The Wagner Act: It's Legislative History and It's Relation to National Defense

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It is proposed in this article to explore the legislative history of the National Labor Relations Act[1] with two purposes in mind first, that an objective basis may be laid for a dispassionate examination of the legislation itself and the conduct of the Board under the law; and second, that on the basis of such legislative history a judgment may be made as to the proper position this legislation ought to assume in an economy devoted primarily to the expedition of national defense.

While controversies regarding the administration of the Act have quite recently received attention in legal periodicals,[2] action by Congress on the adoption of amendments to the Act, urged by the so-called Smith Committee[3] and adopted by the House at the end of the 76th Session, now appears unlikely.

But the nation is now at war. In preparation for defense efforts during the past months, the impact of employer-employee relationships upon the public welfare has

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[1] 49 STAT. 449 (1935). Generally also called The Wagner Act.

[2] *E. g.,* Smith, *The National Labor Relations Act: Abuses in Administrative Procedure,* (1941) 27 VA. L. REV. 615 and Murdock, *The National Labor Relations Act: Should the Act be Amended?* (1941) 27 VA. L. REV. 633.

[3] A committee appointed in the House of Representatives to investigate the Act and the Board, consisting of Representatives Smith of Virginia (Chairman), Murdock of Utah, Routzohn of Ohio, Healey of Massachusetts, and Halleck of Indiana, authorized by H. R. 258, 76th Cong. 2d Sess. (July 20, 1939). For a report of the majority of the committee, see H. R. REP. No. 1902, 76th Cong., 3d Sess. (1940).

been more and more keenly called to the attention of all the people by recent labor disputes affecting the production of materials vital to the national defense program. Here, as in the analysis of the Act and the National Labor Relations Board, the discussion has not been insulated from the play of emotional factors invariably present in a conflict between individuals whose views of the public welfare as affected by labor economics are as divergent as antithetical developments in the general social inheritance of the disputants can make them.

It is of course clear that war time legislation regarding labor disputes is inevitable and legislation already passed by the House, limiting the right to strike,[4] and proposed

[4] On December 3, 1941, debate was begun in the House on Rep. Vinson's bill, to which reference is made *infra*, H. R. 4193. (87 Cong. Rec. 9604, 77th Cong. 1st Sess.) Rep. Ramspeck offered an amendment providing for a cooling off period of 60 days and non-compulsory mediation (*Ibid.*, at 9609), and Rep. Smith offered a substitute to the amendment (set out in full, *Ibid.*, at 6909) which in substance provided for a thirty day waiting period, a freezing of shop organization in its status at the time of the passage of the bill, and prohibiting violence and intimidation in strikes. The amendment was formerly introduced as H. R. 6149. The House voted to substitute the Smith amendment for the Ramspeck amendment by a vote of 182 to 143 (*Ibid.*, at 9636) then to substitute the amendment for the Vinson bill which was agreed to without objection (*Ibid.*) and passed the bill as thus amended by a vote of 229 to 158 (*Ibid.*, at 9637). A number of bills dealing with the subject had previously been introduced.

Cf. E. g., S. 683, by Sen. Ball, introduced on January 31, entitled "Defense Industry Conciliation Act of 1941", making it mandatory that defense industry employee representatives and employers negotiate adjustment of labor problems and conditions whenever either party gives notice of such desire. If settlement fails, no lockout is permitted until ten days after the director of the United States Conciliation Service has an opportunity to bring the dispute to settlement. The director may notify the President if he makes no progress in settling the dispute and the President may appoint a special mediation board. See also, H. R. 2850 and H. R. 4139, by Representative Vinson, introduced on January 29, 1941, prohibiting strikes or lockouts until after investigation and report by Naval Defense Adjustment Board and the National Mediation Board prohibiting the employment of Communists and Nazis. *Cf.* H. R. 10707 and H. R. 10708, 76th Cong. 3d Sess. relating to a twenty-four hour limit in defense strikes cited by Pressman, *Sabotage and National Defense*, (1941) 54 HARV.

legislation for a Model Sabotage Prevention Act,[5] em-
embraces not only a consideration of amendatory legisla-
by previous labor legislation. The problem now presented embraces not only a consideration of amendatory legislation to the Act to foster more amicable employer-employee relationships under normal conditions, but also a consideration of the public interest in timely and effective solution of problems of labor economics in so-called defense industries. As our national cisis grows more and more acute, further examinations of the Act with a view to restating its purpose and its scope are inevitable. And it seems now imperative in determining the course to be followed in the future with respect to the National Labor Relations Act and the Board, to examine the full scope

L. REV. 632, 642. Numerous other bills concerning defense production have also been introduced to regulate activities of labor.

On January 6, 1941, Rep. Hoffman introduced a bill (H. R. 1403) making it unlawful to induce another to pay anything as a condition precedent to employment in the National Defense program, and on January 10, 1941, he introduced a bill (H. R. 1814) making it unlawful for any person to require persons supplying services or materials affecting national defense to be a member of a union or to pay any money to such organization. On March 17, 1941, he introduced a further bill (H. R. 4040) to provide that where strikes or picket lines interfered with the production of defense materials the Federal Bureau of Investigation should hold an election of the striking employees to determine whether the strike should continue; if the majority voted to discontinue the strike, then the Army officials were to take the necessary measures to assure employees the right to pursue their usual employment. On March 31, 1941, Rep. Ford introduced a bill (H.R. 4223) whereby those inciting or participating in strikes against the United States in defense production units would be held guilty of treason and punishable by 25 years imprisonment or death.

On April 7, 1941, Senator Reynolds introduced a Joint Resolution (S.J. 64) prohibiting any labor organization from having as an agent or officer any person not a citizen, or who within the preceding two years had been a Fascist, a Nazi, or Communist, or who had lost his citizenship rights or was ineligible to hold public office.

A discussion of the propriety of such legislation is set out in *Labor and National Defense*, A compilation by the Twentieth Century Fund, at 121, *ff* (1941).

[5] See Warner, *The Model Sabotage Prevention Act*, (1941) 54 HAR. L. REV. 602, *ff*.

and extent of the statute as revealed by the complete history of the legislative process leading to the enactment of the law.

The legislative history of the Act will not, in itself, prove much. But an understanding of such history with all the complex interplay between various individuals and groups seeking to strengthen or emasculate the Act ought to furnish an essential ingredient in a sound basis for determining the proper direction for proposed changes in legislative control of employer - employee relationships. How can Congressman Smith so completely condemn, or Congressman Murdock so heartily endorse the conduct of the Board under the Act unless it is first clear what Congress wanted to have done and to leave undone? And without such knowledge how can we explore the potentialities of the Act in a new crisis or ascertain the part it ought to play in the new labor economics arising from the exigencies of national defense, when and if a new approach to labor problems becomes imperative? In a general examination of the entire controversy we can hardly do less than follow the investigations of legislative intent as conducted by the Supreme Court in specific matters concerning the provisions of the Act and the duties of the Board.[6] Since criticisms have principally been aimed at the procedural aspects of the work of the Board, it may be advisable to examine particularly the actual intent of Congress as to methods to be employed in the implementation of the Act. What Congress approved then it may not now endorse; if so, amendments may be enacted. But until the attitude of the entire legislative branch is shown to have changed, it seems probable that the courts will ascertain

[6] *E.g.*, National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., et al., 303 U.S. 261 (1938); National Labor Relations Board v. The Falk Corporation, 308 U.S. 453 (1940); American Federation of Labor v. National Labor Relations Board, 308 U.S. 401 (1940).

the purpose of Congress from the materials developed concomitant with the passage of the Act. The Board itself ought to do no less; and commendations and criticisms of the Act or the agency should be made from a frame of reference bottomed at least in part upon an understanding of the legislative intent.

Federal Labor Legislation Before the National Industrial Recovery Act

Any chronicle of the history of this legislation would be incomplete without reference to the legislation which preceded it, for frequent reference was made during the legislative process to analogous problems presented by statutes previously enacted relating to labor. Such investigation must, of course, be here limited in extent.

Following the Pullman strike, Congress in 1888 authorized the President to appoint a commission to make investigations and reports in railroad strike controversies.[7] As a result of the recommendations of the commission, the so-called "Erdman Act" was passed in 1898 [8] including provisions that no employee should be forced to relinquish his right to associate with the other employees for the purpose of collective bargaining.[9] A permanent mediation board was created in 1913,[10] and in 1916, employment of railroad employees was limited to an eight hour day.[11] In 1920, a bi-partisan Railroad Labor Board was created and authorized to hold hearings and issue decisions. No power

[7] 25 Stat. 501 (1888).

[8] 30 Stat. 424, Sec. 10 (1898).

[9] Both state and federal legislation making so-called yellow dog contracts punishable criminally, was later held unconstitutional, however, in *Adair* v. *United States*, 208 U.S. 161 (1908) and *Coppage* v. *Kansas*, 236 U.S. 1 (1914).

[10] 38 Stat. 103 (1913).

[11] 39 Stat. 61 (1919) amending 34 Stat. 1415 which limited employment as a safety measure to 16 hours.

of enforcement,[12] however, was granted to the Board. The later failure of the National Industrial Recovery Act, where no effective power of enforcement existed, was foreshadowed in the ineffectiveness of this Act, which was amended in 1926. Without examining the provisions of the Railroad Labor Act of 1926[13] in detail, it may be noted that the Act required recognition of the principle of collective bargaining, forbade interference of either employer or employee with the rights of the other, and provided for voluntary arbitration between the parties. The constitutionality of the Act was upheld in 1930,[14] and the statute was broadened in 1934.[15]

Mr. Leiserson, formerly chairman of the National Mediation Board, and presently a member of the National Labor Relations Board, has characterized the provisions of the Wagner Act as substantially similar in purpose and effect to those of the Railway Labor Act.[16]

The history of the National War Labor Board has already received detailed consideration elsewhere.[17] Briefly, the Board seems to have arisen rather more from the necessities of intelligent distribution of man-power through the industries than as a policing agency to insure amicable

[12] 41 STAT. 470 (Sec. 304 of Transportation Act (1920)).

[13] 44 STAT. 577 (1926).

[14] Texas and New Orleans R. R. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548 (1930).

[15] 48 STAT. 1185 (1934).

[16] VERBATIM RECORD OF THE PROCEEDINGS OF THE HOUSE COMMITTEE INVESTIGATING LABOR BOARD AND WAGNER ACT, p. 3, testimony of W M. Leiserson, on Dec. 11, 1939, hereinafter referred to as "House Hearings" Note also that: "Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was an 'amplification and further clarification of the principles' of the latter. Report of the House Committee on Labor, H.R. 1147, 74th Cong., 1st Sess., p. 3." National Labor Relations Bd. v. Pennsylvania Greyhound Lines, Inc., et al., 303 U. S. 261 (1938).

[17] Hoague, Brown, and Marcus, *Wartime Conscription and Control of Labor,* (1910) 54 HAR. L. REV. 50, at 53-61.

settlement of employer-employee disputes[18], and the enabling legislation provided for the enforcement of awards of the National War Labor Board by permitting the Federal Government to take over the industries themselves.[19] The War Labor Conference Board, predecessor of the National War Labor Board, emphasized as one of the policies to govern relations between workers and employers in war industries that

> The right of workers to organize in trade unions and to bargain collectively through chosen representatives is recognized and affirmed .
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> This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.
>
> Employers shall not discharge workers for membership in trade unions, nor for legitimate trade union activities.

The War Labor Conference Board further suggested at Section 4:

> The workers, in the exercise of their right to organize, shall not use coercive measures of any kind to induce persons to join their organizations nor to induce employers to bargain or deal therewith.[21]

As hereafter appears, the legislative history of the National Labor Relations Act makes it clear that the Act was conceived solely for the purpose of protecting employees against employers, thereby insuring equality of bargaining power. Nothing in the Act or in the proceedings pending its adoption placed any restriction upon em-

[18] *Ibid.*, and *see* NATIONAL WAR LABOR BOARD (Bull. No. 387, Bur. Lab. Stat., U. S. Dept. Lab.), at p. 32, wherein this suggestion is emphasized as a part of the "Principles and Policies to Govern Relations between Workers and Employers in War Industries for the Duration of the War" laid down by the War Labor Conference Board.

[19] NATIONAL WAR LABOR BOARD, *ibid.*, see letter of President Wilson, at 36, *ff.*

[20] *Ibid.* at p. 32.

