

11-1-1987

## Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act

Kenneth M. Casebeer

*University of Miami School of Law*, [casebeer@law.miami.edu](mailto:casebeer@law.miami.edu)

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. Miami L. Rev. 285 (1987)

Available at: <https://repository.law.miami.edu/umlr/vol42/iss2/2>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# University of Miami Law Review

VOLUME 42

NOVEMBER 1987

NUMBER 2

## Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act\*

KENNETH M. CASEBEER\*\*

I. INTRODUCTION .....	285
II. THE PEOPLE OF THE DRAFTING .....	297
III. DESIGN .....	309
IV. LABOR POLICY .....	318
V. EVENTS .....	322
VI. IMPLEMENTATION .....	334
VII. DRAFTS .....	341
VIII. LEGACY .....	347
IX. ELABORATION ON DRAFTING AND DRAFTS .....	348
X. THEORY .....	360

### I. INTRODUCTION

It has become commonplace among labor law academics to view the National Labor Relations Act,<sup>1</sup> also known as the Wagner Act, as both a watershed change in labor relations law and one of the most

---

\* *Editor's Note:* This interview took place on the 2d and 3d of March 1986 between Professor Kenneth M. Casebeer and Leon H. Keyserling, former Chairman of the Council of Economic Advisers under President Truman from 1950 to 1953, member of the Council from 1947 to 1950, and legislative aide to Senator Robert F. Wagner from 1933 to 1938. Mr. Keyserling was actively involved in Democratic economic policy, legal practice, and consulting until his death on August 9, 1987.

*The interview that follows is more of a conversation than either an oral history or an interview about historical events. It is not, however, a verbatim account of the conversation between Professor Casebeer and Mr. Keyserling. The Review undertook minor stylistic editing of the transcript, and placed certain parenthetical remarks made by Mr. Keyserling in footnotes.*

\*\* Professor of Law, University of Miami School of Law. The interviewer would like to thank Michael Fischl for helpful comments. This work is dedicated to the memory of Leon Keyserling.

1. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. II 1984)).

radical legislative initiatives in American history. It may be both.<sup>2</sup> At the same time, disputes have increased in number and intensity as to the exact meaning of the legal transformation brought about by the Act. The dominant paradigm describes a legal regime of state intervention into private labor relations in order to structure, or for some to impose, private governance procedures. The resulting structure of labor relations channels conflict into manageable forms, thereby dampening larger scale, more destabilizing threats to industrial peace.<sup>3</sup> Others see the Act less as an instrument of governmental intervention and more as the legalization and formalization of the previously existing, economically based, institutional practices of labor and management. Legalization of these practices in turn reflects and shapes pluralistic group interests.<sup>4</sup> Critics of both of these views see a more indeterminate, open-ended restructuring of bargaining power and bargaining forms. The generality of the Act's protection of labor practices has allowed—perhaps contrary to legislative intent—conservative judicial and National Labor Relations Board constructions of the law,<sup>5</sup> which ultimately have reduced the economic power of labor. Both the strength of bargaining power and the topics suitable for bargaining were sacrificed.<sup>6</sup> Some commentators have discovered exemplars of state power that are more general than a labor relations policy: alternatively, a codification of class relations<sup>7</sup> or an inefficient

---

2. See, e.g., St. Antoine, *The Wagner Act: Labor Law's Signal Event*, 64 MICH. B.J. 121 (1985).

3. See, e.g., Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 2-4 (1947); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 817 (1973); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 999-1002 (1955). These authors offer analyses of the postwar legal regime inaugurated by the Taft-Hartley amendments to the Wagner Act. See *infra* notes 4-8. To the extent that these amendments created a successor regime, it is nonetheless an indication of the lasting transformative impact of the original Act. Furthermore, to the extent that many of the assumptions used by each analysis generally could be read into an interpretation of the Wagner Act, it is simply the specific legal issue contexts that are different for each author. For a critique of postwar labor law, see Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

4. See, e.g., Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23, 55-63 (1984).

5. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 268-69, 280 (1978).

6. C. TOMLINS, *THE STATE AND THE UNIONS* 199, 241-43 (1985); Klare, *supra* note 5, at 292-93; Tomlins, *The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism*, 39 INDUS. & LAB. REL. REV. 19, 29-34 (1985).

7. See, e.g., Block & Hirschhorn, *New Productive Forces and the Contradiction of Contemporary Capitalism: A Post-Industrial Perspective*, 7 THEORY & SOC'Y 363 (1979); J. Rogers, *Divide and Conquer: The Legal Foundations of Postwar U.S. Labor Policy* (doctoral dissertation, Princeton University, 1984).

regulatory interference with market mechanisms.<sup>8</sup> Despite the divergent views of all the commentators, they agree that the degree of radical change attributable to the Act centers on the legitimation of labor's collective power in the relations of production.

Scholars outside of legal academics take a broader view of the Act's policies, tending to locate the origin and meaning of its provisions in the historical context of the legislation,<sup>9</sup> the administration,<sup>10</sup> and the political and legal culture<sup>11</sup> of the New Deal. The Act is still thought to embody a labor policy, but one designed to provide an administrative lever that would remove or ameliorate threats to stable production and enhance the countervailing power of labor in the aggregate. New economic power would redistribute a portion of the wage bargain that had been further slanted toward increasing profits as a result of economic depression. Under these views, a particular labor policy might have been considered controversial, but its appearance was neither surprising nor incompatible with the loose new political deal that was shaping governmental institutions and policies.

The idea of the Wagner Act was exceptional, though not simply in the labor relations sense or in the political odds of its passage. For a brief moment in history, an idea and a movement appeared that had the potential to redirect American political life, but which now seem lost in the various representations of the legal regime. An emphasis on state planning is missing in both the legal history of labor relations and the institutional history of economic recovery. The thesis offered in this interview does not deny that both significant interventions in the rights and duties of labor and management, and state-supported countervailing power for labor against management, figured prominently within the conceptual framework of the Act. Rather, the suggestion is that since its passage, the roads taken in labor relations law, the difference in labor politics as it develops in the United States, and the perception of unhealthy trends in income distribution all have been affected by a failure to embrace an ideal of public and private interdependence of economic power and social planning. This interdependence was not only conceivable in the mid-1930's, but in fact formed the intellectual commitment behind the Act. Even so, the

---

8. See, e.g., Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

9. For the most thorough legislative political history of the Act, see I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* (1950).

10. See, e.g., J. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* (Vol. I 1974).

11. See, e.g., P. IRONS, *THE NEW DEAL LAWYERS* (1982).

draftsmen clouded any clear case to be made, vacillating on their willingness to embrace this thinking fully.

While it may be argued that the draftsman's intent, as opposed to the legislature's intent—the latter with its own controversies<sup>12</sup>—should play only a small role in statutory interpretation, the recollections of those who created the events certainly pose questions of history that cannot be ignored. While the holder of the drafting pen may be filtering culture, politics, shortrun concerns, and many other forces that are dwarfed by subsequent personal and social history, certainly the same potential distortions affect present-day representations of legislative text and political discourse, including those of the previously characterized scholars.

Thus Leon Keyserling's thoughts on the Wagner Act have importance beyond the mere fact of his drafting. The hypothesis that emerged and was explored in the conversation with him strongly suggests a broader context for interpreting the intent and design of the Act—placing it more than labor law scholars would in the context of the early New Deal and the National Industrial Recovery Act<sup>13</sup> mentality, and placing it more than historians would in the vanguard of progressive state responses to the reality of a changing world.<sup>14</sup> However much critics of the Act saw the proposal through their own agendas, and whatever compromises were forced during two legislative sessions, the drafters believed in democratic and centralized economic planning.<sup>15</sup> Central planning in the early 1930's, it should be

12. See Gudridge, *Legislation in Legal Imagination: Introductory Exercises*, 37 U. MIAMI L. REV. 493, 545-46 (1983).

13. Ch. 90, 48 Stat. 195 (1933) (amended by ch. 246, 49 Stat. 375 (1935)), *repealed by* Pub. L. No. 89-554, § 8(a), 80 Stat. 648 (1966).

14. Finegold & Skocpol, *State, Party, and Industry: From Business Recovery to the Wagner Act in America's New Deal*, in STATEMAKING AND SOCIAL MOVEMENTS 159 (C. Bright & S. Harding eds. 1984).

In introducing the 1935 bill, Senator Wagner connected the purpose of the NLRA to section 7(a) of the NIRA, and asserted an independent interest in redistribution:

In addition, there was a second phase of the program which struck at the very core of the depression. Congress determined to fix wages and hours at a level that might, by reemployment and higher pay, spread adequate purchasing power among the masses of consumers and thus prime the pump of business. Equally in the foreground was the intent to insure a decent measure of security and comfort to those who worked, while protecting the fair-minded employer from the cutthroat tactics of the exploiting few.

79 CONG. REC. 7567-68 (1935).

15. See, e.g., 81 CONG. REC. 2939 (1937) (speech by Senator Wagner entitled, *Industrial Democracy and Industrial Peace*) [hereinafter Wagner, *Industrial Democracy and Industrial Peace*]; J. HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 135-36, 156 (1968); C. TOMLINS, *supra* note 6, at 104; Wagner, *Planning in Place of Restraint*, 22 SURV. GRAPHIC 395 (1933); see also *infra* p. 317 (argument for government's responsibility to solve social dislocation and aid the disadvantaged). For a discussion positing

noted, did not anticipate the increase in administrative bureaucracy. It was then a notion of planning to structure basic roles in social relations and provide a public infrastructure to facilitate stable development and social justice. Today, planning seems to signify direct supervision of specific parties whenever government perceives skewing of their previously entitled Coasian bargaining rights or disapproves of the consequences of acting on them. In the Wagner-Keyserling view, the modern public-private distinction, thought to be a pluralistic, liberal advance of constitutional thinking, subordinating private interest to a separate, legislatively defined public good, may be seen rather as a conservative retreat from private power derived from a recognition of the interdependence of private and public power. Replacing the negatively defined, hands-off philosophy of freedom of contract combined with a laissez-faire state—a private-public unity—with the positive planning of freedom of organization and a redistributive welfare state—a public-private unity—represented a conceptually clearer connection to prior constitutional law. At the same time, it stood for a more radical role for the state than the commonly heralded new constitutional order prevailing from 1937 to the present. Such a comprehensive change in the articulated relationship of political institutions and civil society required not only a labor policy in general, but also a specific labor policy of organization for the 1930's. This policy, intended to resolve the crisis of underconsumption, would also be compatible with general and long-term economic stabilization. Since the AFL and organized labor simply wanted government backing for further organization, their willingness to cede the specifics to Senator Wagner permitted his office to set the rights of labor in a broader economic vision—a vision of governmentally directed labor policy as one aspect of social security and progress. This interview, therefore, intervenes in the current debate about the relationship between the Act and both the political organization of subsequent labor relations and the development, or lack of develop-

---

that the intent was less of a progressive response than simply the traditional response of the state to economic crises, see J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983). Professor Atleson noted that:

A seemingly more helpful analysis might be that in times of crisis the state tends to act to stabilize or rationalize capitalism through an expansion of state power despite the opposition of business. Concessions may be granted to workers, but only in ways that can concurrently increase the power of the state as well. Pressure from below combines with a desire to increase the institutional power of the state at crisis times, and, concurrently, such crises weaken the power of capital to block change.

*Id.* at 43 (footnote omitted).

ment, of broader labor politics in this country.<sup>16</sup>

Contrary to the subsequent emphasis on "labor relations," "rights," and "duties," or on the countervailing power of pluralistic interests, the Keyserling interview suggests that the content of the Act turned on three more general principles. Although each of these principles is independently important, the first lexically encompasses the other two. First, the major innovation of the Act, most clearly articulated in the preamble, described an entirely restructured vision of constitutional democracy in the express linkage between congressional power and individual entitlement.<sup>17</sup> Congress inevitably exercised central planning responsibility under the commerce clause<sup>18</sup> to regulate by action or inaction all economic exchanges that affect the health of a national economic system. Due process reflected the political duty to look behind the purely formal equality represented by "liberty of contract," in order to recognize the role that the state played in preserving inequalities of bargaining power. While creating no affirmative duties on government, legislation that addressed the consequences to individuals of the government's inevitable role in fomenting present economic conditions and enforcing accumulated powers based on expectations of such intervention, would certainly not violate due process. Inequality of bargaining power itself skewed supply and demand to the detriment of the legitimate public policy interest in economic recovery for all. Thus, redressing the distortions and injustices of economic behavior in part caused by past state action must be both legitimate and within congressional authority.<sup>19</sup>

---

16. For a discussion of "American exceptionalism," see J. Rogers, *supra* note 7.

17. An express conceptual linkage of public power limits and the definition of private, individual, and constitutional rights can of course be negative or positive. One could argue that the dying constitutional vision of the Supreme Court in the 1930's applied the direct-indirect effects test of *United States v. E.C. Knight Co.*, 156 U.S. 1 (1894), to prevent federal legislative powers from reaching employment relations, because public power must be defined to serve the laissez-faire freedom of contract defined by due process protections of liberty. All public power is, therefore, derivative of private rights in a private-public unity. For a view of the continuity of pre- and post-1937 constitutional law and its relation to the so-called private law of employment contracts, see Casebeer, *Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765 (1985).

18. U.S. CONST., art. I, § 8, cl. 3.

19. In upholding the constitutionality of the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), Chief Justice Hughes correctly construed the statute's scope of constitutional power, although on narrower grounds than the full economic recovery rationale of the Wagner Act. The preamble to the final version reads:

The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b)

Second, the draftsman's conception of state-supported bargaining power functioned primarily to redistribute wealth in order to attack the problem of underconsumption. This legitimation of bargaining power would be accomplished by enforceable recognition of bargaining units and duties to bargain, prohibition of sham bargaining by company unions, and definition of asymmetrical and general unfair labor practices of management, but not of labor. At the same time, it would attack the reduced production that accompanied recognition strikes. The prohibitions of unfair labor practices were mainly aimed at setting the bargaining process in motion by eliminating these strikes, which were responsible for the most intense and bitter labor

---

occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

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.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

National Labor Relations (Wagner) Act, ch. 372 § 1, 49 Stat. 449, 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. II 1984)).

For one of the few commentaries to approach connecting the Act's preamble with a macroeconomic recovery policy as the conceptual framework for the Act, see Mitchell, *Inflation, Unemployment, and the Wagner Act: A Critical Reappraisal*, 38 STAN. L. REV. 1065 (1986). Professor Mitchell noted that:

Though the statement in the preamble appears clear, it is not conclusive proof that the Wagner Act was originally viewed as an instrument of economic policy. Its inclusion was possibly no more than a means of convincing the Supreme Court that the law involved interstate commerce. The Act's predecessor, the National Industrial Recovery Act of 1933 . . . had been declared unconstitutional only months before the Wagner Act was adopted. Perhaps the preamble—with its reference to burdening the flow of commerce—was simply a ploy to convince the Court that Congress had the authority to pass such a law. But while the constitutionality issue may have been a contributing factor to the language, the history of the Wagner Act suggests that the preamble also embodied a then-popular theory of economic depressions.

*Id.* at 1067 (footnotes omitted); see Atleson, *supra* note 15, at 41; Renshaw, *Organised Labour and the Keynesian Revolution*, in NOTHING ELSE TO FEAR: NEW PERSPECTIVES ON AMERICA IN THE THIRTIES 223-24 (S. Baskerville & R. Willett eds. 1985).



strife during the early stages of the Depression. In addition to state recognition of the legitimacy of independent unions, the elimination of company unions coupled with the economic weapons that were still available to unions, such as secondary boycotts and changes in cargo handling, created a set of economic disincentives that employers could not ignore. Labor Board certification of bargaining units could help ensure the strength of counterorganization, which could then deliver substantial redistribution of the wage bargain.<sup>20</sup>

Third, failures to enforce earlier guarantees of free collective bargaining under the National Industrial Recovery Act, as well as ad hoc measures undertaken through Executive orders and the Resolution 44 Board,<sup>21</sup> inevitably led the draftsmen toward an independent agency with self-contained enforcement capacity and authority. The Board would be actively involved in ensuring bargaining, and would thus be more than a passive factfinder or a preliminary stage in the enforcement of generic rights open to compromise or purchase. This agency would be modeled after the state-of-the-art Federal Trade Commission,<sup>22</sup> and would include minor procedural modifications drawn from the Railway Labor Act.<sup>23</sup>

---

20. Distribution concerned the draftsmen more than jurisdictional lines:

The supporters of [the 1934 version of the Wagner Act, known as the Labor Disputes Act], therefore, were proposing a course qualitatively different from that suggested by previous advocacy of collective bargaining. Their intention was to give unambiguous public support to independent unionism as a means to promote collective bargaining, not in the interest of stabilizing relations between existing organized parties—the rationale of previous legislation—but in vindication of the tangible public interest in the stabilization of the wages, hours and working conditions of the labor force at large. From this flowed the two most important features of the bill; first, its critique of company unionism; and second, its proposal to place authority to determine the appropriate dimensions of a collective bargaining relationships [sic] in the hands of the Board.

C. TOMLINS, *supra* note 6, at 122; see Finegold & Skocpol, *supra* note 14, at 182.

Subsequently, much of the economic power of unions has been restricted by Taft-Hartley and Court decisions. Whether a top-down organizational strategy of virtually all industry would have eventually succeeded with such weapons as widespread boycotts and other economic pressures, and whether such organization would have changed the macroeconomic record, is something which remains theoretical. Compare Mitchell, *supra* note 19, at 1068 (skeptical about a Keynesian wage-push approach to economic recovery, favoring supply side approaches), with J. HUTHMACHER, *supra* note 15, at 158-59 (approving of the demand approach of the Wagner Act). For an analysis of the economic effects of unions, given the change in the basic labor statutes, see R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* (1984).

21. For detailed descriptions of these agencies, see I. BERNSTEIN, *supra* note 9; J. GROSS, *supra* note 10.

22. See Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1982 & Supp. II 1984)).

23. Ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-163, 181-188 (1982)).

This account of the Wagner Act questions any argument that the Act is built upon particularistic institutional or organizational politics regarding labor relations. Whatever the interests of the subsequent National Labor Relations Boards or the courts, the Act seemed simply to allow these legal bodies to exercise power under the statute. The Act did not define a determinate micro-labor-relations policy that a board or a court would implement in the manner of discovery. For example, the interview casts doubt on the overemphasis of the instrumental effect of section 9<sup>24</sup> in Board certification of bargaining unit parameters, particularly as favoring craft or industrial units.<sup>25</sup> The arenas of the 1940's and the Taft-Hartley Act<sup>26</sup> should not be directly traced to the policies of the early 1930's.

In short, the contemplated Act structurally altered state-social coordination.<sup>27</sup> The problems and possibilities facing society resulted in part from the inevitable presence of government: its costs, its politically dependent enforcement of entitlements, and its collective address of breakdowns of complex social institutions and relations. The inevitable intertwining of state and civil society required rationalization through political mechanisms that were guided by democratic decisions. To that extent, the Act's labor policy was a macropolicy,

---

24. National Labor Relations (Wagner) Act, ch. 372, § 9, 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. II 1984)). Section 9 of the Act provides in part that:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

29 U.S.C. § 159 (1982).

25. See Finkin, *supra* note 4.

26. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1982)).

27. The argument takes no strong position on how and why the Wagner Act passed or on its implementation. Thus, it is compatible with the arguments of Theda Skocpol and Kenneth Finegold to "bring the state back" into causal analysis of social action: "Stated most generally, our argument is that structures and party alignments are important in shaping policy outcomes in advanced capitalist democracies. But just how they are important depends on specific historical conjunctures and patterns of prior development." Finegold & Skocpol, *supra* note 14, at 169. The point is to see how the ideas of Wagner and Keyserling develop a particular vision within that picture.

derived in part from fiscal and monetary policy.<sup>28</sup> At the same time, this political economy approach to both the Depression and substandard living conditions, which took the form of labor law and administration, could be articulated and defended on grounds of social justice. Indeed, the defense could be based on constitutional values by providing a scheme that accounted for governmental power as well as individual interests and due process. The additional fact that industrial recovery stimulated by increased consumption due to higher wages could be matched by production uninterrupted by labor strife, simply added support for the central planning assumption and policy option chosen.<sup>29</sup>

The ingenious political tightness of a new constitutional order, combined with a fiscal contribution to economic recovery, embodied in a substantial reordering of state labor policy and labor relations, thus represents an intervention in current historical accounts of the New Deal. The standard account of New Deal economic policy describes more of an antipolicy: political responses to interest groups using government to counterorganize the weak, for a better balance against the strong. Ellis Hawley viewed labor unions as needing support for higher wages and job security, not increased employment, cheaper goods, or an expanded social pie.<sup>30</sup> He also distinguished a

---

28. This structure of the Act should be contrasted to the approach championed by another self-proclaimed author of the Wagner Act, Judge Charles Wyzanski, who wanted both a lawyer's bill—one defined by specific and symmetrical, rights-centered definitions of unfair labor practices of both labor and management—and an enforcement authority located in the Department of Labor. Both suggestions were rejected in the legislative process that ended when the Wagner Act failed to pass in its first draft in 1934. P. IRONS, *supra* note 11, at 214, 230; see *infra* at 304.

