

## Clarence Darrow and the National Recovery Review Board

Michael Hannon (2010)

### National Recovery Administration (NRA) & “Codes of Fair Competition”

The last major activity of Clarence Darrow’s professional life would bring him into conflict with the administration of President Franklin D. Roosevelt. On June 16, 1933 President Roosevelt signed the National Industrial Recovery Act (NIRA) into law.<sup>1</sup> NIRA was supposed to facilitate cooperation between the federal government and the business sector and this hopefully would stimulate the economy and pull the country out of the Great Depression. Under NIRA business competitors met to develop and propose business “codes of fair competition” that would govern prices charged for goods and services, wages paid to labor, and business practices. The proposed codes would then be reviewed for approval by government code administrators. Part of the approval process required businesses to commit to minimum wages and maximum work hours. As part of the “fair competition” code system antitrust laws were suspended. NIRA created the National Recovery Administration (NRA) and Roosevelt appointed Hugh S. Johnson as Director of the NRA to administer the code-writing process and enforce what would become a huge bureaucracy of codes. Johnson and his department, backed by the Federal government, mounted an energetic publicity campaign to garner public support for the code system. The program was touted as a way to protect workers and preserve employment. Adhering to the codes was portrayed as a form of patriotism and businesses that followed the codes were allowed to display a “Blue Eagle” emblem on their stores as a sign of their cooperation with the NRA. The public was encouraged to do business with companies that displayed the Blue Eagle.

President Roosevelt placed much faith in the National Recovery Administration’s ability to coordinate the industries of the country through the “fair competition” codes that were drafted in 1933 by groups including members of labor, business and consumers. NIRA as implemented through the NRA gave the government broad power to try to enforce cooperation amongst industries. The NRA eventually became involved in trying to coordinate business activities in more than 550 industries with approximately 22 million workers. In addition to setting minimum wages and limits on working hours, the fair competition codes were supposed to protect consumers. But they also allowed businesses to coordinate production quotas which dictated prices.

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<sup>1</sup> National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

Roosevelt also asked the country to voluntarily implement a general minimum wage of 20 – 40 cents an hour and a work week of 35 – 40 hours. This general code also came to be symbolized by the Blue Eagle that participating businesses would display.

### **NRA in Trouble**

Despite the hope that these measures would rescue the economy, by 1934 the NRA and its code program was clearly in trouble. It was alleged by some that the codes allowed big businesses to create monopolies by using the code system to limit production and raise prices. The system was also unmanageable as it had grown into a government bureaucracy of about 4,500 staff trying to manage a system that “enacted 546 codes of fair competition, formulated 11,000 orders through which the codes were interpreted, issued another 139 administrative orders regarding NRA administrative procedures, and promulgated 70 presidential executive orders to deal with rights, procedures and privileges.”<sup>2</sup> The NRA was inundated with complaints and many lawsuits were filed.

Senator Gerald Nye of North Dakota and Senator William Borah of Idaho were the most vocal critics of the NRA and the fair competition codes because they believed the codes adversely impacted small businesses. Small businesses, particularly small manufacturers, complained that large businesses used the codes to drive them out of business. Their main complaint was against price fixing set by the codes. The NRA codes set a minimum price that reflected prices charged by larger businesses. For many small businesses, especially small manufacturers, the only way to stay competitive was to charge lower prices for a good or service. Because the codes mandated minimum prices that could be charged this took away the sole competitive advantage of many small manufacturers.

### **National Recovery Review Board**

Hugh Johnson and Senator Nye worked out a proposal to establish a board to receive and investigate complaints from small businesses. Donald Richberg, a key aide to President Roosevelt, wanted Clarence Darrow to serve on the board. Richberg had known Darrow for years. Hugh Johnson then nominated Darrow to chair the new board.

According to one of his biographers, Darrow needed the work because he had lost so much money in the 1929 stock market crash and the subsequent depression.<sup>3</sup> However, a 2005 book on the 1932 Massie trial in Hawaii states that Darrow received \$40,000 plus expenses for about two months work in that trial.<sup>4</sup> A fee of \$40,000 in 1932 is equal to about \$622,000 in 2009.<sup>5</sup>

### **General Hugh Johnson**

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<sup>2</sup> MATTHEW J. DICKINSON, BITTER HARVEST: FDR, PRESIDENTIAL POWER AND THE GROWTH OF THE PRESIDENTIAL BRANCH 48 (1999).

