

Michigan Law Review

Volume 67 | Issue 6

1969

Howard: Mr. Justice Murphy, A Political Biography

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Recommended Citation

Eugene Gressman, *Howard: Mr. Justice Murphy, A Political Biography*, 67 MICH. L. REV. 1278 (1969).
Available at: <https://repository.law.umich.edu/mlr/vol67/iss6/6>

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BOOK REVIEWS

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

Dramatically and unexpectedly, Frank Murphy learned within hours of the death of his predecessor, Justice Pierce Butler, that he would be appointed to the Supreme Court of the United States. On that day, November 16, 1939, there had been a Cabinet meeting at the White House. Desiring to speak privately with President Roosevelt about several routine matters, Attorney General Murphy stayed behind after most of the other Cabinet members departed. In the midst of this discussion with the President, the following episode took place, as described in Murphy's own handwritten notes:

The Assistant Secretary of Commerce was in the room at the time. He stood looking out the window at the far end of the Cabinet Room. I had drawn a chair—the Secretary of State's chair—near the President's right side. He was in his chair at the head of the table.

In the midst of our chat and when Noble wasn't looking he reached over and whispered in my ear "Do you appreciate the significance of what happened this morning—Justice Butler's death?" In a sense I did but did not want to assume that my name would be considered so I remained silent. Without a moment's delay he now leaned back in his chair and with a handsome grin on his face he chucked his arm full length at me, index finger pointing just under the head of the table over against my arm and whispered "You, you!" I was bewildered not only that he had so briefly come to a conclusion on the subject but also, despite the fact that I am fully aware of his love of surprises, that he would announce it to me in this fashion. "It begins to look like it," he added.

I quietly said to him, "Mr. President, I am of course at your service but expect you to do only what is in the best interest of the Country." Beyond this, I said nothing. I did not indicate that I hoped it was true, that I was pleased with it or that I would reject it. "Think it over for a week and then we will have a visit about it."

My thoughts were not settled on the subject for I honestly knew he could make a better choice for the Supreme Court than myself. My long years of training have made me to a degree proficient and very fond of administrative work. Reform and modernization of government, [and] the selection of discriminating personnel attracted me mightily and for these and other reasons I believe I could serve the nation better off the Court than on it. Be that as it may a Supreme Court Justice was born in the informal and boylike performance recited above. He was in glee throughout the brief episode.

He loves with some sort of gleeful passion deflating an important and solemn occasion into a normal affair.

Thus was born a Court appointment that was to span more than nine years, an appointment that brought to the Court a man whose judicial talents were both unique and controversial. J. Woodford Howard, professor of political science at Johns Hopkins University, has sought in this "political biography" to bring meaning and understanding to the judicial career of Frank Murphy. And he has done so with the postulate of Jerome Frank in mind:

The ultimately important influence in the decisions of any judge are the most obscure They are tied up with intimate experiences which no biographer, however sedulous, is likely to ferret out, and the emotional significance of which no one but the judge, or a psychologist in the closest contact with him, could comprehend For in the last push, a judge's decisions are the outcome of his entire life history.¹

While not a psychologist and never an acquaintance of Justice Murphy, Professor Howard has managed to draw a most perceptive and realistic portrait of the Justice. He has come as close as possible, at least for an outside observer, to comprehending the emotional significance of the events in Murphy's life that influenced his work on the Court. This is no hasty tract or superficial biography. It represents thorough research and mature reflection covering more than a decade, starting with the author's doctoral thesis at Princeton under Mason.² And he has had the advantage of examining the recently available papers of the Justice, including those of the Court tenure.

The story of Frank Murphy, as sketched by Professor Howard, "resolves itself into an impressive unity . . . a life of unwavering defense of human rights" (p. 496). As a public prosecutor and criminal court judge, as Mayor of Detroit, Governor-General of the Philippines, Governor of Michigan, and then as Attorney General of the United States, Frank Murphy exhibited an amazing consistency of purpose and action in the civil rights arenas. He was an activist in his complete and uncompromising dedication to the basic democratic ideals that most Americans profess but so often ignore. And he brought that activism, that dedication, to his role as Associate Justice of the Supreme Court.