[21] *Ibid.*

ployees in their use of "coercive measures of any kind to induce persons to join their organizations nor to induce employers to bargain or deal therewith." Hence, it seems doubtful that the principles approved by the Board in 1917, are, as suggested by Congressman Murdock, "exactly the principles of the National Labor Relations Act."[22]

In 1932, the Norris-La Guardia Act[23] was passed, which stated the policy of the government to protect the employee in his right to bargain collectively and further provided that "he have full freedom of association, self-organization, and designation of representatives of his own choosing ..."[24] The Act itself limited the use of injunc-

[22] "At the Conference on Labor Law and Labor Legislation, J. Warren Madden, Chairman of the National Labor Relations Board, who presided, told the audience that the principles on which the War Labor Board was set up in 1917 were exactly the same as those on which the National Labor Relations Board is based. 'It is therefore unthinkable,' he said, 'that these principles be voided or subverted under the present drive for national defense.'" *Report of the Proceeding of the Conference*, 3 NAT. LAW. G. Q. 116 (1940). *Cf.*, also, Rep. Murdock, *The Defense Emergency and the National Labor Relations Act, ibid.*, at 86, 89.

[23] 47 STAT. 70.

[24] The entire section relating to the purpose of the Act is revealing on the question of the development of Congressional consciousness of the necessity of assistance to labor in employer-employee relationships. The section reads as follows "In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows.

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize incorporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definition

tions by employers in labor disputes and made the so-called "yellow dog" contract unenforceable in the federal courts.[25]

THE LABOR PROVISIONS OF THE NATIONAL INDUSTRIAL RECOVERY ACT

The first comprehensive attempt by Congress to regulate labor relations on behalf of all employees in businesses throughout the country was embodied in Section 7 (a) of the National Industrial Recovery Act.[26] As has been noted elsewhere,[27] there was substantially no discussion of the

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of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

[25] For a further general discussion of the history of the labor legislation, see LANDIS, CASES OF LABOR LAW, Chapter I (1934), and MAGRUDER, *A Half Century of Legal Influence upon the Development of Collective Bargaining*, (1937) 50 HARV. L. REV. 1071. Senator Wagner eloquently described the development of labor law in presenting the National Labor Relations Act to Congress. 79 CONG. REC. 7565, *ff.* (1935). A brief summary of labor legislation in the United States is found in LIEN, LABOR LAW AND RELATIONS, Chapter 1 (1938).

[26] 48 STAT. 195 (1933). Section 7 (a) recognized the right of labor to bargain collectively free from employer interference and prohibited so-called "yellow dog" contracts. It further provided for the establishment of wage-hour provisions in the industrial codes to be adopted by agreement of employers and employees if possible, but if no agreement could be had the codes were to be imposed by order, and enforced as other codes. The entire National Industrial Recovery Act was passed with almost unprecedented speed. The bill was introduced as H.R. 5755 and referred to Representative Doughton, as chairman of the House Ways and Means Committee. It was favorably reported on May 23, 1933, without substantial amendment as to the labor features of the Act (although broadened in a minor way by the adoption of a suggested amendment of Mr. William Green), and was debated and passed the House as so amended on May 26, 1933. It was sent to the Senate and was favorably reported by the Senate Committee on Finance with one amendment regarding the labor provisions of the Act, which amendment was rejected by the Senate. Other amendments were adopted, and the bill was sent to joint conference on June 10, after passage by the Senate. The conference report was agreed to by the House on June 10, and by the Senate on June 13. The bill was signed by the President and became law on June 16. *See* 77 CONG. REC. 4062, 4373, 4406, 4996, 5425, 5638, 5701, 5861, 6198 (1933). As to earlier history of the Bill, see 77 CONG. REC. 3611. See also, as to history of the bill H. R. REP. No. 159. 73d Cong. 1st Sess. (1933).

[27] LORWIN AND LUBNIG, LABOR RELATIONS BOARD, (1935) p. 37.

labor provisions of the Act in the House.[28] The sponsor of the Recovery Act in the House confessed ignorance of proposed amendments to Section 7 (a), dealing with labor problems,[29] and the subject was not discussed in the debates. Except for a limited discussion in the Senate regarding the status of "company unions"[30] and support of such organizations by employers,[31] on a proposed amendment apparently authorizing such support,[32] there was little debate in either branch of Congress on the labor provisions of the Act.

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[28] There were, however, some statements made which called the attention of the House to the fact that Sec. 7 (a) served an independent purpose relating to trade unionism as well as its primary purpose relating to recovery. See LORWIN AND LUBNIG, *supra* note 27, at 38, and 77 CONG. REC. 4360 (1933) wherein the following colloquy during the House debate is related.

"Mr. Lambeth. A little while ago the gentleman from New York [Mr. Wadsworth] said that this bill spells the end of individualism in America, meaning, I suppose, rugged individualism. Does the gentleman from Massachusetts agree with me that the kind of individualism it seeks to end is 'ragged' individualism?

"Mr. Connery. Yes. I certainly agree with the gentleman. This bill will end 'ragged' individualism by providing decent wages and outlawing 'yellow dog' contracts and sweatshop conditions."

[29] 77 CONG. REC. 5695 (1933).

[30] The term "company union" is used to designate a group of employees which is dominated or to which support is given by the employer, as distinguished from an "independent union", existing free from employer interference or domination, but not affiliated with a national labor organization.

[31] *See* LORWIN & LUBNIG, *supra* note 27, at 3944 as to the growth of company unionism before the Recovery Act.

[32] *Cf., ibid.* at 43-4. The amendment was reported favorably by the Senate Committee as follows

"Section 7 of the bill sets forth certain conditions that must be contained in each code of fair competition or agreement. Among these is the condition that employees shall have the right of organization and collective bargaining through representatives of their own choosing and shall be free from interference, restraint, or coercion of employers of labor or their agents in designating representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. *Your committee has inserted a proviso in section 7 (a) indicating that it is not intended to compel a change in existing satisfactory relationships between employees and employers.*" (Italics supplied.) SEN. REP. No. 114, 73d Cong., 1st Sess. (1933) 2,3. The amendment was eliminated before final passages of the Act.

It is unquestioned that the purpose of the Act was fundamentally economic. As stated by the former chairman of the Labor Advisory Board of the National Recovery Administration,[33] the Act sought, incidentally, to eliminate undesirable trade practices, and primarily, to stimulate consumption of all products by reducing unemployment (through shortening hours) and raising the purchasing power of labor (through increases in wages) [34] It would appear that the only reason for the provisions of Section 7 (a) was to make it impossible for the industrialist to take advantage of the employees while the nation followed the road to industrial recovery, conduct which might thereby engender further disruption of the economic system. To this end, a ceiling over hours and a floor under wages was imperative, and such ends might best be secured by the active participation of employee groups, unhampered by employer domination, in conferences looking toward the solution of industrial problems, especially those relating

[33] AMERICA'S RECOVERY PROGRAM (1934), contribution by Leo Wolman, pp. 89-90.

[34] The Recovery Act itself set forth the correlation between the purely economic provisions of the Act and those relating to labor, in the manner following:

"Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, *to induce and maintain united action of labor and management under adequate governmental sanctions and supervision,* to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except such as may be temporarily required), *to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor,* and otherwise to rehabilitate industry and to conserve natural resources." (Italics supplied.) 48 STAT. 195 (1933).

to wages and hours. That such was the philosophy of the Act is also apparent from Sections 3 (a) and 7 (a) which gave the President directory power over wage and hour agreements of employer and employee. It was intended that such powers would be supplemented, and the principles of the Act made effective, by active employee participation in formulating such agreements.[35]

Senator Wagner, sponsor of the Recovery Act as well as the later Act generally designated by his name, also described the labor provisions of the Recovery Act as primarily economic.[36]

It has been suggested that the Recovery Act accelerated acceptance of the theory that labor problems were a proper subject for consideration by the Federal Government,[37] laid a foundation upon which subsequent administrative agencies built in implementing later legislation,[38] stimulated organization activities and raised wages,[39] and gave the worker a sense of security in negotiations with the employer.[40]

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[35] The purpose of the Act and the temper of the legislators is indicated in some degree by the other bills introduced at the same session of Congress, the titles of which aptly illustrate their purpose; *e. g.*, S. 1555 introduced by Senator Walsh "To encourage planning in industry by permitting controlled cooperation and protecting agriculture, labor and consumer and to supplement the powers of the Federal Trade Commission", H.R. 5801 by Representative Hoeppel "To add to the purchasing power of the nation and to uphold and support the President in his declaration for a restoration of wages to meet the rising commodity price levels, and for other purposes."

Another bill, H.R. 5664, on the same subject matter as H.R. 5755 was referred to the House Committee on Ways and Means on May 17, 1933, and never was reported out. See 77 CONG. REC. 3610.

[36] Hearings before Committee on Education and Labor on S. 1958. 74th Cong., 1st Sess. (1935) p. 35.

[37] Twentieth Century Fund, LABOR AND GOVERNMENT, p. 355 (1935).

[38] LORWIN AND LUBNIG, LABOR RELATIONS BOARDS, p. 457 (1935).

[39] MILLIS AND MONTGOMERY, LABOR'S PROGRESS AND PROBLEMS, pp. 356-375 (1939), Wolman, *Accomplishments of N.R.A. in Labor Legislation*, (1935) 25 AM. LAB. LEG. REV. 38, 41. Prof. Millis is now Chairman of the Board.

[40] Hearings, *supra*, note 36, statement of Charlton Ogburn, then General

Yet there was complete unanimity of opinion during the Committee hearings and the Congressional debates on the National Labor Relations Act, that effective enforcement of Section 7 (a) of the National Recovery Act had broken down. Mr. Biddle, Chairman of the Board under Public Resolution 44, testified that it had been substantially impossible to enforce Section 7 (a),[41] a conclusion shared by Charlton Ogburn[42] and William Green,[43] respectively, General Counsel and President of the American Federation of Labor The Senate Committee on Education and Labor, after considering the evidence adduced at the hearings on the National Labor Relations Act, stated, as a preliminary to its report on that Act, that the "Government's promise in Section 7 (a) stands largely unfulfilled,"[44] while the House Report stated that the Act proposed to make a "serious" effort to enforce the mandate of Section 7 (a).[45] Senator Wagner, speaking on the National Labor Relations Act in the Senate, asserted that Section 7 (a) had failed, quoting Biddle and General Hugh Johnson, Administrator of the Recovery Act.[46] Representatives Connery,[47] Witherow,[48] and Truax,[49] among others, emphasized the failure of the section during House debates on the Act.

The breakdown of Section 7 (a) having been earlier perceived, the forerunner of the present National Labor

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Counsel, American Federation of Labor, at 151, BEARD AND BEARD, AMERICA IN MID-PASSAGE, p. 521 (1939).

[41] Hearings, *supra*, note 36, at 93.

[42] *Ibid.*, at 149-151.

[43] *Ibid.*, at 101, 102.

[44] SEN. REP. No. 573. 74th Cong., 1st Sess. (1935).

[45] H. REP. No. 1147. 74th Cong., 1st Sess., p. 3 (1935).

[46] 79 CONG. REC. 7568 (1935). Hereafter, where no year is given in the citation from the Congressional Record the reference will be to the year 1935.

[47] *Ibid.*, at 9683.

[48] *Ibid.*, at 9691.

[49] *Ibid.*, at 9715.

Relations Act was introduced at the Second Session of the 73rd Congress in the form of identical bills, designated as S. 2926, and H. R. 8432,[50] sponsored by Senator Wagner and Representative Connery. Each bill was entitled "A bill to equalize the bargaining power of employers and employees, to encourage the amicable settlement of disputes between employers and employees, to create a National Labor Board, and for other purposes." The bills were not passed, but another bill designated as Public Resolution 44, purporting to implement Section 7 (a), was substituted therefor, and carried.[51] The Resolution authorized Board implementation of 7 (a) only for the purpose of elections. There were still no effective sanctions of any kind available for application to employers violating the statutory provisions of the section by the National Labor Relations Board,[52] a limitation which received some consideration during the Congressional debates on the subject.[53] The

[50] S.2926 and H.R. 8432, 73d Cong., 2d Sess. (1934).

[51] The purpose of the Resolution was stated by the President in a press release to be that it "establishes upon a firm statutory basis the additional machinery by which the United States Government will deal with labor relations, and particularly with difficulties arising in connection with collective bargaining, labor elections, and labor representation." (Quoted by Biddle, Hearings, *supra*, note 81, at p. 76.) The resolution authorized the President to appoint a board to investigate violations of section 7 (a), and to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in section 7 (a) of the Act and now incorporated herein." The Act further provides that for the purposes of such election the Board might order production of witnesses, records, etc., and that its orders might be enforced as were those of the Federal Trade Commission; that the Board might make regulations to carry out the provisions of the Resolution and assure freedom from coercion in elections; that the right to strike was not abridged; and that the resolution was to continue in force until the National Industrial Recovery Act was terminated. 48 STAT. 1148 (1934), Pub. Res. No. 44, H. J. Res. No. 375.

[52] Pursuant to the Resolution, the name of the Board was changed from "National Labor Board" to "National Labor Relations Board."

[53] 78 CONG. REC. 12017 (1934).