<sup>3</sup> KEVIN TIERNEY, DARROW: A BIOGRAPHY 426-27 (1979).

<sup>4</sup> DAVID E. STANNARD, HONOR KILLING 298 (2005).

<sup>5</sup> CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited April. 18, 2009).

Hugh Samuel Johnson (1882 - 1942) was born in Kansas and graduated from the United States Military Academy in 1903, in the same class as Douglas MacArthur, and became a commissioned officer in the U.S. Army. In 1916 he served under General John J. Pershing in Mexico and following that became deputy provost marshal general in Washington. During World War I Johnson helped draft the Selective Service Act of 1917 and he was promoted to brigadier general. Johnson retired from the Army in 1919 and went into private business. In 1927 he became an advisor to Bernard Baruch and campaigned for Franklin Roosevelt in 1932. Johnson, at least to a certain extent, admired some aspects of Italian fascism and was known to consult the book *The Corporate State* by Raffaello Viglione, a favorite economist of Mussolini. Johnson reportedly gave a copy of Viglione's book to Labor Secretary Francis Perkins. According to a 1991 article:

Nor was General Johnson alone in the early New Deal years. A startling number of New Dealers had kind words for Mussolini. Rexford Tugwell spoke of the virtues of the Italian Fascist order. So did internal NRA studies. And the President himself expressed interest in bringing the programs of "that admirable Italian gentleman" to America.<sup>6</sup>

Because he was so involved in the economy of the United States Johnson was chosen by *Time* as Person of the Year in 1933.

### **Donald Richberg**

Donald Randall Richberg (1881 - 1960) was an attorney, civil servant, and author who served as a key aide to President Franklin D. Roosevelt. Significantly, Richberg helped write the National Industrial Recovery Act and he served as general counsel and executive director of the National Recovery Administration. Before working in the Roosevelt administration, Richberg earned a reputation as a labor lawyer and worked on behalf of railroad unions as part of the American Federation of Labor. Richberg is credited with drafting and helping to get enacted the Railway Labor Act of 1926.<sup>7</sup> Richberg also helped craft the Norris-LaGuardia Act and the Taft-Hartley Act.

### **Darrow Bypasses Johnson, Meets with President Roosevelt**

Darrow was an interesting choice to head the review board. He was the most famous attorney in the United States but he was not an ardent supporter of Roosevelt and he would have preferred Al Smith to be president. Hugh Johnson would soon regret endorsing Darrow to serve on the board and he later said he made the endorsement in "a moment of total aberration." According to Lowell Mason who worked with Darrow on board, soon after the board was formed they called on Johnson who offered NRA staff to work for the review board and Johnson said their job was to do some investigating and let him know if the codes were alright. Darrow asked, "But supposing we find out the codes

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<sup>6</sup> James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747 (1991).

<sup>7</sup> 44 Stat. 577, ch. 347, May 20, 1926. (An unintended consequence of the act was that railway unions used the power granted under the act to drive blacks from positions in the railroad industry.).

are not all right?’’<sup>8</sup> Johnson responded that the board should then report that to him and said, “‘I am the big cheese here.’”<sup>9</sup> Mason says Darrow quietly said he did not want to do that and decided they should speak with President Roosevelt. Darrow also declined to accept NRA staff. At the meeting with Roosevelt, the president agreed to create the board by executive order and explicitly direct the board to report directly to the president and not to Johnson. Mason then drew up the draft of the executive order which Roosevelt issued with some minor changes as Executive Order 6632 on March 7, 1934:

By virtue of the authority vested in me under the provisions of Title I of the National Industrial Recovery Act of June 16, 1933 (ch. 90, 48 Stat. 195), and in order to effectuate the purposes of said Title, I hereby establish an organization which shall be known as the National Recovery Review Board.

