Coalition and new major party based on it are its indispensible embodiments. It is very probably true of us, as Lincoln warned his contemporaries it was true of them, that "we shall nobly save or meanly lose the last best hope on earth."

So we shall see, and no doubt soon.

[1]The allusion is to the concluding lines of W. B. Yeats' prophetic and much quoted poem, *The Second Coming:* "And what rough beast, its hour come round at last, Slouches towards Bethlehem to be born?"

[2]Leslie Paul, *The Annihilation of Man: A Study of the Crisis in the West* (New York: Harcourt, Brace and Company, 1945).

[3]Madison, *Federalist* No. 10.

[4]Hamilton, *Federalist* No. 68.

[5]H. C. Hockett, *The Constitutional History of the United States 1776-1826* (New York: The Macmillan Company, 1939).

[6]W. B. Hesseltine, *The Rise and Fall of Third Parties: From Anti-Masonry to Wallace* (Washington, D.C.: Public Affairs Press, 1948). The Wallace referred to in the title is of course former Vice President Henry A. Wallace and his Communist-tinctured "Progressive" party.

Judges under Judgment

The Benchwarmers: The Private World of the Powerful Federal Judges, by Joseph C. Goulden, *New York: Weybright and Talley, Inc., 1974. 375 pp. $12.50.*

JOSEPH C. GOULDEN is a Texas newspaperman who got hooked on the law as a court reporter for *The Dallas Morning News*. Upwardly mobile to Washington, D.C., he developed into one of the top practitioners of a not really new form of journalism called investigative reporting (née muckraking[1] in the late 1900's). In 1972 Goulden published *The Superlawyers*, a sprightly account of the great quasi- or semi-political law firms of Washington. *The Benchwarmers* is an equally sportive study, nationwide, of the federal trial courts—and one intermediate court of appeals, that in the District of Columbia—in which the lawyers, super- and otherwise perform their art and make their names.

Goulden starts off, methodically enough, with a chapter on how the chosen lawyers find their way to the district court level of the federal judiciary. He offers the federal version of what Professor Fred Rodell of the Yale law faculty told us some years ago about the state judges: "A judge is a man who knew a Governor." For instance, Chief Judge David N. Edelstein of the southern district of New York, whom Goulden portrays, persuasively, as one of the best of his kind, went to work in the Justice Department after a reassuring record in the Fordham Law School and a few years of private practice in New York. Justice soon assigned him to liaison with Senator Harry Truman's committee watchdogging war contracts in World War II. Truman liked the way the young man did his work and so did his superiors in the Department—which screens judicial candidates for the President. "I suppose it's natural to turn to people you trust when you are filling judgeships," Edelstein told the author.

Yes, it *is* natural, and yet Goulden seems at times to bridle against the system. He notes, accurately enough, that candidates for the federal bench often enjoy the friendship and support of large corporate interests—manufacturing concerns, banks, insurance companies—outfits like that. He lists the members of the American Bar Association's standing committee on the federal judiciary—a body which runs a private screen of judgeship hopefuls available to the Justice Department and the President. There are only twelve committeemen for the whole country and they tend to come from law firms with large property interests among their clients.

And why *not*? Property was listed with liberty and life itself in the triad of con-

cerns for the explicit protection of which the Constitution was enacted. It is the single device by which power can be fragmented for the maintenance of democratic pluralism. An America in which broad ranges of elitist opinion look askance on property is something like what the Soviet Union would be if Solzhenitsyns dominated its academic life, its communications services and, yes, much of government itself. The anti-property tilt is all the more capricious in these latter days when the Wagner Act has effectively "sterilized"[2] property's managerial discipline of cost and cash-flow—when the rate of union wage inflation approximates the rate of productivity decline, and the United States trails most industrial nations in the formation of business capital. The investigative reporters who talk of business today as Lincoln Steffens and Ida Tarbell talked in 1900 are less the with-it realists they profess to be than spokesmen of cultural lag.

