The Utopian Pilgrimage of Mr. Justice Murphy

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On July 19, 1949, Frank Murphy, Associate Justice of the Supreme Court of the United States died in Detroit. The liberal press mourned the passing of a mighty warrior for civil liberty. Other journals observed the protocol of the occasion by politely deplored his death, the University of Michigan Law School prepared a memorial issue of the Michigan Law Review in honor of its distinguished alumnus, a few encomiums appeared in the law journals, then silence set in. A silence which has been broken only by occasional slighting references to Murphy's talents, and by a word-of-mouth tradition in law school circles that the Justice was a legal illiterate, a New Deal political hack who approached the sacred arcana of the Law with a disrespect that verged on blasphemy, who looked upon hallowed juridical traditions as a drunk views a lamppost: as a means of support rather than a source of light.

Murphy was indeed a strange phenomenon and, given the political developments of the past generation, it seems probable that we shall not see his likes again. An Irish-American, Roman Catholic, Frank Murphy was also a militant, dedicated liberal. Probably one of the best-hated figures of the New Deal period for his uncompromising refusal to employ martial law against the sit-down strikers, he also collected enemies among the followers of President Roosevelt for his unswerving defense of civil liberties against even the "enlightened" administration. In addition, because of his thoroughly instrumental approach to law and to legal traditions, he incurred the enmity of all legal scholars in the apostolic succession from Justice Felix Frankfurter. An ideological, even ritualistic liberal, he brought upon himself the scorn of the tough-minded "realists" such as Justice Robert Jackson. While Jackson fulfilled Holmes' dictum that a judge must have in him something of Mephistopheles—in fact, sometimes making Holmes himself, by comparison, appear angelic—Murphy lacked this quality completely. In a real sense, I suggest, Justice Frank Murphy was a utopian pilgrim in this vale of tears, a man with a deep-rooted, religious commitment to the building of a new society in which men would be both free and prosperous. Thus when Murphy died, the Court lost more than its leading civil libertarian; it lost a Justice who was the living incarnation of the militant liberal myth of the New Deal.

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2. Ibid. See also Frank, Justice Murphy: The Goals Attempted, 59 Yale L.J. 1 (1949); Gressman, Mr. Justice Murphy: A Preliminary Appraisal, 50 Colum. L. Rev. 29 (1950); Comment, Mr. Justice Murphy, 63 Harv. L. Rev. 289 (1949).
The criticisms of Justice Murphy are themselves interesting for the light they throw on his symbolic stature. The mildest critics, such as Herman Pritchett, suggest that the Justice's "hyperactive concern for individual rights" led him "into ventures little short of quixotic." This is gentle, indeed, when compared with the strictures of Philip Kurland. Comparing Murphy to Chief Justice Vinson, Kurland observed:

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. . . . Neither dealt with the cases presented as complex problems: for each there was one issue which forced decision. Each felt a very special loyalty to the President who had appointed him.¹

Chief Justice Stone apparently shared this view. From Alpheus Mason's recent biography of the Chief Justice we learn that Stone considered Murphy, along with Rutledge, a "weak sister." Consequently Stone refused to give Murphy important decisions:

"The job of the Court," [Stone] said of one of [Murphy's] opinions "is to resolve doubts, not create them." The Chief Justice was well aware that he slighted Murphy; he often agreed to give him a "break," but in the end Murphy would be nosed out partly because Stone disliked leaving a fine case to the rumination of a law clerk.⁵

The essential difference between Murphy's judicial attitude and that of his more conservative brethren was brought out in 1944 by an exchange of compliments between Murphy and Roberts. Writing for the Court in Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123,⁶ the Justice observed in passing:

Such an issue [portal to portal pay] can be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion.⁷

Dissenting, Mr. Justice Roberts crystallized in the following terms his opposition to Murphy's approach:

The question for decision in this case should be approached not on the basis of any broad humanitarian prepossessions we may all entertain, not

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7. Id. at 592.
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with desire to construe legislation so as to accomplish what we deem worthy objects, but in the traditional view, if we are to have a government of laws, the essential attitude of ascertaining what Congress has enacted rather than what we wish it had enacted.  

We shall subsequently examine Murphy's judicial attitude and technique in detail; suffice it here to note the standard counts of the indictment that has been drawn up against him and examine it briefly. Murphy, it is alleged, was a New Deal politician disguised as a Justice of the Court, and not a very bright politician at that. He was legally a creature of his law clerks, excessively loyal to President Roosevelt, simplistic in his approach to complex legal problems, and bereft of any historical appreciation of the role of the Supreme Court.

Now, as will appear later, I do not look upon my function in this essay as one of glorification, or even rehabilitation—I come neither to praise nor to bury. However, I do feel compelled to demur at the outset to the terms of this indictment. In the first place, since the days when John Marshall filled the office of Secretary of State in the morning and Chief Justice of the United States in the afternoon, we have had a high incidence of politicians concealed beneath the judicial robes of the high Court. Indeed, I have suggested elsewhere that, given the policy functions of the Supreme Court, this is both inevitable and wise: to paraphrase Clemenceau, the meaning of the Constitution is far too important to be left in the hands of legal experts. Thus the complaint against Murphy, to stand up, must be reformulated to assert that he was a "bad" political justice, and this accusation must rest upon more than a subjective dislike of the politics with which he suffused his opinions. This charge must, in other words, rest upon some empirical evidence that his decisions were technically incompetent, and none of his critics have appeared with any documentation of this point, or even with any criteria by which an evaluation can be made.

So here the argument shifts: Enter the ubiquitous law clerks who seemingly saved Murphy from his stupidity. Without the kind of information which could supply substance to this accusation one way or the other, I can enter no judgment on the merits as to Murphy's legal knowledge and intelligence. However, I suggest that the law clerk gambit is one best left unexplored, since who can tell how many judicial reputations may be destroyed by candid revelation of what occurs in the chambers? Justice Frankfurter seems to have implied to Professor Mason that Chief Justice Stone's dissent in the Gobitis case was a consequence of fervent advocacy of the Jehovah's Witness posi-

8. Id. at 606.
tion by his clerk, Alison Dunham.\textsuperscript{11} Elsewhere in the biography of the Chief Justice it appears that his famous footnote 4 in the \textit{Carolene Products} case was the handiwork of his clerk, Louis Lusky\textsuperscript{12} as was the rationale of the \textit{Gerhardt} case.\textsuperscript{13} Obviously we are here in dangerous territory. Yet in a fundamental casting up of accounts, is this law clerk proposition relevant? Why should a Justice not have the right to assimilate the talents of his apprentices? And, if he takes on brilliant young men and gives them leeway, is it not evidence of his own judgment and intellectual capacity?\textsuperscript{14}

The other points in the indictment seem to rest on equally flimsy factual assumptions. The charge that Murphy was overly loyal to President Roosevelt flies in the face of the facts: what Justice asserted more vigorously the rights of the individual, even of individuals who happened to be Nazis, Communists, or Japanese generals, against the executive arm of the government? A reading of Murphy's flaming dissent in \textit{Korematsu v. United States},\textsuperscript{15} which could have been designated more accurately \textit{Korematsu v. Franklin D. Roosevelt, Commander-in-Chief}, should demonstrate the patent inaccuracy of this accusation. Undoubtedly Murphy was simplistic in his approach to legal problems, but, as a reading of John Marshall's disposition of Virginia's case against the Cohen brothers should suggest,\textsuperscript{16} this alone does not constitute high treason against the traditions of the Court.

