1983

Review of *The New Deal Lawyers*, by Peter H. Irons

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The government lawyers who helped shape and defend New Deal agencies have received little attention from scholars. Any oversight has now, however, been redressed. The New Deal Lawyers provides a detailed and careful study of the litigation process that preceded the New Deal's 1937 court triumphs. Peter Irons' book focuses on the activities of three key agencies and their general counsels: the National Recovery Administration (NRA) and Donald Richberg; the Agricultural Adjustment Administration (AAA) and Jerome Frank; and the National Labor Relations Board (NLRB) and Charles Fahy. Each lawyer had a distinctive style, and not surprisingly, the author concludes that the counsel's style determined how his agency responded to constitutional challenges. Richberg tried to use political pressure to settle disagreements. Frank preferred negotiation to litigation; as originally structured, his office did not even have a litigation section. Fahy alone stressed the importance of gaining court approval of his agency. NLRB lawyers carefully selected test cases, engaged in forum-shopping, and wrote sharply focused briefs designed to present issues in a favorable light to a generally hostile judiciary.

In the end, all three agencies faced Supreme Court review. The Court in 1935 held the NRA unconstitutional in United States v. Schechter Poultry Corp.1 A year later, the AAA was overturned in United States v. Butler.2 But, in a series of 1937 cases beginning with NLRB v. Jones & Laughlin Steel Corp., the Court gave its sanction to the NLRB. The New Deal Lawyers recounts the manner in which, willingly or unwillingly, the agencies advanced toward these critical courtroom showdowns.

Drawing on his examination of surviving legal records and interviews with New Dealers, Irons has written a careful study of

1 295 U.S. 495 (1935).
2 297 U.S. 1 (1936).
3 30 U.S. 1 (1937).
what New Deal lawyers did in the first years of the Roosevelt administration. He shows how they prepared and argued their cases. He also discusses the bureaucratic obstacles agency attorneys confronted. Administrators often viewed the lawyers they employed with suspicion. George Peek of the AAA, for example, considered Frank's staff to be "boys with their hair ablaze" and sought to limit their authority. At the same time, the conservative Justice Department succeeded in winning from the agencies a measure of control over the litigation process. Irons makes clear that agency lawyers faced some of their most ardent foes not in the courtroom but in government offices.

But what Irons does not fully articulate is why the subject of this book is worthy of attention. *The New Deal Lawyers* is not a study of how the New Deal itself ultimately won Court approval. Irons apparently accepts the premise that the Court finally yielded not to the power of legal arguments, but to the force of Roosevelt's national support. Similarly, Irons acknowledges it was not sloppy legislative draftsmanship or inadequate trial preparation which caused the invalidation of the AAA and the NRA. Rather, the composition of the Supreme Court made invalidation inevitable. The legacy of the New Deal lawyers, then, cannot be determined by looking at judicial results.

If they had a legacy, it must be found by placing their activities in a larger political and legal context. Irons does not attempt to do this. Instead, he provides only a narrative of events. Irons asserts in his preface that "[t]he process of litigation that leads to momentous Supreme Court decisions is a topic deserving of historical study." Yet, he never satisfactorily explains why he believes this to be true or why the litigation surveyed merits such close analysis. Thus *The New Deal Lawyers* fills a historiographical gap, but the reader wonders why Irons bothered.

All this is not to suggest, however, that Irons' subject lacks importance. With the advent of the New Deal, a "plague" of young lawyers arrived in Washington. Many remained to shape American legal and political history for a generation. Undoubtedly, their initial experiences influenced their attitudes toward the role of law and government, but Irons only briefly explores this subject. In addition, he does not explore the effects of New Deal agency activities on legal thinking and jurisprudence. This is an
important issue because so many government lawyers, Frank being the most prominent, were legal realists, and presumably were anxious to put their theories into practice. Irons offers little insight into these larger questions, and his focus on only three attorneys makes it difficult to discern broad continuities and changes. As a result, despite Irons’ careful research and analysis, *The New Deal Lawyers* is unsatisfying and of limited value.

—William Treanor