

To: Participants in the ABF/Northwestern Legal History Colloquium  
From: Dan Ernst  
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I am grateful to Executive Director/Professor Mehrotra and Professor Shoked for their invitation to present in the colloquium and their willingness to have our discussion be based on a draft not of an article but of a chapter from a book in progress, entitled *FDR's Lawyers, 1933-1935*. Please don't circulate the draft, cite it, or (outside of the colloquium) quote from it.

Because the chapter, "Reefs and Shoals," places you *in media res*, I should say something about the book. In lieu of the introduction I've yet to write, here is a precis of the book and a short conference paper, "Of Sheepdogs and Ventriloquists: Government Lawyers in Two New Deal Agencies."

At least since Basil Rauch's *The History of the New Deal, 1933-1938* (1944), the Roosevelt administration in the years 1933-1935 has often been denoted the "First New Deal," with FDR's legislative campaign of 1935 marking a second one. The basis for that periodization usually was said to be some approach to policymaking thought to dominate legislation and administration, such as (for the first period) "associationalism" or "corporatism" and (for the second) "Brandeisian" antimonopolism or the creation of "countervailing power." Some professional historians, mindful of the improvised and eclectic nature of federal policymaking throughout the Thirties, use the typology of First and Second New Deals warily if at all.

Even so, the first two years of the New Deal strike me as a useful historical period when they are viewed as part of the history of liberal democracy and its rivals in the United States and the world.<sup>1</sup> My focus is less the substance of legislation and administration than the structure and procedures of governance. The economic collapse of 1933 gave Roosevelt the chance to pursue a very ambitious legislative agenda in the special session of Congress that convened on March 9. Many of the new laws indulged in what the friendly critic Alexander Sachs called "unspecified, endlessly discretionary delegation of power by Congress to the Executive." (Sachs felt Congress ought to have emulated "British liberalism in working out detailed and specific legislation for specific economic problems upon specific records of study.") Another friendly critic, the journalist William Allen White, observed that Congress had put "unheard of powers into the hands of the Administration" less because of the merits of the proposed measures than because of "the confidence of the people in the President," who might "soon find himself entrusted with more real power than lies in the hands of any man on the planet." No less a progressive than Justice Louis Brandeis became alarmed. "It was a terrible thing to vest absolute power in one man, and adjourn for so long a period," he wrote of Congress in November 1933. FDR's "aberrations and plunges" had been "the inescapable penalties paid for conferring absolute

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<sup>1</sup>Ira Katznelson, *Fear Itself* (2013); Kiran Klaus Patel, *The New Deal: A Global History* (2016).

power.”<sup>2</sup>

By the middle of 1935, the danger of what Tom Ginsburg and Aziz Huq call “democratic erosion” was contained.<sup>3</sup> I argue that many—but not all—members of the legal cohort known as “New Deal lawyers”—top graduates of the nation’s case-method law schools who worked in the Roosevelt administration—served as one of the “guard rails” that preserved liberal democracy in the United States. This is what one might expect from the sociology of the professions and, in particular, Terence Halliday and Lucien Karpik’s association of lawyers with political liberalism, if only because one of liberalism’s components, the rule of law, would seem to be a prerequisite of the commodifiable expertise from which lawyers profit. But, as Halliday and Sida Liu later argued, lawyers can also thrive as “embedded” brokers within quite arbitrary political regimes.<sup>4</sup> Whether lawyers will form a guard rail or help steer the car through it and over the cliff is hard to predict. Professional considerations, such as career paths and the norms prevailing within a legal division, surely matter.<sup>5</sup> So do legal ones, including statutory provisions and the doctrines of constitutional and administrative law. And so do political ones: the organization and strategies of political parties and the autonomy and capacity of state agencies. A narrative alive to each set of factors but told mostly from the vantage of particular lawyers, with their varying motivations, personalities, and talents, can help us understand what lawyers might or might not contribute to the preservation of liberal democracy in analogous times, such as our own.

*FDR’s Lawyers* views the first two years of the New Deal from the vantage point of three

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<sup>2</sup>Alexander Sachs to Hugh S. Johnson, May 20, 1933, box 9, Acheson-HST MSS; William Allen White, “Sees Barons of Finance in Full Retreat,” *Des Moines Register*, May 28, 1933, 5; “*Half Brother, Half Son*”: *The Letters of Louis D. Brandeis to Felix Frankfurter*, ed. Melvin I. Urofsky and David W. Levy (Norman: University of Oklahoma Press, 1991), 534, 535. Frankfurter sent a copy of White’s column (which also praised the Securities Act of 1933) to Raymond Moley with the request that he pass it on to FDR. Felix Frankfurter to Raymond Moley, June 16, 1933, box 68, Moley MSS.

<sup>3</sup>*How to Save a Constitutional Democracy* (2017), 128-131; see also Steven Livitsky and Daniel Ziblatt, *How Democracies Die* (2018), 118-119.

<sup>4</sup>Terence Halliday and Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries* (1997); Sida Liu and Terence C. Halliday, “Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers,” *Law & Society Review* 45 (2011): 831-866.

<sup>5</sup>The Federal Communications Commission was a political embarrassment until New Deal lawyers supplanted lawyers recruited from or bound for an insular radio bar. Daniel R. Ernst, “The Shallow State: The Federal Communications Commission and the New Deal,” *University of Pennsylvania Journal of Law & Public Affairs* 4 (2019): 403-458.

different lawyers and/or legal divisions. The first is Thomas G. Corcoran who, as a formal matter, worked in the Reconstruction Finance Corporation, save for five months in 1933, when he headed a “flying squadron” of lawyers under the direction, more or less, of Dean Acheson, the Undersecretary of the Treasury. As well, he served as the Washington end of a pipeline that placed top graduates of the Harvard Law School in the New Deal. Many, like Corcoran, were protégés of Felix Frankfurter. Playing the role of “network entrepreneur,” Corcoran wielded the lawyers into a “nonelectoral party” within the executive branch, a phenomenon Sidney Milkis termed “programmatically liberalism.” By the spring of 1935 Corcoran had become functionally, if not formally, President Franklin D. Roosevelt’s assistant and congressional liaison. In the summer of 1935, he became front-page news for his part in the passage of the Public Utility Holding Company Act (PUHCA).<sup>6</sup>

A second vantage point is Jerome Frank and the members of his legal division at the Agricultural Adjustment Administration (AAA), several of whom, including his principal lieutenants Lee Pressman and Alger Hiss, became members of an underground cell of the Communist Party. A restless, omnivorous mind, expert corporate reorganizer, and the author of the sensational *Law and the Modern Mind* (1930), Frank functioned less as lawyer for AAA Administrator George Peek and his successor Chester Davis than the representative of Secretary Henry Wallace, who saw Peek as a rival, and Undersecretary Rexford Tugwell, the New Deal’s most outspoken and vilified planner. As did Peter Irons in *The New Deal Lawyers* (1982), I believe that the legal division’s insistence that sharecroppers in the Cotton South had a federally enforceable right to occupy their land precipitated the dismissal of Frank, Pressman, and others (but not Hiss) in February 1935, but I have identified telling differences between Frank and his lieutenants. I also emphasize the AAA lawyers’ use of marketing agreements for the already heavily regulated dairy industry as a model of government-directed production, a goal with little or no basis in AAA’s organic statute.

The third vantage point is the National Recovery Administration (NRA), which approved codes of fair competition proposed by most of the nation’s industries. Its general counsel, Donald Richberg, a Chicago progressive, understood his role less as the head of a legal division than as a check on the NRA’s impulsive Administrator, the former cavalry officer General Hugh S. Johnson and, after Johnson’s resignation, as an “assistant president,” brokering competing interests within the executive branch. Richberg’s early failure to back his lawyers in a decisive battle over the lumber code when Bernice Lotwin, one of the few female New Deal lawyers, protested its unusually broad delegation of authority to the industry, led to a legal debacle, the government’s precipitous withdrawal of an appeal to the Supreme Court, but it did not keep the legal division from trying to make NRA an agency for formulating and implementing a liberal industrial policy.

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<sup>6</sup>Steven Teles, *The Rise of the Conservative Legal Movement* (2008); Sidney Milkis, *The President and the Parties* (1993); see also David Plotke, *Building a Democratic Political Order* (1996).

“Reefs and Shoals” is one of the book’s chapters on AAA. Following chapters on Tom Corcoran and Jerome Frank, it describes relevant proposals for reforming agricultural markets, introduces the leading administrators of the new programs, and includes the book’s first sighting of the antitrust exemption, the front along which lawyers would fight some of the fiercest intra-agency battles of the early New Deal. The chapter suggests that even so astute a lawyer as Jerome Frank was poorly prepared for Washington politics. Later chapters, written and unwritten, introduce NRA and follow it through the *Schechter Poultry* decision of May 1935, track Corcoran through PUHCA’s passage in August 1935, and narrate internal strife at AAA culminating in the “purge” of February 1935.

Those wishing a fuller view of Jerome Frank and his lawyers may read my symposium article, “Mr. Try-It Goes to Washington: Law and Policy in a New Deal Legal Division,” *Fordham Law Review* 87 (2019): 1795-1815, which is available online on SSRN or from the law review’s website.

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Of Sheepdogs and Ventriloquists:  
Government Lawyers in Two New Deal Agencies

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“Research on state building in the U.S.,” writes the political scientist Gerald Berk, “usually holds twentieth-century governance to a single set of standards, namely those of Weberian (or Prussian) bureaucracy: autonomy, hierarchy, legitimate authority, professionalism, and the capacity to monitor and control behavior.”<sup>7</sup> Typically, it emphasizes the United States’ departure from a continental European norm. European nations bureaucratized before they democratized, but the United States adopted universal white male suffrage before it created many centralized, locality penetrating bureaucracies. When it came to America, bureaucratic autonomy, the condition in which “a politically differentiated agency takes self-consistent action that neither politicians nor organized interests prefer, but that they either cannot or will not overturn or constrain in the future,” rarely came from the top down, through orderly hierarchies of specialized, full-time officials. Rather it emerged in the middle of federal executive departments as bureau chiefs and other “mezzobureaucrats” recruited nonpartisan staffs, developed state capacity, and cultivated constituencies.<sup>8</sup>

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<sup>7</sup>Berk, “The National Recovery Administration Reconsidered,” *Studies in American Political Development* 25 (2011): 83.

<sup>8</sup>Martin Shefter, *Political Parties and the State: The American Historical Experience* (Princeton, NJ: Princeton University Press, 1994); Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton, NJ: Princeton University Press, 2001).

Scholars of American political development recognize that the legal profession has had an outsized role in building the national state. Stephen Skowronek, for example, considered lawyers the “special intellectual cadre” that ran the nineteenth-century state of courts and parties. Further, the sociologist Terence Halliday has distinguished two ways in which lawyers engage in politics, turning on the nature of the authority they assert. “Technical” authority arises from the special expertise of the professional. For lawyers, Halliday mentioned “skill in understanding statutes, drafting contracts, and executing corporate mergers,” which lawyers can exercise without taking an explicit stand on what the law should contain.” “Normative” authority relates to “broad issues of public policy concerning which every citizen should be in a position to come to a decision.” Lawyers are most authoritative when they invoke their technical authority, but because lawyers have “technical authority in a normative system,” they have “an unusual opportunity to exercise moral authority in the name of technical advice” and “exert enormous influence in great tracts of social life.”<sup>9</sup>

When I started in on a book on New Deal lawyers with such literatures in mind, I expected to find my subjects employing their technical authority to bring the responsible executive and bureaucratic autonomy to the federal government. I pictured them as sheepdogs, nipping at the heels of potentially wayward administrators. By authoritatively interpreting statutes, they would help agency heads keep mezzobureaucrats in line. By requiring that orders be supported by finding of facts on a record, they would keep officials from wandering into the arms of businesses and professional politicians. Sometimes the lawyers behaved just this way, but even then they followed their own professional and political instincts rather than simply heeding their master’s voice.