To conclude this evaluation of the criticism of Murphy, I would submit that a directed verdict of not proven, if we may borrow it from the Scottish jurisdiction, is in order. The nub of the case against Frank Murphy appears to be the content of his opinions, rather than their form. That is, he was simplistic and untraditional to the "wrong" ends. In fact, I believe it was Murphy's symbolic stature rather than his personal qualities that has drawn the attacks, and it is to his symbolic function that we now turn.

\textbf{II}

To understand Justice Murphy's symbolic role, it is necessary to examine briefly the New Deal tradition from which he sprung. The New Deal was a many-faceted phenomenon and, above all, a source of myths. Indeed, the reality—which was the masterful expediency of Franklin D. Roosevelt moving now this way, now that, in the effort to

\textsuperscript{11} Interview cited in \textit{MASON}, op. cit. \textit{supra} note 5, at 528.\textsuperscript{12} \textit{Id.} at 513.\textsuperscript{13} \textit{Id.} at 505.\textsuperscript{14} Murphy had only three clerks in eight years; John H. Pickering, 1941-43; Eugene Gressman, 1943-48; T.L. Tolan, Jr., 1948-49.\textsuperscript{15} 323 U.S. 214, 233 (1944).\textsuperscript{16} \textit{Cohens v. Virginia}, 19 U.S. (6 Wheat.) 264 (1821). In Henry Adams' phrase, to him Marshall was "the despair of bench and bar for the unswerving certainty of his legal method." \textit{I THE FORMATIVE YEARS} 104 (Agar ed. 1948).
deal with immediate problems\textsuperscript{17}—has long since vanished beneath layers of myth. To American conservatives, using this elusive term in its immediate political sense, the New Deal appeared as a wave of collectivism that, unless checked, would end by destroying American freedom. To hopeful liberals, the New Deal seemed to present a magnificent opportunity to remedy the economic and social defects which were brought into sharp focus by the depression, and armed with an essentially pragmatic philosophy of life, these worthies descended upon Washington and set to work in piece-meal fashion ameliorating the abuses they found. On the far left could be discerned small colonies of radical sectarians to whom the New Deal represented “incipient fascism” and “bureaucratic collectivism.”

But still another mythical interpretation of the New Deal can be extracted from the public opinion of the thirties, and it is this viewpoint that is of particular concern here. For lack of a better term, I shall designate it the \textit{militant liberal} view of the New Deal. While no specific group can be found that advanced this position in any organized fashion, it was very important nonetheless. To the militant liberal, the New Deal had an essentially millennial function: it must revolutionize American life by creating under government auspices and protection both an economy of abundance and an atmosphere of maximum personal freedom. Many militant liberals were close to socialism, though repelled by the Marxist logic-chopping and sectarian feuds that were characteristic of the left-wing organizations. They were also close to the pragmatic liberals in terms of the goals to be achieved, though they differed from the latter with respect to the efficacy of pragmatic, non-ideological measures of reform. In the fundamental sense, this was a temperamental difference; while the pragmatic liberals stuck close to the ground, making inch by inch inroads into economic and social problems, the militant liberals designed a full-blown American utopia and urged that progress towards it move at full speed.

This unorganized, amorphous \textit{groupement}, to borrow an appropriate term from French politics where such phenomena are plentiful, had little practical impact on the Roosevelt administration. Indeed, many of its constituents detested the anti-ideological sphinx in the White House. Yet, the net impact of its message, particularly since such influential journals as \textit{The Nation} and \textit{The New Republic} reflected its attitude, was considerable, particularly among young people and in liberal circles abroad. In short, these were “true believers” who, rejecting insignificant left-wing factions, placed their dream of the future in the hands of Franklin D. Roosevelt and, perhaps in the hope

\textsuperscript{17} For a superb analysis of Roosevelt and the New Deal, see Burns, \textit{Roosevelt: The Lion and the Fox} (1956).
that their attitude would become a self-fulfilling prophecy, propagandized the message that Roosevelt could be the liberal Messiah. While Roosevelt made few practical, as distinguished from rhetorical, concessions to this point of view, an outstanding instance of his "fence-mending" on the left was the New Deal career of Frank Murphy.

Since the inner life of Justice Murphy is not our concern here, biographical facts can be kept to the minimum. After a varied career at law and in the army during World War I, Murphy was in 1923 elected a judge of the Recorder's Court in Detroit. He was then thirty-three years old. On the bench, he made a name for himself as a pioneer in the assimilation of psychiatric skills into criminal proceedings, operating on the assumption, stated a generation later in his dissent in *Fisher v. United States*, that "only by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization." His work as the judge in a celebrated race trial—the Sweet case which saw Clarence Darrow defending Negroes against a murder indictment growing out of racial hostility—brought high praise on all sides for his impartiality and immunity to criticism. Re-elected to the court in 1929, he resigned in 1930 to make a successful campaign for the office of Mayor of Detroit.

As Mayor of a city ravaged by the depression, he established a nation-wide reputation among liberals for his statement that "not one deserving man or woman shall go hungry in Detroit because of circumstances beyond his control," thus asserting the responsibility of government for the economic welfare of the people. After a second term as Mayor, he was in 1933 appointed by President Roosevelt to be Governor General of the Philippines and, in effect, leader of the movement for Philippine independence. After the Commonwealth was established in 1935, Murphy remained in Manila as United States High Commissioner. Evidence that a decade later he still felt himself in loco parentis to the Philippine people is revealed in his separate opinion in a case in 1945, urging that American tax laws should be construed in such a fashion as to help the struggling Islands achieve maturity and economic strength.

In 1936, Murphy returned to Michigan to win the gubernatorial election and assumed office in 1937 to find himself confronted by the famous sit-down strikes. It was his conduct at this time which really endeared the Governor to the militant liberals, for, instead of declaring martial law, calling out the national guard, and forcibly driving the workers from the factories, Murphy made every effort to avoid a violent solution and entered into negotiations with union leaders instead

18. 328 U.S. 463, 494 (1946).
of jailing them. While we can now view the sit-down strikes with a certain detachment, realizing that since the workers were not prepared to launch a proletarian revolution, they would eventually get bored and go home, the conservative view of Murphy's conduct was that he was encouraging the formation of soviets. The fact that his solution worked was of course even more galling, and Governor Frank Murphy became Public Enemy No. 1 in business circles. In 1938, he was defeated for re-election and was immediately appointed United States Attorney General by President Roosevelt.