29. In an address to Congress, Senator Wagner stated:

I want to emphasize ever more strongly the constitutional power and the intent of Congress to prevent these unfair labor practices even where they do not lead or threaten to lead to strikes. As economic conditions have changed, courts on the whole have shown an increasing willingness to recognize that unsound business practices are a direct burden upon the regularity and volume of commerce. . . . When wages sink to low levels, the decline in purchasing power is felt upon the marts of trade. And since collective bargaining is the most powerful single force in maintaining and advancing wage rates, its repudiation is likely to intensify the maldistribution of buying power, thus reducing standards of living, unbalancing the economic structure, and inducing depression with its devastating effect upon the flow of commerce.

79 CONG. REC. 7572 (1935) (address by Senator Wagner introducing the National Labor Relations Act, May 15, 1935).

30. See E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 195, 276-79 (1966); see also Lothian, *The Political Consequences of Labor Law Regimes: The Contractualist and Corporatist Models Compared*, 7 CARDOZO L. REV. 1001, 1063-65 (1986). Lothian argues that the Wagner Act confirmed the historical tendency to a contractualist, countervailing interest in redistributing the wage term. The perspective is not asserted to be a complete dismissal of corporatist state-private interaction. The article underemphasizes, however, the

labor policy of countervailing power from what would have been a Keynesian attempt to maintain full employment through stimulating consumption and investment.<sup>31</sup> However correct this theory may be about the New Deal as a whole, it is misplaced when attributed to the Wagner Act.<sup>32</sup> While the legal academics see only labor relations, the historians only seem to see the mid-level, countervailing power explanation of the Act.<sup>33</sup> It is true that Senator Wagner insisted that aggregations of workers in national unions match the aggregations of stockholders in corporations of increasing vertical integration, who were allowed to negotiate industrial codes under the NIRA's suspension of the antitrust laws. Yet Senator Wagner, in speeches penned by Keyserling, continually emphasized the deteriorating condition of wages relative to profits as support for the bill on an anticyclical basis. Wagner saw the development as a general problem of a complex economy that was not limited to the consequences of a particular downturn.<sup>34</sup> Keyserling plainly states that increased purchasing power was not an end in itself nor simply a matter of economic fairness or governmental evenhandedness given the existence of other recovery measures.<sup>35</sup> Rather, the working person's freedom could only be

---

connection of Wagner Act thinking to the corporatist aims of the NIRA and its section 7(a), and fails to acknowledge the proto-Keynesian intent behind this specific state intervention in labor relations—a corporatist influence different in kind and larger than a labor relations policy. To this extent, her analysis follows traditional academic assumptions about the 1930's.

31. E. HAWLEY, *supra* note 30, at 278-79.

32. Mitchell, *supra* note 19, at 1067; *see also* C. TOMLINS, *supra* note 6, at 124 ("In Wagner's bill, however, 'labor' was conceived of not as a set of organizations but as the mass of individual employees which constituted the labor force.").

33. *See, e.g.*, P. IRONS, *supra* note 11. *But see* Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 G.W. L. REV. 199, 220-21 (1960) (Wagner's "was no simple doctrine of 'countervailing power.' . . . He foresaw that this process within our enterprise system could become an integral part of an every [sic] larger cooperative process guided by intelligence which would animate the whole economy, including the governmental sector.").

In labor law literature, the only casebook to reference the macroeconomic intent found in the Senate report follows with this dismissal: "The 'purchasing power' theory referred to in the foregoing report, and the related idea that general increases in wages are an effective antidepression measure, have for some time been rejected by many economists." B. MELTZER & S. HENDERSON, *LABOR LAW* 38 (1985).

34. *See, e.g.*, R. Wagner, *Industrial Recovery and the Public Works Act* (NBC radio broadcast, June 13, 1933), *quoted in* Keyserling, *Why the Wagner Act?*, in *THE WAGNER ACT AFTER TEN YEARS* 8 (L. Silverburg ed. 1945); Keyserling, *supra* note 33, at 218-19.

35. Indeed, Tomlins recognized Wagner's proto-Keynesian intent, but submerged its importance by explaining the Act in the context of conflicting policies of various interested parties. C. TOMLINS, *supra* note 6, at 23-29. In analyzing the 1935 bill, he emphasized the Twentieth Century Fund's alternative policy of countervailing economic bargaining power to raise wages, while admitting that Wagner's drafting took virtually no account of it, in order to show that more than labor relations was in the political air. *Id.* He then overemphasized the old NLRB staff's participation by stressing that Keyserling asked this group, with its lawyerly interest in rights and procedure, for such drafting input. *Id.* For an example of this

secure when economic health had been assured. Full employment of social resources would spur consumption, which would in turn increase the investment necessary to ensure this economic health.<sup>36</sup>

The argument gains some further credence when considering the Act's draftsman. Senator Wagner, in addition to his considerable political power, insisted on retaining control over the drafting of all legislation that he sponsored,<sup>37</sup> and Keyserling was his sole legislative aide from 1933 until 1938. Thus, Leon Keyserling occupied a central role in the history of the Wagner Act in a way that was unusual for the period of its passage—one that is virtually nonexistent today. Subsequently, he was a central policy adviser to the Democratic Party and several government administrations,<sup>38</sup> and a consistent and strong voice for Keynesian economic policy. Keyserling, a protege of Rexford Tugwell, was educated at "braintrust hotbeds,"<sup>39</sup> Columbia and Harvard. He subsequently authored the Employment Act of 1946,<sup>40</sup> served as Chairman of President Truman's Council of Economic Advisers, and was the ghost writer for much of the Humphrey-Hawkins amendments to the Full Employment Act.<sup>41</sup> His personal history, both before and after the Wagner Act, coupled with Senator Wagner's own interest in democratic, central economic planning, lend plausibility to the proto-Keynesian intention of the draftsmen. Furthermore, this account of the ideas encoded in the Act is supported in Leon Keyserling's papers, particularly in the evolution of the early drafts and collateral correspondence.

Finally, whatever the simultaneous truths represented by and re-

---

misemphasis of confusing memoranda request with design, see J. GROSS, *supra* note 10, at 132-38. For a work that partially corrects this mistake, see P. IRONS, *supra* note 11, at 226-28; see also *infra* p. 306.

36. Keyserling, *supra* note 33; Keyserling, *Why the Wagner Act?*, in *THE WAGNER ACT AFTER TEN YEARS* 5 (L. Silverburg ed. 1945).

37. I. BERNSTEIN, *supra* note 9, at 63; P. IRONS, *supra* note 11, at 226.

38. Leon Keyserling graduated from the Harvard Law School in 1931, studied economics in graduate school with Rexford Tugwell at Columbia, and joined Senator Robert Wagner's staff in 1933, where he remained until 1938. He served as general counsel to the Federal Housing Administration, after drafting that agency's parent legislation, the National Housing Act. He later joined President Truman's Council of Economic Advisers, and then became its Chairman.

39. "The Brains Trust" was the name given to President Roosevelt's group of confidential advisers. It included: Raymond Moley, Rexford Tugwell, Adolf Berle, General Hugh Johnson, Samuel I. Rosenmen, Robert K. Straus, Charles W. Taussig, and D. Basil O'Connor. See R. TUGWELL, *THE BRAINS TRUST* at xi-xiii (1968). The term often also includes the proteges these men brought with them to Washington.

40. Ch. 33, 60 Stat. 23 (1946) (codified as amended at 15 U.S.C. §§ 1021-1024 (1982)).

41. Full Employment and Balanced Growth (Humphrey-Hawkins) Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (codified as amended at 15 U.S.C. §§ 3101-3152 (1982 & Supp. II 1984)).

presented in the Act, the undeniable impact of political and economic conflict and mediation in its name suggest that the Act's passage is a fascinating event in legal and American history. In this interview, Leon Keyserling discusses the context, the people, the political climate, the strategy and design of the Act, and the policies of its implementation.

## II. THE PEOPLE OF THE DRAFTING

**CASEBEER:** As we begin would you like to make any general remarks about the drafting or the passage of the Wagner Act?

**KEYSERLING:** Yes, I would like to make some general comments, remembering that it was 1933—fifty-three years ago—that I started work on the drafting of the Wagner Act. Because of intervening events, my memory may not be completely accurate, but I think it is reasonably accurate. In 1933, President Roosevelt turned to Senator Wagner on many measures, partly because he had been so very active during the Hoover administration in the proposal of unemployment relief, public works, and economic stabilization measures, and partly because he had been the youngest leader of the New York State Senate when Franklin Roosevelt was a back-bench member,<sup>42</sup> plus Wagner's standing in the United States Senate, and the fact that he was from New York. So the National Industrial Recovery Act (NIRA) was introduced by Senator Wagner.

The background to the Wagner Act of 1935 is contained in the history of the National Industrial Recovery Act. The National Industrial Recovery Act, which was one of the first measures of the New Deal, was originally an embodiment of the so-called Swope Plan. Gerard Swope, the president of the General Electric Company, who was one of the most enlightened and far-sighted businessmen that I ever met, advanced the plan during the Depression before the Roosevelt administration. So the original Swope Plan was merely a plan for the suspension of the antitrust laws so that business could more effectively cooperate in the determination of business policies, especially price policies, but also substitute avowed cooperation for alleged conflict.

I had come down to Washington in March 1933 with Rexford Tugwell because he had been my teacher at Columbia and I had been

---

42. To indicate the ambivalent relationship of Senator Wagner's office to the Presidency, Keyserling remarked:

In those days, some people, such as Frances Perkins in her biography of Roosevelt, referred to him as a dilettante. Regardless of whether that was true, that association was one of the reasons.

in his department when I was an assistant in the economics department there, studying postgraduate economics after I had left the Harvard Law School in 1931. I came to Washington at the instance of Tugwell when he became Under Secretary of Agriculture under Henry Wallace, and he brought me into the Department of Agriculture. He said, "I want you to help me and Henry," by whom he meant Henry Wallace, "but you can get better pay if you're in the legal department." So we got a push for the legal department under Jerome Frank, who later became Chairman of the Securities and Exchange Commission, and then a judge on the United States Court of Appeals for the Second Circuit, sitting in New York. Jerome Frank was slated to be the counsel to the Agricultural Adjustment Administration (AAA), but that law had not yet passed. So he was working without pay, while waiting for the law to pass, and Tugwell sent me to see him. I had never seen Frank before. The first question he asked me was, "Tell me what you know." I thought that was an easy one. I said, "I know Cotton Ed Smith." Cotton Ed [Ellison DuRant] Smith was the chairman of the Senate Agricultural Committee, who had sworn that the AAA would never become law, and that even if it did, that Jew from the New York law firm would never be confirmed. So when I said "I know Cotton Ed Smith," Frank grabbed his hat and said, "Let's go," and up we went to see Cotton Ed Smith. Within five minutes, Cotton Ed Smith had his arm around Jerry and said, "My boy, you're going to get your act and you're going to get confirmed too." The reason was very simple. Cotton Ed Smith was a lifelong friend of my father's, who for many years was the largest cotton grower and exporter, both domestically and internationally, from either of the two Carolinas.

We got in the taxi and started back for the Department of Agriculture and Frank said, "We haven't talked about salary. How about \$4,000 per year?" I had been getting one hundred dollars per month from Columbia and about two hundred dollars from the General Education Board of the Rockefeller Foundation. I was making a study of teaching in the universities, and I had been getting some money preparing plus-minus exams for the trust course at the law school. When he said \$4,000 per year, I said, "Well, that's just great as a starter. But in the meantime, lend me twenty dollars so that I can go back to New York and get my clothes because I'm flat broke."

Before the AAA actually became law, and I was the first lawyer engaged by Jerome Frank, I got involved with Frank in meetings on the National Industrial Recovery Act when it was solely a bill for the suspension of the antitrust laws. Frank and I, and at times Tugwell,

met with John Dickinson, who was Under Secretary of Commerce, Harold Moulton, who was then head of the Brookings Institution, and Winfield Riefler, who later became a high official at the Federal Reserve Board. In connection with those meetings, we had a meeting with Senator Wagner to discuss recovery policy in his office. That's the first time I ever met him. I didn't say anything. I was twenty-five years old and new. I listened to all these people talking for two hours about recovery measures, and then Wagner rubbed his face and said, "I'm awfully tired. We'll have to stop." So I got my first lick in. I said, "Well Senator, I don't want us to leave with the impression that we're all in agreement. I'm not in agreement with anything that's been said." He said, "How's that?" I said, "Well, especially if you're going to have a law for the suspension of the antitrust laws, and even if you weren't going to have one, we have got to do something about purchasing power. We've got to get in there something about the protection of collective bargaining, something about public works, and something about wages and hours." Wagner said, "I agree with you," and the meeting broke up.

A day or two later he called me up and offered me the job as his legislative assistant. We were then called clerks. I was clerk of the Patent Committee, of which he was chairman. This committee was never active.<sup>43</sup>

I went over to Wagner's office and immediately started working. Here's where the Wagner Act started, with a bill for public works for which I used the public works bills that Wagner had been introducing for a number of years with Senators Edward P. Costigan and Robert M. LaFollette, and the famous section 7(a) of the NIRA, dealing with protection of the right of collective bargaining, which was the forerunner to the Wagner Act. The provision that wages and hours should become part of the codes under the National Industry Recovery Act was the forerunner of the Wage and Hours Act of 1938,<sup>44</sup> the first general labor standards act.

**CASEBEER:** Who else besides Senator Wagner would have

---

43. In the early 1930's, Congressmen had small staffs, sometimes consisting of a single professional. Wagner's position was therefore prized. Here Keyserling identified his predecessor:

I succeeded Simon H. Rifkind, who had been with Senator Wagner during his first term, and who went back to his New York law practice in Senator Wagner's firm. He later became a federal judge, and then resigned because he couldn't send two sons to college on a \$10,000 salary. He later joined with Randolph Paul in the firm of Paul, Weiss, Wharton, Rifkind & Garrison.

44. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C.A. §§ 201-219 (West 1965 & Supp. 1987)).



been interested in section 7(a) or some other provision like it being included in the NIRA?

**KEYSERLING:** Well, naturally the AFL [American Federation of Labor], and there were some economists, such as Sumner H. Slichter, from Harvard. He was generally conservative. But I remember that he came down and testified in support of the NIRA in hearings for which I organized the witnesses. There was some support for it.

**CASEBEER:** Was Senator Wagner's initial concern with a provision like section 7(a) mainly from the standpoint of collective bargaining, of a countervailing power to business with the suspension of the antitrust laws, or did he also have a prior commitment to increasing purchasing power?

**KEYSERLING:** He had a strong commitment to increasing purchasing power. That was the basis of his earlier Public Works Act,<sup>45</sup> and the \$3.3 billion public works bill which was put into the NIRA. We arrived at the curious figure of \$3.3 billion because that was the sum total of the projects that Rifkind had collected for Senator Wagner's earlier bills with Costigan and LaFollette. So he was interested in that, and he had had a long history of interest in labor relations. He had secured the decision from the Court of Appeals of New York when Cardozo was a member, but I think not yet chief judge, which for the first time threw out the labor injunction.<sup>46</sup> Wagner was the chief counsel for the unions in opposing the labor injunction. He argued before the Court of Appeals and had a good deal of help from Herman Oliphant who later became general counsel to the Treasury.<sup>47</sup>

When these various provisions of the National Industrial Recovery bill had been drafted, Wagner took them to some of the final meetings. Now the history books tell something about those meetings, but there is no record about what I've told you, the background of how this thing got started. There is so much stuff that is never recorded. Anyway, he took to these meetings the provisions related to collective

---

45. Public Works Administration Appropriation Act, ch. 90, tit. II, 48 Stat. 195 (1933).

46. *Interborough Rapid Transit Co. v. Lavin*, 247 N.Y. 65, 159 N.E. 863 (1928).

47. Of Justice Cardozo, Keyserling recalled:

In 1934, Cardozo had dinner with me and some boys with whom I was living, because one of them was Justice Cardozo's legal secretary. He never had to do any work because Cardozo wrote all his opinions from memory and didn't even have to look at his law books for the citations. Cardozo said that when Wagner appeared before his court in opposition to the labor injunction, he forgot the name of one of the important cases when he was arguing the case. I said, "Well judge, even if he did forget the name of one of the cases, he did much more for the American people."

bargaining, public works, and section 7(a), and that's the way they got into the bill. All this happened before the bill was introduced.

Frances Perkins' biography of Roosevelt,<sup>48</sup> which is very accurate, tells a story that's again told in a very recent book about FDR.<sup>49</sup> Roosevelt opposed the \$3.3 billion for public works. We must remember that his first act upon coming to Washington was the Economy Act,<sup>50</sup> which reduced all our salaries by fifteen percent, including reducing mine as legislative assistant to Senator Wagner from \$3,900 to \$3,315, where it stayed for quite a while. Even after there was an agreement to put the \$3.3 billion provision in the NIRA, Roosevelt made a decision to take it out. Senator Wagner and Frances Perkins prevailed upon Roosevelt that it could go in. So I can only speculate as to whether Wagner would have put it in, whether Roosevelt approved of it or not. But he did finally approve it. Section 7(a) never really came to his attention, but Roosevelt's views on the subject were fully revealed when he came to the Wagner Act.

The NIRA became law after an interesting debate in the Senate. In the summer of 1933 there were a good many strikes, especially because section 7(a) stirred things up but couldn't be enforced.

**CASEBEER:** Let me ask you a question about the intent behind section 7(a). From the standpoint of the supporters of the National Industrial Recovery Act, not necessarily from the standpoint of Senator Wagner, did they understand section 7(a) as simply the necessary political response to the suspension of the antitrust laws? If business was able to combine in large trade associations then concomitantly shouldn't labor be able to organize as well? Was it a political response or was there some policy intent aimed at recovery in it? Did they think that it was necessary for labor and management to coordinate?

**KEYSERLING:** It was almost entirely an aim at recovery. Of course, the argument was used that it was more unanswerable to include section 7(a) because of the suspension of the antitrust laws. But that was not their main concern. Their main concern was the fundamental and basic denial of the right to organize and bargain collectively. Their thinking was greatly influenced by the previous Railway Labor Act,<sup>51</sup> which had contained labor provisions protecting the right of labor to organize and bargain collectively. Thus, the railway labor unions had made much progress in numbers and negotiations.

---

48. F. PERKINS, *THE ROOSEVELT I KNEW* (1946).

49. T. MORGAN, *FDR* (1985).

50. Ch. 314, 47 Stat. 382 (1932).

51. Ch. 347, 44 Stat. 577 (1926) (codified as amended at 29 U.S.C. §§ 101-115 (1982 & Supp. I 1984)).

We must remember that in 1933 the AFL had a very small membership, consisting of only a few million people.

The Act became law, and immediately section 7(a) was flouted. Wagner was on a vacation in Europe and the President appointed a nonstatutory Board to bring about the observance of section 7(a), or at least the removal of the bitter strife that was arising. He appointed Senator Wagner Chairman of that Board. There were three industrial members: Walter C. Teagle, President of Standard Oil of New Jersey, which was then the biggest industrial corporation in America; Louis Kirstein, who was the President of Filenes of Boston; and Gerard Swope. There were also three labor members: William Green, President of the AFL; John L. Lewis, President of the United Mine Workers; and for some strange reason, Professor Leo Wolman, who was a professor of economics at Columbia University, and a specialist in labor problems. I had been in his class when I was doing graduate work there. He later became a member of the New Deal and then completely reversed himself, and became one of the outstanding columnists opposing the New Deal, as did Ray Moley, another Columbia professor.

While Wagner was in Europe, he sent me a telegram asking me to take his place until he got back. Well, you can imagine my taking his place when I went over to the first gathering of the group. We didn't do anything until Wagner got back, but I got a chance to know them and size them up. They were interesting people, especially Gerard Swope and John L. Lewis. Well, after Wagner got back, and despite the composition of that Board, he got unanimous decisions from them in all the cases that arose. There were controversies between labor and management. He got unanimous decisions establishing the need to observe section 7(a), and Wagner's argument to the other members of the Board, especially the business members, was not on the merits or principles. He would just say, "It's in the law, look at it." He got unanimous decisions in all cases enunciating the principle of majority rule. Although they got unanimous decisions, they got no enforcement. The situation became worse and worse. You even had the terrible trouble with Tom Girdler in the steel industry, which led ultimately to what was called the "Memorial Day Massacre."

Later, in the fall of 1933, Wagner said, "We've got to draw up a labor statute and a labor court." Now he didn't have any very definite ideas in his mind as to what he meant by a "labor court." I think he thought more of a regulatory court to hear labor matters. He asked me to start working on a bill. All the way through, I had final author-

ity, subject to Senator Wagner, as to what went into the bill.<sup>52</sup>

**CASEBEER:** In the process of starting to draft the first Wagner bill, the Labor Disputes Act, who were the people that you consulted directly? Who were the people that you were interested in having input into the bill?

