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CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS. By Walter F. Murphy. Chicago: University of Chicago Press, 1962. Pp. xi, 308. $6.50.

In this book, Walter F. Murphy[1] reviews the controversy in Congress over the decisions of the Supreme Court in the middle and late 1950's, particularly those cases in the field of internal security regulation. Murphy concentrates on the Congressional response to these decisions, paying less attention to reactions of those outside the legislative arena except insofar as the activities of those "relevant others" affected Congressional action.

The era to which Murphy devotes most of his study is that containing such decisions as *Pennsylvania v. Nelson*,[2] in which the Court ruled that the federal government had pre-empted the power to control subversion against the United States; *Watkins v. United States*,[3] where the Court reversed the contempt conviction of a person who had refused to answer questions asked him by the House Un-American Activities Committee on the ground that they were not relevant to the committee's purpose; *Slochower v. Board of Education*,[4] in which the Court denied a city college's right to dismiss a professor for "taking the Fifth" before a congressional investigating committee; *Yates v. United States*,[5] in which Mr. Justice Harlan redefined and limited the term "organize" as used in the Smith Act, and declared that advocacy of overthrow of the government without specific incitation to violence was not criminal action; and, most important in terms of ultimate Congressional action, *Jencks v. United States*,[6] where the Court held that defense counsel had the right to see documents (in this instance in the possession of the F.B.I.) used by the government in the preparation of its case against his client. In Congress, this was the period of the Jenner-Butler Bills, which would have curtailed the Court's power to review cases in the internal security field, and of various attempts to reverse specific decisions of the Supreme Court through legislation.

Murphy has modeled his study on Stephen Bailey's earlier volume, *Congress Makes A Law*,[7] which was an examination of the legislative process surrounding

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1. A member of the Department of Politics at Princeton University.
2. 350 U.S. 497 (1956).
3. 354 U.S. 178 (1957).
4. 350 U.S. 551 (1956).
5. 354 U.S. 298 (1957).
6. 353 U.S. 657 (1957).
7. BAILEY, CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946 (1950).

passage of the Full Employment Act of 1946.[8] There are, however, significant differences between Murphy's work and Bailey's earlier study. Bailey was particularly concerned with the actions and reactions of interest groups, and devoted an entire chapter to the background of the key Congressmen who affected the process which shaped the Full Employment Act. Murphy, on the other hand, while interested in the actions of groups, has focused primarily upon Congress as an institution. Unlike Bailey, he has relegated personal sketches of the legislators to detailed—and, I might add, excellent—footnotes, and does not attempt to relate this biographical material to current behavior as Bailey so successfully did. It may be that groups had less to do with the attempts to reverse certain of the court's decisions and to restrain the court than they did with the Full Employment Act, but the reader gets the impression that this possible objective difference is amplified by Murphy's different interests.

In focusing upon Congress, Murphy adds to a growing literature examining the behavior of Congressmen as members of a special social institution—behavior motivated not simply as the result of representing constituents, but behavior motivated through membership in what William White[9] has called "the most exclusive club in America," a "club" located at the center of the extremely complex relationship between states and the federal government.

Congress and the Court is more than a descriptive case study of the Warren Court and the Congressional response to certain of the Court's decisions. The first third of the book is devoted to an excellent historical account of earlier relations—particularly the conflicts—between the Supreme Court and Congress. Murphy's discussion of the Reconstruction Congress' attitude toward the Court, which resulted in the famous removal of the Court's jurisdiction with respect to the Habeas Corpus Act,[10] and the Court's compliance in *Ex Parte McCardle*,[11] is excellent. His retelling of the manner in which Franklin Roosevelt "lost the battle but won the war" in his attempt to "pack" the Court in 1937 is perhaps the most succinct version yet written.

