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Murphy: Congress and the Court

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RECENT BOOKS

CONGRESS AND THE COURT. By *Walter F. Murphy*. Chicago: University of Chicago Press. 1962. Pp. xi, 308. $6.95.

Between March 18 and August 12 of 1958 the House of Representatives of the United States Congress enthusiastically approved five bills which, if enacted, would have been the most substantial restraint ever imposed by Congress on the United States Supreme Court.[1] There is no doubt that dissatisfaction with the Court was at the time substantial in Congress and widespread throughout the country. Yet by August 24 of the same year the last of these bills had, in one way or another, been defeated. Here is a prime legislative mystery which is now convincingly resolved by Professor Walter F. Murphy in *Congress and the Court*. The author, associate professor of politics at Princeton, explores in fascinating detail the conflict between these two bodies that began in May 1954 and reached its climax in August 1958. The book is also much more than that, for this clash is merely the central, dramatic episode with which Professor Murphy compares other attacks upon the Court and thus illumines the continuing tensions that occasionally erupt into open conflict between Congress and the Court. Even where his review of earlier disputes recounts familiar events, such as the Judiciary Act of 1802, the Chase impeachment trial of 1804, the McCardle episode of the Reconstruction period, and the Court-packing plan of 1936-37, it is important to be thus reminded that the crisis of the 1950's was not unique. Professor Murphy makes that history lively, and he often provides insights into those earlier periods that can be helpfully transferred to the present.

It is useful to be reminded, for example, that words of condemnation scarcely exist in the English language, from the sometimes elegant phrases of scholarly distaste, to the most scurrilous insults, that were not long ago used with reference to the Court. Equally, it is interesting to learn how limited is human inventiveness in the political process.

> "By the close of Marshall's chief justiceship, almost all of the basic measures to curb the Court had been seriously suggested or actually tried: impeachment, reduction of jurisdiction, congressional review of decisions, limited tenure, requirement for an extraordinary majority to invalidate a statute, Court-packing, presidential refusal to enforce a decision, and (at the state level) nullification and even resort to force." (p. 63)

1 H.R. 3, 85th Cong., 2d Sess. (1958) (to preclude federal pre-emption except where Congress expressed specific intent to supersede state law); S. 1411, 85th Cong., 2d Sess. (1958), as substantially amended in the House [to reverse the decision in Cole v. Young, 351 U.S. 536 (1956)]; H.R. 8361, 85th Cong., 2d Sess. (1958) (to restrict access of state prisoners to habeas corpus in federal court); H.R. 11477, 85th Cong., 2d Sess. (1958) [to restrict the ruling in Mallory v. United States, 354 U.S. 449 (1957)]; and H.R. 13272, 85th Cong., 2d Sess. (1958) [to broaden the Smith Act definition of "organize," thus reversing in part Yates v. United States, 354 U.S. 298 (1957)].

In the light of that experience and the strong anti-Court passions often exhibited during these early years (including strikingly severe presidential criticism), it is encouraging to be told that "no anti-Court legislation passed Congress between the judiciary acts of 1802 and the Civil War. Furthermore, the Court's prestige grew and flourished in the environment of conflict, and that prestige remained at a high level until 1857." (p. 63) Indeed, it would not be inaccurate to say that the only other occasion on which Congress has ever succeeded absolutely in curbing the Court was in the 1868 legislation restricting the jurisdiction of the Court to review certain writs of habeas corpus, which was sustained in *Ex parte McCardle*.[2]

At the same time it is true that the attack mounted in the mid-fifties was in some ways more substantial than anything that had gone before. Unlike the proposals of President Roosevelt in 1936, in which many saw nothing but a cynical attempt to pack the Court in order to save an already floundering political program, the complaints of the 1950's came from a variety of sources which in combination seemed at times to include every respectable element of society. The coalition of forces may have been peculiarly unstable because of the various, and sometimes contrary, motivation of its supporters; but strong it seemed for a time to be.