Consider the Agricultural Adjustment Administration (AAA). It was created within the US Department of Agriculture and formally subject to Secretary Henry A. Wallace to establish marketing agreements and production controls to give farmers the buying power they enjoyed before the outbreak of World War I. Its administrator, George Peek, had wanted Wallace’s job and extracted a promise of direct access to FDR before taking the position. Wallace’s undersecretary was Rexford Tugwell, an institutional economist who, with two other Columbia professors, formed FDR’s “brains trust” during the 1932 campaign. Jerome Frank, a corporation lawyer and sojourner among Yale’s legal realists, was formally Peek’s general counsel, but functionally Wallace’s and Tugwell’s agent within AAA. Wallace, Tugwell, and Frank shared Wallace’s apartment in the first days of the New Deal; for a while thereafter, Frank and Tugwell shared other quarters and were close friends.

Wallace, Frank and Tugwell were all for raising farmers’ income but all against allowing food processors to pad their profits. Peek, formerly president of a farm implement company, was much less solicitous of the consumer, even though the statute directed AAA to “protect the consumers’ interests” as well as to establish parity prices. But for the Agricultural Adjustment Act, the marketing agreements would violate the antitrust laws. To ensure that they were within

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<sup>9</sup>Halliday, *Beyond Monopoly* (Chicago: University of Chicago Press, 1987), 38-41.

the antitrust exemption, Frank's legal division, which included Alger Hiss, Louis Jaffe, Lee Pressman, Frank Shea, and Telford Taylor, carefully reviewed their terms and insisted on access to the books and records of the food processors. Peek and his subordinates, recruited from industry, generally joined in the processors' resentment of the lawyers' "captious legal objections."<sup>10</sup>

Early on, Peek complained that the lawyers were assuming a policymaking role invested in the AAA's administrators. Frank replied that the legality of the marketing agreements turned on the scope of Congress's delegation in the Agricultural Adjustment Act and, for agreements beyond it, the reasonableness of their restraint of trade. To resolve those issues, his lawyers could not possibly "draw a nice line between policy and law" and "dismiss all questions of policy as none of our business." Peek pushed back hard; Frank, reassured by Tugwell, held his ground until Wallace forced Peek out in December 1933. For months thereafter, the lawyers were riding high and wide at AAA, confident that in resisting the administrators they were doing Wallace's bidding.<sup>11</sup> Only when they set their professional authority against the political might of the Cotton South over the rights of sharecroppers did Wallace balk and acquiesce in the "purge" of Frank, Pressman, Shea and others.

For a contrast, consider the National Recovery Administration (NRA). The National Industrial Recovery Act authorized the president to promulgate codes of fair competition for individual industries. As at AAA, an extremely able group of lawyers (including Thomas Emerson, Milton Katz, and Stanley Surrey) advised administrators overwhelmingly recruited from business. Once again, the basis for the lawyers' claim of authority was statutory: did a code advance the policies of the statute or instead permit industrialists to enjoy monopolistic profits?<sup>12</sup> Once again, when lawyers insisted on defining the antitrust exemption, administrators accused them of exceeding their role. One, who thought of NRA as "the moderator of the collective imaginations of American businessmen," claimed not to see that the agency's lawyers had raised "a *legal* objection" to a code.<sup>13</sup>

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<sup>10</sup>Frank, "Dairy Marketing Agreements and Licenses," July 9, 1934, box 166, ser. 6, Frank MSS. Peter Irons provides the fullest account of Frank at AAA and identified disharmony between chief administrators and general counsels as one of "four major sources of political conflict" experienced by New Deal lawyers. *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982), 10.

<sup>11</sup>Irons, *NDL*, 128-32; Jerome Frank to Felix Frankfurter, December 20, 1935, ser. 2, box 12, Frank MSS.

<sup>12</sup>NIRA also forbid codes "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them."

<sup>13</sup>Dudley Cates to Hugh S. Johnson, August 18, 1933, box 6, entry 20, PI 44, NRA Records.

NRA differed from AAA in at least one important respect. At AAA, Frank plausibly claimed to be implementing the policies of Secretary Wallace. At NRA, a Brookings Institution study found, “there existed no real policy-making body.” The Administrator, Hugh S. Johnson, was a former cavalry officer and had overseen the draft during World War I. He approached FDR’s charge to NRA “to get many hundreds of thousands of unemployed back on the payroll by snowfall” as urgently as he had the creation of the American Expeditionary Force. To put “a plane of competitive action” beneath the downward spiraling economy, Johnson instructed his subordinates “to get the codes in” now and deal with abuses if and when they arose. Negotiations took the form of “plain horse trading and bare-faced poker playing,” as administrators agreed to price controls and production limitations in exchange for pledges of minimum wages, maximum hours, and observance of the right to organize and bargain collectively.<sup>14</sup>

General Counsel Donald Richberg agreed that industrialists had to be coaxed into code-making. He directed his lawyers to approve even the most dubious on an experimental basis. Despite this retreat, lawyers found that administrators, “looking in desperation for some source of advice detached from any one of the special interests represented in the code bargaining process,” sometimes turned to them. On such occasions, their advice went “beyond the issues of law, far into the realm of general policy.”<sup>15</sup>

Conflicting signals from the top allowed lawyers to acquire this authority. Johnson acted as “a mere arbitrator among warring groups with their relative strengths determining the final formulation of policy.” After his behavior became intolerably erratic, he was forced out in September 1934. His replacement, a board representing the conflicting factions, did little better. In April 1934, Associate General Counsel Blackwell Smith had been named “assistant administrator of policy” as well as *de facto* head of the legal division; he and his lawyers had won control of policymaking in early 1935, but they never succeeded in imposing their policies on the code authorities before *Schechter* rang the curtain down<sup>16</sup>

At AAA and NRA, lawyers were not or not simply committed to making federal bureaucracies more closely approximate Weber’s ideal type. Recall my government-lawyer-as-sheepdog metaphor. Sheepdogs reflexively react to their masters’ commands; the New Deal lawyers displayed rather more agency. “We young fellows were well aware of the varied crew

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<sup>14</sup>Leverett S. Lyon et al., *The National Recovery Administration* (1935), 61, 40 n. 11, 46; Leverett S. Lyon and Victor Abramson, *Government and Economic Life* (1940), 1055, 1038-39 n. 6; Colin Gordon, *New Deals: Business, Labor, and Politics in America, 1920–1935* (New York: Cambridge University Press, 1994), 174.

<sup>15</sup>Lyon, *NRA*, 63-64.

<sup>16</sup>Lyon and Abramson, *GEL*, 1040, 1038-39 n. 6; Lyon, *NRA*, 742.

that manned the New Deal ship of state and that some of our crusading efforts had to be directed inwards,” Alger Hiss recalled of his AAA days. “For example, Peek was out of step with what we believed was the ‘true’ spirit of the New Deal; Wallace and Roosevelt, our leaders and champions, of course exemplified the ‘true’ spirit. So Peek’s discomfiture and exit seemed to us part of the script.”<sup>17</sup>

Jerome Frank provides an unusually revealing view of one of the New Deal lawyers’ tactics, the projection, in something approaching an act of ventriloquism, of their normative preferences onto the law, which they then invoked in an assertion of technical authority. Like other New Deal lawyers, Frank regularly asserted a technical expertise grounded in positive law. Milk licenses, for example, had to “be measured by the yardstick of conformity with the language of the statute.”<sup>18</sup> Unlike other New Dealers, he publicly propounded a theory of law that eroded the distinction between technical and normative expertise.

“Perhaps there is no greater obstacle to effective governmental activity than the prevalent notion that the ‘law,’ at any given period of time is moderately well known or knowable,” Frank told a national gathering of social workers in June 1933. Statutes and judicial opinions were “extremely defective instruments of prediction as to what courts will decide in particular future cases.” In fact, judges started “with what they consider a desirable decision and then work backward to appropriate premises, devising syllogisms” as they went until they arrived at an aesthetically pleasing justification of “what they think just and right.”<sup>19</sup>

Frank implied that the technical expertise of lawyers consists in the ability to predict what a future judge will “think just and right” in a particular case. The closest approximation of an explanation I’ve found is Frank’s December 1933 address to the AALS. In it, he conjured up a paradigmatic New Deal lawyer, Mr. Try-It.<sup>20</sup> One day the young lawyer was asked to determine

whether, under a certain statute, a proposed program for the relief of the destitute would be lawful. Mr. Try-it started with his objective. “This,” he said, “is a desirable result. It is all but essential in the existing crisis. It means raising the standard of living to thousands. The administration is for it, and justifiably so. It is obviously in line with the

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<sup>17</sup>Lawrence J. Nelson, *King Cotton’s Advocate: Oscar G. Johnston and the New Deal* (Knoxville: University of Tennessee Press, 1999), 87.

<sup>18</sup>Frank, “Dairy Marketing Agreements and Licenses.”

<sup>19</sup>Frank, “Realistic Reflections on ‘Law’ as a Constructive Social Force,” June 16, 1933, box 166, ser. 6, Frank MSS; Frank to Leon Henderson, July 31, 1939, box 29, entry ww: 172, SEC Records; Frank, “Realism in Jurisprudence,” *American Law School Review* 11 (1934): 1065.

<sup>20</sup>Frank, “Realism in Jurisprudence,” 1065.



general intention of Congress as shown by legislative history. The statute is ambiguous. Let us work out an argument, if possible, so to construe the statute as to validate this important program.”

Certainly Mr. Try-It employed one form of Halliday’s technical expertise, “skill in understanding statutes.” Note, though, that statutory interpretation was the *third* step in Mr. Try-It’s analysis. He started with his own belief that “the relief of the destitute” was “a desirable result.” Even verifying that the Roosevelt administration was “for” relief was a secondary consideration.

Frank did not say why Mr. Try-It’s notion of “a desirable result” was a good predictor of what a future judge might “think just and right.” His most likely answer, I think, was that lawyers trained in “the functional approach” could divine the “immanent rationality in social life,” which the judge would also heed.<sup>21</sup> If this was indeed Frank’s notion of lawyers’ technical expertise, is it surprising that his adversaries demurred and complained that his “principal interest in the AAA was undoubtedly policy and not law”?<sup>22</sup>

If bureaucracies and professions always marched toward modernity in unison, then characterizing the lawyers’ contribution to the New Deal as the forging of bureaucratic autonomy might suffice. But, like Brian Balogh, I have found that they freely departed from the Weberian playbook.<sup>23</sup> Working within agencies that were more “bundles of rules, cognitive principles, or instruments” than “order-making machines,” the New Deal lawyers’ goals set them apart from and sometimes against their administrators.<sup>24</sup> Understanding the state they built and left for us requires seeing them not simply as agents of American political development but also as self-interested actors in American political history.

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<sup>21</sup>Robert W. Gordon, “Historicism in Legal Scholarships,” *Yale Law Journal* 90 (1981): 1028.

<sup>22</sup>Leonard D. White, *Government Career Service* (1935).

<sup>23</sup>Brian Balogh, “Reorganizing the Organizational Synthesis,” *Studies in American Political Development* 5 (1991): 119-72.

<sup>24</sup>See Gerald Berk, *Louis Brandeis and the Making of Regulated Capitalism, 1900-1932* (New York: Cambridge University Press, 2009), 15, 16-17.

