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Book Reviews

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PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT. CASES AND MATERIALS. By *Donald G. Hagman.*† St. Paul: West Publishing Co., 1973. Pp. 1208. $18.50.

Planning law teachers and planning law students undoubtedly differ as to the proper criteria for assessing the worth of a casebook to be used as a teaching tool. Teachers will find Professor Hagman's casebook satisfying because of its comprehensiveness. The scope of the materials, more fully outlined below, is broad enough to provide coverage of every corner of the planning law field as presently conceived—so much so that, in any ordinary planning law course, exclusion of some of the material from specific student assignment will be necessary.

The student assessment of the book, provided that enough of its material is deleted from assignments to make the quantity manageable, is likely to be favorable because the content is both interesting and relevant. Moreover, experience indicates that this casebook can be useful on the shelves of the practitioner, affording a ready reference to some of the classic cases and principles in planning law which the practitioner must sometimes assemble for the orientation of judges and other officials unfamiliar with planning law concepts.

In his introductory chapter, Professor Hagman reiterates his conviction that "legal education is a graduate curriculum as well as a professional curriculum."[1] That view explains the interdisciplinary scope of the work. He has clearly sought to duplicate the broad range of reading exposure usually achieved by the assignment of a variegated reading list to graduate students. It is hard to disagree with the author's approach of editing the collected materials stringently and compiling them in a casebook to permit the law student's time to be utilized in the most efficient manner. Teachers, when unable to find a suitable single source of course materials, will assign a long reading list and then feel pangs of guilt from the realiza-

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1. D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 2 (1973).

tion that students are thus forced to spend unproductive time poking around libraries.

Although the Hagman casebook is related to his hornbook, *Urban Planning and Land Development Control Law*,[2] use of the companion hornbook with the casebook is not required.

The casebook's content is responsive to those who are convinced that public planning and public law are, and should be, interwoven, particularly in the teaching process. The first six chapters after the introduction deal with issues generally pigeonholed as "planning" rather than as "law": plans and planners; national planning; interstate, state and regional planning; local planning; citizen participation; and local government and metropolitan reform. The author's introduction seems to be faintly apologetic about tendering such materials for law school use. If he has any reticence on that score, it is unneeded. Law students can usefully benefit from some exposure to plans and planners so that they may avoid the impression that the center of things in planning is occupied by judges rather than by people and politicians.

One might also dispute Professor Hagman's suggestion that the first six chapters may be omitted when the book is used in a planning school. Those matters may or may not be fully explored elsewhere in the planning curriculum. In teaching planning law to planning students, the teacher and students often find themselves reexamining planning processes, because such reexploration is warranted when the student planners first confront legal constraints.

The book frankly recognizes planning and law as separately identified disciplines. In the chapters which deal with the relationship between planners and lawyers, it seeks to establish bridges between them, while recognizing that conflicts do arise—sometimes resulting in litigation—as to the drafting of ordinances and advocacy in public tribunals, two activities which the organized bar tends to regard as its exclusive domain. Awareness of the areas of potential conflict by young municipal lawyers and young planning consultants can be useful in helping to avoid the pitfalls which could injure their work products and their clients.

Thereafter, the casebook chapters cover the recognized components of planning law, embracing most of the traditional ones, with some less traditional inclusions such as taxation and controls relat-

2. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW (1971).

ing to unstable land. Three chapters deal with the zoning basics. One of them is entitled, "The Zoning Classics" because it sets forth the leading cases which every good planner and planning lawyer should know: *Lionshead Lake, Inc. v. Wayne Township*;[3] *Golden v. Planning Board of the Town of Rampo*;[4] *Vickers v. Township Commission*;[5] *People v. Stover*;[6] *Borough of Cresskill v. Borough of Dumont*;[7] *Appeal of Girsh*;[8] *Cheney v. Village 2 at New Hope, Inc.*;[9] *Nectow v. City of Cambridge*;[10] and, of course, *Village of Euclid v. Ambler Realty Co.*[11]