Apparently Murphy handled the usual functions of this job with competence, but his ideological convictions were not dulled by high office: within a month after he took office, on February 3, 1939, to be precise, he established a "Civil Liberties Unit" in the Criminal Division of the Department of Justice. In announcing his intention of establishing this Unit, Murphy said that "where there is social unrest—as I know from having been through no little of it myself since 1930—we ought to be more anxious and vigorous in protecting the civil liberties of protesting and insecure people." When the new section was set up, the Attorney General justified it in the following terms:

In a democracy, an important function of the law enforcement branch of government is the aggressive protection of fundamental rights inherent in a free people.

In America these guarantees are contained in express provisions of the Constitution and in acts of Congress. It is the purpose of the Department of Justice to pursue a program of vigilant action in the prosecution of infringement of these.

In January, 1940, Attorney General Murphy was appointed to the Supreme Court to fill the vacancy caused by the death of Pierce Butler. Like Butler, he was a middle-western Catholic, but there the resemblance ceased. In a statement made on his appointment to the Court, Murphy emphasized the need for vigorous protection of personal liberties and added that..."those in government—preoccupied with grave social and economic problems—tend naturally to be less sensitive to instances of oppression and denial of constitutional rights. In this welter of confusing factors that principle which is the essence of democracy—tolerance for all sides in all questions—is the loser." Two aspects of this statement are noteworthy: first, Murphy stated clearly his objection to governmental infringements of personal rights; and, second, his only reference is to "social and economic" problems, though

19. Governor Murphy was apparently quite close to the Catholic worker movement which was, and is, strongly pro-labor.
22. Cited, id. at 26 n.37.
war had recently broken out in Europe. Perhaps one reason that President Roosevelt elevated Murphy to the Court was his intuition that while Murphy was a fine intern for "Dr. New Deal," he would have been a first-rate nuisance to "Dr. Win-the-War."

So did Justice Murphy, on the eve of his assumption of judicial office, lay down the gage of battle to all those who would infringe on the liberties of the citizen. And this Justice was to prove himself unique among the New Deal justices in his sensitivity to injustice. His uniqueness in this regard, I suggest, can be understood by the fact that alone among the Roosevelt appointees to the high Court, Murphy was a militant liberal by background and conviction. Every judge is dominated by a telos, by a built-in purpose that suffuses his assumptions about law, so in asserting that he was teleological we cannot distinguish him from Black, Reed, Frankfurter, Douglas, Jackson, or Rutledge. Where he differed from his New Deal brethren was in the content of his telos. True, his views overlapped theirs at many points, but there is nonetheless a discrete corpus of ideals which supplied Frank Murphy with his bearings, his conviction, and his utter ruthlessness when confronted by procedural niceties that seemingly masked substantive evils.

I am not asserting that Frank Murphy was a "great" judge; my analysis and evaluation is directed to a different level where this question is irrelevant. I am concerned with Murphy's symbolic position, both in the minds of his enemies and those of his friends, and my contention is that he was the judicial incarnation of the militant liberal myth of the New Deal, of the body of aspirations which the militant liberals hoped the New Deal would incorporate into American life. Let us examine briefly the components of this myth. A rough summary might read as follows:

First, the militant liberals were dedicated exponents of the rights of minorities, automatic defenders of the persecuted without regard to the opinions which brought down the wrath of the majority.

Second, in their approach to business, the militant liberals were sentimental populists—opponents of "bigness," of trusts, of power concentrations of any sort. This was combined with sympathy for the small farmer, particularly the farmer-debtor in the squeeze of the

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23. For a good discussion of the various strands of New Deal liberalism, see Goldman, Rendezvous With Destiny (rev. ed. 1956). The treatment of Roosevelt's relations with the left of Hofstadter, The American Political Tradition 331 (1948) is very insightful. I should note that much of this composite of the militant liberal I have gained from intensive reading of the liberal and radical literature of the 30's and 40's in connection with a Fund for the Republic project. The files of The Nation and The New Republic are indispensable, and for a somewhat more jaundiced view of the New Deal that yet remains within the militant liberal tradition, Common Sense is most revealing.
capitalist octopus—John Steinbeck's *Grapes of Wrath* was required reading.

*Third,* the militant liberals believed that the federal government had a positive responsibility to create economic security for all Americans. They supported over all planning rather than pragmatic meliorism.

*Fourth,* the militant liberals believed firmly in the divine mission of trade unions, frequently shocking prosaic trade union leaders by the fervence of their convictions since the latter were generally under the illusion that they were committed to raising wages, not saving the world.

*Fifth,* though usually not pacifists in the normal usage of the word, the militant liberals were vigorous anti-militarists, asserting that civil rights were constitutional absolutes which could not be tampered with even in wartime.

This is, of course, an over-simplification, but it should suffice to identify Frank Murphy's ideological pedigree and to distinguish him from the other New Deal Justices. In the course of this comparison, it should be recalled that I am not denouncing these other Justices or excommunicating them from the liberal camp. While I would be a dissembler if I did not admit at the outset that I shared, and still share to some degree, the militant liberal Weltanschuung, this analysis is wholly concerned with their deficiencies from Murphy's vantage point. The inherent wisdom or folly of his philosophy of life is a subject for separate analysis. The clue to an understanding of Murphy's divergence from his liberal brethren lies, I think, in the hypothesis that, while by all accounts a man of considerable practical talent, the Justice was quintessentially a pilgrim in this world. A person who, like the good Christian in the theology of St. Augustine, bears witness in this *civitas* to the values of a transcendent utopia in which he spiritually resides. To Murphy, personal liberty in a society which cherishes man's personality were the necessary preconditions for the achievement of God-given potentialities, and he would lash out with prophetic fervor against any who frustrated the achievement of this democratic utopia in the United States. From this angle, law, indeed, all human institutions, are purely instrumental and traditions maintain their validity only so long as their substance contributes to the fulfillment of the democratic *telos*. Murphy's anti-traditionalism thus itself stemmed from a tradition traceable through St. Thomas Aquinas to Aristotle that instruments retain their legitimacy only as long as they fulfill their proper functions.

Let us now turn to the delineation of this democratic *telos* as Justice Murphy set it forth in the *United States Reports*. 
The various components of the militant liberal tradition were set out above. Retaining the same categories, and adding a few minor ones to fill out the picture, let us examine the opinions of Justice Murphy.

