THE SUPREME COURT TODAY

By LEONARD B. BOUDIN

This is the first of two articles on the Supreme Court. Mr. Boudin is a well-known labor attorney and is chairman of the labor law committee of the New York chapter of the National Lawyers Guild. He has contributed to the "Harvard Law Review," the "Illinois Law Review," the "National Lawyers Guild Review," the "New Republic" and other publications.

WE ARE witnessing today an attack upon the United States Supreme Court of a character unfamiliar at least to this generation. It is the attack of conservative forces who fear the progressive trend of the Court's decisions and who hope to arouse public opinion against that institution. They wail that the Court is rent by dissension and that it is constantly breaking precedent; they intimate that it has a radical flavor. This assault, like those upon our other democratic institutions, requires our study, for measures must be taken to meet it.

Actually, of course, the Court as now constituted is equal in legal scholarship and in understanding of social, economic, and political problems to any bench of its predecessors. Its members are experts in the art of government: three former Attorney Generals, Murphy, Stone, and Jackson; an ex-Solicitor General, Reed; Black from the Senate, Douglas from the Securities and Exchange Commission. It includes men like Frankfurter who have critically studied the court for a score of years and those like Stone who have carried on the liberal tradition in the face of ultra-conservative majorities. It is no wonder that the Court's opinions have a brilliance today that is unequalled in its history.

Even on their own ground the critics meet defeat. Their concern about the number of dissents misses the fact that dissents on the bench are of old vintage, being reported officially as long ago as 1794. They have an important function attested to by such great jurists as Story, White, and Moody. Former Chief Justice Hughes has eloquently said: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

This disposes, too, of the second current criticism of the court: that it frequently breaks with precedent. In the *Lonnie E. Smith* case Justice Roberts said the court's decision "tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." This is a pretty *bon mot*, but little more. The Supreme Court and courts of an earlier day have always disregarded precedent which they believed erroneous. Roberts himself, under the shadow of the President's Court Reorganization Bill, switched his vote in 1937 on the minimum wage issue, thereby overruling earlier judicial law on the subject.

In wartime, few aspects of the court's work are as important as its attitude toward legislative and executive action related to the prosecution of the war. For the court has power far beyond the physical effects of its mandate. An institution constituting an integral section of our system of government, it wields a mighty influence over public opinion. The present Court has two significant achievements to its credit. It has recognized that the fateful character of the present war requires the exercise of emergency powers by the President and Congress. At the same time it has balanced this attitude with an effective concern for civil liberties. Its most significant war decision is *Ex parte Quirin* in which it unanimously held that seven Nazi saboteurs might be tried by a military commission. The Court's procedure there is illustrative of its high sense of responsibility and solidarity in a period of national emergency. Its members were summoned from their vacation recess to hear the arguments without the delays which might at the time have been injurious to national morale. The case was argued on July 29 and 30, 1943. It was decided on the following day. While "a majority of the full Court are not agreed on the appropriate grounds for decision," only one opinion was written.

Much the same approach was manifested in *Hirabayshi* vs. *US*, where the Court unanimously affirmed the petitioner's conviction of violating an act of Congress by disregarding a military curfew order and other restrictions issued by the military commander on the West Coast. These orders affected alien enemies and "all persons of Japanese ancestry residing or being within the limits of military area No. 1." The petitioner, an American citizen of Japanese ancestry, claimed that the law unlawfully discriminated against him. The Court in an opinion written by Chief Justice Stone upheld the government. He reviewed the details of the forbidding military picture existing shortly after Pearl Harbor, the dual citizenship sanctioned by Japanese law and the alleged non-assimilability of the Japanese. While asserting that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," he held that the government, in the present case, might consider ancestry relevant because of "the danger of espionage and sabotage, in time of war and of threatened invasion."

The Court's concern with minority rights was manifested by the issuance of three concurring opinions by Justices Douglas, Murphy, and Rutledge. Douglas emphasized the petitioner's right to have his loyalty tested through administrative procedures. Murphy placed a time limit upon the restrictions, *viz:* the period of actual emergency. Rutledge asserted the right of judicial review over military action.

An important civil liberty in wartime was protected by the Court in the *Kawato* case. There, it upheld the right of an alien Japanese worker, a resident here, to sue his employer in our courts for wages due him. Said Justice Black: "The policy of severity toward alien enemies was clearly impossible for a country whose life blood came from an immigrant stream."

