

## “The Court as Now Constituted” (1943)

*John Q. Barrett\**

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In early 1942, the Supreme Court of the United States, reviewing a number of cases involving criminal convictions of street preachers and proselytizers who were Jehovah’s Witnesses, rejected their claims that the U.S. Constitution protected their activities.<sup>1</sup> In *Chaplinsky v. New Hampshire*, for example, the Supreme Court unanimously defined a Witness preacher’s street speech as unprotected “fighting words.”<sup>2</sup>

In *Jones v. City of Opelika*, a case from Alabama, together with companion cases from Arkansas and Arizona, the Court made another major decision in this vein. The Court affirmed, by a bare 5-4 margin, the constitutionality of Jehovah’s Witnesses’ criminal convictions for selling printed matter without purchasing city-required licenses.<sup>3</sup> Justice Stanley Reed wrote the Court’s opinion. He was joined by Associate Justices Owen J. Roberts and Felix Frankfurter, and by the Court’s two newest Associate Justices, James F. Byrnes and Robert H. Jackson, each in his first year on the bench. In dissent, Chief Justice Harlan Fiske Stone was joined by Associate Justices Hugo L. Black, William O. Douglas, and Frank Murphy.

During the Court’s 1942 summer recess, the Jehovah’s Witnesses who were the losing parties in the *Jones* case sought rehearing.

On October 5, 1942, as the new Supreme Court term began, Justice Byrnes resigned—he concluded his Court career after only one year.

On January 11, 1943, the country learned who the new ninth Justice would be. President Roosevelt nominated Justice Wiley Rutledge of the

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<sup>1</sup> See generally John Q. Barrett, *Justice Jackson in the Jehovah’s Witnesses’ Cases*, 13 FIU LAW REVIEW 827 (2019), available at <https://ecollections.law.fiu.edu/lawreview/vol13/iss4/>. This Jackson List post is based on an aspect of that article.

<sup>2</sup> See 316 U.S. 568 (1942).

<sup>3</sup> See 316 U.S. 584 (1942).

U.S. Court of Appeals for the District of Columbia. The Senate confirmed the nomination swiftly and Rutledge received his commission as an Associate Justice on February 11.

On February 15, Justice Rutledge was present for the first time on the Supreme Court bench. On that day, the Court granted the petitions for rehearing in *Jones* and its companion cases.

On March 10, the Court heard reargument in *Jones*. The Jehovah’s Witnesses’ attorney argued unopposed—the City of Opelika did not, unlike when the case first was argued a year earlier (and it had won), send an attorney to argue its side.

On May 3, the Court announced its decision. It reversed the Jehovah’s Witnesses’ criminal convictions, holding 5-4 that they had First and Fourteenth Amendment rights to leaflet without obtaining municipal licenses.<sup>4</sup> Justice Douglas read the Court’s brief *per curiam* opinion, for himself, Chief Justice Stone, and Justices Black, Murphy, and Rutledge. Justices Roberts, Reed, Frankfurter, and Jackson dissented.

Chief Justice Stone—or perhaps his senior law clerk Bennett Boskey, as draftsman—initially had been prepared to have the Court hand down an opinion stating that its personnel change had caused the change in result from *Jones I* to *Jones II*. On March 25, Stone had circulated to the other Justices a proposed *Jones II* opinion stating that “the Court as now constituted is of opinion that the judgment ... should be reversed.”

The candid words “as now constituted” startled Justice Roberts, and maybe others. Roberts discussed his concerns with Justice Douglas. He reported them to the Chief Justice. Stone readily agreed to delete those words.

In the brief *Jones II* opinion that the Court handed down, it rested its decision to reverse the Jehovah’s Witnesses’ criminal convictions on only its concurrent decision in another Jehovah’s Witness’s case, and on the dissenting opinions that had been filed a year earlier in *Jones I*.

It was nonetheless true, if not stated explicitly by the Court, that the four *Jones I* dissenters now had, with Justice Rutledge, the fifth vote that made the case come out the other way.

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<sup>4</sup> See 319 U.S. 103 (1943).