It is more than a superficial truth that capacity to function in a field may depend partly upon an ability to speak the language, to know the jargon, the passwords. Among tax experts, effective communication requires fluent reference to Internal Revenue Code sections; a few years ago, the ability to identify National Housing Act sections by number, such as 213, 221 (d) and 235, was essential in order to get along with the public subsidizers of housing. Classic-case jargon is also a useful shorthand. For example, *Rampo* is a handy way to refer to concepts of development timing controls, and *Girsh*, to the cognoscenti, conjurs up a whole series of issues involved in judicial prohibitions of exclusion. It is interesting to note that Professor Hagman surveyed his fellow planning law casebook and treatise authors to identify the classic cases. The selection thus has some collective support, ranging from 7 votes out of 10 for *Euclid*, to 2 votes for *Girsh*, *Village 2 at New Hope*, and *Nectow*.

In earlier planning law casebooks, it was possible to get the impression that their authors avoided inclusion of all of the classics because they thought they might be considered tradition-bound or even lazy for doing so. Those compunctions merely meant that their planning law teacher-customers had to fill in the classic-case gaps with handouts or by again subjecting the students to that laborious reading list.

The other two zoning chapters deal with the zoning "forms of

3. 10 N.J. 165, 89 A.2d 693 (1952).
4. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).
5. 37 N.J. 232, 181 A.2d 129 (1962).
6. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 934 (1963).
7. 15 N.J. 238, 104 A.2d 441 (1954).
8. 437 Pa. 237, 263 A.2d 395 (1970) (listed but not reprinted).
9. 429 Pa. 626, 241 A.2d 81 (1968).
10. 277 U.S. 183 (1928).
11. 272 U.S. 365 (1926).

action"—such as variances, special uses and amendments—and additional zoning flexibility devices. The latter chapter is a useful look at interim zoning, contract zoning, conditional zoning, the floating zone, planned unit development, density transfer and the like.

The cases relating to police power and aesthetics are, as might be expected, not confined to zoning devices, but include architectural controls and a look at various kinds of billboard battles.

In dealing with subdivision control, the realistic and pragmatic aspect of the work comes through the attention devoted to those exactions which are extracted from developers as conditions of subdivision approval. Both the product and the process of subdivision exactions can provide the student with a look at constitutional issues in the real world. The product of the exactions—requiring a developer to contribute community facilities without compensation—relates to substantive due process because a balancing analysis of reasonableness is involved. The process of the exactions provides a look into equal protection because that process is often little more than naked negotiation with developers, who, in view of the time constraints they face, are usually unwilling to insist on establishment of uniform standards to ensure equal treatment.

In addition to building and housing codes, the casebook also considers other public tools which correctly, although not traditionally, are regarded as controlling development. The relationship of eminent domain to development (and redevelopment) is obvious and accepted. The importance of taxation as a land-use control may surprise some students before they study the chapter on that matter. In addition to the general effect of property taxes, there are the taxing policies related to open space and, as in the case of the single tax, to the stimulation of development.

Professor Hagman does not provide a chapter on urban redevelopment as such, which is probably just as well, since redevelopment might be more properly classed as a program, using a combination of many tools, rather than a fundamental tool of development control itself. Thus avoiding an unnecessary look backward, the Hagman casebook takes substantial looks at the present and future, with chapters on the relationship of land-use controls to race and poverty, as well as a chapter on unstable land. The race and poverty portion examines the exclusionary cases and the inclusionary programs, but the examination is not likely to become quickly dated because it goes to the fundamentals of the problems rather than the

details of the programs. The consideration of unstable land is also problem-related, with consideration of local and federal taxation and the role of insurance, as exemplified in the National Flood Insurance Program.

The author, having bet correctly on the disappearance of traditional federal redevelopment subsidy, is also betting that the National Environmental Policy Act of 1969[12] will be with us for some time. The logical relationship of the work of the Environmental Protection Agency (EPA) to planning may be apparent, but what is not apparent is the likelihood that EPA, combining financial aid with regulatory policies, can become significantly involved in local and state land-use decision-making.

