

**The New Deal Lawyers.** By Peter H. Irons.<sup>1</sup> Princeton, N.J.: Princeton University Press, 1982. Pp. xiv, 351. \$27.50.

*Reviewed by Victor H. Kramer<sup>2</sup>*

Viewed against all of United States legal history, the four years covered in Professor Irons's book, *The New Deal Lawyers*, are miniscule. Nevertheless, those were unusually important years and their history makes fascinating reading today. The book traces the history of three landmark New Deal agencies—the National Industrial Recovery Administration, the Agricultural Adjustment Agency and the National Labor Relations Board—up to Roosevelt's second inauguration in 1937, shortly before the Supreme Court upheld the constitutionality of the National Labor Relations Act.<sup>3</sup> The result, while not a complete legal history of the period, is some 300 pages of exhaustive detail, which gives a fascinating insight into some of the men whose accomplishments made this period so important.<sup>4</sup>

In his Introduction, Professor Irons states that his "three case studies . . . explore in detail the litigation process."<sup>5</sup> He is concerned, he says, with two related questions:

[H]ow do constitutional test cases emerge from the crowded litigation dockets of federal regulatory agencies; and, second, can differences be discerned in the litigation strategies adopted by different agencies in the selection of test cases?<sup>6</sup>

Having stated his objectives, Professor Irons proceeds to provide a thorough answer to his first question but leaves the second ques-

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1. Visiting Professor of Legal Studies, University of Massachusetts.

2. Professor of Law, University of Minnesota.

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

4. In his Preface, Professor Irons reminds readers he has necessarily "neglected the works of such influential New Deal Lawyers as Dean Acheson, David E. Lilienthal, James M. Landis and William O. Douglas." P. IRONS, *THE NEW DEAL LAWYERS* xii (1982). Professor Irons states in his Introduction that the work of 95 lawyers is discussed in the book. *Id.* at 6. The work of 17 of these 95 are discussed in some detail. The 17 are: Thomas Corcoran, Homer Cummings, Thomas I. Emerson, Charles Fahy, Jerome N. Frank, Paul Freund, Lloyd Garrison, Milton Handler, Alger Hiss, Philip Levy, J. Warren Madden, Calvert Magruder, Stanley F. Reed, Blackwell Smith, Harold M. Stephens, Robert L. Stern, Charles Wyzanski. Since the author concentrated on only three New Deal agencies plus the Department of Justice, a more appropriate title for the book might be "Some New Deal Lawyers."

5. P. IRONS, *supra* note 4, at 4.

6. *Id.*

tion only partially resolved. While Professor Irons does discuss differences between agencies in selecting cases, he is unable to determine whether those differences actually affected the outcome of any of the cases. Rather, he concludes that the overwhelming tide of change, not their legal skills, gave the government's litigators their ultimate victories in the Supreme Court. In other words, President Roosevelt lost the Court-packing battle but won the cause; the majority of the members of the Supreme Court would, in the words of Chief Justice Hughes, no longer "shut our eyes to the plainest facts of our national life."<sup>7</sup>

A minor theme of the book, which is hammered home in considerable detail, concerns conflict and tension between the agencies and the Department of Justice in the management of litigation. The author's belief that this was an unusual phenomenon may reflect his lack of experience as a government lawyer.<sup>8</sup> The conflict, which in the early years of the New Deal made life miserable for lawyers in both the Department and the agencies,<sup>9</sup> continued with vigor and indeed continues down to the present day. This phenomenon—the fight for control of federal litigation—is a fascinating one that defies completely satisfactory explanation. To undertake an explanation would be worthy of a separate book.

7. *Id.* at 287 quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

8. Professor Irons's extraordinary career is set out in the Preface at x-xii. Born in 1940, he became active in the anti-draft movement while in college and ultimately served 26 months in federal prisons. Then followed four years of graduate study in political science, which generated his intense interest in the New Deal. After becoming friendly with Alger Hiss, Irons entered Harvard Law School in 1975, but has never practiced law. Currently he is visiting Professor of Legal Studies at the University of Massachusetts.

9. The prevailing attitude of the Ivy League law school graduates toward the lawyers in the Department of Justice in the early and middle Thirties is well summed up by Thomas Emerson in a passage Irons quotes at 228:

The Justice Department . . . was "the most political branch of the administration, and . . . its staff was filled with people who were more or less failures as lawyers or else ancient bureaucratic types. They had no particular interest in the New Deal. . . ."

Professor Irons refers at great length to a long memorandum by W.B. Watson Snyder, an attorney with the Department of Justice, prepared for Assistant Attorney General Stephens, reporting on the instances in which the lawyers employed by the Petroleum Administrative Board had overstepped their authority and worked at cross purposes with the Justice Department. P. IRONS, *supra* note 4, at 63. Snyder recommended that the Attorney General require the Board to seek authorization from the Justice Department before prosecuting code violations. Stephens rejected Snyder's advice though he shared his attitudes toward lawyers at the Board. Meanwhile, Secretary of the Interior Ickes confided to his diary that "hardly anyone has any respect for the standing and ability of the lawyers" at the Justice Department. *Id.* at 65.