**KEYSERLING:** Well as I said, I had the final say, subject to Senator Wagner. I was the draftsman, but I did get help. I got a good deal of help from Milton Handler. Milton Handler was a distinguished professor of law at Columbia, and a very successful practitioner in the field of antitrust laws. Milton Handler became the general counsel to the nonstatutory Labor Board, so I had a good deal of contact with him. I also had a good deal of contact with a fellow named William Gorham Rice, who was an assistant lawyer to Milton Handler on the nonstatutory Board, and with some of his staff people.<sup>53</sup> Later on, Senator Wagner was succeeded as Chairman of the nonstatutory Board by Lloyd Garrison, who had been dean of the Wisconsin Law School. He in turn was succeeded by Francis Biddle, who later became Attorney General, after being a circuit court judge. I worked with all of those people before the Wagner Act. I worked with people representing the AFL, particularly a lawyer known as "Judge," whose name was Henry Warrum, and another lawyer, who was the counsel for the AFL, named Charlton Ogburn. I worked more closely with Charlton Ogburn as counsel to the AFL. I also did some work on the mechanics of the legislation, but not on the substance, with the staff of Senator David Walsh, who was chairman of the Senate committee that handled the legislation, and his assistant, and some other people like Bob LaFollette, who later conducted the very revealing investigation of labor practices which was one of factors responsible for getting the Wagner Act passed.<sup>54</sup>

After the bill was introduced in 1934, it had tremendous opposition from industry and universal opposition from the press, including

---

52. The young men of the New Deal typically moved in small circles:

This is stated in the book, *The New Deal Lawyers* [P. IRONS, *supra* note 11, at 226-53] in the chapter on the Wagner Act. The man who wrote it verified what I told him by speaking with Tommy Emerson, who lived with me in those early days, along with Abe Fortas and various others—Ambrose Daskow, who was secretary to Cardozo, and Howard Westwood, secretary to Justice Stone. I was secretary and legislative expert to Senator Wagner. We had five men in the house altogether.

53. I. BERNSTEIN, *supra* note 9, at 63; J. GROSS, *supra* note 10, at 64-70. William Leiserson and Benedict Wolf also contributed. I. BERNSTEIN, *supra* note 9, at 63; J. GROSS, *supra* note 10, at 67.

54. *Violations of Free Speech and Rights of Labor: Hearings on S. Res. 266 Before the Subcomm. on Education and Labor, 76th Cong., 1st Sess. 709 (1939).*

editorials by Walter Lippman. He wrote violent editorials against the Wagner Act saying that it couldn't be made to work and it ought to be scrapped.<sup>55</sup> So there was violent opposition. There was no support, except from the AFL, and a few economists and lawyers. One of the lawyers who supported it was a man by the name of Robert Lee Hale, who taught at Columbia Law School. It was a tremendous battle.

The administration imposed a lot of obstacles with the active aid of General Hugh Johnson, who headed the NRA, and Donald Richberg, the counsel to the NRA who became its head when Johnson was forced out by Roosevelt. One of the obstacles was the creation of ad hoc boards to deal with these labor disputes. Roosevelt, at the insistence of Johnson, created one in the automobile industry and in other industries. These boards were terrible. Roosevelt said to the press that labor has the right to be represented by anybody, whether by a union or by the King of Siam or the like.

In the course of the battle, Charles Wyzanski, counsel to the Labor Department, brought an alternative bill to us that was really terrible from our point of view. It prohibited coercion from any source and provided a bill of particulars of unfair labor practices by both labor as well as employers, which had nothing to do with the case because our Act was merely a bill to get labor the right to organize, which industry already had, and to bargain collectively.

**CASEBEER:** Was the origin of the Walsh bill more from Senator Walsh's motivation or from the Labor Department's motivation?

**KEYSERLING:** Well, it wasn't technically a Walsh bill. It remained a Wagner bill but it was reported by Senator Walsh as chairman of the Education and Labor Committee, which handled the bill. Walsh may have had some predilections in that direction, but he was fed a substitute, by Wyzanski, which still bore the name of Wagner.

Walsh reported out of committee this greatly mutilated bill, and then Roosevelt issued Resolution 44,<sup>56</sup> which Wyzanski had drafted.

---

55. Keyserling never forgot these incidents:

Thirteen years later, in 1946, when the Taft-Hartley Act came up, I read an article by Walter Lippmann that said that when the Wagner Act was up, everybody recognized that it was a long-needed reform, but by now the pendulum had swung and we needed the Taft-Hartley Act. So I wrote him a letter: "Dear Walter, I read your article in the *Post* today and I'm sending you a copy of the two articles that you wrote in 1934. I wonder how they could be reconciled?" Wagner had answered the articles in 1934. A couple of days later I got an answer from Walter, "You should have to write three editorials a week." That was the only answer he ever gave me.

56. Resolution 44 was a joint resolution of Congress that reaffirmed the principle of

Between Resolution 44 and the Walsh version of the bill, Senator Wagner got up on the Senate floor when the bill came up for consideration and said that he was so dissatisfied with it that he was going to withdraw it and would come in with a stronger bill next year.

Public Resolution 44 became law but it was a red herring. It didn't accomplish anything. After we had worked on the 1935 version of the Wagner bill and strengthened it between the two Congresses, it was introduced and became law later in 1935. Various efforts were made to sidetrack it. Joe [Joseph Taylor] Robinson was the Democratic leader of the Senate, and Pat [Byron Patton] Harrison was the majority whip, or the second ranking man. They took Wagner up to the White House to get Roosevelt to persuade him to withdraw the bill. The argument they gave was that the bill would be defeated if it came up on the Senate floor. These were the leaders of the Senate on the Democratic side. The Democrats had a big majority and the defeat of the bill would be very embarrassing to them in the 1936 election. When they went up to the White House, Wagner's only argument was, "Well, I don't care whether the bill passes or not. But I'm going to have a vote on it." When he had the vote there were only twelve votes against it. One opponent that I remember the most was Senator Millard Tydings of Maryland, who was a Democrat, but there were others, mostly Republicans. So it passed in that way and then it went over to the House. The chairman of the House Committee was William Connery of Massachusetts.

There was no trouble in the House except for the controversy in the committee about the placement of the Board, because the blandishments of Secretary Perkins to Connery placed it in the Department of Labor. We had to take it out based upon the reports that I wrote for Congressmen Robert Ramspeck and Vito Marcantonio.

**CASEBEER:** I'm curious, how did Ramspeck and Marcantonio, so different in outlook, come to be the spokesmen for the response to Connery?

**KEYSERLING:** Well, they were not acting in conjunction. They did not file one report, they filed two different minority reports.

**CASEBEER:** And did they come to Senator Wagner?

**KEYSERLING:** No, I went over to the House side with the permission of Senator Wagner, and went to see a number of Congress-

---

collective bargaining, but created no enforcement or recognition machinery. S.J. Res. 143, H.R.J. Res. 375, 73d Cong., 2d Sess., 78 CONG. REC. 11,635, 12,041, 12,120 (1934). President Roosevelt acted on the Resolution by Executive order, establishing the nonstatutory National Labor Relations Board, which succeeded the National Labor Board, which also was nonstatutory, and is commonly referred to as the "old" Board.

men, trying to get them to oppose the amendment, including a lot of the liberal Congressmen. The only two I succeeded with, and I don't know the reasons, were Marcantonio and Ramspeck—Ramspeck probably because he wanted to do anything in opposition to the New Deal and thought this was in opposition, and Marcantonio because he was way over to the left. So I drafted for Marcantonio and Ramspeck—and they both made speeches on the House floor under the three minute rule—and the amendment, which would have put the bill in the Labor Department, was taken out. So there was no conflict between the Senate and the House in conference on that subject. That's the way it became law.

**CASEBEER:** I asked you about the people who had been initially involved with you in drafting the '34 bill. Were there other individuals who became important to the language of the '35 bill?

**KEYSERLING:** Very much so, and they are in part treated in the book, *The New Deal Lawyers*.<sup>57</sup> This treatment, however, is not exactly correct because I found out that everybody claims that he drafted the bill.<sup>58</sup> But I got a great deal of help in 1935 from the new staff of the nonstatutory Board, then headed by Francis Biddle. We got a good deal of help from Calvert Magruder. Magruder was a professor at the Harvard Law School, a very fine man who later became a very liberal chief judge of the First Circuit. In between that time, or rather when he was counsel to the nonstatutory Board, and was living in Washington working with me on the '35 version, we along with his wife, Tommy Emerson, and some others, played a great deal of tennis together. I was living with the Emersons in a house in Virginia, which had a tennis court. Magruder used to come out and play with us two or three times a week. But I worked with him. He had succeeded Milton Handler as general counsel. William Gorham Rice continued, and I did some work with him, and I did some work with Tommy Emerson who after having served with the National Recovery Administration, was a lawyer with the National Labor Relations Board. I worked with them on the statutory language. They had very little to say about the substantive provisions. Another one who was as important as any of them was a fellow by the name of Philip Levy, who had been on the *Columbia Law Review* and was a good friend of mine. He was on Magruder's staff. He did a good deal of the work,

---

57. P. IRONS, *supra* note 11, at 226-27.

58. J. GROSS, *supra* note 10, at 132-38 (Gross relied heavily on memoranda on each provision of the Act prepared by Philip Levy of the NLRB staff in order to show the authorship of the staff in the drafting process.). Keyserling stated that the memoranda were requested by him as research support and summaries of discussions. See *infra* at 342.

and especially the research backing up some of the speeches, where he was a very meticulous and careful researcher.

**CASEBEER:** You started to say that they worked more on the technical legal structure.

**KEYSERLING:** No, not technical legal because it was all technical legal, but they had very little influence on the substantive provisions, the definition of the unfair practices, or the preamble, which I want to come back to. They had a great deal of influence on the procedural provisions, which they practically drafted to correct some of the defects found in the provisions for enforcement under the Federal Trade Commission. They improved upon the language that I had drawn substantially from those earlier statutes. The language of the substantive provisions was more original, although I got some help from the provisions of the Railway Labor Act<sup>59</sup> to which I referred. Incidentally, the draftsman of the Railway Labor Act was supposed to be Donald Richberg. He was a great friend of labor, although he became a violent opponent of labor by the time he became counsel and head of the NRA.

After the Act became law, the people who had opposed its passage more or less subsided. They did not worry much about it because they were sure, in view of the decisions on the NIRA, that it would be held unconstitutional. Incidentally, Cardozo was the only one that kept his head, and all the other justices, including Brandeis, opposed the NIRA on the general ground that under the commerce clause the federal government just couldn't regulate these things.<sup>60</sup> This was pretty silly if you paid any attention to Holmes' dissenting opinion in *Hammer v. Dagenhart*,<sup>61</sup> where the Court held unconstitutional the law prohibiting the shipment in interstate commerce of goods produced by child labor, and where he said that the Constitution was not intended to embody any concept of the organic relationship of the individual to the State, or laissez-faire, but that it was made for fundamentally different views. Well, in any event, all the other justices, including Brandeis, were not only opposed to the NIRA because it involved federal action. They were against most of the New Deal for that reason. Cardozo was the only one who limited his dissent to the issue of delegation of power, because when the administration appeared before the Supreme Court in defense of the Act, it appeared that they lost some of the fundamental papers, and

---

59. Ch. 347, 44 Stat. 577 (1926) (codified as amended at 29 U.S.C. §§ 101-115 (1982 & Supp. I 1984)).

60. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

61. 247 U.S. 251, 281 (1918) (Holmes, J., dissenting).



he objected to the provisions that delegated so much power to an administrative body. He called it "delegation run riot." But he was the only one who didn't go along with the Court on the general issue of the commerce clause.

The opposition to the Wagner Act, which must not be confused with the NIRA, subsided greatly. In the decisions on the NIRA,<sup>62</sup> the Snyder-Guffy Coal Act,<sup>63</sup> and even the New York minimum wage statute,<sup>64</sup> the majority couldn't get Roberts to go along. Hughes only had Brandeis, Stone, and Cardozo in a five to four decision against the New York statute.<sup>65</sup> The opposition subsided because they thought the Wagner Act didn't have a chance of being declared constitutional. So it sailed along until 1937.

But the Wagner Act was also part of a fight of the Hughes Court against the court-packing plan. They completely reversed themselves on constitutional law, and Hughes and Roberts joined Brandeis, Stone, and Cardozo.<sup>66</sup> I remember being in the Court with Hughes reading the decisions supporting the Wagner Act even in the most obvious cases regulating manufacturing within a state, on the ground that it entered into interstate commerce. The Act was declared constitutional.

One of the interesting things in connection with the drafting of the Wagner Act was the great controversy about the preamble, which I intended to set the argument for the constitutionality of the Act. Charles Wyzanski took the position that the preamble enunciating the reasons for the constitutionality of the Act should be limited to the traditional grounds that violation of the Act caused industrial disputes and stoppages that reduced the flow of commerce. I put the preamble in those terms, but also in much broader and novel terms, that the denial of the right to collective bargaining burdens commerce, by adversely affecting the performance of the economy, regardless of whether or not there was a strike. I even took the position that the strikes didn't burden commerce very much because after the strike you made up for it. If you didn't sell a million automobiles during the strike, you sold them when the strike was over. The main factor was the burdening of commerce through the deficiency in purchasing power.<sup>67</sup>

---

62. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

63. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

64. *Morehead v. New York ex. rel. Tipaldo*, 298 U.S. 587, 618-31 (1936) (Hughes, C.J., dissenting).

65. *Id.*

66. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

67. Professor Irons recognized the constitutional innovation in linking a due process

## III. DESIGN

**CASEBEER:** Many of the difficulties with the Supreme Court and any federal efforts, or any governmental efforts, to deal with the consequences of the Depression were the twin obstacles of the interpretation of due process as laissez-faire liberty of contract, and the limited notion of the commerce clause. The suggestion has been made that the novelty in the approach was in seeing the two barriers as inextricably linked to each other, and that you had to attack the interpretation of due process in order to understand the correct view of the appropriate reach of the federal commerce clause. How did that argument take shape? What made you think of what seemed to be a gamble—frontally attacking both of the existing doctrinal barriers?

**KEYSERLING:** Well, it didn't arise in my mind, maybe wrongfully, out of any of the history that you relate or out of any of the Court's decisions. It arose out of my own view that one of the basic reasons for the Wagner Act was the effect that it would have upon wage negotiations.<sup>68</sup> Now there's independent proof of that and it's conclusive. If you read Wagner's speeches from the time of the passage of the National Industrial Recovery Act in 1933 until the introduction of the Wagner Act,<sup>69</sup> and certainly long before it became law, he was always making speeches on the Senate floor criticizing the National Industrial Recovery Act Boards on the ground that the wage and price provisions were terrible, that we were going to run into more recessions and trouble because of the failure of wages to keep up with profits, and so forth. These speeches were the very basis of the thinking that the Wagner Act was intended to redress some of that, and if that was a real factor in the burdening of commerce, then it should enter into the preamble. Wyzanski was very much opposed on conservative grounds. I got a considerable amount of support from Thomas Eliot, who was the assistant general counsel to the

---

interest in remedying the consequences of coercion that result from unequal bargaining power, with disruptions of the economy appropriate to commerce power intervention. P. IRONS, *supra* note 11, at 229-30. He failed, however, to see the breadth of the constitutional justification extending to a concern for economic growth and stability. *See also* Mitchell, *supra* note 19, at 1067 (stating that the Wagner Act was originally viewed as an instrument of macroeconomic policy).

68. Going farther than Irons, Bernstein recognized that the preamble had a twin constitutional and economic philosophy content. Yet Bernstein still characterized the economic interest as a countervailing power for "have nots" versus "haves," rather than as a step in economic planning to balance increased consumption and investment. I. BERNSTEIN, *supra* note 9, at 90.

69. 78 CONG. REC. 3443 (1934); 78 CONG. REC. 9333 (1934); 78 CONG. REC. 12,017 (1934); *see also supra* notes 29 & 34 (speeches by Senator Wagner on the need for government planning and intervention in labor relations in order to stimulate economic recovery).

Labor Department. He favored the broader preamble. Well, of course, because we were in absolute control of the language of the statute in 1935, that broader preamble did get into the final Act.

**CASEBEER:** But essentially you thought that the correct economic policy on labor-management relations demonstrated the inadequacies of existing Court doctrines on both the due process and the commerce clauses?

**KEYSERLING:** Of course, because they didn't recognize the effect of the substantive consequences of collective bargaining upon commerce.

**CASEBEER:** And was it part of your thinking that because the correct economic policy could be persuasively demonstrated, that it was unnecessary to take the safer constitutional tact that Wyzanski was proposing, focusing on the strike justification only?<sup>70</sup>

**KEYSERLING:** Well, there was a risk involved in the broader language. I thought the risk worthwhile, and furthermore, I didn't see where there was really much of a risk, because if the Supreme Court didn't want to accept that second argument, if they were willing to accept the first, they'd have a basis for declaring the statute constitutional. In any event, there was never a statute where politics played more of a role, because the decision of the Court really overturned constitutional law, and it was a part of the very astute and able campaign of Hughes against the court-packing plan.<sup>71</sup> This Wagner decision came before the court-packing plan was defeated and abandoned. Hughes led that fight, and actually took Brandeis with him to appear before the congressional committee to refute the argument that the Court was overburdened. Roosevelt's argument, that the reason for his court-packing plan was that the Court was overburdened or the judges were too old, was not a very good ground. He could have simply said that the decisions of the Supreme Court violated the will of the people, violated the 1936 election, and violated the needs of the country, and that you had to have a Court that would look at it differently. Nevertheless, he went that way. That may have had something to do with the defeat of the plan, although in the defeat of the plan, Roosevelt lost a battle but won the war because he got a complete reversal of constitutional history and constitutional law. There were other decisions that followed that also reversed it, including the Social Security Act.<sup>72</sup> So that's the way that provision came into being and how it got enacted into law.

---

70. I. BERNSTEIN, *supra* note 9, at 64.

71. *See supra* notes 17 & 19.

72. *Seward Machine Co. v. Davis*, 301 U.S. 548 (1937).

**CASEBEER:** How much of the opposition of Wyzanski to the preamble was, in your mind, a lawyerly prediction for constitutional difficulties or opposition to the basic underlying policies of increasing purchasing power?

**KEYSERLING:** I don't think he had thought very much about increasing purchasing power, so I don't think it would have been fair to him to say that that was the basis of his objection. I thought the basis of his objection was a perfectly lawyer-like objection, and he was a very good lawyer. His objection was that the preamble went beyond anything that the Court had recognized, and it was much better to limit the preamble to what the Court had recognized, so that it could become simply a matter of fact as to whether the cases under the Wagner Act fell within the boundaries of that principle.

**CASEBEER:** In drafting the specific language in the declaration of policy, was any of that argument crafted against the background of Court decisions?<sup>73</sup>

**KEYSERLING:** I must confess to you that apart from the constitutional law that I had studied when I was at Harvard regarding the general question of the scope of the commerce clause and so forth,

---

73. Professor Gross noted, perhaps too strongly, the textual changes stimulated by *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). He viewed the bill's policies as follows: "With the assistance of Philip Levy and Calvert Magruder of the NLRB and Leon Keyserling, the bill's declaration of policy was revised 'to emphasize the effect of labor disputes on interstate commerce and to de-emphasize the mere economic effects which had been rejected by the court.'" J. GROSS, *supra* note 10, at 144 (quoting an interview between the author and Philip Levy); see I. BERNSTEIN, *supra* note 9, at 121-22. Compare the Act's surviving preamble, *supra* note 19, with the preamble contained in the third draft of the Act. This preamble, the first one written in broad economic terms, read:

The tendency of modern industry toward integration and centralized control has long since overturned the balance of bargaining power between the individual employer and the individual employee, and generally has rendered the individual, unorganized worker helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve his standards of living. As a direct result, the national welfare has failed to keep pace with the national wealth. The failure of the total volume of wage payments to advance as fast as production and corporate surpluses has resulted in inadequate purchasing power, which has accentuated periodic depressions and disrupted the flow of interstate commerce. Inadequate recognition of the right of employees to bargain collectively through representatives of their own choosing has been one of the causes precipitating strikes, lockouts, and similar weapons of industrial strife, with consequent injury to interstate commerce. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate commerce by removing the obstacles which prevent the organization of labor for the purpose of cooperative action in maintaining their standards of living, by encouraging the equalization of the bargaining power of employers and employees, and by providing agencies for the peaceful settlement of industrial disputes.

The Papers of Leon Keyserling, Draft No. 3, National Labor Relations Act § 8, at 1-4 (Feb. 1934) (copies on file in the University of Miami Law Library).

I really hadn't consulted all the recent Court decisions on the subject. I wasn't really reading Court opinions when writing that preamble. I was trying to make constitutional law.

