Arguing *Barnette, et al*. (1943)

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On March 11, 1943, the Supreme Court of the United States finished hearing two days of oral arguments in a series of cases in which Jehovah's Witnesses claimed that various government actions violated their constitutional rights.

Three of the cases, originating in Alabama, Arkansas and Arizona, were rehearings of cases that the Supreme Court had decided two years earlier.[1] Other cases, arising from Pennsylvania, were argued for the first time.[2] In each, the Jehovah's Witnesses challenged the constitutionality of their criminal convictions for violating ordinances that prohibited selling merchandise, as the Witnesses did with books and pamphlets, without first obtaining, for a fee, a city license.

On March 11th, the Court heard the completion of oral arguments, begun the previous day, in those cases. The Court then heard arguments in two additional cases. In one, a Jehovah's Witness challenged the constitutionality of an Ohio city ordinance that prohibited him from knocking on doors or ringing doorbells to distribute handbills advertising a religious meeting.[3]

The final argument of the day was *West Virginia State Board of Education v. Barnette*. The plaintiffs were two young school children, the Barnett sisters. (Their surname got misspelled somewhere in the

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[1] *See* No. 280, *Rosco Jones v. City of Opelika, Alabama*, No. 314; *Lois Bowden & Zada Sanders v. City of Fort Smith, Arkansas*; No. 966, *Charles Jobin v. Arizona*.

[2] *See* No. 450, *Robert L. Douglas v. City of Jeannette*; No. 480, *Robert Murdock, Jr. v. City of Jeannette*; No. 481, *Anna Perisich v. City of Jeannette*; No. 482, *Willard L. Mowder v. City of Jeannette*; No. 483, *Charles Seders v. City of Jeannette*; No. 484, *Robert Lamborn v. City of Jeannette*; No. 485, *Anthony Maltezos v. City of Jeannette*; No. 486, *Anastasia Tzanes v. City of Jeannette*; No. 487, *Ellaine Tzanes v. City of Jeanette*.

[3] *See* No. 238, *Martin v. City of Struthers*.

litigation.) They had been expelled from their public school for refusing to participate in a prescribed salute and pledge of allegiance to the U.S. flag. To do so, they had been taught by their parents and believed as Jehovah's Witnesses, would violate biblical teaching not to bow down before graven images.[4] Their legal argument was that the U.S. Constitution, particularly the First Amendment, prohibited the government's punishment of their behavior in accord with their religious belief.

In each of the cases, the attorney who argued on behalf of the Jehovah's Witnesses was Hayden C. Covington.[5]

In 1943, Supreme Court oral arguments were not recorded. And, alas, no transcripts of Mr. Covington's March 1943 oral arguments seem to have been found. His arguments can be reconstructed to some degree, however, from press reports.

In the *Barnette* oral argument, Hayden Covington made these statements, perhaps roughly in this order, to the Justices:

- The Barnett sisters were directly challenging the correctness of the Court's 1940 decision, *Minersville School District v. Gobitis*,[6] upholding the constitutionality of compelling children who were Jehovah's Witnesses to salute the American flag in their public school.

- There was no "more unstatesman-like decision" in the law than *Gobitis*, "except possibly the *Dred Scott* decision."[7]

- The effect of *Gobitis* had been "to restrain conscience and prohibit the free exercise thereof."

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[4] For contemporary information regarding this belief of Jehovah's Witnesses, see http://wol.jw.org/en/wol/d/r1/lp-e/2009094.

[5] In the 1940s through the 1950s, Covington litigated and won more than two dozen civil liberties cases in the U.S. Supreme Court. *See generally* SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 181-83 (2000).

[6] 310 U.S. 586, *available at* www.law.cornell.edu/supct/html/historics/USSC_CR_0310_0586_ZS.html.

[7] *See Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857), *available at* http://supreme.nolo.com/us/60/393/case.html.

- In *Gobitis*, the Supreme Court "shifted the burden of interpreting the Constitution back to the school boards throughout the country" and said, in effect, that their decisions would determine the rights of Jehovah's Witnesses.

- Because "it is human to err and divine to forgive," the Court should reconsider *Gobitis*.

- *Gobitis* advocated people fighting this issue out in the public forum. The effect had been a "civil war against Jehovah's Witnesses," including 48 states passing mandatory flag salute laws, expulsions of more than 20,000 Jehovah's Witnesses from public schools, and other forms of persecution.

- West Virginia admitted that Jehovah's Witness school children refusing to salute the flag while paying due respect to it in other ways did not pose a clear and present danger to the community, so there was no basis to deny the children's exercise of their religious convictions.

- Three years of experience since *Gobitis* indicated that the only clear and present danger resulting from a refusal to salute the flag was the danger that the person so refusing would be mauled or killed.

- *Gobitis*, "one of the greatest mistakes that this Court has ever committed," should be reversed.[8]

By June, the Supreme Court decided each of these cases. In all but one, in which the Court determined that it lacked jurisdiction to order the relief sought, it decided in favor of the Jehovah's Witness litigants.

For the *Barnette* decision, which did "reverse" (overrule) *Gobitis*, click here.

[8] For the foregoing details of Hayden Covington's oral argument in the *Barnette* case, see *Flag Salute and Religious Liberty*, 11 U.S. LAW WEEK 3279 (Mar. 16, 1943) (reporting on the argument).