Conditional Liberty: The Flag Salute Before *Gobitis* and *Barnette*

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In the 1940 landmark case, *Minersville School District v. Gobitis,*[1] the Supreme Court of the United States first heard arguments on the right of children to refuse to salute the American flag in public schools. Fifteen years earlier, these same issues were being discussed in the Superior Court of Whatcom County, Washington. In both instances, children with strong religious beliefs instilled by their parents refused to participate in morning flag exercises and were expelled from school as a consequence. Also, in both instances, public opinion weighed heavily against those seeking to uphold their First Amendment rights. Why, then, did one case make it to the Supreme Court and not the other?

This study will attempt to answer this question by closely examining the case of nine-year-old Russell Tremain of Whatcom County, Washington, and his struggle to legally refrain from saluting the flag in public schools. To best understand the issues and controversies of the *Tremain* case, this study will first sketch the general setting, explaining both the history of the flag salute in America as well as the rise of "Americanism" in the 1920s that may have contributed to the fervor that erupted in Bellingham, Washington during this period. Second, the essay will explain the details of Russell Tremain's battle in the Washington State court system. Third, the study will examine the intervention of the American Civil Liberties Union (ACLU) in the Tremain case, including the substantial difficulties faced by its legal team. Finally, the essay will identify and explain five major factors that contributed to the case remaining in its original jurisdiction and not advancing to higher courts.

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

First Amendment scholars know well the stories of the Gobitis and Barnette children whose flag salute cases reached the Supreme Court in the 1940s, and entire books have been written about their respective plights.[2] Few scholars know about Russell Tremain and others like him whose legal struggles were never read beyond their community newspapers. These stories provide an important missing link in judicial history. While studies examining First Amendment rulings by the United States Supreme Court are commonplace, scholars have generally overlooked lower court rulings that reveal the history of the issues involved in Supreme Court cases. It is often through cases *not* heard by the Supreme Court that we come to understand what factors contribute to the success and failure of cases that contain constitutional questions. Only by uncovering why some First Amendment cases have stalled in lower courts can we thereby understand why others have succeeded to Supreme Court review.

THE HISTORY OF THE FLAG SALUTE

The flag salute ceremony recognized today was introduced in 1892 by *Youth's Companion* magazine to "stimulate patriotism in the schools."[3] This first flag salute ceremony called for students to state, "I pledge allegiance to my flag and the Republic for which it stands, one nation indivisible, with liberty and justice for all."[4] In 1924, the American Legion recommended that the pledge be changed to include the words "of America" after the words "United States" which had earlier been attached to the pledge.[5] By 1925, when Russell Tremain attended school, students were also required to extend their right hand, "palm up and slightly raised, toward the flag" as they said the words "to my flag."[6]

In 1923, the American Legion convened its first National Flag Convention to "correct the misuse of the flag" which they attributed to citizen "ignorance." By 1924, the National Flag Conference was attended by sixty-eight organizations, all prepared to "have introduced into the classroom a course in flag etiquette."[7] This same year, the American Legion's Commission on Americanism reported that they

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

3. Coutts, "How the Flag Pledge Originated," *Journal of Education* 126 (1942): 225, as quoted in Manwaring, *Render Unto Caesar: The Flag Salute Controversy*, 2.

4. John W. Baer, *The Pledge of Allegiance, A Centennial History 1892-1992* (Annapolis, Md.: Free State Press, Inc., 1992).

5. Coutts, "How the Flag Pledge Originated," 225.

6. Coutts, "The Flag Salute," *National Education Association Journal* 32 (1943): 265, as quoted in David R. Manwaring, *Render Unto Caesar: The Flag Salute Controversy*, 2.

7. American Legion, *Reports to the Sixth Annual Convention of the American Legion* (St. Paul, Minn.: American Legion, 1924), 68.

had distributed 14 million pamphlets on the flag salute to individuals, newspapers, and magazines. In addition to their efforts at flag education, the American Legion also convinced lawmakers in several states to pass bills making the pledge of allegiance mandatory in public schools. By 1942, when the American Legion convinced Congress to pass a similar bill, twenty states had already implemented these laws.[8]

AMERICANISM

The American Legion, in 1925, was involved in a number of "all-American" activities such as teaching the pledge of allegiance. As the leading proponent of "Americanism" in the 1920s, the American Legion lead a nationwide effort to strengthen patriotism in America. For example, the 1919 founding charter of the Legion set out to "combat all anti-American tendencies, activities and propaganda" as well as to "foster the teaching of Americanism in all schools."[9] In the 1924 *Report to the Annual Meeting*, American Legion officers reported that the newly formed Commission on Americanism contained 120 member organizations whose goal was to bring about the "complete obliteration of anarchy, I.W.W.ism, communism and the like."[10] Among these groups was the Ku Klux Klan (KKK), the Daughters and Sons of the American Revolution (DAR and SAR), and the Veterans of Foreign Wars (VFW).

Many of the organizations associated with the Americanism movement during this period publicly bragged of their patriotic achievements. For example, members of the VFW claimed they convinced Congress to make the "Star Spangled Banner" the national anthem. Additionally, the SAR claimed credit for the federal government's recognition of Flag Day.[11] Each of these groups, all participants in the 1924 National Flag Convention, was active in Bellingham, Washington in 1925.

These organizations contributed to what historian Paul Murphy described as a decade "characterized by waves of public intolerance seldom felt in the American experience."[12] Although the 1920s are often remembered as carefree years, the undercurrent of Americanism left a darker shadow on the time. The American Legion and its allies

8. William George Fennell, *Compulsory Flag Salute in Schools* (New York: Committee on Academic Freedom, ACLU, 1936, 1939), as quoted in David R. Manwaring, *Render Unto Caesar: The Flag Salute Controversy*, 5.

9. Raymond Molley, Jr., *The American Legion Story* (New York: Duell, Sloan and Pearce, 1996), 369.

10. American Legion, *Reports to the Sixth Annual Convention of the American Legion*, 70.

11. Bessie Louise Pierce, *Citizens' Organizations and the Civic Training of Youth* (Washington, D.C.: American Historical Association, 1933), 52-55.