Another chapter likely to remain relevant for some time is the one on new towns, which includes brief consideration of new town government. That kind of material can be a rich source of research areas for graduate students. For example, a study of the way in which Columbia, Maryland, has been governed would be an interesting thesis subject, indeed. Columbia, having its municipal and school functions provided at the level of Howard County, provides a good example of why, in some situations, separate municipal incorporation of the new town should not be attempted. In developing Columbia, the Rouse interests stayed away from separate incorporation, initially, because they did not want to break with the wholesome Maryland tradition of keeping local government at the county level. But such respect for Maryland tradition was unexpectedly rewarding at a later stage. After two of Columbia's villages had been developed, the new residents of Columbia, oversupplied with Washington and Baltimore lawyers, initiated litigation to reduce and eliminate some of the further development which had been planned. Those new-resident objectors, mostly unsuccessful in the courts, might have been very successful politically in preventing the completion of Columbia if a new town had been incorporated; if Columbia had been incorporated as a city the new residents could well have taken control of its government and the public development controls. Instead, the new-resident objectors remained a small mi-

12. 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970).

nority in the total population of Howard County, and hence, as yet, have not taken over the county's political processes.

That kind of window into explorable areas constitutes a useful aspect of a study volume. Another such window is the international comparative look provided by the last chapter, which spends nearly 70 pages on the English system of planning and land use control. Thus, although most of the other chapters are admittedly confined to the American context, a comparative approach is made optionally available by the English system chapter. A familiarity with what happens in England is, like ability to use the classic-case jargon, a fashionable attribute for a planning lawyer and planner. As Hagman notes, 4 out of 5 of the current casebooks on American planning law have been authored by teachers who made a pilgrimage to study how "the English do it."

It is clear that the English experience in planning, as in other social machinery, may serve to presage, in a general way, what will happen in United States in the future. As the author points out, we are now following the English trend of being more willing to trade away growth for amenity, in centralizing governmental power over development, and in making planning decisions on an ad hoc basis rather than by adherence to express rules guaranteeing predictability.

Physical development control, which moved away from center stage in the United States in the 1960's, is now returning to constitute one of the half-dozen salient areas of attention in our nation. Heightened student interest in planning law, as evidenced by the increase of such courses in many law schools and the larger student populations taking them, is somewhat explained by the dynamic nature of the wide-ranging subject matter included in the Hagman casebook.

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UNION POWER AND THE PUBLIC INTEREST. By *Dr. Emerson P. Schmidt.*† Los Angeles: Nash Publishing, 1973. Pp. 204. $10.00.

Before commencing any review, the critic must determine for what purpose a work is undertaken and to what audience it is addressed since one would not apply the same standards to a lyric poem as one would to an epic. Most books are written for one of two audiences: for the educated general public which has no particular background in the area in question or for scholars who have a specialized background. When addressed to the first audience, books are normally designed to inform the audience of certain generally accepted "fundamentals" and sometimes through such information to affect the political actions and decisions of the audience. When addressed to the second audience, books are designed to report new discoveries and to provide new theories which will take the place of old shibboleths. Occasionally, one comes across a work which is addressed to both audiences and is well enough written to entertain as well as elucidate. However, books such as Mattingly's *The Armada*[1] are members of a rare species in which Emerson P. Schmidt's *Union Power and the Public Interest* does not fall.

