Maryland Law Review

Volume 35 | Issue 1 Article 12

Book Review

Book Review

The Benchwarmers. By Joseph C. Goulden. Weybright & Talley; 1974. Pp. 352. $12.50.

If the dominant theme of a book on the federal judiciary can be said to appeal to prurient interests, *The Benchwarmers* is the book. Through the selection of unrepresentative occurrences, manifestly erroneous interpretations and not a little muckraking, Joseph C. Goulden has painted a picture of the federal bench that is at best a gross inaccuracy and at worst a consummate prostitution to the current mania for capitalizing on corruption and incompetence in government. It is, therefore, particularly unfortunate that this book was written by a well-known journalist and is probably destined to be read by a large number of people, most of whom will thereby derive their total knowledge of the subject matter.

No one, this writer included, who has spent much time in and around federal district courts can honestly say that he has not observed instances of unacceptable conduct by federal judges. Neither would many such persons argue that a district judge who is unfit for office — whether because he gets intoxicated, is overly partial to certain interests, is consistently disrespectful of counsel or litigants, engages in financial improprieties, expresses racial or ethnic biases or simply is incapable of doing his job — should escape the loudest and most vehement condemnations nor fail to feel the full weight of the constitutional mechanisms available for his removal. Federal courts are public institutions of government and are fair game for any and all criticism. I do not fault Goulden for his attacks on certain judges, albeit that quite a few seem undeserved. I do fault him for purporting to write a book that is "concerned with the personalities and the politics of the federal trial bench" (p. 17) when, in fact, he has written no more than a collection of gossip and half-truths.

The book begins with an explanation of the procedures attending federal judicial appointments. Goulden points out, quite correctly, that the screening agency in that process, the American Bar Association's Standing Committee on the Judiciary, is not a broadly representative group; it is composed primarily, if not exclusively, of attorneys who are members of powerful and usually large law firms that serve big corporate clients; it tends to approve its own kind (pp. 41-43). But the pregnant conclusion, suggested by incidents described throughout the book, is erroneous: federal district judges do not on the whole show a strong bias in favor of gross economic interests.[1] Surprisingly, one often finds a judge who, although

1. That this is so does not, of course, vindicate the stilted selection process. The conspicuous absence, for example, of members of minority groups in federal

pressed from the elitist mold depicted by Goulden, is totally hospitable to a party seeking to advance the cause of environmental protection or to correct the balance between corporate power and the needs of an impecunious individual. *The Benchwarmers* tells us very little about such instances and even less about the relative freedom from economic coercion that the federal courts, as compared with other branches of government, enjoy.

The main body of this book is divided into four chapters, two each dealing with the system when it works and when it does not work. It is immediately clear that the author's selection from among the nearly one hundred federal district courts is not a fair sampling. The district courts chosen all sit in major cities — New York, Chicago, Washington and Oklahoma City[2] — and three of these courts are among the busiest in the United States. One, the United States District Court for the Northern District of Illinois, has a track record for incompetence that is unequalled. Two of the other courts chosen also have unique characteristics: the United States District Court for the Southern District of New York is uncommonly top-heavy in big money litigation, and the United States District Court for the District of Columbia is peculiarly involved in litigation affecting the conduct of the federal government. By selecting these district courts and by choosing cases in them that can best be described as cause célèbres, Goulden creates the erroneous impression that the main business of federal courts is politics, an impression that he uses to bolster his thesis that federal judges should be less aloof from external pressures (*see, e.g.* pp. 2-3, 11, 209, 352).

The author's examples of the system when it works reveal little appreciation for the limited role of the federal courts in our system of government. The two major examples of a properly functioning district court are the *IBM Antitrust Case*[3] and the *Watergate Case*,[4] both of which, while redounding to the everlasting credit of the judges who sat in them, are examples of an article three tribunal operating near its breaking point. Cases such as *IBM* and *Watergate* — like the *Apportionment Cases*[5] — evolve only because the other, primarily responsible, branches of govern-

---

judicial office is injurious to basic notions of equality and to the appearance of justice even if the presence of such persons would make no substantial difference in the decisions of particular courts.