The following persons are hereby appointed to serve as members of the said Board:

Clarence Darrow Fred P. Mann, Sr. Samuel C. Henry  
W. W. Neal, John F. Sinclair, W.O. Thompson.

The duties and functions of the National Recovery Review Board shall be as follows:

(1) To ascertain and report to the President whether any code or codes of fair competition approved under the authority of Title I of the National Industrial Recovery Act are designed to promote monopolies or to eliminate or oppress small enterprises or operate to discriminate against them, or will permit monopolies or monopolistic practices, and if it finds in the affirmative to specify in its reports wherein such results follow from the adoption and operation of any such code or codes.

(2) To recommend to the President such changes in any approved code or codes as, in the opinion of the Board, will rectify or eliminate such results.

The facilities and records of the National Recovery Administration shall be available to the Board whenever required in connection with the performance of its duties.

The review board consisted of two attorneys, Darrow and his former law partner William O. Thompson, a merchant Fred P. Mann, secretary of the National Association of Retail Druggists Samuel C. Henry, a manufacturer William R. Neal, and a banker John F. Sinclair. Because Darrow headed the board it came to be known as the Darrow Board. Darrow also brought two acquaintances to work on the board: Lowell B. Mason and Charles Edward Russell.

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<sup>8</sup> Lowell Mason, *Darrow vs. Johnson*, 238 N. AM. REV. 524, 525 (1934).

<sup>9</sup> *Id.*

Lowell Mason (1893 – 1983) was a criminal lawyer in Chicago who had previously worked with Darrow on several cases. Mason served as the Assistant Corporation Counsel for the City of Chicago from 1916 to 1922. From 1922 to 1930 Mason was a Republican Senator in the Illinois legislature. Mason had lost nearly all of his investments in the 1929 stock market crash and, needing the work, he asked Darrow to appoint him to the position of general counsel for the review board and Darrow agreed. Mason would later serve as a member of the Federal Trade Commission from 1945 - 1956.

Charles Edward Russell (1860 - 1941) was a journalist, author, and activist. Born in Davenport, Iowa, he was the son of an abolitionist editor of the *Davenport Gazette*. He moved to Minneapolis in 1881 to write for the *Minneapolis Journal* which later became part of the *Star Tribune*. During the next twenty years he worked for the *Detroit Tribune*, the *New York World*, the *New York Herald* and the *Chicago Examiner*. He was also a cofounder of the National Association for the Advancement of Colored People (NAACP) in 1909 and a member of the Socialist Party prior to World War I. Russell became one of the most prolific and controversial of the muckraking journalists. He won a Pulitzer Prize in 1928.

The board was given a \$50,000 budget and they setup meeting rooms in the Willard Hotel. Even though he was almost seventy-seven years old Darrow plunged into the work along with the other members. Over the course of nearly four months they held 57 public hearings, reviewed 3,375 complaints, and investigated thirty-four codes. The codes the board examined covered over half of the total employed labor that worked in industries that operated under the NRA codes. Mason described Darrow's handling of the hearings:

Darrow constantly guarded against misinformation, by insisting that all code authorities should be notified of hearings so that they could be present to controvert any misstatements or misrepresentations. In contrast with the NRA hearings, Darrow insisted that when a witness had completed his testimony, the code authority attorney or the code authority member himself could cross-examine the witnesses.<sup>10</sup>

The National Recovery Administration and enforcement of its fair competition codes increasingly generated criticism. This continued as the Darrow Board went to work. A notorious incident occurred in April 1934 when a:

New Jersey court fined a befuddled immigrant tailor, Jacob Maged, \$100 and sentenced him to thirty days in jail for the crime of charging thirty-five cents, instead of the code minimum of forty cents, to press a suit. That he served only three days and apparently never paid the fine after agreeing to adhere to the cleaners and dryers code did little to detract from the shock value of the episode.<sup>11</sup>

## **Darrow Board Report**

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<sup>10</sup> *Id.* at 531.

<sup>11</sup> ALONZO L. HAMBY, FOR THE SURVIVAL OF DEMOCRACY: FRANKLIN ROOSEVELT AND THE WORLD CRISIS OF THE 1930S 170 (2004). (Some other sources state that Maged spent months in jail).