Rights of Minorities

Someone once observed that if Frank Murphy were ever to be canonized, it would be by the Jehovah's Witnesses. Though a member of a faith which has received the full force of Witness vituperation, Murphy, after the impact of the Gobitis case made itself felt, consistently supported the claims of the sect. From Jones v. Opelika in 1942 to Kovacs v. Cooper in 1949, he accepted and endorsed the pleas of the Witnesses in every case they brought to the high Court. In Prince v. Massachusetts, which was about as marginal as a religious freedom case can get, he dissented from the opinion of the Court, written by Rutledge, that the Massachusetts child labor laws legitimately prohibited Jehovah's Witness children from selling literature. He took this opportunity to express his views on the general problem:

The sidewalk, no less than the cathedral or the evangelist's tent, is a proper place, under the Constitution, for the orderly worship of God. No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure.

Other religious minorities uniformly received his support. A religious pacifist barred from the practice of law in Illinois, lost his appeal to the Court with Murphy joining in Black's dissenting opinion. Three times Murphy gave judicial comfort to the Mormon schismatics who retained the custom of plural marriage. Once he wrote the opinion of the Court condemning the employment of the Anti-Kidnapping statute against these polygamists, and in two cases he was in dissent when various other legal restraints were invoked against the practice.

24. 316 U.S. 584, 611 (1942). Murphy here joined the penitential concurring dissent of Justices Black and Douglas in which the trio apologized for joining the majority in Gobitis. 316 U.S. at 623.
27. Id. at 174-76.
30. A state law prohibiting the advocacy, encouragement, etc., of polygamy: Musser v. Utah, 333 U.S. 95, 98 (1948); the employment of the Mann Act:
Racial minorities could count on Justice Murphy to advance their claims for full equality. One of his best expressions of his philosophy of law arose from the Court's intricate disposal of *Steele v. Louisville & N.R.R.*\(^3\) Concurring with the judgment of the Court, Murphy insisted that the racially restrictive practices of the union local, which was attempting to utilize government authority to impose upon the employer conditions discriminatory to Negroes, should have been declared unconstitutional.

The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and to analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less that it should be. . . . Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.\(^3\)

His dissent in the *Screws* case\(^3\) was in a similar, though more infuriated vein.

The Japanese aliens in California, who were unable under the immigration statute of that day to become citizens of the United States, received extended sympathy from Murphy in a lengthy concurrence in the case of *Oyama v. California.*\(^4\) Technically at issue in the case was the validity of an amendment to the state's alien land law which by welding escheat provisions to a broad presumption was designed to end Japanese evasions of the ban on land ownership. The Court dealt with the statute on a very narrow basis, interdicting the presumption without touching on the legitimacy of the land law itself, and Murphy came out fighting. The land law, he asserted, was on its face unconstitutional as an infringement of the fourteenth amendment: it could only be described as a legislative implementation of racism, and the Court betrayed its responsibility to the Constitution when it refused to confront this fact. He filed a similar objection to a California law forbidding the issuance of fishing licenses to aliens ineligible for citizenship which was also disposed of by the Court on other, less ideological, grounds.\(^5\) He consistently defended the claims of the American Indians.\(^6\)

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32. *Id.* at 208-09.
34. *Id.* at 208-09.
36. See *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169,
Murphy did not limit his concern to racial or religious minorities. Urban voters, discriminated against by an antiquated system of congressional districting,\textsuperscript{37} and by the procedures necessary to get a minority party on the ballot;\textsuperscript{38} members of unpopular political minorities such as the quasi-fascist Terminiello\textsuperscript{39} and the communist Gerhard Eisler;\textsuperscript{40} aliens subjected to deportation orders seemingly for their political activities;\textsuperscript{41} all these found in Justice Murphy a strong defender. He was completely undiscriminating; if his opinion holding the communist Schneiderman illegally denaturalized was in part a ritualistically liberal approach to the nature of international communism—he stated at one point that "we should not hold that petitioner is not attached to the Constitution by reason of his possible belief in the creation of some form of world union of soviet republics unless we are willing so to hold with regard to those who believe in Pan-Americanism, the League of Nations, Union Now...."\textsuperscript{42}—he also vigorously asserted the immunity from denaturalization proceedings of admitted Nazis.\textsuperscript{43}

One last minority group to which Murphy extended his judicial support was a thoroughly marginal one indeed—operators of houses of prostitution caught in the dragnet of the Mann Act. Murphy insisted that the sole purpose of the Mann Act was to eliminate and punish white slavery; that the Government had no right to stretch it to convict a genial proprietor who took two of his employees on a Florida vacation. Writing for the Court, he stated that "the sole pur-

\textsuperscript{37} Joining Black’s dissent in Colegrove v. Green, 328 U.S. 549, 566 (1946).
\textsuperscript{38} Joining Douglas’ dissent in MacDougall v. Green, 335 U.S. 281, 287 (1948).
\textsuperscript{39} Joining Douglas’ opinion of the Court in Terminiello v. Chicago, 337 U.S. 1 (1949).
\textsuperscript{40} Dissenting in Eisler v. United States, 336 U.S. 189, 193 (1949).
\textsuperscript{41} Concurring opinion in Bridges v. Wixon, 326 U.S. 135, 157 (1945). In general, see this opinion for his views on deportation procedure. He also joined the dissenting opinions in Ahrens v. Clark, 335 U.S. 188, 193 (1948); Ludecke v. Watkins, 335 U.S. 160, 178 (1948).
\textsuperscript{42} Schneiderman v. United States, 320 U.S. 118, 145 (1943). Wendell Willkie was Schneiderman’s counsel. This opinion, when circulated among his brethren for their comments, brought the following rejoinder from an unidentified Justice: “I think it is only fair to state in view of your general argument that Uncle Joe Stalin is at least a spiritual co-author with Jefferson of the Virginia statute for religious freedom.” Cited by Mason, op. cit., supra note 5, at 795.
\textsuperscript{43} Murphy concurred in Baumgartner v. United States, 322 U.S. 665, 678 (1944), objecting to Frankfurter’s watering down of his Schneiderman rationale; and joined Rutledge’s dissent in Knauer v. United States, 323 U.S. 664, 675 (1946), and the latter’s concurrence in Klapprott v. United States, 335 U.S. 601, 616 (1949).
pose of the journey from beginning to end was to provide innocent recreation and a holiday, and elsewhere he dissented from a decision in the Caminetti tradition which employed the Mann Act against private, non-commercial debauchery. Reading these cases, one gets the distinct feeling that Murphy was repelled by the employment of the majestic sanctions of government against these pathetic, wayward individuals.

No other New Deal Justice approached his record in this area. Without attempting any mathematic computations, certain things are immediately apparent from reading the opinions. Black, for example, wrote most of the Indian opinions that Murphy dissented from and at no point did Rutledge join Murphy in these dissents. Of the other Justices, Rutledge came nearest to equalling Murphy's score.

The Judicial Process

Under this heading, I have grouped those decisions which related in one way or another to the conduct of the judicial process: fair trial, search and seizure, confessions, contempt of court, and the like. Here Murphy's position was forthright, ruthless, and enormously irritating to those who look upon the procedural aspects of law as meaningful. As he put it, dissenting in Carter v. Illinois from an opinion of Justice Frankfurter holding that petitioner had not been denied the elements of due process,

Legal technicalities doubtless afford justification for our pretense of ignoring plain facts before us, facts upon which a man's very life or liberty conceivably could depend. . . . the result certainly does not enhance the high traditions of the judicial process.