2. The courts chosen are the United States District Courts for the Southern District of New York, the Northern District of Illinois, the District of Columbia and the Western District of Oklahoma.

3. United States v. International Business Machines Corp., Civil No. 69-200 (S.D.N.Y., filed Jan. 17, 1969).

4. United States v. Liddy, Crim. No. 1827-72 (D.D.C., judgment and commitment filed Jan. 30, 1973).

5. Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

ment have failed.[6] This is not to say that federal courts should not act when the need arises from the failure of the other branches. But federal courts, in fact all courts, are not ideal forums for the resolution of economic or political problems that are deeply embedded in the fabric of American society. The justification for federal courts does not rest, therefore, upon a handful of last-gasp judicial intercessions, but upon the hundreds, perhaps thousands, of cases in which important national policies are vindicated in narrowly-defined controversies concerning parties before the court.[7]

Nowhere in *The Benchwarmers* does the author demonstrate an appreciation of the essential differences that characterize the judicial branch of government. It is perhaps unfair to expect a non-lawyer to understand abstruse doctrines such as standing, ripeness, mootness or justiciability and when three is a "case or controversy" or a "political question." But anyone claiming familiarity with the federal judiciary should be conscious, for example, of the fact that the courts do not choose their business. Even the casual observer should be able to recognize that the federal courts have neither the means to investigate beyond the attorneys' presentations nor the ability to formulate policies other than those necessary to the resolution of the disputes brought before them. The parade of horrors contained in this book is, therefore, an inchoate depiction of the federal courts: Goulden fails to acknowledge that their potential for doing harm is far less than that of the other branches of government[8] and the availability of meaningful corrective mechanisms is far greater.[9]

Since the central theme of this book is the extent to which federal judges lead cloistered existences, and since every conceivable form of unseemly behavior is cited to support the proposition that this is essentially undesirable, it would seem that some indication of the judicial and extrajudicial conduct relevant to a judge's competence would be in order. *The Benchwarmers,* however, does not suggest even the blurriest of lines for determining the relevancy of particular conduct. It treats, for example, a district judge's somewhat childish affinity for a hood ornament and custom license plate on his car (pp. 206-07) with the same perturbation as another district judge's engagement in real estate speculations involving a company

---

6. *See* H. HART & A. SACHS, THE LEGAL PROCESS 384–85, 398, 400 (tent. ed. 1958).

7. Had he chosen to do so, Goulden might have discussed the contributions of such judges as Frank M. Johnson, Jr., of the United States District Court for the Middle District of Alabama (a total of seven lines, pp. 3, 316) and James E. Doyle of the United States District Court for the Western District of Wisconsin (never mentioned), whose continuous insistence upon the rule of law in the most trying of cases has commended them to countless serious students of the federal courts.

8. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

9. For example, Goulden skims over (p. 137) the Seventh Circuit's strong condemnation of the district court's mishandling of the Chicago Seven Trial. *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972).

that ultimately came under investigation (p. 125). The book also fails to indicate the extent to which a judge's private conduct should or should not be subject to constraints as demanding as those upon his official conduct. By these omissions Goulden plainly reveals that his true purpose is not to say something definitive about the negative side of unaccountability of the federal judiciary.

Late in the book Goulden moves discursively from federal district courts to the United States Court of Appeals for the District of Columbia.[10] Here, as throughout the book, Goulden persists in inferring that there is somehow a corrupt nexus between the undercurrent of personal idiosyncrasies, relationships, and frailties he ferrets out and the decisions reached in particular cases. If he were simply saying that federal judges, like everyone else, are strongly affected by their individual values and experiences, I would have no quarrel with him. He is, however, saying, or strongly intimating, much more than that. Goulden's treatment of the evolution of the test for criminal insanity in the District of Columbia exemplifies his tendency to question the credibility of the federal judiciary by distorting specific events.

