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The New Deal Lawyers

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THE NEW DEAL LAWYERS. By *Peter H. Irons*. Princeton: Princeton University Press. 1982. Pp. xiv, 351. $19.50.

Peter H. Irons' *The New Deal Lawyers* recounts the struggle of three attorneys — Donald Richberg of the National Recovery Administration (NRA), Jerome Frank of the Agricultural Adjustment Administration (AAA), and Charles Fahy of the National Labor Relations Board (NLRB) — to defend New Deal agencies against the hostility of a politically and constitutionally conservative federal judiciary. Ultimately, the Supreme Court struck down the NRA[1] and the AAA,[2] but then upheld the NLRB.[3] That agency's survival is generally credited to the "switch in time that saved nine"; the Court, threatened by Roosevelt's court-packing scheme, responded with politically motivated hospitality toward the NLRB. *The New Deal Lawyers* suggests an additional reason for the success of the NLRB — the superior legal "style" of its chief attorney.

Irons contends that the distinctive traits of the agencies' chief attorneys were reflected in their enforcement programs. Irons characterizes Richberg of the NRA as a "Legal Politician," an ambitious and politically astute man who "parlayed his relationship with Roosevelt into an unofficial post as 'Assistant President' " (p. 29); Frank of the AAA as a "Legal Reformer," a legal realist and self-described reformer (p. 120); and Fahy of the NLRB as a "Legal Craftsman," a lawyer who saw his job not as making social policy, but as enforcing a statute "through the presentation of carefully selected cases in the courts, with meticulous attention to detail and the formulation of narrowly drawn issues the keys to success" (p. 235). Richberg preferred political influence to litigation, while Frank concentrated on negotiation. Neither began his administration with a carefully developed litigation strategy to test his agency's power before the Supreme Court. Only after becoming embroiled in enforcement suits did they realize the value of such planning. By then, Irons observes, they had lost much control over the timing and choice of cases. Fahy, by contrast, at the outset constructed a litigation course to force an early Supreme Court test on a strong case for the NLRB. His meticulous planning paid off, as he presented to a receptive Court a package of four viable cases headed by *NLRB v. Jones & Laughlin Steel Corp*.[4]

Fahy had the additional advantages of relative freedom from interference by both the head of his agency and the Justice Department. Warren Madden, the chairman of the NLRB, approved of Fahy's litigation scheme and allowed him considerable autonomy. Richberg and his superior, Hugh Johnson, usually agreed on most policy issues, but vied for control of the NRA and for influence at the White House, which crippled the agency's effectiveness. Jerome Frank and the chief of the AAA, George Peek,

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

2. United States v. Butler, 297 U.S. 1 (1936).

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

4. 301 U.S. 1 (1937).

clashed violently — personally and professionally — from the day Frank was appointed as general counsel until Peek was forced out. Unfortunately, while Frank's personal relations with Peek's successor were far more cordial, serious policy differences divided them.

"The relentless bureaucratic imperialism of the Justice Department" further diminished Richberg's and Frank's power over their agencies' enforcement and litigation policies (p. 11). Anxious to dominate government litigation, the Justice Department, with Roosevelt's acquiescence, wrested control over all litigation from the NRA and AAA. Consequently, Richberg and Frank were forced to defer to the Justice Department's decisions regarding which cases were appealed and what arguments were made. The Department's distaste for litigation and ignorance of the subject ensured disaster. Fahy, however, avoided this pitfall since the Wagner Act placed primary control of litigation with the NLRB, allowing the agency's lawyers to represent the Board in any court.

Fahy did not escape the hostility of the federal judiciary, however. All three general counsels had to defend the constitutionality of New Deal legislation before a bench composed predominately of elderly, conservative, and partisan Republican judges. Most of the courts were unreceptive; some were outright incompetent. Irons relates Fahy's disheartening exchange with one octogenarian judge.[5] Informed that the constitutional issues in the case centered around the Commerce Clause, the judge sent for a copy of the Constitution, thumbed through it, and inquired of Fahy: " 'Does this case involve Indian tribes?' No, the puzzled Fahy answered. 'Does it involve trade with foreign nations?' No, again. 'Then it must be commerce between the states,' [the judge] concluded triumphantly (p. 256)."[6]

The ultimate test for Richberg, Frank and Fahy was, of course, in 1936 when *Jones & Laughlin* was heard before the Supreme Court. Irons acknowledges that the Court was ripe for a case which would permit it to uphold New Deal legislation on a new, broad reading of constitutional grants of power to Congress. But he proposes that Fahy's victory was as much the product of craftsmanship and control of the NLRB's enforcement program as of fortuitous timing. Conversely, he implies that Richberg's and Frank's lack of planning, internecine feuds with their agency heads, and territorial contests with the Justice Department would have seriously undermined their chances for success even if they had faced a less intractable Supreme Court majority.

Iron's use of the "style" of influential people to explain history derives from James David Barber's studies of American presidents.[7] The approach sharpens his comparison among the three general counsels and organizes his highly detailed discussions of the personalities and politics of the era.

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5. Fahy was appearing before Chief Judge Buffington, age 81, in NLRB v. Pennsylvania Greyhound Lines, 91 F.2d 178 (3d Cir. 1937), *revd.*, 303 U.S. 261 (1938).

6. Irons notes that Judge Buffington remained on the bench until 1958, when he was 103. P. 327 n. 11.

7. *See* J. BARBER, THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE (2d ed. 1977); Barber, *The Interplay of Presidential Character and Style: A Paradigm and Five Illustrations*, in A SOURCE BOOK FOR THE STUDY OF PERSONALITY AND POLITICS 386 (F. Greenstein & M. Lerner eds. 1971).

This clarity, though, comes at the cost of artificially confining engrossing, complicated characters within rigid categories. The reader is left wishing for a fuller description of the personalities of Richberg, Frank, and Fahy.

Only two previous works have undertaken comparable analyses of the roles played by individual lawyers in shaping momentous constitutional litigation. Benjamin R. Twiss, in *Lawyers and the Constitution*,[8] examined the attorneys who argued for a jurisprudence based on states-rights federalism and laissez-faire economics. Richard Kluger's *Simple Justice*,[9] investigated the lawyers who represented the cause of racial equality. The constitutional revolution of the New Deal has been exhaustively studied from the perspectives of the Court, the President, and Congress; *The New Deal Lawyers'* emphasis on the role of these three attorneys makes Irons' book a welcome contribution to this too limited body of literature.

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8. B. TWISS, LAWYERS AND THE CONSTITUTION (1942).

9. R. KLUGER, SIMPLE JUSTICE (1976).