transition, the committee requested the company to hold a special meeting for employees the day before the Jehovah's Witnesses were to return to work.(157) About 350 employees attended the meeting in the Masonic Temple Auditorium to hear representatives of the committee, the company, and the unions, explain the directive. W. G. Koupal, the plant superintendent, announced that the fired workers were returning "with the understanding that there is to be mutual respect by all parties concerned of the religious and patriotic convictions of the other (sic)."(158) The following morning the company posted a notice throughout the plant(159) that required that workers respect the convictions of the Jehovah's Witnesses concerning the flag salute and that the Witnesses refrain from preaching or "witnessing" while on company property. It ended with the requirement that "all employees, (sic) including Jehovah's Witnesses, will refrain from any words or conduct on this Company's premises which might impair mutual tolerance concerning their respective beliefs and convictions."(160)

Paul Schmidt and his son, Bernard, returned to work without incident; the other five Witnesses had secured other employment.(161) Before he returned to Washington, Ernest Trimble, the committee's representative, talked with Paul Schmidt, who was eager to return to his old job. He told Trimble he would warn other Jehovah's Witnesses to avoid religious discussion on the job and that he would purchase war bonds.(162) When he returned to work, Schmidt reported that the company officials treated him well, but most of the workers would not speak to him. He was keenly aware of the tense situation and treated the other workers with consideration. He also requested the Jehovah's Witnesses in Clarksburg to refrain from boasting about the victory.(163) Bernard Schmidt only spent three weeks back in his job. His draft board ordered him to report to a conscientious objectors camp in Hane, Pennsylvania on 21 April. Paul Schmidt worked as a glasscutter at the plant until the mid-1950s when he retired.(164)

The directive to reinstate the fired Jehovah's Witnesses was an unparalleled use of civil rights policy to protect religious freedom.(165) The committee described the directive as an "unprecedented action."(166) The case is notable because it accentuated the principle that the civil rights and civil liberties of an unpopular minority cannot be contingent on the popular will of the community. In the United States, decisions concerning matters of conscience and religious belief have been placed outside of the political will of the majority. The Clarksburg firings and the nationwide wave of persecution against Jehovah's Witnesses demonstrate that, in a democracy, popular religions and political views are not those in need of protection; they are seldom the focus of persecution. Religions that are apt to need protection are those that the majority may perceive as obnoxious, weird, mysterious, peculiar, and nontraditional. Certainly, such religions will possibly raise the ire of the majority, particularly in insulated, relatively homogenous communities. The committee emphasized that, legally, the rights of the Clarksburg Jehovah's Witnesses to their jobs did not depend on their fellow worker's acceptance of their nonconformist, religious practices.

The Clarksburg case was also significant because it provided an excellent illustration of the Committee on Fair Employment Practice's evolution into an effective civil rights protection agency. Executive Order 2088 established a legal cause of action against employment discrimination by

private businesses. For the first time since 1883, when the U.S. Supreme Court struck down statutes that provided similar protections,(167) persons had a federal course of action against private employers who discriminated based on creed, race, or national origin. The committee resolved more than 4,800 employment discrimination complaints.(168) This record produced grassroots support for anti-discrimination actions by the government. As early as 1943, black civil rights leaders called for the committee to be established as a permanent agency. Calls for a permanent committee were written into the 1944 presidential platforms of the Republican, Socialist, and Communist Parties. When Harry Truman became president, he spoke of the need for a permanent agency to monitor fair employment; however, bills to make the committee into a fixed statutory agency failed in Congress.(169) The Clarksburg case was a high-profile illustration of the need for government protection from discrimination in employment.

Finally, the case is significant because it demonstrates a government agency's effective use of persuasion to exercise political power. Political scientists generally identify three major means governments use in exercising power: (1) command authority--making rules that are binding on the whole community and, if need be, can be enforced by coercion; (2) economic incentives--financial benefits provided to people in exchange for compliance with government directives; and (3) persuasion--logical and reasoned arguments and/or persistent appeals from the government for conformity with public policy.(170) The committee's legal authority was limited to making recommendations to resolve discrimination complaints. It could also make use of economic incentives by recommending the withdrawal .of uncooperative companies' defense contracts, but throughout its existence, the committee never made use of this authority. To settle the Clarksburg dispute in a persuasive manner, the committee had to overcome obstacles greater than in most of its other discrimination cases. It had to change the thinking not only of a private employer, but also of seven hundred union workers. In other cases the committee relied on appeals to patriotism and the need for maintaining full wartime production as the rationale for employers to abandon discriminatory practices. In the Clarksburg case, however, patriotism and the war effort were arguments that the Pittsburgh Plate Glass Company had used to defend its firing of the Jehovah's Witnesses. Thus the committee's remaining argument was to challenge the basic unfairness of religious discrimination: that minorities should not be required to conform to religious values of the majority. To do this the committee spent months conferring with the company and union leaders. Clearly the company and unions thought they were reaching compromise positions with the committee. But when the workers finally returned to work, it was under the same requirements outlined in the committee's original directive. In this case, the committee's persistent insistence that religious discrimination is basically unfair, allowed it to preserve the civil rights of a politically unpopular religious minority. The case was a rare and unprecedented use of administrative law to protect religious liberty.

## EXPANDING PROTECTION OF RELIGIOUS LIBERTY USING THE BILL OF RIGHTS

During the Committee on Fair Employment Practice hearing on the Clarksburg firings, an interesting exchange took place between the committee's counsel and Leland Hazard, the company's attorney. Hazard pointed out that the U.S. Supreme Court had held in *Minersville School District v. Gobitis*(171) that it was reasonable for states to require the children of Jehovah's Witnesses to salute the flag at school and expel those who refused. The refusal of the glass workers to salute the flag and their dismissal was, he argued, a similar situation. Ernest Trimble, the committee's lawyer, replied by citing a case that "came up from Charleston, West Virginia of all places." (172) He was referring to *Barnette v. West Virginia State Board of Education*.(173) In that decision, the U.S. District Court of the Southern District of West Virginia did not follow the precedent established by the U.S. Supreme Court in *Gobitis*. The *Barnette* case eventually resulted in a landmark U.S. Supreme Court decision protecting religious liberty.

