

## BOOK REVIEWS

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The Secret Diary of Harold L. Ickes. Volume II: The Inside Struggle.  
New York: Simon and Schuster, 1954. Pp. 759. \$6.00.

An old case in an early yearbook tells of a feline monarch who reigned over a kingdom of mice. In the conduct of public affairs the voice of the sovereign was absolute, and the will of the people was mute. To such an extreme was tyranny driven that the Prince claimed—and actually exercised—the right to consign to his kitchen the bodies of such of his subjects as his whims of the moment dictated. Goaded by a long course of indignities, his subjects met by night in solemn concourse to the good end of imposing limits upon the royal prerogative. They were modest in their demands and insisted upon no substantive changes in the law of the land, nor did they seek equitable relief from acts and things wrongfully and unlawfully done. They did not even demand that a judicial ritual should be staged and a verdict solemnly rendered before a sentence was pronounced upon one of their number. They merely asked that before the arbitrary judgment of the potentate was executed, due notice should be given by the ringing of a bell. And to insure proper coordination between due notice and execution of the sentence, the bell was to be attached to the person of the Lord's Anointed. But for some obscure reason, not recited in the reports of the case, this modest constitutional limitation upon supreme authority was never carried out. As I remember it—I do not possess the *Review's* facilities for research—the case was eventually declared moot for failure to devise adequate relief.

An analogous case—that is as analogues go in the law—is recited in a detail of fragments within the pages of the second volume of Harold Ickes' Secret Diary. In the first term of tenure of the executive office by F. D. R. the will of the people, acting through a Congress of its own selection, was made manifest. A host of matters which lay beyond the competence of the several states, affairs as varied as bituminous coal, agricultural distress, labor relations, the currency system, personal insecurity and national recovery demanded attention. In such cases the two houses came to the rescue with a detail of statutes. But needs were immediate, situations were flexible, and emergencies had to be met; so blanket grants of authority were made to the President, who was empowered to create, to revise, to amend and to shuffle agencies of control. In spite, however, of crises, popular need and dynamic urge, the persons who suffered or who thought they might suffer from such measures appealed to the courts for salvation. And cases raising the issue of

the validity of acts of Congress and of administrative orders were taken to the tribunal which Mr. Chief Justice Hughes has referred to as "the Court of last resort and ultimate error."

At the time, the members of the United States Supreme Court could not with strict accuracy be referred to as "one in faith and doctrine," or even as "one in charity." Three members of the Court, Brandeis, Stone and Cardozo, JJ., were quite sympathetic, or at least tolerant, to political experimentation. They were willing to allow the Executive and the Congress to employ the legislative power and administrative resources in effecting as best they could an accommodation of the national economy to the changing circumstances of a headlong culture. Four members of the Court, Van Devanter, McReynolds, Sutherland and Butler, JJ., demanded of the legislature—what the top sergeant demanded of the rookie—"only silence and damn little of that." They were certain that the separation of state and economy was to be found in the Constitution; that the rule of *laissez faire* was adequate to any emergency the nation might meet. Between the polar groups of the experimentally-minded and the looking-backward stood Mr. Chief Justice Hughes and Mr. Justice Roberts. In the years immediately preceding, these two stalwarts had again and again voted with the trio of Brandeis, Stone and Cardozo. Yet, in the "New Deal cases," their attitudes were not untouched with apostasy, and in case after case measures deemed by the administration and generally by the people to be most salutary were struck down by a union of the Four Horsemen plus Hughes and/or Roberts. By the time of the presidential election of 1936 there was added at the top of the list of national problems that of the Supreme Court. For if five justices had the power to confuse their own preferences with those of the Constitution itself, they could veto any statute or administrative act, federal or state.

By the time of the election of 1936 the stage was set for judicial reform. The sweeping triumph of F. D. R. carried with it overwhelming majorities for his party in both the House and the Senate. Save in privileged quarters the cause of court reform was popular. A few praised the Court as the protector of their perquisites. A larger number was critical of its decisions, but careful of tampering with the institution. The great majority, however, whether they understood what it was all about or not, were quite willing to allow F. D. R. to have his way. Nor was there in the arsenal of debate any dearth of arguments for judicial reform. The separation of powers had never been driven so far as completely to isolate the Supreme Court from the political process. The Chief Executive in exercising his appointive power was rarely unconcerned about the manner of the man he was elevating. Exigencies of state were often factors in the process of selection. A number of great jurists owe their seats, not to demonstrated capacity, but to the fact that they were or had been senators. Theodore Roosevelt—who has said of the

justices that "[t]hey seldom die and never resign"—employed criteria of selection which transcended legal law. The Senate has always been jealous of its "consent" and on occasion the fetish of senatorial courtesy has blocked excellent appointments. Although in general the advice of the Senate lies dormant, a weak or a stubborn president may easily quicken it into flame. At the Memorial Service, Mr. Justice Curtis is referred to as having been appointed by Senator Daniel Webster, and President Hoover most unwillingly sent up the name of Benjamin Cardozo, having been goaded by Senators Norris and Borah, acting for the Judiciary Committee.