The Court has made contributions of equal value in the general field of civil liberty, not directly related to war problems. In the well-known *Schneiderman* case, involving the California leader of the Communist Party, the government sought denaturalization on the theory that the naturalization decree had made an erroneous finding of Schneiderman's attachment to the Constitution. Regarding it as unnecessary to make a specific finding on the objectives of the Communist Party, Justice Murphy, speaking for the majority, pointed out that "A

tenable conclusion . . . is that the Party in 1927 desired to achieve its purposes by peaceful and democratic means. . . ." Further, the Court asserted principles of the highest importance by holding *first*, that a decree of citizenship is entitled to very great weight, and *second*, that beliefs are personal and not matters of association.

The largest number of cases on a single subject during the last two terms have involved the activities of the Jehovah's Witnesses. The Court decided fifteen cases with three unanimous, eight majority, seven concurring and nine dissenting opinions defining the rights of this proselytizing group whose methods often amounted to harassment of their neighbors. The most interesting ones historically are the flag salute cases. It will be recalled that in the *Gobitis* case the Court in June 1940, with only Justice Stone dissenting, held valid a local board of education's rule that pupils salute the national flag daily as a condition of attending a free public school. In the *Barnette* case, three years later, a court of only slightly different composition came to the contrary conclusion. Speaking through Mr. Justice Jackson it said: ". . . censorship or suppression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the state is empowered to prevent and punish. . . ." "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." Far more important practically are cases such as *Murdock* vs. *Pennsylvania* and *Martin* vs. *City of Struthers;* there a divided Court declared invalid city ordinances either absolutely forbidding the door-to-door distribution of leaflets or making it conditional upon securing a license.

THE work of the Court has been so extensive and varied that it is difficult to give a small but representative sampling. It has upheld the validity of the Emergency Price Control Act, an absolute necessity for the prosecution of the war. It has declared insurance companies subject to the Sherman Anti-Trust Act and the National Labor Relations Act. It has struck down labor injunctions issued in violation of the Norris-LaGuardia act or restricting the right of peaceful picketing. The unparalleled judicial success of the National Labor Relations Board since 1937 has been due in large part to the Court's declaration of the wide application of the Wagner Act and the broad powers given to the board. Last term the Court upheld the right of strikers to non-discriminatory reinstatement; it held it to be an employer's duty to execute a signed collective labor agreement; and it struck down collusive labor agreements. This year it held that individual agreements with employes were not a bar to collective bargaining with a certified union. In the *Virginia Electric and Power Co.* case, the Court ordered an employer to repay its employes dues checked off under a company union agreement. Only recently it held that the Hearst "newsboys" were entitled to the protection of the Wagner Act and that the use of the word "employes" in the Act required a broad construction.

The Court's record is not unspotted. Last term it materially impaired the rights of seamen by holding that a strike even in a safe port violated the mutiny laws. (This concerned a strike that occurred July 1938.) In another case, it permitted an employer to obscure the issues in an NLRB hearing with evidence of alleged employe misconduct. However, neither these nor certain other lamentable instances, can conceal the Court's substantial contribution to the enforcement of the Wagner Act.

More troubling is the recent decision in *Hartzel* vs. *US* where the Court reversed a conviction of violating the Espionage Act. The defendant wrote and circulated among army officers and others certain articles marked, as the Court found, by "calumny and invective," calling for an abandonment of our allies and urging the occupation of this country by foreign troops. The majority of the Court, including Black and Murphy, held that there was an absence of "specific intent or evil purpose" to cause insubordination or disloyalty in the armed forces or to obstruct recruiting. The minority's opinion, written by Reed, seems far sounder and more in keeping with the majority's own warning that "our enemies have developed psychological warfare to a high degree in an effort to cause unrest and disloyalty." One can only conclude that the Court dangerously leaned over backwards in what it intended as solicitude for civil liberties.

Enemies of the Court have attempted to cut it into radical and conservative wings. Actually, of course, the line of demarcation is not that precise. Every judge has joined virtually each of his colleagues at one time or another in dissent. This last term (1943-44) there were forty-four different variations of dissenters. Black, for example, was joined in dissent that term by every other justice; Frankfurter, by everyone but Rutledge. The most frequent dissenter is Roberts; during the last two terms he dissented sixty-eight times. This is not to suggest that dissents occur in every case, although this would not have been surprising in view of the select character of the cases accepted for decision by the Court. In the last two terms one hundred and fifty-two unanimous decisions were issued by the Court; in the one hundred and fifty-four remaining cases there were dissents by one or more members of the Court.