The earliest clash with school officials over opposition to saluting the flag concerned a Mennonite whose foster daughter was expelled in 1918 for refusing to salute the flag in a West Liberty, Ohio school.(174) Over the next fifteen years several other religious groups clashed with school officials over mandatory flag ceremonies.(175) The Jehovah's Witnesses entered the flag-salute controversy relatively late. They did so not because of a theological position developed by the sect's theological leaders but, instead, in response to the actions of a young boy.(176) In 1933, Adolph Hitler banned the

Jehovah's Witnesses movement in Nazi Germany; the Witnesses openly defied the ban and refused to give the Nazi salute. By 1945, approximately ten thousand members of the sect were confined in concentration camps. At the 1935 American national convention of Jehovah's Witnesses, the head of the sect, Joseph F. Rutherford, launched an ardent attack on the Nazi persecution of the sect. He warned that, by placing his agents in positions of worldly authority, the devil deceives people as to the source of salvation. "A striking example of this," Rutherford argued, "is the exaltation of one Hitler in Germany. He issues the command that all persons shall 'Heil Hitler,' which in the English language means 'Salvation is by Hitler.'"(177) That this same line of reasoning could apply to the American flag salute did not occur to the sect's leaders. It did, however, to a zealous young Jehovah's Witness. In the fall of 1935, Lynn, Massachusetts third-grader Carleton B. Nicholls, Jr. saw a similarity between the flag salute and the Nazi salute and refused to salute the flag.(178) His father, who supported him, was attested on 30 September during an argument with school officials about the flag salute. On 6 October, Rutherford supported Nicholls's action in a radio address on the issue. He said that the boy "... has made a wise choice, declaring himself for Jehovah God and his kingdom.... All who act wisely will do the same thing."(179) The Jehovah's Witnesses developed their argument that saluting the flag was an act of religious homage that disobeys the biblical injunction against making or serving graven images.(180) Thus began the major point of contention between many Americans and the Jehovah's Witnesses.

Soon, an ever-increasing number of Jehovah's Witnesses children around the nation began refusing to participate in flag salute ceremonies. In response, school officials expelled hundreds of children from school.(181) The sect responded to the expulsions in two ways: pursuing major legal challenges to the constitutionality of the laws that imposes compulsory participation in the flag salute; and where possible, establishing "Kingdom Schools," which met compulsory education laws and allowed greater instruction in the faith.(182)

By 1940, flag-salute cases brought by Jehovah's Witnesses resulted in decisions made by the highest courts in six states.(183) Three of these decisions were reviewed by the U.S. Supreme Court ruling per curiam that the cases posed no substantial federal question.(184) These rulings effectively left in place the state court decisions that compulsory flag-salute ceremonies did not violate the First Amendment provision protecting the free exercise of religion. In 1939, the Court issued a one-sentence per curiam decision affirming the judgment of the U.S. District Court in Massachusetts.(185) This judgment was much more important than the earlier per curiams; it revealed that the Court agreed that mandatory flag-salute requirements did not violate the First Amendment protections of speech or religious practice. Across America, school officials were expelling hundreds of Jehovah's Witnesses children for refusing to salute the flag. Most of these expulsions took place in Pennsylvania, and it was from the little town of Minersville, Pennsylvania that a flag-salute case arose that finally received full hearing before the U.S. Supreme Court.(186)

In early October 1935, seventh grader Lillian Gobitis and her fifth grader brother, William, stopped saluting the flag in the ceremonies at their Minersville school. The superintendent of schools, Charles E. Roudabush, attempted, unsuccessfully, to convince the children's father Walter Gobitis that the children should participate. On 26 October, a sixth grader, Edmund Wasliewski, began to refuse to salute. That same day, Pennsylvania's Attorney General Charles A. Margiotti, issued an advisory opinion upholding the authority of the Cannonsburg, Pennsylvania school board to issue binding mandatory requirements for flag salute ceremonies.(187) This reinforced Roudabush's determination to have the children participate in the flag-salute ceremonies. On 6 November, the Minersville School Board met to determine what response should be made in the flag-salute dispute. After it heard the parents of the Gobitis and Wasliewski children explain the religious scruples that prevented them from saluting the flag, the board unanimously adopted a resolution requiring all students to participate in a daily flag-salute exercise. After the vote, Superintendent Roudabush stood and expelled Lillian and William Gobitis and Edmund Wasliewski for insubordination.

Walter Gobitis wanted to challenge the constitutionality of his children's expulsion, but was stymied because the Jehovah's Witnesses national legal office already had many willing plaintiffs. Not until eighteen months later, on 3 May 1937, did Olin R. Moyle, the sect's national legal counsel, file the case in the U.S. District Court for the Eastern District of Pennsylvania. The ACLU took an interest in

the suit and provided some assistance to Moyle. The following week, the Minersville School Board voted unanimously to fight the suit. The case was argued in Philadelphia on 15 February 1938 and four months later District Judge Albert B. Maris found that the board's requirement that the children salute the flag was an unconstitutional violation of their free exercise of religious beliefs.(188) Within two weeks, the school board unanimously agreed to appeal the decision. Oral arguments in the appeal were made before the Third Circuit of the U.S. Court of Appeals on 9 November 1938. One year later, the three-judge court unanimously affirmed the district court decision.(189)

On 8 January 1940, the school board authorized its attorney to file a petition for a writ of certiorari with the U.S. Supreme Court, which the Court granted on 4 March 1940.(190) The Court heard oral arguments on 25 April. Joseph Rutherford, the domineering president of the Jehovah's Witnesses, himself a lawyer, took over the defense, assisted by the new head of the sect's legal office, Hayden Covington.(191) The ACLU and the Committee on the Bill of Rights of the American Bar Association filed amicus curiae briefs.(192)

The Court's decision was nearly unanimous; only Justice Harlan F. Stone dissented. Writing for the Court, Justice Felix Frankfurter relied primarily on the "secular regulation" rule, which weighs the secular purpose of a concededly nonreligious government regulation against the religious practice it makes illegal or otherwise burdens the exercise of religion. He identified the Pennsylvania flag-salute requirement as an intrinsically secular policy enacted to encourage patriotism among school children. Weighing the circumstances in this case, he argued that the social need for conformity with the requirement was greater than the individual liberty claims of the Jehovah's Witnesses. He emphasized that

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious belief. (193)

In *Gobitis*, the U.S. District Court and U.S. Court of Appeals had not been swayed by the U.S. Supreme Court's decision in *Johnson v. Deerfield*(194) and earlier *per curiam* opinions concerning the flag-salute. The Court expected that Frankfurter's extended treatment of the matter would lay the issue to rest.