12. Paul L. Murphy, "Sources and Nature of Intolerance in the 1920s," *The Journal of American History* (June 1964): 61.

opposed many organizations that questioned government practices, whether moderate, liberal, or radical.

At this time, the War Department pushed for more Americanism in schools, topping off this drive with a plan for compulsory military training at the college level. Because of War Department efforts, "by 1925, eighty-three colleges required all male students to enroll" in the ROTC.[13] The War Department's aggressive stance on compulsory training only fueled the fire of debate in America about the role of citizens in war efforts. Because World War I had left many citizens questioning the United States' commitment to militarism, and many organizations questioning the government's wartime use of sedition laws to silence them, the 1920s were a time of national introspection. "What was America?" many asked, and "what should it become?" Amid this unease in American society, a particular elementary schoolboy attended school like all other boys his age. His trip to school, however, brought this debate to the forefront.

RUSSELL TREMAIN

On Tuesday, 8 September 1925, Russell Tremain, a nine-year-old boy from Bellingham, Washington, returned to school for his first full day of classes following summer break. This year began like all others at Franklin School, with a flag salute and the pledge of allegiance. This year, however, would be different from others. Russell's father, John W. Tremain, a night watchman at the local lumber mill, approached school officials this first week, requesting that his son be allowed to refrain from all flag exercises. Tremain explained that he and his family did not believe in the flag salute because the flag was a symbol of "militarism and war" and was "contrary to the teaching of the Bible and true Christianity."[14] Tremain and his family were members of the Elijah Voice Society (EVS), a splinter group of the Russellites, the original Jehovah's Witnesses. The EVS believed in a literal interpretation of the Bible, the sinfulness of war, and, most importantly, the authority of God over human institutions. The school authorities, following Section 4777 of the Washington State School Law, said all children must participate in the flag exercises "at least once in each week." Hence, they could not accommodate Tremain's request, whatever his beliefs.[15]

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13. "Eighty-Three Enforce It," *The Survey*, 15 December 1925, as quoted in Samuel Walker, *In Defense of American Liberties: The History of the ACLU* (New York: Oxford University Press, 1990), 58.

14. Elijah Voice Society, "An Open Letter to Thoughtful People," (Elijah Voice Society, 18 May 1926).

15. Washington State Law Section 4777, as quoted in a memo by Dr. Sydney Strong, 6 August 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

On the Monday following this discussion, Russell did not appear at school. When the truant officer arrived at the Tremain home to inquire about his absence, she was told Russell would not be attending school because his religious beliefs prevented him from saluting the flag. Ethel Tremain, Russell's mother, explained to the truant officer her family had been told saluting was a requirement of school attendance, and Russell would not salute.[16] This same day, school authorities notified county prosecutor Edwin Gruber that they wanted to pursue legal action against the Tremains.

By Wednesday, 16 September, only one week following Tremain's first discussion with school officials, the case against Tremain reached the Superior Court in Whatcom County for a ruling. At this time, Judge W. P. Brown charged Russell's father with the crime of "failing without excuse to send a child of school age to school." [17] The judge, although stating he found Tremain "absolutely sincere" in his beliefs, also found him guilty and "imposed a $25 fine." Tremain responded that he had a constitutional right to the "free exercise of my religion."[18] Judge Brown, although acknowledging Tremain's religious beliefs led to the incident, did not accept religion as a reasonable excuse for these actions. Russell, the judge concluded, needed to be taught patriotism and respect for the law above all else, including religion. In addition to the charge of keeping Russell from school, Judge Brown also warned Tremain that he would be charged with "contributing to the delinquency of a minor" if he did not send his son back to school immediately.[19] The delinquency charge, Judge Brown cautioned, included the potential punishment of removing Russell from his home to "make sure he is rightly instructed and led."[20]

Tremain responded to these charges by refusing to pay his $25.00 fine, and was promptly placed in the county jail. During the period of his father's incarceration, Ethel Tremain held firm on the family's decision to keep Russell out of school until the authorities allowed him to attend without saluting the flag. Although the truant officer came to the Tremain house again on Tuesday, Russell's mother informed the officer "that she had no intention of sending the boy to school."[21]

On Monday morning, 21 September, Prosecuting Attorney Gruber filed two new charges against John Tremain—a second count of "failing without excuse to send a child of school age to school," and the new

16. "Law May Force Father Allow Son Salute Flag," *Bellingham American*, 14 September 1926, 1.

17. "Father Declares He Will Not Let Son Salute Flag Despite Court Order, Pleads Religious Beliefs," *Bellingham American*, 16 September 1925, 6.

18. Ibid.

19. Ibid.

20. Ibid.

21. Ibid.

charge, "contributing to the delinquency of a minor."[22] The petition filed by Gruber stated that Russell Tremain was a "habitual truant and being in danger of growing up to lead an idle, dissolute and immoral life by reason of not attending school public or private, not being properly instructed to respect the law and not being given any lesson in patriotism and love of county."[23] Also, on this Monday morning, Judge Brown ruled that the charge against Tremain for "contributing to the delinquency of a minor," normally heard in a closed juvenile court, would be made open to the press and the public because of "the great public interest and question of policy at stake," would be open to everyone.[24]

The next afternoon at 2:00 p.m., Russell's father again faced Judge Brown, this time in juvenile court. When the judge asked Tremain to respond to the charges, he sat silently. Upon additional questioning by Judge Brown, Tremain stated that he could not accept the charge or the ruling in Judge Brown's court because he did not believe in a court beyond that found in heaven. Tremain said, "He had pledged allegiance to the heavenly flag and would not recognize the authority of this court." [25] He further explained these religious beliefs to Judge Brown in a closed session of court. Christ would appear very soon, he said, and at that time a "spiritual government would rule the world."[26]

Not amused by Tremain's insistent refusal in open court or in private session to provide what he believed to be a logical response for these actions, Judge Brown ruled that Russell would be taken from his home and placed in the county detention center, a place usually reserved for "incorrigibles and children with criminal tendencies."[27] The judge went on to say that Russell would be kept from his parents and "sent to school until such time as his father and mother, of their own free will, would consent to send him to school and allow him to salute the flag."[28] The Tremains refused to concede, packed two suitcases—one with clothes and one with toys—and sent their son to the detention home.