Most lawyers and many non-lawyers are aware that, in recent years, the law concerning when a mental illness will exculpate a defendant from criminal responsibility has been in a state of flux. In the District of Columbia Circuit, the law progressed from the *M'Naghten* "right-wrong" rule[11] to the *Durham* "product" rule[12] to the American Law Institute two-pronged standard of responsibility.[13] An important moving force behind those changes was Chief Judge David L. Bazelon, whose exposure to and knowledge of psychiatry is considerable. Goulden deals with this evolution and with Judge Bazelon's role in terms that, while not wholly false, utterly demean a serious and competent jurist's admittedly groping efforts to reconcile the criminal law's operative definition of insanity with the evolving consensus among respected psychiatrists and psychologists that volitional as well as cognitive limitations may curtail a person's freedom of choice to act in a particular manner. To say that "the Durham case turned out to be a mouthful of ashes" (p. 261) because the test proved difficult to apply and because it was ultimately discarded is like saying that the *Dred Scott* case stands for nothing because slavery has been abolished.

Goulden also briefly touches upon the thorny problems of disparate sentences for white collar crimes (pp. 104-05), of seemingly unequal sentences for the same crime (pp. 105–06) and of variations in result due to the fortuity of the judges chosen for an appellate panel (p. 265). Again,

10. The author insists on calling this court the "D.C. Court of Appeals" or the "D.C. Appeals Court."

11. United States v. Guiteau, 12 D.C. (1 Mackey) 498 (1882); *see* Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929).

12. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

13. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1971).

he seems to be suggesting that these sometimes undesirable conditions are manifestations of evil motives on the part of the judges. Goulden neglects to consider another equally plausible explanation for these problems: the system, which necessarily entails a large degree of discretion, fails to accommodate the differing but honestly held views of the decision-makers. This does not mean that these problems do not warrant (and are not receiving) serious consideration; to be useful, however, such consideration will have to come from those with a less jaundiced and more comprehending eye than Goulden's.

Although the author ultimately concedes the importance of the principle of judicial independence (pp. 349-52), and although he never seriously suggests a practicable alternative to the available avenues for dealing with an incompetent judge,[14] Goulden is constantly critical of the unanswerability of the federal judiciary. While his final words hold otherwise (p. 551), *The Benchwarmers* comes across as a failure to understand that the very notion of independence — whether it is embodied in a constitutional guarantee of tenure in office or an immunity from suit — means that some improper actions will go unredressed (*see, e.g.*, pp. 141, 232-33). If we could be assured of judges who are right one hundred percent of the time and who are certain that they will be judged as right, we would not need to guarantee all federal judges impunity for their official actions. Failing this, the principle of judicial independence must be appraised, not only in light of the protection afforded the worst action ever taken by a judge, but also in light of the countless times a federal judge might have been unable to act but for the principle. The types of situations depicted by Goulden are precisely the ones in which the parameters of the principle of judicial independence are settled for all cases.

Goulden has wrested from the mass of available evidence concerning the functioning of the federal judiciary that which is most unsavory and atypical. He has ignored or slighted the indispensable, and largely fulfilled, role of these tribunals in our constitutional scheme. And he has presented the product of these distortions in precisely that form which portends large sales. Coming, as it does, at a time when the resilience of all our governing institutions is seriously in question, *The Benchwarmers* is a most unfortunate literary event.

*James M. Kramon**

---

14. The existing procedures are impeachment, U.S. CONST. art. II, § 4 and art. III, § 1, and, in certain circumstances, a petition for the appointment of an additional judge to the particular court, 28 U.S.C. § 372(b) (1970).

* Assistant United States Attorney for the District of Maryland. B.S., Carnegie-Mellon University, 1966; J.D., George Washington University, 1969; LL.M., Harvard Law School, 1970. The views expressed herein are strictly those of the author.