In the years immediately before 1954 the critics of the Court, then chiefly liberals, had proved largely impotent to effect change to their liking. However, the former critics and supporters reversed positions shortly after Earl Warren became Chief Justice in the Fall of 1953, specifically with the decision in *Brown v. Board of Education*.[3] Segregationists were soon joined in condemnation of the Court by other states' righters who were not primarily segregation-minded, by those who reacted in the name of national security, and by those who feared a breakdown in law enforcement at all levels. By August of 1958 a number of state legislatures had voted defiant (and futile) resolutions of interposition; the association of state attorneys general had expressed alarm; the state chief justices had called for "self-restraint"; an American Bar Association committee had specifically disapproved some twenty-four decisions of the Court; and some scholars were beginning to complain about "unreasoned" decisions even when they reached a "right" result. If crisis of confidence there ever was, this was it. Yet, surprisingly, the rising

2 74 U.S. (7 Wall.) 506 (1869). For this purpose I do not count the four constitutional amendments which were adopted, not so much to overturn Court decisions as to alter provisions of the Constitution found defective. This is true of the eleventh, fourteenth, sixteenth, and nineteenth amendments. Similarly, I would agree with Professor Murphy (p. 262 n.) that it is not appropriate for this purpose to include such legislation as that requiring three-judge courts to enjoin enforcement of certain legislative or administrative acts. As he points out (p. 262 n.) the Norris-LaGuardia Act could be classed as an attack on the Court, but involved other issues as well.

3 347 U.S. 483 (1954).

crescendo of criticism never came to anything very much. True, the so-called Jencks bill had been enacted in 1957 in reaction to *Jencks v. United States*;[4] but the statute has been described with considerable justification as simply a codification, although somewhat modified, of the Court's ruling; and most supporters of the bill disclaimed any intent to rebuke the Court.[5] The important thing is that none of the proposals designed to restrict the Court's jurisdiction or its freedom of decision was finally enacted. The reasons for this failure were at the time by no means clear. Professor Murphy has remarkably illuminated the events of that period to demonstrate what factors were most important in the defeat of the anti-Court proposals.

It is an amazing story, made especially authoritative by the fact that Professor Murphy relied not only on the legislative record, but as well did extensive interviewing and on-the-spot research. The author shows, for example, that the anti-Court leadership at one time had sufficient strength to pass S. 654 (designed to reverse the pre-emption point in *Pennsylvania v. Nelson*),[6] but overreached themselves in seeking enactment instead of H.R. 3 (denying all pre-emption except with specific congressional approval). (pp. 217-18) Some legislation actually passed the Senate as well as the House, but the conference reports failed to receive the necessary majority votes thereafter in both Houses. (pp. 218-23)

The study is valuable also for the picture provided of the role of special-interest groups and of individuals. Among the individuals, Lyndon Johnson, then Majority Leader of the Senate, was unquestionably the most important. Murphy describes him thus:

> "In a sense, Lyndon Johnson's role in the battle over the Warren Court was unique. Johnson fully understood the ethic of the Senate. He knew how to advise without becoming patronizing; how to warn without seeming boorish; how to bargain without appearing to bribe or promising more than he could deliver; how to appeal to personal honor, party unity, Senate loyalty, or national welfare without becoming unctuous. Moreover, Johnson knew where each of

[4] 353 U.S. 657 (1957).

[5] In 1959, after the high point of the crisis, Congress filled in the jurisdictional "no-man's-land" found by the Court in Guss v. Utah, 353 U.S. 1 (1957). NLRA § 14(c), added by 73 Stat. 541 (1959), 29 U.S.C. § 164 (c) (Supp. III, 1962). In the same year Congress modified state power to tax the net income of interstate businesses approved by the Court in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). Act of Sept. 14, 1959, 73 Stat. 555. But these issues were scarcely the ones that had agitated Congress in the critical years.

On June 19, 1962, President Kennedy signed P.L. 87-486, amending § 2385 of title 18 of the United States Code to define the word "organize" in the Smith Act "to include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons." H.R. 3247, 87th Cong., 1st Sess. (1962). The effect of this is to reverse in part the decision in Yates v. United States, 354 U.S. 298 (1957).

[6] 350 U.S. 497 (1956).