Chairman of the Senate Committee on Education and Labor stated during the course of debates on the Resolution that it "should be considered as a substitute and as a temporary measure pending the convening of the next Congress."[51] Other senators declared their conviction that the Resolution would help but little to implement the National Industrial Recovery Act so as to permit effective enforcement of Section 7 (a),[55] and the sponsor of the Resolution in the Senate declared it to be "minimum" legislation.[56] Political expediency had apparently dictated the shelving of S. 2926 and H. R. 8432, and an attempt to secure the passage of these bills at the last moment failed.[57]

[51] *Ibid.*, at 11635.

[55] See Statement of Sen. Nye, *Ibid.*, at p. 12047, and Senator Wheeler, *Ibid.*

[56] Speech of Senator Robinson, *Ibid.*, p. 11635.

[57] The history of these bills is interesting. S.2926 was introduced into the Senate by Sen. Wagner on March 1, 1934 (Hearings, *supra*, note 36, at 9), and after it was introduced, the Chairman of the Senate Committee on Education and Labor substituted another bill, retaining most of the features of the Wagner bill, as S.1260 (*Ibid.*, at 16), which was reported on May 10 (*Ibid.*, at 22). Sen. Wagner then withdrew his bill and urged the passage of Pub. Res. 44, introduced by Sen. Robinson, saying: "The Congress and the country during the past year have united in passing and applying the most varied and sweeping changes in our economic life that have ever occurred in so short a time. Perhaps it may be a good thing to allow these reforms to encounter an additional period of trial and error, so that the processes of education and understanding may catch up with the social program that has been inaugurated. That is the judgment of the President with regard to the labor disputes bill, and I am prepared to go along with him The substitute measure which the President has proposed is designed simply to meet serious and immediate difficulty . The sole purpose of the present joint resolution is to permit a board or boards established by the President to hold elections of employees in an atmosphere free from the coercion, interference or restraint that is prohibited by section 7 (a) of the National Industrial Recovery Act as incorporated in the resolution." (78 CONG. REC. 12018 (1934)). Senator McNary announced the decision of the Republican senators to support the resolution. (78 CONG. REC. 11635).

The opposition to the Resolution, arising among those who favored the original Wagner proposals included Senators Norris, LaFollette, Cutting and Walsh. (*Ibid.*, at 12016-12052.) Senator LaFollette offered the original Wagner Act, with Wagner's amendments, as a substitute for the resolution, but later withdrew it. (*Ibid.*, at 12024-9)

The effect of the passage of Public Resolution 44 was negligible, for as stated by the House Committee in its report on the National Labor Relations Act, the boards created thereunder had all of the weaknesses of the former boards in preventing and restraining violations of Section 7 (a) [58] Employers, fearful of governmental intervention in labor matters, felt they might safely concur in the passage of the Resolution[59] and their conclusions were justified by the subsequent ineffectiveness of the legislation. The Resolution itself is not of major importance in ascertaining the legislative intent of Congress in adopting the National Labor Relations Act during the following session. It is important to note, however, that the Congress had become aware that the pious hope for improved employer-employee relationships expressed in Section 7 (a) could not be realized without considerable administrative machinery for the enforcement of the Act. It is also important to note that the nature of the duties of the Board changed under the Resolution, and the promotion of mediation activities formerly considered to be the primary purpose of the Board,[60]

[58] Report, *supra,* note 45, at 4.

[59] The following letter was written by the vice-president of a large industrial organization contemporaneously with the consideration and passage of Public Resolution 44 "My guess is that Congress will today pass the joint resolution proposed as an alternative to the Wagner bill, and that will end, for the time being, at least, many of our troubles in that respect. Personally, I view the passage of the joint resolution with equanimity. It means that temporary measures, which cannot last more than a year, will be substituted for the permanent legislation proposed in the original Wagner bill. I do not believe that there will again be as good a chance for the passage of the Wagner Act as exists now, and the trade is a mighty good compromise.

"I have read carefully the joint resolution, and my personal opinion is that it is not going to bother us very much. For one thing, it would be necessary, if the newly created boards are to order and supervise elections in our plants, that they first set aside as invalid the election just completed.

"I do not think this can be done. If, in 1935, our elections should occur in the second half of June rather than in the first half, the board would have to automatically be legislated out of existence before that date.

"If they try to horn in on us in any situation in the meantime, I think we

gave way to functions of investigation and fact finding, although no authority to enforce its findings was given to it.[61]

The contemporary analysis of the causes for the failure of Section 7 (a) is extremely important, for the National Labor Relations Act must be considered primarily as an attempt to cure the deficiencies of the Recovery Act in its proposals to assist in equalizing bargaining power of em-

have our fences pretty securely set up. Therefore, and for other reasons, I am in favor of compromising by not opposing passage of the joint resolution. This, of course, is my own personal opinion. I have not yet had a chance to clear it with our people here." Read by Senator Wagner in the United States Senate on May 14, 1935. (79 CONG. REC. 7569). Also cited in H. REP. No. 1147, 74th Cong., 1st Sess. 4, 5 (1935), and in FELLER AND HURWITZ, HOW TO DEAL WITH ORGANIZED LABOR, p. 176 (1937).

' *Cf., Labor and the Government,* TWENTIETH CENTURY FUND (1935), at 201, 202. The new Board made decisions involving violation of law, however, following an executive order subsequently issued and providing as follows: "(2) The powers and functions of said Board shall be as follows·

(a) To settle by mediation, conciliation, or arbitration all controversies between employers and employees which tend to impede the purposes of the National Industrial Recovery Act: provided, however, the Board may decline to take cognizance of controversies between employers and employees in any field of trade or industry where a means of settlement, provided for by agreement, industrial code, or federal law, has not been invoked.

(b) To establish local or regional boards upon which employers and employees shall be equally represented, and to delegate thereto such powers and territorial jurisdiction as the National Board may determine " Executive Order No. 6511, December 16, 1933.

This order was in turn followed by Executive Order No. 6580, February 1, 1934, which provided, as amended by Executive Order No. 6612-A, February 23, 1934, that: " 2. Whenever the National Labor Board shall find that an employer has interfered with the Board's conduct of an election or has declined to recognize or bargain collectively with a representative or representatives of the employees adjudged by the Board to have been selected in accordance with section 7 (a) or has otherwise violated or is refusing to comply with said section 7 (a), the Board, in its discretion, may report such findings and make recommendations to the Attorney General or to the Compliance Division of the National Recovery Administration. The Compliance Division shall not review the findings ot the Board but it shall have power to take appropriate action based thereon."

[61] *Cf., Labor and the Government,* TWENTIETH CENTURY FUND (1935), at 203.

ployers and employees. Writers on labor problems have ascribed the breakdown of Section 7 (a), in part, to its ambiguity,[62] and more particularly, to the failure of Congress to insert proper enforcement provisions in the Recovery Act.[63] Recently, historians have attached a major portion of the blame for the failure of 7 (a) to union officials and divisions within the ranks of labor on jurisdictional matters,[64] although the split between the American Federation of Labor and the Congress of Industrial Organizations had not then occurred. At the hearings on the National Labor Relations Act, proponents of the Act presented more explicit reasons for the breakdown of Section 7 (a) to the Senate Committee on Education and Labor The reasons given included the delays in enforcement of Board orders regarding unfair labor practices, claimed to arise out of the failure or refusal of the Department of Justice to enforce the Act;[65] delays in holding elections, because of a consistent practice of employers in appealing election orders of the Board to the courts;[66] creation of company unions which impeded realistic collective bargaining;[67] and most of all, lack of statutory authority which would enable the agency administering the Act to enforce

[62] FELLER AND HURWITZ, HOW TO DEAL WITH ORGANIZED LABOR, 172, 173, (1937).

[63] Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining,* (1937) 50 HARV. L. REV. 1071, at 1089.

[64] BEARD AND BEARD, *op. cit., supra,* note 40 at 520, 521.

[65] OGBURN, *supra,* note 36, at 150; *cf.,* Biddle, at 93. Out of 33 cases referred to the Department of Justice, suit has been brought on only one, the remainder being delayed for various reasons.

[66] *Ibid.,* Green, at 111, 112; Biddle, at 90-97.

[67] Hearings, *supra,* note 36, at p. 40, wherein Sen. Wagner stated. "Over 69 per cent of the plans (for company unions) now in existence have been inaugurated since the passage of the Recovery Act." Note, also TEAD AND METCALF, LABOR RELATIONS UNDER THE RECOVERY ACT, (1933), an illustration of methods of promoting and developing company unions, issued immediately after passage of the Recovery Act.

specified sanctions for a violation of the Act.[68] The Report of the House Committee on Labor relating to the National Labor Relations Act stated: ". . . in crucial cases of recalcitrant employers the Board has been up against a stone wall of legal obstacle."[69]

The Senate Committee on Education and Labor reported that the breakdown of Section 7 (a) and Public Resolution 44 was caused by ambiguity, excessive generality, excessive diffusion of administrative responsibility, disadvantageous tie-ups with codes of fair competition, absence of power vested in the Board, and obstacles to elections ordered by the Board. It is significant that with reference to the National Labor Relations Act subsequently passed, the Committee said:

> A recital of weaknesses in these laws, however, will indicate that the defects are neither intrinsic nor irremediable, but may be cured by the corrective steps taken in the present bill.[70]

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[68] Hearings, *supra*, note 36, Biddle, at 93; Wagner, at 47.

[69] Report, *supra*, note 45, at 4-6. At p. 6, it is stated. "The stark fact is that after two years of Section 7 (a) the Government has succeeded in getting in the courts only four cases for enforcement, two being proceedings in equity and two criminal proceedings; and only one of these cases (the Weirton case) has come to trial. While in the public mind the National Labor Relations Board is probably regarded as responsible for the enforcement of Section 7 (a), the complete control of litigation is vested in the Department of Justice and its various United States attorneys throughout the country." *Cf.*, Biddle and Ogburn, *supra*, note 110.

[70] Report, *supra*, note 44, at 5-6. On the question of the absence of power vested in the Board, the report stated at p. 5: "The present National Labor Relations Board, which is the primary agency entrusted with the safeguarding of Section 7 (a), has no quasi-judicial power. It must seek enforcement through reference to the Department of Justice. Since the Board has no power to subpoena, except in connection with elections, the records which it builds up are based in many cases upon the testimony of complaints along, supplemented at best by the testimony of such witnesses as the defendants voluntarily present. This makes it necessary for the Department of Justice, in any event to make further investigations before bringing suit in court, and if suit is brought at all, it must commence entirely de nova in court, with the defendant having 30 days to answer, or moving to dismiss, or applying for bill of particulars. *Thus is defeated the very purpose of an administrative agency, which*

Members of Congress engaged in little discussion of the reasons for the failure of Section 7 (a) and Public Resolution 44 during the debates on the adoption of the National Labor Relations Act. The assumption seemed rather to be that Section 7 (a) had failed, that the Act under consideration was created to eliminate the causes for the failure as indicated by the reports of the Committees; and that Congress ought to adopt the judgment of the Committees that the second act would perform such functions. The debates were concerned principally with the scope and effect of the proposed bill. Few proponents of the new legislation sought to labor the point regarding the failure of the Recovery Act; nor did opponents of the proposed statute attack its bases therein. In connection with the few statements made relating to the failure of the former Act, however, some references were made to the causes of such failure.[71]

The Wagner Act and the Legislative Process

The Content of the Statute

Doubtless, the primary purpose of the National Labor Relations Act, as indicated by the Senate Committee on Education and Labor, was to render the provisions of Section 7 (a) actually effective. However, the range of the Congressional investigation extended over a much

is to provide specialized treatment of the factual aspects of a specialized type of controversy." Cf., supra, note 59.

[71] 79 Cong. Rec. 7568, 7569 (Sen. Wagner), 9683 (Rep. Connery), 9709 (Rep. Wood). Rep. Truax pointedly called the attention of the House to the "refusal" of the Department of Justice to enforce the labor provisions of the Recovery Act. (*Ibid.*, 9715). Referring to company unions, Sen. Wagner stated that company unions rose from a membership of 432,000, in 1932, to 1,164,000 in 1933, representing a gain of 169%. (*Ibid.*, 7570). Sen. Walsh called attention to the fact that court appeals had destroyed the efficacy even of the election provisions of Pub. Res. 44, and that the failure of 7 (a) of the Recovery Act resulted from the failure of the Act to provide adequate sanctions to implement enforcement. (*Ibid.*, 7658).

wider area than the simple principles enunciated in Section 7 (a), and the testimony given at the hearings on the Act and the Congressional debates furnish most cogent evidence of the attitude of Congress upon certain features of the Act and the exact method in which Congress expected the Act to function under various circumstances stated.