During the three months of its existence the Darrow Board wrote three reports. The first report was completed on May 3 and it was sent directly to the president. The New York Times reported that President Roosevelt received it on May 4 and said he would study it over the weekend and promised to make it public the following Monday or Tuesday if “it is not too profane.”<sup>12</sup>

### **Dissent on Board, Sinclair Issues Minority Report**

John F. Sinclair disagreed with the majority of the Darrow Board to such an extent that he refused to sign the report. Instead he sent his own minority report to the president in which he sharply criticized the board. Sinclair told the president:

The fatal weakness of our work up to this time--and this matter cannot be emphasized too strongly--centers in not having secured at the very start of our investigation a thoroughly competent professional staff of men--experts in code law and economic research--to assist the Review Board in digesting the great mass of testimony . . . bearing upon the effect of the various completed codes upon the small business man. . . . But the majority of the Board has not seen fit to approach this investigation from the point of view of careful research and analysis. As a result, the conclusions of the Board, based, as they are, upon only a very limited amount of direct testimony--and that very largely giving only one side of the situation--must necessarily be inconclusive, incomplete, and at times misleading and unreliable.<sup>13</sup>

Sinclair officially resigned from the board on May 7. He then began to publicly lash out at Darrow's handling of the review board. He was quoted in the news on May 7 as saying:

Not in my 25 years of business and research experience, during which time I have been a member of many boards and committees of investigation, have I witnessed such utter disregard for fair play of the basic facts as the National Recovery Review Board under Clarence Darrow, has shown, even in its open hearings. Such an attitude in times like these is nothing short of tragedy. I have opposed from the beginning the kind of sloppy, one-sided, half information that is the foundation upon which the Darrow-Russell report has been written.<sup>14</sup>

### **Darrow Board Report Withheld from Public**

At a May 9<sup>th</sup> press conference President Roosevelt said he was sending the Darrow Board report along with Sinclair's minority report to the Federal Trade Commission, the Department of Justice, and the National Recovery Administration so the reports can be

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<sup>12</sup> *Code Review Goes to the President*, N.Y. TIMES, May 5, 1934, at 2.

<sup>13</sup> Report from John F. Sinclair, Member, Nat'l Recovery Review Bd., Submitted to the President (Apr. 14, 1934).

<sup>14</sup> Reported by the Associated Press from Minneapolis.

studied, summarized and given to the president in abstract form.<sup>15</sup> Roosevelt said the report was too bulky to be published but after it was summarized an analysis of it would be made public. According to Lowell Mason the first report was withheld from public release for 17 days while Johnson wrote a response to it.

On May 17<sup>th</sup> Sinclair was quoted as saying:

This fight, which has developed national interest, is not a personal one between Mr. Darrow and myself, but a difference in viewpoint on procedure; Mr. Darrow has definitely taken the position of special pleader against the position of careful research, which I believe to be the correct approach. . . . The majority report should be called the “Russell-Darrow report” because the four other members of the Review Board have had no more to do with selecting the personnel, laying out the plans, or writing the report, than they had to do with starting the last World War. It was all done by Clarence Darrow, working through the pen of his special pleader, Charles Edward Russell.<sup>16</sup>

### **Darrow Board Report Released**

The withholding of the first Darrow Board report by the FDR administration along with the public criticism by John F. Sinclair created a great deal of public interest in the report. The administration finally released the report and Sinclair’s minority report to the public on May 20. *Time* published an article on May 28, 1934 about the anticipation that surrounded the Darrow Board’s first report:

Like sentinels at a munition plant in wartime, guards stood watch before the locked doors of the printing office at the Department of Commerce for 18 hours one day last week. Behind the doors political dynamite was in manufacture, the long-awaited report by Clarence Darrow and his special board on the operations of NRA as they affected the small industrialist and businessman was being mimeographed. Also being mimeographed under guard were the dissenting report of John F. Sinclair of Manhattan, newspaper financial columnist and member of the Darrow Board, and the caustic retort of General Johnson.