> his colleagues in both parties stood—or wavered—and what each wanted or feared. At the same time, he cleverly camouflaged his own position; few people knew what Johnson really wanted, other than to come out on the winning side. Perhaps most important, his tactical genius and marvelous ability to dissemble were geared to a restless energy and a burning personal ambition. There were many factors which played a part in the defeat of the anti-Court bills; but without Johnson's leadership, even though it was only warily accepted by the more ardent of the Court defenders, more legislation would certainly have been passed and much of it signed into law." (p. 249)

Professor Murphy convincingly demonstrates that the anti-Court faction in Congress was not able, after 1958, to mount another full-scale legislative attack against the Court in succeeding sessions of Congress. Despite the impetus that might have been provided by the sharply critical report of the Conference of Chief Justices in August 1958, and the more temperate, but still critical, recommendations from the American Bar Association in February 1959, the momentum of the attack was gone, aided no doubt by the fact that several leading senatorial critics of the Court did not return to Congress in 1959.

Professor Murphy suggests that these leadership losses, in combination with the 1958 election results which were generally viewed as favorable to the liberal viewpoint, were enough to preclude the possibility of any substantial attack on the Court, at least in 1959 or 1960. With that I agree; but he goes further to assert, somewhat gratuitously in my judgment, that the Court blunted the attack by a retreat from the criticized decisions. I recognize that his view is widely accepted as orthodox, but I wonder if the evidence justifies that rather serious reflection on judicial integrity. He relies for this conclusion on several decisions of the 1958 Term in which he finds withdrawal from earlier positions, and he suggests that Justices Frankfurter and Harlan "were primarily responsible for the Warren Court's shift in direction." (p. 265) If I may say, that is an unlikely pair to find responding to congressional criticism. Even as Mr. Justice Frankfurter has himself sought to clear Mr. Justice Roberts of the charge that he was in 1937 a party to the alleged "switch in time to save nine,"[7] I would strongly urge that the votes of Frankfurter in 1958-59, as always, represented his own convictions, unaffected by fear of congressional retribution. Generalizing further, as I think one may, it seems unlikely that *any* member of the Court during those years was amenable to such influence. We need scarcely be reminded that these are strong-minded men whose judicially expressed views are but the outward manifestation of deeply held convictions.

In more specific answer, however, further notice should be given the

[7] Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

1958 Term. Professor Murphy makes much (as do other commentators) of the Court's "withdrawal" from *Watkins* and *Sweezy*[8] in *Barenblatt* and *Uphaus*.[9] While it is true that contempt citations for refusal to answer questions posed by legislative bodies were set aside in the earlier cases and upheld in the latter, it should also be noted that the cases were distinguishable on their facts. Indeed, Mr. Justice Harlan in *Barenblatt* specifically reaffirmed the principle of *Watkins* and *Sweezy*; and when a comparable fact situation again came before the Court, in *Deutsch v. United States*,[10] the Court applied the *Watkins* principle to upset the conviction. Moreover, during the 1958 Term itself the Court unanimously upset contempt convictions arising out of other congressional[11] and state legislative[12] investigations. Scarcely the work of an intimidated Court that knows well the art of avoiding decision where the decision is likely to be unpalatable.

Nor can much be made of other "retreats" in the 1958 Term. It was after all the year of *Cooper v. Aaron*,[13] perhaps the most ringing of all the Court's denunciations of segregation. It was also the year of *Greene v. McElroy*[14] which occasioned the recasting of the entire government employee security program when the Court denied that Congress had authorized security discharges without confrontation. It was also the year of *Irvin v. Dowd*,[15] controversial in the extreme on the sensitive points of habeas corpus and the right of state courts to make decisions in criminal cases on grounds immune from federal court review.[16] Not a bad record of liberalism for a Court described as in "retreat" from conservative attacks.

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8 Watkins v. United States, 354 U.S. 178 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

9 Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959).

10 367 U.S. 456 (1961).

11 Flaxer v. United States, 358 U.S. 147 (1958).

12 Scull v. Virginia, 359 U.S. 344 (1959). See also Raley v. Ohio, 360 U.S. 423 (1959).

13 358 U.S. 1 (1958).

14 360 U.S. 474 (1959). See also Vitarelli v. Seaton, 359 U.S. 535 (1959).

15 359 U.S. 394 (1959).

16 See also Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684 (1959) (denial of license for showing of "Lady Chatterley's Lover" invalid on stated grounds); Spano v. New York, 360 U.S. 315 (1959) (continuous questioning without opportunity to consult counsel violates due process); NAACP v. Alabama, 360 U.S. 240 (1959) (contempt citation of NAACP for failure to produce documents upset for second time); Cash v. Culver, 358 U.S. 633 (1959) (absence of counsel denial of due process in circumstances).