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## Reefs and Shoals

“Jerome Frank has gone to Washington to the Department of Agriculture,” Felix Frankfurter alerted Tom Corcoran. “I have told him about you . . . and that you would give him help in finding his way about Washington’s reefs and shoals.” Frank was “a fine fellow, with a certain touch of charming naivete hardly consistent with his broad diatribes on paper.”<sup>25</sup>

Frank may not have realized it when he entered the massive South Building of the U.S. Department of Agriculture on a much warmer and sunnier day than the one that saw the start of Franklin D. Roosevelt’s presidency a fortnight earlier, but he badly needed the advice of someone like Corcoran, “a shrewd fellow generally,” Frankfurter explained to Frank, “who knew “a good deal about Washington ways.”<sup>26</sup> And even with Corcoran’s help, Frank was mostly on his own as he navigated the unfamiliar policies, people, and politics of FDR’s Hundred Days. The waters, he soon discovered, were treacherous.

The origins of the farm problem stretched back to World War I. “While Europe sowed its fields with high explosives,” Henry A. Wallace, FDR’s first Secretary of Agriculture, wrote, “America was sowing more wheat to feed the men who made and fired the explosives.”<sup>27</sup> American farmers incurred debt to expand acreage, often onto marginal land, and labor-saving equipment.

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<sup>25</sup>Felix Frankfurter to Thomas Corcoran, March 21, 1933, box 638, Corcoran MSS.

<sup>26</sup>Felix Frankfurter to Jerome N. Frank, April 2, 1933, box 197, Corcoran MSS.

<sup>27</sup>Henry A. Wallace, *New Frontiers* (New York: Reynal & Hitchcock, 1934), 142.

Farm income hit \$17 billion in 1919, plummeted in 1920, and then recovered to about \$11.5 billion, higher than the prewar levels but not enough to service the debts farmers incurred in the wartime expansion. Meanwhile, industrial prices stayed high, so that by 1921 farmers' purchasing power was only 77 percent of its prewar value.<sup>28</sup> Prices for many agricultural commodities declined over the decade. Between 1919 and 1932, cotton, of crucial importance to Roosevelt's electoral base in the South, fell from \$35 cents a pound to 6.5 cents. "Twelve-cent cotton," the prevailing price in 1926, would be one of FDR's most anxiously sought goals at the start of his presidency. Between 1919 and 1932, the price of wheat fell from \$1.53 to 14 cents a bushel. Cattle prices dropped by 63 percent; hog prices by nearly 80 percent. Prices for dairy products fared much better through 1929, although their decline from 1929 to 1932 was steep.<sup>29</sup>

Meanwhile, credit to rural markets slowed to a trickle. Capital invested in agriculture was \$79 billion in January 1919; in January 1933, it was only \$38 billion, while farm debt continued almost unchanged. Together with taxes, interest payments on mortgages another debt consumed almost a quarter of gross farm income.<sup>30</sup> In Minnesota, the average wheat farmer could service his debt with 116 bushels in 1919; in 1933 he needed 743. Foreclosures jumped to unprecedented levels, but banks had little takers for the land thus recovered. Four thousand

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<sup>28</sup>Van L. Perkins, *Crisis in Agriculture: The Agricultural Adjustment Administration and the New Deal, 1933* (Berkeley: University of California Press, 1969), 19; Chester C. Davis, "The Development of Agricultural Policy Since the End of the World War," in *Yearbook of the United States Department of Agriculture* (1940), 300.

<sup>29</sup>Sebastian Edwards, *American Default: The Untold Story of FDR, the Supreme Court, and the Battle over Gold* (Princeton, NJ: Princeton University Press, 2018), 48; John D. Black, *The Dairy Industry and the AAA* (Washington, DC: Brookings Institution, 1935), 64-75.

<sup>30</sup>Henry A. Wallace, "The Year in Agriculture," in *Yearbook of Agriculture, 1934* (Washington, DC: Government Printing Office, 1934), 2.

failed in 1933 alone.<sup>31</sup>

Midwestern farmers rebelled in collective actions that sometimes turned violent. Some prevented the marketing of commodities by blockading farm-to-market roads, besieging uncooperative farmers, and dumping milk. Others targeted the credit system by disrupting auctions of foreclosed properties with “penny sales,” in which the only bidder acquired the farm at a trivial price and returned it to its occupant, or by marching on state legislatures in support of “mortgage moratorium” laws. Minnesota’s law, adopted in 1932, would produce a landmark of American constitutional history in *Home Building and Loan Association v. Blaisdell*, decided by the U.S. Supreme Court in 1934.<sup>32</sup> Unemployed farm hands joined the ranks of the urban unemployed. In Chicago, nighttime holdups of delivery trucks, not for cash but for milk and bread, became distressingly common.<sup>33</sup> When further governmental efforts proved unavailing, farm unrest became more organized and sometimes turned violent. On April 27, 1933, with Roosevelt’s farm bill stalled in Congress, eight ringleaders and a mob of spectators seized a judge who would not promise to uphold Iowa’s new mortgage moratorium law, transported him to a county crossroad, where they beat him, fixed a noose around his neck, and hoisted him aloft until he lost consciousness. After lowering him, they forced the judge to pray for farmers and for his own deliverance. After removing his trousers and filling them with dirt and grease, they left

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<sup>31</sup>John A. Fliter and Derek S. Hoff, *Fighting Foreclosure: The Blaisdell Case, the Contract Clause, and the Great Depression* (Lawrence: University Press of Kansas, 2012), 48; Davis, “Development of Agricultural Policy,” 314.

<sup>32</sup>Perkins, *Crisis*, 13-14; John L. Shover, *Cornbelt Rebellion: The Farmers Holiday Association* (Urbana: University of Illinois Press, 1965), 41-57, 77-97.

<sup>33</sup>Russell Lord, *The Wallaces of Iowa* (Boston, MA: Houghton Mifflin, 1947), 317.

him to make his own way home.<sup>34</sup>

During the collapse of the farm economy, reformers advanced a number of agricultural reforms. The most prominent one looked to the tariff and subsidized exports to keep prices up without calling upon farmers to limit their production. Known as McNary-Haugenism after the Congressional sponsors of legislation embodying it, the scheme would have the federal government set a “fair exchange value” for each major crop at a price that gave farmers the purchasing power for industrial goods that they had enjoyed before World War I. Commodities bound for domestic markets would be purchased at that price, protected from imports by the tariff. A government corporation would purchase any surplus at the domestic price, sell it abroad on the world price, and be compensated for the difference by an “equalization fee” ultimately borne by consumers.

This “two-price” or “export subsidy” plan debuted in a pamphlet, “Equality for Agriculture,” that circulated anonymously in December 1921 but was soon revealed to be the work of George N. Peek and Hugh S. Johnson, executives of the Moline Plow Company. Peek, the more persistent advocate of the plan, was square-jawed, blue-eyed, six feet tall, with an ancestry stretching back to seventeenth-century Massachusetts. Described by his biographer as “a man of singular energy and ability,” who preferred “frontal assaults” to more subtle tactics, Peek reached the top managerial ranks at John Deere & Company before resigning after the United States’s entry into World War I to help Bernard M. Baruch, the head of the War Industries

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<sup>34</sup>“Troops to LeMars to End Mob Rule,” *Davenport Daily Times*, April 28, 1933, 1, 2.

Board (WIB), put the economy on a war footing.<sup>35</sup> Peek greatly admired Baruch, a wealthy financier and contributor to Democratic politicians. Baruch also came to appreciate Brigadier General Hugh S. Johnson, who liaised between the WIB and the US Army and matched Peek in intelligence, self-assuredness, and admiration for the man they both would come to refer to as “Chief.”<sup>36</sup>

After the war, Peek became president of the Moline Plow. Convinced it could become profitable if it expanded beyond tillage equipment, Peek commenced producing a full line of farm implements and hired Johnson to help him. The depression of 1920-1921, which brought the company to the brink of bankruptcy, disrupted his plans. In the ensuing reorganization, the chair of the creditors’ committee, a banker client of Levinson, Becker, was so eager to retain Peek that, over Jerome Frank’s objection, he agreed to an extremely generous profit-sharing agreement with the businessman. The creditors thought Peek had agreed to stick to plows, but he proceeded with his plans for full-line production. Hugh Johnson, in what Peek considered a betrayal, sided with the creditors. When the creditors’ committee tried to cancel his contract, notwithstanding Frank’s opinion that they lacked grounds for doing so, Peek and two associates sued, ultimately receiving a settlement of \$280,000 (about \$4.2 million today). Peek’s share set him up for life, freeing him to fight for his export-subsidy plan.<sup>37</sup>

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<sup>35</sup>Gilbert C. Fite, *George N. Peek and the Fight for Farm Parity* (Norman: University of Oklahoma Press, 1948), 38, 23.

<sup>36</sup>Confirm: John Kennedy Ohl, *Hugh S. Johnson and the New Deal* (DeKalb: Northern Illinois University Press, 1985), 3-19; Jordan A. Schwarz, *The Speculator: Bernard M. Baruch in Washington, 1917-1965* (Chapel Hill: University of North Carolina Press, 1981), 286-287.

<sup>37</sup>Jerome N. Frank, “The Reminiscences of Jerome New Frank” (1952), 54-58, COHA; Fite, *Peek*, 36-37, 72-76, 100; “New Capital for Plow Co. Plans Given,” *Davenport Daily Times*,

The obvious dedication of “the Man from Moline” to his cause won Peek the respect of farm leaders, government officials, and the farm bloc in Congress. Henry C. Wallace, Secretary of Agriculture from 1921 to 1924 and the father of Henry A. Wallace, guardedly endorsed export subsidies in 1923 and sent a department official named Charles Brand to Moline to confer with Peek and draft legislation. A revision of Brand’s draft was introduced in Congress but failed to pass in 1924. Undeterred, Peek created an organization to lobby for the bill and recruited Chester Davis, Commissioner of Agriculture in Montana and a farm journal editor, as his lieutenant. Thanks to Peek’s relentless efforts, the bill twice passed Congress, only to be felled by Calvin Coolidge’s vetoes.<sup>38</sup>

After the second veto, in 1928, Davis called it quits. McNary-Haugenism, he observed, required large and open markets, but other nations had erected tariff walls too high for American exports to scale. Peek stubbornly soldiered on. “He had taken a position,” Davis recalled, “he had fought for it, and fighting for it was a habit.”<sup>39</sup> Although a Republican, in 1928 Peek campaigned for the Democratic presidential candidate Al Smith rather than Herbert Hoover, a known opponent of McNary-Haugenism.<sup>40</sup> Hoover’s victory doomed the plan in Congress during his administration, but when the Depression overwhelmed Hoover’s preferred solution to

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September 10, 1921, 19; “Moline Plow Co., Inc.,” *Moody’s Manual of Railroads and Corporation Securities* (1922), 2:143. I used Measuringworth.com to calculate the present value of the settlement.

<sup>38</sup>Fite, *Peek*, 38-202; Davis, “Agricultural Policy,” 306, 307-08; Chester C. Davis, “The Reminiscences of Chester Charles Davis” (1953), 163, COHA.

<sup>39</sup>Perkins, *Crisis*, 34; Lord, *Wallaces*, 273; Davis, “Reminiscences,” 32, 242.