In another case, dissenting all alone from an opinion by Justice Black, Murphy savagely asserted, "The complete travesty of justice revealed by the record in this case forces me to dissent."

Now the implication of these remarks, and others of a similar genre scattered throughout his opinions, is clear. It is a self-righteous, even smug, claim to a higher moral perspective than his brethren. So spoke Savonera to the Florentines, and doubtless some of the Justices on the Court wished on occasion that they could deal with their conspicuously moral brother as Florence dealt with its scorpion.

Two cases bring out the strength and weakness of Murphy's approach to due process of law. First, in 1942, Murphy for the Court held that one Glasser had been denied a fair trial in federal court because

47. Id. at 183.
he had not received adequate protection by counsel. Now Glasser, as Justice Frankfurter pointed out in a powerful dissent, was a former United States Attorney who should have been well aware of his legal rights and seen to it that they were asserted. But Murphy acted as though an ignorant Negro farmhand, or an illiterate youth, denied counsel, were sufficient precedents for holding an educated and experienced lawyer to be in the same maltreated category. And Murphy did approach such problems in an absolutist mood, and, one suspects, with an inarticulate assumption, that petitioner was always in the right.

Second, in 1947, Murphy for the Court held a Texas judge's contempt proceedings against a local newspaper to be a violation of the first amendment. His opinion was a restatement of his concurrence in Pennekamp v. Florida in which he had declared that criticism of the Courts is a legitimate form of behavior.

Jonhson v. United States, 333 U.S. 10 (1948); Harris v. United States, 331 U.S. 145 (1947); Zap v. United States, 328 U.S. 624 (1946); Davis v. United States, 328 U.S. 582 (1946).

57. See, Frazier v. United States, 335 U.S. 497 (1948); Moore v. New York,
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of habeas corpus, Justice Murphy could be counted on to vote for the aggrieved party. Many Justices joined him at various points, but there was one additional hobby of Murphy's that got him little companionship from his liberal brethren—his suspicion of certain aspects of administrative procedure, notably the employment by administrative officials of the subpoena power. Thus in 1942, he joined Chief Justice Stone's opinion of the Court in Cudahy Packing Co. v. Holland limiting the use of subpoenas in administrative investigations. Douglas, Black, Byrnes and Jackson dissented vigorously.

This decision was not just a sport: the following year Murphy wrote a dissent, joined by Justice Roberts, objecting to the conference upon Secretary of Labor Perkins of broad-inquisitorial jurisdiction and the subpoena weapon. He pointed out to his former Cabinet colleague that "under the direction of well-meaning but over-zealous officials they [subpoenas] may at times become instruments of intolerable oppression and injustice." Three years later he returned to the assault again in a lone dissent, asserting that the subpoena power should be confined "exclusively to the judiciary." One of his new significant inconsistencies occurred in this area: in Fleming v. Mohawk Wrecking & Lumber Co. in which the Court sustained the authority of the Price Administrator to delegate his subpoena power to subordinates, Murphy silently joined the majority.

Related to Murphy's distrust of bureaucratic inquisitors was his concern about vague statutes and administrative regulations. The Constitution required, as he saw it, that crimes be narrowly defined in order that the individual could have reasonable security, that he might have clear advance knowledge of what the law forbids and what it permits. Thus a vague statute, or the application of an elastic statute to an individual's action, or the formulation of an ambiguous administrative rule called for judicial intervention. Beginning in 1941, when he joined Douglas' dissent in the Classic case, and continuing with his dissent in United States v. Dotterweich in 1943, there are a series of opinions which he either wrote or joined to this effect. It should be

59. 315 U.S. 357 (1942).
64. 320 U.S. 277, 285 (1943).
65. See his dissent in National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943), which will be discussed later in this analysis; his agreement with Roberts' dissent in California v. United States, 320 U.S. 577, 586 (1944); his opinion for the Court in Kraus & Bros. Inc. v. United States, 327 U.S. 614 (1946).
noted that in many cases where a statute or regulation was allegedly too vague to stand up, notably in connection with the activities of the National Labor Relations Board, Murphy did not agree. But it seems significant that he alone of the New Deal Justices persistently reiterated this point over the years.

**Freedom of the Press and Airwaves**

Closely connected with his deep dedication to individual freedom of speech was his special interest in freedom of communication. And here he really parted company with his New Deal colleagues. It was probably his dissents in the network cases and the *Associated Press* case which motivated John P. Frank's suggestive comment that Murphy on occasion allowed "activities he opposed [to] hide behind symbols he cherished." In the network cases, which involved action by the Federal Communications Commission to eliminate certain monopolistic characteristics of the National and the Columbia Broadcasting Systems, Murphy wrote a vigorous dissent, joined only by Roberts, asserting that the FCC had arrogated to itself this power without congressional authorization. Only Congress, he claimed, could legitimately undertake such action. Exposing his real motive, he said:

> [B]ecause of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it [radio] is a matter of deep and vital concern.

In 1945, dissenting in the *Associated Press* case, Murphy returned to this theme. "Today is ... the first time that the Sherman Act has been used as a vehicle for affirmative intervention by the Government in the realm of dissemination of information." Incidentally, Murphy's dissent in this case—a separate opinion from the other two dissenters, Roberts and Stone—did not say that the anti-trust laws could never be used against the press. What he objected to was the government's procedure in the case, which was by injunction and summary judgment, and what seemed to him a lowering of the standards of proof required in an anti-trust case. The evidence, he felt,

> falls far short of proving such a program [of restrictive practices] and hence the decision has grave implications relative to governmental restraints on a free press. ... [S]uch a failure has unusually dangerous implications when it appears with reference to an alleged violation of the [Sherman] Act by those who collect and distribute information.

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68. Frank, supra note 2, at 3.
71. Id. at 50, 52.
Other opinions of his in this area, dealing with the power of courts to punish newspapers for contempt, have already been discussed above. Another opinion in this area which he endorsed was Justice Rutledge’s concurrence in *United States v. CIO.* Here Rutledge and Murphy, rejecting the course of the Court though sharing in its judgment, insisted that the Taft-Hartley provision forbidding trade unions to support political candidates was unconstitutional on its face.

**Governmental Responsibility for “The Good Life”**

Under this rubric, I have placed those opinions of Justice Murphy in which he asserted the responsibility of the federal government over the economic life of the nation, for the fostering of a strong trade union movement, and for destroying irresponsible private centers of economic power.

The great battles over the meaning of the commerce clause were won when Murphy arrived on the bench. The main problems that remained were those of delineating the activities that Congress intended to regulate and determining the degree to which Congress desired to preempt the regulation of interstate commerce and eliminate state regulation. It seems hardly necessary to note that Murphy took an extremely comprehensive view of the commerce power, though from 1946 on, he tended to affiliate with the “states'-rights” position of Justices Black and Douglas, i.e., to accept the wide latitude these Justices were prepared to give to state taxes and regulations affecting interstate commerce.