The Court's ruling, however, contributed to an escalation of confrontations between Jehovah's Witnesses and their adversaries. Throughout the nation in the months following the *Gobitis* decision, there were hundreds of attacks on Jehovah's Witnesses. John Haynes Holmes, chairman of the American Civil Liberties Union claimed, "It is no accident that this long and violent succession of outrages against the Witnesses in recent weeks was coincident with the unfortunate decision of the Supreme Court refusing to interfere with the action of school authorities in demanding the salute."(195) The strength of the link between the violence and the Court's opinion is dramatically illustrated by a sheriff's explanation of why a mob chased seven Witnesses from a small Southern town. He explained, "They're traitors--the Supreme Court says so. Ain't you heard?"(196) That sheriff's explanation of the *Gobitis* ruling was clearly without sound basis, but it was the understanding claimed by many self-appointed defenders of Americanism as justification to attack or discriminate against Jehovah's Witnesses. The reporter who interviewed the sheriff concluded that, "North and South, East and West, the Court decision has served to kindle mob violence against Jehovah's Witnesses."(197)

After the *Gobitis* ruling, refusal to participate in flag-salute ceremonies resulted in the expulsion of Jehovah's Witnesses children in at least thirty-one states.(198) This increase in the enforcement of compulsory flag-salute regulations, however, was accompanied by substantial, unfavorable criticism of the Court's decision. Of the forty-two political science and law journal articles commenting on *Gobitis*, more than three-fourths of them were critical of the decision, less than 10 percent supported it, and 15 percent took no position. The editorial comments in the popular press were no less critical; 171 of the larger newspapers throughout the country disapproved of the decision.(199)

A more significant response to *Gobitis* was the rulings of several state courts that compulsory flag-

salute ceremonies violated their state constitutions. In addition to the earliest of these, the Hancock County Circuit Court decision discussed above, a Minnesota trial court also relied on its state constitution to restrain enforcement of flag-salute regulations.(200) Even more dramatic were the opinions of the supreme courts in Kansas and Washington. Both courts expressed hostility for Gobitis and relied on the religious liberty provisions of their state constitutions to strike down the flag-salute regulations.(201)

The Barnette decision of the Federal District Court of Southern West Virginia presented the most notable judicial defiance of the Gobitis precedent. Appellate procedure requires that lower federal courts conform their rulings to those of the U.S. Supreme Court. Nevertheless, the Federal District Court in West Virginia openly discounted the Gobitis precedent and found that the state's compulsory flag-salute requirements violated First-Amendment protection of the free exercise of religion. The facts in Barnette resembled those in the hundreds of other flag-salute confrontations that occurred across the country. When the Jehovah's Witnesses' national legal office determined that it was again time to bring the flag-salute issue before the high court, West Virginia presented the most attractive forum for litigation due to the fact that challenges to the constitutionality of statewide regulation could be brought before a special three-judge federal district court, from which appeal could be taken directly to the Supreme Court. The sect's legal office chose three parents, Walter Barnette, Lucy McClure, and Paul Stull, who lived near Charleston to bring a class action suit on behalf of themselves and all others similarly situated. Charleston lawyer Horace S. Meldahl filed the complaint on 19 August 1942.(202)

On 27 August, District Judge Ben Moore convened the statutory three-judge court. District Judge Harry E. Watkins and U.S. Court of Appeals Judge John J. Parker joined him on the panel.(203) Hayden Covington, national legal counsel of the Jehovah's Witnesses, represented the parents; West Virginia Assistant Attorney General Ira J. Partlow represented the State Board of Education. At the initial hearing on Tuesday, 14 September, it was soon apparent that Judge Parker disliked the regulation. He urged the board of education to amend its regulation to excuse students who, on conscientious grounds, refused to salute. In order to provide the board the opportunity to consider his suggestion, he recessed the hearing until the following day.(204) The next day, the board voted to reject a compromise position.(205) Later that day when the hearing resumed, Judge Parker maintained that it was "unfortunate that a case of this kind should be in court," and rejected the state's reliance on Gobitis.(206) The court denied the state's motion to dismiss the suit and gave the defendants two weeks to file an answer.(207) Before an answer was submitted, the lawyers for both sides agreed to submit the case for a decision based on the pleadings and briefs already filed.(208) On 6 October 1942, the unanimous three-judge court enjoined the West Virginia school system "from requiring the children of the plaintiffs, or any other children having religious scruples against such action, to salute the flag."(209) Based on cues it perceived coming from the high court itself, the District Court took the unusual step of ruling contrary to a precedent of the U.S. Supreme Court.

The judges on the District Court were aware of changes in both membership and attitude on the Supreme Court. In 1940, Justice Stone had cast the only dissenting vote in the Supreme Court's Gobitis decision to uphold compulsory flag-salute laws. After that decision, membership changed on the Court. In 1941, Chief Justice Charles Evans Hughes and Justice James McReynolds left the Court. President Roosevelt moved Justice Stone to the Chief Justice's chair, and filled the positions left vacant by McReynolds and Stone with James F. Byrnes and Robert Jackson. More significantly, some of the remaining justices modified their positions relative to constraints on religious liberty. In 1942, in *Jones v. Opelika*,(210) the Court upheld a law requiring a license to sell religious literature door to door. Justices Stone, Hugo Black, William Douglas, and Frank Murphy voted in the minority. Black, Douglas, and Murphy, who had supported the Gobitis decision, joined in a special dissenting opinion in *Jones* that was written to expressly declare that Gobitis was "wrongly decided."(211) These developments encouraged the three-judge Federal District Court in West Virginia to discount the precedent established by Gobitis. Writing for the unanimous court, Judge Parker argued:

The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority.... We would be recreant to our duty as judges, if through blind following of a decision, which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by

constitutional guaranties.(212)

At the end of the 1941-42 term, Justice Byrnes resigned and President Roosevelt appointed Wiley Rutledge to the empty seat. On 3 May 1943, Justices Stone, Black, Douglas, Murphy, and Rutledge voted in *Murdock v. Pennsylvania*(213) to reverse a decision it made only nine months earlier in *Opelika*.(214) *Murdock* struck down city ordinances that required obtaining a license and paying a tax for members of religious organizations going from house to house and selling the printed propaganda of their sect. The Court ruled that even though such requirements were general and non-discriminatory, they still infringed on the liberties of free press, free speech, and free exercise of religion. That this decision came so quickly after the *Opelika* decision indicates how quickly a radical change of view came about on the Court. After its *Murdock* decision, the Court seemed poised to reverse *Gobitis* as well.

