

Jehovah Witness faith have refused to give the salute and that the Board has indicated an intent to make the salutation a condition to the right or privilege to attend the public schools.

The question presented has long been a subject of court litigation, both in the state and federal courts. In every case the issue was raised as to whether the flag salute requirement as applied to students refusing to comply upon sincere religious grounds, infringed without due process of law, the liberty guaranteed by the Fourteenth Amendment to the United States Constitution. The applicable portion of the Fourteenth Amendment reads as follows:

"(1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The identical fact situation presented in the instant case was placed before the United States Supreme Court in the case of *Minersville School District v. Gobitis* (1939), 310 U.S. 586, 84 L. Ed. 1375, 60 S. Ct. 1010. There, the children members of the Jehovah Witness faith were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise. In upholding the constitutionality of a resolution similar to that as passed by the Board of Trustees of School District 9, Rosebud County, the court stated that the American flag is the "symbol of our national unity transcending all internal differences, however, large, within the framework of the Constitution" and held that school districts might properly determine the "appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious." The *Gobitis* case constituted the law of the land until the year 1942 at which time its holding was specifical-

Opinion No. 61.

Flag Salute—Compulsion—Refusal to Salute—Constitutional Limitations —Loyalty.

HELD: A board of school trustees may not compel a pupil to salute the national flag where the refusal is based upon sincere religious grounds. Neither the threat of, nor actual expulsion of a pupil may be resorted to in an effort to obtain compliance.

February 9, 1954.

Miss Mary M. Condon
Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Condon:

You have requested my opinion as to the validity of a resolution recently passed by the Board of Trustees of School District No. 9 of Rosebud County, Montana, requiring that all pupils attending school in the district must salute the national flag. You inform me that three students of the

ly overruled in the case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, a case involving the same factual situation. In overcoming the reasoning of the *Gobitis* case that "national unity is the basis of national security" and that the state authorities have "the right to select appropriate means for its attainment," the Court in the *Barnette* case renounced the idea of compulsory acts of uniformity, stating:

" . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

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" . . . 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.

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"We think the action of the local authorities to compell 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."

The law is clear. The facts are unequivocal and are not susceptible to any conclusion other than that reached in the *Barnette* case, *supra*. Words or acts made under the coercive threat of expulsion neither prove loyalty nor foster patriotism.

It is therefore my opinion that a board of school trustees may not compel a pupil to salute the national flag where the refusal is based upon sincere religious grounds. Neither the threat of, nor actual expulsion of a pupil may be resorted to in an effort to obtain compliance.