Murphy's opinions in this area can conveniently be subdivided into four groups: those which interpret the scope of the commerce power under the Fair Labor Standards Act and the Public Utilities Holding Company Act; those examining the rights of labor; those dealing with the operating procedures of administrative agencies; and those adum-
brating the prerogatives of state governments over interstate commerce. Obviously there is some overlap, but if not definitive, this division is accurate enough for our purposes here.

In a series of opinions, both majority and dissenting, Justice Murphy gave a broad interpretation of the FLSA. In a case in particular is worth singling out—the Jewel Ridge case in which Murphy for the Court overruled the Administrator and held portal to portal travel time part of the miner's work-week. Justice Jackson, in dissent, denounced the holding as an extreme instance of judicial lawmaking, one demonstrably against the wishes of Congress. Similarly, Justice Murphy for the Court sustained the "death sentence" provisions of the Public Utilities Holding Company Act of 1935 when, after lurking for years in constitutional limbo, this provision finally came under judicial appraisal.

Murphy's record as a defender of the rights of labor is somewhat more ambiguous than is often realized. Although he was responsible for the key decisions in Thornhill v. Alabama and Carlson v. California, which held that peaceful picketing was a manifestation of freedom of speech and thus protected against state infringement by the due process clause of the fourteenth amendment, Murphy did not join the dissent of Justices Black, Douglas, and Reed in the Meadowmoor case. This in spite of the fact that Black went to great pains to point out in his dissent, perhaps with an eye on Murphy, that the injunction in the instant case was almost identical in wording with the statutes held void on their face in the two earlier cases. Moreover, while he joined Black's dissent in Carpenters & Joiners Union, Local 213 v. Ritter's Cafe, alleging that the employment of the Texas anti-

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75. See his opinions of the Court in Borden Co. v. Borella, 325 U.S. 679 (1945); Jewel Ridge Coal Corp. v. United Mine Workers, 325 U.S. 61 (1945); Phillips Inc. v. Walling, 324 U.S. 490 (1945); United States v. Rosenwasser, 323 U.S. 601 (1945); Overstreet v. North Shore Corp., 316 U.S. 155 (1942); Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 35 (1942). See also his dissents in 10 East 40th Street Building, Inc. v. Callus, 325 U.S. 578, 585 (1945); Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 509 (1945); McLeod v. Threlkeld, 319 U.S. 491, 498 (1943). His one rejection of the claims for broad coverage may have been motivated by his special concern for the press, or by simple common sense. In 1946, he dissented from the Court's holding that a newspaper that shipped 45 of 10,000 newspapers into interstate commerce was subject to coverage under the FLSA. Mabee v. White Plains Publishing Co., 327 U.S. 178, 185 (1946).
79. 310 U.S. 88 (1940).
80. 310 U.S. 106 (1940).
82. Id. at 308-309.
trust law against a secondary boycott was a violation of the union's freedom of speech, and seemed in AFL v. Watson\(^8\) to be eager to strike down the Florida "right to work" law as unconstitutional, he equivocated without opinions when state "right to work" statutes finally arrived for substantive evaluation.\(^8\)

However as a defender of the National Labor Relations Board, he was without peer on the Court. Once it was established to his satisfaction that the Board was operating within its statutory \textit{vires}, and providing no civil liberties issue was apparent on the face of the record,\(^6\) he felt that the task and proper function of the Court was done. As he put it in the \textit{Phelps-Dodge} case,\(^7\) partially dissenting,

\begin{quote}
Our only office is to determine whether the rule chosen, tested in the light of statutory standards, was within the permissible range of the Board's discretion.\(^8\)
\end{quote}

He followed the same track in discussing the actions of other administrative agencies, notably the Securities and Exchange Commission,\(^8\) and the Federal Power Commission.\(^9\) He was never particularly happy about the price control system, probably because of what he felt to be certain unconstitutional procedures that were established for handling violations\(^9\)—and perhaps fundamentally because of his allergy to the

\(^{84}\) 327 U.S. 582 (1946).
\(^{85}\) AFL v. American Sash & Door Co., 335 U.S. 538 (1949); Lincoln Federal Labor Union, AFL v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). In the former case, he dissented without opinion; in the two grouped together under Lincoln Federal Labor Union, AFL v. Northwestern Iron & Metal Co., supra, he concurred with Rutledge's opinion which accepted the judgment, but not the rationale, of the Court.
\(^{86}\) This respect for what the British term the "principles of natural justice" appears clearly in two cases: In 1941, Murphy for the Court remanded to the NLRB the \textit{Virginia Power} Co. case for evidence that defendants in encouraging a company union had not merely been exercising their right of freedom of speech. NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941). The NLRB adduced further evidence that coercion beyond mere verbal encouragement had been involved, and on the basis of the new record, the Court through Murphy sustained the Board's disestablishment of the company union. Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943). In 1949, he employed the same technique in NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949), supporting the Board up to the point where an employer was handed a broad, vague injunction to desist from frustrating certain union activities. The latter technique, he maintained, was bad, and the injunction must be reformulated in specific, equitable terms.
\(^{87}\) Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 200 (1941).
\(^{88}\) Id. at 206. See also his dissent for the Board in International Union of Mine Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 344 (1945), and his agreement with Reed's dissent in Southern S.S. Co. v. NLRB, 316 U.S. 31, 49 (1942).
\(^{90}\) See his dissent in Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 536 (1945), and his agreement with Black's dissent in \textit{FPC} v. Natural Gas Pipeline Co., 315 U.S. 575, 599 (1942).
\(^{91}\) Joining the Rutledge dissent in \textit{Yakus} v. United States, 321 U.S. 414, 448 (1944), in which the two justices asserted that the procedures for handling violations impaired constitutional liberties.
war powers and all their legal ramifications which will be discussed later—but he did join with Douglas in a dissent against a judicial weakening of the price control mechanism. However, the Interstate Commerce Commission, often considered in liberal circles as a feudal vassal of the railroad interests, got little aid and comfort from Murphy. In the Inland Waterways case, for example, there was no discussion by the dissenters of the finality of administrative determinations. On the contrary, Justice Black, speaking for Douglas and Murphy, asserted that:

The issue in this case is whether the farmers and shippers of the middle west can be compelled by the Interstate Commerce Commission and the railroads to use high-priced rail instead of low-priced barge transportation for the shipment of grain to the east.