<sup>40</sup>Perkins, *Crisis*, 23; Fite, *Peek*, 205-220.

the agricultural crisis, loans to cooperatives to purchase commodities and keep them off the market, any Democratic presidential candidate needing to carry the farm belt would give its author a respectful hearing.<sup>41</sup>

When in April 1932 Peek asked Roosevelt to come out in favor of McNary-Haugenism, the presidential candidate responded cordially, if evasively.<sup>42</sup> He did not expressly endorse Peek's plan in his speeches or the party's platform, but he did say that the tariff should benefit farmers as much as it did manufacturers.<sup>43</sup> That claim and Peek's meeting with Roosevelt in October, also attended by Davis and other farm leaders, sufficed for the Man from Moline. He contributed substantially to Roosevelt's campaign, took to the airwaves to urge farmers to vote for FDR, and stumped for him across the Midwest. Democrats played up Peek's bolt from the Republican Party and stature among agricultural reformers. Small wonder, then, that the farm editor Henry A. Wallace wrote the president-elect that Peek should be his Secretary of Agriculture.<sup>44</sup>

Roosevelt never saw Wallace's letter, which Louis Howe, his political secretary, was thought to have intercepted, believing Peek too domineering to follow the president's lead.<sup>45</sup> Others in FDR's inner circle opposed him because they backed a solution to the farm crisis Peek

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<sup>41</sup>Perkins, *Crisis*, 24-26; Davis, "Agricultural Policy," 312-314.

<sup>42</sup>Peek to Roosevelt, April 30, 1932, quoted in Fite, *Peek*, 237.

<sup>43</sup>Franklin D. Roosevelt, "Address of Governor Franklin D. Roosevelt, Topeka, Kansas," September 14, 1932, 18, file 498, MSF FDR; Perkins, *Crisis*, 30-32.

<sup>44</sup>Fite, *Peek*, 239-240.

<sup>45</sup>Fite, *Peek*, 241-242.



abhorred. During the Twenties, agricultural economists began to argue that the markets for farm commodities, as well as for industrial goods, could be “administered,” their supply restricted or expanded with changes in demand to stabilize prices. The cooperative movement attempted this, but producers of staple crops were too numerous and dispersed to abide by agreements limiting production.<sup>46</sup> W. J. Spillman, a Department of Agriculture economist, called for some form of government-led production control in an influential book published in 1927. Other agricultural economists set to work translating “the Spillman idea” into a practical plan. Within the USDA, Mordecai Ezekiel was the most persistent advocate but nationally its greatest evangelist was M. L. Wilson, a professor at the Montana State Agricultural College. Starting in the fall of 1931, Wilson traveled the nation, pitching what he called “voluntary domestic allotment” to farmers, industrialists and anyone else who would listen.<sup>47</sup>

Under Wilson’s scheme, the U.S. Department of Agriculture would estimate the likely consumption of a crop within the United States, a share of which was then allocated to each state, county and producer. For this “domestic allotment,” the producer received a price above the world price. The Agricultural Adjustment Act of 1933 called this the “parity price,” a figure said to bring farm and tariff-protected prices back into balance and restore to farmers the purchasing power they enjoyed before the war. In exchange for this benefit, paid for with a tax levied on the

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<sup>46</sup>Victoria Saker Woeste, *The Farmer’s Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865-1945* (Chapel Hill: University of North Carolina Press, 1998), 201-202.

<sup>47</sup>Wallace, *New Frontiers*, 156-157; Perkins, *Crisis*, 27-29; Lord, *Wallaces*, 292-305, 311; Mordecai Ezekiel, “Summary of comments on H. R. 13991, as passed by the House,” January 14, 1933, box 6, Lee MSS; Richard S. Kirkendall, *Social Scientists and Farm Politics in the Age of Roosevelt* (Ames: Iowa State University Press, 1966), 24-25, 41, 50-51.

first processing of an agricultural commodity and passed on to consumers, participating farmers agreed to reduce their production. Peek complained that the scheme made the Secretary of Agriculture “the czar of farming” and “regimented” hardy American yeomen. In fact, it respected democratic principles. An allotment plan would not go into effect unless 60 percent of the producers of a commodity in a given region approved in a referendum. “The responsibility for the adoption of the plan is definitely placed upon the producers and each producer has an opportunity to vote,” a précis of the plan explained.<sup>48</sup> Even then, dissenters need not participate, although if they did not they would receive only the world price for their produce. For Wilson, the possibility that a referendum might fail was not a bug but a feature. If a domestic allotment plan could not claim the support of a supermajority of the relevant farmers, it “ought not to be in effect for any commodity,” he maintained.<sup>49</sup>

Within Roosevelt’s inner circle, the principal advocate for domestic allotment was Rexford Guy Tugwell. Tugwell entered Roosevelt’s orbit in March 1932, when his Columbia University colleague and political scientist Raymond Moley, tasked by one of FDR’s advisors to assemble university-based experts into a policy-proposing and speech-writing staff, included him in his initial list.<sup>50</sup> The hard-boiled political “professionals” around Roosevelt, such as Louis Howe, a former newspaperman who had made FDR’s election to the presidency his life’s work, and James Farley, who, as Roosevelt’s campaign manager, mustered Democratic politicians across

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<sup>48</sup>George N. Peek with Samuel Crowther, *Why Quit Our Own* (New York: D. Van Nostrand, 1936), 75, 13; Perkins, *Crisis*, 28; “Domestic Allotment,” n.d., box 6, Lee MSS.

<sup>49</sup>Lord, *Wallaces*, 314-315.

<sup>50</sup>Rauchway, *Winter War*, 85-86.

the nation behind the candidate, Moley, Tugwell, and a third Columbian, the law professor Adolf A. Berle, were unwelcome intruders, a “Brain Trust” that attempted to monopolize the manufacturing of policy for the campaign. The professionals grudgingly ceded some territory to the “amateurs” but claimed the dirty work of assembling a winning coalition for themselves and resisted efforts to tie Roosevelt to particular policies and thereby alienate possible supporters.<sup>51</sup>

Tugwell was, in Moley’s opinion, “ignorant of politics” but also “a first-rate economist” and a startlingly original thinker. “Rex was like a cocktail,” the political economist recalled, “His conversation picked you up and made your brain race along.”<sup>52</sup> He had written extensively on agriculture and tried to sell Al Smith on production limitation in 1928 until the presidential candidate finally sided with the McNary-Haugenites.<sup>53</sup>

Tugwell might have been raised on an orchard farm in western New York, but no one taking in his cool, urbane demeanor, wavy hair, and movie-star looks would mistake him for a son of the soil. Certainly, the agricultural economists in the USDA, land-grant universities, and state agricultural commissions looked regarded him an outsider, if not yet the leftist Rasputin of the New Deal’s critics. “He wasn’t a farmer in any sense,” Chester Davis observed, “and he just didn’t have enough grasp of operating problems to make me think his judgment was worth a

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<sup>51</sup>Ibid., 57, 86-87; Samuel I. Rosenman, interview by Joseph Alsop n.d., box 93, Alsop Papers; Daniel L. May “Raymond Moley and His Relationship with Franklin D. Roosevelt and the New Deal, 1932-1936” (M.A. thesis, University of Southern California, 1966), 9-23.

<sup>52</sup>Raymond Moley, *After Seven Years* (New York: Harper, 1939), 15.

<sup>53</sup>Michael V. Namorato, *Rexford G. Tugwell: A Biography* (Westport, CT: Praeger, 1988), 39, 45; Rauchway, *Winter War*, 83.

damn.”<sup>54</sup> His intellectual home was an academic subdiscipline, “institutional economics,” whose members rebelled against the laissez-faire pieties and *a priori* reasoning of the larger field. Even if Adam Smith’s theory of markets once described economic behavior, they argued, it was grotesquely outdated when large corporations ruled their industries and administered prices, limiting production to boost their profits at the expense of workers and consumers.<sup>55</sup> “The cat is out of the bag,” Tugwell declared in 1933. “There is no invisible hand. There never was.” His open scoffing at the notion that free markets automatically promoted the general welfare and his trip to the Soviet Union in 1927 with a delegation of trade unionists won him a national reputation as the New Deal’s greatest radical. “Beware!” a friend wired Jerome Frank, after meeting the economist in the lawyer’s company. “This morning at your breakfast table I saw the face of Robespierre.”<sup>56</sup>

Tugwell considered export subsidies at best a palliative; production control got to the root of the farm problem. He arranged for M. L. Wilson to lunch with Roosevelt in July 1932 and saw to it that FDR’s public statements on farm policy were at least compatible with Wilson’s domestic allotment plan.<sup>57</sup> Convinced that agriculture was part of a larger, “delicately balanced”

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<sup>54</sup>Namorato, *Tugwell*, 12-13; Lord, *Wallaces*, 348; Davis, “Reminiscences,” 341.

<sup>55</sup>Walton H. Hamilton, “The Control of Big Business,” *Nation* 134 (May 25, 1932): 591-593; see Malcolm Rutherford, *The Institutional Movement in American Economics, 1918-1947: Science and Social Control* (New York: Cambridge University Press, 2011).

<sup>56</sup>The quotation is from an address delivered in June 1933, published in Rexford Guy Tugwell, *The Battle for Democracy* (1935; New York: Greenwood Press, 1969), 14; Namorato, *Tugwell*, 39-40; Arthur M. Schlesinger Jr., *The Coming of the New Deal* (Boston, MA: Houghton Mifflin, 1959), 50.

<sup>57</sup>Namorato, *Tugwell*, 46-47; Perkins, *Crisis*, 30-31.

economy, he kept the theme of “interdependence” in Roosevelt’s speeches. In the “Forgotten Man” radio address of April 1932, for example, Roosevelt argued that when half the nation’s workers toiled in agriculture, boosting their purchasing power was not just a matter of equality for farmers but also “one of the essential parts of a national program of restoration” of the entire economy. Later that month, Roosevelt praised Thomas Jefferson as “one of the first to preach the interdependence of town and country.”<sup>58</sup> As the historian Eric Rauchway observes, in such speeches, Roosevelt turned “a special interest into a common concern” and farm relief into “an essential first step in reviving the entire U.S. economy.”<sup>59</sup>

Tugwell also found an alternative to Peek as a potential Secretary of Agriculture in Henry A. Wallace, an agronomist, editor of the influential periodical *Wallaces’ Farmer*, and son of Henry C. Wallace, who headed the U.S. Department of Agriculture in the Harding and Coolidge administrations. He was forty-three years old when he met Roosevelt, over lunch in Hyde Park, in August 1932. Wallace’s knowledge of farming and “unaffected simplicity,” appealed to FDR, who invited him to help draft the major speech on farm relief he was to deliver in Topeka the next month.<sup>60</sup> McNary-Haugenites regarded Wallace more skeptically. Chester Davis thought him “a dreamer, a side-line student of affairs,” who had been “a pleased and interested onlooker

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<sup>58</sup>Franklin D. Roosevelt, “Radio Address re a National Program of Restoration,” April 7, 1932, file 469, “Jefferson Day Dinner Address,” April 18, 1932, file 473, MSF FDR; see Bernard Sternsher, *Rexford Tugwell and the New Deal* (New Brunswick, NJ: Rutgers University Press, 1964), 42.

<sup>59</sup>Franklin D. Roosevelt, “Jefferson Day Dinner Address,” April 18, 1932, file 473, MSF FDR; Rauchway, *Winter War*, 87.