"Ten-Minute Break," by Cpl. Seymour Kameny

NM SPOTLIGHT

DUMBARTON OAKS vs. ALBANY

By THE EDITORS

THERE is a lameness and hypocrisy about Mr. Dewey's plea for small nations that completely reveals the piddling size of the man and the brand of politics he plays. First, with resounding fanfare the Republican factotums announce that the issue of world organization and security cannot be a partisan affair but is the concern of the whole nation. Then they produce a foreign affairs plank which mocks this attitude and exposes what the men who run the Republican machine really have in mind. Whether it be Hoover or Colonel McCormick blowing fire through the editorial nostrils of the Chicago *Tribune*, the intent of the dominant group in the Republican Party is to make the United States the solar center of world politics with Uncle Sam wielding the big stick over the heads of other states. This is by and large the classical position of the Republican Party, the party of American imperialism. It began with McKinley and reached a high point under Hoover. It thwarted international collaboration among nations, large and small, and sought to divide the world in order to rule it. And the fact that that policy almost made us the pariah of the earth is now to be completely forgotten—or at least Dewey hopes that the country has so short a memory that it will not recall the attacks made on a world community of nations by a Senator Lodge or the Republican outbursts of temper against collective security, lend-lease, and a dozen other matters which spelled the difference between victory and defeat.

Mr. Dewey now charges that because the four leading Allies have the major responsibility for ordering the future of world security, such leadership would be tantamount to coercion and the "rankest form of imperialism." This is arrant nonsense and it becomes even greater nonsense in view of the fact that Dewey himself proposed in September 1943, such imperialist instruments as an exclusive Anglo-American alliance in opposition to a four-power understanding. And more, Dewey has on two occasions taken sly digs at the commitments which the President made at the Teheran meeting. At no time has he had a good word for Teheran whose fulfillment would impede the "rankest form of imperialism" espoused by so many of the eminent in his party's leadership.

And among these eminent is John Foster Dulles behind whose skirts Mr. Dewey is now hiding. This is characteristic Dewey acrobatics similar to his stunt of letting Governor Edge of New Jersey inform the country of how Dewey feels about international cooperation. Moral cowardice has had no better example than these Deweyisms. As for Dulles, all his pretensions to liberalism cannot hide the fact that since he is Dewey's close adviser on foreign affairs he too is responsible for the Republican candidate's outrageous statement of last week. It would hardly be far-fetched to assume that Dulles had more than a hand in its formulation. And the egregious cheek of both Dulles and his protege in Albany is that both men take the attitude that the government must account to them for what happens at the Dumbarton Oaks meeting. In typical partisan fashion they set themselves up as though they were an independent de facto state and executive department to whom Washington is responsible.

HAVING pulled a first-rate political boner with his stupid statement, Dewey attempted to get Wendell Willkie's support in order to make it appear that Willkie approves Dewey's position. But Willkie's frigid reply is indicative of how deep are the differences between them—differences which involve fundamental policy toward our Allies and postwar international organization. Willkie makes it clear that he was not consulted by Dewey when the latter prepared his statement with Dulles acting as amanuensis, but more important, he strongly implies that the "issue" of small nations is being used to endanger the success of the Georgetown meeting. Unlike Dewey, Willkie is willing to wait until the meeting is over before he enters into any public discussion. And although Willkie will have met with Dulles and given Dulles his opinion, it is more than apparent that this does not represent his endorsement of the Republican foreign policy plank or of Dewey's candidacy.

WHERE has Mr. Dewey been all these past months? Not only has he not been talking but quite obviously neither has he been reading. For any reading of the Moscow Agreement, the Connally Resolution, and the President's recent memorandum on a world organization shows that the rights of the smaller powers have been kept well in mind. The Moscow Agreement to which we are bound sets forth the "principles upon which the four governments agree that a broad system of international cooperation and security should be based. Provision is made for the inclusion of all other peace-loving nations, great and small, in this system." The Connally Resolution reads in part: "that the Senate recognizes the necessity of there being established at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security." And the President's memorandum of last June 15 made it clear that "the maintenance of peace and security must be the joint task of all peace-loving nations" and that he was "not thinking of a superstate with its own police force and other paraphernalia of coercive power."

These three quotations prove that Dewey is simply talking through his hat and that he has other motives separate from his tender solicitude for small nations. His outburst on the eve of the Allied meeting in Georgetown is in effect an act of sabotage. He bases his charges on "recent reports" and fails to identify the source of these rumors, although we are quite certain that their origin is in Mr. Dewey's head as well as in the heads of those around him who see that the President's forthright approach to the problems of world secur-