The county detention home was about four miles outside the town limits of Bellingham. According to the *Bellingham American*, he lived here, "attending school, apparently happy . . . saluting the flag as

22. "New Charges Filed Against Father Who Kept Son From Saluting Flag," *Bellingham American*, 21 September 1925, 1.

23. Ibid.

24. Ibid.

25. "Court Takes Tremain's Son: Despite Parents Boy to Be Sent Public School," *Bellingham American*, 22 September 1925, 1.

26. Ibid.

27. "Lad Removed From Custody of His Folks," *Bellingham Union Reveille*, 23 September 1925.

28. "Court Takes Tremain's Son: Despite Parents Boy to Be Sent Public School," *Bellingham American*, 22 September 1925, 1.

instructed"[29] until 4 December 1925, when he was moved to the home of his aunt and uncle, the Mutclers, who owned a farm in Greenwood, Washington. Russell was not moved to their home because of a change of heart by the judge, but because a child at the detention home had come down with a "loathsome disease" that the authorities feared Russell could contract.[30] Although Russell's parents asked the court if he could be sent home at this time, Judge Brown refused. The Tremains, said Judge Brown, must "completely change their minds toward the flag salute before the boy can be sent home." He did, however, allow one concession: "The boy may visit his parents occasionally, but under no circumstances is he to spend the night at their home."[31]

Russell's stay at his relative's home lasted fewer than two months. Due to the illness of his aunt, Russell returned to the county detention home on 9 January 1926. Only two weeks later, on 27 January, Russell was taken much farther from home, being transferred from the county detention home in Bellingham to the Washington Children's Home in Seattle. Within one week of Russell's departure, his parents packed up their belongings and moved to Seattle to be near their son.

On 20 May 1926, the Tremains were notified via court order that custody of their son would permanently be given to the Washington Children's Home Society for adoption by a "Christian family." After nine months of unyielding protest by the Tremains, Judge Brown decided that Russell should not live without "Christian, patriotic" parents any longer. He set a court date for 4 June to settle the matter for good. Although the Tremains knew their son was being placed up for adoption on this date, they refused to attend the court hearing, reiterating their earlier position that they did not recognize the authority of the court.

At the hearing, Judge Brown questioned L. J. Covington, the northwest representative of the Washington Children's Home Society, about the Tremain family and their reasons for not attending the court session. Covington explained to the court that he had spoken with the Tremains about the importance of their appearing. Covington, in an attempt to get them to recognize the authority of the court, even quoted passages from the Bible that referenced Jesus giving "tribute . . . to the government of Caesar." These biblical references, however, did nothing to sway Tremain or his wife. In reference to the examples advanced by Covington, Tremain replied that "this was the best government in the world," but he still could not acknowledge any government other than heaven's. Covington explained to the court that

29. "Free Tremain From Jail As Term Expires," *Bellingham American*, 24 September 1925, 1.

30. "Boy Whose Parents Would Not Le[t] Him Salute Flag Is Sent To Farm," *Bellingham American*, 4 December 1925, 3.

31. Ibid.

Tremain had in no way changed his position on the authority of the court since September. Covington told the judge, "his attitude is this, and it seems fixed, that he renders no allegiance to any other but what he calls the 'heavenly citizenship.'"[32] Judge Brown then asked if Covington believed the Tremains' attitude toward the flag salute also remained unchanged, to which Covington replied, it "is the same attitude. . . . Nothing that I could do would change it."[33]

Judge Brown then questioned Russell about his parents, their visitation schedule, and his feelings about the pending adoption. Russell answered truthfully to the seemingly biased questions. "Yes," he would rather live in the "regular house, like the ordinary boy[s]" the judge described. He "didn't know" if his father worked, but "yes" he did visit during the day when most regular people worked. And, "yes," his parents did visit only "once a week."[34] Judge Brown needed no further proof beyond Russell's responses. His decision had been made.

The judge chose to make a ruling on Russell's adoption the same day, reading aloud his opinion to the court. Because the Tremains would not send their son to school and have him participate in flag exercises, the judge explained, they were "placing the child in danger of growing up to lead an idle, dissolute and immoral life." He went on to conclude that the Tremain family, for refusing to uphold the law, was unfit to raise a child. He stated, "[I]f a home where such regard of law is taught is not an unfit place to raise a child, then I am unable to understand what home would be unfit."[35] With this statement, he ruled the custody of Russell Tremain would be permanently turned over to the Washington Children's Home Society.

THE AMERICAN CIVIL LIBERTIES UNION

On 29 May, one week before Russell's adoption hearing, the national ACLU office in New York City sent its first correspondence regarding the *Tremain* case.[36] On this day, Roger Baldwin, president of the ACLU, sent two telegrams, one to the Tremains asking them to allow the ACLU to act on their behalf in the upcoming adoption proceedings for their son, and a second one to George F. Vanderveer of the Seattle Central Labor Council, requesting that he act on behalf of the ACLU to protest the adoption of Russell "in case [his] parents

32. Superior Court of Washington, Whatcom County, "In the Matter of the Welfare of Russell Tremain, A Juvenile," Case J-926, 4 June 1926, 3-4.

33. Ibid., 5.

34. "Court Takes Tremains Son: Despite Parents Boy to Be Sent Public School," *Bellingham American*, 22 September 1925, 1.