While most of the debate in the Senate took place before the Recovery Act was declared unconstitutional,[72] the bill did not reach the House until after the decision of the Supreme Court holding the Act invalid.[73] Consequently, although there was but little discussion of the question of constitutionality in the Senate,[74] the House considered the problem at length.[75] The discussions of constitutionality are important primarily because therein the proponents of the measure emphasized the economic aspects of the legislation: *i. e.*, that Congress had power to remove certain sources of industrial strife and unrest tending to burden and obstruct interstate commerce by encouraging collective bargaining between employers and employees.

For it is clear that Congress considered the basis of the Act to be economic. The theory of balancing the economic keel of the country by equalization of bargaining power of employer and employee, which in turn would raise both real and monetary wages, was primary in its consideration. The idea was enunciated by the language

[72] The Act was debated in the Senate, for most part, on May 15, 1935. 79 CONG. REC. 7547-7638. The Recovery Act was declared unconstitutional in *Schechter Poultry Corp. v. U S.*, 295 U. S. 495, decided on May 27, 1935.

[73] The House debates began on June 19, 1935. 79 CONG. REC. 9650-9732.

[74] See comments of Sen. Wagner, 79 CONG. REC. 7751-2, 7565, *ff.*

[75] The discussion as to constitutionality in the House became quite acrimonious. Especially interesting were the comments of the following Representatives Lehlbach, 79 CONG. REC. 9778; COX, *Ibid.*, Sabath, *Ibid.*, 9680; Hollister, *Ibid.*, 9681, Connery, *Ibid.*, 9684, Rich, *Ibid.*, 9688, 9690; Halleck, *Ibid.*, 9691, Smith, *Ibid.*, 9692, 9694-8, Marcantino, *Ibid.*, 9700; Blanton, *Ibid.*, 9700, 9701, Tarver, *Ibid.*, 9707, Wood, *Ibid.*, 9709; Truax, *Ibid.*, 9714.

of the "Findings and Policy" provisions,[76] the Report of the Senate Committee, which listed the two objectives of the bill as industrial peace and economic adjustment,[77] and the Report of the House Committee in which it was said.

> The committee wishes to emphasize particularly the objective of the bill to remove certain important sources of industrial unrest engendered, first, by the denial of the right of employees to organize and by the refusal of employers to accept the procedure of collective bargaining, and second, by failure to adjust wages, hours, and working conditions traceable to the absence of processes fundamental to the friendly adjustment of such disputes.[78]

In introducing the bill, Senator Wagner reviewed statistics showing concentration of wealth, reflected briefly on the evils attendant upon the problems arising out of technical obsolescence, and restated the argument familiar under the Recovery Act that the stability in labor relations to be insured by the Act would result in increased wages for the worker, which in turn would ultimately result in the economic rehabilitation of the country.[79] The same theories had been manifest all through the Senate Committee hearings on the Act.[80]

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[76] The provisions of the Act relating to findings and policy are quite extended, due doubtless in part to the questions of constitutionality raised by opponents to its passage.

Section one concludes as follows: "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (49 STAT. 449).

[77] Report, *supra*, note 44, at 1-4.

[78] Report, *supra*, note 45, at 8.

[79] 79 CONG. REC. 7567. Former Representative (now Senator) Mead of New York, also, discussed this portion of the economic approach in the House, *ibid.*, at 9711.

[80] *E.g.*, the idea was expounded at length during the hearing by Lloyd K. Garrison, former Chairman of the old Labor Relations Board, (Hearings,

The most significant portions of the legislative history of the Act are, of course, to be found in an examination of particular provisions of the Act extensively discussed in the passage of the bill, particularly the sections dealing with substantive rights.

It is interesting to note that the framers of the Act were especially careful when creating the Act to designate clearly what specific labor practices, among others, should be considered as unfair when committed by the employer. They sought thereby to fortify the administrators in the performance of their duties by setting forth a list of specifically forbidden labor practices so that the courts might know what activities Congress intended to proscribe. As Senator LaFollette said in the debates on Public Resolution 44, in 1934:

> The experience of the Federal Trade Commission has shown that the courts give a restrictive interpretation to such a general phrase as "unfair methods of competition." It is, therefore, important that unfair labor practices should be defined explicitly [81]

The force and effect of the provisions of the Act prohibiting the creation of company unions has already been

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supra, note 36, at 125) as well as by Ogburn (*ibid.*, at 153) and by Biddle (*ibid.*, at 77).

[81] 78 CONG. REC. 12028 (1934). The idea was also expressed during the Senate hearings by Sen. Wagner, Hearings, *supra*, note 36, at 38, and during the debates on the Act. 79 CONG. REC. 7596. Note also, statement of James Hart, *The Exercise of the Rule Making Power and the Preparation of Proposed Legislative Measures by Administrative Departments*, (1937), at p. 16 "If Congress gives an administrative organ a mere empty formula for its mandate, and then simply tells it to apply this formula by the case-to-case method, the courts are apt to interfere, for interpretation of this formula is a question of law on which the courts have the last word. The famous *Gratz case* [Federal Trade Commission v. Gratz, 253 U. S. 421, 427 (1920)] is an example. But if Congress delegates to the administrative organ the power to supplement its policy by complementary rules and regulations having the force and effect of law, then the courts will interfere only if the delegation is unconstitutional or the rules and regulations are ultra vires."

considered in part.[82] The problem was considered at length during the hearings, especially by Lloyd K. Garrison, former Chairman of the National Labor Board under Section 7 (a),[83] as well as by Chairman Biddle[84] and Mr. Ogburn,[85] all of whom stressed the disadvantages of employer support of, or interference with, the organizations designated by employees as their agencies for collective bargaining. The reports of the Committees deal with company unionism with severity, the House report especially denouncing company dominated organizations where "the employer sits on both sides of the table" and makes a "sham" and a "mockery" of collective bargaining.[86] In the debates, company unions received universal condemnation, and their unpopularity was relied upon heavily by proponents of the Act in securing a favorable hearing from the Congress.[87] An amendment to the Act offered in the House by Representative Lloyd, which would have the effect of allowing an employer to contribute financial and other support to a labor organization, was rejected without a division.[88]

So, also, the provisions of the Act relating to the duty

[82] See *supra*, text to note 67. See also, *infra*, note 171, and text.

[83] Hearings, *supra*, note 36, at 129-131. Many of the objections urged against "company" unions are also valid against "independent" unions. For instance, Dean Garrison especially emphasized the advantages of representation of employees by individuals not employed by the same employer and hence not subject to economic coercion by him, lack of knowledge of company unions of nation-wide conditions affecting matters concerning hours and wages; and that such unions could not engage in making industry-wide agreements which in some cases would be the only practical means of collective bargaining.

[84] *Ibid.*, at 82.

[85] *Ibid.*, at 148, 149.

[86] Report, *supra*, note 44 at 17, 18. See also report, *supra*, note 45 at 9, 10.

[87] 79 CONG. REC. 7569, 7570 (Senator Wagner), 79 CONG. REC. 7660 (Senator Robinson), 79 CONG. REC. 7660 (Senator Walsh), 79 CONG. REC. 9682 (Representative Griswold), 79 CONG. REC. 9685 (Representative Connery), 79 CONG. REC. 9691 (Representative Witherow), 79 CONG. REC. 9699 (Representative Marcantino), 79 CONG. REC. 9716 (Representative Truax), 79 CONG. REC. 9719 (Representative O'Malley).

[88] 79 CONG. REC. 9727.

of the employer to bargain collectively with his employees were thoroughly discussed at the Senate Committee hearings and during the Congressional debates. The provision of the Act requiring collective bargaining was inserted as an amendment during the hearings at the request of Mr Biddle,[89] who was supported, among others, by Mr. Garrison.[90] Both Senator Wagner and Representative Connery pointed out the provisions of the Act did not require the employer to come to an agreement with the employees but did require him to bargain with them in good faith.[91]

There was little discussion, either in the Committee reports or in Congressional debates, of the provisions of the Act prohibiting an employer from discriminating against an employee because of membership in or activity on behalf of a labor organization.[92] The discussion relating to Section 8 (3) of the Act, dealing with discrimination, centered principally around the closed shop question which recurred constantly throughout the course of the debates.[93]

Those advocating defeat of the bill urged that the bill encouraged the creation of closed shop agreements by specifically excluding such agreements from the discrim-

[89] Hearings, *supra*, note 36 at 4, 79.

[90] *Ibid.*, at 136, 137.

[91] 79 CONG. REC. 7570 (Sen. Wagner); 79 CONG. REC. 9685-9686 (Rep. Connery).

[92] Sen. Wagner, *ibid.*, Chairman Biddle, Hearings, *supra*, note 36 at p. 81.

[93] Section 8 (3) provided as follows "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

ination clause of the proposed law.[94] Proponents of the measure replied that the purpose of the language of Section 8 (3) was to allow the states to approve or disapprove the closed shop in their respective jurisdictions by legislation.[95] Two amendments to the Act were introduced in the House to restrict the right of labor organizations to demand a closed shop. The amendments were rejected without a division.[96]

Another question extensively examined at all times during the consideration of the bill was the claimed partiality of the Act toward the employee without compensating privileges granted to the employer At no place in the legislative process does the intention of Congress to outline a bill of rights for labor of an unprecedented scope become more clearly manifest.[97] Such intention is significant, for in itself it displays the Congressional intention to endow the enforcing agency with wide implementary powers in order that the effective execution of the broad powers of the statute could be made. As has been observed, the Act is bottomed upon an attempt to give the employees equality of bargaining power with the employer[98] Particularly

[94] *E.g.*, Rep. Taber; 79 CONG. REC. 9726.

[95] *E. g.* Sen. Wagner, 79 CONG. REC. 7570, *Cf.*, Rep. Connery, 79 CONG. REC. 9726.

[96] Representatives Taber and Biermann introduced the bills. See 79 CONG. REC. 9726.

[97] The frankness with which the approach was taken is illustrated also in the discussion at the hearings and in Congress relating to the "company union" question, discussed *infra*.

[98] See paragraph two of Section 1 of the Act, stating that: "the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association, substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." See also Dean Garrison's plea for equality of opportunity for collective bargaining, Hearings, *supra*, note 36 at 127.

vehement objections were raised because of the failure of the Act to provide sanctions against coercion by employees. Some consideration was given to the matter during the Senate hearings,[99] and the report of the Senate committee[100] contained a full discussion of the question of coercion by employees, defending the form of the bill, and pointing out that existing law was sufficiently comprehensive to deal with the problems suggested. It is significant that the report stated. "To say that employees and labor organizations should be no more active than employers in the organization of employees is untenable; this would defeat the very purpose of the bill." Fear was also expressed that the courts might interpret any conduct of an employee as being "coercion", and the report expressed the desire of the committee to avoid such judicial interference. During debate on the bill Senator Tydings offered an amendment to make coercion by employees unlawful.[101] The most extensive debate on any individual issue during the consideration of the Act then ensued, the amendment being supported by Senators Couzens, Borah and Hastings,[102] who urged the adoption of the amendment on the ground that the Act ought to protect employees from being coerced by other employees as well as protecting them from being coerced by the employer The amendment was attacked

[99] Hearings, *supra*, note 36, at 47, (statement by Senator Wagner) and 78 (statement of Chairman Biddle of the Board).

[100] Report, *supra*, note 44 at 16, 17. The problem is not directly considered in the House Report, but the general tenor of the document is the same as that of the Senate Report. Referring to the proposal for the inclusion of a prohibition against coercion by the employees the report stated. "The only results of introducing proposals of this sort into the bill, in the opinion of the Committee, would be to overwhelm the Board in every case with counter-charges and recriminations that would prevent it from doing the task that needs to be done."