**CASEBEER:** In going back but still focusing on the interaction of the Labor Department and the bill, once the drafts had been pretty much set on either the '34 bill or the '35 bill, were there points in which people in the Labor Department, Wyzanski, the Secretary of Labor, or other people, were consulted about the language? They clearly had an interest in having whatever board was established under the Labor Department.

**KEYSERLING:** I didn't consult them. They intruded. Wyzanski got into it through the Walsh report and in other ways. His differences with me were both on the substantive provisions, and on the ground that it was unfair—the typical refrain of the business and press oppositions—that this was a one-sided Act. Wagner made many speeches asking how it could be one-sided to give labor the right to organize and bargain collectively, free from interference. So they objected to that and they objected to the preamble. But we didn't seek them out for consultation. They just naturally came into the picture as the Labor Department.

**CASEBEER:** Well, the Labor Department clearly wanted to establish that whatever administrative apparatus was created would be in the Labor Department. The Labor Department favored more of a mediation or conciliation approach to labor-management disputes. They also, as you said, favored a notion of mutuality in which there would be unfair labor practices attached to both businesses and labor organizations. In what ways did the Department attempt to change or intrude into the actual drafting of the bill before it was taken to the Senate? Was there ever any effort to influence the actual language choices?

**KEYSERLING:** Yes, I think I still have some draft language that Wyzanski drew before the Act was introduced. But in any event, his more important action was in getting the ear of Senator Walsh, who came from his home state of Massachusetts.

**CASEBEER:** Let me ask some questions about the influence of Senator Wagner on the underlying ideas and policies of both the '34 and '35 bills. You've said that he was attracted to you initially in the National Industrial Recovery Act discussions because of the argument you made about how administrative policy should be shaped, and the appropriate economic understanding of what it could accomplish. Did he have a set of economic advisers or people he talked to

that gave him a substantive understanding of what should be accomplished, or did you talk to him about it?

**KEYSERLING:** Apart from me, Simon Rifkind had done a very good job during the six years he was with Wagner of interesting him in unemployment relief. Rifkind, who was not an economist and did not have much knowledge of the subject, brought in a lot of people to give their views. He consulted widely with economists and obtained memoranda from them in connection with public works and other matters. When I was there, we had people coming and testifying on the bills, but the people that I worked with in the course of the preparation of the bill were the people I've mentioned, and not outsiders, because my views were fairly short and simple on this question. I didn't feel that it was necessary to consult with advisers as to whether you needed adequacy of purchasing power. I mean, there wasn't much for me to consult with them about. On the technical details, the outside people wouldn't have had much to offer anyway. I could get a lot more from Milton Handler, or Calvert Magruder, who I was working with, or those who were on the Labor Board, and Phil Levy especially, who was quite a student of the history of the procedural provisions under the Federal Trade Commission Act,<sup>74</sup> where they had a lot of trouble because of the deficiencies in language. We strengthened that greatly.

Senator Wagner had strong views on the general economic issue. In fact, the proof of that is the basis on which I got to work for him. I was from South Carolina, and I'd never met him. It was on the basis of those few minutes of remarks of mine that he offered me the job when Rifkind was going back to New York, plus the fact that he used to run into Tugwell, and Tugwell always recommended me to him because of my writing flair. Tugwell's ideas influenced my thinking on the subject of economics. But it was mostly the little interview that we had. That also showed what was already Wagner's line of thinking. Now also, as I said, he made many speeches from the inception of the NIRA on its one-sidedness, its treatment of the wage and price problem, and its failure to enforce, or even try to enforce, section 7(a). Maybe the NIRA didn't have the legal authority, but it didn't even try. The NRA opposed the Wagner Act. Richberg and Johnson were violently opposed to it.

**CASEBEER:** I'd like to talk a little bit about how you translated your ideas about the general economic situation into the substantive parts of the '35 Act, and to do it in a couple of ways. One is

---

74. Ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1982 & Supp. II 1984)).

to talk about how and where you came to have those particular perspectives in general, and then how they became part of a labor-management policy?

**KEYSERLING:** I went to Columbia as a freshman in 1924 after attending Beauford High School. We had to sign up for classes. Most of them were compulsory. I had to take contemporary civilization, a basic first year course, which was a review of the history of Western thought, philosophy, economics, and everything else, going from the Greeks and the Romans all the way through to the present. And I had to take a course in English. On the basis of my entrance exams, I was excused from the freshman course in English, but I had to take a second year, more advanced course in English. I had to take a language, so I continued French. I had to take mathematics, so I took trigonometry. That left one choice. I put down Greek on the advice of a couple of men to whom I had been introduced by older cousins who were juniors at Columbia. They were very nice to me, and invited me to smokers and took me to the theatre. I was so naive that I didn't realize that they were trying to get me into a fraternity, which I did join against the advice of my father. He said they were clannish. When I went to the gymnasium to register for my first year, and this shows the element of chance, I happened to walk up to the desk of a young instructor in government by the name of A. Gordon Dewey. He looked at me and said, "Why do you want to take a damn thing like Greek? Why don't you take history or government or economics?" But I'll swear if he had said, "Why don't you take history or economics or government?" I would have said to put me down for government. But since he said economics last, I said put me down for economics. Then I walked into the first class of economics and the instructor, Horace Davis, looked at my frosh cap and said, "Don't you read the college syllabus? Economics I is open only to sophomores." So I started walking out. And then the second fantastic accident happened. He called me back and said, "Why don't you go up to the sixth floor and talk to the head of the department. Of course, if he says that you can take economics, then you can take it." So I went up and I walked in on this man, and he didn't ask me my name or why I wanted to take economics, his only question was, "How old are you?" I said, "16." He said, "A man who is 16 years old can accomplish anything in life that he wants to," and he signed me up for the course. That man was Tugwell, which was the third fantastic accident, so I took economics. Because of that, when I was in my second year, I was a year ahead of the whole class in economics. I had a seminar class with Tugwell, and I got to know him very well. That's the rea-

son why five years later, after majoring in economics in college, I met him again when I got out of law school.

Jobs were very tight because of the Depression, but due to the fact that one of my father's farms had been bought by one of the Guggenheims, and Guggenheim was a major client of Chadbourne, Stanchfield & Levy, which was then one of the great New York law firms, they offered me a job at \$1,800 per year. You had to have a clerkship before you could get your license, and \$1,800 per year was tops. Most of the firms weren't paying anything to their clerks compared to what they pay now. But the Sunday before I was to report to that firm on a Monday, I happened to be taking a walk with a friend of mine who I had gone to Europe with when I graduated from college. This was the next tremendous accident. I figured that the chances of my going into economics were about one in a million. My friend Bob said to me, "Why do you want to go into that law firm? Why don't you go to see your old friend Tugwell who is doing work with Governor Roosevelt?" So the next morning I appeared at Tugwell's office and he immediately offered me three jobs while I studied economics at Columbia. I accepted a job as an assistant in the department that involved doing some work with the freshmen for the first year course, including taking them around on trips to see leading establishments like the morgue, Bellevue Hospital, Western Union Telegraph, and the Ford assembly plant in New Jersey. I took the class on trips and I did some lecturing, and that's how I got to know him so well. I became so interested in economics that I went back and studied, and after graduate school, Tugwell got me one of the assignments that I had from the General Education Board of the Rockefeller Foundation. They paid me one hundred dollars per month to go around the country studying the teaching of the social sciences in the universities. That's where I sized up the economics teaching.<sup>75</sup>

---

75. Keyserling indicated his irritation with academic economists:

By the time that I left Columbia two years later to come to Washington, I had completed all of the requirements for the Ph.D., except that I didn't write a thesis, because I became too busy when I got to Washington. The consequence was that despite this record of not writing a thesis about the monetary system of Spain in the fourteenth century or some such topic, and in spite of the fact that by the time I was appointed to the Council of Economic Advisers, I had had thirteen years of experience in Washington, working more than anybody on all of the basic legislation, and all of the basic national economic problems. Despite my having all of the qualifications for being on the Council, the economics profession took the sharp position that it was outrageous for Truman to appoint me to the Council because I didn't have a Ph.D. in economics. By that point I had written and published forty works that were much more important than most Ph.D. theses. Actually, when I was appointed, some of the economists at



Now as to the second part of your question, to what extent did that enter into the Wagner Act? Very little. Aside from the preamble, the Wagner Act itself did not deal with the economic policy. It dealt with the prohibition of unfair labor practices and the procedural requirements for enforcing the statute. So it really didn't deal with economics. The economics, however, were dealt with concurrently in all the speeches that Wagner made, the congressional reports on the Wagner Act that I wrote, the speeches on the Senate floor, and his articles in the *New York Times* and elsewhere defining the economic reasons for the Wagner Act, and being very, very critical of the administration of the NIRA. Although he had been the congressional sponsor, he was very critical of how it was being administered. Those talks contained studies of the trends in wages, profits, prices, and the economy and what was happening to it.

**CASEBEER:** Was there any thinking at the time, either by yourself or by Senator Wagner, that the Wagner Act itself was a keystone, or a part of a recovery program which was really an alternative to the National Industrial Recovery Act's approach?

**KEYSERLING:** It was not an alternative because Wagner never abandoned the idea of the importance of cooperation between government and business, and the limited type of economic planning that the NIRA represented. He made a speech on the Senate floor when the NIRA was declared unconstitutional in which he said that as a former judge, he never questioned the supremacy of the decisions of the Supreme Court, but he pointed out the many great accomplishments of the NIRA.<sup>76</sup> Despite its one-sidedness, it was the beginning. It did

---

Harvard and M.I.T. organized a committee, and got an interview with Truman to tell him why I shouldn't be appointed. Truman listened patiently for fifteen minutes. At the end he said, "Gentlemen, the reasons you've given me for not appointing Keyserling are the very reasons why I'm going to appoint him." I have never really had a good relationship with most of the profession, although outstanding people such as Alvin Hansen strongly supported me, and Ken [John Kenneth] Galbraith had assigned most of my pamphlets. This was the case not because of that early history, but rather because during all the later years, I've been so critical of what they were doing and written so much along different lines. I think they're bankrupt. I don't think they deal with the problems. That's how I became interested in the economic aspects of the Wagner Act.

76. 79 CONG. REC. 9417-18 (1935) (speech by Senator Robert F. Wagner). Senator Wagner said that:

The main obstacle to recovery was an outworn philosophy of government that had been suited to the oxcart era, but that was totally unadjusted to the machine age. It was a dogma insisting upon extreme individualism at a time when the individual had become the helpless victim of forces too big and too powerful for him to control. It was a dogma that failed to perceive the need for national action although our mighty industries had burst the bounds of conventional State lines and were country-wide or even international in their

accomplish the abolition of child labor. It did accomplish improvements of wage and price policies, and so forth.

Senator Wagner had an article that I wrote in the *Survey Graphic*, which was then a leading journal of social policy edited by Paul Kellogg. He "wrote" the article just a few months after I went to work for him. The article was titled, *Planning in Place of Restraint*,<sup>77</sup> and argued in support of the National Industrial Recovery Act just after it was enacted. This was a pro-planning argument. Wagner was a planner. He was not a fascist-type planner, but he was a government planning man. He had had a statute passed during the Hoover administration that provided for the establishment of the Economic Stabilization Board. The principles of that Act were that whenever the indexes of economic activity fell below a certain point, the government would step in with compensatory public spending in the form of public works. Now, that became law and the Board was appointed, but Hoover never did anything under it. So Wagner had a long history in this field even before I went to work for him.

**CASEBEER:** Of course, there is nothing necessarily inconsistent with a demand strategy for recovery and an economic planning strategy for recovery, but they also aren't necessarily the same. Did you share his commitment to a planning approach?

**KEYSERLING:** That brings me to something that is beyond the scope of this discussion, and that is my role in the Employment Act of 1946.<sup>78</sup> This Act was entirely a planning statute that set goals requiring the quantification and balance of production and consumption, and investment and consumption, with the required flows of income, and the effect upon tax and monetary policy. That's what I've been writing about ever since. That's what we did when we were in Truman's administration, and we had such a good record on production, employment, inflation, and a balanced federal budget, all at the same time. But actually I had learned that from World War II, when all those policies had been followed in an extreme fashion. I had argued that if you learned during the war of new kinds of anesthesia, you don't abandon them because the war is over. The continuation of these policies after the war didn't import the high taxation and the direct controls that you had had during the war. The reason for those was not because you were planning, but because the planning showed

---

scope. It scoffed at the possibilities of Nation-wide cooperation although cooperation was the only safeguard against social disintegration on one hand or radical overthrow on the other.

*Id.* at 9417.

77. See Wagner, *Planning in Place of Restraint*, *supra* note 15.

78. Ch. 33, 60 Stat. 23 (1946) (codified as amended at 15 U.S.C. §§ 1021-1024 (1982)).

that if you were burning up half your product in fighting the war, and paying out wages and salaries for the whole product, the purchasing power is twice as much as the civilian supply, and you therefore had to have controls and higher taxation. But the planning features, the setting of goals, the development of balanced relationships, and the use of tax and monetary policy in support of them, were just as necessary after the war, and we used them in the Truman administration. They were amplified further in the Humphrey-Hawkins Act,<sup>79</sup> which was really an amendment to the Full Employment Act of 1946. The complete violation of that policy in everything that's been done since 1966 occurred just as much during the Carter administration as during the Reagan administration: no planning; the use of tax and monetary policy to distribute income upward; and no consideration of the equilibrium requirements of investment and consumption. All that's been abandoned, and the whole concept of full employment has been abandoned. You would think that the only purpose of economic policy was to balance the budget, to balance our international trade accounts, to reduce the price of the dollar, and to get rid of the federal deficit—all of which are secondary issues, all of which are means rather than ends, and all of which are aberrations that have occurred mostly from the failure to have a full-production economy. The deficit has not been caused by too much spending or too little taxation. It's been caused by the fact that you can't squeeze the blood of additional federal revenues out of the turnip of a starved economy. Well, all those deviations have taken place since 1966 and increasingly in later years.

#### IV. LABOR POLICY

**CASEBEER:** In the substantive provisions of the '35 Act, the Wagner Act, the provisions on unfair labor practices are in large part related to some of the experiences of the nonstatutory Board and the first or "old" NLRB, concerning company union practices and other practices that frustrated the intent of section 7(a). Was any consideration in drafting those unfair labor practices directed toward the outcome of collective bargaining? Was there an attempt to match wage rate performance with productivity performance? Or, was the drafting of those provisions mostly directed against the administrative failures of the prior Boards?

**KEYSERLING:** The provisions of the Act were directed toward

---

79. Full Employment and Balanced Growth (Humphrey-Hawkins) Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (codified as amended at 15 U.S.C. §§ 3101-3152 (1982 & Supp. II 1984)).

specifying what were prohibited as unfair labor practices, and providing the administrative procedures for achieving the goals of the Act. The provisions of the statute itself were not economic, except for the preamble, and didn't deal at all with the empirical record of price-wage policies. They were dealt with, however, in the speeches that Senator Wagner made and in the committee reports, which I wrote, and in the articles that he wrote for the *New York Times* and other magazines, all of which dealt with the economics in support of the Wagner Act. Some of them became part of the legislative history.

**CASEBEER:** That's really why I'm asking the question. Much of the supporting argument for the passage of the bill seems directed towards the weakness of consumption and purchasing power in the economy. But in your view, would the substance of the Act be something that would naturally contribute to the larger economic goal?

**KEYSERLING:** Naturally, because it would place labor in a more equal bargaining position at the wage table and at the supplementary benefits table. But the Act itself did not go into those matters. The Act did what I said it would.

**CASEBEER:** With the language in the preamble about equalizing bargaining power, with the twin objectives of increasing consumption and more adequate collective bargaining aimed at limiting labor-management disputes, together with the language on contributing to industrial peace, was it the view of either you or Senator Wagner that the strengthening of the collective bargaining process itself was the objective of the Act, and that that automatically would contribute to industrial peace? Or, was there some sense of the need to manage labor-management relations governmentally in order to create industrial peace?

**KEYSERLING:** The provisions of the statute were solidly based on the proposition that the denial of the right to organize and bargain collectively was the source of the most fractious and bloody types of industrial disputes. Senator Wagner's empirical review of history after the Act had been vindicated in 1937 showed almost a vanishing of those types of industrial disputes.<sup>80</sup> Maybe "automatically" isn't the right word, but it was our view that the greatest contribution to greater equity and the distribution of the product between wages and profits would come, not through the definition of terms by government, but by the process of collective bargaining with labor placed in a position nearer to equality. We never accepted the view that labor

---

80. See *National Labor Relations Act and Proposed Amendments: Hearings on S.J. Res. 114 Before the Senate Comm. on Education and Labor, 76th Cong., 1st Sess., 84 CONG. REC. 4184 (1939).*

had equal bargaining power, much less the frequently heard view that the pendulum had swung the other way and that labor had all the power. Labor has never had any equality of bargaining power. The United Auto Workers has never had the power of the General Motors Corporation in terms of funds. They didn't have the lasting financial resources. They won a lot of benefits through the leadership of Walter Reuther, and because work stoppage was a very important weapon. But to say today, especially with the kind of Labor Board existing now, that labor and management are in positions of equality, is refuted by any examination of the history of the actual trends in economic development and the division of purchasing power. Plus, the fact is that the government in recent years has increasingly become an instrument for the distribution of income upward through tax and monetary policy. You would need even greater compensation on the wage-price front, and you have been getting the reverse. The real average wages of nonsupervisory work in manufacturing today, or of industry today, are no higher than they were ten or fifteen years ago, which is fantastic.

**CASEBEER:** In that sense, the goal of industrial peace was not thought to be an independent goal that was meant to limit the effect of the Act to contribute to a more equalized bargaining relationship?

**KEYSERLING:** It was directed to both, but there was also the other side of it. I was very much influenced by some of the things that Brandeis had said when he got involved in the steel industry disputes many years earlier. At that time, he was the so-called "counsel for the people." The argument against the rights of labor at that time was that the workers, after all, were well paid and well fed. Brandeis didn't necessarily accept that. What he said, and I always remembered it, was, "Even if men are well fed, they will still struggle to be free." So you see, we were interested in the struggle to be free as well as in the bread and butter issue. I really don't know whether we explicitly weighed one higher than the other. They were complementary and each fed the other, both on the plus side and on the minus side.

**CASEBEER:** The reason I asked the question is that in some senses, courts' interpretations of the Wagner Act in recent years have increasingly emphasized the goal of industrial peace as a way of limiting the bargaining relationship of both labor and management.

**KEYSERLING:** That's the natural tendency of the courts, and actually, it is a conservative trend. It's a more traditional approach. Now as I said, Brandeis had said at the time of the steel controversies, in which he played a part, that even if men are well fed, they will still

struggle to be free, which I thought was a very strong statement. Wagner said somewhat the same thing in one of his most important speeches,<sup>81</sup> in which he argued in support of the Wagner Act after it had been passed, but before it had been declared constitutional. Wagner said, "Men versed in the tenets of freedom will become restive when not allowed to be free."<sup>82</sup>

**CASEBEER:** In that regard, what do you think was the greatest contribution of the Act to the goal of increased freedom for labor, for the working man?

**KEYSERLING:** The greatest contribution is what happened. The membership in the AFL, and later the AFL-CIO, rose from 3 or 4 million to 18 or 20 million, depending on how you count it. The whole process of wage negotiation and wage determination changed profoundly. That's one of the reasons why we had such a good economic record. We didn't have the sharp recession after World War II we had had after World War I. From 1920 to 1922, we had one of the worst depressions we've ever had, obscured only by the crash of 1929.<sup>83</sup>

**CASEBEER:** Let me ask one other question about the Act as a whole and your participation in it. Is there any part of the final Act, the '35 Act, of which you are most personally proud or find most significant?

**KEYSERLING:** No, I wouldn't say so. I love the thing as a whole. I am equally proud of the preamble, which was an innovation, and the substantive provisions. I am more proud, if you want to use that term, of these parts than of the administrative provisions because the administrative provisions are much less creative in the sense that they were borrowed from the Federal Trade Commission procedure, and because others had more of a hand in drafting them than the parts of which I am most proud, simply from the point of view of authorship. But the guts of the statute are in the preamble and the substantive provisions. The administrative provisions are merely commonplace to any administrative statute that has to be enforced. I think they were better devised in the Wagner Act than in the earlier statutes, but I couldn't take much personal responsibility for that, even though I recognized the need for people with more knowledge in

---

81. 79 CONG. REC. 7565 (1935) (speech by Senator Wagner introducing the NLRA).

82. *Id.* at 7570.

83. At this point Keyserling repeated a personal memory of economic collapse:

I remember my father had 10,000 bales of cotton and the price almost over night dropped from forty odd cents per pound to eighteen cents per pound. That began the end of prosperity for that part of the country. He then turned to truck farming.

that field, and the need to turn to people like Milton Handler who had had so much experience as an antitrust lawyer.