Nor are there of necessity nine chairs because there are nine candlesticks or some other quantitative symbol to which the number must conform. A number of heads are better than one. There must be men enough to carry the judicial load and so long as human eyes do not see the contours of the law alike, prudence demands an odd number. But at one time the bench consisted of six, and the necessity of saving California to the Union during the Civil War was so imperative that a tenth justice had to be appointed, even though an extra chair had to be rolled in. In general, too, the original docket aside, the ambit of the Court's jurisdiction is fixed by the Congress through the judicial code as amended. The two houses determine procedure and appoint limits to the Court's discretion in hearing or refusing to hear cases. But far more important is the character of the Court's work. Its litigants are usually no more than champions who go forth to battle. It is of little concern whether or not Paterfamilias Dagenhart is to be permitted to live in idleness on the earnings of his children, or whether Bunting triumphs in a tilt against the State of Oregon, or what personally happens to the Leo Nebbias of this world. It is the validity or invalidity of a federal child labor law, the power of a state to fix minimum wages, and the right of a commonwealth to take its amateur fling at price-fixing which is the issue. These and like questions which are the grist of the Supreme Court mill are matters of public policy. Their proper frame of reference is political tradition as that tradition is remade by enlightened public opinion. To have their fate depend upon a legalistic battle is to invoke an irrelevant ordeal. The Supreme Court handles the kind of problems which engage the legislatures, federal and state. So long as such issues reach the Court as legal questions, they can be handled only by men learned in the law. But the questions themselves are of a kind with those which engage the legislatures, state and federal. They demand of members of the bench a special competence in the affairs of the state. When, as in the mid-thirties, such a lack of competence is clearly demonstrated, there arises a danger to the Republic of which the Executive and the Congress may well take account. In all our history, the prospect of judicial reform was never brighter than on New Year's Day, 1937. No president could have asked for a better hand than that held by F. D. R. as he started his Court fight. Yet

things went wrong almost from the beginning, and out of nothingness there appeared obstacles which could not be overcome.

*The Secret Diary of Harold L. Ickes* is perhaps the most authentic account we possess of that doughty and ill-fated adventure. It falls short of the whole truth and its items are not necessarily the entries set down by the Recording Angel. It rambles into every nook of public affairs, and roars into unexpected quarters. Rarely has any historical event been fitted out with so many diverse sidelights. Yet, it is the more valuable because Ickes met the course of events head-on; he set down his notes day by day, and no more than his "blundering" colleagues did he know what lay ahead. By the aid of an excellent index, the reader may disentangle the story of the "court packing" from the miscellany of derring-do in which it is set. Ickes was too much in the thick of things to be objective, and too much of a crusader to capture the significance of underlying trends. For these very reasons, the Diary is all the more worth while as an intimate part of the story which the author is telling. Although Ickes is strong on the motives and judgments of the actors, the larger lines of the battle are often confused by the vivid skirmishes which he recounts. He gives what an intelligent diarist can give, an assortment of items which can be made to take their places in a chapter of history. He fails to give what no diary can ever produce, a consecutive story of the whole affair.

For all of that, the failure of the reform is written large in the collection of fragments. The fatal defect, as is now apparent, lies in the relationship of the plan to the cause. The heart of the plan was the proposal that for every member of the Court who stayed on the bench after attaining the age of seventy, an additional justice was to be appointed. The older man was to be allowed to linger as long as he liked, and was to have a full voice in the proceedings, but the younger man who came to the bench was likewise to share fully in the proceedings and to enjoy the same voting rights as his elder colleague. The logical anomaly in the proposal is obvious. The older man was deemed competent enough to carry on, but incompetent enough to demand the services of an extra colleague. At the time six of the nine members of the bench were seventy or more. This meant an increase in the membership of the Court to fifteen, but neither nine nor fifteen fixed the number of chairs. The new formula was to be a membership of nine, plus the number of members who had attained the age of seventy. Its minimum limit was thus nine and its maximum limit eighteen. The authorship of the plan is quite uncertain. It came immediately from ranking officials within the administration, presumably with the Attorney General as the chief architect; but Ickes insists that the plan was originally drawn up for President Wilson by his then Attorney General, one James Clark McReynolds. It is perhaps more relevant that the plan was anything but pleasing to Mr. Justice McReynolds, the successor-in-person to the former Attorney General. The administrative diffi-

culties which would have ensued in the operation of a Court as vacillating in number as in personality have never been adequately detailed.