35. Ibid., 10.

36. There is no record of previous correspondence from the ACLU involving the *Tremain* case in the archival materials of the ACLU national office.

refuse to contest" the case.[37] Vanderveer replied by telegram the same day, saying he would take up the case for the ACLU, but before proceeding would need "to have authority from one person with legal interest in the controversy."[38]

The Tremains, however, did not respond directly to Baldwin's offer of assistance. Instead, they handed over the telegram to the Elijah Voice Society to respond on their behalf. In a telegram received by the ACLU the following day, the Elijah Voice Society thanked Baldwin and the ACLU for their proposed assistance, but stated it could not accept the ACLU's offer. The telegram concluded: "Owing to certain faith and principles on which our society is founded and in accordance with which we operate, we cannot accept."[39]

Because the Tremains quickly rejected Baldwin's initial strategy of defending their family, he instead focused his attention on retaining Vanderveer to act on the behalf of the ACLU as an independent attorney protesting the case. The legal strategy behind appearing at the 4 June hearing was to argue that Judge Brown's original decision was a breach of Russell's First Amendment rights. As Baldwin explained, this decision was "an unconstitutional violation of religious freedom."[40]

On 3 June, Vanderveer sent a second telegram to the ACLU stating he could not act on the behalf of the Tremains at their custody hearing, a decision never fully explained in a letter dated 4 June 1926. In the letter, Vanderveer reasoned that the short period allotted for preparation and the parents' unwillingness to pursue the case in court had kept him from participating. To begin with, Vanderveer had not had time to speak to the Tremains or to members of the Elijah Voice Society in the five days since Baldwin's first telegram. Moreover, he could not appear legally on behalf of Russell's parents who had neither approved his counsel nor agreed to acknowledge the authority of the court. Vandiver wrote that he had reached a roadblock where Russell's parents were concerned: "[A]s I understand it, these people were not merely neutral upon the question of appealing in court but were actually opposed to it for religious reasons. . . . Obviously therefore, I could not appear as their counsel."[41]

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37. Roger N. Baldwin to George F. Vanderveer, 29 May 1926, American Civil Liberties Union Papers, Vols. 298 and 299, Princeton University (microfilm, University of Washington).

38. George Vanderveer to ACLU, 29 May 1926, American Civil Liberties Union Papers, Vols. 298 and 299, Princeton University (microfilm, University of Washington).

39. Elijah Voice Society to ACLU National Office, 30 May 1926, American Civil Liberties Union Papers, Vols. 298 and 299, Princeton University (microfilm, University of Washington).

40. ACLU Press Release, 26 August 1926, American Civil Liberties Union Papers, Vols. 298 and 299, Princeton University (microfilm, University of Washington).

41. George Vanderveer to ACLU National Office, 4 June 1926, American Civil Liberties Union Papers, vols. 298 & 299, Princeton University (microfilm, University of Washington).

Although Russell Tremain's permanent adoption was settled on 4 June, the ACLU was just beginning to consider what it could do to rectify the situation brought about by his family's religious resistance to the flag salute. On 12 June, the ACLU wrote to E. Edson of Lynden, Washington, regarding the case. The ACLU Field Secretary asked Edson, a friend of the organization, to report back on the specifics of the June 4 trial. The Field Secretary also asked Edson if he could think of a way to convince the Tremains to change their mind about accepting the ACLU's assistance. The letter questioned whether there was any way that "these people [the Tremains] could be brought to responsibility in this matter?"[42]

More importantly, Baldwin and the ACLU, independent of the Tremain's assistance, were beginning to consider additional legal alternatives by which to challenge the constitutionality of the law. Thus, they asked Edson, "Do you think it would be possible to find someone who would be willing to test this ruling of the Board of Education regarding compulsory saluting of the flag?"[43] Baldwin clearly saw that the *Tremain* case had implications beyond the family. While the case could address the larger questions of the compulsory flag salute and religious freedom, and possibly serve as a test case for the nation, the ACLU was willing to abandon the Tremains in lieu of court action through another case, if need be. The ACLU needed someone to challenge this law in court.

Edson's letter of reply, however, seemed to halt any further consideration of action challenging the Board of Education or the state laws under which it functioned. Edson argued that fighting the decision at the local level would be extremely difficult, with only a slim possibility of success. He also explained that fighting the compulsory flag exercises would unleash a wrath of public opinion against the ACLU, and that there would be a "loss of prestige in losing that kind of suit."[44]

In mid-July, Roger Baldwin personally met with the Tremain family during a trip to the Pacific Northwest. As in previous attempts, he was unable to convince them that the ACLU or any other organizations should represent the family in a court they did not acknowledge. When Baldwin failed to convince the Tremains to undertake legal action on their own behalf, or place that authority into his hands, he decided to pursue the case without their assistance by engaging in a two-pronged attack: one in the media, and the other in the courts. On 14 July, Baldwin contacted Lucille Milner at the New York office and asked her to prepare a pamphlet on the *Tremain* case. At this time, the

42. ACLU Field Secretary to E. Edson, 12 June 1926, American Civil Liberties Union Papers, vols. 298 & 299, Princeton University (microfilm, University of Washington).

43. Ibid.

44. E. Edson to Lucille B. Milner, 16 June 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

ACLU was a prolific pamphleteer, sending thousands of publications to sympathetic reporters and ACLU "correspondents" each week. In his letter, Baldwin reminded Milner that the publication should present the facts, but not place too much emphasis on wrongdoing as public sentiment was clearly on the side of retribution against the Tremains. He cautioned that the pamphlet should contain "arguments on both sides" in order not to offend too many political allies. "Even our good friends in Calif[ornia]," he reminded her, "aren't sure it isn't a good thing."[45]

In conjunction with this media blitz, Baldwin contacted an old friend and ACLU supporter, the Rev. Dr. Sydney Strong. Baldwin asked Strong, a clergyman in Seattle, to intervene in the case with the goal of negotiating a compromise that would return Russell to his home. On 14 July, during his trip to the Pacific Northwest, Baldwin wrote to Strong about two legal courses that could be pursued—an appeal of the original court decision and habeas corpus proceedings. The appeal would directly question Judge Brown's 4 June decision that Baldwin considered "an unconstitutional violation of religious freedom," while the habeas corpus proceedings would seek to determine if Russell were being unlawfully deprived of his liberties by being removed from his parents. Baldwin acknowledged, however, that both of these avenues would be difficult to follow without the parents' consent, writing that "[T]he trouble with either proceeding is how to get a complaint in legal form without the parents' participation." He went on to say that what the ACLU really wanted was to test these decisions in "another court."[46] Baldwin was searching for an opportunity to question the first decision in a comparable or higher court setting, possibly opening up an avenue for future appeal.