[101] 79 CONG. REC. 7653. The suggestion of Senator Tydings was not new. It had received considerable congressional discussion during the preceding session. 76 CONG. REC. 12043 (1934).

by Senators Wagner, Norris, Barkley and Walsh,[103] who reiterated the arguments urged in the Committee report that such a provision might be invoked by the courts against labor,[104] and that the rights of the employees were amply protected against coercion of parties other than the employer by existing law.[105] The amendment was voted down by a roll call vote of 50 to 21.[106] A similar amendment to the Railway Labor Act had been derailed in the legislative process the previous year.[107] In the House, the substance of the Tydings amendment was debated prior to the consideration of amendments to the bill and the general construction of the Act to aid the employee by a limitation of previously uncircumscribed privileges of the employer, was a subject of much discussion.[108] An amendment which embodied the principles of the Tydings amendment was twice offered and defeated without a division.[109] Later a similar amendment was presented by Representative Dean who urged its adoption on the ground that "The amendment will help the employers to protect their employees" and that "it would prevent any Communist or Socialist from . stirring up trouble by antagonizing employees against employers in a given industry."[110] The amendment was rejected without a record vote.[111]

Problems relating to the selection of the unit appropriate for collective bargaining were apparently not con-

[102] 79 CONG. REC. 7654 (Couzens), 7654 (Borah), and 7655 (Hastings).
[103] *Ibid.*, 7650 (Wagner), 7668 (Norris), 7656 (Barkley) and 7658-7661 (Walsh).
[104] *Ibid.*, 7657, 7670.
[105] *Ibid.*, 7670.
[106] *Ibid.*, 7675.
[107] 79 CONG. REC. 7671.
[108] *Ibid.*, 9716 (Truax), 9719 (O'Malley), 9718, 9726 (Connery).
[109] *Ibid.*, 9718, 9726.
[110] *Ibid.*, 9726.
[111] *Ibid.*

sidered of great importance by Congress at the time of the consideration of the bill. Chairman Biddle of the Board emphasized at the Senate hearings that the duty of selecting the appropriate unit could be fulfilled only by the Board.[112] Only a few comments were made in the Congressional debates concerning Section 9 (c) of the bill,[113] which allowed the Board to make investigations and findings regarding the unit of employees appropriate for collective bargaining purposes. Yet at least one speech in the House was directed principally at the possibility of abuse of this power by the Board,[114] concern being expressed principally for those men who were not members of any union,[115] and an amendment was urged by Representative Ramspeck that employees of more than one employer should not be included in a unit appropriate for collective bargaining. The amendment passed the House but was lost in the joint committee on amendments.[116]

[112] Hearings, *supra*, note 36 at 83.

[113] Section 9 (c) of the Act reads as follows "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method of ascertain [So in the original] such representatives."

[114] "Paragraph (a) of Section 9 ought to be called the sell-out section, for where the man does not belong to a union he can have his job rated at almost nothing by the union promoters. There is not any question about that, and no one can deny it. This is the worst section of the whole bill Consider what this provision does—it permits the board to say that the unit shall be a group in a certain territory. Perhaps in that territory will be plants in which the employees are perfectly satisfied with the conditions of employment, plants where there is not the slightest excuse for trouble, but this power to bring that plant in with other plants can create a situation where these men will be forced entirely out of their rights . " Rep. Taber, 79 CONG. REC. 9705.

[115] As heretofore suggested, there was no division of labor into groups representing the Congress of Industrial Organizations and the American Federation of Labor at this time.

[116] The amendment was adopted in the House with little discussion. How-

Though the debate was limited on this feature of the Act, it is clear that Congress understood generally the nature of the problems that the Board would be called upon to face in adjudicating on this question, which subsequently developed into the most controversial subject considered by the Board.[117] In addition, a number of bitter general criticisms were made of the Act, all of which indicated an understanding of the possible scope of the legislation.[118]

Numerous amendments to the Act were also proposed in the House, all emphasizing the extent and nature of the legislation proposed. In addition to suggested amendments already discussed, amendments were introduced to extend the benefits of the Act to agricultural workers;[119] to impose

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ever, Rep. Wood called attention to the fact that the United Mine Workers were then attempting to get a trade-wide agreement with coal operators affecting five or six hundred thousand workers, and expressed concern over the effect of the amendment upon such negotiations; Rep. Ramspeck rejoined that the amendment would not preclude negotiations upon authority of the individual unions. The amendment passed by a vote of 127 to 87. 79 CONG. REC. 9727, 9728. The conference report eliminating the amendment was later adopted by the House. 79 CONG. REC. 10300. The intention and effect of the amendment and compromise thereon was later a subject of disagreement between the Board and Rep. Ramspeck. See 2 HOUSE HEARINGS, 604-6, 608-9, 636-9.

[117] Rep. Taber also introduced an amendment in the House looking to elimination of the provision in the Act giving the Board power to select the bargaining unit, saying: "Under the bill the Board could create units or districts or territory over which a single operation or decision or bargaining could take place, which would include plants where the employees did not belong to the union at all and were perfectly satisfied with their situations, and would throw them right out of employment I hope the committee will adopt this amendment and prevent such an outrage happening." (The House was then sitting as a Committee of the Whole.) The amendment was lost by a vote of 78 to 43. 79 CONG. REC. 9727.

[118] It was claimed and denied that the passage of the legislation would cause more strikes (Rep. Connery at 79 CONG. REC. 9687, Rep. Rich at 9688, 9690; Rep. Blanton at 9702; Rep. Ekwall at 9704, Rep. Sweeney at 9705, and Rep. Faddis at 9706), that the act was inspired by and promoted for the sole benefit of the American Federation of Labor (Representative Rich at 79 CONG. REC. 9689; and Senator Tydings at 9672), and that the bill was "class legislation" (Rep. Eaton at 79 CONG. REC. 9680).

[119] By Rep. Marcantino, who submitted a minority report as a member of the House Committee considering the Act (Hearings, *supra*, note 78 at 26-30) in

a duty on the Board to regulate and control intra-union activities by examination of union books and records, and the supervision of its internal affairs;[120] to create a bi-partisan Board;[121] to limit the right to strike;[122] to place the Board under civil service,[123] and to write into the bill a guaranty of the right of free speech.[124] It was argued

which he advocated the inclusion of agricultural workers within the meaning of the term "employees" The amendment was rejected *viva voce*. 79 CONG. REC. 9720, 9721.

[120] By Rep. Rich. The amendment was extremely broad in its scope and limited the benefits of the Act to such unions as would file an agreement with the Board to refrain from many actions inevitable in the exercise of the right to strike. The following colloquy took place upon the reading of the bill.

"Mr. Lesinski. It looks like a bankers' bill. Mr. Rich. Mr. Chairman, I wish to state that the amendment itself does its own speaking and it is not necessary for any member of Congress to make any comment on it at this time."

The amendment was rejected without a division. 79 CONG. REC. 9721.

[121] By Rep. Ekwall. Rejected by a vote of 79 to 97, without debates. 79 CONG. REC. 9725.

[122] By Rep. Biermann. Rejected by a vote of 107 to 140. 79 CONG. REC. 9730.

[123] By Rep. Ekwall. The amendment was rejected without a count of the members and without debate. 79 CONG. REC. 9726.

[124] The provision, being House Amendment No. 23, was adopted without debate and without division (79 CONG. REC. 9730) and reads as follows "Nothing in this act shall abridge freedom of speech, or of the press, as guaranteed in the first amendment to the Constitution." The committee of Conference on Amendments to the Act struck the amendment for the reason, as indicated in the committee report, that "the Amendment could not possibly have had any legal effect, because it was merely a restatement of the first amendment to the Constitution, which remains the law of the land regardless of congressional declaration." 79 CONG. REC. 10299, 10300.

In view of the prior attention given by Congress to the provisions of the Act extending protection to employees in union organizational pursuits, it seems probable that the provision was intended to preserve the right of the employer to express his opinion concerning the advisability of union organization.

In an exhaustive opinion on the subject of free speech, the Sixth Circuit Court of Appeals in *N. L. R. B.* v. *Ford Motor Company*, 114 F (2d) 905 (1940) *cert. den. on other grounds*, 61 S. Ct. 621 (1941), reaffirmed its conclusion in *Midland Steel Products Co.* v. *N. L. R. B.*, 113 F (2d) 800 (1940) that "Unless the right of free speech is enjoyed by employers as well as by employees the guaranty of the First Amendment is futile for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person." No reference is made in the opinion to the legislative history of the Act.

also that a strike ought to be designated as violative of the spirit of the Act where it occurred after consummation of an agreement between the employer and the union and in the violation of the contract.[125]

Much criticism of the Board and the Act has centered around the procedural problems involved in the enforcement of the provisions of the law over the past five years. It therefore becomes especially important to note the course of the legislative process with respect to the powers and duties of the Board in the administration of the law So, also, Congressional suggestions and limitations as to the implementation of the Act may be enlightening as to the proper place the administration of the statute ought to occupy in an economy principally conceived to promote national defense effectively.

The most enlightening features of the legislative process in disclosing the type of administrative procedure sought to be authorized by Congress are, of course, found in the disputes and declarations as to the administrative implementation specifically required by the Act itself. With the breakdown of Section 7 (a) green in their several memories, the proponents of the Act granted ample investigatory powers to the Board in Section 11 of the Act, especially including the power of subpoena both with and without demand for the production of documents. A clear-cut and well-defined method of enforcement of the decrees of the Board on appeal to the courts was set up in Section 10, subsections (e) and (f) Proponents of the bill were especially anxious to avoid having a trial *de novo* before the federal courts, a practice existing under Section 7 (a).[126] There was little opposition to the adoption of those procedures during the debates in the Senate and in

[125] See note 122, *supra.*

[126] *Cf.*, Biddle, Hearings, *supra,* note 36 at 94.

fact the author and principal proponent of the bill, Senator Wagner, spent but little time at the hearing or in the debates discussing the procedural features of the Act.[127] In the House, however, a bitter attack was made on the power extended to the Board to subpoena witnesses and to petition the courts for imprisonment of the party subpoenaed in the event that the subpoena was not obeyed. The inability to get evidence before the Board had caused much of the breakdown of Section 7 (a)[128] and the retention of the subpoena power was considered correspondingly important to the effective operation of the Act. Violent objection to the provision was made by Representative Blanton, who read to the House the section of the Act providing that agents of the Board should have power to examine records and subpoena attendance of employers, and stated

> And if such employer should refuse to be thus examined, or to allow snoopers to go through the books of his establishment at will, or should refuse to jump across the United States at the command of such agent, and take all of his books and records of his business with him to place before such agent, he is to be punished for contempt under this bill.[129]

[127] Wagner, *Ibid.*, at 32; 79 CONG. REC. 7565-7574. References to enforcement sections of the bill are made at p. 7569 and at pp. 47-49 of the Hearings, *supra*, note 36.

[128] Biddle, Hearings, *supra*, note 36 at 94-95 and Wagner, 79 CONG. REC. 7569. See also, *supra*, note 70.

[129] 79 CONG. REC. 9702. Rep. Blanton's entire speech follows the tenor of the above quotation. The potentialities for abuse latent in the grant of the subpœna power to the Board were remarked upon the Report of the Attorney General's Committee on Administrative Procedure, in which present Board procedures with respect to subpœnas were criticized as follows.

"The Board furnishes to the trial examiner and to the Regional Director subpoenas signed in blank, application must be made to the former for issuance of subpoenas during the course of the hearing, while the latter will issue them prior to the hearing. The Board's trial attorney customarily obtains his subpoenas before the hearing begins, but the degree of supervision exercised over him in their use varies from region to region, it is not always required that he justify as other parties must, the issuance of a subpoena at this stage. The Committee recommends that the practice, which has persisted in some regions,

Representative Blanton offered no substitute for the above provision, and no extended discussion of this power was thereafter had.

Objection was made also to the portion of the Act which provided that rules of evidence appropriate in courts of law should not be controlling in hearings before the Board. The provision was criticized severely by Representative Smith of Virginia,[130] and a further attack on the provision was also made in the House by Representatives Blanton[131] and Taber[132] An amendment proposing to nullify the clause was rejected by a vote of 84 to 117.[133]

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of furnishing the Board's trial attorneys with a supply of blank subpoenas, so that they are not required to apply to the trial examiner even during the hearing, be abandoned. The Committee perceives no reason why the requirement that all parties must justify the issuance of a subpoena should be relaxed in favor of the Board's attorney, and recommends, accordingly, that Regional Directors impose uniform standards for all parties." See also Sec. 107 of "Code of Standards of Fair Administrative Procedure" proposed by the minority members of the Committee, (Report, p. 217) at p. 221, providing that subpoenas "shall be issued to private parties as freely as to representatives of any agency."

[130] 79 CONG. REC. 9694. Rep. Smith has been Chairman of the House Committee investigating the Act and the Board.

[131] 79 CONG. REC. 9701.

[132] Rep. Taber stated "This provision permits this board to rig up the proposition without permitting the party who is cited to be heard at all." 79 CONG. REC. 9705.

[133] In proposing the amendment, Rep. Halleck, also a member of the Committee to investigate the Board, stated.

" If the bill becomes law a national labor relations board is set up which, as I understand it, will be a quasi-judicial body charged with hearing and determining certain questions of fact which may be presented to it. The particular provision to which I object reads as follows. 'In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.'

"I propose to strike out of that sentence the word 'not' and to provide thereby that the general rules of evidence applying in courts of law and equity shall prevail. My idea is simply this, that the board is charged with the duty of determining questions of fact. In my view these facts should be established as any fact is established in any court, by competent evidence. I do not mean evidence circumscribed by technical rules, but I do mean that it should be evidence of fact as distinguished from hearsay, rumors, or reports; that the

A third objection made to the procedural provisions of the Act related to the statement in Section 10 (e) that: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Representative Smith attacked this procedural provision[134] also, but subsequent

persons who are there present and testifying shall testify to such facts as shall establish the charge." 79 CONG. REC. 9729. Under Representative Halleck's amendment, however, the Board would in fact have been bound by the "evidence circumscribed by technical rules" to which he refers.