In a bitter fight contagion is rampant, and here it was easy for the enemies to infect the cause with the frailties of the plan. They made it appear that it was the institution of the Court rather than the erring ways of the brethren which was the target of politics. It is tradition that the High Court is above the battle; that from their seats on Olympus the justices are not to address appeals to the Congress or to the public; yet the center block of Hughes, C. J., flanked on right and left by Van Devanter and Brandeis, JJ., rose to the defense of the Court as an institution and broke the silence of long decades. In deed, as well as word, the Court committed itself to the battle. As Thomas Reed Powell has put it, "[a] switch in time saves nine." And by the vote of Roberts, who moved across to join Brandeis, Stone, Cardozo, JJ., and Hughes, C. J., the kind of social legislation which only a year before had been found to be unconstitutional was discovered on a second look to be consistent with the mandates of that immortal document. Nor did the administration tighten its lines and move with the neatness and dispatch expected of it. A number of senators who had staunchly supported New Deal measures announced that they could not go along with the proposed plan. It is not that they loved F. D. R. and the party less, but that they loved the Constitution more. The congressional leadership which with other issues had proved effective was unable to maintain the discipline essential to victory. A number of prominent law teachers went along because they were convinced of the necessity of judicial reform and saw no alternative. But even the ranks of the intellectuals did not remain unbroken. One professor of law in a not-unknown school was eloquent in persuading others to fight, but refused to take a public stand himself. And all the time Ickes gave counsel, listened to rumors, made speeches, damned his colleagues and gave his utmost to the crusade. In the end a bill was passed which gave to justices the privilege, if they wished to take it, of leaving the bench after attaining the age of seventy, yet allowed those who departed to draw their full salaries for the rest of their lives. The Congress had come to believe that it was better to allow the Court to be reformed by acts of God and ferment from within than by resort to its own legislative mandate.

But even in defeat, fortune did not desert F. D. R. A salary with no work is a lure, even to justices, and in spite of T. R.'s words, in time they do shuffle off the mortal coil. So, through a discriminating choice of personnel, Roosevelt was given a second chance to reform the Court. In fact, he elevated a sitting jurist to the office of Chief Justice and made eight appointments to the bench. No president in history has ever had a like opportunity to have the law of the land interpreted and applied by a group of justices of his own choosing. It is a grand game, that of out-guessing the forces which

shape personality, and of choosing so shrewdly that after appointment judges remain the same men. Senator Robinson of Arkansas, who had given his all to a fight in which he could not put his heart, was scheduled for the first vacancy. F. D. R., according to Ickes, "owed it to Old Joe," but a wise Providence called him to celestial duty, and since the political exigencies of politics demanded a senator, Hugo Black got the appointment, and the opportunity to put to use his superb—even if unsuspected—judicial qualities. The idea of balance suggested to F. D. R. a less experimentally-minded person for the next appointment, and Stanley Reed stepped from the office of Solicitor General, where he had pleaded the cause of New Deal measures to the Court. An old friendship which went back to the days of World War I culminated in the appointment of Felix Frankfurter to the chair once held by Holmes and immediately vacated by Cardozo. The choice of William O. Douglas to take the place made vacant by the retirement of Brandeis was a natural. It is hard to tell whether the older man was more pleased with his successor than the younger man to step into such distinguished shoes. Robert Jackson came to the Court as, more nearly than any other, the very personification of the New Deal, and Frank Murphy, whatever the reasons which prompted his appointment, brought to the Court a burning passion for righteousness. James Byrnes took the Supreme Court in his stride. It was a reward for outstanding political service and was a necessary complement to the round of other offices which he had held. Wiley Rutledge, like Cardozo before him, was the nominee of a group of intellectuals who succeeded in reaching the ear of the President. To them he represented the belief in the law as a living thing, a developing instrument of social justice. In some cases performance was not so much inferior to as different from promise. In only one or two instances did the qualities which have made these men distinctive have anything to do with the reasons which led to their appointment. It is of note that Ickes' first choices for the Court were Robert Maynard Hutchins and Leon Green—and it is interesting to speculate as to how much more excitement such dynamic individuals would have brought into the U.S. Reports.

But the Roosevelt majority could not endure. Before F. D. R.'s successor, a man of his own choice, had rounded out his term, four new faces were seen upon the bench; and in the Eisenhower administration a Truman appointee and a Roosevelt appointee have been replaced. The erosion of the New Court did not have to await the newcomers. There were breaks in the ranks and departures from a fighting faith before Truman's first appointee took office. A couple of justices once firmly seated lapsed at least at times into the belief that they were now numbered among "The Nine Old Men." The acts and things done by the Old Court had left a curious impress upon some of the new members of the Court. If the Four Horsemen plus Hughes and/or Roberts had done wrong, it was the power to do wrong which was at fault.

