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Mr. Justice Murphy: a Political Biography. by J. Woodford Howard.

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MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY. By J. Woodford Howard. Princeton, N.J.: Princeton University Press, 1968. Pp. 578. $12.50.

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Adamson v. California[1] was decided in 1947. Since overruled by the Warren Court, it became immediately famous because of a contentious debate between Justices Black and Frankfurter. Black would have had the due process clause of the fourteenth amendment "incorporate" all of the substantive provisions of the Bill of Rights—in this instance the federal standard of the fifth amendment privilege against self incrimination. Black accused his brethren in the majority of reading their ideas of "natural law" into the Constitution. This, as is well known, infuriated Frankfurter, who maintained that Black's history (about the meaning of the fourteenth amendment) was faulty, and that "due process" did not give the Justices a warrant to roam at large, placing their ideas of good social policy (natural law) into the Constitution. Votaries of the cult of Frankfurter worship leaped into the battle to write long and (to them) convincing accounts of how the former Harvard law professor was indubitably correct.

Little noticed in the fray, perhaps because the Black position was itself so extreme, was the brief and pointed dissenting opinion of Mr. Justice Francis William Murphy, who, for some reason, was always called Frank Murphy. In that dissent, Murphy anticipated the tenor and swing of the decisions of the Warren Court, saying, Justice Black is probably correct in saying that the fourteenth amendment does include all of the substantive provisions of the Bill of Rights but he does not go far enough. Those, said Murphy, are the *minimal* guarantees of the Constitution; in addition, there are certain unnamed constitutional rights which the Justices could identify and protect in appropriate cases. A little over twenty years after *Adamson,* Black had been vindicated (in large part) by the Supreme Court—and, what is even more important, so too had Frank Murphy. Murphy's statement in *Adamson* had become law in certain areas: "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights."[2]

The essential debate here concerns the nature of the judicial function in constitutional matters. Professor Howard's biography is the first full-scale treatment of one of the most maligned (and underestimated) Justices in the history of the Supreme Court. Just as the decisions of the Warren Court in large part

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1. 332 U.S. 46 (1947).
2. *Id.* at 124.

vindicated Justice John Marshall Harlan-I, so too did the same Court place the judicial imprimatur on a number of positions that Murphy, all alone (or almost so) and unafraid, had staked out during his brief decade on the High Bench in the 1940's. But while the first Harlan is now celebrated by bench and bar, Murphy remains forgotten. Perhaps Howard's fine biography of an avowedly instrumentalist Justice will help to resurrect his reputation.

Why Murphy should have been and still is so derided and ignored merits attention. Howard mentions and develops the question in what, for students of the Supreme Court, are the finest chapters of a fine biography. He quotes a number of contemporary commentators. For example, Arthur M. Schlesinger, Jr. called him "tense, dramatic, self-intoxicated," a judge who had "a semi-mystical urge toward isolated positions"; C. Herman Pritchett thought that Murphy illustrated how "hyperactive concern for individual rights can lead a judge into ventures little short of quixotic." But it was Philip B. Kurland, a member of the cult of Frankfurter worshippers, who took the most critical position; speaking of Murphy and Chief Justice Fred Vinson, he opined: "Neither had any great intellectual capacity. Both were absolutely dependent upon their law clerks for the production of their opinions. Both were very much concerned with their place in history, though neither had any feeling for the history of the Court as an institution . . . . Each had desires for a non-judicial role in government. Neither dealt with the cases presented as complex problems: for each there was only one issue which forced decision. Each felt a very special loyalty to the President who had appointed him. Both were more impressed with the office which they held than with the function they were called upon to perform."[3] That is the indictment: Murphy is accused of being a "political" judge who failed to follow the dictates of "sovereign reason" in his decision-making.

What Murphy perceived, seemingly instinctively, was a shore dimly seen: the fact that the Court was then, had always been, and still is a very special type of Court, one that makes "political" decisions in a "legal" context. Murphy's error—if error it was—was in failing to conform to the accepted image of a judge. As Howard says, "he subordinated ideas to ideology, legal reasoning to emotion, and appeared thereby as the epitome of a 'lawless' judge."[4] He was, "by word and deed, . . . the most radical Justice in the nation's history."[5] The way of a radical is never easy, particularly if that radicalism exists within a profession that almost by definition (law being the conserving force of any society) is given over to conservatism. The accusation that Murphy lacked proper "judicial temperatment" presupposes an ideal model of the judge; indeed it presupposes a person who never existed, if, for example, one were to believe Chief Justice John Marshall, who said: "Courts are mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a

3. P. 471.
4. P. 479.
5. Pp. 475-76.

mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."[6] Justice Frankfurter, the idol of what William James and Morris R. Cohen called the "intellectualists," often discussed the requisites of the judicial temperament, but was not himself immune from the pulls and tugs that sway mortal men. For example, he could speak of the need for "invincible disinterestedness" on the part of a Justice, while simultaneously and steadfastly voting to uphold a given ideological position such as the need for Executive power in wartime[7] or the principle of federalism as he saw it.[8] Howard documents this.