At the zero hour 150,000 words of controversy were dumped upon the public. Vitriolic bomb shells of recrimination burst in the camps of Johnson and Darrow while Sinclair's trench mortar added to the loud discord. By and large the U. S. took the bombardment without flinching.<sup>17</sup>

The first report covered the codes for the following industries: Iron & Steel Industry, Motion Picture, Bituminous Coal, Cleaning & Dyeing Trade, Retail Solid Fuel, Ice, Electrical Manufacturing, and Rubber Manufacturing (footwear division). The Darrow Board report contained the board’s conclusions that the NRA codes promoted

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<sup>15</sup> *President Refers Darrow Report*, N.Y. TIMES, May 10, 1934, at 4.

<sup>16</sup> *Sinclair Renews Attack on Darrow*, N.Y. TIMES, May 17, 1934, at 2.

<sup>17</sup> *Recovery: Darrow Report*, TIME, May 28, 1934.

monopolies and this hurt small businesses. According to an article written in 1990: “The 155-page Darrow report made a scathing attack upon the NRA, which repudiated the very essence of the NRA idea—that business could regulate itself for the benefit of all. The Report vehemently denounced the big businessmen’s domination of the codes.”<sup>18</sup> Lowell Mason stated that the board encountered more complaints filed against the motion picture code than any other.<sup>19</sup> The report about the motion picture code stated that “Monopolistic practices in this industry are bold and aggressive and its small enterprise is cruelly oppressed.”<sup>20</sup>

### **Special Report Controversy**

The controversy between the Roosevelt administration, especially Hugh Johnson, and the Darrow Board grew when Darrow and William O. Thompson signed and issued a *Special and Supplementary Report to the President*. The special report, made public simultaneously with the first board report on May 20, was written by Thompson who convinced Darrow to sign it. The five page report advocated socialism to fix the economic ills of the country. The report stated, “The choice is between monopoly sustained by government, which is clearly the trend in the National Recovery Administration, and a planned economy, which demands socialized ownership and control, since only by collective ownership can the inevitable conflict of separately owned units for the market be eliminated in favor of planned production.”<sup>21</sup>

The public believed the special report came from the Darrow Board and assumed it reflected the board’s views because Darrow signed it. But in reality it was totally contradictory to the Darrow Board report. But it greatly discredited the board’s work and Johnson and other supporters of the NRA codes used it to attack the Darrow Board. Johnson urged that the Darrow Board be abolished and he pointed to the special report to support his recommendation. Darrow tried to distance the review board from the special report saying that it had no more relevance to the board’s report than did “a chapter from St. Luke” but the damage had been done.

### **Darrow v. Johnson**

Hugh Johnson was greatly angered by the Darrow Board report. In a letter dated May 15, 1934 to President Roosevelt, Johnson wrote:

A more superficial, intemperate, and inaccurate document than the report, I have never seen. In the hope of an impartial forum to which ‘little fellows’ might complain, I agreed with Senator Nye on the creation of the Board and, as the record demonstrates, nobody could have shown more good faith than I in its

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<sup>18</sup> Stephen J. Sniegowski, *The Darrow Board and the Downfall of the NRA.*, 14 CONTINUITY 63, 72 (1990) [hereinafter *Downfall of the NRA*].

<sup>19</sup> Mason, *supra* note 79, at 526.

<sup>20</sup> NATIONAL RECOVERY REVIEW BOARD: FIRST REPORT TO THE PRESIDENT OF THE UNITED STATES 5 (1934).

<sup>21</sup> CLARENCE DARROW & WILLIAM O. THOMPSON, SPECIAL AND SUPPLEMENTARY REPORT TO THE PRESIDENT (1934).



composition. But this Board is not in good faith. It assumes, after a few hours of cavalier inquiry and prejudiced and one-sided testimony, to pass on codes upon which we have spent days and weeks of inquiry and negotiation. . . . In my judgment, this Board has missed a great opportunity for real public service. As it is now acting, it is of no service to anybody—it is a political sounding board. In view of its fixed prejudices and partisanship and its unfair methods of taking and reporting on testimony, the conclusion is inescapable that the Board is not proceeding in good faith to fulfill its public obligations. Its continuance as an agency of Government would enable it to promote private purposes at the public expense, and in my judgment would impair seriously the usefulness of the National Recovery Administration. The Board was established at my suggestion to supply fair and constructive criticism. It is clearly incapable of fulfilling this function and, therefore, I recommend that it be abolished forthwith.