The West Virginia State Board of Education voted to appeal the *Barnette* decision to the Supreme Court. The state's principal argument was that *Barnette* raised no substantial federal question because *Gobitis* settled the constitutional questions raised by the flag-salute expulsions. The state's brief quoted extensively from Justice Frankfurter's *Gobitis* opinion. Given the clear indications that at least five justices were ready to lay aside the *Gobitis* precedent, there was little else the state's lawyers could do. The American Legion's amicus curiae brief filed in support of the state's appeal did little more than duplicate the West Virginia argument.(215)

Covington answered the state's appeal in a brief that was a mixture of Jehovah's Witnesses Bible teachings and constitutional arguments. He included a fiery attack on the Court's *Gobitis* opinion, especially rejecting Frankfurter's deference to legislative policymaking authority. Such deference, he argued, allowed the legislature to define its own powers. He emphasized the nationwide persecution of Jehovah's Witnesses that followed *Gobitis* and concluded with a long list of law journal and newspaper articles that criticized the decision.(216) The American Bar Association's Committee on the Bill of Rights and the ACLU filed amicus curiae briefs that argued *Gobitis* was bad law and should be overruled.(217)

On Flag Day, 14 June 1943, the U. S. Supreme Court announced its decision in *West Virginia State Board of Education v. Barnette*.(218) In a six-to-three vote,(219) the Court overturned its *Minersville School District v. Gobitis* decision and thereby effectively terminated the legal controversy over compulsory flag salute ceremonies in American schools. The *Barnette* decision also indirectly repudiated the many violent attacks on Jehovah's Witnesses that followed *Gobitis*. Moreover, in this case Justices Black, Douglas, Murphy, and Rutledge formed the voting bloc that served as the Court's liberal core throughout the 1940s. Likewise, the *Barnette* and *Murdock* decisions reflected the New Deal Court's move toward broader construction of the Free Exercise Clause. In *Barnette*, Justice Jackson enunciated what has become a guiding principle in protecting individual liberties: "If there is any star in the 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."(220)

## CONCLUSION: THE UNIQUE LEGAL AND POLITICAL CONTRIBUTIONS OF THESE CASES

Meaningful developments in law resulted from hundreds of cases across America that grew out of the Jehovah's Witnesses practicing their faith in ways that offended or inconvenienced others. The four West Virginia cases discussed above were particularly significant because legal protection for the free exercise of religion was expanded in each case using a different kind of law. The legal response to the expulsion of children who refused to salute the flag from Hancock County schools resulted in an early example of "new judicial federalism." In that case, the Circuit Court used the Constitution of West Virginia to expand protection of religious practice beyond that protected by the United States Constitution and the federal courts. The criminal prosecutions that followed the castor oil incident in Richwood resulted in developments in judicial interpretation that expanded application of the federal civil rights statutes' color-of-law provisions. It was also the only successful federal criminal prosecution in the hundreds of violent attacks on Jehovah's Witnesses during the early 1940s. The legal action

that followed the firing of the Jehovah's Witnesses glassworkers in Clarksburg was especially significant because it is most likely the finest example of the infrequent use of administrative law to protect religious liberty. It also provided an excellent example: the value of government use of persuasion to enforce public policy. Additionally, this high-profile case resolved by the Committee on Fair Employment Practice demonstrated the need for a permanent, statutory federal agency to protect the civil rights of minority groups. The best known of the four cases, West Virginia State Board of Education v. Barnette, is a landmark case in defining the Bill of Rights' protections for free exercise of religion and freedom of speech. It was also in this bellwether case that a strong liberal bloc coalesced; that bloc influenced the Court's decisionmaking over the next seven years. Therefore, it was a harbinger of the Court's movement toward a position of strong, unwavering rulings protecting individual liberties.

(1.) Victor Rotnem, "Criminal Enforcement of Federal Civil Rights," *Lawyers Guild Review* (May 1942): 18-23; Francis H. Heller, "A Turning Point For Religious Liberty," *Virginia Law Review* 29 (1943): 440-59; Edward F. Waite, "The Debt of Constitutional Law to Jehovah's Witnesses," *Minnesota Law Review* 28 (1944): 909-46; Hollis W. Barber, "Religious Liberty v. Police Power--Jehovah's Witnesses," *American Political Science Review* 41 (1947): 226-47; William Shephard McAninch, "A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court," *Cincinnati Law Review* 55 (1987): 997-1077; David P. Currie, "The Constitution in the Supreme Court: Civil Rights and Liberties, 1930-1941," *Duke Law Review* (1987): 800-30; "Jehovah's Witnesses: Definers of Freedom," in *Congressional Quarterly's Guide to the U.S. Supreme Court*, 3rd ed., vol. 1, ed. Joan Biskupic & Elder Witt (Washington, D.C. CQ Press, 1997), 453; Lee Epstein and Thomas G. Walker, *Constitutional Law for A Changing America, Rights, Liberties and Justice*, 3rd ed. (Washington, D.C.: CQ Press, 1998), 101; and Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence, Kans.: University Press of Kansas, 2000).

(2.) John E. Molder and Marvin Comisky, "Jehovah's Witnesses Mold Constitutional Law," *Bill of Rights Review* 2 (1942): 262-68.

(3.) Harlan Fiske Stone to Charles Evans Hughes, 24 March 1941, quoted by Peters, *Judging Jehovah's Witnesses*, 186.

(4.) M. James Penton, *Apocalypse Delayed: The Story of Jehovah's Witnesses* (Toronto: University of Toronto Press, 1985), 88.

(5.) David R. Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (Chicago, Ill.: The University of Chicago Press, 1962), 27.

(6.) Barbara Grizzuti Harrison, *Visions of Glory: A History and a Memory of Jehovah's Witnesses* (New York: Simon & Schuster, 1978), 185-86.

(7.) Barber, "Religious Liberty v. Police Power," 227.

(8.) Manwaring, *Render Unto Caesar*, 26; and Harrison, *Visions of Glory*, 185.

(9.) See *Commonwealth v. Palms*, 14 A.2d 484 (Penn. 1940).

(10.) William J. Whalen, *Armageddon Around the Corner: A Report on Jehovah's Witnesses* (New York: John Day Company, 1962), 57-58.

(11.) Huey B. Howerton, "Jehovah's Witnesses and the Federal Constitution," *Mississippi Law Journal* 17 (1946): 347-71, 352; Charles G. Hanson, "Note: Constitutional Law--Jehovah's Witnesses," *Notre Dame Lawyer* 22 (1946): 82-94; and Jerry Bergman, "The Modern Religious Objection to Mandatory Flag Salute in America: A History and Evaluation," *Journal of Church and State* 39 (Winter 1997): 215-

36.

(12.) Morton Grodzins, *The Loyal and the Disloyal: Social Boundaries of Patriotism and Treason* (Chicago, Ill.: University of Chicago Press, 1956), 18.

(13.) For a summary of these attacks, see Manwaring, *Render Unto Caesar*, 163-67.

(14.) *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

(15.) James A. Beckford, *The Trumpet of Prophecy: A Sociological Study of Jehovah's Witnesses* (New York: John Wiley & Sons, 1975), 35.