## V. EVENTS

**CASEBEER:** At this point, can we talk about the relationship, if any, between the events connected with labor in the period from 1933 to 1935, and the adoption of the Wagner Act? First, were there any particular events in strikes or other organizational activities of labor that either were related to Senator Wagner's concerns, or to the political atmosphere in which the Act was received?

**KEYSERLING:** That was during the period when Senator Wagner was Chairman of the nonstatutory Board, beginning in the summer of '33. He didn't stay at that job until 1935. He found that he didn't have the time because of Senate activities and his involvement in the housing legislation and other things. He also began chairing the Banking and Currency Committee.

**CASEBEER:** Were there events in the labor community?

**KEYSERLING:** Yes, there was a great deal of economic strife during that period. The most significant was the "Memorial Day Massacre" of the steel industry, to which Tom Girdler was connected as president of Republic Steel. That was just one example of the bitterness of industrial strife.<sup>84</sup> The statistical history of it has been reviewed in some of Senator Wagner's speeches.

**CASEBEER:** Was the increased strike activity in '33, '34, and '35 related more to the issue of job security and employment or to the issue of collective bargaining itself?

**KEYSERLING:** More to collective bargaining itself. The other aspects evolved into greater significance later, but the most bitter disputes were on the issue of the right to bargain collectively. That was the great disturbing issue. That is treated in some of the Senator's articles in the *New York Times*.<sup>85</sup>

**CASEBEER:** How important was it that the federal government had seemingly made a commitment in section 7(a) to the principle of collective bargaining?

**KEYSERLING:** It was terribly important, because that is what was being violated. That was the thing that labor and others could get their hands on when they talked about this problem. The government guaranteed the right but had done nothing to enforce it.

---

84. P. IRONS, *supra* note 11, at 214.

85. Wagner, *Company Unions: A Vast Industrial Issue*, *New York Times*, March 11, 1934, at 1, col. 1.

**CASEBEER:** Was that important in labor's support for the Wagner Act as it ultimately took shape?

**KEYSERLING:** It was important in the initiation and development of the Wagner Act because the idea for the Wagner Act originated when Senator Wagner said that we needed an industrial court because we couldn't enforce section 7(a). So that was its original purpose. Now on the other hand, if hypothetically there had been a Wagner Act but not a section 7(a), maybe labor would have been equally interested.

**CASEBEER:** To what extent did the AFL feel comfortable with the specifics of the Act? They would have been very supportive of governmental action to establish more than just a promise of collective bargaining.

**KEYSERLING:** The AFL was very satisfied, which was both good and bad. It was very good because they had a good statute to be satisfied with. It was bad because in my examination of the history of the relationship between labor and legislation from then until now, organized labor has never been the originator or creator of any of the important progressive economic or social legislation that has benefited labor. When I came to Washington, the AFL still was formally opposed to unemployment insurance. If you take section 7(a), social security, housing, or the Humphrey-Hawkins Act, labor never was in the forefront of creative initiation.

**CASEBEER:** It was suggested, I believe in Peter Irons' book,<sup>86</sup> that there was more than a coincidental symbolism in making the primary substantive provision of the Wagner Act, section 7, parallel to section 7(a) of the NIRA. Was that a conscious decision?

**KEYSERLING:** You mean the numbering of the section? I think that was accidental. I wouldn't remember that. Maybe it was done deliberately.

**CASEBEER:** In the initial reception of the Wagner Act, do you think that the impact on reducing labor-management strife was attributed solely to the improved enforceability and administrative mechanism for enforcing the right of collective bargaining, or was there a symbolic importance that labor attached to the passage of the Act?

**KEYSERLING:** I think there was a connection, but actually you have got to be careful because I never believe that you can really compare an actuality with a hypothetical. I would have to guess what would have happened if there hadn't been a Wagner Act. So it is temerious to try to form any real estimate. I have a strong feeling that

---

86. P. IRONS, *supra* note 11, at 227.



Wagner always took the position that the reduction of that kind of bitter strife was due to the recognition of unions. That seems like a very logical position, but you can see that it is not perfect because you still have the Wagner Act with a different complex of political and economic forces, and a different Labor Board, and now with Taft-Hartley,<sup>87</sup> they are moving backwards toward renewed and more bitter opposition to labor. You couldn't have believed in 1935, that until a year or two ago, it would have taken ten years of terrible strife in the textile industry with the J.P. Stevens Company before they would even recognize that there was a Wagner Act. So who knows just exactly how it would have worked out. I think the evidence is as conclusive as it could be in this field, that the Wagner Act in its earlier years had a great influence upon the reduction of bitter industrial strife. Even including J.P. Stevens, there has never been the kind of situation that you had in the Homestead strike, or that you had in the Tom Girdler situation, or that you had in the Rockefeller cases with Josephine Roche's company.

**CASEBEER:** I ask the general question in part to try to distinguish the support and reaction of the rank and file from the support and reaction of the leadership. It has been suggested that particularly in section 9, the linking of the election unit with the bargaining unit was objectionable to the AFL even though they strongly supported the passage of the bill.<sup>88</sup> Were there objections to the unit certification sections contemporary to the drafting?

**KEYSERLING:** Not much, except on one occasion. When I was drafting the Wagner Act, William Connery, the chairman of the House Labor Committee, rushed over to my office to see me, and said that the AFL was very concerned about the Wagner Act because it would strengthen industrial unions at the expense of the craft unions. Industrial unions were not then in the AFL. I tried to reassure them and was effective at least in getting them to go along. But there was that ripple. It couldn't have been very much of a ripple because their support of the Wagner Act was strong.

Later on, the amendments of 1937 came from two sources. There were the amendments projected by conservative Senators, and there were those amendments articulated by the AFL in opposition to the industrial unions. Senator Wagner, maybe surprisingly, didn't go along with his old friends in the AFL by supporting their amendment. He strongly supported the original Act and testified against both the

---

87. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1982)).

88. I. BERNSTEIN, *supra* note 9, at 96; J. GROSS, *supra* note 10, at 134.

AFL amendments and the Burke amendments,<sup>89</sup> and he was successful in that the Act was not amended. The Taft-Hartley Act came much later.

It is interesting to speculate what would have happened at the time of the Taft-Hartley Act if Senator Wagner hadn't had to withdraw because of ill health. He couldn't even get down to participate in the vote on Taft-Hartley. Further, to illustrate what I said about the position of the Truman administration, all members of the cabinet except the Secretary of Labor, including Harold Ickes, Secretary of the Treasury, urged the President to sign the Taft-Hartley Act. Yet in 1947, when the Taft-Hartley Act came up for a vote, Secretary Ickes, who had never voiced a word of support for the Wagner Act during the two years that we struggled for it, took the public position that Senator Wagner didn't participate in the Taft-Hartley vote because he wanted the Taft-Hartley Act to pass, so that the Democrats would have a political issue in the next campaign. Now could you imagine anything more fantastic than that? But that is what he said, which shows the Truman administration's complete disavowal of any knowledge of the Wagner Act and its history.

**CASEBEER:** Can we talk about the relationship and sometime opposition of the Roosevelt administration to the Wagner Act? We have already discussed that the two acts, the '34 draft and the '35 draft, were largely handled from within the Senator's office. Did Roosevelt have a defined labor policy in mind or in his proposals that was contrary to the Wagner Act?

**KEYSERLING:** When defining Roosevelt's labor policy, if you want to be charitable, you can say that it was pragmatic. If you want to be realistic you have to say that it was rather confused and experimental to the point of being entirely ad hoc. He just tried one thing after another depending upon what the latest person recommended to him. The industrial boards, Public Resolution 44, and his pronouncements on the Wagner Act, were examples of this. So, I would say that he didn't have very much of a labor policy. Senator Wagner was correct in saying that Franklin was too busy sailing boats at Hyde Park to learn much about labor problems.

**CASEBEER:** Do you think that that attitude explains President Roosevelt's intervention into and the subsequent setting up of the

---

89. On the origin of these attempts to change the Act, Keyserling added:

Senator Burke's amendments were partly independent because they were more industrial provisions and I don't think Senator Burke was exactly a handmaiden of the AFL.

Automobile Labor Board, which undermined the approach of the National Labor Board?

**KEYSERLING:** I think that was almost entirely the product of listening to the people he had talked to most recently, particularly those people he would naturally have turned to. The advice that caused him to act in that manner came essentially from Hugh Johnson and Donald Richberg, who were still over at the National Recovery Administration. They were responsible for the administration of section 7(a). They were the people that he naturally turned to, and they were the people, I think, that were primarily responsible for his decision to take action on those individual boards. I don't know what position the Labor Department took. I really don't know whether they were even consulted.

**CASEBEER:** Did either the White House or the National Recovery Administration understand that they were undermining the National Labor Board?

**KEYSERLING:** I don't think they understood it very thoroughly, and I don't think they cared very much about the nonstatutory Board, particularly after Senator Wagner's time there. The administration held Senator Wagner in high esteem, but he was only around for a period of grace. He was the administration's main spearhead in the Senate for almost everything.

**CASEBEER:** The failure of enforcement, therefore, was more the result of neglect rather than an intentional undermining of the nonstatutory Board's policies?

**KEYSERLING:** I think that is true of Roosevelt, but I don't think it was true of Johnson or Richberg at all. I think that they intended to undermine those policies.

**CASEBEER:** What was their primary source of opposition?

**KEYSERLING:** They had contacts with the industrial community, which explained their attitudes and the general skewing of the NIRA toward business. They were business products. There was the same influence by the business community as in agriculture. In agriculture, the farm giants controlled and represented the leadership of the farm committees on the Hill and were behind Henry Wallace, the great liberal, and the purging of Tugwell and Frank from the Department of Agriculture when Frank was named Chairman of the SEC, and Tugwell was named the head of the Resettlement Administration. They were both thrown out of the AAA, and the bane of both of them was George Peek, the administrator of the AAA. George Peek was the selection of Bernard Baruch. So you have the same combination of forces in the AAA, despite the reputation of Henry Wallace. This

is apart from the fact that the programs were substantially in conflict with one another, as were many of the New Deal laws; the AAA was trying to plow down production to get prices up, and the NIRA was trying to expand production due to unemployment.

**CASEBEER:** So their opposition was not simply a matter of antagonism about the appropriate bargaining position of labor to management, but rather concerned the effect that a truly strengthened labor force would have over the direction of economic recovery?

**KEYSERLING:** Of course. They were antilabor to put it into words.

**CASEBEER:** When the response in the form of a strike wave in 1933 and 1934 forced the Roosevelt administration's hand, and forced Public Resolution 44, which led to the establishment of the old NLRB, did the prior opposition to the NIRA still influence the weakness of the enforcement of the second Board?

**KEYSERLING:** I don't think that Resolution 44 was primarily in response to what you cite. I think the primary objective of "44" was to derail the 1934 Wagner Act. I think "44" was the answer to the Wagner Act.

**CASEBEER:** So it was simply a political substitute? It wasn't really intended to change the enforceability of a new labor policy?

**KEYSERLING:** Well, they actually claimed that it would be effective, but I don't see how they could have thought so.

**CASEBEER:** The reason I asked the question is that it has been suggested by commentators that the failure of the nonstatutory Board was due to the failure of the enforcement provisions that were located in the NIRA, but that the failure of the first NLRB, the Public Resolution 44 Board, was due to the lack of enforcement interest in the Justice Department and more of a dragging of the feet on legal grounds than labor policy.<sup>90</sup>

**KEYSERLING:** I think that is quite likely. The Justice Department may have been justified in the sense that Public Resolution 44 didn't give them very effective legal grounds to take to court. I think that the Justice Department's view, unlike that of the NIRA, was not primarily ideological. It was not taking sides in the conflict; but rather, the Department generally felt that it didn't have very good legal grounds to stand on. They may have felt the same way about taking the National Industrial Recovery Act into court, but they had to do that. They couldn't do anything about it. It was too important. The violations were too widespread.

---

90. P. IRONS, *supra* note 11, at 220-25.

**CASEBEER:** Regarding the intent of the Act, one commentator has written:

Both the Senate and the House reports stress the continuity of the Labor Act with prior law—the Norris-LaGuardia Act and the sequence of railway labor legislation culminating in the 1934 amendments to the Railway Labor Act of 1926. The principle of majority rule, so hotly contested when originally enacted, was imported from the railway labor legislation; and the phrasing of sections 7 and 8(1) of the Wagner Act was carried over essentially verbatim from the Norris-LaGuardia Act via section 7(a) of the National Industrial Recovery Act, which had a developed case law under the (old) National Labor Relations Board.<sup>91</sup>

Essentially, this commentator is arguing that the provisions had been established politically by the earlier legislation.

**KEYSERLING:** In the first place, they hadn't been established politically in the sense of providing political easements for the Wagner Act, because the Railway Act had the support of the railway unions, which were the powerful unions at that time. They had more power with Congress than all of the other unions put together. That is why they got a Railroad Retirement Act<sup>92</sup> before the Social Security Act.<sup>93</sup> This is also why they got the Railway Labor Act many years before the Wagner Act or even section 7(a). The railway unions' political power disposes of the idea that they created a political easement for the Wagner Act.

With regard to the second part of the question as to whether portions of the Wagner Act had been drawn from elsewhere, I think three different acts were cited. In one sense it is true that the Act was based on other acts because I studied all of those different acts and drew upon them. But in another sense, it is profoundly untrue, because I still had to decide which ones I was going to select from, which ones I was going to ignore, which parts of each act I was going to modify, and which parts of each I was going to take virtually verbatim. So it is true that I consulted those acts a good deal, especially the Railway Labor Act. The Norris-LaGuardia Act<sup>94</sup> deals with a much more limited subject. Its phraseology in terms of the rights of labor may have been relevant, but it deals specifically with the labor injunction, which was a different issue. It involved the making of labor law by the courts. The statement that we relied upon other acts,

---

91. Finkin, *supra* note 4, at 46-47.

92. Ch. 868, 48 Stat. 1283 (1934).

93. Ch. 531, 49 Stat. 620 (1935).

94. Ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1982 & Supp. I 1984)).

therefore, is essentially true, but its implication is overdrawn if it was meant to suggest that we simply relied upon those other acts. We looked at them and used them selectively, and sometimes accepted them and sometimes didn't.

**CASEBEER:** The argument has been made that the recognition provisions in the Act were intended to create a bargaining agent for labor that would be able to establish conclusively an organization of labor-management relations; that the point of the Wagner Act was to establish contracts to govern labor-management relationships. Is that a fair characterization of the legislative intent?

**KEYSERLING:** Yes and no. I don't think Wagner would ever say that, despite his feeling about equality of bargaining power and his support for effective contracts. I don't think that politically he would have argued that his purpose for the Wagner Act was to establish contracts. What he always said was that his purpose was to make the worker a free man, and that always went over well with the audiences. He made fun of the company union, which he called the marionette of the employer, and the dictator of the terms of the labor agreement. He always argued, "All I am trying to do is make the worker a free man." I don't think he emphasized the making of contracts; although naturally, the right to organize and bargain collectively would be meaningless if it didn't lead to contracts.

Another example that that was not his primary concern originally, or even in the second Wagner Act, if you want to call it that, was that it specifically did not contain the employer's obligation to bargain collectively and make a contract. It did not contain it because that hadn't been our approach. Our approach was to make the worker a free man and give him equality of bargaining power and let him make his contract if he could. The Chairman of the nonstatutory Board, Francis Biddle, came before the committee and introduced the amendments that incorporated the obligation to bargain collectively. That idea had some difficulty because the Board had to define when you were sincerely bargaining collectively and when you weren't. In any case, Biddle introduced that amendment. Senator Wagner, although he hadn't had it in the original bill, never interposed objections to it, and it did in fact pass and became part of the law. But that came from the Labor Board.<sup>95</sup>

**CASEBEER:** Can we talk about the addition of section 8(5), the duty to bargain provision, to the four sections initially specified as unfair labor practices? Was it thought that section 7 of the Act

---

95. J. GROSS, *supra* note 10, at 137.

directly created an enforceable duty to bargain, or that such an enforceable duty would not produce the optimal labor-management relationship?

**KEYSERLING:** I think that if I had been asked, I would have said, "Does the right to organize collective bargaining involve the duty of the employer to organize the bargain collectively?" Or perhaps I would have said, "Is a refusal to bargain collectively on the part of the employer a denial of the right of the worker to organize the bargain collectively?" And I certainly would have answered with an emphatic "Yes," because that would be the only answer I could give.

**CASEBEER:** Therefore section 8(1), preventing interference with section 7, really encompassed all that was necessary to prevent the unfair labor practice of the employer who refused to deal seriously with the rights established?

**KEYSERLING:** I think the Biddle amendment merely specifically incorporated the actual intent. I could never have taken the position that even after labor had been organized to bargain collectively, the employer could just say "I won't bargain with you," and the enforcement of the right by labor could only be by *force majeure*; in other words, a strike or some other method. Had I taken that position, I would have been saying that labor has to do exactly the same things—go through the strike process to get the right recognized. So it must have been my view, or Senator Wagner's view, that you couldn't get purchasing power by organizing if you didn't get a contract, so that must have been implicit in the whole Act. We took the position that bargaining collectively was implicit, but if you were going to bargain collectively, the employer had to bargain.

**CASEBEER:** But you didn't see any particular cost to granting that right expressly?

**KEYSERLING:** No, we never objected to it and I assume that the decisions under the Wagner nonstatutory Board must have included cases where the Board held that the employer had to make a genuine effort to bargain collectively, because no seven men could have held that if the employer refused to meet with workers, that would not be an interference. So I think the Biddle amendment was a refinement and specification of what the whole Act meant. They may have discovered in their attempt to administer section 7(a) that an important factor was the refusal of the employer to bargain collectively.

**CASEBEER:** In the implications of the duty to bargain, what was the intellectual process that went into deciding that the subject of

collective bargaining should be wages, hours, and conditions of employment? Was there a reason for the selection of those topics?

**KEYSERLING:** Because those were the big issues.

**CASEBEER:** Was it thought that the duty to bargain should be limited to those issues?

**KEYSERLING:** No. We just concentrated on those issues because that is what collective bargaining is all about. The issue of supplementary benefits originated largely with the United Auto Workers much later under Walter Reuther. Even the other types of fringe benefits really developed considerably later. So at that time, the whole nature of the labor contract was wages, hours, and working conditions. After all, wages can be extended to include fringe benefits as a form of wage, and other working conditions can include almost anything. So it was really an all inclusive set of terms.

**CASEBEER:** But wages, hours, and conditions of employment weren't necessarily thought to be terms of art that excluded topics of bargaining.

**KEYSERLING:** Certainly not. I think those terms were thought of as all inclusive. Working conditions and terms of employment included any term of employment, sick leave, vacations, or any other employment terms.

**CASEBEER:** Did anyone think to include interests of labor that were not necessarily thought of in terms of a wage term or any other condition that could be treated as part of the wage exchanged for labor? Would it have been a contemporary political issue to think about conditions of employment as related to management of the enterprise, or other kinds of decisions about profit sharing?

**KEYSERLING:** I don't think we considered that one way or the other, and I don't think it entered our minds. I think that if we had been asked at the time whether it included profit sharing, we would have said no, simply as a matter of practical feasibility. In addition, we would have been concerned about the effect profit sharing would have had upon the chances of the bill's passage if we had said that this gave labor the right to demand a share in profits. No, I don't think we intended to include that.

**CASEBEER:** In the section 9 unit determination decision, was there a specific reason why the linkage should be made between the unit for election purposes and the unit for bargaining purposes?

**KEYSERLING:** I think it was a practical matter that tied in with the question of majority rule. I think the question of majority rule was only a secondary concern in the Railway Labor Act. It was a natural part of Senator Wagner's political thinking that unless you



had majority rule, you had nothing. Without majority rule, you just had the division of labor within itself that management could foster and exacerbate. They had found that out. The Wagner Board had enunciated the principle of majority rule, which is inseparable from these other factors because that is the only way you can choose representatives and have a meeting.

**CASEBEER:** We were talking about the determination of the bargaining unit in section 9 of the Act. The majority rule principle demanded some way of setting an electoral unit. Was there any connection in your thinking between the unit picked for electing representatives, and the actual bargaining with employer groups?

**KEYSERLING:** If a unit were organized to select bargainers, wouldn't the bargainers then represent that unit in dealing with the employer?

**CASEBEER:** It might have been that the electoral unit might have allowed the bargaining representative to determine which subgroups or whether the full group would bargain with either individual employers or groups of employers.

**KEYSERLING:** I wouldn't be able to answer that question. Evidently it was something that arose at the time in construction of the administration of the Act by the statutory Board.

**CASEBEER:** Was there any pressure from the AFL in particular or any other organized labor group to allow the labor organizations, rather than the administrative Board, to define the intended or targeted bargaining unit?

**KEYSERLING:** You are asking questions that presumably arose when the Board was administering the Act. I wasn't there at that time and wasn't following it very closely. It really doesn't relate to the development of the statute.