But of course now as then, actual business abuse must be exposed and prosecuted. And Goulden agrees, amiably enough, that this is happening. Having told us how federal judges are made, he follows with two chapters on "When the System Works" and two on "When the System Flops." The system works in the southern district of New York, where Chief Judge Edelstein presides over the government's prosecution of alleged monopoly in the great case of *United States v. International Business Machines, Inc.* It works, says Goulden, when a hitherto "nondescript district judge" in Washington detects one false note after another in the trial of business-political rascality at Watergate, and presses his suspicions inexorably to *Götterdämmerung*—Goulden's own eminently appropriate term.

But the system "flops," says the author, in Chicago, where the district bench, named usually under pressure from the Mayor Daley machine, is cited with special vim for a long catalog of incompetence and malfunction. Goulden draws on a formal evaluation by the Chicago Council of Lawyers in which seven out of thirteen federal district judges were found wanting in one or more judgely attributes. Next to bottom man was Judge Julius J. Hoffman of the famous conspiracy trial growing out of the riots at the Democratic convention of 1968.

And the system flops again in Oklahoma City, where Judge Stephen S. Chandler, a summation of practically all the judicial eccentricities, as Goulden tells the story, has been engaged for thirty years in a series of personal vendettas with a variety of opponents headed in rank at least, by the Hon. Alfred P. Murrah, until recently chief judge of the Tenth Circuit Court of Appeals, to which Chandler's court is immediately responsible in the federal court hierarchy. And sometimes working, sometimes flopping, is the District of Columbia Court of Appeals, the "mini-Supreme Court," whose nine judges seem to the author as much concerned with in-house ideological strife as with the objective exegesis of the law. A concluding chapter details the foibles and fancies, the wisdom and courage of a long list of individual judges across the nation.

Goulden writes with newspaper fluency—and flippancy—telling us, for instance, that lawyers trying a case in Judge Julius Hoffman's court "wanted to keep the hell away from [the] tearing, biting edges" of His Honor's notorious irascibility. Throughout the book the spoor of the faithful reporter is on plain view—facts in their detail and profusion, their skilful marshalling into pattern and persuasion over eighteen months of interviews with a hundred or more laymen, lawyers and judges, and documentary pages read into the thousands. As suggested above, the perspective is that of the still trendy liberalism, but Goulden retains an intermittent objectivity perhaps best illustrated in the candor with which he relates why it was that Judge Sirica was undistinguished and all but indistinguishable before Watergate. Again, Goulden concedes that Mr. Nixon's nomi-

nation of Judge Clement F. Haynsworth, Jr., for the Supreme Court was blocked on "thin" evidence. And objectivity is of the essence in the author's comment on proposals for such chastity-belt legislation as conflict-of-interest curbs for judges: ". . . [A] few rogues and scoundrels are the price one must pay for an independent judiciary. . . ."

Nevertheless, two dissents are in order, one grave indeed, the other hardly more than nitpicking at a still surprising error in simple definition. The nitpicking first: court opens, says Goulden, when ". . . . the judge flop[s] into his chair behind the bench . . . ," bench being ". . . a fancy but time-honored name for what is actually an out-size desk. . ." But of course the judge's chair *is* the bench by metaphor, an article of furniture for sitting, from old law French in which the court *was* the judges sitting *en banc,* as the Supreme Court Justices do still. Goulden himself seems to acknowledge this usage in his title—yet there is still difficulty. Webster, at least the second Webster, says that the word benchwarmer comes from baseball slang, meaning players who "sit idle or useless on a bench." Goulden names a few district judges who may be useless, and some are doubtless idle, but the term hardly applies, as his title applies it, to the district judiciary as a whole. After all, Goulden himself says elsewhere that "one overriding fact about the system is that it works—usually." Could it be that the title, not without sales appeal in an age of metastatic skepticism, was whipped up and sent out by his editors while Goulden was down the hall?