Indeed, Dr. Schmidt would make no pretense that *Union Power and the Public Interest* is a work of scholarship as well as a tool of education. Rather, the whole purpose of the book is to set before the public the author's conservative views regarding the impact of legal protections afforded labor unions by state and federal governments and thus hopefully persuade the public to support labor law reform. It would be less than realistic to recognize that the views expressed by the author are minority views, at least within the intelligentsia whose liberal imagination throughout the century has been preoccupied with the sufferings of those for whose plight the liberals have felt themselves responsible.[2] Unfortunately, the picture of the oppressed industrial workers which so dominated the liberal mind bears little relationship to reality.[3] To confront this liberal imagina-

1. G. MATTINGLY, THE ARMADA (1959).

2. V. BROMBERT, THE INTELLECTUAL HERO: STUDIES IN THE FRENCH NOVEL, 1880-1955, at 140-49 (1961).

3. American Iron & Steel Institute, News Release, Oct. 16, 1974. The average employee in the steel industry earns $9.32 an hour in wages and fringe benefits.

tion with brute facts, as Dr. Schmidt does with some degree of clarity and vigor, is a commendable activity. However, it is probably not possible for this reviewer to fully appreciate such an effort because one defect of his education is an excessive devotion to style which makes him uneasy over Dr. Schmidt's combination of quotations (Adam Smith, Professor Simons and George Meany) with summations of scholarly research. Additionally, his professional soul winces at the author's lay analysis of legal principles and judicial decisions.

Certainly, the author performs a useful public service in emphasizing what politicians, newspapermen, college professors and union officials would have us all forget—the fact that one of the cornerstones, if not the foundation, of union power is the omnipresent threat of violence. Indeed, David McDonald, former president of the United Steelworkers of America, graphically explained the origins of dues check-off in the steel industry as follows: After recognition of the USW by one of the major steel companies, the USW began to collect dues from the company's employees as they left the plant on pay day. The reluctance of these loyal unionists to pay dues led to the formation of collection squads whose battles with their fellow employees developed into mass riots which prevented the oncoming shift from entering the plant. Faced with this disruption of production, the company's management readily agreed to the union's requests for dues check-off.[4]

The picket line, the symbol of unionism, epitomizes violence—present or threatened—as the keystone of union power. The purpose of the picket line is not to persuade or to request sympathy, a single picket could do that; the real purpose is to coerce—to prevent others from crossing the line.[5] Although most pickets would prefer to deter individuals from crossing a picket line by peaceful though illegal actions such as blocking public highways, trespassing on private property and interfering with contractual relations, many are quick to resort to more violent tactics if necessary. Indeed, any attempt to operate by a struck company is inevitably met with a concerted campaign of sabotage and terrorism, including violence directed at those individuals crossing the picket line.

4. D. McDonald, Union Man 120-25 (1969).

5. "'[P]eaceful picketing' is a self-contradiction and aptly describes nothing that is known to man." Cooper Co. v. Los Angeles Bldg. Unit, 3 CCH Lab. Cas. 60,728, 60,731 (Cal. Super. Ct., County of Los Angeles 1941).

Lawlessness on the picket line is winked at by police officials who will normally refuse to intervene or will delay intervention as long as possible, fearing that such intervention—known as law enforcement when the illegal activities are conducted by ordinary citizens or college students—will bring unpopularity. The unwillingness of guardians of law and order to enforce the law in the context of a labor dispute is seen by many union members as a tacit recognition of their right to engage in illegal conduct in the course of a strike, and thus encourages further violence and illegal activity.[6] Moreover, the laissez-faire attitude of public officials creates a situation where a small minority of workers can coerce not only the employer but also the great majority of their fellow workers. Wildcat strikes are epidemic in the coal industry not because the vast majority of the miners are adverse to or do not need to work, but because they are consistently terrorized by a small group of malcontents who, exempt from interference by the law, punish by all manner of violence any who fail to respect their picket line, regardless of the reason for its existence.