(16.) See also, Joseph T. Tinnelly, "A Current Problem in Freedom of Speech and of Religion," *St. John's Law Review* 16 (1941): 108-17, 112-13, n. 44: "The Witnesses have been charged with sedition, disrespect to the flag, riot, breach of the peace, disorderly conduct, conspiracy against the government, trespassing, offending and annoying people, vagrancy, soliciting and canvassing with out a license, inciting riot, assault and battery, distribution of obscene literature, blasphemy, violating the Sabbath laws, and distributing circulars without a permit." An example of such legal action in West Virginia is in the case of a woman and young girl, who were attacked repeatedly while distributing Jehovah's Witnesses literature in Grantsville. They were permanently enjoined from distributing religious literature in the county. See *Matthews v. West Virginia ex rel. Hamilton*, Chancery Orders of Calhoun County Circuit Court, 16 November 1942 (vol. 11, 319).

(17.) Victor W. Rotnem and F. G. Folsom, Jr., "Recent Restrictions Upon Religious Liberty," *American Political Science Review* 36 (1942): 1053-67, see esp. 1061.

(18.) Robert J. O'Brien, "Persecution and Resistance: Jehovah's Witnesses and the Defense of Religious Liberty in West Virginia," an unpublished manuscript in my possession. This article examines the expulsion of Jehovah's Witnesses children from school in Barbour, Hancock, Harrison, Kanawha, Nicholas, Upshur, and Wood Counties. It also discusses or enumerates attacks on Jehovah's Witnesses with the complicity of government officials in the West Virginia towns of Bluefield, Clarksburg, Follansbee, Holliday's Cove, Huttonsville, Keyser, Martinsburg, Morgantown, New Martinsville, Phillippi, Riehwood, St. Marys, Wellsburg, and Williamson. Dr. O'Brien, a professor at West Virginia Wesleyan College, is writing a comprehensive book on the persecution of Jehovah's Witnesses.

(19.) Minutes of the Hancock County Board of Education, 22 May 1941.

(20.) "Jehovah's Witnesses Indicted," *The (New Cumberland, W.Va.) Independent*, 16 April 1942, 1.

(21.) *Minersville School District v. Gobitis*, 310 U.S. 586.

(22.) Quoted in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) at 626.

(23.) *State v. Frank Clementino, Sr.*, *State v. George Maupin*, *State v. Joe Mercante*, *State v. Pete Mercante*, and *State v. Arthur Ginier*; files of the Hancock County Circuit Clerk. The grand jury returned all these indictments on 14 April 1942. Based on the number of children they had in school, all the men except Ginier were named in two indictments.

(24.) This Order is in the Maupin file.

(25.) 1941 W. Va. Acts 32., codified at W. VA. Code [sections] 1851(1) (1943).

(26.) "Judge J.H. Brennan Gives Opinion In Flag Salute Cases," *The (New Cumberland, W.Va.)*

Independent, 4 June 1942, 1.

(27.) "Memorandum of Opinion," State v. Mercante, 4 June 1942, 12; located in the Joe Mercante file.

(28.) Donald E. Wilkes, Jr., "The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court," Kentucky Law Journal 62 (1974): 421-51; Robert D. Bursack, "Of Laboratories and Liberties: State Protections of Political and Civil Rights," Georgia Law Review 10 (1976): 533-64; William J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," Harvard Law Review 90 (1977): 489-504; and Ronald K. Collins, Peter J. Galie, and John Kincaid, "State High Courts, State Constitutions and Individual Rights Litigation Since 1980," Publius 16 (1986): 141-61.

(29.) Constitution of West Virginia, Article III, [sections] 15.

(30.) "Memorandum of Opinion," State v. Mercante, 1 June 1942, 12.

(31.) The other decisions were Brown v. Skustad, Minnesota, St. Louis County District Court, 1942 (unreported), cited in Manwaring, Render Unto Caesar, 193; State v. Smith, 127 P.2d 518 (Kans. 1942) and Bolling v. Superior Court, 133 P.2d 803 (Wash. 1943).

(32.) Interview with Harding Legg, Mount Lookout, W. Va., 26 September 1996 [tape recorded]; and "Stipulation of Facts," 1, United States v Catlette Docket no. 9390 (S.D.W.Va. 1942), unreported decision. National Archives and Record Administration--Mid Atlantic Region, Philadelphia, Pa. Record Group 21 [hereinafter NARA-RG 21, Catlette]. The petition protested the Ohio State Fair Association's cancellation of a contract for use of the Ohio State Fair Grounds for a national convention of Jehovah's Witnesses.

(33.) "Court's Charge," 11, NARA-RG 21, Catlette.

(34.) Legg interview; and Leonard A. Stevens, Salute! The Case of the Bible vs. the Flag (New York: Coward, McCann & Geoghegan, Inc., 1973), 13.

(35.) Rotnem & Folsom, "Recent Restrictions," 1061, n. 23.

(36.) The earliest scholarly reference to the event is a two sentence description in a footnote by Rotnem and Folsom, *ibid.* A brief summary of the case's importance is provided by Frank Coleman, "Freedom From Fear On the Home Front," Iowa Law Review 29 (1944): 415-29, see esp. 421-22; and by John T. Elliff, *The United States Department of Justice and Individual Rights, 1937-1962* (New York: Garland, 1987, reprint of Elliff's Harvard thesis, 1967), 93-94. A more extensive examination is found in a study of the first years of the U.S. Department of Justice civil Rights Section; see Robert K. Carr, *Federal Protection of Civil Rights: Quest For A Sword* (New York: Cornell University Press, 1947), 134-35, 143-44, and 155-59. Brief references to the Richwood incident are included in Manwaring, *Render Unto Caesar*, 166 and 179. A detailed, but poorly documented, description of the attack is found in Stevens, *Salute!*, 11-17. The Richwood case is also discussed in Peters, *Judging Jehovah's Witnesses*, 89-92, 113-14, and 120-23.

(37.) "Stipulation of Facts," 2, NARA-RG 21, Catlette.

(38.) *Ibid.*, 2.

(39.) See Manwaring, *Render Unto Caesar*, 6, 63, 64, 77, 165, 166, and 175-76; Heller, *A Turning Point for Religious Liberty*, 446; William Pencak, *For God & Country: The American Legion, 1919-1941* (Boston, Mass.: Northeastern University Press, 1989), 303 and 318; and Peters, *Judging Jehovah's Witnesses*, 107-13.

(40.) "Affidavit of C.A. Cecil," 8 July 1940, American Civil Liberties Union Archives 2249:180, Seeley G. Mudd Manuscript Library, Princeton University [hereinafter, ACLU Archives]. All material from the ACLU Archives is used by permission of the Princeton University Library.

(41.) This information comes from an account in the 29 June 1940, issue of a mimeographed newspaper, the Richwood Daily News Letter. Jim Comstock, a high school English teacher, launched the paper as a student summer project. I have a photocopy of this issue and the 1 July 1940 issue, made from the files of The Richwood (W. Va.) Nicholas Republican. Comstock later became well known as publisher of the weekly newspaper, the West Virginia Hillbilly. This account has been reprinted in several newspapers; see Jim Comstock, "Mandatory flag-saluting has ugly history," Charleston (W. Va.) Gazette, 16 October 1988, 5.