Triviality aside, however, nowhere does Goulden attend adequately to the ultimate worry of many legal scholars—that the philosophical positivism, the well-meaning but impatient jurisprudence of results, which turned Chief Justice Warren's Supreme Court into a "third legislative chamber,[3] now osmosizes all the way down the judicial hierarchy, until district judges, too, begin to make up the law as they go along, eschewing objective precedent for personal predilection. "We have in fact much more than I like of what might be called a Harun al Raschid type of justice in this country," says Erwin N. Griswold[4] of the Harvard law faculty.

Consider District Judge Robert R. Merhige, Jr.'s extraordinary order cancelling historic political boundaries so his court could command enough white children to lighten the racial mix in the inner-city schools of Richmond. Goulden dismisses this case without any comment at all, in a brief footnote on another matter, as merely "a controversial busing order. . . ." He does not mention a similar order by the late Judge Stephen J. Roth of Detroit, which was recently voided by the Burger Supreme Court.

Treated more fully, but still without reference to larger ideational concerns, is Chief Judge David L. Bazelon's effort in the D.C. Court of Appeals to abate the rigors of the criminal law as received, by infusions of psychiatry: in his "compassion for criminal defendants," Goulden explains, Bazelon crafted new norms of criminal accountability "without adhering," as one jubilant psychiatrist put it, "to the narrow limits of criminal sanity. . ." The project failed, reports the author, but only because the psychiatrists found it impossible to adapt their mystery to the fact-finding compulsions of the adversary process.

And, most suggestive of all, Goulden interrupts his own applause of Judge Sirica in the Watergate trials to quote the quite different comment which he attributes to the eminent A.D.A. polemicist and civil rights lawyer, Joseph L. Rauh, Jr.:

> It seems ironic that those most opposed to Mr. Nixon's lifelong espousal of ends justifying means should now make a hero of a judge who practiced that formula to the detriment of a fair trial for the Watergate Seven. . .

Agreed that there is a certain grace in Goulden's printing this rebuttal of his own

view. But though he does not quarrel with such criticism from such a source, neither does he allow it to qualify his conclusion that the judicial system "worked" at Watergate. This goes beyond mere indifference to judgely venturism: it touches fundamental questions of due process for the accused. True, it is casebook law that due process does not guarantee a perfect trial, only a fair one. Rauh did not complain of detriment to a perfect trial, only to a fair one—fairness was subordinate to "the obvious 'other purpose' " of getting at persons not on trial.[5]

The Sirica strategy certainly worked in the Warrenesque sense that it produced results, indeed, all the way to *Götterdämmerung*. But due process of law, not *Götterdämmerung*, is the result to which judges are solemnly sworn. *Götterdämmerung* is a prosecutorial goal, and if prosecutors flinch, or are fired, then the remedy mandated in the Constitution, and demonstrably available at Watergate, is impeachment. To put it another way, due process is the end for judges, but the means for prosecutors. Of all judgely malfunctions, subordination of due process to other ends is surely the most grave. The several virtues of Goulden's book include an industrious catalogue of all the lesser judicial errors, but it applauds the error-in-chief. This might reasonably be called an exercise in selective scotoma. It hardly describes a triumph of *American* constitutionalism.

Reviewed by C. P. IVES

[1]The term, first applied by President Roosevelt in 1906, was derogatory but gained respectability with its practitioners' proof of misdoings in business and politics.

[2]Justice Robert H. Jackson, speaking for himself, Chief Justice Stone and Justices Frankfurter and Roberts in dissent: Wallace Corp. v. NLRB, 323 U.S. 248, 270.

[3]Learned Hand, *The Bill of Rights*, p. 68.

[4]The Benjamin N. Cardozo Lecture, Association of the Bar of the City of New York, November 21, 1972, p. 25, mimeographed text.

[5]*Washington Post*, August 30, 1973, p. A 6.