**CASEBEER:** In the drafting of the statute, it was simply a natural assumption that the bargaining unit would follow directly from the election of representatives. Wasn't there any discussion of that feature?

**KEYSERLING:** The representatives would have to be elected by someone, and I assume that they would represent the group that elected them. That would just be my assumption. There were all kinds of questions, such as determination of the units, the certification of the units, the powers of the units, and resolving conflicts among the units. All of these questions arose in the administration of the Act. I didn't watch it very closely. In fact, I turned to other things after the Act was passed. Although I maintained some interest in it, by that time I was thoroughly engrossed in the housing bill.

**CASEBEER:** In some of Senator Wagner's responses during the Senate hearings, and in answering other Senators' questions on the floor, Senator Wagner stated that the National Labor Relations Board should be the decision maker over the appropriate electoral unit, because a neutral party had to be the initial designator of the appropriate unit. Otherwise, if the unit were left in control of business, that would mean the perpetuation of company unions by a different name. For labor, it would create the possibility of jurisdictional disputes or fragmentation in bargaining.<sup>96</sup>

**KEYSERLING:** That sounds logical.

**CASEBEER:** Was that a consideration that was simply a response to the difficulties of getting union recognition despite the paper guarantee of section 7(a)? Was it also a consideration of how labor and management negotiations could best contribute to economic stability?

**KEYSERLING:** I think it must have been both, because the ultimate purpose was economic stability and harmonious labor relations.

**CASEBEER:** Was it hoped that the collective bargaining strategy that would emerge from an enforceable right of union recognition would lead to a larger bargaining unit or industry- or area-wide bargaining? Was that ever a consideration in the drafting?

**KEYSERLING:** We were aware of the problem of industry-wide bargaining and may have favored it, but I don't think the Act was designed to force or even to put pressures in that direction. The industrial union itself, which ultimately resulted in the advent of the CIO before it merged with the AFL, was designed to create a larger bargaining unit than the craft unit system by including workers on more levels. The Act did not foresee whether it was to extend from the company or group of companies to the industry as a whole. As a matter of fact, a good deal of the bargaining is now conducted on an industry-wide basis, especially in the automobile and steel industries.

Even in the automobile industry, the units of the United Automobile Workers that work for Chrysler bargain for a wage agreement with Chrysler that isn't necessarily identical to, nor even determinative of the bargaining with General Motors or Ford. So it really hasn't gotten beyond company bargaining to industry bargaining, at least not in those important instances.

**CASEBEER:** It wasn't necessarily something that was to be

---

96. 79 CONG. REC. 7565-74 (1935).

encouraged by the National Labor Relations Board, but it wasn't necessarily to be interfered with either.

**KEYSERLING:** That's right. That's certainly true.

**CASEBEER:** How was the decision arrived at to limit the definition of employees who would be included in bargaining units, particularly the decision on agricultural workers?

**KEYSERLING:** That's an interesting story in itself. The Senator originally left out agricultural workers for purely political reasons. The difficulty of getting the bill through the Senate with such a disproportionate representation of rural people, allied to management and not to agricultural labor, would have increased beyond all reason the odds against getting the Act passed.

During the consideration of the Act, Rex Tugwell's secretary came over to see me and said that Tugwell and Wallace would like to see the Act extended to include agricultural workers. I said I would talk to the Senator about it. So I went to see Wagner and he was rather thoughtful. He said that if Henry Wallace would write him a letter asking that agricultural workers be included, he would include them and make the fight for it. But if Wallace wasn't willing to fight for it, he couldn't undertake it alone. I relayed that message and we never heard from Tugwell about it again.<sup>97</sup> Wallace was very careful. He was not prepared to fight for the Wagner Act for agricultural labor. Later on, I had similar requests when I was in the Housing Agency.<sup>98</sup>

## VI. IMPLEMENTATION

**CASEBEER:** That, for the most part, ends my questioning

---

97. Keyserling seemed disappointed at this lack of response:

This was another sidelight on Henry Wallace's record, despite his later incarnations. I knew Henry Wallace very well. He was a wonderful man, very educated, well meaning, and progressive. But as Secretary of Agriculture, he necessarily performed as a Secretary might. He was entirely beholden to the chairmen of the agricultural committees in the Senate and the House, who were all big Southern landowners like Senator Smith and Congressman Bankhead, who later became Speaker of the House and was the father of Tallulah Bankhead.

98. This disappointment was repeated:

Charlie [Charles F.] Brannan, who was at that time Under Secretary of Agriculture, later became Secretary of Agriculture. He has remained one of my very close friends, and I see him frequently. Brannan shared my interest in having the low rent housing program extend to agricultural workers. I went to see Henry Wallace about it, but I got nowhere with him, again because he was afraid of the House and Senate committees on agriculture. Naturally, those people wouldn't have wanted it, and were going to vote against him. In fact, they fought the low rent housing and subsidized program in general, even though agricultural workers were not included.

about the different sections of the Act. You raised a point just now that I am curious about. When the legislative battle had finished and the Act had been adopted, was it simply the pressures of other business in the Senator's office, or was it also interests of yours, that led you in directions other than further labor legislation?

**KEYSERLING:** First of all the preliminary question is the extent to which Wagner was interested in the staffing, membership, or administration of the Labor Board. Not long after it became a permanent body, there was intense pressure on him to intervene because the Board had split badly between the more conservative group and the others. This resulted in the non-reappointment of those I classify as falling on the liberal side: John Madden and especially Ed Smith. I wouldn't want to classify them as anything more than "liberal," even though there were scandalous rumors that they were under the influence of Lee Pressman, the communist lawyer for Phil Murray, until Murray finally got rid of him and got the communists out of the labor movement. The Labor Board split up into the left group, which included Ed Smith, but not so much Madden, a conservative man who leaned toward the labor side because they were often on the right side regarding decisions, nor John Carmody, who was on the more conservative side. Roosevelt put Madden on the claims court and Bill [William M.] Leiserson took his place. Bill Leiserson was a part of the conservative group, and although he originally thought that company unions were a good idea, he was now violently against them because of what they actually turned out to be. He provided great support to us during the consideration of the bill on the company union issue, and generally on the other provisions of the bill.

**CASEBEER:** How did the changing character of the membership on the Board and the staffing of the Board change the direction of the Act?

**KEYSERLING:** We were talking about Wagner's interest. Wagner was often asked to intervene when administrative troubles occurred. However, he made a scrupulous point of not getting involved in the administration of any agency whether he had created it or not. For that reason, while it was true that Wagner could have selected the three original members of the permanent Board, or at least two of them, he kept his hands entirely off of that decision, which was extraordinary. He didn't know Madden. He knew Smith because Smith had been on the nonpermanent Board, but he had no interest in him. He also knew John Carmody because John had been a labor conciliator whom Wagner would call when he was Chairman of the first nonpermanent Board. But he took no interest in the selec-

tion of the membership, nor in the staffing. He had nothing to do with the appointment of the general counsel.

I had wanted to be general counsel, and Wagner could have forced it, but Madden objected on the ground that I was too young and had no court experience. In fact, I had no real legal experience at that time. I hadn't even been counsel to the Housing Agency yet, and to take a young person who had never been in court and make him general counsel to lead the fight before the courts to vindicate the Act, was a legitimate point, not that I couldn't have done it just as well. When Madden raised that point, Wagner said that if they were going to appoint someone of my age like Tommy Emerson or Nat Witt as general counsel, they had to appoint me. But if they chose to appoint an older and more experienced man, he would not interfere. That is exactly what happened when they appointed Charles Fahey, who became one of my closest friends. Frances Biddle later selected Fahey to become Solicitor General when Biddle was Attorney General, both because Biddle had been interested in the Labor Board and because of Fahey's record as general counsel.

It would have been a great misfortune for me if I had gotten that job. I don't know what would have happened, but I wouldn't have had the experience that I had the way it turned out. I couldn't have had a job that was better for me than the job on the economic council and the relationship with Truman as a member of his cabinet. So that was a fortunate thing that happened to me, contrary to my wishes at that time.

**CASEBEER:** Did you keep an interest in the operation of the Board?

**KEYSERLING:** As I have said, I did not because I became totally involved in the battle for the Housing Act, a two year battle which was just as strenuous and just as difficult as the Wagner Act. I could have watched it passively, but I couldn't have actively tried to inspect or influence what they did because it was against Wagner's policy. Wagner didn't want anybody in his office interfering with the Board, because he wouldn't interfere with it himself as a matter of principle. He said, "I don't want to get involved in the administration of the executive departments." He said that if he got involved in that, he wouldn't have time for anything else and they would be expecting all kinds of things that he could not do. So he just kept his hands off. Except, of course, he took the leadership in the fight against the amendments to the Act. That was a different thing. They were trying to destroy his product. It was not that he was interfering with the administration; he was maintaining an interest in the statute.

**CASEBEER:** When the Act passed, how was it received by those who had been active in either labor or labor legislation? Did you ever have any conversations with Lewis or Green, or other AFL leaders after its passage?

**KEYSERLING:** They were jubilant about the Act and made very active use of it. Labor membership increased tremendously, multiplying about five times.

**CASEBEER:** How about academic people like Felix Frankfurter, who had been so involved in the injunction issue?

**KEYSERLING:** Frankfurter rather studiously avoided interfering in the operation of Wagner's office. However, he unconsciously expressed his support. He wrote a wonderful letter to the Senator about his speech, *Industrial Democracy and Industrial Peace*,<sup>99</sup> which of course, I wrote, which traced the whole economic situation at that time. I suppose in fairness to Frankfurter, he undoubtedly knew that I was Wagner's only professional assistant and that I was very heavily involved in everything that he did, including speech writing. So Frankfurter had many reasons to be happy about my work, but I never had many contacts with him. I really should have gotten in touch with him and asked to come to see him when he was a Justice. I could easily have done that, but I didn't.

**CASEBEER:** What about the general response of the law school community? Was there academic criticism or support for the bill either before or after its passage?

**KEYSERLING:** One of my most outstanding observations in my work in Washington was how little interest the academic profession generally takes or how little they know about what is really going on. *Challenge* magazine, which is an economics magazine, not long ago had the slogan, "Economic laws are what the Congress says they are," which was a new approach for economists. Generally speaking, they didn't take much of an interest. Some of them took a specialized interest and wrote articles about it that were readily available.

**CASEBEER:** Let me ask a question about other legislative programs that addressed labor issues. Was there anybody else in Congress from 1933 to 1935 who had a different concept or a different substantive program for labor relations than Senator Wagner?

**KEYSERLING:** They didn't have different programs, but all of them had different ideas. The twelve senators who voted against the National Labor Relations Act had different ideas about labor relations and the protection of labor. But they didn't have programs. I

---

99. Wagner, *Industrial Democracy and Industrial Peace*, *supra* note 15.

don't recall anybody who had a program. The only exception was Senator LaFollette, who ran a long investigation into espionage and other antilabor practices. He was very helpful in securing passage of the Wagner Act. But the strangest thing is that even he never introduced legislation. Likewise, the great Temporary National Economic Committee, which conducted a very comprehensive investigation of economic problems, never introduced a single piece of legislation. Senator O'Mahoney was chairman. So when Senator Elbert Thomas said to me, "Why don't some of the other Senators introduce legislation instead of Senator Wagner? It would go over better because he seems to be doing it all and Frank Kent is stigmatizing him as a labor advocate." In response, I said that he needed to introduce legislation and so did everybody else. Wagner used to say to me, "Why the hell do they keep on having more hearings? The problem has already been developed, so let's do something about it." That is the way it was.

**CASEBEER:** What was Senator Wagner's attitude toward proposals for recovery that were connected to labor, like Senator Hugo Black's "thirty hour" proposal?

**KEYSERLING:** The Senator was the sponsor of most of the recovery legislation. He sponsored the initial \$3.3 billion public works bill which was in the original National Industrial Recovery Act. He also sponsored the Emergency Relief Act<sup>100</sup> and the Civilian Conservation Corps Act.<sup>101</sup> He sponsored almost everything. He was sponsor of the National Housing Act,<sup>102</sup> creating the FHA, which was mainly a recovery Act. He sponsored the Homeowners Loan Act,<sup>103</sup> which was a recovery Act. He monopolized almost all of the legislation, partly because Roosevelt chose him to handle the legislation that came from the White House, such as the Homeowners Loan Corporation Act, and in the other cases when the legislation originated outside of the White House. I remember when Roosevelt made a speech in favor of Wagner's reelection in 1938 when Wagner ran for a third term. I was very active in the campaign. Roosevelt began by saying that "people often talked about the Wagner Act, but that there were so many Wagner Acts that I don't know which one to talk about."

**CASEBEER:** Did the Senator oppose the thirty hour bill?

---

100. Federal Emergency Relief Act of 1933, ch. 30, § 2(b), 48 Stat. 55.

101. Civilian Conservation Corps Reforestation Relief Act, ch. 17, 48 Stat. 122 (1933), *repealed by* Pub. L. No. 89-554, § 8(a), 80 Stat. 648 (1966).

102. Ch. 847, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750 (1982 & Supp. II 1984)).

103. Ch. 64, 48 Stat. 123 (1933) (codified as amended at 12 U.S.C. §§ 1461-1470 (1982 & Supp. II 1984)).

**KEYSERLING:** The thirty hour week bill never came to a vote. He opposed it in the sense that the provisions of the National Industrial Recovery Act were designed to answer the thirty hour bill. He never supported it. What he would have done had it come to a vote, I just don't know.<sup>104</sup>

**CASEBEER:** In your view was that a misguided approach to recovery?

**KEYSERLING:** Yes, because I didn't believe in sharing unemployment instead of creating jobs. The thirty hour bill was an attempt to share unemployment by having a lot of people unemployed ten hours per week instead of a smaller number of people unemployed full time. My opposition to the shortened work week has gone much further. When I was working closely with Walter Reuther many years later, when he was one of the main financial supporters of the Conference on Economic Progress, the labor movement started developing support for a shorter work week, and Reuther asked me to help him oppose it. He said he just didn't believe that the solution to the unemployment problem was shortening the work week. He said we ought to have a shortening of the work week only when we came to prefer more leisure rather than more work, and when we were productive enough to justify that, and our production needs were more fully met. But as an employment measure, he opposed it. Later, when we had so many recessions and so much unemployment, the labor pressure for a shorter work week became so insistent even within the CIO, and later within the AFL-CIO, that Reuther stopped actively opposing it because it was futile, but he never actively supported it.

**CASEBEER:** In your view, did recovery programs have to link wage rates to productivity or production increases?

**KEYSERLING:** Yes. The wage rates should equal the productivity gains in real terms except in one case, and this is where I later differed so strongly with the Heller Council. They started with the formula that wage rates should equal productivity gains, but if productivity dropped to zero because you were in a recession, they also said that wage rates should not be increased, because otherwise there would be inflationary pressures. Keynes knew better, and even Hoover knew better because Hoover pleaded with business not to reduce wage rates even during the Great Depression, because it would simply aggravate the problem, but they didn't listen to him.

My own approach was that each factor in the economy should be adjusted to the full-employment quotient. In other words, spending

---

104. Wagner did vote for the bill, although it never came to final consideration. J. HUTHMACHER, *supra* note 15, at 144.



policy, tax policy, and wage policy should all be adjusted to a model that I would call a national prosperity budget, or full-employment budget. We should then strive to adjust each factor according to this model. This is contrary to the recent and current practice, which I have opposed so much, that adjusts everything downward because something else is going down. In other words, if production is going down and therefore revenues are less, and you slash public investment programs to comport with the poor performance of the other sections, that is not budgeting for a full economy. That is what I learned during World War II; you adjusted each component to the requirements of a full economy.<sup>105</sup>

**CASEBEER:** So nothing in the powers of the National Labor Relations Board was intended to restrict collective bargaining in order to seek the highest possible wage rate for labor?

**KEYSERLING:** To the best of my knowledge, the National Labor Relations Board was never intended under the Act to determine wage rates or hours, nor did it attempt to do so. It limited itself to supporting a wholesome and clear atmosphere for collective bargaining. That was the philosophy of the Act. It was not a wage board, and it was not an hours-of-work board. I presume in theory

---

105. Keyserling described the New Deal economics record, and fears for future policy:

Of course, more than just increased wage rates arising out of collective bargaining were necessary. During the Depression, the break of the economic recovery came a little later than the Wagner Act. That came in 1937. But labor was still concerned. Unemployment was being brought down, but was still very high, and remained very high until World War II, which created the utterly wrong impression fomented by economists and others, that the New Deal did not succeed in reducing unemployment until World War II. This is absolutely false. In numbers and percentages, the reduction of unemployment was much greater during the New Deal period than at any later time, despite much greater difficulties, much less knowledge, and much fewer instruments. It was a unique reduction of unemployment, and the only reason it didn't go down even further was that in 1937, due to Roosevelt's innate conservatism and the pressures from Secretary Morgenthau, and especially from the Congress, there was a very sharp cutback in federal spending.

But in 1937 there was a sharp cutback in public spending because of these forces, which Senator Wagner opposed. That brought about one of the sharpest recessions that we have ever had. From 1937 through 1939, we really had a depression within a depression. But even after that setback, which was not due to the New Deal but to the departure from it, if you measured all the way from 1933 to 1939, the reduction in unemployment, measured on both a percentage and an actual basis, was greater than at any subsequent time. A better record was made then than at any later time. The record in recent years has been absolutely fantastic. We still have six to seven percent unemployment after all these years. Alvin Hansen used to say to me, that the thing he feared more than anything else was that economists would come to accept higher and higher levels of unemployment as being consistent with full employment. It is nothing but a rationalization for failure.

that if in the process of collective bargaining, labor proposed wages that were outlandishly high, and the employer refused to go along, the Board wouldn't have held that the employer was refusing to bargain collectively. In fact, the Board did not, and under the Act wasn't supposed to, evaluate bargaining in good faith based on whether the parties were in agreement on the terms, but rather only whether they were bargaining in good faith. Did they intend to reach an agreement?

## VII. DRAFTS

**CASEBEER:** Let me again shift away from the policies, the intent, and the sections of the Act, to the process of writing and drafting the provisions. You said that particularly in constructing the final version of the '35 Act that there was some building on past legislative provisions like the Railway Labor Act, and section 7(a) of the NIRA. Clearly, a lot of attention was paid to an independent and workable administrative apparatus to overcome the enforcement problems of the nonstatutory Boards. Was the actual drafting work, the design to accomplish both the substantive goal and the administrative goal, a lengthy process? Was it a process which went through many drafts, or was it a relatively straightforward problem?

**KEYSERLING:** It could be better answered by looking at the drafts. There were many drafts.<sup>106</sup>

**CASEBEER:** What were the influences on the changes from the original drafts?

**KEYSERLING:** Both Senator Wagner and I were partially at fault. If you are drafting a speech and nobody else has anything to do with it, you redraft it and change it because you are not satisfied. That was one of the reasons for the changes in the draft. Other changes resulted from my discussions with the people that I have mentioned already, whether on the nonstatutory Labor Board, in the labor movement, or elsewhere.

**CASEBEER:** That is what I am really asking. Was the Senator interested in particular language? Did he go over the wording of the sections with you, or was he more interested in the general outcome that was going to be produced in the end?

**KEYSERLING:** He didn't go over the details of the legislative drafting. He knew that our thinking was generally the same and he had confidence in the people that I was working with. He knew that I

---

106. There are eight drafts of the bill written prior to the submission of the Labor Disputes Bill to committee in 1934 contained in the Papers of Leon Keyserling, *supra* note 73.

was clearing matters with the AFL people. No, he didn't go into the details of the drafting. However, he was a very good reader of language. He was interested in reading the drafts from the point of view of whether they were clear, which is a very different thing from the other question. He would frequently say, "It just isn't clear. Make it clearer. What does it mean?"

**CASEBEER:** What about the interaction with the people that you were consulting with? Did you have lengthy debates with your friend Emerson?

**KEYSERLING:** We were in agreement to a very large extent. I actually used Phil Levy more than any of the others. Phil came from Columbia Law School and served on Biddle's staff, as well as on the staff of the permanent Board. I asked him to prepare very long memoranda, which became part of the record. The man who wrote the book, *The New Deal Lawyers*,<sup>107</sup> made one mistake, which he was happy to correct. After getting hold of all these memoranda by Levy, he thought that Levy was more the originator of the Act. He didn't realize that they were all memoranda that I had asked Levy for. In effect, Levy was on my staff during this period. I thought so highly of him that I recommended Levy as my successor when I left Wagner to go with the Housing Agency. He became my successor and continued there until he was drafted into the war effort.

**CASEBEER:** In the 1934 bill, the Labor Department took an active interest in the location of the Board, and in the application of unfair labor practices to labor organizations as well as employers. Why did they drop, or at least not strongly push the same two points on the '35 Act?