Along with discussion about remedies through the court system, Baldwin had several conversations about the need for Strong to adopt Russell so another family could not adopt him while the ACLU was working to send him back to his parents. In the 14 July letter, Baldwin suggested that Strong's adoption of Russell would not help the legal situation, and should thus be avoided for the time being. He did recommend, however, that Strong speak to Ralls at the Washington Children's Home in Seattle to ensure that Russell would not be "adopted out" while the ACLU was "arranging this action" to secure Russell's return.[47]

Strong shifted the focus of the ACLU involvement in the *Tremain* case from one of legal adviser to that of arbiter. While at first the ACLU focused on the Tremains solely as a First Amendment test case,

45. Roger N. Baldwin to Lucille B. Milner, 14 July 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

46. Roger N. Baldwin to Sydney Strong, 14 July 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

47. Ibid.

now, due to the prompting of Strong, they focused foremost on saving Russell from adoption with Strong mentioning the need to focus on Russell's return in almost every letter to Baldwin. On 21 July, he wrote, "My real purpose is to return Russell to his parents."[48] On 13 August, Strong again informed Baldwin he was working on getting Russell back to his home by planning a meeting between Judge Pemberton, a Bellingham attorney consulting for the ACLU, and Ralls, superintendent of the Washington Children's Home Society to "discover, if possible, some way of getting the boy back where he belongs."[49]

As an incentive to force a compromise, Strong employed the ACLU method of moving discussions forward by threatening the use of negative publicity. As part of his negotiation tactics, he mentioned to Ralls that the ACLU was interested in the case, and he and his organization may get "a lot of bad publicity" if things were not "adjusted" and Russell returned to his home.[50]

On 27 August, the first breakthrough in Strong's negotiations to return Russell to his parents was recorded. In a letter to Baldwin, Strong explained that Ralls had agreed to return Russell on the condition he attend a new school. Furthermore, Ralls agreed to a request that the new school excuse Russell from flag exercises. After consulting with the Tremains, who said they "have always been willing to send their son to school," Strong reported he would be able to know for sure if the compromise would work when the schools opened 6 September.[51] In reply, Baldwin admitted his fear that the compromise would not go through because it directly contradicted Judge Brown's order.[52]

On 2 September, Strong sent Baldwin a somber letter, explaining that his fear had been well placed. Initially, the plan had seemed to work. Ralls had taken the compromise plan to the Board of the Washington Children's Home Society for approval. The board voted against the compromise, stating they could not return Russell without the permission of Judge Brown.[53] Three days later, however, Strong traveled to Bellingham to meet with Judge Brown regarding the case. Strong reported to Baldwin that, contrary to earlier reports, the judge was actually quite "agreeable." During the meeting, Judge Brown agreed to "modify the order" and return Russell to his home if the

48. Sydney Strong to Roger Baldwin, 21 July 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

49. Ibid., 13 August 1926.

50. Ibid., 26 August 1926.

51. Ibid., 27 August 1926.

52. Roger Baldwin to Sydney Strong, 30 August 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

53. Sydney Strong to Roger Baldwin, 2 September 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

Tremains would send him to a "public or private school (that is satisfactory to local authorities)."[54] In a letter to Baldwin explaining this compromise, Strong said Ralls would arrive the next week to receive the modified order. Because, as he saw it, the parents were not being asked to compromise their principles, Strong concluded all would be settled shortly.

Two weeks following the compromise in Judge Brown's chambers, Baldwin received shocking news from Strong that the compromise had collapsed. Although all three parties (the judge, the Children's Home, and the Tremains) had agreed to follow the plan, no public school would take Russell if he was unwilling to salute the flag. Although Strong had secured a place for Russell in the private YMCA school in Seattle, the Tremains refused to send him there, believing it to be a concession that they were unwilling to make. Instead, they reasoned that their son should be able to attend public school without having to violate his religious beliefs.

That same day, Baldwin received three letters regarding the legal options remaining for the case. The first, a continuation of the letter from Strong, notified that the time for appeal of the original decision had passed. Strong, disappointed from two setbacks, suggested the ACLU continue its publicity campaign, conceding that this may be all that was left to do. The second letter was one of two sent to Baldwin from W. D. Lane, a Seattle attorney working for the ACLU. Lane had more bad news for Baldwin. Because the jurisdiction for the *Tremain* case fell under the Superior Court of Whatcom County, habeas corpus proceedings could not be initiated in another state court, no matter what error the petitioner believed Judge Brown had committed. In essence, the case was tried in the right court, and therefore, no other comparable state court could be asked to review its decision.[55] The third letter, also from Lane, discussed whether a question of constitutionality could be raised in the state courts through habeas corpus proceedings. After referring to several applicable Washington State cases, he concluded that "no," it could not.[56]

Between 6 and 29 November 1926, the general counsel of the ACLU, Wolcott Pitkin, suggested one final legal option to Baldwin. This last chance effort was a taxpayers' suit in which a taxpayer would file suit against the state claiming that his or her taxes had been misspent by supporting Russell's confinement.[57] While a legal stretch, this new idea captured Baldwin's attention—for two days. In a follow-

54. Ibid., 11 September 1926.

55. W.D. Lane to Roger N. Baldwin (Letter 1), 17 September 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

56. Ibid., (Letter 2).

57. Roger N. Baldwin to W.D. Lane, 29 November 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

up memorandum on the taxpayers' suit two days later, Pitkin noted that the success of such an action relied on the demonstration that a public official made a poor decision regarding the use of public money. He explained that in the *Tremain* case, it could not be proven that a public official had acted "fraudulently or in bad faith in paying public money."[58] Russell had been sent to the Children's Home by a judge in an official court for legal reasons. His care, therefore, could not be considered a taxpayer burden.