If violence is the keystone of union power, surely monopoly, as Dr. Schmidt indicates, constitutes one of the pillars. Certainly, nothing in the law seems more absurd than the union's exemption from the anti-trust laws.[7] The purpose of the anti-trust laws is to preclude the elimination of price competition; the purpose of labor unions is to eliminate wages as a factor in price competition. Since labor costs constitute a major component of the price of any product, the labor anti-trust exemption necessitates the lessening of price competition. Perhaps even more absurd is the present proposal of Senator Philip Hart (Democrat, Michigan) to require the breakup of companies which have dominant positions in certain industries, but to leave untouched the position of unions which dominate several different industries.[8] It is difficult to see how the country is threatened by the existence of General Motors, which is but the largest of four domestic auto makers, but not by the existence of the UAW, which repre-

6. Representative of the general feeling that labor is above the law is the recent statement by Arnold Miller, President of the UMW, that the UMW would not comply with any injunction issued under the Taft-Hartley Act, § 29 U.S.C. § 178 (1970), prohibiting the UMW from conducting a nationwide coal strike. BNA DAILY LAB. REP., Oct. 10, 1974, at 198.

7. Clayton Act § 17, 15 U.S.C. § 6 (1970).

8. The Industrial Reorganization Act, S. 1167, 93d Cong., 1st Sess. (1973). *See generally* "Statement of the United States Steel Corporation before the Senate Subcommittee on Anti-Trust and Monopoly regarding The Industrial Reorganization Act."

sents not only the employees of all four domestic automobile producers but also has a dominant position in the aerospace and agriculture equipment manufacturing industries. Possibly, Senator Hart's anti-trust perspective is influenced by the fact that he owes his Senate seat to UAW money and UAW votes.

It is one thing to enumerate the sources of union power, to illuminate the detrimental effect of such power on the public interest and to suggest directions for federal remedial legislation, but quite another to examine the feasibility of such legislation from a political standpoint. And yet, this latter point, which Dr. Schmidt does not consider, is perhaps the most significant problem connected with labor law reform. Little is clearer to this reviewer than the fact the Congress, as it is presently constituted, is incapable of enacting legislation which is opposed by the unions. Although the AFL-CIO may not yet have a veto-proof Congress, it does have one which is responsive to its desires because of the extent to which Congressmen have become dependent on AFL-CIO campaign contributions.[9]

It is obvious, then, that legislation which benefits the public at the expense of organized labor stands little chance of passage until such time as the present electoral system is reformed and the power of money removed from politics. The growth of the country and the importance of national media exposure have created a situation, unforeseen by the constitutional framers, in which a successful candidacy for public office is dependent upon an enormous campaign chest. The only dependable source of campaign funds for candidates who are not independently wealthy are those individuals or organizations with financial interests dependent upon government favor. For such persons, campaign contributions constitute a necessary business expense. In return, these contributors expect and receive value for their contributions. Where public officials are dependent upon the favors of special interest groups for their election, the interests of such groups are necessarily favored at the expense of the public. Only a small majority of elected officials can successfully avoid the pressures of those upon whom they are dependent for support. Accordingly, restrictions upon union power, the elimination of farm subsidies and the reform of the transportation system are all matters which will not be accomplished until a system of public campaign financing is created.[10]

9. D. Caddy, The Hundred Million Dollar Payoff (1974).

10. The enactment of the Federal Election Campaign Act Amendment of 1974, Pub. L.

However, it should be recognized that the removal of the power of the purse from political campaigns will not automatically lead to the creation of a political situation in which the public interest will be protected at the expense of labor, for the political strength of labor comes not just from its purse but also from its organization. Indeed, the decline of the big city political machines has left the labor unions as the only organized force in American politics today. The great contribution that labor made to the Humphrey campaign in 1968 was not money but men—it was labor's manpower and organization which made possible that last desperate drive in October, 1968, which nearly overcame the impact of far left-wing intransigence and almost avoided the Nixon presidency.[11] Accordingly, it is clear that a new election reform law which simply limited cash contributions but did not regulate contributions in kind would increase, rather than diminish, the power of the labor barons whose organizational resources cannot be matched by the business community.[12] It is impossible to conceive of General Motors ceasing the major part of its business activities for a two-week period before the election to devote its energies to the election of conservative candidates; for the United Auto Workers of America *not* to devote its energies in the last two weeks before an election to the campaigns of pro-labor candidates is equally impossible to conceive of. Accordingly, any real campaign reform measure must carefully regulate both contributions in cash and contributions in kind if it is to diminish rather than enhance the power of organized labor.