The necessity for abrogation of court requirements for rules of evidence where factual matters are to be decided by administrative agencies, has received much attention by commentators. A most cogent and concise statement is made in the *Report of the Attorney General's Committee on Administrative Procedure, supra*, note 129, at 70, wherein it is suggested that traditionally such agencies have not adopted judicial requirements as to the admissibility of evidence and that "The absence of a jury and the technical subject-matter with which agencies often deal, all weigh heavily against a requirement that administrative agencies observe what is known as the 'common law rules' of evidence for jury trials. Such a requirement would be inconsistent with the objectives of dispatch, elasticity, and simplicity which the administrative process is designed to promote. An administrative agency must serve a dual purpose in each case: It must decide the case correctly as between the litigants before it, and it must also decide the case correctly so as to serve the public interest which it is charged with protecting. This second important factor makes it necessary to keep open the channels for the reception of all relevant evidence which will contribute to an informed result." For other pertinent discussions as to the necessity of the relaxation of such rules, see Ross, *Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commission*, (1922) 36 HAR. L. REV. 263, Wigmore, *Administrative Boards and Commissions: Are the Jury Trial Rules of Evidence in Force for Their Inquiries?* (1922) 17 ILL. L. REV. 263, Thelen, *Practice and Proceduce before Administrative Tribunals*, (1928) 16 CAL. L. REV. 208, Lavery, (1938) 12 CINN. L. R. 192, 195; Stephens, *Administrative Tribunals and Their Rules of Evidence*, (1938) 24 A. B. A. J. 630; Swancara, *Exclusionary Rules of Evidence in Administrative Hearings*, (1932) 11 ROCKY MT. L. REV. 77, Aitchinson, *The Morgan Case and Administrative Procedure*, (1939) 7 GEO. WASH. L. REV. 703, 722, 723.

[134] It is somewhat difficult to ascertain the exact nature of Rep. Smith's objection. The pertinent portion of his remarks follows

"And again, on page 19, line 24, in dealing with the power of the federal courts to review the decisions of the Board the power of the court is effectively fettered by this language: 'And the findings of the Board as to the fact [sic], if supported by the evidence, shall in like manner be conclusive.' Let me express the hope that if the bill is to be passed that the House will by amendment, so far as is possible, eliminate the most glaring of its defects." 79 CONG. REC. 9694.

speakers did not advert to the criticism. The attack on this feature of the legislation is now especially interesting in view of the proposals of the Attorney General's Committee on Administrative Procedure. The Committee recommended, with respect to the weight to be given to the findings of the trial examiners of the Board hearing complaints of unfair labor practices in the field, that the decisions of hearing commissioners (to replace present trial examiners) should be final in the absence of exceptions, and that "where exceptions are to findings of fact, the Board be reluctant to disturb such findings in the absence of clear error."[135] The recommendation is doubtless appropriate from the standpoint of administrative convenience, and in view of congressional inaction on Representative Smith's objection may well be considered consonant with the legislative intent.

The Wagner Act and the Legislative Process

The Nature of the Agency

The hearings, reports, and debates are especially valuable in enabling those examining the administrative structure of the Board to ascertain how far the present organization of the Board has followed Congressional intention as to the manner in which the Act ought to be administered. One *liet motif* running through all of the discussions of the Act was that it sought to create a body for administrative adjudication similar to the Federal Trade Commission.[136] The reasons for the introduction of this

[135] Final Report of Attorney General's Committee on Administrative Procedure, at 158 (1941).

[136] H. R. Rep. No. 1147, 74th Cong., 1st Sess. 23 (1935), Sen. Rep. No. 573, 74th Cong., 1st Sess. 14 (1935); Hearings, *supra*, note 36, Sen. Wagner at 49. Chairman Biddle at 95, 79 Cong. Rec. 7569 (Sen. Wagner), *Ibid.*, 9722 (Rep. Marcantino), Conf. Rep. on S. 1958 (upon amendments to the Act after passage by each branch of Congress), *Ibid.*, 10298, set out, *infra*, note.

comparison by the sponsors of the bill were obvious· the declaration of administrative duties and privileges granted to the Board, especially the rule making powers, should be recognized as not revolutionary in nature but as based upon years of experience in administrative ·bodies with which Congress and the people were reasonably familiar Moreover, the internal organization of the Federal Trade Commission had been approved by the courts and it was doubtless thought that an organization utilizing the procedural methods of the Federal Trade Commission would receive more lenient treatment during the course of inevitable appeals to the courts. Comparison, however, was not limited to the Federal Trade Commission, but extended to the Interstate Commerce Commission, and other bodies as well, so that it is clear that at no time was there any intent to limit the organization to the exact type exemplified by the Federal Trade Commission.

Another characteristic of the agency which was constantly expressed by those discussing the Act was that the organization should be "quasi-judicial." During the course of the hearings many references to the nature of the agency as "quasi-judicial" were made,[137] and the committee reports further emphasized this characteristic of the Board to be created. The report of the House Committee states the powers of the Board briefly as follows.

> The work of the Board and its agents or agencies, on the other hand, is quasi-judicial in character, dealing with the investigation and determination of charges of unfair labor practices as defined in the bill and questions of representation for the purposes of collective bargaining.[138]

[137] Rep. Marcantino, *ibid.*, Sen. Wagner, *ibid.*, Biddle, *ibid.*

[138] *See,* H. R. Rep. No. 1147, 74th Cong., 1st Sess. 14 (1935). As to preliminary discussion, see Hearings, *supra,* note 36 at 87 (Chairman Biddle), at 116 (Green). Mr. Garrison stated that the Board was to be "exclusively

The Congressional concept of the Act as creating a "quasi-judicial" agency led naturally to the erection of safeguards to insure the independence of those administering the Act.

During the hearings before the Senate Committee. the absolute necessity for independence of the Board from any departmental influence was insisted upon by many of those testifying concerning the bill. Lloyd Garrison, former Chairman of the National Labor Board under the Recovery Act, urged that the Board be entirely independent and pointed out the necessity that its independence be clearly established in order that it might gain public confidence.[139] Chairman Biddle of the National Labor Relations Board

judicial," at 131. Note the following interesting colloquy on the proposed Board (at 39)

"The Chairman (Sen. Walsh). You are setting it up apart from the Labor Department? Sen. Wagner. Yes; because it is a quasi-judicial body and ought to be independent of the Labor Department. Sen. Borah. How do you create a judicial body in this way Sen. Wagner. I do not say that it is entirely judicial. "

Further reference to the judicial quality of the Board is made in the report of the conference committee on the Act:

"Section 3 (a) of the Senate bill provided. 'There is hereby created as an independent agency in the executive branch of the Governmnt a board to be known as the "National Labor Relations Board"' House amendment No. 6 strikes out the phrase 'as an independent agency in the executive branch of the Government.' The Board as contemplated in the bill is in no sense to be an agency of the executive branch of the Government. It is to have a status similiar to that of the Federal Trade Commission, which as the Supreme Court pointed out in the Schecter case, is a quasi-judicial and quasi-legislative body. The conference agreement accepts this amendment." 79 CONG. REC. 10298.

[139] *Hearings before Committee on Education and Labor on S. 1958*, 75th Cong., 1st Sess. 132 (1935)

"It [the Department of Labor] is charged with the function of promoting the interest of the labor people. I think it would not be in accordance with sound principle to have that kind of agency responsible in any way for the work of a judicial body which has got to pass on controversies between laboring people and their employers. I think it would be a vital error to put this Board under the Labor Department, not because the Labor Department would interfere with it but solely because of the impression on the public and the effect which it would necessarily have by being placed under the Department of Labor."

stressed the importance of independence and impartiality for the Board and suggested that the appointment of or supervision over employees of the Board by the Department of Labor would destroy such independence.[140] Senator Wagner, discussing the Act at the hearings, suggested that " . for the Department of Labor to have control of the personnel carrying out quasi-judicial functions might inject politics or political influences into a board that ought to be free."[141] Senator LaFollette and Chairman Biddle also expressed the feeling that a practical supervision by the Department of Labor over the Board would be impossible.[142] The President of the American Federation of Labor and the Secretary of Labor both urged, however, that the Board be placed in the Department of Labor [143] Nevertheless, the Act as reported out by the Senate Committee and passed by the Senate provided for the creation of an independent Board·[144] the Act was reported favorably by the House Committee after an amendment made in committee that the Board should be "created in the Department of Labor."[145] Rep. Connery stated that "I consulted with the President at the White House in refer-

[140] *Ibid.*, at 85, 86. "The value and success of any quasi-judicial Government board dealing with labor relations lies, as the Secretary has stressed, first and foremost in its independence and impartiality." Mr. Garrison concludes that if the Secretary of Labor has budgetary power and the power to appoint subordinates in the Board "the machinery cannot be considered either impartial or independent."

[141] *Ibid.*, at 115. Chairman Biddle also expressed a fear that Board administration might become too susceptible to purely political fluctuations if it were not completely independent. *Ibid.*, at 86.

[142] *Ibid.*, at 87.

[143] *Ibid.*, at 62, 63, 114. It has been suggested elsewhere that administrative bodies should be placed under "the responsible political head of the appropriate department," especially in rule making activities. Hart, *The Exercise of Rule Making Power and the Preparation of Proposed Legislative Measures by Administrative Departments*, at 19-21 (1937).

[144] SEN. REP. No. 573, 74th Cong., 1st Sess. 8 (1935).

[145] Report *supra*, note 138 at 11; 79 CONG. REC. (9722).

ence to this. After that conference I returned to my committee and reported its result, and the committee decided to put the Board under the Department of Labor."[146] The amendment was vigorously opposed by Representative Marcantino, among others,[147] and was rejected by a vote of 48 to 130.[148] The bill as originally introduced provided at Section 12 for extensive arbitration of labor disputes through machinery set up by the Act,[149] and Senator Wagner testified before the Senate Committee that it was his desire to retain the Conciliation Service of the Department of Labor in the National Labor Relations Board.[150] However, the provision was ultimately withdrawn by committee amendment approved by the Senate.[151]

The proposal to place the Board at least partially under the direction of the Department of Labor, led to a consideration at the hearings of the necessity for reposing policy

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[146] 79 CONG. REC. 9722.

[147] *Ibid.*, Rep. Marcantino cogently summarized the entire debate as follows: ". I should have thought that . . precedent alone would have induced the establishment of the Board as an independent agency. The Board is to be solely a quasi-judicial body with clearly defined and limited powers. Its policies are marked out precisely by the law. That such an agency should be free from any other executive branch of the Government has been the recognized policy of Congress. . It seems strange that this Committee which has built up so fine a record in the interests of labor, should be grudgingly unwilling to establish for the protection of labor's most basic rights an agency as dignified and independent, and as likely to attain the prestige that flows from the independence, as those which have been established to protect the interests of other groups."

[148] *Ibid.*, at 9725.

[149] Hearings, *supra*, note 139 at 6.

[150] *Ibid.*, at 51.

[151] 79 CONG. REC. 7652. Note Sen. Wagner's later statement regarding a combination of prosecution and conciliation functions in one body: "The confusion of the voluntarily submitted fair practice provisions with Section 7 (a) has put the Recovery Administration in the untenable position of conciliator and prosecutor at once. Not only has Section 7 (a) been lost in the shuffle but the Recovery Administration itself has suffered from the misplaced burden." 79 CONG. REC. 7568.

making and enforcement powers in the same body It has already been noted that the Department of Justice failed to enforce the decisions of the old Boards operating under Section 7 (a) and Public Resolution 44.[152] Witnesses and Congressmen disagreed as to whether the failure arose from lack of personnel, lack of proper enforcement procedure, or disinterest in the cases transferred to it for prosecution.[153] Out of a consideration of the problems so arising came the argument of Chairman Biddle that the law raised economic, social, and legal problems; that a specialized body was necessary to deal with them, that with reference to the contents of Section 7 (a) "the language of the section is broad and subtle measures of evasion are countless," and finally, that "adequate enforcement required agents who are sympathetic with the basic purposes of Congress."[154]

The intent of Congress to create an administrative body which would be free from what were thought to be predilections of the courts toward restricting the rights of labor[155] was clearly revealed in the reports and debates regarding the restriction of coercive practices of employees as well as employers by the Act. The Senate report described with some particularity the conduct which courts had at times determined was coercive, including picketing, threats to strike, closed-shop agreements, circularizing banners or publications, and other like activities. To allow the courts to determine these questions and enjoin or otherwise prevent such activities under the cloak of preventing

[152] See *supra*, note 65.

[153] Hearings, *supra*, note 139 at 182 (H. A. Millis, now Chairman, National Labor Relations Board), at 93 (Chairman Biddle); 79 CONG. REC. 7569 (Sen. Wagner); *ibid.*, 9723 (Rep. Marcantino).