On 6 December, six months after entering the public debate regarding Russell Tremain, the ACLU formally stopped pursuing the case. Baldwin admitted there was nothing more that the ACLU could do in Washington State, and more pressing issues had arisen in other parts of the country. He wrote to Lane that the ACLU would have to drop the *Tremain* case for good.[59]

Russell remained in the Washington State Children's Home for almost another full year after the ACLU gave up its fight. On 28 November 1927, after renewed negotiations, the Bellingham juvenile court released Russell to his parents' custody with one stipulation: Russell must attend school, public or private.[60] No records could be found containing the specific details of this agreement or what happened to Russell Tremain after this date.

WHY NOT RUSSELL?

The *Tremain* case, while interesting and colorful, also provides a clear example of the difficulties in pursuing a case that never moved beyond the county bench. Five major factors prevented the *Tremain* case from becoming a First Amendment Supreme Court test for religious and speech freedoms; (1) the authorities' (including Judge Brown's) strict adherence to the letter of the law; (2) the influence of the Elijah Voice Society on the Tremain family; (3) the overwhelming public sentiment against the Tremains and the ACLU; (4) the ACLU's belated intervention in the case as well as its lack of authority in legal proceedings; and most importantly, (5) the refusal of Russell's parents to fight for their own rights in court.

The Authorities

The people in position of authority in the case—the school

58. Wolcott H. Pitkin, "Memorandum Re: Russell Tremain," 1 December 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

59. Roger N. Baldwin to W.D. Lane, 6 December 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

60. *Bellingham Times*, 28 November 1927 as quoted in Manwaring, *Render Unto Caesar: The Flag Salute Controversy*, 14.

authorities, the judge, the superintendents of the county detention and Washington Children's homes—strictly enforced the regulations and laws in their respective jurisdictions. While most relied upon specious legal reasons for enforcing the flag salute and its ramifications, it was clear from their actions and statements that these people, on the whole, did not like the Tremains for what they considered to be anti-patriotic actions and poor parenting. For example, the Tremains were convinced that authorities at the county detention home in Bellingham and in the Washington Children's Home in Seattle were speaking poorly of them to their son. These authorities, the Tremains said, were trying to get Russell to convince them to change their position so he could return home. The Tremains reported that Russell had "heard considerable bitter talk against his parents' action and was prevailed on against his own wishes to say and do things to cause his parents to retract in their stand."[61] In addition, the authorities at the Washington Children's Home kept information regarding Russell from his parents. Following the court decision on 4 June, the Tremains reported that for two months they were not allowed to see their son or know where he was being held. They wrote to Baldwin that they believed the superintendent of the home did not like them because of their position, and therefore would not give them information regarding their son. The Tremains said the superintendent was "embittered toward us for not *compromising* and taking Russell home."[62]

In addition to the parents' reports of abuse, there were outside sources to substantiate that actions taken to aggravate the Tremains in the hope of changing their position in the matter may have instead taken place. Dr. Sydney Strong reported in one letter to Lucille Milner of the ACLU that he believed Russell was moved from Seattle to Spokane to make life more difficult for the Tremains immediately following the 4 June decision. Strong went on to say that Ralls may have been using this move to frighten them into compliance. "Mr. R[alls] thinks his parents are very obstinate refusing to come and see him," Strong wrote, "and he may be trying to scare them, by removing the boy."[63]

Judge Brown, the most powerful authority in this case, also took a strict stand against the Tremain family. He was quick to act in the case, and quick to hold his ground. During the September 1925 hearings, Judge Brown made two unusual decisions regarding the

61. J.W. and Ethel D. Tremain, *A Biographical Sketch of a Little Lad* (Elijah Voice Society, 27 May 1926, photocopy), 2, in American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

62. J.W. Tremain to Roger N. Baldwin, 6 August 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

63. Dr. Sydney Strong to Lucille B. Milner, 31 July 1926, 2, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).

Tremain case. The first was his decision to try a juvenile case in open court. Although this decision fell within his discretion, this practice was and is rarely used because closed hearings are seen as in the best interest of protecting the welfare of the child. If judges were swayed by "public interest" on a regular basis, as Judge Brown claims he was in this case, then damaging information would be made public on a daily basis about children and their families.

It is most likely that Judge Brown had more than one reason for opening up this juvenile court case in the "public interest." First, it seems likely that he opened up the court proceedings in this case to make an example of John Tremain. Public sentiment was strongly in Brown's favor, and the judge's court was an excellent forum to demonstrate how an un-patriotic American would be tried and prosecuted. Second, Judge Brown imposed strict requirements on Russell's parents for his return to their custody. It was not enough for the Tremains to say they would return their son to school, but they also had to decide "of their own free will" to send Russell back to a public school where he had to "salute the flag."[64] Although Judge Brown, almost one year later, agreed that Russell could return to his parents' home if he attended a public or private school, the judge added the stipulation that the school would have to be approved by the court. The strict original decision and subsequent rulings most likely caused the Tremains, who had strong beliefs regarding the authority of the court, to become even more rigid in their stance. Russell had already been removed from their home (the most traumatic thing that could happen in this situation), and perhaps instead of causing them to give in, it may well have reinforced their beliefs. To the Tremains, Russell's removal only pointed out that the government did promote militarism and war and did take children from their homes when they did not go along with these ideas.

Judge Brown saw the Tremains' refusal to send their boy to school as a direct violation of state law (which it was). He did not, however, consider that there might be a larger question at hand. In Judge Brown's view, he must uphold the law as written, and since the question of religious freedom was only articulated once in his court and never as an explanation of Russell's actions, the state law would stand as the only measuring stick. This boy, he reasoned, must salute the flag at least once a week or violate the law. If school officials overlooked the refusal, they would be held responsible as outlined in Section 4778 of the Washington State School Law. The law stated that any public school employee "willfully refusing or neglecting to comply with Section 4777 (the flag salute exercise section) shall be guilty of a misdemeanor."[65] Judge Brown would not allow the legal obligation to

64. "Court Takes Tremains Son: Despite Parents Boy to Be Sent Public School," *Bellingham American*, 22 September 1925, 1.