<sup>60</sup>Lord, *Wallaces*, 319-322, 336; John C. Culver and John Hyde, *American Dreamer: A Life of Henry A. Wallace* (New York: Norton, 2000), 102-104.

rather than an active participant” in the fight for farm relief. George Peek described him as “a dreamy, honest-minded and rather likable sort of fellow” who had “never been an active member of our farm group and had not gone through the days of battle.”<sup>61</sup>

Wallace’s approach to farm reform was eclectic. He thought export subsidies were worth trying, but he also called for production control, as much to conserve farmland as to administer farm prices. This open-mindedness fit nicely with Roosevelt’s goal of postponing the alienation of any faction of farm leaders as long as possible.<sup>62</sup> He was already Tugwell’s choice for Secretary of Agriculture in the late summer of 1932, for the two shared much intellectual ground, enjoyed each other’s company, and hoped FDR would remake the Democrats into a progressive party.<sup>63</sup> In the general election, the Iowan’s vigorous editorializing and speechifying helped his cause with the political “professionals” around FDR. After the election and a visit with FDR in Warm Springs in December 1932, his nomination was thought likely but was not announced until February 1933. By that time, a bill embodying the domestic allotment plan, drafted at Roosevelt’s request and with Wallace’s help, but amended, at George Peek’s insistence, to legalize marketing agreements to promote exports, languished in Congress, where it would expire with the lame-duck session and Hoover’s presidency.<sup>64</sup>

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<sup>61</sup>Lord, *Wallaces*, 322; Davis, “Reminiscences,” 208, 238; Peek, *Why Quit*, 59.

<sup>62</sup>Lord, *Wallaces*, 321, 263; Culver and Hyde, *American Dreamer*, 101-104.

<sup>63</sup>Rauchway, *Winter War*, 141.

<sup>64</sup>Sternsher, *Tugwell*, 86-88; Culver and Hyde, *American Dreamer*, 104, 106-108; Perkins, *Crisis*, 32-33; Rauchway, *Winter War*, 100-104; George N. Peek, “Memorandum on Amendments Suggested by George N. Peek, Moline Illinois,” February 23, 1933, box 6, Lee MSS.

“The city resembles a county fair in the Deep South,” Thomas Austern, who had led his class at the Harvard Law School, then clerked for Justice Louis Brandeis, and then joined Covington & Burling, Washington’s leading law firm, wrote to Jerome Frank on the eve of Inauguration Day. “The spirit of festivity is somewhat of a contrast to the melancholy outlook of those who are immediately to have or to relinquish power.”<sup>65</sup>

The person who was to have the most power was, by all accounts, anything but melancholic. Franklin D. Roosevelt “does not seem tense, or worried, or appalled,” reported the business journalist W. M. Kiplinger. “His health and spirits appear to be excellent.” Even long-time, cynical observers of the Washington scene were “frankly amazed at this new man, at his simplicity and directness.”<sup>66</sup>

After promising the nation “action, and action now” in his inaugural address, the new president realized he might never have a more accommodating Congress than the special session that would soon convene to pass emergency banking legislation. With the support of Wallace and Tugwell, now serving as Assistant Secretary of Agriculture, Roosevelt decided to try for a farm bill.<sup>67</sup> On March 8, Wallace issued a call for farm leaders to gather in Washington. Many of the fifty who turned up on March 10 had taken the same train from Chicago the night before. At a stop somewhere in Ohio, one farm leader had scooped up a newspaper and reported to his fellows that Congress had just granted the president sweeping powers to meet the banking crisis.

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<sup>65</sup>Thoms Austern to Jerome N. Frank, March 3, 1933, box 1, ser. 1, Frank MSS.

<sup>66</sup>*KWL*, March 17, 1933.

<sup>67</sup>Anthony J. Badger, *FDR: The First Hundred Days* (New York: Hill and Wang, 2008), 47-48.

Well aware of their differing preferences for relief, the farm leaders decided that an equally broad delegation of legislative power to the Secretary of Agriculture was the surest way to have a program in place by spring planting. “Let’s get some purchasing power put into agriculture, and put it in right now,” one said. “Let’s not fuss around too much about how it’s going to be done.”<sup>68</sup> Wallace and Tugwell had already come to the same conclusion, even though they realized that administering an omnibus statute, as Wallace later wrote, “would be living in a veritable hell.”<sup>69</sup>

On March 11, the conferees presented Roosevelt with a memorandum summarizing their recommendations, which he accepted with a becoming mixture of charm and gravity.<sup>70</sup> Then drafting started in earnest, led by Frederic P. Lee, who, as Senate Legislative Counsel, had helped write the first McNary-Haugen bill, and Mordecai Ezekiel, with input from Peek, Tugwell, Wallace, and others. On March 16, Roosevelt sent the resulting bill to Congress with the explanation that it “seeks to increase the purchasing power of our farmers and the consumption of articles manufactured in our industrial communities, and at the same time greatly to relieve the pressure of farm mortgages and to increase the asset value of farm loans made by our banking institutions.” At ten the next morning, Wallace and Tugwell testified on behalf of the bill before a Senate Committee. Later that day, they interviewed the person that Tugwell thought could fill

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<sup>68</sup>Perkins, *Crisis*, 36-37; Culver and Hyde, *American Dreamer*, 114-15. The quotation is Milburn L. Wilson’s recollection of a speech by Earl Smith, president of the Illinois Farm Bureau. Milburn L. Wilson, “The Reminiscences of Milburn Lincoln Wilson” (1956) 1008, COHA.

<sup>69</sup>Wallace *New Frontiers*, 166-167.

<sup>70</sup>Wilson, “Reminiscences,” 1020.



the “all-important” job of “top legal man” at USDA.<sup>71</sup>

Jerome Frank was not their first choice for Solicitor. Wallace’s instinct had been to appoint Lee, but Tugwell strongly argued otherwise. “Look here, Henry,” he said, “a lawyer is all-important in a set-up of this kind. The type of lawyers we’ve had here in the department just won’t do to handle the complexities we’ll be getting into. We’ve got to have men with broad experience and breadth of vision.”<sup>72</sup> Milton Handler, a law professor and antitrust expert at Columbia University, was Tugwell’s first choice, even though he knew nothing of agriculture and failed to impress Wallace. (He did know a great deal about consumer protection, the subject of a food-and-drug law the assistant secretary intended to propose.) After consulting three U.S. Supreme Court justices, Handler declined the offer.<sup>73</sup>

A few days earlier, Tugwell arranged for Wallace to meet Felix Frankfurter, who was in Washington to celebrate Oliver Wendell Holmes’s ninety-second birthday with the justice. “I don’t know when I took such a quick and deep liking at first sight to a man as I did in Wallace,” Frankfurter wrote Tugwell. The Secretary was “a man who not only cared about social justice but really knows how to translate that great ideal into completeness.” Frankfurter had evidently

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<sup>71</sup> Franklin D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt*, ed. Samuel I. Rosenman (New York: Random House, 1938), 2: 74; Henry A. Wallace, “The Reminiscences of Henry Agard Wallace” (1951), 5398, COHA.

<sup>72</sup>Wallace, “Reminiscences,” 240, 5399.

<sup>73</sup>Wallace, “Reminiscences,” 5398-5399; Milton Handler, “The Reminiscences of Milton Handler (1974), 2-3, COHA; *The Diary of Rexford G. Tugwell: The New Deal, 1932-1935*, ed. Michael Vincent Namorato (Westport, CT: Greenwood Press, 1992), 81 (February 17, 1933).

seconded Tugwell's view that "the old type of solicitor" would not do.<sup>74</sup> "For your purposes," he later reminded Tugwell, "it is extremely important to have a man who knows what law he has to get away from and with, as well as to be aggressively imaginative in devising new forms for achieving your policies." Frank was just the person, "steeped in the ways of courts as well as in the thousand and one problems that the practical exigencies of practice and negotiations teach a man." He had two sides, Frankfurter explained. The first, a "playful, dialectic, argumentative side," was very much the minor one. More important was the second, his "penetrating, practical-experience talent for bringing results to pass in the world of affairs." Further, Frank was "widely read in the modern literature of economic and social thought, and has simply a fiendish appetite and capacity for work."<sup>75</sup>

That sufficed for Tugwell and Wallace to invite Frank to Washington. We do not know what they told him about their plans, including whether they expected clashes with George Peek, who had not yet accepted Wallace's offer to head the new farm agency. Frank later claimed they asked him to "do more than be a lawyer," to opine on policy as well as law. But we do know that Wallace liked Frank immediately. "He had a great warmth of personality and broad knowledge," the secretary later recalled. and he was "a *very* stimulating conversationalist."<sup>76</sup> He also knew

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<sup>74</sup>Felix Frankfurter, "In response to his invitation . . .," March 15, 1933, reel 90, FF-LC MSS; Felix Frankfurter to Rexford Tugwell, March 11, 1933, reel 76, FF-LC MSS; Wallace, "Reminiscences," 5399.

<sup>75</sup>Felix Frankfurter to Rexford Tugwell, March 15, 1933, reel 76, FF-LC MSS. Perhaps after reflecting upon the political obstacles Frank might face, the following day Frank strongly recommended Alvin G. Reis, a Wisconsin progressive and Harvard law alumnus. Felix Frankfurter to Rexford Tugwell, March 16, 1933, reel 76, FF-LC MSS.

<sup>76</sup>Peek, *Why Quit*, 81 (replace with diary); Frank, "Reminiscences," 164, 165; Wallace. "Reminiscences," 235, 5398-5399.

something of the marketing of agricultural commodities and domestic allotment. Frank had observed Joseph Cotton keep Chicago's meat packers from mulcting America's allies during World War I, represented a packinghouse in a reorganization while at Levinson, Becker, and studied Thomas Chadbourne's plans for the sugar industry.<sup>77</sup> Just a few months earlier, he had discussed "the so-called domestic allotment plan" with "[o]ne of the men who had a lot to do with originating it and who is working out its details." "There may be nothing to it," he had written Thurman Arnold, "but it sounded pretty good to me."<sup>78</sup>

Frank warned Tugwell and Wallace that Roosevelt might object to his appointment because of Chadbourne's attacks during the campaign, but a call to the White House brought no objections. Rather than take the oath of office at once, as Tugwell and Wallace urged, Frank asked for and received a week's time to wrap up matters at the firm. Chadbourne, who happened to be in Washington, gave Frank his blessing, after a fashion. "I know the kind of fellow you are," he said. "I think it's kind of silly, but if that's what you want to do, go ahead. Any time you want to come back, we'll be happy to have you." Levy, who also profited from Frank's hard work and brilliance, tried to dissuade him. Frank was clearing over \$50,000 a year at

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<sup>77</sup>For the reorganization of Wilson & Company, see Frank, "Reminiscences," 71-72.

<sup>78</sup>Wallace, "Reminiscences," 5398-5399; Jerome N. Frank to Thurman W. Arnold, December 29, 1932, box 16, ser. 2, Frank MSS. Arnold took up Frank's suggestion that his Yale colleagues study domestic allotment or some other measure addressing "some of the current political problems." Days after Frank's first meeting with Tugwell and Wallace, Arnold and Wesley Sturges proposed making the refinancing of farm debt contingent on the recipients' promise to limit production. "Yale Professors Offer Farm Plan," *New York Times*, March 19, 1933, N1.

Chadbourne, he argued. It was “goddamn nonsense” to leave a job that paid so well.<sup>79</sup>

But before Frank could return to Washington, an embarrassed Tugwell called to withdraw the offer. As political amateurs, neither he nor Wallace had sufficiently appreciated how ravenous for patronage Democrats were after over a decade in the political wilderness. They had also ignored, perhaps wilfully, what James Farley, now installed as Roosevelt’s Postmaster General and chief patronage manager, called “the rules of the game.” One rule was that no one who had spoken against Roosevelt or one’s congressman deserved a position. Other rules derived from political geography. State parties were owed top governmental positions roughly in keeping with their contribution to Roosevelt’s victory, and different regions had special claims on certain departments, such as the West on Interior and the Midwest on Agriculture. Finally, legal positions were especially valuable. “Political expediency dictates that legal positions be kept as plums,” a civil service official explained, “for lawyers as a class are politically active and politically valuable.” Properly distributed and rotated, even a few such plums could flavor “a large number of puddings.”<sup>80</sup>

Under the rules of the game, the biggest legal plum at the Department of Agriculture could not go to a resident of New York, especially if, as Vice President James Nance Garner

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<sup>79</sup>Jerome Frank, interview by Joseph Alsop, August 1, 1938, box 93, Alsop MSS; Frank, “Reminiscences,” 65-66; Rovere, “Frank has always taken an almost superhuman view . . .,” box 1, part 3, Rovere-WHS MSS. According to Measuringworth.com, the equivalent salary would be just under \$1 million.