(42.) "More About Jehovah's Witnesses," Richwood Daily News Letter, 1 July 1940, 3-4.

(43.) Vi Finlinson, "Jehovah's Witnesses Pro's and Con's," The Richwood (W. Va.) Nicholas Republican, 11 July 1940, 3.

(44.) "Stipulation of Facts," 2, NARA-RG 21, Catlette.

(45.) Ibid., 2-3.

(46.) Ibid.

(47.) Legg interview.

(48.) "Stipulation of Facts," 3, NARA-RG 21, Catlette.

(49.) Comstock, "Mandatory flag-saluting."

(50.) "2 Held Guilty in Civil Rights Case of Jehovah's Witnesses," Charleston (W. Va.) Gazette, 4 June 1942.

(51.) A columnist in the Richwood newspaper presented a digest of the views of the town's residents; Finlinson, "Jehovah's Witnesses Pro's and Con's." Two letters to the editor criticized the attack: A Citizen, "In The Mail," The Richwood (W. Va.) Nicholas Republican, 11 July 1940, 1; and M. B. McClung, "Readers' Forum," The Charleston (W. Va.) Gazette, 11 July 1940, 8. A brief Associated Press story provided a sketchy, somewhat inaccurate account of the attack: "9 Refuse to Salute Flag, Are Fed Castor Oil by Richwood Mob," The Charleston (W. Va.) Gazette, 1 July 1940, 7.

(52.) Carr, Federal Protection of Civil Rights, 156.

(53.) Manwaring, Render Unto Caesar, 177-79.

(54.) Ibid., 133-34.

(55.) Harry P. Stumpf, American Judicial Politics (New York: Harcourt, Brace, Jovanovich Publishers, 1988), 107.

(56.) Lemuel R. Via to Wendell Berge, 18 December 1941, National Archives and Records Administration, Record Group 60. U.S. Department of Justice Central Files, Case 171891-1. At the time this article was researched, some of the Department of Justice correspondence files were missing from the National Archives. I determined the content of some of the correspondence cited here from records slips of the correspondence that were compiled by Department of Justice clerks and which served as an index of the correspondence files. The record slips identified the sender, recipient,

date, subject and Department of Justice file number of each letter [hereinafter NARA-RG 60].

(57.) Ibid.

(58.) Raoul Berger, Memorandum of 21 April 1942, quoted in Carr, Federal Protection of Civil Rights, 134-35.

(59.) Wendell Berge to Lemuel R. Via, 17 April 1942, NARA-RG 60 Catlette.

(60.) See Mackin v. United States, 117 U.S. 348 (1886); United States v. Moreland, 258 U.S. 433 (1922); and Duke v. United States, 301 U.S. 492 (1937).

(61.) Although the strategy of indictment by information proved successful in this instance, its usefulness is limited by several considerations. As Carr, Federal Protection of Civil Rights, 135-36, argues, it limits prosecutions of those who are officers of the law. Others who deprive persons of their civil rights must be tried under 18 U.S.C. [sections] 51 (1925), conspiracy to deprive persons of their civil rights, which, because it is a felony, requires indictment by a grand jury. This meant that because it was difficult to convince the local people who made up grand juries to indict those who attacked Jehovah's Witnesses, it was possible to prosecute only law officers acting under color of law.

(62.) The statute had its origins in the Civil Rights Act of 1866, see 14 Stat. 27, c. 31 [sections] 2. It was retained in the Revised Statutes of 1873 as section 5510 and carried over and given its present wording in the Criminal Code of 1909 as section 5440, see 35 Stat. 1092, c. 321 [sections] 20. In 1942, this provision was found in the United States Code of 1925, 18 U.S.C. [sections] 52 (1925).

(63.) United States v. Buntin, 10 Fed. 730, 732 (C.C.S.D. Ohio 1882); and United States v. Stone, 188 Fed. 836 (D.C. Md. 1911) at 841.

(64.) The U.S. Supreme Court upheld this application of the statute in United States v. Classic, 313 U.S. 299 (1941).

(65.) "Court's Charge," 6 and 11, NARA-RG 21, Catlette. The only victim of the attack who did not testify at the trial was C. A. Cecil.

(66.) Ibid., 12.

(67.) Ibid., 15-16.

(68.) "Order on trial, guilty verdict," 1, NARA-RG 21, Catlette and 2 Held Guilty In Civil Rights Case, 1 and 12.

(69.) "Order Overriding Motion to Set Aside Verdict and Imposing Judgment," 1, NARA-RG 21, Catlette.

(70.) "Appellant's Brief," 5, Catlette v. United States No. 4992, National Archives and Record Administration--Mid Atlantic Region, Philadelphia, Pa. Record Group 276 [hereinafter NARA-RG 276, Catlette].

(71.) Wendell Berge to Claude M. Dean, 16 November 1942, NARA-RG 276 Catlette.

(72.) Catlette v. United States, 132 F2d 902 (4th Cir. 1943), 906.

(73.) Ibid.

(74.) Ibid.

(75.) Ibid.

(76.) For an extensive discussion of the legal significance of this case, see Chuck Smith, "Jehovah's Witnesses and the Castor Oil Patriots: A West Virginia Contribution To Religious Liberty," *West Virginia History* 57 (1998): 95-110.

(77.) *Screws v. United States*, 325 U.S. 91 (1945). For a note mentioning that Catlette contributed to this development, see G. L. Clark, "Annotation: Validity and construction of statutes making conspiracy to deprive or deprivation of constitutional right a federal offense," 162 A.L.R. 1373, 1396 (1946).

(78.) George C. Schmidt to J. E. Mayeur, 4 June 1942, West Virginia and Regional History Collection, West Virginia University Libraries, A&M 2423--Window Glass Cutters League of America, Series 2, Legal Matters 1924-73, Box 2, Folder 13, Jehovah's Witness Case 1941-43 [hereinafter WVRHC, Jehovah's Witnesses file]. All materials from this collection are used with permission of the West Virginia University Libraries.

(79.) Franklin D. Roosevelt, "Address to Congress Requesting War Declaration," 8 December 1941, in *The Public Papers and Addresses of Franklin D. Roosevelt*, vol. 10 (New York: Russell & Russell, 1950, reissued 1969), 514.

(80.) Ibid.

(81.) "Affidavit of Fred Kroll, Brief of Pittsburgh Plate Glass Company," 20, The National Archives and Records Administration: Record Group 228, Committee on Fair Employment Practice, Headquarters Records/Legal division--hearings, Entry 19 530-53-41-07, Box 336, [hereinafter NARA RG 228, Hearing Records].