This reviewer knew and worked with Snyder in the Antitrust Division in the late Thirties and early Forties. He was a lovely person, a reasonably good investigator, and a lawyer of limited judgment. Had Professor Irons had the opportunity to work with Mr. Snyder, he might not have placed so much emphasis on Snyder's reports.

Most recently, former President Carter and his first Attorney General, Griffin Bell, tried to do something about the conflict over control of federal litigation. Carter appointed a study group whose tasks included a study of federal legal representation.<sup>10</sup> That group identified many problems inherent in the existing system by which the attorneys in the Department of Justice battled the agency lawyers for control over federal litigation.<sup>11</sup> The study group submitted to the President a number of "options" for change; some were adopted<sup>12</sup> but none appears to have made much difference.

With the decline of federal regulation under President Reagan the problem may be less acute. But under President Carter, the dramatic increase in government lawyering overwhelmed the Justice Department's litigation capacity. Although the numbers are geometrically greater, the problem in the 1980s is remarkably similar to that in the 1930s. The following passage, although describing the conflict in 1933-35, applies equally to the conflict as it exists today, or at least as it existed under President Carter:

Since its establishment in 1870, the Department had fought a back-and-forth battle with the cabinet departments and independent agencies for control of federal litigation. In essence the argument revolved around the respective merits of centralization and expertise; the Justice Department would claim that the government must speak in court with one voice . . . while the agencies countered that their lawyers best understood the statutes and the details of their cases.<sup>13</sup>

As a matter of logic and symmetry in organization charts, a very strong case can be made for centralization in the Department of Justice. But as is so often the case, the facts fly in the face of logic and symmetry. The volume of litigation to which the United States is a party staggers the mind; there are scores of thousands of cases pending in which the government is involved.<sup>14</sup> The Department simply does not have enough lawyers to take charge or even supervise this body of litigation.<sup>15</sup>

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10. See OFFICE OF MANAGEMENT AND BUDGET, DATA ON THE FEDERAL LEGAL SYSTEM, PRESIDENT'S REORGANIZATION PROJECT 7 (January 1979) (available in Minnesota Law School Library).

11. See OFFICE OF MANAGEMENT AND BUDGET, SYNOPSIS OF DRAFT OPTIONS, FEDERAL LEGAL REPRESENTATION STUDY, PRESIDENT'S REORGANIZATION PROJECT (March 24, 1978) (unpublished).

12. See Exec. Order No. 12146, 3 C.F.B. 409 (1980).

13. P. IRONS, *supra* note 4, at 41 (footnote omitted).

14. On June 30, 1982 there were 57,967 civil actions pending in the U.S. District Courts in which the U.S. was a party. See REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 226 (1982).

15. Although there were about 55,000 employees in the Justice Department in 1981, only 4,145 or about 7.7 percent of these were lawyers. See JUSTICE MANAGEMENT DIVI-

The book's great strength lies in its detailed, vivid pictures of the lawyers behind the agencies. For example, Professor Irons has a discerning eye for the prejudices and inferiority complexes of lawyers in the New Deal days. Thus, he spends several pages discussing the contrasting attitudes of Nathan Margold, Jerome Frank and Charles Fahy toward employing Jewish lawyers on their legal staffs.<sup>16</sup> Frank, who was then Solicitor of the Department of Agriculture, reported in a memorandum to Secretary of Agriculture Henry Wallace:

[T]here are only two Jews on the staff and I have recommended two others. The total staff will be something over thirty, and I do not think that five Jews out of this total would be a disproportionately large number. Indeed I have taken such care to discourage Jewish applicants that I have gained the reputation among my non-Jewish friends, at Columbia, Yale, and elsewhere, of being anti-Semitic. At least half a dozen very able lawyers have been rejected by me on this ground . . . .<sup>17</sup>

In contrast to Frank's perception, Adlai Stevenson II, who was then of Frank's staff, observed in a letter to his wife that "there is a little feeling" in the AAA "that the Jews are getting too prominent." He continued by noting that Frank "has none of the racial characteristics" of the other Jewish lawyers who, although "individually smart and able, are more racial."<sup>18</sup> Nathan Margold, Solicitor of the Interior Department, was also concerned that he would "lay myself open to the charge which is almost certain to be laid against me, if I choose too many Jewish men", and consequently, rejected most of the Jewish lawyers recommended to him by Frankfurter.<sup>19</sup> In contrast, the general counsel for the NLRB, Charles Fahy, showed no reluctance to hire Jewish lawyers. J. Warren Madden, Chairman of the NLRB, later recalled that the NLRB was a haven for "young men who had made excellent records in law school but who, on account of their race, a great many of them being Jewish, did not have good opportunities"<sup>20</sup> for careers in private practice. Now that large numbers of Jewish lawyers are accepted both in the big firms and in government agencies, these New Deal attitudes may seem quaint if not repugnant; nevertheless, they provide an interesting insight into the attitudes of the top lawyers in New Deal agencies.<sup>21</sup>

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SION, U.S. DEPARTMENT OF JUSTICE, EMPLOYMENT FACT BOOK FOR THE PERIOD JANUARY 1, 1981 TO DECEMBER 31, 1981 6, 14 (1982).