<sup>80</sup>Daniel Scroop, *Mr. Democrat: Jim Farley, the New Deal and the Making of Modern American Politics* (Ann Arbor: University of Michigan Press, 2006), 84; Benjamin V. Cohen, recorded in “The New Deal Dinner,” March 4, 1977, Benjamin Cohen Estate Collection, RSRC; Albert Henry Aronson, “The Lawyer in the Federal Service,” *United States Law Review* 68 (1934): 37.

grumbled more generally about the New Deal's appointees, he had "never worked a precinct."<sup>81</sup> Raymond Moley, who understood the rules, was enraged to learn, late on the evening of March 14, that Tugwell had offered the solicitorship to Handler. As Moley's secretary noted, "these appointments are made by the President, and he has no right to take it upon himself to proceed without consulting at least Jim Farley." Convinced that Tugwell had acted "solely on propinquity and friendship," Moley alerted Farley, who "was so mad that he nearly tore the telephone out by the roots."<sup>82</sup>

Why Wallace thought he could evade Farley when he offered the solicitorship to Frank is uncertain; that Farley vehemently opposed Frank's appointment is not.<sup>83</sup> Wallace's own account of the affair omitted Farley altogether. After offering the job to Frank, he explained, Iowa's new Democratic Senator proposed Seth Thomas of Fort Dodge (population, 21,895) for the job. Realizing that he had "to have the Senator from my own state on my side," Wallace named Thomas.<sup>84</sup> Presumably, Farley helped the secretary to that realization and also provided a cover

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<sup>81</sup>Lord, *Wallaces*, 353. Milburn Wilson recalled that a "number one lawyer in a good county seat town in the Midwest" quizzed him about the solicitorship on the overnight train to Washington departing Chicago on March 9. Wilson, "Reminiscences," 1010-11.

<sup>82</sup>Celeste Jedel, Moley diary, March 14, 1933, Moley MSS. Jedel, Moley's former student and very able secretary, kept this diary for her boss.

<sup>83</sup>Wallace later claimed that the Solicitor "had always been a Senatorial appointee." Wallace, "Reminiscences," 234, 5416; Raymond Moley to Felix Frankfurter, March 22, 1933, box 68, Moley MSS.

<sup>84</sup>Wallace, "Reminiscences," 5399-5400; U.S. Department of Commerce, *Fifteenth Census of the United States: 1930: Population* (Washington, DC: US Government Printing Office, 1932), volume 3, part 1, p. 781. The senator, Louis Murphy, had earlier written President-Elect Roosevelt that Wallace's nomination "would be a source of gratification to me." Louis Murphy to Franklin D. Roosevelt, January 21, 1933, Ia18-581, Wallace MSS. Thomas beat out the person Moley's secretary believed would prevail, Arthur Mullen, Jr., the son of the

story: Frank could not have the job because his grandfather was once a leader of Tammany Hall, the regular organization of New York City Democrats arrayed against Roosevelt. Although that explanation was unconvincing—the grandfather had been dead for many years and had never been part of the Tammany machine—the decision stuck.<sup>85</sup>

Wallace could afford to acquiesce because he and Tugwell had an alternative which, they assured Frank, had the president's approval. Many of the solicitor's duties were routine matters arising from such "old-line" units as the Bureau of Animal Industry and the Meat Inspection Service. Thomas would handle these matters but have nothing to do with the agency to be created by the farm bill. As general counsel of the Agricultural Adjustment Administration (AAA), Frank would of course work with its Administrator—still expected to be Peek—but because the Secretary of Agriculture issued AAA orders and because Wallace promised not to do so without Frank's approval, the lawyer would play a major role in fashioning farm policy.<sup>86</sup>

At Frankfurter's urging, Frank accepted the arrangement. At first he was glad he did. "The job is going to be even more interesting than I anticipated," he wrote to Lee Pressman on April 10. Tugwell and Wallace "are unbelievably swell."<sup>87</sup> The secretary, his assistant, and their

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Nebraska politician who was FDR's floor leader in the Democratic National Convention in 1932. Jedel, Moley diary, March 15, 1933; Thomas O'Brien Hanley, "A Western Democrat's Quarrel with the Language Laws," *Nebraska History* 50 (1969): 150.

<sup>85</sup>Rovere, "It was fortunate for Frank and the New Deal . . .," box 1, part 3, Rovere-WHS MSS. In a later oral history, Frank identified the ostensibly offending relation as his father-in-law, who had died in 1917 and had never lived in New York. Frank, "Reminiscences," 66-67.

<sup>86</sup>Frank, "Reminiscences," 67-68, 89.

<sup>87</sup>Frank, interview by Alsop; Jerome N. Frank to Lee Pressman, April 10, 1933, box 16, ser. 2, Frank MSS.

lawyer took adjoining rooms at the Cosmos Club and then shared Wallace's spacious apartment in the Wardman Park until his family came to Washington, at which point Tugwell and Frank decamped to a rented house near Embassy Row. "Night after night stray lawyers, economists, newspapermen, and innocent bystanders appeared at the house," wrote the historian Arthur M. Schlesinger, Jr., "and indulged heavily in conversation and bourbon."<sup>88</sup>

Congress did not pass the farm bill until May 12; meanwhile, Frank worked for Wallace and Tugwell "into the wee, small hours of the night" on a voluntary basis.<sup>89</sup> Although he did not completely ignore the need to line up support for his confirmation—he asked an old friend to mobilize Chicago Democrats; Frankfurter offered to write Burton Wheeler, George Norris, and Bronson Cutting—recruiting lawyers for his legal division occupied more of his time.<sup>90</sup> Tom Corcoran turned up with an invitation to dine with Justice Brandeis and the names of several Harvard men, including his brother Howard and Milton Katz, who had clerked for Judge Mack and was brilliantly assisting Stanley Reed, the general counsel of the RFC.<sup>91</sup> Frank needed no

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<sup>88</sup>Rovere, "In Washington, at the beginning at any rate . . .," box 1, part 3, Rovere-WHS MSS; Arthur M. Schlesinger, Jr., *The Coming of the New Deal* (Boston: Houghton Mifflin, 1959), 50.

<sup>89</sup>Jerome N. Frank to Karl N. Llewellyn, May 10, 1933, box 13, ser. 2, Frank MSS.

<sup>90</sup>Jerome N. Frank to Ulysses S. Schwartz, April 18, 1933, box 16, Jerome N. Frank to Felix Frankfurter, April 18, 1933, Felix Frankfurter to Jerome N. Frank, April 24, 1933, box 12, ser. 2, Frank MSS. Leon Keyserling, a Harvard law graduate and Tugwell protégé who worked for Frank on an unpaid basis, claimed Frank's confirmation was assured once he introduced the general counsel in waiting to Keyserling's father's lifelong friend, "Cotton Ed" Smith, chairman of the Senate Committee on Agriculture and Forestry. Kenneth M. Casebeer, "Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act," *University of Miami Law Review* 42 (1987): 297-298.

<sup>91</sup>Jerome N. Frank to Felix Frankfurter, April 8, 1933 [confirm date], Jerome N. Frank to Felix Frankfurter, April 18, 1933, box 12, ser. 2, Frank MSS; Thomas G. Corcoran to Malcolm

one's suggestion to recruit Lee Pressman, who, after himself quitting the Chadbourne firm, written Frank than neither of them would ever again have "any similar yoke around our necks." Although Pressman did not immediately accept Frank's offer, at Frank's request he did speak to two Harvard law graduates Frankfurter had suggested through Corcoran: Alger Hiss, whom Pressman had supervised at the *Harvard Law Review* and whom Corcoran had recruited to Cotton & Franklin, and Nathan Witt, whom Pressman had known since their undergraduate days.<sup>92</sup> In April, Frank also canvassed Judge Mack and law professors at Columbia, Yale, and the University of Chicago.<sup>93</sup> He would have to appoint some "political deadwood," Frank told Katz, but he also intended to hire "a small nucleus that will run the legal phases of the show." Frank's candor and generosity impressed the young lawyer, but, more knowledgeable of Washington's way after a year at RFC, he wondered whether the general-counsel-in-waiting would be able to hire his inner circle. "In fact," Katz wrote a friend and fellow job seeker, "until the act is passed and Frank's appointment published, it seems to me that even his job isn't secure."<sup>94</sup>

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Sharp, June 22, 1933, box 291, Corcoran MSS. Corcoran also discussed recruits with Frank over dinner. Thomas G. Corcoran to Jerome N. Frank, April 17, 1933, box 3, ser. 1, Frank MSS.

<sup>92</sup>Jerome N. Frank to Lee Pressman, April 10, 1933, Lee Pressman to Jerome N. Frank, April 12, 1933, box 16, ser. 2, Frank MSS; Gilbert J. Gall, *Pursuing Justice: Lee Pressman, the New Deal, and the CIO* (Albany: State University of New York Press, 1999), 14, 19-20; Thomas G. Corcoran to Alger Hiss, February 2, 1931, box 46, Corcoran MSS.

<sup>93</sup>Jerome N. Frank to Julian Mack, April 17, 1933, Jerome N. Frank to Milton Handler, April 18, 1933, Jerome N. Frank to Paul Sargent, April 18, 1933, Jerome N. Frank to Harry Bigelow, April 19, 1933, box 16, Jerome N. Frank to Karl N. Llewellyn, April 14, 1933, box 13, ser. 2, Frank MSS.

<sup>94</sup>Milton Katz to John H. Hollands, April 24, 1933, box 1, Katz MSS.



For his part, Frank was “still somewhat in awe” of his job.<sup>95</sup> He freelanced on a range of matters, including helping Tugwell write speeches for FDR and draft the National Industrial Recovery Act. Farm politics were opaque to him. The first time he attended a meeting of Wallace, Tugwell, and Ezekiel with Peek and Davis, he could “feel some strong tension” but only vaguely understood its origins.<sup>96</sup> He again realized he was not quite up to speed when, after a late-night meeting with farm leaders, he observed to Wallace and Tugwell, “I suppose those are the fellows we’re going to have to work with,” and the pair turned to each other, grinned, and said, “Well, as little as we have to.”<sup>97</sup>

The farm bill, rammed through the House but having tougher going in the Senate, was another puzzle. As a newcomer to agricultural legislation, Frank was reluctant to offend Frederic P. Lee, whom Wallace had hired to produce a bill, and deferred to the veteran legislative drafter, even about crucial sections, such as an incomprehensible paragraph in the Declaration of Policy protecting consumers inserted at Wallace’s insistence.<sup>98</sup> He also spotted but felt out of his depth on crucial issues of administrative law, such as whether the statute adequately provided for hearings and for judicial review. Again he deferred to the drafters, and the flawed procedures

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<sup>95</sup>Jerome B. Frank to Felix Frankfurter, April 8, 1933, box 12, ser. 2, Frank MSS.

<sup>96</sup>Frank, interview by Alsop; Frank, “Reminiscences,” 72, 73.