In addition to the historical material and the detailed case study of Congressional reaction to the Warren Court, Murphy attempts to generalize concerning Court-Congress relationships. He has written a fine summary chapter of analysis, and has also interspersed analytical comments between sections of narrative. He is to be applauded for remaining close to his materials and for refusing to jump to unwarranted conclusions. He suggests that conflict between Court and Congress—perhaps one should say "sustained" conflict—has occurred "only over important issues of public policy,"[12] but that the importance of the issues is a necessary rather than sufficient condition for such conflict. One further basic characteristic of these conflict situations is that the language being interpreted by the Court is unclear; another is that public sentiment concerning the issues under consideration is

8. 60 Stat. 23 (1946), 15 U.S.C. §§ 1021-1024 (1958).
9. WHITE, CITADEL: THE STORY OF THE U.S. SENATE (1956).
10. 12 Stat. 755 (1863).
11. 73 U.S. (6 Wall.) 318 (1867), 74 U.S. (7 Wall.) 506 (1868).
12. P. 257.

"largely unsettled." It seems to me that these ingredients would perhaps appear in any situation of conflict in which the Court has become involved, not merely conflict with Congress. However, Murphy goes on to add the distinguishing criterion that Congress reacts only when "the Court has made what congressmen have considered to be a threat, direct or indirect, to legislative authority."[13]

The author points out that a major factor limiting attacks upon the Court is that legislators can use the Court's decisions as a defense against pressure, by the President or interest groups, for certain action. In diminishing the Court's prestige, which they would be doing in part through a serious attack upon the Court, legislators would be destroying one of their own defenses—and this causes them to act more circumspectly.

The manner in which the Congress criticizes the Supreme Court and the way in which the Court responds to such criticism has been a subject of interest for some time, going back well beyond Dooley's aphorism that "the Court follows the election returns." The study of cases has been long in coming. Murphy's study shows that, in much the same manner as the Court of the 1930's reversed its earlier anti-New Deal decisions, so the Warren Court (without, however, the leadership of its Chief) has backed down from its decisions in *Nelson*,[14] *Slochower*,[15] and *Watkins*.[16] It is speculative to ask what would have happened had the Court not retreated; groups on the Far Right are still crying for Warren's scalp. However, at the time of these later decisions the Congressional attack upon Court power, evinced particularly in the Jenner-Butler Bills, had lost its force; Congress did manage to pass legislation lessening the impact of *Jencks*, although it did not, as Murphy clearly shows, completely reverse that decision. Murphy distinguishes the Warren Court's reaction from the Hughes Court's withdrawal by pointing out that while the Court in 1937 backed down in the face of negative legislative reaction, the Warren Court retreated *after* the Congressional attack upon the Court had lost its real force.

Murphy's study helps to fill a significant gap in our knowledge concerning the Supreme Court and constitutional law. As recently as 1957, it was written, "[I]n all the vast literature on the high tribunal nothing significant appears which sets out in detail what impact a Court decision has. No empirical study devoted to assessing the influence of a Court statement exists."[17] Murphy's book goes far toward repairing this major omission. Alongside two major articles on church-state relations and the literature on the aftermath of *Brown v. Board of Education*,[18]

13. P. 267.
14. See Uphaus v. Wyman, 360 U.S. 72 (1959).
15. See Beilan v. Board of Education, 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 468 (1958).
16. See Barenblatt v. United States, 360 U.S. 109 (1959).
17. Patric, *The Impact of a Court Decision: Aftermath of the McCollum Case*, 6 J. PUB. L. 455 (1957).
18. 347 U.S. 483 (1954); 349 U.S. 294 (1955). Patric, *supra* note 17, and Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AM. POL. SCI. REV. 777-791 (1959), are the two articles on church and state. On the aftermath of *Brown*, see, among others, BLAUSTEIN AND FERGUSON, DESEGREGATION

it provides for scholar and layman alike a much fuller explanation of the place which the Supreme Court actually holds within the American political and governmental system.

STEPHEN L. WASBY*

AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES (1957), and PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961).

*Assistant Professor of Political Science, Southeast Missouri State College.