On May 21<sup>st</sup> Darrow released a statement in response to Hugh Johnson’s public criticism of the first Darrow Board report. Darrow said in part:

The monopolists and profiteers that were uncovered by the Review Board’s report had their innings today and with their attorneys, paid and unpaid, filled the air with their clamors. When they pause to take a breath and reason has a chance to be heard, it may be well to remind the public of certain basic facts totally and no doubt intentionally disregarded in these infuriated clamors.<sup>22</sup>

Darrow explained that the review board had only two purposes: “First, to discover if under the codes monopolistic practices existed; second, to discover if under the codes small enterprises were oppressed.”<sup>23</sup> He stated that the board found these two things did occur in certain industries. Having made its findings:

Seventeen days later its report is made public, together with the excited ejaculations of General Johnson and Mr. Richberg, who, apparently under the impression that the National Recovery Act is their personal property, break into shrieks of rage at the suggestion that operations are not perfect or are susceptible of improvement.<sup>24</sup>

Johnson responded to Darrow’s statement: “I have little comment to make on Clarence Darrow’s statement. He is a grand old man who has long had my admiration and affection. But I do have to answer his questions.”<sup>25</sup> Johnson then said if monopolistic practices existed under the codes the Darrow report did not specify where and “simply ‘finds’ generalities. It could have said all that without any hearings at all. The report is simply dogma.”<sup>26</sup>

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<sup>22</sup> *Text of Statements by Darrow and Johnson on the NRA*, N.Y. TIMES, May 22, 1934, at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Johnson also declared:

I collaborated in forming this board because I thought they would point out specific evils that we could correct. Mr. Darrow assured me that this was exactly his idea. If we had had only Clarence Darrow and the original board to deal with we would have seen some real constructive action. It was the camp followers who came in later that made the trouble.<sup>27</sup>

Johnson used the controversy generated by the Darrow and Thompson special report to criticize the Darrow Board, saying “all it has done is to render a conjectural opinion on insufficient and improper evidence, to emit a sociological essay, and to conclude that the only hope of the country is the socialism of Karl Marx and Soviet Russia.”<sup>28</sup>

At one point Hugh Johnson vented his anger at Darrow instead of just the board:

Nobody in the world was ever more adept in convincing twelve men that another man who had bombed somebody, or poisoned somebody, or taken a kanaka for a ride in the most approved gangster style, or, with psychopathic urge, taken a little boy into the Michigan dunes and beaten the life out of him, hadn't either bombed, or poisoned, or ridden or beaten anybody . . . . It's a great gift.<sup>29</sup>

The Darrow Board submitted the second report to the president on June 8. Darrow leaked this report to the press because he was angry that the administration withheld the first report for several weeks. This prompted the administration to make the second report public on June 11.

On June 13 William O. Thompson resigned from the board by sending a letter to the president. Thompson had not gotten along with board member William Neal and general counsel Lowell Mason. Thompson had refused to sign the second board report.

Less than four months after it had been created the National Recovery Review Board filed its last report on June 28, 1934. The third report had a section for conclusions the board thought important enough to emphasize. The first such conclusion was that in virtually all of the 34 codes examined “one condition has been persistent, undeniable and apparent to any impartial observation. It is this, that the code has offered an opportunity for the more powerful and more profitable interests to seize control of an industry or to augment and extend a control already obtained.”

### **Darrow Resigns, Board Abolished**

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> ARTHUR MEIER SCHLESINGER, *THE COMING OF THE NEW DEAL, 1933-1935, THE AGE OF ROOSEVELT* 134 (2003). (Johnson's reference to bombing is most likely the William Haywood trial; the reference to “a kanaka” is about the murder of Joseph Kahahawai and the Massie trial in Hawaii and the reference to the little boy is to Bobby Franks who was murdered by Leopold and Loeb.).