Frankfurter, despite his powerful mental capacity, fundamentally misconceived the role and function of the Supreme Court during the second half of his long tenure on the High Bench. He sat in Holmes' seat, and seemingly thought of himself as another Holmes—acting as a sort of schoolmaster, spinning aphorisms that will not last, bucking the tide of history. At a time when the issues facing the Court were basically different from the economic-policy questions that plagued the Justices during Holmes' time, he held staunchly and steadfastly to a position of self-styled "judicial self-restraint." One of the many myths about the supreme tribunal is that Frankfurter could and actually did adhere to such a position; he, too, had his preferences and values, which he sought to further.[9] I do not suggest that Murphy had a fully developed philosophy of judicial action in nearly the extent to which his colleague and foe did. Murphy was cut in the Earl Warren mold; he saw the complexities of Supreme Court cases in rather simplistic either-or dichotomies. A visceral judge, he asked the Warren question—"Was it fair?"—and came to decisions that have since won the approval of a majority of the Court.

Subtitled "a political biography," Howard's book is an account of a political judge who sat on a political court. His error, if error it be, or great sin, if sin it be, was to let the long-hidden cat out of the bag: He openly and avowedly, even defiantly, was a "gut" reactor who espoused frankly instrumentalist positions. Not that he couldn't write opinions with the deftness and opacity that so delights lawyers, because that language is familiar and permits lawyers a range of maneuver within only broadly denoted lines; that he did, and often, as Howard notes (but as Murphy's critics refuse to concede). He could have been the very model of the traditional jurist—grave, solemn, a bit pompous, unclear

6. Osborn v. United States Bank, 22 U.S. 738, 866 (1824).
7. Korematsu v. United States, 323 U.S. 214 (1944).
8. Adamson v. California, 332 U.S. 46 (1947).
9. *Compare* Grant, *Mr. Justice Frankfurter: A Dissenting Opinion*, 12 U.C.L.A.L. REV. 1013, (1965) *with* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960), and Miller, *Some Pervasive Myths About the United States Supreme Court*, 10 ST. LOUIS U.L.J. 153 (1965).

in language but giving the appearance of adherence to "the law"—but he chose not to (or perhaps he had the role thrust upon him). What his judicial career so clearly illustrates is the need to perceive the Supreme Court of the United States as a *political* organ, a policy-maker in the American system of governnance. Of course, much lip service is given to that notion, but little has been done to examine its permutations. Legal scholars, for the most part, have been content to parse opinions of Supreme Court Justices without making systematic and comprehensive reference to either the inputs of the adjudicative process or the outcomes (in the sense of "impact analysis" of Court decisions).

The time has now come—indeed it is long past due—for something more by way of studying that particular and peculiar institution, the Supreme Court, and the Constitution. Law school courses in Constitutional Law can no longer be confined largely to scrutiny of what the Justices have had to say. For what is now being seen, mainly through the efforts of political scientists, is the political dimension of American constitutionalism. Casebooks in current use simply do not provide the data, qualitatively or quantitatively, necessary to an understanding of the Court and the Constitution. The great value of the book under review is that it reveals, in considerable detail, some of what takes place behind the velvet curtains of the Marble Palace. Howard's exposition will rank with Alpheus Thomas Mason's great biography of Chief Justice Harlan Fiske Stone for its revelations of the internal working of the Court during the 1940's. Mason's book was criticized by some reviewers for being too candid about the Court; the same problem troubled Howard, because he used Murphy's notes of secret judicial conferences and intra-Court memoranda. "Some lawyers," he said, "believe the public has no legitimate interest in judicial decisions beyond published opinions. Personally, I believe the public in a democracy has a right to know how its judges decide cases, and I share the view expressed by Charles Evans Hughes and others that knowledge of how courts operate would vindicate popular respect for the judiciary."[10]

In sum, Professor Howard's book is necessary reading (together with Mason's biography of Stone) for anyone who would understand the Supreme Court decisions of the 1930's and '40's. It tells much, but not all; it adds a degree of understanding about the operations of the Court that is not obtainable elsewhere. With its publication, students of the High Bench should await, impatiently and eagerly, biographies of Jackson and Frankfurter—those two giants of the anti-Murphy clique—and (eventually) of Warren and Black and Douglas.

10. P. viii.