**KEYSERLING:** They pushed them as strongly as they could. They just were defeated by Senator Wagner. In 1935, as I said, Secretary Perkins got Congressman Connery, chairman of the House committee, to report the bill out of committee, with the Board in the Labor Department. Perkins, unlike Roosevelt, never opposed the bill. When she testified on the bill, she supported it, not strongly, but she supported it. But the insistent point in her testimony was that the Board should be in the Labor Department. She just lost. She didn't withdraw. Likewise, on the so-called Wyzanski bill, which Senator Walsh put forward in 1934, they never changed their position. Wagner just withdrew the bill and put in a new one the next year. For one reason or another, Wagner was able to force Walsh to go along with

---

107. P. IRONS, *supra* note 11, at 226.

it. Besides, Wyzanski was in Europe that year attending meetings of the International Labor Organization.

**CASEBEER:** So the Labor Department shifted its focus from the Senate to the House. Was that because Walsh changed his mind?

**KEYSERLING:** No. They shifted their focus after the bill had passed the Senate. It was after the Wagner bill passed the Senate in 1935 that Perkins prevailed on Connery to have the bill put the Board in the Labor Department.

**CASEBEER:** But Walsh must have changed some of his positions.

**KEYSERLING:** He changed them for whatever reason. In 1935 he went along with the revised Wagner bill.

**CASEBEER:** How was the decision made that Senator Wagner would write the Senate report so that his office would be responsible for the report accompanying the bill?

**KEYSERLING:** Well, that wasn't the situation in 1934. In 1934 Wyzanski wrote the report. The chairman of whatever committee it was would generally ask Wagner to write the report for his bill, even if he wasn't on the committee. As I said before, I wrote the report for Black on the housing bill. I wrote the report for Walsh on the labor bill in 1935, and I also wrote the House report on the bill.

**CASEBEER:** Was it a normal course of events that the committee chairman would ask the sponsors, instead of their own office, to write the report?

**KEYSERLING:** I don't know whether it was a general practice overall, but it was true in Wagner's case as to the labor and housing bills. We didn't write the report on the National Industrial Recovery Act, but Wagner remained the sponsor of the bill. It didn't change in that case because the bill was reported to the Finance Committee. That was also true of the Social Security Act, which he introduced. But the social security bill was not a Wagner product. The social security bill was a product of the special committee that Roosevelt appointed in 1935. But there again on the social security bill, Wagner didn't write the report, but the bill was reported in the Senate as his bill and he made the lead-off speech for it in the Senate and was in charge of the debate. Except for Wyzanski's temporary take over of Walsh, which had no ultimate effect, Wagner was in complete control of the labor bill throughout the testimony, the reports, the bills, and everything else.

**CASEBEER:** Was there any reason why the Labor Department itself didn't develop an administration policy on labor-management relations, collective bargaining, and strikes?

**KEYSERLING:** I don't know the reason why, but they didn't. Perhaps it was because Wagner had preempted the field, but for whatever reason they didn't.

**CASEBEER:** They seemed to favor conciliation?

**KEYSERLING:** Yes, conciliation was favored under John Steelman, who was a conciliator to whom Wagner frequently turned for help when he was under the temporary Board. Later, Steelman became special assistant to President Truman, and a great rivalry developed between him and Clark Clifford. Clifford was the man for the liberals, such as Brannan, me, and the others, and Steelman was the man for Sawyer, who was Secretary of Commerce, and Snyder, who was Secretary of the Treasury. Truman, however, always decided on our side.<sup>108</sup>

I forgot one other important thing. One of the reasons that Wagner supported a strong and independent Board, although I think he would have supported one anyway, was the extent to which Secretary Perkins interfered with the operations of the nonstatutory Board under Garrison and Biddle. She interfered with their staff appointments and tried to interfere in their policy decisions. This was quite a problem with Biddle and Garrison. Of course, Wagner knew all about that. That may have been one of the reasons he supported an independent Board even though he didn't think that the Labor Board should be in the Labor Department either.

Frankfurter, who taught administrative law at Harvard, felt very strongly about the independent Board, and approved very much of the dissenting reports that I wrote for Ramspeck and Marcantonio. Wagner felt that even if these agencies ultimately should be absorbed into the existing departments, a newly created Board could be much more venturesome if it were independent, than if it were in one of the departments. The Labor Board never would have established the record it did in the early years if it had been in the Labor Department.

**CASEBEER:** Was that consideration something that was

---

108. On Cabinet selections, Keyserling commented:

Snyder was much closer to him personally. Snyder was his closest personal friend. Mrs. Snyder was a close friend of Mrs. Truman's, and their daughter Drucy was Margaret Truman's closest friend. That went back to Missouri. But when Snyder and I differed on a matter of economic policy, Truman always took my side because he understood the function of the Council of Economic Advisers. The other agencies were claimants for their constituencies, and the Council was supposed to be an independent economic general staff. Truman always took my side. He said that at that level, I was the greatest advocate that he ever had around him, which was quite a compliment in view of the fact that he had Acheson and Clifford, and I'm sure he didn't say the same thing to them. That was just not Truman.

important in the design of the administrative sections of the Wagner Act? That is, the experience of the nonstatutory Boards was one in which there were contrary policies in both the Labor Department and the Justice Department?

**KEYSERLING:** I think the difference was that in the Justice Department, the question was purely lawyerlike: Could they defend themselves before the Supreme Court?<sup>109</sup> In the Labor Department, however, it was mostly policy quarrels. When we wrote the administrative provisions of the Wagner Act, on which as I have said I got a lot of help, we clearly wrote them with the assumption that the Board would be independent. Had we written them with the assumption that the Board would be in the Labor Department, we would have had to define the role of the Secretary of Labor in the administrative procedure to clarify what she did, and the extent to which her decisions affected what happened.

**CASEBEER:** You wanted both a judicial approach to the decision of unfair labor practices and a quick independent internal access to the federal courts to enforce the orders?

**KEYSERLING:** Exactly. As Senator Wagner and I believed, a quasi-judicial body, particularly in the early years of its life, should be independent. It should really run its show.

**CASEBEER:** Beyond the theory of administrative practice, was that related also to the specific context of labor-management relations, that a strong signal needed to be sent, particularly to employers?

**KEYSERLING:** That may have had something to do with it. To give another example, in 1937, when the Housing Act became law, Secretary Ickes administered the public works provisions under title II of the National Industrial Recovery Act. For some reason, Wagner never objected to having a department administer grants to the states and localities for public works. He never reached that point. When the Housing Act came up, Ickes said that he had had a housing division under his Public Works Administration, and that they had built something like twenty demonstration projects. When the Housing Act came up, Ickes insisted that the housing administration be placed in the Interior Department. Wagner wanted an independent housing administration. That resulted in quite a battle. When it came up in the Senate, Ickes bribed a number of Senators by offering them projects. He had hundreds of millions of dollars of projects to offer, and the Senate ruled to put it in the Interior Department, which is exactly the way it finally came out. But Wagner won that battle

---

109. P. IRONS, *supra* note 11, at 216-25.

because Ickes wanted Mr. Gray, who was the head of the Housing Division of Public Works, to be administrator of the Housing Authority. Wagner backed Nathan Strauss, and again there was quite a battle. Wagner went up to Hyde Park and got Roosevelt to appoint Strauss. From the moment Strauss was appointed, Ickes announced that even though it was in his department he would have absolutely nothing to do with it. So we operated as an entirely independent agency within the Interior Department, and I was general counsel.

Then a lot of other things happened. There were reorganizations. We got transferred to the Federal Works Agency when it was still comprised of sixteen warring agencies. Roosevelt called on me for a plan; or rather, he called on Sam Rosenman for a plan to straighten this out. Rosenman talked to the two top people in each of the sixteen agencies and went and told Roosevelt that I should draw up a plan. So Roosevelt asked me to draw up a plan. I drafted Executive Order 9070, which took effect in February 1942. This order created the National Housing Agency as a wartime agency responsible for war housing. The FHA and other agencies were constituent units under it. I became general counsel to that agency. I went over there rather than accept the position of administrator of the United States Housing Authority. I remained with that job until I went on to the Economic Council. So I wrote the Executive order that created the National Housing Agency under the Housing Act of 1949,<sup>110</sup> on which I worked with Wagner and Senator Taft. It was the most comprehensive of all of the housing acts. The temporary wartime National Housing Agency became the Housing and Home Finance Agency, and later by Executive order, it became the Department of Housing and Urban Development (HUD). In effect, as I once said to Pat Harris when she was the head of Housing and Urban Development, "I really laid the bricks for this agency through Executive Order 9070, and the Housing and Home Finance Agency."

Wagner maintained his position that the Housing Agency should be independent, which it was in effect due to the circumstances that I described. It remained independent until the National Housing Agency was created under the Executive order.

**CASEBEER:** Did you and Senator Wagner sharply disagree about any aspect of either of the Acts?

**KEYSERLING:** Senator Wagner and I never had a sharp disagreement on anything, except that sometimes he didn't like the drafts of some of my speeches. But that was not a quarrel because I didn't

---

110. Ch. 338, 63 Stat. 413 (1949) (codified as amended at 42 U.S.C. §§ 1401-1490 (1982 & Supp. II 1984)).

have a vote on the decisions.<sup>111</sup>

**CASEBEER:** Were there any aspects of the Act that you would have favored including, which were modified from the original draft for purely political reasons?

**KEYSERLING:** Hardly so. We didn't equivocate on the Act and we really got what we wanted, which was amazing in view of all the opposition and all the conflicting forces. That is a tribute to Senator Wagner.

### VIII. LEGACY

**CASEBEER:** Let me ask one last general question. In light of the experience of fifty years under the Wagner Act, people like Lane Kirkland have suggested that at least some unions could do better without the Wagner Act. Do you think there are any reforms or major changes which are now appropriate?

**KEYSERLING:** There is nothing wrong with the Act. It just needs another President and a different kind of Board. I think Lane Kirkland is just dead wrong on that, and a lot of the top labor people have told me that he is altogether wrong in saying that labor would be better off without the Wagner Act.

**CASEBEER:** Are there, in your opinion, any changes, particularly administrative changes, that would better fulfill the initial purposes of the Act?

**KEYSERLING:** It's a matter of different personnel—different personnel in the White House, different personnel on the Board, and a different person as general counsel to the Board, who is made almost superior to the Board under the Taft-Hartley Act.<sup>112</sup>

---

111. On his relationship with Senator Wagner, Keyserling remembered:

In all of the years that I worked with Senator Wagner, there was only one time he ever got angry with me that was entirely unreasonable. The story once came out in the press that I had drafted the Housing Act. This enraged him. It was so unreasonable because he had everybody working on the Act—twelve people and me. Everyone interested knew that I had drafted the thing. This was nothing unusual, but it just enraged him. He said, "Oh, so now you are the Senator." But he got over it in an hour or so, and never raised the question again. But all through the time I worked for him, I was extremely careful about not creating the impression that I was sharing responsibility with him. He appreciated that. I was so unlike some of the later people with Kennedy, who went around claiming that they educated the President; that he knew nothing about economics, but they taught him. If that had happened when I was with Truman, he'd have fired me.

112. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1982)).



**CASEBEER:** In your judgment, would that improve the ability of labor to utilize the original tools effectively?

**KEYSERLING:** There's no question about it. Labor is responsible for its troubles in some respects. George Meany said that he was never really interested in organizing more people. He said that labor had enough people. But even at twenty million, organized labor is only one-fifth of the work force. However, he was never very interested in more. That was one of the two tremendous differences between Meany and Walter Reuther. The other was that they had altogether different views on international policy. Although Reuther was the one who had cleaned the communists out of the UAW, Meany was more avowedly anticommunist. The previous UAW president, R.J. Thomas, came very close to being a communist. So Reuther was just as clearly anticommunist in the labor movement as anyone else. But he didn't go along with Meany on withdrawal from the International Labor Office just because the Russians were in it. Reuther was influenced by his principal adviser on international matters, who was avowedly a former communist, and was the strongest anticommunist of all the communists who had "gotten religion" and become anticommunist. Therefore, the AFL was at fault for failing to organize more workers. They differed with Reuther on that. They also differed on some matters of international policy, which was one of the reasons Reuther got the auto workers out of the AFL-CIO.

**CASEBEER:** Was it difficult for the AFL to operate effectively during the drafting of the National Industrial Recovery Act, and later, the National Labor Relations Act, given their policy of avoiding appeal to government power?

**KEYSERLING:** They changed that policy due to the Great Depression. When I came to Washington, the AFL was officially against unemployment insurance. William Green had a top advisor named Florence Thorne. She was a big influence on him and she was antigovernment, but that changed over when Meany came in and when the Depression came. They became the most active supporters of all of the legislation that we worked for: The Housing Act, the Labor Relations Act, the NIRA, the Fair Labor Standards Act, and so forth.

## IX. ELABORATION ON DRAFTING AND DRAFTS

**CASEBEER:** I have some questions on some specific points that arose from one of our previous talks. I want to start with some of the personalities who were involved with you throughout the different stages of the drafting process. I'm curious about the initial "summit

meeting” in 1934 when Charlton Ogburn, the AFL people, Senator Wagner, and some others were initially meeting to talk about the specifics of a labor bill.<sup>113</sup> I’m curious about how that meeting came to pass, how it was set up, and its purpose.

**KEYSERLING:** In late 1933, Wagner told me he wanted a labor court bill. I started work on what became the Wagner Act. I don’t recall the particular meeting that you are referring to. But it’s quite likely that Wagner had a meeting with people like Green, Warrum, or Ogburn to talk about his proposal for going ahead with the labor bill. If so, the meeting would have been held in his office. Now, I had many, many other meetings with both Warrum and Ogburn, so I suppose that initial meeting would have involved a general statement by the Senator that he was interested in such legislation. He also would have wanted to get their initial reactions, which of course would have been warm and favorable.

**CASEBEER:** Did either Warrum or Ogburn have any specific points that they wanted to include in the bill? Did they mention that they wanted certain kinds of provisions?

**KEYSERLING:** No, they at no time took the initiative in doing that. Of course, they commented upon the drafts of the bills that I prepared, but they did not initiate details. They were interested in a bill to vindicate section 7(a) and provide enforcement provisions for it.

**CASEBEER:** They didn’t care whether it should be an independent agency or located in the Labor Department or a labor court?

**KEYSERLING:** I don’t recall any such brief, but they never objected to the Senator’s determination to have an independent agency.

Now, I may not have mentioned to you that one of the reasons the Senator was so strongly in favor of an independent agency, although he would have been for it anyway, was that the Garrison and Biddle Boards had a good deal of trouble with the Secretary of Labor on all kinds of things, such as appointments, substance, and so forth. Of course, the substance of things would have been Wyzanski’s ideas. That was one of the reasons they were so insistent upon an

---

113. In January 1934, Senator Wagner met with William Green, John L. Lewis, Henry Warrum, Charles Wyzanski, and Keyserling. I. BERNSTEIN, *supra* note 9, at 63.

Supporters of increased purchasing power as an anti-Depression policy connected with this meeting, or Senator Wagner’s period with the NRA and National Labor Board, include John L. Lewis, Gerard Swope, Leo Wolman, Harold Moulton, and William Leiserson. See Renshaw, *supra* note 19, at 220-21.

independent board. These factors had contributed to Wagner's thinking, although I know he would have been in favor of a very independent board anyway.

**CASEBEER:** In the drafting of the '34 bill, did Milton Handler have particular experiences from the first nonstatutory Board that he thought were problems that needed to be drafted against; that an independent agency, for example, would be able to better deal with some of the issues?

**KEYSERLING:** Naturally, as I have said, I had extensive discussions and conferences with Milton Handler as counsel to the non-statutory Board. He was involved in the process all along.

**CASEBEER:** One of his main concerns seems to have been the use of elections to produce an exclusive representative.

**KEYSERLING:** That was because they had that kind of problem even in Wagner's time. It evolved out of the nonstatutory Board. If they were going to have collective bargaining, they needed to have representatives chosen for that purpose.

**CASEBEER:** In the drafting of the second bill when you were working with a number of people who were on the staff of the Resolution 44 Board, the Garrison Board, did they express any frustration with the Board's procedural mechanism?

**KEYSERLING:** Naturally. They had many frustrations. They couldn't get Justice to enforce the law.

**CASEBEER:** Were there any particular cases that they were most concerned about?

**KEYSERLING:** No, I don't remember any particular cases. The only contact I had with that kind of thing was reviewed in *Industrial Democracy and Industrial Peace*,<sup>114</sup> where I talked in detail about the patient efforts of the labor people to do this and do that. The person that helped me most on the memoranda relating to that was Phil Levy.

**CASEBEER:** He was particularly interested in the mechanics of the administrative agency?

**KEYSERLING:** Yes, well, they were all interested. But Phil was the person who did most of the detail work for me because I was in a better position to ask him to do things, rather than Handler or Magruder. I remember particularly how helpful his memoranda were in connection with *Industrial Democracy and Industrial Peace*.

**CASEBEER:** Was there ever a time when the AFL was at odds

---

114. Wagner, *Industrial Democracy and Industrial Peace*, *supra* note 15.

with any of the people involved in the drafting process over the question of unfair labor practices against unions?

**KEYSERLING:** We did not have to put much of an effort in convincing the other people on that issue because we were so strongly against it. Senator Wagner frequently talked about that in his speeches.

Now, there is one other thing that I should have mentioned. In 1934 or 1935, the nonstatutory Board went out on its own and drafted a bill, in lieu of the Wagner bill. They had eager fingers. I don't remember that it was substantially different, but those people had their own ideas as to how to make the presentation. This was rather unusual and rather uninformed. Wagner always had his bills drafted from his own office—he never asked other people to draft bills. Biddle then invited Wagner over, and I went over with him. They handed us copies of this alternative bill. Wagner took it politely. He didn't mention to them how he felt about it, but the next day, on my own initiative, I visited Biddle and explained to him that we didn't operate that way. That was the end of that bill. This was not due to differences of opinion. What I mean is that the lawyers over there, Tommy Emerson and Nat Witt, just wanted to draft a bill. That is natural, but it was not in accordance with the processes we operated under.

**CASEBEER:** Were you and Emerson still living in the same house at that time?

**KEYSERLING:** Yes. We had to be because we didn't leave that house until late 1934 when he got married, and I went to live with Emerson and his wife out in Virginia. He had a tennis court out there. That's where Magruder and his wife used to come and play with us regularly. That's a matter of interest but is of no significance because nothing ever happened to that draft.

**CASEBEER:** I asked a number of questions about the AFL which seemed by all accounts, to take a hands-off attitude on the specifics. Were there non-AFL unions that were more interested in the drafting?

**KEYSERLING:** I don't recall that we dealt with non-AFL unions.

**CASEBEER:** There's correspondence with the Newspaper Guild.

**KEYSERLING:** That's a different thing. They were critical and the correspondence reveals the nature of the relationship. They didn't have any influence on us.

**CASEBEER:** The Newspaper Guild seemed to want direct

enforcement of unfair labor practices in the courts rather than through an administrative agency?

**KEYSERLING:** You mean through the Department of Justice?

**CASEBEER:** Through statutory crimes, basically.

**KEYSERLING:** There are a lot of different things they may have wanted but we didn't honor their views very much.

**CASEBEER:** But you did consider the alternative of making unfair labor practices direct violations of civil law for the purposes of damages?<sup>115</sup>

**KEYSERLING:** No, we didn't do that. Well, we considered it in the sense that we read what they gave us, but not seriously.

**CASEBEER:** They also wanted an unfair labor practice that would have required businesses to open their books.

**KEYSERLING:** That was a very contentious issue. The chief proponent of that issue in an entirely different connection was Walter Reuther, but it was very controversial and we never got into it. It went to the question of fair wages in terms of profits and other factors, and because the Wagner Act didn't deal with the question of what was a fair wage or what the wage should be, we didn't get into it at all. We weren't going to confront the issue of opening books, although it was a good idea. They should open their books. Walter Reuther began to press that issue much later.

**CASEBEER:** The reason that I asked the question is the line that you had in mind between preventing unfair labor practices in order to permit collective bargaining and to equalize bargaining power, as opposed to preventing unfair labor practices in order to encourage specific agreements or to encourage a wider range of issues being involved in collective bargaining.

**KEYSERLING:** The purpose of the Wagner Act, of course, was to serve specific agreements because without specific agreements there would be no meaningful collective bargaining. But as I said before, we drew a close distinction between the Wagner Act as the basis for assuring collective bargaining, and the contents of the bargaining. We never went into the contents of the bargaining. The issue of opening books, therefore, was not really an important issue for us because it was directed toward what the wage should be, or what the employer could afford to pay.

**CASEBEER:** So the bargaining process itself would set its own agenda as to what issues would be addressed?

**KEYSERLING:** Yes.

---

115. I. BERNSTEIN, *supra* note 9, at 63.

**CASEBEER:** Or what the contents of those deliberations would be?

**KEYSERLING:** The Wagner Act was solely to promote, protect, and assure collective bargaining, and unionization in a sense. It was as an entirely independent matter, not directly related to the Act, that Wagner gave many talks in which he was very critical of the Recovery Act codes on the ground that labor was falling behind on the wage front.