65. Dr. Sydney Strong to File, 6 August 1926.

be lifted from the Tremains only to be placed on the school authorities. Those who violated the law, he explained, must be held accountable.

Judge Brown made clear in his 4 June decision that by teaching their son to not participate in the flag exercises, the Tremains were also teaching him to break the law. In his oral decision to place Russell permanently in the care of the Washington Children's Home Society, Brown stated:

> If a home where such disregard of law is taught is not an unfit place to raise a child, then I am unable to understand what home would be unfit. Is crime to be avoided where parents teach disrespect for any law—flag laws or laws relating to intoxicating liquor, or laws relating to morals or laws relative to taking life or property?[66]

To Judge Brown, hence, no distinction could be made between breaking the law for reasons of delinquency and breaking the law for reasons of religious conviction. To him, laws had been broken, and Russell's parents needed to be held responsible for these violations.

Elijah Voice Society

The judge and other authority figures were only one factor that contributed to the case's demise. The Elijah Voice Society also played a major role in the *Tremain* case. The Tremain family was a member of the Society, a Christian sect, which met in a local theater in Bellingham. The Elijah Voice Society, like the Jehovah's Witnesses who would later refuse to salute the flag, believed in a literal interpretation of the Bible as well as in the Second Coming of Christ. They interpreted the Bible to mean God was against militarism and war, and as followers, they should not salute or pay homage to the American flag, a symbol of militarism. The EVS position on the second coming was also a factor in this case. The elder Tremain had mentioned in one of his meetings with school authorities that he believed the Second Coming to be only weeks away. While in jail, Tremain stated that the reign of the "anti-Christ" would end "within the next six weeks," and the "reign of Christ" would soon end all struggles, including his struggle in this case.[67] These two basic beliefs coupled together and reinforced by the EVS, may well have influenced Tremain's refusal to take action in the case. If Christ were to come in the next six weeks, there was no compelling reason to solve the flag salute controversy.

Members of the Elijah Voice Society were closely involved with the family and the case from its inception. In fact, it is quite likely that the original idea to keep their son out of school came from a Society

66. Superior Court of Washington, Whatcom County, "In the Matter of the Welfare of Russell Tremain, A Juvenile," Case J-926, 4 June 1926, 10.

67. "Tremain Sanity Hearing Delayed Pending Careful Action in Case," *Bellingham American*, 18 September 1925, 1.

convention held only a few weeks earlier where the issues of militarism and the flag salute were addressed. The Tremains noted in a 1926 pamphlet that they had "recently discussed this question [of refusing to participate in flag exercises] at one of their conventions."[68] Their strict adherence to these principles may also have been attributed to pressure on the Tremain family. From the beginning of the controversy, members of the EVS were present at the Tremains' side. During these first days, the EVS supported the Tremain family in person and in the press. For example, members were present with Ethel Tremain and Russell on the second and third full days of John Tremain's incarceration. The *Bellingham American* reported that on Saturday, 19 September 1925, the Elijah Voice Society "promised him support and assistance to maintain his stand."[69] This support was evident at the 22 September trial when four or five members attended the proceedings to determine whether Russell would be removed from his parents and placed in the county detention home.[70] Even if the Tremains wanted to compromise, the EVS was constantly at their side, pressing them to hold their rigid stance.

It is clear from letters circulating between the Tremain family, the EVS, and the ACLU that the Tremains heavily relied upon the EVS for guidance in how to proceed with the case, especially in the legal arena. When the Tremains received the first offer of assistance from the ACLU, they turned over the request to the EVS for reply. The EVS, as stated earlier, denied any assistance. While no correspondence between the Elijah Voice Society and the Tremains stated explicitly that the EVS was acting in the role of legal advisor, it is obvious that the law would in all likelihood balk at bringing down upon themselves the abuse, antagonism and ridicule that would be sure to follow any attempt to bring legal action against the Bellingham School Board.[71]

Another reference in this same letter from Edson showed just how deep this sentiment went. Even though Edson personally disagreed with the judge's decision to remove Russell, he believed the boy should not be returned to his parents. Even Edson, an ACLU member, stated that, "[S]o far as the boy is concerned I still think as I said in a former letter that he is probably better off almost any place rather than with his parents, unless perhaps their fanaticism would act as a 'horrible example' rather than encourage him to follow in their footsteps."[72]

Roger Baldwin in his letter to Lucille Milner regarding the creation of a pamphlet on the *Tremain* case, reiterated the potential for harsh

68. J.W. and Ethel D. Tremain, *A Biographical Sketch of a Little Lad*, 2.

69. "New Charges Filed Against Father Who Kept Son From Saluting the Flag," *Bellingham American*, 21 September 1925, 1.

70. "Lad Removed From Custody of His Folks," *Bellingham Union Reveille*, 23 September 1925, 1.

71. Ibid.

72. Ibid.

public sentiment when he reminded her to include both sides of the story as many even friends of the ACLU did not agree with the Tremain's stance. The kind of harsh criticism Baldwin feared and Edson described prompted editors of the Blaine, Washington *Journal* to call for sensibility regarding the Tremain adoption. "No matter what we think of their [Tremain's] opinion in the matter," *Journal* editors wrote, "they are supposed to be granted absolute freedom in religious beliefs."[73] Very few voices of reason such as this, however, were audible in the debate.

American Civil Liberties Union

Not only was public opinion against the Tremain family, it was also against the Tremain's allies, the ACLU. In the 1920s, the ACLU found itself engaged in battle with many organizations that supported the Americanism movement. Because of its position supporting conscientious objectors and the right to free speech during the World War I, the ACLU had been branded by many as communist "red" or at least "pink." Among those critical of the ACLU were the American Legion, which often described the organization as "un-American," and J. Edgar Hoover who frequently placed the ACLU and its activities under review by the Federal Bureau of Investigation.