Therein lies the key to the enigma of Frank Murphy—a key that serves to explain a great deal about what have been described as his strengths and his weaknesses as a Justice. During the 1940's, the period of Murphy's service on the bench, the Court was confronted with two

1. LAW AND THE MODERN MIND 114-15 (1930).

2. Howard, Frank Murphy: A Liberal's Creed (unpublished doctoral thesis in the Princeton University Library, Department of Politics, Feb. 1959).

major types of civil liberties problems: (1) those generated by wartime controls and restrictions; and (2) those emanating from the awakening of the legal system to the need for greater constitutional and judicial protection of basic human rights. To those tasks, Justice Murphy brought a full measure of understanding and insight. In forceful and colorful language, he gave voice to the libertarian idealism that underlies the Bill of Rights and that came into greater prominence in the subsequent years of the Warren Court. Seldom has the judicial and public conscience of the nation been so eloquently expressed than in the opinions of Murphy during this period, opinions that for the most part were dissenting from or concurring with the results reached by the Court majorities.³

So complete was Murphy's commitment to Christian morality and democratic principles that he sometimes appeared to overplay his hand, thereby causing much of his conventional work on the Court to be overshadowed and little appreciated. As Professor Howard has noted, "The essential fact to be grasped about Murphy is that, while he was capable of functioning in conventional terms and did so more often than not, he *chose* different tactics when battling for principles he felt most deeply" (p. 478). From his earlier experiences in public life, Murphy brought to the Court a fighting, evangelical, and emotional approach to civil liberties. It was an approach that sometimes translated complex problems to simpler moral terms and allowed few procedural niceties to stand in the way of giving vent to vigorous constitutional condemnations.

As a result, Justice Murphy completely antagonized those who profess that the legal system is simply a process of calm objective discovery of pre-ordained and immutable principles. He appeared to some observers to use his seat on the Court as a pulpit from which, to use the words of Felix Frankfurter, "he exercised the compassionate privileges of a priest when in fact he was only a judge" (p. 480). He became known as a "lawless" judge who confused the "law" with his own notions of compassion and morality.

Such denigrating comments, perpetuated and echoed throughout the two decades since Murphy's death in 1949, do not find their ultimate refutation in any re-evaluation of Murphy's opinions or in a defense of his vanity or the other personal idiosyncrasies that obviously annoyed some of his fellow men. Rather, that refutation is to be found in the growing recognition that the Supreme Court, in many of its functions, is necessarily a political institution that is

3. See, e.g., *In re Yamashita*, 327 U.S. 1, 26 (1946); *Korematsu v. United States*, 323 U.S. 214, 233 (1946); *Bridges v. Wixon*, 326 U.S. 135, 157 (1945); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 208 (1944); *Falbo v. United States*, 320 U.S. 549, 555 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 109 (1943).

forced to play an activist role in the development of certain constitutional doctrines, whether they be the federalist doctrines of the Marshall Court or the reapportionment concepts of the Warren Court. The Court is something more than an arbiter of conflicting views among lower courts as to the proper interpretation of a tax or jurisdictional statute; it is something more than a vehicle for resolving legal problems through the use of legal logic or the correlation of past precedents. The Supreme Court is also a unique and human institution designed to forge and expand our basic legal and constitutional doctrines to meet men's needs. In so acting, the Court and its members must perforce reflect and apply, in the context of cases and controversies, some of the fundamental notions of public and historical morality.

A natural part of the Court's function in these respects is the individual expression of views by the Justices. Confronted from time to time with some of the most controversial and significant of our nation's social problems, Justices who hold strong views about the legal or constitutional implications of those problems have consistently given expression to their views. On occasion those views can be contained within the limited bounds of a majority opinion. More often, strong views can best and most effectively be set forth in concurring and dissenting opinions. Frank Murphy was thus no pariah in utilizing such means to voice his abhorrence of what he conceived to be invasions of personal freedom. He was not the first nor the last to use his seat on the Court as a "pulpit" to preach his notions of constitutional freedom.

History will doubtless judge Frank Murphy not as a lawless innovator of personalized views but as a dramatic expositor of constitutional ideals. He had an established right to express those views and he will ultimately be judged by the intrinsic merit of what he had to say, rather than by the mere fact or manner of expression. History will also judge him on the merits of his conventional but nonetheless significant contributions to other aspects of the Court's role in the judicial system. Such in-depth studies of the man as that by Professor Howard make it possible for history to make its judgment dispassionately and with all the relevant facts revealed.

When President Roosevelt whispered "You, you" in Frank Murphy's ear on that day in November of 1939 he was perhaps creating a judicial figure of greater stature and more enduring qualities than either could then foresee. Certainly Justice Murphy's final place in judicial history will be more important and significant than that assigned to him by those who cry that he misconceived his function with that of God. The ultimate truths that time alone can establish may well prove that much of what Justice Murphy

so eloquently stated in the 1940's had meaning not only for that period but for all of our constitutional time.

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former clerk to Justice Murphy.*