[154] Hearings, *supra*, note 139 at 94, 95, *Cf.*, Landis, *Symposium on Administrative Law*, (1939) 9 AM. L. SCH. REV. 131, ff.

[155] For a history of the approach of the English courts to the problem of labor relations see LANDIS, CASES OF LABOR LAW (1934) Chapter I.

"coercion," it was argued, would be in effect to nullify the Act itself, as well as the Norris-La Guardia Act designed to prevent the use of the injunction in labor disputes in the federal courts by the employers.[156] In the Senate debates on the amendment proposed by Senator Tydings to prohibit "coercion" by employees, the fear of allowing the courts to engage in interpretation of the word "coercion" was clear. Senator Barkley inquired of Senator Couzens whether solicitation to join a union might not be conceived by a court to be "coercion";[157] Senator Wagner emphasized that the court *had* held that a threat to strike was coercive and foresaw the emasculation of the Norris-LaGuardia Act if the amendment were adopted.[158] It remained for Senator Norris, however, to review the anti-labor activities of the courts in detail, commenting upon the Sherman Act, the Clayton Act, and the general approach of the courts in the past toward injunctive relief for employers, including their interpretations of "coercion," and emphasizing the dangers implicit in the proposed amendment.[159] Whether rightly or wrongly, it seems

[156] Report, *supra,* note 144 at 16; see also, *supra,* note 65.

[157] "Assuming he and I were employed by the same employer or by different employers as laboring men not belonging to any union, and somebody, either from the inside or from the outside, came to him or me, or to both of us, to persuade us to join a particular union by arguing with us that it was a better union, or a more efficient or a more effective union than some other union. Would that be regarded as coercion or intimidation?" 79 CONG. REC. 7656.

[158] *Ibid.,* at 7657, 7670.

[159] " the Sherman Anti-trust Law became a weapon by which labor was almost crushed out of existence because of the construction placed upon the law by the courts. The Clayton Anti-trust Law did not do labor much good. The constructions which were put on that law by the courts from time to time practically took away all its force and effect.

"In the hearings [on the Norris-LaGuardia Act] which went on for three years or so, during all of which I had the honor to preside, and in which I heard every word of the testimony, the history of these injunction suits was given, and the opinions of the courts were presented, showing that there was a gradual movement toward the domination of capital over labor. The history of these injunctions shows that the general trend was to construe the

clear that in matters relating to labor economics, the 74th Congress agreed, in the words of Lord Erskine, that "Even the noble judges are clothed beneath their ermine with the common infirmities of man's nature."

The interpretation of the Act itself by the Board has in general followed the suggestions enunciated during the legislative process. A recent report of the Board recites that

> the purpose of the National Labor Relations Act is to provide a legal channel through which labor disputes centering around the right to organize and bargain collectively can be adjusted without resort to strikes or other forms of economic action [169]

Since Dr. William E. Lieserson was appointed to the Board after the report was issued, his conception of the Act may be referred to specially:

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laws as capital wanted them to be construed. Suppose the pending amendment were agreed to and some laboring man should meet some other laboring man and say to him, 'I should like to have you join my union,' what would there be to hinder one of the courts holding that that was coercion and issuing an injunction in such a case? 'You may not coerce.' I would not think such an act was coercion. the Senator from Maryland would not think it was coercion, of course; we would not have agreed, either of us, with the construction placed by courts on the various acts that Congress has passed." 79 CONG. REC. 7669.

[169] Third Annual Report, National Labor Relations Board, p. 1 (1939). See also, Madden, Letter to Senator Burke, quoted in Hearings before a subcommittee of the committee on the judiciary on S. REC. 207, 75th Cong., 3d Sess. (1938) at 11, "Self-Government for Workers" speech delivered before the American Political Science Association, December 29, 1938, 3 LRR Man. 1085, Radio Speech on January 29, 1939 over Mutual Broadcasting System, 3 L.R.R. Man. 1182; "The National Labor Relations Act, popularly known as the Wagner Act, provides, in essence, for only three things. One is the liberty of working people to join or form unions if they wish to, free from interference by their employers. The second is the duty of employers to bargain collectively with the representatives selected by a majority of their employees. The third is the duty of the government, acting through the National Labor Relations Board, to ascertain by an election or otherwise what union, if any, a majority of the employees in a proper unit desire to represent them." To the same effect, see Smith, *The Labor Relations Act as Guardian of Democracy*, speech before the Carolina Political Union, 2 LRR 1078 (1938).

It [the Act] is intended to afford to employees the same right of human association, the same freedom to associate with their fellows for common benefit, that employers enjoy in their manufacturers' associations, chambers of commerce, and trade associations.[161]

The decisions of the United States Supreme Court interpreting the scope, intent, and purpose of the Act closely parallel the explanations made by the Board. It has been stated that the Act assumes that free opportunity for collective bargaining with accredited representatives of employees will promote industrial peace, and that the purpose of the Act is

to protect interstate commerce by securing to employees the rights established by Section 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes.[162]

Emphasis has also been placed by the court upon the duty of the Board to prohibit unfair labor practices and on its right to investigate the conduct of the employers to ascertain whether they have intimidated or coerced employees.[163]

Conclusions Concerning the Legislative Intent

The history of legislation in the transportation industry, beginning in 1888, slowed down by court decisions from time to time during the development of a more charitable approach to the problems of labor by the courts and the public, and culminating in the passage of the Railway Labor Act in the years preceding the National Labor Relations Act, reveals the growing social consciousness of Congress regarding modern industrial problems. The hard-headed economic approach to labor difficulties on a *quid*

[161] 1 House Hearings at 3.

[162] National Labor Relations Bd. v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 265, 266 (1938).

[163] *Cf.*, The Associated Press v. National Labor Relations Bd., 301 U. S. 103, 129.

pro quo basis in the Recovery Act wherein labor and capital agreed to share the benefits and the burdens of the plan proposed to stimulate business activities also displayed a conviction that at least a part of the remedy for our economic illnesses lay in established employer-employee relationships achieved through employer acceptance of the desirability of collective bargaining. More significant still was the conclusion of Congress that Section 7 (a) of the Recovery Act had failed, along with Public Resolution 44, which sought to implement it, because of delays in the enforcement of Board orders, delays in holding elections, ambiguity of the statutes, the rise of company unions, diffusion of administrative responsibility, and the lack of existing powers for investigation and enforcement vested in the Board. In the Recovery Act and Public Resolution 44, implementary powers of the Board were lacking, undoubtedly due in part to a general reluctance to invest the Board with discretionary powers for enforcement. And the necessity for such implementation was freely conceded during the debates on the Act, which itself embodied provisions rectifying many of the conditions causing the breakdown of Section 7 (a). The indignation against company unions, a consideration of the methods necessarily used in combating them, and the approval of the provisions leaving the closed shop problem to be dealt with by the states, all indicate an understanding of the extremely wide-spread regulatory activities to be performed by the Board. The extent of Congressional awareness of the scope of the Act is also shown by the rejection of amendments which directed the attention of Congress to every controversial part of the provisions of the Act and extensive debates concerning the partiality of the Act toward the employee, in which it was agreed that the purpose of the Act was to promote equality of bargaining power be-

tween employer and employee by assisting the employee while refraining from giving aid to the employer. The entire record of the hearings, reports, and debates indicates the promulgation of legislation to translate into action Congressional conviction on a political and economic problem of tremendous proportions, the difficulties in the execution of which were well recognized by those enacting the legislation. It may be assumed that the agency administering the legislation was expected to have and exercise powers to implement the Act coextensive with the duties therein imposed.

The legislative history of the procedural provisions of the Act and the Congressional conception of the general nature of the agency adds weight to the finding that the power of enforcement intended to be conferred on the Board was extremely wide in scope. The concept of the Board as analogous to the Interstate Commerce Commission and the Federal Trade Commission, with their wide powers for adaptation of the statutes to multifarious activities in the regulation of transportation industry and unfair trade practices, emphasized the scope of procedural adaptation to the changing problems of labor relations implicitly and explicitly extended by the Act. On the other hand, there were constant references to the Board as a "quasi-judicial" agency. What the legislators meant by "quasi-judicial" is doubtful, but it is clear that traditional judicial characteristics were not considered the *sine qua non* of adjudicative excellence; for the courts themselves were severely criticized in the course of the debates.

The Wagner Act and the Legislative Process
Implications for National Defense

No one living in America in 1935 needs be reminded that during the period when the National Labor Relations

Act was passed, the country was still slowly emerging from the economic chaos of the preceding five years. Rolls of the Works Progress Administration were crowded, millions of other employables were employed only part time, and unemployment was still the major economic problem of the country. The labor market was, in a word, glutted. The unfair labor practices of employers during the half decade before the Act had been unrestricted by labor principally because of intensive competition among many workmen for a few jobs. In such a labor economy, it seemed manifest that economics and ethics alike dictated an attempt to equalize the bargaining power of capital and labor Nowhere in the debates do the rights of consumer, or of the public generally, appear to have been considered except as to the general public interest in stimulating economic recovery through relieving the public of the burden of labor disputes—a factor which, in view of the extensive discussion concerning the constitutionality of the statute, may have been presented by the proponents of the Act principally with a view to establishing the "burden on interstate commerce" theory upon which the constitutionality of the Act was ultimately rested.

Our present economy, predicated principally upon a scarcity of labor, raises a question as to how far the Act was intended to cover labor problems currently arising The problems to be met are not altogether the same as those of 1935, although basically the problems in each type of labor economy are to prevent work stoppages and insure fair dealing. Certainly the emphasis in the administration of such legislation must change, for in times of labor scarcity the worker is much closer to equality of bargaining power with the employer than in periods of labor plenitude. Certainly, also, the stake of the public in the speedy and equitable settlement of labor disputes has grown immea-

surably with our entrance into armed conflict.

Specific aspects of the aims of the Act ought to be examined in the light of those changes in national economy A principal problem which has arisen in the recent months relates to the need for mediation of labor disputes. As has already been noted, bills have been introduced into Congress to require mediation[165] of such controversies and the rising tide of labor disputes prompted the President to appoint a special mediation committee by executive order on March 21st last.[166]

Will the legislative process justify an extension of

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[165] See note 4, *supra.*

[166] 6 FED. REG. 1532, 1533 (No. 56) March 21, 1941. The order created a board to be known as The National Defense Mediation Board of eleven members representing employers, employees and the public. The Board is to act upon application of the Department of Labor after its conciliation efforts have failed to adjust the dispute. No sanctions are given the Board except the right to take testimony and publish findings and recommendations concerning disputes. The proclamation also states that parties to labor disputes should give the Board and the Department of Labor notice of demands in such matters, full information as to developments, and advance notice of "threatened interruptions to continuous production."

Under a regulation of the Office of Production Management, a Labor Division was established on March 18, 1941, the duties of the Director of which were to ascertain labor requirements for national defense, develop programs and coordinate efforts for assuring an adequate labor supply for national defense and advise with employers regarding standards of work and employment, and "assist in the prevention and adjustment of any labor controversies which might retard the defense program " O. P M. Regulation No. 5, Mar. 18, 1941, 9 U. S. L. WEEK 2575 (1941).

Public sentiment as to mediation shown by the Gallup polls at the time of the appointment of the commission indicated that 85% of the people would require employers and employees to mediate their differences. See Gallup polls released March 26, 1941 and March 30, 1941. In a later survey by the same group, a cross section of voters was asked. "When workers in a factory working on defense contracts vote to go on strike, do you think they should be required by law to wait for sixty days before the strike can start?" Fewer than one voter in twelve had no opinion on the subject; eighty-nine percent favored the proposal and eleven percent disapproved. Among industrial labor union members more than two-thirds approved such a cooling off period. N. Y. Times, May 2, 1941, 20:3.

Board activities into the field of conciliation? The report of the House Committee on the adoption of the Act after reciting the quasi-judicial powers of the Board,[167] related

> This of course does not preclude securing compliance, either by a stipulation procedure or otherwise, prior to formal hearing or application to the courts. But the Board and its agents or agencies are required to carry out the declared will of Congress as provided in this definite legislation, the law must have application in all cases, and must not be haggled about or compromised because of exigency of a particular situation or the weakness of a particular employee group as against a more powerful employer. Under the bill it is contemplated that the Board, its agents or agencies will not confuse the quasi-judicial nature of their function by intruding upon the regular work of the Conciliation Service of the Department of Labor.[168]

While the Board has in fact settled many of the charges of unfair labor practices brought to its attention,[169] the jurisdiction to prevent these practices is such that normally there has been no occasion for it to attempt to settle a dispute as it is in progress, the jurisdiction of the Board being limited under the Act to finding whether an employer has engaged in unfair labor practices, and to ascertaining the appropriate bargaining agency designated by the employees. It has already been noted that the bill originally provided machinery for extensive arbitration of labor disputes, and that it was originally planned to retain the Conciliation Service of the Department of Labor in the Board.[170] The fact that these provisions were eliminated from the bill before its final passage[171] illustrates

[167] See text to note, 138, *supra.*

[168] *Supra,* note 138.