(82.) "Verbatim transcript of proceedings," 66, NARA RG 228, Hearing Records.

(83.) Ibid., 48.

(84.) "Affidavit of Howard L. Halbach, Brief of Pittsburgh Plate Glass Company," 18, NARA RG 228, Hearing Records.

(85.) "Verbatim Transcript of Proceedings," 124; and "Affidavit of Clarence James, Brief of Pittsburgh Plate Glass Company," 39; both in NARA RG 228, Hearing Records.

(86.) "Witnesses Examined," *Time*, 29 July 1941, 40.

(87.) "Minutes of the Harrison County School Board of Education," 5 August 1941, Minute Book 4, 100.

(88.) "Non-Saluters Open School in Northview," *The Clarksburg (W.Va.) Exponent*, 25 September 1941, 9.

(89.) "Minutes, Norwood Local," 16 December 1941, West Virginia and Regional History Collection, West Virginia University Libraries, A&M 2423--Window Glass Cutters League of America, General Correspondence, Records 1924-73, Series 3, General Correspondence, Box 26, Folders w/ Norwood Local Correspondence [hereinafter WVRHC, Window Glass Cutters, Gen. Cor.].

(90.) Ibid.

- (91.) "Schoolroom Flags," The Clarksburg (W.Va.) Exponent, 19 December 1942, 6.
- (92.) "Intermediate Findings and Directions," 21 December 1942, 1; West Virginia and Regional History Collection, West Virginia University Libraries, A&M 2423--Glass, Ceramic, and Sand Silica Workers, Local 2, Records, 1934-1974, Series 1 Correspondence, Box 5, Folder 31, General Correspondence, 1939-44 [hereinafter WVRHC, G.C.&S.S.W].
- (93.) "Verbatim transcript of proceedings," NARA RG 228, Hearing Records.
- (94.) Stanley Meredith to Harry D. Nixon, 19 December 1940, WVRHC, Window Glass Cutters, Gen. Cor.
- (95.) "Verbatim transcript of proceedings," 41, NARA RG 228, Hearing Records. The seven fired workers were Clyde Seders, Paul G. Schmidt, Bernard L. Schmidt, Woodrow Parson, Charles W. Faris, Brown H. Russell, and Charles R. Ferris.
- (96.) Ibid. and Stanley Meredith to Harry D. Nixon, 27 December 1940, WVRHC, Jehovah's Witnesses file.
- (97.) Francis Schmidt, interview by author, Clarksburg, W. Virginia, 12 September 1998 [hereinafter, Schmidt interview]. Francis Schmidt is the son of Paul Schmidt. During the interview, he gave me a 1905 photograph of the West Fork Local of the Window Glass Cutters League. Paul Schmidt is among the workers in the picture. He is also pictured among glass workers at the Lafayette glass plant in a 1912 photograph published in Ron Borum, ed., Harrison County 76 (Clarksburg-Harrison Bicentennial Commission, 1976), 36.
- (98.) "Verbatim transcript of proceedings," 142, NARA RG 228, Hearing Records.
- (99.) For a more complete description of the efforts Paul Schmidt made to regain his job, see Chuck Smith, "Paul Schmidt: A Workingman's Tenacious Pursuit of Religious Liberty," *Journal of Law and Religion* 14 (2000): 559-78.
- (100.) Executive Order 8802, 25 June 1941, The National Archives and Records Administration, Record Group 11, General Records of the United States [hereinafter NARA RG 11].
- (101.) James w. Rush, "The Fair Employment Practice Committee and the Shipyard Hearings of 1943-1944," *Prolog: Quarterly of the National Archives and Records Administration* 29 (1992): 279-89, 281.
- (102.) Charles Zaid, Preliminary Inventories: No. 147, Records of the Committee on Fair Employment Practice (National Archives and Records Administration 1962), 4.
- (103.) Executive Order 8802, 25 June 1941; Executive Order 8823, 18 July 1941; Executive Order 9111, 25 May 1942; and Executive Order 9346, 27 May 1943, NARA RG 11.
- (104.) Paul G. Schmidt to Clifford Forster, 7 March 1942, ACLU Archives 2428: 128.
- (105.) Ibid.
- (106.) "Exhibit #11, Memorandum, Daniel R. Donovan to Lawrence W. Cramer," no date, NARA RG 228, Hearing Records.
- (107.) Accounts of this investigation are in: William Saas to Philip Murray, 27 April 1942, WVRHC, Window Glass Cutters, Gen. Cor.; "Exhibit #11, Memorandum, Daniel R. Donovan to Lawrence W. Cramer," no date, NARA RG 228, Hearing Records; and Paul G. Schmidt to Clifford Forster, 13

August 1942, ACLU Archives 2428: 139.

(108.) "Exhibit #11, Memorandum, Daniel R. Donovan to Lawrence W. Cramer," no date, 1, NARA RG 228, Hearing Records.

(109.) Ibid., 2.

(110.) Frank Fenton to J. E. Mayeur, 20 May 1942, WVRHC, Jehovah's Witnesses.

(111.) Paul G. Schmidt to Clifford Forster, 13 August 1942, ACLU Archives 2428: 130.

(112.) Ibid.

(113.) Schmidt interview.

(114.) Lawrence W. Cramer to J. E. Mayeur, 19 August 1942, WVRHC, Jehovah's Witnesses file.

(115.) "Government Exhibit 6--Lawrence W. Cramer to Irwin De Shetler," 19 August 1942, NARA RG 228, Hearing Records.

(116.) Lawrence W. Cramer to Howard L. Halbach, 19 August 1942, The National Archives and Records Administration: Record Group 228, Committee on Fair Employment Practice, General Correspondence Entry 5, 530-53-41-02 Box 53 [hereinafter NARA RG 228, CFEP, cor.].

(117.) Lawrence W. Cramer to William Green, 19 August 1942, WVRHC, Jehovah's Witnesses file.

(118.) Stanley R. Meredith to Harry E. Nixon, 1 September 1942, WVRHC, Jehovah's Witnesses file.

(119.) Frank Fenton to J. E. Mayeur, 9 September 1942, WVRHC, Jehovah's Witnesses file.

(120.) J.E. Mayeur to Frank Fenton, 9 September 1942, WVRHC, Jehovah's Witnesses file.

(121.) Lawrence W. Cramer to J.E. Mayeur, 16 October 1942, WVRHC, Jehovah's Witnesses file.

(122.) Lawrence W. Cramer to Howard L. Halbach, 19 October 1942, NARA RG 228, CFEP, cor.

(123.) "Agendum," 9 November 1942, National Archives and Records Administration: Record Group 228, Committee on Fair Employment Practice, Headquarters Records/office of the committee, Entry 3, 530-53-40-01 [hereinafter referred to as NARA RG 228, office].

