

Barnette at 60

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Flag Day, June 14, 2003, marks the 60th anniversary of Justice Robert H. Jackson's opinion for the Supreme Court in *West Virginia State Board of Education v. Barnette*.¹

The *Barnette* decision, rendered amid the commendable patriotism that characterized the home front during that dark middle period of World War II, invalidated a West Virginia State Board of Education resolution that required all school teachers and students to participate in a flag salute and recitation of the Pledge of Allegiance. The case was brought on behalf of students who were Jehovah's Witnesses. In deference to their belief that the Bible forbade them to bow down to graven images,² they refused to salute the flag and, for that refusal, they were expelled from school. The school expulsions had the effect of making the children unlawfully absent, which subjected them to delinquency proceedings and their parents to criminal prosecution.

The Supreme Court held, 6-3, that the State's flag salute requirement violated the children's First Amendment rights, which exist to strengthen "individual freedom of mind in preference to officially disciplined uniformity..."

A leading hero of the *Barnette* case, in addition to the children, their parents and lawyers, was the Chief Justice of the United States, Harlan Fiske Stone. In June 1940, when Stone was an Associate Justice, he had dissented powerfully but alone from the Supreme Court's decision to uphold

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¹ 319 U.S. 624 (1943).

² See Exodus 20:4-6: "You must not make for yourself a carved image or a form like anything that is in the heavens above or that is on the earth underneath or that is in the waters under the earth. You must not bow down to them nor be induced to serve them, because I Jehovah your God am a God exacting exclusive devotion, bringing punishment for the error of fathers upon sons, upon the third generation and upon the fourth generation, in the case of those who hate me; but exercising loving-kindness toward the thousandth generation in the case of those who love me and keep my commandments." (From The Bible Online, at www.watchtower.org.)

a Pennsylvania flag salute requirement.³ (Jackson, who was Attorney General of the United States and a Supreme Court nominee at that time of impending American involvement in the war in Europe, reported then to his Cabinet colleagues and to President Roosevelt on the anti-alien, anti-Fifth Columnist hysteria that was sweeping the country, and Jackson criticized the Supreme Court for joining in that hysteria by ruling against Jehovah's Witnesses in that first flag salute case.⁴)

By June 1943, Stone had been appointed Chief Justice; new Associate Justices, including Jackson, had joined the Court; and a majority of the Justices was prepared to revisit and rectifying the earlier mistake.

Chief Justice Stone assigned Justice Jackson to write the Court's opinion in *Barnette*. Although all of it bears rereading, the words to consider closely, at any time, are Jackson's summary paragraphs:

The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

³ *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

⁴ See III HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES: THE LOWERING CLOUDS* 211 (1955) (recording, on June 15, 1940, Attorney General and Supreme Court nominee Jackson's comments at the previous day's Cabinet meeting: "Bob Jackson told about the hysteria that is sweeping the country against aliens and fifth columnists. He is particularly bitter about the decision recently handed down by the Supreme Court in the Jehovah's Witnesses case...").

orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.