<sup>97</sup>Jerome N. Frank to Felix Frankfurter, April 8, 1933, box 12, ser. 2, Frank MSS; Frank, “Reminiscences,” 75-76.

<sup>98</sup>Frank, “Reminiscences,” 69-70; Wallace, “Reminiscences,” 237. Frank wrote Frankfurter that it might be “impolitic” for him to suggest amendments. Jerome N. Frank to Felix Frankfurter, March 25, 1933, reel 76, FF-LC MSS.

became law.<sup>99</sup>

On one matter, however, Frank felt obliged to intervene. Wallace, Tugwell, and other proponents of domestic allotment were most interested in a section of the act empowering the Secretary of Agriculture to enter into agreements with the producers of seven “basic agricultural commodity,” defined as wheat, cotton, corn, hogs, rice, tobacco, and milk, to reduce their output in exchange for rent or other benefit payments.<sup>100</sup> A different section authorized the Secretary of Agriculture to “enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties.”<sup>101</sup> This section, which was not limited to the seven “basic” commodities, was what Peek expected to use to establish his two-price system of export subsidies; it also apparently allowed the giant corporations that processed agricultural products—meat packers such as Swift & Company, millers such as General Mills—to do lawfully what the federal antitrust laws had previously outlawed, entering into agreements to fix prices and restrict the distribution of their products.<sup>102</sup> But corporation lawyers spotted a flaw in Lee’s handiwork: because the bill did not *expressly* exempt signatories from the antitrust laws, later courts might find that the Agricultural

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<sup>99</sup>Frank, “Reminiscences,” 71. Frankfurter offered some advice but urged Frank to rely on Paul Freund, then serving as Justice Brandeis’s legal secretary. Felix Frankfurter to Jerome N. Frank, March 28, 1933, box 12, ser. 2, Frank MSS. Frank apparently did not pursue the suggestion, perhaps because he remembered Freund as the editor who rejected his submission to the *Harvard Law Review*.

<sup>100</sup>Agricultural Adjustment Act, 48 Stat. 38, title 1, §§ 8 (1), 11 (1933).

<sup>101</sup>Agricultural Adjustment Act, 48 Stat. 38, title 1, § 8 (2) (1933).

<sup>102</sup>Fite, *Peek*, 247.

Adjustment Act only authorized marketing agreements that complied with them. The agreements USDA officials contemplated, setting prices and restricting distribution, clearly did not.

Frank learned of the problem when Silas Strawn, an eminent Chicago lawyer turned up on behalf of the city's meat packers to explain that his clients, long the targets of federal antitrust prosecutions, would never enter into marketing agreements unless the statute expressly exempted them from the operation of federal antitrust law. "I was just sitting around on the sidelines," Frank recalled, but he felt obliged to share his concerns with Wallace, Tugwell, and Lee. "I don't know whether you ever want to use this section or not," he explained, "but if you do, I quite sympathize with [Strawn's] point of view. If I were a lawyer for these people, I would never let them enter into such an agreement." After Frank intervened, the sentence "The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States" was added to the statute. Although it addressed the immediate concerns of the food processors, just what contractual provisions this "antitrust exemption" exempted was uncertain and was bound to be contested once AAA was underway.<sup>103</sup>

The problem Frank did not spot was George Peek. Not without misgivings, Henry A. Wallace conceded that Peek was the "the logical man" to direct AAA. "He had put in so many years of his time and so much of his money battling for the farm cause," Wallace recalled. "His name was known to all the farm leaders." He understood the markets for the major crops. He was a

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<sup>103</sup>Frank, "Reminiscences," 70-71. The language Frank apparently suggested simply provided that agreements "shall be conclusively presumed to be legal in any private or public proceeding." Mordecai Ezekiel to Frederic P. Lee, April 3, 1933, box 6, Lee MSS. The enacted version provided that agreements "shall be deemed to be lawful" but added an express exemption from the antitrust laws. Agricultural Adjustment Act, Stat. 34, title 1, §8 (2) (1933).

businessman who could recruit other businessmen to implement a new program. But Peek was also unalterably convinced that export subsidies were the only permanent solution to the farm crisis; he had testified in Congress against the limitation of agricultural production other than “occasionally in cases of great emergency”; he was famously stubborn, “by all accounts a bull-headed individual.”<sup>104</sup>

Wallace had asked Peek to return to Washington as soon as Roosevelt decided to try for a farm bill in the special session. Having seen Tugwell and Ezekiel write domestic allotment into the lame duck bill, Peek left Moline at once to ensure that Wallace, the diffident fellow fifteen years his junior, a mere “bystander in the farm fight,” did not let “the economists” do it again.<sup>105</sup> With what a journalist called “a certain seasoned caginess,” Peek declared himself willing to help Wallace in any way he could, to the extent that doing so would not be “stultifying.”<sup>106</sup> When, during a late-night meeting of farm leaders at USDA on March 12, Wallace asked whether he would take the reins at AAA, Peek was noncommittal: the farm bill had not even been drafted, and he knew from an earlier session with Ezekiel and Lee that it would include domestic allotment. During the next two weeks, he demonstrated his strength to Wallace with displays of Baruch’s backing and the opposition of key Senators to domestic allotment unless a sensible administrator was at the helm. Hugh S. Johnson came down from Baruch’s New York City

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<sup>104</sup>Wallace, “Reminiscences,” 5412, 232-233; *Investigation of Economic Problems: Hearings before the Committee on Finance*, US Senate, 72d Cong., 125 (1933); Lord, *Wallaces*, 270; Milton Katz to Julian Mack, May 19, 1933, box 1, Katz MSS.

<sup>105</sup>Davis, “Reminiscences,” 280-281.

<sup>106</sup>George S. Peek, diary, March 4, 9, April 1, 1933, Peek MSS [confirm]; Lord, *Wallaces*, 332.

headquarters to help Peek fight, in Johnson's words, that "damned Communist" Tugwell and his "communistic" scheme of benefit payments.<sup>107</sup> Before a Senate committee, Peek opposed production control as a permanent policy, because it would amount to "drying up this country in the interest of foreign nations." He would only concede that it might be necessary "in certain instances and at certain times" and that no single approach would work for every crop. On March 25, he told a Mississippi cotton planter he would refuse to administer AAA as long as "such men as Tugwell and Ezekiel [were] in a position to run circles around him and perhaps around the Secretary." By that point, he probably knew from Frederic P. Lee that Ezekiel was already quietly developing plans to implement domestic allotment.<sup>108</sup>

The following afternoon, in the lobby of the Carlton Hotel, at Wallace's request, Peek met the man who wanted to be his general counsel. Jerome Frank "stayed over two hours," Peek wrote in his diary. "Said he was a close friend of Felix Frankfurter and said it was through him that he came here." Frank's assurance that Peek had "the full and complete confidence of the Secretary" probably did not have its intended effect, coming from a stranger to farm politics who had known Wallace for less than a month. Although in his diary Peek did not refer to Levinson, Becker's representation of Moline Plow's creditors, the two men probably acknowledged it, for Peek later wrote, "I found that I knew him—I had met him at a time when he was counsel for a group of banks." Peek also did not mention Frank's appearance, although Davis, who observed

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<sup>107</sup>Peek, diary, March 11-22, 1933, Peek MSS [confirm].

<sup>108</sup>*Agricultural Emergency Act to Increase Farm Purchasing Power: Hearings before the Committee on Agriculture and Forestry*, US Senate, 73d Cong. 75-76 (1933); Peek, diary, March 25, 1933, Peek MSS [confirm]; Mordecai Ezekiel to Frederic P. Lee, March 20, 1933, box 6, Lee MSS.

him in this period, thought he needed a haircut, and Frank's long work hours and indifference to his attire could make him seem disheveled, even dissipated.<sup>109</sup> Yet Peek let Frank talk eagerly on. "We discussed many angles of the existing depression and the way out," the farm leader noted in his diary. Frank predicted another bank crisis in the near future if stronger measures than the Emergency Banking Act were not adopted. He also explained that he was trying to get Frankfurter and James Harvey Rogers, a Yale economist then calling for a massive infusion of farm credit, to come to Washington, and he asked Peek to meet with them if they did.<sup>110</sup>

As Wallace once remarked, Peek "had a singularly opaque mind."<sup>111</sup> If Peek's exchanges with Frank were guarded, the lawyer might have missed Peek's negative reaction to his name dropping of Frankfurter, well-known as a radical for his campaign to free the anarchists Sacco and Vanzetti. Evidently, he did not see anything presumptuous in suggesting that a couple of Ivy League professors had something to teach him about agricultural policy. One of Frank's mental habits, noted by Gardner Jackson, who observed him closely at AAA, might also have been at work. Once someone agreed with his observation that an economic or social problem required redress, Jackson claimed, Frank "in his own mind imbued that person with all the ardent disinterestedness characterizing his own pursuit of his objectives."<sup>112</sup> If Frank indulged this habit

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<sup>109</sup>Davis, "Reminiscences," 278-279; *Jerome N. Frank, 1889-1957* (Association of the Bar of the City of New York and the New York County Lawyers' Association, [1957]), 19; Richard Rovere, "The circuit court bench, Judge Learned Hand . . .," box 1, part 3, Rovere-WHS MSS.

<sup>110</sup>Peek, diary, March 26, 1933, Peek MSS [confirm]; Peek, *Why Quit*, 21; *Investigation of Economic Problems*, 1238-1239.

<sup>111</sup>Wallace, "Reminiscences," 232-233.

<sup>112</sup>Gardner Jackson to Richard Rovere, December 18, 1946, box 1, Rovere-FDRL MSS.

during his conversation with Peek, it would explain why, between their tête-a-tête on March 28 and the passage of the farm bill on May 12, he was oblivious to the threat the businessman posed.

For Peek neither liked nor trusted his would-be general counsel. Soon after Peek and Frank met, Wallace asked Peek to take the lawyer with him to Capitol Hill to defend some amendments to the farm bill. Peek declined, and, unaccompanied, complained to Senate Majority Leader Joseph Robinson about “the half-baked proposals” emanating from USDA and reiterated his belief that subsidized exports were the only permanent solution to the farm problem. That same day he told Wallace he would not take the AAA job “without having it understood that the Tugwells and Ezekiels could not run circles around him.”<sup>113</sup>

With Tugwell set on crop control and Peek dead set against it, Wallace feared the New Deal agriculture policy might deadlock. In desperation, he dispatched M. L. Wilson to Chicago to recruit Chester Davis to run the new agency’s domestic allotment program, reasoning that Peek would trust his erstwhile brother-in-arms from the McNary-Haugen crusade. Once Davis signed on, Wallace told Peek he would ask Roosevelt to appoint him Administrator, but only if Peek agreed to hire Davis to oversee domestica allotment programs. Peek agreed, but had requirements of his own. He asked that Charles Brand, a McNary-Haugen ally, then serving as executive secretary of the National Fertilizer Association, be named “Coadministrator.” Wallace agreed, because he had secretly preferred the meticulous Brand to Peek for administrator.<sup>114</sup> Peek also declared that “no self-respecting man” would take the job without the right to take his

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<sup>113</sup>Davis, “Reminiscences,” 283; Peek, diary, March 28, 1933, Peek MSS [confirm].