This quotation, though from an opinion by Justice Black, brings out a characteristic that Murphy shared with that Justice and Douglas, a quality which I have designated “populism.” There is a sentimental anti-capitalism, or more correctly, a sentimental attachment to a world of small businessmen and independent farmers, which comes out clearly in a series of opinions dealing with various aspects of the administrative process. In his concurring opinion in United States v. Bethlehem Steel Corp., Murphy, irritated by the profits claimed by the steel company in some World War I contracts, went out of his way to declare:

In voting for affirmance of the judgment, I do not wish to be understood as expressing approval of an arrangement like the one now under review, by which a company engaged in doing work for the government in time of grave national peril—or any other time—is entitled to a profit of 22 per cent under contracts involving little or no risk and grossing many millions of dollars. Such an arrangement not only is incompatible with sound principles of public management, but is injurious to public confidence and public morale.

In this same “populist” tradition, we find him dissenting in behalf of the farmer-debtor burdened by a “narrow formalistic” interpretation of section 75 of the Bankruptcy Act, and, in particular, advancing an

92. Davis Warehouse Co. v. Bowles, 321 U.S. 144, 156 (1944). But see the Kraus Bros. case, 327 U.S. 614 (1946), in which he condemned for the Court the creation of ambiguous offences by the Price Control Administration.
93. See his agreement with Roberts' dissent in California v. United States, 320 U.S. 577 (1944), and his agreement with Black's dissent in ICC v. Inland Waterways Corp., 319 U.S. 671, 692 (1943).
94. 319 U.S. 671, 692 (1943).
95. 315 U.S. 289, 310 (1942).
96. Ibid.
anti-monopolistic interpretation of patent rights. As might have been expected, he joined the Douglas dissent in United States v. Columbia Steel Co., which is as vigorous and well-reasoned an anti-monopoly tract as any populist could hope for. Perhaps the full flavor of this viewpoint is best set forth by an excerpt from a dissent by Justice Black in an enormously intricate case.

Hereafter, [said Black, in view of the interpretation of the full faith and credit clause expounded by the Court] . . . the state in which the most powerful corporations are concentrated, or those corporations themselves, might well be able to pass laws which would govern contracts made by the people in all of the other states. (Ephasis added.)

Murphy joined Black in this opinion, which surely states in its essence the populist assumptions about the extent of corporate power over the political process.

In the general area of “states'-rights” over interstate commerce, Murphy apparently had no strong views of his own. The evidence suggests that he accepted Chief Justice Stone's leadership in this tricky field until the latter died; then moved over to the Black-Douglas camp. His one opinion of the Court in this connection dealt with a conflict between the ICC and the state of California.

The Constitution and the War

While Murphy differed in degree from his New Deal colleagues on many of the problems we have examined, it was in connection with the war powers that he demonstrated his uniqueness. While for all the other Justices, to a greater or lesser degree, the Constitution went into judicial hibernation during World War II, to Frank Murphy it stood in its pristine form as a guardian of the rights of the individual and the ideals of American society.


True, he got off to a slow start by disqualifying himself in Ex parte Quirin,\textsuperscript{102} the case of the Nazi saboteurs, presumably because he was temporarily a Lt. Col. in the Army on active service,\textsuperscript{103} and in the first draft case involving the rights of conscientious objectors, he joined the majority opinion, sustaining the government, rather than Jackson's dissent.\textsuperscript{104} But from the Hirabayashi case\textsuperscript{105} on, he was a consistent, even doctrinaire, opponent of the view that the Constitution had gone to war.

And here he violently parted company with his liberal brethren. Black and Douglas, in particular, became vigorous war-hawks,\textsuperscript{106} Jackson retired to a private universe of realpolitik suggesting that the Court should avoid ruling on nasty wartime problems since it was bound, given the power situation of the moment, to make bad decisions,\textsuperscript{107} and even Rutledge, who had stood shoulder to shoulder with Murphy in many a lost cause, defected. In short, Justice Murphy found himself isolated on an extreme promontory, standing in lonely, and perhaps visionary, grandeur, and with the fiery virulence of a religious prophet, he castigated his friends and erstwhile associates for their betrayal of the democratic faith. Indeed, one suspects that he became a bit obsessed about the matter: if he reads carefully the first two or three hundred pages of volume 327 of the \textit{United States Reports}, beginning with the \textit{Yamashita} case,\textsuperscript{108} he gets the feeling that Murphy has become literally frenzied, striking about him at his colleagues in all types of cases with the angry passion of a betrayed lover.

We have it on the testimony of his law clerk, Eugene Gressman, that Murphy almost immediately regretted his concurrence in the Hirabayashi case,\textsuperscript{109} feeling that the real motive for the detention and expulsion of the Nisei from the west coast to concentration camps in the hinterland was not military, but racial. Only hesitantly had he given his approval to the judgment of the Court, and he insisted on writing a separate opinion to make clear his reasons. In this he stated:

\begin{quote}
In voting for the affirmance of this judgment I do not wish to be understood as intimating that the military authorities in time of war are sub-
\end{quote}

\textsuperscript{102} 317 U.S. 1 (1942).

\textsuperscript{103} \textit{Mason}, op. cit. \textit{supra} note 5, at 655.

\textsuperscript{104} \textit{Bowles v. United States}, 319 U.S. 33, 36 (1943).

\textsuperscript{105} \textit{Hirabayashi v. United States}, 320 U.S. 81 (1943).

\textsuperscript{106} See, e.g., their dissents in \textit{Viereck v. United States}, 318 U.S. 236, 249 (1943), and \textit{Cramer v. United States}, 325 U.S. 1 (1945); Black's opinions of the Court in \textit{Korematsu v. United States}, 323 U.S. 214 (1944), and \textit{Falbo v. United States}, 320 U.S. 549 (1944); Douglas' opinion of the Court in \textit{Singer v. United States}, 323 U.S. 338 (1945), for their general approach to the interpretation of war powers.

\textsuperscript{107} See this amazing dissent in \textit{Korematsu v. United States}, \textit{supra} note 106, at 233, for a full statement of his views.


\textsuperscript{109} Gressman, \textit{supra} note 2, at 36.
ject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens in those places which may be designated as "military areas." While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men.  

When the plight of the American-Japanese came again to the Court in 1944, Justice Murphy drew the sword of duty and wrote one of the most passionate dissents in the history of the Supreme Court. He denied utterly that the decision had been founded on military criteria, and declared flatly that the evacuation and detention—for he refused to join the sophistry of the Court that these were separate, discrete actions—fell into "the ugly abyss of racism." At the heart of his dissent is the point, ignored by Justice Black's majority opinion, that a "military judgment" cannot be simply, and circularly, defined as a judgment by a military officer. Thus the Court, while not having the right to supersede the Chiefs of Staff as military experts, has the duty to see that military judgments are in fact founded upon military considerations and not upon views on social policy temporarily in uniform.

With regard to the enforcement of the Selective Service Act, particularly with reference to conscientious objectors, Murphy consistently insisted that "all of the mobilization and all of the war effort will have been in vain if, when all is finished, we discover that in the process we have destroyed the very freedoms for which we fought." Dissenting alone from Black's opinion of the Court in Falbo v. United States—a case involving the rights of conscientious objectors—Murphy uttered what is probably the clearest and most forceful statement of his telos:

The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.