Even assuming, however, that real election reform is enacted, one must anticipate that the Congress would be little more inclined to enact measures desired by the majority of the public if such measures are opposed by union leaders. The real danger of a democracy is not, as De Tocqueville[13] thought, the tyranny of a majority, but rather the tyranny of a minority which is able, by a concentration of force, to achieve its ends even in the face of some opposition from the majority.[14] The power of organized labor in the United States

No. 93-443 (Oct. 15, 1974), U.S. CODE CONG. & AD. NEWS 4618 (Nov. 15, 1974), will increase rather than decrease the power of the purse in politics because public financing of presidential but not congressional campaigns will permit the special interests groups to concentrate all their resources in the congressional elections.

11. T. WHITE, THE MAKING OF A PRESIDENT—1968, at 364-66 (1969).

12. This fact probably accounts for the AFL-CIO endorsement of public campaign financing. BNA DAILY LAB. REP., April 2, 1974, at 64.

13. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 271-89 (1835).

14. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 134-35 (1956).

will ordinarily be great enough to preclude legislation inimical to its interests even though the majority of the people may favor such legislation. However, if the majority becomes actively aroused, if the people seek to exert their will, then, as in 1947[15] and in 1959,[16] the Congress may be forced to further limit union power.

Events of recent years, however, have demonstrated that the mere passage of legislation designed to correct abuses does not automatically result in their elimination, even if accompanied by purposeful administration. In a democracy, governmental action is dependent upon the good will of the minority to an extent not generally recognized. Indeed, determined opposition on the part of a minority is fatal to a democratic society. A policy vehemently opposed by a minority must be dropped or the vehemence met by force. In all likelihood, this will lead to further violence and initiation of a vicious cycle of disintegration from which the society may never recover.

The conflict between the majority and the minority following the passage of legislation may follow two courses. First, if a small fringe element of the minority is completely deteined to realize its ends, it may initiate terrorist or guerilla activity to protest the restrictive legislation. If this element of the minority is small and lacks support from others, then the majority may be able to suppress terroristic actions with little damage to the framework of the society. Indeed, it is because the leftist terrorist fringe in the United States is so small and receives, relatively speaking, little support from the other leftist elements that the establishment has been able to hold it in check with little damage to democratic institutions. While the experience of Ulster shows the impossibility of controlling terrorism in a democratic society when the terrorist group is large and receives widespread sympathy and support from other elements of the minority, it is unlikely that legislative action which would interfere with the exercise of monopoly power by labor unions would provoke this sort of terrorism. Legislation which affects only the economic interests of individuals does not normally produce a terroristic reaction of this nature because terrorism is, from an economic standpoint, self-defeating. Terrorism is adopted by those whose emotional states are such that they not only believe that the end justifies

15. Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141-88 (1970).

16. Labor-Management Reporting & Disclosure Act of 1959, Act of Sept. 14, 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.).

the means, but also secretly enjoy the means which they are "forced" to adopt. Unfortunately, extremism and sadism have their adherents in all parties and institutions: left, right, academic, business and, certainly, labor.

The second course that post-legislative conflict between majority and minority may take involves universal but generally pacific resistance to the legislation among all the elements which compose the minority. The prime example of this kind of conflict is in Great Britain today. Upon taking office, the government of Prime Minister Heath resolved to enact labor legislation (closely patterned, interestingly enough, on the Labor-Management Relations Act) which would bring some order to the chaos which has characterized British labor-management relations in this century and which has been a prime factor in the decline of Britain.[17] Accordingly, Parliament duly enacted an Industrial Relations Act[18] in face of the declared opposition of the trade unions. The efforts of the trade unions did not stop the passage of the bill and progressed from political opposition to civil disobedience. Indeed, massive strikes were launched to protest the passage of the law, while union officials openly encouraged resistance. Following the defeat of the Conservative government in a strike forced by the National Miners Union, the new Labor government of Prime Minister Wilson repealed the law and embarked on a doomed attempt to enter into a "social contract" with the labor barons pursuant to which the government would further "soak the rich" while the unions would moderate their wage demands and thus decrease the inflation rate.[19] In so doing, however, Wilson has merely spotlighted the crucial issue which faces Britain today, and perhaps most other Western countries tomorrow—Who rules, the people or the unions? Once that question comes to the fore, democracy itself will be in grave danger if unions continue to frustrate a democratic answer through their ability to enforce their views by means of economic chaos.