In 1925, the ACLU was fighting battles both inside and outside the organization. The ACLU had just emerged from a strong internal conflict over the use of the courts to remedy civil rights abuses. Until this time, the ACLU had no success in representing clients at the Supreme Court level, and Roger Baldwin had come down on the side of those who thought the courts were not a good way to prevent or correct civil rights violations. He altered his position on this issue, however, when the ACLU won its first victory in the Supreme Court in the 1925 case, *Gitlow v. New York*, and the ACLU refocused its civil rights efforts on the legal system.

Between 1925 and 1927, the ACLU had a number of other court cases in the headlines. Two major legal battles were underway: the *Scopes* trial and the *Sacco* and *Vanzetti* case. Because both *Scopes*, which involved the question of teaching evolution in the public schools, and *Sacco* and *Vanzetti*, which involved the possibility of two innocent men wrongly accused being executed, took up a great amount of time and Union resources, the *Tremain* case was probably not a priority for the ACLU especially in July 1925 when the *Scopes* trial was in session.[74]

In addition, Roger Baldwin was so frustrated with the "mundane

73. "Getting Into Deep Water," *Blaine Journal*, 6 June 1926, reprint, American Civil Liberties Union Papers.

74. Walker, *In Defense of American Liberties: The History of the American Civil Liberties Union*, 72-76.

tasks" involved in "running a national organization" that he took a leave of absence from his position as president in 1925.[75] Although it is not clear why the ACLU did not pursue representation from the Tremain family prior to the last week in May, Baldwin's absence at the helm in 1925 may provide a partial explanation. What is clear, however, is that a representative of the ACLU was not present in court on behalf of the Tremains on 4 June 1926. The ACLU Field Secretary for Washington State did write to Vanderveer and explain that the ACLU found out 29 May the *Tremain* adoption case "would be disposed of on 4 June." There is no mention made, however, as to whether the ACLU knew about the Tremains or their case prior to this date.

The ACLU, late to the case to begin with, also was abandoned by Vanderveer, the attorney who agreed to pursue the case, only one day before the adoption hearings. The ACLU had no time to contact another attorney in the region to follow-up with the case with less than twenty-four hours notice. It was left without a presence in the courtroom on 4 June, a presence it desperately needed if it was going to carry this case to a higher court.

Over the course of their nine-month involvement in the *Tremain* case, Baldwin and the ACLU recommended five potential legal remedies. None of these remedies could or would be pursued, mainly because Russell's parents adhered resolutely to the idea that an earthly court could not be acknowledged. The ACLU intervention in the *Tremain* case amounted to a series of failures. Every legal strategy pursued by the organization was ultimately discarded as unworkable. Representing the Tremains, appealing the original decision, challenging the state laws concerning the flag ceremonies, bringing forth habeas corpus proceedings, and challenging the decision with a taxpayer's suit were all rejected as untenable positions. With these options removed, the ACLU could not fight on the ground it knew best—the legal system—and therefore retreated. Retrospectively, only one major action begun by the ACLU seemed to have made an impact on Russell's situation: contacting Dr. Strong to conduct information negotiations. Strong's intervention marked a turning point in the ACLU's participation in the *Tremain* case. Before Strong was contacted, Baldwin was only considering legal solutions to Russell's problem. Once Strong entered the negotiations, however, he adamantly stated his role was to return Russell to his parents, not to test Russell's rights in court. Strong's one-to-one approach with Judge Brown and Ralls of the Children's Home Society, not legal intervention, ultimately led to a breakthrough in the stalemate. Although Dr. Strong did bring about movement in the case, his insistence of placing Russell's well being over that of a legal victory may well have caused the ACLU's last legal solutions to be rejected.

75. Ibid., 69.

The Tremain Family

The biggest legal roadblock to returning Russell to his parents, however, did not involve an outside organization, but instead was Russell's parents. Although it is unclear how the case would have progressed if his parents had been willing to acknowledge the jurisdiction of the court early on, it is clear that the Tremains did not actively pursue the release of Russell or retribution for the violation of their First Amendment rights. Even after the negotiation between Dr. Strong and Judge Brown in the early autumn months of 1926 could have returned Russell to his home, the Tremains stubbornly refused to compromise.

Although the Tremains' position on this issue was honorable and could have easily been argued before Judge Brown as a violation of their First Amendment freedoms of speech and religion, the Tremains' insistence on avoiding the courts ultimately led to the demise of the case. Throughout the twenty-six months Russell was removed from their care, the Tremains would not acknowledge the court system, and therefore, would not seek remediation through its laws. Wolcott Pitkin, General Counsel of the ACLU, described this problem well in a letter to Roger Baldwin on 27 October 1926: "[T]he fundamental difficulty seems to be that our very structure of government is not designed to protect the rights of people who refuse to protect themselves."[76]

Because the *Tremain* case involved parents with strongly held views and a young boy taken from his home, the ACLU first viewed the Tremain case as a perfect test case for freedom of religion and speech. It was the stuff of which legendary Supreme Court cases were made; it was the stuff of press releases and publicity. Russell Tremain's case, however, would never see the inside of the Supreme Court, would never set a national precedent, and would never make worldwide headlines.

Russell Tremain's case, as egregious a violation as any argued before the Supreme Court, never became a First Amendment test case. Although the ACLU intervened on Russell's behalf and brought national attention to his plight, their efforts were too little and too late. Even before the ACLU arrived on the scene, Russell's case was doomed to fade in the lower court records. The authorities' strong stance against the Tremain family, EVS pressure to "hold the line," public sentiment supporting the flag salute and opposing the Tremains as well as the ACLU, and J. W. and Ethel D. Tremain's insistence to avoid the court on religious grounds all contributed to the death of this case in the Superior Court of Whatcom County, Washington.

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76. Wolcott H. Pitkin to Roger N. Baldwin, 27 October 1926, American Civil Liberties Union Papers, vols. 298 and 299, Princeton University (microfilm, University of Washington).