(124.) "Summary of actions taken at November 23rd meeting of the committee," 24 November 1942, NARA RG 228, office.

(125.) Malcolm S. MacLean to W.G. Koupal, 23 November 1942, NARA RG 228, office.

(126.) Office of War Information, War Manpower Commission, "Advance release: For Sunday Morning Papers, Nov. 29, 1942," National Archives and Records Administration: Record Group 228, Committee on Fair Employment Practice, Headquarters Records/Information and Public Relations Division, Press releases, 1941-1945, R - Z, Entry 64, 530-53-50-05, box 510.

(127.) Ibid.

(128.) "7 Of Jehovah Sect Ordered Rehired, New York Times, 29 November 1942, 32; "Bias Charged in Firings," Business Week, 26 December 1942, 62.

(129.) "Agendum, meeting of Dec. 7, 1942," NARA RG 228, office.

(130.) "Verbatim transcript of proceedings," 95-96, NARA RG 228, Hearing Records.

(131.) Lawrence W. Cramer to William M. Saas, 5 December 1942, WVRHC, G.C.&S.S.W. and Stanley R. Meredith to J. E. Mayeur, 11 December 1942, WVRHC, Jehovah's Witnesses file, n. 78.

(132.) Meredith, *ibid.*

(133.) Minutes, meeting of Dec. 7, 1942," NARA RG 228, office.

(134.) George M. Johnson to Committee Members, "Summary of actions taken at December 7th meeting of the committee," 9 December 1942, NARA RG 228, office.

(135.) J.E. Mayeur to Lawrence W. Cramer, 16 December 1943, WVRHC, Jehovah's Witnesses file.

(136.) *Ibid.*

(137.) Rush, "Fair Employment Practice Committee."

(138.) The committee met from 11:30 a.m. to 1:00 p.m. and 2:30 to 6:00 p.m. Six members of the committee were present; as were nine workers who opposed the rehiring and their lawyer, two officials and two attorneys of the company; Paul Schmidt was the only one of the fired workers present. "Verbatim transcript of proceedings," 1, NARA RG 228, Hearing Records.

(139.) "Brief of Pittsburgh Plate Glass Company, 220-44," NARA RG 228, Hearing Records.

(140.) "Verbatim transcript of proceedings," 17 and 23, NARA RG 228, Hearing Records.

(141.) "Brief of Pittsburgh Plate Glass Company," 3-10, NARA RG 228, Hearing Records.

(142.) *Ibid.*, 11-13.

(143.) Verbatim transcript of proceedings, 23-142, NARA RG 228, Hearing Records

(144.) Paul G. Schmidt to Clifford Forster, 12 December 1942, ACLU Archives 2428: 147.

(145.) "Verbatim transcript of proceedings," 143-44, NARA RG 228, Hearing Records.

(146.) Paul G. Schmidt to Clifford Forster, 12 December 1942, ACLU Archives 2428: 147.

(147.) *Ibid.*, 147-48.

(148.) *Ibid.*, 160-62.

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- (151.) "Summary of Action Taken at March 1, 1943, Meeting of the Committee," NARA RG 228, office.
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- (171.) Minersville School District v. Gobitis, 310 U.S. 586 (1940),
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- (173.) *Barnette*, 47 F. Supp. 251 (S.D.W.Va. 1942)
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- (175.) *Ibid.*, 12-15.
- (176.) *Ibid.*, 30.
- (177.) *Ibid.*, 30-31.
- (178.) At that time the Pledge of Allegiance was recited by placing one's right hand over the heart. When the words "I pledge allegiance to the flag" were recited, at the word "flag" the right arm was extended toward the flag with the palm up.
- (179.) *Manwaring, Render Unto Caesar*, 31.
- (180.) Exodus 20: 3-5. For a detailed explanation of this rationale, see Bergman, "The Modern Religious Objections to the Flag Salute."
- (181.) *Manwaring, Render Unto Caesar*, 56.
- (182.) *Ibid.*
- (183.) *Nicholls v. Lynn*, 7 N.E.2d 577 (Mass. 1937); *Leoles v Landers*, 192 S.E. 218 (Ga. 1937); *Hering v. Board of Education*, 194 Atl. 177 (N.J. 1937); *Gabrielli v. Knickerbocker*, 82 P.2d 391 (Cal. 1938); *People ex tel. Fish v. Sandstrom*, 18 N.E.2d 840 (N.Y. 1939); and *State ex tel. Bleich v. Board of Public Instruction*, 190 So. 815 (Fla. 1939).
- (184.) *Leoles v. Landers*, 302 U.S. 656 (1937); *Hering v. Board of Education*, 303 U.S. 624 (1938); and *Gabrielli v. Knickerbocker*, 306 U.S. 621 (1939).
- (185.) *Johnson v. Deerfield*, 306 U.S. 621 (1939).
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- (187.) 1935-36 Pennsylvania Opinions of the Attorney General, 100, 26 October 1935.
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- (195.) John Haynes Holmes, "The Case of the Jehovah's Witnesses," *Christian Century* 57 (17 July 1940): 896-98; see esp. 898.
- (196.) Beulah Amidon, "Can We Afford Martyrs?" *Survey Graphic*, September 1940, 457-60; see esp. 457.
- (197.) *Ibid.*
- (198.) Manwaring, *Render Unto Caesar*, 187.
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- (200.) *Brown v. Skustad*, Minnesota, St. Louis County District Court, 1942 (unreported), cited in Manwaring, *Render Unto Caesar*, 193.
- (201.) *State v. Smith* 127 P.2d 518 (Kans. 1942); and *Bolling v. Superior Court*, 133 P.2d 803 (Wash. 1943).
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- (203.) "Order," 27 August 1942, *ibid.*
- (204.) "Flag Salute Case Argued in Court," *The Charleston (W. Va.) Gazette*, 15 September 1942, 13.
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- (206.) *Ibid.*
- (207.) *Ibid.*
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- (209.) "Final Decree," 6 October 1942, NARA-RG 21, *Barnette*.
- (210.) *Jones v. Opelika*, 316 U.S. 584 (1942).
- (211.) *Ibid.*, 623-24.
- (212.) *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 at 253 (S.D.W.Va. 1042).
- (213.) *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).
- (214.) *Jones v. Opelika*, 316 U.S. 584 (1942).
- (215.) Manwaring, *Render Unto Caesar*, 215-17.
- (216.) *Ibid.*, 217-20.

(217.) Ibid., 220-24.

(218.) West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

(219.) Stone, Black, Murphy, Douglas, Jackson, and Rutledge voted to overrule Gobitis; Roberts, Frankfurter, and Reed voted to maintain it.

(220.) Ibid., 642.

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