From this perspective, then, the most important problem posed by union power is not how that power is misused or what legislation must be enacted to correct it, but rather how, under our present political structure, needed legislation can be enacted and how, if enactment is met with determined opposition from union leaders

17. P. Einzig, Decline and Fall? Britain's Crisis in the '60's (1969).
18. Industrial Relations Act 1971, c. 72.
19. Trade Union and Labor Relations Act 1974, c. 52.

and union members alike, the legislation can be enforced. To these questions there are no easy answers. In the past, certainly, the American political structure has proved durable enough to enact legislation restraining union power. Union leaders and union members have been loyal enough to the system to accept, without extra-legal opposition, legislation which they have bitterly opposed. However, there are no guarantees that the future will follow the past in this regard and there now exist some ominous signs that it will not. If there is any fundamental weakness to Dr. Schmidt's useful work, it is in its failure to recognize at least the implications of this larger problem.

*James T. Carney**

THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES. By *Joseph C. Goulden.*† New York: Weybright and Talley, 1974. Pp. 375. $12.50.

Joseph C. Goulden is the author of *The Superlaywers*[1] and, having found a good thing, has fixed his reportorial eye on the "private world of the powerful federal judges." Watergate alone cannot explain the recent surge of interest not just in things legal (and illegal), but also in the *dramatis personae* acting on the legal stage: the lawyers and the judges. It may not be long before the secret and powerful world of the clerks of court is laid bare.

Goulden's approach is descriptive: how federal judges get to the bench; how the good and the bad ones conduct themselves once there; how the Court of Appeals for the District of Columbia operates; and, finally, how the judges attempt to regulate themselves. It is a hair-raising journey, made more so by the knowledge

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1. J. GOULDEN, THE SUPERLAWYERS (1972).

that a look at the judicial system of any of our states would probably make *The Benchwarmers* pretty tame reading.

It is probably fair to say that most lawyers generally regard federal judges as being more competent and judicious as a whole than their state court brethren. The reason for this may lie in the fact that federal judges have a much greater degree of "independence" than state court judges. Goulden points out that the drafters of the Articles of Confederation were anxious to avoid the situation that existed before the Revolution when colonial judges served at the pleasure of the Crown. Instead, an independent judiciary was established and judges continued to serve during their good behavior. The Constitution, of course, adopted this same approach: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."[2]

Although the Constitution assures the federal judiciary of independence from the executive and legislative powers, it is surprisingly silent on how the appointment of a federal judge is to be made and what the qualifications should be. For example, nothing in the Constitution requires a federal judge or a Supreme Court Justice to be a lawyer. Goulden says that the only reason that federal judges are appointed by the President is that presidents have simply been following the example set by George Washington. One wonders (although Goulden does not explore) whether the Supreme Court has the constitutional power to appoint federal judges. Not until 1948 was it explicitly provided that federal judges had to be appointed with the advice and consent of the Senate.