16. P. IRONS, *supra* note 4, at 60, 126-28, 237.

17. *Id.* at 127.

18. *Id.* at 128.

19. *Id.* at 60.

20. *Id.* at 237. Fahy's father was a Catholic, but his mother was Jewish. *Id.* at 234.

21. Even Thurman Arnold, who worked closely with Abe Fortas both on the Yale

*The New Deal Lawyers* is thoroughly and carefully researched. Wide use is made of the oral history collections at Cornell and Columbia, the Franklin D. Roosevelt Library, the National Archives and the Manuscript Division of the Library of Congress.<sup>22</sup> In addition, the author interviewed several of the New Deal lawyers including Alger Hiss, Thomas Emerson, Charles Fahy and Thomas Corcoran.<sup>23</sup> Out of the interview with Emerson came a wonderful appellate courtroom story. Charles Fahy, then General Counsel of the Labor Board, was arguing the *Greyhound*<sup>24</sup> case before the Third Circuit. The panel consisted of:

[T]hree judges of advanced age and diminished ability: Chief Judge Buffington was eighty-one and had been on the federal bench since 1892; his two colleagues, Oliver Dickinson and J. Whitaker Thompson, were comparative youngsters at seventy-nine and seventy-five. Tom Emerson, who accompanied Fahy to Philadelphia for the argument, recalled the judges "had absolutely no idea of the constitutional issues involved." The normally unflappable Fahy was incredulous when Judge Buffington interrupted him: after sending a clerk for a copy of the Constitution, the judge thumbed through it and asked 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," Buffington concluded triumphantly.<sup>25</sup>

From Irons's interview with Leon Keyserling comes another gem. Keyserling was then legislative aide to Senator Wagner and Charles Wyzanski was Solicitor of the Labor Department. These two brilliant and arrogant lawyers had a bitter dispute in 1934-35 over the bill that would become the National Labor Relations Act. Professor Irons described this controversy:

Labor Department Solicitor Charles Wyzanski, cautious on legal questions and institutionally loyal, had helped to torpedo Wagner's Labor Disputes Act in 1934 and drafted Public Resolution 44 to displace it. Keyserling acidly recalled

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faculty and in the Department of Agriculture in the early New Deal days and later founded a famous firm with him, was well aware of the problem of the Jewish lawyer in the thirties. In a 1936 letter to Professor Leon Green, apparently concerning qualified candidates for a law faculty, Arnold, then at Yale, wrote concerning Fortas:

[H]e is under a handicap here because he is a Jew and they are paying him a miserable salary. . . . He is married to a Gentile, a most attractive girl who will fit in anywhere. He is not Jewish in appearance and if his name were not *Abe Fortas*, I do not think anyone would know he was a Jew.

VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD 222 (G. Gressley ed. 1977).

22. P. IRONS, *supra* note 4, at 301, 334.

23. *Id.* at 334.

24. *NLRB v. Pa. Greyhound Lines*, 91 F.2d 178 (3d Cir. 1937). The three judges who participated in the decision were Buffington, Dickinson (who was then on the District Court of the Eastern District of Pennsylvania) and Biggs, not Thompson. Biggs dissented in part.

25. P. Irons, *supra* note 4, at 256 (footnotes omitted).

Wyzanski's "look of satisfaction" when the resolution passed "and he thought that the Wagner bill was as dead as a coffin nail." When it turned out that Wyzanski's approach had expired and Wagner revived his bill, "Wyzanski did all he could to ruin the bill," Keyserling charged.<sup>26</sup>

Admittedly, as the reader plows through hundreds of pages relating to almost forgotten cases of 50 years ago, he may tend to weary of such exhaustive detail.<sup>27</sup> Recollected in its entirety, however, the book left this reader with the satisfying feeling that he had learned something about his older colleagues of almost two generations ago that he hadn't appreciated at the time: they were, on the whole, an extraordinarily able bunch. The proof is in their work, which is well described in *The New Deal Lawyers*.

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26. *Id.* at 230 (footnotes omitted).

27. This reader found the following two errors in details in the book:

Robert L. Stern, who is given a good deal of credit in the book for developing the arguments which ultimately changed the Supreme Court's mind on the reach of federal power over commerce, *see id.* at 294-98, is described as having started his New Deal career with the Petroleum Administrative Board and then having moved to the Solicitor General's office in the Department of Justice. *Id.* at 48. Actually, his move there was delayed for several years which he spent in the Antitrust Division of the Department of Justice.

On page 298, the author states that Hugh Cox was in the Solicitor General's office. Cox held various high posts in the Antitrust Division of the Department of Justice from 1935 to 1943; in the latter year he became Assistant Attorney General in charge of the newly-created War Division; later that year he became Assistant Solicitor General. 35 WHO'S WHO IN AMERICA 504 (1968-69). That office, at least after 1942, had nothing to do with the Solicitor General. Its title was subsequently changed to Office of Legal Counsel. (Cox's name was inadvertently omitted from the index. *See* P. IRONS, *supra* note 4, at 343).