<sup>114</sup>Wallace, “Reminiscences,” 235-236, 5412-5413. Chester Davis thought Brand “a good egg but very pompous.” He predicted, accurately, that he would be “a terrific bottleneck.” Davis, “Reminiscences,” 105, 281.

concerns directly to the president.<sup>115</sup>

More maneuvering ensued, including three White House meetings at which Wallace and Peek aired their differences before Roosevelt. Peek threatened to oppose the farm bill with all his might if it only gave benefits to farmers who limited production. Wallace accepted an amendment removing that restriction, but he also brought M. L. Wilson in for a prolonged, late-night session in a hopeless attempt to persuade Peek of the merits of domestic allotment. In a decisive meeting on May 3, attended by cabinet secretaries and other top officials, Roosevelt insisted that farm policy must include restriction of production and that although Peek could bring matters directly to him, he could do so only in the presence of Secretary Wallace.<sup>116</sup> Peek decided that even with these qualifications he had his rivals checked. He knew that Davis also mistrusted Tugwell and that farm groups would insist, as a Missourian McNary-Haugenite wrote, on “a strong and practical man” at the helm of AAA. “Peek had very great influence with the farm leaders,” Wallace later acknowledged, “and I wanted to maintain his support.”<sup>117</sup>

On May 12, the day the farm bill became law, an exchange of letters between Wallace and Peek revealed how far apart the two men remained. Peek wanted Wallace to delegate to him all powers granted the Secretary of Agriculture under the statute, including when and whether to use the domestic allotment or export subsidies and marketing agreements provisions of the

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<sup>115</sup>Peek, diary, April 1, 1933, Peek MSS [confirm].

<sup>116</sup>FDR Day by Day, April 5, 7, May 3, 1933; Peek, diary, April 2, 6, 1933 [confirm]; Lord, *Wallaces*, 339; Perkins, *Crisis*, 86.

<sup>117</sup>Peek, *Why Quit*, 91; Wallace “Reminiscences,” 5404, 5415; William Hirth, “The Peek Nomination,” *Missouri Farmer* 25 (June 1, 1933): 8. Wallace had overlooked Hirth, a McNary-Haugenite, when inviting farm leaders to Washington in early March. Wallace, “Reminiscences,” 5406-5407.



statute. Peek thought he could take any disagreement with Wallace to Roosevelt and could make or veto any AAA appointment. Wallace replied at once. Because Congress had constituted AAA as an agency within the Department of Agriculture and because Wallace, not Peek, was Secretary of Agriculture, “in the very nature of things, . . . the weight of responsibility must rest largely on my shoulders.” AAA would proceed at once with an acreage reduction program for cotton and corn and would not look to foreign markets to solve the farm crisis until possibly sometime in the future. Peek could insist on a joint meeting with the President only on matters of “general policy.” Finally, Wallace told Peek that although he would not force anyone on him, major appointments should be “collaborative.” He added that Peek should give special consideration to “a few tentative commitments which have already been made.”<sup>118</sup>

That very day, Jerome Frank was sworn in as general counsel. When, the next day, Peek became Administrator and Brand Coadministrator they immediately hauled Wallace before the president and demanded Frank’s firing.<sup>119</sup> “I advanced among other reasons the thought that he had had no experience with farm organizations and farmers, that he had been a city lawyer, and that his personality was such as not to inspire the confidence of the farm leaders,” Peek later wrote. Frank had it from Wallace that the “other reasons” included that he was a Jew, and he believed Peek still resented his part in the Moline Plow reorganization.<sup>120</sup> After a brief

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<sup>118</sup>The letters appear in Peek, *Why Quit*, 100-102.

<sup>119</sup>Chief, Division of Appointments, US Department of Agriculture to Jerome N. Frank, May 12, 1933, box 9, ser. 2, Frank MSS; “Wallace Expects Farm Bill Results within 30 Days,” *St. Louis Post-Dispatch*, May 13, 1933, 2; FDR Day by Day, May 13, 1933.

<sup>120</sup>Peek, *Why Quit*, 21; Frank, “Reminiscences,” 74. Chester Davis also thought Peek held a grudge over the Moline Plow affair. Davis, “Reminiscences,” 283.

discussion, Roosevelt (in Peek's rendering) "agreed with our point of view and told Wallace in our presence that he had better get rid of Frank." The three returned to the Department of Agriculture, where, after a brief interval, Wallace summoned Peek and Brand to his office. Frank was already present. "Wallace said he had told him what the President had said," Peek wrote, "and we thought that the matter was settled."<sup>121</sup>

Frank thought otherwise. "I didn't say anything," he recalled, "but I went out and thought about it and got angrier and angrier." He sought out Tugwell and then returned to Wallace. "Look," he said, "I'm not going to take this lying down." He had severed his connections with his firm; he had spent weeks recruiting a legal division; he had taken a chance that the bill might not pass; he had worked on other tasks for the Secretary at a grueling pace for days on end. Such protests might have been for naught, but for one thing: Wallace needed Frank to check Peek. Without him, Peek would be the *de facto* maker of farm policy in the New Deal and Wallace a figurehead.<sup>122</sup>

An outing had been planned the following day for Roosevelt's inner circle, a Sunday cruise down the Potomac on the presidential yacht. Wallace and Tugwell joined the party, and cornered the president. When the president told them of Farley's continuing objections to Frank, Tugwell, as Wallace recalled, "just laid it on the line, absolutely flat," that firing Frank would be unjust. Roosevelt, sensing that Tugwell spoke from "a sense of complete moral conviction," yielded. (His willingness to respect another's viewpoint when so expressed, Wallace observed, "was one of the very great and attractive traits of Roosevelt in those days.") On Monday, Wallace

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<sup>121</sup>Peek, *Why Quit*, 21.

<sup>122</sup>Frank, "Reminiscences," 73-74.

sent for Peek and, “in great distress,” pleaded that Frank be retained. “If you force Frank to resign,” the administrator recalled the secretary saying, “I will also have to resign; it will interfere with all our plans.” Against his better judgment, Peek later wrote, “I yielded to his appeal.”<sup>123</sup>

Peek had lost a battle, but he did not intend to lose the war. Believing that Roosevelt had authorized him to run AAA as if it were an independent agency, he told Frank that Wallace was to have nothing to do with AAA. In reply, Frank pointed out the many places where the statute vested power in the Secretary of Agriculture, not the Administrator of AAA. Peek then countered by using his own salary to hire Frederic Lee as his personal lawyer and, for a time, relied on Lee’s advice rather than Frank’s, notwithstanding Lee’s lack of an appointment.<sup>124</sup> Frank discovered that the permission he thought he had to hire at least fifteen lawyers was revoked and that Farley would authorize no appointments unless applicants got “endorsements,” statements from prominent Democrats in their states or localities that they had not made themselves obnoxious to the party. Frank soon came to a satisfactory arrangement with Farley, but when he then sent a list of hires to Wallace, the secretary’s administrative assistant instructed him to take such matters up directly with Peek or Brand. And when Frank went to Brand, the Coadministrator not only refused to authorize new hires but instructed Frank to send away those who were already volunteering for him on the expectation of a permanent position to make room

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<sup>123</sup>FDR Day by Day, May 14, 1933; Wallace, “Reminiscences,” 5416; Peek, *Why Quit*, 21-22 [confirm in diary].

<sup>124</sup>Davis, “Reminiscences,” 281-282; George N. Peek to Frederic P. Lee, June 16, 1933, box 6, Lee MSS.

for those of Brand's own choosing.<sup>125</sup>

Frank's situation was not helpless. As Davis later explained, the urgent need "to get the thing going" forced both sides to make concessions. Still, Frank won only the right to hire the six lawyers (including Tom Corcoran's brother Howard and Alger Hiss) who had been working for him on a volunteer basis in expectation of an appointment.<sup>126</sup>

Surveying the wreckage, Milton Katz, writing from Corcoran's legal division at the RFC, wrote a fellow job seeker that neither Wallace nor Tugwell had shown himself to be "conspicuously skillful in a political fracas." Frank had been "a babe in the woods." Katz, to whom Frank had promised a job, considered his conduct "rather reprehensible"; still, when Frank "sorrowfully informed me of the result," his impulse had been "to scold him gently, pet him consolingly on the back of the head, and soothe him with advice to wear rubbers when it rains."<sup>127</sup>

For solace and advice, Frank traveled over four hundred miles to speak to the man who had launched him on the "swell opportunity" now foundering on Washington's reefs and shoals. "I think I can imagine how you feel, and the justification for your soreness of heart," Felix Frankfurter wrote after their meeting in Cambridge. Frank should stop worrying "about the matter we talked of here"—which the professor did not identify but might have been anti-

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<sup>125</sup>Paul H. Appleby to Jerome N. Frank, n.d., written on Jerome B. Frank to Paul H. Appleby, May 22, 1933, box 9, Jerome N. Frank to Paul Appleby, August 3, 1933, box 17, ser. 2, Frank MSS; Frank, "Reminiscences," 74-75, 76-77.

<sup>126</sup>Davis, "Reminiscences," 282; Jerome N. Frank to Henry A. Wallace, May 17, 1933, box 58, entry 104, Agriculture Records.

<sup>127</sup>Katz to Nickerson, June 2, 1933, box 1, Katz MSS.

Semitism—and get back in the fight. “The best defensive is the offensive of achievement,”

Frankfurter told Frank. “And with a few fellows like Alger Hiss you really can ‘show ‘em.’”<sup>128</sup>

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<sup>128</sup>Felix Frankfurter to Jerome N. Frank, June 6, 1933, box 12, ser. 2, Frank MSS.

*Abbreviations in the Notes*

- Acheson-HST MS: Dean G. Acheson Papers, Harry S. Truman Library, Independence, MO
- Agriculture Records: Office of the Secretary of Agriculture, Record Group 16, National Archives
- Alsop MSS: Joseph and Stewart Alsop Papers, Manuscript Division, Library of Congress
- COHA: Oral History Archives, Columbia Center for Oral History, Columbia University, New York, NY
- Corcoran MSS: Thomas G. Corcoran Papers, Manuscript Division, Library of Congress
- FDR Day by Day: Franklin D. Roosevelt Day by Day: A Project of the Pre Lorenz Center at the FDR Presidential Library, <http://www.fdrlibrary.marist.edu/daybyday/>
- FF-LC MSS: Felix Frankfurter Papers, Manuscript Division, Library of Congress
- Frank MSS: Jerome New Frank Papers, Manuscript and Archives, Yale University Library, New Haven, CT
- Katz MSS: Milton Katz Papers, Harry S. Truman Library, Independence, MO
- Lee MSS: Frederic P. Lee Papers, Division of Rare and Manuscript Collections, Cornell University Library, Ithaca, NY
- Moley MSS: Raymond Moley Papers, Library and Archives, Hoover Institution, Palo Alto, CA
- MSF FDR: Master Speech File, Franklin D. Roosevelt Library, Hyde Park, NY
- NRA Records: National Recovery Administration, Record Group 9, National Archives
- [Peek MSS: George N. Peek Papers, State Historical Society of Missouri, Columbia, MO]<sup>129</sup>
- Rovere-FDRL MSS: Richard Rovere Papers, Franklin D. Roosevelt Library, Hyde Park, NY
- Rovere-WHS MSS: Richard Halworth Rovere Papers, Wisconsin Historical Society, Madison, WI
- RSRC: Recorded Sound Research Center, Library of Congress
- SEC Records: Records of the Securities and Exchange Commission, Record Group 266, National Archives
- Wallace MSS: Henry A. Wallace Papers at the University of Iowa, Microfilm Edition, Manuscript Division, Library of Congress

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<sup>129</sup>I've yet to work in this collection. In this draft I rely on George N. Peek with Samuel Crowther, *Why Quit Our Own* (New York: D. Van Nostrand, 1936), or Gilbert C. Fite, *George N. Peek and the Fight for Farm Parity* (Norman: University of Oklahoma Press, 1954).