During the War, various sorts of legal action were brought against Nazi sympathizers and alleged enemy agents. When the convictions resulting from these actions came before the Supreme Court on appeal, Murphy without exception voted against affirmation, and was the only

See also his dissents in Sunal v. Large, 332 U.S. 174, 193 (1947), and Cox v. United States, 332 U.S. 442, 457 (1947); and his agreement with Frankfurter's dissent in Singer v. United States, 325 U.S. 538, 546 (1945).
113. 320 U.S. 549, 561 (1944).
Justice with this record. It was his view that, if anything, the existence of a state of war required an increase in constitutional sensitivity and militantly flung his influence against the passions of the moment.\textsuperscript{114}

Probably his most notable effort to view the tumults of the hour \textit{sub specie aeternitatis} occurred when counsel for General Yamashita attempted to obtain a writ of habeas corpus from the high Court, claiming that the military commission established to try Japanese "war criminals" was unconstitutional and without jurisdiction. The Court held itself without jurisdiction—at least this seems to be what the Court held: the opinion is in John P. Frank's words, "sufficiently opaque to defy brief statement"\textsuperscript{115}—with Rutledge writing a dissent joined by Murphy and Murphy writing a separate solitary dissent.\textsuperscript{116} Murphy's dissent was a blistering attack on the whole war crimes procedure in the Far East as "unworthy of the traditions of our people."\textsuperscript{117} Noting that the real lesson of the trials was \textit{Don't Ever Lose a War}, he asserted that even the admitted Japanese atrocities "do not justify our abandonment of our devotion to justice in dealing with a fallen enemy commander. To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals."\textsuperscript{118}

Murphy's anti-militarian was more dogged than fruitful, but it can be found in a whole series of opinions, the most noteworthy of which is his lengthy concurring opinion in \textit{Duncan v. Kahanamoku}\textsuperscript{119} reasserting the vitality of David Davis' sonorous holding in \textit{Ex Parte Milligan}\textsuperscript{120} that "the Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."\textsuperscript{121} And who but Murphy could have achieved the combination of anti-militarism and populism attained by the following statement?

\begin{quote}
In my opinion it is of greater importance to the nation at war and to its military establishment that high standards of public health be maintained than that the military procurement authorities have the benefit of unrestrained competitive bidding and lower prices in the purchase of needed milk supplies.\textsuperscript{122}
\end{quote}

\textsuperscript{115} Frank, \textit{Cases on Constitutional Law} 797 (1950).
\textsuperscript{116} Yamashita v. Styler, 327 U.S. 1, 26 (1946).
\textsuperscript{117} Id. at 28.
\textsuperscript{118} Id. at 28.
\textsuperscript{120} 71 U.S. (4 Wall.) 2 (1866).
\textsuperscript{121} 327 U.S. at 335.
\textsuperscript{122} Concurring opinion in Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 280 (1943).
In regard to Murphy's attitude towards the war powers, there is one point that remains for brief treatment: his attitude towards the limitations on the right of appeal incorporated in the price control legislation. It will be recalled that an Emergency Court of Appeals was established to handle cases arising under the statute and elaborate procedures were set up governing the legal aspects of appeal. When in 1944, the constitutionality of this structure was challenged, Roberts, Rutledge and Murphy dissented from Stone's holding that it was a valid exercise of the war powers.\textsuperscript{123} That this was not just constitutional windmill tilting is suggested by the fact that the Rutledge dissent, which Murphy joined, has impressed even such a hard-boiled realist as Edward S. Corwin.\textsuperscript{124}

This examination of the judicial record of Justice Murphy has, I suspect, been a tedious trip for the reader. However, it seems important to get the data on the record before moving on to the final section of this essay in which I will summarize what seems to me the judicial essence of Frank Murphy.

\textbf{IV}

It was suggested earlier that Justice Frank Murphy was the judicial incarnation of the militant liberal myth of the New Deal, and while at some points, \textit{e.g.}, his view of trade unions, he fell a bit short of the archetypical aspiration, it is nonetheless true that he fitted the pattern far more closely than did any of his New Deal colleagues on the Court. While each of the other Justices went part way down the road with him, each turned off somewhere short of Murphy's destination.

But this still leaves open the persistent question: Was he a "good" judge? To the extent that this means: Was he a good legal craftsman?, I would venture the opinion, based both on a careful reading of every opinion he wrote (including a mass of technical tax opinions which have not been discussed here: of the 132 opinions he wrote for the Court in his nine years of service, almost a third were in this category and they were mostly for a unanimous Court) and disregarding as irrelevant the question of authorship on grounds explained earlier, that while Justice Murphy surely did not have the technical competence of a Frankfurter or a Stone, he was certainly not below par for the Court. The basic proposition that has to be understood in dealing with Murphy, I think, was that he chose not to immerse himself in the mysteries of the guild.

This choice was based on both temperamental and intellectual reasons: by temperament he was a fighter who was aroused by seeming injustice and did not want to check the rule book before he went into

\begin{footnotes}
\footnote{Yakus v. United States, 321 U.S. 414, 460 (1944).}
\footnote{Corwin, \textit{Total War and the Constitution} 131 (1947).}
\end{footnotes}
action; by intellect he was an instrumentalist, not in the Deweyan sense of being a pragmatist, but in the natural law tradition of viewing all the phenomena of the world about us in terms of a higher purpose, as instruments for the fulfillment of the telos. In other words, Murphy mounted the wild horse of natural law and mercilessly rode down those institutions, traditions, legal precedents, which stood between him and his destination—a democratic utopia.

Therefore it is perhaps not unfair to his memory to suggest that he was the McReynolds of the left, though I hasten to add that he did not share the latter's misanthropic disposition. Like McReynolds, he was a vigorous, even belligerent, fighter for the things he believed in, and like McReynolds, he called a spade a spade. He was also a judicial activist, who had no time for philosophies of "self-restraint"—except, of course, when judicial self-restraint contributed to his substantive goal. But here he is in good company. Even the Court's leading advocate of self-restraint, Justice Frankfurter, has been known to rise above principle—a dissent in Brown v. Board of Education would surely have followed logically from the author of the Gobitis opinion. 1

Yet, given these qualities, there was a quality about Murphy which made him an asset to the Court. No one, and certainly no student of constitutional law, would want a Supreme Court composed entirely of Murphy's—or of Jackson's, or Frankfurter's, for that matter—but is it not valuable to sprinkle the high tribunal from time to time with men who, disdaining the tortuous paths of the law, assert in a clarion peal the basic truth, so often forgotten by those with their nose close to the earth of precedent, that law is at root an instrument for the achievement of social goals? And that in a democracy, there are no more priceless goals than individual liberty and collective prosperity? If this is the case, then the utopian pilgrimage of Mr. Justice Murphy was not made in vain.