Darrow submitted his resignation along with the third report. The board also returned \$5,000 that it had left from the \$50,000 budget. On June 30, 1934 President Roosevelt issued Executive Order 6771 abolishing the National Recovery Review Board.

### **Hugh Johnson Resigns**

Criticism of the NRA and Hugh Johnson continued and there was internal dissention within the NRA. Johnson, who did not take the criticism well, “became increasingly irresponsible in both his rhetoric and his actions, tending to violent temper explosions and excessive drinking. Such intemperate actions finally convinced President Roosevelt that Johnson was an obstacle to the success of the NRA.”<sup>30</sup> Johnson submitted his resignation on September 24, 1934 and President Roosevelt replaced him with a five man National Industrial Recovery Board dominated by Donald Richberg.

Darrow wrote an article published in *The Rotarian* in November 1934 titled “NRA and ‘Fair Competition.’” Darrow explained his belief that because the National Industrial Recovery Act provided for the repeal of the Sherman Anti-Trust Act this allowed large corporations to gain monopoly power over small businesses despite the promise of “fair competition” under the NRA codes. Never one to mince words, Darrow sharply criticized the NRA codes:

It is all well enough to talk about fair competition and unfair competition, but the opportunity of the small businessman to compete with the large concerns on equal terms is about as fair as would be a contest in the arena between a thoroughly equipped prizefighter and a child.<sup>31</sup>

Darrow’s article was followed by a counterpoint article by Donald R. Richberg who was identified as the Chairman of the Federal Industrial Policy Committee.

### **1935**

Darrow wrote an article titled "Many Faults in NRA" that was published in the *Commercial Bulletin and Apparel Merchant* in February.

### **Senate Investigation**

The controversy created by the NRA and the National Recovery Review Board prompted the Senate to pass Resolution 79 under which the Senate Committee on Finance began an investigation of the National Recovery Review Board. The committee began holding hearings on March 7, and concluded on April 18, 1935. The hearings generated four volumes of material. Lowell B. Mason served as counsel for the Senate Judiciary Subcommittee investigating the NRA.

### **Darrow Testifies**

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<sup>30</sup> *Downfall of the NRA*, *supra* note 18, at 82.

<sup>31</sup> Clarence Darrow, *NRA and “Fair Competition,”* 45 ROTARIAN 12, 52 (1934).

Clarence Darrow was called to testify on March 20. Darrow told the committee that the board had “great trouble” getting the reports circulated so “I delivered no more to the President. I did not see that the law said it should be delivered to him so that he could put it in the closet, but carry it to the people, so in surreptitious ways and in other ways we put this out so far as the papers would publish it. A good share of them did.”<sup>32</sup>

Darrow was asked if he formed any opinions during his investigation. He replied that “[t]he outstanding opinion was that the N.R.A. was gotten up to help ‘big business’, and they could not help big business very much unless they took the business away from the small fellows. We arrived at that conclusion from what seems to be perfectly obvious and undisputed evidence.”<sup>33</sup>

Darrow reiterated one of the main complaints by small manufacturers--the minimum prices set by the codes took away the only chance small businesses had to compete. He told the committee “The only possible way that the little man can live is to charge less for his stuff than the big man does, and the big fellows have to charge because their expenses are great.”<sup>34</sup>

Darrow as usual made those in attendance laugh numerous times. He took several digs at his friend Donald Richberg when he was criticizing the NRA legislation. Darrow said, “Let me tell you who made this thing. I am not going to talk about you, Don; I might if you were not here. Once he was a friend of the poor man. Once, I said.”<sup>35</sup> At another point Darrow was asked about the effect of the NRA on child labor. He responded “Of course it was going out of style fast. When my friend Richberg begins to tell what they have done he says that they have abolished child labor the first thing. I was working on that before he was born.”<sup>36</sup>

Darrow showed his preference for a controlled economic system when he stated “I think that something like a socialist system would be the only thing that would make anything like an equal distribution of wealth.”<sup>37</sup> At another point when asked about economic laws he said “I would say that the best theory to get would be that of some of the old philosophers, William Morris among the rest, ‘to everybody according to his needs, and from everybody according to his capacity.’”<sup>38</sup>

### **Mason Sees Parallels Between NRA and Mussolini’s Fascism**

Lowell Mason testified and was asked if there were parallels between the NRA and Fascist corporative state operations. Mason replied “Yes, sir; they are both handled on

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<sup>32</sup> *Investigation of the National Recovery Administration: Hearings on S. Res. 79 Before the S. Comm. on Finance, 74th Cong.* 298 (1935).