**CASEBEER:** In section 13, where there is the guarantee of the right to strike, there's a question of whether it was contemplated that the right to strike would be limited by the collective bargaining process. Was there some specific reason for putting that residual guarantee of the right to strike in the Act?

**KEYSERLING:** There was a definite reason. First, because Wagner was always strong for the right to strike on the ground that without the right to strike, which was labor's ultimate weapon, they really had no other weapon. That guarantee was a part of his thinking. It was particularly necessary because a lot of people made the argument that because the government was giving labor the right to bargain collectively, that was a substitute for the right to strike, which was utterly wrong.

**CASEBEER:** It could be argued that the section 7 guarantee for mutual aid and protection as a concerted activity would include a guarantee of the right to strike.

**KEYSERLING:** We made that explicit.

**CASEBEER:** You wanted to make it explicit?

**KEYSERLING:** Yes, because some courts would have construed the opposite: that they had to exercise this right as a condition precedent to the right to strike. We didn't want to interfere in any way with that basic weapon. We never interfered with the right of the employer to close his plant.

**CASEBEER:** Then the strike or the lockout weapons were to be deployed in the judgment of each side to the collective bargaining?

**KEYSERLING:** Yes, although we didn't specifically guarantee in the statute the right to lockout because we were dealing with employee's rights. Employers still had plenty of rights.

**CASEBEER:** Was the issue of sitdown strikes or the use of strikes during the course of the contract discussed?

**KEYSERLING:** Well, certainly, the explicit guarantee of the right to strike didn't delimit it in any way. They could strike at any time.

**CASEBEER:** So that if there was an impasse, for example, over the terms of the contract—

**KEYSERLING:** They could strike.

**CASEBEER:** It would simply be a matter of the collective bargaining that would go on not only in the formation of the agreement but in its interpretations and in any reopening of negotiations?

**KEYSERLING:** They would still have the right to strike. But without the explicit guarantee of section 13, they may well have developed, as a result of pressure on the part of employers, pressure on the part of the media, or even through court decisions, some idea that Congress had given labor something as an alternative to the right to strike. This wasn't true at all. We did believe, correctly, that if the Act succeeded in protecting the right to bargain collectively, it would limit strikes based upon the failure to recognize the union bargaining, a most dangerous and exacerbating type of strike. The Act reduced the likelihood of that and other types of strikes by providing an avenue for collective bargaining. After the Act became effective with the constitutional sanction of the Court, Wagner frequently used statistics to show that the number of these strikes had been reduced.

**CASEBEER:** It was an effort to equalize the bargaining power that would force both sides to a realistic understanding of their joint interests, rather than in some way administratively force an agreement and maintain it?

**KEYSERLING:** No, there was no provision of the Act to force an agreement. That would have been compulsory arbitration in a form that both the Senator and labor were against.

**CASEBEER:** I wonder if I could read you a quotation from a recent commentary that makes a point about the intent of the Act and its legislative history. Professor Matthew Finken is describing one of the early cases that arose under the Act, and the brief of the NLRB to the Supreme Court:

Under the heading that the contract is 'irrelevant' to the employer's duty to bargain, the Board asserted squarely that: '[c]ollective bargaining may properly deal with a change in the existing contract.'

The major difficulty with this position, as the company argued in reply, was that it ignored the fact that the labor Act's protection of bargaining was precisely to secure collective agreements. The flouting of agreements made was, the company argued, inconsistent with the achievement of labor peace and industrial stability . . . . One comes away from the briefs and the case with the impression that the Board was simply out-lawyered, for it marshalled no argument or authority to rebut the company's argu-

ment, which was firmly rooted in the legislative history of the Act.<sup>116</sup>

And then he cited to the Senate report accompanying the bill in 1935, which you wrote for Senator Wagner. I am wondering if that is a fair interpretation of the intent of the Act?

**KEYSERLING:** Did the courts ever hold after the Act was in effect that this was the case, that the collective bargaining demand cannot deal with the alteration of an existing contract, or that a contract was sacred in the sense that you couldn't even raise the question of changing a contract in the event that circumstances changed? We never intended that.

**CASEBEER:** That was never the intent?

**KEYSERLING:** No. If he infers that that was the intent, I think he is wrong. I don't see how it could be because there are many situations when either party may want to honor the contract's changed circumstances. Extreme increases in the price level and all kinds of other factors might cause either party to want to reopen a contract. The essence of a contract is that it can be reopened. It can't be violated, but it can be reopened. We certainly never intended to prevent that. If he says that the legislative intent was to prevent the reopening of contracts, I don't see where he got that.

**CASEBEER:** Let me ask a couple of questions about the changes in the drafts as they went along.<sup>117</sup> Relatively early on, I think in the third draft in 1934, and all the way through the eighth draft, there was a protection of the closed shop if it had been bargained for, but only on the condition that the closed shop did not exclude minority groups or minorities of employees from union membership. Was that something that you or the Senator were interested in but subsequently was dropped from the Act for some reason?

**KEYSERLING:** I could almost state categorically, as the actual history of the Act, that nothing that we felt was important got dropped. We had command throughout of what went into the Act.

**CASEBEER:** But this provision said that nothing in the Act was meant to change the state law status or the permissibility of the closed shop, providing only that a closed shop could not be with a union that had exclusive membership requirements. That provision

---

116. Finkin, *supra* note 4, at 39-40 (footnotes omitted) (quoting Brief for National Labor Relations Board at 31, *NLRB v. Sands Mfg. Co.*, 306 U.S. 322 (1939)). *But see* Keyserling, *Why the Wagner Act?*, *supra* note 36, at 17.

117. The first draft is dated January 31, 1934, and the second draft is dated February 19, 1934. No dates appear on drafts three through seven. The eighth draft is dated February 27, 1934.



did not make it into the Act. There was some opposition to the Act from people like Leonard Boudin, who felt that racial minorities would be unprotected with a majority rule, exclusive representation provision.

**KEYSERLING:** There have been and still are all kinds of questions as to the democracy of the unions, but we didn't intend to write a statute reforming the unions or determining their practices. That would have been a seamless web. I guess the changes that you refer to just reflected further thinking on our part and undoubtedly comments from other people, probably including some of the union people.

**CASEBEER:** That part of the draft also had another feature that later did not make it into the Act. It was originally provided that a closed shop agreement could only be reached if sixty percent of those eligible to vote in the unit election chose that particular bargaining representative. This was later increased to seventy-five percent of the potential membership.<sup>118</sup>

**KEYSERLING:** Then it was dropped.

**CASEBEER:** Yes. Was there some reason for the initial percentages and then the change?

**KEYSERLING:** I guess the only reason was that at the beginning we were very ambitious about doing a lot of things. We later decided that the statute should not be complicated with such things. The dropping of those provisions was consistent with the general philosophy underlying the Act. We were not attempting to rewrite the practices of unions, or for that matter of employers, except on the sole issue of the right to organize and bargain collectively.

**CASEBEER:** It would seem that setting limitations on the ability of the employer and employee to reach a closed shop agreement, whether by quorum percentages or by other provisos, would be attempting to set substantive terms of the contract, or parameters of substantive terms.

**KEYSERLING:** That's right.

---

118. The draft reads:

No employer shall by interference, influence, restraint, favor, coercion, or in any other manner attempt to abrogate or modify the right of employees guaranteed in Section 10 . . . . Provided, that nothing in this Act shall prevent an employer from requiring of a person seeking employment, as a condition of employment, that such person belong to an organization, when such organization is composed of at least 60 per cent of such employer's employees and imposes no inequitable restrictions upon membership.

The Papers of Leon Keyserling, Draft No. 3, National Labor Relations Act, *supra* note 73, at 6-10.

**CASEBEER:** That would have made it harder to defend in other sections of the Act.

**KEYSERLING:** That's right. I find nothing puzzling about provisions appearing in one stage and not in another. As I said, even where you have sole authority, it is really like you are writing a speech and then changing it ten times, and not saying things that you have to say or saying things that you didn't mean. It's a wonder the degree of similarity that the drafters maintain. Changes had to be made.

**CASEBEER:** In the eighth draft, which seemed to be the final draft before the Act was introduced in 1934, there was a criminal penalty for some of the unfair labor practices.<sup>119</sup> Why was it taken away?

**KEYSERLING:** We in general took the view that the Labor Board, supported by court decisions, was responsible for enforcement and that we weren't getting into what kind of penalties and strategies should be used in securing enforcement. We felt that putting the Act on the statute books, having a Board to enforce it, and the recourse of the Board to the courts for enforcement, didn't make it incumbent upon us to prescribe penalties and means of enforcement. Another reason was that we couldn't envisage just what circumstances would arise or what would be an appropriate or inappropriate means of enforcement.

**CASEBEER:** So while you wanted a tight administrative practice, you wanted the substantive regulations to evolve almost as a common law of the Labor Board?

**KEYSERLING:** It's really a part of the Senator's philosophy that he didn't want to get involved with the administration of the Act.

**CASEBEER:** He didn't want to have to relegislate continually.

**KEYSERLING:** That's right.

**CASEBEER:** In the drafts, continuing well into the last drafts before the submission of the bill, the original Board membership was to be divided. Within the eighth draft, a representative of employers and a representative of employees, and then three neutrals were to make up the five person Board. That provision was then dropped.<sup>120</sup>

**KEYSERLING:** We dropped that because we didn't want the

---

119. The draft made unfair labor practice a misdemeanor as follows:

Any unfair labor practice that has led or tends to lead to a labor dispute that might burden commerce, or obstruct the free flow of commerce, or dissipate natural resources, or affect the general welfare, shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than \$500 for each offense, and each day such violation continues shall be deemed a separate offense.

*Id.*, Draft No. 8, at 12.

120. *Id.* at 15.

Board to be divided ab initio; and we wanted purely public responsibility. After all, if we had set up a Board with the obvious kind of division that was involved, it would have been like a lot of boards and advisory groups, including many of the advisory groups to the President, such as the Mobilization Board, which failed for that reason. We didn't think that an administrative board of a quasi-judicial nature should be a divided ab initio anymore than the Supreme Court should be chosen by picking members on a representative basis.

I have on other occasions, although Wagner wasn't involved in it, begun to be critical of the Federal Reserve Board. I objected to the Board's composition, as many people did, and recommended that the Board include members of agriculture, business, and labor. But that was partly because the Federal Reserve Board was never a public body in the same sense that the Labor Board was. The Federal Reserve Board was always a banking board. The Open Market Committee, which was a very important part of the Fed, was drawn from the chief officers of various federal reserve banks, and people appointed to the Board have been almost entirely banking and business people. There had never been any labor people appointed to the Federal Reserve Board, and I have at times made recommendations to Congressmen. The Federal Reserve Board should be a more representative Board so that the interests of various groups would be considered in determination of monetary policy. But that was a different kind of question.

**CASEBEER:** Was it a Labor Department suggestion that the Board be representational?

**KEYSERLING:** Not that I recall. After all, it was their idea that the Board would, in reality, be the Secretary of Labor.

**CASEBEER:** There was also a section early on, on mediation and arbitration.<sup>121</sup>

**KEYSERLING:** That was taken out, yes.

**CASEBEER:** Were those originally Labor Department suggestions? It seemed to be their approach to labor-management disputes.

**KEYSERLING:** No. I think in the original drafts we put that in to cover the waterfront, but they were taken out.

**CASEBEER:** The final elimination was in the original late drafts, a provision to prevent courts from enjoining investigations or proceedings of the Board, which was then removed from the final Act.<sup>122</sup>

---

121. *Id.* at 30.

122. This provision stated, "No court shall have any jurisdiction to enjoin the Board or an examiner from taking proceedings and holding hearings under a complaint." *Id.* at 28.

**KEYSERLING:** I think a lot of those removals were in the interest of clarity and simplification.

**CASEBEER:** Is that one you might have liked to have left in, in light of the early federal district court treatment of the Board's decisions?

**KEYSERLING:** Without making excessive claims, if we had wanted it to stay in, it would have stayed in. This was just the history of the Act, it is not a matter of prideful claiming. We got what we wanted. Again, I have to say for the purpose of emphasis that differences between a first and an eighth draft are only natural and are to be expected. The changes in substance and language were made on the basis of more reflection and more discussion.

**CASEBEER:** There are some memoranda and correspondence from the Labor Department that were related to Labor Department changes. The Labor Department wanted the Board to be in the Labor Department.

**KEYSERLING:** That was a big fight all the way through to the end.

**CASEBEER:** They also suggested the tripartite Board, and they suggested that the NLRB should stay its hand if other NIRA boards were established in specific industries, such as the automobile industry.

**KEYSERLING:** We were against that. That was the President's approach, except that his approach didn't include the Labor Board.

**CASEBEER:** Was it ever feared that there would have to be some compromise on any of those points in order to get the bill passed and have the administration's support?

**KEYSERLING:** I don't recall important compromises on that basis at any stage. The one outstanding case, which I have already told you about, was the inclusion of farm labor. Wagner said he was willing to put it in the bill if Wallace asked for it, but that never happened. That was a compromise. He certainly felt that they should be protected, but he just saw in the Senate and its almost dominant rural composition at the time, a farm interest composition—the chairmen of most of the committees were controlled by southerners—that putting in farm labor would be too much to carry, although he would have been willing to take the risk if the Department of Agriculture was committed to supporting it.

**CASEBEER:** These suggestions to put the Board in the Labor Department, or to make the NLRB contingent on other NIRA

boards, in fact in the proposal that the Labor Board have only concurrent jurisdiction with other boards—

**KEYSERLING:** We were entirely against that. After all, what we were trying to get rid of were the industrial boards.

**CASEBEER:** Were these suggestions from the staff of the Department? Was there ever a point where Frances Perkins became directly involved in asking for any other changes?

**KEYSERLING:** I wouldn't know about the extent to which the staff of the Secretary of Labor had responsibility for the decisions of the Labor Department. I would have no way of knowing that. It is true that the specific recommendations came from the staff, but I'm sure that Wyzanski must have cleared them with the Secretary of Labor.

**CASEBEER:** So Wyzanski would have been the person that made the suggestions on behalf of the Labor Department?

**KEYSERLING:** Yes.

**CASEBEER:** Do you recall, aside from wanting the Board to be in the Labor Department, whether there was any other part of the bill in which Wyzanski himself was personally interested?

**KEYSERLING:** That is reflected in what I call the Walsh bill, although it was still the Wagner bill. There were many differences between the bills.

**CASEBEER:** The limitation of the declaration of purpose?

**KEYSERLING:** Yes, but there were also many substantive differences, and the reflection of that was the Walsh report, which Wyzanski wrote. It began with a declaration of what the bill does not do. Now, some of that was a true answer to our opposition's claim that the bill did what it didn't do. Other parts of it would make sure that the board didn't do some of the things that it should do and that the Wagner draft provided. That long beginning of the report on what the bill does not do is very revealing.

## X. THEORY

**CASEBEER:** There is a question that I'd like to ask that I don't know how to frame. It really doesn't go to the language of the bill or the specific unfair labor practices that were drafted, and it's not on the economic philosophy behind the Act. It's more on the legal philosophy. It's a product of the sense that I get from your answers to a whole series of questions, and I think it's in some ways capsulized by the different approaches between the Wagner bill and the Walsh substitute bill. It's also reflected in speeches given by Senator Wagner in both this period and somewhat later. It's about having to rethink the

role of law. It strikes me that the Wyzanski approach was one that you were quite opposed to because it attempted to carve out the narrowest use of law—to restrain practices—the narrowest restraint of employer practices that would then allow labor some additional freedom in which to operate. Essentially, that bill was directed to a narrow restraint of specific practices. Was it your influence on the Senator, or was it the Senator's own background, which led him or led you to think more in terms of an affirmative attempt to strengthen the power of organized labor?

**KEYSERLING:** It was very hard for me to delineate between what the Senator felt and what I felt. I can only say that in a general way, the reason we got along, and the reason I could be effective, was that broadly speaking, we were in agreement. Second, on the more detailed aspects, he relied greatly on my judgment. It was very hard for me to say just where I ended and he began.

I recall that the Senator used to go to New York from time to time. His buddies in New York were people like Al Smith and a man named Surrogate Foley. They were all conservatives, and sometimes he would come back from New York very worried, and maybe he found it difficult at times to get me to change my position. I remember this happened one time when he came back, and Al Smith convinced him that my view on the preamble issue was incorrect. He saw that it was correct when it was spelled out to him just what that would mean in the courts.

**CASEBEER:** The article, *Planning in Place of Restraint*,<sup>123</sup> captured some of what I was trying to get at.

**KEYSERLING:** That was an article arising out of the National Industrial Recovery Act struggle, not the labor struggle, but it also was a part of the Tugwell philosophy, which I had imbibed. He was strong for centralized planning.

**CASEBEER:** In it there's a paragraph that reads:

It may seem paradoxical that the gospel of freedom for business enterprise nurtured a legal system which indulged solely in restraints and prohibitions. But this was inevitably the case. You could not define the terms of free competition. You could not regulate laissez-faire. You could not schematize planlessness. You could merely outlaw practices which were deemed to interfere with the inordinate play of enterprise.<sup>124</sup>

**KEYSERLING:** I guess the purple pen got away with me on that. I can see what it meant. I think it was essentially right, that

---

123. Wagner, *Planning in Place of Restraint*, *supra* note 15.

124. *Id.* at 396.

once you were committed to the doctrine of laissez-faire it surely prescribed what the government and the courts could attempt.

**CASEBEER:** It seems to me that that creates two ways of reading the Wagner Act. One way of reading the Wagner Act is that it is a stronger version of the Walsh substitute bill. It is just reading the unfair labor practices as governmental interventions in collective bargaining to restrain certain practices. Another way to read the Wagner Act is one that would emphasize the planning function, that the point of preventing the antilabor practices would not simply prevent such practices, but would free up the possibility of equalized collective bargaining power leading to a limitation of industrial strife, and also the freedom of the working man to have some control over conditions.

**KEYSERLING:** In a sense that the opposition did not realize, the Wagner Act was in some ways a very conservative statute, because it says that there are a lot of things that the government ought not to decide. We should permit labor and business to decide them. There's one Wagner speech where he said something to the effect that everyone is a leaf born of revived industry and rehabilitated labor, and that totalitarian governments make some attempts that we reject. A lot of it was really quite conservative. It was much less a planning statute than the ideas embodied in *Planning in Place of Restraint*. The National Industrial Recovery Act, with the codes under the aegis of government, business, and labor, was much more in the nature of centralized planning than the Wagner Act. Of course, the Employment Act of 1946<sup>125</sup> and the Humphrey-Hawkins Act<sup>126</sup> are much more oriented to government planning because they didn't say that wages should be left to the efforts of revived industry and rehabilitated labor. They didn't call for direct controls but they did call for the government to set appropriate wage, price, and profit policies quantitatively to bring about economic equilibrium and a proper balance between investment and consumption. So the Employment Act and the Humphrey-Hawkins Act are much more radical, if you want to use that term, than the Wagner Act.

**CASEBEER:** Radical in the sense of government intervention?

**KEYSERLING:** Exactly.

**CASEBEER:** Into market process?

**KEYSERLING:** Although the Senator was somewhat ambiva-

---

125. Ch. 33, 60 Stat. 23 (1946) (codified as amended at 15 U.S.C. §§ 1021-1024 (1982)).

126. Full Employment and Balanced Growth (Humphrey-Hawkins) Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (codified as amended at 15 U.S.C. §§ 3101-3152 (1982 & Supp. II 1984)).

lent on that, maybe because he was a German or for some other reason, he was pretty supportive of planning.

**CASEBEER:** But it wasn't thought that the result of equalized bargaining power would interfere with coordination. It would make it easier by removing some side issues, and also by allowing cooperation of labor-management interests.

**KEYSERLING:** The Employment Act and the Hawkins Act are more advanced than the Wagner Act. But if the Employment Act and the Hawkins Act were implemented, you would still need the protections afforded by the Wagner Act in a way that you don't have now.

**CASEBEER:** In the drafting of the Employment Act, was any of the impetus for that Act reflective of any disappointment over the ability of labor and management?

**KEYSERLING:** No, I don't think so. I think the impetus for that Act was based largely on the basic thrust of my 1944 essay.<sup>127</sup> But the impetus for that Act was really the intent to avoid after World War II what had happened after World War I, and what happened in 1929. You know most of the economists were strongly arguing that there would be eight million unemployed right after the war. One of my articles in the *New York Times* contests that proposition. But that didn't rest entirely upon the idea of what the Employment Act would do. It rested upon measures taken by the government during the war to ease the transition.

**CASEBEER:** I suppose that I should ask if you can think of questions that I should have asked but didn't?

**KEYSERLING:** Oh, you've asked every question, and as I said originally there is no such thing as an unfair question, it's only the answers that can be unfair.

**CASEBEER:** Thank you, Mr. Keyserling.

---

127. L. KEYSERLING, *THE ROAD TO FREEDOM: A POSTWAR APPROACH FOR AMERICA* (1944).