[169] Out of 22,891 cases disposed of by the Board between October 1, 1933, and June 30, 1939, 48 per cent were settled, 13.5 per cent were dismissed by the regional director for the Board, and 24.3 percent were withdrawn after conference with Board Officials. 2 House Hearings 375, Exh. 40.

[170] *Supra,* notes 140-150, and text.

[171] *Supra,* note 151 and text.

clearly that in the field of general conciliation, at least where unconnected with a prosecution for unfair labor practices, the Board can have no place in labor disputes in defense industries.[172]

A constant irritant of public opinion relating to labor now as at all times has been the jurisdictional strike. When the public safety is imperiled, stoppages of production pending determination, not of *whether* the employees are to belong to a union, but as to *which* union shall represent the employees of a particular employer, incur increasing disapproval of the public.[173] In this field, prompt and effective action by the Board in designating a bargaining agency under the Act may result in eliminating causes of friction prior to suspension of production, for the Board is particularly charged with the duty of determining appropriate bargaining agencies and units by Section 9 of the Act. It seems reasonable to believe that the Board will endeavor to give jurisdictional disputes in defense industries preferential places on its dockets. The President, however, in an Executive Order[174] moved to insure that this be done by extending power to the National Defense Mediation Board "to request the National Labor Relations Board, in any controversy or dispute relating to

[172] See, also Section 10 (b) of the Act, which apparently grants jurisdiction to the Board to intervene in a labor dispute not involving representation of employees only " whenever it is charged that any person has engaged in or is engaging in any such unfair practices", which apparently restricts the jurisdiction of the Board only to matters wherein a charge has been filed.

[173] Although the subject has not specifically been made the occasion for a survey, it cannot be doubted that jurisdictional strikes have had much to do with the sentiment shown in the Gallup polls wherein 72% of those responding to inquiries on the subject stated that they would approve forbidding strikes in the defense industries, (See Gallup polls released on March 26, 1941, and March 30, 1941) and one-third of the union members questioned regarding the lag in defense industries voluntarily mentioned strikes and failure of labor unions to cooperate.

[174] *Supra,* note 166, at Section 2 (e).

the appropriate unit or appropriate representatives to be designated for purposes of collective bargaining, to expedite as much as possible the determination of the appropriate unit ." In the absence of discussion of this matter in the legislative process, it seems clear that the Presidential suggestion is in conformity with the general spirit and scope of the Act.

With the public attitude toward the need for accelerated preparation for national defense rapidly approaching the "Work or Fight" degree of intensity,[175] public reaction against production delays due to labor difficulties in defense industries[176] presents the question of what sanctions, if any, can be invoked by existing governmental agencies against labor to insure the uninterrupted production of defense materials. The history of the Act makes it clear that it was never intended that the Act should impose any responsibilities upon employees with reference to their relationships with employers, excepting perhaps the duty to affiliate with a majority group where a closed-shop contract had been executed. Particularly was it indicated in Section 13 of the Act that "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." When, during a discussion of the bill on the floor of the Senate, it was suggested that the bill ought to be amended to make it obligatory on the members of the unions to fulfill the conditions of a contract entered into by them with the management, it was replied by proponents of the bill that to so amend the bill would

[175] "Work or Fight" became a watchword during the First World War. See Selective Service Regulations Sec. 121A-L, (1918) the effect of which is discussed generally in Hoague, Brown and Marcus, *Wartime Conscription and Control of Labor* (1940) 54 HAR. L. REV. 50, at 58-59 and NATIONAL WAR LABOR BOARD (Bull., No. 387, Bur. Lab. Stat., U. S. Dept. Lab.), 34, *ff*, dealing with general enforcement of "Work or Fight" requirements. For present developments in this direction see notes 187 ff. *infra*. and text.

[176] *Cf., e. g.*, notes 173 and 166, *supra*.

be to establish a virtual "slavery" of the employees. Upon such a response, the amendment was defeated.[177] Such a legislative history reflects no theory in the legislative process whereby Board orders might require employees to remain at their positions.

Moreover, coercion of employees by other employees in defense industries, either apart from or in connection with strikes, may ultimately become a subject of vital public concern. Here, also, it seems clear from the legislative history of the Act that the Board may exercise no jurisdiction over such problems. The discussion of the matter in the Senate hearings[178] and the Report of the Senate Committee on the bill,[179] as well as the debates on the floor of the Senate,[180] reveal a considered determination to place coercion by employees beyond the scope of the regulatory powers of the Board.

Employees, as well as employers and the general public, have rights which ought to be safeguarded in the months to come. It has been suggested that "labor peace, and the resultant steady flow of production, can best be achieved through fair dealing—not repressive legislation."[181] Certainly there can be no quarrel with such a conclusion. But what is "fair dealing", and what part ought the Board play in ensuring it? During the early stages of the defense program, the Board called the attention of the Army and Navy officials having charge of placing orders for defense materials to the fact that certain industrial organizations had been accused and found guilty of unfair labor practices

[177] 79 CONG. REC. 9730.

[178] *Supra*, note 99 and text.

[179] *Supra*, note 100 and text.

[180] *Supra*, notes 101-106 and text.

[181] Pressman, *Sabotage and National Defense*, (1941) 54 HAR. L. REV. 632, 644. See also LABOR AND NATIONAL DEFENSE, *op. cit. supra*, note 2, at 118, 122 ff.

by the Board. After contradictory announcements by officials of the Army and the Navy and a somewhat equivocal opinion by Attorney General Jackson, the Assistant Secretary of War issued to contracting officers a statement of the labor policy of the War Department informing them that although compliance with the Act would be a factor in considering the ability of a contractor to carry out his contract,

> The award of a War Department contract is not to be considered as barred by the single fact that proceedings under the National Labor Relations Act have been instituted or that findings of violations of the Act have been made by the National Labor Relations Board.[182]

Thereafter, the Army and Navy officials inserted a clause into agreements with contractors setting forth the statement of the Commission concerning labor policy approved by the President as a guide to letting such contracts. This was done by means of Procurement Circular 43. Even this order was rescinded on June 5, 1941, however, by Procurement Circular 40.[183]

Nowhere in the legislative history of the Act is there any suggestion that the Board should solicit the cooperation of other branches of the Government in applying sanctions for violation of the Act by withholding government contracts, and the memorandum above incisively demonstrates the disapproval of the War Department of the application of such sanctions. It seems possible, at least, that the conclusion of the Assistant Secretary might have been different had there been any evidence of a legislative

[182] Q. M. G. Circular letter No. 104, Nov. 28, 1940; 9 U. S. L. WEEK 2357 (Dec. 24, 1940). For a history of the discussion of the legal and political considerations involved in awarding defense contracts to those accused of violations of the National Labor Relations Act, see also 9 U. S. L. WEEK 2217 (October 8, 1940) and 2230 (October 15, 1940).

[183] 9 U. S. L. WEEK, 2160, 2347 and 2750 (1940-1941).

intent to authorize the imposition of such a penalty by the Board. However, in view of the very broad general powers granted the President to require the cooperation of industrial leaders in national defense matters through the so-called "lease-lend" bill,[184] there seems to be no present need to seek for additional techniques through which employers may be required to cooperate—in labor disputes or other matters—for the furtherance of the defense program. This is, of course, particularly true in view of the broad powers granted to the President in time of war as Commander in Chief of the Army and Navy.

The method of approach to the first real labor crisis in national defense preparations indicates the probable procedures to be followed in the future, and emphasizes that imperative necessity for the production of defense materials may elicit governmental intervention in labor disputes of a distinctly different nature from that authorized in the Act. The controversy is tersely described in an executive order by the President, issued during the dispute, which set forth in substance that The North American Aviation, Inc., at its Inglewood plant in Los Angeles, California, had contracts with the United States for the manufacture of military aircraft, that a controversy arose at the plant over terms and conditions of employment between the company and the workers which they were unable to adjust by collective bargaining; that the matter was referred to the National Defense Mediation Board, and that notwithstanding an agreement between the Mediation Board and the representatives of the employees to resume operations, the strike continued, causing cessation of production of aircraft.[185] Serious difficulties

[184] Public Law 11, H. R. 1776, 77th Cong., 1st Sess., Approved March 11, 1941.

[185] Executive Order No. 8773, June 9, 1941, 6 FED. REG. 3109 (1941), 9 U. S. L. WEEK 2750 (1941).

were experienced during the latter part of May, and more particularly during the first few days of June. During this period, varied pressures were brought to bear on the recalcitrant employees and their supporters. On May 28, 1941, the regulations of the Selective Service Administration were amended so as to provide more broadly for the reclassification of all registrants,[186] amending and combining Section XXX and Paragraph 333 of Volume 3 of the Selective Service Regulations. The amendments related to all individuals deferred, and placed renewed emphasis on the fact that deferments (including those made for persons engaged in defense industries) were merely temporary and subject to change by the various draft boards. In view of the general application of the amendment, the connection with the North American dispute is only speculative. On June 5, 1941, however, a more direct announcement was made by the Secretary of War to the effect that soldiers who had held key positions in defense industries before induction, whose services were requested by their respective employers, might be released to re-enter their previous employments.[187] The decision rendered many skilled workers at least potentially available to relieve the labor scarcity which might be expected to result from possible widespread extension of the area of employer-employee conflicts. On the same day, the Army and Navy officials withdrew the provisions in contracts which had indirectly discouraged unfair labor practices on the part of employers.[188] The strike continued in unabated intensity, and on June 9, 1941, two steps of far reaching significance in war labor economics took place. On that date state directors of the Selective Service System were re-

[186] 6 FED. REG. 2603 (1941).
[187] 9 U. S. L. WEEK 2750 (1941).
[188] See note 183, *supra*, and text.

quested to reclassify employees in defense industries who had terminated the employments under which they had received deferred status,[189] and the President issued an executive order directing the Secretary of War to take over the plant, directing also that workers returning to the plant for employment were to be protected, and authorizing the Secretary to employ civilians in his discretion. Possession and operation under the order were to be terminated as soon as the President determined that the plant would be privately operated in a manner consistent with the needs of national defense.[190] Production was resumed in due course, and on July 2, 1941, under another executive order, possession of the plant was relinquished.[191]

Hence it appears that procedures other than those established by the Act are presently favored in the solution of those difficulties peculiar to our present necessities in promoting production for national defense purposes, both as to preliminary negotiations now handled by various

[189] The instructions provided as follows "The basic principle upon which selective service operates is to keep the man on the job where he can render the greatest service to his government. The citizen who has been deferred because of the job he is performing in the national defense program cannot expect to retain the status of deferment when he ceases to work on the job for which he was deferred. The status of deferment and the responsibility to perform the necessary work are inseparable.

"Therefore, I hereby direct all agencies of the Selective Service System to take the necessary action to reconsider the classification of all registrants who have ceased to perform the jobs for which they were deferred, and who are, by such failure, impeding the national defense program." Instructions of Acting Director to State Directors, June 9, 1941, quoted from 9 U. S. L. WEEK, 2750 (1941).

[190] Cited *supra*, note 185.

[191] 6 FED. REG. 3253 (1941). The practice has also been followed subsequently. See Executive order No. 8868 Aug. 23, 1941, in connection with the Federal Shipbuilding and Drydock Co. (Kearney, N. J.), (10 U. S. L. Week 2127 (1941)), Executive Order 8928, Oct. 30, 1941, Air Associates, Inc., (Bendix, N. J.), (*ibid.*, at 2274).

committees mentioned, and as to ultimate removal of stoppages in production caused by labor disputes.

It further appears that neither the legislative history of the Act nor present sanctions in labor disputes in defense industries furnish a foundation upon which it can be said that the Act is, or was intended to be, adaptable to a war time economy. Quite possibly it is true, as Representative Murdock has said, that "the scheme of the Act should be supported by even greater sanctions than it carries at the present time,"[192] even though it may be doubted that the public welfare would be served by "the enactment of legislation, adding criminal penalties for violation of the NLRA," as suggested by the General Counsel for the Congress of Industrial Organizations.[193] In any event, it is clear that no present widening of the scope of the authority of the Board to enforce penalties against recalcitrant employers, either by a denial of government contracts in defense matters, or otherwise, can be predicated upon the legislative history of the Act. It is equally clear that there has never been an indication in the legislative process that the provisions of the Act might be invoked to police in any manner the conduct of employees in their relationships with the employer or other employees, to disaffirm the right to strike, or to require mediation or arbitration of labor disputes.

[192] Murdock, *The Defense Emergency and the National Labor Relations Act*, (1940). 3 NAT. LAW. G. Q. 87, 90.

[193] See *supra*, note 181, at 645.