If the veto power of the Court had been used to strike down statutes designed to meet a felt need, it seemed to follow as of course that it must not be employed to strike down measures which served vested interests, and since the power was not to be denied or abridged by legislative mandate, it must be sterilized through a self-denying ordinance. Although this attitude was not consistently maintained, its influence was manifest in many lines of doctrine. The old mythology had won a well-deserved repose, but a new collection of myths was created and fitted out for judicial service. The fiction was indulged that the Congress could never, or hardly ever, do any wrong, and that its acts emerged from a political process pure and undefiled. The administrative agencies were peopled with officials possessed of a kind of specialized omniscience known as *expertise*. The failure of the Congress to act evoked the term of art "silence," and this rational silence was deemed a studied legislative judgment not to act. Such facts of life as special interests, the seniority committee system, and the pressures of power politics were too realistic to become terms in the formula of decision. In the economic field, issues were resolved by procedures more legalistic than the Old Court had ever employed. In the field of civil rights the legislative and the executive were indulged in playing fast and loose with the guarantees of the Constitution. In respect to racial segregation and the rights of fractional groups to talk nonsense in the name of religion, progress was made. But in other domains the New Court could hardly be called the champion of the liberties of the people. The many and varied techniques by which the New Court, with decorous language, deposited hard problems upon the doorsteps of other agencies were not anticipated by Ickes, nor need they be recited here. That dramatic catalog of interlocked proceedings awaits the industry and insight of an editor of the *Review*. An exact title for his article is "The Cult of Irresponsibility."

If Ickes, the staunch champion of judicial reform, had had his way, I wonder if things would by now have been different. It is true that the Court was not packed by an application of the formula of nine plus one extra for every justice over seventy, but the Old Court was speedily unpacked and the judicial millennium did not arrive. If F. D. R. had been able to play a game with chronology, matters might have been set to rights, for if the New Court, with its philosophy of judicial *laissez faire*, had sat during the thirties, it could have allowed the whole New Deal program to take its experimental way. And if the Old Court could have sat during the forties, with its philosophy of giving full sway to the due process clause, the whole legislative program designed to serve privilege might have been struck down. In such an event, however, one cannot but wonder if the Old Court might not have abandoned its old philosophy and have exalted the legislative power; for the roots of judicial preference run deep. One wonders, too, if the New Court would have accepted its self-denying role had its members not been condi-

tioned by the untimely acts and things done by the old bench. For as "interstate" and "intrastate" have been alike judicial synonyms for laissez faire—the one being invoked when the validity of state legislation is being questioned and the other when the challenge is directed to a federal statute—so it is that the validity of theories may well derive from impinging circumstance. As against members of the New Court the Four Horsemen now stand out as possessed of one outstanding merit. Van Devanter, McReynolds, Sutherland and Butler, JJ., were willing to entertain questions of public policy and to give answers. They never, even when confronted by a stubborn problem, called for a bowl and water to wash their hands of all responsibility. There have in almost every age been great jurists upon the Court. Many of them as staunch individuals or as minority groups maintained a fighting faith. But if some editor of this *Review* does the History of the Supreme Court for which we are all looking, I am sure that his subtitle cannot be "An Institution in a Heroic Role." In the meantime, judicial reform goes its appointed way. President after president has been certain that he, by his appointments, could improve the performance of the Court, and for better or for worse, president after president has demonstrated that he was not fully acquainted with the qualities of the man he was appointing. It is not to be forgotten that it was Wilson who appointed McReynolds, and Coolidge who elevated Stone to the bench. Thus, the effort to make the law the instrument of justice is everlasting, and of the reform of the Supreme Court there can be no end.

For the immediate future at least there is not likely to be a return engagement of the play called "Belling the Cat." Instead, so far as the vista opens ahead, judicial reform is to be left to the finite span of human life, the measure of wisdom in the selection of jurists, the luck which appends the rightful choice of gods, and the erosion of time.

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Taxation in the United States. By Randolph E. Paul. Boston: Little, Brown and Company, 1954. Pp. 774. \$15.00.

In a remarkably timely volume, Randolph E. Paul, tax attorney and war-time government official, traces the development and growth of the revenue system from the beginning of our government down to the present time. This review of the past is appropriately timed as we commence to meet the problems of adjustment accompanying the most comprehensive revision of the revenue laws which our country has ever seen. The Internal Revenue Code