Despite the independence assured to the federal judiciary by the Constitution, it would be naive to assume that "politics" is not involved in the selection of federal judges. The senators from the state where the vacancy exists generally have to give their blessings to the applicant; the Justice Department has to approve; and, depending on the particular administration's willingness to cooperate, the American Bar Association's Committee on the Federal Judiciary also gets into the act. Goulden makes much of the ABA Committee's role: its secrecy, its hidden biases, its membership's not being representative of the bar as a whole, and its orientation towards the

2. U.S. CONST. art. III, § 1.

status quo. Some of these criticisms may be well taken, but what is disturbing is Goulden's unwillingness to probe the implications of his criticisms. There is a suggestion that the whole process would produce better results if it were more open and representative. These are sacred words today, and it is easy to sympathize with someone wanting to let the sun shine in on the federal judiciary. It is troublesome, though, to think in terms of representativeness when dealing with the selection of judges. The inference always seems to be that the selecting body should be representative of particular interests, so that the judges selected are representative of those interests. Somehow the concept of interest groups picking judges to reflect their interests makes the idea of electing judges seem more attractive; despite its many vices, the selection of judges by the ballot has at least the virtue of diminishing (not eliminating) the selection of judges by groups expecting to have their views represented on the bench by their candidate. Whether judges should be representative of interests is a concept that bears considerable inquiry, but unfortunately *The Benchwarmers* does not contain such an inquiry.

Goulden's best chapters deal with the judicial system working (in New York City) and failing (in Chicago). Judge David N. Edelstein, then chief judge of the Southern District of New York, is seen wrestling with the case of United States v. IBM, Inc.,[3] described by *Business Week* (before the AT&T antitrust suit) as "the largest and most complex antitrust battle ever waged."[4] There is an interesting vignette about Edelstein's confrontation with IBM's lawyers and the resulting finding of contempt of court against IBM for its refusal to turn over certain documents. The sanction imposed by Edelstein on IBM was a fine of $150,000 a day, presumably (although Goulden does not tell us) ensuring the delivery of the documents. The tone of the chapter on Chicago is set with a description of a hearing where the judge irrelevantly runs on about the railroad industry for a half-hour, leaving the assembled lawyers with one thought: he "had presided over court while stone-eyed drunk."[5] If Goulden's descriptions of the federal judicial system in Chicago are accurate, one wonders how anyone can practice law in that city amongst the apparent pervasive atmosphere of fraud and corruption.

3. 58 F.R.D. 556 (S.D.N.Y. 1973).
4. BUSINESS WEEK, Nov. 11, 1972, at 110.
5. J. GOULDEN, THE BENCHWARMERS 115 (1974).

It is hard to write anything new on Watergate, so satiated are we with it, and the chapter on Judge Sirica is, consequently, not very informative. In addition, one wonders whether the chapter really lives up to its title, "When the System Works." Without attempting to diminish in any manner Judge Sirica's role, Watergate probably stands more for the proposition that the political system works than that the federal judicial system works.

The chapter on the Court of Appeals for the District of Columbia reveals the best and the worst of *The Benchwarmers*. It describes in engaging detail the personalities and backgrounds of the judges on that circuit. The reader learns of the deep policy and personality split between the pro- and anti-Bazelon judges. David L. Bazelon is the widely known author of the now discarded *Durham*[6] rule, which overturned the criminal insanity test of knowledge of right from wrong set forth in *M'Naghten's Case*.[7] Bazelon's knowledge of and interest in psychiatry have produced results in criminal cases that have been strongly opposed by other members of the D.C. Circuit and district courts. Although the split is deep and bitter because of its personality tones, it seems a healthy division; the issues deeply split society, and it would probably be more upsetting if the federal judiciary simply overlooked them. What makes this chapter troublesome is that the author refuses to be drawn into these issues; he prefers to discuss the personalities and failures of the judges without dealing with the issues that divide them. It makes for interesting reading, but one wonders whether anything of substance has been said.

Perhaps the book's main contribution is to catalogue the weaknesses of the present incumbents of the federal district courts. To be sure, the future will produce different incumbents, but one suspects that the weaknesses will not have changed very much. Given this almost inescapable fact, one wonders why Goulden did not feel compelled to suggest alternatives for improving the federal bench. A harder task, to be sure, but certainly a more valuable one than that performed by the author.

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6. United States v. Durham, 130 F. Supp. 445 (D.D.C. 1955).

7. 8 Eng. Rep. 718 (H.L. 1843).

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