<sup>33</sup> *Id.* at 299.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 303.

<sup>36</sup> *Id.* at 306.

<sup>37</sup> *Id.* at 308.

<sup>38</sup> *Id.* at 309.

the same lines. Mr. Mussolini says that he has taken his Fascist state from our industrial system and he has incorporated it also into the political state. The founders of Fascism in this country believe that we should first complete our industrial Fascism, have the Government control of industry through N.R.A. as the first step, in other words, we should not have a march on Washington such as they had in Rome, nor should we have the Beer Hall Putsch such as they had in Germany, but that the whole thing can be accomplished through the N.R.A. organization . . . .”<sup>39</sup>

Mason told the committee that this industrial fascism would be done through the “fair competition” codes “according to the theory of the NRA and the Fascist theory, that is legislation, the law of the land, they send men to jail or fine them or put them out of business by refusing to give them the ‘blue eagle’ if they disobey the law, which is far more effective, Senator, than the castor-oil treatment which is given in Italy in making men line up with the regimentation.”<sup>40</sup>

### **NRA Ruled Unconstitutional**

President Roosevelt wanted the NRA renewed for two years and sent a bill to congress to pass the renewal. On May 27, 1935, while the bill was still pending, the United States Supreme Court held the National Recovery Act invalid because it unconstitutionally regulated intrastate commerce and it was an impermissible delegation of legislative authority to the president.<sup>41</sup> Four days after the *Schechter Poultry* decision President Roosevelt angrily denounced the decision in a press conference because “We have been relegated to the horse-and-buggy definition of interstate commerce.”

The Brookings Institution did a comprehensive review of the National Recovery Administration. It issued five reports and in the last published in 1935 it included a brief mention of the Darrow Board:

An outgrowth of the attack in Congress was the appointment by the President on March 7 of the National Recovery Review Board, the so-called Darrow board. The negotiations preceding its appointment lasted six weeks and were widely publicized. Its three reports made in May and June of the same year, covering an examination of some 34 codes, included a sweeping denunciation of NRA as an agency promoting monopolistic exploitation and causing oppression of small enterprises. This board was ill equipped, on the side of fact finding and procedure, for effective accumulation and analysis of evidence. Nevertheless, its existence was of very great importance. Throughout the spring of 1934, it kept before the country, the President, and the NRA itself the idea that all was not well with the

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<sup>39</sup> *Id.* at 1114.

<sup>40</sup> *Id.*

<sup>41</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *See also* *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (declaring as an unconstitutional delegation of legislative power the National Industrial Recovery Act, ch. 90, § 9(c), 48 Stat. 195, 200 (1933)).

codes. It dramatized the need for internal re-examination of the results of code making.<sup>42</sup>

A scholar writing about the Darrow Board and the NRA concluded:

It seems apparent that the Darrow Board played a major role in the downfall of the NRA. While the NRA was criticized by persons of various opinions, such as liberal collectivists and classical economists, criticism by small business proved most effective in stimulating public, and especially congressional, opposition to the NRA. The Darrow Board provided the perfect forum for the small-business critics of the NRA. The Darrow Board definitely was partisan; it did not weigh evidence in a detached manner, but tried to make a case against the NRA. At the same time, however, it was mainly, though not entirely, philosophically consistent. The Darrow Board reflected a belief in the competitive market system; this was diametrically opposed to the cooperative, corporate ethos upon which the NRA was based. From the viewpoint of the Darrow Board, the problem was not that the NRA had gone astray; rather, its very nature was malign.<sup>43</sup>

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<sup>42</sup> LEVERETT S. LYON, ET AL., *THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL* 710-11(1935).

<sup>43</sup> *Downfall of the NRA*, *supra* note 18, at 83.